

Expert Report

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For the case *Warman v. Marc Lemire*

This report provides a framework for answering the following question: is it advisable for polities to enact and enforce laws that prohibit the expression of hate speech on a broad basis, including contexts that do not involve the direct incitement of imminent lawless action that is likely to occur, direct threats, or the targeted uttering of words that are likely to incite an immediate breach of the peace? To answer this question, one must take into account the costs (and potential costs) of such laws, and consider the benefits of alternative methods and laws that do not endanger the freedom of speech. I conclude that hate speech laws of broad scope violate the principles and practices of a free society for a number of reasons, especially given the fact that alternative approaches to deal with racism are readily available.

I. Introductory Remarks

All reasonable persons agree that racism and hate crimes are immoral and harmful to individuals and the social order. Fostering tolerance and punishing crimes stemming from racism are compelling state interests. When governments prohibit racist speech as a means to combat these evils, the question is whether the particular laws and approaches the government adopts to deal with the problem are advisable, and for what reasons? In evaluating laws against hate speech, it is important to bear some fundamental distinctions

in mind. The first distinctions concern the types of harms the laws are designed to prevent. Two major harms are the emotional impact of being exposed to offensive and/or threatening messages, and the possibility of disturbance of the peace due to the angry response to targeted hate speech (this is the problem of maintaining “public order.”)¹ Another set of harms is less immediate, entailing the longer-range influence of such expression on attitudes and behavior. These harms include the “silencing” of minority voices, the encouragement of acts of discrimination, the eventual commission of hate crimes (as opposed to directly inciting them), or, in extreme cases, the rise of genocide or slavery. Thus, we may distinguish between direct and longer-range harms.²

The second key distinction concerns the type of laws the state utilizes to restrict speech. The state may enact laws to punish direct incitements to imminent lawless action or direct threats to public order, or to punishing racist rhetoric regardless of the immediate or present danger. Laws that punish more immediate and imminent harms are generally easier to justify because the link between the expression and the harm is more demonstrable (the link between cause and effect is less speculative), and because such laws are typically more limited in scope, thereby posing fewer problems for the principles and practices of free speech.

Several key issues or questions arise concerning broad prohibitions of hate speech, including: 1) Definitional. How should hate speech be defined? Is the definition adequate to deal with the problem, and is it specific enough to avoid the danger of undue

¹ On public order in general as a basis for restrictions on speech, see, e.g., David Barnum, “The Constitutionality of Public Protest Activity in Britain and the United States,” ... On psychic harm, see the essays in Mari J. Matsuda, et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993).

² See, e.g., Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York University Press, 2002).

ensorship? 2) What evidence exists concerning the impact of hate speech on society; in particular, does it—or to what extent does it—“cause” or contribute to the growth of hate crimes or similar longer term harms? Was hate speech, for example, a central cause of the Holocaust? 3) What problems can arise with the application of broad anti-hate speech laws? Are the laws effective, and can authorities apply them in a manner that avoids the problem of undue censorship? What unintended consequences can accompany the application of hate speech laws? 4) What alternative approaches to combating racism and hate crimes exist other than broad prohibitions of racist rhetoric, and how effective are these alternatives?

The best way to answer these and related questions would be to conduct a comparative risk analysis involving more than one culture. Such an analysis would include assessing the benefits of the application of broad hate speech laws, discounted by the probability that they will be unsuccessfully applied and the probability of other costs associated with unintended consequences.³ Included in the calculation of risks/costs is the probability of over-enforcement, discriminatory enforcement, and non-enforcement. In addition, the feasibility of alternative approaches to fostering tolerance and non-racist attitudes and conduct should be factored into the analysis. As of yet, no one has conducted such a study. Instead, we have anecdotal evidence of the consequences, which often provides little comfort to those who believe that broad hate speech laws are wise. At the very least, one should be wary of those who promise that the enforcement of broad hate speech laws does not pose the danger of negative unintended consequences.

³ See Anuj C. Desai, “Attacking *Brandenburg* with History: Does the Long-Term Harm of Biased Speech Justify a Criminal Statute Suppressing It?” 55 *Federal Communications Law Journal* 353 (2003), pp. 373-390, esp. p. 380.

Indeed, there is very little concrete evidence of the longer-range harms of hate speech. Several scholars have discussed and demonstrated more immediate harms, which include: the inciting of immediate or imminent hate crimes; emotional trauma and feelings of insecurity; provoking a disturbance of the peace.⁴ Note that these harms can be addressed by more limited laws that prohibit such acts as the incitement of imminent violence; making threats directed at discrete targets; and the targeting of discrete individuals or groups with so-called “fighting words”—words that provoke violence or otherwise spark disturbance of the peace.⁵ In these cases, the causal link between the speech and the social harm is evident and demonstrable, as the harm they inflict is caused by the very utterance of the speech, not some long-range speculative harm. As I will discuss, this is not the case for generalized hate speech in broader contexts.

The three major empirical concerns in the application of broad hate speech laws concern the question of cause and effect, the availability of alternative methods of fighting racism, and the issue of misapplication. I will address each of these questions separately.

II. Cause and Effect

As discussed above, two longer-range alleged effects of hate speech are the “silencing” of minority voices, the encouragement of discrimination and hate crimes.

