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## Legal vs. non-legal responses to hateful expression

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### 3 Legal vs. non-legal responses to hateful expression

*Nadine Strossen*

We must recognize the limits of legislation to combat hate speech.<sup>1</sup>

– Adama Dieng, United Nations Special Adviser on the Prevention of Genocide  
(from Senegal)

Legal scholars are dedicated to the theoretical interpretation of hate speech legislation ... but do not examine its actual impact... [I]t is time to verify whether the theoretical expectations stand the test of reality.<sup>2</sup>

– Andrea Scheffler, Friedrich-Ebert-Stiftung (German foundation)

#### **Punishable and protected ‘hate speech’ under US law**

The laws of many countries, including developed democracies, outlaw so-called hate speech. Along with other commentators, I use quotation marks to underscore that the term has no specific agreed-upon meaning, and has been defined by laws in other countries to encompass a wide range of expressions that convey hateful, discriminatory views on the basis of personal characteristics such as race, religion, gender, and sexual orientation. The U.S. Supreme Court has long held that the free speech guarantee in the U.S. Constitution’s First Amendment bars the government from restricting any speech based solely upon its hateful or hated message. The court has stressed that such expression should be countered not by suppression, but rather, by more speech – what is often called ‘counter-speech’. Notably, pertinent decisions have been unanimously endorsed by Justices all across the court’s ideological spectrum.

The Justices’ consensus in these hate speech cases flows from the ‘viewpoint neutrality’ principle, which the court has hailed as the ‘bedrock’ principle underlying the freedom of speech guarantee: i.e. that the government may never regulate speech solely due to the disfavoured, distressing or generally feared nature of its viewpoint or message. Rather, the government may restrict speech in light of factors that go beyond its *content*, to encompass its *context*. Regulation is permissible – indeed, warranted – if, in a particular context, speech (including hate speech) directly causes certain imminent, specific, serious harms that cannot be averted through other means. The Supreme Court has laid out particular criteria for several types of speech that satisfy this general standard, including ‘true

threats', intentional incitement of imminent violence, and targeted harassment. This demanding general standard, which is often called the 'emergency' test, replaced the earlier 'bad tendency' or 'harmful tendency' test, which the court invoked until the second half of the twentieth century. Under that more lenient standard, which is still reflected in the hate speech laws in other countries, the government may punish speech because of a more indirect, speculative, potential connection between the speech and some feared harm it might cause.

In many situations, hate speech is conveyed in contexts that satisfy the emergency principle, and hence it may be restricted. For example, if someone targets hateful expression at another with the intent of instilling a reasonable fear that s/he will be subject to violence, that constitutes a punishable 'true threat'. However, in contrast with most other comparable countries, the US does not permit punishment of hate speech that does not satisfy such appropriately demanding contextual standards. To underscore the important point that even under the speech-protective US approach, significant instances of hate speech may be punished, I use the term 'constitutionally protected hate speech' to signify the subset of hate speech that may *not* be punished. Correspondingly, I use the term 'hate speech law' to signify any law that punishes constitutionally protected hate speech.

My 2018 book *HATE: Why We Should Resist It with Free Speech, Not Censorship* lays out the reasons why censoring constitutionally protected hate speech is at best ineffective, and at worst counterproductive, for advancing the important goals that its proponents seek to promote, which I wholeheartedly support: equality, dignity, diversity, inclusivity, individual well-being, and societal harmony. Accordingly, the anti-censorship case is not dependent on First Amendment tenets, but is also independently justified by universal human rights principles, as well as policy concerns.

## Universal concerns about the problematic impact of hate speech laws

I hope that the general principles and policy considerations I discuss in this chapter will contribute to the understanding of all who seek to advance both free speech and equality anywhere in the world. Indeed, it is noteworthy that the American approach to these issues has been championed by human rights advocates, lawyers, and other experts in international agencies and in many other countries. These international supporters of the American approach have witnessed first-hand the actual impact of hate speech laws in other countries, concluding that, no matter how well intentioned, these laws have been detrimental in practice. Here are just a few recent examples of pertinent statements from these many worldwide 'hate speech' law critics:

- In 2017, the European Centre for Press and Media Freedom, based in Germany, opposed German legislation requiring social media to remove hate speech, explaining: 'Combating illegal incitement to violence, hatred, ... and discrimination is ... crucial.... But ... censoring speech has never

[been] shown to be effective: it is rather by more speech ... that our societies will be helped'.<sup>3</sup>

- In 2017, a racially diverse coalition of prominent South African comedians and satirists called for limiting that country's hate speech laws to essentially track the American approach. The coalition members expressed concern about the laws' censorial impact on humour, including political humour.
- In 2015, the European Commission Against Racism and Intolerance issued a report critiquing European hate speech laws as potentially even counter-productive; the report urged European countries to prioritize non-censorial alternative measures, including counterspeech, concluding that they were 'much more likely' than censorship 'to prove effective in ultimately eradicating' hate speech and its potential harmful effects.<sup>4</sup>
- In 2015, UNESCO (United Nations Educational, Scientific and Cultural Organization) issued a report on 'Countering Online Hate Speech', which stressed that 'Counter-speech is generally preferable to suppression of speech'.<sup>5</sup>
- In 2017, British human rights barristers Amal Clooney and Philippa Webb wrote:

[I]nternational law on insulting speech should be applied in a manner that is ... more protective of speech, in line with the approach espoused by the U.S. Supreme Court under the First Amendment.... Intent to incite hatred, hostility or discrimination should be insufficient to justify criminal sanctions.<sup>6</sup>

- In 2017, Anna Sauerbrey, editor of the German newspaper *Der Tagesspiegel*, wrote:

[T]he American way of dealing with Nazism ... always seemed to me the more mature way of handling threats to liberal democracy. Germany's [outlawing of hate speech] seems like a permanent declaration of distrust in ... argument and ... education.... I have faith in a democratic public's ability to police itself. I wish Germany did.<sup>7</sup>

- In 2017, Auckland University of Technology History Professor Paul Moon stated:

What we need is open debate, which will change racist and intolerant views, not censorship.... If what they say is racist or promoting hate, then we should expose and ridicule it, not just shut it down.<sup>8</sup>

### **Why hate speech laws are at best ineffective and at worst counterproductive**

*HATE: Why we Should Resist It With Free Speech, Not Censorship* quotes many experts who raise serious questions about whether constitutionally protected hate

speech materially contributes to its feared harms: discrimination, violence, and psychic injury. Even if we assumed that these harms were markedly fuelled by constitutionally protected hate speech – as distinguished from hate speech that is punishable even under US law – censorship would not significantly reduce the problematic speech or the feared harms. Moreover, in several important respects, hate speech laws can actually exacerbate rather than reduce the feared harms. In sum, wholly apart from their First Amendment flaws, hate speech laws are bad public policy no matter where they are enforced.

***No correlation between hate speech laws and reduced hateful speech or violence***

*No inter-country correlation*

Many countries with hate speech laws have experienced no positive impact in terms of reducing discrimination; in fact, some governments that have enforced criminal hate speech laws have brutally discriminated on the bases of race, ethnicity, and religion. For instance, Canadian Professors Louis Greenspan and Cyril Levitt noted that ‘[t]he rise of France’s National Front party, which under the leadership of Jean-Marie Le Pen was overtly racist, ... occurred in a country that had supposedly immunized itself’ through hate speech laws.<sup>9</sup> They concluded further that ‘respectable’ racists’ have gained political power in Germany, even though it ‘has some of the toughest anti-hate legislation in the world’. In 2017, a German journalist observed that ‘Germans have long argued over whether’ this legislation ‘has worked’, citing Germany’s ‘severe problem with right-wing extremist violence’, and the strength of the right-wing Alternative for Germany party, whose ‘ideas ... might be construed as racist’, and which received 12.6 per cent of the vote in the September 2017 national elections.<sup>10</sup>

Based on extensive experience in countries around the world, the respected international human rights organization, Human Rights Watch, repeatedly concluded that suppressing hate speech does not effectively promote equality. For example, in 1992, in response to the push for hate speech codes on US college campuses to remedy discrimination, Human Rights Watch endorsed the US opposition to such regulations, explaining: ‘[A] careful review of the experience of many other countries ... has made clear that there is little connection in practice between draconian hate speech laws and the lessening of ethnic and racial violence or tension’.<sup>11</sup> In 2016, Human Rights Watch reached the same conclusion concerning India’s hate speech laws, noting that they ‘are used to stifle political dissent, harass journalists, restrict activities by non-governmental organizations, arbitrarily block Internet sites or take down content, and target religious minorities and marginalized communities, such as Dalits’.

Other experts have concurred. In 2013, the European Parliament acknowledged that hate speech and bias crimes were increasing in European Union countries despite their strong hate speech laws.<sup>12</sup> A 2011 study of hate speech laws that was prepared for the UN High Commissioner for Human Rights

concluded that ‘massive ... criminal regulations’ of hateful speech did ‘not seem to have made a meaningful contribution to reducing racism or ... discriminatory conduct’.<sup>13</sup> Likewise, in his 2016 book, which surveyed the experience of many mature democracies with hate speech laws, Oxford University professor, Timothy Garton Ash, concluded that there is no correlation between the existence of such laws and any reduction in the amount of either hateful speech or discriminatory conduct.

This general pattern is illustrated by anti-Semitic expression and violence. In 2013, the European Union Fundamental Rights Agency conducted a survey of European Jews – 76 per cent said that anti-Semitism had become worse in their countries within the last five years, despite the prevalence of European hate speech laws.<sup>14</sup> Similarly, recent surveys by the Anti-Defamation League showed that France had twice the level of anti-Semitism as the United States, despite France’s vigorous enforcement of its strict hate speech laws against anti-Semitic expression.<sup>15</sup> Jacob Mchangama, founder and director of Justitia, a Copenhagen-based think tank, commented that these laws ‘may have actually increased’ anti-Semitism, and that ‘laws against denying the Holocaust ... may have even encouraged Holocaust denial by endowing it with a veneer of ... intellectual martyrdom’.<sup>16</sup>

