The Constitutional Right to Express Hatred: A Comparative Analysis

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Introduction

Hate speech, considered here as degrading speech intended to intimidate or incite violence against certain persons or groups on a range of distinguishing characteristics, presents a unique and problematic challenge to constitutional provisions protecting the freedom of speech. The position adopted in the United States is markedly different than those taken by other liberal democracies such as Canada and Germany and this paper will address the reasons for this paradigmatic divergence. It will begin with an examination of the historical, political, and social context against which these constitutional provisions were drafted and the particular threats to speech which they were to counter as well as the vision of the enshrined right. The focus will then shift to the underlying theoretical bases supporting privileged status speech protection and the reasons for excluding or limiting certain categories of speech in specific circumstances. The application of these principles and limitations will be scrutinised through the domestic case law from the jurisdictions above, with especial attention to relevant international law informing national jurisprudence. This latter point will require detailed consideration of the View of Human Rights Committee of the ICCPR (HRC) but space precludes an analysis of European Court of Human Rights jurisprudence. The goal of this paper is therefore to elucidate a coherent and justifiable approach to the clash between laws proscribing hate speech and constitutional provisions safeguarding a right to free speech, but again space precludes a detailed analysis of the role played by equality rights in this context.

Contextual Considerations

In 1791, the adoption of the First Amendment in the US enshrined unfettered free speech in the context of a successful revolution founded upon the dissemination of doctrines and ideas- a foundation which continues to influence these rights[1]. Textually, the freedom of speech is a negative absolute right against the government and speech found within its ambit is extended high levels of protection by the courts. This high premium placed upon speech has resulted in the exclusion of certain categories of speech from the constitutional ambit resulting in a two-tiered system of protection. It also requires reservations to be entered for treaties potentially requiring a limitation upon speech rights as the Supremacy Clause of Article 6 of the Constitution dictates that treaties must be compliant to that document.

Relevant international instruments, on the other hand, were agreed in the post-war era with emphasis upon the maintenance of democratic stability in racially and ethnically diverse populations[2]. Furthermore, the severe atrocities which had occurred then were seared into the collective memory the potentially devastating effects of unfettered free speech upon other essential rights proved that curtailment of speech is not the supreme threat to functional democratic orders as the US system suggests and granted a greater leeway for incursion into the realm of free speech by laws prohibiting hate speech. Treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) mandate prohibitive laws in Article 4 in face of domestic constitutional free speech guarantees[3], and Article 20(2) of the ICCPR provides an

explicit prohibition of the advocacy of hatred inciting discrimination, violence or hostility. Additionally, the limitation provisions allowed under Article 10(2) of the ECHR and Article 19(3) of the ICCPR support this shift towards balancing expression with other rights, resulting in a single-tier system with an expansive concept of expression, but allows for its limitation as the right 'carries special duties and responsibilities'. This shift can also be considered as a reaction to redress the difficulties of the achronistic US position.

As will be seen, the international paradigm informs the approach in many liberal democracies and is considered better suited to contemporary challenges so an analysis of the View of the HRC is required to appropriately contextualise national jurisprudence.

In *Faurisson v France*[4], the 'Gayssot Act' criminalising the contestation of crimes against humanity was alleged to curtail the freedom of expression[5]. The HRC accepted the possible abstract incompatibility of the Act and limited its consideration upon the facts[6]. It found the restriction of expression was permissible since the statements were 'of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism'[7], and the necessity limb was satisfied upon the acceptance of Holocaust denial as 'the principle vehicle of anti-semitism'[8]. The concurring opinion of Nisuke Ando draws attention to the possible chilling effect upon expression this opinion may cause, preferring 'specific legislation prohibiting well-defined acts of anti-semitism'[9]. Elizabeth Evatt and David Kretzmer's concurring opinion emphasised the 'right to be free from incitement to racism or anti-semitism' concluding that these means were proportional for its protection[10]. These views elucidate the strong balancing of rights involved with the restriction of expression by the HRC in the context of hate speech.