⁴ See Robert J. Boeckmann and Carolyn Turpin-Petrosino, “Understanding the Harm of Hate Crime,” 50 *Journal of Social Issues* (2002), pp. 207-225. This article is a nice overview of the essays in the symposium on hate crimes and hate speech in this volume. See also Donald Alexander Downs, *Nazis in Skokie: Freedom, Community, and the First Amendment* (University of Notre Dame Press, 1985); “Skokie Revisited,” *Notre Dame Law Review* 1985; Mari J. Matsuda, et al., *Words That Wound*.

⁵ Such laws are present in virtually all societies, including the United States, where the First Amendment provides the most extensive protection of free speech in the world. In general, see Louis Greenspan and Cyril Levitt, *Under the Shadow of Weimer: Democracy, Law and Racial Incitement in Six Countries* (Praeger, 1993).

Hate speech distorts the market of free speech because of the fear it engenders and the emotionalism of its appeal. As James Weinstein concludes in addressing these problems in the United States, no empirical evidence exists to support either of these propositions. Indeed, "That the ideal of racist and gender equality has become official American policy also belies the 'market failure' theory for the suppression of hate speech."⁶ If Weinstein is correct—and the evidence appears quite strong that he is—it would be wrong to conclude that the presence of hate speech "causes" society to be racist. (Indeed, it could have the opposite effect, as hate speech is very offensive and off-putting to most people.) There appears to be no "market failure" in this regard. So the question of cause and effect must be more narrowly defined: does hate speech cause hate crimes or other more discrete forms of harmful conduct? And does it make some peoples' attitudes more racist?

Law is not applied on a blank slate, so its effectiveness will depend on many factors that are present in the field of application. As Weinstein writes, "those who assert that racist ideas expressed as part of public discourse lead to illegal racist acts (as well as those who deny such a connection) offer little empirical evidence for their position. The causes of human behavior are always complex."⁷ Other social, economic, and political factors can be significant causal factors. For example, a famous Anti-Defamation League study in 1960 discussed how anti-Semitic outbreaks have often galvanized opposition to racism and raised social consciousness about the harms of racism; the study also showed that anti-Semitism fluctuates with social and economic conditions, independent of hate

⁶ James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Westview Press, 1999), p. 103.

⁷ Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, p. 132.

speech and hate speech laws per se.⁸ Other studies support the conclusion that well-known social and economic factors contributed substantially to the Holocaust, independent of hate speech per se (e.g., economic crisis, hyperinflation in the 1920s, the effects of the Versailles Treaty, the fear of communism, and the lack of enforcement of laws protecting equal civil liberties, etc.)⁹ Anuj Desai quotes Enzo Traverso, who has studied historical research on the Holocaust: “Historians, motivated by the conviction that racial hatred alone is not enough to explain the murder of six million human beings, have spent decades studying *a whole set of causes* that resulted in the extermination of Europe’s Jews.”¹⁰ The fact that the governments of Imperial and Weimar Germany actively enforced hate propaganda laws adds to the conclusion that factors other than hate speech played major roles in bringing about the Holocaust.¹¹ The failure of the government to enforce the laws that protected the system of free speech and civil liberty (e.g., critics of Nazis were brutalized, often with impunity) and the basic rights of Jews and other minorities also contributed to the Holocaust in meaningful ways.¹²

Another key social and political fact should also be kept in mind: Nazi Germany did not have nearly as solid a democratic tradition as the United States and Canada enjoy today. Hate speech is uniformly met with derision in the public and private spheres in these countries, and the governments of these countries have been forceful in prosecuting hate crimes and in denouncing racism with counter-speech. This social and political environment differs markedly from Germany in the first half of the twentieth-century,

⁸ David Caplovitz and Candace Rogers, *Swastika 1960* (Anti-Defamation League, 1961).

⁹ See Desai, “Attacking *Brandenburg* with History,” pp. 364-6. See also Aryeh Neier, *Defending My Enemy: American Nazis, The Skokie Case, and the Risks of Freedom* (Dutton, 1979).

¹⁰ Enzo Traverso, *Understanding the Nazi Genocide: Marxism after Auschwitz* (Pluto Press, 1999). Peter Drucker, trans.

¹¹ Desai, “Attacking *Brandenburg* with History,” pp. 367-8.

¹² This is a major theme in Neier, *Defending My Enemy*.

providing significant opportunity for the government and activist groups to influence and shape attitudes and beliefs in the tolerant direction. As James Weinstein remarks in his analysis of hate speech policy in the United States, it is highly questionable to believe that protecting hate speech (except in the narrowly defined contexts I discuss above) will lead to the reinstatement of slavery or segregation. "There would have to be far-reaching changes in American society and institutions before racist beliefs could lead to such enormous injuries."¹³

So the question of cause and effect is complex, as many variables affect racial attitudes and the inclination to commit criminal acts. The broader the context and the longer the time frame, the more complicated the question of cause and effect becomes, as a number of societal and cultural variables other than speech enter into the picture that influence attitudes and conduct. Consider, for example, a comparison of sex crimes between Japan and the United States. Some researchers link violent pornography to sexual aggression and sex crimes.¹⁴ But though Japan has at least as much violent pornography as the United States, its level of sex crimes is significantly lower than in the United States.¹⁵ Or one can consider the fact that equality for women in American society has grown substantially in recent decades (by almost any measure), the same period in which pornography in its various forms has become more widespread than ever through the Internet, videos, and other sources. The impact of expression on a society is a complicated matter, mediated by such factors as economics, social cohesion, peer groups, family strength, and the like. In his recent book on hate speech and the Holocaust, for

¹³ Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, p. 131.

