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Similar Interpretations, Different Conclusions: The Criminalization of Hate Speech in the West

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The United States is unique internationally in that hate speech is not considered a criminal offense. Drawing from a sample of Western countries and their respective statutes, the analysis will look at different nations' interpretations of hate speech criminality. This study identifies common patterns in international criminal legal codes and compares them to U.S. jurisprudence, focusing on content neutrality and the ideological content of these laws. It was found that hate speech statutes internationally tended towards content neutrality, were structured similarly to anti-defamatory codes, and generally did not result in amendments/extensions of new regulatory laws. These findings imply a closer relationship between the logic of hate speech criminality to U.S. jurisprudence than otherwise assumed.

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I. INTRODUCTION

Hate speech is a controversial topic in the United States. From cases of public university speakers to cross burning, American law has invoked the First Amendment as permitting all types of expression, regardless of content. However, this has come into conflict with what is legitimately considered a criminal offense. Namely, the "Fighting Words" clause of the Amendment deems speech that leads to violence as punishable in itself (e.g., threats, libel, slander); raising the question as to whether bigoted speech constitutes fighting words in the United States.[1] This has made hate speech, it is argued, difficult to define: U.S. legal tradition has ruled that the highlighting of one expression as discriminatory while another as not constitutes arbitrary censorship. Thus, the Supreme Court has essentially built a position of *discriminatory, but for whom?* concerning the effects of hateful expression. Concurrently, it has ruled that since defining hate speech criminally necessitates answering this question, any resulting restrictions on expression would lead to the violation of the First Amendment rights of at least one group that the hateful speech concerns. Such is the central antagonism, within the American legal context, as to defining hate speech.

The existence of this conflict stands in marked contrast to almost all the rest of the world. From France to China, a vast majority of nations in the globe have criminal stipulations for speech that has content deemed racist, sexist, and otherwise discriminatory; in this regard, the United States is unique. Particularly of interest is how nations, typically conceived of as having similar cultural, political, and legal values as the United States—that is, the West—fit within this contrast, due to their similarity, to U.S. law and

1. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Here, the Court ruled that certain language, even absent of a specific threat, is subject to restriction whilst not violating the First Amendment, thus constituting "'fighting' words." Specifically, "Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574.

jurisprudence. Further, if these international anti-hate speech measures exhibit this similarity to U.S. jurisprudence, can they perhaps be justified within the American context since no such law exists, and in what form? This analysis seeks to explore these topics, firstly, by outlining several dynamics in defining hate speech; secondly, by defining what constitutes the West; and thirdly, by examining how international hate speech laws inform American jurisprudence.

II. ISSUES IN DEFINING HATE SPEECH

Internationally comparative research on hate speech, to date, is scarce and has not attempted to empirically assess statutes of various countries. Subsequently, much work has remained value-centered, in that analyses extend to commentaries on general trends in U.S. and European law, rather than extensive collection of the laws themselves. Additionally, researchers have observed that legal practice in America and the rest-of-the-West differs in presuppositions of what either side is accomplishing through rulings on hate speech. For example, political scientist Erik Bleich surmises that "scholarship suggests" that American citizens are culturally "more supportive of expansive free speech protections (in support of the value of liberty), whereas Europeans may weigh other values (such as human dignity and personal honour)."[2]

Ironically and dangerously, the assignment of these values to either American or European legal practice may more so reflect pre-conceived notions emerging from this alleged divide between the two perspectives, rather than the actual content or realization of either party's penal codes. In other words, the scholar may see a trend regulating hate speech and attach the protection of human dignity to it, while the actual laws in question have no mention nor justification of such a thing. Or, in a more complicated situation, seemingly opposite speech-regulatory laws and rulings may reflect the same set of values. This is explicitly witnessed when most Western and American courts make their respective rulings on the same justification—that, through their respective laws which criminalize or protect hate speech, they are upholding a democratic society.

In a third scenario—which present scholarship has given the least attention—both an American and Western legal conclusion are the same but are treated as representative of separate philosophies. Human dignity as a concept, in particular, heavily embodies this third scenario. The concept appears explicitly in non-American Western legal codes to the extent that it carries significant weight in evaluating hate speech. Essentially, even if the speech

2. Erik Bleich, *Freedom of Expression Versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe*, 40 J. ETHNIC & MIGRATION STUD. 283, 285 (2014).

does not constitute something to be empirically proven as entailing a physical threat, the violation of one's human dignity may still justify punishing a hateful expression.[3] From Canada to Germany, Western legal codes have made great mention of this idea, often intertwining it with their foundational legal principles. The landmark 1999 Canadian case *Law v. Canada (Minister of Employment and Immigration)*, for example, establishes human dignity as embedded in the concept of equality within the Canadian constitution and, consequently, meriting a system of evaluating its presence. From the perspective of the Supreme Court of Canada, these principles prevent against "perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society."[4] In stark contrast, America has no explicit mention of the concept of human dignity in its jurisprudence, all the while exhibiting a broader, more relaxed status of hate speech criminality.

However, it would be a mistake to view these two characteristics as representative of an irreconcilable contradiction with broader, Western hate speech philosophy, rulings, or penal codes (or that these two factors are co-determinant). For example, in the case of *Chaplinsky v. New Hampshire*, in which a man was arrested for calling another a fascist, the Supreme Court upheld the punishment.[5] This reveals that, even within the American framework, making a certain expression may constitute grounds for criminal punishment. Thus, the same concepts embedded in the framework of America's Western cousins have been practically implemented in U.S. law, whilst U.S. law is treated, to varying degrees, as hosting an exceptional set of inalienable qualities that other Westerners are estranged from and vice versa.

Interestingly, the Supreme Court of the United States also found that the comments Chaplinsky had made did not constitute free speech in the first place, but simply were threatening language, and thus did not merit the protection of the First Amendment, something which (as we shall see later) the European Court of Human Rights has similarly ruled.[6] Therefore, in the debate between the two "sides" (United States and the rest-of-the-West)—

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3. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 521-31 (2009). Here, Tsesis discusses international norms for the evaluation of hate speech—"The prevalent international trend to regulate hate speech is grounded in what, to borrow Martha Nussbaum's description of constitutional governance, is meant to 'secure for all citizens the prerequisites of a life worthy of human dignity.'" *Id.* at 521. The legal concept of human dignity thus tends to emphasize the guarantee of an environment free from hatred ("the prerequisites of a life"), rather than the establishment of a direct line of cause-and-effect between speech and a criminal act. *Id*. This may also explain the focus anti-hate speech legislation has on *incitement to violence*—that is, potential, indirect consequences arising from the speech—versus immediately observable violence.

4. Law v. Canada (Minister of Emp't & Immigration), [1999] 1 S.C.R. 497, 529 (Can.).

5. *Chaplinsky*, 315 U.S. 568.

6. E.S. v. Austria, App. No. 38450/12 (Eur. Ct. H.R. Mar. 18, 2019) (HUDOC).

which, supposedly, is characterized by contradictory stances on speech regulation—the Supreme Court has in the past upheld apparently non-American interpretations of hate speech. This provides us with two nameworthy implications: (1) that, if holding the explicit wording of a statute or ruling in primary regard, both other-Western and American jurisprudences make possible anti-hate speech law; and (2) that, if holding what is implied by a broader legal philosophy in primary regard (e.g., the non-mention of "human dignity" in American law but the attempted protection of it), both other-Western and American jurisprudences make possible anti-hate speech law.

This complicated relationship between justification, ruling, and policy has made distinguishing the United States from other Western nations in terms of value systems difficult—or, at least, very abstract. Resultantly, some scholars have tended to perceive hate speech legislation as requiring broad conceptual preconceptions in a nation's legal system in order to be addressed, which, as it is claimed, Americans and other Westerners do not share. For instance, in the Canadian case *Regina v. Keegstra*, the Canadian court ruled that a schoolteacher was subject to criminal punishment for his anti-Semitic comments toward his students.[7] Commenting on the outcome of this case, scholar Michel Rosenfeld concludes that the "Canadian conception of autonomy . . . is less individualistic than its American counterpart," stemming from the court's reference to things such as the "diversity in forms of individual self-fulfillment" and the creation of a "tolerant and welcoming environment" for all social groups irrespective of individual desire.[8] "[I]t," he iterates, "seemingly places equal emphasis on the autonomy of listeners and speakers."[9] These conceptual grounds of when it is justified for limiting speech, Rosenfeld argues, more broadly comes at odds with how the "United States is shaped above all by individualism and libertarianism," so much so that "collective concerns and other values such as honor and dignity lie at the heart of the conceptions of free speech that originate in international covenants or in the constitutional jurisprudence of other Western democracies."[10]

These evaluations of broader Western law and the Canadian ruling thus, at first, appear to posit that the two systems of jurisprudence—that is, America vs. the rest-of-the-West—are at odds based upon their, for example, "conception of autonomy."[11] To be sure, Rosenfeld even informs the reader earlier that "freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies."[12] However, this observation conflicts with the creation of a comparative study in the first

7. R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.).

8. Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1543 (2003).

