

# HATE SPEECH: A COMPARISON BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE UNITED STATES SUPREME COURT JURISPRUDENCE

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## INTRODUCTION<sup>1</sup>

Freedom of expression in Europe has not come easily. Historically, bloody wars have raged over the continent waged by totalitarian regimes aimed at controlling fundamental freedoms, with freedom of expression always being near the top of the list of suppressed rights. But the impact of free speech, particularly with regard to the fall of Communism, has been monumental.

Despite the key role freedom of expression has played in safeguarding the liberties now enjoyed in Europe, intergovernmental bodies and national legislatures are all too ready to limit that right based on ideology. Even the European Court of Human Rights (“ECHR”), which has for decades strongly held that freedom of expression includes the right to shock, offend, and disturb,<sup>2</sup> very recently blurred what had been very clear jurisprudence protecting expression by upholding domestic “hate speech” legislation in Sweden that prohibited criticism of homosexual behavior.<sup>3</sup> “Hate speech” legislation in Europe has become such a problem that even mainstream Christian values expressed publically and privately have led to fines, imprisonment, and injury to employment.<sup>4</sup>

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<sup>1</sup> Parts of this Article are largely adopted from materials Benjamin Bull, Paul Coleman, and the author wrote for Alliance Defending Freedom. The author has also presented these materials in talks on “hate speech.”

<sup>2</sup> See, e.g., *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

<sup>3</sup> *Vejdeland v. Sweden*, App. No. 1813/07 ¶¶ 8–9, 59–60 (Eur. Ct. H.R. Feb. 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>.

<sup>4</sup> See, e.g., *Eweida v. United Kingdom*, App. No. 48420/10 ¶¶ A(1)(a), (2) (Eur. Ct. H.R. lodged Sept. 29, 2010) (communicated case), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112944> (noting both applicants were employees who lost wages for wearing cross necklaces in violation of staff uniform policies); *Ladele v. United Kingdom*, App. No. 51671/10 ¶¶ A(1)(a), (2)(a) (Eur. Ct. H.R. lodged Aug. 27, 2010) (communicated case), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111187> (explaining how

This Article proceeds in a four-fold manner. First, the Article gives an overview of the European landscape, exhibiting just how clouded the definition of “hate speech” has become amongst intergovernmental bodies charged with protecting freedom of expression. Second, the Article provides a brief overview of the history of “hate speech” legislation and how that history should be used as a hermeneutic to view the free speech debate today. Third, the Article provides a detailed analysis of the existing jurisprudence of the ECHR, pinpointing precisely where it has gone off course in defining the contours of speech protection. Finally, the Article examines United States Supreme Court jurisprudence on freedom of expression, providing a comparative analysis of the standard used by the United States Supreme Court and the ECHR.

#### I. OVERVIEW OF “HATE SPEECH” AT THE EUROPEAN LEVEL<sup>5</sup>

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides the right to freedom of expression in the following terms:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>6</sup>

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the first applicant, a public registrar, was threatened with losing her job when she refused to register the civil partnerships of homosexual couples, and how the second applicant, a therapist, was fired when he refused to counsel homosexual couples on sexual issues); JON GOWER DAVIES, *A NEW INQUISITION: RELIGIOUS PERSECUTION IN BRITAIN TODAY* 13–14 (2010) (referring to a situation in the U.K. of a husband and wife who managed a hotel and who were all but run out of business due to allegations from a guest that they had equated Muhammad to Hitler, even though the district judge rejected the case).

<sup>5</sup> For a more in-depth look on this topic see Roger Kiska & Paul Coleman, *Freedom of Speech and “Hate Speech”: Unravelling the Jurisprudence of the European Court of Human Rights*, 5 INT’L J. FOR RELIGIOUS FREEDOM, no. 1, 2012, at 129; PAUL COLEMAN, *CENSORED: HOW EUROPEAN “HATE SPEECH” LAWS ARE THREATENING FREEDOM OF SPEECH* (forthcoming 2012).

<sup>6</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

The ECHR has repeatedly held that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfillment.”<sup>7</sup> The ECHR has also held on numerous occasions that freedom of expression must be protected. The court has explicitly stated that freedom of expression protects not only the “‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also [protects] those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”<sup>8</sup> While freedom of expression is subject to exceptions in Paragraph 2 of Article 10, these exceptions “must, however, be construed strictly, and the need for any restrictions must be established convincingly.”<sup>9</sup> It is paramount that any European government or intergovernmental authority not act to indoctrinate and not be allowed to make distinctions between persons holding one opinion or another. Any such distinctions would be contrary to the principles of democracy, which have been so bravely defended throughout the recent history of Europe.<sup>10</sup>

The issue of constraints on speech and opinion has risen to prominence in Europe in recent years. The prevalence of high-profile “hate speech” cases, running the gambit from criticism of Islam<sup>11</sup> to

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<sup>7</sup> *E.g.*, *Dichand v. Austria*, App. No. 29271/95 ¶ 37 (Eur. Ct. H.R. Feb. 26, 2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60171>; *Marônek v. Slovakia*, 2001-III Eur. Ct. H.R. 337, 349; *Thoma v. Luxembourg*, 2001-III Eur. Ct. H.R. 67, 84; *see also* *Şener v. Turkey*, App. No. 26680/95 ¶ 39(i) (Eur. Ct. H.R. July 18, 2000), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753>; *Lingens v. Austria*, 103 Eur. Ct. H.R. 11, 26 (1986).

<sup>8</sup> *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); *accord Dichand*, App. No. 29271/95 ¶ 37; *Marônek*, 2001-III Eur. Ct. H.R. at 349; *Thoma*, 2001-III Eur. Ct. H.R. at 84; *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 69, 81; *Arslan v. Turkey*, App. No. 23462/94 ¶ 44(i) (Eur. Ct. H.R. July 8, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271>; *De Haes v. Belgium*, 1997-I Eur. Ct. H.R. 198, 236; *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, 500; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); *Thorgeir Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) at 27 (1992); *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) at 25 (1991); *Lingens*, 103 Eur. Ct. H.R. at 26; *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

<sup>9</sup> *Şener*, App. No. 26680/95 ¶ 39(i); *accord Thoma*, 2001-III Eur. Ct. H.R. at 84; *Observer & Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 30 (1991).

<sup>10</sup> *Cf.* Council of Eur., Rep. of the Comm. of Experts on Human Rights, Problems Arising from the Co-Existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, 45, H(70)7 (Aug. 1, 1970) [hereinafter Report on Human Rights] (noting that restricting one’s freedom of thought or opinion is contrary to the quality of a democratic society).

<sup>11</sup> *Norwood v. United Kingdom*, 2004-XI Eur. Ct. H.R. 343, 347–50 (decision) (holding the case inadmissible because the applicant’s actions constituted a violation of the Convention that bars protection of those same actions).

criticism of homosexual behavior,<sup>12</sup> has led to robust discussion at the intergovernmental level regarding what is and what is not acceptable speech.

It is first worth considering, therefore, what “hate speech” actually is. The central problem is that nobody really knows what it is or how to define it. Humpty Dumpty’s conversation with Alice in Lewis Carroll’s *Through the Looking Glass* seems very relevant to the discussion.

“When *I* use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”<sup>13</sup>

“Hate speech” seems to be whatever people choose it to mean. It lacks any objective criteria whatsoever. A recent factsheet of the ECHR admits that “[t]here is *no universally accepted definition* of . . . ‘hate speech.’”<sup>14</sup> Similarly, a previous factsheet observed that “[t]he identification of expressions . . . [of] ‘hate speech’ is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal.”<sup>15</sup>

The purpose of the factsheet is to simplify for the general public the meaning of the legal concept behind “hate speech.” Instead, the factsheet defines “hate speech” as: (1) without definition, (2) difficult to identify, and (3) speech that can sometimes appear *rational* and *normal*.<sup>16</sup> As will be discussed below, the ECHR, which uses legal certainty as a keystone in its interpretation of the legitimacy of interferences with Convention rights, upholds vague “hate speech” laws criminalizing certain forms of expression.

Despite the lack of definition, many intergovernmental bodies and States themselves have attempted to identify the *particular* speech that *they* consider to be criminal. The Fundamental Rights Agency of the European Union (“FRA”), in one of the more dubious attempts to define

<sup>12</sup> *Vejdeland v. Sweden*, App. No. 1813/07 ¶¶ 8–9, 59–60 (Eur. Ct. H.R. Feb. 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>.

<sup>13</sup> LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 124 (Alfred A. Knopf, Inc. 1984) (1872).

<sup>14</sup> EUROPEAN COURT OF HUMAN RIGHTS, *HATE SPEECH* para. 4 (2012), *available at* [http://www.echr.coe.int/NR/rdonlyres/D5D909DE-CDAB-4392-8A0-867A77699169/0/FICHES\\_Discours\\_de\\_haine\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/D5D909DE-CDAB-4392-8A0-867A77699169/0/FICHES_Discours_de_haine_EN.pdf).

<sup>15</sup> COUNCIL OF EUR., *HATE SPEECH 2* (2009), *available at* <https://wed.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2021692&SecMode=1&DocId=1434498&Usage=2>.

<sup>16</sup> *Id.*

“hate speech,” stated, “‘Hate speech’ refers to the incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic . . . .”<sup>17</sup>

The FRA, however, with some legal juggling, completely redefines “hate speech” in another document, stating, “The term ‘hate speech’, *as used in this section*, includes a broader spectrum of verbal acts [including] *disrespectful public discourse*.”<sup>18</sup> It also admits that the data collected by the national monitoring bodies “may not, strictly speaking, all fall under a legal definition of hate speech.”<sup>19</sup>

So, if it is accepted that there is no definition of “hate speech,” it is surely not helpful for the same organization to use different definitions in different documents and label some incidents as “hate speech” while at the same time admitting they may not come under a legal definition of “hate speech.”

The most significant instance in recent years with regard to the confusion of terms as it relates to legal and illegal speech has come from Strasbourg, France. In the recent case of *Vejdeland v. Sweden*, the ECHR held that while the particular speech in question “did not directly recommend individuals to commit hateful acts,” the comments were nevertheless “serious and prejudicial allegations.”<sup>20</sup> The ECHR further stated that “[a]ttacks on persons” can be committed by “insulting, holding up to ridicule or slandering specific groups of the population,” and that speech used in an “irresponsible manner” may not be worthy of protection.<sup>21</sup>

As stated at the outset of this Article, the ECHR has for decades held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man. It has time and time again held that freedom of expression “is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

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<sup>17</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HATE SPEECH AND HATE CRIMES AGAINST LGBT PERSONS 1 (2009), *available at* [http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-hate-speech-crime\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-hate-speech-crime_EN.pdf).

<sup>18</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOMOPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN THE EU MEMBER STATES: PART II—THE SOCIAL SITUATION 46 (2009) (emphasis added), *available at* [http://fra.europa.eu/fraWebsite/attachments/FRA\\_hdgso\\_report\\_part2\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_part2_en.pdf).

<sup>19</sup> *Id.*

<sup>20</sup> App. No. 1813/07 ¶ 54 (Eur. Ct. H.R. Feb. 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>.

<sup>21</sup> *Id.* ¶ 55.

shock or disturb.”<sup>22</sup> *Vejdeland* represents a shocking departure from very well-settled case law on freedom of expression.

Under this confusion of jurisprudence, how can anyone be confident in a system that places certain expressions in the “protected category” on the basis that there is a fundamental right to use speech that “offends and shocks” and that also places other expressions in the “criminal category” on the basis that such speech is “serious and prejudicial”?

What is the difference between protected “offensive and shocking” speech on the one hand and criminal “serious and prejudicial” speech on the other hand? The answer is that nobody knows and that Humpty Dumpty was right: “*The question is . . . which is to be master—that’s all.*”<sup>23</sup> In other words, it is increasingly clear that whichever “group” shouts the loudest gets to decide what is and is not criminal speech. This is bad for fundamental freedoms and bad for the principles of legal certainty and the rule of law. In legal terms, this means: fail, fail, and fail.

Furthermore, the question arises as to whether *Vejdeland* was fact-specific or if it marked a new trend in ECHR jurisprudence. The case involved individuals who had been linked to neo-Nazism.<sup>24</sup> The applicants unlawfully entered a school and placed approximately 100 pamphlets condemning homosexuals and homosexual behavior in students’ lockers.<sup>25</sup> Under such a notorious set of facts, the chamber judges of the ECHR could have been more amenable to uphold the fines because of how unsympathetic the applicants were. In other words, the chamber very well could have decided the case not because it was “hate speech” but because those were the only charges on the proverbial “table.”