¹⁴ See, e.g., Edward Donnerstein, Daniel Lenz, and Steven Penrod, *The Question of Pornography: Research Findings and Policy Implications* (Free Press, 1987); Donald Alexander Downs, *The New Politics of Pornography* (University of Chicago Press, 1989), esp. Ch. 5.

¹⁵ See, e.g., Donald A. Downs, "Pornography," in *Encyclopedia Encarta*, 2005.

example, Alexander Tsesis concludes that hate speech led to the Holocaust; but he pays very little attention to cultural comparisons and to the other numerous cultural, social, and economic factors that influenced German behavior.¹⁶ And whereas researchers have conducted numerous experiments and investigations of the links between pornography and violence, much less work has been done on the broader effects of hate speech.

Three Models of Causality

It is instructive to consider the major ways to think about causality. In general, there are three major models or conceptions of causality.¹⁷ The first notion of causality is “deterministic” or “logical” causality. In this concept, a factor C “causes” E if C is “one of a set of individually necessary and jointly sufficient conditions for the occurrence of E.”¹⁸ Thus, X must be present for Y to occur, as must other factors in the set. (W is necessary, but not sufficient.)¹⁹ This concept of causality does not necessarily tell us much about the impact of hate speech, as legal scholar Anuj Desai writes. “[B]ecause each and every ‘cause’ [in the set] is necessary to the effect, it is logically no more helpful to say C1 causes E than to say C2 or any other member of C (d) causes E.”²⁰

¹⁶ Tsesis, *Destructive Messages*. See the criticism of Tsesis’s book by Desai, “Attacking *Brandenburg* with History.”

¹⁷ In this discussion of the models of causation, I am indebted to the work of five scholars: Frederick Schauer, H.L.A. Hart, Tony Honore, Stephen Morse, and Anuj Desai. I have also utilized these models in my book on pornography, *The New Politics of Pornography*, Ch. 5.

¹⁸ Desai, “Attacking *Brandenburg* with History,” p.368. Desai’s illuminating analysis is drawn from Frederick Schauer, “Causation Theory and the Causes of Sexual Violence,” 1987 *American Bar Foundation Research Journal* 737, pp. 742-43.

¹⁹ Necessary and sufficient causality is the tightest form, as in the model, Y would occur every time X was present, and X could cause Y without the presence of any other variable. See Stephen Morse, “Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law,” 51 *Southern California Law Review* 527 (1978); “Failed Explanations and Criminal Responsibility: Experts and the Unconscious,” 68 *Virginia Law Review* 971 (1982).

²⁰ Desai, “Attacking *Brandenburg* with History,” page 369.

The second conception of causality is known as “attributive” causality, in which we simply *attribute* more causative power to some factors over others in the set of causative factors. In this model, we pick the cause or causes out of the set C(d) that seem to be the most important, or those which seem “*really*” important compared to the others.²¹ What criteria should we use to attribute causality to one (or more) factor(s) over others in the set? Philosophers H.L.A. Hart and A.M. Honore provide one method: using “common sense” to single out that factor (or those factors) which appear to be the most “abnormal.”²²

For example, take *People v. Stamp*, a felony murder case involving the robbery of a store owned by a man with a poor heart.²³ In this case, the owner died of a heart attack in the face of the loaded gun. But just what is the “cause” of the owner’s death? The victim’s poor heart? The fact that he might have eaten fatty foods and did not exercise? The fast food restaurants that he might have frequented? Or the robber pointing the gun? All of these factors might have “logical” or “deterministic” causative power; but we surely would choose the robbery as the most important cause because it is abnormal (and sinister) and it is the event that precipitated the heart attack. Another approach to attributive causality would probably lead to the same conclusion in this particular case, but perhaps not in other cases: emphasizing the factor that will contribute the most to the social goals that we want to promote, or which is most amenable to being affected by policy (the most amenable “stress point”).²⁴ In this approach, determinations of causality

²¹ This is Desai’s emphasis in “Attacking *Brandenburg* with History,” p. 369.

²² See H.L.A. Hart and A.M. Honore, *Causation in the Law* (Oxford University Press, 1985), pp. 26-61.

²³ *People v. Stamp*, 82 Cal. Rptr. 598 (1969).

²⁴ Guido Calabresi is the leading advocate of this position. See Calabresi, “Concerning Cause and the Law of Torts,” 43 *University of Chicago Law Review* 69 (1975).

are based on policy considerations, not some scientifically neutral assessment.²⁵ In the *Stamp* case, preventing robbery and murder would no doubt head the list. But one can imagine other cases in which the social policy and common sense approaches would differ.²⁶

It is easy to see why hate speech could be singled out as a cause of harm under the attributive causality approach. It stands out in terms of its moral offensiveness, and it is often disturbing and frightening, to hear. The history of free speech and censorship is replete with examples of society linking rhetoric to harmful results because of the moral and psychological association of the speech with harm and disapproval.²⁷ The danger with this logic, however, is that it can lead us to neglect the other causes of harm that exist in set C(d), some of which may actually be more causally harmful than hate speech per se (and the suppression of which does not pose dangers for freedom of speech). And such emphasis might also encourage us to neglect the policies and conditions which can restrict the causative influence of hate speech. (See the discussion of “priming” below.)

