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Doctrine and Consequences: A socio-legal Analysis of American Debates on Free Speech and Incitement to Racial and Religious Hatred

By

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Abstract

This thesis attempts to draw upon critical legal scholarship of the United States First Amendment law, particularly the wide 'freedom of speech' it allows, to frame a discussion concerning the Amendment's apparent tolerance of speech inciting racial and religious hatred against the backdrop of recent mass shootings or violent attacks of white supremacists' perpetrators who cite, disseminate, or are influenced by online hate speech. The thesis is engaged in a critical, doctrinal, theoretical, and evidence-based commentary upon First Amendment Incitement Doctrine (the rule in *Brandenburg*). The crux of the First Amendment Incitement Doctrine is that speech can only be censored if it produces an immediate illegal action. The combination of legal and jurisprudential analysis is then complemented, in the second half of the thesis, with discourse analysis of online newspapers/magazines to illustrate the harm resulting from First Amendment's wide tolerance of free speech. I argue that the evident consequences of abusive hate speech should also be factored into future discussion and debates around the First Amendment. The theoretical framework of this research locates the analysis of hate speech regulation in Ronald Dworkin's teaching on how to interpret the law and not in the scholar's 'free speech absolutism' where I argue that this erudite scholar misapplied his own theory. The research philosophy utilized here is interpretivism. I assessed 2637 online articles and conducted a thematic analysis. The study finds that African Americans and Jews are the main targets of hate speech perpetrated by white supremacists and that internet communication has been used to amplify this hatred. The study further finds that online hate speech tends to drive offline violent acts. My original contribution to knowledge is the overarching importance of contextualizing harm and the imminence of risk when interpreting free speech cases and concomitantly, that discursive constructions in media should be utilized by the Supreme Court when seeking to regulate online hate speech that harms historically oppressed minorities in America. If the momentum of online hate speech against racial and religious minority groups is not effectively checked by the law, America could well be facing a ticking time-bomb as has been argued-the Capitol Building episode may be a case in point.

Dedication

To my Parents, HRH Fabian Okwuosha Uzokwe (1923-1999) and Emilia Idu Uzokwe 1935-2018) for teaching me resilience and hard work and in memory of Anthony Gogo Nwedo (1912- 2000) and Mother Mary Paul Offiah (1952-2005) my spiritual Parents, for impacting in me the spirit of prayer and penance.

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AUTHOR'S DECLARATION

I declare that the research contained in this thesis, unless otherwise formally indicated within the text, is the original work of the author. The thesis has not been previously submitted to this or any other university for a degree and does not incorporate any material already submitted for a degree.

Signed.....

Dated.....

Table of Contents

Chapter One

Free Speech and Brandenburg in an Internet Age (of Hate)

Introduction

In the United States, First Amendment jurisprudence has supported freedom of speech over the regulation of hate speech particularly from the twentieth century[1] while the rise of the internet has contributed to the problem where hate speakers have utilized the media to spread hatred against historically oppressed groups. The continuous and repeated harms caused to racial and religious minorities because of the broad protection of free speech in modern day America calls for the re-evaluation of the First Amendment provision as established in Brandenburg. In 1969, the United States Supreme Court (hereinafter referred to as the Court) established the doctrine of incitement in *Brandenburg v Ohio*.[2] The Court held in this all-important case that speech can only be censored if it has the propensity to lead to immediate unlawful action. On this case rests the essence and crux of the American constitutional law and is known as the doctrine of incitement. In a society, where the law does not intervene to censor incitement to violence or hatred against certain racial/religious minorities, the result is evident in Nazi Germany and Rwanda. Brown could not have overstretched this point when the scholar noted that not legislating against incitement to hatred (even if it is on the principle of equality), obviously sends a message of 'unequal standing or lesser sociolegal status' to those members who are victims of hate speech.[3] History might as well repeat itself if robust free speech protections in the United States (U.S.) continue to allow a greater range of hatred to be expressed against minorities without legal censorship[4] especially as perpetrated by white supremacists. The research explores arguments around the relativistic approach of the Court in adjudicating free speech cases of the racial and religious kind and white supremacists' online incitement to hate/violence against racial minorities in modern America.

[1] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 230.
[2] 395 U.S. 444, 449 (1969).
[3] Alexander Brown, 'The "Who?" Question in the Hate Speech Debate: Functional and Democratic Approaches' (2017) 30 Canadian Jour. Of Law & Jurisprudence 23, 25.
[4] Joshua J Warburton, 'Should There be Limits on Hate speech? (2013) 42 Index on Censorship, 150, 151

The thesis suggests potential regulatory efforts to limit discriminatory speech of the racial and religious kind (against African and Jewish Americans) as these are worth protecting too, under the American legal system. This study seeks to contribute to the debate on free speech incitement issues to advance scholarship in this area theoretically and doctrinally while utilizing media sources for analysis in chapters five and six of this thesis to illustrate the harm caused by abusive hate speech. Also, this thesis seeks to direct attention to the impact made by white supremacist to the problem of online hate speech/incitement against racial and religious minorities because of broad protection of speech in America. As a result, some sections of this work, particularly in chapters one, five and six contain hateful comments that can upset the reader.

This introductory chapter delineates the problem, focus, scope, and limitations of this research. It highlights key issues in this area of study, the relevance of the research and the contribution it makes to knowledge in legal theory and media studies. This work is not an attempt to articulate the tremendous disagreement among disparate American scholars on hate speech or resolve the conflicts of countless eminent writers on why hate speech should be regulated. It is also not aimed at proposing an acceptable theory of free speech under American jurisprudence,[5] which scholars in the United States have not been able to accomplish. Instead, conceptually, the broad aims of this research are to explore the First Amendment free speech provision in the light of the doctrine of incitement using Ronald Dworkin's legal theory as the interpretative scheme to gain insights on ways to regulate racial and religious hate speech in America. This work also examines the influence of white supremacists in promoting speech inciting hate and violence against African and Jewish Americans in the United States. It also undertakes an illustrative review of selected media outlet[6] to gain some insight into the impact broad protection of speech has on racial and religious minorities, bearing in mind that free speech doctrine is not just a product of theory but of lived experience and judgments as well.[7] The thesis aims to analyse the theoretical and conceptual foundations of the doctrine of incitement and assess the pertinent

[5] See Alexander Tsesis, 'Balancing Free Speech' (2016) 96 BU L REV 1, 6-16. For a detailed discussion of the three methods of interpretation used in the First Amendment jurisprudence- market place of ideas, self-expression and self-determination. See further Edwin C. Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) pp 6-7, 47-51. See also, chapter three of this work (pages 13-20) for a more elaborate discussion of these theories.

[6] Especially media outlets in Pittsburgh and Charleston, cities which have experienced major white supremacists' outrages

[7] James Weinstein, *Hate Speech Pornography, and the Radical Attack on Free Speech Doctrine* (Westview Press 1999) 11.

workings within this constitutional provisions and practice. While other works in this area have emphasized the formalistic and abstract nature of the modern free speech doctrine of incitement,[8] this work on a deeper level criticizes this approach and conducts a theoretical/doctrinal analysis that presents an antidote to this core traditional interpretation of free speech.

1.1 The Problem

In the U.S, advocacy of violence is fully protected[9] but incitement to violence is excluded from protected speech under the First Amendment. Incitement to violence applies when a speaker's words are deemed to incite violent or illegal acts.[10] Crane defines incitement, "as a speech-act intended to motivate others to engage in unlawful lethal activity."[11]As mentioned earlier, the doctrine was established by the United States Supreme Court in *Brandenburg.* The Court in that case held that, the First Amendment guarantees of free speech or expression disallows the state from prohibiting advocacy of the use of force or of law violation unless such advocacy, 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'[12] In other words, a speaker must intend lawless action that occurs or likely to occur immediately after the expression. Following this ruling, the three conditions that will have to be met for speech not to be protected include intent, likelihood, and imminence. The Court by this legal definition of incitement, sets a high standard for criminalizing speech,[13] especially considering the more recent growth of internet communication. It is not surprising then that in the U.S., this rule has enabled all forms of dangerous speech to be protected. How the three conditions outlined above can be determined by the Court with online communication is a question to answer. The Court by this ruling also makes regulation of speech contingent on the outcome, that is, if a speech produces an illegal or violent outcome, then it can be censored.

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[8] Mari Matsuda et al, Words that Wound: *Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 7-9; Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012); Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' [2000] 40 Santa Clara L Rev 729

[9] Emerson J Sykes, 'In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019' (2019) 85 Brook L Rev 15,

[10] JoAnne Sweeny, 'Incitement in the Era of Trump and Charlottesville' (2019) 47 Cap U L Rev 585, 587

[11] Jonathan K Crane, 'Defining the Unspeakable: Incitement in Halakah and Anglo-American Jurisprudence' (2009) 25 J L & Religion 329, 230.

[12] *Brandenburg* at 447.

[13] Emerson J Sykes, 'In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019' (2019) 85 Brook L Rev 15, 16, also see John P Cronan, 'The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard' (2002) 51 Cath U L Rev 425,428.

The protection of hate speech in the U.S. stands in sharp contrast to the world community and other developed countries.[14] The U.S. free speech approach appears based on different normative principles and pragmatic evaluation of the effects of speech on audiences as well as its value to self- expression.[15] As Henry notes, 'international efforts to regulate hate speech are limited by the open speech policies of the United States.'[16] Speech is only outlawed if it has the propensity to cause immediate violence. In other words, the *Brandenburg* court ruled that only speech that has a causal link to harm can be punished while other developed countries have outlawed the dissemination of speech that incite hate or violence even when there is no clear and present danger as U.S. courts will hold.[17] This mode of interpreting free speech cases by the Court has been challenged in this work. As a legal doctrine, incitement may sometimes, but may not always involve hateful speech.[18] This research uses the term both in its limited sense (legal definition) and its broad sense that incorporates hate speech.

Under *Brandenburg*, a speaker can be protected under the First Amendment in two ways; first, direct his advocacy of unlawful action at some future time rather than imminently. The Court held in *Hess* v *Indiana*[19] that the language of the appellant fell outside the narrowly tailored category of speech because the words were not likely to produce imminent disorder (it only amounted to advocacy of illegal action at some indefinite

[14] The Public Order Act, 1986, Ch. 64, S 5-6 (Eng), Parliament made it illegal to use "threatening, abusive, or insulting words" that cause another "harassment, alarm, or distress." For Germany, use of "threatening, abusive, or insulting…words likely to incite hostility against or bring into contempt any group of persons… on the ground of the colour, race, or ethnic or national origins of that group of persons" is forbidden. Denmark, precludes attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population," New-Zealand's *Human Rights Act, Section 13(1)* amended on 1 July, 2013, by Section 413 of the Criminal Procedure Act 2011 (2011 No 81) http://legislation.govt.nz/act/public/1993/0082/latest/DLM305478.html accessed 12 October, 2020, also provides against racial incitement or harassment. Canada, engraved hate speech in their laws, in these words, "by which a group of people are threatened, derided or degraded because of their race, colour of skin, national or ethnic background." For definitions of racial incitements in these countries see generally Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 8. See also Rachel E VanLandingham, 'Words We Fear: Burning Tweets & the Politics of Incitement' (2019) 85 Brook L Rev 37,.66, notes that the US, in contradistinction to other developed nations, does not have any federal criminal legislation on incitement.

[15] See foot note 8, the rule in *Brandenburg* will be elaborated in chapter three of this work.

[16] Jessica S. Henry, 'Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States' (2009) 18 Information and Communication Technology Law, 235, 241

[17] Alexander Tsesis, 'Prohibiting Incitement on the Internet' (2002) 7 Va JL & Tech 1,9. See Schenck v. United States 249 U.S. 47 (1919), This case will be expounded in chapter three.

[18] Emerson J Sykes, 'In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019' (2019) 85 Brook L Rev 15, 16.

[19] 414 U.S. 105 (1973), the defendant, in an anti-war rally shouted that they would 'take the fucking street later' (at 107). He was arrested because a police officer overheard his words and his conviction was upheld by the Indiana Supreme Court, but the decision was reversed by the Supreme Court of the United States (Per Curiam).

future time), not sufficient to punish the defendant.[20] Second, even if the speaker intends to advocate imminent unlawful conduct, he is protected if the surrounding circumstances make the unlawful action 'unlikely.'[21] Charles Evers warned a crowd that if they did not respect a boycott order of 'racists stores, we're gonna break your damn neck.' [22] The Court in applying *Brandenburg* reasoned that since no violence occurred after the speech was made, it was protected speech.[23] These two conditions are greatly utilized by modern day haters in America- white supremacists. Kobil notes that the *Brandenburg* test is by far the most speech-protective standard applied by the Court to shield advocacy of illegal conduct from governmental censorship. It also favours the speech of extremists over governmental regulation and perhaps "too blunt an instrument" to address the expression advocating violence that currently proliferates on the Internet."[24] It is also too deterministic an approach by the Court in interpreting cases of free speech.

When *Brandenburg* was decided more than five decades ago, there was no internet. Those who wished to disseminate information used traditional modes of communication such as newspapers, leaflets, television, and radio. So, dissemination of information was under control by the gatekeepers of such traditional media. The internet introduces new challenges to the doctrine of incitement posed by online speech,[25] due to the amount of hate that proliferates on the internet. At the beginning of internet communication in 1995, at least fifty hate groups used electronic message boards to disseminate hateful messages but exactly four years later, there were approximately 800 of such hate sites targeting minority populations.[26] For instance, a hate speaker

[20] Michael J Sherman, 'Brandenburg v. Twitter' (2018) 28 Geo Mason U CR LJ 127, 130. *Hess* at 108. See also Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 233.
[21] Ibid 233.This position was clarified in *Hess*.
[22] NAACP v Claiborne Hardware Co. 458 U.S. 886, 928 (1982)
[23] Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 233. *NAACP* at 928.
[24] Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 234.
[25] Rachel Hatzipanagos, 'How Online Hate Turns into Real-Life Violence' *The Washington Post* 30 November 2018. https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/. Accessed 4 December 2020; the commentator says Dylann Roof (the Charleston shooter who killed 9 African Americans in a church) was self-radicalized online; Andrew Marantz, 'Free Speech is Killing US: Noxious Language Online is Causing Real-World Violence. What can we do about it?' *The New York Times* 4 October 2019. https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html. Accessed 4 Dec 2020; American Bar Association Reports (ABA), 'Invisible Threats: Mitigating the Risks of Violence From Online Hate Speech Against Human Rights Defenders' https://www.americanbar.org/groups/human_rights/reports/invisiblethreats-online-hate-speech/ accessed 4 Dec. 2020 and Masood Farivar, 'Can Shutting Down Online Websites Curb Violence?' https://www.voanews.com/silicon-valley-technology/can-shutting-down-online-hate-sites-curb-violence accessed 4 Dec. 2020.
[26] Julian Baumrin, 'Internet Hate Speech and the First Amendment, Revisited' (2011) 37 Rutgers Computer & Tech LJ 223, 233.

in Australia can inspire another person in America via internet communication just by a click of a device. Criminal prosecution of hate speech is sparse because of broad protection that the Supreme Court affords speech in the U.S. The courts may have to refine their approach to the tremendous change that has occurred in communication by the rise of the internet. The thesis argues that the incitement test as the Court currently applies and interprets even subsequent cases, might be the reason that racial and religious regulation of speech in America is inhibited.

The work provides evidence from media discourse and analysis of white supremacists' contributions to the problem of online hate in American and a better understanding of how this form of speech can affect racial and religious minorities in real life. Previous research has looked quantitatively at the scope, content, and producers of online hate speech but not how white supremacists contribute to online hate that impacts racial and religious minorities.[27] Scholarship has received little attention on how the broad interpretation of the First Amendment by the courts appears to inhibit racial and religious hate speech regulation. The work enlightens academics, legislative bodies, the judiciary, (especially the Supreme Court), law enforcement officers and major stake holders on the possible risks to the lives of racial and religious minorities as online hate content by white supremacists continue to permeate America's internet spaces. Edwin Baker, a strong advocate of non-censorship of hate speech comments that he will abandon his defense of hate speech if evidence shows that such speech drives genocidal events, but he expresses pessimism that such evidence will ever be produced.[28] The quest to explore such evidence is the primary motivation for this research. An important question, therefore, concerns whether it is likely that evidence of speech inciting violence will ever be obtained when the law sets an insurmountable obstruction to hate speech regulation with the rule firmly established in

[27] Binny Mathew et al., 'Spread of Hate Speech in Online Social Media' (2019) Conference Paper https://www.researchgate.net/publication/334155686_Spread_of_Hate_Speech_in_Online_Social_Media >Accessed 10 September 2020; Radu Meza, Hanna Orsolya Vincze and Andreea Mogos, 'Targets of Online Hate Speech in Context' (2019) 4 Intersections 26; Raphael Cohen-Almagor, 'Taking North American White Supremacist Groups Seriously: The Scope and Challenge of Hate Speech on the Internet' (2018) 7 International Journal for Crime, Justice and Social Democracy 38; Sarah Rohlfing, The Role of Social Networking in Shaping Hatred: An Exploration into User-Responses to and Influence and Permissibility of Online Hatred (DPhil thesis, University of Portsmouth 2017); Shani Burke, Anti-Semitic and Islamophobic Discourse of the British Far-Right on Facebook (DPhil thesis, Loughborough University 2019) and Christopher Brown, 'WWW.HATE.COM: White Supremacist Discourse on the Internet and the Construction of Whiteness Ideology'(2009) 20 The Howard Journal of Communication 189.

[28] C Edwin. Baker, 'Hate Speech' (2008) Faculty Scholarship at Penn Law 198, https://scholarship.law.upenn.edu/faculty_scholarship/198, accessed 27 November 2020.

Brandenburg? In the light of this, the specific questions to be addressed throughout this research, in pursuance to the aims outlined earlier would be the following. They involve an original combination of both doctrinal and theoretical issues, methods, and modes of analysis.

1. What is the First Amendment in American jurisprudence? What basic principles of free speech does it embody?
2. How does the Supreme Court's application and interpretation of free speech cases (with the advent of the internet) inhibit racial and religious hate speech regulation?
3. How might Ronald Dworkin's interpretative, adjudicatory, and moral theory enrich and inform the approach of the Supreme Court in deciding cases involving minorities?
4. How have white supremacists contributed to the problem of internet hate in America?
5. What does an illustrative analysis of incidents of incitement in media news outlets tell us about the impact of abusive hate speech in the United States?

The Supreme Court in striking a balance between protecting speech and targeting minorities against dangerous speech, has not drawn that thin line.[29] The hate speech debates in America focus more on free expressions guaranteed under the constitution rather than on individuals or groups that are the targets of such speech and the harm it causes; though controversy which seem culminated into a deadlock has been on for over three decades in the United States.[30] The main objective of this research is to direct attention to groups that are harmed by hate speech and the fact that the provisions of the law on free speech abets this harm through cases and precedents evolved over time by the Court from *Brandenburg* and beyond .

1.2 Freedom of Speech

The U.S. Constitution (Amendment 1) entrenches the fundamental nature of freedom of expression.[31] It states thus, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[32] This provision has been seen as the

[29] The Court did not take cognizance of how conveying racial animus via internet can produce bias motivated misconduct. See Alexander Tsesis, 'Prohibiting Incitement on the Internet' (2002) 7 Va JL & Tech 1. Here, the scholar argues that domestic laws are inadequate to curb the danger of internet incitement, democratically administered countries should enter into an international treaty to prevent terrorists and white supremacist from indoctrinating volatile followers. Basically, the Court relegates action-inducing utterances.
[30] Charlotte H Taylor, 'Hate Speech and Government Speech' (2010) 12 U Pa J Const L 1115, 1117.
[31] Note that in this research freedom of speech and freedom of expression will be used interchangeably to mean the same thing.
[32] Constitution of the United States of America (Amendment 1)

bedrock of democracy[33] as demonstrated in numerous cases.[34] Amendment 1, has also been interpreted to mean that it admits of no censorship to free expression;[35] that it guarantees by its wording, absolutist speech.[36]

1.2.1 Fundamentalist v Non-Fundamentalist Argument

First Amendment fundamentalists have unyielding commitment to free speech as admitting of restraint and that the cure for bad speech is more speech. These thinkers believe that regulation of hate speech constitute a serious danger to First Amendment protections.[37] These advocates of free speech protections extending to hate speech argue that those who live in a free society should be able to accept that the society is for everyone and all must learn to accommodate the diversity of each group.[38] They note that silencing speech is wrong and that racial slurs are 'momentary inconvenience' that those in a free society should bear.[39] On the other side of the divide are those who argue for regulation of hate speech among whom but not limited to members of

[33] Benjamin Franklin, one of the founding fathers of American democracy once said; "Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins" in Ann Dannreuther, 'Free speech explained in 5 Human Rights, Cases' *Each Other* 26 May, 2016, https://eachother.org.uk/5-things-learned-free-speech-cases/ Accessed 23 January, 2020.

[34] *Whitney v California*, 274 U.S. 357 (1927), Justice Louis D. Brandeis was noted to have said in this case that those that won the American independence were convinced that the final end of democracy was to enable men the freedom to develop and that government 's deliberative forces should have dominance over the arbitrary; *Near v. Minnesota*, 283 U.S. 697, 51 s. Ct. 625, 75 L. Ed. 1357 (1931), the court nullified a Minnesota Statute that allowed specified governmental officials or private citizens to institute a lawsuit to suppress a public nuisance in the name of the state including publication of issues in the future unless the publisher can prove it was true, with good motives and for justifiable end; See 'Notable First Amendment Cases' http://www.ala.org/advocacy/intfreedom/censorship/courtcases, Accessed 27 January, 2020. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the US S. Ct rejected cries from proponents of regulation of virtual child pornography and held that Child Pornography Prevention Act (1996) was unconstitutional under the First Amendment. See Lyndall Schuster, 'Regulating Virtual Child Pornography in the Wake of Ashcroft v. Free Speech Coalition' (2002) 80 Denv U L Rev 429. See also other cases *Mutual Film Corporation v. Industrial Commission of Ohio* 236 U.S. 230 (1915); *Agency for International Department v. Alliance for Open Society* 570 U.S. 205 (2013).

[35] Alexander Tsesis, 'Balancing Free Speech' [2016] BU L REV 1, 3. The clause of Amendment 1. See also Harry Melkonian, *Freedom of Speech and Society A Social Approach to Freedom of Expression* (Cambria Press 2012) 4. Here, Melkonian says that the minority of Supreme Court has come very close to interpreting the First Amendment Clause in absolute terms.

[36] Scholars in this category are Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) 1961 The Supreme Court Review 245; C Edwin. Baker, 'Hate Speech' (2008) Faculty Scholarship at Penn Law 198, https://scholarship.law.upenn.edu/faculty_scholarship/198 accessed 11 Nov.ember 2020
Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y REV. BOOKS, Mar. 21, 1996, 46 at 46, argues that freedom of speech admits of no restraint (Dworkin recognizes the First Amendment as moral principles that government has no right to censor)

[37] Mari J. Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 1. Matsuda is not a free speech absolutist but merely stating here the perspectives of the scholars in this area.

[38] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 2.

[39] Richard Delgado and Jean Stefancic, *Must We Defend the Nazis? Why the First Amendment Should not Protect Hate Speech and the White Supremacist* (New York University Press 2018) 28.

victimized communities.[40] These scholars note that there has been an alarming increase of hate speech in America, a social malaise that has acquired renewed vigor in recent years.[41] Hate speech, according to these writers, when sustained can be a useful tool for intimidation and creates an environmental threat to social peace.[42] For these scholars, the First Amendment equips individuals with potentials to propagate racism. Amendment 1 works to 'trump or nullify the only substantive meaning of the equal protection clause…'[43] These scholars argue that those who promote hate aim to compromise the dignity of the people they target and present them as not being in good standing with the society by ascribing them obnoxious characteristics.[44] It will not be an overstatement to aver that no freedoms can be absolute and there is a danger of hate speech occurring in a culturally and ethnically diverse society like the United States. The making of egregious statements under the guise of free speech is a flagrant abuse of that right[45] and a total disregard for the values that America's constitutional system also holds sacrosanct, that is, the equal protection under the law.[46]

1.3 Comparison of Canada and United States

In Canada, the government identifies commitment to free speech as synonymous with the inviolability of the dignity of individuals (the right to protect personal honor), as its foremost value[47] while the First Amendment is a prohibition against government interference rather than an imposition of a positive duty on the part of government to endorse, receive and transmit ideas among its citizens.[48] One can conclude that American jurisprudence and scholarship holds strong preference for liberty over equality, the commitment to individualism that champions freedom from the State (negative freedom) as against freedom through the State

[40] Mari J. Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 1. See Footnote 35.
[41] Mari J. Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 1. Several other scholars such as Alexander Tsesis, Balancing Free Speech, Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012), Frederick Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience' (2004) 117 Harvard Law Review 1765, have contributed substantially through their works on the regulation of hate speech.
[42] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 5.
[43] Mari J. Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 15.
[44]Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 5.
[45] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 14.
[46] Constitution of the United States of America (Amendment 14).
[47] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1541.
[48] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1529-1530.

(positive freedom).[49] Canada has produced a clear free speech jurisprudence distinct from that of the United States despite the two systems being similar in many ways, both were former British colonies and are advanced constitutional democracies, with many immigrant populations.[50] Also, the United States and Canada have equal protection of its citizens under the law.[51] In *Regina* v *Keegstra*,[52] the defendant, a teacher, vilified Jews to his pupils calling them, 'treacherous, 'sadistic,' and 'money loving,' among others. He enjoined his students to represent him verbatim in examination to avoid bad grades. James Keegstra was tried under a criminal statute that banned willful promotion of hate speech against an identifiable group based on their colour, race, and ethnic origin.[53] The Court upheld the defendant's conviction while affirming support for free expression under the Canadian law:

> a) Seeking and attaining truth is an inherently good activity; (b) Participation in social and political decision-making is to be fostered and encouraged; and (c) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.[54]

It appears evident from the preceding quotation that the Canadian Courts follow closely the U.S. theoretical model of free speech relying on justifications from democracy, pursuit of truth and autonomy.[55] However, the Canadian autonomy is more protective of pluralistic society and emphasizes the autonomy of both listeners and speakers unlike the US[56] that gives rein to uninhibited speech to dispel falsity and relegates the autonomy of hearers impacted by such hateful speech. Furthermore, the Canadian Court adopted a nuanced approach in *Keegstra* that the defendant could not be protected for his hate propaganda which tends to undermine mutual

[49] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1529.
[50] In *Keegstra*, a leading hate case in Canada, the court discussed extensively the approach of the United States court to such speech but indicated it was departing from such approach. See also Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," Cardozo Law Review 24, no. 4 (April 2003): 1523, 1542, Rosenfeld writes here that the Canadian Supreme Court consistently cites the US court in cases that come before it and promotes in principle and practice the ideals of truth, self-fulfillment and democracy just as the US, See pp 1541-1543.
[51] Embedded in the Canadian Charter of Rights and Freedom (1982) while the equal protection clause of the United States is entrenched in Amendment 14 of the Bill of Rights (1868),
[52] [1990] 3 S.C.R. 687
[53] Mugesera v Canada [2005] 2 S.C.R.100, 2005 SCC 40, Criminal Code (R.S.C., 1985 c.C-46) 319(1)(2), Public Incitement of Hatred. See also) Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523,1542.
[54] Ibid 1543, Quoting Will Kymlicka, Multicultural Citizenship: A Theory of Minority Rights 14 (1995) 728
[55] This will be discussed in the chapter 3 of this work.
[56] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1543.

respect among diverse racial, religious and cultural groups in Canada.[57] The Court in the US may not access the impact of such speech on the target and audience as the court in Canada did-that came to the conclusion in *Keegstra* that members of the target-group are likely to feel humiliated or denigrated and suffer injury to their sense of self-worth, thus avoid contact with the larger society as a consequence.[58] There has been ongoing debate in Canada to establish a constitutional balance between the right to free speech and the protection of vulnerable groups from hateful speech.[59] The Supreme Court of Canada (SCC) has looked at this issue within the context of the Criminal Code[60] and its civil human rights laws.[61] The SCC made its initial pronouncements in 1990 on the legality of civil hate speech restrictions in Canada in (*Human Rights Commission*) v *Taylor*,[62] where a narrow majority of the SCC declared Canada's federal civil human rights provision that censored the public expression of hate speech as a justifiable limitation of freedom of expression.[63] The decision in *Taylor* generated strong criticism over a period of time and so after two decades was revisited in Saskatchewa*n (Human Rights Commission) v Whatcott.*[64]The Supreme Court of Canada while affirming the holding in *Taylor*, unanimously held that such civil restriction on hate speech is justified under Canada's free and democratic society.[65] The legislative intervention in *Whatcott* did not subsist as four months later, the federal government under the Prime Minister's (Stephen Harper) directive abolished the only federal hate speech legislation in Canada in the name of unfettered free speech.[66]

[57] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1543.
[58] Ibid See Nationalist Socialist Party of America v Village of Skokie; 432 U.S. 43 (1977)
R.A.V. v City of St Paul 505 U.S. 377 (1992), Snyder v Phelps 131 S. Ct 1207 (2011)
[59] Lauren E Scharfstein, 'The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions' (2019) 19 Asper Rev Int'l Bus & Trade L 375, 376.
[60] Ibid. RSC 1985 c C-46. See R v Keegstra, [1990] 3 SCR 697; R v Andrews, [1990] 3 SCR 870; and RvKrymoski, 2005SCC 7, [2005] 1SCR101.
[61] Ibid. Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892, 75 DLR (4 F) 577 [Taylor]; Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11, [2013] ISCR 467 [Whatcott}.
[62] Ibid, the Saskatchewan civil human rights provision was challenged as not constitutional because it restricted the public spreading of hate speech as violating free speech expression of the constitution. See Scharfstein, 376.
[63]Lauren E Scharfstein, 'The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions' (2019) 19 Asper Rev Int'l Bus & Trade L 375, 376.
[64] See note 51 above
[65] Lauren E Scharfstein, 'The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions' (2019) 19 Asper Rev Int'l Bus & Trade L 375, 376.
[66] Ibid, 377. Bill C-304 received the assent of the Queen and Section 13 of the Canadian Human Rights Act (CHRA)

Michael Rosenfeld laments the U.S. exclusion of hate speech from the scope of constitutionally protected speech[67] just as Scharfstein bemoans the legislative gap of hate speech provision in Canada, Chapter three discusses certain ways the U.S. courts have undermined the regulation of hate speech in case laws of racial and religious minorities through doctrines and tests evolved by the courts as well as statutes ruled unconstitutional.[68] On regulating hate speech, Sarah Sorial notes that the U.S. relies on the language of "incitement" as a way of defining extreme speech and restricting censorship.[69] The US emphasizes that only speech that incites violence can be regulated though the country does not have any express laws on incitement as other western countries.[70] Such laws seemingly raise the basic problem of relying on speech effects rather than the content of speech to punish hate speech.[71] Hate speakers who can frame their words in a language not deemed inciting, under the American free speech law, are able to get away even when their words cause harm to their targets.[72]

1.4 Definition of Hate Speech

Hate speech has been defined as an expression that is, 'abusive, insulting, intimidating or harassing, and/or incite violence, hatred or discrimination'[73] It is directed at a person or group based on their gender, race, religion, political affiliation, ethnic origin, disability and sexual orientation among others.[74] In some countries and particularly in international legislations, hate speech is described as speech, gesture or conduct that is proscribed because it incites violence or prejudicial action against certain groups in the society.[75] Article 20(2)

[67] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1525.
[68] *Brandenburg* v *Ohio* 395 U.S. 444 (1969), *Watts v United States* 394 U.S. 705 (1969), *Elonis v. United States* 575 U.S. (2015) *Reed v. Town of Gilbert* 576 U.S. (2015).
69 Sarah Sorial, 'Free Speech, Hate Speech, and the Problem of (Manufactured) Authority' (2014) 29 CAN JL & SOC 59, 60.
[70] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523; Nathan Courtney, 'British and United States Hate Speech Legislation: A Comparison' (1993) 19 Brook J Int'l L 727; Irene Nemes, 'Regulating Hate Speech in Cyberspace: Issues of Desirability and Efficacy' (2002) 3 Information and Communication Technology law 193
[71] Sarah Sorial, 'Free Speech, Hate Speech, and the Problem of (Manufactured) Authority' (2014) 29 CAN JL & SOC 59, 60. See also footnote 57 above.
[72] Sarah Sorial, 'Free Speech, Hate Speech, and the Problem of (Manufactured) Authority' (2014) 29 CAN JL & SOC 59, 60.
[73] Karmen Erjavec & Melita Poler Kovačič, 'You Don't Understand, this is a New War!" Analysis of Hate Speech in News Web Sites' Comments' (2012) 15 Mass Communication and Society 899, 900.
[74] Jiri Herczeg, 'Freedom of Speech, Hate Speech and Hate Speech Legislation in Czech Republic and European Union' (2017) 2017 Jura: A Pecsi Tudomanyegyetem Allam- es Jogtudomanyi Karanak tudomanyos lapja 63.
[75] Jiri Herczeg, 'Freedom of Speech, Hate Speech and Hate Speech Legislation in Czech Republic and European Union' (2017) 2017 Jura: A Pecsi Tudomanyegyetem Allam- es Jogtudomanyi Karanak tudomanyos lapja 63.

of the International Covenant on Civil and Political Rights (ICCPR)[76] provides that, "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"[77] One of the strongest and clearest statements on the limits of hate speech is contained in the Convention on the Elimination of all Forms of Racial Discrimination (CERD)[78] which mandates signatories to the convention to, "adopt immediate and positive measures to eradicate all incitements to, or acts of, such discrimination…[by declaring] punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts."[79] But for the purposes of this thesis, racist hate speech 'is a persecutorial degrading or hateful message of racial (or religious) inferiority directed against a historically oppressed group'[80]

Take for instance, these classes of speech:

- 'Most gypsies are unsuitable for human co-existence, unsuitable for living among people. These Gypsies are animals and act as animals … they should not be tolerated or understood but punished.'[81]
- "...the blacks had nothing in Africa except the mud hut. They're eating their brothers. they live more than the caveman did"[82]
- "As was told to me, I had to destroy the Jews"[83]
- 'You rape our women and are taking over the country'[84]

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[76] International Covenant on Civil and Political Rights, art 20. Dec. 19,1966, 999 U.N.T.S. 171, 178. See also Rebecca Meyer, 'Pursuing a Universal Threshold for Regulating Incitement to Discrimination, Hostility or Violence' (2018) 44 Brook J Int'l L 310.
[77] Ibid. See also Rebecca Meyer, 'Pursuing a Universal Threshold for Regulating Incitement to Discrimination, Hostility or Violence' (2018) 44 Brook J Int'l L 310.
[78] International Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966. 660 U.N.T.S. 195. See also Kathleen Mahoney, 'Hate Speech, Equality, and the State of Canadian Law' (2009) 44 Wake Forest L Rev 321, 324.
[79] Art 4 of CERD, *adopted and opened for signature*, Dec. 21, 1965. *entered into force*, Jan 4, 1969. *https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx* accessed 5 Nov. 2020.
[80] Mayo Moran, 'Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech' (1994) 1994 Wis L Rev 1425, 1429. Original definition by Mari J. Matsuda in 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 27 Mich L Rev. 2320, 2357.
[81] Robert Kushen, 'Seeds of Extremism' (2013) 42 Index on Censorship, 44. This statement was uttered by Zsolt Bayer (a founding member of FIDESZ- is a national conservative, right-wing populist political party, a majority political party). The statement was during a rally on February 13, 2009, a rally against Roma Crime.
[82]Michael Isreal, 'Hate Speech and the First Amendment' (1999), 15 Journal of Contemporary Criminal Justice 97. These words were said on Kansas City television station in 1987 by the Imperial Dragon of the Missouri Knights of Ku Klux Klan who was being interviewed.
[83] Erna Petri made this statement when asked why she killed six Jewish children when she was standing trial for the crime. On a summer day in 1943, she noticed six Jewish children on the side of the road, who probably jumped out from box cars conveying them to "the East," the children were terrified and hungry. Erna, calmed them down, obtained their trust and took them home. They were ages 6-12 years. She fed them from her kitchen and then took them to the back of the house, shooting them one after another until she killed them all. https://www.facinghistory.org/holocaust-and-human-behavior/chapter-9/proving-oneself-east, accessed 25th November 2019.
[84] Raf Sanchez and Peter Foster in *The Telegraph*, 18 June 2015. , Charleston Shooting: Suspect Dylann Roof 'in Custody' after Church of Nine-As it happened (*The Telegraph*, 18 June 2015)

- "On the day when people rise and don't want you Tutsi anymore, when they hate you as one and from the bottom of their hearts … I wonder how you will escape"[85]
- " Muslims and 9/11! Don't serve them, don't speak to them, and let them in"[86]

These messages undoubtedly send negative, affective signals about members of the minority groups denigrated and also to those in the community who are not those being attacked.[87] Hate speech of the racial and religious kind represents, according to Zhong Zewei, 'the most visceral and dangerous fault line.'[88] 'The road to genocide in Rwanda was paved with hate speech'[89] and so was Nazi Germany.[90] For Mahoney, it might appear either an oversimplification or exaggeration to attribute hate speech to genocidal events but there is no doubt that such speech played pivotal roles in such episodes.[91]

In the U.S., a significant challenge confronts the courts in determining speech constitutionally protected and those excluded. The parameters of freedom of expression fall within the provisions of the First Amendment as to whether the interpretation of the document should be dynamic or static. This is a big debate surmised in the next section.

https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11682685/Nine-killed-at-South-Carolina-church.html. Accessed 25 November 2019. Dylann Roof's (White Supremacist) comments as he shot and killed nine in Charleston, South Carolina, United States, a historic Emmanuel African Methodist Episcopal Church, statements referenced the black people who were his targets and motivated his choice of place for the attack.

[85] Kennedy Ndahiro, 'In Rwanda, we all Know about the Dehumanizing Language, Years of Cultivated Hatred Led to Death on a Horrifying Scale' *The Atlantic*, 13 April 2019. https://www.theatlantic.com/ideas/archive/2019/04/rwanda-shows-how-hateful-speech-leads-violence/587041/. Accessed 29 February, 2020. Noel Hitimana (staff of the radio station that promoted extreme speech against Tutsis) made this statement a month to the genocide on Radio Television Libre De Mille Collins (RTLM). The radio station was government sponsored but privately owned.

[86] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 1, the author narrates the story of a sign on a New Jersey city street corner (presumably after the terrorist attack in the United States) observed by a man taking a walk with his two children who were both minors and how the man was short of words when his daughter asked him the meaning of the above words.

[87] Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311, 319.

[88] Zewei alluding to the statement made by the Prime Minister of Singapore, Lee Hsien Loong at a National Day Rally in 2009.

[89] William A Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 McGill L J, 141, 144.

[90] In the mid-1930s, the Nazis assumed power in Germany. Jews were predominantly influential because they were in good professions and business. Hitler and other race haters disgusted that main German city were occupied by the Jews started preaching to lower classes the risk Jews posed to their existence. They preached that the white race should triumph over the predatory animal lust and "beast men" who preyed on their women. With their hate speech rhetoric, it was not difficult to eliminate six million Jews from the face of the earth from 1939-1945. See Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311, 314.

[91] Kathleen Mahoney, 'Hate Speech, Equality, and the State of Canadian Law' (2009) 44 Wake Forest L Rev 321, 326.

1.5 The First Amendment Debate

The debate in this area is how principles derived from an eighteenth-century constitution should inform the present communication and information age.[92] This is a debate that centers on the originalist and the living constitutionalist schools of academic and judicial approaches. The living constitutionalist view is that a twenty first century society cannot be bound by an eighteenth-century sensibilities and technology.[93]

The 'originalist' maintains that judges interpret the U.S. Constitution as it was written and as it was intended to be applied by its framers.[94] Originalist scholars argue that the constitution should not vary according to changing times and generations because this would render the words of the law meaningless.[95] Wachtler is of the view that the 'originalist' position is flawed if followed to the latter as it requires us to determine if the drafters would have preempted changes that could occur long after they are dead.[96]

The living constitutionalism is a theory of the development of the constitution by the interaction of the courts and the political branches.[97] It denotes a descriptive and normative process of constitutional interpretation.[98] The idea that the constitution ought to reflect growth over time to meet with new challenges, social, political and especially historical realities often unanticipated by the framers.[99] The argument is that judges should interpret the constitution to be consistent with modern needs and circumstances including incorporating also popular opinion and public discourse.[100] These two positions continue debates over the flexibility or rigidity of the interpretation of the constitution and its drafters..[101] This writer will return to this argument in chapter seven of this work.

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[92] Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414.
[93] Sol Wachtler, 'Dred Scott: A Nightmare for the Originalists' (2006) 22 Touro L Rev 575, 578
[94] Sol Wachtler, 'Dred Scott: A Nightmare for the Originalists' (2006) 22 Touro L Rev 575
[95] Ibid 577.
[96] Sol Wachtler, 'Dred Scott: A Nightmare for the Originalists' (2006) 22 Touro L Rev 575, 581.
[97] Jack M Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 Nw U L Rev 549,566.
[98] Ibid. Constitutional construction is defined by Balkin as when political actors 'elaborate and enforce constitutional values by creating new institutions, laws, and governing policies' p 566
[99] Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Can JL & Jurisprudence 55
[100] Ibid 56.
[101] Sol Wachtler, 'Dred Scott: A Nightmare for the Originalists' (2006) 22 Touro L Rev 575,580.

1.6 The Internet and the First Amendment

In *Reno v American Civil Liberties Union,*[102] the internet is described as an "international network of interconnected computers" that form "a unique and wholly new medium of worldwide human communication."[103] The Supreme Court in its significant attempt to address the application of the First Amendment to the internet, declined to address "the level of First Amendment scrutiny that should be applied to this medium."[104] The Court noted that the "internet is not as 'invasive' as radio or television,"[105] and that a user of the internet should assent to generally and necessarily receiving troubling communications.[106] Thus the Court in that case, granted full protection to internet communication while acknowledging the limitless, heterogeneity and dynamic nature of the internet.[107] For Tsesis, the First Amendment is designed to allow robust debates, which encompasses popular, controversial and unpopular points of view.[108] The government is prevented from telling citizens what to speak, hear, write or read[109] because the First Amendment protects speech as a foremost value in society.[110] Henry is of the view that under the First Amendment to the Constitution, online hate enjoys the same protections as any other form of speech.[111]

The court demonstrates this broad protection in *Planned Parenthood* v *American Coalition of Life's Activists*[112] the defendants who were anti-abortion groups created a website which they named "Nuremberg Files'[113]on which they listed personal details of all abortion doctors in the U.S., crossing out the names of those murdered or injured from the list. The doctors sued on grounds that the creators of the website had

[102] 521 U.S. 844 (1997). See Strasser, 165
[103] *Reno* at 850.
[104] *Reno* at 870. See also Lynn Adelman and Jon Deitrich, 'Extremist Speech and the Internet: The Continuing Importance of Brandenburg' (2010) 4 Harv L & Pol'y Rev 361.
[105] *Reno* at 868-869.
[106] *Id* 867,869. See Adelman and Deitrich, 361. These writers however argue that internet communication and the rule established in Brandenburg are compatible.
[107] *Reno* 870, Lynn Adelman and Jon Deitrich, 'Extremist Speech and the Internet: The Continuing Importance of Brandenburg' (2010) 4 Harv L & Pol'y Rev 361.
[108] Alexander Tsesis, 'Dignity and Speech: The Regulation of Hate Speech in a Democracy' (2009) 44 WAKE FOREST L REV 497, 512.
[109] Dale Carpenter, 'The Antipaternalism Principle in the First Amendment' (2004) 37 Creighton L Rev 579.
[110] Richard Delgado and Jean Stefancic, *Must We Defend the Nazis? Why the First Amendment Should Not Protect Hate Speech and the White Supremacist* (New York University Press 2018) 1.
[111]Henry Ibid, 235, 236. Henry J.S, Beyond Free speech: Novel approaches to hate on the Internet in the United States [2009] 18 Information & Communications Technology Law 235, 236.
[112] 244 F.3d 1007 (9th Cir. 2001),
[113] We recall the Nuremberg Trials (1945-1949) responsible for bringing 13 Nazi war criminals to justice. So that the website was named after this infamous trial rings a bell to anyone who accessed the website.

deprived them of their anonymity and their speech hurt them as it posed direct threat to their lives.[114] The Court of Appeals for the Ninth Circuit noted that the speech of the defendants did not pose any danger to imminent lawless action but was merely made in the context of public discourse rather than direct individual communication.[115] The Ninth Circuit reasoned that the First Amendment though it does not protect all public discourse, protects speech that encourages others to commit violence (makes future violence more likely) unless such expression could produce imminent lawless action.[116] The Court concluded that unless the 'Nuremberg Files' creators threatened that its members would assault the doctors, their speech was protected under the First Amendment.[117] According to scholars, this case suggests the importance of re-evaluating current First Amendment principle on incitement and its suitability to resolving issues surrounding the censorship of speech fostering violent conduct on the internet.[118]

In the present age, the internet is used to relay text, pictures, sound, video images, send electronic mails and instant messages that the recipient receives immediately on his electronic device.[119] It constitutes a large platform from which a speaker or publisher of information disseminates and receives information "from a world-wide audience of millions of readers, viewers, researchers, and buyers."[120] Thus, the internet has provided so many with easy, inexpensive, self-expressive medium for communicating messages.[121] Prior to the emergence of the internet, a speaker's message could only be conveyed to a limited number of people but the internet has made it possible for messages to be transmitted to every country of the world at every time of the day.[122] Chemerinsky states, "the internet has significantly changed the nature of free speech, including the problem of false speech"[123]

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[114] Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Int'l L 1, 16.
[115] Ibid. See also *Planned Parenthood* at 1018. See also Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227
[116] Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Int'l L 1, 16 *Planned Parenthood,* 1015
[117] *Planned Parenthood* 1015
[118] Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 229.
[119] *Ren*o at 853. See Kolbi, 242.
[120] Ibid. See also Kolbi 242. See also Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414; Scott Hammack, 'The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts' Approach to True Threats and Incitement' (2002) 36 Colum JL & Soc Probs 65
[121] Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414.
[122] Scott Hammack, 'The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts' Approach to True Threats and Incitement' (2002) 36 Colum JL & Soc Probs 65 ,81.
[123] Erwin Chemerinsky, 'False Speech and the First Amendment' (2018) 71 Okla L Rev 1, 2.

The first U.S. governmental effort to regulate the internet relates to the *Communications and Decency Act*, 1996 (CDA)[124] enacted by Congress in response to the frequent and exaggerated reports of pornography accessible to minors on the internet.[125]According to Djavaherian, the Court issued its strictest standard in that case

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less *restrictive alternatives* would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.[126]

The Supreme Court declared the Act unconstitutional in *Reno* v *American Civil Liberties Union.*[127] The Court was asked to decide on this new medium of communication and how government can legislate online content. The Court issued a statement that online content is fully protected under the First Amendment and accorded the same level of protection as that on print.[128] The Court also noted that cyberspace is not located in any geographical location of the world but available to anyone that can access the web.[129]

The key issue here is how a document or law ratified in 1791 can resolve the problems of the twentieth century America[130] with new and challenging technologies especially when hateful messages can be disseminated from any location in the world with different cyber laws guiding each jurisdiction. As Djavaherian puts it, American legal system has faced challenges with adapting to new technological inventions and changes.[131] This poses new challenges for the courts to legislate on cases with the internet having unfettered free flow of information and extraordinary jurisdictional, enforcement problems and dilemmas.[132] The decision in *Reno* demonstrates the Supreme Court's highest level of free speech protection to online data consumption. In that

[124] Title V of the Telecommunication Act of 1996, Pub L No 104, 110 Stat 56, Codified at Scattered Sections of 47 United States Code. See also Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414, 415.
[125] Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414, 415 referencing Robert Cannon, The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Highway' (1996) 49 Fed Comm **U** 5 **1.**
[126] Reno at 2346... See also David K Djavaherian, 'Reno v. ACLU' (1998) 13 Berkeley Tech LJ 371, 378. Emphasis Djavaherian.
[127] *ACLU v Reno*, 1117 S. Ct 2329 (1997).
[128] David K Djavaherian, 'Reno v. ACLU' (1998) 13 Berkeley Tech LJ 371.
[129] *Reno* 849 see also Weissblum, 51.
[130] Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414.
[131] David K Djavaherian, 'Reno v. ACLU' (1998) 13 Berkeley Tech LJ 371
132 Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414.

case, there was a disagreement between Congress and the Supreme Court on the constitutional speech standard that was suitable for the World Wide Web. Congress argued that the same standard for the traditional news media (Television, Newspaper, radio) should apply with the regulation on the internet. The court did not apply that doctrinal framework but rather viewed the internet as face-to-face communication.[133]

1.7 Internet Versus Traditional Speech

Scholars who studied a social media site to understand the effects of unrestricted speech in an online setting using snapshots of chats of users on GAB found that the volume of offensive speech consistently increases and that GAB users are 'becoming more hateful at an increased and faster rate,'[134] such status quo will be unlikely in a traditional mode of speech. The number of people with access to internet speech has been predicted to reach 3.2 billion (approximately one third of the world's population) in 2021.[135] This number would be difficult to reach with the traditional communication methods. The internet possesses certain characteristics that make it a unique forum to propagate hatred and might benefit the Court to apply a different standard on speech that advocates violence.[136] Brown outlines ease of access, anonymity and size of audience as three features that distinguish the internet from other forms of communication.[137] The anonymous nature of the internet makes the matter more pressing at a time hate mongers freely spew their dehumanizing discourse online without being traced, for example, when such people use pseudonyms instead of their real names to create online accounts and send out hateful messages.[138] It is hard for the Federal Bureau of Investigation (FBI) to prosecute such account owners because the names are not real.[139] In essence, the internet introduces different kind of speaker-audience relationship that makes the standard in *Brandenburg* difficult to apply.[140] The internet has also made it easy and quick for hate speakers to connect with others

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[133] Jack Healy, Julie Turkewitz and Richard A. Oppel, Jr, 'Cesar Sayoc, Mail Bombing Suspect, Found an Identity in Political Rage and Resentment' *New York Times*, 28 October 2018, ,https://www.nytimes.com/2018/10/27/us/cesar-altieri-sayoc-bomber.html, accessed 27 November, 2019.
[134] Binny Mathew et al, 'Hate Begets Hate: A Temporal Study of Hate Speech' (2020) 4 ACM Hum. Computer Interaction 1.
[135] Juan Carlos Pereira-Kohatsu et al., 'Detecting and Monitoring Hate Speech in Twitter' (2019) https://www.mdpi.com/1424-8220/19/21/4654 < accessed 9 September 2022.
[136] *Reno* at 850.
[137] Alexander Brown, 'What is so special about online (as compared to offline) hate Speech?' (2018) 18 Ethnicities 297.
[138] Karem M Douglas et al, Understanding Cyberhate (2005) 23 Social Science Computer Review 68, 74.
[139] Ibid
[140] John P Cronan, 'The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard' (2002) 51 Cath U L Rev 425, 428.

who are complicit in ideas they propagate especially for white supremacists who spread race hate speech online.[141]

1.8 White Supremacists' online Presence

Extremists' groups have discovered that the internet is a tool for spreading hate and indoctrinating others.[142] The internet as an open and unrestricted source of information has served as a medium for extremists to post messages and the pervasiveness of such hate speech cannot be quantified.[143] Mahoney notes that in 1995, there was only one internet site that foster hatred in America but in 2005, the hate sites increased to 5000. The replication of hate sites has continued in the U.S. with the Wiesenthal Center in California reporting that between April 1995 and July 1996, the number of racial hate pages increased from 3 to 100 though the center grossly misrepresented the actual number at the time of the report.[144]An organization reports a total of 940 hate groups they traced on America soil in 2019.[145] These websites promote racism, anti-Semitism, homophobia, and ethnocentrism that thrive in the U.S. because of a few controls of their activities.[146]

According to the Police Chief Magazine, there has been a rise in anti-Semitic incidents in the last five years in the U.S. with a total of 1,986 (2017), 1,879 (2018) and 2,100 (2019) which amounts to the highest in forty years and an increase of 56% from the previous year.[147]According to the magazine, a small group of people (supposedly, white supremacists) are perpetrating hate on online platforms and amplifying hateful ideologies.[148] These white supremacists are empowered by the online hate environments to intensify violent attacks against minorities.[149]

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[141] Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311, 318.
[142] Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227,230.
[143] Chris Gosnell, 'Hate Speech on the Internet: A Question of Context' (1998) 23 span style='font-size:13px;'>Qspan>span style='font-size:10px;'>ueen's LJ 369, 372.
[144] Ibid
[145] The Southern Poverty Law Center, https://www.splcenter.org/hate-map. Accessed 21 May 2020.
[146] Alexander Tsesis, 'Prohibiting Incitement on the Internet' (2002) 7 Va JL & Tech 1, 1. Tsesis notes that there are approximately 4000 hate websites in 2001.
[147] Oren Segal, (Vice President of ADL Center for Extremism) This data was reported by the Anti-Defamation League Website, Violence and the Rise of Anti-Semitism, *Police Chief Magazine*, https://www.policechiefmagazine.org/targeted-violence-anti-semitism/ Accessed 23 September 2020.
[148] Ibid
[149] Ibid

The World Wide Web (WWW) appears to be the most effective way and the most publicly influential medium for spreading hate messages[150] Don Black who owns a hate website named 'Stormfront' proclaimed that, "the internet is that opportunity we've been looking for…we never were able to reach the audience that we can now so easily and inexpensively"[151] In the US, Stormfront has 150,000 visits in a five-month period.[152] These organizations create websites on holocaust denial, white supremacism (KKK), anti-racial sentiments among others.[153] The websites serve to keep together individuals who have common purpose and intent in disseminating hate. Gosnell concludes that hateful expressions and vilifying groups of people are easily accessible on the internet which reach numerous people.[154]

1.9 Online Hate Speech and Offline Violence

The Supreme Court seems oblivious of the fact that there is empirical evidence that online hate speech leads to offline commission of crime.[155] The columnist, Caroline Davies opined that the repeated use of words makes ordinary, dangerous language and allows hatred to take root which might lead to persecution.[156] The writer continues that hate speakers have therefore succeeded in persuading their hearers by their words "to commit frenzied acts, despicable and often incomprehensible acts."[157] In lending credence to the above, Powell notes that the U.S. Supreme Court ignores the reality that prejudice, or racial bias are instrumental to

[150] Chris Gosnell, 'Hate Speech on the Internet: A Question of Context' (1998) 23 span style='font-size:13px;'>Qspan>span style='font-size:10px;'>ueen's LJ 369, 382.
[151] Quoted in Diane Werts 'How the Web Spawns Hate and Violence' *Newsday*, 23 Oct.,2000 at B27, referenced in Tsesis A, 'Prohibiting Incitement on the Internet' (2002) 7 Va JL & Tech L 1, 13.
[152] Chris Gosnell, 'Hate Speech on the Internet: A Question of Context' (1998) 23 span style='font-size:13px;'>Qspan>span style='font-size:10px;'>ueen's LJ 369, 382.
[153] Chris Gosnell, 'Hate Speech on the Internet: A Question of Context' (1998) 23 span style='font-size:13px;'>Qspan>span style='font-size:10px;'>ueen's LJ 369, 382.
[154] Ibid.
[155] Raphael Cohen-Almagor, 'Taking the North American White Supremacist Groups Seriously: The Scope and Challenge of Hate Speech on the Internet (2018) 7 Int'l Jo for Crime, Just & Soc Democracy 38, See also notes 21 of this chapter. Also, Ben Colliver, 'The Normalcy of Hate a Critical Exploration of Micro Crimes Targeting Transgender People' (PhD Thesis, Kingston 2018); Laura Leets and Howard Giles, 'Words as Weapons-When do they Wound? Investigations of Harmful Speech' (1997) 24 Human Communication Resaerch 260.
[156] Caroline Davies, 'One-Quarter of Britons Witnessed Hate Speech in Past Year, Poll Finds', *The Guardian,* January 27, 2018. https://www.theguardian.com/society/2018/jan/27/uk-hate-speech-poll-holocaust-memorial-day-2018. Accessed 20 November 2019.
[157] Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311, 318-319.

attacks on the minority[158] Tsesis adds that the U.S. embracing uninhibited speech above all democratic values comes in conflict with indicators linking hate speech with bias crimes.[159]

Studies have found a correlation between use of internet communication and hate crime.[160] Muller and Schwarz used facebook data to study a right-wing party's (*Alternative fur Deutsch- land* (AFD) anti-refugee sentiments in Germany, found that social media facilitates online hate speech and real-life violent crime.[161] Another comparative study of six nations noted the dangers of online hate speech and its potential link to offline violence.[162] Hate crime scholars suggests that the internet encourages violent behaviour because it makes it possible, for individuals who believe the same ideologies to advocate hate and intolerance.[163] There is also consensus that the internet increases access to materials and information needed to carry out violent acts.[164]

1.10 Impact of Hate Speech on Victims

Delgado and Stefancic opine that hateful speech especially of the racial and religious kind can shock, wound, render its victims speechless, silent, afraid and less able to participate in public discussions after such speech are made.[165] The injury the minority suffer from hate speech is part of a continuum by which these persons

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[158] Cedric Merlin Powell, 'The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond' (1995) 12 Harv Blackletter L J 1,2 Powell referenced Michael J. Sniffen, FBI chief says U.S. Rivals Germany in Hate Murders, *N.Y. Times*, 24 June 1994 at A20.

[159] Alexander Tsesis, 'Prohibiting Incitement on the Internet' (2002) 7 Va JL & Tech 1,

[160] Karsten Muller and Carlos Schwarz, 'Fanning the Flames of Hate: Social Media and Hate Crime' (2017) https://booksc.xyz/book/72097461/469780 accessed 13 October, 2020; Binny Mathew et al., Spread of Hate Speech in Online Social Media (Conference Paper 2019), https://arxiv.org/abs/1812.01693. Accessed 9 Nov. 2020.

[161] Karsten Muller and Carlos Schwarz, 'Fanning the Flames of Hate: Social Media and Hate Crime' (2017) https://booksc.xyz/book/72097461/469780 accessed 13 October 2020.

[162] Ashley Reichelmann et al, 'Hate Knows No Boundaries: Online Hate in Six Nations' (2020) https://doi.org//10.1080/01639625.2020.1722337 accessed 12 October 2020. See Binny Mathew et al, Bowers attacked and killed 11 in the Tree of Life Synagogue Pittsburgh after posting anti-Semitic messages on his Gab (under the username @Onedingo) ON 27 Oct. 2018.

[163] Ibid, Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 230. See also Dhammika Dharmapala and Richard H. McAdams, 'Words that Kill? An Economic Model of the Influence of Speech on Behaviour (With Particular Reference to Hate Speech)' (2005) 34 Jour. Of Legal Studies 93.

[164] Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 230. For instance, the Columbine High School shooters culled information on how to make local bombs with which they attacked the school from the web; Julian Baumrin, 'Internet Hate Speech and the First Amendment, Revisited' (2011) 37 Rutgers Computer & Tech LJ 223

[165] Richard Delgado and Jean Stefancic, *Must We Defend the Nazis? Why the First Amendment Should Not Protect Hate Speech and the White Supremacist* (New York University Press 2018) 1.

are subordinated and the speech follow them wherever they go.[166] Racist hate speech victims experience emotional distress, stress, hypertension, psychosis and suicidal thoughts.[167] Due to the impact of hate speech on their target, most countries and the international community have taken strong stance against hate speech through their laws.[168] Laws to combat hate speech are important in order to avert the psychological and physical harms experienced by targets of hate speech.[169] The United States is yet to endorse, if ever, the United Nations Convention on the Elimination of all Forms of Racial Discrimination and have no laws that ban incitement to racial hatred.[170] Article 4 of the Convention banishes, inter alia, any form of racial superiority, hatred, advocacy, or incitement to racial discrimination which is the reason the U.S. has not ratified it because the provision violates the First Amendment that validates both advocacy and incitement relative to certain objections that will be discussed in the chapter three of this work.[171]

In this research, the literature review will be embedded in the theoretical chapters which are the first four chapters of this research. A one-chapter literature review is not possible due to the nature of the issue under review. This work explores the theory, concepts, and doctrines around the First Amendment broad speech protection (particularly as interpreted by the Supreme Court in the incitement doctrine) using online media sources for analytical illustration on how this provision of the law impacts racial and religious minorities in the U.S.