9. *Id.*

10. *Id.* at 1541.

11. *Id.* at 1543.

12. *Id.* at 1530.

place through the common denominator of *Western democracy*. Presumably, the two sides are attempting to uphold the same values or have these identical values already embedded into their legal systems. Rosenfeld, paradoxically, transforms different value systems into a single framework when justifying points of conflict between *Western democracies*. He, for one, conceives of the United States and his comparative nations as all falling under the category of Western democracy, and that their separate conclusions on hate speech are "alternative approaches," that is to imply, not radical breaks.[13] If, however, the United States and the rest-of-the-West have the same value systems, and the outcomes of the same systems are different (on, for instance, autonomy), what standard is being used to evaluate the nations as upholding the same principles? The perceived differences between two legal interpretations is thus further complicated, especially if one wishes to hold the perspectives of both nations equally: what may seem as greater autonomy in the American context may, to the Canadian legal structure, be meaningless toward ultimately preserving the freedom concerned in the first place.

Consequently, the qualification of "relative autonomy"—and, extrapolating from what is demonstrated by Rosenfeld, the conception of Europeans valuing human dignity, or the alleged greater individualism in the United States—neither negates nor supports the *legal* possibility of hate speech in America. Notably, the U.S. Constitution does not outline a specific degree of the preservation of autonomy of an individual in the enactment of American laws. We thus are compelled to reiterate the two points drawn earlier—neither when measuring from explicit demarcations of hate speech, nor implications of what constitutes hate speech, is the legal possibility of hate speech criminalization in an international or American context negated. Therefore, if we are to presume that the two systems are built on the same structural legal principles—whatever it may be identified as, the preservation of individuality, freedom, etc.—then, based on existing hate speech statutes across the West, do these specific laws reflect these values, to what extent, and how? And, if so, can they find parallels and, perhaps, implementation into an American framework? In short, there is a necessity to address statutes as they are written to see if these supposed philosophical conflicts are really responsible for the differences in hate speech legality.

Subsequently, one is compelled to question the common notions that have gathered around the absence of hate speech laws in the United States, both in how they reinforce or legitimize the non-criminalization of hate speech and whether present U.S. jurisprudence may accommodate them. This requires a more in-depth investigation of American law to date.

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13. Rosenfeld, *supra* note 8, at 1524.

A. AMERICAN JURISPRUDENCE

One of the hallmarks of American society—and jurisprudence—is the First Amendment's free speech provision. In essence, the founders conceptualized free speech as important in preventing tyrannical encroachment on civil liberties and the separation of church and state. There have been a number of extremely important U.S. Supreme Court cases on the subject of free speech, several of which deal directly with the issue of "hate speech." To date, however, the Supreme Court has not provided a "hate crime" exception to the First Amendment. Put simply, "hate speech" does not exist in the legal sense within the United States.

The first cases to deal with the notion of hate speech in the United States were *Beauharnais v. Illinois* and *Brandenburg v. Ohio*.[14] In *Beauharnais*, the Supreme Court was tasked with reviewing an Illinois law that outlawed the publishing or depiction of the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed, or religion."[15] In this case, the individual in question was distributing handouts to petition the mayor of Chicago to prevent whites from being further encroached on by "negros." The handout included not only violent language, but also called on whites to unite and apply to become members in the White Circle League of America. His conviction was subsequently upheld by the Court based on the finding that the law in question was constitutional. In sum, the Court held that libelous utterances, pursuant to Illinois law, were not protected speech. This case serves as some basis for challenging hate speech as it allows respondents to argue that certain forms of speech may need to be restricted if they do breach libel law.

In *Brandenburg v. Ohio*, the Court had to interpret Ohio's criminal syndicalism statute in light of a KKK leader's statements and advocacy of action and violence during a rally in response to the perceived oppression of whites in America. While this case deals more with freedom of speech broadly, it does provide that speech that incites others to "imminent lawless action" is not protected speech, thus overturning the "clear and present danger" test.[16] This requires a temporal element: imminence. Thus, even hateful speech can be restricted if it incites others to violence. This makes the burning of crosses, as an example, all the more difficult to place in terms of regulation, as it can be argued from the Supreme Court's own discussion that the burning of crosses is a call to violence.[17]

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14. Beauharnais v. Illinois, 343 U.S. 250 (1952); Brandenburg v. Ohio, 395 U.S. 444 (1969).

15. *Beauharnais*, 343 U.S. at 271.

16. *Brandenburg*, 395 U.S. at 447-49. *See* Schenck v. United States, 249 U.S. 47 (1919).

17. *See* Virginia v. Black, 538 U.S. 343, 352-57 (2003).

In *R.A.V. v. City of St. Paul*, several teens were charged under a local hate crime ordinance that outlawed their burning of crosses on a black family's property.[18] The Court acknowledged that such actions would have already been punishable via existing criminal statutes, but that the use of the statute in question was unconstitutional and lacked content neutrality. The Court held that while speech can be regulated in some situations, such as obscenity, defamation, and fighting words, they are only capable of being regulated because of their "constitutionally proscribable content."[19] Meaning, the government can regulate speech if such speech is constitutionally prohibited, but the government may not regulate said speech based on "hostility-or favoritism- towards the underlying message expressed."[20] In essence, such regulation of speech must be content neutral. In *R.A.V.*, the statute in question was not content neutral because it only targeted speech concerning specific subjects. Specifically, the ordinance outlawed the use or depiction of a symbol that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[21] In the end, the Court held that even if all of the speech in this case was in fact prohibited under *Chaplinsky's* "fighting words" doctrine,[22] the law itself is still unconstitutional because it proscribes "otherwise permitted speech solely on the basis of the subjects the speech addresses."[23]

The *R.A.V.* case makes it clear that the speech in question—the burning of crosses—can be prohibited, but *not* based on the ideas that said speech is trying to convey, while also being prohibited merely for property interests too. This tension between upholding the free speech tenets of the First Amendment and protecting insular groups from being subjected to not just hateful speech but also hateful acts that are considered speech (e.g., burning of crosses) is extremely tenuous. For example, in *Wisconsin v. Mitchell*, the Supreme Court held that sentencing enhancements for bias-motivated crimes (also called "hate crimes") do not violate the First Amendment just because discriminatory motive is punished.[24] This is because discriminatory acts are likely to incite unrest and subsequent retaliatory acts.[25] While similar in scope to *R.A.V.*, the major difference here is that the ordinance in the former case was focused on speech, whereas the ordinance in the latter case was focused on conduct that was unprotected under the First Amendment.[26] Essentially,

18. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
19. *Id.* at 383-84.
20. *Id.* at 386.
21. ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).
22. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
23. *R.A.V.*, 505 U.S. at 381.
24. Wisconsin v. Mitchell, 508 U.S. 476 (1993).
25. *See id.* at 488 (the Court tacitly agrees with the rationale presented by the State as to its bias-motivated crime, in that they "are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.").
26. *Id.* at 477.

the state's interest in preventing greater harm to society by punishing specific conduct of a hateful nature is constitutional, and courts already consider and rely on statements to prove motive or intent in criminal cases.[27]

In a subsequent case, *Virginia v. Black*, the Supreme Court was again called on to address the practice of cross burning.[28] In this case, the Court struck down a Virginia law that prohibited such actions with "an intent to intimidate a person or group of persons" and that "any such burning . . . shall be prima facie evidence of an intent to" do so.[29] Similar to *R.A.V.*, the Court in *Virginia v. Black* held that a state may restrict the burning of crosses with the purposes of intimidation, but the requirement that *any* such cross burning serves as prima facie evidence of intent to intimidate rendered the statute in question unconstitutional. The Virginia Supreme Court held that the statute was "analytically indistinguishable from the order found unconstitutional in *R.A.V.*"[30] However, the U.S. Supreme Court disagreed, holding instead that "[they] did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination . . . rather, [they] specifically stated that some types of content discrimination did not violate the First Amendment."[31]

Instead, the Court maintained that a state can prohibit cross burning with the intent to intimidate in accordance with *R.A.V.* since it is proscribable speech under the First Amendment and is a form of intimidation that is "most likely to inspire fear of bodily harm."[32] Nonetheless, the Court did argue that the prima facie provision of the statute would "create an unacceptable risk of the suppression of ideas" since it blurs the line between otherwise lawful protected free speech in the form of political protest and other forms of speech that are designed to intimidate.[33] This would lead to juries inferring intent even when inculpatory evidence was not provided, or in the face of contradictory evidence. Put another way, the provision "strips away the very reason why a State may ban cross burning with the intent to intimidate," as it gives the jury carte blanche to convict in every case involving cross burning whereby a defendant exercises their "constitutional right . . . to put on a defense."[34]

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27. *Id.*
28. Virginia v. Black, 538 U.S. 343 (2003).
29. VA. CODE ANN. § 18.2-423 (1996).
30. *Black*, 538 U.S. at 351 (citing Black v. Virginia, 553 S.E.2d 738, 742 (Va. 2001)).
31. *Id.* at 361 (citing R.A.V v. City of St. Paul, 505 U.S. 377, 388 (1992) ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.").
32. *Id.* at 363.
33. *Id.* at 365.
34. *Id.*

More recently, the Supreme Court in *Matal v. Tam* held that the disparagement clause of the federal Lanham Act—which prohibits trademark registration if it may disparage others—violated the First Amendment.[35] This case dealt with the "Redskins" namesake of the Washington, D.C., NFL team, which enjoins commercial speech, but also wrestled with the issue of hate speech. Notably, the Court again chiseled away at the notion that there is a "hate speech" exception to the First Amendment in holding:

> Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."[36]

The topic of hate speech continues to be a controversial subject, especially in the age of the internet whereby countries are all trying to catch up to how the internet allows for the dissemination of hate speech within and between countries.[37] While the internet is an example where the United States and other liberal democracies differ in terms of hate speech regulation, the United States also differs from most Western nations in terms of when the government can regulate hateful speech, defaulting to when it calls for "imminent violence."[38] European higher court rulings exemplify this difference.

