

# The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies

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*Since the 1960s, many liberal democracies have instituted laws that penalise hate speech and hate crimes in ways that limit the freedom for racists to express themselves. This article examines the legislation and enforcement of provisions against incitement to racial hatred, Holocaust denial, and crimes motivated by racial bias in Western Europe and the United States. Viewed over time, the pace of change has more closely resembled a slow creep than a slippery slope, and the extent of legislation and enforcement has differed across countries in different domains. This article documents the trend and highlights causes for concern, yet concludes that it is possible to enact and enforce laws that limit these forms of racism without being overly inimical to freedom of expression and opinion.*

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Freedom of expression and freedom of opinion have been cornerstones of the liberal project for centuries. From the 1689 English Bill of Rights to the 1948 United Nations Universal Declaration of Human Rights, they have been enshrined and extended in constitutional and international law.<sup>1</sup> They have also been vigorously defended by thinkers such as John Stuart Mill, whose famous 1859 treatise *On Liberty* includes the bold assertion that ‘there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered’ (Mill 1991: 20). This liberal standpoint has found absolutist supporters in the United States Supreme Court, and has drawn sympathy among scholars and citizens who subscribe to the view that ‘I may disapprove of what you say, but I will defend to the death your right to say it’.

Yet, as central as they are to the liberal project, freedom of speech and of opinion have never been sacrosanct values. Mill’s own ‘harm principle’ establishes guidelines for expression that can be justifiably limited by law, and his contributions have

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formed the basis for more than a century and a half of debate about just where to draw the line around permissible speech. This article contributes to this ongoing discussion through an empirical examination of how liberal democratic states have limited such freedoms when they take the form of racist expression or racist opinion-as-motive.<sup>2</sup> It examines the trajectory of laws against hate speech and hate crimes in Western Europe and in the US in order to judge the extent to which freedom of speech and of opinion have been constrained when they conflict with injunctions against racism.

Overall it has become much riskier to express or to act upon provocatively racist thoughts in contemporary multi-racial, multi-ethnic and multi-faith democracies. Values such as community cohesion, public order, human dignity and psychological harm have been invoked as counterweights to freedom in order to justify restrictions on racism.<sup>3</sup> To illustrate this value shift, the first section of this article retraces the steps West European countries took between the 1920s and the 1990s to penalise racist sentiments. Between 1960 and 1990, in particular, many countries enacted specific laws against forms of racist speech such as incitement to racial hatred and Holocaust denial. These laws have limited the ability of individuals to express their racist beliefs. In the domain of incitement, the US has been the exception to this international rule by progressively elevating the value of free speech over protections against racist language.

The second section highlights legislation and policy-making over the past two decades that have created additional limitations on the freedom to be racist. This is particularly visible in punishments for hate crimes—defined as crimes motivated by racial, ethnic or religious bias. In most cases, laws against hate crimes punish the underlying crime (such as vandalism or assault), but then supplement the sentence with an additional penalty for the perpetrator's racist opinion when it serves as a motive for the crime. The effect is to penalise opinions that are seen as especially harmful because they are a central element in the commission of a crime. In this domain, the US has been at the forefront of developing legislation, with European countries more recently following suit. West European countries have also established or proposed additional provisions in the past few years that limit free expression in order to punish statements deemed racially, ethnically or religiously divisive. These include a British law prohibiting incitement to religious hatred and potential French legislation that may forbid denial of the Armenian genocide.

The third section of this article examines prosecutions and legal penalties. It shows that the enforcement of provisions restricting the freedom to be racist has not been draconian. In most cases, judicious enforcement has meant that hate speech and hate crime provisions are not as inimical to freedom of expression and opinion as some might fear. However, in the conclusion I suggest that some of the recently proposed restrictions on free speech should raise red flags for those who seek a sustainable balance between free expression and limitations on racist speech. Although there has not been a slippery-slope effect, the slow creep away from freedom of expression and

of opinion is a significant limit of the liberal state that deserves close attention and extensive debate.