1.11 Limitation to this Research

The doctrine of incitement is assessed theoretically and conceptually. Those who carved this doctrine in the early 19th century did not envisage or anticipate the emergence of the internet nor realize that the American society will become more hateful in the 21st Century. The critical analysis of this doctrine to determine if it is

[166] Ibid, 28.
[167] Richard Delgado and Jean Stefancic, *Must We Defend the Nazis? Why the First Amendment Should Not Protect Hate Speech and the White Supremacist* (New York University Press 2018) 28.
[168] See foot note 10 of this chapter
[169] Alexander Brown, 'The "Who?" Question in the Hate Speech Debate: Functional and Democratic Approaches' (2017) 30 Canadian Jour. Of Law & Jurisprudence 23, 27.
[170] Nathan Courtney, 'British and United States Hate Speech Legislation: A Comparison' (1993) 19 Brook J Int'l L 727, 728.
[171] International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for endorsement by member states on 21 December 1965 and entered into force on 4 January 1969. See Chapter 2 of this work for a detailed discussion on advocacy and incitement section 2.6.2.

sound in theory and in practice is no doubt a herculean task. The following problems and limitations present for this researcher.

First, there are several minority groups impacted by the incitement doctrine in the American society. For instance, Asians, Hispanics, Muslim men and women, gay men and women among others but as the researcher cannot study everything and everybody, the research focused only on minority groups presented in the data- Jewish and African Americans. Second, the data used for this research is newspaper articles produced by Journalists. The researcher is not a journalist and has never been engaged in journalism to have insight into how news is produced including the process of constructing the news. The news reports and editorials may have been impacted according to the writer's culture and bias. Nonetheless, utilizing journalistic articles for this research was a viable was insightful in exploring both positive and negative impact of the doctrine in constitutional development and in its practical aspects.

The research demonstrates that the American system has been profusely criticized as falling short of standards of free speech in comparison with other nations in its inability to regulate speech that incites hate or violence against racial and religious minorities. The scholarship in this area is complex, multifaceted, and immense. This work does not seek to resolve the deadlock among free speech scholars in America but comprises an attempt to utilize media sources as illustrative evidence of public discourse and opinions seemingly lacking in scholarship on the doctrine of incitement, to enrich and develop the discussion of free speech in America and to try to plant the jurisprudence in the real world of dangerous intolerance and racial violence rather than the abstract peaceful isolation of the court room or legal text.

The research will limit itself to online advocacy. The work does not suggest or link online hate speech to fatal harm in the real world (deterministic causality) but will illustrate how incitement to hate or violence against the minority over time, if accepted in a legal system, can be problematic and may lead to deadly violence.[172]

[172] Julian Baumrin, 'Internet Hate Speech and the First Amendment Revisited' (2011) 37 Rutgers Computer & Tech LJ 223; Tsesis A, 'Prohibiting Incitement on the Internet' (2002) 7 Va JL & Tech L 1.

As Cantor puts it, the Justices (of Supreme Court in America) did not base the interpretations of free speech on moral considerations or popular reactions to the wisdom of free speech.[173] Cantor echoes Ronald Dworkin in this statement that is the theoretical framework used for this research in chapter four. There is prolific literature on free and hate speech[174] but scholarship has failed to develop a body of evidence to address the incitement doctrine of the Supreme Court from the angle of broad interpretation by the courts. This research begins to bridge this gap by offering illustrations from online media outlets of cities that have experienced hate inspired mass killings. At this juncture, I want to outline the contribution this research makes to scholarship.

1.12 Contribution of this Research

The theoretical basis of the doctrine of incitement and how it is justified both in theory and in practice is explored. The thesis addresses this gap in existing literature to lend greater insight into the doctrine as applied by the courts, decided cases and particularly, its formal application. The courts have clearly not addressed the practical implications of this doctrine in the internet age and within the context of widely proliferating hate groups in America. Chapters five and six of this thesis present this unique perspective of incitement that has not been explored in existing literature in law. The thesis presents several original avenues seeking to clarify aspects of the doctrine of incitement to provide a foundation for possible reforms, this approach differs from most existing scholarship. The thesis is especially relevant at a time that the doctrine of incitement gained traction and is revived by a former president accused by mainstream media of inciting violence against racial minorities in the United States.[175] This work highlights challenges in the application of the doctrine of incitement to help eliminate such problems in future case laws and the precedents of the courts. The thesis deals with the novel issues of reconciling the theory and development of the law with modern discourse on

[173] Milton Cantor, *The First Amendment Under Fire*: *American Radicals, Congress and Courts* (Taylor and Francis Inc. 2017) 10.
[174] Katharine Gelber, *Speaking Back the Free Speech Versus Hate Speech Debate* (John Benjamin Publishing Company 2002); Antoine Buyse, 'Dangerous Expressions; the ECHR, Violence and Free Speech' (2014) 63
INT'L & COMP LQ 491, Jessica S Henry, Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States (2009) 18 Information and Communication Technology Law, 235; Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative
Analysis' (2003) 24 CARDOZO L REV 1523
[175] Neil Richards, 'Free Speech and the Twitter Presidency' (2017) 2017 U Ill L Rev Online 1.

the impact of the law, dimensions of the question that have not been examined in the same depth and extent by other legal scholars.

The preceding sections of this chapter outlines issues in the literature that impact broad protection of speech under the American system namely but not limited to the internet and the First Amendment, the unprecedented increase of online presence of white supremacists, the internet as distinct from traditional mode of speech and mayhem that internet speech causes are well grounded in scholarship with the incitement doctrine both in books[176] and Articles.[177]The extant literature on incitement has merely addressed the theoretical and legal defects of the doctrine but not the impact it has on racial and religious minorities in the practical sense. The review notes importantly, literature gaps in checking how the doctrine applies in the real world. The review takes cognizance of the fact that the Court appears to distance itself from the internet age and downplays the impact of this in adjudging free speech cases involving minority groups. This current research attempts to explore in practical terms viewpoints of the media on broad protection offered speech and to assess if there exists any contradiction in legal theory and public discourse which has not really been addressed in scholarship. In chapter three, further review of literature explores the constitutional significance of the doctrine of incitement identified in the theory and precedents established by the courts. In chapter four, the Dworkin's theory of law is utilized to reflect the conceptual foundation of this thesis.

[176] Mari Matsuda et, *Words that Wound Critical Race Theory, Assaultive Speech and the First Amendment* (Routledge Taylor & Francis Group 2018); Richard Delgado and Jean Stefancic, *Must we Defend the Nazis: Why the Firsts Amendment Should not Protect Hate Speech and White Supremacy* (New York University Press 2018); Ivan Hare and James Weiinstein, *Extreme Speech* and Democracy (Oxford University Press, 2009); Katharine Gelber, *The Free Speech Versus Hate Speech Debate* (John Benjamin Publishing Company 1984) and Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

[177] Sarah Sorial, 'Hate Speech and Distorted Communication: Rethinking the Limits of Incitement' (2015) 34 Law and Philosophy 299.; Russell L. Weaver, 'Brandenburg and Incitement in a Digital Era' (2011) 80 Miss LJ 1263; Edward J. Eberle, 'Cross Burning, Hate Speech, and Free Speech in America' (2004) 36 Ariz St LJ 953; Edward J. Eberle, 'Cross Burning, Hate Speech, and Free Speech in America' (2004) 36 Ariz St LJ 953 ; Alexander Tsesis, 'Inflammatory Speech: Offense Versus Incitement' (2013) 97 Minn L Rev 1145 ; James Hart, 'Revisiting Incitement Speech' (2019) 38 Quinnipiac L Rev 111; Lynn Adelman and Jon Deitrich, 'Extremist Speech and the Internet: The Continuing Importance of Brandenburg' (2010) 4 Harv L & Pol'y Rev 361; Julian Baumrin, 'Internet Hate Speech and the First Amendment, Revisited' [2011] 37 Rutgers Computer & Tech LJ 223; James Banks, Regulating hate speech online [2010] 24 International Review of Law, Computers & Technology, 233.

1.13 Personal Interest in this Area of Research

My master's dissertation examined the right to life vis a vis an incident that occurred in Nigeria on November 20, 1999. The story had it that the president of the nation, following the killing of 12 policemen near an Ijaw town named 'Odi' ordered the Nigerian military to go to the town. In retaliation, the military backed by the chief executive, killed, maimed, raped, demolished, and destroyed every living person on sight including their homes in the town. By the time they finished unleashing their mayhem, only two buildings were standing in the whole town-a church and the village school. The incident in this case would be more properly described as crime against humanity and I did suggest that the then president should be prosecuted, and that the Constitutional immunity granted to him, should not override the human rights of the individuals and their families murdered. My interest over the years in researching human rights issues has not waned, instead my curiosity has continued to grow but this time to examine the question of free speech in a system where I personally experienced hate speech in a university environment.

1.14 Methodology

This research uses a mixed methods approach combining both doctrinal and illustrative (thematic and critical discourse analysis) approaches in investigating problems of online hate speech against racial and religious minorities in America. A more detailed discussion of the methods will be developed in chapter two of this work.

1.15 Thesis Structure Summary

The second chapter comprises the methodology outlining both the analytical perspectives and illustrative methods that are utilized in this research. The chapter discusses the ethics of online research, challenges of obtaining data for the analysis from Google of online newspapers and concludes with the analytic strategy adopted for the study. The third chapter concerns the constitutional bedrock for this work. It discussed the key theories, principles, concepts, tests and doctrines of the First Amendment free expression provisions, particularly, how the Supreme Court's interpretation and espousal of unencumbered free speech protection deters censorship of hate speech in America. Chapter four provides the theoretical framework for this study located in Ronald Dworkin's interpretative and moral theory. The chapter argues that Dworkin's overall thesis

(that enjoined judges to discover a right answer in difficult cases and jettison legal positivism while applying principles of law), if read together provides a clear path to censorship if applied by American courts especially the Supreme Court. Chapters five and six contain the illustrative analysis of media sources in which the major themes in the media discourse are identified. Chapter five focuses on an overly tolerant First Amendment free speech provision that downplays the content and context of speech against a historically oppressed groups (African and Jewish Americans) who suffer grave harms because of the permissiveness of the law. Chapter six discusses white supremacists' contributions to speech that incites violence and the mode of transmission of such speech-the internet. Chapter seven contains the discussions and conclusion of this thesis. This chapter uses arguments developed in prior chapters and seeks to tie the thesis together. It discusses the broader significance of the findings and advances a claim regarding the original contribution this research makes to our understanding of the interaction between free speech, the interpretation that the courts accord speech, and how the broad protection offered speech is framed in media reports and discourse generally.

1.16 Chapter Conclusion

This introductory chapter has briefly outlined the focus of this project. It established that incitement to hate or violence against minority groups in America has been made more visible because of the nature of internet communication and how the courts interpret the provisions of the law. Hate speech directed at racial and religious minorities cause them all sorts of harm so the law should not provide cover for such speech for white supremacists' perpetrators who take advantage of the effectiveness and inexpensive nature of the internet to proliferate hate. The United States differs in its approach to protecting racial and religious motivated speech and has largely been generous in invoking the First Amendment. America is therefore not at par with Canada, its sister nation, and other developed countries in regulating hate speech. The next chapter provides the methodology and methods for this inquiry.

Chapter Two

Methodology

Introduction

This exploratory study assesses legal frameworks to regulate speech that incites hate or violence against African and Jewish Americans relying on online media sources accessed following a Google search. The work is an attempt to develop a socio-legal approach to hate speech and incitement by exploring the law in action in real social context rather than merely focusing on the letter of the law that encompasses analysis of legal rules found in primary sources (the law in the books, legal doctrine).[1] In this sense, the thesis comprises an attempt to mirror the law in action and doctrinal approaches to the hate speech incitement issues as it exists in the United States of America and the First Amendment jurisprudence using reports in online media sources to evaluate the impact on minorities of broad protection offered under the law. This research is illustrative as it uses online media sources to represent discussions on the First Amendments and the impact of broad protections on racial and religious minorities in America. In law, the black letter or doctrinal approach is more common. Also, from the social sciences, legal doctrine is not generally considered as a key focus for social research.[2] The importance of this research and the originality it contributes to knowledge cannot be over-stated because it introduces a mixed methods approach that is rare in the discipline of law, that is, the idea that law in the books can differ from how the law works in practice.

White supremacists have been noted in contemporary America as promoting speech that extends to advocating violence against racial and religious minorities.[3] The thesis explores the doctrine of incitement of the Supreme Court and how racial and religious minority groups are impacted by extremists who take advantage of this doctrine as broadly interpreted by the courts. This chapter addresses some ethical issues of the research and

[1]Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Legal Research* (eds) (Oxford University Press 2010) 2. See also Emerson H Tiller and Frank B Cross, 'What is Legal Doctrine' (2006) 100 Nw U L Rev 517

[2] Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Legal Research* (eds) (Oxford University Press 2010) 2

[3] Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311, 315-316

the manner of data collection and analysis. The thesis uses combined doctrinal and illustrative analytical tools methodological approaches. The combination of doctrinal and illustrative analysis presents an interdisciplinary approach that is rewarding but challenging.[4] This work is significant as it assesses the practical implications of the law on free speech and incitement to violence against the backdrop of law in cases, statutes, and legislations.

2.1 Doctrinal Research

Watkins and Burton define doctrinal research as a 'research process that is used to identify, analyze and synthesize the content of the law.'[5] 'Doctrine' means 'a synthesis of rules, principles, norms, interpretative guidelines and values' which 'explains, makes coherent or justifies a segment as part of a larger system of law'[6] This method looks essentially on the legislation in question and case laws surrounding it to determine the supposedly correct statement of the law on the matter.[7] This method of research basically deals with analysis aimed at incorporating new elements of legislation or discerning legal principles from recent case law through constant search for legal coherence.[8] The three key features of a doctrinal research as outlined by Van Gestel and Micklitz are; first, that arguments are obtained from sources that are authoritative (principles, rules, precedents, scholarly publications); second, legal doctrine aims to present the principles as a coherent whole after gathering and synthesizing the law; third, decisions in individual cases will have to fit into the entire system, not thrive in arbitrariness.[9] This implies that the research must be critical, creative and rigorous. Critiques of the doctrinal methodology argue that the main weakness is that it focuses on the rules of law without logical reference to the context of the problems they are supposed to resolve.[10] For this reason,

[4] Margaret L. Ken et al, 'Gaining Insights from Social Media Language: Methodologies and Challenges' (2016) 21 Psychological Methods 507, 510.
[5] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 9
[6] Ibid 10
[7] Ibid 9-10
[8] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 10
[9] Ibid, 10 Quoting R Van Gestel and H Micklitz (2011) Revitalizing Doctrinal Legal Research in Europe: What About Methodology? (European University Institute Working Papers Law 2011/05) 26
[10] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 16, see Cedric Merlin Powell, 'The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond' (1995) 12 Harv Blackletter L J 1 the scholar presents a powerful argument that laws devoid of contextual analysis is flawed citing examples of the Supreme Court decisions in *RAV* v *City of St Paul* and *Wisconsin* v *Mitchell*, that these cases are stripped of principled analysis of hate speech and hate crimes because doctrine is placed over the right of the oppressed people, 3. For instance in RAV, the question of what a burning cross

the researcher (and the research) can become too formalistic and assume roles that are excessively dogmatic and rigid.[11] In attempt to overcome this weakness, this work complements doctrinal research with an illustrative approach by engaging in critical discourse analysis using reports from online media sources to bridge the gap between theories and practice.

2.2 Critical Discourse Analysis

Fairclough captures the meaning of critical discourse analysis (CDA) as a method in social science that aims "to systematically explore often opaque relationships of causality and determination between; (1) discursive practices, events and texts, (2) wider social and cultural structures, relations and processes; to investigate how such practices, events and texts arise out of and are ideologically shaped…"[12] Richardson, on another hand, describes CDA as a form of theory and method that individuals and institutions employ the use of language in focusing on social problems.[13] CDA in detecting social problems, highlights the view of those who suffer against the backdrop of critically analysing those in power.[14] CDA inferentially and explicitly engages, analyzes, and criticizes representations in the news and produces brilliant monologue on a subject. CDA in this study recognizes the importance of using language as ideas in analysing texts, investigating and interpreting social impacts.[15] Discourses as spoken or written language use[16] are fundamentally historical and can only be understood relative to context.[17] For instance, a statement such as, 'you rape our women and are taking over the country''[18] would not have been deemed by the court to meet the incitement to violence threshold because the words were not directed against any individuals or groups if made outside the scene of the shooting. By contrast, British Home Secretary, Priti Patel commented that Trump directly incited his supporters by his words, thereby prompting the violence that occurred at the Capitol building perpetrated by

means for a black family was never asked nor was there analysis of the effect of such dangerous racist symbol on oppressed groups.

[11] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 16.

[12] Norman Fairclough, 'Critical Discourse Analysis and the Marketization of Public Discourse: The Universities' (1993) 4 Discourse Society 133, 135.

[13] John E Richardson, *Analysing Newspapers an Approach from Critical Discourse Analysis* (Palgrave Macmillan 2007) 1.

[14] Ibid 27.

[15] Ibid.

[16] Norman Fairclough, 'Critical Discourse Analysis and the Marketization of Public Discourse: The Universities' (1993) 4 Discourse Society 133, 134.

[17] Op. cit. Richardson 2.

[18] Chapter one, footnote 78

the President's supporters.[19] Trump's supporters marched to the Capitol after his address on 6th of January 2021, no time passed. This might meet the imminence requirement by the courts. But instances of what Trump said to the crowd were, 'we will never give up, we will never concede…,' also, 'we will not let them silence your voices…,' [20] may not be considered sufficiently inflammatory and the court may consider these words as within Trump's First Amendment speech rights because to prove Trump's intent to cause violence by using these words is a potentially uphill task.[21] This present work is reform oriented. As discussed, some principles of the free speech law in America are critically exposed and analyzed to identify areas of difficulty regarding what the law is, and to assess the legal doctrines or rules found wanting as to what the law ought to be through analysis of texts that shape the context and mode they are produced and which shapes the viewpoints of people who read and consume them.[22] This work is a theoretical and doctrinal exploration comprising critical analysis of legal principles, doctrines, cases and concepts surrounding the First Amendment free speech law to expose its limitations, consequences, relevance as well as any problems arising from its use. CDA accomplishes these goals by investigating the relationship (using media reports) to illustrate the impact of the First Amendment law on racially and religiously marginalized minority by the powers that be-white supremacists.

2.3 Research Philosophy: Interpretivism

The interpretivist researcher aims to unravel meaning attendant to human behaviours and the world. This mode of acquiring knowledge explores motives behind human actions and behaviours without disregarding subjective meaning behind such actions. In this work, meanings are discovered not in human actions but through looking at online newspaper opinions on incitement to hate. According to Myers, an interpretivist assumes that reality is obtained and socially constructed through 'language, consciousness and shared meaning,'[23] Dworkin's epistemology rests on the interpretivist approach used by the 'extra-ordinary judge' to

[19] BBC News on January 7, 2021, 'Capitol Siege: Trumps words 'directly led' to violence,' Patel Says. https://www.bbc.com/news/uk-politics-55571482 accessed 2 February 2021.

[20] 'Trump's speech before mob stormed Capitol: Familiar refrains and grievances, tall tales and disputed data — and an invitation to march together down Pennsylvania Avenue' *Associated Press* 14 January 2021. https://www.marketwatch.com/story/trumps-speech-before-mob-stormed-capitol-familiar-refrains-and-grievances-tall-tales-and-disputed-data-and-an-invitation-to-march-together-down-pennsylvania-avenue-01610604782 >accessed 2 February 2021.

[21] If Trump had said to the crowd, go burn the capitol, pull down the pillars that hold the building rests on... the court may still (following precedent) not have regarded Trump as inciting violence.

[22] Op. cit..Richardson, 37.

[23] Michael D Meyers, *Qualitative Research in Business and Management* 2nd ed (Sage 2013) 67.

discover moral principles inherent in the law.[24] This research will utilize online articles to discover and unravel contextualized meanings of the doctrine of incitement. [25] The Court has interpreted the doctrine of incitement in a way that is antithetical to hate speech, that is, disregarding the context and historical realities of oppressed minorities. Interpretation of this doctrine by the Court that excludes context downplays or ignores the devastating impact of speech inciting hatred or violence.

2.4 Bias/Reflexivity

Reflexivity concerns the extent to which the researcher is open to alternative interpretations and alert to the assumptions implicit in the research questions posed.[26] Reflexivity teaches us to be mindful of the disparity in our research analysis to represent and to report them accurately.[27] It is difficult to imagine that any research can proceed from nowhere- everyone will ordinarily approach an academic work of this nature with preconceived ideas and the researcher's beliefs can certainly impact on the analysis process.[28] Researching hate speech of the racial and religious kind puts me in a position of potential bias as I come from one of these racial backgrounds. Any researcher studying hate speech in America, presupposes that some racial minorities are placed in disadvantaged positions and that we ought to censor speech to protect these groups. As a researcher, I caution myself to be clear about these inherent notions and reflect on them as the research unfolds and develops.[29] In this research, an attempt to remain impartial and objective urges me to look at the data sources critically and with an open mind to caution myself about both study and human bias. Also, adopting a reflexive position and acting responsibly and transparently during the analysis stage is important. This is because in research that involves analysis of any data, the onus is on the researcher, to make his or her choices transparent to permit replication of the research if possible; this would include the method of data collection (also what was collected) and data analysis. The sections following discuss the difficulties of conducting online research.

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[24] See chapter 4.4.1

[25] Ariadna Matamoros-Fernández and Johan Farkas, 'Racism, Hate Speech, and Social Media: A Systematic Review and Critique' (2021) 22 Television and New Media 205 looked at 104 research articles to research online racism on social media.

[26] Robert V Kozinets, 'Netnography Doing Ethnographic Research Online' (Sage 2010) 169.

[27] Robert V Kozinets, 'Netnography Doing Ethnographic Research Online' (Sage 2010) 169.

[28] Andrew Brindle, *The language of Hate: A Corpus Linguistic Analysis of White Supremacist Language* (Routledge 2016) 13.

[29] Andrew Brindle, *The language of Hate: A Corpus Linguistic Analysis of White Supremacist Language* (Routledge 2016) 13

2.5 Ethics in Research

Ethics can be referred to as rules of conduct or morals guiding research. The aim is to maximize benefits and minimize harm to ensure autonomy, dignity, and safety to participants of a research.[30] This research involves collation of textual materials but not human participants. When this researcher filled the ethics form of the University of Brighton and checked the list online, a page automatically appeared on the screen indicating that no ethics approval was required to go on with this research. This is likely to be because I specified that only textual content available to the public will be used for this research. The Association of Internet Researchers (AoIR),[31] has produced detailed guidelines for online research. The researcher will comply with the University of Brighton ethical guidelines and to the AoIR in conducting this research. Kozinets states that very few guidelines exist on how to conduct online research therefore, the researcher ought to decide on a contingent basis the procedure to adopt in doing the research.[32] This means that the researcher decides as the research unfolds what to do but not have a fixed straight-jacketed approach in conducting the research. For instance, though I keep my research questions in mind, I would allow the data obtained to drive this study.

2.5.1 The Ethics of Online Research

The world-wide-web provides both quantitative/qualitative rich data source and also access to great amounts of first-hand accounts and experiences of persons and groups.[33] Scholars opine that web research has become a tremendous source of data for researchers interested in social interaction and the dynamics of communication.[34] The new digital online spaces such as websites, blogs, microblogs and social networking sites also create for researchers' new challenges on principles of informed consent, privacy (confidentiality)

[30] Lisa Sugiura, Rosemary Wiles and Catherine Pope, Ethical Challenges in Online Research: Public/Private Perceptions (2017) 13 Research Ethics 184, 186.
[31] Internet Research: Ethical Guidelines, Association of Internet Researchers 3.0, unanimously approved by AoIR membership on October 6, 2019. https://aoir.org/reports/ethics3.pdf, >accessed 30 November 2020.
[32] Robert V Kozinets, 'Netnography Doing Ethnographic Research Online' (Sage 2010) 5.
[33] Lisa Sugiura, Rosemary Wiles and Catherine Pope, Ethical Challenges in Online Research: Public/Private Perceptions (2017) 13 Research Ethics 184, 185.
[34] Javier Borge-Holthoefer and Sandra González-Bailón, 'Scale, time, and Activity Patterns: Advanced Methods for the Analysis of Online Networks' in Grant Fielding, Raymond M Lee and Grant Blank (ed) *The Sage Handbook of Online Research Methods* 2nd ed (Sage 2017) 260.

and anonymity in extracting content that are publicly available. The suitability of applying these concepts in online contexts have been debated.[35]

2.5.2 Anonymity and Informed Consent

The question arises as to what anonymity means within the context of materials accessible publicly. Two sets of problems present for this research; first, how a person deals with materials available publicly; and second, relates to who can give informed consent to internet-based research.[36] Eynon et al, are of the view that researchers who use publicly available data should perform their studies in a robust manner that goes beyond the guidelines prescribed in the laws and institutions.[37] While some researchers claim that public documents do not require any form of consent to be quoted, some suggest that consent of participants is required.[38] However, scholars are of the opinion that consent based on materials that are publicly available is less clear, but researchers ought to act with caution by taking out all biographical or other details that might reveal the source of the information.[39] This researcher assumes that the need for informed consent is waived when data are in the public domain and meant for everyone to peruse. Kozinets reports that not every contributor to an online post, wants such material to be used by those who conduct research on the internet (but I think that what Kozinets means here are social media posts and not online articles from newspapers, magazines and NGO websites that this study uses as data).[40] However, he notes that,

> It is important to recognize that anybody who uses publicly available communication systems on the internet must be aware that these systems are, at their foundation and, mechanisms for storage, transmission, and retrieval of comments. While some participants have an expectation of privacy, it is extremely misplaced.[41]

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[35] Rebecca Eynon, Jenny Fry and Ralph Schroeder, 'The Ethics of Online Research' in Grant Fielding, Raymond M Lee and Grant Blank (ed) *The Sage Handbook of Online Research Methods* 2nd ed (Sage 2017) 20.
[36] Carrie Paechter, 'Researching sensitive issues online: implications of a hybrid insider/outsider position in a retrospective ethnographic study' (2012) 13 Qualitative Research 71, 80.
[37] Eynon et al., page 27.
[38] Ibid, Robert V Kozinets, 'Netnography Doing Ethnographic Research Online' (Sage 2010) 75-80, the author urges that researchers make known their presence to online communities while conducting research to avoid set-back to such research projects.
[39] Andrew Shepherd et al., 'Using Social Media for Support and Feedback by Mental Health Service Users: Thematic Analysis of a Twitter Conversation' (2015) 15 BMC Psychiatry 29
[40] Robert V Kozinets, 'Netnography Doing Ethnographic Research Online' (Sage 2010) 138 referencing Joseph Walther, 'Research Ethics in Internet Enabled Search: Human Subject Issues and Methodological Myopia' (2002) 4 Ethics and Information Technology 205-216.
[41] Ibid 142

Kozinets suggests anonymizing all identifying information so that individuals or online communities can be protected especially for sensitive data. These safeguards include scrubbing IP addresses or having them logged off to ensure that online contributors to a conversation are protected.[42] Some have argued that even with all these precautions, complete anonymity is not guaranteed on the internet[43] since a google search might easily reveal source of the information. In this research, data used are online articles meant for public perusal, therefore, no consent is needed from the gate keepers of the writers.

2.6 Methodological Challenges

The second stage of my doctoral work was particularly daunting.[44] From July 2020 until March 2021, the attempt to obtain data for analysis proved especially difficult. My mind reverts to Edwin Baker's words in his article 'hate speech' at this point. Baker enumerates the type of evidence that would be required to outlaw hate speech in America. The scholar doubts if such evidence has been or will ever be produced.[45] Baker's words made sense at this stage of my work. Attempts to use social media data failed after several months of searching for evidence of racial and religious incitement to hate on social media without success. The hate speakers have largely deserted public on-line spaces due to stringent rules governing such areas (Facebook, Twitter, and other social networks) and gone into more private and secluded networks, darker parts of the internet where they thrive with less disturbance. When I attempted to undertake interviews with those affected by hate speech and other key actors in the fight against hate, little did I realise that this would be even more challenging. The many African and various American churches, Synagogues, police departments and American academics I contacted, all declined participation in this research. A few that accepted gave me an unrealistic 12- or 18-months' time-frame availability for interview which I perceived as a polite way of refusal. This perhaps might be because free speech and censorship of speech continue to be highly contested issues in America. Months of intensive and passionate search for interviewees yielded zero results as I eventually owned up to myself that I had to look other ways. My initial contact for prospective interviewees began with American scholars

[42] Kozinets 155.
[43] Robert V Kozinets, 'Netnography Doing Ethnographic Research Online' (Sage 2010) 153.
[44] See Footnotes 1 & 2 above.
[45] Edwin C Baker, 'Hate Speech' (2008) Faculty Scholarship at Penn Law 198. paragrahphttps://scholarship.law.upenn.edu/faculty_scholarship/198/ accessed 21 March 2021. See also the preceding paragraph.

who were well known in academic parlance for defending minority rights, particularly regarding the need to censor dangerous speech. I had to reach out to one of the professors through her university because her information, unlike others, was nowhere including on the website of the university. When eventually I was able to contact her through the school, she stated in her email, 'For security reasons I am not granting interviews with people…. this is what it has come to for free speech.' I was particularly shaken by the fact that scholars whose names will never be disclosed to anyone or in my work, refused participation. Another interesting dimension was that professors who taught constitutional law declined interviews for reasons that they were not free speech experts. An African American Church Pastor (where a mass shooting occurred), I contacted for interview, overtly stated that since I was conducting this research in the United Kingdom, although working in the United States, they were not willing to open themselves up to 'strangers.' I received all kinds of response (some very distressing), from potential interviewees that convinced me that Americans whether pro or anti hate speech regulation, prefer to be silent on certain issues. In any event, they were reluctant to talk to me.

Hate speakers frequently make utterances on social media and there was, as a result, a great deal of media comments of hate speech and incitement and many other researchers had begun to focus their energies there. Google seemed an appropriate place, as an open source to focus my research with varied search techniques that has had significant impact on availability of research materials.[46] The motivation that the research is worth it despite obvious methodological challenges was also inspired by a cartoon on a Neo-Nazi website representing caricatures of Jewish and African Americans and urging that a world without these groups of people, would be a world devoid of pests.[47]

[46] Karen Blakeman, 'Finding Research Information on the Web: How to Make the Most of Google and Other Free Search Tools' (2013) 96 Science Progress, 61, 62.

[47] Originally contained in Middle East Media Research Institute (MEMRI) Special Report, No. 44, Mar 22, 2019, Referenced by Written Testimony of Zionist Organization of America (ZOA), 'Hate Crimes and the Rise of White Nationalism' to the House of Representatives Committee on the Judiciary, 116th Congress, Tue. 16 April 2019. https://www.congress.gov/116/meeting/house/109266/witnesses/HHRG-116-JU00-Wstate-KleinM-20190409.pdf. >accessed 21 March 2021.

Blakeman outlines the usefulness of using Google to produce search results. Google is a search engine used to detect, organize, distribute knowledge, data, and information.[48] It is also a convenient but effective tool that this research can utilize for gathering data. Google personalizes one's search results to enable one to obtain divergent points on a particular research area.[49] Google searches will be utilized to gain insights into the impact the First Amendment's doctrine of incitement have on the minority in America especially as represented in media discourse and reports.

2.7 Search Engines

Search engines promote the sharing of information by giving users access to content through keyword searches.[50] They provide diversity of opinion inherent in virtual space[51] but their use can be both frustrating and demanding and many users give up before they attain their goals or objectives.[52] Hirsu describes searching as an act of 'profound sociable practice' and a move towards excavating the development of information[53] and the shaping of knowledge and understanding by a given audience.[54] To this extent, search engines display certain characteristics that are like what can be obtained from traditional media on a variety of topics and subjects.[55] Its strength lies in the regularity obtained from a search term that is consistent across the entire webpage.[56] The researcher considers this key function of search engines a useful method by which to gauge information on the impact of incitement to hate/violence against racial/religious minorities through keywords search on the web at no expense to quality or relevance.

[48] Min Jiang, 'The Business and Politics of Search Engines: A Comparative Study of Baidu and Google's Search Results of Internet Events in China'(2014) 16 New Media and Society 212, Ahmet Uyar, 'Google Stemming Mechanisms'(2009) 5 Journal of Information Science 499.
[49] Karen Blakeman, 'Finding Research Information on the Web: How to Make the Most of Google and Other Free Search Tools' (2013) 96 Science Progress 61, 64.
[50] Gonenc ̧Gurkaynak, Ilay Yılmaz, Derya Durlu, 'Understanding search engines: A legal perspective on liability in the Internet law vista' (2013) 29 Computer Law and Security Review 40
[51] Laura A Granka, 'The Politics of Search: A Decade Retrospective' (2010) 26 The Information Society 364
[52] Jennifer A Bandos and Marc L. Resnick, 'Understanding Query Formation in the Use of Internet Search Engines' (2002) PROCEEDINGS of the HUMAN FACTORS and the ERGONOMICS SOCIETY, 46 Annual Meeting.
[53] Lavinia Hirsu, 'Tag Writing, Search Engines, and Cultural Scripts' (2015) 35 Computers and Composition 30, 32.
[54] Laura A Granka, 'The Politics of Search: A Decade Retrospective' (2010) 26 The Information Society 364
[55] Laura A Granka, 'The Politics of Search: A Decade Retrospective' (2010) 26 The Information Society 364, 365.
[56] Laura A Granka, 'The Politics of Search: A Decade Retrospective' (2010) 26 The Information Society 364, 366-367.

2.8 Using Google as a Search Engine

In *ACLU* v *Reno,* the court defines web search engine in terms of their importance and purpose as services that enable users to search for websites with unique categories of information.[57] The court also held in *Lockheed Martin Corp.* v. *Network Solutions Inc*.[58] that keywords search always yield numerous possible websites.[59] The truth, according to Hirsu is that we like to Google, and we believe in the outcome of our searches.[60] Google is one of the leading search engines that emerged two decades ago as a 'perfect search engine' that attained prominence through innovation and expansion.[61] Google has become a blessing for those who dig into the net for data, images, sounds and, much more importantly, points to new opportunities for discourse dissemination and reception.[62] Google serves the largest percentage of questions at 25 billion webpages and 47.3% of search queries.[63] For this research, the preference for Google is that this search engine spreads its net wide in a hierarchy of importance by pointing to websites that are often visited by those with similar queries as one asks.[64] Most importantly, Google is not legally bound to remove hateful contents from its website in the United States unlike in Germany and France where it does.[65] Google chooses not to intervene in the U.S. probably because of laws that accommodate all kinds of speech with limited legal restraint. This is unlike social media forums that by their policies regulate the spread of offensive speech targeted against minority groups. In 2007, Google noted that, the ranking of any site's results, is dependent on computer algorithms that use innumerable factors to calculate a page's relevance according to a given query[66].The search algorithms change each time a search query is raised on two separate occasions.[67]

[57] 929 F. Supp. 824 (E.D. Pa. 1996), Ibid 42.
[58] 985 F. Supp. 949, 952 (D. Cal. 1997). Ibid
[59] Laura A Granka, 'The Politics of Search: A Decade Retrospective' (2010) 26 The Information Society 364, 366-367.
[60] Lavinia Hirsu, 'Tag Writing, Search Engines, and Cultural Scripts' (2015) 35 Computers and Composition 30
[61] Lavinia Hirsu, 'Tag Writing, Search Engines, and Cultural Scripts' (2015) 35 Computers and Composition 30, 41.
[62] Siva Vaidhyanathan, *The Googlization of Everything* (University of California Press 2011) 7
[63] Bing Pan et al, 'In Google we Trust: Users' Decisions on Rank, Position and Relevance' (2007) 12 Journal of Computer-Mediated Communication 801
[64] Robert C Berring, 'Legal Research and the World of Thinkable Thoughts' (2000) 2 J App Prac & Process 305, 316.
[65] Siva Vaidhyanathan, *The Googlization of Everything* (University of California Press 2011) 65.
[66] Siva Vaidhyanathan, *The Googlization of Everything* (University of California Press 2011) 66.
[67] Bing Pan et al, 'In Google we Trust: Users' Decisions on Rank, Position and Relevance' (2007) 12 Journal of Computer-Mediated Communication 801, 807.

2.9 Concerns about Using Google Search

A search for key words or phrases can yield ambiguous results because words can have multiple meanings. Some writers have described words as noisy, and analyses made difficult by ambiguities, multiple senses, and use of rhetoric.[68] The researcher intends to minimize this problem by using precise phrases (for instance, 'incitement to hate') instead of single words (for example, 'hate') to eliminate this uncertainty. The researcher engages with the subject matter in question as an active user and not just a passive consumer of online information that merely retrieves materials from search engines.[69] In other words, in conducting this research, there is an overarching need to uphold the value of rigour that removes researcher bias to follow an objective process in order to arrive at the aim of the research.[70] For Davies and Dodd, 'rigour is the authoritative evaluation of good research and the unspoken standard by which all research is measured.'[71] This research in applying rigour will pay attention to the consistency of search terms and the analysis of such terms, mindful also of the subjectivity and limits of the research finding.

2.10 Research Sample Selection

This section outlines the method of selecting sample and data base used for the selection of online media sources including certain websites that are relevant to the issues under consideration. I will explain each of my sample source and explain the selection. I based my selection of articles on high levels of readership for the *New York Times* and the *Washington Post.* I also considered cities that have had racial and or religious mass shooting that involved minorities in the U.S. Key newspapers of these cities were selected, they include - *Pittsburgh Post-Gazette* and *Post* (The Tree of Life Synagogue shooting of religious Jews) *and the Courier* (Mother Emmanuel Episcopal Church Shooting Targeted African Americans in Charleston). I selected the police chiefs magazine (an important publication that reports events surrounding white supremacists' contributions to events such as mass murder and other hate crimes on minority groups), websites of Southern

[68] Margaret L. Ken et al, 'Gaining Insights from Social Media Language: Methodologies and Challenges' (2016) 21 Psychological Methods 507, 510.
[69] Lavinia Hirsu, 'Tag Writing, Search Engines, and Cultural Scripts' (2015) 35 Computers and Composition 30, 31.
[70] Deirdre Davies and Jenny Dodd, 'Qualitative Research and the Question of Rigor' (2002) 12 Qualitative Health Research 279, 280.
[71] Deirdre Davies and Jenny Dodd, 'Qualitative Research and the Question of Rigor' (2002) 12 Qualitative Health Research 279

Poverty Law Center (reports on how the law impacts blacks and Jews) and similarly the Anti-Defamation League, Network Contagion Resaerch Institute (an important resource for their power of prediction, they predicted the Pittsburgh shooting and it occurred shortly after).

2.11 Data Selection

The initial step was to determine the search terms to obtain optimal relevant results. To frame the research temporally, I settled for a five-year period of online articles published between (2015-2020) for reasons that the two most deadly attacks perpetrated by white supremacists on African and Jewish Americans occurred within this time frame. This period was chosen also to categorise and study the online articles on incitement to hate in a meaningful way that revolve around two events impacting these groups of people in American society especially in this decade. However, a major event which this work did not want to miss out that bordered on incitement (the violence in the Capitol Building on 6 January 2021) had to be added so I included the first quarter of the year 2021. This event was prompted by a U.S. president with his occasional rants against minority groups and this is a period when online hate speech and incitement discourse in America is topical. The timeline for collecting these articles was for a two-month period-March 19 to May 18, 2021. There were reasonable expectations that data selection for this period would achieve data saturation for research questions raised for this work given this timeframe. As I discussed earlier, after exploring social media for data failed, focus on interviews through academics, police officers and victims of hate speech also failed, I decided to cull my data from google search. Some days into the search, after I obtained some relevant articles on google, I experienced difficulties with retrieving the content of relevant articles from on Google. This was because the newspaper websites particularly, blocked the content and asked for the reader to subscribe for the whole content to show. I therefore subscribed and paid for four media outlets-two national and two local newspapers. The four newspapers selected were the *Pittsburgh Post-Gazette,* the *Post, and the Courier,*[72] *New York Times* (NYT) and *The Washington Post* (WP). The first two newspapers were selected based on the cities or areas that the worst most deadly attack on African and Jewish Americans occurred and perpetrators had both left

[72] These were selected because they are tops in the cities and areas where Jews and blacks were attacked in Synagogue and the church by white supremacists

'hate-filled online commentary' against these groups' sequel to the attack.[73] *The Washington Post* and the *New York Times*[74] represent the most widely read national newspapers that could contain useful information of the issues under investigation. Newspapers are a constant reference points for news media and a key source for understanding how an opinion or social issue is interpreted.[75] The importance of newspapers in setting agenda for debates continue to grow about the stories they report and editorially frame.[76] To this extent, analysing articles in newspapers and other sources appears a fair and transparent way of reflecting the debate on hate speech and incitement to violence and how these provisions of the law impact the minority in the United States.

2.12 Data Description

This research seeks to shed light on the doctrine of incitement of the Supreme Court by assessing if online hate speech has impact offline violence. The research utilizes media outlets to gain insights into the nature of speech that incites hate against racial and religious minorities. The research data consists of online articles culled from Google search. The researcher's concern is to develop a suitable data base for this research. The collection of dependable and robust data from online articles was both time consuming and complex.[77] The online articles are written as news reports, editorials, and opinion pieces[78] that focus on some search queries.

Essentially, I looked at 2637 online articles but excluded many that concerned free expression in other countries, Europe, and the rest of the world. I removed articles that did not contain much (less than six lines) and those that were no longer available on the web even though the titles were there. I also excluded articles that had titles accompanied with images and no textual materials. I obtained the following respective

[73] Kevin Sack, 'Anguished by 'Spiral of Hate,' Charleston Pastor and Pittsburgh Rabbi Grieve as One' *New York Times* 4 November 2018. https://www.nytimes.com/search?query=anguished+by+spiral+of+hate**.** >accessed 22 September 2020.
[74] The two newspapers were selected based on wide readership and tops in the circulation list. The NYT has been described by some editors of the Encyclopedia Britannica as a record newspaper.
[75] Stephen Cushion et al, 'Newspapers, Impartiality and Television News Intermedia Agenda Setting During the 2015 U.K. General Election Campaign' (2016) Journalism Studies https://www.tandfonline.com/doi/full/10.1080/1461670X.2016.1171163 >accessed 16 June 2021
[76] Ibid
[77] Joseph Downing and Richard Dron,' Tweeting Grenfell: Discourse and networks in critical constructions of British Muslim social boundaries on social media' (2020) 22 New Media and Society 449, 453.
[78] Ibid

categories at the termination of my search; *New York Times* 405, *The Washington Post* 512*; Pittsburgh Post-Gazette* 309, *Post and Courier,* 388 and 1023 from other Google sources including NGO websites. All these make a total of 2637 online articles. I would want to state that I started eliminating articles that were not substantially related to my research queries from the period I started the search. Articles that were not sufficiently related to the questions being examined were excluded even if they contained contents on free expression so that I would not be overwhelmed by data especially since I was considering, at this point, manual analysis to capture the dynamics of the issues I wanted to explore. The reason for deciding on manual analysis will be discussed shortly.

2.13 Selection of Articles for Coding

On google, I commenced my search. Single word search terms did not yield good results but pulled up a lot of irrelevant information. For instance, a search term 'hate' or 'speech' yielded definitions, legislations, research articles and a whole lot of insignificant materials that were not what I needed to conduct my analysis. I terminated the idea and decided that phrases and word combinations will yield better results. I explored search terms based on research questions and the aims of the research. For instance, in my mind at this stage, articles that I considered relevant were the ones that discussed opinions on protection offered to speech, targets of such speech, types of speech allowed by the law, mode of spread of such speech and possibly online sites used to disseminate the speech. I kept an open mind during the search because I assumed this was an exploratory stage and I needed to keep an unbiased attitude in culling up the data. After exploring and identifying key search queries, four were chosen after I used combined search criteria which yielded the most result- 'incitement to hate,' 'incitement to violence,' 'internet hate in America,' and 'white supremacists hate speech.'[79] These research queries pulled up good information related to my research questions on the First Amendment, white supremacists, antisemitic incidents, and antisemitic contents including the exact words used by perpetrators.

[79] This method is consistent with a certain study in Ariadna Matamoros-Fernandez and Johan Farkas, 'Racism, Hate Speech, and social media: A Systematic Review and Critique (2021) 22 Television and New Media 205, 208.

The media contents were obtained according to the relevance they had to the research questions. I selected each article based on my own judgement by having a quick look at the article that it addressed the themes and issues of my research. It is therefore a purposive sampling which began from the time I accessed the articles I knew would be useful for coding and data analysis based on content.[80] I realized that if I downloaded all articles with my search queries, the data would overwhelm me. I excluded any online articles that commented on free expression in other countries and retained only U.S. based commentaries. I included only articles from 2015-2021, other prior years were excluded. The search was carried out both on the websites of other sources (The Network Contagion Research Institute, The Southern Poverty law Center, The Anti-Defamation League, The Police Chiefs Magazine among others) and in the websites of the newspapers I used. To have the full content of any article accessed, I copied the relevant articles into a word document: the author, the entire content or part of the article, date of the article, the name on the article and internet link. This made possible my ability to access the articles during analysis and to enable me to access the contents when I cancel my paid subscription.

2.14 Thematic Data Analysis

Braun and Clarke define thematic analysis as, "a method for identifying, analysing, and reporting patterns (themes) within data."[81] Thematic analysis enables the data to be set in rich detail by way of minimizing, organizing, and interpreting various aspects of the research topic.[82] Braun and Clark outlined the six stages of thematic analysis [83]

- Familiarizing oneself with the data
- Generating initial codes
- Searching for themes
- Reviewing themes
- Defining and naming themes

[80] Lawrence A Palinkas et al, 'Purposive Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Resaerch' (2015) 42 Admin Policy Mental Health 533, it is a sampling strategy in qualitative research that identifies and selects information rich cases that relates to issues under investigation.
[81] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 79.
[82] Ibid. See also Lorelli S Nowell et al, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 International Journal of Qualitative Methods 1, ,2.
[83] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 87.

- Producing the report.

I followed strictly the six stages outlined above. I want to note here that initially when I started my search, I only copied the link after skimming through an article, so this stage took a long time. Attempts to access the articles later failed so I changed my strategy by copying the relevant articles and storing the content for analysis. When I was no longer finding new articles from the different sources I accessed and search results gave me the same articles that I had seen previously, I stopped my search, confident that I had accessed most of the relevant materials from my chosen sources. A theme represents something unique in the data in relationship with the research question so that the researcher needs to exercise good judgment to determine what a theme is by remaining flexible.[84] Thus, in analysing the data obtained, I looked out for themes that will emerge and categorised them for analysis.

2.15 Coding Strategy

The researcher decided, given the volume and length of the articles from the sources above to sample further and reduce the data. I had considered using the NVivo to code and analyse the data retrieved, but following discussions, including with my supervisor, I chose not to in the belief that the complex, ideological and nuanced nature of the arguments and debate issues might be better explored personally and directly. For this reason, I chose the 80 articles from the bulk of 2637 based on purposive sampling of articles rich in content and most connected to issues I was looking at (for instance, articles with reports on protection accorded speech, those who promoted hate speech and the type of speech allowed under the first Amendment, public opinion and how Americans conceived First Amendment protections, how hate was being spread etc). At this stage, I looked at different thesis repositories, Europe, America, online libraries including Ethos to see if I can find a law thesis with similar methodology, but I did not.

For coding, a total of 80 most relevant articles (20 each from the *Pittsburgh Post-Gazette* and the *Post and Courier*, 10 each from the *New York Times* and the *Washington Post* and 20 from other Google sources

[84] Ibid 82.

including, *The Atlantic, Police Chiefs Magazine and NGO websites* outlined above),[85] were copied into the words document which came to 55,400 words on Microsoft word. I read through the whole document twice to familiarize myself with the data before I started my initial coding. I also conducted a textual analysis of the data with initial line by line reading of the articles to identify patterns that are similar and differences in opinion of columnists and contributors. The entire coding and analysis were conducted manually. The researcher always kept in mind at this stage, the research questions and was open as to what the data might reveal. In other words, the coding frame was both analyst ((by the researcher's analytic preconceptions),[86] and data driven.[87] This was important because of the nature of the topic and the sources of the data. It was also important to keep the data corpus within manageable limits. The patterns that emerged and ran through most of the articles were, the races under attack, the formidable character of the First Amendment law, the main progenitors, and perpetrators of incitement to hate/violence (who received encouragement and empowerment online) and the technological changes that have helped fuel hate speech-the internet. These four themes were the most common themes arising as I studied the data repeatedly.

The codes were assigned colours and varied in length-two words, a phrase and even a whole paragraph depending on the nature of the media content. I then categorised the codes into themes to enable me compare similarities and differences of opinions. The categories fell into five broad themes, 'the first amendment is formidable, 'words are powerful and have potentials to lead to offline violence,' 'the internet/social media is used to disseminate hate,' 'white supremacist online presence against African and Jewish Americans,' (especially anti-Semitism) and 'individuals who commit murder receive a lot of encouragement from one another.'

[85] Hsiang Iris Chyi and Maxwell McCombs, 'Media Salience and the Process of Framing: Coverage of the Columbine School Schools' (2004) 81 Journalism and Mass Communication Quarterly 22-35 the authors utilized the print media to assess the salience of the columbine school shooting emphasizing different aspects of the event during its life span; Aaron Kupchik and Nicole L Bracy, 'The News Media on School Crime and Violence: Constructing Dangerousness and Fueling Fear' (2008) 7 Youth Violence and Juvenile Justice 136-155, in this article, the authors, based on a sample of news stories report how print media frame the problem of school crime and violence. This research is consistent with the methods used by these authors as I utilize the print media to assess the impact of First Amendment incitement doctrine on racial and religious minorities in the United States.
[86] Ibid 183-184. This form of analysis is also theoretically driven and does not exist in an epistemological vacuum and also tends to offer a less rich description of the data.
[87] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 88.

The analysis began with an initial set of codes with specific research questions in mind (theory) but the researcher remained open to the themes that emerged while going through the data. After collecting the articles from the sources above, I categorised the breath of identical opinions in the articles. The writers all acknowledge and reiterate that the first amendment protects all kinds of speech, that anti-Semitism was pervasive in America, that White supremacists were contributing enormously to hate speech against outgroups and that the internet was playing a huge role in spreading hate speech. It must be noted that the narratives contained in the online articles represent public opinion of issues being investigated. The media unarguably, report local, national, and international issues, events, and happenings. Essentially, it is not particular words that incite hate that is at issue here, rather it is the subjective perspectives/narratives contained in the online articles that were analysed.

From the foregoing, analysing opinion pieces/reports/editorials is an advantage in this work. The non-analysis of words that incite hate is useful so as not to promote extremist content that can cause further harm to groups such content targets.[88] Also, the researcher is not exposed to extremist content and possible retaliation by hate speakers and how this may affect the carrying out of the research.[89] For this reason, analysis was not be about semantic meaning of hateful words but of opinions, ideas, assumptions, conceptualizations, interpretations and ideologies behind written language in the sources I accessed. In other words, broader assumptions and structures are incorporated beyond the facial meaning used in the data collected because interpretation is important during the development of themes. As outlined above, the researcher followed the different phases of thematic analyses: familiarisation with the data; generating initial codes, searching for themes, reviewing the themes, defining/naming the themes, and producing the report.[90] Below are the methodology diagram and an overview of my coding scheme. These will be elaborated more in chapters five and six of the thesis.

[88] Thomas Colley and Martin Moore, 'The Challenges of Studying 4Chan and the Alt-Right, 'Come on in the Water's Fine' (2020) New Media and Society https://journals.sagepub.com/doi/pdf/10.1177/1461444820948803. >accessed July 10, 2021.
[89] Ibid
[90] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 87. See also Lorelli S Nowell et al, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 International Journal of Qualitative Methods 1, 4.

Figures 1 &2: Methodology Diagram and coding Table

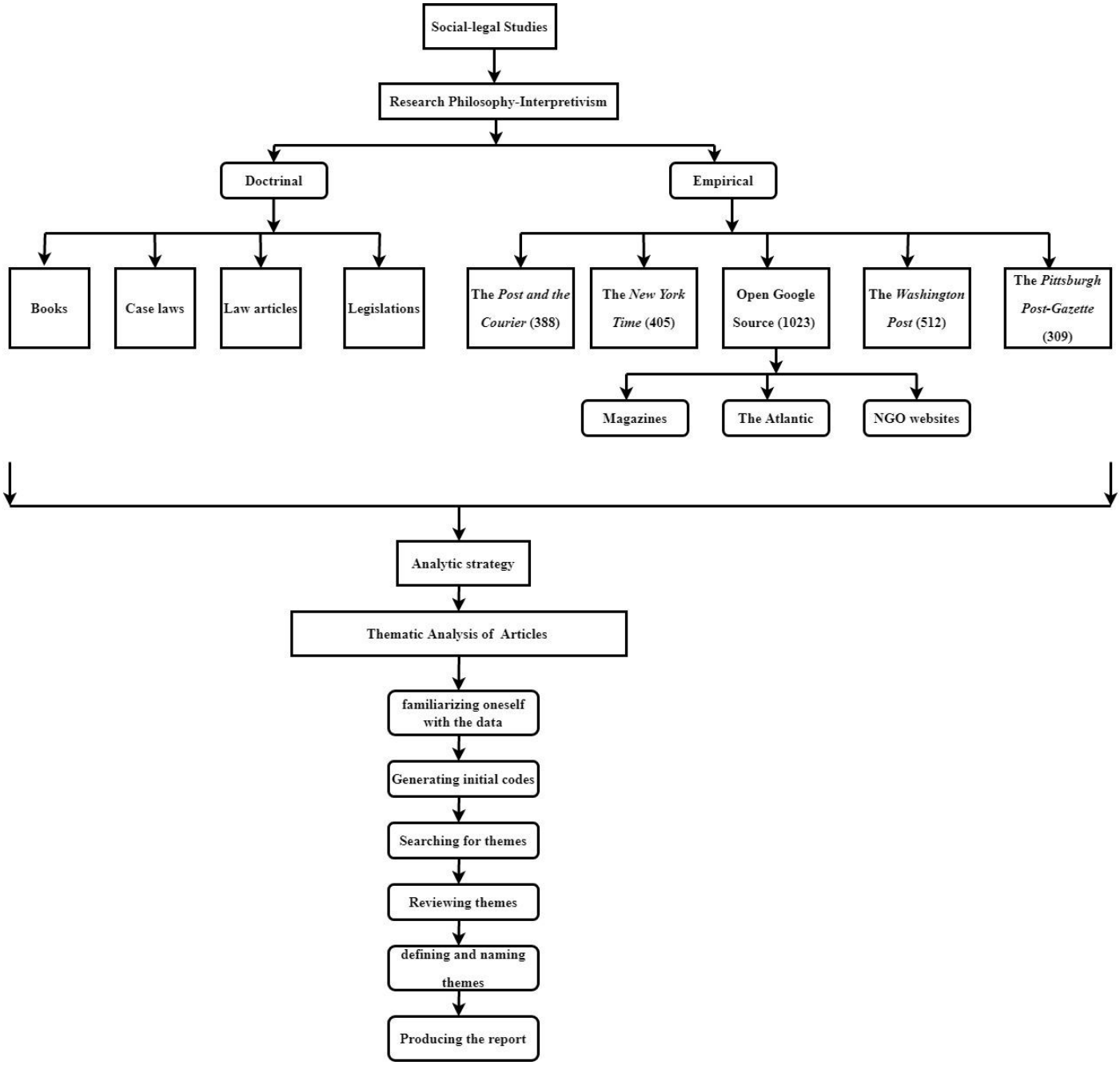
Social-legal Studies
Research Philosophy-Interpretivism
Doctrinal
Empirical
Books
Case laws
Law articles
Legislations
The *Post and the Courier* (388)
The *New York Time* (405)
Open Google Source (1023)
The *Washington Post* (512)
The *Pittsburgh Post-Gazette* (309)
Magazines
The Atlantic
NGO websites
Analytic strategy
Thematic Analysis of Articles
familiarizing oneself with the data
Generating initial codes
Searching for themes
Reviewing themes
defining and naming themes
Producing the report

Figure 2: Analysis and Coding Scheme

Codes	Categories	Themes	Subthemes
• Jews/African Americans • Groups involved in targeted attacks • Historically oppressed groups	• Manifestations of targeted violence	• Placing hate within context	
• Comments on broad nature of the first amendment • Conducts it protects (for example Charlottesville) • Words it protects (For example-Jews will not Replace us) • No hate speech line drawn • Turning the law into a weapon	• Opinions on what speech are protected under the law-The law is too permissive.	• The First Amendment is Formidable/ admits almost every form of speech including speech that incites to violence	• Truth will weed out falsehood • The role of the Supreme Court in fueling hate
• Words that Kill • Words that cause harm/Jews deserving nothing but death • Words that Cause real World harms • Comments that mirror violence • Antisemitism increasing by day in the US	• The types of speech that engender harm	• Content of speech • Incitement to Hate • Imminency of the harm • Lethality of words • Hate Rhetoric • Words are powerful and can be used to cause real world violence	• Jews insecure in a country they call home
• The presence of White Supremacists groups in perpetrating online hate/offline violence/ extremists are empowered by online access	• White Supremacists Contributions to Hate	• Perpetrators of Hate/Progenitors of modern hate in America	• White Supremacists who commit murder receive encouragement and support from each other • Like minds
• Sources used to disseminate Hate	• Mainstream social network (Facebook Twitter, Reddit) • Social media • Message Boards, 8chan, 4chan, Gab.com	• Mode of hate speech spread	• Massage boards Control hate content

2.16 Chapter Conclusion

The combined doctrinal and media sources accessed as data have been discussed here as the methods used in this thesis. The chapter reviewed some ethical and methodological issues and challenges using publicly available documents for research. It also identified Google and the website of the newspapers as the source of data collection and described the modus operandi for data selection. It concluded with the procedure the researcher adopts for conducting a thematic analysis. The thorough assessment and investigation into the theoretical, conceptual, and judicial meaning of the incitement doctrine under the American system with the use of media outlets presents a clearer perspective for the courts, academics, law enforcement officers, the aggrieved minority, and Americans at large. Therefore, while the socio-legal approach explores the impact of this doctrine in real concrete situations, the doctrinal approach benefits the research because it provides in-depth details of the doctrine in theory and its development over the decades. The next chapter discusses the constitutional bedrock for this thesis-the First Amendment. While the chapter discusses the key provisions of the law on free expression, it directs attention predominantly to precedents of the Supreme Court that enable broad protection of speech that consequentially damage the interests of the minority in the American society.