B. EUROPEAN AND OTHER WESTERN JURISPRUDENCE

The EU's European Court of Human Rights (ECHR) enforces two notable articles of the European Convention of Human Rights—Article 9, the right to religious peace, and Article 10, the right to the freedom of expression.[39] In one case, a woman who had called the Prophet Mohammed a pedophile in a public space had challenged her subsequent fine under an Austrian court to the ECHR. Citing Article 10, she claimed that her comments "occurred in the framework of an objective and lively discussion which contributed to a public debate."[40] That is, rather than being specifically oriented against the Prophet Mohammed, the woman argued she was submitting criticism to a religious group as part of a rational discussion, and that she had

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35. Matal v. Tam, 137 S. Ct. 1744 (2017).

36. *Id.* at 1764 (citing United States v. Schwimmer, 279 U.S. 644, 655 (1929)).

37. *See generally* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006).

38. *Id.* at 549.

39. Council of Europe, European Convention on Human Rights, art. 9-10, Apr. 11, 1950, E.T.S. No. 005.

40. E.S. v. Austria, App. No. 38450/12 (Eur. Ct. H.R. Mar. 18, 2019) (HUDOC).

made such statements not as "mere value judgments" but as value judgments based on facts.[41]

Several concepts familiar to American legal philosophy converge here: the freedom of speech, the ability to participate in a free and rational discussion, and the security of the exchange of ideas. Interestingly, the European Court did rule to uphold Article 10 when *weighed against* Article 9, showing that the woman's comments compromised the principle of religious peace, and therefore the Austrian fine was justified under the Convention.[42] At first, this seems to confirm Bleich's summation of current scholarship's assessments of the matter—that the Europeans tend to weigh "human dignity and personal honour" over free expression.[43] However, this would stop halfway in addressing the extent of the ECHR's argument—in addition to comparing Articles 9 and 10, the court continued that her statements were "incompatible with the freedom of thought, conscience and religion," and that even if her statements occurred in a lively discussion, they were "not compatible with Article 10."[44] In other words, the woman's comments did not constitute the act of freely expressing ideas at all, in that her comments actually violated not only Article 9 but also did not invoke Article 10's protections in the first place.[45] The European Court's perspective is thus more variable than others may assume: it is not only that hate speech is not protected under the freedom of speech, but also that hate speech to begin with does not constitute a form

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41. *Id.* at 1.

42. *See id.* at 2. ("The Court noted that those who choose to exercise the freedom to manifest their religion under Article 9 of the Convention could not expect to be exempt from criticism. They must tolerate and accept the denial by others of their religious beliefs. Only where expressions under Article 10 went beyond the limits of a critical denial, and certainly where they were likely to incite religious intolerance, might a State legitimately consider them to be incompatible *with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures*." [emphasis mine]). The *with respect* factor of this judgment may be viewed as the act of weighing two freedoms against one another to reach a conclusion (which, as some have noted, has a place in broader Western law but is absent from its American counterpart). However, the former half of this statement carries another dimension, that being not invoking the right in question in the first place, which we shall discuss shortly.

43. Bleich, *supra* note 2, at 285.

44. E.S. v. Austria, App. No. 38450/12 (Eur. Ct. H.R. Mar. 18, 2019) (HUDOC).

45. *Id.* at 3. Specifically, the court had concluded the woman had packed "incriminating statements into the wrapping of an *otherwise acceptable expression of opinion* and claim that this rendered passable those statements *exceeding the permissible limits* of freedom of expression." [emphasis mine]. *Id.* at 21. This implies that, from ECHR's perspective, there is a legally delineated space that Article 10 operates upon—moving outside of it relinquishes its relevancy and protections. The court, subsequently, defines and enforces the boundaries of this space. This stands to contrast with the American perspective that the rulings are products of Article 10 being compromised in favor of another, that the Europeans weigh one value more or less than another. This suggests that hate speech statutes and rulings may have a place in American law, in the sense they do not have to be considered as wholesale compromises of the First Amendment.

of equal discourse.[46] This ruling, that the woman's comments are rather a violation of religious peace than a compromise of freedom of speech, complicates the dichotomy present research has established between the United States and most Western nations regarding hateful expression.

To elaborate, the ECHR has two explicitly stated official approaches for such cases. One is the invoking of Article 17, which views the content of the offender's speech as an attack upon the Convention's values, and therefore their speech represents a negation of the freedom of expression. The other is the setting of "restrictions of protection," that meaning the limiting of this freedom in order to protect the other values of the Convention.[47] Rather than being a dichotomous affair, defining hate speech is multi-faceted for Western nations. The ECHR's latter approach matches with the observations and assumptions of scholars, and has found parallels among the legal policy of, for example, former countries of the British Empire. The former approach, on the other hand, confronts the issue from an altogether new direction by demarcating hate speech as an attack upon free expression, rather than a side-effect that must be monitored and regulated.[48]

Overall, the ECHR—and other Western high courts for that matter—conduct themselves with the intent to protect foundational legal principles that look very similar to one another. In another case, the court had revoked the license of a Danish television station for its promotion of the Kurdistan Workers Party (whom the EU recognizes as a terrorist group), stating that the station could not be protected by Article 10 of the Convention because it had tried to employ "this right for ends which are clearly contrary to the values of the Convention."[49] Though bizarre if taken from the perspective of the Supreme Court of the United States, the EU high court essentially argued that

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46. *See id.* at 3 ("Under these circumstances, and given the fact that Mrs S. made several incriminating statements, the Court considered that the Austrian courts did not overstep their wide margin of appreciation in the instant case when convicting Mrs S. of disparaging religious doctrines. *Overall, there had been no violation of Article 10*." [emphasis mine]).

47. *Factsheet–Hate Speech*, EUR. CT. HUM. RTS., 1 (2020), https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf [https://perma.cc/ZZY2-7WDM] ("Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention," and "the approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).").

48. *See* Saskatchewan (Human Rights Comm'n) v. Whatcott, [2013] 1 S.C.R. 467 (Can.) ("The limitation imposed on freedom of expression by the prohibition in s. 14(1)(b) of the Code is a limitation prescribed by law within the meaning of s. 1 of the Charter and is demonstrably justified in a free and democratic society."). The legal systems of these countries do not create a two-step approach as the Europeans have it—that is, the regulation of hate speech is considered the creation of an acceptable barrier of free speech, rather than hate speech also possibly not being considered free speech in the first place (hence, Article 17 in ECHR law—certain expressions can violate the spirit of constitutional ordinances).

49. ROJ TV A/S v. Denmark, App. No. 24683/14, 14 (Eur. Ct. H.R. 2018) (HUDOC).

the speech in question ran contrary to values enshrined by its Convention (this would be similar to if the Supreme Court declared hate speech a criminal offense because it goes against the values of freedom of speech). Instead of the two sides conflicting on what fundamental values to uphold, they rather rule separately on the same justification. In other words, both sides interpret their laws similarly, in that they uphold the—as the ECHR puts it—"foundations of a democratic, pluralistic society," but, on formulating case-rulings and (as to be seen) statutes, they reach different conclusions.[50]

Present scholarship further explains the matter. Legal professor, Eric Heinze, for instance, has argued that both the United States' First Amendment and European guarantees of free-speech and restrictions of hate speech set out to accomplish the same thing—that is, to create an even "arena for the competition of many distinct communities."[51] To Heinze, the European perspective views vulnerable sections of the population as beginning speech at an uneven level, therefore necessitating hate speech restrictions; the American perspective, on the other hand, holds that First Amendment protections equalize the legal validity of speech, therefore also protecting vulnerable sections of the population. Heinze's analysis is unique in that, compared to other scholars, he maintains that the supposed philosophical differences between Europe and the United States are not so great insofar as they are justified on the same grounds (e.g., the creation of "evenness" between speech). However, his conclusions affirm that "European hate speech bans raise real concerns about government regulation of public discourse in societies that depend upon an open and transparent system of participatory democracy for the very legitimacy of their laws."[52] Such notions of these laws in the first place constituting the regulation of public discourse presupposes both the content of these statutes and their effects; that is, to Heinze, they stifle or enhance "participatory democracy." From the perspectives of different nations' legal systems, however, hate speech regulation may have never touched participatory democracy to begin with. Concurrently, these "real concerns"—in statute-based, empirical terms—remain unexamined, leaving open a holistic analysis as to the meaning of these concepts and the efficacy of these laws.