### *No intra-country correlation*

There is no evidence that countries that enact hate speech laws experience a decline in the amount of either hateful speech or discriminatory behaviour. Of the many illustrations of this non-correlation, I will cite just a few. Britain adopted its first hate speech law in 1965.<sup>17</sup> Recalling his own personal experience of racist attacks, as someone who had been born in India, British writer Kenan Malik has noted that the ensuing decade ‘was probably the most racist in British history’, involving not only ‘Paki-bashing’, when racist thugs would seek out Asians to ‘beat up’, but also openly racist public institutions that included the police [and] immigration officials.<sup>18</sup> Focusing on the current European situation, Agnès Callamard, who is Director of Columbia Global Freedom of Expression, noted that although ‘European governments have produced more laws ... prohibit[ing] “Hate Speech” than any other region, with the possible exception of the Middle East’, European countries ‘are ravaged by intolerance and ... increasing inequality’, citing ‘rising levels of violence and hate, anti-immigrant, anti-Roma and anti-Semitic rhetoric.’<sup>19</sup>

Another pertinent study was conducted by two Australian professors who examined the impact of that country’s multiple hate speech laws from 1989, when the first such law was enacted, through to 2010. The authors concluded that after the laws were enacted, minority communities in Australia continued to experience ‘high levels of verbal abuse’ and in some cases even an increase in such abuse.<sup>20</sup> As one final example, I will cite a UNESCO research project that tracked hate speech in Kenya leading up to its 2013 elections. Kenya had adopted a hate speech law in 2008 in an effort to stem the type of rampant inter-group

violence that had occurred during the 2007 to 2008 post-election period. Notwithstanding this law, the study concluded that hate speech, including calls for discriminatory violence, was ‘still ... serious [and] extensive.’<sup>21</sup>

### *The rise of Nazism in Germany despite hate speech laws*

Given the horrors of the Holocaust, even diehard free speech stalwarts would support hate speech laws if they would have averted that atrocity. That is certainly the case for me, as the daughter of a German-born Holocaust survivor, who nearly died at Buchenwald. That also is true for international human rights champion Aryeh Neier, who escaped from Nazi Germany as a child with his immediate family, while the Nazis slaughtered his extended family. Neier was the ACLU’s executive director between 1977 and 1978, when the ACLU successfully – but controversially – defended the First Amendment rights of neo-Nazis to hold a demonstration in Skokie, Illinois,<sup>22</sup> a town that had a large Jewish population, many of whom were Holocaust survivors. He declared:

I am unwilling to put anything, even love of free speech, ahead of detestation of the Nazis.... I could not bring myself to advocate freedom of speech in Skokie if I did not believe that the chances are best for preventing a repetition of the Holocaust in a society where every incursion on freedom is resisted. Freedom has its risks. Suppression of freedom, I believe, is a sure prescription for disaster.<sup>23</sup>

Proponents of hate speech laws assume that the enforcement of such laws might have prevented the spread of Nazi ideology in Germany, but the historical record belies this assumption. Throughout the Nazis’ rise to power, there were laws on the books criminalizing hateful, discriminatory speech, which were similar to contemporary hate speech laws. As noted by Alan Borovoy, general counsel of the Canadian Civil Liberties Association, when he opposed Canada’s current hate speech legislation:

Remarkably, pre-Hitler Germany had laws very much like the Canadian anti-hate law. Moreover, those laws were enforced with some vigour. During the fifteen years before Hitler came to power, there were more than two hundred prosecutions based on anti-Semitic speech.<sup>24</sup> And, in the opinion of the leading Jewish organization of that era, no more than 10% of the cases were mishandled by the authorities.

The German hate speech laws were enforced even against leading Nazis, some of whom served substantial prison terms. But rather than suppressing the Nazis’ anti-Semitic ideology, these prosecutions helped the Nazis gain attention and support. For example, Danish journalist Flemming Rose reports that between 1923 and 1933, the virulently anti-Semitic newspaper *Der Stürmer*, published by Julius Streicher, ‘was either confiscated or [its] editors [were] taken to court on

... thirty-six occasions.’ Yet, ‘[t]he more charges Streicher faced, the greater became the admiration of his supporters. The courts became an important platform for Streicher’s campaign against the Jews’.<sup>25</sup>

The major problem with Germany’s response to rising Nazism was not that the Nazis enjoyed too much free speech, but that the Nazis literally got away with murder. In effect, they stole free speech from everyone else, including anti-Nazis, Jews, and other minorities.

### *Factors contributing to hate speech laws’ ineffectiveness*

The lack of correlation between hate speech laws and reduced discrimination or violence is not surprising in light of several features of such laws, which make them ineffective in reducing hateful speech and thus in reducing the harms that such speech is feared to cause.

#### *Inevitable under enforcement*

To begin with, hate speech regulations are invariably unduly vague, so that those charged with enforcing them must make discretionary judgments. Some judgments are inevitably overinclusive, penalizing speech that is important for individual freedom, as well as for democratic self-government. Let me cite just two examples of such expressions that have recently been punished under European hate speech laws: a French LGBT rights leader’s use of the term ‘homophobe’ to describe the leader of an opposition group; and a British politician’s quotation of a critical statement about Islam from a book by Winston Churchill, during a campaign speech.