Chapter Three

Exploration of the First Amendment Free Speech Protections

Introduction

Having looked at the methods that I will adopt for this research, I now turn to the debates about the scope, purpose, explanation, and interpretation of the First Amendment that have continued for more than two centuries after its adoption.[1] The search for the meaning of the First Amendment has continued to evolve and the practical stakes for such a search are high[2] as these rights encompass freedom of conscience, thought, assembly, opinion, religion, and association which overlap with free speech in meaning and scope. David J. Richards states that free speech is 'a thread of common principles in different bodies of law'[3] because of its critical and interpretative power. It is observed later in this chapter, that the courts in interpreting free speech cases, look at both content (by checking the meaning of the word), Tsesis refers to the conceptual (dictionary) and the constitutional meaning of cases.[4] Traditionally, attention has been focused mostly on the free speech protection of the First Amendment law[5]provided in the constitution. It appears that the Supreme Court's attempt for a coherent theory is not in sight as evidenced by "a pattern of aborted doctrines, shifting rationales, and frequent changes of positions by individual Justices."[6] This chapter traces the historical and legal contexts in which the First Amendment law developed. It discusses justifications or theories of free speech and doctrinal tests applied over time by the court. An attempt will be made to discuss the meaning, scope, interpretation, and legal principles of the First Amendment free speech law. The principles of free speech are complex,[7] and some protected speech falls outside the scope of this research. The speech that falls within this work will be discussed shortly in this chapter. Protected speech which is beyond the scope of this research project includes freedom of the press, the right to assemble and petition the government for redress and the implied freedoms of expressive and private association.[8]

[1] Randall P. Bezanson, 'The New Free Press Guarantee' (1977) 63 Virginia Law Review 731.
[2] Martin H Redish, 'Value of Free Speech ' (1981-1982) 130 U Pa L Rev 591.
[3] David A J Richards, 'A Theory of Free Speech' (1987) 34 UCLA L Rev 1837.
[4] Alexander Tsesis, 'Inflammatory Speech: Offense Versus Incitement' (2013) 97 Minn L Rev 1145, 1147.
[5] Randall P. Bezanson, 'The New Free Press Guarantee' (1977) 63 Virginia Law Review 731.
[6] Ibid, quoting Blasi, The Checking Value in First Amendment Theory, 1977 M. B. FOUND. RESEARCH J. 521, 526.
[7] Kent Greenawalt, 'Free Speech Justifications ' (1989) 89 Colum L Rev 119.
[8] Russell W Galloway, 'Basic Free Speech Analysis' (1991) 31 Santa Clara L Rev 883.

In this chapter, we note that articles and textbooks referenced here seldom consider the theory of free speech against the background of effect in practice but possess rather a descriptive nature and character of the doctrine of incitement. The emphasis on the how free speech, its principles and theory have developed are traced in this chapter. A critical review of the literature in this chapter identifies within the existing body of knowledge, the evolution, the conceptual development, and interpretation of the doctrine as it evolves. To fill the gap of scholarship in this chapter, I discuss precedents, principles, cases, texts, doctrines among others that doctrinally impact racial and religious minorities in legal theory to gain deeper insight into the impasse of the First Amendment incitement doctrine. Research in this area has not paid close attention to how the instrument of the law inhibits regulation of racial and religious hate speech and the courts' non contextualization of harm has amplified violent attacks on minority individuals.

3.1 Historical Overview of the First Amendment

The Right to Free Speech was enshrined into the United States Constitution on December 15, 1791.[9] This right embodied in the First Amendment emerged as a reaction to suppression of the press that was prevalent in the English society that required, until 1694, a government-issued license for a publication to be granted.[10] The law of Sedition in England restricted speech on the grounds that the crown was above criticism and made it a crime for anyone to censure the king publicly.[11]

For Chemerinsky, in England at the time, publication that was true could not be accepted as a defence against the king but was perceived as even worse because it could do more damage.[12] The First Amendment was therefore adopted to obliterate the Seditious Act of the English Law to make it impossible to prosecute or punish citizens under the Act.[13] Ultimately, the document eliminated the limitation placed on speech and

[9] R o b e r t S. Peck, *Libraries, The First Amendment and Cyber Space, what you Need to Know* (American Library Association 2000) 25
[10] Erwin Chemerinsky, *Constitutional Law Principles and Policies* 5th ed (Wolters Kluwer 2015) 1363
[11] Erwin Chemerinsky, *Constitutional Law Principles and Policies* 5th ed (Wolters Kluwer 2015) 1364
[12] Ibid 1364
[13] Ibid 1364

allowed free flow of ideas and information among people unregulated by government.[14] As Tim Wu succinctly puts it, the law was created with the presumption that the greatest threat to free speech was speakers being punished directly by the government.[15] Historically, to protect the free expression and criticism of the affairs of government, was the major purpose for the establishment of Free speech law in the First Amendment.[16] The First Amendment appeared to have been confined to a narrow and trivial role after it was introduced into the Bill of Rights until it came alive several decades after it was adopted.[17] Kauper[18] outlines the four stages of the First Amendment prior to which no major development or interpretation of the law occurred. These were.

1. The period the federal government prosecuted people under the espionage laws during the First World War.
2. The period from 1925 to 1940 that represents significant development in free speech vis a vis the Fourteenth Amendment
3. The ten-year period from 1940 to 1950 characterised as the tipping point of judicial protection of free speech under the constitution.
4. From 1950 upwards, the period of recession.

Vick lend credence to Kauper that the First 140 years of the document was of minimal significance.[19] The law appeared to be activated during the First World War following the passing of new Espionage and Seditious Acts under which those who spoke out against the war were charged with crimes for the speech they made.[20] For instance, there were more than 2,000 convictions of those who did nothing but speak against America's involvement in the war, under the Espionage Act during World War 1.[21] This mode of controls by the government against speech met with the reaction of the judiciary; the federal and the Supreme courts, at all levels from district courts to the Supreme Court, condoned the government's profuse arrests to accommodate

[14] R o b e r t S. Peck, *Libraries, The First Amendment and Cyber Space, what you Need to Know* (American Library Association 2000) 25
[15] Tim Wu, 'Is the First Amendment Obsolete'? (2018) 117 Michigan Law Review 547
[16] *Mills* v *Alabama*, 384 U.S. 214, 219 [1966]
[17] Tim Wu, 'Is the First Amendment Obsolete'? (2018) 117 Michigan Law Review, 548
[18] Paul G Kauper, 'Frontiers of Constitutional Liberty: Five Lectures Delivered at the University of Michigan February 13,14,15,20 and 21, 1956. Ann Arbor, University of Michigan Law School. 55, 60
[19] Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414,415.
[20] Ibid 551, Espionage Act, 1917 (Codified as amended in Scattered section of 18, 22, and 50 U.S.C.), Sedition Act, 1918 (Repealed 1921).
[21] James Weinstein, "A Brief Introduction to Free Speech Doctrine (1997) 29 Arizona State Law Journal 461,462

war times as was necessary.[22] However, influential jurists-Learned Hand, Louis Brandeis and Oliver Wendell Holmes opposed what they saw (expressed either in dissent or concurrence) and eventually establishing the founding jurisprudence of the modern First Amendment law.[23] The views of these justices remained in the minority until the 1950s and the 1960s but eventually became majority holdings that form the bedrock of the First Amendment free speech jurisprudence (especially termed as political speech).[24] During these periods, the court expanded the doctrine of what constituted speech[25]and who counted as the speaker.[26] Post is of the view that the First Amendment is simply a 'disjunction' or 'hypertrophy' between words and the ends which they serve.[27] From 1920s, the First Amendment extended to all governmental institutions, federal, state, and local while adopting in content and purpose strong libertarian stance in interpreting the free speech clause.[28]

3.2 Interpreting the Free Speech Clause

United States libertarians tend to emphasize and overstate the absolutist sounding text of the First Amendment as 'The American Constitution is the longest lasting constitution in the world.'[29] Many Free Speech theorists in America, merely construct interpretative theories on the First Amendment to the US Constitution, rather than freedom of speech as an ideal principle.[30] Americans are always engaged with the debate on how to understand and interpret the intent of the founders and those that ratified the document of the 1787 Constitution, 1791 Bill of Rights and the 1868 Fourteenth Amendment.[31] Lewis reasons that the progenitors of the free speech law, James Madison and different state legislators who ratified the document did not set any guidelines for the interpretation or produce any useful code as to how to apply the free speech law.[32] To derive

[22] Ibid 552
[23] Ibid 552, See *Whitney* v *California* 274 U.S. 357, 372-380 (1927), (Brandeis J, Concurring) and *Abrams* v *United States,* 250 U.S. 616, 624-631(1919) (Holmes J., Dissenting.
[24] Ibid 552, *Dennis* v *United States,* 341 U.S. 494 (1951), *Brandenburg* v *Ohio* 395 U.S. 444 (1969).
[25] *Buckley* v *Valeo,* 424 U.S. 1 (1976) (per curiam).
[26] *First National Bank of Boston* v *Bellotti,* 435 U.S. 765 (1978).
[27] Robert Post, 'Understanding the First Amendment (2012) 87 Washington Law Review, 549.
[28] Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414, 415.
[29] David A J Richards, 'A Theory of Free Speech' (1987) 34 UCLA L Rev 1837.
[30] Ewan Paton, 'Respecting Freedom of Speech' (1995) 15 Oxford J Legal Stud 597, 603.
[31] Ibid, also see *Scott v Sanford* 60 U.S. 393 (1857), the court held in this case that African Americans even if they were free from slavery were not United States citizens. The Fourteenth Amendment granted citizenship both to naturalized and individuals born in the United States. It is known as the due process and the equal protection clause. The Amendment literally overturned *Scott.* The Fourteenth Amendment has four Clauses. The State Action Clause declares that the State cannot make or enforce any law that abridges the privileges/immunities of any citizen.
[32] Anthony Lewis, *Freedom for the Thought that we Hate: A Biography of the First Amendment* (Basic Books 2007) 41

legitimacy for interpreting provisions of free speech law, such provision must rest on the public justifying State power to protect all persons as equals.[33] Richards referencing Berger, notes in effect, that interpreting the document will make sense if it limits application of constitutional language to what the founders properly thought about and the scope they contemplated, not to some abstract and extraneous matters.[34]

For example, under the Fourteenth Amendment, the law can apply equal protection against State-sponsored racial discrimination rather than gender discrimination in accessing criminal or civil law.[35] It makes sense that judges bear the special responsibility of interpreting the words of the provisions; as looking to the 1791 and 1787 statements of the document to answer constitutional questions will be a futile effort.[36] According to Bork, in interpreting the freedoms of the majority and the minority in a constitutional democracy, the Supreme Court is entrusted with the power to define the laws.[37] The Court resolves this predicament by interpreting constitutional provisions through reasoned principles and stare decisis, not by imposition of the value choices that aids either the minority or majority.[38]

The First Amendment free speech clause has been interpreted to protect not only speech but also printed matter[39]and symbolic speech.[40] Symbolic speech has been defined as communication that uses conduct rather than spoken words in transmitting ideas or opinion.[41] The Supreme Court's interpretation of these rights have

[33] David A J Richards, 'A Theory of Free Speech' (1987) 34 UCLA L Rev 1837, 1841, 1853.
[34] David A J Richards, 'A Theory of Free Speech' (1987) 34 UCLA L Rev 1837, 1841.
[35] Ibid
[36] Anthony Lewis, *Freedom for the Thought that we Hate: A Biography of the First Amendment* (Basic Books 2007) 41.
[37] Robert Bork, 'Neutral Principles and Some First Amendment Problems (1971) 47 Ind LJ 1, 3.
[38] Robert Bork, 'Neutral Principles and Some First Amendment Problems (1971) 47 Ind LJ 1, 3.
[39] Salman Rushdie's book *Satanic Verses* was banned because it insulted the sensibilities of Muslims as it was termed blasphemous. Similarly, the publication of offensive cartoons of Prophet Muhammad in Denmark that led to violent demonstrations worldwide that claimed the lives of 139 people are cases of prints in freedom of expression. See also Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victims Perspective' (2009) 27 Sing L Rev 13, 20.
[40] Anthony Lewis, *Freedom for the Thought that we Hate: A Biography of the First Amendment* (Basic Books 2007) 40, In *Virginia v Black,* 123 S. Ct. 1536 (2003), the Supreme Court recognized that Cross-burning was a symbol of intimidation of person or group of persons-it sends a powerful message to a group of a motive to intentionally place them in fear of bodily harm. The burning of a cross is prima facie evidence to infer intent, so intent need not be proved when a cross is burned. See further, Angela R Ernst, 'Virginia v. Black' (2004) 10 Wash & Lee Race & Ethnic Anc LJ 131, 132.
[41] Finbarr J. O'Neil, 'Symbolic Speech' (1975) Fordham Law Review 590, *Spence* v *Washington*, 418 U.S. 405, 410(1974) (per curiam) quoting *West Virginia State Bd. of Education* v *Barnette*, 310 U.S. 624, 632 (1943), the court stated that symbols are primitive but effective ways of communication

been broad to encompass most forms of communication.[42] In *Stromberg* v *California,*[43]and in *Texas* v *Johnson,*[44] the Supreme Court declared unconstitutional, a California law that forbade carrying of a red flag as a mark of opposition to government and determined that burning the American flag was protected speech under the First Amendment, reversing the decision of the lower courts.[45]

Weinstein opines that the Supreme Court in the modern era provides rigorous protection for unpopular speech through protecting the right of speakers using offensive ideas.[46]In *New York Time* v *Sullivan,*[47] Justice Brennan stated that public discourse should be unrestricted, robust, and open-ended,[48]a statement which appear to be a 'guiding vision' for numerous cases deemed important in free speech decisions.[49] The U.S. courts particularly the Supreme Court have engendered a robust tradition of unimpeded speech in discourse to facilitate free flow of information. This sets a more protected status on speech than in any western country.

3.2.1 Speech Protected Under the First Amendment

Galloway notes that the First Amendment protects free expression that comprises a host of constitutional rights encompassing speech namely

- Press
- Right to assemble
- Right to petition the government for redress of grievances
- Implied Freedoms of expressive and private association.[50]

In other words, free expression is the large umbrella under which all First Amendment provisions are embodied. On another hand, free speech represents the matrix of all other freedoms, it is absolutely important

[42] Russell W Galloway, 'Basic Free Speech Analysis' (1991) 31 Santa Clara L Rev 883, 892.
[43] 283 U.S. 359 (1931), the Court's majority ruled that banning red flags from being exhibited as a mark of protest the government was unconstitutional and violated the First and the due process clause (Amendment 14).
[44] 491 U.S. 397 (1989), the Supreme Court ruled that burning the US flag was protected under the first Amendment. It was therefore constitutionally protected form of speech.
[45] Anthony Lewis, *Freedom for the Thought that we Hate: A Biography of the First Amendment* (Basic Books 2007) 40
[46] James Weinstein, "A Brief Introduction to Free Speech Doctrine (1997) 29 Arizona State Law Journal 461,463.
[47] 376 U.S. 254 (1964).
[48] See Weinstein 464.
[49] James Weinstein, "A Brief Introduction to Free Speech Doctrine (1997) 29 Arizona State Law Journal 461, 464.
[50] Russell W Galloway, 'Basic Free Speech Analysis' (1991) 31 Santa Clara L Rev 883. It must be noted that the Free Speech law is exceptionally large and complicated which this work cannot exhaust. According to Galloway (foot note 41), a full exposition will fill several volumes and so the scope of free speech that this work covers will be clearly outlined.

for an informed society and is the foundation of a democratic government.[51] For Kauper, it is a cardinal and crucial constitutional right,[52] that allows a truly free and democratic society to flourish and it grew out of a need for open discussion of political and other ideas.[53]" It is the most fundamental right protected by the U.S. Constitution."[54] The law provides;

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[55]

From the foregoing provision, Shanor opines that the First Amendment bans abridgment of freedom of speech but does not define speech nor categories that fall within the protection of speech or those that fall outside of it.[56] The First Amendment applies to the states through the Due Process Clause of Fourteenth Amendment.[57] In *Gitlow* v *New York,*[58] the U.S. Supreme Court held that the Fourteenth Amendment to the constitution extends to the First Amendment to apply to all states government.

The First Amendment provision is carved in absolute terms.[59] Justice Black, the chief proponent of the absolutist speech argument,[60] but the First Amendment does not and should not confer or secure an absolute right to anyone to express their view at any place, any time and in whatever way they want.[61] Matsuda opposes this view of the First Amendment law as framed in language that connotes, "that people are free to think and say whatever they might, even the unthinkable."[62] However, this absolute view has failed to prevail as some

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[51] Ibid; 883.
[52] Paul G Kauper, 'Frontiers of Constitutional Liberty: Five Lectures Delivered at the University of Michigan February 13,14,15,20 and 21, 1956. Ann Arbor, University of Michigan Law School. 55, 91
[53] Theresa J Pulley Radwan, 'How Imminent Is Imminent: The Imminent Danger Test Applied to Murder Manuals'(1997) 8 Seton Hall Constitution LJ 47
[54] Mari J Matsuda, Public Response to Racist Speech: Considering the Victim's Story in Mari J Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 31
[55] Amendment 1, Constitution of the United States of America
56 Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 325
[57] See *Richmond Newspapers, Inc*. v *Virginia,* 448 U. S.555, 575 (1980). The Fourteenth Amendment states that no State shall make or implement any law that shall abrogate the privileges or immunities of United States citizens.
[58] 268 U.S. 652 (1925).
[59] Theresa J Pulley Radwan, 'How Imminent Is Imminent: The Imminent Danger Test Applied to Murder Manuals' (1997) 8 Seton Hall Constitution LJ 47, 49
[60] John Laws, 'The First Amendment, and Free Speech in English Law' in Ian Loveland (ed) *Importing the First Amendment Freedom of Expression in America, English and European Law* (Hart Publishing 1998) 124
[61] See O*livieri* v *Ward,* 801 F. 2d 602 (2nd Cir. 1986).
[62] Mari J Matsuda, Public Response to Racist Speech: Considering the Victim's Story in Mari J Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 31
67

Justices recognize the need for government to curtail speech in certain contexts. Laws quoting Brennan J, asserts that the First Amendment does not only protect free speech but also governs thoughts and communication at the verbal, non-verbal, visual and symbolic levels. It is not concerned with private right but with public power that government has the responsibility to protect.[63] The purpose of the clause was therefore to secure the protected domains of speech from government's interference.[64]The breath of the First Amendment is wide and encompasses not only speech but applies to freedoms of the press[65], religion and assembly[66] and 'the scope of the law remains dynamic and not static.'[67] It also protects freedom of assembly and of association. In examining the core meaning of the First Amendment, the Supreme Court explored the history of James Madison's statement in the document and came to the conclusion that the power to censor speech is given to the people against the government and not vice versa.[68] James Madison is often referred to as the architect of the Bill of Rights.[69] A bill of rights, according to Madison will codify the principles of liberty, enable people to internalize their values while providing a basis for revolting against abuse of power.[70] It will also give renewed power to the courts.[71] Kurtis suggests that guarantees of speech should work at popular and institutional levels such as the Supreme Court and States Supreme Court, Congress and state legislatures which can constrain or empower speech.[72]

[63] Ibid 125
[64] David Kemper Watson, 'Constitution of the United States: Its History, Application and Construction' Chicago, Callaghan, 1371
[65]Which includes freedom exercised on printed matter: In 1988, Salman Rushdie's book, *The Satanic Verses* was declared anathema by the Muslim world and Muslims were challenged to kill the author. Rushdie was compelled to go into hiding for exercising his freedom and his book has been regarded as one of the most controversial literary works in modern times. Also, another incident occurred on January 7, 2015, where a French Satirical Newspaper, *Charlie Hebdo* was attacked by unknown armed men leaving 12 dead for publishing cartoons of the Prophet Mohammed. This event opened prolific research on the right to free speech and whether the Freedom of speech has been deemed one of the most contested rights Vis a Vis other human right provisions.
[66] Mark P Denbeaux, 'First Word of the First Amendment' (1985-1986) 80 NW U L Rev 1156, 1157
[67] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 326
[68] John Laws, 'The First Amendment, and Free Speech in English Law' in Ian Loveland (ed) *Importing the First Amendment Freedom of Expression in America, English and European Law* (Hart Publishing 1998) 124,
[69] Mark P Denbeaux, 'First Word of the First Amendment' (1985-1986) 80 NW U L Rev 1156, 1164
[70] Michael Kent Curtis, *Free Speech, "The People's Darling Privilege" Struggles for Freedom of Expression in American History* (Duke University Press 2000) 70
[71] Ibid 70
[72] Ibid 218

3.2.2 Speech not Protected under the First Amendment

The Court has held that certain expressions are not protected under the First Amendment which means that such cases cannot be legislated under the First Amendment law. To this extent, criminal speech, obscenity, fighting words, commercial speech (especially concerned with illegal activity) and child pornography are also not constitutionally protected.[73] The Supreme Court has continued to enlarge, since after *Chaplinsky*, classes of speech that are not protected which includes expression that infringes on copyright laws,[74] but the court, Tsesis avers, is hesitant with lengthening the list of unprotected speech.[75] In *United States* v *Stevens*[76] the court announced that First Amendment protections must be limited to the "historic and traditional categories long familiar to the bar"[77] For the purposes of this research, only few of the exceptions will be discussed as several of these exceptions are beyond the scope of this work.

It does appear, as Shanor predominantly notes, that most aspects of what will usually be considered in lay terminology; (such as perjury, extortion and conspiracy among others), would not come under First Amendment protections if someone were charged for these offenses.[78] Rather, the First Amendment free expression provisions can be explained by a sort of "speech effect" the case law suggests how a listener will react to words spoken-whether such words will cause harm and so on"[79] One begins to wonder why the American courts evaluate speech effects rather than the impact of speech to outlaw speech. This makes Curtis pose these questions; should despised and contentious speakers be allowed to pervade the public space? How much has the main media and *individuals* allowed radical views that seem to threaten established interest of the minority? Should free speech principles be expanded to continue to protect speech that are dangerous or

[73] Russell W Galloway, 'Basic Free Speech Analysis' (1991) 31 Santa Clara L Rev 883, 893
[74] Ibid 1435, 1444, See also *Harper* & *Row Publishers Inc.* v *Nation Enters*, 471 U.S. 539,559-560 (1977).
[75] Alexander Tsesis, 'The Categorical Free Speech Doctrine and Contextualization (2015) Emory Law Journal 495, 496, see also United States v. Stevens, 559 U.S. 460, 468 (2010) (describing the categories of unprotected speech). Here the Crush Video Acts was struck down for being substantially overbroad on a ruling of 8-1 majority, Justice Alito, dissenting on the grounds that an expressive activity under the freedom of speech First Amendment law most certainly should not protect violent criminal conduct and that the majority decision would forestall Congress from stopping future commission of such crime.
[76] 559 U.S. 460, 468 (2010) (Citing Shanor)
[77] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 339
[78] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 344
[79] Ibid

evil? The courts have applied doctrines that appear inimical to regulating obnoxious speech in the U.S. We turn now to the discussion of two of those doctrines.

3.3 The Overbreadth and Vagueness Doctrines

3..3.1 The Overbreadth Doctrine

First Amendment free speech cases that come before the Courts can be held to be unconstitutional for overbreadth and vagueness.[80] An overbroad regulation offends "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly [sic] and thereby invade the area of protected freedoms."[81] For a court to find a Statute to be overbroad, under the First Amendment,[82] the flaw "must not only be real but substantial as well, and judged in relation to the statute's plainly legitimate sweep."[83] The overbreadth prevents states from chilling constitutionally protected speech.[84] When a state's law is challenged as overly broad, the reviewing court evaluates whether the state has compelling interest that include "preserving the peace..[and] protecting each person from crime or from the fear of crime as to withstand the scrutiny of the Court."[85] This doctrine was central to the analysis of *R.A.V* v *The City of St Paul*,[86] where the speech right of young white boys including R.AV., who burnt a cross in the backyard of a black family had the majority in the Supreme Court reasoning that such an act could be punished as trespass, or burglary, or terrorism or more so arson but not as a symbol of racial hatred or alarm.[87] With the decision in this case by the Supreme Court, scholars like Taylor saw the doors to hate speech regulation in the US as closed. [88]

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[80] The Communication and Decency Act (CDA) 47 U.S.C.A S 609 (West Supp. 1997), S 223 (a)(1)(b) (the 'Indecent transmission' provision) prohibits the creation or solicitation or initiation or obscene transmissions of messages to a minor and 223(d)(1) prohibits knowingly sending or displaying of messages that describe sexual or excretory activity or organs to a minor. The law was found constitutionally overbroad and was struck down as violating the First Amendment.
[81] *Zwickler* v *Koota*, 389 U.S. 241, 250 (1967) (quoting NAACP V HARV. L Rev. 844, 853 (1970) See also Huffman 265.
[82] *Grayned* v *City of Rockford*, 408 U.S. 104, 115 (1972).
[83] *Broadrick* v *Oklahoma*, 413 U.S.601, 615 (1973).
[84] *The First Amendment Overbreadth Doctrine* (Case note), 83 HARV. L.Rev. 844,853 (1970) See Huffman, 266.
[85] William H III Huffman, 'R.A.V. v. St. Paul: Case Note' (1993) 17 Law & Psychol Rev 263, 266.
[86] 112 S.Ct. 2538, 2550 (1992)
[87] R.A.V. v. City of St. Paul, 112 **S.** Ct. 2538, 2550 (1992), see also Kathleen M Sullivan, 'Resurrecting Free Speech' (1995) 63 Fordham L Rev 971, 972.
[88] Charlotte H Taylor, 'Hate Speech and Governmental Speech' (2010) 12 U Pa J Const L 1115, 1118.

3.3.2 Vagueness Doctrine

Another test the Court will always employ in assessing First Amendment cases by the State and for the Federal laws is the void for vagueness doctrine. A law under the due process clause of Amendment 14 will be declared void if a person of ordinary intelligence cannot determine the persons that are regulated, the conducts that are prohibited and punishments that are imposed under the law. The Court enumerates the three rationales behind the test in *Grayned;* the State must notify the person of ordinary intelligence an opportunity to know the speech that is prohibited so that he acts in accordance to it,[89] to forestall arbitrarily and discriminatory enforcement[90] and to invalidate a vague law to the degree that it imposes a "chilling effect" on speech that are protected by the First Amendment.[91] Such a law will be declared unconstitutionally vague by the courts. Usually, the State has a heavy burden to discharge to justify regulation of most forms of racial and religious hate speech based on overbreadth or vague legislations relying mainly on 'public order' and 'morality.'[92]

In 1977, the Seventh Circuit Court of Appeals was confronted with the most controversial and publicized free speech issues in *Skokie case.*[93] This case concerned an attempt by members of the nationalist socialist party, to conduct a march in Skokie, a Chicago Suburb with swastikas. Skokie at the time was populated by some forty thousand Jews and holocaust survivors.[94] The local municipal authorities took steps to forestall the march by enacting new legislations. The judges in that case denounced the Party's principles and display of such symbols; that were a reminder of the concentration camps and the general genocide against the Jews but maintained that Neo-Nazis speech was still protected under the First Amendment and the laws made by the municipal authorities violated their rights. This case made possible the re-consideration and scope of free

[89] Grayned at 108
[90] Huffman quoting Stephen Eckerman, It Dare Not Speak its Name: The Burning Cross, Symbolic Speech and the Bias-Related Disorderly Conduct Statute of *R.A.V* v *St Paul,* 2 Civil Rights Law Journal 361, 363 (1992)
[91] *Grayned, 408* U.S 104 (1972) at 108. See Huffman 266
[92] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 43.
[93] *Nationalist Socialist Party of America* v *Village of Skokie,* 432 U.S. 43 (1977), this case was only procedural but the case that established substantive protection of free speech was Collins v. Smith, 578 F.2d 1997 (7th Cir. 1978)
[94] James Magee, Book Review, The Tolerant Society: Freedom of Speech and Extremist Speech in America. By Lee C. Bollinger (1987) Constitutional Commentary, University of Minnesota Law School Scholarship Repository.

speech rights in America. In *Skokie,* the Seventh Circuit court defended, an ideology, in which unquantifiable resources were spent, to defeat a few decades earlier.[95]

The European Court took a very different turn in a similar case that came before it in 2013.[96] The court ruled that Hungary did not violate the freedom of assembly of the Hungarian Guard Association (HGA) by banning it. The HGA organized paramilitary marches in villages with Roma populations with members calling to defend ethnic Hungarians from crimes perpetrated by Gypsies. The European Court held that such event was physically threatening and racially divisive and can have a frightening effect on the racial minority targeted because it went beyond mere expression of offensive ideas.[97] The European Court unlike in *Skokie* reasoned that the activities including utterances and expressions of the Hungarian Guard would cause harm to the Roma minority targeted. The contrast of the two courts is evident in these apparently similar cases, the Seventh Circuit should have also recognized that the villages had a public interest, arguably a compelling one at that, to prevent hateful threatening speech that targeted Jews in *Skokie*.

3.4 Justifications for Freedom of Speech

Over the years, legal scholars, philosophers and academics have consistently made attempts to explain free speech protections in the First Amendment.[98] For some, free speech should be preserved as a welcome tradition for the governed because the people give government legitimacy by their consent in a democracy.[99]

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[95] James Magee, Book Review, The Tolerant Society: Freedom of Speech and Extremist Speech in America. By Lee C. Bollinger (1987) Constitutional Commentary, University of Minnesota Law School Scholarship Repository.

[96] Vona v Hungary App No 35943/10 (ECtHR, 9 July 2013), See also Antoine Buyse, 'Dangerous Expressions; the ECHR, Violence and Free Speech' (2014) 63
INT'L & COMP LQ 491.

[97] Ibid, para 53, 63 and 66. See also Ibid.

[98] Martin H Redish, 'Value of Free Speech ' (1981-1982) 130 U Pa L Rev 591, argues that free speech serves only one true value, which he termed individual self-realization-the development of the individual's power and ability to realize his full potentials; Alexander Tsesis, 'Free Speech Constitutionalism' (2015) 2015 U Ill L Rev 1015, Professor Tsesis critiques free speech rationales as furthering democracy, or personal autonomy or advancing the 'market place of idea' (truth). He adopts free speech theory that embraces a general theory of constitutional law that protects individual liberty and the common good of a free society; C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 UCLA L Rev 964, in defining the scope of the First Amendment exposes the inadequacy of the liberty and the market model while promoting a model more elaborate and broadened in scope to cure the defects and provide, 'protection for a progressive process of change.; J.K Miles, 'A Perfectionist Defence of Free Speech' (2012) 38 Social Theory and Practice 213, Miles presents a case for the appeal to virtue (justified opinion) for free speech justification rather than traditional truth, democracy and autonomy theories.

[99] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper and Brothers Publishers 1948) 2.

Others propose that speech in furthering the truth should be preserved to advance individual liberty and the common good in a free society.[100] One of the earliest scholars that made a compelling argument for free speech was Meiklejohn while other scholars have followed; eager to elaborate some unified justification or value for free speech. In the United States, three main theories; autonomy, democracy and truth are proposed for why the government should guarantee free speech to its citizens.[101] According to Tsesis, the three justifications all recognize the rationale for a normative, constitutional commitment to secure free flow of information if the government overstretches its power.[102] I will present a summary of these theories in this section because the theories are well grounded in scholarship.[103]

3.4.1 Personal Autonomy

The rationale for this value is that free speech should be the justifiable right of every individual to enable them to exercise their intellectual capacity[104]and autonomy gained from unrestrained speech.[105] According to these theorists, individuals in the society if stripped of free speech will not develop or grow.[106]Greenawalt argues that the autonomy of human beings is that individuals should discover the truth for themselves so that free speech suppression is not permissible even if the speech was contaminated by falsehood.[107] Individuals are able to convey what they learn including preferences, criticisms, joys and pains that would never make any meaning without the power of speech.[108] Free Speech therefore is a personal right that must be exercised and guarded against the intrusion of the government,[109] Any speech linked to an individual ought to be afforded constitutional protection and so Rosenfeld opined that an autonomy justification best affords

[100] Alexander Tsesis, 'Free Speech Constitutionalism' (2015) 2015 U Ill L Rev 1015.
[101] Ibid
[102] Ibid. 1016.
[103] C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 UCLA L Rev 964; Kent Greenawalt, 'Free Speech Justifications ' (1989) 89 Colum L Rev 119; Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper and Brothers Publishers 1948) and Alexander Tsesis, 'Free Speech Constitutionalism' (2015) 2015 U Ill L Rev 1015.
[104]Alexander Tsesis, 'Free Speech Constitutionalism' (2015) 2015 U Ill L Rev 1015, 1028
[105] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1535.
[106] See also Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523.
[107] Kent Greenawalt, 'Free Speech Justifications ' (1989) 89 Colum L Rev 119, 122.
[108] Kent Greenawalt, 'Free Speech Justifications ' (1989) 89 Colum L Rev 119, 122.
[109] Alexander Tsesis, 'Free Speech Constitutionalism' (2015) 2015 U Ill L Rev 1015, 1030

protections to all types of speech.[110] This condition, Reddish describes, as 'individual self-realization' which enables the individual to develop his powers and abilities to attain full potentials in realizing their destiny through making life-affecting decision.[111] Reddish suggests that free speech theories embody complex values that cannot be confined to a specific value and proposes that a complete free speech protection in a State must take cognizance of the value of self-realization; and incorporate moral norms inherent in such choice. Reddish believes autonomy to be the foundational reason for the constitutional protection of speech. Carpenter is of the view that there are more important social values in the society than self-autonomy and that exalting it above all others, accords it too much importance.[112]

3.4.2 Democracy

Proponents of this theory argue that the sole purpose of free speech guarantee is to foster the workings of the democratic process and values for the benefit of the society.[113] According to Meiklejohn, the chief proponent of this theory, power exercised by the government is derived from the consent of the governed so that, if there is dearth of such consent, government lacks just powers.[114] An angle of this theory emphasizes that free speech, advances self-government, that is, the need to regulate speech in the interest of citizens to become better democrats.[115]

Carpenter argues that the State could regulate speech by championing diversity and giving more attention to public affairs. Meiklejohn asks, "What, then, is the difference between a political system in which men do govern themselves and a political system in which men, without their consent, are governed by others?" Unless those in a democracy make the distinctions clear, discussion of freedom of speech or of any other freedom was meaningless and futile.[116] Bork notes that the main purpose served by free speech in the Constitution is

[110] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1535.
[111] Martin H Redish, 'Value of Free Speech ' (1981-1982) 130 U Pa L Rev 591, 593
[112] Dale Carpenter, 'The Antipaternalism Principle in the First Amendment' (2004) 37 Creighton L Rev 579, 636.
[113] Martin H Redish, 'Value of Free Speech ' (1981-1982) 130 U Pa L Rev 591, 596, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence* (2000) 88 California Law Review, 2353, 2362.
[114] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper and Brothers Publishers 1948) 3
[115] Dale Carpenter, 'The Antipaternalism Principle in the First Amendment' (2004) 37 Creighton L Rev 579, 636.
[116] Ibid 5

to aid the political process and that form of expression falls within the speech provision.[117] One would assume that when people have freedom to criticize the policies and the workings of the government without constraint by the government, the free speech provision is being fulfilled. Blasi has adopted an approach Redish referred to as the 'check value' as the core purpose of the First Amendment free speech under which analysing, official conduct will receive the highest level of protection.[118] So that, "government must regulate citizens' behaviour *directly*, not regulate what information they hear to mold their behavior *indirectly.*[119]

Tsesis states categorically that the United States protection of free speech is not a "suicide pact," that a democracy consists of a quilt of individuals pieced together by principles and laws and each person adds glow and contributes to the overall pattern.[120] The thread that ties the separate parts loosens if individuals call for degradation, murder or oppression of identifiable minority groups through speech and this distorts the usual peaceful coexistence of groups living in a such an open and democratic society.[121]

3.4.3 Truth

The search for truth justification for free speech theory is exemplified in the marketplace of ideas doctrine. Justice Holmes in championing the metaphor of speech as the "marketplace of ideas" declared in *Abrams* v *United States* dissent.

> [M]en ... may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[122]

[117] Martin H Redish, 'Value of Free Speech ' (1981-1982) 130 U Pa L Rev 591, 592.
[118] Dale Carpenter, 'The Antipaternalism Principle in the First Amendment' (2004) 37 Creighton L Rev 579, 636.
[119] Dale Carpenter, 'The Antipaternalism Principle in the First Amendment' (2004) 37 Creighton L Rev 579, 637.
[120] Alexander Tsesis, 'Dignity and Speech: The Regulation of Hate Speech in a Democracy' (2009) 44 WAKE FOREST L REV 497, 513. Stated in relationship to *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963).
[121] Tsesis quoting, Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1384-
85 (1998).
[122] *Abrams* v *United States*, 250 U.S 616 (1919) AT 630 (Holmes J dissenting)

Holmes relies on John Stuart Mill's postulations that human knowledge is fallible and needs challenge to develop.[123] Mill argued that truth can be discovered through robust debate that is devoid of governmental interference[124]and that truth is gained from incremental practical process dependent on trial and error of uninhibited conversation.[125] Baker elucidates Mills three main reasons for holding that speech should be unimpeded. First, false ideas are better allowed in discourse so that if such opinions contain elements of truth, there is a chance for correcting error. Second, if opinions that are received and disputed each hold part of the truth, their encounter in loose discussion provides access to the truth. Third, false or heretical opinion can be held as dead dogma, its meaning embraced and will be of no use.[126] Simply put, 'truth is able to outshine falsity in debate or discussion only if truth is there to be seen.'[127] To this extent, the value of free speech does not depend on the liberty of individuals but in the benefits derived from unhindered discussion and the social gain is enormous if society should in its inquiry for truth, does not tolerate any restraint.[128] Holmes radical statement in the market place of ideas in *Gitlow* v *New York*[129] that all ideas is an incitement because they move people to act or not to act,[130] is worthy of note. If therefore the beliefs expressed are subsequently accepted among people, the only meaning of free speech is that such ideas should have their way.[131] *Gitlow's* majority opinion is cited in the Supreme Court's First Amendment jurisprudence as good law.[132] Justice Sanford in his majority opinion in that case recognized that the future effect of violent opinion cannot be accurately predicted but that the State can make laws to protect peace and safety in the public sphere and in so doing 'suppress the threatened danger in its incipiency'[133] The function of the State is to enforce rights-as a neural authority between individuals as carrier of rights and duties within the State.[134] Holmes' free trade of

[123] Pnina Lahav, 'Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech' (1988) 4 JL & Pol 451, 455.
[124] C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 UCLA L Rev 964.
[125] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1533.
[126]C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 UCLA L Rev 964, 965.
[127] Ibid, 967.
[128] Ibid
[129] 268 U.S. 652, 672 (1925) (Holmes, J., dissenting)
[130] U.S. 652, 673 (1925) (Holmes, J., dissenting.
[131] Ibid
[132] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 735
[133] Ibid, 735, Gitlow, 669
[134] Ibid

ideas reflects the notion of the function of the State is to secure these freedoms and rights.[135] Holmes perspectives on free speech or expression appears to reflect the Enlightenment belief that the monopoly of truth cannot be conceded to the State but that free speech was necessary in discovering truth.[136] Holmes thinks that free speech is so important that it should be protected even at the risk of a dominant majority repressing others' liberties to advance the will of the dominant forces of a community; on the other hand, Brandeis envisages free speech as protecting against 'tyrannies of government majorities'[137]

Justice Brandeis is optimistic that speech will dispel false speech, and even subvert evil.[138] Justice Brandeis in his opinion puts it categorically and clearly; that discussion provides adequate protection against the dissemination of harmful doctrine and the fitting cure for evil speech are good arguments.[139] Brandeis recognized that the drafters of the Constitution believed in liberty that will engender political truths and maintenance of happiness so that suppression of speech is only justifiable on grounds that such speech posed an immediate danger or 'serious evil' occurring.[140] For Brandeis, abstract fears about future harms cannot justify restriction of speech.[141]

The constitutional protection of free speech is not hinged on the fact that speech is harmless in society with people living 'within their own autonomous and combat zones,'[142] but that the benefits that society reaps from free exchange of ideas far outweigh the harmful effects of reprehensible ideas.[143] The one risk that society takes in allowing speech is the potential that such speech can cause harm especially if the speech enters the

[135] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729
[136] Pnina Lahav, 'Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech' (1988) 4 JL & Pol 451, 455.
[137] Ibid, see also A. Tsesis, 735, 736.
[138] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 733, 734.
[139] *Whitney v. California* 274 U.S. 357 (1927), see also Anthony Lewis 162
[140] *See Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).
[141] Ibid
[142] Ibid *Whitney* v. *California*, 274 U.S. 357, 376 (1927).
[143] *Abrams* v *United States*, 250 U.S 616 (1919) AT 630

market place of ideas and later influences tyrannical conduct.[144] An idea that is evil can be determined as to whether its value is worth the danger it presents to society.[145] Put in another way, people perceive truth differently in the free exchange of thought in the marketplace of ideas and that this normal process should not be obstructed except under strict conditions where congressional or State power can compellingly and narrowly abrogate speech.[146] Matsuda extends this reasoning further; ideas deserve a public forum and unpopular ideas are opposed through counter expression voiced freely have the greatest chance of obtaining the right results.[147]

The Supreme Court in determining and resolving free speech cases regularly relies on the marketplace of ideas theory.[148] This theory assumes in practice that truthful voices will win out in the competition with those that are false. It relies on the assumption that organized debate will lead to veracity. Thus, the market remains open to all views.[149] Goldman and Cox put it more concisely, "more total truth possession will be achieved in a free unregulated market for speech than in a system in which speech is regulated."[150]

Tsesis laments the inadequacy of the marketplace of ideas theory in identifying the broad range of issues to protect free speech. The scholar notes that the State in ascertaining whether to regulate speech can do so on a case-to-case basis and that the key issue would be to protect the over-all fairness and equality of individuals in society.[151] I tend to agree with Tsesis that no justifications for free speech can be determinative of all cases. The issues in this area of law are complex and overlapping, formalistic categorization can be unsatisfactory.[152] Reddish views the theories as flawed in either result or structure or in both because all the theorists have not

[144] Theresa J Pulley Radwan, 'How Imminent Is Imminent: The Imminent Danger Test Applied to Murder Manuals' (1997) 8 Seton Hall Const LJ 47, 48
[145] Ibid 58
[146] [146] Paul G Kauper, 'Frontiers of Constitutional Liberty: Five Lectures Delivered at the University of Michigan February 13,14,15,20 and 21, 1956. Ann Arbor, University of Michigan Law School. 55, 62
[147] Mari J Matsuda, Public Response to Racist Speech: Considering the Victim's Story in Mari J Matsuda et al, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 32
[148] Edwin C Baker, 'Scope of the First Amendment Freedom of Speech'(1978) 25 UCLA L Rev 964, 968
[149] Alvin I Goldman and James C Cox, 'Speech, Truth, and the Free Market for Ideas' (1996) 2 LEG 1, 2. See also *Abrams* v *United States*, 250 U.S. (1919) 630
[150] Alvin I Goldman and James C Cox, 'Speech, Truth, and the Free Market for Ideas' (1996) 2 LEG 1, 3.
[151] Alexander Tsesis, 'Free Speech Constitutionalism' (2015) 2015 U Ill L Rev 1015, 1042.
[152] Ibid, 127

undertaken an analysis of the first principles of free speech to make logical inferences from them.[153] Despite criticism by different scholars, Rosenfeld is of the opinion that the pursuit of truth provides the best justification for free speech in the United States constitutional jurisprudence.[154] There are safeguards in place in the form of doctrinal principles by the courts to ensure that the exercise of freedom of speech are within the ambit of the law. This will be our focus in the next section.

3.5 Content versus Context

Justice Holmes's majority opinion in *Schenck* promptly rejected the claim that Congress could not limit speech when he states that free speech would not protect a man who screams out fire in a theatre, causing panic.[155] Speech should be regulated especially in a culturally and racially diverse society. Free speech jurisprudence has through the years painstakingly identified categories outside the free speech clause while providing rationale and justification for such exclusion.[156] The Supreme Court heralds this trend on a case-to-case basis by determining speech categories not protected by the First Amendment.[157] The exceptions or limitations are not usually based on the quality of speech but on reasons that government must abrogate speech. A city may not stop a racist rally but that only if it is intended to and likely to lead to imminent violence; neither will a city forbid the use of a loudspeaker due to it being used to criticize a police chief but because the noise from the microphone disrupts public peace; or a zoning board, license an adult theatre due to the events in the theatre promoting immorality but because the theater contributes to crime in the area.[158]

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[153] Martin H Redish, 'Value of Free Speech ' (1981-1982) 130 U Pa L Rev 591, 593

[154] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1536.

[155] Deirdre Golash (ed) *Freedom of Expression in a Diverse World* (Springer 2010) xvi, *Schenck v. United States*,249 U.S. 47 (1919) Charles Schenck was the general secretary of the socialist party who opposed the draft to recruit men into military during WW1. Schenck printed 15,000 leaflets calling men to resist the draft. The Supreme Court convicted him. Schenck will be discussed more in the later section of this chapter.

[156] Alexander Tsesis, 'The Categorical Free Speech Doctrine and Contextualization (2015) Emory Law Journal 495, 496.

157 Alan K Chen and Justin Marceau, 'High Value Lies, Ugly Truths, and the First Amendment' (2015) 68 Vand L Rev 1435,1441.

[158] Alan K Chen and Justin Marceau, 'High Value Lies, Ugly Truths, and the First Amendment' (2015) 68 Vand L Rev 1435,1441

Content-based regulations are speech outlawed based on what the speaker has to say, such as 'fighting words' expressions. As a rule, the Court uses strict scrutiny when faced with content-based restrictions.[159] In *Reed* v. *Town of Gilbert,*[160] the Supreme Court unanimously reversed the decision of the U.S. Court of Appeals for the 9th Circuit. The Court held that the Sign Code in the provisions of the municipality, identified various categories of signs based on the type of information contained, then subjects each category to a different restriction. The Court further held that these types of regulations were content-based and could not survive strict scrutiny.

However, if speech is perceived as affirmatively harmful, that kind of speech will still be protected under the First Amendment unless that sort of speech will bring about immediate calamity.[161] The government has no power to restrict speech based on its message, subject matter or ideas but when a regulation affects the content of a speech, the government bears the evidential burden of justifying such regulation is compelling and narrowly tailored.[162] The evidential burden in most cases that have come before the courts have not been successfully discharged by the States as some of the cases discussed in the next section will show. In *Brandenburg* v *Ohio*,[163] the court interpreted the First Amendment to mean that ideas could not be banned or restricted based on content and speech that aroused anger or resentment in others and these set of laws have been struck down as unconstitutional because they amounted to 'viewpoint discrimination'.[164] We will come back to the discussion of this important and unique case later. In most cases that came before it, the Supreme Court based its interpretation of the law, not on the quality of speech but on reasons why the government must

[159] Alan K Chen and Justin Marceau, 'High Value Lies, Ugly Truths, and the First Amendment' (2015) 68 Vand L Rev 1435,1441.
[160] 576 U.S._(2015), https://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf. Accessed 5 March 2020.
[161] Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 423
[162] Douglas W Vick, 'The Internet and the First Amendment' (1998) 61 Mod L Rev 414, 416. See also Marjorie Heins, 'Viewpoint Discrimination' (1996) 24 Hastings Const LQ 99, 110. See further *Police Department* v *Mosley* 408 U.S. 9 (1972) where the court stated that expressions under the First Amendment could not be restricted by government because of its message, its ideas, its subject matter or its content.
[163] 395 U.S. 444 (1969), this was a landmark case that interpreted the First Amendment to the United States Constitution.
164 Ibid 11, See *also Rosenberger v Rectors and Visitors of the University of Virginia 515* U.S. 819 (1995), where the court defined view-point discrimination as, ""When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." https://www.mtsu.edu/first-amendment/article/1028/viewpoint-discrimination, accessed 25 November 2019.

abrogate speech. For instance, a racist speech was allowed and the law that forbade it, held unconstitutional because it did not amount to incitement.[165] In this work, I argue for an interpretative approach that will go beyond normative principles to accommodate a less flawed conception of persons for a more equality-oriented protected rights of free speech.[166] I argue that free speech law that will consider the experiences of the racial and religious minorities will be more beneficial relying on the history of America with its badge of slavery.[167] An example where the Court considered context was in *Beauharnais v. Illinois,*[168] where it upheld the legality of a group libel Statute in Illinois that, "portray depravity, criminality... or lack of virtue of a class of citizens, of any race, color, creed, or religion" and to expose those citizens to "contempt, derision, or obloquy."[169] The majority of the Supreme Court Justices found that given Illinois history of racial conflict, it was within the power of the legislature to punish group libel.[170] The defendant's conviction was upheld for distributing leaflets urging Caucasian homeowners to oppose neighborhood integration.[171] The Court reasoned that since Illinois has a history of group libel causing damages, the Statute prohibiting it was constitutional to preserve individuals from being harmed.[172] While the Court acknowledged the potential for governmental abuse of such statute, it however stated that such was remote to declare the law unconstitutional.[173] It must be pointed out that some scholars believe that the precedent in *Beauharnais* is no longer good law due to subsequent cases that appeared to have rendered the decision in that case of no effect.[174] Tsesis dismisses the argument of these scholars as not only speculative but that the scholars fail to take cognizance of recent Supreme Court cases that make it obvious, that *Beauharnais* remains valid precedent.[175]

The court would need to apply the law on race and religious hate speech by looking at both content and the context around the speech made as Sorial reasons that modern hate speech especially by extremist groups are

[165] See *Brandenbur*g
[166] David A J Richards, 'A Theory of Free Speech' (1987) 34 UCLA L Rev 1837, 1841, 1853.
[167] See section 1.4 of chapter one.
[168] 343 U.S. 250 (1952).
[169] Ibid at 252
[170] See A. Tsesis at 736
[171] 343 U.S. 250 (1952) at 252, see also A. Tsesis at 736.
[172] Ibid 254-260
[173] *Beauharnais*, 263. See also Tsesis, 736.
[174] *R.A.V. v City of St Paul*, 505 U.S. 377 (1992*) and New York Times Co. v. Sullivan* 376 U.S. 254 (1964).
[175] Alexander Tsesis, 'Burning Crosses on Campus: University Hate Speech Codes' (2010) 43 Conn L Rev 617

couched in such a way to evade prosecution-in civil and respectable language and such speech have become more acceptable by a larger audience.[176] Recourse to context without content in deciding cases is inadequate and vice versa. In other words, if the way speech is expressed determines if a person will be prosecuted, the content of such speech is not relevant, this at least appears to be grounds that *Brandenburg* was concluded. Strasser concludes that as a result, one is uncertain whether *Brandenburg* has implications for threatening or terrorizing speech,[177] though the defendant's hateful speech cannot be contested looking at the content of his speech. Generally, content is an all-encompassing concept in a discourse (for example, topic) while 'viewpoint' connotes an opinion (perspective) but the Supreme Court has often used the two interchangeably. The Court often justifies the use of these concepts as flowing from the concern that government could not hijack public debate in its attempt to favour or forbid speech.[178]

3.6 Free Speech Exceptions

3.6.1 The Fighting Words Exception

While the United States protects emotive hate speech, it does not do so when such speech 'rises to the level of so-called fighting words or constitutes a true threat of violence.'[179] 'Fighting words' are epithets that can reasonably instigate a violent reaction if addressed to an 'ordinary citizen,'[180] "or words that 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed"[181] For fighting words to apply, it must satisfy three conditions;

- The words must be addressed to an individual and must be a face-to-face communication, a crowd will not suffice.[182]

[176] *Beauharnais*, 263. See Tsesis 736, 635-636.
[177] Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339, 343.
[178] Marjorie Heins, 'Viewpoint Discrimination' (1996) 24 Hastings Const LQ 99, 101.
[178] Karmen Erjavec and Melita Poler Kovacic, "You Don't Understand, this is a New War! Analysis of Hate Speech in News Web Sites Comments' (2012) 15 Mass Communication and Society 899, 901.
[179] Karmen Erjavec and Melita Poler Kovacic, "You Don't Understand, this is a New War! Analysis of Hate Speech in News Web Sites' Comments (2012) 15 Mass Communication and Society 899, 901.
[180] *Cohen* v *Californi*a, 403 U.S. 15, 20 (1971) Also see Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 735.
no. 3, 2000, p. 729-
[181] *Chaplinsky* v *New Hampshire*, 315 U.S. 568 (1942) (created the fighting words exception), see also Russell W Galloway, 'Basic Free Speech Analysis' (1991) 31 Santa Clara L Rev 883, 894.
[182] *Cohen*, 403 U.S. at 20 See also Russell W Galloway, 'Basic Free Speech Analysis' (1991) 31 Santa Clara L Rev 883, 895.

- The words must tend to incite an immediate breach of the peace.[183]
- Whether a reasonable person in the speaker's position would foresee the words as capable of producing immediate violent response[184]

The Supreme Court established this rule in *Chaplinsky* v *New Hampshire,*[185] that case is often cited as extending First Amendment protection to all certain categories of expression that are historically not included.[186] In that case, a Jehovah's Witness was convicted for using offensive, mocking and infuriating words on another person.[187] The Supreme Court upheld the conviction of the defendant for contravening a statute that outlawed using of offensive words in public places,[188] while declaring that speech rights under the First Amendment are not absolute in all cases and under all circumstances.[189] Justice Murphy concludes in that case that 'fighting words' are not, and never will be protected by the Constitution.[190]

In addition, the *Chaplinsky* court listed lewd and obscene, the profane, the libelous and 'fighting words' as excluded in protection of speech. These classes of speech inflict injury and have the tendency to incite immediate breach of the peace.[191] In determining these categories of speech that did not rise to the level of constitutional protections, the Court reasoned that social interest in order and morality far outweigh the benefit, if any, derived from such speech.[192] It appears reasonable to assume that it is normal for the court to exclude from the purview of the First Amendment, speech devoid of any communicative or social value.[193] It must be noted that as the fighting words doctrine developed, there was a shift from examining the meaning of the words said to assessing the general context in which the words were spoken.[194] This was demonstrated in *Cohen* v *California* where the defendant entered the court in a jacket with the words "fuck the draft" stitched

[183] Galloway, 895, *Chaplinsky* at 574.
[184] Galloway, 895 *Chaplinsky* at 572.
[185] 315 U.S. 568 (1942).
[186] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 338.
[187] Ibid
[188] 315 U.S. 568 (1942).at 569.
[189] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 338
[190] *Chaplinsky*, 571-572.
[191]Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 338, 339, See also *Chaplinsky*, 571-572 (Citing Shanor)
[192] Alan K Chen and Justin Marceau, 'High Value Lies, Ugly Truths, and the First Amendment' (2015) 68 Vanderbilt Law Review 1435, 1443. See also Chaplinsky, 315 U.S. at 572.
[193] Alexander Tsesis, 'The Categorical Free Speech Doctrine and Contextualization (2015) Emory Law Journal 495, 508.
194 William H III Huffman, *'R.A.V.* v. *The City of St. Paul*: Case Note' (1993) 17 Law & Psychol Rev 263, 265

to the back of his shirt.[195] The Court reversed the defendant's conviction. By inference, speech considered fighting words, can be brought under the First Amendment law, only if it targets a particular person, some abstract statement not directed at a particular person does not satisfy this requirement. This doctrine also makes it hard for online vilification or threats of racial and religious minority to be prosecuted under the First Amendment as such statements are non-directional. Huffman is of the view that the Court has used the doctrine in *Cohen* to stop government from eliminating undesirable words and that the court's analysis of speech cases has relied on the doctrine for over five decades.[196]

The court categorically states that the First Amendment; "does not even protect a man from an injunction against uttering words that may have all the effect of force."[197] Shanor observed that the right to free speech arose from debates over speech effects and the early court notably decided in *Schenck*, "that the causal link between leafleting against the draft and others obstructing it was sufficiently clear for no right to extend."[198] The overarching question is; how might people understand speech effect where the audience come from different backgrounds or communities and with divergent shared norms?[199] The fault-line, argues Shanor between various audiences, is obvious in discourse on hate speech.[200] This argument has implications for this research in relationship with whether hate speech that targets racial/religious groups should be excluded from protected speech in the light of the harm-effect it causes. Put differently, why should American courts concentrate on consequences of speech to exclude or allow speech under the First Amendment? The next section attempts to provide answers to these questions.