United States

'Freedom of speech is not only the most cherished American constitutional right, but also one of America's foremost cultural symbols'[11]. Thus, the US ratified the ICCPR but entered a reservation to Article 20 to preclude its restriction to the constitutionally protected rights of free speech and assembly[12], and similarly with ICERD, the US ratification reserved the application of Article 4[13]. Schauer suggests the US position illuminates important ideological differences; the international instruments impose 'viewpoint discrimination', against 'the American understanding...that principles of freedom of speech do not permit government to distinguish protected from unprotected speech on the basis of the view espoused'[14].

This intolerance of 'viewpoint discrimination' has spawned a markedly different approach to hate speech regulation in the US, where the First Amendment is able to protect speech that falls foul of criminal provisions in other jurisdictions. That hate speech can be properly categorised as part of political speech and such 'public discourse be open to the opinions of all'[15] provides further support for constitutional protection.

Despite this, however, the very nature of hate speech may push the category outside constitutional protection. In *Chaplinsky v New Hampshire*[16], Murphy J, for a unanimous Supreme Court, said that:

> 'There are certain well-defined and narrowly-limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include...the insulting or 'fighting words' those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'[17].

The case interestingly permits a 'heckler's veto' of speech since the reaction of the recipients may be taken into account in its restriction, and is pertinent for hate speech.

In the English case of *Beatty v Gillbanks*[18] which is still good law, Field J held that since the Salvation Army had not committed unlawful acts and as the disturbances caused by the Skeleton Army as a result of their procession was neither intended nor a necessary or natural consequence of their actions, a conviction could not stand, negating the heckler's veto. In *Terminiello v Chicago*[19], Douglas J for the Supreme Court reversed the conviction for a speech which resulted in a riot; the First Amendment was designed to 'invite dispute...[and] best serve[s] its high purpose when it induces a condition of unrest...or even stirs people to anger'[20]. Jackson J famously dissenting said that '[t]here is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact'[21].

The position was finalised in the leading case *Brandenburg v Ohio*[22], which specifically concerned racist hate speech. The Court, *per curiam*, held that:

> '[T]he constitutional guarantees of free speech...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'[23].

This definitive 'imminent lawless action' test departed from earlier rulings. Holmes J set the 'clear and present danger' standard in *Schenck v US*[24], which *Whitney v California*[25] subsequently broadened to require only a 'bad tendency' to produce the prohibited result which *Brandenburg* overruled. Meiklejohn, resting First Amendment protection upon the theoretical justification of effective participation in a democracy, criticised this possibility as restricting speech to protect citizens violates the very rights of those claimed to be protected by the restriction[26].

The *Brandenburg* decision affirmed that free speech occupies the hierarchical apex of constitutional values and consistently prevails over competing societal interests. Subsequent hate speech cases illuminate the zealous protection of speech by the Supreme Court. For instance, in *National Socialist Party of America v Skokie*[27], the Supreme Court found no grounds to prohibit a Nazi march through a town with a disproportionately large population of Holocaust survivors under the First Amendment.

The high-water mark for First Amendment protection of hate speech is found in Scalia J's majority judgment in *RAV v St Paul*[28] where the Bias-Motivated Crime Ordinance, which required the arousal of 'anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender', was held unconstitutional due to its proscription of speech based purely upon content. Even if cross burning met the incitement standard by constituting 'fighting words', distinction between such incitements amount to a viewpoint discrimination[29], which is extremely noteworthy since *Chaplinsky* has provided consistent authority for the exclusion of such speech from the First Amendment.

White J, concurring on narrow grounds, notes that the categorical exclusion of certain classes of speech is legitimate under the First Amendment, despite being content-based and defends this position as the 'approach has provided a principled and narrowly focused means for distinguishing between expression that the government may freely regulate and that which it may regulate on the basis of content only upon a showing of compelling need.'[30]. He criticises the novel 'under-inclusiveness' interpretation of the since 'it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms' in contrast with '[t]he overbreadth doctrine [which] has the redeeming virtue of attempting to avoid the chilling of protected expression'[31].

Subsequently, the Court retreated from *RAV* in *Virginia v Black*[32] on essentially identical facts, allowing statutes focussing on harm or threat of harm to withstand the First Amendment, provided that they do not require specific grounds for that intimidation. O'Connor J held that intimidation is a type of ''true threat', where a speaker directs a threat to a person or group of persons with the intent of placing the victim in the

fear of bodily harm or death'[33]. The ruling is consistent with *RAV* since content discrimination is not at issue as it 'does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion[34]'.