²⁵ Calabresi’s notion of attributive causality is a form of pragmatism as that philosophy is commonly understood. See, e.g., Eric Macgilvray, *Restructuring Public Reason* (Harvard University Press, 2004).

²⁶ Take a criminal law case in the 1950s in which a battered woman leaves her home after an attack and sleeps outside in the cold because she is afraid to return to the house that night. If she dies due to exposure, is the husband guilty of homicide? A few decades ago, this question would never have been asked because social policy did not recognize domestic violence as a major problem. Today, one might attribute guilt to the husband because social policy now recognizes domestic violence as something social policy should address. In general, see Donald Alexander Downs, *More than Victims: Battered Women, the Syndrome Society, and the Law* (University of Chicago Press, 1996).

²⁷ Philosopher David Hume maintains that psychological association or the “relation of ideas” constitute the basis upon which human beings construct the content and contours of such moral concepts as property. The association between hate speech and hate crime is similar in nature, as we naturally link speech and action. See Hume, *A Treatise on Human Nature* (Oxford University Press, 1978), Book III, “Of Morals,” pp. 501-34. L.A. Selby-Bigge and P.H. Nidditch, eds. Free speech as a system cannot exist unless we make a fundamental distinction (rebuttable under narrow circumstances) between speech and action. Equating speech and action can amount to thought control.

The third model of causation is what Frederick Schauer calls “probabilistic” causality. In this model, C would be considered causative if its presence in society simply made E more likely to exist than if C were not present. C does not always cause E in this model (hence, deterministic causality is not present), but does make E more likely to occur. To borrow terminology from legal scholar Stephen Morse, in this case C would “predispose” others toward E.²⁸

In social science and psychology, most causes are of the probabilistic or predisposing nature. It is important to note that many advocates of the broad criminal suppression of hate speech appear to conclude that hate speech causes hate crimes and other harms in a deterministic sense. But outside of very specific situations (such as the direct incitement of harm—though even here the matter is complex), there is no conclusive or persuasive evidence that hate speech causes harms in this manner. Nor is there sufficient evidence that focusing on hate speech as opposed to other causes (as in the attributive causality model) would lead to a decrease in hate crimes and related harms. Indeed, Desai points out that anecdotal evidence might suggest otherwise, for the prosecution of hate speech laws before the Third Reich “suggest that biased speech is not particularly susceptible to pressure from a legal system, and that criminalization would do little to prevent a horrific event such as the Holocaust.”²⁹

When we turn to probabilistic causality, similar problems arise. If hate speech is probabilistically causative of hate crimes, why is it that Nazi Germany gave birth to the Holocaust, while other highly anti-Semitic countries in Europe did not? Desai poses the question well:

²⁸ Morse, “Crazy Behavior, Morals, and Science,” pp. 565-71.

²⁹ Desai, “Attacking *Brandenburg* with History,” p. 372.

[W]hy was it in Germany rather than in any number of other European countries that the Nazis came to power? Was the level of anti-Semitic messages higher in Germany? Many historians argue that the answer is 'no,' which suggests that there may not even be a correlative connection let alone a causal one in the relevant, probabilistic sense. Without asking a comparative question, one simply does not know whether *every* society, when faced with the economic and social conditions of Weimar Germany, would necessarily have responded with some sort of discriminatory oppression...irrespective of what happened in the immediately preceding nine centuries in that country.³⁰

Along similar lines, why is it that the United States has made gains in equality (by almost any measure) at the same time that First Amendment law has grown progressively more protective of hate speech? Hate speech has been common throughout history, while genocide and waves of hate crimes ebb and flow.

Thus, in assessing the longer-range impact of hate speech on society, one must proceed with caution, and with due respect for the questions that arise in determining causation and the implementation of policy. The evidence of direct, attributive, and probabilistic causality is presently far from convincing. *But even assuming that probabilistic causality can be demonstrated, this does not mean that censorship of general racist rhetoric is advisable.* In his seminal article on causality, Frederick Schauer concluded that violent and degrading pornography cause harm in a probabilistic sense, yet he did not conclude that this fact called for censorship. The practice of censorship poses problems in its own right, as I will discuss below. Furthermore, alternative approaches to dealing constructively with race exist which do not involve censorship and the risks to free speech that censorship entails.

³⁰ See Desai, "Attacking *Brandenburg* with History," pp. 377-8.