3.6.2 Advocacy, Incitement and True Threats Exception

According to Casey Brown, the First Amendment protects varieties of speech including extreme speech, emotionally charged speech and even speech that advocates violence, but it does not protect speech that incites

[195] 403 U.S. 15 (1971), 16.
[196] William H III Huffman, *'R.A.V.* v. *The City of St. Paul*: Case Note' (1993) 17 Law & Psychol Rev 263, 265.
[197] ibid
[198] William H III Huffman, *'R.A.V.* v. *The City of St. Paul*: Case Note' (1993) 17 Law & Psychol Rev 263, 265.
[199] William H III Huffman, *'R.A.V.* v. *The City of St. Paul*: Case Note' (1993) 17 Law & Psychol Rev 263, 265.
[200] Ibid.

people[201] to imminent lawless action or speech that threatens harm.[202] Extreme speech is defined as speech that passes beyond the limits of legitimate protest and includes speech used for advocating violence for political objectives and "hate speech" against persons or groups.[203] Most western countries require that speech that incites violence is prohibited in their criminal and civil laws.[204] The focus of this legislations is mainly to capture more obvious forms of hate speech.[205] In *Brandenburg v. Ohio,*[206] where an Ohio Ku Klux Klan leader asserts that revenge might be taken if the U.S. government continues to suppress the white race,[207] the Supreme Court drew a distinction between advocacy and incitement in reversing the conviction of the defendant, held that the First Amendment protection of free speech stops the government from prohibiting, "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."[208] The Supreme Court found the Ohio Statute to be unconstitutional. The court evaluated the law, which seemed to punish mere advocacy but did not make explicit that Brandenburg's derogatory remarks towards Jews and Blacks and suggested vengeance against federal branches of government.[209]

The Supreme Court in that case overturned the conviction of the defendant for violating the Ohio State Statute that made illegal advocacy of violence as a means of political reform.[210] The court held that advocacy of violence or lawless activity could not be punished unless such amounts to incitement of illegal action and likely to instigate imminent lawless action.[211] There is therefore, a constitutional right to advocate violence

[201] Alexander Tsesis, 'Terrorist Speech on Social Media' (2017) 70 VAND L REV 651, 653.
[202] Casey Brown, 'A True Threat to First Amendment Rights: *United States* v. *Turner* and the True Threats Doctrine' (2011) 18 Tex Wesleyan L Rev 281, 287. See also *See* NAACP v. Claiborne Hardware Co., *458* U.S. 886, 927 (1982).
[203] Sarah Sorial, 'Free Speech, Hate Speech, and the Problem of (Manufactured) Authority' (2014) 29 CAN JL & SOC 59, 61.
[204] See Sarah Sorial, 62. Section 319(1) & (2), 1985, Canadian Criminal Code, prohibits the incitement to violence or hatred in a public place of any identifiable group where such incitement can lead to a breach of the peace. Also, Canadian Human Rights Act, s 13 (1), 1977 makes a crime communicating by telephone in a way that exposes a person or persons to contempt, hatred or discrimination-of an identifiable. Australia enacted the Racial Vilification Act, s 131A in New South Wales though enacted in 1996, there has not been any successful prosecution till date under the law.
[205] Sarah Sorial, 'Free Speech, Hate Speech, and the Problem of (Manufactured) Authority' (2014) 29 CAN JL & SOC 59, 62.
[206] Brandenburg v. *Ohio*, 395 U.S. 444 (1969) (per curiam).
[207] Ibid at 446, See also Tsesis, 737
[208] Ibid 447
[209] Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339, 341.
[210] *Brandenburg* v *Ohio* 395 U.S. 444 (1969).
[211] *Brandenburg,* 447.

but the caveat is that such advocacy should not constitute incitement likely to result in illegal conduct.[212] The decision in the case is worrying in the sense that it is not always possible to determine when and which words can incite lawless action and hateful speech may not always result in an imminent illegal action. Rather, such words, may have gradual harmful impact. Though Weinstein supports the holding in *Brandenburg*, he still notes that it is difficult to understand why people in a constitutional democracy should enjoy the right to advocate a violation of enacted laws as laid down in that case.[213]

Incitement appears to be unprotected speech because of its similarity to conduct as Calvert puts it.[214] In a different case,[215] brought against a Republican presidential candidate (until recently, the President of the United States) in 2016, the plaintiffs alleged that under Kentucky law, Trump incited a riot. The plaintiffs argued that Trump's speech, 'get' em out of here' was calculatedly made to incite violence against them and was not protected under the first Amendment.[216] The District Judge, David Hale in March 2017 deemed it reasonable that Trump's statement was understood to be an as order, an instruction, and a command, constituted an advocacy to the use of force.[217]

The decision in *Brandenburg* points to the direction that government may not exclude an idea from public discourse based on its being wrong, evil, dangerous or offensive.[218] The court in *Brandenburg* endorsed tight restrictions on criminal penalty for speech attacking racial or religious group.[219] Mr Brandenburg had stated in his speech, "Personally, I believe the nigger should be returned to Africa, the Jews to Israel"[220] and more

[212] Weinstein 465.
[213] Weinstein, 465.
[214] Clay Calvert, 'First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer' (2019) 51 Conn L Rev 117, 121.
[215] *Nwanguma* v *Trump*, No 16C 101504 (Jefferson Cnty. Cir. Ct. Ky Mar 31, 2016). See Calvert, 121.
[216] Ibid
217Nwanguma v. Trump, 273 F. Supp. 3d 719, 727 (W.D. Ky. 2017), rev'd and remanded, 903 F.3d 604 (6th Cir. 2018). See Calvert, 122.
[218] Ibid 465.
[219] Anthony Lewis, *Freedom for the Thought that we Hate: A Biography of the First Amendment* (Basic Books 2007) 159
[220] Anthony Lewis, *Freedom for the Thought that we Hate: A Biography of the First Amendment* (Basic Books 2007) 159

hateful was "bury the niggers;"[221] "let's give them back to the dark garden"[222] This case shows that attempts to outlaw hate speech have always been thrown out by the Supreme Court.[223] Tsesis observed, that the Court did not focus on these hateful words but rather on the vengeance aspect of the speech.[224] Sarah Sorial avers that relying on incitement by the court in the U.S. as a way of identifying hate speech is inadequate[225] and this writer is in support of this view that America should recourse not to effects of hate speech but on the content of such speech to prosecute offenders. Criminal liability should attach as soon as hateful speech is made and not dependent on the effects the speech will produce or whether it will incite someone to violence. If liability for such words were taken more seriously by the court, people will be more responsible and hate speech may not continue to proliferate in the U.S. While the influential case that established incitement to violence was *Brandenburg,* other cases either strengthened or added more confusion to the test over time.[226]

Sherman states that *Brandenburg* needs to be reviewed in the light of online speech with regards to 'imminence' of the requirement that raises more problems than it purportedly solves.[227] A person who advocates or incites an unlawful action must stimulate a spontaneous and emotional appeal for a collective action from his hearers.[228] The courts in the U.S. need to recognize that in this internet age, unlike when *Brandenburg* and other cases were decided, dissemination of harmful information among hate groups that indoctrinate members against the minority can occur. Due to the changes that have occurred in technology, scholars have argued that the incitement principle established in *Brandenburg* is due for change.[229]

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[221] Ibid *Brandenburg* at 448 (*quoting Noto* v *United States* 367 U.S. at 297-298) See also Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339, 382.

[222] *Brandenburg* at 448 (*quoting Noto* v *United States* 367 U.S. at 297-298) See also Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339, 382.

[223] Jeremy Harris Lipschultz, *Free Expression in the Age of the Internet: Socio and Legal Boundaries* (Westview Press 2000) 11, see also *R.A.V* v *City of St. Paul*, 505 U.S. 377 (1992)

[224] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 735. 737.

[225] Sarah Sorial, 'Free Speech, Hate Speech, and the Problem of (Manufactured) Authority' (2014) 29 CAN JL & SOC 59, 60.

[226] The importance of *Brandenburg* in this work cannot be over emphasized because the defendant targeted mainly black and Jewish minority group in his speech. The ruling in *Whitney* v *California* was expressly overturned in *Brandenburg.* Also, the ruling in *Dennis* v *United States* effectively removed the lower bar set for the government in prosecuting speech. The work argues that the variety of tests-clear and present danger and the imminent threat of harms applied by the Court are inadequate in assessing incitement against targeted groups especially in this age of communication revolution.

[227] Michael J Sherman, 'Brandenburg v. Twitter' (2018) 28 Geo Mason U CR LJ 127, 128.

[228] Michael J Sherman, 'Brandenburg v. Twitter' (2018) 28 Geo Mason U CR LJ 127, 131, see also NAACP v. Claiborne Hardware, *458* **U.**S. 886, 928 (1982). Unless the words or actions led to imminent lawless action, the speech was protected

[229] See Sherman above; Alexander Tsesis, 'Prohibiting Incitement on the Internet' (2002) 7 Va JL & Tech 1;

The true threats doctrine encompasses "words which are voluntarily and intentionally uttered which avow a present or future determination to inflict physical injury on an individual or a group."[230] A true threat must also "convey a serious or genuine threat, and must be distinguished from idle, careless talk, exaggeration, jests, or political hyperbole."[231] Furthermore, the threat must be made, "with the intent of placing the victim in fear of bodily harm or death."[232] There is no condition that the threatened individual has knowledge of the threat, what is important is that the threat had been communicated to another person.[233] On the strength of this reasoning, Tsesis suggests that the Court, failed to ground its opinion on an empirical foundation, which is that the KKK rally may have sparked off a racial conflict.

In *Virginia* v *Black*, [234] the Court explained that 'true threats' are not covered by the First Amendment. The Court recognized in that case that cross burning intended to threaten could be prohibited by the State because of its intimidating effect and the possibility of creating pervasive fear in victims that they are targets for violence.[235] The Court further argued that cross burning with the objective to menace is a type of 'true threat' that places an individual or group in fear of bodily harm or death.[236] Interestingly in this case, the Court held that intent was a necessary component of a true threats statute and remanded the case for the state to determine whether an intent element was implicit in the statute. Zewei opined that the Supreme Court demonstrates in this case that *racist* hate speech rarely consists of psychic assault but merely qualifies as 'political speech' that responds to the need for public discourse.[237]

David S Han, 'Brandenburg and Terrorism in the Digital Age' (2019) 85 Brook L Rev 85; Steven G Gey, 'The Brandenburg Paradigm and Other First Amendments' (2010) 12 U Pa J Const L 971.

[230] *People* v. *Prisinzano*, 648 N.Y.S.2d 267,275 (N.Y. Crim. Ct. 1996**).**

[231] Ibid (Citing Watts, 394 U.S. at 708), A political hyperbole is a statement that considering the conditions surrounding the making of the statemen, that is, its context will not constitute an intentional threat to instill bodily harm or instill fear in the victim.

[232] Paul T Crane, 'True Threats and the Issue of Intent' (2006) 92 Va L Rev 1225, 1227; See also *United States v. Magleby*, 8420 F.3d 1136, 1139 (10th Cir. 2005) (quoting Black, 538 U.S. at 360). The Tenth Circuit Appeal Court in this case, made the speaker's intent a pre-condition for true threat to be established

[233] *Prisinzano,* See also C. Brown, 368-369.

[234] 538 U.S. 343, 359-360 (2003).

[235] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 338, 353.

[236] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 338, 353.

[237] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 42.

In a separate case the Court decided just prior to *Brandenburg,*[238] an incitement case cited to emphasize the similarity between incitement and true threats.[239] The principal opinion on true threats was decided in early 1969 by the Supreme Court was *Watts*. Watts was convicted for allegedly threatening the president, for making the following statement at a political rally, **"**If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.**'** because "'[t]hey are not going to make me kill my black brothers."[240] The majority in *Watts* understood the Statute as punishing, "the knowing and wailful act of threatening the life of the President,"[241] Watts was convicted under 18 U.S.C S 871(a), that prohibit[ed] deliberately and willfully making a threat to take the life of or to inflict bodily harm upon the president of the United States.[242] The Court explained that the threat must be made knowingly and willfully and that the Statute did not require the, "intent to execute the content of the threat."[243] Applying the case contextually, the appellate court, held that the defendant may have intended to make a threat.[244] Justice Wright of the court of appeal, in dissenting, was perturbed that a conviction might pass off on statements meant to be a jest or political hyperbole. The Court drew a distinction between making a threat on one hand and protected speech on the other hand and concluded that Watts words were, 'a kind of very crude offensive method of stating a political opposition to the President.'[245] The court may have come to its decision on the grounds that extremist speech does not involve personal hatred, which is not equated with malevolent anti-Semitism or racism.[246]

This was different from the court's decision in *United States v Kelner,*[247] the Second Circuit Court reviewed the conviction of the appellant who on a news show communicated his intention to murder Yasser Arafat.[248]

[238] *Watts v. United States*, 394 U.S. 705 (1969).
[239] Casey Brown, 'A True Threat to First Amendment Rights: United States v. Turner and the True Threats Doctrine' (2011) 18 Tex Wesleyan L Rev 281, 288.
[240] *Watts v. United States*, 394 U.S. 705 (1969).
[241] Ibid, 678, see also Mark Strasser, 344.
[242] Casey Brown, 'A True Threat to First Amendment Rights: United States v. Turner and the True Threats Doctrine' (2011) 18 Tex Wesleyan L Rev 281, 288-298.
[243] *Watts* at 680, Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339,344.
[244] *Watts* at 680
[245] Ibid at 708.
[246] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1537.
[247] 534 F.2.d 1020 **(**2d Cir. 1976).
[248] Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339, 369, See also *Kelner,* 1022.

Mr Arafat (President of Palestine Liberation Organization) was visiting the US at the time, for the purpose of addressing the General Assembly of the United Nations. Russel Kelner, an American Jew of the Jewish Défense League (JDL), honoured a press conference on a New York Television, dressed in Military Uniform and brandishing a gun while uttering the statement "…We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive".[249] The court in rejecting that it was political hyperbole as ruled in *Watts*, held that Kelner's words were true threats and not protected under the First Amendment. The court laid down more conditions for the definition of true threat in these words; a "true threat" was said to exist "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.'[250] In this case the appellate court strictly drew a legal line proscribing the extent to which the defendant's freedom of speech can be exercised.[251] The basis for these decisions are the doctrinal tests that the *Kelner* court has applied. The next section discusses these tests which in my reasoning are clogs on the wheel of freeing the U.S. jurisprudence from hate speech protection.

3.7 Tests

3.7.1 The clear-and-present-danger test (Schenck)

In *Schenck* v *United States*[252] Justice Holmes rejected an absolutist interpretation of the First Amendment free speech law and proposed the 'clear and present danger' text for when speech can legally be abridged. The government can regulate speech posing a clear and present danger. We will come back to this all-important case later in this chapter, but it is necessary to stress that this was one of the early cases that the Supreme Court decided based on the effect of speech.[253] This test has been identified as the modern jurisprudence of the First

[249]'United States v. Kelner: Threats and the First Amendment ' (1977) 125 U Pa L Rev 919, 919-920.
Kelner 534 F.2d at 1021.
[250] 'United States v. Kelner: Threats and the First Amendment ' (1977) 125 U Pa L Rev 919, 924.
[251] 'United States v. Kelner: Threats and the First Amendment ' (1977) 125 U Pa L Rev 919.
[252] 249 U.S. 47 (1919). 266. generally pages 27-29 and foot note 204- 221 where I discussed advocacy and incitement to violence for more elaborate discussion of Brandenburg and the implication of the Supreme Court's decision in the case.
[253] Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 347

Amendment free speech law.[254] The case relates to a group of socialists who handed out leaflets challenging the use of conscripting people for the war.[255] The group counselled people not to conscript into the army but stand up to their rights against slavery and involuntary servitude, quoting the Thirteenth Amendment to the Constitution.[256] Charles Schenck sent out the leaflets via email and his argument in the court to challenge his conviction, was that his First Amendment free speech rights were violated because he was arrested on account of his speech-mere advocacy.[257] In rejecting the defendant's argument, Justice Holmes, stating the majority opinion, wrote that some speech presents, "such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent"[258]Justice Holmes reasoning was that considering the circumstances at the time-war time, there was every likelihood that young men would heed Schenck's call to dodge the draft. Therefore, Congress has powers to prevent such advocacy.[259] A new standard, the clear-and-present-danger evolved from this decision, to prohibit speech for its proclivity to danger, the speech must create

a) a clear and present danger
b) a danger that Congress has a duty to prevent[260]

The question therefore in every case is to assess whether the words used are utilized under circumstances and are of such a nature as to produce a clear and present danger that will bring about substantive harms that Congress has a right to halt.[261] The Supreme Court upheld the trial court's conviction of Schenck for intending to influence men to dodge the draft.[262] Justice Holmes in establishing a class of speech that the government

[254] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729,732
[255] Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 421
[256] Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 421
[257] Theresa J Pullen Radwan, 'How Imminent is Imminent: The Imminent Danger Test Applied to Murder, with JJ Holmes and Brandeis Dissenting, stating that the correct test of clear and present danger was not applied, at 673, see also Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present
Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 422
[258] Ibid 53 & 54 See also
[259] Ibid 54
[260] Ibid 54 See also *Schenck* (1919), (fn 160) 732, 733.
[261] Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 422
[262] Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 422

can censure uttered that, free speech would not protect a man who shouts fire in a crowded theatre causing panic.[263]

This principle was further elaborated in *Abram* v *United States.*[264]Abram was charged for a breach of the Espionage Act for protesting the intervention of America in a Russian revolutionary battle.[265] Using the text, the court ruled that the defendant's protest could not be proscribed.[266] Justice Holmes in opposing the conviction stated, "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[267] Holmes believed the convictions were only based on Abrams communist affiliations, but that he should not have been convicted since the pamphlets posed no threat leading to the overthrow of the United States.[268] The test therefore established the famous market place of ideas doctrine quoted above.[269] The Supreme Court reasoned that the Statute[270] did not distinguish between speech that incites 'imminent lawless action' with speech that raised 'mere abstract teaching ..or moral necessity for a resort to force and violence.'[271] Subsequent decisions seemed to abandon the requirements for the clear and present danger test in its original form.[272] This principle makes even tighter for those who bring hate cases to court to prove culpability of the defendant. We all know that it is not always clear for speech to present danger that is immediate and clear. The consequences of bad speech can be gradual rather than contemporaneous- Nazi Germany and Rwanda are cases in point.

[263] Ibid
[264] 250 U.S. 616 (1919).
[265]*Abrams* 617
[266]*Abrams 617*
[267] *Abrams (*Justice Holmes dissenting) at 620, See also A. Tsesis, 733
[268] Ibid
[269] See discussion on page (Justification from Truth) p 17 of this chapter.
[270] The Ohio Criminal Syndicalism Statute under which Brandenburg was convicted was unconstitutional. See Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339, 289.
[271] Mark Strasser, 'Advocacy, True Threats, and the First Amendment' (2011) 38 Hastings Const LQ 339, 290.
[272] See *Fiske* v *Kansa*s, 274 U.S. 380 (1927), where the plaintiff was tried and convicted in Kansas for contravening the Criminal Syndicalism Act of the State. The Supreme Court of Kansas reversed the decision. "The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant,
without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution" at 380 268 U.S 652 (1925).

In *Gitlow* v *New York,* which involved distribution of *The Revolutionary Age* materials, (printed in a radical newspaper promoting a manifesto modelled after communism) by the defendants for the overthrow of the government. The Court held that the materials constituted a clear and present danger to the government with majority opinion ruling that when Congress determines certain speech to be dangerous, the court could not hold otherwise.[273] It must be noted that *Gitlow* argued at his trial that the article did not precipitate a violent action, he was still convicted, and his conviction was upheld by the state's appellate court.[274] Justices Holmes and Brandeis dissenting in that case, stated that 'If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views'.[275] According to Radwan, the *Abrams* Court removed the requirement that the danger be "present," while *Gitlow* took away that danger be "clear" so that technically and effectively, the clear and present danger test established in *Schenck*, was abolished.[276] One could also argue that the concept did not survive for too long being saddled with controversy with the courts and legal scholars.[277] Justice Read's words demonstrate that no definition can give an incontrovertible answer to 'what is meant by clear and present danger'.[278] Though the Court at various times associate the word with, 'grave peril,'[279] 'serious threat,'[280] Perhaps the concept was better clarified in *Brandenburg* by Justice Holmes in another test that makes it more difficult for hate speech cases to be successful in court.

3.7.2 Imminent Threat of Harms Test (Brandenburg)

The test in *Brandenburg* v *Ohio,*[281] was a milestone in the clear and present danger test in the decision of the court, first used in *Schenck.* The defendant, a Ku Klux Klan (KKK) leader invited a local press to a meeting which was aired on television. At this event, armed person made demeaning statements against blacks and

[273] 268 U.S 652 (1925). Gitlow and 3 others were indicted and convicted by the Supreme Court of New York for criminal anarchy. The Statute was held to be constitutional, an incitement was affirmed, at 655, 673, 670-71
[274] Encyclopaedia Britannica on *Gitlow* v. *New York, https://www.britannica.com/event/Gitlow-v-New-York.* Accessed 17 March 2020.
[275] *Gitlow* at 673
[276] Radwan at 56, see also *Abrams* and *Gitlow*
[277] Chester James Antieau, 'Clear and Present Danger--Its Meaning and Significance ' (1950) 25 Notre Dame Law 603
[278] *Pennnekamp* V *Florida*, 328 U.S. 331, 348, 66 S.Ct. 1029, 90, L. Ed. 1295 (1946). See also Chester James Antieau, 'Clear and Present Danger--Its Meaning and Significance ' (1950) 25 Notre Dame Law 603
[279] *Thomas* v *Collins* 323 U.S. 516 S. Ct 315, 430 (1945) See also Antieau 604
[280] *Craig* v *Harney*, 331 U.S. 365, 67 S. Ct. 1249 (1947) See also Antieau 604
[281] 395 U.S. 444 (1969), see also pp 27, 28 and 29, on advocacy, incitement and true threat discussion. See also p 23 for more on this case.

Jews.[282] However, the only statement that was recorded that could have been interpreted as incitement was framed in a manner that would have precluded interpretation of such criminal intent.[283] The statement was, "The Klan has more members in the state of Ohio than any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it is possible that there might have to be some revengeance taken."[284] Brandenburg because of his speech on air for advocating violence was convicted for violating the Ohio law.[285] The court in relinquishing the "clear and present danger test" relied on the imminent danger law which could result from speech:

> [T]he constitutional guarantees of free speech and free press do 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.[286]

The three key requirements for the defendant not be protected are; intent (the speech must be seen to be inciting lawless action), imminence (the lawless action must be imminent) and likelihood (the speech is likely to produce such lawless action).[287] The words above imply that only 'imminent lawless action' can be prosecuted so that speech must directly advocate lawless action and the words are likely to bring about lawless conduct.[288] The court did not specify how imminent the action must be to meet that test whether the action and the speech would happen contemporaneously or at different times or day intervals[289] qualify as imminent and according to Radwan, these differences are monumental.[290] The Court also held that 'given that the recorded speeches were abstract assertions rather than advocacy to commit imminent violence, application of the Ohio statute

[282] Alexander Tsesis, 'Burning Crosses on Campus: University Hate Speech Codes' (2010) 43 Conn L Rev 617, 634.
[283] Alexander Tsesis, 'Burning Crosses on Campus: University Hate Speech Codes' (2010) 43 Conn L Rev 617, 634.
[284] Ibid
[285] *Brandenburg* 445,
[286] Ibid at 447
[287] Clay Calvert, 'First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer' (2019) 51 Conn L Rev 117, 122.
[288] Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 429
[289] 395 U.S. 444 (1969) 447
[290] Theresa J Pulley Radwan, 'How Imminent Is Imminent: The Imminent Danger Test Applied to Murder Manuals' (1997) 8 Seton Hall Const LJ 47, 48

would intrude on First and Fourteenth Amendment freedom of speech and assembly.'[291] Another legal scholar is of the view that the test's logical conclusion is that the end justifies the means.[292] Is it possible to determine within the context of human existence, the effects of speech- that is, that a dangerous speech, for example, is capable of causing harm even from the time it was made?[293] Tsesis opines that the standard in *Brandenburg* forestalls punishing empty or emotionally charged threats.[294] The aim of the court in establishing the standard in *Brandenburg*, for Tsesis, is to ensure that government does not prosecute anyone who makes a joke in the heat of anger, or the spur of the moment urges an unlawful conduct.[295]

The duty of the courts to fix a standard for protecting free speech cannot be overstated especially in a multiracial society. The test was designed by Holmes as techniques to balance First Amendment rights against competing general or public interest.[296] In essence, it was utilized by the courts as

> "…a universal formula for limiting legislative impairment of free expression and was equated with an interpretation that tended towards absolutism in the interpretation of these freedoms, as distinguished from the familiar test of reasonableness."[297]

Kauper regards this test as being at the centre of the judicial conscience and a reminder that free speech laws can rank high on the scale of values though there is no exact formula for its application.[298] The Supreme Court unanimously reversed the conviction of the KKK leader who advocated return of Africans to Africa and the Jews to Israel on grounds that there was no evidence that the speaker was inciting 'imminent lawless action' or that such action was likely to happen.[299] This might be due to the fact that the Klan gathering was at a

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[291] Alexander Tsesis, 'Burning Crosses on Campus: University Hate Speech Codes' (2010) 43 Conn L Rev 617, 634.
[292] Ronald J Jr Krotoszynski, 'The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited' (2019) 72 SMU L Rev 415, 418
293 Amanda Shanor, 'First Amendment Coverage ' (2018) 93 NYU L Rev 318, 349
[294] Alexander Tsesis, 'Burning Crosses on Campus: University Hate Speech Codes' (2010) 43 Conn L Rev 617, 634-635.
[295] Ibid at 635.
[296] Theresa J Pullen Radwan, 'How Imminent is Imminent: The Imminent Danger Test Applied to Murder Manuals' (1997) 8 Seton Hall Const LJ 47, 86.
[297] Theresa J Pullen Radwan, 'How Imminent is Imminent: The Imminent Danger Test Applied to Murder Manuals' (1997) 8 Seton Hall Const LJ 47, 86.
[298] Theresa J Pullen Radwan, 'How Imminent is Imminent: The Imminent Danger Test Applied to Murder Manuals' (1997) 8 Seton Hall Const LJ 47, 86.
[299] Anthony Lewis, *Freedom for the Thought that we Hate: A Biography of the First Amendment* (Basic Books 2007) 159

private location with only the journalist invited who was not a participant at the rally.[300] In other words, the language uttered above (Jews returning to Israel and blacks to Africa) was not directed to a public audience which was not the case in *Schenck.*[301] In order to accommodate the weakness of these tests and limit the scope of their invocation by the courts, this writer introduces the balancing test that the courts often use which might help to protect targets or victims of racial and religious hate speech.

3.7.3 Balancing Test

It is argued in this section that intimidating hate speech inflames dangerous attitudes and so the value of such speech should be balanced against the likelihood that it will cause harm.[302] As Delgado and Stefancic put it, it is necessary to understand the dependability of free speech and equal dignity of persons in the society in order to understand the hard work of such a search for balancing competing principles.[303] The European Court on Human Rights did such balancing in *Jersild v Denmark*[304] where the Judges weighed a journalist's right of expression to report facts of racists youths interviewed and the harms imposed by the hate message on its target.[305] In that case, a journalist interviewed a group of young people (who named themselves the, 'Green jackets') who made disparaging remarks against immigrants and ethnic minorities in Denmark. The journalist who relayed the interview on national television was convicted alongside the youths who made the speech. The journalist appealed his conviction on the basis that he was a journalist (reporting expressions of others) and merely acted as one. The European Court held that the commentaries run on TV did not condemn nor affirm the words of the youth and therefore the journalist could not be exculpated from racial discrimination. Rosenfeld reiterates that such balancing adopts a proper approach-place weight on the dignity of the victims of hate speech. In achieving this, it is, 'imperative to put aside

[300] Alexander Tsesis, 'Burning Crosses on Campus: University Hate Speech Codes' (2010) 43 Conn L Rev 617, 635.
[301] Ibid
[302] Alexander Tsesis, 'Dignity and Speech: The Regulation of Hate Speech in a Democracy' (2009) 44 WAKE FOREST L REV 497, 508.
[303] Dale Carpenter, 'The Antipaternalism Principle in the First Amendment' (2004) 37 Creighton L Rev 579.
[303] Richard Delgado and Jean Stefancic, *Must We Defend the Nazis? Why the First Amendment Should not Protect Hate Speech and the White Supremacist* (New York University Press 2018) xv.
[304] Nov. 4, 1950, art. 10(2), 213 U.N.T.S. 221.
[305] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1557.

tired maxims and conversation- closing clichés that formerly cluttered First Amendment thinking and case law.'[306] Defenders of hate speech must show that the interest in safeguarding such speech is convincing enough to overcome the preference for equal protection.[307] Tsesis argues for a synthetic approach to free speech as against the current categorical rule approach adopted by the Supreme Court.[308] For the scholar, free speech is an important element of a representative polity that should advance the welfare of citizens by safeguarding individual liberties on an equal basis. Free speech is not a value that supersedes all other values in a constitutional hierarchy.[309] The analysis of free speech should go beyond the First Amendment to a broad-based ideal of the constitution which includes, 'whether regulations on the content of speech infringe individual liberty balanced against significant social considerations.'[310] Tsesis proposes a normative source for balancing free speech against other values which standard should include a descriptive baseline for evaluating existing doctrine.[311]

The US courts can borrow the balancing approach used in other jurisdictions that are multi-racial. In Singapore, Judge Richard Magnus appealed to racial and religious sensitivity in assessing the balance to apply. The Judge reasoned that given the fragility of the society of the Singaporean society and its race riots, "[t]he right of one person's freedom of expression must always be balanced by the right of another's freedom from offence and tampered by wider public interest considerations".[312]

The United States Constitution, according to Tsesis, protected a racist institution in its earliest form because the same Constitution that safeguarded speech also institutionalized slavery.[313] The drafters of the Constitution did not deem it important to protect the free expression of slaves.[314] The scholar continues that the passage of

[306] Alexander Tsesis, 'Balancing Free Speech' (2016) 96 BU L Rev, 1 25.
[307] Ibid, 25-26.
[308]Alexander Tsesis, 'Balancing Free Speech' (2016) 96 BU L Rev 1, 17.
[309] Alexander Tsesis, 'Balancing Free Speech' (2016) 96 BU L Rev 1, 17
[310] Alexander Tsesis, 'Balancing Free Speech' (2016) 96 BU L Rev 1,17
[311] Alexander Tsesis, 'Balancing Free Speech' (2016) 96 BU L Rev 1, 17. See this article for a detailed discussion on how to balance free speech by the courts.
[312] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 24.
[313] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729.
[314]Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729-730.

the Thirteenth Amendment that abolished slavery did not inhibit the spreading of racially intolerant views.[315] Even in the twentieth century, the United States jurisprudence has endorsed freedom of expression over restriction of dangerous speech unlike other western countries. There is need therefore for the U.S. courts with this history of slavery and other race crisis not to overlook the mode of balancing in free speech cases that protects racial and religious minorities.

It is worthy of note that the German Courts instead of establishing broad defence to protect free speech as the American Courts have done,[316] take the approach of weighing the defendant's freedom of speech against the plaintiff's right to protect his reputation.[317] Both the German and British law prohibit racial and ethnic attacks on minorities that threaten a breach of the peace[318] and will give preference to the dignity of the targets of the invective stereotypes that are harmed because the speech trigger collective biases that diminish their sense of security in the system.[319] From the foregoing, the rule in Brandenburg, the texts and doctrines discussed thus far, it appears that the courts base decisions of free speech on what I refer to as the contingency of harm. Law indeed should have precision. It is not right for the courts to give indeterminate guidelines; that is, to regulate bad speech based on some future unlikely violence. A discussion of the harm principle will be both instructive and necessary here.

[315] Ibid

[316] See chapter 1 on protections of hate speech p 8. Germany incorporated in their Penal Code section 130 (1), that whoever incites hatred against an identifiable group or advocates violent actions against such group through insults or defamation shall be punished with imprisonment from three months to five years; Denmark engraved same in its Penal Code in Article 266b but subject to a fine or imprisonment for up to 2 years; Canada's Criminal Code Section 319 (1), 1985 contains the incitement prohibition liable to an imprisonment of two years if convicted and many other countries such as the United Kingdom, New Zealand , Australia, including Africa (South Africa Constitution, Section 36(1) enacted hate speech laws in their countries codes. US has no federal hate speech legislation against incitement and scholars like Tsesis have written a lot arguing for the US to evolve such a law at the federal level.

[317] George Rutherglen, 'Theories of Free Speech' (1987) 7 Oxford J Legal Stud 115, 117.

[318] Ibid, 117 & 118

[319] Alexander Tsesis, 'Regulating Intimidating Speech' (2004) 41 HARV J ON LEGIS 389, 390.

3.8 The Harm Principle

Government is allowed to limit free speech if necessary, to prevent harm that might impact those in the State.[320] The principle as formulated by John Stuart Mill holds that; "[t]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[321] It provides that interference with individual's freedom can only be justified to the extent that another person is prevented from harm.[322] It therefore gives each individual, the liberty to make a choice that suits him best.[323] In so doing, each person attains an optimal development or as Mill puts it, "become a noble and beautiful object of contemplation"[324] Mill's arguments were well articulated in his book, *On Liberty,* and referenced in law as the theoretical origin for the protection of free speech. Harm, according to Mill, belongs to the domain of action which can operate in a limited manner compared to freedom secured by speech.[325] Speech, Mill continues, cannot be carried out in isolation but occurs in relationship with others, so speech contributes to a chain of events that harm others.[326]

The issue to assess at this juncture is how the U.S. Courts have applied or implied the harm principle in dealing with racially and religiously motivated speech. Harm here will be used in an inclusive, unrestricted sense that is both indirect and psychological.[327] The constitutional doctrine in the 1920s allowed prohibition of speech if they were potentially harmful.[328] The propensity of speech in causing harm, has often not been fully acknowledged by the Supreme Court in the way it has dealt with free speech First Amendment issues-de-emphasizing the possibility that speech that are protected have substantial harmful effects.[329] For instance, in *Gertz* v *Robert Welch, Inc.,* the Court states that under the First Amendment, "there is no such thing as a false

[320] Rebecca L Brown, 'The Harm Principle and Free Speech' (2016) 89 S Cal L Rev 953, 954.
[321] Donald A Dripps, 'The Liberal Critique of the Harm Principle' (1998) 17 Crim Just Ethics 3
[322] Owen Fiss, 'A Freedom Both Personal and Political' in David Bromwich and George Kateb (ed) *On Liberty: John Stuart Mill* (Yale University Press 2003) 179.
[323] Owen Fiss, 'A Freedom Both Personal and Political' in David Bromwich and George Kateb (ed) *On Liberty: John Stuart Mill* (Yale University Press 2003) 179.
[324] Ibid
[325] Owen Fiss, 'A Freedom Both Personal and Political' in David Bromwich and George Kateb (ed) *On Liberty: John Stuart Mill* (Yale University Press 2003) 179.
[326]Owen Fiss, 'A Freedom Both Personal and Political' in David Bromwich and George Kateb (ed) *On Liberty: John Stuart Mill* (Yale University Press 2003) 180.
[327] Kent Greenawalt, 'Free Speech Justifications ' (1989) 89 Colum L Rev 119, 121.
[328] Robert C Post, 'Blasphemy, the First Amendment and the Concept of Intrinsic Harm' (1988) 8 Tel Aviv U Stud L 293
[329] Frederick Schauer, 'Harm(s) and the First Amendment' (2011) 2011 Sup Ct Rev 81,87 &88, See also Brown 957

idea" [330] also Justice Harlan's opinion in *Cohen's* case that those who live in a democracy should recognize the implication of being in such an open society and Justice Brennan's statement in *Rosenbloom* v *Metromedia, Inc.*[331] to rely on counter speech to cure the harms of false speech are all cases that the Supreme Court has undermined the harmful effects of hate speech.[332]

In *Snyder v Phelps,* the Supreme Court ruled that the actions of the defendants were protected under the First Amendment. In that case, members of the Westboro Baptist Church picketed at the funeral of a soldier by holding signs such as, "America is doomed,' 'You will go to hell,' 'homosexuality is bad' and 'thank God for dead soldiers to the point of disrupting events at the funeral.[333] The father of the man that died brought an action of infliction of severe emotional distress against the defendants. The District Court Judge, Richard Bennett, awarded the family five million dollars in damages. The Court of Appeals for the Fourth Circuit held that though defendant's words were repugnant, the judgment violated their First Amendment rights. On further appeal, the Supreme Court held that Phelps and others were speaking on matters of public concern and on public property and had no intention to mask an attack on Snyder on a personal level.[334]

This case exemplifies the clearest statement issued by the Court on the First Amendment protecting speech that is harmful that when the harm caused relates to "public discourse" or issues of "public import" the speaker is protected.[335] In *Brown v Entertainment Merchants Association,*[336] the Court did not allow the State's restrictions on access to minors, of video games that could expose them to killing or maiming but held that the games were protected under the First Amendment in a 7-2 decision.[337] These recent cases, according to Scheuer, reveals the Court's most recent confrontation with speech-creating harm.[338] It must be noted that

[330] 418 U.S 323 (1974).
[331] 403 U.S. 29, 48 (1971).
[332] See Schauer for the reasoning in this section
[333] 131 S. Ct 1207 (2011).
[334] , 131 S. Ct 1207 (2011). see also Schauer, 83.
[335] Ibid, 90, Ethan Fishman, 'To Secure These Rights: The Supreme Court and Snyder v. Phelps' (2011) 24 St Thomas L Rev 101, 102.
336Ct 2729 (2011) 131 S. Ethan Fishman, 'To Secure These Rights: The Supreme Court and Snyder v. Phelps' (2011) 24 St Thomas L Rev 101,
[337] Frederick Schauer, 'Harm(s) and the First Amendment' (2011) 2011 Sup Ct Rev 81, 83.
[338] Ibid

harm resulting from hate speech directed to a racial group does not only affect that group but goes to the fabric of the entire society.[339]

Thus far, the whole essence of the clear and present danger test was to tighten the causal links between speech and resulting harms and so foster public discourse by reducing substantially, classes of speech that could be suppressed constitutionally.[340] For the preceding reason, Holmes and Brandeis contend that the Constitution would only ban speech, if the danger perceived was imminent and there was reasonable ground for that belief.[341] The Court's approach may injure the interest of targets of racial and religious hate speech in the society because the harm that may be done may not always be clear and imminent. The harm that justifies legal intervention is identified, as a scholar noted, by recourse to potential strife that may crop up between the various races and the risk of violence being omnipresent due to hate speech.[342] Speech should be restricted if its harm exceeds its value[343] and the harm should be nipped from the bud before it progresses. Nazi hate speech developed and was embedded in the minds of its hearers for years-the harm it did was not immediate. It gradually affected culture and politics to a greater extent over time and the death of millions of a race was the result. Rwanda was not an exception. Hateful speech of a racial or religious type can be unarguably invidious and the courts should not base its regulation on the imminence of the harm.

339 Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 25.
340 Robert C Post, 'Blasphemy, the First Amendment and the Concept of Intrinsic Harm' (1988) 8 Tel Aviv U Stud L 293.
341 Robert C Post, 'Blasphemy, the First Amendment and the Concept of Intrinsic Harm' (1988) 8 Tel Aviv U Stud L 293.
342 Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 21.
343 Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 30.

3.9 Conclusion

This chapter has established the constitutional foundation for this inquiry. The cases, principles, tests, doctrines, and concepts discussed here signpost the attitude of the courts in the United States with regards to excessive protection afforded free of expression. As a result, American jurisprudence has not been able to offer even minimal support against racial and religious hate speech by at least allowing the development of appropriate federal legislation despite repeated calls by scholars that such a law be enacted to protect racial minorities. This conclusion appears evident following decisions in *Brandenburg, R.A.V., Phelps* and other State Statutes that were struck down either as overbroad or vague. The courts should not downplay the content of speech as against the outcome speech produces. Law should have some degree of certainty. The courts have ruled on what constitutes incitement on the probability of harm and even when there is likelihood that harm might occur, the courts seem to take a different route. The need to contextualize harm cannot be overemphasized in this work especially when racial and religious minorities seem heavily impacted by the rulings of the courts such as in *RAV* and *Brandenburg*.

The courts in America ought to consider the content as well as the outcome hateful speech produces and that mere reliance on imminence of violent outcome has been found wanting in contemporary times by what happened in Germany and Rwanda. History can as well repeat itself if the United States courts, particularly, the Supreme Court continues its liberal approach to hate speech interpretation of cases involving racial and religious minorities in the country. It is worth mentioning at this point that the approach of the court as seen from the cases reviewed in this chapter is strict reliance on legal principles and disregard to morality in adjudging each case. For this reason, leading scholars in this area [344] have referred to the First Amendment jurisprudence as formalistic (law devoid of conscience). For this reason, therefore, Ronald Dworkin, an American theoretical and jurisprudential giant, is introduced as the theory framework in this research with the scholar's emphasis on the morality of law to address the problem of a First Amendment law without

[344] See footnote 176 of chapter one. Scholars in this area include Tsesis, Waldron, Matsuda et, Delgado and Stefancic among others have all emphasized in different articles and books the judicial approach to the interpretation of the First Amendment free case cases that strips the law of good morality that should guide adjudication of cases.

conscience. The next chapter discusses major concepts and phrases that American courts can utilize in adjudicating free speech cases. The chapter extrapolates from the scholar's distinguished scholarship on how to remedy the flaws inherent in the approach of the courts and generally the way the American people respond to their First Amendment right.

Chapter Four

Ronald Dworkin's Interpretative and Legal Framework

Introduction

Ronald Dworkin's theory of adjudication can be a powerful tool to critique the performance of the United States Supreme Court with regards to legislating cases of free speech that relate to racial and religious minorities.[1] The first chapter discussed the rule in *Brandenburg* that laid the foundation for the extraordinary freedom of speech in the US.[2] The chapter identified the dilemma faced by racial and religious minority groups who live in a society that is the most outspoken in the world. As we saw, hateful words are uttered there with little or no fear of consequences.[3] The second chapter details my research agenda with regards to the source, the content and inherent challenges of conducting research of this nature. In exploring the doctrine of incitement as handed down by the Supreme Court, the chapter proposes that the research will utilize online media content from Google to conduct a thematic analysis. The third chapter explored the First Amendment protections with a view to exposing areas of the law that seemingly protect hatred motivated speech of minority racial and religious groups (referred to as 'outgroups', to borrow the words of Tsesis).[4] This fourth chapter situates this work in the legal tradition the researcher adopts. It discusses Ronald Dworkin's legal and moral theory and how it can inform and enrich the attitude of the judiciary in practice, specifically the Supreme Court in adjudicating and interpreting cases impacting outgroups. The chapter intends to illustrate and extrapolate from Dowrkin's distinctive scholarship and thoughts in both the theory and practice of law. In one

[1] Dennis Davis, 'Dworkin: A Viable Theory of Adjudication for the South African Constitutional Community' (2004) 2004 Acta Juridica 96, Davis considered Dworkin's adjudication theory a viable one to interpret South African judiciary racist legislations. This writer is circumspect of the interpretation in cases such as *Brandenburg, Skokie, R.A.V* and several other cases already discussed in this work but keeping in mind that such cases are unusually damaging of racial and religious minority groups but that the judges came to the decisions on the tenets of the American legal system founded on freedom and liberty of the individual to the highest level.

[2] Anthony Lewis, *Freedom for the Thought that we Hate* (Perseus Books Group 2007) IX, see also Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 730, Tsesis writing on the defects of the First Amendment lend support to the fact that the United States jurisprudence essentially protects freedom of speech over the restriction of hate speech.

[3] Lewis, Ibid

[4] Outgroups and racial/religious will be used interchangeably as synonyms in this research.

of his most celebrated books, *Law's Empire* (1986), he argues that legal positivism[5] is grossly inadequate, in its response to legal practice because of its reliance on legal rules rather than on legal principles especially as apparent in hard cases which are usually adjudicated not based on rules but on principles.[6] The chapter argues that Dworkin's thoughts on the functions of judges and the courts could play unique role in ameliorating speech that incites hate against racial and religious minorities in America. Furthermore, Dworkin's thoughts if adopted, will inform the judgments of the Court on online advocacy, incitement, and threat of hate against outgroups that have become pervasive under the America system.

Scholars will wonder why the choice of Dworkin when he is widely regarded as presenting one of the most persuasive arguments against hate speech censorship.[7] The intent here is not to delve into Dworkin's arguments and strong support lent by scholars such as Gould, Weinstein, or numerous others on why censoring speech violates the major principles of liberal and democratic governance. It is also not focused on Waldron's powerful defence of hate speech prohibition but is rather an attempt to buttress the argument that non-censorship of racial and religious hate speech contradicts Dworkin's proposition that all individuals in a political or legal entity should be treated with equal concern and respect.[8] It is also not evident for this writer how Dworkin's 'law as integrity' can thrive in a legal system rife with race and religious hate speech.[9]

[5] The legal dictionary defines, 'legal positivism' as a school of thought that advocates that the legitimate sources of law are those written rules, principles and legislations expressly enacted by a governmental entity. Legal positivists believe that law is strictly separate from morality which is what Dworkin directly opposes. https://legal-dictionary.thefreedictionary.com/Legal+Positivism. Accessed 6 March 2020.
[6] Ronald Dworkin made a distinction between simple and hard cases. For him hard cases are those types of cases that must be settled with ligation in a court of law. A discussion of legal principles is in the last phase of this chapter where Dworkin distinguishes between legal rules and principle.
[7] Rebecca Ruth Gould, 'Is the "Hate" in Hate Speech the "Hate" in Hate Crime? Waldron and Dworkin in Political Legitimacy' (2019) 10 Jurisprudence 171
[8] See note 36 below and the subsequent paragraph, p 8 of this chapter.
[9] See discussions in this chapter, notes 27-33.

4.1 The Moral Reading of Free Speech Cases

Pauline Westerman regards a theoretical framework in doctrinal legal research as providing both a guideline and a perspective from which a piece of work can be described in a meaningful way.[10] The scientific attribute of research is adjudged largely by how and the extent to which the data is evaluated or interpreted within a theoretical framework.[11] Hoecke referred to legal doctrine as a hermeneutic discipline that deals largely with interpretation of texts, cases and statutes.[12] In such a discipline, documents and texts constitute the object of the research while interpretation become the activity of the researcher.[13] Hoecke emphasizes the argumentative nature of legal research that goes beyond interpretation by incorporating a broader perspective to address and answer a concrete legal question(s) based on generally or least acceptable views.[14]

In this research, 'outgroups' will be used as synonym for racial and religious groups since we assume, as mentioned in the preceding chapter, that race and religion are not easily separable. We observed that most free speech cases ultimately get to the highest court (Supreme Court). So Tsesis states that the extent to which hate speech can be regulated rests on Supreme Court precedents.[15] The third chapter revealed the deterministic approach of the Supreme Court in adjudicating free speech cases.[16] We recall that the First Amendment free speech law merely states what Congress should not do (abstract provision) rather than an express provision of what constitutes free speech. Amendment 1, therefore leaves interpretation and prescription of legal principles of freedom of speech in the domain of the Court.

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[10] Pauline C. Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 90

[11] Jan BM Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 111. Vranden referred to an Article by Pauline Westerman and Marc Wissink published in the Dutch *Nederland Juristenbled* (NJB), On Legal Doctrine as an Academic Discipline (Translation of the title of the Article)

[12] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 4

[13] Ibid

[14] Ibid

[15] Henceforth this research will refer to the Supreme Court as, "The Court".

[16] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech'(2000) 40 Santa Clara L Rev 729, 730. We recall that the state can only sanction speakers based on the speech producing, "imminent lawless action" or likely to produce such action. See also foot notes 259 & 272 in chapter two.

The choice of Ronald Dworkin's theses for this research, is due to his background and preoccupation with the American constitutional law. Adopting a moral perspective approach in law, he was arguably the greatest philosopher of law that America ever produced. Dworkin in his critique of legal positivism's conception of law, brilliantly drafted a new theory of law that is normative (moral). According to Kramer, the United States system falls short of perfection and is morally benevolent and so Dworkin's view of law as a domain for working out of moral principles is a good ground upon which to stand to challenge a deterministic and relativistic view of law approach which has been adopted consistently by the Court on free speech cases.[17] Guest notes that humanity is at the core of all of Dworkin's writings as he describes his work as based on 'morality', 'equality', 'freedom' and 'integrity' among others.[18]

Dworkin's theories are remarkable as well as intellectually astute, and Williamson qualified his works as creating 'shockwaves' among scholars of jurisprudence.[19] In this work, there is no intention to criticize Dworkin's theses or to present the arguments of his numerous critics. This would derail attention from the focus of this research. This researcher has identified Dworkin's whole theses inter alia on law, morality, justice, rights, and freedom as concepts that will modify the attitude of the U.S. Supreme Court if adopted.

The challenge in this chapter will be to identify how to examine Dworkin's perspectives on legal theory and practice without necessarily going into discussions of legal positivism, or natural law, Hart's concept of law among others, because these substantially influenced his theory of law. The intent of this writer is to bring in these influences to the extent they assist in clarifying his thoughts, not to attempt an elaborate discussion of certain paradigms and persons that influenced Dworkin.

[17] Matthew Kramer, 'Also Among the Prophets: Some Rejoinders to Ronald Dworkin's Attacks on Legal Positivism' (1999) 1 Canadian Journal of Law and Jurisprudence 53

[18] Stephen Guest, *Ronald Dworkin* (Stanford University Press 2013) 8

[19] Marcus Williamson, 'Professor Ronald Dworkin: Legal Philosopher Acclaimed as the Finest of His Generation' *Independent* 15 February 2013 https://www.independent.co.uk/news/obituaries/professor-ronald-dworkin-legal-philosopher-acclaimed-as-the-finest-of-his-generation-8497540.html. Accessed 25 January 2020.

For Ronald Dworkin, judges and the courts are key players in a polity because they are concerned with not only safeguarding and enforcing rights, but also involved with the interpretation of legal principles.[20] The First Amendment declares individual rights against the government in broad terms and in abstract language.[21] Dworkin proposes a moral reading of the provisions of the constitution by lawyers, judges and citizens - interpret and apply the clauses on the understanding that they invoke moral principles about political decency and justice.[22] The moral reading chips away the difference between law and morality by enmeshing one into the other, it, 'brings political morality into the heart of constitutional law.'[23] Looking at Dworkin's works, his writings are subsumed in morality without which his whole argument collapses, thus the adoption of this theoretical perspective.

4.1.1 A Moral Framework

A moral/normative model is epitomized by constitutional integrity through the application of legal principles by judges as Davis distinctly puts it.[24] The moral reading mandates judges to find the meaning of abstract moral principles (such as contained in the wordings of the First Amendment), restate them to the understanding of all who live in the society within a given legal system, and apply such principles to the 'concrete political controversies' that come before them.[25] The First Amendment free speech laws are a set of abstract provisions that are given meaning by the actors in the law courts through interpretation. A search for a normative framework that provides protection in the American legal system for outgroups against speech inciting hate is the overarching aim of this research.

[20] Roger Cotterrell, 'Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy' (1987) 1987 Am B Found Res J 509, 512

[21] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold Hongju Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 81

[22] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold Hongju Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 80.

[23] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold Hongju Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 80,82.

[24] Dennis Davis, 'Dworkin: A Viable Theory of Adjudication for the South African Constitutional Community ' (2004) Acta Juridica 96, 98.

[25] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold H Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 81, 87.

For Taekema, a framework is necessary to provide a standard or values that serves to support a judgment.[26] Distinguishing between frameworks that are internal (which are principles that are part of the law) and external (constitutes theories that provide the standards), Taekema emphasizes that the distinctions between the two are not apparent. Internal frameworks, according to the writer, traces the normative basics within positive law.[27] The internal standards for this researcher, should go beyond principles of law to incorporate the experiences of outgroups in hate speech cases. The external standards will incorporate such normative frameworks without which outgroups will not find justice. For instance, the theory of truth (typified in the marketplace of ideas theory) that allows dangerous speech to pervade the public space, continuously relied on by the Supreme Court, is a standard that damages the equal protection of the minority under the law.

Legal doctrine is termed a normative discipline because it systemizes norms and makes choices between values and interests, primarily looking for a better law amidst competing values.[28] There are scholars who argue against the normativity of legal doctrine on grounds that law both prescribes and creates norms and so can be used for the practical purpose of deciding what to do.[29] The search for a better law, gives rise to an empirical research- connoting elements external to law which includes inter alia, philosophy, morals, politics and sociology.[30] Hage refers to a better law as the H -standard, a law that "maximizes the long-term happiness of all sentient beings."[31] Ronald Dworkin calls this, 'law as integrity', a model of law that reveals the political history of the legal community and informs judges on how to identify legal rights in order to obtain consistent understanding of justice and fairness.[32] Dworkin writes:

[26] Sanne Taekema," Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice" (2018) www.lawandmethod.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010. Accessed 22 January 2020.
[27] Sanne Taekema," Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice" (2018) www.lawandmethod.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010. Accessed 22 January 2020.
[28] Ann Ruth Mackor, 'Explanatory Non-Normative Legal Doctrine. Taking the Distinction between Theoretical and Practical Reason Seriously' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 46
[29] Ann Ruth Mackor, 'Explanatory Non-Normative Legal Doctrine. Taking the Distinction between Theoretical and Practical Reason Seriously' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 46
[30] Ann Ruth Mackor, 'Explanatory Non-Normative Legal Doctrine. Taking the Distinction between Theoretical and Practical Reason Seriously' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 46
[31] Jaap Hage, 'The Method of a Truly Normative Legal Science' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 19
[32] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 225.

> …propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.[33]

In this passage, Dworkin presupposes a holistic approach to law and legal rights that involves all members of the legal system (community) and does not imply, to use the words of Justice Holmes, in *Gitlow* 'the beliefs expressed in proletarian dictatorship destined to be accepted by the dominant forces of the community.'[34] Tsesis adds that the inference that can be made from Justice Holmes's statement in the above case is that the dominant class may use speech to suppress the ideals of democracy which includes protection of civil rights.[35] One would assume that Dworkin's law as integrity was evidenced in *Beauharnais v. Illinois,*[36] the only decision of the Supreme Court on the First Amendment that took into consideration, historical and political facts in upholding the conviction of the defendant rather than recourse to abstract theory, that is, the provision of the First Amendment.[37] A government's obligation to maintain the integrity of its constitutional system must include the protection of both speech and equality.[38] Dworkin expresses this as follows;

> I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern: and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document…[39]

From the foregoing, it appears obvious that individuals are at the centre of Dworkin's work as he reiterates the need for them to be protected from abuse of government while drawing attention to how the legal system should be conducted in practice. For him, law, morality, and politics converge at the centre, referred to as the

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[33] Ibid

[34] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 768.

[35] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 768

[36] See Chapter three-foot notes 166-173

[37] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 771.

[38] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 779.

[39] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold H Koh & Ronald C Sly (eds) Deliberative Democracy and Human Rights (Yale University Press 1999) 81, 87.

social practice of law. This writer considers Dworkin's moral reading of the constitution a viable approach for lawyers and judges in adjudicating free speech cases. Laws and legal principles devoid of moral elements may not yield fairness for outgroups in a multi-racial society and a volatile system where racial and religious minorities are placed at risks with history of repeated attacks.[40] Tsesis in outlining the shortcomings of the First Amendment jurisprudence decried the paradoxical nature of the American Constitution.[41] The scholar further states that the Supreme Court has focused more on speakers' liberties than protecting the historically oppressed racial (religious) and ethnic groups.[42] For Tsesis, hate speech 'breeds prejudice' because such speech 'indoctrinate listeners' with beliefs that are likely to justify force and persecutions against them.[43] Perhaps, the Littleton,, Colorado shooting,[44] the Illinois/Indiana drive-by shooting[45] call for a reassessment of contemporary free speech doctrine and criminal legislation that bans racial and religious hate vitriol intended to incite violence.[46] The theoretical investigation of hate speech will be incomplete without looking empirically to examine if the non-regulation of hate speech leads to incendiary acts of mass violence in America.

4.1.2. A Socio-legal Framework

The nineteenth century witnessed the development of legal scholarship as a practical discipline.[47] Quoting Ross, Hoecke states that verification consists in checking statements in legal doctrine against the background

[40] There have been attacks on the minority on American soil in places of worship that led to multiple fatalities-some examples are the Tree of Life Synagogue in Pittsburgh (Jewish), Emanuel African Methodist Church in Charleston (African American), First Baptist Church in Sutherland Springs (Silk). At least over 100 lives have been lost to church shootings from 1999 till date Greg Garrison reports that 99 lives have been lost, including the killers from 1999 to 2017, https://www.al.com/living/2017/11/post_346.html. >accessed 18 February 2020.

[41] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729. Tsesis refers to the constitution here and writes that the drafters of the constitution did not incorporate protections for speech of the slaves after the passage of the Thirteenth Amendment. See also chapter 3 Foot notes 308-309.

[42] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 730.

[43] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 731.

[44] The Columbine shooting Spree that occurred when two student targeted people on basis of race and religion in 1999.

[45] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 730.

[46] Ibid 731

[47] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Hart Publishing 2011) 5.

of judicial practice.[48] For Hoecke, certain laws exist, and their correctness can be verified against the background of what happens in real life. Though legal reasoning can neither be true or false but can only be less or more convincing.[49] Hoecke concludes that legal doctrine is not reducible to a one-dimensional discipline but a combination of several. Terry Hutchinson cites an example with a workshop in 1995 (at the Canberra University) on a particular research project on corporate law, that used various methodologies, comparative legal analysis, law and economics, historical methods, and theoretical critique.[50] When a research project is conducted within a wide-range and varied area, in a legal context, it falls within the purview of socio-legal studies.[51]

A socio-legal research perspective is an approach to the study of law that covers the theoretical and practical analysis of law as a social phenomenon.[52] Ronald Dworkin belongs to the class of scholars who proposes a socio-scientific/legal approach to the study of law. The scholar expresses a participant's viewpoints of the study of law thus,

> We need a social theory of law, but it must be jurisprudential just for that reason. Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective, like innumerable histories of mathematics, whether they are written in the language of Hegel or of Skinner.[53]

The preceding quotation demonstrates that Dworkin believed in going beyond the theoretical study of law. Disputes about law do not concern what the law is but what the law ought to be (he calls such disputes, the 'semantic sting').[54] In using media outlets to gauge opinions on incitement to hate or violence, this practical aspect augments the theoretical discussion. Kramer implied this conclusion in stating that a person who wants

[48] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Hart Publishing 2011) 6.
[49] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 7.
[50] Terry Hutchinson, 'Doctrinal Research' in Dawn Watkins and Mandy Burton (eds*) Research Methods in Law* (Routledge 2013) 7- 8.
[51] Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies: A challenge to the Doctrinal Approach' in in Dawn Watkins and Mandy Burton (eds*) Research Methods in Law* (Routledge 2013) 34, 35.
[52] Ibid
[53] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 14
[54] Ibid 45.

sufficient exposition of the law will espouse basic patterns of legal reasoning –expound judicial argumentation *with practice*,[55] and incorporate other methods in the study of law. It is no wonder that Dworkin posits a theory of law that is typically liberal and moral.

4.2. The Liberal Theory of Law

"Our constitution is law, and like all law, it is anchored in history, practice, and integrity"[56]

The quotation above sums up the essence of Dworkin's theory of law. Law is the 'best moral interpretation of existing practices of justifying the coercive power of governments against their subjects; law is therefore a subset of politics which is, in turn, a subset of morality.'[57] In *Taking Rights Seriously,*[58] Dworkin discusses the general theory of law which begins with critique of legal positivism, especially the positivist model presented by H.L.A. Hart. The legal positivists maintained a strict separation of law and morality, while arguing that law is both a construction of social facts and an object of scientific knowledge.[59] Dworkin's attack on legal positivism was 'sustained' and 'detailed.'[60] In presenting a dual theory of law; Dworkin argues that the analytic element enumerates conditions to be met for law to exist while the normative component aspires for what the law ought to be (which includes the behaviour of legal institutions).[61] He also attacks pragmatism and natural law theories stating that judges should interpret law to serve fairness and the best interest of the community.[62] Dworkin rejects both positivist and pragmatic theory of law and adopts a third theory-law as integrity. Law is, "an interpretative account of constitutional practice that takes legal rights seriously" adept

[55] Matthew Kramer, 'Also Among the Prophets: Some Rejoinders to Ronald Dworkin's Attacks on Legal Positivism' (1999) 1 Canadian Journal of Law and Jurisprudence 55, emphasis mine.
[56] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold H Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 81 at 90.
[57] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 12
[58] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).
[59] Giorgio Pino, 'Positivism, Legal Validity, and the Separation of Law and Morals' (2014) 27 Int'l Journal of Jurisprudence & Philosophy of Law 190, 192-193, In this work, I have no intention of doing a detailed discussion of legal positivism as that will be a deviation from my main project but just to mention in passing the trend of thought that influenced Dworkin's writings. Though I have to acknowledge the difficulty of discussing Dworkin's thoughts while expunging the major tenets of legal positivists thoughts and teachings.
[60] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 27
[61] Jules L Coleman, *Taking Rights Seriously*, 66 California Law Review, 886.
[62] Robert Justin Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism (Durham, Duke University Press) 77, 78.

at searching for right answers to constitutional disputes.[63] In the scholar's view, positivism takes right seriously but is unable to proffer right answers to legal issues, pragmatism on another hand, is more likely to identify morally right answers to legal questions but law as integrity combines both approaches.[64]

The State must safeguard the personal autonomy of individuals, that is, "right to be treated with equal concern and respect,"[65] through reasoned debate (and consistency) of the law by public officials. Dworkin proceeds from rejecting law as mere descriptive proposition that constitutes 'plain facts.'[66] Law as plain facts are past decisions by legal institutions, city councils and courts.[67] For instance, if the law stipulates that immigrant students must own a biometric resident card, then that is the law so questions about that law can be obtained from where the records of the institution are kept. For Dworkin, grounds of law can either be on, plain facts as recorded in 1) as stated above and, 2) originating from plain historical facts. The law is not just plain fact but encompasses an interpretative understanding of law that is evaluative, comprising of what makes the most moral sense of the practices in a legal system.[68] Under this judicial system, legal actors- judges and lawyers have ideological disagreements over what law is and the criteria that apply in determining grounds of law.[69] Interpreters of the law should therefore strive for what is fair and just, and also take cognizance of connected events while also accounting for remarkable differences.[70]

Dworkin identifies three categories of law; first, law as a distinct and complex social institution that may be society's instrument for oppression. Second, law and rules of law have standards with a particular historical

[63]Robert Justin Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism (Durham, Duke University Press) 77.
[64] Robert Justin Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism (Durham, Duke University Press) 77, 78.
[65] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 28.
[66]Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 29. Dworkin's criticisms of positivism were based on two premises- that positivist had pure distortion of law as consisting of 'social facts,' if this were the case, the disagreement on the meaning of law would be theoretical. Rejecting law as social fact, he argues that law is interpretative and that in the science of law, the disagreements concern criteria of legality, which borders on interpretation and not on empirical facts. Law does not consist of social fact. See Milos Zdravkovic, 'Theoretical Disagreement About Law' (2014) 62 Pocetna. http://ojs.ius.bg.ac.rs/index.php/anali/article/view/35/70 Accessed 20 February 2020.
[67] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 7.
[68] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 31.
[69] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 31.
[70] Michel Rosenfeld, 'Dworkin and the one Law Principle: A Pluralist Critique' (2005) 3 Dans Ravue Internationale De Philosophie, 363. Revue-internationale-de-philosophie-2005-3-page-363.htm. Accessed 6 February 2020. See also Law's Empire, 47

antecedent, that is, those laws enacted by law makers or settled by judges. Third, a source of law that emanates from rights, duties, powers, and social relations-Dworkin relates to this aspect of law as 'propositions of law' to distinguish between propositions of law as a social institution and propositions about laws or legal rules.[71] The government has responsibility to recognize and enforce through the court such rights and duties. This model of enforcement is not synonymous with Justice Holmes view of legal rights in which the sovereign acts upon the express will of the majority, for instance, 'withhold liberty and property from outgroup members.'[72] Law justifies holding back or enforcing state coercion which a responsible government considers in employing such powers.[73]

Ronald Dworkin has argued for a theory of law and free speech embedded in personal morality, legal justification and political legitimacy,[74] not law engraved in the hands of the sovereign whose duty is to unleash the power to punish.[75] The moral reading is about the meaning of the constitution and 'not a theory about whose view of what it means must be accepted by the rest of us.'[76] In Dowrkin's view, the legal system cannot be hijacked by any group of people, neither judges, nor the sovereign or government but worked out by the community by their practices and history. Judges nevertheless hold a unique role in having to adjudicate cases in the legal community, this is the focus of the next section.