### **Developments in Europe and the United States between the 1920s and the 1990s**

There were few meaningful legal restrictions on racist expressions in pre-World War Two Europe. Openly anti-Semitic newspapers such as *Der Stürmer* and *L'Antijuif* flourished in Weimar Germany and Third Republic France, as did anti-Semitic books and articles in mainstream newspapers (Brustein 2003; Schor 1992; Showalter 1982).<sup>4</sup> One of the few attempts to legislate against racist speech came in 1936, when backbench British law-makers proposed outlawing incitement to racial or religious prejudice in light of the rabble-rousing behaviour of Oswald Mosely's British Union of Fascists. MPs opposed to such language argued that it would restrict criticism of churches and of Germany and France (Hansard, Commons, v. 318, cc. 639–40), the latter presumably on the grounds that such criticism might incite prejudice against the German or French 'races'. Speaking for the government, the Attorney General rejected the proposed wording on the grounds that neutral, catch-all language banning incitement to disorder was more in keeping with legal precedent and, moreover, encompassed racial and religious incitement, making such narrow wording too limiting (Hansard, Commons, v. 318, cc. 643). These arguments won the day and the proposed amendment to ban incitement to racial or religious prejudice was rebuffed.

Laws against racial incitement are now quite common and uncontroversial across Europe. Yet, as the British example suggests, they must not be viewed as preordained. Even in the early 1960s, Britain's Conservative government refused to pass a law against racial incitement, ignoring the call to action of a 1962 petition with 430,000 signatures. Home Office bureaucrats maintained that such a law was unworkable and attempted to persuade the newly elected Labour government of 1964 to refrain from enacting one. Home Secretary Frank Soskice eventually overrode this argument by justifying the measure as a tool for immigrant integration, aiming thus to prevent Britain from establishing a 'distinction between first- and second-class citizens and the disfigurement which can arise from inequality of treatment and incitement to feelings of hatred directed to the origins of particular citizens' (Hansard, Commons, v. 711, c. 926). The House of Commons devoted substantial time to debating this law, with the Conservative spokesperson moving an amendment to halt debate on the bill which introduced 'a new principle into the law affecting freedom of speech' (Hansard, Commons, v. 711, c. 943). In spite of these objections, the 1965 Race Relations Act (Section 6) rendered it illegal to intentionally use threatening, abusive or insulting language likely to stir up hatred against sections of the British public on the grounds of colour, race, or ethnic/national origins. Over the years, this legislative principle has been extended several times. Many of these were codified in the 1986 Public Order Act, which grants protection to groups defined by nationality (including citizenship) and which eases the requirements for proving transgressions by eliminating the need for

both *intent* and *likelihood* to be present in the utterance—now either is sufficient (Bindman 1992: 259–60; Douglas-Scott 1994: 317; Sherr 1993).<sup>5</sup>

Germany acted more quickly in the postwar era to establish penalties for expressing or inciting racism. It did so in part through banning the use of Nazi rhetoric and symbols. Article 86 of the criminal code prohibits National Socialist propaganda that seeks to undermine the democratic order, while Article 86a forbids symbols such as Nazi flags, swastikas and the ‘Heil Hitler!’ salute (Wetzel 1993: 87).<sup>6</sup> Moreover, in 1960, Parliament unanimously voted—through a reform of Article 130 of the criminal code—to make it illegal to incite hatred, to provoke violence, or to insult, ridicule or defame ‘parts of the population’ in a manner apt to breach the public peace (Stein 1986: 283). While this provision did not specifically identify actions based on racism, its intent was clear to all parties—it was passed following a wave of synagogue and cemetery desecrations and in the wake of the courts’ failure to punish a Hamburg businessman who distributed tracts decrying the role of ‘international Jewry’ (Stein 1986: 282; Whitman 2000: 1337–8). Since that time, the criminal code has been supplemented with provisions that also prohibit racist publications.<sup>7</sup>

The French government passed its landmark anti-racism law in 1972 after almost a decade and a half of mounting political pressure (Bleich 2003: 114–41; Errera 1992). Even as it prepared to enact legislation, prominent political leaders such as Minister of Justice René Pleven and Chairman of the National Assembly Law Committee Jean Foyer argued that no specific legislation against racial incitement was required. Yet, the 1972 law contained extensive provisions, banning not only defamation—technically outlawed by the 1939 Marchandeu decree, although its provisions were abrogated by the Vichy regime and went virtually unenforced in the postwar decades—but also provocation to hatred or violence based on ethnicity, nationality, race or religion. During the run-up to its passage, with the writing on the wall, even the skeptical Jean Foyer admitted that ‘It is nevertheless true that racist-inspired acts are particularly odious and that it may therefore be useful to foresee a specific punishment against them.’<sup>8</sup> All told, therefore, racial incitement provisions in the major European democracies originated primarily in the 1960s and 1970s, and not earlier, as might be supposed.