III. Alternative Methods

Democratic societies possess meaningful legal and policy tools to combat racial prejudice and hate crimes that do not involve the criminalization and censorship of hate speech per se outside of narrow contexts. Indeed, the use of such tools is possibly considerably more effective in combating prejudice and crime than broad restrictions of speech per se. These tools include laws against discriminatory *conduct* in the workplace, in the housing markets, and in public accommodations; the rigorous and conscientious application of hate crime laws or other laws that cover such acts; thoughtful government programs promoting racial tolerance; the widespread employment of counter-speech to contest racist ideas and claims; and appropriate government surveillance of hate groups and their activities (in the United States, for example, strong protections for freedom of speech have coexisted with the latter government action). Indeed, a study by Human Rights Watch concludes that Germany has done a poor job of preventing hate crimes because it has placed more emphasis on enforcing hate speech laws than on enforcing other legislation that prohibits discriminatory conduct, as opposed to speech. (For this and other reasons, the report does not support the enforcement of generalized hate speech laws.) A very telling fact is that German governments have not sufficiently punished actual hate crimes, handing down light punishments for serious criminal acts. The under-enforcement of the normal criminal law sends the unmistakable message that Germany does not really care about protecting racial and national minorities from harm.³¹ In the United States, on the other hand, general hate speech is protected by the First

³¹ "Germany for Germans': Xenophobia and Racist Violence in Germany." *Human Rights Watch/Helsinki, 1995 Report*. See also the response by Manfred H. Wiegandt in *Human Rights Quarterly* (1997).

Amendment, but prosecutors are known to take hate crimes very seriously. Free speech libertarianism is balanced with punitive criminal laws governing conduct.

A glance at what researchers call the “priming” of attitudes and beliefs provides support for taking alternative approaches seriously. “Priming theory” holds that the impact of a message on a person is mediated and influenced by the ideas and values that a person brings to the encounter with the message. One group of “priming” researchers maintains that their study “found support for the effects of conscious priming of a value. It revealed that an individual’s attitude toward issues of free speech and harm of hate speech is determined by what value is brought into the individual’s conscious awareness and the individual is encouraged to think about.”³² Accordingly, the impact of hate messages can be shaped or “primed” by the government and other sources filling the public sphere with credible counter-messages. In contemporary Canada and America, anti-racist attitudes and messages dominate the public sphere, media, and education as never before. The outcry that arises when a hate crime is made public attests to this fact.³³

IV. Effectiveness: The Law of Unintended Consequences

Coercive law is not always the best way to deal with social problems. As legal scholar Herbert Packer has written, there is a “limit to the criminal sanction.”³⁴ This claim takes on additional credibility when law is used to censor ideas. To be sure, resorting to “slippery slope” arguments to dissuade governments from engaging in censorship can be too simplistic or “knee jerk” in nature; so it is appropriate to be duly

³² Gloria Cowan, et al. “Hate Speech and Constitutional Protection: Priming Values of Equality and Freedom,” 58 *Journal of Social Issues* 247 (2002), p. 259. Cite other examples here, too.

³³ On the evolution of attitudes toward race, see, e.g., Paul M. Sniderman and Edward G. Carmines, *Reaching beyond Race* (Harvard University Press, 1987).

³⁴ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

wary of slippery slope claims. Nonetheless, policy makers should heed some problems that often arise on the path to censorship, as demonstrated by historical experience.

Framing the Questions and Thinking of Costs and Benefits

In thinking about effectiveness, one should begin by placing the problem in proper perspective. It is interesting to compare the prevalence of overt racism and racist rhetoric in society (the type of expression covered by laws that prohibit general racist expression) with the extent of pornography. Pornography is omnipresent on a variety of levels, and some reputable individuals and organizations even make arguments that pornography has at least some useful effects.³⁵ But, as James Weinstein points out, it is “inconceivable” that a reputable organization or person would offer similar praise of hate speech. “Hate speech, then, is a pariah, having neither pornography’s allure nor its support. This accounts for its lack of prevalence in today’s society and suggests that, unlike pornography, it may be possible to suppress this material. The question then becomes: *What benefit is there in further reducing a type of expression already extremely marginalized in public discourse?*”³⁶ No doubt some benefits are gained from broadly suppressing hate speech, including improvement of the tone of discourse in society and rendering hate less available to potential sympathizers. But effectiveness can also be limited, raising questions about whether the benefits are worth the actual or potential costs. For example, the editor of a volume of essays published in the early 1990s discussing hate speech regulations in fifteen countries concluded that “[m]ost papers

³⁵ See, e.g., Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights* (NYU Press, 1995).

³⁶ Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, pp. 138-9. Emphasis added.

share the view that laws which restrict free expression do not reduce hatred or violence.” The most they achieve is protecting human dignity and improving civility in the public realm.³⁷

Of course, any such benefits must be weighed against potential costs. One specific cost is that censors often confront a Catch-22 problem. If they pass measured laws designed to single out the worst forms of hate speech, hate mongers can simply modify their language to circumvent the law. (This is known as the “Marc Antony Problem” in free speech lore in reference to Marc Antony’s duplicitous speech in Shakespeare’s play, *Julius Caesar*.) Worse, such modified speech may actually be more persuasive to audiences than the more virulent hate speech the law was designed to cover. But if the government broadens the scope of the law to punish less virulent (and therefore less off-putting) forms of hate speech, it runs into the problem of overkill, and there is a good chance that enforcement will be lax, selective, or simply too oppressive.³⁸

Indeed, some critics of hate speech and pornography have argued that the *real* problem is not violent and extreme or overt forms of such material, but rather the more “moderate” forms that are more widespread and alluring to persons outside the camps of extremists. Violent or virulent forms of expression are off-putting to the average citizen, creating opposition rather than sympathy. But by limiting itself to the more extreme forms of hate speech, the law might actually encourage hate mongers to modify their positions, thereby making them more effective. This unintended consequence occurred in response to England’s 1965 Race Relations Act (Sec. 6). In reaction to the law’s

³⁷ Frances D’Souza, introduction to *Striking the Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (Sandra Coliver, ed., 1991), p. vii. See also Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, p. 138.