Returning to Western courts, much of our present focus has fallen upon acts of individual speech; that is, speech divorced from a wider group. However, under European law, organizations are not shielded from legal scrutiny regarding expression. The approach to enforcing criminalization of this speech has several dimensions, as different countries, even within similar legal frameworks, have varying approaches toward the matter. Italian law, for

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50. EUR. CT. HUM. RTS., *supra* note 47, at 1.

51. Eric Heinze, *Wild-West Cowboys Versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 182, 192 (Ivan Hare & James Weinstein eds., 2009).

52. *Id.* at 195.

instance, explicitly demarcates organizations attempting to invoke the ideology of the banned Fascist Party as liable to fine and even imprisonment for their members.[53] However, the broader ECHR has generally given more leeway toward speech stemming from organizations. For one, in *Faruk Temel v. Turkey*, the accused had made statements considered to have been defending the use of violence and terrorism.[54] He was acquitted of his charges, which were found to be in violation of Article 10, on the basis that he was simply "presenting his party's views on topical matters of general interest."[55] Further contextualizing the matter was that he was part of an opposition party, who—expectedly, the ECHR argues—would give a controversial, contrarian view.

Another case, *Gündüz v. Turkey*, concerned the accused's endangerment of people's safety and constitutional values for his statements that various European institutions were "impious" for their non-abidance to sharia law.[56] The court found his punishment in violation of Article 10, for "[t]he mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as hate speech."[57] Thus, similar to U.S. law, the defining controversy of hate speech regulation is when the incitement to violence begins. In a third, exemplary case of this—*Sürek v. Turkey*—the accused had defended what the EU designates as a terrorist organization.[58] Having spoken as a representative of a political group, the accused was ruled to have been fined without violation of Article 10 because they had *specifically named* individuals whom are deserving of retribution for their political positions.[59] Therefore, had he not made this personal connection, he may have been acquitted of wrongdoing.[60] The perceived harm to come to a nameable individual is therefore weighed more heavily in these courts than a position which conveys the general ideology of an organization. This complicates the assignment of "greater individualism" attributed to American rulings and legal philosophy, as the concern for nameable, threatened individuals forms a leading concern of European jurisprudence as well.

Other national situations exemplify the extent to which hate speech law can be flexible. Australia designates that though hate speech is not a criminal offense federally, it is not within the spirit of the law (i.e., *unlawful*). The

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53. *See infra* Table 1.
54. *Factsheet – Hate Speech*, *supra* note 47, at 7.
55. *Id.*
56. Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. 435.
57. *Id.*
58. Sürek v. Turkey (No. 1), IV Eur. Ct. H.R. 353 (1995).
59. *Id.*
60. *See id.* ("The Court held that there had been no violation of Article 10 (freedom of expression). It noted that the impugned letters amounted to an appeal to bloody revenge and that one of them had identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence.").

government, subsequently, has established a federal committee, the *Australian Human Rights Commission*, who may take complaints and dedicate resources toward conciliating hate speech grievances between relevant parties.[61] However, at a local level, Australian territories may have their own laws regarding the criminal status of such expressions. *Deen v Lamb* in the state of Queensland serves as one such example. The territory has its own anti-discrimination acts, which were put into effect to contend that, Mr. Lamb, a political candidate, had not incited hatred against Muslims through the dissemination of a political pamphlet carrying messages against Islam.[62] Condensed, the grounds for his defense were that even if the content of the pamphlet were offensive, they were not intended to incite hatred, as they were rather an expression of his party's political platform, meaning Mr. Lamb himself could not be charged for their hateful content. Additionally, the unlawful (but not criminal) status of hate speech may mesh with other aspects of Australian law, such as the case of *Jones v Toben* in 2002, where the developer of an anti-Semitic website was forced to remove its hateful content.[63] Though the federal court had ruled in reference to the Racial Discrimination Act in 1975, this ruling was prefaced through several cases that asserted the Australian government's regulation of speech in general.

In fact, in another case, *Australian Broadcasting Corporation v Lenah Game Meats*, the court asserted that the government's interjection on matters regarding expression is "[not] itself incompatible with the representative democracy created by the Constitution," and, further, that "the power is a feature of that democracy."[64] The Australian example further shows that conceiving of what is hostile to an individual and what is hostile to a sociological minority may be legally realized as separate concepts. With respect to international standards of hate speech, understanding its regulation occasionally necessitates analyzing the hate speech as a phenomenon in itself, rather than as an extension of the regulation of speech in general. In other words, a country's jurisprudence may view such laws as more so an attack on what is defined as hate, rather than a limitation on one's capability to express themselves. So commented the judge of *Jones v Toben*: "I am satisfied that the act of publishing that material was an act reasonably likely . . . to humiliate and intimidate a group of people, namely members of the Australian Jewish community," the focus being on the persons affected by the speech.[65]

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61. *See Complaints,* AUSTRALIAN HUM. RTS. COMMISSION, https://www.humanrights.gov.au/complaints [https://perma.cc/QD69-7E89].

62. *Deen v Lamb* [2001] QADT 20 (Austl.).

63. *Jones v Toben* [2002] FCA 1150 (Austl.).

64. *Australian Broad Corp v Lenah Game Meats* (2001) 208 CLR 199 (Austl.).

65. *Jones v Toben* [2002] FCA 1150 (Austl.).

In contrast, avoiding being impugned for hate speech may involve a court interpreting *away* from the individuals affected by the expression.[66] Canadian cases exemplify this theme. In *Saskatchewan (Human Rights Commission) v. Whatcott*, which involved the distribution of homophobic fliers, the court found the distributor subject to censorship on the grounds that limiting his expression "is demonstrably justified in a free and democratic society."[67] Interestingly, the case was years later (in 2010) overturned on appeal, through the defense that the fliers themselves did not incite hatred—rather, that specific statements within them did, which was not sufficient to punish Whatcott.[68] As the ruling on the appeal for Whatcott went, "[it was] found that the Tribunal and Court of Queen's Bench had failed to take the moral context of the flyers properly into account . . . [the court] had erred in selecting specific phrases from the flyers, rather than dealing with the content and context of each flyer as a whole." This movement from evaluating the individual and particular statements they had made to the broader flier demonstrates a theme in hate-speech rulings across the West: the cases where hate speech is more likely to be found entail the establishment of a link between the offender, the statement, and the affected audience. Flipped, this means individuals or statements that are found to have contexts which estrange them from the original offender in question are more likely to be acquitted of wrongdoing. For example, in another Canadian case, *R. v. Zundel*, the court found that holocaust-denier Ernst Zundel could not be criminally convicted for hate speech because the "right of a minority to express its view, however unpopular it may be," would otherwise be violated.[69] In other words, the court had not perceived, or concluded, the case as entailing Zundel against a social group or individual, but rather as Zundel and his legal capacity to express his opinion.[70]

Overall, non-American legal interpretations of hate speech tend to provide more defense toward persons speaking on behalf of an organization. This more so connects hate speech law in the predominant Western context

66. *Id.*

67. Saskatchewan (Human Rights Comm'n) v. Whatcott, [2013] 1 S.C.R. 467 (Can.).

68. *See id.* ("The tribunal's decision with respect to the other two flyers was unreasonable and cannot be upheld. The tribunal erred by failing to apply s. 14(1)(b) to the facts before it in accordance with the proper legal test. It cannot reasonably be found that those flyers contain expression that a reasonable person, aware of the relevant context and circumstances, would find as exposing or likely to expose persons of same-sex orientation to detestation and vilification. The expression, while offensive, does not demonstrate the hatred required by the prohibition.").

69. R. v. Zundel, [1992] 2 S.C.R. 731 (Can.).

70. *See id.* ("Under s. 181, the accused is not judged on the unpopularity of his beliefs. It is only where the deliberate publication of false facts is likely to seriously injure a public interest that the impugned section is invoked. Any uncertainty as to the nature of the speech inures to the benefit of the accused.").

to libel, threatening language, and the ease at which one may connect the two between individuals rather than between groups and society.