The result of such “hate speech” provisions is a reduction in the fundamental right to freedom of speech and freedom of expression. Instead of being free to disagree with one another, have robust debate, and freely exchange ideas, “hate speech” laws have shut down debate and created a heckler’s veto. In the end, a chilling effect is created that leads to self-censorship and an overly sensitive society.

A recent FRA publication laments that “[t]here is currently no adequate EU binding instrument aimed at effectively *countering expression of negative opinions* against LGBT people, incitement to

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<sup>22</sup> *E.g.*, *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (internal quotation marks omitted).

<sup>23</sup> CARROLL, *supra* note 13, at 124 (emphasis added).

<sup>24</sup> *See Vejdeland*, App. No. 1813/07 ¶ 8; SWEDISH SEC. SERV., OFFENCES RELATED TO NATIONAL INTERNAL SECURITY 28–29 (2001), available at <http://www.sakerhetspolisen.se/download/18.7671d7bb110e3dcb1fd80009985/pmv2001en.pdf>.

<sup>25</sup> *Vejdeland*, App. No. 1813/07 ¶¶ 8, 56.

hatred or discrimination, as well as abuse and violence.”<sup>26</sup> Is this really what we want? A binding instrument aimed at countering the expression of negative opinions?

The current trend towards vague “hate speech” laws has led to a new type of inquisition. Those who express views that are unpopular or not part of the politically correct orthodoxy of European society can lose their jobs, be fined, or even spend time in jail.<sup>27</sup> The aims of “hate speech” laws are legitimate only in as much as they seek to protect minority groups. However, the laws almost universally fail to meet the requisite levels of legal certainty, foreseeability, and clarity as required by the European Convention on Human Rights.<sup>28</sup> Furthermore, the toll that such censorship takes on freedom of speech is neither necessary in a democratic society nor proportionate to the aims sought.<sup>29</sup> As the following examples will show, the end result of vague “hate speech” laws is often the marginalization of the mainstream and the further alienation of fringe groups. Rather than promoting tolerance, “hate speech” laws can be the impetus for even greater intolerance.

In the United Kingdom, numerous street preachers have been arrested by the police for “hate speech.”<sup>30</sup> Their crime? Merely preaching

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<sup>26</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY 36–37 (2010) (emphasis added), available at [http://fra.europa.eu/fraWebsite/attachments/FRA-2011-Homophobia-Update-Report\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-2011-Homophobia-Update-Report_EN.pdf).

<sup>27</sup> See sources cited *supra* note 4.

<sup>28</sup> See *Brumărescu v. Romania*, 1999-VII Eur. Ct. H.R. 201, 222 (stating that “legal certainty” is one of “the fundamental aspects of the rule of law”); *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, 496–97 (explaining that clarity and foreseeability are necessary to protect individuals from arbitrary State interference); *Müller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) at 20 (1988) (discussing the ECHR’s jurisprudence on the necessity that valid legal consequences be foreseeable).

<sup>29</sup> See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (outlining the legal framework for what is “necessary” in a democratic society and what it means for a law to be “proportionate” to the aims sought).

<sup>30</sup> See Andrew Alderson, *Preacher Threatened with Arrest for Reading out Extracts from the Bible in Public*, TELEGRAPH, Aug. 15, 2009, <http://www.telegraph.co.uk/news/religion/6034144/Preacher-threatened-with-arrest-for-reading-out-extracts-from-the-Bible-in-public.html> (discussing the threat of arrest); *Christian Preacher on Hooligan Charge After Saying He Believes That Homosexuality Is a Sin*, DAILY MAIL, May 1, 2010, <http://www.dailymail.co.uk/news/article-1270364/Christian-preacher-hooligan-charge-saying-believes-homosexuality-sin.html>; *Actual Footage of British Police Arresting Christian Street Preacher, Dale Mcalpine*, YOUTUBE (May 14, 2010), <http://www.youtube.com/watch?v=12LtOKQ8U7c>; *Birmingham Street Preacher Wins Wrongful Arrest Case*, CHRISTIAN INST. (Dec. 10, 2010), <http://www.christian.org.uk/news/birmingham-street-preacher-wins-wrongful-arrest-case/>; *Michael Overd Cleared of Verbally Abusing Gay Men in Taunton*, BBC NEWS (Feb. 10, 2012), <http://www.bbc.co.uk/news/uk-england-somerset-16984133>.

*publicly* from the Bible. Were they preaching on a controversial topic? Yes, they were. But does that mean only inoffensive preaching should be permitted?

Some of the cases have been extraordinary. For example, at Easter time a few years ago, policemen from the “Race and Hate Crime Unit,” following a complaint by a member of the public, investigated a church minister for handing out flyers advertising an Easter service.<sup>31</sup> The leaflet simply featured a picture of a flower and said, “New Life, Fresh Hope” and gave information regarding the service.<sup>32</sup>

In another example from last year, the police investigated a cafe owner for displaying Bible verses on a television in his cafe.<sup>33</sup> And even more recently, authorities banned a church in Norwich, in England, from distributing literature that argued the theological correctness of its religion when compared to Islam.<sup>34</sup> The church members had been peaceably handing out the same leaflet in the same area for four years without prior incident until the authorities held that such literature promoted “hatred.”<sup>35</sup> Such examples continue to come to light at an alarming rate. Subjective offense by the listener, no matter how sensitive they are, has become the standard for censorship with a palpable chilling effect being the result.

Last year in Ireland, a humanist accused a bishop of incitement to hatred for giving a homily that referred to Ireland’s increasingly “godless culture.”<sup>36</sup> The humanist complained to the police that the sermon was hostile to those who do not share the church’s aims. In response, the police launched an investigation and passed on the file to the prosecutor.<sup>37</sup> Such a claim would have been unthinkable, and perhaps even humorous, in years past. The rapidity of the ideological shift in European culture with regard to freedom of speech and freedom of thought has been unprecedented.

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<sup>31</sup> THE CHRISTIAN INST., MARGINALISING CHRISTIANS: INSTANCES OF CHRISTIANS BEING SIDELINED IN MODERN BRITAIN 37–38 (2009), available at <http://www.christian.org.uk/wp-content/downloads/marginchristians.pdf>.

<sup>32</sup> *Id.* at 37.

<sup>33</sup> Ross Slater & Jonathan Petre, *Police Tell Cafe Owner: Stop Showing Bible DVDs, or We Will Have to Arrest You*, DAILY MAIL, Sept. 24, 2011, <http://www.dailymail.co.uk/news/article-2041504/Police-tell-cafe-owner-Stop-showing-Bible-DVDs-arrest-you.html>.

<sup>34</sup> *Norwich Reformed Church Banned for Islam ‘Hate’ Leaflet*, BBC NEWS (Apr. 16, 2012), <http://www.bbc.co.uk/news/uk-england-norfolk-17733162>.

<sup>35</sup> *Id.*

<sup>36</sup> Jerome Reilly, *Bishop Accused of Incitement to Hatred in Homily*, INDEPENDENT.IE (Jan. 29, 2012), <http://www.independent.ie/national-news/bishop-accused-of-incitement-to-hatred-in-homily-3003057.html>.

<sup>37</sup> *Id.*



In Spain, in the summer of 2010, a pro-family television network was fined 100,000 euros for running a series of advertisements in support of the traditional family and showing “*only actual footage*” of a “gay pride” parade.<sup>38</sup> Is it controversial to publicly support the traditional family? Apparently it is. But does that mean that such support should be censored? Furthermore, why is the expression in the “gay pride” parade protected but its reproduction criminalized? It seems judges and administrators have become the arbiters of what is and what is not acceptable public opinion and discourse.

Perhaps one of the most disturbing cases in recent times comes once again from the United Kingdom. Police arrested Ben and Sharon Vogelenzang (both Christians) after a conversation with a guest who was staying at their hotel.<sup>39</sup> Ben, Sharon, and the female Muslim guest had a lively debate about religion—each side arguing that their own religion was correct.<sup>40</sup> It should be noted that the ECHR has held that the freedom to try to convince one’s neighbor of the correctness of one’s beliefs is inherent in Article 9 of the European Convention on Human Rights.<sup>41</sup>

Several days after their debate, the guest complained to the police, and the police arrested the Vogelenzangs and charged them with “a religiously-aggravated public order offence.”<sup>42</sup> After a lengthy investigation, the court eventually threw out the case and acquitted Ben and Sharon; in the meantime, the ordeal destroyed their business, which has never recovered.<sup>43</sup> One conversation. One false complaint. And it devastated lives as a result.<sup>44</sup>

Moving from Europe for just a moment, there are places around the world where freedom of expression is severely limited. One country in

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<sup>38</sup> Matthew Cullinan Hoffman, *Spanish Television Network Fined €100,000 for Criticizing Homosexuality*, LIFESITENEWS (July 26, 2010), <http://www.lifesitenews.com/news/archive/ldn/2010/jul/10072601>; Press Release, European Centre for Law & Justice, ECLJ Deeply Concerned After Spanish Government Censors Freedom of Expression/Religion of Catholic Media Group (July 6, 2010), <http://eclj.org/Releases/Read.aspx?GUID=496702da-27da-40cc-b78b-44836d02a2c6&s=eur>.

<sup>39</sup> DAVIES, *supra* note 4, at 13–14.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> See *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. 3, 17 (1993) (“[The] freedom to ‘manifest [one’s] religion’ . . . includes in principle the right to try to convince one’s neighbour, for example through ‘teaching’ . . .” (second alteration in original) (citing Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 9)).

<sup>42</sup> DAVIES, *supra* note 4, at 13–14.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> See *id.* at 13–19 (giving a detailed analysis of the case and the effect it had on the hotel managers’ lives).

particular that has been highly criticized for its “blasphemy laws” is Pakistan.<sup>45</sup> The widespread abuse of these laws has led to the trial, imprisonment, and murder of many citizens—all charged with the crime of using offensive speech.<sup>46</sup>

But it is little wonder the laws are so abused when we look and see just how vague some of the terminology is. For example, one section of the Pakistan Criminal Code states, “Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished . . . .”<sup>47</sup>

This language is so broad that it could mean anything. But the aforementioned law does not just appear in the Criminal Code of Pakistan. The exact language for the elements that make up this crime in the Pakistan Criminal Code are also in the criminal code of a European Union country.<sup>48</sup> We need to be very careful. Loosely worded criminal legislation and vague terminology can be used and abused with devastating consequences. The consequences of the laws in Pakistan are common knowledge, but as outlined, limitations on freedom of speech are increasingly taking place in Europe as well.

## II. HISTORY OF “HATE SPEECH”

In 1948, the UN delegates recognized that the problem was not simply that totalitarian governments were engineering society poorly or in the wrong direction. They recognized that the solution was not merely correcting how state-oriented ideologies implemented their programs or simply nudging them in a better direction. No, the problem was that the State had seized the reins of society entirely and constrained the liberty of individuals. The solution was to erect a barrier between the natural, inherent rights of mankind and the power of the State.

The Universal Declaration of Human Rights (“UDHR”)<sup>49</sup> and its progeny, the European Convention on Human Rights, are guarantors of *human* rights against the State. The Declaration does not give rights to the State but rather burdens it with supporting rights. It does not give the State a license to experiment with social values and fundamental rights by being the arbiter of what is acceptable speech and, therefore,

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<sup>45</sup> *E.g.*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 68 (2009).

<sup>46</sup> *Id.*

<sup>47</sup> PAK. PENAL CODE § 298 (2006).

<sup>48</sup> *See* CYPRUS CRIMINAL CODE § 141 (1959).

<sup>49</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

also acceptable opinion. In fact, it explicitly closes this door in its final article, which explains that nothing in the whole Declaration can be properly interpreted as bestowing upon a State the right to undermine “any of the rights and freedoms set forth herein.”<sup>50</sup>

It is through democratic, relational, and rhetorical efforts that social values are to be fostered and furthered, not through the exclusionary and discriminatory mandates of the government. For let us not forget that discrimination forms the core of the State’s attack on freedom of expression: this is not a “content-neutral” development of the law but one that discriminates against certain views.

The history of “hate speech,” stemming from the preparatory meetings to the UDHR, paints a rather surprising picture of how undemocratic restrictions on freedom of expression can be.