³⁸ See the discussion of “definitional problems” in Desai, “Attacking *Brandenburg* with History,” pp. 358-62.

prohibition of overtly racist rhetoric (previously, the law had focused mainly on threats to public order, not racist rhetoric per se), some racist groups modified their language and created book or magazine clubs that appealed to a wider audience than the groups had previously enjoyed. According to researcher Anthony Dickey, “Regularly published papers, journals and magazines of racist organizations immediately became more moderate in the presentation of their views as soon as the 1965 Act came into force. At least one leader of a racist organization has admitted that this has been to the advantage of his movement...This concerns the proliferation of ‘semi-respectable’ racial publications which are of a seemingly high standard and professional character.”³⁹

The discussion of “priming” above also casts some light on the problem under discussion, as messages (by hate groups, the government, and anti-discrimination groups) are mediated by the values and knowledge of the recipients. Paul Iganski, for example, writes that the effects of hate speech laws and hate speech are mediated by the prior dispositions and beliefs that listeners and consumers of web pages bring to the table in the first place.⁴⁰

Dharmika Dharmapala and Richard McAdams have written an important article presenting a formal model that deals with the links between hate crimes and hate speech. Dharmapala and McAdams conclude that the link between hate speech and hate crimes is more complicated than people often think. The authors apply an “economic” model, which looks at the costs and benefits that engaging in hate crimes create for perpetrators. They also consider “esteem theory,” which examines how engaging in hate crimes enhances the fame of perpetrators within their peer group(s) or in society. The esteem of

³⁹ Anthony Dickey, “English Law and Race Defamation,” 14 *New York Law Forum* 9 (1968), pp. 24-5.

⁴⁰ Paul Iganski, “Legislating against Hate: Outlawing Racism and Anti-Semitism in Britain,” 58 *Critical Social Policy* (1999), pp. 129-40. Other articles in this symposium raise similar points.

one's peers factors into the utility functions of individuals. In some cases—depending on the prior beliefs and utility functions of perpetrators—raising the cost of hate speech (through criminalization, etc.) can actually *increase* the level of hate crimes, as such legislation enhances the prestige of such acts within the community of hate. Under other circumstances, increasing the cost of hate speech can *reduce* hate crimes, depending, once again, on the impact on the specific community. The point is that the impact of punishing hate speech depends upon the psychological states and incentive structures of individuals and groups, and is not straightforward.⁴¹ The fact that hate speech laws can lead to an *increase* in hate crime under some circumstances (at least based on the model) should be considered a potential cost.

Politics and Censorship

Another problem is the politics of censorship. Even more narrowly written laws that prohibit hate speech outside of contexts of direct harm have the potential to be applied in an uneven or overly broad way. One issue that is too often ignored is the *politics* of speech regulation. Because even narrow restrictions on general rhetoric and speech have the potential to cover much expression, enforcers generally have to be selective in applying the law. A principled approach to prosecutorial discretion typically targets the most extreme and harmful examples of the expression covered by the law. (In this case, the Marc Antony problem I just discussed can come into play, however.) But this is not always the case. Prosecutors are not always immune to political pressures, so the application of laws restricting speech can be used for political purposes, and be

⁴¹ Dhammika Dharmapala and Richard H. McAdams, "Words that Kill? Economic Perspectives on Hate Speech and Hate Crimes," Working Paper 2003-05. University of Connecticut, Department of Economics, Working Paper Series.

influenced by political pressure. Indeed, works on the history of censorship are replete with examples of the politicization of enforcement. No responsible person should discuss censorship without taking politics into consideration.⁴²

Some examples are quite relevant to Canada's hate speech approach. For example, Canada's laws against advocating genocide, promoting hatred of identifiable groups, and the spreading of false news were applied against non-racist speech by minorities earlier in the twentieth-century. Throughout the years up to the 1980s, targets included an American who put up a sign declaring his intent to leave Canada because of its hostility to Americans; civil rights leaders who spoke out against the government's treatment of Jehovah's witnesses; an underground newspaper that published a parody of an establishment paper; a Francophile who distributed a pamphlet falsely claiming to be presented by an anti-French group; and the well known case in which prosecutors reacted to the Canadian Supreme Court's 1992 *Regina v. Butler* decision (in which the Canadian Supreme Court ruled that Canada's obscenity laws prohibited "degrading" and "dehumanizing" pornography as construed by anti-pornography feminists) by prosecuting lesbian bookstores. In all of these cases, the people targeted by the law lacked political power. Canadian authorities also detained a foreign film praising Nelson Mandela because of the fear that it might incite hatred against South African whites.⁴³

⁴² On the politics of regulation in general, see James Q. Wilson, ed., *The Politics of Regulation* (Basic Books, 1980). As applied to pornography, see Paul S. Boyer, *Purity in Print: Book Censorship in America from the Gilded Age to the Computer Age* (University of Wisconsin Press, 2002), second edition. On the misapplication of college speech codes in America because of political pressure, see Donald Alexander Downs, *Restoring Free Speech and Liberty on Campus* (Cambridge University Press, 2005); and Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press, 1998).

⁴³ See Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, pp. 142-147. Weinstein's analysis here is drawn from essays in *Striking a Balance*.