III. METHODS

This study will compare America and the rest-of-the-West's penal policy toward hate speech and subsequently ask if the examined statutes indicate a true divide in understanding speech regulation or, rather, that they constitute different consequences of the same strain of thought (that is, the "safeguarding" of freedom of expression). In the event of the latter conclusion, we will evaluate the potential origin of such deviations in jurisprudence across countries, and thereby determine what relevance they have in the American legal context. More broadly, our study will test the alleged, persisting philosophical deviations between the United States and the rest-of-the-West, as well as their merit in assessing the roots and consequences of these laws, based on the collection and examination of explicitly available articles found in various nations' penal codes.

Towards defining "the West," political economists and social theorists Samir Amin and Immanuel Wallerstein have conceptualized the Western World as comprising a series of cultural, political, social, and economic characteristics attained through the historical policy of European-based colonial empires.[71] This shared background has created legal systems based on similar (or at least perceived as such) adjudicative philosophies.[72] Consequently, this analysis has identified Western nations as consisting of:

> 1) Former mother-countries of European and American overseas colonial empires and their neighboring historical subject states, or those countries that had facilitated colonization via financial-backing;[73]

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71. SAMIR AMIN, EUROCENTRISM (2009); IMMANUEL WALLERSTEIN, *The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis*, *in* THE ESSENTIAL WALLERSTEIN (Immanuel Wallerstein ed., 2000).

72. AMIN, *supra* note 71, at 206. Amin discusses the "homogenization," or standardization, of ideology, including legal and cultural values, based on the organization of a world market. Particularly, he argues, the domination of Western states over the world economic system (e.g., the presence of American Coca-Cola in the so-named Third World) thus supplies the West with cultural hegemony over the globe. This has led to the West defining itself as a separate entity from "the Orient," that is, most of the world, thus creating the category of nations that this analysis is interested in. In truth, much of the legal principles here can be found across the globe, but most research has only focused on the United States and Europe, on claims that they have unique, common values.

73. This consists of France, Spain, Italy, Portugal, Britain, Germany, Austria, United States, Belgium, Netherlands, Denmark, Sweden, Ireland, Finland, Japan, and Norway. For more information and examples regarding the facilitation/financing of empire-building, see BJØRN ENGE BERTELSEN & KIRSTEN ALSAKER KJERLAND, NAVIGATING COLONIAL ORDERS: NORWEGIAN ENTREPRENEURSHIP IN AFRICA AND OCEANIA (2015).

> 2) white-predominant states established through settlement, that is, the seizure of land against native peoples through state-endorsed programs;[74]
>
> 3) those nations that contain generally high living-standards relative to the rest of the world, who are not former members of the Warsaw Pact, who had received the Marshall Plan, and who have attained cultural prestige from the rest of the Western world for their existence;[75]
>
> 4) and that have populations of above two million (to control for potential outliers).[76]

These characteristics in mind, this study utilizes a legal content analysis to address the selected nations. Statutes were gathered via archival analyses of countries' penal codes. Of the twenty-one countries examined, all had some form of hate speech code. Most were made publicly available by their respective governments; those that were not could be found through the monitoring of international government and non-governmental institutions, such as the Council of Europe, the United Nations Human Rights Office, or Rainbow Europe. Across the twenty-one selected Western nations, the "root" hate speech statutes respective to each nation were examined. Root-statutes denote the primary, presently in-effect, anti-hate speech statute in a country's penal code. Following that, the statutes underwent coding through three criteria, addressing the following themes and questions:

> 1) *Content Neutrality*: Does the law reflect content neutrality? Or is it oriented only to a specific social group?
>
> 2) *Anti-Harassment/Broader Justification*: Does the adjudication present in the wording of the law explicitly reference broader ideological notions (such as *freedom*, *democracy*, or *human dignity*) [Broader Justification], or is it an extension/its own outgrowth of anti-harassment legislation [Anti-Harassment]?
>
> 3) *Amendments/Extensions to New Forms of Discrimination*: Have the laws in question been extended or amended

74. Consisting of Canada, Australia, New Zealand, and Israel.

75. That is, Greece.

76. The total list being: France, Spain, Italy, Portugal, Britain, Germany, Austria, United States, Belgium, Netherlands, Denmark, Sweden, Ireland, Finland, Switzerland, Norway, Canada, Australia, New Zealand, Israel, Japan, and Greece. In any case, most of the selected countries fall within other typical regions of focus sketched by other scholars (mainly, EU countries beginning from the German-Polish border westward).

> to include new legally-acknowledged forms of discrimination, that is, the creation of new statutes or explicitly-written amendments that constitute their own articles in the penal code?

Firstly, addressing content neutrality allows us to address a basic fixture of U.S. legal policy. Supreme Court cases have overwhelmingly ruled that hate speech laws violate content neutrality. Justice Scalia, for one, had argued in the aforementioned 1992 cross-burning case that the Constitution's First Amendment may not permit any regulation on racist expression unless, equivalently, antiracist speech too received restrictions.[77] The Court's confirmation of Scalia's general opinion thus echoes in Bleich's summation of the matter: "In the USA, it is virtually impossible to secure a conviction for racist expressions."[78] Therefore, evaluating globally if the actual manifestations of these laws do or do not express content neutrality shall test this conclusion.

In turn, discerning content neutrality will inquire into the validity of the claim that the United States and the rest-of-the-West have greatly differing legal philosophies. To reiterate, American justices, researchers, and public-consciousness have generally argued that hate speech criminality constitutes an infringement upon various broader concepts (rights, even), chiefly including—but not limited to—the freedom of speech, the promotion of free and rational discourse in society, and the individual's liberty from state subordination. If these laws somehow defend these things within the same line of argument, such statutes may therefore appear as products of an equal strain of legal thinking rather than objects holistically in conflict with U.S. adjudication.

This leads us to our second criterion: the statutes' legitimization on grounds of these *Broad Justifications* (e.g., the defense of a "freedom of speech") or through more mundane wording, such as content paralleling a nation's concurrent anti-harassment codes. If treating all laws relevant to speech-regulation and non-regulation at face-value, the problematization of hate-speech criminality might constitute the expanded protection of citizens into more specific contexts (such as race, nationality, or gender), rather than the sacrifice of public discourse for the defense of the disadvantaged, as Heinze conceptualizes.[79] To account for the scale of this problematization, as

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77. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Bleich, *supra* note 2, at 284.

78. *Id.* at 284.

79. Heinze, *supra* note 51, at 182. 18. Here, Heinze uses religion as an example: ". . . [the French view] strikingly contrasts with the US in the way in which it envisages a rigorously neutral 'arena for the competition of many distinct communities.' Much of the history of Europe, then, is nothing but an attempt to build such arenas, albeit not always in the ways

well as its consequent various statutes over time, the third category, *Amendments/Extensions to New Forms of Discrimination,* was implemented. The criterion does what it describes: it tests if a nation's penal code has expanded the application of a hate speech regulation over time; this serves to draw a parallel between American legal practice (the use of precedent—in this case, reference of the root statute—to qualitatively add to law) while also addressing U.S.-centered fears that the regulation of speech leads to further government control of expression.

To re-iterate, the above categories comprise an attempt to map ideological currents in hate speech statutes. Ultimately, this framework shall be used to construct a verdict as to the difference—or similarity—between internationally differing hate speech statutes, and if this difference or lack thereof reflects on value-centered analyses negatively or positively. Essentially, it is to ask the three-pronged question: are adjudicative values between America and the rest-of-the-West really that different, to what extent, and, if not, where may one find the origin of differences in hate speech law?

IV. FINDINGS AND DISCUSSION

A. HATE SPEECH LAWS IN THE WEST

Overall, our findings reveal that hate speech laws vary significantly by country. Based on the analysis described above, we found that hate speech in the West is largely content neutral, is not often based on some ideological concern or proscription, and has not been legally expanded upon through amendments in criminal codes. Each of these findings are unpacked below as well as how the study, at large, applies to the context of hate speech in the United States.

Of all twenty-one countries, sixteen were found to be content neutral in character (76%). France's anti-hate speech law exemplifies how speech regulation may exhibit content neutrality: "Public distribution of speech or images that provoke the committing of a crime holds those who distributed said speech or images as accomplices qualifying for said crime, provided the crime followed the distribution of the material." Making no reference to what specific expression the offender must make to constitute a crime, the law neither protects nor prevents speech based on it belonging or effecting a particular group. An opposite example would be that which is found in Italy's penal code:

> [It is illegal that] an association, a movement, or at least a group of five people pursue their undemocratic goals of the

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Americans were doing it." The European or non-American Western conception here, therefore, seeks to create an even playing field between ideas by creating legal protections for minority beliefs vis-à-vis majority beliefs.