The sweeping discretion with which hate speech laws inherently invest enforcers is also inevitably exercised in ways that are underinclusive, immunizing politically powerful hatemongers. The underenforcement problem is especially acute in countries that lack longstanding democratic structures or traditions, where powerful political figures routinely engage in speech that violates their countries’ hate speech laws, but are not held legally accountable for doing so. This is true, for example, in Poland, where popular politicians target gays, Jews, Roma, and other ethnic minorities;<sup>26</sup> in Hungary, where powerful political groups target Roma and Gypsy minorities;<sup>27</sup> in Zimbabwe, where former President Robert Mugabe’s loyalists targeted his political opponents;<sup>28</sup> in India, where powerful politicians, including Prime Minister Narendra Modi, target marginalized minority castes, religions, and sects;<sup>29</sup> and in Rwanda and Kenya, where government officials target ethnic minorities.<sup>30</sup> Likewise, Singaporean LGBT rights activists have complained that ‘the LGBT community in Singapore ... experience[s] hate speech ... in public statements by influential newsmakers, such as politicians or religious leaders,’ but receives ‘no ... protection’ under that country’s hate speech laws.<sup>31</sup> Hong Kong Baptist University professor Cherian George has concluded that hate speech laws are less effective than ‘US political culture’ in constraining ‘politicians who indulge in hate

speech,' with the result that 'hate speech appears more flagrant and prevalent in elections in India than in the United States, despite the wider latitude that the First Amendment offers American politicians.'<sup>32</sup>

Ironically but predictably, it is precisely in those countries where there is the most discrimination, and the most hate speech, that authorities are least likely to enforce hate speech laws designed to prevent or redress such discrimination. This point was stressed in a study of such laws in Latin America by Fordham Law School professor Tanya Hernandez, an internationally recognized comparative race law expert, who concluded:

Entrusting the enforcement of ... [a] criminal [hate speech] law to public authorities risks having the law undermined by the complacent inaction of public officials who may harbor the same racial bias as the agents of hate speech. This is a particular danger in Latin America, where police officers are consistently found to discourage Afro-descendants from filing racial discrimination complaints, and are often the perpetrators of discrimination and violence themselves.<sup>33</sup>

#### *Driving some expression underground*

[A]s my grandmother used to tell me, every time a fool speaks, they are just advertising their own ignorance. Let them talk. If you don't, you just make them a victim, and then they can avoid accountability.<sup>34</sup>

(President Barack Obama, 2016 Howard University Commencement address)

Censorship drives some discriminatory expression underground, with important negative consequences. First, because some people who harbour hateful, discriminatory ideas are deterred from expressing them, we don't realize who they are. We therefore lose the opportunity to dissuade them and to monitor their conduct to ensure it is not discriminatory. Second, we lose the opportunity for people to listen to these ideas and to realize their flaws. Third, those of us who deplore such ideas are deprived of the opportunity to formulate and communicate responses, and everyone else is deprived of the opportunity to hear such exchanges. In the long run, an open airing of discriminatory ideas, and an ensuing debate about them, may well be more effective in curbing them than censorship would be. Fourth, as a 2015 UNESCO report observed: '[H]ate speech is ... a window into deeply-rooted tensions and inequalities, which ... do need addressing'.<sup>35</sup> Hate speech thus has the positive impact of energizing citizens to engage in social justice activism in an effort to address the discrimination and hatred that plague our society. As the old saying puts it, 'Sunlight is the best disinfectant.'<sup>36</sup>

***Incentivizing more palatable and thus more potent hateful speech***

Hate speech laws induce some speakers with hateful ideas to ‘sugarcoat’ them, with the perverse result that they are more widely circulated and accepted. Based on their study of the hate speech laws in six European nations, professors Louis Greenspan and Cyril Levitt concluded that these laws had forced politicians with racist agendas to adopt ‘carefully worded racist programs,’ making them ‘more potent’. They drew a telling contrast between the sanitized racist expression in Europe and the American Nazi Party’s uncensored speech: ‘With slogans such as “Hitler was right – he gassed the Jews,” ... the [U.S.] racist right could make no headway in the general population.’<sup>37</sup>

*Increasing attention and support*

Censoring any material increases an audience’s desire to obtain it and disposes the audience to be more receptive to it. By casting the silenced speaker as a free speech martyr, censorship also ousts critics from the moral high ground. Not surprisingly, then, many hatemongers welcome hate speech laws and prosecutions under them. Consider an early major prosecution under Canada’s federal criminal hate speech law against James Keegstra, a virulently anti-Semitic public school teacher. He was charged under the law in 1984, two years after he had been dismissed from his teaching job because of his anti-Semitic indoctrination of students.<sup>38</sup> The ensuing protracted legal proceedings ultimately resulted, in 1996, in a one-year suspended sentence, one year of probation, and 200 hours of community service. As University of Calgary law professor Peter Bowal summed up the case:

[Fourteen] years from the time Keegstra was dismissed from his teaching job, after [legal proceedings] ... costing an estimated million dollars, an unrepentant Keegstra was sentenced to the equivalent of a tap on the wrist.... Ironically, that public stage granted him 14 more years to publicize his opinions. The extensive media coverage of the cumbersome legal saga may even have garnered Keegstra more sympathy.