Broad hate speech laws have also been misapplied in other countries, as well. Britain's experience with various forms of its racial incitement laws is not encouraging. According to legal scholar Patricia M. Leopold, "several of the prosecutions under section 6 [of the Race Relations Act of 1965 and 1970], both successful and unsuccessful, had unfortunate and unforeseen results, and gave rise to bad publicity on an already unpopular section."⁴⁴ For example, though the Solicitor General promised that he would use the law to target only the most pernicious forms of racist speech, the first prosecution under the 1965 act was of a 17-year-old laborer with a history of mental illness who threw a racialist pamphlet attached to a bottle through the glass door of a Member of Parliament. The conviction was reversed on appeal, leading to "strong criticism." The first prosecution for a public speech was of Michael Abdul Malik, a Black Power advocate. Leopold stresses that the *Malik* case and others of this nature had the "unforeseen and undesirable consequence" of giving these groups vastly more publicity than they could have achieved otherwise—a problem that can arise in many prosecutions of hate. (Many observers of hate groups note that they live on negative publicity, which also serves as a recruitment tool.)⁴⁵ The 1967 prosecution of the *Southern News*, a publication of the Racial Preservation Society in England, represents this danger. The paper claimed that it did not intend to encourage racism, but rather to promote "a humane solution to the problem of coloured immigration," and that the publication constituted an "educational enterprise." Regardless, the government prosecuted the group; but the jury found the defendants not guilty. Leopold concludes, "Not only did the *Southern News* get the benefit of full publicity in the course of the trial, but the defendants, upon their

⁴⁴ Patricia M. Leopold, "Incitement to Hatred—The History of a Controversial Criminal Offence," 1977 *Journal of Public Law* 389, p. 394.

⁴⁵ See Downs, *Nazis in Skokie*.

acquittal, reprinted the particular issue of *Southern News*, with the overprint, 'Souvenir Edition, the paper the Government tried to suppress.' The result of this case more or less gave legal sanction to a particular style of racial comment in Britain." Leopold concludes that this and other unsuccessful prosecutions "give a measure of respectability to racialists and their organizations."⁴⁶

As mentioned, another undesirable effect of the prosecution of broad hate speech laws can be the publicity it gives hate mongers, who often thrive on the attention. In the United States, the famous Skokie case in the late 1970s gave the Nazi provocateurs undreamed of publicity, as many commentators have observed. In France, the trial of a Holocaust denier gave the defendant an opportunity to publicly defend the conclusions of Holocaust denial in a very prominent forum. Weinstein presents evidence that attorney generals in the United Kingdom have become "increasingly reluctant" to prosecute because of the fear that trials "would provide platforms for racists who, if convicted, would claim martyrdom, and, if acquitted, would claim vindication."⁴⁷

Indeed, the problem of martyrdom is something that must also be considered a cost of broad hate speech regulation, as it turns racists into victims who can claim they have been denied equal justice. Leaders of racialists groups are quick to play this card. A related cost is more speculative. Allowing racists to express their views exposes them to society, thereby providing society and government an opportunity to monitor them and plan against them. It also provides these groups with a "safety valve" by which to spew their hate. Prohibiting such expression thereby can deprive society of politically relevant

⁴⁶ Leopold, *Incitement to Hatred*, p. 397-8.

⁴⁷ Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine*, p. 151, citing Roger Errera, "In Defense of Civility: Racial Incitement and Group Libel in French Law," and Geoffrey Bindman, "Incitement to Racial Hatred in the United Kingdom: Have We Got the Law We Need?," in *Striking a Balance*.

information or knowledge of the groups' presence, and might encourage the groups to resort to more sinister action. (The "safety valve" argument has never been empirically demonstrated, however.)

Group Libel Laws and Free Speech

The United States has also had a checkered history when it comes to punishing general racist rhetoric. Though First Amendment law now protects general hate speech except in the case of targeted threats and fighting words, laws against "group libel" were once punishable. And many colleges and universities attempted to pass numerous "speech codes" throughout the later 1980s and the 1990s. These codes constituted renewed forms of group libel or restrictions on racist expression in higher education. Neither of these movements proved successful.

The U.S. Supreme Court narrowly upheld Illinois' group libel law in 1952 (*Beauharnais v. Illinois*), opening the door to similar legislation across the country. But though group libel had some prominent advocates (most notably the famous sociologist David Reisman, who wrote a series of law review pieces in the 1940s advocating such measures), only a handful of states passed such laws, and enforcement was sporadic, at best. Most importantly, leading civil rights advocates (including prominent Jewish groups who had once supported group libel laws) decided that these laws were detrimental to the cause of social justice rather than helpful. Such groups as the Anti-Defamation League, The American Jewish Committee, and the American Jewish Congress grew concerned about some of the problems discussed above; in addition, they came to the conclusion that *extensive free speech is the ally of equality and social justice*, not the enemy of these

goods. Even Reisman came to reject his prior position on group libel laws. In 1954, Harvard psychologist Gordon Allport published his path breaking book, *The Nature of Prejudice*. In addition to analyzing the psychological dynamics of prejudice, Allport addressed the efficacy of legislation designed to battle and remedy prejudice. Allport's conclusions embodied the consensus of psychologists and social scientists that had emerged by the 1950s after the country's tentative experiments with group libel laws. He strongly endorsed civil rights and fair employment laws, but concluded that "the weight of opinion seems against" group libel and similar broad racist speech laws. The best way to combat prejudice is not through broad speech restrictions, but rather through prohibitions of discriminatory *conduct*, education, and the free speech.⁴⁸