Laws proscribing hate speech are generally struck down as unconstitutional, falling down under First Amendment scrutiny. This is because of the classification that such speech is political, and so aligns closely with the constitutional commitment to democracy, as well as a strong intolerance towards content-based discriminations, since the government is not trusted to draw distinctions between types of speech. This is particularly pertinent in hate speech as its proscription of certain categories of speech may result in a bias towards some groups over others, resulting in favouritism and stigmatisation flowing from such discrimination. Such hostility to laws against hate speech is not found in the jurisprudence of other liberal democracies which prefer to balance free expression with other important social values.

Canada

Everybody has the right to freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms, but the reasonable limits clause in section 1 which guarantees these rights, simultaneously subjects them to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The definitive test of this provision is in *R v Oakes*[35], comprising of two limbs: there must be a 'pressing and substantial objective'; and the means must be 'proportional', requiring that these means to be 'rationally connected to the objective', that there must be a 'minimal impairment of the rights', and that there must be proportionality between the infringement and the objective. There is a striking similarity between restrictions allowed in the Canadian Charter and those under the Article 10(2) of the ECHR, and may be indicative of the influence that international has had on its domestic constitutional jurisprudence.

In the context of hate speech, the leading case of *R v Keegstra*[36] concerned section 319(2) of the Criminal Code which created an offence for communicating statements wilfully promoting hatred against any identifiable group, subject to four defences. Dickson CJ reaffirmed that s.2(b) encompassed all forms of communicative expression, hate speech was held outside of the narrow exception of communication conducted through direct physical harm per *Dolphin Delivery*[37] as '[i]t is criminalised for the repugnancy of its *meaning*, not because any physical harm is consequent on its utterance. With meaning, therefore, comes constitutional protection'[38]. This expansive interpretation of s.2(b) problematically conflicts with the equality guarantee of Charter section 15 proscribing state discrimination on grounds including those enumerated in s.319(2), as well as denying the requirement of Charter section 27 to interpret those rights to favour Canada's multicultural heritage[39]. Nevertheless, hate speech is found to be protected by s.2(b) and the Court moves onto justified limitations in s.1.

In the first limb *Oakes* test, ss. 15 and 27 are understood to inform the interpretation of s.1, partially alleviating this inconsistency[40]. In finding that this limb is satisfied, the Chief Justice notes that a 'person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he...belongs'[41]. Raz contends that expression should be protected as it serves to validate ways of life, and conversely, that official censorship insults and marginalises those lifestyles[42]. Thus, this theoretical self-identification justification for the protection of speech arguably supports the proscription of hate speech. Coupled with this is the threat of subtle attitudinal changes caused as '[e]ven if the message of

hate propaganda is outwardly rejected, there is evidence that its premise...may persist in a recipient's mind as an idea that holds some truth'[43].

This is reminiscent of MacKinnon's[44] contention of pornography as hate speech, founded upon recent (in 1985) experimental research linking pornography to empirically measurable harm through attitudinal changes[45]. The US Seventh Circuit Court of Appeals in *Hudnut*[46] considered a challenge upon an Indianapolis ordinance proscribing pornography based upon this view. Judge Easterbrook accepts MacKinnon's argument: 'Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets'[47], but ultimately held the ordinance unconstitutional as its definition was overbroad in not proscribing only obscene materials per the *Miller*[48] test, illustrating again the high levels of speech protection available under the First Amendment and the Canadian Courts may be more willing to grant a limitation upon such speech in light of *Keegstra*.

The Court, accepting the importance of s.319(2)'s objective, then moved on to proportionality. The Chief Justice rejects both the contradiction of criminalisation with the objective by legitimating the message of hate speech and providing its disseminator with a platform as well as the descent totalitarian descent of Weimar Germany despite its proscription of hate speech by emphasising the strong normative condemnation that criminalisation entails[49]. The four available defences in s.319(3) and the difficulty of prosecution requiring subjective proof of desire or recklessness to the result reveals the tight tailoring of the provision satisfy the 'minimum impairment' requirement, and moreover, the availability of alternatives does not preclude the use of criminal prohibition[50]. The conclusion is that the incursion into expression by s.319(2) is not beyond its objective as '[t]he limitation...is more faithful to Charter values that is the crystallized right expressed in the document itself'[51].