The UDHR, which went through seven drafting stages, invited the most vigorous discussions over Article 19 (freedom of expression)<sup>51</sup> and Article 7 (protection against discrimination).<sup>52</sup> Serious questions arose as to how “tolerant” a tolerant society should be with regard to freedom of expression in light of the history of fascist propaganda that brought Europe into World War II under the Nazi’s regime in Germany.<sup>53</sup> With the West being staunch supporters of heavy protections for freedom of expression, it was the Communist countries that aggressively proposed amended language to implement “hate speech” language into the UDHR.<sup>54</sup>

In language strikingly similar to that used by the proponents of “hate speech” in today’s political spectrum in support of rigid “hate speech” laws, Soviet Delegate Alexandr Bogomolov argued that laws prohibiting the “advocacy of hatred” were “of the greatest importance”:

The affirmation of the equality of individuals before the law should be accompanied by the establishment of equal human rights in political, social, cultural and economic life. In terms of practical reality, this meant that one could not allow advocacy of hatred or racial, national or religious contempt . . . Without such a prohibition, any Declaration

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<sup>50</sup> *Id.* at 77.

<sup>51</sup> The ratified version of Article 19 states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” *Id.* at 75.

<sup>52</sup> Article 7 states, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” *Id.* at 73.

<sup>53</sup> JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 66 (1999).

<sup>54</sup> *Id.* at 67–69.

of Human Rights would be useless. It could not be said that to forbid the advocacy of racial, national or religious hatred constituted a violation of the freedom of the press or of free speech. Between Hitlerian racial propaganda and any other propaganda designed to stir up racial, national or religious hatred and incitement to war, there was but a short step. Freedom of the press and free speech could not serve as a pretext for propagating views which poisoned public opinion.

Propaganda in favour of racial or national exclusiveness or superiority merely served as an ideological mask for imperialistic aggression. That was how the German imperialists had attempted to justify by racial considerations their plan for destruction and pillage in Europe and Asia.<sup>55</sup>

While the Soviet Union and other Communist nations were largely unsuccessful in placing restrictions on speech within the UDHR,<sup>56</sup> their efforts continued throughout other international treaties drafted in the years that followed.<sup>57</sup>

The International Covenant on Civil and Political Rights (“ICCPR”) continued the debate on “hate speech” where the UDHR ended.<sup>58</sup> The minutes of the meetings and the voting record tell the same story as the drafting of the UDHR; broadly speaking it was the Communist nations that sought to prohibit “advocacy of national, racial or religious hatred,” while the liberal democratic nations argued in favor of free speech.<sup>59</sup> However, unlike the UDHR, when it came to the final version of the ICCPR, the Communist nations garnered enough support to pass amendments prohibiting “hate speech” and added a specific prohibition on speech to the ICCPR with Article 20(2), which states, “Any advocacy

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<sup>55</sup> Comm’n on Human Rights, Working Group on the Declaration of Human Rights, 2d sess., 6–7, Dec. 10, 1947, U.N. Doc. E/CN.4.AC.2/SR/9 (1947).

<sup>56</sup> Stephanie Fariior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 15–17 (1996) (describing a UDHR amendment proposed by the Soviet representative to the U.N. Commission on Human Rights that failed by a vote of ten to four).

<sup>57</sup> Cf. John McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1767 (2009) (showing efforts taken by Communist States to insert “hate speech” prohibitions into international treaties after World War II).

<sup>58</sup> See Fariior, *supra* note 56, at 20–21; see also *Travaux préparatoires of Article 20 of the International Covenant on Civil and Political Rights*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/TravauxPreparatoires.aspx/> (listing the ICCPR’s records of meetings and drafting documents).

<sup>59</sup> See MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 406–07 (1987); see also MORSINK, *supra* note 53, at 67–69 (explaining individual Communist and liberal nations’ involvement in the drafting process).

of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>60</sup>

Similarly, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) requires signatories to the treaty to undertake “immediate and positive measures designed to eradicate all incitement to, or acts of . . . discrimination.”<sup>61</sup>

Despite the requirement to give “due regard to the principles embodied in the Universal Declaration of Human Rights,” including freedom of expression, State Parties must nevertheless, *inter alia*, “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination” and “declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.”<sup>62</sup> Adopted by the United Nations General Assembly in 1965,<sup>63</sup> Article 4 is undoubtedly the most far-reaching of all the international laws relating to “hate speech.”

During the adoption of ICERD in the United Nations General Assembly, it was the Colombian representative who most articulately challenged the impending threats to freedom of speech. He stated:

[T]o penalize ideas, whatever their nature, is to pave the way for tyranny, for the abuse of power; and even in the most favourable circumstances it will merely lead to a sorry situation where interpretation is left to judges and law officers. As far as we are concerned, as far as our democracy is concerned, ideas are fought with ideas and reasons; theories are refuted with arguments and not by resort to the scaffold, prison, exile, confiscation or fines.

.....

Moreover, we believe that penal law can never presume to impose penalties for subjective offences. This barbarous practice is merely the expression of fanaticism such as is found among uncivilized people and is hence proscribed by universal law. Here, therefore, is one voice that will not remain silent while the representatives of the most advanced nations in the world vote without seriously pondering on the dangers involved in authorizing penalties under criminal law for ideological offences.<sup>64</sup>

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<sup>60</sup> International Covenant on Civil and Political Rights art. 20(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>61</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].

<sup>62</sup> *Id.* at art. 4(a)–(b).

<sup>63</sup> *Id.* at 212 n.1.

<sup>64</sup> U.N. GAOR, 20th Sess., 1406th plen. mtg. at 8, U.N. Doc. A/PV.1406 (Dec. 21, 2001).

Despite the stark warnings, many of the nations of the world adopted censorship on “hateful” speech by means of the criminal law.<sup>65</sup> While the communist regimes that invested huge amounts of power in the hands of the State have now been shamed and consigned to history, the notion that the State ought to have the power to control speech that it considers to be “dangerous” nevertheless remains. As one commentator noted, “The voting record reveals the startling fact that the internationalization of hate-speech prohibitions in human rights law owes its existence to a number of states where both criticisms of the prevalent totalitarian ideology as well as advocacy for democracy were strictly prohibited.”<sup>66</sup>

As State Parties passed Article 2(2) of ICCPR and Article 4 of ICERD, these new articles required State Parties to take positive measures to introduce “hate speech” laws.<sup>67</sup> The international measures passed at the United Nations have now filtered down into domestic legislation, and, in spite of the numerous eloquent defenses of free speech given during the ratifying process of the international documents, “hate speech” laws have gradually spread throughout the liberal democratic nations<sup>68</sup> that once opposed them.<sup>69</sup> Ironically, many of these nations are now some of the most enthusiastic users of the “hate speech” laws they originally rejected.

### III. EUROPEAN COURT OF HUMAN RIGHTS ANALYSIS

#### A. *Fundamental Nature of Freedom of Expression*

As the ECHR has repeatedly held, “[F]reedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment.”<sup>70</sup> The ECHR has also held on numerous occasions that

<sup>65</sup> See, e.g., Criminal Code, R.S.C. 1985, c. C-46, §§ 318, 430 (Can.); National Cohesion and Integration Act, (2008) Cap. 12 § 13 (Kenya); Public Order Act, 1986, c. 64, § 18 (U.K.).

<sup>66</sup> Jacob Mchangama, *The Sordid Origin of Hate-Speech Laws*, POL’Y REV., Dec. 2011–Jan. 2012, at 45, 51.

<sup>67</sup> See ICCPR, *supra* note 60, at art. 2(2); ICERD, *supra* note 61, at art. 4.

<sup>68</sup> E.g., Public Order Act, 1986, c. 64, § 18 (U.K.); Prohibition of Incitement to Hatred Act, 1989 (Act No. 19/1989) (Ir.); see also Criminal Code, R.S.C. 1985, c. C-46, §§ 318, 430 (Can.).

<sup>69</sup> BOSSUYT, *supra* note 59, at 407.

<sup>70</sup> Lingens v. Austria, 103 Eur. Ct. H.R. 11, 26 (1986); *accord* Dichand v. Austria, App. No. 29271/95 ¶ 37 (Eur. Ct. H.R. Feb. 26, 2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60171>; Marônek v. Slovakia, 2001-III Eur. Ct. H.R. 337, 349; Thoma v. Luxembourg, 2001-III Eur. Ct. H.R. 67, 84; Şener v. Turkey, App. No. 26680/95 ¶ 39(i) (Eur. Ct. H.R. July 18, 2000), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753>.

“[f]reedom of expression constitutes one of the essential foundations of such a society,” the hallmarks of which are “pluralism, tolerance, and broadmindedness.”<sup>71</sup>

Furthermore, the ECHR has been clear that a High Contracting Party cannot act to indoctrinate and cannot be allowed to operate distinctions between persons holding one opinion or another.<sup>72</sup> Any such distinctions would be contrary to the principles of democracy that have been so bravely defended throughout the recent history of Europe.<sup>73</sup> This freedom of expression protects not only the “‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”<sup>74</sup>

Protection for freedom of expression pertains to all views and opinions and to all forms of media or publication.<sup>75</sup> The protections afforded to freedom of expression in Europe have generally been interpreted very liberally in a number of cases.<sup>76</sup> One example is *Arslan v. Turkey*, in which the ECHR extended Article 10 protection to a book recounting the history of the Kurdish people in Turkey from an admittedly biased perspective and encouraging people to oppose the Turkish government.<sup>77</sup> In *Goodwin v. United Kingdom*, the court also

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<sup>71</sup> *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); *accord Thoma*, 2001-III Eur. Ct. H.R. at 84; *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 69, 81; *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) at 25 (1991); *Lingens*, 103 Eur. Ct. H.R. at 26.

<sup>72</sup> MONICA MACOVEI, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 (2004).

<sup>73</sup> Cf. Report on Human Rights, *supra* note 10.

<sup>74</sup> *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23; *accord Dichand*, App. No. 29271/95 ¶ 37; *Marónek*, 2001-III Eur. Ct. H.R. at 349; *Thoma*, 2001-III Eur. Ct. H.R. at 84; *Jerusalem*, 2001-II Eur. Ct. H.R. at 81; *Arslan v. Turkey*, App. No. 23462/94 ¶ 44(i) (Eur. Ct. H.R. July 8, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271>; *De Haes v. Belgium*, 1997-I Eur. Ct. H.R. 198, 236; *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, 500; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); *Thorgeir Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) at 27 (1992); *Oberschlick*, 204 Eur. Ct. H.R. (ser. A) at 25; *Lingens*, 103 Eur. Ct. H.R. at 26; *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

<sup>75</sup> *Goodwin*, 1996-II Eur. Ct. H.R. at 500 (discussing the “[p]rotection of journalistic sources” as a part of freedom of expression); *accord MACOVEI*, *supra* note 72, at 11 (addressing freedom of the press, particularly radio and television broadcasting).

<sup>76</sup> See, e.g., *Lingens*, 103 Eur. Ct. H.R. at 26; *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 40; MACOVEI, *supra* note 72, at 49 (“[T]he Court has developed a large jurisprudence, demonstrating the high protection afforded to freedom of expression, in particular to the press.”).

<sup>77</sup> App. No. 23462/94 ¶¶ 45, 50.

extended Article 10 protection to journalists' sources.<sup>78</sup> The court also gave Article 10 protection in *Sunday Times v. United Kingdom* to a newspaper when the British government imposed an injunction restraining the newspaper from publishing damaging information about the British government.<sup>79</sup>

Ideas have also generally enjoyed strong protection. The ECHR has held that the dissemination of ideas, even those strongly suspected of being false, enjoy the protections of Article 10.<sup>80</sup> The responsibility of discerning truth from falsehood has in this sense been placed on the proper figure, the listener. Overall, the ECHR has thus recognized that the cure to bad speech is more speech and intelligent dialogue.

### *B. Prescription, Legitimate Aim, and Necessity*

In analyzing interference with freedom of expression, the ECHR utilizes a three-prong test to determine whether the interference in question was violative of the European Convention on Human Rights.<sup>81</sup> The ECHR first asks whether the State interference with speech was "prescribed by law"; second, it inquires whether the interference pursued a "legitimate aim[]"; and, finally, the ECHR analyzes whether the interference with the fundamental right to expression was "necessary in a democratic society."<sup>82</sup>

#### 1. Prescription

With regard to the question of whether a law restricting freedom of expression is "prescribed by law," High Contracting Parties are given a larger margin of appreciation under this first test, with the ECHR deeming such leeway to be legitimate inasmuch as national authorities must be able to judge the circumstances warranting restrictions on guaranteed rights.<sup>83</sup> By no means is the margin of appreciation unlimited; the ECHR utilizes a high level of scrutiny when analyzing interference with fundamental rights such as freedom of expression.<sup>84</sup>

The ECHR has been clear that the term "law" must be viewed broadly as meaning any measure with the force of law in effect at a given time.<sup>85</sup> Furthermore, the ECHR has stated that it "has always

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<sup>78</sup> 1996-II Eur. Ct. H.R. at 502-03.