> fascist party, enhancing, threatening, or using violence as a method of political struggle or advocating the suppression of the freedoms guaranteed by the Constitution or denigrating democracy…or acting racist propaganda, which addresses its activities to the exaltation of leaders, principles, facts and methods of that party or its outward manifestations of character turn fascist.[80]

By laying out parameters for what political ideology specifically may not be displayed (e.g., "character turn fascist") and through what means ("at least a group of five people"), this statute does not constitute content neutrality. It, however, along with the other non-content-neutral statutes such as Japan's and Switzerland's, has such either inconsistent, specific, or general applications that they do not become holistically wielded to prevent the speech assumed to be addressed by the law. In Italy's case, this root-statute (i.e., original statute that has not been expanded upon) has witnessed contradictory rulings in different courts across the country.[81] Japan's statute sets forth no specific stipulations for deeming the criminality of certain speech or its punishment, instead only providing measures against bigoted expression as a goal the country should pursue.[82] Switzerland's forbids blasphemy against "God, or . . . objects of religious veneration"; however, Switzerland is a loose-fit for lacking content neutrality, given how the remainder of the root-statute mimics its content-neutral counterparts found throughout the rest of the country list.[83] Western Europe in general is no stranger to anti-blasphemy laws, many of which are in a contemporary setting intertwined with typical anti-hate-speech practices.[84]

The trend of non-content-neutral statutes having the least consistent application contradicts common anxieties in the United States regarding hate speech law—that is, if a state is to set out regulating expression, it will naturally lead to the arbitrary oppression of a citizenry. As the data shows, the addressal of specific social groups within a legal framework (e.g., Japan's

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80. *See infra* Table 1.

81. *See Italy: Responding to "Hate Speech,"* ARTICLE 19 (Apr. 6, 2018), https://www.article19.org/resources/italy-responding-hate-speech/ [https://perma.cc/HE53-7XJ7] ("The application and interpretation of the existing 'hate speech' provisions contained in criminal law are also inconsistent. Italian courts often consider the racial or ethnic bias as an aggravating circumstance in cases of criminal defamation, or consider them under the crime of 'criminal conspiracy' carried out by organised groups on the Internet via blogs or social media.").

82. *See infra* Table 1.

83. *See infra* Table 1.

84. See E.S. v. Austria, App. No. 38450/12 (Eur. Ct. H.R. Mar. 18, 2019) (HUDOC), wherein an Austrian anti-blasphemy law was invoked over what the court ruled to be comments which "hurt others without reason and therefore did not contribute to a debate of public interest" rather than an offense against the authority of the religion itself.

referencing of "foreigners to Japan") does not necessarily correlate with the persecution of those outside it. If informing American legal matters, this comparative perspective complicates Scalia's opinion in 1992 that, to secure the freedom of speech, any regulations concerning racism would have to apply to anti-racist statements as well.[85] For one, the framework of the statute may not create a racist versus anti-racist dichotomy in the first place (for example, France's establishment of a link between expression and crime rather than racism in itself), and secondly, even the criminalization of speech pertaining to a specific insular minority or political ideology (e.g., Italy and fascism) may not threaten the hateful speech in question.[86] The utility of such laws, therefore, cannot be evaluated primarily by their relationship to abstract principles, such as the pluralistic exchange of ideas, but rather by their relationship to people. This distinction is key to understanding why some Western nations justify speech regulation as not constituting the limiting of the freedom of speech, while U.S. courts have, in terms undergirded by the same principles.

In tandem with such principles, seven out of the twenty-one nations (33%) featured broader ideological justifications for their statutes, as opposed to explanations which mirror anti-harassment or anti-libel regulations. Canada, out of all this minority, makes the most explicit confirmation of researchers' assumptions/observations of the logic conveyed for anti-hate speech laws: " . . . the rights and freedoms in the Charter are not absolute. They can be limited to protect other rights or important national values. For example, freedom of expression may be limited by laws against hate propaganda . . . ."[87] Most others, such as Germany's, reference concepts such as human dignity or freedom, which renders a case such as Canada's (the limiting of one right for the safeguarding of another) unique. The fourteen other root-statutes focus mainly on the abusive or demeaning nature of such expressions, such as Ireland's ("the material or recording is threatening, abusive or insulting").[88] In short, most of the West has conceived of hate speech as not creating great ideological questions, as raising—to re-invoke Heinze—"real concerns about government regulation of public discourse in societies that depend upon an open and transparent system of participatory democracy."[89]

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85. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Bleich, *supra* note 2*,* at 284.

86. *See* ARTICLE 19, *supra* note 81. In addition to inconsistent rulings: "In particular, the protected characteristics exhaustively listed in criminal law concerning the most serious forms of 'hate speech' are limited to race, ethnic origin, nationality, or religion, and proposals to expand this protection have stalled in parliament. Further, the prohibitions of incitement in criminal law do not follow international standards in this area; and a range of other vague offences are prohibited by the criminal law." *Id.*

87. *See infra* Table 1.

88. *See infra* Table 1.

89. Heinze, *supra* note 51, at 195.

This may also be extrapolated toward countries without as strict regulations—nations that have more so conceptualized hate speech law as conflicting with or representing an outright limiting on freedom of expression tend to be more relaxed on the matter. Australia, once again, considers hate speech not as a criminal offense per se, but rather as something not within the spirit of Australian law.[90] Concurrently, federal regulations on it are less strict than other nations, with individual territories taking up the responsibility to varying intensities.[91] Canada draws distinctions between the encouragement and promotion of hatred, the former being legal while the latter is illegal. Sparing oneself of the technicalities between encouragement and promotion, this effectually creates additional means of arguing against the indictment of someone on terms of hate, based around, as put in Canadian law, the protection of free speech.[92] Nevertheless, the tendency of these laws—that is, outside of a minority (seven of the twenty-one)—to not reference these higher notions may highlight their potentiality in *not* violating American, legal-ideological principles.

Lastly, five out of the twenty-one statutes (24%) exhibited amendments or extensions. The most extensive example of these five would be Britain's Public Order Act of 1986:

> A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence" if "he intends thereby to stir up racial hatred" or "having regard to all the circumstances racial hatred is likely to be stirred up thereby.[93]

The law in question had evidently begun to address racism, but evolved to include more specific forms of hate speech acts and discrimination, such

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90. *See Commonwealth Consolidated Acts*, AUSTLII, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/rda1975202/s18c.html [https://perma.cc/29X4-R7UK] ("However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.").

91. *See Deen v Lamb* [2001] QADT 20 (Austl.). Where Queensland law, where the territory's respective anti-discrimination laws were utilized for and framed the ruling, which is Queensland's specification of the federal government's position that hate-speech may be unlawful, though not necessarily criminal.

92. R. v. A.B. (2012), 349 N.S.R. 2d 84 (Can. N.S.) ("Promotion in this context means actively supporting or instigating hatred. The Supreme Court of Canada has determined that promotion goes beyond encouragement. In other words, it is not a criminal act to encourage people to hate. An act of hatred or a hateful comment could act as an example or an encouragement to others by emboldening them. Promotion must go beyond uttering hate filled comments and thereby encouraging others to act in the same way.").

93. *See infra* Table 1.

as the Crime and Disorder Act of 1988, which expands on "abusive or insulting behavior," or the Religious Hatred Act of 2006, which explicitly handles hate speech targeting religion.[94] Overall, the absence of cases like Britain's less so implicates the contrast of these laws to the American tradition of precedent so much as it reflects their content neutrality. Most are so broad or find evolving application in systems not based in common law, that amendments and extensions do not manifest. An example of this is Finland's Chapter 11, Section 10 of its criminal code, which renders illegal "an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis."[95] The amalgamation of various social statuses into a single law stands to contrast with the system of precedent-established acts showcased by common-law countries.[96] The nations featured in our study that have common law systems consist of the former British empire—meaning, Australia, New Zealand, Canada, and of course Britain, as well as the United States. This implies a potential place for hate speech legislation within the American system as, evidently, such laws have already found justification and space in countries that follow similar mechanisms of jurisprudence.

B. APPLICATION TO THE UNITED STATES

An important facet of this study is to connect the legal traditions of similarly situated Western countries to that of the United States' hate speech jurisprudence. The Supreme Court has often relied on what the international community has done in relation to some government action or individual behavior to discern if a legal consensus has emerged or is emerging. This is evident in relation to the use of the death penalty for juveniles[97], the criminalization of sodomy,[98] the rights of the accused in interrogation,[99] and in several other important criminal procedure cases.[100] From 1940 to 2006, the

94. *See infra* Table 1.
95. 511/2011, The Criminal Code of Finland.
96. For an example, see *infra* Table 1's entry for Britain.
97. Roper v. Simmons, 543 U.S. 551 (2005).
98. Lawrence v. Texas, 539 U.S. 558 (2003).
99. Miranda v. Arizona, 384 U.S. 436 (1966).
100. *See* Steven G. Calabresi, *'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law* 2-3 (Nw. Pub. Law Research, Working Paper No. 892585, 2006), https://ssrn.com/abstract=892585 (citing Hurtado v. California, 110 U.S. 516 (1884); Palko v. Connecticut, 302 U.S. 319 (1937); Wolf v. Colorado, 338 U.S. 25 (1949)).