Thus, tightly drafted laws proscribing hate speech are allowed under the Canadian Charter which adopts a vastly differing perspective from the US. The dissent in *Keegstra* authored by McLaughlin J offers an interesting insight into the differences between the two jurisdictions. Her view is that the Charter is more closely aligned to the American approach rather than the international approach of the majority, since Holmes J's 'clear and present danger test' is reflected by the initial inclusion of speech under s.2(b) with justifiable limitations under s.1[52]. It is submitted that this contention is flawed seeing that the initial inclusion of speech within constitutional guarantees with subsequent justifiable limitations upon narrowly enumerated grounds is the hallmark of international instruments. Article 10 of the ECHR allows for limitations in subsection 2, and Article 19 of the ICCPR similarly provides for limitations in subsection 3 based upon the idea that the freedom of expression 'carries duties and responsibilities', identical to the wording of the justifiable limitations clause found in Charter s.1. Further support is found in the text of the First Amendment, which provides for an absolute negative right with no exclusion clause available.

Keegstra thus elucidates the priority that the Charter affords to the principles of human dignity and equality in allowing justifiable incursions into free expression which contradict these values. The following landmark case of *Zundel*[53], in striking down section 181 of the Criminal Code criminalising the spread of false news, illuminates the high threshold requirements for s.2(b) despite *Keegstra*. Section 181 conflicted with s.2(b) and could not be saved by s.1 as it was 'overbroad, particularly invasive and not proportional to its putative objective' and the chilling effect upon protected speech could not be justified, especially given that s.319 provided for an alternative basis for a prosecution[54].

These cases deeply divided the Court, so its unanimous judgment in *Attis*[55] potentially illustrates its direction. An anti-semitic teacher was removed from the classroom by an administrative decision finding that it

constituted discrimination against Jewish students since it 'poisoned the educational environment'[56] and a 'gagging order' was imposed threatening complete dismissal if further anti-semitic material was produced. La Forest J upheld the removal from the classroom, but found that the 'gagging order' failed the 'minimal impairment' justification in s.1, despite the potential for a 'residual poisoned effect', as this would infringe too greatly upon his freedom of speech[57].

The Supreme Court thus conducts a very delicate balancing exercise between the rights enshrined under the Charter. Its jurisprudence indicates that, in line with international instruments and other liberal democracies, the basic principles of human dignity and equality provide for the foundation of guarantees and so allow limitations to be placed upon expression where there is conflict. Despite this emphasis, however, expression is not easily limiting and only proscriptive laws which are tightly drafted and carefully implemented will pass through *Oakes* test scrutiny.

Germany

German Basic Law (*Grundgesetz*) guarantees freedom of expression under Article 5, with a limitations clause in subsection 2 limiting it to 'provisions of general laws...and in the right to personal honour'. In adopting the general approach of other liberal democracies, the Constitutional Court allows far greater incursions into the realm of free expression. In the Criminal Code, Articles 130 and 131 penalise on public order grounds, Incitement to Hate and Race-Hatred Writings respectively premised on human dignity which is understood in terms of equality[58]. The latter Article is extremely broad and nebulous, allowing punishment for communicative material 'which incite to racial hatred'[59]. When considering German jurisprudence, it must be emphasised that their Constitutional Court is not an appellate court, considering only whether the court below had considered the Basic Law and applied the required balancing. It is therefore less intrusive than the Supreme Courts of the US and Canada and cannot be directly compared.

The German approach to hate speech is particularly interesting due to a combination of its Kantian understanding requiring the balancing of constitutional rights and duties, and of the historical atrocities committed under the Third Reich which resulted in especial protection for the Jewish community[60]. Whilst the former point is reflective of Germany's adherence to the international position, its position on anti-semitic expression is most illuminating. The Constitutional Court in the *Luth*[61] case upheld advocacy of a boycott against the director of an anti-semitic film, focussing upon the damage to Germany's reputation resulting from the persecution of the Jews. In balancing competing rights, the Court held that economic interests must yield to public opinion on important issues[62].