This outcome, Bowal commented, ‘may explain why there have been few successful prosecutions’ under Canada’s criminal hate speech law in the years since.<sup>39</sup>

*The technological impossibility of silencing hate speech*

Given the recent explosion of decentralized communications technologies, including the internet and mobile phones, today it is practically impossible to block any type of expression completely. Even after online hatemongers have been imprisoned under hate speech laws, their websites remain active. For example, Ernst Zundel, a purveyor of neo-Nazi propaganda, was prosecuted and

convicted for engaging in hate speech in both Canada and Germany, in litigation that dragged out for 11 years, from 1996 to 2007. But as one expert noted in 2010, ‘Even now, Zundel’s website is still running and regularly updated with his “letters from prison” despite his incarceration.’<sup>40</sup>

### *Enforcement frustrations*

As illustrated by the Canadian *Keegstra* case, an additional drawback of hate speech laws from the perspective of the people the speech disparages is that their eventual remedy, and the perpetrator’s eventual penalty, if any, often comes too late and at too high a transaction cost to afford meaningful relief. The most thorough study of the enforcement problems in these cases was undertaken by Australian professors Katharine Gelber and Luke McNamara, who reviewed the enforcement of their country’s hate speech laws. Because the Australian laws are typical, there is no reason to believe that the problems Gelber and McNamara documented are in any way out of the ordinary. They concluded that ‘pursuing a remedy under Australia’s hate speech laws is arduous, stressful, time-consuming, and possibly expensive.’ Individuals who were targets of such speech, as well as their lawyers and the organizations that supported them, consistently complained that ‘you might win in the end, but it’s going to take so much out of you.’ Too often, the complainants end up winning what they dismiss as merely ‘a pyrrhic victory’.<sup>41</sup>

### ***How effective are hate speech laws at reducing ... intergroup hostility?***

Far from reducing intergroup violence, hostility, and tensions, hate speech laws often tend to fuel them. This problem is so prevalent that the Singaporean communications scholar, Cherian George, who has studied these laws in various countries, coined a term to describe it: ‘hate spin’. Politicians ‘spin’ expression by rival groups as hate speech, thus bringing charges under their countries’ laws, thereby stirring up hostilities, to their political advantage.<sup>42</sup>

Even in developed democracies, enforcement of hate speech laws is likely to increase, not decrease, intergroup tensions. Experience teaches that the most effective way to reduce or resolve intergroup conflicts is through cooperative, conciliatory approaches, rather than through ‘lawfare’.

Hate speech laws curb the sort of intergroup dialogue about bias that experts consider a precondition for reducing intergroup hatred and discrimination. As Pierre Bierre of Stanford University’s Neuropsychology Laboratory has observed, ‘[T]he first step to resolve conflicts is to get people to open up and share unedited gut feelings, ... and the second step is to remove the listening blocks that prevent the other side from hearing those feelings.’ For that reason, he criticizes hate speech laws, which have a chilling impact on both open expression and open-minded listening.<sup>43</sup>

*... Retaliatory violence?*

Another potential harm to which constitutionally protected hate speech is feared to contribute to is retaliatory violence against the speaker or the speaker's allies by those who despise the message. If a government capitulated to such threats of retaliatory violence by suppressing the speech, that would only encourage further threats and violence rather than curbing them. This was a recurrent theme throughout the US civil rights movement, when courts refused to halt speeches and demonstrations by civil rights advocates because of threatened and even actual violence by opponents of their cause.

In 2012, the then President, Barack Obama, flagged this concern (among others) in explaining to the UN General Assembly why the United States did not censor the anti-Islamic video that was then (erroneously) believed to have spurred the murderous attacks on the U.S. Embassy in Benghazi, Libya: '[F]or us to respond in that way to hateful speech empowers any individual who engages in such speech.... We [would] empower the worst of us.'

*The costs of hate speech laws outweigh their benefits*

The case for censoring constitutionally protected hate speech is often based largely on reciting the potential harms to which such speech is feared to contribute, with no rigorous analysis of other factors that we logically must consider in evaluating whether such laws are warranted. As I have shown, though, hate speech laws do not effectively suppress constitutionally protected hate speech or its feared harmful impact, and might even aggravate at least some feared harms. These considerations provide an independent basis for rejecting hate speech laws, even beyond the grave damage they do to freedom of speech, equality, and democracy. Further, as I discuss in more detail below, experts concur that non-censorial alternative measures, including counterspeech, are much more effective than hate speech laws in reducing both the incidence and potential harmful impact of constitutionally protected hate speech.

**How non-censorial methods effectively curb the potential harms of constitutionally protected hate speech**

In 2015, the European Commission against Racism and Intolerance (ECRI) issued a report strongly urging European nations to pursue non-censorial responses to hate speech. This is especially note-worthy because in recent decades many European nations have enacted hate speech laws with the encouragement of regional bodies, including ECRI. But, as a result of its monitoring of the efforts of European nations to curb hate speech and discrimination, ECRI concluded that alternative, non-censorial measures are '*much more likely* to prove effective in ultimately eradicating hate speech' and its potential harmful effects<sup>44</sup> than laws forbidding hate speech.

### Counterspeech

[T]he strongest weapon against hateful speech is not repression; it is more speech – the voices of tolerance that rally against bigotry ... and lift up ... mutual respect.<sup>45</sup>

(President Barack Obama)

In the end, we will remember not the words of our enemies, but the silence of our friends.

(Martin Luther King, Jr.)