<sup>79</sup> 30 Eur. Ct. H.R. (ser. A) at 41-42.

<sup>80</sup> *Salov v. Ukraine*, 2005-VIII Eur. Ct. H.R. 143, 180.

<sup>81</sup> *Müller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) at 19 (1988).

<sup>82</sup> *Id.* (internal quotation marks omitted).

<sup>83</sup> *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

<sup>84</sup> *Id.* at 23.

<sup>85</sup> *See Huvig v. France*, 176 Eur. Ct. H.R. 36, 53 (1990) (referring specifically to Article 8(2)).



understood the term ‘law’ in its ‘substantive’ sense, not its ‘formal’ one; it has included both enactments of lower rank than statutes and unwritten law.”<sup>86</sup> In *Sunday Times v. United Kingdom*, for example, the ECHR stated that “the word ‘law’ in the expression ‘prescribed by law’ covers not only statute but also unwritten law.”<sup>87</sup> Unwritten law is common law.<sup>88</sup> In common law countries, such as the United Kingdom, the ECHR has stated that

[i]t would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not “prescribed by law” on the sole ground that it is not enunciated in legislation: this would . . . strike at the very roots of that State’s legal system.<sup>89</sup>

In order to be prescribed by law, the law in question must be accessible and foreseeable in its effects.<sup>90</sup> It thus cannot suffer from vagueness. The “quality” of the law must clearly and precisely define the conditions and forms of any limitations on basic Convention safeguards and must be free from any arbitrary application.<sup>91</sup> The requirement of prescription has been a progressively larger stumbling block in European jurisprudence as States increasingly adopt loosely worded legislation that makes the hearer, in his subjective understanding, the arbiter of whether the speech in question was criminal or not. The example provided above regarding Cyprus’s blasphemy law mirroring that of Pakistan<sup>92</sup> is a clear example of “hate speech” legislation that fails to meet the criteria required to pass Convention scrutiny. The provisions are so broad that they provide no guidance or foreseeability whatsoever to the general public on how to govern their actions. At the same time, the wording of the legislation gives unfettered discretion to local authorities to determine what is and what is not acceptable expression.

The ECHR, in *Metropolitan Church of Bessarabia v. Moldova*, held that domestic law, to meet the clarity requirement, must afford a

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<sup>86</sup> *Id.* at 53–54 (citation omitted).

<sup>87</sup> 30 Eur. Ct. H.R. (ser. A) at 30 (1979).

<sup>88</sup> *Chappell v. United Kingdom*, 152 Eur. Ct. H.R. 3, 22 (1989) (stating that “law” includes unwritten or common law”).

<sup>89</sup> *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 30.

<sup>90</sup> *See id.* at 31.

<sup>91</sup> *Olsson v. Sweden*, 130 Eur. Ct. H.R. (ser. A) at 30 (1988); *see also* *S.W. v. United Kingdom*, 335 Eur. Ct. H.R. 28, 42 (1995) (discussing how the development of criminal law by the courts should be reasonably foreseeable); *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.

<sup>92</sup> *Compare* CYPRUS CRIMINAL CODE § 141 (1959), *with* PAK. PENAL CODE § 298 (2006).

measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention:

In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.<sup>93</sup>

Precisely stated, for the general public, a law limiting freedom of expression must be accessible and foreseeable in its effects. One of the roles of the judges of the ECHR, therefore, is to assess the “quality” of a law, ensuring that the law has the requisite precision in defining the conditions and forms of any limitations on basic safeguards.<sup>94</sup> The precision and foreseeability requirement is necessary in order to avoid both arbitrariness and an unfettered discretion by the authorities to act as they wish.<sup>95</sup> The legislation in question, therefore, must be easy to access, as well as clear and precise in order that the public may govern its actions accordingly. It is only, thus, when these four elements of precision, access, clarity, and foreseeability are met that the law will be deemed to meet the criteria of prescription by law.<sup>96</sup>

## 2. Legitimate Aim

The second prong of the analysis of interference is whether the interference in question pursues a legitimate aim. Restrictions on rights guaranteed by the European Convention on Human Rights must be narrowly tailored and must be adopted in the interests of public and social life, as well as the rights of other people within society.<sup>97</sup>

The ECHR recognizes that “it is in the first place for the national authorities to assess whether there is a ‘pressing social need’ for the restriction and, in making their assessment, they enjoy a certain margin of appreciation.”<sup>98</sup> Therefore,

[t]he Court’s task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of

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<sup>93</sup> *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 111.

<sup>94</sup> *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31.

<sup>95</sup> *Olsson*, 130 Eur. Ct. H.R. (ser. A) at 30; *see also* *Hentrich v. France*, 296 Eur. Ct. H.R. 3, 19 (1994).

<sup>96</sup> *See* *Ezelin v. France*, 202 Eur. Ct. H.R. (ser. A) at 21–22 (1991).

<sup>97</sup> *See* *Thoma v. Luxembourg*, 2001-III Eur. Ct. H.R. 67, 84 (“Although freedom of expression may be subject to exceptions they must be narrowly interpreted and the necessity for any restrictions must be convincingly established.” (internal quotation marks omitted)); *Thorgeir Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) at 27 (1992).

<sup>98</sup> *Thoma*, 2001-III Eur. Ct. H.R. at 85.

appreciation. In so doing, the Court must look at the “interference” complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are “relevant and sufficient.”<sup>99</sup>

Article 10, paragraph 2, provides an exhaustive list of the circumstances in which a person’s right to freedom of expression may legitimately be restricted.<sup>100</sup> They are:

[1] in the interests of national security, territorial integrity or public safety, [2] for the prevention of disorder or crime, [3] for the protection of health or morals, [4] for the protection of the reputation or rights of others, [5] for preventing the disclosure of information received in confidence, [and] [6] for maintaining the authority and impartiality of the judiciary.<sup>101</sup>

With regard to national security and territorial integrity in a post-9/11 Europe, the courts have been more willing to accept, as a legitimate aim, the limitation of speech for individuals or groups the courts hold to be seditious.<sup>102</sup> However, the margin of appreciation associated with national security concerns is by no means unlimited. In *Zana v. Turkey*, the former mayor of Diyarbakir, in southeast Turkey, made statements in favour of the Kurdish Worker’s Party that coincided with the massacre of civilians, including women and children.<sup>103</sup> While noting his opposition to massacres, he defended the killings as accidents.<sup>104</sup> The court convicted the former mayor of Diyarbakir under Turkish law for supporting the activities of an armed organization.<sup>105</sup> Before the ECHR,

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<sup>99</sup> *Id.* (citing *Fressoz & Roire v. France*, 1999-I Eur. Ct. H.R. 1, 19–20).

<sup>100</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 10(2).

<sup>101</sup> *Id.*

<sup>102</sup> *See, e.g.*, Press Release, Registrar of European Court of Human Rights, Chamber Judgment: *Leroy v. France* (Oct. 2, 2008), available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2501837-2699727> (holding a cartoon condoning terrorism was not protected under Article 10); *see also* Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT’L SEC. J. 1, 10–12 (2011) (discussing the impact of 9/11 on the ECHR’s analysis of whether the cartoon in *Leroy v. France* was protected under Article 10); Shawn Marie Boyne, *Free Speech, Terrorism, and European Security: Defining and Defending the Political Community*, 30 PACE L. REV. 417, 424–25 (2010) (“In contrast, the European Convention on Human Rights (‘ECHR’), which sets the broad framework for human rights protections in Europe, tempers the protection afforded to free speech with the governmental necessity of imposing restrictions ‘in the interests of national security, territorial integrity or public safety, [or] for the prevention of disorder or crime.’” (alteration in original) (quoting Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 10)).

<sup>103</sup> 1997-VII Eur. Ct. H.R. 2533, 2540, 2547.

<sup>104</sup> *Id.* at 2540.

<sup>105</sup> *Id.* at 2541–42.

the Turkish authorities argued that the conviction of the applicant, which included a jail sentence, was in the interest of national security.<sup>106</sup> The ECHR held that the interference pursued a legitimate aim because the applicant was a well-known political figure in the region during a time when serious disturbances raged in the area and because his influence could objectively lead to further violence.<sup>107</sup>

In contrast, in *Ergin v. Turkey (No. 6)*, in which a newspaper editor was criminally fined for writing an article purported to incite individuals to evade military service, the ECHR held that the interference was disproportionate to pursuing the aim of national security and did not correspond to a pressing social need.<sup>108</sup> Similarly, in *Piermont v. France*, the ECHR rejected France's assertion that they possessed a legitimate aim to protect France's territorial integrity by preventing a member of the European Parliament who had condemned France's presence in French Polynesia from entering New Caledonia.<sup>109</sup>

With regard to the prevention of disorder or crime, the ECHR has readily accepted this exception as a legitimate aim, particularly in cases that would undermine homeland security, such as with the integrity of the police force. For example, the ECHR has held that verbally abusing police officers in public could be held as a crime because such actions hinder the job of the police by undermining their authority.<sup>110</sup>

Cases in which High Contracting Parties have used the protection of health and morals as an aim for interfering with freedom of expression have been relatively few. Many of the cases, however, focused on issues relevant to the Christian moral worldview, such as cases that dealt with obscenity and blasphemy laws. In *Handyside v. United Kingdom*, the ECHR upheld the seizure of books containing obscene materials that were intended for school children because the seizure pursued the legitimate aim of protecting young children from immoral material that could have objectively harmed their development.<sup>111</sup> In *Wingrove v. United Kingdom*, the ECHR again upheld protection of public morals as a legitimate aim where the British Board of Film Classification refused to distribute a film depicting Saint Teresa of Avila having an erotic fantasy involving the crucified figure of Christ.<sup>112</sup>

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<sup>106</sup> *Id.* at 2546.

<sup>107</sup> *Id.* at 2549.

<sup>108</sup> 2006-VI Eur. Ct. H.R. 325, 329–30.

<sup>109</sup> 314 Eur. Ct. H.R. (ser. A) at 9–10, 25–27 (1995).

<sup>110</sup> *Janowski v. Poland*, 1999-I Eur. Ct. H.R. 187, 200–02.

<sup>111</sup> 24 Eur. Ct. H.R. (ser. A) at 24–25, 28 (1976).

<sup>112</sup> *Wingrove v. United Kingdom*, 1996-V Eur. Ct. H.R. 1937, 1942–43, 1959–60.

In another case with religious liberties implications, the ECHR upheld the protection of the reputation or rights of others as a legitimate aim.<sup>113</sup> In *Otto-Preminger-Institut v. Austria*, the ECHR upheld the seizure of a film by Austrian authorities in a highly Catholic part of Austria because the film was highly offensive to Catholics.<sup>114</sup>

The aim of preventing the disclosure of information received in confidence has provided very little by way of ECHR case law. This protection is provided for both sensitive government documents and corporate documents that could endanger the well-being of these entities. However, in contrast, the ECHR has held that the convictions of French journalists who published private company documents that they procured through illegal photocopying means violated Article 10 of the Convention.<sup>115</sup>

Finally, the ECHR has upheld on a number of occasions interferences with Article 10 rights under the legitimate aim of maintenance of the authority and impartiality of the judiciary. A wider margin of appreciation has been provided to this aim because of the central importance of the rule of law and integrity of the judiciary to a democratic society. In *Sunday Times v. United Kingdom*, for example, the ECHR agreed that the government had a legitimate aim for an injunction against the applicant newspaper that ordered the newspaper not to publish an article on a thalidomide producer that would have prejudiced a class action lawsuit involving a number of children born with severe disabilities.<sup>116</sup> The court ultimately held, however, that the United Kingdom violated Article 10 because of the next prong of the test: the necessity of the interference for a democratic society.<sup>117</sup>

### 3. Necessary for a Democratic Society

The final criterion that must be met for government interference into Convention protections to be legitimate is that the interference in question must be necessary in a democratic society. The ECHR has stated that the typical features of a democratic society are pluralism, tolerance, and broadmindedness.<sup>118</sup> For such an interference to be necessary in a democratic society, it must meet a “pressing social need” while at the same time remaining “proportionate to the legitimate aim

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<sup>113</sup> *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. 3, 20–21 (1994).

<sup>114</sup> *Id.*

<sup>115</sup> *Fressoz & Roire v. France*, 1999-I Eur. Ct. H.R. 1, 7–9, 24.

<sup>116</sup> 30 Eur. Ct. H.R. (ser. A) at 35, 41–42 (1979) (finding that the interference was justifiable as pursuing a legitimate aim, but ultimately holding that there was a violation of Art. 10 because the interference was not necessary for a democratic society).

<sup>117</sup> *Id.* at 41–42.