In terms of Holocaust Denial, the German position is aligned with the international position elucidated in the *Faurisson* case above. In the *Holocaust Denial Case*[63], the Constitutional Court rejected a freedom of expression complaint based upon a content limitation of a public speech by a revisionist historian[64]. The reasons given by the Court echo Raz's emphasis upon the role of expression in the 'self-perception', or validation, of both individuals and their identifiable group; protecting the Jewish people from continuing harm outweighs the expression rights of 'demonstrably false facts [which] have no genuine role in opinion formation'[65].

Stein concludes his analysis with a dilemma: the dangers of new atrocities and excesses could flow from diminishing the sense of responsibility and guilt from the collective conscience, but that sense of guilt could provoke a counter-productive backlash against democratic principles and institutions, delegitimising the

entire system of rights protection[66]. Germany is arguably over-protective of equality and dignity rights at the expense of expression, by allowing for the criminalisation of expression upon overbroad criteria, and in doing so, goes beyond the position mandated by international instruments, and Criminal Code ss. 130 and 131 are likely to be struck by the US and Canadian Courts if enacted in their jurisdictions. This intrusive incursion into free expression in Germany may, however, be justified by the peculiar historical and social context to affirm its departure from previous positions.

Theoretical Perspectives

Finally, it is necessary to place hate speech within general free speech theory to justify, and challenge, the limitations upon this category. Alongside the three positive arguments for speech is the negative suspicion of governmental restrictions where the party seeking to limit speech must show good grounds to justify such incursions.

The Millian argument from truth, as applied by US jurisprudence is 'the power of the thought to get itself accepted in the competition of the market' according to the dissenting opinion of Holmes J in *Abrams*[67], which subsequently became the dominant justification in the US[68]. Rosenfeld critiques these viewpoints by saying that 'Mill overestimates the potential of rational discussion while Holmes underestimates the potential for serious harm of certain types of speech that fall short of the 'clear and present danger' test'[69], suggesting perhaps that the polar nature of the truth argument precludes the delicate balancing of speech rights with other socially important interests. Laws proscribing hate speech, by excluding inquiry and the adoption of alternative perspectives, assume the infallibility which Mill sought to avoid in his defence of speech. It is unlikely that such proscription furthers truth by dogmatically ascribing one set of official facts as impregnable, but the abstract defence of speech must be tempered with practical considerations such as the resultant impact upon victims as well as implicit and incidental effects which flow subtly from them. The US, in subscribing to the abstract truth defence of speech, may fail to adequately account for competing interests which other liberal democracies are more sympathetic towards.

The democratic basis for the defence of speech is premised upon the requirement of a well-informed citizenry to discharge their duty within a functional self-governing democracy. According to this justification, political speech occupies a privileged position within the parameters of protected speech, but this does not necessarily protect all forms of such speech; anti-democratic and hate speech may not fall within its ambit since these forms of speech are not logically required for the functioning of a healthy democracy[70]. A wider conception of the democratic argument, however, disputes the exclusion of expression protection. Constitutional guarantees are designed to prevent the tyranny of the majority and protect the minority from harm, which justify their existence. This foundation has apparently shifted to the tyranny of history, exemplified in the US and Germany, where the crystalisation of past has formed the interpretative core of rights provisions. The resultant shift has led to a bias in conducting the balancing exercise to favouring one set of rights over another, causing perhaps an illegitimate skew in favour of speech and equality and dignity respectively. Whilst it may be beneficial that culturally and historically determined positions be retained, the theoretical justifications for this retention are weaker than a rights-based constitutional theory protecting against majoritarian oppression.

The argument from autonomy is premised upon the need to protect self-expression and thus provides the most expansive scope for the protection of expression, which is further widened if the focus of the rights

shifts from that of the disseminator to those of the recipient. Censorial activity by the authorities could amount to a form of Orwellian thought-control where the inability to communicate ideas leads to the loss of the ideas themselves. In the context of hate speech, such control may not be perceived as a negative consequence, but the very existence of such regulation threatens other forms of expression and weakens constitutional protection against their erosion through the slippery slope argument.