[H]ardly any of the voices that should have been raised in moral protest against Nazism were to be heard in Germany or the territories conquered by the Reich. Where political and religious leaders did speak out against the Nazis, notably in ... Denmark, most Jews were saved. Those Jews who died ... were victims of the silence of Europe's moral leadership as they were victims of the Nazis.<sup>46</sup>

(Aryeh Neier, international human rights leader, and a Holocaust survivor)

Speech that counters the potentially harmful impact of hate speech comprises a broad range of expression, including information and ideas that directly refute the hateful message; broader, proactive educational initiatives; and expressions of remorse by discriminatory speakers. The internet not only makes it easier than ever to convey hateful messages; it also makes it easier than ever to rebut them. What's more, the internet makes it easier to measure the extent and impact of counterspeech. Although the field is still young, there have been promising online counterspeech initiatives and studies of their efficacy. For example:

- Google has added to its website a disclaimer about sites containing hateful messages. If any such site shows up prominently in response to a search request, the user will see an explanation of how search results are ranked, as well as an apology, to dispel any impression that Google endorses such messages.<sup>47</sup>
- YouTube has developed videos to counter hateful messages.<sup>48</sup>
- Facebook has created tools that enable users to privately notify authors of content they find objectionable before formally asking Facebook to remove it.<sup>49</sup>

Facebook engaged the US public policy organization, Demos, to undertake research about the extent to which counterspeech is produced and shared on its platform. Demos' initial report, issued in 2015, found that hateful online speech is 'often met with disagreement, derision, and counter-campaigns,' and that this 'crowd-sourced response' has significant advantages over suppression: '[I]t is faster, more flexible and responsive, [and] capable of dealing with [problematic expression] from anywhere and in any language'. Some Facebook users actively

search out hate speech for the express purpose of challenging it. Some counter-speech is shared publicly, and some is conveyed via private communications with the speaker. The report concluded that some types of content and format were especially effective at countering hate speech: photos and videos; ‘constructive’ comments; and comments about specific policy issues.<sup>50</sup>

In 2016, a report was issued about counterspeech on Twitter, co-authored by a group of scholars from the United States and Canada. The report concluded that hateful and other extremist speech was most effectively undermined by counterspeech rather than by removing it. Echoing the Demos report about Facebook, the Twitter report concluded that images are more persuasive than text alone, and that humour, including satire, is especially powerful. The report indicated that by combining these two approaches, humour and images, ‘people who do not share a language,’ can effectively ‘counterspeak together, often in large numbers and across cultural and national boundaries.’<sup>51</sup> Among the examples the report cited was the following:

Dani Alves, a [black] Brazilian soccer player, was subjected to a humiliating racist gesture when a spectator threw a banana at him on the field.... Another player ... quickly posted an image of himself eating a banana, on the hashtag #Somostodosmacacos, meaning ‘we are all monkeys’. That hashtag ... spread quickly.... [T]housands of people posted banana-eating selfies in spontaneous support.<sup>52</sup>

Impressively, the Twitter report noted situations in which counterspeech was able to accomplish ‘lasting changes in beliefs’ even when the speaker seemed ‘firmly committed ... to hateful ideology’ and ‘to declaring it publicly.’<sup>53</sup> The report identified the strategies that were successful in these situations, including the use of an empathic or kind tone in response to the speaker rather than targeting the speaker as hateful or racist (although identifying the speech as such).<sup>54</sup>

Paradoxically, experts concur that in some circumstances the most effective form of counterspeech can be silence. By deliberately choosing to ignore provocative, hateful speakers, silence can powerfully convey implicit messages of disdain, while at the same time denying hateful speakers the attention they seek and often get from sparking controversy. Those engaged in counterspeech should be careful not to act in ways that are ultimately counterproductive, including efforts to silence hateful speakers through aggressive counter-demonstrations. Although such tactics might seem morally justified, they almost always backfire.

*Empowering disparaged people to engage in counterspeech*

I believe deeply that minority group members who are discriminated against ... have the ... responsibility [to] speak on their own behalf.

(Theodore Shaw, former director-counsel and president, NAACP Legal Defense and Educational Fund)

We have to teach [our young people] how to deal with adversarial situations. They have to learn how to survive with offensive speech they find wounding and hurtful.

(Gwen Thomas, U.S. civil rights activist)

The ... protection [of a 'hate speech' law] incapacitates.... To ... be told that white folks have the moral character to shrug off insults, and that I do not.... That is ... the most racist statement of all!<sup>55</sup>

(Conservative political activist, Alan Keyes)

While all of the activists quoted above are African-American, they are ideologically diverse, spanning the left-right spectrum. They all agree, though, that hate speech laws that aim to promote equal rights in fact do the opposite, through paternalism and protectionism. Accordingly, these activists urge those who are disparaged by hate speech to confront it directly. Admittedly, this is often easier said than done, for such speech can have both the intent and the effect of silencing those it disparages.

We have seen increasing social justice advocacy in the United States in recent years, with members of minority groups actively leading and engaging in such efforts, including on campus. Surveys indicate that this trend promises to continue. It is essential for the well-being of both individuals and society that we encourage and facilitate such counterspeech rather than adopting the disempowering, anti-democratic censorial approach.