Laws forbidding Holocaust denial are perhaps the most controversial limitation on freedom of expression to have flourished over the past few decades. These statutes make it illegal to deny the Holocaust took place, to downplay its extent, or to excuse the fact that it happened. Austria established such prohibitions by passing its *Verbotsgesetz* in 1947. The law was amended in 1992 and formed the basis for the highly publicised 2006 conviction of British historian David Irving, who asserted during a 1989 trip to Austria that there had been no gas chambers at Auschwitz, that Hitler had tried to protect Jews not murder them, and that *Kristallnacht* was carried out by agitators dressed as Nazis instead of by the Nazi party. Other countries have followed Austria’s path in enacting bans on Holocaust denial but, again, not in the immediate aftermath of the Second World War. Germany established its proto-provisions in 1985 and codified them in 1994, France acted in 1990 and Belgium in

1995. Among long-standing liberal democracies, Luxembourg and Israel also have such laws on their books.<sup>9</sup>

In Germany and France, several influential political and societal leaders have acknowledged the controversial nature of these provisions. In the *Bundestag* debate surrounding the 1985 law, a liberal (FDP) member took particular pains to note that his party grudgingly supported this bill, but recognised that it placed limits on freedom of opinion (Stein 1986: 310). Prominent German legal scholars such as Winfried Brugger (2003) have also taken a stand against the provision. In France, several leaders of the conservative RPR party, as well as nationally known historians, publicly lamented that the measure smacked of establishing an 'official history' that would undermine principles of free academic research and might even give credibility to revisionist theses (Bleich 2003: 162–3). This line of criticism was vigorously pursued in recent years with the proposed passage of additional laws related to slavery, colonialism and the Armenian genocide (Weil 2007).

A closer examination of the German case helps to reveal the rationale behind penalising Holocaust denial.<sup>10</sup> German constitutional logic differentiates between 'high-value speech', 'low-value speech' and 'non-speech' (Brugger 2003: 8). The expression of deep personal convictions in the political sphere is considered high-value speech, and as such it is to be strongly protected. However, when such expressions have significant negative consequences, they may be downgraded to the status of low-value speech, at which point free speech is no longer necessarily the preeminent value. In these cases, the courts weigh the importance of freedom of expression against its detrimental effect on other constitutional values such as dignity, honour, equality, the protection of young people, public peace and civility (Brugger 2003: 9). Brugger argues that the German government clearly sees 'the right to speech [as] limited by the perceived higher value of eliminating all kinds of racism in the broadest sense' (2003: 39).<sup>11</sup>

Looking beyond individual European states, it is important to note that international institutions are also extremely supportive of laws against racism, even if they impinge upon free speech. United Nations documents portray freedom of expression as one core right among several, and one which can be limited in the face of other imperatives (Walker 1994: 87–90). The 1966 International Covenant on Civil and Political Rights (Art. 20, para. 2), for example, holds that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. The 1966 International Convention on the Elimination of All Forms of Racial Discrimination (Articles 4a and 4b) goes even further, stating that signatory countries should 'condemn [i.e. outlaw or ban] all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form', thereby targeting not only speech, but also associations. Only a handful of countries have expressed reservations about these articles when ratifying these documents (Walker 1994: 89–90), suggesting the widespread international acceptance of these principles.

As a number of scholarly texts emphasise, the United States has been the most prominent exception to this trend toward limiting racist speech (Bird 2000; Delgado and Stefancic 1997; Gould 2005; Greenawalt 1995; Haiman 1981; Walker 1994). Most casual observers—particularly Americans—believe that the US has always been the citadel of free expression, having enshrined the principle in the First Amendment of the Constitution which proclaims in part that ‘Congress shall make no law . . . abridging the freedom of speech.’ Yet, between the early 1940s and the early 1950s, the US enabled significant restrictions on freedom of expression that are little-remembered today. In the 1942 *Chaplinsky v. New Hampshire* decision—315 US 568 (1942)—the Supreme Court developed its ‘fighting words’ doctrine, meant to define the limits of free speech when such expressions were likely to generate a breach of the peace. At the time, fighting words were defined as those that ‘by their very utterance inflict injury or tend to incite an immediate breach of the peace.’ This formulation could easily have become the foundation for limiting speech that incited hatred or caused grievous offence across racial, ethnic or religious lines.