<sup>118</sup> See cases cited *supra* note 8.

pursued.”<sup>119</sup> The ECHR defines proportionality as being the achievement of a fair balance between various conflicting interests.<sup>120</sup> Any interference with freedom of expression must be based on just reasons that are both “relevant and sufficient.”<sup>121</sup> This need must of course be concrete.<sup>122</sup>

The State has a duty to remain impartial and neutral, since what is at stake is the preservation of pluralism and the proper functioning of democracy, even when the State or judiciary may find some of those views irksome.<sup>123</sup> Clearly, when the State is allowed to dictate what is and what is not offensive and to punish speech it deems offensive, a *de facto* case of viewpoint discrimination is established and a project of social engineering is embarked upon.

“Any interference must correspond to a ‘pressing social need’; thus, the notion ‘necessary’ does not have the flexibility of such expressions as ‘useful’ or ‘desirable.’”<sup>124</sup> The list of restrictions of freedom of expression, as contained in Article 10 of the Convention, is exhaustive; they are to be construed strictly, within a limited margin of appreciation allowed for the State, and only convincing and compelling reasons can justify restrictions on that freedom.<sup>125</sup>

The ECHR summarized its definition of how to determine whether a pressing social need has been met in *Zana v. Turkey*, noting that it must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient.” In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in

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<sup>119</sup> *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 38.

<sup>120</sup> See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 24 (1981) (balancing justifications for retaining a law and detrimental effects of retaining it); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (discussing proportionality between restrictions on freedom of expression and a legitimate pursued aim).

<sup>121</sup> *Zana v. Turkey*, 1997-VII Eur. Ct. H.R. 2533, 2548; see also *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 22 (addressing the requirement of relevancy and sufficiency in Article 8).

<sup>122</sup> See JEAN-FRANCOIS RENUCCI, ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION 47 (2005).

<sup>123</sup> *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1, 27.

<sup>124</sup> *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 ¶ 116 (Eur. Ct. H.R. June 14, 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81067>.

<sup>125</sup> *Wingrove v. United Kingdom*, 1996-V Eur. Ct. H.R. 1937, 1956 (“No restriction on freedom of expression . . . can be compatible with Article 10 unless it satisfies, *inter alia*, the test of necessity as required by the second paragraph of that Article.”).

Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.<sup>126</sup>

*C. Vejdeland v. Sweden: “Hate Speech” Restrictions Upheld by the European Court of Human Rights*

In 2004, the applicants, Tor Fredrik Vejdeland, Mattias Harlin, Björn Täng, and Niklas Lundström, “together with three other persons, went to an upper secondary school . . . and distributed approximately a hundred leaflets . . . in or on the pupils’ lockers.”<sup>127</sup> The principal then stopped the applicants and told them to leave the premises.<sup>128</sup> The leaflets in question criticized homosexual behavior—referring to it as “deviant sexual proclivity” that had “a morally destructive effect on the substance of society”—and warned the pupils of “homosexual propaganda” allegedly being promulgated by teachers in the school.<sup>129</sup>

The court’s account is as follows:

For distributing the leaflets, the applicants were charged with agitation against a national or ethnic group . . . . The applicants disputed that the text in the leaflets expressed contempt for homosexuals and claimed that, in any event, they had not intended to express contempt for homosexuals as a group. They stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools.<sup>130</sup>

Nevertheless, on July 6, 2006, the Supreme Court of Sweden convicted the applicants under Chapter 16, Article 8, of the Swedish Penal Code for “agitation against a national or ethnic group.”<sup>131</sup>

In the judgment, the ECHR took “into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them.”<sup>132</sup> The ECHR further noted that “the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.”<sup>133</sup> The court also considered the penalty imposed on the applicants and noted that none of the applicants served prison time, although the maximum sentence for their offense

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<sup>126</sup> *Zana*, 1997-VII Eur. Ct. H.R. at 2548 (citations omitted).

<sup>127</sup> *Vejdeland v. Sweden*, App. No. 1813/07 ¶¶ 1, 8 (Eur. Ct. H.R. Feb. 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>.

<sup>128</sup> *Id.* ¶ 8.

<sup>129</sup> *Id.* (internal quotation marks omitted).

<sup>130</sup> *Id.* ¶¶ 9–10 (internal paragraph numbering omitted).

<sup>131</sup> *Id.* ¶¶ 15, 18.

<sup>132</sup> *Id.* ¶ 56.

<sup>133</sup> *Id.*

carried a prison sentence of two years.<sup>134</sup> It therefore held that the penalties were not excessive.<sup>135</sup>

In deciding, however, that the *content* of the expression was unworthy of protection, as the ECHR did in paragraphs fifty-four to fifty-five of the judgment,<sup>136</sup> the ECHR is on a far more dangerous footing. As the dissenting opinion of Judge András Sajó, joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria, warned in *Féret v. Belgium*:

Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go “against the spirit” of the Convention. But “spirits” do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous.<sup>137</sup>

However, in holding that there had been no violation of Article 10, in large part because of the content of the applicants’ expression, the ECHR has done a disservice to freedom of expression as enshrined in the Convention. The ECHR has long held “that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”<sup>138</sup> However, in this decision, the ECHR held that the language was “serious,” “prejudicial,” and “insulting.”<sup>139</sup> It also maintained that speech used in an “irresponsible manner” may not be worthy of protection.<sup>140</sup>

As a result of the ECHR’s reasoning, it is surely impossible for citizens to effectively regulate their conduct so that they know when their “offensive” and “shocking” speech is protected but not their “serious and prejudicial” speech. The ECHR could quite easily have dismissed the applicant’s case on the basis of the circumstances of the case without having to make its remarkably vague holdings on the content of the applicants’ so-called “hate speech.”

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<sup>134</sup> *Id.* ¶ 58.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* ¶¶ 54–55 (noting that “serious and prejudicial allegations,” while “not necessarily entail[ing] a call for an act of violence,” can be “exercised in an irresponsible manner”).

<sup>137</sup> *Id.* ¶ 2 (Spielmann, J., concurring) (translating *Féret v. Belgium*, App. No. 15615/07 (Eur. Ct. H.R. July 16, 2009) (Sajo, J., dissenting)).

<sup>138</sup> *Id.* ¶ 53 (internal quotation marks omitted).

<sup>139</sup> *Id.* ¶¶ 54–55.

<sup>140</sup> *Id.* ¶ 55.



In *Şener v. Turkey*, the government charged the owner and editor of a weekly review under the Turkish Prevention of Terrorism Act (1991) “with having disseminated propaganda against the indivisibility of the State by publishing” an article containing sharp criticism of the Turkish Government’s policies and actions of their secured forces with regard to the population of Kurdish origin.<sup>141</sup> The ECHR found that

although certain phrases seem aggressive in tone . . . the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, recrimination or armed resistance. On the contrary, the article is an intellectual analysis of the Kurdish problem which calls for an end to the armed conflict.<sup>142</sup>

The ECHR held that the government had “failed to give sufficient weight to the public’s right to be informed of a different perspective on the situation . . . irrespective of how unpalatable that perspective may be for them.”<sup>143</sup> The ECHR concluded that the editor’s “conviction was disproportionate to the aims pursued and, accordingly, not necessary in a democratic society.”<sup>144</sup> As such, the ECHR held “there [had] therefore been a violation of Article 10 of the Convention.”<sup>145</sup>

#### *D. Expression in the Context of Religious Freedom*

The ECHR has elevated “freedom of thought, conscience and religion,” guaranteed by Article 9 of the Convention, to being one of the cornerstones of a democratic society.<sup>146</sup> The ECHR has held that religious freedom is “one of the most vital elements that go to make up the identity of believers and their conception of life.”<sup>147</sup> Article 9 has taken the position of a substantive right under the European Convention on Human Rights.<sup>148</sup>

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<sup>141</sup> App. No. 26680/95 ¶¶ 6–8, 44 (Eur. Ct. H.R. July 18, 2000), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753>.

<sup>142</sup> *Id.* ¶ 45.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* ¶ 47 (internal quotation marks omitted).

<sup>145</sup> *Id.*

<sup>146</sup> *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. 3, 17 (1993).

<sup>147</sup> *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. 3, 17 (1994).

<sup>148</sup> *See Manoussakis v. Greece*, 1996-IV Eur. Ct. H.R. 1346, 1365 (holding that under the European Convention on Human Rights, states have no discretion in determining whether beliefs or expressions of beliefs are legitimate); *Otto-Preminger-Institut*, 295 Eur. Ct. H.R. at 17–18 (citing *Kokkinakis* to reinforce that Article 9’s religious dimension is a vital element in the make-up of believers’ identities); *Kokkinakis*, 260 Eur. Ct. H.R. at 17 (commenting that Article 9’s religious dimension is a vital element in the make-up of believers’ identities); *Hoffmann v. Austria*, 255 Eur. Ct. H.R. 45, 50, 53–54, 60 (1993) (holding that no issue arose under Article 9 where the applicant became a Jehovah’s Witness, brought action for custody of her children, and the Supreme Court of Austria

The freedom to choose one's faith and live it out is an inviolable freedom protected under the European Convention.<sup>149</sup> Discriminatory treatment of a religion for historic, ethnic, or content-based reasons, which has the effect of diminishing this freedom, violates the European Convention on Human Rights.

As the majority opinion in *Hasan v. Bulgaria* correctly reasons:

The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.<sup>150</sup>

In addition, the ECHR has held that, similar to freedom of expression, guaranteeing freedom of thought, conscience, and religion assumes State neutrality.<sup>151</sup> Respect for a plurality of beliefs and convictions is a basic obligation of the State. Individuals must be able to freely choose, and States must allow individuals to freely adopt, their religious convictions and religious memberships. Article 9 enshrines the dictum that the right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.<sup>152</sup>

In the specific case of freedom of religion, the ECHR's task in order to determine the margin of appreciation in each case is to "take into account what is at stake, namely the need to maintain true religious

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ruled against her, overturning lower courts, on the grounds of the children's religious education and well-being).

<sup>149</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 9–11.

<sup>150</sup> 2000-XI Eur. Ct. H.R. 117, 137.

<sup>151</sup> See *Manoussakis*, 1996-IV Eur. Ct. H.R. at 1365 (explaining that discretion of the State must be excluded in determining legitimate religious beliefs or expressions of those beliefs under Article 9 of the Convention); see also *Jehovah's Witnesses Moscow v. Russia*, App. No. 302/02 ¶ 141 (Eur. Ct. H.R. June 10, 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99221> (reiterating that the ECHR has held States must exercise discretion when determining whether religious beliefs or practices are legitimate); *Church of Scientology Moscow v. Russia*, App. No. 18147/02 ¶ 87 (Eur. Ct. H.R. Apr. 5, 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80038> (commenting that the ECHR's job is to review State decisions concerning the exercise of State discretion in light of conformity with the Convention).

<sup>152</sup> *Manoussakis*, 1996-IV Eur. Ct. H.R. at 1365.

pluralism, which is inherent in the concept of a democratic society.”<sup>153</sup> “The restrictions imposed on the freedom to manifest” all of the rights inherent in freedom of religion, including the freedom to express one’s religious opinions, “call for very strict scrutiny by the [ECHR].”<sup>154</sup> In the exercise of its supervisory function, the ECHR must consider the basis of the interference complained of with regard to the case as a whole.<sup>155</sup>

Freedom of religion, within the context of the black letter of Article 9, is multi-faceted.<sup>156</sup> Among other things, it means the right to pray anytime and anywhere. It also means that one can share one’s opinion and faith freely, including references to the Bible or God. It means that no one can tell a person of faith what to believe. It means freedom to follow one’s own Christian conscience, even in one’s professional life, without fear of being persecuted or fired from one’s position. It means speaking openly about one’s Christian beliefs in whatever stage of life—for example, in an office or on a university campus. Freedom of religion includes the right to live one’s faith whether at work, in the store, in a church, or in the classroom.

While this is what the black letter of the law says, the reality is that Christian expression has been limited on multiple occasions at both the European and domestic levels. Within the context of religious expression, the issue of evangelism has been much debated. *Kokkinakis v. Greece*<sup>157</sup> was the seminal ECHR case dealing with the limitations of sharing one’s faith.<sup>158</sup> The government charged the applicant, a Jehovah’s Witness, with proselytism and sentenced the applicant to imprisonment and to pay a fine.<sup>159</sup> The ECHR’s holding was very clear about the fundamental right to religious expression in the context of evangelism:

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to “manifest [one’s] religion”. Bearing witness in words and deeds is bound up with the existence of religious convictions.