U.S. Supreme Court relied on foreign law in several criminal law and procedure cases:[101] *Trop v. Dulles*,[102] *Miranda v. Arizona*,[103] *Coker v. Georgia*, [104] *Edmund v. Florida*,[105] *Thompson v. Oklahoma*,[106] *Roper v. Simmons*,[107] and *Atkins v. Virginia*;[108] five of which deal with the death penalty. Furthermore, the Court has been extremely laissez-faire in regards to hate speech (see prior sections). Nonetheless, reliance on foreign precedent is extremely controversial, and many scholars think it should be a "one-way street" in that others follow the lead of the United States.[109] It has been argued that because America is an "exceptional" nation, we should not take cues from other countries,[110] or that relying on the decisions of other nation's judgments—even if their judicial system is based on or mirrors ours—is undemocratic.[111] Aside from citing or relying on precedent, even relying on an "international consensus" can pose problems as it results in the counting of other nations' laws, irrespective of the will of the American people or their established laws.[112]

While the scope of this study is not to settle the debate about relying on international precedent in American courts, it is important to examine how similar countries compare and contrast on matters of law, especially free speech protections given their fundamental nature to a democratic society. Since there is no "hate speech" law or precedent in the United States that dictates "hate speech," only speech that does not result in a call to violence is allowed, within this context. Irrespective of the fact that many other Western nations *have* criminalized hate speech or restricted free speech in some manner, most Western nations, too, adopt a content-neutral position, and one

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101. *Id.* at 11.
102. Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).
103. Miranda v. Arizona, 384 U.S. 436 (1966).
104. Coker v. Georgia, 433 U.S. 584 (1977).
105. Edmunds v. Florida, 458 U.S. 782 (1982).
106. Thompson v. Oklahoma, 487 U.S. 815 (1988).
107. Roper v. Simmons, 540 U.S. 1160 (2004).
108. Atkins v. Virginia, 536 U.S. 304 (2002).
109. *See generally* Adam Liptak, *U.S. Court is Now Guiding Fewer Decisions*, N.Y. TIMES (Sept. 18, 2008), https://www.nytimes.com/2008/09/18/us/18legal.html [https://perma.cc/Q6MC-EZM2].
110. Calabresi*, supra* note 100.
111. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF. (2004), http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp [https://perma.cc/V2PD-GPWG].
112. *Id.* ("Judges are likely to cite foreign decisions for the same reason that they prefer quoting from a previous decision to stating a position anew: They are timid about speaking in their own voices lest they make legal justice seem too personal and discontinuous. They are constantly digging for quotations and citations to support positions they've adopted on grounds other than the compulsion of precedent. In-depth research for a judicial opinion is usually conducted after rather than before the judges have voted, albeit tentatively, on the outcome. Citing foreign decisions is probably best understood as an effort, whether or not conscious, to further mystify the adjudicative process and disguise the political decisions that are the core, though not the entirety, of the Supreme Court's output.").

that is *not* explicitly based on some ideological presupposition. These findings reveal that many Western countries share similar principles towards free speech, even whilst enumerating a restriction of said speech.

Thus, compared to most Western courts, the philosophical divergence with the United States tends to be more mundane; it is mainly a matter of where anti-harassment criminalization may be extended. This would assist in explaining the ECHR's non-consideration of certain speech as pertaining to Article 10.[113] From its perspective, the criminal act does not fall under the jurisdiction of free speech protections; rather, it more closely and practically aligns with the arbitrary targeting of others with threats or abuse. In the American context, invoking the fighting words clause would represent the more "mundane" interpretation of hate speech regulation. On the other end, Supreme Court rulings have combatted this perspective by adjoining what has otherwise mirrored anti-defamation law to an attack upon the foundations of American society. This difference, in one aspect, exemplifies the debate within the United States of defining hate speech and implementing regulations against it—that is, conceiving of such broader notions as threatened or not. Therefore, the tendency of actual hate speech laws to *not* invoke these concepts may indicate a presupposed reluctance to evaluate their effects (e.g., defense against abuse) rather than a genuine assessment of their ideological validity. In other words, both parties agree beforehand that they are inhabiting and expressing the wills of a *free, democratic* system. Therefore, the adherence to underlying legal principles may be ruled out in the debate regarding hate speech—this is confirmed no more explicitly in the Australian justification for the aforementioned *Broadcasting Corporation v Lenah Game Meats*, which argued that the power to regulate speech is a feature of representative democracy.[114] Further, the Supreme Court's assessment that "we protect the freedom to express 'the thought that we hate'" would just as well find place in the ECHR's sanctioned permissible extents in which speech deemed hateful can occur (for example, within certain political debate).

The chief issue, then, lies within the topic of "imminent violence" in American jurisprudence—the incitement to violence needs to be established as temporally linked between the expression presented and the crime committed (or to be committed). From the standpoint of most of the West, the incitement to violence is more socially-disseminated than involving a directly observable effect coming explicitly after and in connection to a preceding event. *R.A.V. v. St. Paul*, for example, established that laws targeting hate crime (that is, not hate speech) were justified on the basis that such discriminatory acts were connected to imminent violence. On the other hand, Australia's *Jones v Toben* expressed concern for the content of a website's

113. *See* E.S. v. Austria, App No. 38450/12 (Eur. Ct. H.R. Mar. 18, 2019) (HUDOC).
114. *Australian Broad Corp v Lenah Game Meats* (2001) 208 CLR 199 (Austl.).

effect upon the development of a particular subset of Australian youth. However, this difference in rulings alone would portray hate speech legislation as too narrow. As witnessed in the ECHR's withdrawal of charges following *Gündüz v. Turkey*, the calling for an ideology deemed offensive to European values (here being Sharia law) was ruled non-criminal for the fact that offender had not also called for violence to implement it. On the other hand, in *Sürek v. Turkey*, the former had mentioned the specific names of individuals, which emboldened the court's opinion that he *was* putting people in danger. This shows hate speech criminality may also be established with imminence in mind, further connecting to the temporal requirement found in American jurisprudence.

Conclusively, whether anti-hate speech laws *should* be implemented in the United States has not been established in this paper. The implications and potential consequences of these laws would have to be evaluated in the political and social contexts of the United States. It is highly unlikely that said laws would comport with the Constitution for the very reasons outlined in this paper; that the subjectivity of the perceived "hate" allows otherwise democratic participation to be suppressed. However, if using foreign cases as reference, the supposed exceptionalism of American jurisprudence does not hold up internationally. Put another way, while American jurisprudence differs from the countries examined—especially since many countries *do* restrict some forms of speech—the underlying rationale for said restrictions or its axiomatic basis does not differ very much. Therefore, on grounds that hate speech laws can be established with imminent violence in mind, that they can be argued to uphold democracy, that they can fit within a common law framework, and that they can be flexible in national contexts—that is, with all these factors accounted for holistically—then the criminality of hate speech should rely upon circumstances deeper than conflicts in overarching principles. Practically, this means two things: (1) the outright criminalization of hateful speech within the United States is unlikely to come to fruition, however, (2) the criminality of such expressions may have more relevancy and possibility in U.S. law than otherwise assumed.

These two takeaways are locked in conflict with one another. Given the flexibility of various state legal traditions, as well as their respective evolutions and the shared histories of Western states, it seems plausible that the United States *could* criminalize hateful speech, given the findings of these studies. This is especially the case if links between various forms of speech can be seen to result in violence thereafter. Western case examples have been provided in this study to demonstrate how various forms of speech can be interpreted to incite violence in ways that differ from American rulings (e.g., lack of content neutrality). Such a link is not far-fetched given the evolution of American jurisprudence on the matter (see section above).

For a link to be established between modes of speech and imminent violence, empirical studies would need to be conducted. These studies would

have to quantitatively examine the use of specific forms of speech (e.g., cross-burning, flag burning, ideologically-based protests, etc.) and the corresponding onset of violence. This violence, or even unlawful behavior (if taking a broader approach), would need to be imminent, however. This all, of course, differs from outright calls to violence which are already not protected in any manner within the United States. Nonetheless, the focus here is on otherwise protected speech that is seemingly of a hateful nature that, intentionally or unintentionally, results in violence, per U.S. jurisprudence. Based on the American jurisprudence proffered here, it seems that this very link would need to be substantially demonstrated for there to even be a conversation about restricting free speech further.

In any case, the examination of Western hate speech laws provides valuable insight into how American jurisprudence is both similar to and different from other nations it shares a legal tradition with (some more than others). Moreover, the analysis conducted in this piece provides evidence that most Western countries are also content neutral in their statutory restriction of free speech. Thus, while the United States has no such laws on "hate speech," and some Western countries *do*, the analysis demonstrates that for all of the variance amongst Western nations' foundations of free speech, they ultimately reach conclusions that are more similar than expected and that are backed by interpretations of the same character. These similarities are centered on protecting society and democracy, but countries deviate in terms of where they anchor their arguments here (see above section).