As I acknowledged above, in some instances the adverse psychic and emotional impact of hate speech might be so incapacitating for some people that they are unable to engage in effective counter-speech, at least in the moment, and other people who are exposed to such speech might lack the education or access to means of communication that would make their counterspeech effective. These are serious concerns, which can and must be addressed through a range of measures, including: proactive counselling and training about engaging constructively with hate speech; education about utilizing social media and other communications vehicles for drawing attention and responding to hate speech; and providing access to helpful technology, organizations, and other resources. Fortunately, there is a rapidly expanding treasure trove of easily accessible online resources.

A related problem with advocating counterspeech by those who are targeted by hate speech – as the above-quoted African-American activists do – is that it is arguably unfair to expect the targeted persons to shoulder this burden. While this is a significant issue, there are countervailing considerations. First, such individuals of course have no *duty* to engage in counterspeech. Second, others in our society who are committed to equality and individual dignity have a moral responsibility to condemn hate speech and to express support for people whom it targets. Third, the time, effort, and energy that disparaged people expend to engage in counterspeech can be viewed as a sound investment that will yield benefits for them personally, as well as for all concerned. Barack Obama has

repeatedly articulated this view. Having exhorted minority students to engage in counterspeech in response to racist speech, he acknowledged that this ‘may not seem fair, but ... if you want to make life fair, then you’ve got to start with the world as it is.’ As he told the 2017 Howard University graduating class: ‘[Y]ou have the responsibility to speak up in the face of injustice.... And you might as well start practicing now, because ... you will have to deal with ignorance, hatred, racism ... at every stage of your life.’<sup>56</sup>

### *Education*

No one is born hating another person because of the colour of his skin or his background or his religion.... People must learn to hate, and if they can learn to hate, they can be taught to love.<sup>57</sup>

(Nelson Mandela)

Education is a vital form of counterspeech. One key educational strategy is to convey accurate, positive information about traditionally marginalized groups. This proactive approach can be pursued in myriad ways, including through the school system, mass media, social media, and entertainment. Social science studies have shown that positive media depictions reduce prejudice and promote a more tolerant and integrated society.<sup>58</sup> These studies parallel the famous ‘intergroup contact theory’ that psychologist Gordon Allport pioneered in the mid-twentieth century about the positive impact of actual contact with people from other groups. In 1956, sociology professors Donald Horton and Richard Wohl coined the term ‘para-social interaction’ to refer to the illusion of face-to-face relationships that audience members sensed with mass media characters.<sup>59</sup> Since then, social scientists have continued to document that media exposure generates the same prejudice-reducing impact as real-world intergroup contact.

Initiatives to counter discrimination through media depictions began in the immediate aftermath of the Holocaust. In 1947, for example, Hollywood released two films that exposed the anti-Semitism that was still pervasive in North America: *Gentleman’s Agreement* and *Crossfire*. Although both films were artistically acclaimed, they were controversial – and almost not made – because of the very anti-Semitism they were created to counteract.<sup>60</sup> Today’s ongoing controversies about ‘#Oscarsowhite’ and ‘#Emmysowhite’ make clear that, for all the progress the US entertainment industry has made since 1947, much remains to be done.<sup>61</sup>

Many other educational initiatives can curb the potential negative effects of hate speech. For members of minority groups who are disparaged by hate speech, it is especially important to develop the skills and outlooks that can help them to avert or minimize the potentially adverse psychic and emotional impact of such speech, and to refute its message. Some psychologists endorse teaching college students and others general cognitive-behavioural therapy techniques for reducing anxiety and other negative reactions that might result from stressful situations, including exposure to hate speech.<sup>62</sup> Psychologists also endorse educational approaches for developing people’s resilience in the face of such

situations – their ability to maintain their sense of self-esteem and to carry on effectively with their work and personal activities.

### *Apologies*

‘I’m sorry’ are the two most healing words in the English language.<sup>63</sup>  
(Psychologist, Harriet Lerner)

A specific ‘more speech’ measure that experts have hailed as mutually beneficial, both for those who engage in hate speech and for those whom they disparage, is a refreshingly simple one: a sincere apology. Proponents of hate speech laws stress that targeted speech can contribute to adverse psychological and physiological effects. It therefore should not be surprising that healing words, in the form of sincere apologies, can have positive psychological and physiological benefits. Psychotherapist Beverly Engel cites research showing that ‘receiving an apology has a noticeable positive physical effect on the body... [I]t actually affects the bodily functions of the person receiving it – blood pressure decreases, heart rate slows and breathing becomes steadier.’<sup>64</sup>

Experts warn, however, that the benefits of sincere apologies do not flow if they are coerced. According to Engel, an apology that you make because someone else tells you it is the right thing to do will lack healing power.<sup>65</sup> This is yet another reason why we should address discriminatory speech through a constructive educational approach rather than an adversarial, punitive one.