Allport's position was prescient, at least in the United States, for the Civil Rights Movement that took off in the 1960s rode the back of the expanding free speech right that was being fashioned by the Supreme Court. Even a perusal of the history of the 1960s reveals the intimate relationship between the explosion of civil rights in the United States and the expansion of free speech rights based on the "viewpoint neutrality," "heckler's veto," and related doctrines.⁴⁹ The viewpoint neutrality doctrine stipulates that all viewpoints are entitled to equal First Amendment protection, including those of Communists and right wing hate groups. The heckler's veto doctrine holds that a speaker's right should not be held hostage by threats of disruption in response to the speech. These two doctrines (and others) provided the opportunity for unpopular groups

⁴⁸ Gordon W. Allport, *The Nature of Prejudice* (Addison-Wesley Press, 1954), Ch. 29 ("Ought There to Be a Law?"). For this discussion of group libel laws, Reisman, and Allport, I am indebted to Samuel Walker's *Hate Speech: The History of a Conflict* (University of Nebraska Press, 1994), Ch. 5. See also my *Nazis in Skokie*, Chs. 1 & 8. Reisman's essay, entitled "Democracy and Defamation," appeared in three editions of Volume 42 *Columbia Law Review* (1942).

⁴⁹ A voluminous literature exists on this topic. See, e.g., Harry Kalven, Jr. *The Negro and the First Amendment* (University of Chicago Press, 1965).

and dissenters to make their views known, and limited the power of government to engage in politicized enforcement of the law that served dominant interests.

Speech Codes, Political Correctness, and Censorship in Higher Education

A couple of decades later, some activists and leaders began forgetting the lessons of the 1960s, at least in higher education. Beginning in the later 1980s, institutions of higher learning across the land began promulgating speech codes prohibiting expression that demeans, derogates, or disparages individuals or groups based on race, religion, nationality, sexual orientation, and similar characteristics. Some codes were narrowly written, directed to such things as face-to-face fighting words, whereas other were more like group libel laws, prohibiting such expression in general. (In many cases, even narrowly based codes were applied as if they were group libel laws.) In many respects, the speech code era represented a return of the era of group libel laws. This time, however, the experience was even worse, as authorities enforced the codes much more often than they had enforced the old, abandoned group libel laws. The fact that campus enforcers often lacked the prosecutorial expertise and experience of typical legal authorities proved to be another exacerbating factor in the application of codes.

Numerous works have chronicled how the speech code era in American higher education led to the enforcement of ideological orthodoxy on campus and politicized application (almost always targeting conservatives).⁵⁰ And by restricting speech and

⁵⁰ For a small sampling of this copious literature, see, e.g., Kors and Silverglate, *The Shadow University*; Downs, *Restoring Free Speech and Liberty on Campus*; Nat Hentoff, *Free Speech for Me, not for Thee: How the American Left and Right Relentlessly Censor Each Other* (Harper Collins, 1992); Richard Bernstein, *Dictatorship of Virtue: Multiculturalism and the Battle for America's Future* (Alfred E. Knopf, 1994); in Edith Kurzweil and William Phillips, eds., *Our Country, Our Culture: The Politics of Political Correctness* (Partisan Review Press, 1994).

ideas, codes often fostered resentment, animosity, and incivility (moral bullying)—the very mentalities that the codes were designed to ameliorate. Today, institutions of higher learning are under attack for being hostile to conservative ideas, even though conservatism is a major philosophy in the country.

A key problem in the speech code era has been politicized enforcement. Philosopher Timothy Shiell pinpointed this problem in one of the more thoughtful books on speech codes. Shiell concludes that *who* enforces the rules (and *how* they are enforced) is often more important than *what* they actually say. He points to the case of the men's basketball coach at Central Michigan University, who was fired for using the word "nigger" in a locker room speech, even though the minority players approved of the use of the term in that particular context. "All they [enforcement officials] needed was a complaint to convict him. This list of abuses could go on and on...the apparatus of the administration and enforcement of speech regulations tends to encourage overzealousness as a means of career advancement." Furthermore, "even unsuccessful prosecution has a chilling effect on speech."⁵¹

V. Conclusions

Given the problems I have discussed, there are reasons to be wary of laws that prohibit general racist expression and rhetoric, except when such expression takes place in such narrowly defined contexts as threats targeted at individuals; fighting words targeted directly at individuals; and direct incitements of imminent lawless action that is likely to occur. In these cases, the harm is demonstrable, and is the causal link between the expression and the harm. When it comes to more generalized forms of hate speech,

⁵¹ Timothy C. Shiell, *Campus Hate Speech on Trial* (University of Kansas Press, 1998), p.151.

the best remedies appear to be alternative forms of combating hate speech, which include the rigorous enforcement of laws against discriminatory conduct and hate crimes; government and societal condemnation of racial hatred; and appropriate surveillance of hate group conduct and activity. Ample means short of broadly based censorship exist to combat racism and hate, and which do not pose dangers to the status of freedom of speech and thought.