Irrespective of the similar interpretations used and different conclusions reached, Western traditions towards hate speech are more often than not content neutral and not expressed with direct reference to ideology; two concepts that are likely highly correlated. If U.S. jurisprudence protects and continues to extend this tradition, it should further examine the extent to which imminent lawless action or violence *can be* a product of otherwise protected free speech. Failing to understand and inculcate within the American tradition how varying forms of speech can indirectly lead to unlawful outcomes is one of the major shortcomings of the American legal tradition concerning speech in general, and hate speech specifically.

CONCLUSION

The study of other countries' approaches to hate speech therefore provides several lessons—namely, that encountering the legal practices of other nations forces the viewer to reflect on their own traditions and approaches. In the case of the United States and hate speech, the reaction to these other practices elucidates American assumptions on the matter. Whether they are founded in discerning the nature of hate speech law, and whether it is so different from what is already present in U.S. jurisprudence, is a different story. As the findings show, most Western nations have hate speech statutes in their

penal codes that are content neutral and without broader-ideological justifications. These results challenge notions that the mere existence of such statutes imply a philosophical divergence from U.S. adjudication. Additionally, these statutes tend to be flexible in both how they are conceived and implemented, with a minority exhibiting amendments and extensions. This finding draws two points, the first being that hate speech criminality has had practical implementation in common-law systems similar to the United States. This fact, combined with other nations' claims that these laws protect free and rational discourse, further highlights the closeness, rather than estrangement, of broader Western adjudication to its American counterpart. The second point reaffirms flexibility: hate speech laws do not necessarily lead to the ballooning of criminal statutes against expression. Additionally, these statutes tend to be particularized toward expressions deemed demeaning, threatening, or imminently violent (as, once again, they tend to avoid broader justifications). Notably, this has also created space for court arguments that supposedly offensive speech can be permissible based on its wider politically discursive context. Regardless of similarities, the Supreme Court of the United States has consistently proven, at most, reluctant to establish a notion of hate speech in American jurisprudence. However, the parallel idea that there are inherent properties to hate speech statutes which outright deny them a place in American jurisprudence may be discarded—at least in a comparative sense.

V. TABLE 1: CHARACTERISTICS OF ROOT STATUTES[115]

NATION	SPECIFICATION	CONTENT NEUTRAL?	ANTI-HARASSMENT (X) OR BROADER JUSTIFICATION (✓)?	AMENDMENTS/ EXTENSIONS?
AUSTRALIA	"It is unlawful for a person to do an act, otherwise than in private," if "the act is reasonably likely, in	✓	X	✓

115. Notes and further information for each statute are available upon request.

	all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" and "the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group." As of the *Australian Human Rights Commission Act 1986* (AHRCA 1986): "[A]n act is taken not to be done in private" if it "causes words, sounds, images or writing to be communicated in public."		
AUSTRIA	Sentencing may be extended to whoever "publicly, in a manner suited to jeopardise public order, or in a manner perceivable to the general public incites or instigates to violence against a church, religious denomination or any other group of persons defined by criteria of	✓	✓

	race, colour of skin, language, religion or ideology, nationality, descent or national or ethnic origin, sex, a disability, age or sexual orientation or a member of such a group, explicitly on account of his/her belonging to such a group" and "in a manner perceivable to the general public, stirs up hatred against one of such groups or who verbally harasses such groups in a manner violating their human dignity and who thereby seeks to decry them." These criminal acts may include "printing, broadcasting or in another medium which makes these acts accessible to a broader public."			
BELGIUM	Public, discriminatory expressions on the basis of race, skin color, national or ethnic origin or	✓	X	✓

	ancestry are banned.			
BRITAIN	"A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence" if "he intends thereby to stir up racial hatred," or "having regard to all the circumstances racial hatred is likely to be stirred up thereby."	✓	X	✓
CANADA	". . . the rights and freedoms in the Charter are not absolute. They can be limited to protect other rights or important national values. For example, freedom of expression may be limited by laws against hate propaganda . . ."	✓	✓	
DEMARK	"Any person 'who, publicly or with the intention of wider dissemination, makes a statement or im-	✓	X	

	parts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.'"		
FINLAND	"A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for ethnic agitation to	✓	X

	a fine or to imprisonment for at most two years."			
FRANCE	Public distribution of speech or images that provoke the committing of a crime holds those who distributed said speech or images as accomplices qualifying for said crime, provided the crime followed the distribution of the material.	✓	X	✓
GERMANY	"Whosoever, in a manner capable of disturbing the public peace . . . incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them," or "assaults the human dignity of	✓	✓	

	others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population . . . shall be liable to imprisonment from three months to five years."			
GREECE	Forbids "to wilfully and publicly, either orally or by the press or by written texts or through pictures or any other means, incite to acts or activities which may result in discrimination, hatred or violence against individuals or groups of individuals on the sole grounds of the latter's racial or national origin or religion."	✓	X	✓
IRELAND	"It shall be an offence for a person" to "prepare or be in posses-	✓	X	

	sion of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in the State or elsewhere, whether by himself or another" or "to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published, in the State or elsewhere, whether by himself or another" if "the material or recording is threatening, abusive or insulting and is intended or, having regard to all the circumstances, including such distribution, display, broadcasting, showing, playing or other publication thereof as the person has, or it may reasonably be inferred that he has, in view, is

	likely to stir up hatred."		
ISRAEL	*Article One "A"*: "If a person holds a publication . . . in order to cause racism, then he is liable to one year imprisonment, and the publication shall be confiscated." *Article Two*: ". . . unlawful association [is partly defined as] . . . a body of persons . . . which in an organized manner, in its by-laws, in its propaganda or in some other manner propagates, incites or encourages racism . . . ."	✓	X
ITALY	It is illegal that "an association, a movement, or at least a group of five people pursue their undemocratic goals of the fascist party, enhancing, threatening, or using violence as a method of political struggle or advocating the suppression of the freedoms guaranteed by the Constitution or		✓

	denigrating democracy, its institutions and values of strength, or acting racist propaganda, which addresses its activities to the exaltation of leaders, principles, facts and methods of that party or its outward manifestations of character turn fascist."		
JAPAN	No punishments outlined for "unfair discriminatory speech and behavior," but "set[s] out the basic principle for efforts toward their elimination" via education and awareness-raising activities.		X
NETHERLANDS	"Any person who in public, either verbally or in writing or through images, intentionally makes an insulting statement about a group of persons because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental	✓	X

	or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category."		
NEW ZEALAND	"It shall be unlawful for any person" to "publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting" or "use in any public place . . . or within the hearing of persons in any such public place, or at, my meeting to which the public are invited or have access, words which are threatening, abusive, or insulting" or "use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were	✓	✓

	reasonably likely to be published in a newspaper. magazine, or periodical or broadcast by means of radio or television . . . ."		
NORWAY	"Any person who willfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. An expression that is uttered in such a way that is likely to reach a large number of persons shall be deemed equivalent to a publicly uttered expression . . . The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty."	✓	X
PORTUGAL	"Anyone who, in a public assembly, in a writing purported to be divulged or by	✓	✓

	any means of mass communication . . . provokes acts of violence against a person or a group of persons because of his race, colour, ethnic or national origin or religion" or "defames or insults a person or groups of persons because of his race or ethnic or national origin or religion, especially through the negation of war crimes or of crimes against peace and humanity; intending to cite racial or religious discrimination or to encourage it, is punishable with imprisonment from 6 months to 5 years."	
SPAIN	"Those who provoke discrimination, hate or violence against groups or associations due to racist, anti-Semetic reasons or any other related to ideology, religion or belief, family	X

	situation, belonging to an ethnic group or race, national origin, gender, sexual preference, illness or handicap, shall be punished with a sentence of imprisonment from one to three years and a fine from six to twelve months . . . Those who, with knowledge of its falseness or reckless disregard for truth, were to distribute defamatory information on groups or associations in relation to their ideology, religion, or belief, belonging an ethnic group or race, national origin, gender, sex, sexual preference, illness or handicap shall be punished with the same penalty."	
SWEDEN	". . . a prosecutor may prosecute" for "defamation and gross defamation...insulting behaviour towards a person exercising, or for the exercise of, his or her duties	X

	in office . . . insulting behaviour towards a person with allusion to his or her race, colour, national or ethnic origin or religious belief" or "insulting behaviour towards a person with allusion to his or her homosexual inclination."	
SWITZERLAND	"Any person who publicly and maliciously insults . . . the religious convictions of others, and in particularly their belief in God, or maliciously desecrates objects of religious veneration . . . who . . . prevents, disrupts or publicly mocks an act of worship . . . is liable to a monetary penalty . . . Any person who publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion . . . who publicly	✓

	disseminates ideologies [that pursue] systematic denigration or defamation of the members of a race, ethnic group or religion . . . who with the same objective . . . participates in propaganda campaigns . . . who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in [images], by using gestures, through acts of aggression or by other means . . . who on any of these grounds denies . . . or seeks justification for genocide or other crimes against humanity . . . who refuses to provide a service to another on the grounds of that person's race, ethnic origin or religion when that service

	is intended [for] the general public, is liable to a custodial sentence not exceeding three years or to a monetary penalty."