According to Article 9, freedom to manifest one’s religion is not only exercisable in community with others, “in public” and within the

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<sup>153</sup> *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 114; see also *Kokkinakis*, 260 Eur. Ct. H.R. at 17 (holding that the freedoms protected in Article 9 are foundational to a democratic society).

<sup>154</sup> *Manoussakis*, 1996-IV Eur. Ct. H.R. at 1364.

<sup>155</sup> *Kokkinakis*, 260 Eur. Ct. H.R. at 21.

<sup>156</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, at art. 9.

<sup>157</sup> 260 Eur. Ct. H.R. 3.

<sup>158</sup> Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT’L L.J. 249, 272 (2008).

<sup>159</sup> *Kokkinakis*, 260 Eur. Ct. H.R. at 8–9.

circle of those whose faith one shares, but can also be asserted “alone” and “in private”; furthermore, it includes in principle the right to try to convince one’s neighbour, for example through “teaching”, failing which, moreover, “freedom to change [one’s] religion or belief”, enshrined in Article 9, would be likely to remain a dead letter.<sup>160</sup>

Recent arrests of street preachers in Great Britain have increased at an alarming rate.<sup>161</sup> Yet, in 2007, a review of the leading authority in the United Kingdom on the law relating to street evangelism revealed several principles that have garnered international consensus on the right of speakers to express or even promote their ideas in the public square, so long as they did not incite violence.<sup>162</sup> In the case of *Redmond-Bate v. Director of Public Prosecutions*, Ms. Redmond-Bate was street-preaching with two other women.<sup>163</sup> Some members of the crowd exhibited hostility towards them.<sup>164</sup> A constable asked the women to stop preaching, but when they refused to do so the police arrested them for breach of the peace.<sup>165</sup> The police charged Ms. Redmond-Bate “with obstructing a police officer in the execution of his duty,” and the court convicted her.<sup>166</sup>

On appeal, the Divisional Court overturned the decision.<sup>167</sup> The leading judgment was given by Lord Justice Sedley who held that the

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<sup>160</sup> *Id.* at 17 (alterations in original) (citations omitted).

<sup>161</sup> See, e.g., Heidi Blake, *Christian Preacher Arrested for Saying Homosexuality Is a Sin*, TELEGRAPH, May 2, 2010, <http://www.telegraph.co.uk/news/religion/7668448/Christian-preacher-arrested-for-saying-homosexuality-is-a-sin.html> (reporting on the arrest of street preacher Dale McAlpine); *Birmingham Street Preacher Wins Wrongful Arrest Case*, CHRISTIAN INST. (Dec. 10, 2010), <http://www.christian.org.uk/news/birmingham-street-preacher-wins-wrongful-arrest-case/> (reporting on the arrest and subsequent trial of street preacher Anthony Rollins); Hilary White, *Another UK Street Preacher Arrested, Charged, for Views on Homosexuality*, LIFESITENEWS.COM (May 3, 2010), [http://www.lifesitenews.com/home/print\\_article/news/1756/](http://www.lifesitenews.com/home/print_article/news/1756/) (reporting that Dale McAlpine’s arrest was the second arrest of that kind made in just over a month); see also Bureau of Democracy, Human Rights, & Labor, *International Religious Freedom Report 2010*, U.S. DEP’T OF STATE (Nov. 17, 2010), <http://www.state.gov/j/drl/rls/irf/2010/index.htm> (detailing the status of religious freedom in the United Kingdom); *Video: US Govt Notes UK Christians Get Rough Ride*, CHRISTIAN INST. (Nov. 18, 2010), <http://www.christian.org.uk/news/video-us-govt-notes-uk-christians-get-rough-ride/> (reporting on U.S. Secretary of State Hilary Clinton’s address concerning the Department of State’s annual report on religious freedom in the United Kingdom).

<sup>162</sup> See generally *The Law Relating to Street Evangelism*, CHRISTIAN INST. (Apr. 2007), <http://www.christian.org.uk/wp-content/downloads/the-law-relating-to-street-evangelism.pdf> (summarizing English laws on religious freedom as they pertain to street preaching and offering advice on how to comply with such laws).

<sup>163</sup> (1999) 163 J.P. 789 (Q.B.) 790 (Gr. Brit.).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 798–99.

issue was whether the constable had acted reasonably in reaching the view that there was an imminent threat and in determining where that threat was coming from.<sup>168</sup>

If the appellant and her companions were . . . being so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble . . . , then it was they and not the preachers who should be asked to desist and arrested if they would not.<sup>169</sup>

Lord Justice Sedley pointed out, “Nobody had to stop and listen. If they did so, they were free to express the[ir] view . . . .”<sup>170</sup> He also confirmed that protected speech “includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.”<sup>171</sup> He continued:

To proceed . . . from the fact that . . . preaching about morality, God and the Bible (the topic not only of sermons preached on every Sunday of the year but of at least one regular daily slot on national radio) to a reasonable apprehension that violence is going to erupt is, with great respect, both illiberal and illogical. The situation perceived and recounted by [the constable] did not justify him in apprehending a breach of the peace, much less a breach of the peace for which the three women would be responsible.<sup>172</sup>

The mere fact that the Church’s perspective may be “unpalatable” to some does not legitimize its censorship by the State under the Convention. On the contrary, what stands out from *Şener* is the ECHR’s admonition that “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest.”<sup>173</sup> In this respect, the ECHR parallels the United States Supreme Court in the special protection it affords to speech dealing with “matters of public concern.”<sup>174</sup> As demonstrated in *Snyder v. Phelps*, Christian expression on sensitive moral and religious issues

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<sup>168</sup> *Id.* at 790–91.

<sup>169</sup> *Id.* at 797 (citations omitted).

<sup>170</sup> *Id.* at 798.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 798.

<sup>173</sup> *Şener v. Turkey*, App. No. 26680/95 ¶ 40 (Eur. Ct. H.R. July 18, 2000), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753>.

<sup>174</sup> *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

could fairly be characterized as constituting speech on matters of public concern.<sup>175</sup>

In 2004, Alliance Defending Freedom assisted Pastor Åke Green in the appeal of his one-month jail sentence<sup>176</sup> after a court found him guilty under a Swedish “hate-crimes” law forbidding criticism of participants in homosexual behavior.<sup>177</sup> Green had preached a sermon to his small congregation in which he directly quoted Scripture from the Bible on the subject of sexual immorality, including homosexual behavior.<sup>178</sup> A recording of the pastor’s sermon was provided to the state prosecutor who instituted a criminal prosecution against Green.<sup>179</sup> The trial court convicted Green and sentenced him to prison simply for expressing his religious beliefs to his church congregation.<sup>180</sup> The Swedish appeals court overturned the conviction, concluding, “Åke Green, at the time he made his statements, acted out of his Christian conviction to improve the situation of his fellow man, and did so according to what he considered to be his duty as a pastor.”<sup>181</sup> The court recognized that Green’s speech resulted from “a theme found in the Bible.”<sup>182</sup>

The Observatory on Intolerance and Discrimination Against Christians in Europe has presented recommendations before the OSCE regarding the need to defend freedom of speech, particularly that of

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<sup>175</sup> Quoting from case precedent, the Supreme Court explained:

“[S]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’” The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” That is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”

*Snyder*, 131 S. Ct. at 1215 (citations omitted) (quoting, respectively, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985); *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

<sup>176</sup> *ADF Protecting Religious Liberty Internationally, Assisting Defense of Pastor in Sweden*, ALLIANCE DEFENDING FREEDOM (Nov. 9, 2005), <http://www.alliancedefendingfreedom.org/News/PRDetail/1179>.

<sup>177</sup> Keith B. Richburg & Alan Cooperman, *Swede’s Sermon on Gays: Bigotry or Free Speech?: Pastor Challenges Hate-Law Restrictions*, WASH. POST, Jan. 29, 2005, at A1.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; see also Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

<sup>180</sup> Richburg & Cooperman, *supra* note 177; see also Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

<sup>181</sup> Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

<sup>182</sup> *Id.*

Christians to “teach Christian/Biblical Anthropology, faith and morality.”<sup>183</sup> The OSCE concluded, as recently as 2009, that intolerance and discrimination against Christians needed to be addressed; nonetheless, these abuses, particularly in the area of speech regarding homosexuality, and Islam, persist.<sup>184</sup> Ambassador Janez Lenarcic, Director of the OSCE Office for Democratic Institutions and Human Rights (“ODIHR”), acknowledged the need for action, stating,

What came out clearly from this meeting is that intolerance and discrimination against Christians is manifested in various forms across the OSCE area . . . .

While denial of rights may be an important issue where Christians form a minority, exclusion and marginalization may also be experienced by Christians where they comprise a majority in society.<sup>185</sup>

This troubling trend has been manifested primarily in the curtailment of freedom of Christian expression. Freedom of thought, conscience, and religion is under a very real threat to being limited to mere freedom of worship in private or within the confines of church. Expression of moral views, Christian symbols, or appeals to an objective truth (either morally or with regard to the theological superiority of one’s religion) have become the subject of job discrimination<sup>186</sup> and criminal charges.<sup>187</sup>

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<sup>183</sup> Barbara Vittucci, Observatory on Intolerance & Discrimination Against Christians, Key Recommendations for OSCE Summit in Kazakhstan, 2010 (Oct. 7, 2010), available at <http://www.osce.org/home/71878> (translation available on the website for OSCE); see also Working Session 2, OSCE Review Conference, Observatory on Intolerance & Discrimination Against Christians, Fundamental Freedoms, Including Freedom of Thought, Conscience, Religion or Belief (Oct. 1, 2010), available at <http://www.osce.org/home/71587> (reporting, in part, that Christian parents in Germany served jail time for not allowing their children to watch a play that displayed themes in opposition to their moral beliefs).

<sup>184</sup> See Press Release, Org. for Sec. & Co-operation Eur., Intolerance and Discrimination Against Christians Needs to be Addressed, Concludes OCSE Meeting (Mar. 4, 2009) (on file with the Regent University Law Review) (summarizing the issues raised at an OSCE meeting concerning escalating discrimination against Christians in Europe); see also Taner Akcam, Op-Ed., *Turkey’s Human Rights Hypocrisy*, N.Y. TIMES, July 20, 2012, at A23 (reporting that while Turkey’s Prime Minister works hard to protect Muslim freedoms, the freedoms come at the price of discrimination against Christians, Arabs, and Kurds); *Christians Take ‘Beliefs’ Fight to European Court of Human Rights*, BBC NEWS (Sept. 4, 2012), <http://www.bbc.co.uk/news/uk-19472438> (reporting that four Christians living in the United Kingdom are taking their respective employment cases up to the ECHR based on violations of Article 9).

<sup>185</sup> Press Release, *supra* note 184 (internal quotation marks omitted).

<sup>186</sup> See, e.g., *Ladele v. United Kingdom*, App. No. 51671/10 ¶¶ A(1)(a), 2(b) (Eur. Ct. H.R. Aug. 27, 2010) (communicated case), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111187> (recounting that Ladele was threatened with dismissal if she failed to perform civil partnership ceremonies and that McFarlane was dismissed due to his refusal

## IV. COMPARATIVE JURISPRUDENCE: THE UNITED STATES

Internationally, the courts in Canada and the United States are most analogous to those in Europe with regard to strictness of procedural requirements, transparency, and respect for the rule of law. The American model of protection for expression stands in stark contrast to that of Europe, however, in that it provides profound protection for expression, including religious expression.

The First Amendment has long afforded the American people with strong freedoms in the area of speech and expression.<sup>188</sup> At the heart of the First Amendment is the inescapable relationship between the free flow of information and a self-governing people, and American courts have not hesitated to remove obstacles that obstruct this flow. Embodied in American democracy is the firm conviction that wisdom and justice are most likely to prevail in public decision-making if all ideas, discoveries, and points of view are plainly set forth before the people for their consideration.

Chief Justice Roberts of the United States Supreme Court recently affirmed,

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow . . . . [W]e cannot react to [the] pain [inflicted] by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.<sup>189</sup>

At the same time, American courts have recognized that not all expression enlightens the body politic and that some words are capable of perpetrating serious harm. Thus, as experience revealed that the value of a species of expression was thoroughly meager, but its potential for harm great, American courts began to define narrow categories of words that states could restrict or punish.<sup>190</sup> The United States Supreme

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to counsel same-sex couples); *Eweida v. United Kingdom*, App. No. 48420/10 ¶ A(1)(a) (Eur. Ct. H.R. Sept. 29, 2010) (communicated case), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112944> (recounting that Eweida was sent home without pay for failure to comply with uniform restrictions concerning a cross necklace and that Chaplin was placed in a non-nursing position for failure to cover a crucifix).