[71] John C Vlahoplus, 'Understanding Dworkin' (1993) 1 Geo Mason Indep L Rev 153, 163

[72] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 767. Tsesis here points out Justice Holmes idea of what legal rights means-a concept of law based on the sovereign having the ability to rule by force.

[73] Ibid

[74] John C Vlahoplus, 'Understanding Dworkin' (1993) 1 Geo Mason Indep L Rev 153, 157

[75] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 767. Tsesis comments on Justice Holmes view of law in contradistinction with Dworkin's

[76] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold H Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 81, 91.

4.3. Theory of Adjudication

Dworkin's theory of adjudication boarders on how a judge reads a text of the law. This is pivotal to the First Amendment provision, regarded as an abstract provision that is given relevance or meaning by judges through adjudication and interpretation. He creates a colossal and rigorous justificatory theory of judicial adjudication that withstands the test of time, which Pannick described as sophisticated.[77] Kieran states categorically that any meaningful argument against a judge's use of ethics, proceeds and terminates with Dworkin.[78]

Dworkin discussed the adjudication theory for the first time in his 'Hard Case' thesis where he laid out the ideal duties of judges (what they ought to do) and the function of judges (what they really do). He uses a hypothetical 'Hercules' to represent a superhuman judge with extraordinary skills and knowledge whose duty is to formulate 'a political and moral right...that best explains existing legislation, custom and precedents'[79] Hercules, will gauge the ruling theory of law that will be a guide to the rights to apply in reaching the best possible decision.[80] This task is accomplished by the highly talented judge (Hercules) through application of precedents in hard cases. Judicial decisions, according to Dworkin, affect a great deal of people in America and other jurisdictions because the law becomes what the judges stipulate. Adjudication is essentially how a judge reads a text of the law and fashions the appropriate blend between interpretative freedom and the constraints imposed by the text.[81] Dworkin submits that there is a moral dimension to any legal action and a risk of an act of public injustice where a judge decides who shall have what and who has behaved well.[82] For the scholar, if the judgment is unfair, a moral injury is inflicted on a member of the community because the convicted person has been stamped out as a violator.[83] The injury is substantial 'when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma' and vice versa.[84]

[77] David Pannick, 'A Note on Dworkin and Precedent' (1980) 43 Mod L Rev 36.
[78] Francis Kieran, 'Duelling with Dworkin: Political Morality in Constitutional Adjudication' (2006) 6 U C Dublin L Rev 30, 31.
[79] David Pannick, 'A Note on Dworkin and Precedent' (1980) 43 Mod L Rev 36.
[80] David Pannick, 'A Note on Dworkin and Precedent' (1980) 43 Mod L Rev 36.
[81] Dennis Davis, 'Dworkin: A Viable Theory of Adjudication for the South African Constitutional Community' (2004) 2004 Acta Juridica 96, 97
[82] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 1.
[83] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 2
[84] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 1-2.

Dworkin would have been signposting in this instance, the attitude of the Court, in not attaching much significance to the derogatory speech against racial and religious minority such as *Brandenburg, Snyder, R.A.V* among others. It is not arguable that someone who advocates a return of Jews to Isreal or blacks to Africa or church members carrying large posters at the funeral of a dead soldier with words such as, 'You are God's enemy' 'You will go to hell' 'Pray for more dead soldiers will leave substantial emotional injury or harm to the recipients of such speech when the victims are turned away by the Court. It is surprising that Dworkin alludes to the undesired stigma that a litigant who did not obtain justice from the courts would suffer though he opposed derogatory speech regulation. This writer is of the view that Dworkin misapplied his own theory and failed to realize that conclusion. Jeremy Waldron took on Dworkin in his book, *The Harm in Hate Speech,* that it is not possible to take Dworkin seriously on his legitimacy and free speech argument. However, if Dworkin had lived to this present time in America, he would have probably improved or qualified some of his liberal teachings on free expression. A more detailed discussion of Dworkin's free speech thesis is presented later in this chapter.

The duty of Judges should include assessing and applying competing rights in court for which one party has a right to win at the end.[85] Judges however deploy their moral and political opinions in adjudicating cases. Dworkin rejects the view that in hard cases, judges employ legislative discretion while deciding for one party over another, this idea, be argues is incompatible to democracy because judges should not be involved with law-making.[86] Denvir in support of the above view, points out that the controversy over the correct model for the United States constitutional adjudication is between judicial 'constraint'(passivist) and the 'activist' position. The writer states that the passivist model warns the Supreme Court of the nightmare of judges duplicating the work of legislatures while the activist enjoin the court to move towards protecting individuals and groups that are powerless to defend themselves in the power politics. The judiciary should stay engaged with interpreting what the clauses of the constitution mean-finding also the correct approach to interpretation.

[85] David Pannick, 'A Note on Dworkin and Precedent' (1980) 43 Mod L Rev 36
[86] David Pannick, 'A Note on Dworkin and Precedent' (1980) 43 Mod L Rev 36

4.3.1. Theory of Interpretation

The above interpretation 'imminent lawless action' appears to be inconsistent with the requirements of legal certainty for how can a future lawless action be determined? What about speech capable of producing long term lawless action as in Nazi Germany and Rwanda? The First Amendment requires construction[87] which is demonstrated in the words of Rogow as he recounts his experiences at the Supreme Court thus

> Forty years of lawyering, nearly 400 reported cases, and more than 40 major First Amendment cases have brought me closer to understanding why the 44 words of the First Amendment cause such ferment. More than 800 Supreme Court decisions address First Amendment issues, and most of them are unanimous. …differences in political, economic, religious, and social philosophy, differences that are often exacerbated by the historical period in which the cases arise.[88]

The quotation above is in consonance with Dworkin's theory of law as an 'interpretation' of legal practices[89] that takes into consideration the history and political practice synonymous with the people and so;

> …there must be an interpretative stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing if it is…but it must fit every aspect or feature of the standing practice.[90]

Interpretation finds a language that fittingly discovers the content of what the framers of the constitution had in mind when drafting the words of the constitution.[91] According to Dworkin, moral reading turns judges into philosopher-kings-who impose their personal convictions on others by finding the best moral principles of

[87] Lawrence B Solum, 'The Interpretation-Construction Distinction' (2010) 27 Const Comments 95, 96. Solum in this article draws the interpretation-construction distinction. Interpretation discovers the semantic content of a legal text while construction is the process that gives a text (such as the provisions of the First Amendment) legal effect (either by translating the linguistic meaning into legal doctrine or by implementing the text. Solum argues that legal theorists must distinguish between the two concepts to enable legal theorists to clarify the nature of important debates.

[88] Bruce S. Rogow, 'A First Amendment Life' in Joseph Russomanno (ed) *Defending Commentary on the First Amendment the First Issues and Cases* (Lawrence Erlbaum Associates Publishers 2005) 140, see also notes 5 (chapter two).

[89] Barbara Baum Levenbook, 'The Sustained Dworkin' (1986) 53 U Chi L Rev 1108, 1111.

[90] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 66.

[91] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold H Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 81, 87-88

equal status for men and women.[92] Constitutional interpretation must go beyond the intent of the founding fathers, that is, to protect the free expression and criticism of the affairs of the government.[93] For Dworkin, ministers of the law must not regulate speech because that will be contrary to the intent of the founders. This probably influenced Dworkin's work who though he did not support regulation of hate speech emphasized evolving law as integrity. The judge must interpret and or construct the text to reflect integrity irrespective of subjective political convictions but will rely strongly on core moral principles.[94] Engaging in interpretation entails the theoretical task of incorporating the law into a jurisprudential model- a model clearly fleshed out.[95] This excludes value skepticism or subjectivity which leads to the court reverting to the majority will, expressed through the legislature.[96] This in my thinking would have been what Dworkin had in mind when he wrote;

> Law cannot flourish as an interpretative enterprise in any community unless there is enough initial agreement about what practices so that lawyers argue about the best interpretation of roughly the same data. That is a practical requirement of any interpretive enterprise: it would be pointless for two critics to argue over the best interpretation of a poem if one has in mind the text of "Sailing to Byzantium" and the other the text of "Mathilda Who Told Lies"[97]

Another way of representing the above passage especially in relating it to interpretation of free speech cases in court is that judges or lawyers ought to rely on some set standards instead of utilizing a relativist approach. For instance, the Supreme Court Justices of the United States are nine, Dworkin is of the opinion that in deciding cases of free speech that come before them, justices at least agree on some set standards and not base decisions on subjective views of individual justices. This approach is what Tsesis criticizes in *Abrams v United States*,[98] that Justice Holmes doctrine in that case was premised on moral relativism.[99] A model of principles

[92] Ronald Dworkin 'The Moral Reading and the Majoritarian Premise' in Harold H Koh & Ronald C Sly (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 81, 90.
[93] Robert Justin Lipkin. Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism. Durham, Duke University Press.
[94] Ibid
[95] Matthew Kramer, 'Also Among the Prophets: Some Rejoinders to Ronald Dworkin's Attacks on Legal Positivism' (1999) 1 Canadian Journal of Law and Jurisprudence 54
[96] John Denvir, 'Professor Dworkin and an Activist Theory of Constitutional Adjudication' (1980) 45 Alb L Rev 13, 17.
[97] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 90-91
[98] 250 U.S. 616 (1919).
[99] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 733. See notes 121 of chapter 3 for Justice Holmes doctrine (dissent) in Abrams v United States. Professor Tsesis further notes that Justice Holmes embraced the relativistic approach in all his writings.

ought to be established on morals that represent law at its best following Dworkin's argument not on subjective individualistic views on justices of the Court.[100] The decision in *R.A.V v The City of St Paul* is instructive here; the court declared unconstitutional, expressions that were obviously biased.[101] Tsesis affirms that Justice Scalia's majority opinion in that case announces as illegal, laws intended to banish racist and anti-Semitic speech.[102] The decision in that case would have clearly been different for outgroups if the Supreme Court Justices paid heed to what cross burning in America symbolized and used it as standard of interpretation.[103] Also, *Brandenburg* was decided without considering the hateful words used against the racial minorities, rather, the Supreme Court was more interested in distinguishing between, 'persons calling for immediate use of violence' and 'those teaching an abstract doctrine about the use of force.'[104] Similarly, in the *Skokie* case, though the court acknowledged the mental hardship the Nazi march would constitute to the Jews in Skokie, it still struck down the Statute that would have prevented the harm that the Jewish minority would suffer if the march was to be conducted. No wonder Kramer opined that if officials in a legal system would adopt the perspective of Dworkin in deciding cases, results will be different.

Rosenfeld regards Dworkin's theory of interpretation as a reconstruction theory aimed at understanding what is interpreted in "its best light" and to "restructure it" with regards to the meaning used for what is interpreted to become apparent in its best light.[105] Law conceived as a social practice that involves everyone, "would engage in the interpretative construction and reconstruction of law to make it the best possible, and hence channel it to its most justified uses"[106] This point seems to buttress the fact that Dworkin's

[100] Kramer, 54
[101] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 732.
[102] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 738.
[103] Rian Dundon, 'Why does the Ku Klux Klan burn Crosses? They Got the Idea from a Movie' *Timeline* *https*://timeline.com/why-does-the-ku-klux-klan-burn-crosses-they-got-the-idea-from-a-movie-75a70f7ab135?gi=3738c33e5c78 Accessed 4 February, 2020. Cross burning in America is associated with the Ku Klux Klan. It is a symbol of hate, intimidation, fear and violence in the South of America and beyond, including burning crosses before lynching a black man.
[104] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 737. See also notes 216, 217 & 218 (chapter 3) for the hate words and speech made against outgroups. See also notes 204 in chapter two for more on Brandenburg.
[105] Michel Rosenfeld, 'Dworkin and the one Law Principle: A Pluralist Critique' (2005) 3 Dans Revue Internationale De Philosophie, 363. Revue-internationale-de-philosophie-2005-3-page-363.htm. Accessed 6 February 2020. See also Law's Empire, 47
[106] Ibid

interpretative project rests on the rule of law that ensures fairness for all[107] and against the majoritarian premise that presupposes that 'fairness' depends on a political majority. In other words, if most American citizens support that speech should be uninhibited (including hate speech), it should be accepted by all. The individuals affected by such speech will find life unsupportable in that system. Denvir citing Bickel, opines that it is the responsibility of Government to provide enduring basic values and not just material welfare of citizens[108] Dworkin adopts a theory that is protective of individuals rather than the majority, a model that is expedient for outgroups for he writes

> The constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.[109]

In America, the law on free speech is basically what the justices say it is and the Supreme Court can potentially overrule other decisions of government if such laws are contrary to the Constitution.[110] For example, the Communication and Decency Act (CDA, 1997) and the laws enacted by the City of Saint Paul, which were both struck down by the Supreme Court on grounds of overbreadth and as contravening the First Amendment free speech law are cases in point here.[111] Bork lends support to this view by stating that the Supreme Court's decisions, especially the ones clouded with controversy go beyond the will of individual justices but embrace the understanding of the U.S. Constitution.[112] Bork further states that the Supreme Court in protecting the rights and liberties of the people, should, "make fundamental value choices that are attributed to the founding

[107] John Denvir, 'Professor Dworkin and an Activist Theory of Constitutional Adjudication' (1980) 45 Alb l Rev 13. Denvir was referring to the work of H. Hart published in 1977 titled 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 GA. L. Rev. 969, 989.

[108] Denvir, 17 Quoting the work of A Bickel, 'The Least Dangerous Branch' (1962).

[109] Ronald Dworkin, *Taking Rights Seriously,* (Harvard University Press 1977) 132-133. See also Kermit L. H, 'Think Things, Not Words" Kermit L. Hall, *Judicial Review in American Constitutional Theory' in Judicial Review and Judicial Power in the Supreme Court* (ed) (Routledge 2013) 189.

[110] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 20.
In *Law's Empire*, Dworkin views the United States Supreme Court as famously important and have the last word undoubtedly on issues of free speech. The decisions of the Court can lead to revolutions, and he cites an example with the decision of the Court in 1954 that no State has the right to segregate by race in public schools that led to a social revolution that surpassed any political Institution, 2.

[111] See also foot note 77 and 83 of Chapter three.

[112] Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind LJ 1, 3-4

fathers of the constitution, not the Court"[113] For Dworkin, the choices might involve vague constitutional standards. These standards raise controversies about interpretation especially in protecting individuals, but the scholar argues that textual vagueness does not require interpretation in itself [114] although there exists a right answer in every hard case.

4.4. Right Answer Thesis

Dworkin presents a compelling view that there is always a right answer to every hard case or complex legal questions. He first draws a distinction between hard and easy cases. Hard cases refer to those cases in law 'where there is controversy in the value judgments concerning the identification of the law; those matters of law where the issues faced by a judge, or a lawyer are contentious and potentially litigable.'[115] A hard case gives rise to arguments about the veracity of a proposition that may not be settled by alluding to plain facts that determine the issue under dispute.[116]

The idea of right answer thesis flows from his disenchantment for skepticism and that the right answer is made possible through legal argumentation that excludes cynicism or disbelief.[117] When a case is brought to the court in which judges have no existing or applicable law (clear answer) to the issue before them (hard case), Dworkin argues that there is always a right answer to such cases especially in developed legal systems. The scholar excludes the consideration of there not being a right answer and that such assumption is belligerent to the right answer he defends.[118] However, Dworkin does not state how the right answer can be obtained and seemed to contradict himself by stating

> Even if in principle, one best theory of law, and so one right answer to to a hard case, that right answer is locked in legal philosopher's heaven, inaccessible to laymen, lawyers and judges alike. …it is pointless to demand that a judge seeks to find the right answer, even if there is one, because his answer is no more likely to be right than anyone else's

[113] Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind LJ 1, 3, 5.
[114] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 20.
[115] Stephen Guest, *Ronald Dworkin* 3rd ed (Stanford University Press 2013) 40
[116] Ibid 40. A plain fact view of law holds that law can be identified by reference to what is acceded to by a specified group-some social or empirical facts accepted by the group as law.
[117] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 288-289.
[118] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 280.

and because there is no way to prove that his is the right answer even if it is.[119]

A close look at Dworkin's words above is not really a denial but an affirmation of a right answer. It is evident that Dworkin adopts the position that judges do not make laws because every legal question raised already has a right answer, through discovering the facts and the rights of the parties involved in the case.[120] He further states that in every legal proposition, there are bivalent concepts; one is either liable or not liable of a given concept of law.[121] For instance, Mrs. X is liable in damages to Mr. Y in the amount of $1000 for slipping on her icy sidewalk and breaking his arm or 'no Will shall be valid without three witnesses.' These are propositions of how things are in law rather than a statement about truth and falsity.[122] They are affirmative action statements which are not descriptive but expression of what the speaker wants the law to be.[123]

Janzen criticizes Dworkin's examples above as defeatist on the grounds that the first account makes no allowance for the veracity of the propositions of settled law. The second are based on a principle of law but have elements of an undefined law and therefore cannot have a right answer as proposed by Dworkin.[124] The question to ask at this juncture is, is there also a right answer to every free speech case and how can that right answer be attained? The answer to this question might come later in this work but Dworkin's free speech thesis seems unrealistic but interesting and does not seem to align with his other theories in principle.

4.4.1 Free Speech Thesis

Ironically, Dworkin did not favour hate speech regulation. For him freedom to utter hate, '…is the price we pay for the legitimacy of our enforcing certain laws that hatemongers oppose…'.[125] For Dworkin, if we want to ban laws against discrimination, for instance, it is important to allow open discussions about such laws if

[119] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 280.
[120] Jacob Paul Janzen, 'Some Formal Aspects of Ronald Dworkin's Right Answer Thesis' (1981) 11 Man LJ 191.
[121] John C Vlahoplus, 'Understanding Dworkin' (1993) 1 Geo Mason Indep L Rev 153, 157.
[122] See these examples in Ronald Dworkin, 'Law as Interpretation' (1982) 9 Critical Inquiry 179, 179-180
[123] Ronald Dworkin, 'Law as Interpretation' (1982) 9 Critical Inquiry 180
[124]Jacob Paul Janzen, 'Some Formal Aspects of Ronald Dworkin's Right Answer Thesis' (1981) 11 Man LJ 191 192-193.
[125] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 174. See also Evan Hare and James Weinstein (ed) *Extreme Speech and Democracy* (Oxford University Press 2009), In Dworkin's forward to this book, he argues for free speech for everyone in a democracy to be given a voice to air out their opinion, fears, tastes, presuppositions or prejudices and ideals.

citizens want to express their support for discrimination in that manner.[126] He makes it clear that the minority deserves to be protected but he regards the arguments of proponents of hate speech restriction as exaggerated or even absurd.[127] However, Dworkin believed interestingly that everyone should have a voice in the polity to express their opinion, such freedom to express unconditionally, marks them out as 'responsible agents' rather than just' passive victims'[128]

Dworkin engages on freedom of speech within the scope of how Americans possess the ethical right to defy the law.[129] In a democracy such as the U.S., citizens have a moral duty to be docile to all laws regardless of their wish to have some of the laws changed.[130] For Dworkin, right consists of power relations in different contexts.

> In most cases when we say that someone has a 'right' to… *free speech*, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference. I use this strong sense of right when I say that you have the right to spend your money gambling, if you wish, though you ought to spend it in a more worth-while way. I mean that it would be wrong for anyone to interfere with you even though you propose to spend your money in a way that I think is wrong.[131]

The statement above actually makes a distinction between someone having a right to do something and that person being right in the action being performed. In other words, a bifurcation ought to be made between a person's guaranteed an act by the law and that individual doing what is right.[132] This appears a technical distinction and simply would mean in my thinking, that a person being guaranteed right can still be used in a way that is wrong or right depending on the choice one makes. I will come back to this in a later chapter. Dworkin succinctly and clearly states it thus.

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[126] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 174
[127] Ibid 174, 176.
[128] Ibid 175, Dworkin made the statement in the forward to Hare and Weinstein, eds., Extreme Speech and Democracy (Oxford University Press 2009) v-ix.
[129]Ivana Tucak, 'Analysis of Freedom of Speech' (2011) Jura: A Pecsi Tudomanyegyetem Allam-es Jogtudomanyi Karanak Tudomanyos 132.
[130]Ivana Tucak, 'Analysis of Freedom of Speech' (2011) Jura: A Pecsi Tudomanyegyetem Allam-es Jogtudomanyi Karanak Tudomanyos 133-134.
[131] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 188
[132]Karmen Erjavec and Melita Poler Kovacic, 'You Don't Understand, this is a New War! Analysis of Hate Speech in News Web Site' Comments (2012) 15 Mass Communication and Society 899, 901.

> There is a clear difference between saying that someone has a right to do something in this sense and saying that it is the 'right' thing for him to do, or that he does no 'wrong' in doing it. Someone may have the right to do something that is the wrong thing for him to do, as might be the case in gambling.[133]

Dworkin points to the disparity between the right to do something and the right not to-while the right not to, hardly poses any difficulty, the problem is when the 'right' is used in analysing the circumstances it is not wrong for a person to act in accordance with his beliefs or conscience. For instance, the example given in chapter one,[134] Dylann Roof's statement that his victims 'rape their women and are taking over their country' emanates from his deep-seated belief that his victims were indeed worthy of elimination because they were 'intruders' who had no right to be in existence. Whether these beliefs are right or wrong is a different case altogether. For Dworkin, the moral right of citizens to violate the law stems from Americans having fundamental rights against their government, moral rights converted into legal rights by the constitution.[135] It will therefore be wrong for the state to deprive individuals in the state of these rights, for example right to free speech, even if that right was used to destroy rather than to build. Dworkin seem to be oscillating between two extremes here.

The state must justify actions inhibiting the freedoms of their citizens. Freedom of speech is exercised against the government in a strict sense so that government cannot inhibit speech even if majority will gain from the restriction. According to Tucak, it does not mean that the state is unable to prevent a catastrophe. Dworkin reasons that a person in the American Legal system has a right 'not to act according to the law' when the law unfairly tramples on the rights of that person.

In essence, Dworkin's arguments on free speech seem to gain their credibility from non-censorship of speech stemming from the provisions of the U.S. Constitution, however, those who attack non-regulation of hateful

[133] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 188.
[134] Footnote 24 Chapter 1.
[135] Ivana Tucak, 'Analysis of Freedom of Speech' (2011) Jura: A Pecsi Tudomanyegyetem Allam-es Jogtudomanyi Karanak Tudomanyos 133-134.

speech cite the constitution, this then amounts to circular reasoning[136] and a resolution may not be in sight yet. Dworkin was not an originalist that believed that the wordings of the first Amendment stick to the intent of the drafters.[137] Indeed, if he was, then his interpretation of the U.S. Constitution as one that should reflect morality and all his theses (such as law as integrity, right answer thesis, interpretation among others) collapses. Therefore, Dworkin's whole writings and argument from inference, make regulation of hate speech in America, imperative. I will restate again here that regrettably; this was a conclusion that this reputable scholar failed to realize.

Dworkin is undoubtedly a liberal and moral theorist in justifying freedoms provided by the constitution.[138] Nickel points out that Dworkin's freedom of speech theory is utilitarian and unable to provide a good framework for 'alternatives and arguments necessary for wise decision making.[139] Nickel appears to take Dworkin thesis on hate speech censorship in isolation instead of reading the scholar in a wholistic manner. This researcher thinks that Dworkin's work ought to be read together and that removing the scholar's free speech theory from his other teachings lead to an irredeemable absurdity. I argue that Dworkin's free speech thesis makes hate speech regulation in America a *sine qua non* for reasons that will be discussed in the next section.

[136] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012, 181.
[137] I mean here that originalists insist that the words of the First Amendment carved in absolute terms must not regulate speech. If Dworkin argues in his legitimacy theory that inhibiting citizens was not right because it casts aspersion on a process reached by everyone in a democracy, is this not a contradiction in terms for him to be proposing law as integrity?
[138]Ivana Tucak, 'Analysis of Freedom of Speech' (2011) Jura: A Pecsi Tudomanyegyetem Allam-es Jogtudomanyi Karanak Tudomanyos 135
[139] James W Nickel, 'Dworkin on the Nature and Consequences of Rights' (1977) 11 Ga L Rev 1115, 1118-1119.

4.5 Making Hate Speech Censorship Imperative

Discussion on regulation of speech in America seem to exclude the equal protection clause[140] but elevates hateful speech over equality.[141] The debate has also been carved in absolute terms by the U.S. Supreme Court whose approach is to protect speech at all costs including the most vile and valueless.[142] While scholars who advocate for hate speech censorship in America and those on the other side of the divide seem not to come to consensus, Gould opines that legal scholars and European legal theory, including those on the liberal left, agree that Waldron's position is the most accepted because it was the first that brought to focus, Dworkin's opposition to hate speech censorship.[143] Gould and Weinstein who acknowledge the importance of Waldron's arguments on hate speech ban attempt to discredit the major premises on which the scholar's positions rest.[144] Dworkin defended the right to free expression and argued against non-regulation of speech based on its scope being a measure for determining political legitimacy in a democracy.[145]

Political legitimacy may be summed up as a process through which rulers are given power to enforce laws coercively[146] or put in another way, 'conditions that create an obligation for people to obey the laws in a political entity.[147] Political legitimacy is attained when those who are opposed to a particular legislation (for instance, hate speech) are allowed to express their views however foul and hateful such expressions.[148]

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[140] See Footnotes 38 and 41 of Chapter one.

[141] Cedric Merlin Powell, 'The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond' (1995) 12 Harv Blackletter L J 1, 5. See decisions in RAV

[142] Cedric Merlin Powell, 'The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond' (1995) 12 Harv Blackletter L J 1, 2.

[143] Rebecca Ruth Gould, 'Is the 'Hate' in Hate Speech the 'Hate' in Hate Crime? Waldron and Dworkin in Political Legitimacy' (2019) 10 Jurisprudence 171.

[144] Ibid. See also James Weinstein, 'Hate Speech Bans, Democracy, and Political Legitimacy' (2017) 32 Const Comment 527, 531, the writer noted that Jeremy Waldron advances the most powerful argument against hate speech bans and credited with properly criticizing Dworkin and himself for not properly defining what they meant (Dworkin and Weinstein) that hate speech regulation can deprive anti-discrimination laws of their legitimacy.

[145] The work will derail from the objective of this researcher if a detailed discussion on Dworkin's doctrine on political legitimacy is presented here. Jeremy Waldron thoroughly responded to Dworkin's legitimacy argument in his 2012 publication, *The Harm in Hate Speech*. Dworkin's argument centers on non-justification of hate speech regulation based on two types of laws- (expressions of racial hostility, religious hatred etcetera) on the one hand, and the laws supposedly evolved to protect the people for whom we enact hate speech laws (laws against violence, discrimination etc). See Waldron, at p 78. Alexander Brown in his persuasive article, 'Hate Speech Laws, Legitimacy, and Precaution: A Reply to James Weinstein' (2017) 32 Const Comment 599, took on Dworkin Weinstein and other anti-censorship sentiments and defended Waldron's positions.

[146] Weinstein, 533 referencing Christopher Wellman, Liberalism, Samaritanism, and Political Legitimacy (196) 25 PHIL & PUB AFF.211.

[147] Weinstein, 233-234.

[148] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 176-179.

Essentially, Dworkin claims that in regulating speech, we compromise the legitimacy of all other laws we value in a legal system because such hate speech laws deprive other laws of their legitimacy.[149] Specifically, Dworkin's argument is that everyone in a democracy participates in public discourse that leads to decisions that are eventually enacted into laws.[150] Dworkin claims that upstream laws destroy the legitimacy of downstream laws-laws enacted to protect the people for which the former (upstream) laws are made. Brown justifies anti-discrimination laws because they appeal to fundamentals of justice that no one can reasonably reject.[151] Anti-discrimination or hate speech laws should be in place to diffuse the hard edges of illegitimacy in American society and also substantially mitigate race motivated hate speech[152] in a legal system replete with racist expressions protected under the First Amendment.[153] These laws are used to curb hate that corrode elements of shared equal status and dignity of members in the American society.[154] As Shiffrin notes, in a typical discriminatory society such as the U.S., it seems apparent that anti-discrimination laws are in themselves morally imperative.[155] While it is not arguable that free speech leads to a better understanding of problems in a society, non-discrimination is a value that fosters peaceful co-existence in a multi-racial and religious society.[156] The fair representation of outgroups including not chilling their voices in public debates constitute an important element of democratic participation.[157]

Democracy is unlikely to thrive in contradiction if it protects free expression and then compromises those basic values on which its existence rest.[158] Free speech and vigorous debates should be balanced against

[149] Ibid 184. Waldron argues here that Dworkin assigns legitimacy a normative nomenclature-a law is legitimate in a double sense; either a political obligation to obey such law (using force to uphold the law) and that those for whom the law was made have no obligation to comply to it because the law is illegitimate. For either of the meaning Dworkin had in mind, did Dworkin really mean and believe what he was saying about legitimacy?
[150] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 178.
[151] Alexander Brown in his persuasive article, 'Hate Speech Laws, Legitimacy, and Precaution: A Reply to James Weinstein' (2017) 32 Const Comment 599, 604.
[152] Steven H Shiffrin, 'Hate Speech, Legitimacy, and the Foundational Principles of Government' (2017) 32 Const Comment 675, 680.
[153] Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311,
[154] Alexander Brown, 'Hate Speech Laws, Legitimacy, and Precaution: A Reply to James Weinstein' (2017) 32 Const Comment 599, 604.
[155] Shiffrin, 680
[156] Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Int'l 1, 13.
[157]Shiffrin, 680.
[158] Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Int'l L 1, 2.

hateful expressions that emanate from such discussions[159] The holding in *Erbakan v Turkey*[160] is instructive here; that democracy is founded on tolerance and equal respect and dignity so that government can censor speech that promotes intolerance. As already discussed in previous chapters, democratic countries and international legislations recognise the need for a balance in protecting free expression by regulating speech likely to target racial and religious minorities. Therefore, a society that respects free expression is not synonymous with one 'where there are no restrictions on that freedom.'[161] It is a society that measures the freedom to engage in such public discussions and debates against the necessity of restriction in particular cases.[162] A society that ignores the seeds of its own destruction may not be deemed healthy.[163] It is important to note that the question is how targets of racial and religious hate speech ought to be integrated into democratic societies in such a way that they have equal concern and respect as Dworkin postulated.[164] Race and religious hate speech should be denounced whenever and whatever time it rears its head up in a democratic state.[165] Dworkin and other opponents of hate speech ban fail to realize when speech as it were, diminishes the equal moral worth of others because speakers are given leeway under the law to spew hate that clearly undermine fellow citizens or in Shiffrin's words, these scholars confuse respect for speech and respect for individuals suffering under the burden of hate speech. Indeed, if race and religious hate speakers have their way, victims will certainly not have equal status either in private or in the public sphere.[166]

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[159] Bakircioglu, 11. The US in protecting speech relies on its justification based on democracy, autonomy and truth and seem to invoke these continually with little limitations. The Court in Canada even though it follows the U.S. Court differ from US approach in *Regina* v *Keegstra*, chapter 1, notes 62 & 66, also in the statement of the Singaporean Judge, Richard Magnus in Chapter 3, note 306 is instructional here. See also chapter 3 notes 312-313, German and Britain on speech censorship.

[160] App no 59405/00 (ECtHR, 6 July 2006). The European court held in that case that "… [T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance …" Press Unit, the European Court of Human Rights, Facts Sheet on hate speech, February 2020https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf. <accessed 2 March 2020.

[161] Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Int'l L 1, 2 referencing Kevin Boyle, 'Freedom of Expression and Restriction on Freedom of Expression' (2002), (Unpublished Manuscript, on file with the Tulsa Journal of comparative and International Law)

[162] Ibid

[163] Thomas M Keck, 'Hate Speech and Double Standards' (2016) 1 Const Stud 95, 101.

[164] Thomas M Keck, 'Hate Speech and Double Standards' (2016) 1 Const Stud 95, 101.
117.

[165] Ibid.

[166] Steven H Shiffrin, 'Hate Speech, Legitimacy, and the Foundational Principles of Government' (2017) 32 Const Comment 675, 678.

It is unarguable that most free speech doctrines allow some permissible restriction on some expressions, and one cannot say that such restrictions show disrespect for others.[167] The doctrines permit government to ban speech that advocate illegal action,[168] group defamation[169] fighting words,[170] true threat,[171] including several other speech types and one scholar suggests that the merits of these doctrines do not show disrespect for citizens but evince disrespect for particular speech choice the citizen would like to make.[172] In *Gertz* v *Robert Welch Inc*,[173] the court recognized that nasty things said about the plaintiff were unprotected while nice things said about that same person were protected.[174]

It is not contestable that excessive control of free speech can render the right meaningless in a democracy but conflicts between rights and freedoms (such as free speech) should be resolved in a reasonable manner.[175] Though the judiciary can set tests and criteria such as discussed in chapter two, doctrines set by the courts should not ignore the substantial harm inherent in hate speech and the values a legitimate society should uphold for citizens to have equal footing in a legal system.[176] Dworkin's argument appears overdrawn and its significance cannot be applied to the scholar's entire project of law as integrity, equality and taking into cognizance the history of a people in deciding morally based laws that he vigorously tried to defend. If Dworkin is resurrected from death to address his rather extreme views on non-censorship of speech, going back to the drawing board will be inevitable. Evolving a non-censored morally based free speech law, will be at best 'suspect' and in fact inconsistent considering his overall theses. Waldron nicely puts it that if Dworkin was serious about his meaning and description of legitimacy of allowing any form of speech, then the argument has a 'frightening prospect'[177] and its logic will apply even to exceptions to free speech.

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[167] Steven H Shiffrin, 'Hate Speech, Legitimacy, and the Foundational Principles of Government' (2017) 32 Const Comment 675, 676. See also note 72 of chapter three, exceptions to free speech.
[168] *Schenck* v *United States*, Chapter 3 note 246.
[169] *Beauharnais v Illinois* See note 166 of chapter 3.
[170] *Chaplinsky v New Hampshire*, note 183 of chapter 3.
[171] *United States v Kelner* note 241, Chapter 3.
[172] Shiffrin, 676
[173] 418 U.S. 323 (1974)
[174] Shiffrin, 676.
[175] Shiffrin, 676
[176] Steven H Shiffrin, 'Hate Speech, Legitimacy, and the Foundational Principles of Government' (2017) 32 Const Comment 675, 678.
[177] Waldron 182

This chapter will be incomplete without some discussion of Dworkin's disagreement without legal positivists over the major function of principles over rules in judicial adjudication.

4.6. Rules, Policy and Legal Principles

Dworkin attempts to disprove Hart's concept of rule as a subset of a community's law but notes that in hard cases, laws are created by recourse to standards (principles and policies) and not to rules.[178] The difference between rule and principle is a logical one because the former applies to facts of a case while the latter relates to reasons for decisions reached in a case. For instance, a rule (that a will is valid if signed by three witnesses) and a principle of law (a man who murdered his grandfather to inherit from his wealth, may not profit from his own wrongdoing), directs our attention, that in hard and simple cases, judges do not exercise discretion but revert to standards rather than rules.[179] The theorist exalts the function of principles over rules. For him, rules may be vital, but principles have functional weight and value. A rule is incapable of incorporating all the standards of law as no rule can assign sufficient weight to various principles because it is through assigning weight that recognition is given to 'authoritative standards of law.'[180] In jettisoning the separation of law and morality, he argued that principles are embedded in the 'political morality' of the community.

Dworkin makes a comparison between policy and principle affirming that judicial decisions generated by policy offer stronger objections than those effectuated by principles of law.[181] Policy decisions ought to reflect thorough political process that considers different interests of those involved to achieve accurate expression of such interest. Dworkin illustrates the distinction between policy and rules with the 1889 case of *Riggs v. Palmer*[182] where a beneficiary (grandson) of a will killed the testator (grandfather) to accelerate his inheritance. The court had no precedent for that case. The court although accepted that the will was valid (under the rule that it was executed accordingly- signed by three witnesses), held however that the grandson

[178] Jules L Coleman, *Taking Rights Seriously*, Ronald Dworkin (1978) 66 Calif L Review 885.
[179] See Coleman for argument in this section.
[180] Jules L Coleman, *Taking Rights Seriously*, Ronald Dworkin (1978) 66 Calif L Review 891.
[181] Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057, 1061.
[182] 115 N.Y. 506 (1889).

could not inherit under the will (the legal principle that a murderer is forbidden from inheriting from his victim). This case undoubtedly established precedent for the statutory intent of the law makers as the court went beyond the plain text of the law to prevent an absurdity from occurring. Here, the court followed a rule (in terms of its applicability, that played an indispensable role), and applied a principle, that seemed to give weight and relevance to the case.

Dworkin sees policies as 'standards that sets out a goal to be reached' to improve the social, economic and political welfare of the community while principles are standards of observation not because it enhances the social, political or economic status desired but due to them being recipe for fairness and justice.[183] Nalbandian notes that for Dworkin, rules, principles and policies act as the 'moral thread' that knits together the various valuable interests of members in the society.[184] In another case the question was raised as to whether the court will allow itself to be used as an instrument of inequality and injustice.[185] Many writers concede that the Supreme Court erred in its decision in *R.A.V,* did the court compromise Dworkin's standards by non-commitment to the history of the people? This writer joins many other critics of the Supreme Court in this case (a climax in hate speech case) to answer the above question in the affirmative. Dworkin is an optimist in proposing that there can always be a one right answer in every hard case. This thesis, according to Nalbandian emanates from his critics of standards outlined above. Dworkin affirms that the law cannot be made only of rules but contain other standards-policies, principles inter alia and that while these standards are as salient as rules in the legislative/ executive process, they differ in nature.[186] In response to his critics about the unclear distinction between rule, policy, and principle, the one right answer thesis discussed above emerged.

[183] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 22.
[184] Elise G. Nalbandian, 'Notes on Ronald Dworkin's Theory of Law' (2009) 2 Mizan Law Review 370, 372.
[185] *Henningsen v. Bloomfield Motors, Inc.,* N.J. 358, 161 .2d 69 (1960), a case of how a manufacturer of a car may limit his liability for a defective product.
[186] Elise G. Nalbandian, 'Notes on Ronald Dworkin's Theory of Law' (2009) 3 Mizan Law Review 370, 372.

4.7 Conclusion

In this chapter, we have attempted an exploration of issues and concepts in Dworkin's legal and moral thoughts while arguing that these provide convincing support for American courts especially the Supreme Court in adjudicating free speech cases. In adopting Dworkin's legal perspectives, this thesis aims to analyse the conceptual significance of the doctrine of incitement in the light of propositions made by this seasoned scholar in constitutional development and theory. This chapter suggests that a solution may be found for outgroups in free speech cases if the Supreme Court can take on board Dworkin's moral interpretation when deciding cases that are brought before it. Interestingly, the only case that the court applied the moral reading was decided in favour of outgroups.[187] The chapter characterizes the moral interpretation as the elimination of judges' use of relativistic approach in adjudicating cases or in the practice of law, choice of principles or precedents and knowing when to apply a rule and principle in arriving at the right answer in every hard case. The next two chapters draw out and describe the analysis of this thesis. As indicated earlier, chapters five and six are both analyst and data driven. Chapter five discusses the practical and doctrinal flaws of the First Amendment incitement doctrine as it impacts the historically oppressed groups in America. The chapter analyses media contents of speech and how these impact minorities and outgroups in the American legal system. In using online media outlets, the chapter is an attempt to use representations of viewpoints in opinion discourse of newspaper data gathered. The two chapters are strictly data driven and the researcher critically explores the use of semantics and language in news report, editorials, opinion pieces in the newspapers selected to assess in the pursued analysis, if there exists any contradiction and or consensus in legal doctrine and public discourse. The analysis typically assesses if the right to free speech as a provision of the law and as practiced is within the provision of the law from media perspectives and discourse. In conclusion, this chapter has built a strong conceptual framework from Dworkin's teaching on which to address some of the critiques against the First Amendment jurisprudence namely

- that it is too formalistic
- that it has not taken cognizance of the internet age as against the time of Brandenburg
- that it is decontextualized
- free speech tradition that is invidiously racist

[187] See footnotes 36 above.

It is against these frameworks that the next two chapters explore opinion discourse in online newspaper Articles.

Chapter Five

A Practical Approach to the First Amendment Incitement Doctrine

Introduction

The last chapter detailed Dworkin's moral/ legal thesis and on how to interpret the law to ensure that judges serve the interest of justice without favouring one group over another in a legal community. The chapter argued that censorship of dangerous speech is necessary in American society for outgroups to be protected from harms. I argued in this chapter that Dworkin erred in his defense of free speech absolutism for reasons that he could not defend law as integrity and freedom while downplaying the impact of hate speech on racial and religious minorities for that would be a contradiction in terms.

The researcher in looking at the numerous online articles was reflecting on racial and religious minorities and how they are impacted under the U.S. free speech law.[1] The themes that were evident after coding were the over permissiveness of the First Amendment, which admits all forms of speech including speech that necessarily incites violence against racial and religious minorities. The amendment was passed and ratified by Congress in the interest of minority population in the U.S. though the wording was not limited to that race but to the whole country.[2] It is no surprise that Matsuda and colleagues write that the First Amendment free speech law equips racists-Nazis and liberals with a constitutional right to be racists.[3] Amendment 1, works to trump the substantive meaning of the Fourteenth Amendment equal protection clause.[4] The two main themes that emerge from the data that this chapter deals with concern;

1. The encompassing nature of the First Amendment (almost all kinds of speech are protected)

[1] Alexander Tsesis, 'Inflammatory Speech: Offense Versus Incitement' (2013) 97 Minn L Rev 1145, 1447, Tsesis conducted similar research in which he investigated based on critique of the holding in *Holder* v *Humanitarian Law Project* (130 S. Ct. 2727), worthy of note is the scholars comment that the articles at the constitutional level did not distinguish between protected speech that listeners find obnoxious and unprotected speech that lead to commission of violent crimes. The scholar drew this distinction in the in this article.

[2] See book review by Watson, David Kemper. Constitution of the United States: Its History, Application and Construction. Chicago, Callaghan, 1594.

[3] [3]Charles R Lawrence et al, 'Introduction 'in Mari Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018), 15.

[4] Ibid

2. Words are powerful and can cause real world harms

Particularly, the data revealed high levels of antisemitic attacks by white supremacists and use of the internet and social media to promote hate against historically oppressed groups. These themes will form the discussions in the two preceding chapters five and six which are the analysis chapters of this thesis.

This chapter discusses effect of broad protection of speech that continue to spiral into violence against historically oppressed racial and religious minorities in America as presented by the articles assessed and analysed. The articles analysed addressed freedom of speech against the backdrop of racial and religious minorities, particularly, African and Jewish Americans. Many free speech scholars especially those in favour of censorship have argued that the First Amendment cannot be discussed in isolation of historically oppressed groups. These scholars opine that the U.S. constitution is racists as the same document that created the first amendment also enthroned slavery.[5] Also antisemitic incidents have been on continuous increase across the U.S. which stems from the persecution of Jews in Nazi Germany and has continued till date. I believe that any discussion of the First Amendment outside these contexts become, simply put, a cosmetic argument expunged of relevance.[6] The data analysed also revealed enormous degree of contributions to hate by white supremacist and the proliferation of hate speech on the internet. Therefore, the quest for protection that excludes victims' stories, that is, the impact of racists messages that white supremacists promote and the mode of the spread engenders an absolutist position that is antithetical to the marketplace of ideas and the equal

[5] See generally Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311; Mari J. Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) and Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' [2000] 40 Santa Clara L Rev 729.

[6] See Mari Matsuda, 'Public Response to Racist Speech' in Mari Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 15. This was an angle that Dworkin so meticulously defended in his work-that interpretation of the constitution should incorporate the history of the people so that legal actors (judges) could evolve 'law as integrity.' See footnotes 30, 31, 32 and 37 of the Theoretical Framework chapter 4. On June 17, President Biden signed into law Juneteenth as a national holiday to commemorate the National Emancipation Day for Blacks slavery and racism in America. See Seung Sim Kim, 'Juneteenth Holiday Marking the End of Slavery after Decades of Inaction' *The Washington Post* 17 June 2021. https://www.washingtonpost.com/politics/juneteenth-holiday-marking-the-end-of-slavery-becomes-law-after-decades-of-inaction/2021/06/17/b3d5dba4-cf89-11eb-a7f1-52b8870bef7c_story.html. Accessed 19 June 2021. In the East room of the white house the president comments that great nations do not ignore their painful past nor walk away from the mistakes they made but rather come to terms with these mistakes so everyone can begin to heal and grow together. How then will the courts ignore this historical epoch and also Jewish persecution in interpreting free speech cases?

protection clause provided by the Fourteenth Amendment.[7] The Fourteenth Amendment in the concluding part of Section 1, says that no one shall be denied equal protection under the law.

The two themes above were then classified into other themes to reflect the views expressed within the texts in the articles regarding the significance of the law and especially how law works in practice rather than in the erudite scholarship of books and legal briefs or the detached world of the court room. These themes, as represented in media texts and contained in the doctrine of the courts were classified for better understanding of the reader as context, content, the marketplace metaphor and the lethality of words deployed. Thus, in assessing free speech cases, the Court needs to go beyond the normative principles to take into consideration the cultural, historical, and existential realities of racial and religious minority groups. The question this chapter seeks to answer is how the Supreme Court's application and interpretation of free speech cases (with the advent of the internet) inhibit racial and religious hate speech regulation? Before attempting the answer to this question, we pause here to discuss the strategy adopted for analysis in the next two chapters.

5.1 Analysis Strategy

After the researcher collated and saved all the articles on a computer protected password on Microsoft word, the coding began by assigning different colours to the labels. For instance, I assigned labels according to comments on the types of speech protected, comments on the minority that are impacted, comments on groups who perpetrate hate or violence (also types of slurs spewed out) and hateful words used to mention just a few. The opinions, editorials, reports were studied as strings of words that provide ideas and meaning into the research questions bearing in mind at this level, that words and meanings are not fixed and that as the researcher, I must decode the meaning of certain words from the context used. As Haratyan opines, that contents in the texts have cohesive elements that links such texts to situations in the real world.[8] To this extent, the researcher must be creative during the analysis stage to alter the conventional meaning to buttress words used, to provide the context and cultural meaning of the texts in the articles. I noted that opinions in the

[7] See Footnote 41 of Chapter one. See also the chapter 4, paragraph following footnote 26.
[8] Farrzaneh Haratyan, 'Hallyday's FSL and Social Meaning' (2011) 17 Int'l Conf. on Humanities, Historical and Social Sciences IACSIT Press Syngapore 260.

commentary of the articles present narratives or discourse on stories that occur at the time the articles were written which also reflect the writers' cultural and personal values. The researcher relies on the semantic contents of discourse articles to account for the argument in the opinion piece as texts are coherently linked to form a meaningful whole. In this work, during the analysis, I was deeply engaged with the research that even though I knew that words can be controlled in the researcher's favour, I remained objective and allowed the data to drive the analysis.

At this point in the study also, it was clear in my mind though that this was legal research and so I had to code, categorise themes and subthemes according to the semantic, contextual, cultural, and even historical meanings of words or texts in the articles and their relationship with doctrine and the application in practice. This is all discourse analysis is engaged with, 'lexico-grammatical analysis of language in the social, physical, cognitive, cultural, interpersonal, and situational context.'[9] Opinion discourse of newspapers can reveal the cultural, historical, political, social impact of the doctrine of incitement.

5.2 Framing Discourse in Media Texts

As noted earlier, opinion discourse and editorials were gathered from two national, two local newspapers and other google sources. The *New York Times* (NYT) has wide readership and is among the largest and most widely circulated in the U.S. It not only ranks the second in the country but internationally among the first twenty. It has won several prices in reporting and most of its staff were former White House staff. For instance, William Safire (editorial writer) worked as President Nixon's speech writer and Peggy Noonan was George W.H Bush and Ronald Reagan's speech writer. The NYT is known to circulate among the upper- and middle-class intellectuals and therefore considered as one of the most influential newspapers in the U.S. It is also known to lean more to the left in congressional, state, and local elections but it has sometimes supported republican candidates. On another hand, the Britannica described the *Washington Post* (WP) as the dominant newspaper in the U.S. capital and one of the greatest newspapers in the U.S. The WP is known for good

[9] Farrzaneh Haratyan, 'Hallyday's FSL and Social Meaning' (2011) 17 Int'l Conf. on Humanities, Historical and Social Sciences IACSIT Press Syngapore 260.

journalism- it presents news neither leaning to the left or to the right. In other words, it is neither liberal nor conservative in news reporting though it tends to be more liberal. The local newspapers, *Pittsburgh Post-Gazette* was established in the late 18th century and is the longest serving newspaper in Pittsburgh area in the state of Pennsylvania. The newspaper is rated low in bias reporting and is said to have shifted from a liberal to a conservative newspaper. The *Post and Courier* is the oldest and largest circulating newspaper in traditional Southern United States and a right-wing newspaper that has won 97 press awards and the President's Cup of Excellence. It is published in Charleston, South Carolina. I chose these newspapers based on not only readership status but also newspapers of the cities where two mass shootings occurred against American Jews and African Americans in (both occurred in a church and a synagogue) places of worship.

The interpretative activity of the researcher involves the lexical features of the media text relating them to the research questions and deriving inferences of the semantic meanings from the texts. In the texts, I looked out for convergent and divergent opinions in the newspapers. According to Fowler, a writer is only able to make texts out of discourses that are available, and the reader is not just a passive receiver of meanings but formulates ideological positions from the texts they read.[10] The reader of the text is discursively engaged with the text before encountering the text and then reformulates it as a system of meanings that may be consistent or contrary to the idea that informed the text.[11]

This chapter and the next proceed on the assumption that ideas are present in written texts. In accessing the data, the interpretative skill of the researcher comes into play as media texts are related to the research questions and inferences are made from the semantic meanings of the texts. At this stage, I made sense of media contents as a form of discourse through discussing several conceptual aspects of media texts in the newspapers. We note with interest that the sources analysed showed common features in the subject matter examined- consensus on the over permissiveness of the First Amendment, agreement that anti-Semitic

[10] Roger Fowler, 'On Critical Linguistics' in Carmen Rosa Caldas-Coulthard, and Malcolm Coulthard, *Texts and Practices Readings in Critical Discourse Analysis* (Routledge London 1995) 7.
[11] Ibid

incidents are growing in frequency in the United States, that the internet is getting more hateful among others. Diversity among the Newspapers only relates to criticism regarding the banning of certain individuals from social media and how much speech that could be protected. The U.S newspapers and their presentation of issues of this nature are usually partisan but in the reporting of the issues relating to the First Amendment and the protection offered speech under the First Amendment, the newspapers speak with one voice. The doctrine, ideas and pragmatic elements were interpreted against the background of narratives of the opinion discourse in the newspapers. Contributors to the articles for the data include but not limited to academics, police officers, minorities impacted by hate speech and anti-hate agencies that promote the welfare of African and Jewish Americans. The next two chapters discuss issues arising from the data.

5.3 Context as Against Normative Analysis

The theme that stands out in all the articles analysed was the formidability of the First Amendment jurisprudence. This was a recurrent opinion in the online articles analysed. The contributors to the articles all agree that freedom of speech protection in America is overly broad because of the First Amendment and that vulnerable members (Jews and African Americans particularly) of the society seem to bear the burden of hate speech and the failure of legal authorities to censor it. The law takes precedence over and above the protection of the minority against harms and so, in the following paragraphs, I present here opinions represented in prominent print -media accessed advancing the view that, while the law is important it should not denigrate and harm minorities by overlooking the context in which the words were uttered. Such contexts as enumerated by the columnists include the types of speech that are made without consequences or fear of prosecution, discourse on other countries where legal limits to hate are observed and mention of minority groups as historically persecuted-slavery or antisemitism.

At a congressional hearing in Pittsburgh after the Tree of life massacre, the Rabbi Jeffrey Myers asked whether there was no line that needed to be drawn if we find out that the line is being crossed when someone writes online, ‘hang all African Americans in this town’ or ‘blow up Synagogues.’ The Rabbi’s suggestion is that there are times when speech is so toxic that it needs to be outlawed. The committee’s answer to the Rabbi was

swift and clear, such a law will be faced with a high hurdle, the First Amendment.[12] The Rabbi referred to instances of the statements above as the hateful words that influenced potential shooters.

On numerous occasions, the U.S. Supreme Court has consistently and arguably incorrectly dealt with cases affecting outgroups in a decontextualized manner while protecting free expression as the hallmark of American liberty.[13] This has been fully expatiated in chapters one and three of this work.[14] It is not surprising that five decades after *Brandenburg,* the Court follows its usual doctrinal analysis in a recent case,[15] Justice Alito held, "this provision violates the free speech clause of the First Amendment.[16] It offends a bedrock First Amendment principle: speech may not be banned on the ground that it expresses ideas that offend."[17] The Court[18] disregarded a racial nomenclature that disparages a racial minority which was adopted by a musical group and ruled that the Act on which registration was denied was unconstitutional. It is no wonder that Robinson of the *Post and Courier* (PC) writes that the proudest boast of free speech jurisprudence in America is that it protects freedom to express those thoughts that we abhor.[19] It includes those ideas we generally find unacceptable; such speech we find repulsive and offensive.[20]

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[12] Torsten Ove 'Free speech vs. hate speech: How societies balance competing rights' *Pittsburgh Post-Gazette* 22 October 2019 https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. >accessed 3 May 2021

[13] Torsten Ove 'Free speech vs. hate speech: How societies balance competing rights' *Pittsburgh Post-Gazette* 22 October 2019 https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. Accessed 3 May 2021

[14] We elaborated the approach of the Court in dealing with content v context. The Court has always downplayed the context as against the content of speech and ruled such laws as unconstitutional as either vague or overbroad. See generally Chapter one footnotes 66-69, chapter 3 section, 5 'Content v Context and also footnotes 117-225 of Chapter three.

[15] *Matal v Tam,* 137 S. Ct. 1744 (2017). The case relates to denial of a Trademark registration (The Slants) by the United States Patent and Trademark Office pursuant to S 2(a) of the Lanham Act that prohibits registration of marks that disparages groups. The Court of Appeals for the Federal Circuit later reversed the decision of the Trademark Trial and Appeal Board that affirmed the Patent and Trade Office after it examined the attorney's refusal of registration. See Russ VerSteeg, 'Historical Perspectives & Reflections on Matal v. Tam and the Future of Offensive Trademarks' (2017) 25 J Intell Prop L 109, 115.

[16] *Tam* at page 1754

[17] Ibid 1751 see also VerSteeg, 'Historical Perspectives & Reflections on Matal v. Tam and the Future of Offensive Trademarks' (2017) 25 J Intell Prop L 109, 115

[18] See footnote 10 of this chapter for summary of *Matal.*

[19] Eric P. Robinson 'Charlottesville, the First Amendment and the Press' *The Post and Courier* Sept 27, 2017 https://www.postandcourier.com/our-gazette/opinion/charlottesville-the-first-amendment-and-the-press/article_869084b6-7d3a-54e0-adc1-26530672c869.html. Accessed 9 May 2021.

[20] Eric P. Robinson 'Charlottesville, the First Amendment and the Press' *The Post and Courier* Sept 27, 2017 https://www.postandcourier.com/our-gazette/opinion/charlottesville-the-first-amendment-and-the-press/article_869084b6-7d3a-54e0-adc1-26530672c869.html. Accessed 9 May 2021.

Ove of the PPG enumerates that in France, the Court of Cassation upheld the conviction of a Palestinian activist who violated their hate speech laws by wearing a t-shirt with a sign, "long live Palestine, boycott Israel." Likewise, in Germany, two Chinese tourists were arrested, tried, convicted, and fined under German law banning Nazi symbols for performing the 'Hail Hitler salute' outside the Reichstag in Berlin. Similarly in the UK, a Scottish comedian was indicted for inciting racial hatred when on YouTube, he made a video, training a dog on how to perform Nazi salute in response to questions such as, 'do you want to gas the Jews?' The court found him guilty and fined him. These kinds of prosecutions are unthinkable in the US.[21] For instance, in 2017, 300 neo-Nazis with flaming touches marched through the quadrangle of the University of Virginia with a message, 'Jews will not replace us,' In her statement reacting to the event, the president of the school wrote that the authorities of the university must abide by 'state and federal laws' by granting the freedom of expression of the protesters though she condemned in strongest terms, the hatred in the act of the protesters.[22] The courts, following precedent, would hold that these statements are too general and undirectional and are therefore protected under the first Amendment. As Ove puts it,

> 'Yet so long as they don't involve a direct threat to an identifiable target, these internet rants (or offline) are protected by the First Amendment, just as newsletters, flyers, and live speeches were protected in earlier times.' [23]

In the literature, scholars agree that the problem with regulating racial and religious diatribes is the First Amendment but why some argue that the law needs some adjustment, others suggest however, that to censor hate speech will lead to a slippery slope- a part towards totalitarianism by the government.[24] The opinion pieces, editorials and reports in the PPG favour strict censorship of speech with a few exceptions while those in PC present a more liberal view of free speech-that censorship is strange under the American system. Pittsburgh and Charleston represent two cities impacted by a mass shooting event. The national newspapers (NYT and the WP appear to reflect a more pragmatic view.

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[21] See Ove for these examples listed on this paragraph.
[22] Ibid
[23]Torsten Ove 'Free speech vs. hate speech: How societies balance competing rights' *Pittsburgh Post-Gazette* 22 October 2019 https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. Accessed 3 May 2021
[23] See Ove for the examples listed on this paragraph. Emphasis mine
[24] Bhikhu Parekh, 'Is there a Case for Banning Hate Speech?' in Michael Herz and Peter Molnar (ed) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) 71.