Traditionally balanced against free speech arguments are ones in favour of human dignity, which is the foundation upon which the international post- war human rights movement was built. Its fundamental importance is reflected generally in national constitutional orders which require the restrictions upon other rights in its favour. Whilst these are essential factors to be taken into account in limiting hate speech, the need to protect dignity does not necessarily entail its curtailment. The prime illustration is the *Skokie* case, above, where:

> 'Because of their very marginality, and because they had no sway over the larger non-target audience in the United States, the actual march by the Neo-Nazis did much more to showcase their isolation and impotence than to advance their cause. Under the circumstances, allowing them to express their hate message probably contributed more to discrediting them than a judicial prohibition against their march.'[71]

It is submitted that, despite a lack of detailed supporting empirical evidence, a vast majority of prohibited hate speech falls within this category and unfettered speech is preferable to attempts at legitimately excluding certain categories of speech as beyond the pale. Contrary to Raz's contention that censorship is condemnation of a way of life, it is further submitted that censoring an extreme fringe opinion from expression would grant it more publicity and grant its proponents a feeling of martyrdom which would further their cause; his contention is most applicable to minority groups seeking equality within society rather than minority groups seeking to ostracise other groups.

A final theoretical consideration is the requirement of harm for the proscription of hate speech. If this is the threshold criterion, its definition must be coherent, consistent, and easily discernible since a lowering of the threshold would considerably widen the ambit of proscribable hate speech. The *Hudnut* case provides an example of the slippery slope in this context, where MacKinnon's feminist theory that pornography is harmful hate speech towards women manages to raise justifications for its proscription only to dilute and weaken the harm test in the process. The requirement of explicit harm for limiting speech is defensible and would bring cohesion to the field of excluded expression as, for instance, obscenity is outside constitutional protection in the US (*Miller v California)* and Canada *(R v Butler*[72]*)* upon this basis.

Conclusion

The arguably antiquated approach taken by the US placing primacy on the protection of speech is inconsistent to the post-war international model which balances constitutional rights according to complex criteria. The addition of an explicit exclusion clause into the free speech provisions of international instruments and which were adopted in many liberal constitutions is reflective of the global shift away from the US model and as a measure to address its shortfalls. The achronistic position of the US does not, however, make it *per se* illegitimate or illegal as it is free to derogate or reserve, as appropriate, from provisions in international instruments which contradict against its heavy presumptive protection of free speech. Whilst the US has been criticised for reservations which render ratification essentially pointless, such as in ICERD, it is difficult to see

how such a constitutional system could fully comply with its provisions without severe foundational upheavals. Arguably, the normative force of having the US as a party obviates this problem, but may weaken the structural force of any treaty if its reservations counter its spirit.

The international system allowing proscription of hate speech is a reaction to the atrocities conducted during the war which were precipitated by such speech, as well as a focus to harmonise increasingly pluralistic populations found in liberal democracies. Proscribing speech fosters equality and respect for this diversity, but its suppression may accumulate latent hostility and result in hate expression which is more harmful than speech. The curtailment of speech is violative of the theoretical grounds which mandate its especial protection, potentially weakening the protection for speech generally. Given the importance of protecting speech, only compelling counterarguments should be provided for its curtailment. The Canadian approach providing presumptive protection of expression to be limited in narrow categories on strict criteria when it infringes upon conflicting constitutional rights is arguably the best approach; it allows for high levels of speech protection, but allows limitations when the freedom interferes substantially with other rights or constitutional values. The German approach is mired in the past and perhaps overcompensates in its protection of dignity and equality at the expense of expression in order to indicate its abandonment of that history and so goes too far.

Whilst the US position differs markedly from the approach taken by other liberal democracies and the international order, it does provide an alternative model for coping with such a problem and serves as a constructive contrast to evaluate and critique the methods employed by other jurisdictions. The existence of an alternative does not challenge the legitimacy of its rivals, but rather represents the difference of priority placed upon the protection of rights with no position being more theoretically or pragmatically justifiable. The rights system reflects and enshrines societal values such that differences in approaches and solutions are both valuable and inevitable.