<sup>187</sup> See, e.g., *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. 3, 8 (1993) (describing the multiple separate charges filed against Kokkinakis for trying to convert people to his religion).

<sup>188</sup> “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I.

<sup>189</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

<sup>190</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (commenting that “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” are not considered protected speech under the Constitution).



Court, thus, excluded libel, obscenity, and incitement from the First Amendment's protections.<sup>191</sup> But, in time, even these free speech exceptions became smaller in scope.<sup>192</sup> Under the current state of the law, there remain only three types of speech that are constitutionally proscribed: obscenity, defamation, and speech that creates "clear and present danger."<sup>193</sup>

In analyzing a government restriction on speech under the United States Constitution, a three-step legal framework has typically been employed. First, a determination is made of whether the speech is protected by the First Amendment; second, the "nature of the forum" or place where the speech occurs is identified—which in turn dictates the standard for judging the speech restriction; and, finally, an assessment is made of whether the justification for the speech restriction satisfies "the requisite standard."<sup>194</sup>

#### A. Protected Forms of Expression

It is well settled that religious utterances and discussion, such as those detailed above with regard to criticism of homosexual behavior, constitute protected speech under the United States Constitution. "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince."<sup>195</sup> Religious speech, therefore, is entitled to the same protection granted to secular, private expression under the First Amendment.<sup>196</sup>

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<sup>191</sup> See, e.g., *Miller v. California*, 413 U.S. 15, 36–37 (1973) (reaffirming that the First Amendment does not protect obscene material); *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam) (commenting that incitement language is not protected in times of war and should logically extend to times of peace); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301–02 (1964) (Goldberg, J., concurring) (commenting that personal libel is not protected under the First Amendment).

<sup>192</sup> See *Cohen v. California*, 403 U.S. 15, 19–20 (1971) (holding that curse words on a jacket are protected by the First Amendment); *N.Y. Times Co.*, 376 U.S. at 278–79, 282–83 (holding an Ohio statute unconstitutional because it failed to distinguish incitement, which is not protected by the First Amendment, from mere advocacy); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02, 506 (1952) (holding that a state cannot ban a movie only on the grounds that it is sacrilegious).

<sup>193</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (defamation); *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (speech that creates "clear and present danger").

<sup>194</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

<sup>195</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

<sup>196</sup> *Id.*; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 235 (1990); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

Furthermore, so-called “offensive” speech is protected. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>197</sup> The Supreme Court has pointed out that preserving “the opportunity for free political discussion is a basic tenet of . . . constitutional democracy.”<sup>198</sup> The Court stated that, in public debate, United States citizens “must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”<sup>199</sup> This is inevitably so because popular speech and agreeable words have little need for constitutional protection.<sup>200</sup>

Under U.S. analysis, the true test of the right to free speech is the protection afforded to unpopular, objectionable, disturbing, or even despised speech.<sup>201</sup> “The fact that society may find speech offensive is not a sufficient reason for suppressing it.”<sup>202</sup> The United States Supreme Court explained in *Cox v. State of Louisiana* that

a “function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.”<sup>203</sup>

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<sup>197</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>198</sup> *Cox v. Louisiana*, 379 U.S. 536, 552 (1965).

<sup>199</sup> *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)) (internal quotation marks omitted).

<sup>200</sup> See *City of Houston v. Hill*, 482 U.S. 451, 472 (1987).

<sup>201</sup> See, e.g., *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (“The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed” (alteration in original) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992))); *United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (quoting *Johnson*, 491 U.S. at 414)).

<sup>202</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

<sup>203</sup> *Cox*, 379 U.S. at 551–52 (alterations in original) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)).

This is true even if the offensive speech is premised on an attack of race, ethnicity, religion, or sexual preference, otherwise depicted as “hate speech.”<sup>204</sup>

### *B. Unprotected Forms of Expression*

Historically speaking, there have been few exceptions to the constitutional protection set aside for pure expression. In 1942, the Supreme Court described these departures in detail: “These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>205</sup>

The *Chaplinsky* categorical approach has endured its share of critics over the years, most notably, a later version of the Supreme Court in *R.A.V. v. City of St. Paul*:

We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as not being speech at all. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.<sup>206</sup>

The very notion of First Amendment “exceptions” is viewed with skepticism because a hallmark of free speech is to allow for the free trade in ideas, even ideas that most people find distasteful or unsettling. The First Amendment denies the government the power to prohibit

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<sup>204</sup> See *Virginia v. Black*, 538 U.S. 343, 365–67 (2003) (holding, on grounds of viewpoint and content discrimination, that the act of burning a cross is not always “intended to intimidate” and that burning a cross as part of a political rally “would almost certainly be protected expression” (quoting *R.A.V.*, 505 U.S. at 402 n.4 (White, J., concurring))); *R.A.V.*, 505 U.S. at 391 (White, J., concurring) (discussing an ordinance applied only to “fighting words . . . on the basis of race, color, creed religion, or gender” (internal quotation marks omitted)); *Johnson*, 491 U.S. at 408–09 (“[A] principle ‘function of free speech under our system of government is to invite dispute.’” (quoting *Terminiello*, 337 U.S. at 4)); *Cohen v. California*, 403 U.S. 15, 21 (1971) (discussing distasteful modes of expression).

<sup>205</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>206</sup> *R.A.V.*, 505 U.S. at 383–84 (emphasis omitted) (citations omitted) (internal quotation marks omitted).

disfavored or even offensive expression.<sup>207</sup> And it matters not that “a vast majority of its citizens believes [the message] to be false and fraught with evil consequence.”<sup>208</sup>

Under the current state of law, there remain only three types of speech that can be constitutionally proscribed: (1) obscenity, (2) defamation, and (3) speech that creates “clear and present danger.”<sup>209</sup> So-called “hate speech” is most likely to be analyzed under the “clear and present danger” test first penned in 1919 in the case of *Schenck v. United States*.<sup>210</sup> Justice Oliver Wendell Holmes, speaking for the Court, concluded that the government has the right to outlaw expression “used in such circumstances and [that is] of such a nature as to create a clear and present danger.”<sup>211</sup> It is in this case that Justice Holmes offered the famous analogy: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.”<sup>212</sup>

### 1. *Brandenburg* Test

The “clear and present danger” test was later modified and restated in *Brandenburg v. Ohio*.<sup>213</sup> In this decision, the Supreme Court held that the guarantees associated with free speech allow for expression that advocates the use of force and even the threat of illegal action “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>214</sup> Under this revamped standard, a threat of harm or lawlessness is granted protection unless there is a showing of: (1) intention, (2) imminence, and (3) likelihood of the threat coming to fruition.<sup>215</sup> Following *Brandenburg*,

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<sup>207</sup> *Johnson*, 491 U.S. at 414.

<sup>208</sup> *Black*, 538 U.S. at 358.

<sup>209</sup> See cases cited *supra* note 193; see also *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007) (“[S]peech that is obscene or defamatory can be constitutionally proscribed because social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.”); *Chaplinsky*, 315 U.S. at 573 (“The [limited scope of a statute] does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee . . . including profanity, obscenity and threats.”); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“When clear and present danger . . . or other immediate threat to public safety . . . appears, . . . the power of the State to prevent or punish is obvious.”).

<sup>210</sup> 249 U.S. 47, 52 (1919).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> 395 U.S. 444, 447 (1969).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

these three elements became necessary for restricting any form of communication as “clear and present danger.”<sup>216</sup>

## 2. “Fighting Words”

The “fighting words” doctrine, first established in *Chaplinsky*, remains alive and well. However, the concept has been adjusted to mirror the revised “clear and present danger” standard set out in *Brandenburg*. The “fighting words” exception is limited in scope because the very concept is generally considered to be inconsistent with free speech principles.<sup>217</sup> “The fact that speech arouses some people to anger is simply not enough to amount to fighting words in the constitutional sense.”<sup>218</sup>

Rather, to come under this exception, comments must be directed to the hearer,<sup>219</sup> must be reasonably regarded by the hearer as a direct personal insult,<sup>220</sup> and must be inherently likely to provoke an “immediate” violent reaction.<sup>221</sup> Thus, the “fighting words” doctrine incorporates the *Brandenburg* elements of intention, imminence, and likelihood.

Finally, and perhaps most importantly, for comments to classify as “fighting words,” they can play no role in the expression of ideas.<sup>222</sup>

## 3. “True Threats”

In what can only be described as an exception to an exception, words that classify as “true threats” are proscribable, even if they fail to meet the elements of the *Brandenburg* standard. A “true threat” is a statement communicating a serious intention to “commit an act of unlawful violence.”<sup>223</sup> A threat of this nature is deprived of protection even if the speaker does not intend to carry out the threat, so long as the statement establishes intimidating speech.<sup>224</sup> Because a true threat is not a means for trading ideas, this type of communication sits outside of

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<sup>216</sup> See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902, 928–29 (1982) (holding, under the *Brandenburg* standard, “emotionally charged rhetoric” is constitutionally protected when it does not “incite lawless action”).

<sup>217</sup> *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989).

<sup>218</sup> *Cannon v. City of Denver*, 998 F.2d 867, 873 (10th Cir. 1993).

<sup>219</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

<sup>220</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>221</sup> *Cantwell*, 310 U.S. at 308.

<sup>222</sup> See *Feiner v. New York*, 340 U.S. 315, 319–21 (1951).

<sup>223</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>224</sup> *Id.* at 359–60.

constitutional parameters, irrespective of any showing of intention, imminence, or likelihood that the threat will be realized.<sup>225</sup>

### C. Forum Analysis and Restrictions

The extent that protected speech can be validly regulated by the state depends in large part on the nature of the forum.<sup>226</sup> In First Amendment jurisprudence, the United States Supreme Court recognizes three types of forums: traditional public forums, designated public forums, and nonpublic forums.<sup>227</sup>

#### 1. Traditional Public Forum

A traditional public forum is a parcel of property used for “the free exchange of ideas.”<sup>228</sup> Traditional public forums are “open for expressive activity regardless of the government’s intent.”<sup>229</sup> This type of forum is “defined by the objective characteristics of the property, such as whether, ‘by long tradition or by government fiat,’ the property has been ‘devoted to assembly and debate.’”<sup>230</sup> In essence, a traditional public forum is any public property that allows for open public access and is compatible with expressive activity, with streets, sidewalks, and parks being prime examples:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use

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<sup>225</sup> See *id.* But cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992) (“[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particular intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.”).

Utilizing this same logic linked to a “true threat,” the suspect provision found in the Freedom of Access to Clinic Entrances Act of 1994 § 3, 18 U.S.C. § 248 (2006), outlawing “threat of force,” has been upheld as a valid restriction on speech. See, e.g., *Riely v. Reno*, 860 F. Supp. 693, 702–03 & n.7 (D. Ariz. 1994) (discussing the freedom of anti-abortion expression conducted by way of spray painting “DEATH CAMP” on an abortion facility); *Cook v. Reno*, 859 F. Supp. 1008, 1010 (W.D. La. 1994) (discussing anti-abortion demonstrations outside an abortion clinic); *American Life League, Inc. v. Reno*, 855 F. Supp. 137, 141–42 (E.D. Va. 1994) (discussing prayer and sidewalk counseling outside reproductive healthcare facilities and the meaning of the term “injure”).

<sup>226</sup> *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

<sup>227</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

<sup>228</sup> *Id.* at 800.

<sup>229</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

<sup>230</sup> *Id.* at 677 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>231</sup>

Striking down floating buffer zones around abortion clinics in *Schenck v. Pro-Choice Network*, the United States Supreme Court noted, “Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is *at its most protected* on public sidewalks, a prototypical example of a traditional public forum.”<sup>232</sup>

In *Heffron v. International Society for Krishna Consciousness, Inc.*, the Supreme Court provided a definitive statement on the objective characteristics that flow from a traditional public forum.<sup>233</sup> Contrasting the venue of a state fair with a public street, the Court stressed the following physical characteristics of a public forum: (1) public accessibility, (2) public thoroughfare, and (3) open air.<sup>234</sup> These factors have since become an integral part of public forum analysis.<sup>235</sup> When present, these attributes demonstrate high potential for communication and low possibility for interference with other activities.<sup>236</sup>

Aside from physical characteristics, a crucial factor in tagging a piece of property as a traditional public forum is whether expression is compatible with the purpose of the property.<sup>237</sup> To determine compatibility, the focus is on the purpose of the property and how speech could interfere with that purpose. For example, in *Greer v. Spock*, the Supreme Court observed that a military base could not effectually serve its primary function of protecting the country and training military personnel while simultaneously serving as a forum for public expression.<sup>238</sup>

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<sup>231</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

<sup>232</sup> 519 U.S. 357, 377 (1997) (emphasis added).