In the light of the cases discussed in previous chapters, *Brandenburg, R.AV., Skokie,* among others, it appears that what is driving the attitude of Justices of the Court is the provision of the First Amendment. Doctrinally, the First Amendment jurisprudence is in the state of paralysis,[25] the Court has not taken cognizance of recent happenings especially repeated attacks on minority groups after speeches made by white supremacists as expressed by columnists. This is an area, arguably, that the Supreme Court needs to pay attention to, rather than heavy reliance on the law (norms) not to censor speech however despicable rather than evaluating the contexts that give rise to this racial and religious hate speech. Bollinger in an interview with the *Washington Post* states categorically, 'and the degree, as you point out, the protection that has been afforded to speech in the United States, really since the last century, is the strongest, most protective system that has ever been set up by a society.'[26] Bollinger noted that since the 1960s, Neo-Nazi speech, Klan Speech among others, and the Supreme Court has evolved the doctrine that these ideas, however disgusting, are protected unless they incite imminent lawless action.[27] The researcher observed from some of the texts analysed, that certain words or language that incite violence are normalized and not regarded as worthy of protection. Opinion discourse in the media regarding such speech has it that persecutory and discriminatory speech constitutes the quest for truth under the American system. The Court needs to pay attention to the conversations in the media and public discourse generally in interpreting cases of free speech that impact racial and religious minorities in the U.S.

Nielsen who examined offensive public speech by interviewing individuals from diverse racial backgrounds noted that there is a serious disconnection between the constitutional analysis of the courts and legal scholars (which include traditional first amendment scholars and critical opponents of hate speech regulation) and what the average American believes.[28] Most individuals the scholar interviewed spoke extensively about lack of

[25] Cedric Merlin Powell, 'The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond' (1995) 12 Harv Blackletter L J 1, 49.
[26] Free to State: The New Free Speech The *Washington Post Live* 7 October 2020 https://www.washingtonpost.com/washington-post-live/2020/10/07/free-state-new-free-speech-2/. Accessed 11 May 2021.
[27] See chapter one, section 1'1 or footnotes 7-23 of the same chapter on the doctrine of incitement and the liability requirements under the American law.
[28] Laura Beth Nielsen, *License to Harass, Law, Hierarchy and Offensive Public Speech* (Princeton University Press 2004) 3.

legal intervention to control hate speech. The problem has thus been beautifully presented in the words of Nielsen below:

> But the courts have made hate speech decisions with virtually no empirical analysis of the phenomenon or its effects on target groups. Rather than seriously engaging in an analysis of the costs and benefits to society of rules that might limit such behavior, American courts have treated such conduct as "speech," which can be regulated only if the state offers a compelling justification. This doctrinal treatment in effect grants a license to harass. The judicial protection of offensive public speech works to normalize and justify such behavior. Without acknowledging it, courts have placed a significant burden on traditionally disadvantaged target groups in our society.[29]

The quotation above signposts the attitude of the courts in deciding free speech cases. The Court barely takes into consideration the empirical and living realities of the oppressed group in the American society. The exceptional nature of American free expression culture has been shown in most cases that have come before the Court as one that underscores extreme suspicion of governmental regulation of speech and high tolerance of potential harm caused by same.[30] Bellware writing in the *Washington Post* (WP) states that this problem accentuates the deficiencies of the law and reveals its negligent or perhaps 'neutral' stance regarding whom it protects.[31] Kirchick of the *Pittsburgh Post-Gazette*, suggests that America needs to make more and smarter use of the First Amendment to refute falsehood.[32] The article states that government is banned from censoring speech but that private communication companies can do a better job by removing hateful content from public places. However, the right to remove offensive content rests in particular companies who will use their subjective evaluations to know what to keep and what to take out. Also at least, most of the articles reviewed or analysed present opinions that point to the conclusion that hate speech incites violence against minority groups with majority of the articles naming Jews and African Americans as groups hugely impacted.

It would appear, that what Kirchick explicitly refers to by making 'more and smarter use of the First Amendment' is the all-important marketplace of ideas that rules the American free speech protection. The

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[29] Laura Beth Nielsen, *License to Harass, Law, Hierarchy and Offensive Public Speech* (Princeton University Press 2004) 3.
[30] David S Han, 'Brandenburg and Terrorism in the Digital Age' (2019) 85 Brook L Rev 85.
[31] Kim Bellware, 'Facing a First Amendment fight, a small Minnesota town allows a white supremacist church' *The Washington Post* 14 December 2020. https://www.washingtonpost.com/religion/2020/12/14/murdock-white-church/. Accessed 15 May 2021.
[32] James Kirchick , 'America doesn't need a hate speech law: The First Amendment should not be curtailed' *Pittsburgh Post-Gazette*, Nov 12 2019, https://www.post-gazette.com/opinion/Op-Ed/2019/11/12/James-Kirchick-America-does-not-need-hate-speech-law/stories/201911120017?cid=search. 3 May 2021.

sections that follow capture newspaper reports on the depth and breadth of hate speech targeted against minorities within the provisions of the First Amendment, to develop a fuller understanding of the 'clear and present' threat' that hate speech poses to racial and religious minorities in America today.

5.4 Truth will weed out Falsehood

The United States is replete with instances of speech that incites racial and religious hate as both precursors to and forms of violence. The commentaries or reports within the articles agree there is too much hate speech in virtual spaces, and this is also the position of most scholars who have examined the issue of First Amendment provisions in the light of minorities subject to harm due to non-censorship of speech. The theory of the marketplace of ideas is often used to justify why hate speech cannot be regulated. The position of the law on the marketplace of ideas has been discussed in the chapter three of this work.[33] This theory lies at the core of the justification for free expression in the United States which goes back to the 17-century but no one in all this time has explained how good ideas will drive out bad ones and how truth will triumph over falsehood at least in the empirical sense[34] especially in a system deemed unequal in multiple ways.[35]

The problem is how we can fit in this 18th century idea into the current system of the U.S. in the 21century with hate groups multiplying by day in online networks, racial and religious minorities attacked by these groups in their churches and Synagogues and anti-Semites growing in strength with some of them calling for minorities to be killed. In other words, how can we account for truth in the marketplace amidst voices that aim to chill others in the debate by deliberately using hate vitriol whilst seemingly protected by the law? The

[33] See Section 3.4.3 of Chapter two, 'Truth.'

[34] Richard Stengel, 'Why America Needs a Hate Speech Law' *The Washington Post* 29 October 2019 https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/. >accessed 11 May 2021.goes

[35] See generally Mari Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018); the scholars present powerful argument from a critical race tradition, building on the racists speech experience of the minorities in their strong critique of the First Amendment that protects the right of racists; Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012), the central thesis of this book is that hate speech undermines the equal dignity of outgroups against the background of systemic racism and segregation in the US. Waldron defends in strong terms hate speech regulation especially with reference to Nazi legacy in Europe and the harms such speech causes to minority and Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' [2000] 40 Santa Clara L Rev 729; the scholar in this article advances arguments in favour of hate speech regulation against the background of historically oppressed groups- tracing the precedent of the Supreme Court and the deficiencies of the First Amendment (as protecting racists).

opinion discourse strongly suggests that there should be no shrinking of speech. That it is alright for antisemites to say what they think about their beliefs. For the PPG, 'we must defend people's rights to say things we don't agree with, even if what is said is false and objectionable.'[36] For Matsuda, how can the American system laden with laxity overly protecting bad speech dispel falsehood in conversations to arrive at the truth where victims of hate speech find themselves unable to express what they see, feel and experience? The scholar continues that 'in the absence of theory and analysis that give outgroups a diagnosis and a name for the injury they experience, they internalize the injury done them and are rendered silent in the face of continuing injury.'[37] The newspapers see Matsuda's perspective on the above differently. The columnists discuss free speech more as admitting of no censorship by the government and the social media agencies.

Matsuda who researched and argued for narrowing hate speech while travelling around universities in America to advocate for these ideas, encountered the most degrading and vicious gutter racial slurs and verbal assaults which the scholar could not reprint even for academic purposes.[38] Woods's opinion is that the country needs to kick-start the intense healing whipped up by long centuries of slavery, Jim Crow laws including deeply embedded legalized and institutionalized racism.[39] That is why scholars like Powell say that the marketplace model is a myth and not the solution to free expression in America but that an analysis hinged on context is a better solution to the problem of hate speech.[40] This means following opinion in the newspapers that the court should keep in perspective the harms that that are the offshoot of speech that incite violence against racial and religious minorities.

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[36] ---'War on Free Speech' *Pittsburgh Post-Gazette* 26 January 2021. https://www.postgazette.com/opinion/editorials/2021/01/26/The-war-on-free-speech-Parler-Social-Media-technology/stories/202101140041?cid=search accessed 2 May 2021

[37] Charles R Lawrence et al, 'Introduction' in Mari Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 13.

[38] Charles R Lawrence et al, 'Introduction' in Mari Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018) 13.

[39] Janee Woods, 'Let's be Honest, we Can't be Colorblind because America is not Post-Racial' https://qz.com/258571/lets-be-honest-we-cant-be-colorblind-because-america-is-not-post-racial/. Accessed 24 June 2021.

[40] Cedric Merlin Powell, 'The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond' (1995) 12 Harv Blackletter L J 1, 5-6.

It is assumed that more speech is seen as the most feasible manner to protect free expression especially with calls to censor speech that are valueless. Powell opines that the Supreme Court ignores the reality on ground to interpret the Constitution in a moral and principled manner.[41] The reality is that historically oppressed groups are suffering from broad protection of speech, and this is popular opinion in the articles analysed. This researcher suggests that the Supreme Court takes seriously the right of racial and religious minorities that are fatally shot by white supremacist in their churches and Synagogues on constant basis in interpreting free speech cases. The scholar adds that the Constitution is a moral document and should be interpreted as such by the Court. Analysis that does not take into consideration the peculiarities of the American society in interpreting the First Amendment within the context of hate speech is misplaced.[42]

The incontrovertible reality is that internet speech has enabled hate and falsehood to spread unchecked inspiring terrorists of all stripes-which has disproved the marketplace of ideas principle.[43] People do not have equal and adequate access to the marketplace and so are unable to participate in the conversation to the degree that falsehood will be refuted or for the truth to collide with error.[44] This pertains especially to social and/or cultural groups that lack access to mainstream media to commensurately partake in the marketplace to get their ideas accepted and adopted. Baker argues that lack of access for disfavoured groups and the overwhelming participation of privileged groups frustrates the achievement of optimal results, and the marketplace of ideas is doomed.[45] The next chapter will discuss the role the internet plays from the data

[41] Cedric Merlin Powell, 'The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond' (1995) 12 Harv Blackletter L J 1,2. The Court has largely ignored the fact that ethnic and religious minorities in the US are targets of hatred and extremism. Chitratan Singh 'Chitratan Singh: Taking action to combat hate' *Pittsburgh Post-Gazette* 27 Oct 2019 **https://www.post-gazette.com/opinion/Op-Ed/2019/10/27/Chitratan-Singh-Taking-action-to-combat-hate/stories/201910270032?cid=search**. 4 May 2021. A simple search on Google of mass shooting in houses of worship in the United States yields results too numerous to count.; see also Eva Westheimer 'White supremacy and anti-Semitism: We must defeat them together' *Pittsburgh Post-Gazette* 20 September 2017 *https://www.post-gazette.com/opinion/letters/2017/09/20/White-supremacy-and-anti-Semitism-We-must-defeat-them-together/stories/201709200075?cid=search*. 5 May 2021, the writer recognizes that the black and brown communities deal with the harsh realities of white supremacy daily.

[42] Theoretical Framework Chapter, footnote 25 and Section 3.1 (the moral reading).

[43] Charles Lane, 'Keep Government Hands off Free Speech' *The Washington Post* 4 November 2019 https://www.washingtonpost.com/opinions/keep-government-hands-off-free-speech/2019/11/04/33315ce4-ff2e-11e9-8bab-0fc209e065a8_story.html. Accessed 11 May 2021.

[44] See chapter three, footnote 124, robust conversation participated by everyone will enable trial and error that results in obtaining the truth.

[45] C Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) 4-5.

reviewed, in spreading hate and restricting robust speech because certain groups have their voices chilled or excluded from the conversation.

For Baker, truth can outshine falsity in debate if it is 'discoverable' or 'objective' and the truth can be seen. If truth is subjective, that is, it is created or invented, a better theory needs to explain how the various viewpoints lead to the truth.[46] But we know that what constitutes truth is relative. For instance, the *Pittsburgh Post-Gazette* Editorial Board[47] condemns the banning of *Parler*, an extremist social media site as well as other social media for what it termed, 'shrinking of the broad marketplace of ideas.' The Board states that the attempt to ban these extremists on social media represents a chilling assault on free speech. It denounced the websites chiefs for banning President Trump from Twitter and other social media following the violence associated with the 'invasion' of the Capitol building on January 6th, 2021. The Board emphasized that the cure for bad speech is 'more speech' and the solution is not to hide away bad speech from the public eye. Here is what one of the columnists argued, 'Far better to let people decide for themselves what they want to hear and believe. We can only hope consumers will weed out the crackpots, but often they don't, and we just have to suffer through.'[48]

In debates that compare verbal claims to what happens in real world, such claims can be determined more accurately by showing errors inherent in such claims and then differentiate such errors from reality.[49] Bollinger offers that the manner to deal with the Court's protection of odious speech is simply to counter the ideas, speak about them and possibly counter the evil effects with good speech.[50] Stengel is of the opinion that in the age of the internet, truth is not optimized, the truth does not always win in every case. One is tempted to ask where the truth can be found in a closed internet forum filled with hate and shared only by members of the

[46] C Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) 6.
[47] The war on Free Speech, Pittsburgh Post-Gazette 26 Jan 2021 https://www.post-gazette.com/opinion/editorials/2021/01/26/The-war-on-free-speech-Parler-Social-Media-technology/stories/202101140041?cid=search accessed 2 May 2021
[48] Sally Kalson 'Acres of Gun, Annals of Agony' *Pittsburgh Post-Gazette* 1 May 2011 https://www.post-gazette.com/opinion/sally-kalson/2011/05/01/Acres-of-guns-annals-of-agony/stories/201105010204?cid=search. Accessed 6 May 2021.
[49] C Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) 6.
[50] Free to State: The New Free Speech *The Washington Post Live* 7 October 2020 https://www.washingtonpost.com/washington-post-live/2020/10/07/free-state-new-free-speech-2/. Accessed 11 May 2021

group? To this extent, is the marketplace presumed level playing field of speakers? The marketplace therefore may not effectively and realistically work in the social media.[51]

Some columnists opine that banning people from using such outlets will only send them underground, where their thoughts will 'fester' and 'simmer.' The bad and objectionable speech if banned by those operating social media bars bad thoughts and evil speech from coming to the open, for these writers, this is not protection, it is only burying one's head in the sand.[52] The Board concludes that the move to ban the President from his social media accounts is un-American. It states that for a free society like the US, it is better to err on the part of openness. The realistic way to combat stupid speech, is to use smart speech and to fight hate speech is to utilize charitable speech, the Board concludes.[53] However, Stone of the *Pittsburgh Post-Gazette,* asserts that the President's free speech rights were not violated by banning him because the guarantees of freedom of speech stops government from restricting speech but not individuals.[54] However, Stone argues that Twitter's ban of Mr Trump on 8 January, 'due to the risk of further incitement to violence' is a decision that stands alone and has no place under American law.[55]

Zuckerberg, the CEO of Facebook who is Jewish commented that posts on Facebook that denied the holocaust will not be removed. He said that he did not think that those who denied the murdering of six million Jews were "intentionally" getting it wrong and that if those posts did not call for harm and violence, the speech was protected. When an outcry was raised for these comments, Zuckerberg quickly clarified that though he finds holocaust denials deeply perturbing, he still felt that 'the best way to fight offensive bad speech is with good

[51] Richard Stengel, 'Why America Needs a Hate Speech Law' *The Washington Post* 29 October 2019 https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/. Accessed 11 May 2021.
[52]The war on Free Speech, Pittsburgh Post-Gazette 26 Jan 2021 https://www.post-gazette.com/opinion/editorials/2021/01/26/The-war-on-free-speech-Parler-Social-Media-technology/stories/202101140041?cid=search accessed 2 May 2021
[53] The Editorial Board 'A seamless garment: Counteract hate speech with charitable speech' *Pittsburgh Post-Gazette* 13 Aug 2018 https://www.post-gazette.com/opinion/editorials/2018/08/13/A-seamless-garment-Counteract-hate-speech-with-charitable-speech/stories/201808130012?cid=search. 3 May 2021.
[54] Geoffrey R Stone 'Social media and 'free speech': Is it time for government regulations?' Pittsburgh Post-Gazette 17 January 2021 https://www.post-gazette.com/news/insight/2021/01/17/Social-media-and-free-speech-Is-it-time-for-government-regulations/stories/202101170027?cid=search. Accessed 2 May 2021
[55] Ibid

speech.'[56] Pulcastro, an FBI intelligence analyst agrees by stating that while the haters are fully protected, we also have First Amendment rights to denounce hate when it rears up its head,[57] whatever this statement means. For Lord writing in the WP, we must concede that there is market failure in the marketplace of ideas perhaps explaining why such argument does not justify calling for laws against hate speech.[58] Lord concludes that "the marketplace metaphor, which bases free speech on its consequences, rather than on humankind's intrinsic right to engage in it, needs reformulation.'[59] Argument from truth is the sole justification discussed by the newspapers and other sources reviewed. We can see from different points raised above that argument from personal autonomy or democracy no longer hold any sway in the justification of free speech. At this juncture, we pause to consider one of the requirements on which to hold a person liable under principles of incitement based on the consequences of speech and the next section addresses this. It becomes necessary to discuss this in the light of the data investigated on the content of speech (that will be discussed in the next section) and groups that perpetrate crime against minority groups. This is further discussed in chapter six of this work.

5.5 The 'Imminency' Requirement

The rule of incitement requires that the speech made must be contemporaneous with the follow up violence or unlawful action. As outlined in chapter one, an unlawful act that will/might occur in some indefinite period, is protected.[60] The Court has not specified or classified how much time it will be -hours, days, weeks or even months that will elapse for a perpetrator to be liable under the doctrine of incitement. The rule in *Brandenburg* is over sixty years old and has remained the bedrock of American constitutional law. There has been no guideline by the Court even in subsequent cases on what to do with speakers who commit unlawful act after

[56] For the entire paragraph see Matt O'Brien, 'Facebook bans Holocaust denial, distortion posts' *The Post and Courier'* 12 Oct 2020. https://www.postandcourier.com/ap/facebook-bans-holocaust-denial-distortion-posts/article_a4cb48ba-0cb6-11eb-b176-8ba0991b2869.html. Accessed 9 May 2021

[57] Peter Smith, 'FB1 Urges Lawrencewille Residents TO Report Hate Incidents as Pieces to Larger Puzzle' *Pittsburgh Post-Gazette* 28 January 2019. https://www.post-gazette.com/news/crime-courts/2019/01/28/FBI-Lawrenceville-hate-incidents-crimes-Federal-Bureau-of-Investigation-Pittsburgh/stories/201901280134. Accessed 15 June 2021

[58] Peter Smith, 'FB1 Urges Lawrencewille Residents TO Report Hate Incidents as Pieces to Larger Puzzle' *Pittsburgh Post-Gazette* 28 January 2019. https://www.post-gazette.com/news/crime-courts/2019/01/28/FBI-Lawrenceville-hate-incidents-crimes-Federal-Bureau-of-Investigation-Pittsburgh/stories/201901280134. Accessed 15 June 2021

[59] Charles Lane, 'Keep Government Hands off Free Speech' *The Washington Post* 4 November 2019 https://www.washingtonpost.com/opinions/keep-government-hands-off-free-speech/2019/11/04/33315ce4-ff2e-11e9-8bab-0fc209e065a8_story.html. Accessed 11 May 2021

[60] See footnotes 15-17, chapter 1.. It does appear following the ruling in *Hess* that the unlawful act or violence will follow quickly after the speech and the advocacy will be such that it is likely to lead to a violent or unlawful action.

they purportedly posted online hateful speech against outgroups or influenced by the words of others. The problem with internet speech will be discussed in chapter six of this work as most of the articles indicate that the internet is the key mode of disseminating hate speech especially by extremists' groups.

The Court has accumulated enough evidence in recent times not to continue to downplay or relegate speech that influences unlawful action- such as mass shooting. The newspaper evidence discussed a couple of killers who were hugely influenced by what others said or did. For instance, the El-Paso shooter boasts of having been influenced by another white supremacist.[61] The Pittsburgh shooter who posted copious anti-semitic comments on GAB received considerable encouragement. His hate rants were supported by other account holders who acquiesced indirectly to the content of his post by not affirming or rebuking him of his anti-Semitic posts. Also, the Chabad shooter (shooting occurred on 27th of April 2019) referenced both the Pittsburgh and the New Zealand shooters in his online manifesto filled with anti-Semitic conspiracy theories that Jews were responsible for the thoroughly planned genocide of the European race and therefore deserved to die.[62]

We must recall that *Brandenburg* advocated that Jews returned to Israel and Blacks to Africa. The assaultive speech made by *Brandenburg* in that case was not at the core of the analysis of the Court, rather the Court engaged itself with the outcome rather than the impact of hate speech on its targets.[63] The *Brandenburg* test guarantees that one is free to hate and say it out so long as someone is not threatened directly.[64] A person is completely protected if he goes on his Twitter and write, 'hang all African Americans in Virginia' or 'shoot all Jews in New York city,' because these are general statements not directed at any person. So long as these

[61] The shooting occurred on 3rd August 2019 in the State of Texas, 23 were killed and another 23 injured.
[62] IACP Police Chief Magazine, 'Targeted Violence and the rise of Anti-Semitism' https://www.policechiefmagazine.org/targeted-violence-anti-semitism/ >accessed 1 May 2021
[63] See chapter two section 3.7.2, Imminent threat of harms in Brandenburg.
64 James Kirchick 'James Kirchick: America doesn't need a hate speech law: The First Amendment should not be curtailed' *Pittsburgh Post-Gazette*, Nov 12 2019, https://www.post-gazette.com/opinion/Op-Ed/2019/11/12/James-Kirchick-America-does-not-need-hate-speech-law/stories/201911120017?cid=search. 3 May 2021

words are not direct threats to identifiable target, they are protected.[65] Robinson succinctly puts it that the tradition of tolerance for hate speech is the badge or indicator of American law because it protects all types of speech from the most radical to the most reserved and everything in-between.[66]

The contributors to most of the articles were all in agreement that the First Amendment protects hateful expressions. This position was well clearly surmised by the *Post and Courier* that the U.S. Constitution protects nearly every form of speech short of the "fire-in-a-crowded-theatre" prohibitions. It continues that most people put up with the objectionable "art" and offensive language in the interest of protecting the First Amendment's broad application. Thus, hate speech is deemed less dangerous rather than abridgements to our freedom.[67] Kirchick of the WP argues that there is no precise definition of hate speech, since what a person terms hate could be another person's legitimate argument worthy of debate.[68] For this columnist, there is no evidence, that hate speech regulations dampen violence and extremisms but rather censorship tends to promote the very phenomena they intend to combat. Stengel of the WP adds that it seems like a design flaw in an internet age for the U.S. to protect hate speech but that it should not protect hateful speech that can cause violence by one group against another.[69]

Accordingly, the Supreme Court has been called upon to reckon with these events so clearly spelt out by media of harm people continue to suffer and re-visit this major doctrine that haters have taken advantage of in many ways and for too long. Any analysis within the legal spectrum that excludes these increasingly deadly targeted attacks by white supremacists sets a perilous choice between freedom of speech and right not to be killed. It

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[65] Torsten Ove 'Free Speech vs Hate Speech: How Societies Balance Competing Rights' 22 Oct 2019 *Pittsburgh Post-Gazette* https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. >accessed 5 May 2021

[66] Eric P. Robinson 'Charlottesville, the First Amendment and the Press' *The Post and Courier* Sept 27, 2017 https://www.postandcourier.com/our-gazette/opinion/charlottesville-the-first-amendment-and-the-press/article_869084b6-7d3a-54e0-adc1-26530672c869.html. >accessed 9 May 2021.

[67] Kathleen Parker, Column: Can Words be Lethal? *The Post and Courier* 21 June 2017. https://www.postandcourier.com/aikenstandard/opinion/column-can-words-be-lethal/article_bddbdc10-b855-59ec-b991-224e2cc30419.html, 11 May 2021.

[68] James Kirchick, 'No America Doesn't need a Hate Speech Law' *The Washington Post* 7 November 2019 https://www.washingtonpost.com/opinions/2019/11/07/no-america-doesnt-need-hate-speech-law/. <accesed11 May 2021.

[69] Richard Stengel, 'Why America Needs a Hate Speech Law' *The Washington Post* 29 October 2019 https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/. >accessed 11 May 2021

is possible for the Court to have a closer look on the doctrine of incitement and set the timeframe for a post-speech unlawful act or at least set the boundary that cannot be crossed as the Pittsburgh Rabbi suggested. The cases above and some other targeted attacks (for example, the shooting dead of nine African Americans in a black church, Charleston, South Carolina on 17th June 2015), demonstrate the pressing need for the Court to provide a functional guideline to determine the imminency requirement so that justice can be served for members of minority groups. It is important to emphasize that the Supreme Court cannot leave the lower courts in confusion on the imminency requirement in *Brandenburg* and accordingly narrow down the spectrum of hate speech accommodated by the law.

John Horgan of the Georgia State University states that racial and religious incitement is insidious and pervasive and has become an attractive counterculture to younger people in the United States.[70] As an inchoate crime, it appears an oversight if the law bases criminalization of incitement to the imminency of the unlawful action without clear specifications or guidelines as to how to apply it. Modern day hate speakers especially white supremacists raise fundamental and troubling questions on the adequacy of the rule in *Brandenburg.* Han refers to the standard in *Brandenburg* as a bygone relic that is not suitable for the present internet age and the world of social media.[71] This longstanding constitutional right doctrine fails to address, in the words of Tsesis, protected speech that some listeners find to be abhorrent and unprotected speech that foster the commission of violent crimes.[72] The next section explores evidence from media articles analysed-interpreting a range of opinion on the content of speech. The analysis shows a significant growth of anti-Semitism and evidence that the law offers protection to those who incite hate or violence against outgroups in America.[73]

70 Rich Lord 'The pull of extremism: White nationalism is growing and dividing' *Pittsburgh Post-Gazette*, 21 Oct 2019 https://www.post-gazette.com/news/crime-courts/2019/10/21/White-nationalism-online-supremacy-Tree-of-life-shooting-Robert-Bowers-screw-your-optics/stories/201910040166?cid=search. Accessed 3 May 2021

[71] David S Han, 'Brandenburg and Terrorism in the Digital Age' (2019) 85 Brook L Rev 85, 92. This will be the subject of the next chapter-internet and hate speech perpetrators.

[72] Alexander Tsesis, 'Inflammatory Speech: Offense Versus Incitement' (2013) 97 Minn L Rev 1145, 1148.

[73] See Alexander Tsesis, 'Inflammatory Speech: Offense Versus Incitement' (2013) 97 Minn L Rev 1145. The doctrine of incitement has been expatiated in chapters 1 & 3.

5.6 Content of Speech: Anti-Semitism

All the articles reviewed expresses that anti-Semitism; that ancient expression of hate, which at a point in human history became a full-blown ideology of hate is making a come-back not only in America but also in other parts of the world.[74] This fact is evidenced in the spontaneous attacks on Jews and their institutions and in African American churches across the U.S. A 2018 survey conducted by the European Union found that 80% of European Jews feel that anti-Semitism has increased in the last five years and 40% of Jews live in perpetual fear of being physically attacked.[75] In 2018 and 2019 respectively, there were 249 and 270 incidents of anti-Semitic attacks influenced by extreme ideologies.[76] In 13% of the cases in the two years, the attacks were attributed to known white supremacists online trolling and distributing anti-Semitic flyers as well as coordinating activities targeting Synagogue vandalism.[77] The statistics are worse in the United States. The Anti-Defamation League (ADL) record that in the first six months of 2019, a total of 780 anti-Semitic incidents and 785 reported the same period in 2018.[78] In New York city alone, 200 of such incidents occurred in the first half of 2019. The anti-Semitic acts included taunts, graffiti, harassment, and assaults directed at religious Jews.[79] Loeffler states that America today grapples with deadly resurgence of anti-Semitism. Below are excerpts from the newspapers of comments analysed:

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74 The Editorial Board 'Anti-Semitism lives: The hate that will not die' *Pittsburgh Post-Gazette* 5 January 2020 *https://www.post-gazette.com/opinion/editorials/2020/01/05/Anti-Semitism-lives-The-hate-that-will-not-die/stories/202001040007?cid=search*. >accessed 5 January 2020.

75 The Editorial Board 'Anti-Semitism lives: The hate that will not die' *Pittsburgh Post-Gazette* 5 January 2020 *https://www.post-gazette.com/opinion/editorials/2020/01/05/Anti-Semitism-lives-The-hate-that-will-not-die/stories/202001040007?cid=search*. Accessed 5 January 2020.

76 The Editorial Board 'Anti-Semitism lives: The hate that will not die' *Pittsburgh Post-Gazette* 5 January 2020 *https://www.post-gazette.com/opinion/editorials/2020/01/05/Anti-Semitism-lives-The-hate-that-will-not-die/stories/202001040007?cid=search*. Accessed 5 January 2020.

77 IACP Police Chief Magazine, 'Targeted Violence and the rise of Anti-Semitism' https://www.policechiefmagazine.org/targeted-violence-anti-semitism/ accessed 1 May 2021

78 Jonathan Greenblatt 'Jonathan Greenblatt: Social media is not doing enough to curb anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search**.** Accessed 5 May 2021**.**

79 Jonathan Greenblatt 'Jonathan Greenblatt: Social media is not doing enough to curb anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search**.** Accessed 5 May 2021. Such incidents have become so common in the US which has necessitated the lunching of a new online site by the ADL to track racial slurs especially by extremists. See Souad Mekhennet 'Anti-Defamation League launches tool to track anti-Semitism' *The Washington Post* 1 February 2020. https://www.post-gazette.com/news/faith-religion/2020/02/01/Anti-Defamation-League-launches-tool-to-track-anti-Semitism/stories/202002010053?cid=search. Accessed 5 May 2021

> "Unlike hate movements of the past, extremist groups are able to quickly normalize their messages by delivering a never-ending stream of hateful propaganda to the masses. One of the big things that changes online is that it allows people to see others use hateful words, slurs and ideas, and those things become normal." (Washington Post, 18 October 2018, Margret Underhill).

The approach of the Court in analysis of free speech cases is to eschew context and place doctrinal concerns over groups that are historically oppressed. On this view, Bobelian of the *Washington Post* reports (quoting Rosenbaum) that the Justices of the Supreme Court instead of restricting those that pollute our public dialogue have treated every speaker-'an assortment of white supremacist and Nazi wannabes -like an Edison or Einstein.'[80] Jews have suffered the most harm from Charlottesville to Squirrel Hill, Pittsburgh to Poway, American anti-Semitism has reared its head to demonstrate deadly propensity for violence.[81] The Supreme Court cannot downplay the effects of hate messages, the role of the internet in spreading hate and the lethargic official response to target groups that are continuously harassed, attacked or murdered. Police chiefs write that after the Pittsburgh attack, sixteen white supremacists were arrested for alleged plots to attack Jewish communities.[82] The chiefs concluded that the Jewish community in the U.S. feels enormously insecure in a place they initially considered a home.[83] In 2018, after the Pittsburgh Synagogue shooting, President Trump made a powerful statement on anti-Semitism,

> "The vile, hate-filled poison of anti-Semitism must be condemned and confronted everywhere and anywhere, it appears. There must be no tolerance for anti-Semitism in America or for any form of religious or racial hatred or prejudice."[84]

[80] Michael Bobelian, Is free speech an 'inviolable' right or a cover for 'hostile acts'? *The Washington Post* 5 June 2020 https://www.washingtonpost.com/outlook/is-free-speech-an-inviolable-right-or-a-cover-for-hostile-acts/2020/06/04/a2e132f8-9948-11ea-a282-386f56d579e6_story.html 23 May 2021

[81] Jones Loeffler, 'An Abandoned Weapon in the Fight Against Hate Speech' *The Atlantic*, 16 June 2019. https://www.theatlantic.com/ideas/archive/2019/06/lost-history-jews-and-civil-rights/590929/ accessed 16 June 2019." Jews will not replace us" these were written boldly by 300 Neo-Nazi's with flaming touches who marched through the University of Virginia on a late Friday evening in August 2017 and the President of the school responded that the University must abide by 'state and federal law' on the First Amendment of free speech and freedom of Assembly.' Their hands were tied. Interestingly, the Anti-Defamation League and the American Jewish Committee concurred that the protesters need to exercise their protected speech though the condemned the display of swastikas.

[82] Loeffler

[83] IACP Police Chief Magazine, 'Targeted Violence and the rise of Anti-Semitism' https://www.policechiefmagazine.org/targeted-violence-anti-semitism/ accessed 1 May 2021.

[84] Remarks by President Trump at the 91st Annual Future Farmers of America Convention and Expo," Oct. 27, 2018, at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-91st-annual- future-farmers-America-convention-expo/). >accessed 1 May 2021

Even while the President made the above speech, he had been accused by the mainstream media of his tolerance for anti-Semitism especially for statements he made after the Neo-Nazi march at Charlottesville that, 'there were very fine people on both sides.'[85] Biden was later to comment that, "With those words, the president of the United States assigned a moral equivalence between those spreading hate and those with the courage to stand against it." The president though the most powerful man in the U.S. at the time, condemned anti-Semitism in the strongest terms in the words above but was neutral where outright condemnation should have followed. Under the circumstance, Americans would have expected their president to go beyond the general denunciation of anti-Semitism to confront the particularities of the situation, 'not to ignore the vile poison of anti-Semitism, or those that spread its venomous creed'[86] – the Neo-Nazi march and violence. Rabbi Jeffrey Meyers of Tree of Life Pittsburgh advised that politicians tone down the words of hate within the country and speak more responsibly to end hate-filled speech in the country.[87] Booth[88] of PPG cautioned President Trump in these words, 'let me help you out, Mr. President. I suggest that, until we figure out what the hell is going on, you institute a total and complete shutdown of your inciting, racist rhetoric.' Booth was referring to the spate of killings by white supremacists in different cities in the U.S. motivated by extremists' ideologies especially anti-Semitism who draw their strength from Trump's hate rhetoric.

For Cherwitz (PPG), the prevalence of anti-Semitism in the US calls for diligent and concrete actions to quell the tide of attack rather than the, 'never again' passive attitude of response that are insufficient but pays only lip service to the quest to prevent anti-Semitism.[89] The columnist is of the view that Trump embolden these

[85] Angie Drobnic Holan, "In Context: Donald Trump's 'Very Fine People on Both Sides' Remarks (Transcripts) *The Poynter Institute* 26 April 2019. https://www.politifact.com/article/2019/apr/26/context-trumps-very-fine-people-both-sides-remarks/. >accessed 10 June 2021.

[86] State of the Union 2019 transcript, *CNN*, February 6, 2019, at https://www.cnn.com/2019/02/05/politics/donald-trump-state-of-the-union-2019-transcript/index.html)

[87] The Editorial Board 'A seamless garment: Counteract hate speech with charitable speech' *Pittsburgh Post-Gazette* 13 Aug 2018 https://www.post-gazette.com/opinion/editorials/2018/08/13/A-seamless-garment-Counteract-hate-speech-with-charitable-speech/stories/201808130012?cid=search. 3 May 2021.

[88] Max Booth 'Max Boot: Trump is leading our country to destruction' *Pittsburgh Post-Gazette* 5 August 2019. https://www.post-gazette.com/opinion/2019/08/05/Trump-is-leading-our-country-to-destruction/stories/201908060018?cid=search. Accessed 7 May 2021.

89 Richard Cherwitz 'The usual rhetoric won't stop anti-Semitism' *Pittsburgh Post-Gazette* 2 January 2020 https://www.post-gazette.com/opinion/2020/01/02/The-usual-rhetoric-won-t-stop-anti-Semitism/stories/201912310100?cid=search. Accessed 5 May 2021.

haters and must be denounced because an attack on any minority group is a potential attack on all vulnerable groups.[90] The position of Greenblatt, ADL chief executive, is that anti-Semitism is related to other forms of racial hatred and that there has been increasing use of anti-Semitic vitriol across the political spectrum.[91] It becomes necessary to evolve a system to track the anti-Semitic incidents across the U.S. The tool uses a tracker to record all incidents because of the astronomical growth of anti-Semitism in the U.S.[92] The tool allows various people, whether the police, student, journalist, and the public to observe antisemitic incidents around the country and their immediate vicinity.[93] The challenge according to Greenblatt, is that stereotypes against Jews spread fast in a system where the government do not seem to have a solution to the problem. Also, anti-Semitic related violence occurs in cities where the ADL has no office and people are not willing to report incidents.[94]The irony according to Loeffler is that American Jews have forgotten how to fight anti-Semitism in an age where this ideology has returned with a vengeance.[95] They are trapped in the anachronistic understanding of the First Amendment- some Jewish lawyers even defend the right of Neo-Nazis and anti-Semitic bigots.[96]

5.7 Likelihood of the Violence Occurring: The Lethality of Words

Interestingly, the narratives of the articles often conflated words with deeds. Most of the articles favoured the perspective that hate speech leads to violence. The stories the writers present support the idea that killing, or

[90] Richard Cherwitz 'The usual rhetoric won't stop anti-Semitism' *Pittsburgh Post-Gazette* 2 January 2020 https://www.post-gazette.com/opinion/2020/01/02/The-usual-rhetoric-won-t-stop-anti-Semitism/stories/201912310100?cid=search. Accessed 5 May 2021.

[91] Jonathan Greenblatt 'Jonathan Greenblatt: Social media is not doing enough to curb anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search. Accessed 5 May 2021

[92] Souad Mekhennet 'Anti-Defamation League launches tool to track anti-Semitism' *The Washington Post* 1 February 2020. https://www.post-gazette.com/news/faith-religion/2020/02/01/Anti-Defamation-League-launches-tool-to-track-anti-Semitism/stories/202002010053?cid=search. Accessed 5 May 2021.

[93] Souad Mekhennet 'Anti-Defamation League launches tool to track anti-Semitism' *The Washington Post* 1 February 2020. https://www.post-gazette.com/news/faith-religion/2020/02/01/Anti-Defamation-League-launches-tool-to-track-anti-Semitism/stories/202002010053?cid=search. Accessed 5 May 2021

[94] Souad Mekhennet 'Anti-Defamation League launches tool to track anti-Semitism' *The Washington Post* 1 February 2020. https://www.post-gazette.com/news/faith-religion/2020/02/01/Anti-Defamation-League-launches-tool-to-track-anti-Semitism/stories/202002010053?cid=search. Accessed 5 May 2021.

[95] Jones Loeffler, 'An Abandoned Weapon in the Fight Against Hate Speech' *The Atlantic*, 16 June 2019. https://www.theatlantic.com/ideas/archive/2019/06/lost-history-jews-and-civil-rights/590929/ accessed 16 June 2019.

[96] Ibid

violence is an off shoot of hate speech and needs to be curbed to protect minority groups particularly, Jews and Blacks.[97] The following are extracts from the newspapers analysed.

> "Here within 40 months were two ruthlessly murderous attacks in the most sacred of spaces, victimizing minority communities-one racial, one religious-that share a centuries long struggle against bigotry and persecution. In both instances, the gunmen left a cache of hate-filled online commentary and eagerly volunteered their motives. "(Kevin Sack, *New York Times*, 4 November 2018).

> "We should not kid ourselves that online hate will stay online," Neufeld added. "Even if a small percentage of those folks active online go on to commit a hate crime, it's something well beyond what we've seen for America." (Washington Post, Adam Neufeld, 18 November 2018).

The articles contain the exact words utilized by white supremacists to describe Jews. Hatred for Jews was not coded in rhetoric; but words used either described Jewish roles in the U.S. or explained historical stereotypes that attracted hatred or discrimination towards them. For instance, one of the Synagogue shooters just prior to the shooting wrote, "Open your eyes! it is the filthy EVIL Jews bringing in the filthy EVIL Muslims into the country!!!"[98] Waldman of the *Washington Post* comments that the shooter committed the worst anti-Semitic massacre in American history because he believed the conspiracy theories propagated by the then American president among others about immigrants threatening American and then joined it to his natural hatred for Jews as being part of the problem.[99]

Another white supremacist was caught on tape leaving racists messages against African Americans and Jewish people, 'little kikes. They get ruled by people like me. Little fucking octaroons. My ancestors enslaved those little pieces of fucking shit.'[100] A white supremacists who drove for at least six hours to unleash mayhem on a minority group said in his online hate manifesto posted just few minutes before shooting dead more than

[97] So far, all the articles in this chapter support this idea.
[98] Ruth Marcus, Trump has stoked the fears of the Bowerses among us oct 28, 2018 *Washington Post*, (https://www.washingtonpost.com/opinions/trump-has-stoked-the-fears-of-the-bowerses-among-us/2018/10/28/2d4cc088-daf0-11e8-b3f0-62607289efee_story.html) accessed 30 April 2021
[99] Paul Waldman, 'With racist ad, Trump sinks to a new low' *The Washington Post* 1 November 2018 https://www.washingtonpost.com/blogs/plum-line/wp/2018/11/01/with-racist-ad-trump-sinks-to-a-new-low/ 20 Sept. 2020
[100] Jason Wilson, 'White supremacist Richard Spencer makes racist slurs on tape leaked by rival' *The Guardian*, 4 Nov. 2019. https://www.theguardian.com/world/2019/nov/04/white-supremacist-richard-spencer-racist-slurs-tape-milo-yiannopoulos accessed 1 May 2021

twenty people said that he was inspired by another extremist who identified himself as someone who killed 51 people in two mosques outside the United States.[101] One of the leaders of a hate group wrote, "These false Jews," promote the filth of Hollywood that is sending the American people and the people of the world and bringing you down in moral strength…It's the wicked Jews, the false Jews, that are promoting lesbianism, homosexuality. It's the wicked Jews, false Jews, that make it a crime for you to preach the word of God, then they call you homophobic."[102]

In the preface to their book, *Must We Defend Nazis?* Delgado and Stefancic write that hate crimes are only provable by examining what the accused person said or posted online prior to the commission of an offense.[103] To this extent, many perpetrators of mass shooting in the U.S. were all enthusiastic consumers of hate speech.[104] Speech does not pull the trigger but who seriously doubts that examples of speech above or in chapter one of this thesis create a climate where acts of violence are likely? The question is, can violence occur in a vacuum? For Lord, writing in the *Pittsburgh Post-Gazette,*

> It is my experience that words precede action…we must stand together against hate speech that triggered the mass shooting at the tree of life…Words matter. when the public constantly receives hate messages online, on air, and in print, some people feel it is their duty to do something.[105]

'The attempt to split bias from violence has been this society's most enduring rationalization,'[106] the words above delineate a correlation between hateful words and violence. Words matter and can be used to incite people to commit violence, says Rossie Shuford, the executive director of the American Civil Liberties Union

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[101] Sara Sidner, 'Internet sites blamed for helping incite racist violence, but there's no plan to rein them in' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[102] Leonard Pitts, 'Condemn bigotry regardless of source' *The Post and Courier* 17 March 2018 **https://www.postandcourier.com/opinion/commentary/condemn-bigotry-regardless-of-source/article_d63c3524-2953-11e8-a1c7-17499502b3ba.html. 10 May 2021**. Accessed 10 May 2021. I did not include the name of the person who said these words, to save the person from harm. Subsequent quotations of this nature will exclude the name of the maker.

[103] Richard Delgado and Jean Stefancic, *must we defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy* (New York University Press 2018)

[104] Richard Stengel, 'Why America Needs a Hate Speech Law' *The Washington Post* 29 October 2019 https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/. >accessed 11 May 2021

[105] Rich Lord 'New Tree of Life shirts include 'Words Matter' message' *Pittsburgh Post-Gazette* 11 Feb 2019 https://www.post-gazette.com/local/city/2019/02/11/New-Life-Congregation-Tree-of-Life-massacre-shirts-Words-Matter/stories/201902110089?cid=search. Accessed 6 May 2021.

[106] Mari Matsuda, 'Public Response to Racist Speech' in Mari Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge 2018), 20 quoting Patricia Williams.

(ACLU) in Pennsylvania.[107] for Matsuda, it is a necessary and unavoidable part of racism and so there is clear connection between racist words and racist deeds.[108] On June 17, 2015, and October 27, 2018, two attacks, one racial, the other, religious, occurred targeting African Americans and Jews.[109] The gunmen,[110] both white supremacists left online hate messages prior to the attack against the minority groups they attacked. Loeffler of *The Atlantic* opines that those white supremacists 'have twisted the law into a weapon with which to lunch a frontal attack on American liberalism'.[111] According to the *Police Chief Magazine*, extremist violence does not exist in a vacuum. In numerous cases, the hatred would have been nurtured and expressed by these white supremacists through online speech in social media forums long before the commission of the violent act-murder.[112] The most virulent form of hate usually occurs online and extremists are empowered by online access, according to police chiefs. Morten Kleine, the president of the *Zionist Organization of America*, states in a report that there is a plethora of internet sites that unleash hatred and violence especially against American Jews and Blacks.[113] For the great Jewish historian,

> "One of the principal lessons of Jewish history has been that repeated verbal slanders are sooner or later followed by violent physical deeds. Time and again over the centuries, anti-Semitic writings created their own fearful momentum which climaxed in an effusion of Jewish blood. "[114]

On another hand, after the killing of George Floyd, Facebook wrote that it planned to limit misinformation

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[107] Torsten Ove 'Free Speech vs Hate Speech: How Societies Balance Competing Rights' 22 Oct 2019 *Pittsburgh Post-Gazette* https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. Accessed 5 May 2021

[108] Ibid 33.

[109] Kevin Sack, 'Anguished by 'Spiral of Hate,' Charleston Pastor and Pittsburgh Rabbi Grieve as One' *New York Times* 4 November 2018. https://www.nytimes.com/search?query=anguished+by+spiral+of+hate. Accessed 30 April 2021.

[110] Ibid, why I do not want to mention their names is to deny them the popularity they seek by committing such egregious acts.

[111] Jones Loeffler, 'An Abandoned Weapon in the Fight Against Hate Speech' *The Atlantic*, 16 June 2019. https://www.theatlantic.com/ideas/archive/2019/06/lost-history-jews-and-civil-rights/590929/ accessed 16 June 2019. The law Loeffler was referring to here could be the First Amendment.

[112] IACP Police Chief Magazine, 'Targeted Violence and the rise of Anti-Semitism' https://www.policechiefmagazine.org/targeted-violence-anti-semitism/ accessed 1 May 2021.

[113] Morton A. Klein, 'Hate Crimes and the Rise of White Nationalism' Report of the Zionist Organization of America (ZOA), US House of Representatives Committee on the Judiciary, 116th Congress, 9 April 2019. https://www.congress.gov/116/meeting/house/109266/witnesses/HHRG-116-JU00-Wstate-KleinM-20190409.pdf. 1 May 2021.

[114] Paul Johnson, *A History of the Jews* (Harper &Row Publishers 1987) 579

and hate speech related to the trial of Derek Chauvin, the Minneapolis police officer charged with the murder of Floyd to keep such speech from spilling over into real world harm.[115] In October 2019, a United Nations (UN) expert warns that social media companies are failing to address offline harm incited by online hate.[116] Kaye and other UN experts in an open letter addressed to the National Assembly write that online and offline hate speech has, 'exacerbated societal and racial tensions, inciting attacks with deadly consequences around the world.'[117] These experts pinpointed the connection between exposure to hate and number of crimes committed as a result. For Kaye, online hate speech is no less harmful because it is online but to the contrary because of the speed of its spread, can incite grave offline harm.[118] Hatzipanagos of the *Washington Post*, places in perspective the number of attacks inspired by online hate speech in America especially by white supremacist.[119] The columnist states that of 34 extremist related murders recorded in 2017 in America, 18 were committed by white supremacists whose rage festered online until it exploded into the real world.[120] These opinions demonstrate the extent that online hate vitriol connects to real world violence.

The Pittsburgh Synagogue shooter in the weeks preceding his attack posted on his GAB social media account referring to the *Hebrew Immigrant Aid Society* (HIAS), "You like to bring in hostile invaders to dwell among us?" Just a week to the 27 October attack, he posted again, '"HIAS likes to bring invaders in that kill our people. I can't sit by and watch my people get slaughtered. Screw your optics. I'm going in."[121] While also being arrested by the deputy when he surrendered after shooting dead eleven people, he said to the SWAT

[115] Davey Alba 'Facebook, preparing for Chauvin verdict, to limit posts that might incite violence' https://www.post-gazette.com/news/nation/2021/04/20/Facebook-preparing-for-Chauvin-verdict-to-limit-posts-that-might-incite-violence/stories/202104200122. 20 April 2021, accessed 1 May 2021

[116] David Kaye, United Nations News, 'Companies' Failing to Address offline Harm Incited by Online Hate' 21 October 2019. https://news.un.org/en/story/2019/10/1049671. Accessed 12 August 2021.

[117] Ibid

[118] David Kaye, United Nations News, 'Companies' Failing to Address offline Harm Incited by Online Hate' 21 October 2019. https://news.un.org/en/story/2019/10/1049671. Accessed 12 August 2021

[119] Rachael Hatzipanagos, 'How Online Hate Turns into Real-Life Violence' *The Washington Post* , 18 November 2018 https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/**.** Accessed 12 August 2021

[120] Comments made by Shannon Martinez, the Project director of Free Radicals Project, a project that helps people to leave extremist groups.

[121] Rich Lord, 'How Robert Bowers Went from Conservative to White Nationalist' *Pittsburgh Post-Gazette,* 10 Nov 2018 https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165. Accessed 2 May 2021.

officer that he wanted all Jews to die for wanting to eliminate his race (commit genocide against his people).[122] Similarly, the Charleston Mother Emmanuel church shooter, also nurtured and spewed hate online. While he was gunning down his victims, he screamed that his victims raped their women and were taking over their country.[123]

For Kantor, there is a need to recognize the distinct correlation between incitement and violence. He comments that 'the Jewish people all too frequently have had bloody reminders about the power of words.'[124] Hate speech and incitement is usually dismissed as bigotry or merely use of painful words; it can be a springboard for more severe consequences.[125] The world witnessed inflammatory speech that preceded each genocidal event that occurred in Nazi-Germany, Rwanda, or former Yugoslavia.[126] The truth about these examples is that the hate and incitement that precipitated into violence was known but largely ignored and dismissed. In America, the law lends credence to hate in a way that is unrivalled through the marketplace of open discussion, non-censorship of the internet and non-banning of extremists' groups. According to Buckley, we have now multiple examples of online hate speech spilling into offline violence, the courts can no longer continue to be apathetic about it.[127]

Parker seems to defer from the opinions of other columnists. For her, words matter but they are not lethal. This assertion was demonstrated by the analysis of the 'Texting suicide case' between Michelle Carter and Conrad Roy 111. At the time of his death, Carter was 17 whose boyfriend, Roy spoke to her frequently about

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122 Kevin Sack, 'Anguished by 'Spiral of Hate,' Charleston Pastor and Pittsburgh Rabbi Grieve as One' *New York Times* 4 November 2018. https://www.nytimes.com/search?query=anguished+by+spiral+of+hate. Accessed 30 April 2021.

123 Ibid. I contacted the police departments in Charleston and Pittsburgh for the hate speech posted online by the two white supremacists who perpetrated the crime, but they declined release of the commentary. The speech had been taken down and are no longer available on the websites.

124 Moshe Kantor, 'The Power of Words in the Battle Against Hate' *CNN* 26 January, 2018 https://www.cnn.com/2018/01/26/opinions/language-leads-to-violence-mk-opinion-intl/index.html accessed 23 May 2021

125 Moshe Kantor, 'The Power of Words in the Battle Against Hate' *CNN* 26 January, 2018 https://www.cnn.com/2018/01/26/opinions/language-leads-to-violence-mk-opinion-intl/index.html accessed 23 May 2021

126 **Moshe Kantor, 'The Power of Words in the Battle Against Hate' *CNN* 26 January, 2018 https://www.cnn.com/2018/01/26/opinions/language-leads-to-violence-mk-opinion-intl/index.html accessed 23 May 2021**

127 IED Buckley, 'Social media Venom is Spreading Offline, and We Need an Antidote' *The Post and Courier* 3 Nov 2018. https://www.postandcourier.com/opinion/commentary/social-media-venom-is-spreading-offline-and-we-need-an-antidote/article_af0c49f2-de08-11e8-933f-8ff6ed55efc9.html. Accessed 10 May 2021.

taking his own life. Michelle texted and spoke to Conrad and urged him to go ahead and do it. When he had second thoughts and got out of the car, Mitchell cautioned him to go back into his truck. Sadly, at one point she texted him, "You're ready and prepared. All you must do is turn the generator on and you will be free and happy. No more pushing it off. No more waiting."[128] Conrad then returned to the vehicle and died. Parker defended Carter that she did not know the consequences of the words she used and did not understand (this was not to excuse Carter's meanness towards a friend) but that what she said to Roy should not constitute the crux of a legal argument and her sense of shame or guilt did not amount to legal guilt. This is too much of technicality in the application of law. In this age and time, a 17-year-old in this culture knows the meaning of suicide and the implication of taking one's own life. Parker fails to realize that words really matter and are lethal especially because Carter was convicted of involuntary manslaughter and sentenced to two and half years in prison for the role, she played in facilitating the intention of her boyfriend. The question for Parker is, what if Carter at that crucial moment discouraged Roy from getting back into the car, would he be alive today? If Carter's words made him get back into the car, may be her dissuading words not to do it would have saved Roy from killing himself.

Most perpetrators of mass shooting in America were all regular consumers of hate speech, from Texas to California. Indeed, even though speech does not pull the trigger but as Kirchick asks, 'does anyone seriously doubt that such hateful speech create a climate where such acts are more likely'?[129] For Stengel therefore,

> Let the debate begin. Hate speech has a less violent, but nearly as damaging, impact in another way: It diminishes tolerance. It enables discrimination. Isn't that, by definition, speech that undermines the values that the First Amendment was designed to protect: fairness, due process, equality before the law? …All speech is not equal. And where truth cannot drive out lies, we must add new guardrails. I'm all for protecting "thought that we hate," but not speech that incites hate. It undermines the very values of a fair marketplace of ideas that the First Amendment is designed to protect.[130]

[128] Kathleen Parker, Column: Can Words be Lethal? *The Post and Courier* 21 June 2017. https://www.postandcourier.com/aikenstandard/opinion/column-can-words-be-lethal/article_bddbdc10-b855-59ec-b991-224e2cc30419.html< accessed 11 May 2021.For all written in this paragraph.
[129] Richard Stengel, 'Why America Needs a Hate Speech Law' *The Washington Post* 29 October 2019 https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/. >accessed11 May 2021
[130] Ibid.

Thus far, there are words that their facial value means nothing or little to the common person but are nevertheless associated with deadly violence among hate speakers. The next section discusses one of such concepts which appear to be potentially important that the courts and law enforcement officers should pay attention to. The use of such terms sends red flags-imminent prospect of attack on outgroups by white supremacists. The term, 'screw your optics,' was discussed by newspapers as a hate rhetoric.

5.8 Hate Rhetoric- 'Screw Your Optics'

The words, 'screw your optics,' was voiced by the Pittsburgh Synagogue shooter. If these words were taken literarily, they do not mean much but they mean a lot in the white supremacists' world. According to Lord of the *Pittsburgh Post-Gazette,* the optics debate centers around 'accelerationists' who want to achieve an all-white nation by fighting a race war that they consider urgent.[131] This phrase used by White nationalists and supremacists took another meaning after the shooting. Lord opined that a search on Twitter for 'screw your optics revealed 42 (including mass shootings and white nationalists post) and on Google at least 40 images with versions of 'screw your optics,' on them.[132] The argument goes this way.

> There's a clear structure to how this works, and what this ideology does is that it focuses attention on certain groups as the enemy and makes the issue seem very, very urgent," "That's the fear part. The race war is going to start right now. The threat is immediate, urgent and that action can be taken.[133]

[131] Rich Lord 'The Pull of Extremism: White Nationalism is Growing and Dividing' *Pittsburgh Post-Gazette,* 21 Oct 2019 https://www.post-gazette.com/news/crime-courts/2019/10/21/White-nationalism-online-supremacy-Tree-of-life-shooting-Robert-Bowers-screw-your-optics/stories/201910040166?cid=search. >accessed 3 May 2021.
[132] Rich Lord 'The pull of extremism: White nationalism is growing and dividing' *Pittsburgh Post-Gazette,* 21 Oct 2019 https://www.post-gazette.com/news/crime-courts/2019/10/21/White-nationalism-online-supremacy-Tree-of-life-shooting-Robert-Bowers-screw-your-optics/stories/201910040166?cid=search. >accessed 3 May 2021.
[133] Rich Lord 'The pull of extremism: White nationalism is growing and dividing' *Pittsburgh Post-Gazette,* 21 Oct 2019 https://www.post-gazette.com/news/crime-courts/2019/10/21/White-nationalism-online-supremacy-Tree-of-life-shooting-Robert-Bowers-screw-your-optics/stories/201910040166?cid=search. >accessed 3 May 2021

Optics decodes winning the 'race war' of the white supremacist. In 2017,[134] 'clean-cut young men in polos and khakis holding tiki torches. Advocates for "optics" won that day.'[135] The next morning following the rally, the Nazi and confederate flag appeared with an optics video of a car driven by a Neo-Nazi plowing through counter-protesters-killing a 32-year-old Heather D Heyer and injuring many others.[136] The Contagion Research Institute based in New York analysed the word 'optics' and discovered its connection with some extremists' terms some of which are:

- WN -short form for white nationalism or a white homeland
- Civnat- far-right term for moderate to conservative whites
- Atomwaffen- A violent Neo-Nazi clique
- Gtkrwn- extremist code for 'gas the kikes-race war now'[137]

Thus far, 'screw your optics,' means much more than its apparent and *prima facie* meaning. The shooter was lauded after the Tree of Life Pittsburgh shooting by his fellow extremists as not just a guy but a thing to do![138] The question again is, where a rhetoric is used which is understandable only by insiders; members who use it, how can others not in the same conversation refute the falsehood?

5.9 Conclusion

The newspapers are in unison about different aspects of doctrinal issues raised in the data. Opinion discourse raise uproar about the types of speech protected under the First Amendment. Predominantly contained in the data is that antisemites are omnipresent in the U.S and antisemitic incidents have increased in the country.

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[134] Unite the Right Rally in Charlottesville, Virginia. When white supremacists planned a demonstration over the City of Charlottesville's decision to remove the statue of Robert E Lee. The rally quickly took a different turn with racial taunting, shoving and obvious brawling with protesters and counter-protesters that culminated into a death and many people were wounded. Sheryl Gay Stolberg and Brain M Rosenthal, 'Man Charged After White Nationalist Rally ends in Deadly Violence' The *New York Times*, 12 August 2017. https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html.>accessed 9 June 2021.

[135] Rich Lord 'The pull of extremism: White nationalism is growing and dividing' *Pittsburgh Post-Gazette*, 21 Oct 2019 https://www.post-gazette.com/news/crime-courts/2019/10/21/White-nationalism-online-supremacy-Tree-of-life-shooting-Robert-Bowers-screw-your-optics/stories/201910040166?cid=search>accessed 3 May 2021.

[136] Rich Lord 'The pull of extremism: White nationalism is growing and dividing' *Pittsburgh Post-Gazette*, 21 Oct 2019 https://www.post-gazette.com/news/crime-courts/2019/10/21/White-nationalism-online-supremacy-Tree-of-life-shooting-Robert-Bowers-screw-your-optics/stories/201910040166?cid=search. >accessed 3 May 2021.