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[1] Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1990-1991) 36 McGill LJ 1416, 1422.
[2] *Ibid.,* 1423.
[3] Dominic McGoldrick and Therese O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law' (1998) 18(4) Legal Studies 453, 469-470.
[4] Communication No. 550/1993.
[5] *Ibid.,* paras 2.3 and 3.1.
[6] *Ibid.,* para 9.3.
[7] *Ibid.,* para 9.6.
[8] *Ibid.,* para 9.7.
[9] Communication No. 550/1993*.,* B.
[10] *Ibid.,* C.10.
[11] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1529.
[12] Henry J Steiner, Philip Alston, and Ryan Goodman, International Human Rights in Context: Law Politics and Morals (3rd ed. Oxford University Press, New York 2008). 651.
[13] *Ibid.,* 652.
[14] *Ibid*.
[15] Robert C Post, 'Racist Speech, Democracy, and the First Amendment' (1991) 32 William and Mary L Rev 267, 314.
[16] [1942] 315 US 568.
[17] *Ibid.,* 572-573.
[18] (1881-82) LR 9 QBD 308.
[19] [1949] 337 US 1.
[20] [1949] 337 US 1., 4.

[21] *Ibid.,* 36.
[22] [1969] 395 US 444.
[23] *Ibid.,* 447-448.
[24] [1919] 249 US 47.
[25] [1927] 274 US 357.
[26] Thomas Michael Scanlon, 'Freedom of Expression and Categories of Expression' (1978-1979) 40 U Pitt L Rev 519, 529-530.
[27] [1978] 432 US 43.
[28] [1992] 505 US 377.
[29] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523., 1539.
[30] [1992] 505 US 377, 399-400.
[31] [1992] 505 US 377, 402.
[32] [2003] 538 US 343.
[33] *Ibid.,* 344.
[34] *Ibid.,* 345.
[35] [1986] 1 SCR 103.
[36] [1990] 3 SCR 697.
[37] [1986] 2 SCR 573
[38] Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1990-1991) 36 McGill LJ 1416, 1419.
[39] *Ibid.,* 1420.
[40] *Ibid.,* 1430.
[41] [1990] 3 SCR 697, para 65.
[42] Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 Oxford J Legal Stud 303, 312-316
[43] [1990] 3 SCR 697, para 66.
[44] Catharine A MacKinnon, 'Pornography, Civil Rights, and Speech' (1985) 20 Harv CR-C-L L Rev 1.
[45] Catharine A MacKinnon, 'Pornography, Civil Rights, and Speech' (1985) 20 Harv CR-C-L L Rev 1*.,* 52-56.
[46] [1985] 771 F.2d 323.
[47] *Ibid.,* 329.
[48] [1973] 413 US 15.
[49] Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1990-1991) 36 McGill LJ 1416, 1431.
[50] Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1990-1991) 36 McGill LJ 1416*,* 1431-1432.
[51] *Ibid.*, 1432.
[52] *Ibid.,* 1436.
[53] [1992] 2 SCR 731.
[54] Dominic McGoldrick and Therese O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law' (1998) 18(4) Legal Studies 453, 463.
[55] 1 SCR 825.
[56] *Ibid.,* paras 34-37.
[57] *Ibid.,* paras 103-107.
[58] Eric Stein, 'History Against Free Speech: The New German Law Against the "Auschwitz"- and other- "Lies"'. (1986-1987) 85 Mich L Rev 277, 282-286.
[59] *Ibid.,* 285.
[60] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1548-1550.
[61] [1958] BverfGE 7, 198.
[62] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1551.
[63] [1994] 90 BVerfGE 241.

[64] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1552.
[65] *Ibid.*
[66] Eric Stein, 'History Against Free Speech: The New German Law Against the "Auschwitz"- and other- "Lies"'. (1986-1987) 85 Mich L Rev 277, 321-322.
[67] [1919] 250 US 616, 630
[68] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1533.
[69] *Ibid.,* 1534.
[70] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1532-1533.
[71] Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1538.
[72] [1992] 1 SCR 452.