The actual experience under hate speech laws confirms the psychologists’ teachings. Australian Professors Katharine Gelber and Luke McNamara concluded that one reason why their country’s hate speech laws are counterproductive is that they undermine the constructive remedy that a sincere apology can afford. People who are disparaged by hateful, discriminatory speech initially tend to seek only genuine apologies. However, when the protracted legal proceedings finally do culminate with a court-ordered apology, this frustrates complainants who seek a genuine acknowledgement of wrongdoing.<sup>66</sup>

### *Counterspeech by government and campus officials*

Social scientists have confirmed that counterspeech by leaders in the pertinent community is especially persuasive in rebutting hateful speech and in countering its potential harmful effects. Government officials may engage in counterspeech as long as their counterspeech does not, in practical effect, have such a deterrent effect on the ideas at issue as to become the functional equivalent of censorship. If it is difficult to draw the line between censoring and censoring in a specific situation, the official should refrain from comment. To reduce the danger of de facto suppression, officials who are engaging in counterspeech should stress that they are not seeking to punish the speaker.

Likewise, in a university setting, where intellectual freedom is especially important, campus officials should not convert their ‘bully pulpit’ into a pulpit

for bullying speakers whose views they oppose. A university should avoid creating even the appearance of ideological orthodoxy. If university officials specifically criticize particular hateful messages, they should also emphasize their support for the freedom of all members of the university community to express contrary views, to minimize the risk that the officials' statements will chill discussion and dissent.

### ***Developing thicker and thinner skin***

No one can make you feel inferior without your consent.<sup>67</sup>

(Eleanor Roosevelt)

For our own well-being, we should develop relatively thick skins, so that our sense of self-confidence is not threatened by hateful words. This is how I understand that old nursery rhyme, 'Sticks and stones may break my bones, but words will never hurt me'. It is not a statement of fact; all of us have been hurt by words in myriad ways. Given words' indisputable power to hurt us, the old nursery rhyme is not a descriptive statement, but rather an exhortation; it encourages us to respond to words in a way that empowers us and disempowers those who seek to hurt us.

To be sure, some of us are less able than others to withstand the hurtful impact of particular wounding words, including hate speech. A member of a marginalized minority group will likely find it harder than others to face down discriminatory words with the attitude that they 'will never hurt me'. Moreover, each of us has our own unique degree of (in)sensitivity to hurtful words; we range across the spectrum from the most thin-skinned to the most thick-skinned. But no matter who we are as individuals, and no matter which societal groups we belong to, we can, and must, increase our capacity to resist the hurtful potential of hateful, discriminatory words that target us, while also becoming more sensitive to such words that target others. In short, we should develop a thicker skin on behalf of ourselves and a thinner skin on behalf of others. Behavioural psychologists and other experts attest to having successfully taught methods for doing so.

### ***Outreach and interaction***

Social science studies have confirmed what everyday experience suggests: that the most effective way to decrease people's negative attitudes toward members of any societal group is to give them an opportunity to get to know one another.<sup>68</sup> The 'inter-group contact theory' was first formulated by Harvard professor Gordon Allport in his trailblazing 1954 book *The Nature of Prejudice*. Allport posited that interaction is especially constructive in settings such as school, work, and community groups, where people collaborate on common endeavours. Allport's findings have been corroborated by a vast social science literature, which documents that inter-group contact plays a vital role in reducing prejudice

and promoting a more tolerant, integrated, and harmonious society. The evidence demonstrates that contact overcomes prejudice and forges positive relationships among people from many different groups, including racial and ethnic groups, the elderly, LGBT persons, mentally ill people, persons with disabilities, and AIDS victims. A 1993 study of heterosexuals' attitudes toward gay men, for example, found that the extent of contact predicted these attitudes better than any other variable, including political ideology.<sup>69</sup>

### ***Self-restraint***

In Europe, we have more legal limitations on speech but less social pressure, while in the U.S. you have very few legal limits but far more social pressure.<sup>70</sup>

(Flemming Rose, Danish journalist)

Just because one has the right to say something does not mean that it is right to do so. So when critics tell us that some things we say are unnecessarily hurtful or insensitive, even unintentionally, we should rephrase our message whenever we can do so without undermining its substance or viewpoint. When we choose to do that, we are exercising our free speech rights – thoughtfully.

In addition to voluntarily chosen sensitive and respectful language, another type of voluntary self-restraint involves 'trigger warnings', alerting an audience that one is going to use language or discuss a topic that might upset some audience members. Such warnings should not be mandated by government or by university officials. As the Supreme Court has long recognized, forcing people to say something they do not choose to say violates the principles of free speech and academic freedom as fully as forcing people *not* to say something they want to say.<sup>71</sup> But if a teacher or other speaker chooses to issue such a warning, that is an exercise of free speech. Moreover, if it is offered with the intent and effect of facilitating certain audience members' engagement with the subject, it could foster free speech, rather than suppressing it.

In addition to individual self-restraint, public- and private-sector entities may discourage the use of hate speech, and in some contexts may even penalize such speech. Many organizations have restricted hate speech as a matter of business practice and professional ethics. Such self-regulation is one of the non-censorial alternatives to hate speech laws that the ECRI (the European Commission against Racism and Intolerance) has endorsed. Indeed, the ECRI concluded that it 'can be the most appropriate and most effective approach to tackling hate speech'.<sup>72</sup>

### **Conclusion**

The evidence that this chapter discussed supports the conclusions of many expert individuals and organizations around the world – that counterspeech and other

non-censorial alternatives are much more likely than hate speech laws to prove effective in limiting hate speech and its possible harmful effects. This constitutes an independently sufficient and universally relevant basis for rejecting hate speech laws, even beyond their damage to freedom of speech, democracy, equality, and societal harmony.

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