A decade later, the 1952 *Beauharnais v. Illinois* ruling—343 US 250, 252 (1952)—upheld the constitutionality of group libel statutes, which punished injurious statements directed at racial or religious groups which would expose ‘the citizen of any race, colour, creed or religion to contempt, derision or obloquy or which is productive of breach of the peace or riots’ (quoted in Greenawalt 1995: 60). In the case in question, the leader of the White Circle League of America was convicted for circulating literature decrying the ‘rapes, robberies, knives, guns and marijuana of the negro’. Sympathy for such laws reached a peak in the context (and in the wake) of interwar American race riots and the atrocities of the Nazi era (Walker 1994). These laws were never extremely popular—only a few states enacted such statutes, and proposals for legislation in Congress did not make much headway (Haiman 1981: 90). But in delivering the 5–4 decision on the *Beauharnais* case, Justice Felix Frankfurter drew on a logic that would be familiar to contemporary European advocates of restricting racist speech when he wrote:

[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.<sup>12</sup>

If the sentiments underpinning the *Chaplinsky* and *Beauharnais* decisions had come to dominate American discourse, the position of the US on free speech may have become quite similar to those of its European liberal democratic counterparts.

But, between the late 1940s and the 1970s, the Supreme Court backtracked from this logic (Douglas-Scott 1994: 316–7; Gould 2005: 19–20; Walker 1994: 105–13). In the 1949 *Terminiello v. Chicago* decision—337 US 1, 4 (1949)—the Court overturned the conviction of a defrocked Catholic priest whose zealous anti-Semitism spurred a Chicago crowd to begin throwing rocks through windows. Instead of holding him accountable for an immediate breach of the peace, Justice William O. Douglas wrote for the 5–4 majority that provocative speech ‘may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger’. The 1969 *Brandenburg v. Ohio* decision—395 US 444 (1969)—established the principle that incitement to violence could only be proscribed if it was likely to produce imminent lawless action and not merely if it advocated violence in general terms or at a later time, thereby strictly limiting state prosecutions for incitement.<sup>13</sup> Finally, the death knell for group libel provisions was sounded in 1978, when the Supreme Court let stand the voiding of a Skokie, Illinois, city ordinance that prohibited ‘dissemination of any material . . . which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so’ (quoted in Walker 1994: 123–4). In the wake of this decision, a small group of American Nazis was granted permission to march through a town that was over 50 per cent Jewish and which contained almost 5,000 Holocaust survivors—though the group eventually decided not to carry out its march in Skokie (Walker 1994: 122). Decisions such as these signalled that even words that offend or inflict injury or that may lead to a breach of the peace have been interpreted as constitutionally protected forms of free speech in the US.<sup>14</sup> In most liberal democracies, however, the trend has been the opposite—to limit expression that is deemed harmful on racial, ethnic or religious grounds. There have been almost no parallels to the American model of moving to permit racist speech that was once forbidden.

### **Recent Developments in the United States and Europe**

If the United States has taken steps to permit racist speech that was once forbidden, it has also taken the lead in developing hate crime statutes that enhance penalties for crimes ‘motivated by bias toward individuals or groups based on particular status characteristics such as race, religion, ancestry, sexual orientation, or gender’ (Jenness and Grattet 2001: 77). Most of these laws boost punishment for underlying crimes (such as assault, vandalism or intimidation) carried out because of biased motives which the state deems particularly opprobrious. The criminal act is technically the target of the penalties. But sentences can be supplemented if the perpetrator is motivated by racism, meaning that indications of racist opinions or ideologies are in effect independently punished if they are exhibited during (or sometimes even before or after) the act. Frequently, the most damning evidence that a crime is motivated by illegitimate bias consists of the perpetrator’s expressions, such

as the hurling of a racial epithet at a victim during an assault or the use of anti-Semitic graffiti when vandalising property.