[137] Ibid

[138] Rich Lord 'The pull of extremism: White nationalism is growing and dividing' *Pittsburgh Post-Gazette*, 21 Oct 2019 https://www.post-gazette.com/news/crime-courts/2019/10/21/White-nationalism-online-supremacy-Tree-of-life-shooting-Robert-Bowers-screw-your-optics/stories/201910040166?cid=search > accessed 5 May 2021

The columnists also discuss words as being apparently lethal as many white supremacists go on a shooting spree after being instigated or influenced by like minds. What drives the discourse is the overprotective law of the First Amendment which is formidable and diametrically opposed to speech regulation, but we must accept the peculiar nature of America so that the proposed solution to the problem of harmful speech in this work favours arguments for censorship. Most of the articles reviewed mention certain groups as those most impacted and these justify the censorship of such speech especially when perpetuated in a system that the columnists all agree is historically, culturally, and institutionally racist. This chapter demonstrates that hate speech regulation in American can be attained if the Court considers the context and content of speech. Reformulating also the *Brandenburg* imminency requirement doctrine can provide a clear part to narrowing the broad speech protection under the American system. The next chapter discusses the mode of spread and perpetrators of hate speech. The data analyzed strongly suggests that the internet empowers racists and that white supremacists are major proponents of racial and religious hate speech in America. Ultimately, this research seeks to highlight through discourse analysis in the newspapers, the doctrinal and practical realities surrounding the First Amendment's doctrine of incitement against racial and religious minorities. The next chapter discusses how internet communication and white supremacists have contributed to the spread of racial and religious hatred. The questions the chapter seeks to answer are how white supremacists contribute to the problem of internet hate speech in America and how media discourse portrays the impact of abusive hate speech.

Chapter Six

Analysis of Mode of Spread of Hate Speech, the Perpetrators, and the Court

Introduction

In the preceding chapter, an attempt was made to discuss the apparently impregnable nature of the First Amendment as presented by the sources reviewed and how the First Amendment has been used as a cover by white supremacists and other extremist groups to harass minority groups especially Blacks and Jews. The discourse in the sources see the law as over-protective but they also state that it is un-American for the courts or the government to regulate speech.

> "Some would urge the Supreme Court to draw a clear line between free speech and hate speech, and bar the latter," she says, adding, "This is nonsense." But if we cannot draw this line, can no speech be prohibited under any circumstances? Can we not continue to prohibit inciting a riot or other forms of violence? …but it is absurd to hold that it cannot be drawn at all..." (NYT, 9 June 2015).

The above reflects argument of some columnist on regulation of speech. Due to incessant harm suffered, the minority voices in the articles say that it is important to put into context the risks and harms suffered by those impacted by the broad protection of speech- especially historically oppressed minorities. The discussion laid bare by those referenced by the writers (for instance, the survivors of the massacre in Pittsburgh and Charleston) is that context in accessing speech should count to prevent potential harm against minorities. This chapter continues the discussion in terms of those who propagate hate (white supremacists) or incites violence against vulnerable minorities and the means used to achieve their aim-the internet.

The NYT reports that African Americans and Jews have shared a centuries-long struggle against prejudice and persecution[1] in the hands of white supremacists. Below are excerpts of some texts analysed.

> "But when their rhetoric reaches certain people, the online messages can turn into real-life violence. Several incidents in recent years have shown that when online hate goes offline, it can be deadly. White supremacist Wade Michael Page posted in online forums tied to hate before he went on to murder six people at a Sikh temple in Wisconsin in 2012" (*Washington Post*, 18 November 2018, Hatzipanagos)

[1] Kevin Sack, 'Anguished by 'Spiral of Hate,' Charleston Pastor and Pittsburgh Rabbi Grieve as One' *New York Times* 4 November 2018. https://www.nytimes.com/search?query=anguished+by+spiral+of+hate. >accessed 30 April 2021.

For the columnists, the new communication medium: the internet provides a powerful new mechanism for transmitting and intensifying pre-existing hatreds in the age of tribalism.[2] White Supremacists' use different media tools to reach a broader public in furtherance of their message.[3] It is important to recall the Court's position that the internet is not as intrusive as the traditional modes of communication (radio and television) and that those who access the internet ought to acquiesce to its troubling content.[4] The sources analysed largely expressed the fact that the internet contribute largely to hate. The PPG states that the online network is a loose one incapable of being monitored. The Court also accorded the same level of protection to the internet as in printed communication without consideration to the unique nature of internet communication.[5] The liberal stance of the Court in the words above is evident. It is not arguable that the mode of communication in the *Brandenburg* era was less effective than in the present times of the internet so that the Court to accord the same level of protection to the internet as in prints is surprising. The Court errs if it does not regard the internet as a 'much more dynamic path' to the extremes,[6] that the columnists describe as giving a sense of purpose to extremists. For instance, in the wake of the Columbine High School shooting on 20th April, 1999, that revealed violent web pages invented by teenage murderers, the media reports, predominantly centered on the capacity of the internet to spread hate and promote violent messages.[7] For Kobil, the internet has been used quite effectively by white supremacists and other extremists groups to propagate hate inspired violence and also to create a sense of community by like-minded individuals to commit violent acts.[8] It is also general opinion that

[2] Ruth Marcus, 'Trump Has Stoked the Fears of the Bowerses Among Us October 28, 2018 *Washington Post*, **(https://www.washingtonpost.com/opinions/trump-has-stoked-the-fears-of-the-bowerses-among-us/2018/10/28/2d4cc088-daf0-11e8-b3f0-62607289efee_story.html)** >accessed 30 April 2021

[3] Jacob Gursky and Samuel Woolley, How Hate and Misinformation go Viral :A Case Study of Trumps Retweet About TechStream, 2 September, 2020 , https://www.brookings.edu/techstream/how-hate-and-misinformation-go-viral-a-case-study-of-a-trump-retweet/ >accessed April 4,2 021.

[4] See chapter 1, footnote 100. Though the *Reno* case had to do with obscene materials on the internet, which the Court held places an unusual burden on adults to materials that should be accessible to them. It is likely that if the Court were confronted with the case of hate speech on the internet, given this precedent, it will give a similar ruling.

[5] See Chapter 1, footnote 122. See also chapter 1section 1.7, Traditional versus internet speech.

6 Rich Lord, 'How Robert Bowers went from conservative to white nationalist' *Pittsburgh Post-Gazette*, 10 Nov 2018 https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165. Accessed 2 May 2021

[7] Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 230.

[8] Daniel T Kobil, 'Advocacy online: Brandenburg v. Ohio and Speech in the Internet Era' (2000) 31 U Tol L Rev 227, 230.

the internet facilitates access to information and materials needed to commit violent acts.[9] This chapter presents media discourse on the practical challenges posed by use of internet communication by white supremacists. The chapter will refer to doctrinal issues that either facilitate or amplify this hatred as we go along in our discussion.

6.1 White Supremacists Targeted Attack Statistics

Rosenbaun seems to echo white supremacists twisting of First Amendment right to free speech in the introduction to his book in the following words which the data analysed in this thesis support fully.

> The moral legitimacy of free speech no longer makes sense to many people. Its virtues have been thoroughly abused by one set of citizens who have trampled upon the rights of others-fellow citizens who retain rights of their own, rights that should not be subordinated to the First Amendment.[10]

The Center for Strategic and International Studies (CSIS) reports that there is a rise in far-right extremism in the U.S. and the frequency of the attacks more than quadrupled especially between the years 2016 and 2017.[11] The Center continues that between 2007 to 2011, the number of violent attacks was five or less, 14 between 2012 to 2016 and the figure jumped to 31 in 2017. The perpetrators, the center added, were mostly white supremacists who acted alone rather than as a group. Similarly, the Southern Poverty Law Centre (SPLC) identify over 950 hate groups in America in 2018 and noted that much of the increase took place inside the white supremacist movement.[12] In view of the points made in section 1.8 of chapter one, which relates to white supremacists' online presence and their ways of indoctrinating individuals, the articles reviewed note that white supremacists contribute to the problem of hate speech in America. For instance, the NYPD intelligence unit has remarked that they see an increase in the level of chatter, the number of platforms, the pitch and tone

[9] Ibid
[10] Thane Rosenbaun, *Saving Free Speech…From Itself* (Fig Free Books 2020) 24
[11] Seth G Jones, 'The Rise of Far-Right Extremism in the United States' CSIS Report, 7 November 2018. https://www.csis.org/analysis/rise-far-right-extremism-united-states. Accessed 16 July 2021.
[12] Joe Heim 'Hate groups in America remain on the rise, according to a new study' *Pittsburgh Post-Gazette* 21 Feb. 2018 https://www.post-gazette.com/news/nation/2018/02/21/Hate-groups-in-America-remain-on-the-rise-according-to-a-new-study/stories/201802210211?cid=search. Accessed 6 May 2021

of the outpouring of hate and that the individuals do not just share their ideas but also stir and encourage each other.[13]

The years 2015 -2019 marked the four deadliest targeted attacks by white supremacists in the United States. Extremists ideologically motivated murders in 2019 targeted Jews in two incidents, Hispanics in one and African Americans in another incident.[14] At a legislative hearing, Lucy Macbeth, a U.S. Representative reminiscing the bigotry that claims more life every day in the U.S., whose son was murdered in 2012 said, 'hatred has already made survivors of so many of us, and there will be more survivors everyday if that hatred and white supremacy is allowed to persist.'[15] Two others who were impacted like Macbeth also did not hesitate in adding, 'we do not want other people to endure what we and our community had to endure, we therefore urge you (members of Congress) to combat this rising tide of hate and violence.'[16] The *Washington Post* puts this in a clearer perspective, " the reality is that people are getting killed, there are mass shootings and mass murders that are clearly being connected to ideas like white genocide which are fueling radicalization."[17] White Supremacists make use of different media tools for various purposes to promote their hateful agendas; for instance, to reach a broader public, they use Twitter or to strategize, they use the Telegram.[18] *Pittsburgh Post- Gazette* reports that a House hearing on white nationalism degenerated into a finger pointing exercise where each side of the house blamed the other side for things they were doing wrong. Democrats blamed President Trump for inspiring white supremacists including the Pittsburgh shooter. Republicans blamed democrats for tolerating an anti-Semite in the House by refusing to strip a congresswoman of committee

[13] Greg B Smith, 'Anti-New York White Supremacist Hate is Rising, NYPD Says, The City 14 August 2019 https://www.thecity.nyc/special-report/2019/8/14/21210876/anti-new-york-white-supremacist-hate-is-rising-nypd-says accessed 4 April, 2021.
[14] IACP Police Chief Magazine, 'Targeted Violence and the rise of Anti-Semitism' https://www.policechiefmagazine.org/targeted-violence-anti-semitism/ accessed 1 May 2021
[15] Reported by Tracie Mauriello 'A flood of online of hate speech greeted a House hearing on white nationalism' 9 April 2019 *Post-Gazette Washington Bureau* https://www.post-gazette.com/business/tech-news/2019/04/09/House-hearing-white-nationalism-YouTube-hate-Facebook-Google-Candace-Owens-Lieu/stories/201904090152?cid=search May 3, 2021
[16] Ibid. Martin Gaynor and Daniel Leger commenting in the *Pittsburgh Post-Gazette*
[17] Elizabeth Dwoskin and Craig Timeberg, 'Facebook bans Alex Jones, Louis Farrakhan, others for being 'dangerous' *The Washington Post* 2 May 2019. https://www.post-gazette.com/business/tech-news/2019/05/02/Facebook-bans-Louis-Farrakhan-far-right-Milo-Yiannopoulos-Alex-Jones-dangerous/stories/201905020170?cid=search. Accessed 5 May 2021
[18] Jacob Gursky and Samuel Woolley, How Hate and Misinformation go Viral :A Case Study of Trumps Retweet About TechStream, 2 September, 2020 , https://www.brookings.edu/techstream/how-hate-and-misinformation-go-viral-a-case-study-of-a-trump-retweet/ <accessed 4 April, 20/21.

assignment after making an antisemitic comment. A witness called to testify at the hearing blamed Muslims for hatred towards Jews. On both sides, the blame was on social media that has served as conduit for hate speech and a vehicle for recruiting all manner of white supremacists.[19] A republican congress person lent credence to the above statement by stating that though white supremacy has been the deadliest form of extremist movement for the last ten years in America, it has been made worse by social media.[20] The newspaper columnists were in consensus on this fact-that social media continues to amplify the problem of hate speech and that though the companies have their own policies guiding hate on their platforms, the government needs to do more to regulate hate. The next section identifies and discusses some social media platforms where the worse hate occurs. Haters seem to go into a more secluded dark areas of the net.

6.2 Social Media contributions to Hate

Platforms such as Facebook and Twitter while they have advanced global connections and changed the structure of society, have contributed to amplifying antisemitism, racism and other forms of hate.[21] According to Greenblatt, white supremacy has metamorphized into a global epidemic through spread of hate speech sustained by the social media.[22] These social media companies seem to generally assume that action against an abuser on their platforms is censorship or a violation of the First Amendment.[23] The *Pittsburgh Post-Gazette* states that social media companies are private companies and therefore not controlled by the First Amendment.[24] For instance if a person went to a Macdonald and screamed, 'die Jews and return to Israel,' the owners of the business will throw the individual out, so Greenbelt asks, why should the online world be different? Twitter, Facebook, Google, and all other online networks should actively monitor their platforms

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[19] For the entire paragraph beginning with Pittsburgh Post-Gazette see Tracie Mauriello 'A flood Online of Hate Speech Greeted a House Hearing on White Nationalism' 9 April 2019 *Post-Gazette Washington Bureau* https://www.post-gazette.com/business/tech-news/2019/04/09/House-hearing-white-nationalism-YouTube-hate-Facebook-Google-Candace-Owens-Lieu/stories/201904090152?cid=search <accessed May 3, 2021

[20] Ibid David Cicilline, U.S. Rep. commenting

[21] Jonathan Greenblatt 'Jonathan Greenblatt: Social media is not doing enough to curb anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search. Accessed 5 May 2021

[22] Ibid

[23] Judy Bolton-Fasman 'The Fine Line Between Free Speech and the First Amendment' *JewishBoston.* 10 March 2017. https://www.jewishboston.com/read/the-fine-line-between-free-speech-and-the-first-amendment/. Accessed 20 July 2021.

[24] Jonathan Greenblatt 'Jonathan Greenblatt: Social Media is Not Doing Enough to Curb Anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search. Accessed 5 May 2021

to identify when speech veers into hate or incitement to violence.[25] This is a necessary distinction that must be made; there must be a line drawn between good speech and violence or hate inciting speech. For Waldman,[26]

> What is new is the awesome power that these platforms have: They control what we see, what order we see them in and when we see them. They have the power to determine the world of our information and that hasn't existed before."[27]

From the foregoing, the important role these companies occupy should make them pro-active in regulating hateful contents; they ought to not just have in principle the policies, but take such policies seriously when haters use their platforms for targeted attacks.[28] For instance, why would Facebook allow the Christchurch shooter to livestream the attack, as he ran around randomly shooting church members, on its platform?[29] They are powerful private companies that can indeed regulate hate speech.[30] Though Facebook uses search algorithms to identify extreme speech and disallows hate groups from its services, it is still not doing enough because of the pervasive nature of online hate content. Rabbi Cooper aptly puts it, 'when stores display offensive product, they are removed, on the internet, that is quite another thing.'[31] Online platforms can and should adopt policies that make it possible to expunge any 'virulent and toxic hatred' likely to incite violence on historically oppressed groups.[32]

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[25] Jonathan Greenblatt 'Jonathan Greenblatt: Social Media is Not Doing Enough to Curb Anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search. Accessed 5 May 2021

[26] Ari Ezra Waldman (Law Professor) is the Director for Innovation Center of Law and Technology, an NGO that Fights Online abuse and discrimination.

[27] Judy Bolton-Fasman 'The Fine Line Between Free Speech and the First Amendment' *JewishBoston.* 10 March 2017. https://www.jewishboston.com/read/the-fine-line-between-free-speech-and-the-first-amendment/. Accessed 20 July 2021.

[28] Judy Bolton-Fasman 'The Fine Line Between Free Speech and the First Amendment' *JewishBoston.* 10 March 2017. https://www.jewishboston.com/read/the-fine-line-between-free-speech-and-the-first-amendment/. Accessed 20 July 2021.

[29] The attack occurred in New Zealand, the city of Christchurch on a Friday, 15 March 2019 where a white supremacist attacked worshippers in two different mosques and killed 51 People.

[30] Hades Gold made this statement. She is Jewish and Was a Victim of Anti-Semitic Threats on Her social media.

[31] Brett Molina, 'White Supremacist Rally Could be Tipping Point for Tech's Tolerance for Hate Speech' *USA Today* 14 August 2017, https://www.usatoday.com/story/tech/2017/08/14/charlottesville-could-tipping-point-social-medias-tolerance-hate-sites/564973001/ <accessed 1 May 20121.

[32] Jonathan Greenblatt 'Jonathan Greenblatt: Social media is not Doing Enough to Curb Anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search. >accessed 5 May 2021

6.3 Online Platforms

For the contributors to the articles analysed, many extremists find comfort and sense of belonging in online platforms especially when they are not breaking through with their careers or are going through some personal crisis.[33] For instance, the PPG opines that the internet can draw a person from a raucous ideology to a full-blown radical thinking.[34] In September 2018, the Network Contagion Research Institute (NCRI) warned of 'an imminent spill of white supremacy and antisemitism from a massive radical web community' and just days later, a person from that online community struck at the Tree of life Synagogue.[35] Finkelstein[36] says the "epidemic" is consolidated on a loose online organization that no one understands, or knows how to check and which has no single mechanism to deal with.[37] Stevens, who though a strong adherent to free speech who quit his Twitter account writes, " I do know that speech, in so many forms and forums, has been less collegial, coarser, angrier, and more mob-like. The heckler's veto is now a full-fledged tsunami of rage. Many are now afraid to speak"[38] Evidence of comments analysed that a professor lends their voice to the media, and we know that usually academics use evidence-based information and barely speculate.

> "Internet culture often categorizes hate speech as "trolling," but the severity and viciousness of these comments has evolved into something much more sinister in recent years" (*Washington Post*, 18 November 2018 by Whitney Phillips, Professor Syracuse University).

[33] Rich Lord, 'How Robert Bowers Went From Conservative to White Nationalist' *Pittsburgh Post-Gazette*, 10 Nov 2018 https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165. >accessed 2 May 2021

[34] This was uttered by Mary Beth Altier, an Assistant Professor at New York University Center for Global Affairs

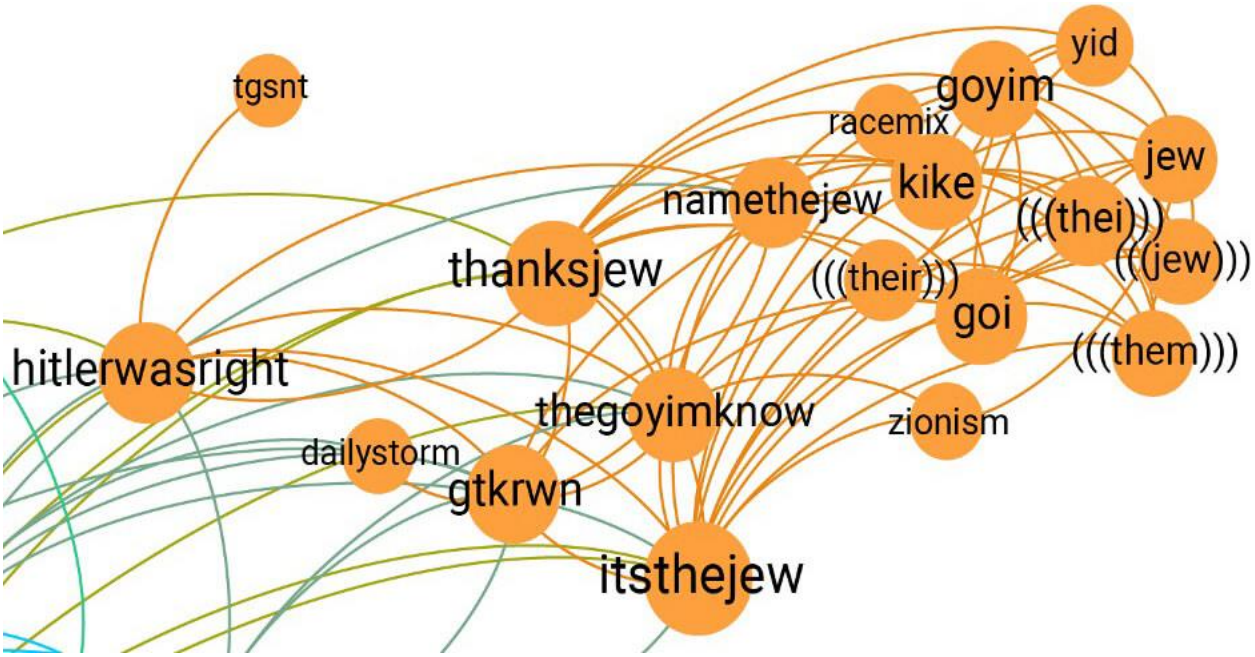
[35] The Network Contagion Research Institute (NCRI), this organization with predictive technology. See the website https://networkcontagion.us/technology/ >accessed 21 July 2021.

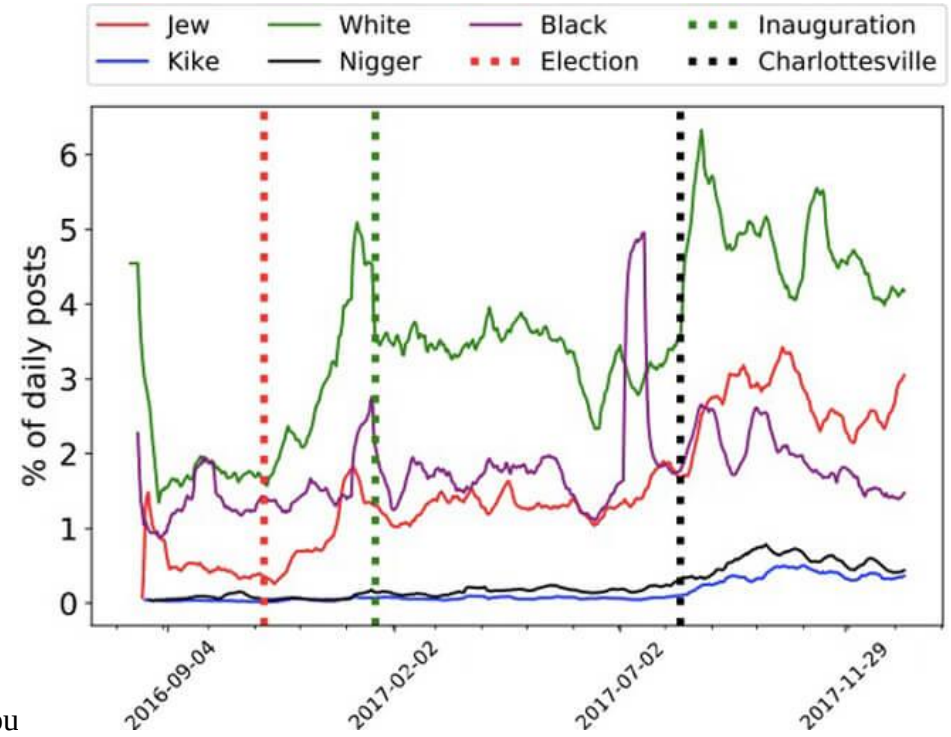
[36] Joe Finkelstein is the Director of NCRI

[37] **Rich Lord**, 'How Robert Bowers went from conservative to white nationalist' *Pittsburgh Post-Gazette*, 10 Nov 2018 https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165. >accessed 2 May 2021

[38] Bret Stevens in his Forward to the Book by Thane Rosenbaun, *Saving Free Speech…From Itself* (Fig Tree Books 2020) 22.

Below are diagrams from NCRI website showing name-calling on an extremist website.





Source

Source: NCRI Website accessed on 21 July 2021.[39]

According to the ADL, white supremacists utilize online forums to access the global community to perpetrate their racists views and connect with like-minded individuals.[40] The New York Police Department (NYDP) says that much of the hate happens through online billboards, xenophobic posters on immigrant neighborhoods and at public rallies.[41] The *Cable News Network* (CNN) describes these online platforms as a 'racist's virtual paradise' in which authorities think are home to three hate-filled rants by suspected mass shooters.'[42] Also, the online space allows isolated extremists to become more involved especially with recruiting and radicalizing like-minds. It is necessary to discuss some of these online forums that radicalize white supremacists at this juncture. Due to strict hate speech policies that guide major social media platforms such as Facebook, Twitter and YouTube, white supremacists have moved to less restrictive ones that enable them to give vent to their racial and religious vitriols. The social media forums discussed in subsequent sections have been used by extremists to amplify hate and incite violence against minorities but particularly Jews and Blacks.

[39] The Network Contagion Research Institute (NCRI), this organization with predictive technology. See the website https://networkcontagion.us/technology/ Accessed 21 July 2021.
[39] Ibid
[40] ADL American White Supremacist Groups Exploiting International Connections https://www.adl.org/blog/american-white-supremacist-groups-exploiting-international-connections?gclid=Cj0KCQjwl9GCBhDvARIsAFunhsll3-XA2WYfIfaB1_oCzChD6lcJdteARxyYmKM7y6hrigDAYbQTzjgaAgZQEALw_wcB April 30 2021
[41] Greg B Smith, 'Anti-New York White Supremacist Hate is Rising, NYPD Says, The City 14 August 2019 https://www.thecity.nyc/special-report/2019/8/14/21210876/anti-new-york-white-supremacist-hate-is-rising-nypd-says >accessed April 4 2021.
[42] Sara Sidner, 'Internet sites blamed for helping incite racist violence, but there's no plan to rein them in' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

6.3.1 The 8Chan

This site was founded in 2013 by Fredrick Brennan, a man born with a genetic bone disorder and now confined to a wheelchair.[43] 8Chan is an open internet forum used by white supremacists in the U.S. and other countries to foster violent action.[44] It is an unregulated message board noted for its violent white supremacists' content.[45] Sidner of *CNN* describes 8Chan as one of the most influential sites that has played a role in the radicalizing of young men with far-right extremist ideas.[46] The El-Paso shooter posted his hate manifesto on this forum shortly before opening fire on innocent shoppers at the Walmart.[47] This shooter made it evident in his hate manifesto that he was inspired by another shooter who also posted a manifesto on 8Chan before massacring over fifty people. A researcher with the ADL describes 8Chan as the "lion's den of hate."[48] The 8Chan is a billboard accessible to any one on the internet that does not require special knowledge to reach which members of the far-right use because of its commitment to allow any type of speech.[49] The SPLC notes that, 'the 8Chan is one of the influential sites that plays a role in radicalizing young men when it comes to far right extremism.'[50]

> "This is, after all, the decade-old Internet forum whose beloved Pepe meme caused a weeks-long national panic — and a denunciation from the Clinton campaign — in September because of its new popularity among white-supremacist Trump backers." (*Washington Post*, 9 November 2016, Abby Ohlheiser).

Th WP and the NYT present this site as an influential one in the statement above where white supremacists celebrated the election of a meme president and a president that will foster their cause and values.

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[43] Timothy Mclaughlin, 'The Weird, Dark History of 8Chan' *Wired* 8 August 2019. https://www.wired.com/story/the-weird-dark-history-8chan/https://www.wired.com/story/the-weird-dark-history-8chan/. A >accessed 17 August 2021.

[44] Sara Sidner, 'Internet sites blamed for helping incite racist violence, but there's no plan to rein them in' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[45] Tim Hume, 'Toronto Van Attack Suspect Says He Used Reddit and 4Chan to Chat with other Incel Killers' *Vice News* 27 September 2019. https://www.vice.com/en/article/bjwdk3/man-accused-of-toronto-van-attack-says-he-corresponded-with-other-incel-killers. Accessed 16 July 2021.

[46] Sara Sidner, 'Internet sites blamed for helping incite racist violence, but there's no plan to rein them in' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[47] Sara Sidner, 'Internet Sites Blamed for Helping Incite Racist Violence, But There's No Plan to Rein Them In' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[48] Sara Sidner, 'Internet Sites Blamed for Helping Incite Racist Violence, But There's No Plan to Rein Them In' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[49]Sara Sidner, 'Internet Sites Blamed for Helping Incite Racist Violence, But There's No Plan to Rein Them In' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[50] Sara Sidner, 'Internet Sites Blamed for Helping Incite Racist Violence, But There's No Plan to Rein Them In' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

The 8Chan though available to everyone, law enforcement agents have limited access to the site to stop possible attacks unless there is active investigation under an existing law.[51] The Christchurch attacker and the Poway, California killer all posted their hate manifestos online on 8Chan.[52] The site was shut down after the El Paso attack and users have long migrated to other message boards.[53] The same is true of 4Chan and GAB.

6.3.2 The 4Chan

It is a long-standing forum set up in 2003 by Chris Poole (known as the boy-genius) as a free-extremist site for white supremacists/ nationalists mainly of young people and consists of 22 million users.[54] The site does not need log in details so that users are not identifiable. It is a left wing liberal anti-establishment web community that advocates free speech fundamentalism.[55] The site is noted for its endemic use of aggressive language that are racist and anti-Semitic.[56] This message board has a long history of offending and harassing minorities.[57] Marcel Hesse, who brutally murdered his eight year old neighbour, Jayden and a friend of his, Christopher W, boasted to his sister who went to visit him in prison, "I am 4Chan!"[58] This killer was happy that 4Chan emboldened him. The Toronto van attacker who killed 10 and wounded many others, told the police that he communicated with two incel mass killers online and hoped his action will motivate other

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[51] Sara Sidner, 'Internet sites blamed for helping incite racist violence, but there's no plan to rein them in' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[52] Tim Hume, 'Toronto Van Attack Suspect Says He Used Reddit and 4Chan to Chat with other Incel Killers' *Vice News* 27 September 2019. https://www.vice.com/en/article/bjwdk3/man-accused-of-toronto-van-attack-says-he-corresponded-with-other-incel-killers. Accessed 16 July 2021.

[53] Ibid

[54] James Palmer, 'How Does Online Racism Spawn Mass Shooters'? *Foreign Policy* 4 August 2019 https://foreignpolicy.com/2019/08/04/online-racism-4chan-8chan-shootings-elpaso-dayton-texas-ohio/ Accessed 11 July 2021. Poole founded 4chan at age 15. See Jennifer Elias '4Chan Founder has Left Google' CNBC News, 22 April 2021. https://www.cnbc.com/2021/04/22/4chan-founder-chris-poole-moot-has-left-google.html. Accessed 17 August 17, 2021

[55] Thomas Colley and Martin Moore, 'The Challenges of Studying 4Chan and the Alt-Right: 'Come on the Water's Fine' (2020) https://journals.sagepub.com/doi/pdf/10.1177/1461444820948803 Accessed 11 July 2021.

[56]Thomas Colley and Martin Moore, 'The Challenges of Studying 4Chan and the Alt-Right: 'Come on the Water's Fine' (2020) https://journals.sagepub.com/doi/pdf/10.1177/1461444820948803 Accessed 11 July 2021

[57] Abby Ohlheiser, 'We Actually Elected a Meme as President': How 4Chan Celebrated Trump's Victory. *The Washington Post* 9 November 2016 https://www.washingtonpost.com/news/the-intersect/wp/2016/11/09/we-actually-elected-a-meme-as-president-how-4chan-celebrated-trumps-victory/**.** Accessed 11 July 2021

[58] Jane Lavender and Dave Burke, 'Murder Manifesto' of Teenager Accused of Slaughtering Boy, 9 and Sharing Images on Dark Web' *Mirror* 24 November 2017 https://www.mirror.co.uk/news/world-news/murder-manifesto-teenager-accused-slaughtering-11580224. Accessed 16 July 2021.

frustrated misogynists.[59] He was empowered by 4chan after also connecting with like minds on Reddit. Over time, 4Chan attracted multiple lawsuits and Facebook subpoenas for threats of violence posted on the site.[60] Its founder, Poole in 2015 eventually announced his retirement from running the site after selling it to a Japanese internet entrepreneur for an undisclosed amount.[61]

6.3.3 Gab.Com

Gab was founded in 2016 by Andrew Torba who claims to be a conservative christian and a Trump supporter.[62] *CNN* described Gab as a controversial social network that hosts hate-filled violent speech.[63] This social media site was described by NYT as an extremist network. It is the number one place that white supremacists gather, says the director of the Intelligent Project, Heidi Beirich.[64] Also described since it was founded as the epicenter of extremely antisemitic and antiblack content.[65] In Gab's website, reads the following statement:

> Gab allows all speech which is protected by the First Amendment of the U.S. Constitution. Hate Speech is one type of speech protected by the First Amendment per the recent, unanimous, Supreme Court ruling in Matal v Tam, but our policy doesn't revolve around hate speech. It revolves around the legal definition of protected speech. We also protect trolling, edgy political memes, Second Amendment themed discussion…and other types of speech that are being suppressed by Twitter, Facebook, Tumblr, and other companies for various reasons.[66]

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[59] Tim Hume, 'Toronto Van Attack Suspect Says He Used Reddit and 4Chan to Chat with other Incel Killers' *Vice News* 27 September 2019. https://www.vice.com/en/article/bjwdk3/man-accused-of-toronto-van-attack-says-he-corresponded-with-other-incel-killers. Accessed 16 July 2021.

[60] See Jennifer Elias '4Chan Founder has Left Google' CNBC News, 22 April 2021. https://www.cnbc.com/2021/04/22/4chan-founder-chris-poole-moot-has-left-google.html. Accessed 17 August 17, 2021.

[61] See Jennifer Elias '4Chan Founder has Left Google' CNBC News, 22 April 2021. https://www.cnbc.com/2021/04/22/4chan-founder-chris-poole-moot-has-left-google.html. Accessed 17 August, 2021.

[62] Abbey Ohlheiser, 'Banned from Twitter, this site Promises you can Say Whatever you want' *The Washington Post* 29 November 2016. https://www.washingtonpost.com/news/the-intersect/wp/2016/11/29/banned-from-twitter-this-site-promises-you-can-say-whatever-you-want/. Accessed 17 August 2021.

[63] Jazmin Godwin, 'Gab: Everything you Need to Know about the Fast-Growing Controversial Network' *CNN1* 17 January 2021. https://www.cnn.com/2021/01/17/tech/what-is-gab-explainer/index.html. Accessed 17 August 2021.

[64] Ashley Murray**, '**Gab.com, social platform favored by alleged Tree of Life gunman, boasts amid probe' *Pittsburgh Post-Gazette* 31 Dec 2018 https://www.post-gazette.com/news/politics-nation/2018/12/31/Gab-robert-bowers-tree-of-life-epik-monster-anti-semitism/stories/201812310115?cid=search. Accessed 7 May 2021.

[65] Jane Coaston, 'Gab, the Social Media Platform Favoured by the Alleged Pittsburgh Shooter, explained' VOX 29 October 2018. https://www.vox.com/policy-and-politics/2018/10/29/18033006/gab-social-media-anti-semitism-neo-nazis-twitter-facebook. Accessed 27 July 2021. Gab was founded in 2016 by Andrew Torba in response to what he saw as mass censorship of mainstream social media who banned users for racists comments and antisemitic memes etc.

[66] Torsten Ove 'Report rips online haunts of accused Tree of Life, New Zealand shooters as platforms for extremism' *Pittsburgh Post-Gazette* 9April2019 *https://www.post-gazette.com/local/region/2019/04/09/adl-gab-8chan-bowers-tree-of-life-pittsburgh-tarrant-new-zealand-hate/stories/201904090070?cid=search*. Accessed 6 May 2021.

Gab claims it has about one million users that promote all types of speech including violent threats to minority groups. Its users applaud it as a network where they can speak freely beyond the constraints of Twitter's or Facebook hateful content policy.[67] It was this network that the Pittsburgh shooter used profusely to post antisemitic comments. Gab denies even the obvious as it includes in its policy statement, that to suggest that individuals could be radicalized online is as absurd as to propose that typewriters could radicalize individuals.[68] The SPLC designates the website as one where users are "radicalized aggressively."[69]

The PPG reports that a diagram analysis of 36 million comments for a two-year period on Gab shows conversations that whites are victims of persecution by non-whites and are often related to antisemitic and anti-immigrant terms.[70] It becomes clear from this report that white supremacists using Gab strongly perceive themselves as under threat by Jews and therefore maliciously spread the message that they need to be on their guard to avert white extermination by Jews. This was probably the reason the Pittsburgh shooter espoused three 'white supremacists rallying cries' about Jews-

> that Jews are responsible for immigration and that immigration is destroying the white race that public perception is less important than taking action to protect whites[71]

The killer in Christchurch mosques and in Pittsburgh Synagogue referenced white genocide as their motives for the mass shooting and this can be troubling as the PPG also reports that the white genocide theory acts as

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[67] Ashley Murray**, '**Gab.com, social platform favored by alleged Tree of Life gunman, boasts amid probe' *Pittsburgh Post-Gazette* 31 Dec 2018 https://www.post-gazette.com/news/politics-nation/2018/12/31/Gab-robert-bowers-tree-of-life-epik-monster-anti-semitism/stories/201812310115?cid=search. Accessed 7 May 2021.

[68] Torsten Ove 'Report rips online haunts of accused Tree of Life, New Zealand shooters as platforms for extremism' *Pittsburgh Post-Gazette* 9April2019 *https://www.post-gazette.com/local/region/2019/04/09/adl-gab-8chan-bowers-tree-of-life-pittsburgh-tarrant-new-zealand-hate/stories/201904090070?cid=search*. Accessed 6 May 2021

[69] Ashley Murray**, '**Gab.com, social platform favored by alleged Tree of Life gunman, boasts amid probe' *Pittsburgh Post-Gazette* 31 Dec 2018 https://www.post-gazette.com/news/politics-nation/2018/12/31/Gab-robert-bowers-tree-of-life-epik-monster-anti-semitism/stories/201812310115?cid=search. Accessed 7 May 2021.

[70] Torsten Ove 'Report rips online haunts of accused Tree of Life, New Zealand shooters as platforms for extremism' *Pittsburgh Post-Gazette* 9April2019 *https://www.post-gazette.com/local/region/2019/04/09/adl-gab-8chan-bowers-tree-of-life-pittsburgh-tarrant-new-zealand-hate/stories/201904090070?cid=search*. Accessed 6 May 2021

[71] Torsten Ove 'Report rips online haunts of accused Tree of Life, New Zealand shooters as platforms for extremism' *Pittsburgh Post-Gazette* 9April2019 *https://www.post-gazette.com/local/region/2019/04/09/adl-gab-8chan-bowers-tree-of-life-pittsburgh-tarrant-new-zealand-hate/stories/201904090070?cid=search*. Accessed 6 May 2021

a virus on these platforms.[72] The ADL surmises in their reports that extremists are being radicalized on Gab and 8chan in the same manner that adherents of terrorist groups such as ISIS are radicalized.[73] Essentially, these forums serve as, "round-the-clock white supremacists' rallies, amplifying and fulfilling their vitriolic fantasies."[74] In conclusion, Gab had problems with internet hosting when Google and Apple denied it hosting in their app stores in 2017 and so left the site internet homeless.[75] Microsoft also abridged its webhosting contract, the P*ost and the Courier*, reports. It is important to check the flow of hate speech with regards to these platforms in the U.S. as other western countries do. For instance, Australia has proposed to throw network executives into jail if they leave violent videos to linger on their sites. Germany fines companies for illegal hate speech while Britain is considering heavy fines for 'harmful content.'[76] This type of regulation has not been contemplated in the US and not likely to in the foreseeable future. The next section explores the liability for the content of speech that the Supreme Court has greatly relegated to the background in adjudging free speech cases.

6.4 Liability for Content of Speech

The Supreme Court has always disregarded the content of speech but rather assesses the effect the speech will produce.[77] The *Post and Courier* notes that the *Brandenburg* rule was developed at a time preceding the internet and needs to be updated,[78] *RAV* is a disturbing example of where a symbol of racial hatred (burning cross) was endorsed by the Court. Burning a cross can be assumed as the content of speech as demonstrated

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[72] Torsten Ove 'Report rips online haunts of accused Tree of Life, New Zealand shooters as platforms for extremism' *Pittsburgh Post-Gazette* 9April2019 *https://www.post-gazette.com/local/region/2019/04/09/adl-gab-8chan-bowers-tree-of-life-pittsburgh-tarrant-new-zealand-hate/stories/201904090070?cid=search*. Accessed 6 May 2021

[73] Torsten Ove 'Report rips online haunts of accused Tree of Life, New Zealand shooters as platforms for extremism' *Pittsburgh Post-Gazette* 9April2019 *https://www.post-gazette.com/local/region/2019/04/09/adl-gab-8chan-bowers-tree-of-life-pittsburgh-tarrant-new-zealand-hate/stories/201904090070?cid=search*. Accessed 6 May 2021

[74] Ibid

[75] Frank Bajak 'Squelched by Twitter, Trump seeks new online megaphone' *The Post and the Courier* 25 January 2021 https://www.postandcourier.com/ap/squelched-by-twitter-trump-seeks-new-online-megaphone/article_40529210-52d1-11eb-a9ce-53b853c9e684.html. Accessed 9 May 2021.

[76] See Editorial Board, The dark side of regulating speech on Facebook' *Washington Post*, 3 April 2019. https://www.washingtonpost.com/opinions/the-dark-side-of-regulating-speech-on-facebook/2019/04/03/73316af4-557a-11e9-814f-e2f46684196e_story.html. Accessed 23 May 2021. For the these examples on regulating content.

[77] See Chapter three, section 3.5. Content v Context.

[78] Danielle Allen and Richard Ashby Wilson**,** 'The rules of incitement should apply to — and be enforced on — social media' *The Washington Post* 8 August 2019. https://www.washingtonpost.com/opinions/2019/08/08/can-speech-social-media-incite-violence/ Accessed 11 May 2021.

in that case which the Supreme Court deemed as deserving of First Amendment protection to the detriment of vulnerable minority groups. As argued previously, speech can only be banned if it produces imminent harm not due to its content. The Court should be profoundly aware of speech that can spill over into real world harms-whether it be a low or high value because speech should never be used as a weapon that causes harm,[79] as discussed in the previous chapter and the newspaper discourse points to the direction there is real harm, not perceived harm as Hatzipanagos comments above indicate. In this thesis, it has been argued that speech considered outside of the context in which it was made is flawed.

Holding technology companies criminally liable for the content they carry would be one way to limit hate speech and incitement to violence. If tech companies are held liable, this might encourage them to monitor hate speech aggressively on their platforms especially the darker parts of the hell such as the billboards the articles outlined. The PC reports that technology companies are not liable for the content they carry, individuals who post such content are held accountable.[80] The operators of platforms are given discretion as to what to carry but what if the inflammatory and dangerous speech are such that are protected under the First Amendment? What can be done? The *Post and Courier* advises that the time has come to pursue civil liability for those platforms that neglect to regulate hateful contents on their sites.[81] It says that those sites are like toll roads-private operators of public good, on the one hand, and communication, transportation, on the other. On toll roads, all conventional rules of public roads apply.[82] The same rules, therefore, should apply to social media sites with regards to incitement. It should be aggressively enforced including through extradition, if necessary, the PC concludes.

[79] Thane Rosenbaun, *Saving Free Speech… From Itself (*Fig Tree Books 2020) 462
[80] Star Parker, 'Column: Freedom of Speech is Slipping Away' *The Post and Courier* 25 Jan. 2021 https://www.postandcourier.com/aikenstandard/opinion/column-freedom-of-speech-is-slipping-away/article_9cfa6be0-5b7e-11eb-86c5-fb20f7fa9cbc.html. Accessed 9 May 2021. Section 230 of the *Communications and Decency Act (1996*) holds third parties liable for posts on the internet and social media sites.
[81] Danielle Allen and Richard Ashby Wilson**,** 'The rules of incitement should apply to — and be enforced on — social media' *The Washington Post* 8 August 2019. https://www.washingtonpost.com/opinions/2019/08/08/can-speech-social-media-incite-violence/ Accessed 11 May 2021.
[82] Danielle Allen and Richard Ashby Wilson, 'The rules of incitement should apply to — and be enforced on — social media' *The Washington Post* 8 August 2019. https://www.washingtonpost.com/opinions/2019/08/08/can-speech-social-media-incite-violence/ Accessed 11 May 2021

Bollinger in an interview with the *Washington Post* thinks that the government punishing speakers on the social media is inconsistent with the First Amendment's past and ongoing constitutional development. One of such development was the holding in *Reno* where the Court held as unconstitutional the Communications and Decency Act 1996 based on its content.[83] Given the hardline approach in *Reno*, the Supreme Court will always block the legislative efforts of Congress to censor speech based on content. For Bollinger, we should raise concerns on twisting and changing the law not only to balance the interest of different groups but to punish speakers for the content of their speech.[84] How exactly Bollinger's suggestion not to twist and change the law will be carried out with the problem of those who oppose censorship on one hand and those who support regulation on the other. It is quite troubling that some adherents of free speech continue to argue that no matter how detrimental hate speech is, white supremacists were entitled to speak freely,[85]while the Supreme Court has not helped matters due to its relentless devotion to the First Amendment, to borrow the words of Rosenbaun.

6.5 The Supreme Court's 'Intellectual Hypocrisy'

Relying on the slavish attachment to the First Amendment free speech law, the Supreme Court continues to adopt a doctrinal approach of indifference to the targeted oppressed groups in analyzing cases despite astounding evidence as to the harm vulnerable minorities experience. The Court continues to undermine the potential harmful consequences of free speech.[86] The ostensible approach of the Court is never to regulate hate speech subject to very narrow and few exceptions.[87] There is no light at the end of the tunnel even in the foreseeable future. The path to censorship of hate speech by the Court is a long way from now following precedent, if ever. Rosenbaun asks, 'why should the United States stand out among western nations in

[83] See chapter one footnotes 120-123.
---[84] Free to State: The New Free Speech *Washington Post Live* 7 October 2020 https://www.washingtonpost.com/washington-post-live/2020/10/07/free-state-new-free-speech-2/. Accessed 11 May 2021
[85] Michael Bobelian**,** Is free speech an 'inviolable' right or a cover for 'hostile acts'? *The Washington Post* 5 June 2020 https://www.washingtonpost.com/outlook/is-free-speech-an-inviolable-right-or-a-cover-for-hostile-acts/2020/06/04/a2e132f8-9948-11ea-a282-386f56d579e6_story.html >accessed23 May 2021.
[86] Thane Rosenbaun, *Saving Free Speech…From Itself* (Fig Tree Books 2020) 435, 'intellectual hypocrisy' used by this author seem to be how the writer of this work describes the Supreme Court Justices.
[87] See Chapter three section 3.2.2, speech not protected by the First Amendment

defending the rights of bullies and bigots to prey upon marginalized groups with weaponized words?[88] America might be sitting on a time bomb if the Court continues to undermine the impact of internet speech inciting violence against historically oppressed groups. For instance, the Capitol building incident on 6th January was motivated by the speech made by one man and his supporters hurried to where law makers were and the violence that ensued was totally unanticipated. That is the power of speech! One can then imagine when many haters recruit like minds who promote their extremist agendas against outgroups. This can be dangerous especially if this happens over time.

The cooperation of the Supreme Court is needed to stop expanding categories of hate speech protected under the First Amendment and unless the Court changes its approach to protecting speech which falls short of standards to restrict damaging speech, no significant changes towards censorship can be attained. So Bobelian of the *Washington Post* asks, who then should determine what speech is constitutionally protected and what standards to be used to make that determination? All the time the Supreme Court made such determination, it ended in futility.[89] The Court is the reason that hate speech continues to grow and fester on the internet with the rule in *Brandenburg* that has remained the law since its creation more than six decades ago and still taking the lead under the American constitutional law. Rosenbaum could not have articulated it better that hate mongers have twisted a constitutional right formulated to enhance our political dialogue into a tool for oppression. For the scholar, the First Amendment has been used to provide cover for those who commit violent act and then disguise it as a political expression.[90] It has become evident that with the Supreme Court's protection of bad speech, the marketplace of ideas maxim that Americans cling to, the continuous threat of violence against minority groups by white supremacists, the data analysed points to other possible ways to regulate hate speech. The next section explores practical ways that hate speech, particularly online, can be checked.

[88] Thane Rosenbaun, *Saving Free Speech…From Itself* (Fig Tree Books 2020) 26.
[89] Thane Rosenbaun, *Saving Free Speech…From Itself* (Fig Tree Books 2020) 26.
[90] Michael Bobelian**,** Is free speech an 'inviolable' right or a cover for 'hostile Acts'? *The Washington Post* 5 June 2020 https://www.washingtonpost.com/outlook/is-free-speech-an-inviolable-right-or-a-cover-for-hostile-acts/2020/06/04/a2e132f8-9948-11ea-a282-386f56d579e6_story.html >accessed 23 May 2021.

6.6 Regulatory Measures to Speech Inciting Violence

According to the *Post and Courier*, the mainstream platforms already ban at least in theory, hate speech and incitement to violence. However, they are more reluctant to limit falsehood as they claim not to be the channels for truth.[91] Campbell, a *CNN* law enforcement analyst suggests that one way forward to dealing with the problem of hate speech/incitement would be moderation of comments and regulation to potentially separate legal free speech from illegal incitement to violence.[92] Technology companies seem to allow all types of speech while they try to avoid their sites being utilized as a tool for physical harm-this appears to be an inessential response to accusations that they accommodate and enable abuse and violence.[93] For instance, in 2016, Twitter terminated several high-profile accounts including that of Richard Spencer[94] in a bid to crack down on hate speech. One month after, it reinstated Spencer's Twitter account claiming he was suspended because he managed multiple accounts. Twitter admitted through its CEO that harassment on the platform has gone too far though its policy forbids call to violence against people based on certain characteristics-race, colour, ethnicity, religion among others.[95] Facebook says that it has always banned groups or individuals who advocate hate and or violence.[96] Both Twitter and Facebook have removed hate groups and their leaders from their platforms to prevent them from festering hate on the internet.[97]

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[91]Molly Roberts 'Commentary: Tech Giants Have to Fight Harder Against Anti-Vexxers' The Post and Courier 14 Sept. 2020 https://www.postandcourier.com/opinion/commentary/commentary-tech-giants-have-to-fight-harder-against-anti-vaxxers/article_b168c16e-7d8e-11e9-bacf-6f13239ee1b2.html. >accessed 9 May 2021.

[92] Sara Sidner, 'Internet Sites Blamed for Helping Incite Racist Violence, But There's No Plan to Rein Them In' CNN, 6 August 2019, https://www.cnn.com/2019/08/06/us/white-supremacist-hate-sites-8chan-soh accessed 1 May 2021

[93] *Brett Molina,* 'White Supremacist Rally Could be Tipping Point for Tech's Tolerance for Hate Speech' *USA Today* 14 August 2017, https://www.usatoday.com/story/tech/2017/08/14/charlottesville-could-tipping-point-social-medias-tolerance-hate-sites/564973001/ accessed 1 May 20121.

[94] A white nationalist who sent updates on the Charlottesville event

[95] *Brett Molina,* 'White Supremacist Rally Could be Tipping Point for Tech's Tolerance for Hate Speech' *USA Today* 14 August 2017, https://www.usatoday.com/story/tech/2017/08/14/charlottesville-could-tipping-point-social-medias-tolerance-hate-sites/564973001/ accessed 1 May 20121.

[96] Elizabeth Dwoskin and Craig Timberg 'Facebook bans Alex Jones, Louis Farrakhan, others for being 'dangerous' *The Washington Post* 2 May 2019. https://www.post-gazette.com/business/tech-news/2019/05/02/Facebook-bans-Louis-Farrakhan-far-right-Milo-Yiannopoulos-Alex-Jones-dangerous/stories/201905020170?cid=search. Accessed 5 May 2021

[97] Joe Heim 'Hate groups in America remain on the rise, according to a new study' *Pittsburgh Post-Gazette* 21 Feb. 2018 https://www.post-gazette.com/news/nation/2018/02/21/Hate-groups-in-America-remain-on-the-rise-according-to-a-new-study/stories/201802210211?cid=search. Accessed 6 May 2021

There are hundreds of millions of posts every day on social media so the companies will be unable to keep up an effective check on online hate.[98] Hate predates the internet so it is not possible to eliminate hate but cracking down on social media will not rid the society of hatred nor end violence against Jews and blacks.[99] These companies need to act far more responsibly than they are doing because they need to know that their extraordinary creations embolden extremist.[100]

The chief Executive of NCRI suggests that there are approaches to regulating violence inciting networks. One way would be to constitute a politically neutral body that monitors online communications and informs social media networks of speech inciting violence on their platforms.[101] Another way could be to develop a legal framework that will hold online platforms accountable if they do nothing about speech inciting violence.[102] The *Pittsburgh Post-Gazette* suggests that Congress could criminalize violent criminal organizations such as the white supremacy.[103] This would entail defining like-minded extremists as a criminal group that have online link and share a criminal purpose.[104] Some propose using practical measures such as gun control to limit hate-in other words, ban the tools that turn haters into killers (high-capacity magazines, armour piercing bullets and similar ones).[105]

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98 Jonathan Greenblatt 'Jonathan Greenblatt: Social Media Is Not Doing Enough To Curb Anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search. Accessed 5 May 2021

99 Jonathan Greenblatt 'Jonathan Greenblatt: Social Media Is Not Doing Enough To Curb Anti-Semitism' *Pittsburgh Post-Gazette* 29 Oct 2019 https://www.post-gazette.com/opinion/Op-Ed/2019/10/29/Jonathan-Greenblatt-Social-media-is-not-doing-enough-to-curb-anti-Semitism/stories/201910290013?cid=search. <accessed 5 May 2021

100 Ibid

101 Rich Lord, 'How Robert Bowers Went From Conservative to White Nationalist' *Pittsburgh Post-Gazette*, 10 Nov 2018 https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165. <accessed 2 May 2021

102 Rich Lord, 'How Robert Bowers Went From Conservative to White Nationalist' *Pittsburgh Post-Gazette*, 10 Nov 2018 https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165. <accessed 2 May 2021

103 Torsten Ove 'Free Speech vs Hate Speech: How Societies Balance Competing Rights' 22 Oct 2019 *Pittsburgh Post-Gazette* https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. <accessed 5 May 2021

104 Torsten Ove 'Free Speech vs Hate Speech: How Societies Balance Competing Rights' 22 Oct 2019 *Pittsburgh Post-Gazette* https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. <accessed 5 May 2021

105 Torsten Ove 'Free Speech vs Hate Speech: How Societies Balance Competing Rights' 22 Oct 2019 *Pittsburgh Post-Gazette* https://www.post-gazette.com/news/crime-courts/2019/10/22/tree-of-life-synagogue-pittsburgh-online-hate-speech-first-amendment-rights-protections/stories/201910200007?cid=search. <accessed 5 May 2021

At a Congressional hearing, witnesses asked lawmakers to empower local police, strengthen laws that check online hate speech by calling out bigotry and extremism whenever it occurs-even the White House.[106] When provocative things that can embolden white supremacists or other extremists are said even by people in high positions, people including law makers should stand up against it since these harm minority groups.[107]

Debates that sparked off after the Christchurch shooter livestreamed his crime on Twitter was whether government should regulate speech inciting violence. In other words, what are the real and substantive issues on how to balance the necessity for expression and the perils of online speech?[108] Wimbley of the PPG opines that there are no current plans to monitor hateful speech online and this is quite disturbing.[109] For the columnist, the trolls on social media and how individuals use this medium to harass and intimidate others obviously call for a legislation that should address the problem.[110] But, regulation is not in sight in the United States, Wimbley concludes. This in fact is regrettable in a country like the United States, a number one nation that should champion the cause of human rights.

6.7 Conclusion

This chapter evidenced the roles the internet plays in exacerbating hate or speech inciting violence against racial and religious minorities especially as perpetrated by white supremacists. The newspaper discourse portrays the social media platforms as being responsible for harm in the outside world. Doctrinally, the courts

[106] Tracie Mauriello 'A Flood Online of Hate Speech Greeted a House Hearing On White Nationalism' 9 April2019 *Post-Gazette Washington Bureau* https://www.post-gazette.com/business/tech-news/2019/04/09/House-hearing-white-nationalism-YouTube-hate-Facebook-Google-Candace-Owens-Lieu/stories/201904090152?cid=search <accessed May 2, 2021.

[107] Said by Eva Paterson, President of the Equal Justice Society in Oakland, California cautioning Republicans in the house to stop the president if he was using words that motivated white supremacists to commit harmful acts. See [107] Tracie Mauriello 'A Flood Online of Hate Speech Greeted a House Hearing on White Nationalism' 9 April, 2019 *Post-Gazette Washington Bureau* https://www.post-gazette.com/business/tech-news/2019/04/09/House-hearing-white-nationalism-YouTube-hate-Facebook-Google-Candace-Owens-Lieu/stories/201904090152?cid=search <accessed May 2, 2021.

[108] The Editorial Board 'The slippery Slope: Government Should Not Regulate Online Speech' *Pittsburgh Post-Gazette* 1 Sept. 2019 https://www.post-gazette.com/opinion/editorials/2019/09/01/Donald-Trump-administration-free-speech-online-regulate/stories/201908190004?cid=search. <accessed 4 May 2021.

[109] Lacretia Wimbley 'State lawmakers to float six bills to combat hate' *Pittsburgh Post-Gazette* 9 May 2019 https://www.post-gazette.com/news/crime-courts/2019/05/09/Lawmakers-unveil-legislation-combat-hate-crimes-pittsburgh-pennsylvania/stories/201905090091?cid=search. <accessed 4 May 2021

[110] Lacretia Wimbley 'State Lawmakers to Float Six Bills to Combat Hate' *Pittsburgh Post-Gazette* 9 May 2019 https://www.post-gazette.com/news/crime-courts/2019/05/09/Lawmakers-unveil-legislation-combat-hate-crimes-pittsburgh-pennsylvania/stories/201905090091?cid=search. <accessed 4 May 2021

particularly the highest court of the land, should pay attention to what happens in real life. Rosenbaun termed regards the attitude of the Court as 'intellectual hypocrisy' in censoring dangerous speech that affects historically oppressed groups. If the Court continues this unusual adulation of the First Amendment while ignoring continuous harm that they suffer, it will be that the highest court of the land is implicitly and explicitly abetting white supremacists who champion the course of hate in America. The Court cannot continue to ignore the voice of the media that:

> Words hurt, they can wound, and they are every bit as lethal as a physical blow. Threats are made through words, fights are instigated, riots incited- words manipulated in the service of violence. The special harm that words cause can linger and are often much more long-lasting than the effects of physical damage.[111]

The rule in *Brandenburg* has done more harm than good in American. It has enabled broad protection of speech under the American system. It has given white supremacists and other haters unprecedented power to unleash hate/violence on historically oppressed groups. Delgado and Stefancic remind us that, 'if we are willing to defend speech in broad social terms, we should be able to consider systemic concerted harms as well'[112] In considering the limits to free speech under the American law, these perpetrators are allowed just any type of speech. This dissertation offers a contextualized approach that can help the Supreme Court to redirect the course of events in censoring hate speech in America. This approach will control or quell the tide of hate inspiring extremists to murder their fellow citizens. The research suggests that the Court embodies public discourse in interpreting and arriving at decisions impacting minorities.

We have demonstrated from data analyzed that the imminency requirement in *Brandenburg* is unworkable in the online context and has only helped in amplifying speech inciting violence against minorities. The Court needs to take into consideration the imminency standard in *Brandenburg* when creating future precedents as it has been established in this work that it is possible for an online speech to rise to the level of incitement that causes death and widespread harm in real world.