<sup>233</sup> 452 U.S. 640, 650–51 (1981).

<sup>234</sup> *Id.* at 651.

<sup>235</sup> See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 479–80 (1988) (discussing the nature of the forum in question); *United States v. Grace*, 461 U.S. 171, 177 (1983) (noting that public accessibility is only one factor considered and is not, by itself, dispositive).

<sup>236</sup> See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 697 (1992) (Kennedy, J., concurring) (“In my view the policies underlying the [forum analysis] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.”); *Hague*, 307 U.S. at 515 (“Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

<sup>237</sup> See *Krishna Consciousness*, 505 U.S. at 697–98 (Kennedy, J., concurring) (emphasizing compatibility with speech as the determinative factor for assessing a traditional public forum by discussing “times of fast-changing technology”).

<sup>238</sup> 424 U.S. 828, 838 (1976).

## 2. Designated Public Forum

The well-recognized “second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public.”<sup>239</sup> It is birthed “by government designation of a place or channel of communication for use by the public at large for . . . speech, for use by certain speakers, or for the discussion of certain subjects.”<sup>240</sup> A designated public forum can only be established “by purposeful governmental action.”<sup>241</sup>

## 3. Nonpublic Forum

Finally, if the property is not a traditional public forum and has not been opened by the government for expression, then the area is classified as a nonpublic forum.<sup>242</sup> Nonpublic forum consists of “[p]ublic property [that] is not by tradition or designation [open] for public communication.”<sup>243</sup>

## 4. Restrictions

Speech finds its greatest protection when communicated in a traditional public forum. Restrictions on speech may be upheld as valid time, place, and manner regulations where they serve governmental interests that are significant and legitimate, are content-neutral, and are narrowly tailored to serve such interests, leaving open ample alternative channels of communication.<sup>244</sup> In “quintessential public forums” such as streets or parks, the state may enforce a content-based speech restriction only if it shows such regulation to be “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>245</sup> Content-neutral laws are subject to a different and lesser form of scrutiny that requires the restriction to be “narrowly tailored to serve a significant government interest, and leave open ample channels of communication.”<sup>246</sup> A speech restriction is content neutral if

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<sup>239</sup> *Krishna Consciousness*, 505 U.S. at 678.

<sup>240</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

<sup>241</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

<sup>242</sup> *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 53 (1983).

<sup>243</sup> *Id.* at 46; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>244</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Hill v. Colorado*, 530 U.S. 703, 725–26 (2000).

<sup>245</sup> *Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>246</sup> *Id.*



it is “justified without reference to the content of the regulated speech.”<sup>247</sup>

In contrast, the government enjoys significant latitude in regulating speech in a nonpublic forum. In this type of forum, the government is free to impose a content-based restriction on speech.<sup>248</sup> Nonetheless, the government does not possess “unfettered power to exclude any [speaker] it wish[es].”<sup>249</sup> Any restriction on speech must be “reasonable.”<sup>250</sup> In the designated public forum, either of these standards can apply, depending on whether the restricted speech falls inside or outside the designation of the forum.<sup>251</sup>

Finally, on public school grounds, forum analysis applies to the expression of outsiders just like any other governmentally-owned property, but, as it concerns students or teachers, no forum analysis is necessary, as it is presumed that these individuals have a right to speak on school property.<sup>252</sup> While schools may forbid student speech that is “vulgar,” “lewd,” “indecent,” or plainly “offensive”<sup>253</sup> and may censor “school-sponsored” speech that is “reasonably related to legitimate pedagogical concerns”<sup>254</sup> or “reasonably viewed as promoting illegal drug use,”<sup>255</sup> it is well settled that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>256</sup>

### 5. Viewpoint Discrimination

Viewpoint discrimination is flatly prohibited under the First Amendment in any type of forum. In *Lamb’s Chapel v. Center Moriches*

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<sup>247</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *see also* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>248</sup> *See* *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677–78 (1998).

<sup>249</sup> *Id.* at 682.

<sup>250</sup> *Id.* (“[E]xclusion of a speaker from a nonpublic forum must not be based on the speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property.” (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985))); *see also* *Cornelius*, 473 U.S. at 809 (“The reasonableness of the Government’s restriction . . . must be assessed in the light of the purpose of the forum and all surrounding circumstances.”); *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (discussing the reasonableness of a resolution against First Amendment speech).

<sup>251</sup> *See* *Ark. Educ. Television Comm’n*, 523 U.S. at 679–80 (discussing access to a forum and the government’s choice of what standard to apply).

<sup>252</sup> *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>253</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986).

<sup>254</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>255</sup> *Morse v. Frederick*, 551 U.S. 393, 403, 408–09 (2007).

<sup>256</sup> *Tinker*, 393 U.S. at 506.

*Union Free School District*, the Supreme Court found that a school district had engaged in impermissible viewpoint-based discrimination by denying a church access to district property for a child-rearing presentation where other community groups were able to access it for similar purposes, stating:

[T]here [is no] indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius* . . . that

“[a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”

The film series involved here no doubt dealt with a subject otherwise permissible . . . and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.<sup>257</sup>

Likewise, in *Rosenberger v. Rector & Visitors of University of Virginia*, the Court stated, “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.”<sup>258</sup>

Content refers to topic; viewpoint refers to opinion. Therefore, while a content-based restriction calls for heightened scrutiny, a viewpoint-based restriction is altogether impermissible.<sup>259</sup> An exclusion premised on religion often targets viewpoint, not content, and is improper for this reason. The Supreme Court in *Good News Club v. Milford Central School* stated, “[S]peech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint.”<sup>260</sup>

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<sup>257</sup> 508 U.S. 384, 393–94 (1993) (third alteration in original) (internal citation omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 473, 806 (1985)).

<sup>258</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>259</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387–88 (1992).

<sup>260</sup> 533 U.S. 98, 112 (2001); *see also* *Orin v. Barelay*, 272 F.3d 1207, 1214–16 (9th Cir. 2001) (striking down a college policy that prohibited an abortion protestor from using religious terms in speech); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 567–69 (7th Cir. 2001) (invalidating a village hall policy that made space available to civic programs and activities but excluded National Day of Prayer organizers who wished to use the hall to pray for the civic government).

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The statute at issue in *Vejdeland* would be unconstitutional viewpoint discrimination under *R.A.V.* Because the statute criminalized only certain kinds of insulting speech, that is, insults based on “protected” characteristics and not insulting speech generally, it “handicap[ped] the expression of particular ideas.”<sup>261</sup> While the government has the authority to “single[] out an especially offensive mode of expression” for punishment, it cannot single out a particularly obnoxious viewpoint.<sup>262</sup>

Unlike the ECHR, the U.S. Government would not need a viewpoint-discriminatory “hate speech” law to stop the appellants from leafleting. Under the Supreme Court’s public forum doctrine, student lockers are a nonpublic forum within which the government may impose reasonable restrictions on speech.<sup>263</sup> For example, the school, as a matter of policy, may exclude outsiders from the premises or may deny them access to the lockers.

The appellants could have been prosecuted under a number of content-neutral grounds, requiring no examination of the content of their leaflet. They were distributing leaflets within a school and had refused to comply when required to leave by the principal.<sup>264</sup> They had no right to be on school property in the beginning and were certainly trespassing when asked to leave.<sup>265</sup> They could similarly have been prosecuted under the Swedish equivalent to these laws. Sweden has legislation that covers trespass,<sup>266</sup> and it seems clear that a prosecution would have been successful. Of course, the ECHR did not have the luxury of selecting between alternate charges and had to consider the compatibility of their conviction under “hate speech” laws with Article 10 of the Convention. Nevertheless, the court went further than was necessary when it

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<sup>261</sup> *R.A.V.*, 505 U.S. at 393–94 (“[F]ighting words of whatever manner that communicate messages of racial, gender or religious intolerance . . . would alone be enough to [find] the ordinance presumptively invalid.”).

<sup>262</sup> *Id.* at 393.

<sup>263</sup> See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (concluding that teacher mailboxes were a nonpublic forum based on the Court’s unwillingness to suggest that “students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes” (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 117–18 (1972))).

<sup>264</sup> *Vejdeland v. Sweden*, App. No. 1813/07 ¶ 8 (Eur. Ct. H.R. Feb. 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>.

<sup>265</sup> *Id.* ¶ 56.

<sup>266</sup> *Brottsbalken [BrB] [Criminal Code] 12:1, 12:2, 12:6* (Swed.).

lamented the content of the leaflets in paragraphs fifty-four to fifty-five.<sup>267</sup>

But the ECHR's approach appears to have been colored by its disapproval of the applicants' viewpoint.<sup>268</sup> In his concurring opinion, Section President Judge Spielmann "confess[ed] that it is with the greatest hesitation that I voted in favour of finding no violation of Article 10 of the Convention."<sup>269</sup> He acknowledged that the place of distribution neither forms part of the *actus reus* of the crime nor is it an aggravating circumstance.<sup>270</sup> Yet *Vejdeland* would seem to be H.L.A. Hart's quintessential "hard case," decided on its facts and of limited precedential value.<sup>271</sup> If this is how the case comes to be seen, then we have little to fear. On the other hand, should it be followed, it marks a dramatic expansion in the definition of "hate speech" at the ECHR and a departure from settled ECHR orthodoxy. For now, the case leaves us in a state of flux where the only people who know whether someone is using protected offensive and shocking speech or criminal "serious or prejudicial" speech are the forty-seven judges of the ECHR.

#### CONCLUSION

"Hate speech" laws have a chilling effect on religious freedom when they are defined to mean that certain appeals to truth, whether moral or spiritual, are punishable by law. European nations have a duty to remain neutral with regard to value judgments about the content of religious speech. While a nation may legislate to promote conditions where competing worldviews live peaceably together, it may not legislate so that only one worldview has a voice in the public square and quash those voices that differ in content. Nor can governments dictate that people of faith may not speak publically what they deem to be moral truths.

The end product of this promotion of radical relativism is the incubation of an environment ripe for fundamentalism. For on the fringe of relativism lies a very attractive fringe of fundamentalism where

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<sup>267</sup> *Vejdeland*, App. No. 1813/07 ¶¶ 54–55, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>. In coming to its conclusion, the ECHR applied the "test of necessity in a democratic society." *Id.* ¶ 51 ("The test of 'necessity in a democratic society' requires the Court to determine whether the inference complained of correspond[s] to a 'pressing social need.'").

<sup>268</sup> *Id.* ¶¶ 59–60.

<sup>269</sup> *Id.* ¶ 1 (Spielmann, J., concurring).

<sup>270</sup> *Id.* ¶ 6.

<sup>271</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08, 615 (1958).

people will go to extremes to find what they deem to be Truth with a capital “T.”

Originally developed as a shield, the principles of tolerance and “hate speech” are now all too often being used as a sword to defeat the fundamental freedoms of religion and expression. Tolerance is slowly becoming totalitarianism. The freedom to express moral ideas based in sacred texts, as Åke Green did in his Biblically based sermon on homosexual behavior, is being met with prison sentences.

The practice of States in dictating what is and what is not acceptable speech based on content or opinion is blatant viewpoint discrimination and cannot be accepted within a democratic society. Such policies seep into educational requirements, restrictions on media, and into every facet of society. The policies amount to nothing less than social engineering. The ECHR finds itself within very troubled waters and would do well to reflect on its own history and precedent as well as take into consideration the United States Supreme Court’s free speech framework.

We cannot forget, and we must not forget, the origins of “hate speech” restrictions as being a Soviet ploy to control free media and govern what is and what is not acceptable speech. Indeed, it was in large part because of the expression of democratic ideals and reform in Poland in the 1980s that the Soviet juggernaut was made to topple.

Freedom of expression must continue to be recognized as the fundamental human right it truly is. The European Court of Human Rights must make clear through its jurisprudence that, indeed, freedom of expression can only be limited in cases of necessity, and only then where the limitation is narrowly tailored and proportionate to one of the legitimate aims enumerated by Article 10 of the Convention. As with the settled case law of the United States Supreme Court, this means that limitations to free expression should be limited to speech that leads to an imminent and objective threat of violence. Established jurisprudence in Europe and the United States makes clear that existing time, place, and manner restrictions, as well as civil remedies such as for defamation and libel, are more than sufficient in protecting conflicting rights. History has proven that free exercise of speech transforms cultures, whereas heavy-handed restrictions on speech lead to totalitarianism and rampant State control. Just as the drafters of the Universal Declaration of Human Rights rejected “hate speech” limitations of expression, modern jurisprudence would do well to learn from history rather than repeat it.