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[111] Thane Rosenbaun *Saving Free Speech…from itself* (Fig Free Books 2020) pp 28-29.
[112] Richard Delgado and Jean Stefancic, *must we Defend Nazis?* (New York University Press 2018) 149.

Regulating online hate speech can be a herculean task because of the nature of internet communication. It will take millions of dollars to achieve aggressive hateful content removal from all internet and social media forums. The realistic way forward dealing with content removal or stopping racists from even posting such content, will be to take care of the law that empowers them-limit the broad protection of speech offered under the First Amendment.

Chapter Seven

Discussion and Conclusion: A Tenable Approach to Drawing that Thin Line!

Introduction

With the chapters clearly laid out so far in this research, it becomes necessary to revisit the aims of this project. This research aimed to look critically into the doctrine of incitement to provide evidence from media discourse and analysis of white supremacists' contributions to the problem of online hate in America and a better understanding of how this form of speech can affect racial and religious minorities in real life. The research also aimed to use Dworkin's moral and legal theory to read free speech cases more in terms of how the law impacts minorities rather than adjudging the law according to legal doctrine. The study was undertaken to raise awareness to the fact that it is the instrument of the law that is fueling the hate in America and to point to the direction that minority groups are impacted adversely. In other words, a doctrine that departs from real world connections as evinced by opinion discourse analysis in the newspapers is unworkable. The uniqueness of this work lies in integrating critical discourse analysis and media analysis into the study of law. It has therefore introduced a new approach to assess legal doctrine and the impact its observation has in real life.

The previous chapter discusses the contributions of white supremacists in promoting online hate against outgroups and particularly the sites these extremists use in fostering speech that incites violence. The chapter concludes that the First Amendment free speech law affords hate speakers protection to unleash violence against minorities especially with the anonymity, immediacy and convenience nature of internet communication that gives them leverage.

This chapter uses arguments in prior chapters to posit a recommended approach to attaining censorship of speech, in other words, drawing that thin line that if crossed, will constitute hate speech which under the current free speech American jurisprudence is missing because of the high threshold set in *Brandenburg*. The research suggests that the First Amendment incitement doctrine ought to embrace a context-sensitive

interpretative frame of analysis, including embracing media representations of the issues discussed in chapters five and six, not the absolutist or relativistic angle always adopted by the Court, nor the strict censorship of all hate speech but one that takes into consideration, the living constitutionalist position in terms of incitement to hate and the advocacy of lawless action.[1] In these forms of expression, we acknowledge the hurt and harm that can be caused to the minority as established in chapters five and six of this thesis. This chapter proposes a systematized, interrelated, contextualized interpretative scheme of First Amendment law on

- Dworkin's position on how to interpret the constitution
- The growth and changes in technology vis a vis the special nature of American society where bigots thrive because of the broad interpretation of the First Amendment by the Supreme Court
- Consideration by the Supreme Court of a perspective that favours groups that are oppressed as other countries and the European Court have done.

The chapter concludes with the research findings reiterating the original contribution made to scholarship by the analysis in this thesis.

7.1 Surmising Dworkin's Position

The question asked at the beginning of this work is, how might Ronald Dworkin's theoretical framework enrich and inform the approach of the Supreme Court in deciding cases involving racial and religious minorities?

As elaborated in chapter four, Dworkin presents the most convincing argument against censorship of speech, but the scholar also made a case for a model of 'law as integrity,' where he argued for the practice of law to take into consideration the history of the people and the entire legal system in adjudging what is just and fair.[2] Dworkin argued for an all-inclusive approach that would incorporate all members of the legal community, where law, morality and politics will define the real meaning and practice of the law.[3] For Dworkin, law that is de-contextualized, that is, not anchored on history, practice and integrity is perverse.[4] Law should be

[1] See Chapter 1.5, the living constitutionalist argues that interpreters of constitutional provisions should take into consideration the dynamism and growth of our times while interpreting the wordings of the law.
[2] See Chapter four, footnotes 32.
[3] See chapter four, footnotes 39-41.
[4] See chapter four, footnote 56

interpreted by judges to serve the interest of justice and fairness that recognizes connected events and marked differences between and among people.[5] Putting all the above together, Dworkin's overriding position is that the interpretation of law cannot be in vacuo, but must reflect the concrete events surrounding the lives of people in a legal community. In other words, the Court cannot adjudicate free speech cases in isolation of the historical past of Jewish and African Americans' experiences of the holocaust and slavery. Nor can the court ignore the come-back of Antisemitism in present day America and the impact of the attacks on Jews.[6] Dworkin's teaching is clear on this position. In the light of this research, newspapers play significant role in framing public debates, which should form a strong connection with the interpretation the Court gives to First Amendment free speech cases that impact minorities.

The First Amendment is considered an abstract document that is assigned meaning by major actors of the law, that is, the judges. As Bork states, the Supreme Court is entrusted with the power to interpret the free speech law in such a way that it neither aids the minority nor the majority but through reasoned argument,[7] to this extent, Fisch emphasizes that opinions of the Supreme Court are the primary source of law.[8] For this reason, it is important for the Justices while deciding cases that impact outgroups to heed to the particularities of their history and existence as emphasized above.[9] According to Dworkin, a standard must be set to serve as a determinant for any decision on free speech. For instance, considering Jews, it would then be against Dworkin's perspective for the march with swastikas of the members of National Socialist Party of America in the village of *Skokie* to hold because hundreds of Jewish holocaust survivors would be impacted by the exercise.[10] The approach of the court of appeal for the 7th circuit, would have been to assess the devastating impact of the march on holocaust survivors that live in Skokie rather than the court ruling that the march did

[5] See chapter four, footnotes 70
[6] See Notes 67 and 71 of chapter 5, where the Anti-Defamation League states that there was a total of 780 anti-Semitic incidents in a six-month period and New York alone had 200 of such incidents in the year 2019.
[7] Robert Bork, 'Neutral Principles and Some First Amendment Problems (1971) 47 Ind LJ 1, 3. See also footnote 36 of Chapter three.
[8] William B Fisch, "Hate Speech in the Constitutional Law of the United States' (2012) 50 Am. J. Comp. L 463, 465.
[9] See chapter three, footnotes 101, the decision in *RAV,* the justices disregarded the symbol of racial hatred in deciding this all-important case.
[10] See also chapter 3, footnotes 92-94

not constitute 'fighting words.'[11] The outcome would have been different also in *Brandenburg* and *RAV* If the Justices set a standard and contextualized their approach (assessing the practical impact of the speech on their target).[12]

The reference point or standard would have been for the Justices to take into consideration what the words used by Brandenburg meant or what a burning cross represents for a black family. In these two instances and other free speech cases impacting minority groups, the non-commitment to the history of the people by the Court's analysis compromises Dworkin's salient position. Essentially, if the Supreme Court employs the moral interpretation as suggested by Dworkin, in interpreting cases for outgroups, more just outcomes will be reached and the path to censorship might be attained. In this thesis, I argued that the path to racial and religious hate speech regulation can be attained if Dworkin's theses are read together and not in isolation of the scholar's free speech thesis. I emphasized that if Dworkin's position on free speech is not considered with the rest of his teaching, it would mean that this erudite scholar misapplied his own principle and failed to realize it. If Dworkin's maintains his absolute stand on free expression of allowing each citizen a voice in the polity, then he must back away from denoting law as integrity, equality, morality and in the light of the scholar's general thesis, he is being paradoxical. Hate and dangerous speech is not synonymous with freedom, equality, integrity among others as Dworkin reiterated in his works.

The analysis chapters of this work (five and six) demonstrate that the United States protects incitement to racial and religious hate speech, including speech that harms outgroups, protects hate speakers (white supremacists and extremists) and downplays largely the use of the internet (or social media) in disseminating speech that incites violence. No wonder Heinz notes that 'many Europeans saw American racism as confirmation that hate speech fans the flames of violence.'[13] To this extent, countries like Canada, Australia

[11] We recall that 'Fighting words' is one of the exceptions to free speech. See chapter 3, section 3.6.1
[12] How could the Court not place weight on the words used by *Brandenburg* and also the meaning of burning cross in the fenced yard of the black family in *RAV*? The Supreme Court in Virginia and Black (2003) ruled that cross burning can be inferred as intent to intimate (see footnote 235 of chapter 3) but then directly reneged on that ruling in RAV.
[13] Eric Heinz, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9 Int'l Jour of Law in Context 590

and New Zealand shunned the U.S. model of free speech, while following the European approach that seemed so totally different from the U.S. model of free expression.[14]

7.2 Growth and changes in Technology

The questions raised for this thesis in this area is; how does the Supreme Court's application and interpretation of free speech cases (with the advent of the internet) inhibit racial and religious hate speech regulation?

The debate between the living constitutionalists and the originalists comes into play here.[15] The argument that the First Amendment which was ratified more than two thousand years ago is sacrosanct and that the wordings indicate that there should be no censorship of speech is an aberration. This is the position of the originalists. This argument cannot be sustained because the wordings of the First Amendment do not contain an express provision of the right to free speech (for instance, 'everyone is guaranteed a right to free speech) but rather a negative provision of what Congress cannot do. For instance, instead of providing that everyone has the right to free speech, the provision reads, "Congress shall make no law…" It is important to put into perspectives this element of interpretation because of the wordings of the law. It is the Justices that assign meaning to any case that comes before them.[16] The law cannot remain static over time because change is the only constant in life, so the originalists are backward looking. Law is dynamic and Dworkin insists that it should be anchored in history as well as in practice and on integrity.[17] Dworkin is assumed to be an originalist in his free speech propositions but then turns around to postulate a moral reading of the provisions of the constitution, arguing that law cannot be separated from morality.[18] In chapter four of this work, I argued that Dworkin's whole thesis crumble (by this I mean that the scholar's writings on treating those in a legal community with equal respect and concern, evolving law as integrity etc are paradoxical to his free speech absolutism) and not

[14] Eric Heinz, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9 Int'l Jour of Law in Context 590, 591.
[15] See chapter one-the First Amendment debate, Section 1.5.
[16] See the 'moral reading of free speech cases' chapter 4, Section 4.1, the provisions of the First Amendment and what constitutes free speech is in the domain of the court to prescribe and interpret legal principles inherent in that law-last sentence of second paragraph. See also chapter 4 footnotes, 22-24
[17] Searching for a better law amidst competing values, see Chapter 4 footnotes 26-32, to obtain a model of law that is consistent with fairness.
[18] See chapter 4 footnote 23, this constitutes his attack on the science of law (positivism), for him law is enmeshed in morality.

sustainable if we hold to the scholar's argument that all types of speech should be admitted, and no speech should be regulated. If this were the case, the scholar's whole theses fall together due to the huge emphasis on judges interpreting the law to obtain the best principle of law to serve the interest of fairness, justice inter alia of people in the legal community. Dworkin therefore cannot sustain his originalist position on free expression because it contradicts his core teachings on law otherwise, he will have to jettison or abandon his 'social practice of the law.'[19]

The living constitutionalists' position is more sustainable. For them, the constitution needs to reflect the changes that occur over time. To this extent, the Constitution is a living document that should take into cognizance, the changing patterns in any society.[20] If this argument is reckoned with, then the constitution will be read or interpreted to reflect growth and changes that occur in human society.

The Supreme Court in *Reno* offers the same level of speech protection on the internet as in prints. The Justices fail to realise unarguably, that the internet era does not operate, given its unique characteristics as a traditional medium of communication.[21] Adopting the same level of protection for the internet as in prints by the Court is misdirected as it is not debatable that for the internet, the scope of conversations is wider and the context within which conversations are held different as in the 1960s.[22] The decision in *Brandenburg* was held more that 50 years ago when there was only the traditional mode of communication, so I do not agree with the decision in *Reno* that those who access the internet ought to consent to its troubling content. Scholars like Brown dismissed this viewpoint of the Court when he argued that in today's world, it is almost impossible to turn one's eyes away from the internet space as the internet can render people 'captive audience' to unwanted speech.[23] As the Editorial Board of the *Pittsburgh Post-Gazette* opined, the arrival of the internet has brought

[19] See chapter 4, footnotes 63 & 64.
[20] Chapter 1 footnote 94, 95 & 96, the constitution should reflect new changes that occur in human society. Judges cannot interpret the constitution without reflecting modern needs and circumstances.
[21] See chapter one of this thesis on the difference between the internet and traditional speech, Section 1.7.
[22] See also chapter One, sections 6 and 7. See particularly *Planned Parenthood V American Coalition of Life Activists* for the liberal approach of the Court in dealing with internet speech.
[23] Alexander Brown, 'Averting your eyes in the Information Age: Hate Speech, the Internet and the Captive Audience Doctrine (2017) 12 Charleston Law Review. https://ueaeprints.uea.ac.uk/id/eprint/68358/1/Accepted_manuscript.pdf. Accessed 10 October, 2021.

enormous changes to the way we express ourselves especially its unique power to engage people of all kinds in different parts of the world and offering opportunity to people to amplify their words and ideas.[24] For Tufekci, the print or broadcast era of communication differs from the internet era in significance and mode, so censorship of speech cannot operate under the same logic.[25] The obvious differences between internet communication and traditional mode of communication raised in this study are anonymity, immediacy of receiving message and the availability of like-minds to influence one another.

Social media networks such as 4chan and 8chan are message boards that hate speakers can engage with and without formal registration or identification. In other words, users can post any form of messages without needing to identify who they are or even if these message boards require user registrations, fake names can be utilized. This is also true of all other social networks where people can use fake identities to promote hateful messages. The Pittsburgh shooter registered on Gab as,'Onedingo.com' which was not his real name. Most of the white supremacists who left online comments before going on their 'shooting mission' did so anonymously and often leave the police to decode who posted the comments. The police will in some cases say that they found comments that they suspect were left by the shooter few minutes to a mass shooting. In prints, commentators would have to generate their own audience, online, it is not the case because, "flamers, bullies, bigots, charlatans, know-nothings, and nuts'[26] utilize this open access to reach out to a larger audience and in different parts of the globe. There are no physical spaces with online communication. All it takes is a click and a device and anybody can access another person connected or complicit in the ideas the person believes. This problem has no doubt led to a situation where hateful messages are transmitted by like-minds to millions of people without anyone taking responsibility for the content of such messages.

[24] The Editorial Board 'The Slippery Slope: Government Should Not Regulate Online Speech' *Pittsburgh Post-Gazette* 1 Sept. 2019 https://www.post-gazette.com/opinion/editorials/2019/09/01/Donald-Trump-administration-free-speech-online-regulate/stories/201908190004?cid=search.<accessed 4 May 2021. See chapter 6 footnotes 6-9. Also, online platforms are utilized to disseminate hate and to recruit like-minds, chapter 6 6ootnote 34-38.
[25] Zeynep Tufekci, 'Twitter and Tear Gas: The Power and Fragility of Networked Protest (2017) 226 quoted in Tim Wu, 'Is the First Amendment Obsolete?' (2018) 117 Michigan Law Review 547, 548.
[26] Howard Rheingold, *Smart Mobs: The Next Social Revolution* (Basic Books 2004) quoted in Mathew W Hughey and Jessie Daniels, 'Racists Comments at Online New Sites: A Methodological Dilemma for Discourse Analysis' (2013) 35 Media, Culture and Society 332, 333.

These extremists connect to one another online.[27] Hatzipanagos of the *Washington Post* reports that a 30-year-old man who was an online friend with the Pittsburgh shooter was arrested by the police for ranting that the victims of the Synagogue deserved what happened.[28] Not long ago, I watched a short clip of an African American lady who gave a white American lady the beating of her life for calling her a nigger (the response of the attacker is not justifiable on any grounds). As a graduate student in Aberdeen, my neighbour (an elderly Scottish lady) told me that, "I ought to be happy that I was allowed to come to this country to study," I called the Scottish police who arrived immediately, spent a reasonable amount of time with the lady and then came to me and asked if I wanted her prosecuted. I answered in the negative, however, they made her climb the stairs to my apartment to apologize for the racist comment uttered.

In online speech, such physical threat is absent, no one will punch a person who uses an abhorrent language online. Hateful words online, can spiral into further physical violence without a threat to oneself.[29] This was the case with most of the mass shooters mentioned in this work. Their hateful content, not only spread like a virus but they connect also in such a way that they are unstoppable. Both the Walmart (El Paso) and the Synagogue (Pittsburgh) shooters all wrote that they were influenced by the far away Oslo shooter. Internet communication defies and transcends boundaries and spaces. White Supremacists are complicit in evil and ideas they promote. One commentator writes, 'the killers use their internet posts to praise previous attacks by other white supremacists and after new assaults, the manifestos get passed around, feeding the cycle of propaganda and violence.'[30] This type of transmission will be difficult to achieve with traditional mode of communication so the Supreme Court abets these extremists when it refuses to grant appropriate regulatory measures that will check these excesses on the internet.

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[27] Chapter 5:3 on the imminency requirement discusses the influences and encouragement these white supremacists have between/among themselves.

[28] Rachel Hatzipanagos, 'How online Hate Turns into Real World Violence' *The Washington Post* November 30, 2018. https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/<accessed 9 September 2021

[29] Rachel Hatzipanagos, 'How online Hate Turns into Real World Violence' *The Washington Post* November 30, 2018. https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/<accessed 9 September 2021. See also chapter 5, section 5.4 for the number of anti-Semitic attacks influenced by extreme ideologies of white Supremacists.

[30] Sarah N Lynch and Mark Hosenball, 'Stopping America's Next Hate Crime killers on Social media is no Easy Task' *Reuters* 9 August 2019. https://www.reuters.com/article/us-usa-shooting-internet/stopping-americas-next-hate-crime-killers-on-social-media-is-no-easy-task-idUSKCN1UZ10S.<acessed 9 September 2021.

The Court and Legislators should pay attention to these special characteristics of the internet and bring about workable changes with this new mode of communication. Following precedent, unless white supremacists make a specific threat online, they are not culpable.[31] For instance, they will not threaten to shoot a particular person online because they know this aspect of the law (that the verbal threat must be specific and not general) and so will not say something that they know that violates the law. So, these supremacists make hateful comments that cannot be tied to any overt act and so they cannot be held accountable or prosecuted. They know what to do and they do it to be within the limits of the First Amendment that protects them unduly. Since the First Amendment is a constitutional provision, we revert to the courts to provide limits and curtail the power granted to extremists who use the law as excuse to offend and harm others. The courts in the U.S. have the responsibility to prevent and stop these harms to ensure that outgroups are protected as other western countries and the European Court have done. The next section examines the provisions incorporated into the law of other countries to shield minorities from incitement to violence and considers the approach of the European Court that differs significantly from the U.S. method of not regulating hate speech.

7.3 Insight from other Countries on Regulation of Hate Speech

In principle, the U.S excludes words that incites violence from protected speech but advocacy of the use of force is fully protected. However, the advocacy to commit illegal action can only be proscribed if it leads to imminent lawless action.[32] Yet, there is no guideline by the Court on the duration of time between the inciting words and the consequent illegal or violent action.[33] It is possible that those who commit violent action are influenced by hate speech made by others or even posted by themselves before they go on a shooting spree. The *Brandenburg* rule is too broad and directionless.

[31] As future fears of abstract harms is protected, at least that is the holding in *Hess*. See Chapter 1, footnote 16-18.
[32] See chapter 1, footnote 9.
[33] See section 5.3 of Chapter 5.

The Organization for Security and Cooperation in Europe (OSCE) organized in 2004 its first conference on internet hate speech. The representatives of different countries noted the difference in approach in Europe and the U.S. After being taunted, the representative from America presented the American position, Mr. Rychlak explained that in America, "…censorship is more offensive than offensive speech, and that the United States instead draws the line when expression presents a clear and present danger by constituting harassment, threats, or incitements to imminent lawlessness."**[34]** More than half a century after this rule, with tremendous changes that have occurred, the U.S. has not shifted its position. That is the reality of the American free speech law.

Other countries of the world have evolved a legal system on speech that incites violence against outgroups. The countries in Europe and former Yugoslavian countries have adopted stringent regulations that forbid hate speech or speech that incites violence.[35] They are not just thin lines; they are express provisions under the country's laws that make it criminal for persons or groups to be targets of hate speech or targets of incitement to violence. A country like Hungary took regulation of hate speech further in its Media Law enacted in 2010. This law empowered the ruling party to punish any kind of offending expression protected by an earlier review of the Criminal Code.[36] Unlike the United States, these countries have adopted various safeguards against hate speech to ensure that minority populations are protected.

The United Kingdom prohibits public statements that provoke, "hatred against any identifiable group where such incitement is likely to lead to a breach of the peace."[37]In the Public Order Act (POA, 1986), Parliament made it illegal to use "threatening, abusive, or insulting words" likely to cause another "harassment, alarm, or distress."[38] Likewise, Germany, provides that, "threatening, abusive, or insulting…words likely to incite hostility against or bring into contempt any group of persons… on the ground of the colour, race, or ethnic or

[34] Julian Baumrin, 'Internet Hate Speech and the First Amendment, Revisited' (2011) 37 Rutgers Computer & Tech LJ 223, 252.
[35] Karmen Erjavec and Melita Poler Kovacic, "You Don't Understand, this is a New War! Analysis of Hate Speech in News Web Sites' Comments (2012) 15 Mass Communication and Society 899, 901.
[36] Miklos Haraszti, 'Forward: Hate Speech and the Coming Death of the International Standard Before It Was Born (Complaints of a Watch Dog)' in Michael Herz and Peter Molner (ed) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012), xviii.
[37] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 8.
[38] Ibid 728 See Public Order Act, 1986, Ch. 64, S 5-6 (Eng).

national origins of that group of persons" are forbidden. The German government included hate speech as an official ideology and policy.[39] Similarly, Denmark, precludes attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population," while, New Zealand forbids the use of, "threatening, abusive or insulting words or behaviour," when these are intended "to stir up racial hatred." Canada, engraved hate speech in their laws, in these words, "by which a group of people are threatened, derided, or degraded because of their race, colour of skin, national or ethnic background."[40]

The U.S. has no federal legislation that bans hate speech and the Supreme Court continues to enlarge categories of speech protected relying on the First Amendment. The Court bases the decision to censor hate speech on whether the speech leads to imminent unlawful action or if such speech incites another to commit an act of violence. It has been established in chapter five of this work that clear guidance by the Court is required to regulate speech and that racial and religious minorities being harmed in the American system justifies a revision of the current rule in *Brandenburg* that leaves the law open-ended. The European Court has not undermined the protection of minority groups from speech inciting hate or violence in its case laws.

7.4 The Approach of the European Court

The European Court of Human Rights has made attempts to safeguard the minority from harm by the case laws it has evolved to ensure that speech inciting violence against them are not promoted or disseminated. In *Jersild v. Denmark*[41] The court held that the racist remarks by the (Greenjckets) were "more than insulting" to members of the group targeted and therefore not protected under Article 10[42] of the European Convention

[39] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1525

[40] For the definitions of what constitutes hate speech, see Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 8.

[41] App. No. 15890/89, 19 Eur. Ct. H.R. Rep. 1 (1995) (Commission report). See Global Freedom of Expression, Columbia University. https://globalfreedomofexpression.columbia.edu/cases/jersild-v-denmark/. <accessed 13 September 2021.

[42] European Convention on Human Rights and Fundamental Freedoms [ECHR]. Nov. 4, 1959, art 10, 213 U.N.T.S. 221, provides, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…" https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-10/, <accessed 13 September 2021

of Human Rights.[43] Also in *Norwood v the United Kingdom*,[44] the appellant who displayed a large poster on his bedroom window after the 9/11 attack in the U.S. with the words 'Islam out of Britain' was charged and convicted as attempting to cause alarm or distress. The European Court held that a clear and fierce attack on a particular group would suffice to establish a violation of Article 17 of the European Convention on Human Rights.[45] The court reasoned that Art. 10 cannot be invoked against Article 17. On numerous occasions, the court explicitly stated that freedom of expression must be protected.[46] In *Erbakan v Turkey*,[47] the court held that, "… [T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance …"[48]

However, unlike the Strasbourg court, the U.S. court has been drastically different in its hate speech decisions. In *Snyder v Phelps*[49] the U.S. Supreme Court would rather take a different direction, regarding extremist speech at a funeral of a fallen soldier to be mere political speech or debate rather than hate speech by upholding the right of a religious minority group to express hateful views in a way that most Americans considered

[43] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 35.
[44] (2004) 40 EHRR SE 111, [2004] ECHR 730. Article 10, this Article protects the right to free expression and to speak freely without fear of government interference.
[45] Article 17 provides "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." https://www.jus.uio.no/lm/coe.convention.on.human.rights.1950.and.protocols.to.1966.consoloidated/17.html, Accessed 2 March,2020. Article 10 provides for Freedom of Expression.
[46] *Jerusalem v Austria* App no 26958/95 *(*EtCHR 2001-II, 2003*) Handyside v United Kingdom, App No. 5493/72* (ECtHR, 7 December 1976), *Vona v Hungary* App No 35943/10 (ECtHR, 9 July 2013).
[47] App no 59405/00 (ECtHR, 6 July 2006).
[48]Press Unit, the European Court of Human Rights, Facts Sheet on hate speech, February 2020https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf. Accessed 2 March 2020.
[49] 562 U.S. 443 (2011).

offensive.[50] On the above case and several others discussed, the U.S. court needs to revert its attention to the statement of the court in Canada[51] as it held that;

> Framing that speech as arising in a "moral" context or "within a public policy debate" does not cleanse it of its harmful effect. Indeed, if one understands an effect of hate speech as curtailing the ability of the affected group to participate in the debate, relaxing the standard in the context of political debate is arguably more rather than less damaging to freedom of expression. As argued by some interveners, history demonstrates that some of the most damaging hate rhetoric can be characterized as "moral;' "political" or "public policy" discourse.[52]

Racial and religious hate speech can potentially discriminate, exclude, subordinate, and make second class citizens of others in their own country,[53] unless the courts intervene like the Canadian court in the above decision. The courts in America are yet to draw that thin line between public policy discussion and where it meets with hate speech. This research is not within the scope of political speech, but I wish to state that the Court needs to recognize the harm in hateful speech and put such speech in context. Regrettably, the Court is not doing so. The leading hate speech case in the U.S. is *R.A.V.* v City of *St Paul*[54] where the petitioner with other teenagers (challenged their conviction) for burning a crudely made cross inside the fenced yard of an African American family under an ordinance enacted by the city of St Paul.[55] Justice Scalia, delivering the majority opinion, noted that the key principle under the U.S. constitutional law is that government will not proscribe speech or expressive conduct because it disapproves of the ideas expressed. Justice Scalia went on to emphasize that all such content-based laws are presumed invalid.[56] The Justice gave a formulation based on St Paul's Ordinance which outlaws 'fighting words' "on the basis of race, color, creed, religion, or gender" as facially unconstitutional. Zewei understands the U.S. hate speech decisions as characterized by absolutism

[50] J Michael Martin, 'Snyder & Phelps: Applying the Constitution's Historic Protection of Offensive Expression to Religiously Motivated Speech' (2011) 24 Regent U L Rev 487. In this case members of Westboro church picketed at the funeral of Mr Snyder's son (a soldier) -on some key political issues such as homosexuality and wrote such words like, "thank God for dead soldiers' etc. Mr Snyder sued that the church caused him emotional distress. The court of first instance awarded the plaintiff 11 million dollars in damages but the Supreme Court reversed on First Amendment grounds that the church were demonstrating on matters they had right to and did not intend to attack Snyder on a personal level.

[51] *Whatcott* v *Saskatchewan*, (Human Rights Tribunal), 2010 SKCA 26 at 138, See also Sarah Sorial, 65.

[52] *Whatcott*, ibid at 116.

[53] Petal Nevella Modeste, 'Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment' (2001) 44 Howard LJ 311, 317.

[54] 505 U.S. 377 (1992).

[55] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 31. Burning a cross is a symbol of the KKK domination of blacks in America.

[56] Ibid 31.

that treats restrictions with distrust unlike Canadian jurisprudence that affirms the state's positive role in promoting tolerance and equality.[57] Furthermore, the U.S. Supreme Court's approach in *R.A.V* gave no serious consideration to St Paul's compelling interest in taking an affirmative stance against the most virulent forms of speech and prejudice.[58] The Justices played down the particular ills of hate speech especially what burning cross meant in America in that case while exaggerating the 'hate-neutralizing potential of rational, colour-blind deliberation.'[59] Zewei further states that the Canadian and the European approach would assess cases against the backdrop of compelling State's interest, appeal to democratic values such as equality, dignity, multiculturalism including responding to ethno-religious heterogeneity in the society.[60]The Court downplayed the emotional and physical harm an African American family would experience for the conduct of these youth and again ruled in favour of the appellant refusing to draw that thin line where free expression meets with hateful expression-thus, decontextualizing the harm that should have formed the basis for that decision. Parekh could not have put this more aptly,[61] 'every form of speech occurs within a particular historical and cultural context, and its content, import, insinuations, and moral and emotional significance are inseparable from, and can only be determined in the light of, that context.' From the foregoing discussion, the U.S. approach to free speech downplays the harms of hate speech. The protection of racial and religious hate speech stands in sharp contrast to other developed countries or indeed other advanced democracies. The question posed by some notable scholars who propose the regulation of hate speech is, "at what point does condemnation, insult, or disdain cross the line to become a message of persecution, inhumanity, or degradation?"[62] They further ask, which group really count, will majorities accept a law that protects only minorities (bigots, vilifiers, haters), or those groups who have been historically battered or decimated? It appears that in the U.S. system, free expression favours haters rather than oppressed groups. White supremacists have used the law to continue to

[57] Zewei 33.
[58] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 35.
[59] Ibid 36
[60] Zhong Zewei, 'Racial and Religious Hate Speech in Singapore: Management, Democracy, and the Victim's Perspective' (2009) 27 Sing L Rev 13, 36.
[61] Bhikhu Parekh, 'Is There a Case for Banning Hate Speech?' in Michael Herz and Peter Molner (ed) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) 41.
[62] Michael Herz and Peter Molner (ed) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) 3.

perpetuate hate on these groups and the Court has only fanned this hate in the manner it has interpreted the cases brought before it.

7.5 The Apex Court Unyielding Approach to Protecting Hate Speech

Referring to the discussions in chapter six, section five, it can be stated that the Supreme Court has consistently ignored the impact of hate speech and the harms on targets of such speech in cases that come before it. Perhaps the best way to demonstrate the attitude of the Court is to recall the comments made by Albert Snyder after losing his case on First Amendment grounds on a voting of 8-1 in favour of his opponents, "My first thought" the petitioner opined, "was that eight Justices didn't have the common sense that God gave a goat."[63] The above statement in itself is an expression of Snyder's First Amendment rights considering the denigrating nature of the words used for the Justices of the Supreme Court. Free speech right in America is in trouble. It can be surmised using the words of Liptak, "the United States' commitment to the protection of hate speech is distinctive, deep and authentic- and also perhaps reflexive, formal and unthinking."[64] The Court has consistently considered that the harm outgroups suffer does not justify suppression of such speech but in more speech.[65] The hostility of the Court towards censoring speech can be observed from imminency requirement of the rule in *Brandenburg* which has been discussed in chapter five of this work. How can the Court not leave any directions to the lower courts on the time frame to work with when inciteful words follow an unlawful action? This study shows that minority groups have been attacked following incitement to hate which has continued unabated because of the way the Court has dealt with such incidents in the past. Also, the rule in *Brandenburg* requires that 'intent' be proved for culpability to be established. How exactly can intent be proved for a speech that is anonymous? How can someone who incites violence via a message board with no identifiable personal details be held liable if such a person cannot be traced? What if the message cuts across borders with different regulatory internet rules? These are some of the insurmountable difficulties with the

[63] Adam Liptak, 'Forward: Hate Speech and Common Sense' in Michael Herz and Peter Molner (ed) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) xviiii.
[64] Adam Liptak, 'Forward: Hate Speech and Common Sense' in Michael Herz and Peter Molner (ed) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) xviiii.
[65] Michael Herz and Peter Molner, 'Introduction' in Michael Herz and Peter Molner (ed) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) 3.

high hurdle set by the Court in *Brandenburg.* The rule indisputably needs to be re-assessed in the light of internet communication and this research. The next section discusses the findings and the original contribution of this research.

7.6 Findings of the Study

The research provides both theoretical, methodological, and analytical findings. To the best of my knowledge, this research is the first within the law discipline to advance the understanding of a major doctrine of the Supreme Court in practice using the combined theory of Dworkin, critical discourse, and media analysis. The innovative theoretical framework and methodological evolution utilized distinguishes this research from similar works in law. In utilizing google to obtain data, the work again distinguishes itself as the first in methodology and law (among leading figures in this area) to examine these issues. I developed my own search queries, painstakingly conducted the research that enabled me to identify and answer my research questions, thereby arriving at the aim of my research. The research demonstrates the possible effects, in real life of such a major doctrine in the United States jurisprudence. In using Dworkin, the thesis has argued that the scholar's standpoint on non-censoring of speech raises great challenges to his whole project; particularly, the harms suffered by minority groups which will be discussed shortly. Also, on the methods, the newspaper and other sources used as data for this study, similarly, provide astounding pieces of rich and nuanced information from academics, victims of hate speech, proponents of hate speech, law makers, major stakeholders, police, and different organizations who speak out against hate and those impacted by same. In other words, the research produces a critical discourse analysis of newspaper reports/ opinion pieces of public debates on the breadth and depth of the impact of First Amendment free speech broad protection on historically oppressed groups. It evidences how the newspapers frame debates through their reporting. The research undeniably confirms the connection between doctrine and public debates as represented in newspaper discourse-the doctrinal and newspaper analysis meet to the extent that minority groups are adversely impacted by the broad protection offered speech in America. The Court should take into consideration this linkage in interpreting free speech cases impacting minority groups.

Free speech fundamentalists and non-fundamentalists support the view that the First Amendment overly protects hate speech including the advocacy of the use of force and incitement to lawless action unlike other developed nations. There is no single exception to the view in scholarship that the First Amendment protects all kinds of speech including speech that incites people to commit unlawful action or to commit a violent action. Many eminent U.S. scholars such as Waldron,[66] Bollinger[67], Tsesis,[68] Rosenfeld,[69] Henry,[70] Schauer,[71] Matsuda et al,[72] Delgado and Stefancic[73] among others support the view that the United States protects hate speech as no country does, excludes hate speech from constitutionally protected speech and therefore an oddity or outlier in comparison with other nations. Free speech absolutists also affirm this fact.

It is well settled in theory/scholarship that the First Amendment protects bad and dangerous speech. In *Hess* the Court held that advocacy of the use of force for an indefinite period is protected. This would mean that if someone goes online and writes, 'shoot all Jews in New York City' this is protected under the First Amendment because the statement is not directed at anyone and has no time frame as to if or when the action will be carried out. This was the reason the Charlottesville event could not be stopped and at least one person paid the price for allowing the Neo Nazis their free expression. Free speech is indeed not free. It has costs. Many African and Jewish Americans continue to pay the cost of free speech in America with their blood.[74] When the law protects extremists who advocate violence, this is a fundamental problem.

The theoretical chapters of this thesis clearly demonstrate that the First Amendment free speech law (particularly the rule in *Brandenburg*) is the major force driving racial and religious hate speech in the U.S. The three theoretical chapters, one, three and four adopt a doctrinal approach. In these chapters, I identified,

[66] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012)
[67] Lee C. Bollinger, *The Tolerant Society* (Oxford University Press Inc. 1986) 3
[68] Alexander Tsesis, 'Regulating Intimidating Speech' (2004) 41 HARV J ON LEGIS 389, 390.
[69] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CARDOZO L REV 1523, 1525.
[70] Jessica S. Henry, Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States (2009), 18 Information & Communications Technology Law, 235, 237, 238.
[71] Frederick Schauer, Harms and the First Amendment' (2011) Sup. Ct Rev 81
[72] Mari Matsuda et al, *Words that Wound, Critical Race Theory, Assaultive Speech and the First Amendment* (Routledge 2018)
[73] 'Richard Delgado & Jean Stefancic, *must we Defend the Nazis Why the First Amendment Should not Protect Hate Speech and the White Supremacists* (New York University Press 2018)
[74] See chapter 5, footnote107

analyzed, and synthesized contents of the law, especially, the doctrine of incitement of the Supreme Court in case laws, legislations, research articles; then critiqued the shortcomings, to assess the inadequacies of this major principle of the Court. I take a strong position here against the attitude of the Court to regulating speech impacting outgroups under the Court's prevailing interpretation of the First Amendment. In other words, these chapters support the position that the Supreme Court in legislating free speech cases, has significantly relied on broad interpretation of the law while relegating censorship of racial and religious hate speech in most of the cases brought before it. This fact is evinced in many State legislations that were struck down by the apex Court as either overbroad or vague and the fact that the U.S. has no single federal legislation banning hate speech is an issue that goes against, in every ramification, the interest of the persecuted minority. Following *Brandenburg*, the Court has continued to enlarge the scope of hate speech protected under the First Amendment and adamantly not paid heed to the new mode of transmission of messages (the internet) and the perpetrators of racial and religious hate speech (white Supremacists) in modern day America.

The second stage of the thesis was a systematic gathering and thematic analysis of data from online newspapers and other sources from Google which I selected based on cities a mass shooting occurred against Jewish and African Americans. The findings presented in chapter five of this thesis are that protection of speech should not relegate the content/context of speech. The Court in deciding cases of free speech brought before it, should take onboard the historical, existential, social, and practical life of racial and religious minorities in deciding such cases as presented in media discourse. This research finds that it is necessary to contextualize harm and the imminence of risk in regulating online hate to serve the best interest of justice and fairness in decisions impacting outgroups and that the Court errs if it proscribes speech only based on incitement to immediate danger or violence occurring. The study further finds that African and Jewish Americans are the main targets of online hate speech perpetrated by white supremacists and that online hate speech appears to drive offline violent acts.[75] The internet is used to exacerbate this hate against outgroups,

[75] Taylor Lorenz, 'The Pittsburgh Suspect lives in the Web's Darkest Corners' *The Atlantic*, October 27, 2018. https://www.scribd.com/article/391762526/The-Pittsburgh-Suspect-Lived-In-The-Web-s-Darkest-Corners<> accessed 21 October, 2021; ---'Two More Platforms Have Suspended Gab in the Wake of Pittsburgh Shooting,' *The Verge* October 28, 2018 https://njaah.org/jewish/two-more-platforms-have-suspended-gab-in-the-wake-of-pittsburgh-shooting/<> accessed October 22

another significant finding of this study supported by the newspapers analysed. One surprising finding relates to the opinion in the newspapers of the cities where a mass shooting occurred (the *Pittsburgh Post-Gazette* and the *Post and Courier*). Newspaper opinions in both cities emphasized the need for unfettered free speech as a landmark of the American constitutional law. For instance, the PPG, condemned Twitter for suspending Donald Trump. The analysis of the papers revealed, as a matter of degree, that free speech should not be regulated by the government, that the First Amendment right is an inviolable right that makes America what it is. However, more studies are needed in this area of research as Siegel notes that just a handful of research have begun to assess the prevalence of hate speech on internet platforms.[76] Chapter six enumerated the contributions to hate that 8chan, 4chan, Gab among others utilize in spreading extremist ideology and white supremacists post on these platforms just before violent attacks.[77]

This thesis is unique as it makes prominent contribution by combining theory (legal doctrine), critical discourse analysis embedding it with interdisciplinary approaches to assess doctrine and its consequences utilizing media representations to assess the impact of the law on racial and religious minorities that reveals the existence of linkage in real life between speech and violence. Also drawing from media discourse is the influence of the internet in inciting violence and the necessity of the Court contextualizing harm in seeking to regulate online hate speech especially as perpetrated by white supremacists against racial and religious minorities in the United States. In general, the findings above provide answers to pertinent questions regarding how the Court can adjudicate free speech cases relating to the doctrine of incitement with racial and religious minorities and lay out tremendous impact this can have on the current practice in the First Amendment jurisprudence. The thesis has therefore made an original contribution and filled a gap in the illustrative

November 2021; Drew Harwell, 'Three Mass Shooting this Year Began with a Hateful Screed on 8Chan: It Founder Call it a Terrorist Refuge in Plain Sight. *The Washington Post* 4th August 2019a.. https://www.washingtonpost.com/technology/2019/08/04/three-mass-shootings-this-year-began-with-hateful-screed-chan-its-founder-calls-it-terrorist-refuge-plain-sight/. <.>accessed 29 October 2021; Chetty Naganna & Alathur Sreejith, 'Hate Speech Review in the Context of Online Social Network' (2018) 40 Aggression and Violent Behaviour 108; Alexander A Siegel, 'Online Hate Speech' in Nathaniel Persily and Joshua A Tucker, (ed) *social media and Democracy* ((Cambridge University Press 2020) 56. See also chapter 1, notes 150 -158.

[76] Alexander A Siegel, 'Online Hate Speech' in Nathaniel Persily and Joshua A Tucker, (ed) *social media and Democracy* ((Cambridge University Press 2020) 66..

[77] Lima Lucas et al, 'Inside the Right Leaning Echo Chambers: Characterizing Gab, an Unmoderated Social System' (2018) https://ieeexplore.ieee.org/abstract/document/8508809<>accessed 23 November 2021. The authors find that Gab hosts banned users from other social media networks dismissed from such network because of their hate speech and extremism.

practical sense in literature by exploring how media discourse portrays the influence of the incitement doctrine on racial and religious minorities in understanding contemporary free speech jurisprudence in America. This area of law has received little attention in legal research. Evidence from the research shows that newspapers can frame discourse on doctrines of the law and how these impact the existential lives of historically oppressed groups.

The probability of harm occurring after a speech inciting violence, therefore, should receive, the highest form of speech protection. This is because this study has produced evidence showing that harm does occur and that those who dismiss censorship of speech inciting violence based on speculation should have a re-think.[78] A major authority in this area of study notes very strongly that speech that incites violence against outgroups are real and justify the use of regulation to prevent the use of force and persecution against these groups.[79] In essence, this study as supported by Tsesis is that hate speech is a catalyst for discrimination, persecution, and oppression.[80]

Other findings provide strong support for the contributions to hate speech by white supremacists. This is evident in the many targeted attacks discussed in the analysis chapters. White Supremacists because of the kinds of speech allowed under the law incite violence against racial and religious minorities. The hate speech white supremacists propagate against outgroups are speech within the limits of the law. As chapter five demonstrates, the problem particularly is when the words used are coded and do not amount to hate speech or advocacy of the use of force. For instance, the Pittsburgh shooter wrote, 'screw your optics, I am going in,' who would have decoded this language as a call to violence?

[78] Eric Heinze, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9 Int'l J L Context 590, 596-597. See also Katharine Gelber and Luke McNamara, 'Evidencing the Harms of Hate Speech' (2016) 22 Social Identities 324, 325.
[79] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 731.
[80] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 731

The study finds that online hate speech tends to lead to real world violence and the groups most likely to be attacked are African and Jewish Americans.' It finds that these extremists who propagate hate online are influenced and incited by one another to commit acts of violence. In other words, online messages that incite or directly advocate violence influence targeted attacks on minorities.[81] These extremists present an emergency that needs urgent attention, to act "now' or it will be too late. Their conspiracy theories, that Jews are about replacing the white race evokes in them the desire to attack and exterminate the 'intruders.' The 32 year old Oslo killer who massacred seventy seven people at two different locations on July 25th 2011 was convinced that if he did not act fast, the spread of Nordic culture will necessitate mass migration of Muslims who would take over Europe and so he went on a killing spree to exterminate the next generation of Labour Party leaders at a summer youth camp.[82] The El Paso shooter drove for six hours to ensure that he eliminated immigrants in South Texas that were taking over their country and so did the Pittsburg shooter too who truly believe that Jews are not worthy of living with others.

The killing of racial and religious minority groups by white supremacists incited by speech cannot be dismissed as harms undeserving of legislative intervention.[83] Bakalis in a very persuasive article justifies the need for a hate crime legislation for victims that are excluded.[84] Jewish and African Americans are persecuted by white supremacists and therefore excluded if a criminal legislation is not evolved to protect them against incessant attacks and the harms intended to be outlawed by such legislations.[85] Tsesis outlines some shooting spree in the U.S. which the scholar states that had there been criminal legislations in place banning the use of racially and religiously denigrating expressions, such tragedies may have been prevented.[86] Such speech inciting hate or violence, should be censored to prevent further harms of oppressed groups.

[81] Erik Bleich, 'The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies' (2011) 37 Jour of Ethic and Migration Studies 917; Laura Leets and Howard Giles, 'Words as Weapons, when do they Wound? Investigations of Harmful Speech (1997) 24 Human Communication Research 260 and Dhammika Dhamapala and Richard H. McAdams, 'Words that Kill? An Economic Model of the Influence of Speech on Behaviour (with Particular Reference to Hate Speech)'(2005) 34 Jour of Leg Studies 93
[82] Liz Fekete, 'The Muslim Conspiracy Theory and Oslo Massacre' (2011) 53 Race and Class 30, 31. The shooter had left 90 minutes to his shooting spree a 1,500-page online manifesto in which he entitles, '2083: A European Declaration of Independence.
[83] See Footnote 81
[84] Chara Bakalis, 'The Victims of Hate Crime and the Principles of Criminal Law' (2017) 37 Legal Studies 718.
[85] Ibid 737-738.
[86] Liz Fekete, 'The Muslim Conspiracy Theory and Oslo Massacre' (2011) 53 Race and Class 30, 31. The shooter had left 90 minutes to his shooting spree a 1,500-page online manifesto in which he entitles, '2083: A European Declaration of Independence 730-731.

The contemporary free speech law, the crux of the American free speech law (the rule in *Brandenburg*), no doubt needs revision and should indeed be revised in the light of the tragedies that occur on regular basis in America, the major contributors of hate speech and the change in the techniques of communication.[87] The Court has the responsibility to prevent speech that incites violence or hate against the two racial and religious minorities, who are the main focus of this research by handing down precedents in case laws that ban speech that trigger hostility against these groups. Context is important and plays a key role in the assessment of law. It will not make sense to ban anti-Semitism in Nigeria because that country has no history of hostility towards Jews but can ban for instance, open grazing of cows because of the repeated history of Fulani herdsmen that continue to commit obnoxious acts against indigenes of places they graze cows.[88] The U.S. with its dual history of anti-Semitism and slavery, has an obligation to forestall repeated attacks on Jews and African Americans by enacting a criminal legislation that hold extremists accountable for their words and actions. Law ought to go beyond prescribing norms, to incorporate morals. As Dworkin avers, laws have their origin in morality and the culture of the people. The Supreme Court cannot ignore this fact and continue to apply a principle of law that is obsolete in a modern complex technological era. The U.S Supreme Court should cease to empower racists and bigots by changing this constitutional narrative-discriminatory, hateful and persecutorial speech against racial and religious minorities should not be protected under the law. The fight against these forms of speech should be championed by the courts not encouraged.

7.7 A Compromised Position

The debate on the broad protection of speech offered under the American legal system by previous writers in this field blame the First Amendment and the Supreme Court for interpreting the law in a deterministic manner, that is, only a form of speech that has causal effect to harm can be regulated.[89] The development of theory in

[87] Alexander Tsesis, 'The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech' (2000) 40 Santa Clara L Rev 729, 731.
[88] *International Crisis Group* 'Stopping Nigeria's Spiraling Farmer-Herder Violence' 26 July 2018. https://www.crisisgroup.org/africa/west-africa/nigeria/262-stopping-nigerias-spiralling-farmer-herder-violence.> accessed 2 November 2021.
[89] Chapter 1, footnote 17, only speech that has a causal link to harm can be censored.

this area of the law is morally deficient because determinism does not hold sway in human action. If human actions are ultimately determined and free will is excluded from one of the considerations for acting or not acting in a particular way, why then should people be punished for violating the law? The decisions that we humans make are not a product of cause and effect. We are endowed with rationality and free will. We do not act on impulse but think through our thoughts before we act. We also live by the consequences of our action if we make the wrong choice. Existing scholarship presents a formalistic First Amendment law[90], but this study directs attention to the law as it ought to be evolved from a different trajectory than it has so far done. Philosophical theorizing and interpretation of free speech by the courts has clearly not addressed the incidental issue of harm caused to minorities in America. The law has been interpreted to privilege haters to cause harm rather than promote equality under the law. It is not difficult to see how such a core right as freedom of speech is interpreted in such a way as to truncate the peaceful existence and full participation of historically oppressed groups. The real implication of allowing broad protection of speech is too evident even in media/public discourse of the issues involved in racial and religious hate speech. An important contribution this research makes to scholarship is that a debate on free speech cannot alienate historically oppressed minorities and further discourse should build on the harm caused which is no longer a matter of controversy according to the media's prevailing opinion and in the light of this research. The harm suffered by minority groups is substantial and is a critical issue that cannot be justified on the 'marketplace of ideas' or from justification of 'truth' argument.

7.8 Flaws in the Justification of free speech from Truth

The argument from truth persists in contemporary free speech debate in America and was the only one highlighted by the data sources accessed and analyzed.[91] The discussion of what constitutes truth cannot be practically explored in this piece of work because even a thesis topic examining the subject will not do justice to it the meaning or definition is as broad as it is vague. This researcher wonders how denigrating and

[90] See Footnotes 66-71 of this chapter

[91] See chapter five footnotes 28-31, see generally 5:2., truth will weed out falsehood. Chapter five, Footnotes 40, &41 Baber arguing that what constitutes truth is relative. If that is the case, how then can truth outshine falsity?

demeaning the rights of racial/religious minority groups (through unregulated free speech that gives vent to the good, the bad and the ugly) fosters truth. As argued in previous chapters, the justification from truth does not provide a good rational for uncensored free speech and it clearly undermines significant harms suffered by racial and religious minorities which should be central to the First Amendment debates. It fails to totally consider the nature of the American society, changes in communication/technology and that expunging context in interpreting free speech cases by the courts corrodes core values that cause substantial injury to others.[92] In a marketplace of ideas, with uneven audience, truth cannot simply compete with or allay falsehood. The argument will make sense if there is objective truth and human cognition can be placed on the same plane. This mode of reasoning cannot provide even the least theoretical basis for an argument under the First Amendment jurisprudence unless an element of law lacks a moral dimension that does not protect right or punish wrongdoing. This angle is the whole essence of Ronald Dworkin's teaching.

7.9 A Moral Cure for a Formalistic First Amendment Law

Ronald Dworkin believed in a moral law. Law cannot be separated from morality.[93] The two are intertwined. Law is morality and morality is law.[94] This argument has been laid out in the chapter four of this work. The scholar's perspective is that moral law cannot be separated from the science of law, one is enmeshed in the other. Free speech theorists and critics all agree that the Supreme Court and the classical First Amendment jurisprudence safeguards speech because of the U.S. Constitution and not because it is ethical to do so. This research introduces this dimension to the debate on free speech by bringing in Dworkin's thesis as rationale to achieve the abrogation of racial and religious hate speech in America if the Court adopts the scholar's teaching in deciding cases that impact racial and religious minorities. Presently, the Supreme Court treats targets of hate speech with indifference contrary to the prevailing opinion in data analyzed, when it should integrate public discourse in interpreting First Amendment cases that impact historically oppressed groups.

[92] Chapter 5 footnote 34, interpretation based on context is more protective of racial and religious minorities
[93] See footnote 173 or page 32 of chapter one, note particularly the words of Cantor that the justices of the Supreme Court did not base their argument of free speech on moral grounds or popular opinion of free speech.
[94] See also Powell, Chapter 5, footnote 35

For Dworkin, interpretation must be based on practice and morally justifiable. The scholar laid out so meticulously, the role of morality in explaining and in practice of the law. Legal rights are grounded on moral obligations without which there is no essence. The direct implication of Dworkin's moral theory or philosophy of law is that law comprises both content and context, while the former gives relevance, the latter provides the background for the practice of law. The Court has also been inconsistent in the application of its own ruling especially in always throwing overboard context and sometimes conflating these two different concepts. The Supreme Court takes no legal cognizance of the above fact in deciding cases of free speech. The Court always will expunge content from the context that gives rise to the speech brought before it. For instance, in *Virginia* v *Black,* the court ruled that cross-burning is not protected under the First Amendment as it is a mark of visible threats of violence against others. But in *RAV,* the same Court held the contrary, noting that the conduct of the appellant (burning cross) cannot be inferred as incitement to violence against the black family targeted.[95]

Dworkin's whole thesis/teaching points to a valid and objective moral standard. Beginning with his postulation of a super-human judge, Hercules, who can resolve any dispute or case brought before the court. The scholar builds further on this, that the extremely talented judge can interpret the law to discover objective moral standards that evolve from the practices of people in a legal system. The Constitution of the U.S., therefore, should be read as a set of moral principles not on the whims and caprices of individual justices of the Court that decide cases not on moral considerations but on empirical justifications of harms that follow speech. This research provides evidence in media discourse and reports that there are considerable harms done to racial and religious minorities which can no longer be ignored by the courts. Future adjudication and interpretations of cases involving racial minorities by particularly, the Supreme Court must be faithful to the above fact. Otherwise, the Court dithers in an issue so significant with serious implications in contemporary discourse of free speech as represented in media reports. In essence, the argument I present in the whole of this project, is

[95] G Sidney Buchanan, 'The Hate Speech Case: A Pyrrhic Victory for Freedom of Speech? (1992) 21 Hofstra L Rev 285, this author argues that this paradoxical ruling by Justice Scalia poses not only a threat but hurts free speech values if upheld in subsequent cases.

the relevance of interpreting free speech provisions relative to public opinion and reports at least, in the light of this research as it puts on the spotlight causes for concern discussed in chapters five and six. This Thesis undeniably provides salient evidence that is central to the discourse on freedom of speech and of judicial responses to the broad protection accorded speech. The work in building on existing scholarship, differs significantly from previous research as it provides further evidence from media sources to support the view that racial and religious minorities are under attack in the United States of America not only by extremists but by the interpretations of the law. Racial minorities are under persecution by the very institution that should protect them so the Supreme Court cannot exclude analysis/interpretation of the law from the social implications of the impact of broad protection of free speech on racial and religious minorities.

7.10 Concluding Statements

This thesis combines doctrinal, theoretical, and conceptual approaches to illustrate current discourse on free speech as it reflects the doctrine of incitement and to highlight newspaper discourse as it impacts upon minority individuals and groups in American Society. Three issues are particularly addressed in this thesis; one, how this doctrine theoretically and doctrinally has been interpreted and analysed by the Court; two, as a concept, how it has worked in real life or beyond the court room; three, how internet communication and white supremacists have used the instrument of the law (this doctrine) to their advantage. In essence, the doctrine has formed the theoretical basis of the classical free speech law. In brief, the newspaper discourse (in the analysis chapters) underlines the fact that harm is experienced by the minority and that the law on free speech is disadvantageous to these groups.

This thesis is an approach to consider the classical formulations of free speech by the courts (especially the Supreme Court) with current discourse in the media. We argue that the doctrine of incitement as theoretically and doctrinally developed over the decades ignores popular opinion as portrayed in media discourse. Just as the title of my thesis suggests, there is a wide gap between doctrine and its impact on practice or put differently, the gap between legal doctrine and the consequence of such doctrine is wide. To this extent, the American free speech constitutionalism rests on two theories, at least, in the light of this research.

- The Rule in Brandenburg (incitement doctrine) which I rename in this work as the theory of contingency of harm
- Theory of truth (the modern jurisprudence of the first Amendment is driven by the theory that open debate engenders truth).

Having considered all the issues in the chapters of this thesis, the inference that can be drawn is that these two theories from their inception to these modern times, are unsound both in theory and in practice. The reason is not far-fetched. According to constitutional scholars and the press, the way that these theories have evolved has perpetuated racism. Their application and operation over the decades create more challenges and controversies than they seek to resolve in free speech disputes.

I identified the problem of the doctrine of incitement in different chapters of this thesis. The Court creates a high hurdle for speech to be regulated. For speech to be censored, it must lead to imminent unlawful act and has the likelihood to lead to such act. The speaker also must intend the speech to lead to such violent act. Therefore, I reframed it as the doctrine of contingency of harm. We cannot judge harm that is likely to occur in the future by retrospection. The incitement test is flawed on all fronts. In theory, the doctrine is ambiguous. We can refer to chapter five of this work with reference to the imminency requirement. As a legal doctrine, it relies solely on formality (science of law). By this I mean, the justification of a doctrine by appeal to principles. The doctrine indeed creates insurmountable challenges. It permits the law to act against the legal rights of what the law promises under the fourteenth Amendment, to give equal protection to all citizens under the law. It extricates the law from morality (or its conscience) to promote the deliberate acts of haters who rely on the law to injure the legal interest of others. The Court has reneged on its role of creating precedents that protect the rights of everyone in the society. It therefore directly creates undue hardship and injustice to aggrieved individuals and groups when plaintiffs with legitimate claims are turned away.

The thesis argues and maintains that the definition of free speech is only discoverable if interpreted within a broader context, in a more holistic manner and understanding bringing to bear, Dworkin's teaching that law is enmeshed in morality, so the science of law is an aberration as protection of speech within the context of

principles of law cannot produce a framework of justice and fairness at the practical level-human actions. Interpretation of free speech that relies exclusively on legal principles as the courts have done, approves of the harm done to racial and religious minorities. The courts, particularly the Supreme Court, need to realise the overriding importance of conceptualizing and contextualizing harm in deciding cases of free speech. The thesis argument stems from the idea and conclusion that the theoretical/doctrinal framework of free speech that excludes the harms that emanate from broad interpretation of free speech makes it difficult to formulate a doctrine synonymous with equal protection under the law. This thesis therefore substitutes a formal dogma of the free speech law with a new framework-the moral perspectives of law identified in Ronald Dworkin with analytic review of public discourse.

The socio-legal analysis explored the impact in real concrete situations, that is, reports and opinion pieces discourse in newspaper articles. While the doctrinal approach provides in-depth knowledge of the theory; clarifies the content of the law by critically analysing statutes, judicial judgments and other legal authorities, the newspaper analysis was beneficial as it reveals how laws are implemented and enforced in the society. Both approaches augment each other when we consider the practical implications of such a major doctrine of the Court. The decided cases and precedents of the Court have not taken cognizance of concrete issues in real practical terms to address unconscionable behaviour within certain contexts- internet hate which is unprecedented in an atmosphere that is unregulated and amidst growing threat of white supremacism/ antisemitism as revealed in the data used for this research.

The findings and recommendations contained in this thesis are original, unprecedented, and significant in the light of previous literature and discourse on free speech in America. The thesis has made an original contribution and filled a gap in the practical illustrative field of law by exploring how the First Amendment doctrine of incitement has been conceived in public discourse by the media. It has also no doubt contributed to the body of literature on the theory of free speech that considers the moral perspectives of law rather than law based on principles (the contingency of harm) that has played a role in isolating racial and religious minorities in their own country. There is much scholarship in free speech but little or no scholarship in the distinctive angle of harm done to racial and religious minorities from the point of view of technological

change, judicial decisions, and replication of hate groups in the U.S in legal research. This work goes some way in filling this gap.

This research serves as a focal point of reference for further research as it lays the background for future research that will focus on the inherent harm done to minority groups via the internet and by white supremacists as portrayed by the media. Media discourse that focuses on the minority harmed can impact the direction of future research to develop or improve the law and so eliminate further barriers to significant changes required in the trajectory of free speech in America. There are also several other directions for future research. The First Amendment can be studied against the background of critical race theory and focus on other racial groups too, for instance, the Asians (the most recent case of free speech decided against a minority group in 2017 was in Matal v Tam). Other researchers could also examine in more detail how internet communication has changed the landscape of free speech incitement issue using both qualitative and quantitative methods in media discourse to measure its impact on other minority groups.

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