Fierce legal and scholarly debates have erupted over whether such laws punish opinion and expression or whether they simply penalise conduct (see Jacobs and Potter 1998; Lawrence 1999). In its landmark 1992 *R.A.V. v. City of St. Paul* decision—505 US 377, 392–5 (1992)—the Supreme Court struck down a city ordinance that prohibited symbols that knowingly arouse anger, alarm or resentment on the basis of race, colour, creed, religion or gender. Writing the majority opinion, Justice Scalia held that the ordinance prohibited racist speech and biased beliefs and thus unfairly chose sides against the idea of racial prejudice (Lawrence 1999: 86–8). Following the *R.A.V.* decision, the supreme court of Wisconsin invalidated its state-level hate crime provisions on the grounds that they impermissibly punished racist thought, thereby violating First Amendment protections (169 Wis. 2d 153, 485 N.W. 2d 807; Lawrence 1999: 88–9). But the US Supreme Court overturned this ruling in its 1993 *Wisconsin v. Mitchell* decision—508 US 476 (1993). It reasoned that the Wisconsin statute against aggravated battery motivated by racism in fact penalised the *conduct* of the perpetrator, not his thought or expression. Yet, this seems a distinction without a difference, for the disputed element was not the battery but rather the racial bias that motivated the perpetrator. Following the Supreme Court's decision—508 US 476 (1993)—a young man who was convicted of a crime that normally carries a two-year maximum penalty was sentenced to four years (out of a new maximum of seven years, under the provisions of the hate crime statute) because he selected his victim on the basis of race.

In spite of their potential to infringe on freedom of opinion and expression, almost every US state now has a hate crime law on the books. Washington and Oregon were innovators in this domain, enacting laws in 1981. Four states passed legislation in 1982, and two more did so in 1983. By 1990, 28 states had hate crime laws, and by 1998 that number had risen to 41 (Jenness and Grattet 2001: 74; cf. Lawrence 1999: 178–89). The US federal government has also passed hate crime laws, including the Hate Crimes Sentencing Enhancement Act (HCSEA) of 1994, which identifies eight crimes for which judges are allowed to lay on additional penalties if the defendant acted 'because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person' (quoted in Jenness and Grattet 2001: 44). Such enhanced penalties are typically justified on the grounds that hate crimes 'cause greater societal harm and injury to the individual and community victims' (Lawrence 1999: 103). In 1985 Congressional hearings on the proposed 1990 law, Representative Biaggi echoed this sentiment when he stated that 'The effect of hate crimes . . . eats away at the very core of society. It is a form of poison spreading through our land. It affects people physically and psychologically' (quoted in Jenness and Grattet 2001: 53).

Widening the scope of such laws, Congress enacted the Hate Crimes Prevention Act in 2009 after over a decade of failed attempts to do so.<sup>15</sup> This law empowers federal authorities to aid state and local jurisdictions dealing with hate crimes, and it grants the



Department of Justice the right to pursue investigations and prosecutions where state laws are deemed insufficient. Moreover, the statute permits federal law enforcement to pursue a wider variety of infractions, instead of merely addressing crimes that violate a narrow list of federally protected civil rights, and widens the protected categories to include gender, sexual orientation, gender identity and disability and mandates the collection of statistics on hate crimes against transgendered people. Although the reach of this law has not yet been fully tested, by all accounts it involves a dramatic strengthening of federal power. The US therefore has an extremely well-developed arsenal of state and federal provisions against hate crimes that have garnered support from legislative majorities across the country.

The most common European parallel to such laws lies in the use of racist motives as aggravating factors at the sentencing stage of successful prosecutions. Some countries have passed laws explicitly stating that racist motives merit additional penalties. Although these have typically not been termed hate crime laws, they are often exact or close analogues to American legislation. For example, Italian Law No. 205/1993, Section 3, established an aggravating circumstance for any crime committed 'with a view to discrimination on racial, ethnic, national or religious ground[s]' (OSCE/ODIHR 2005: 132). Sweden, Spain, Belgium, Austria and a number of other European liberal democracies have similar statutes (OSCE/ODIHR 2005: 105–58). France's 2003 provisions (Law 2003-88 of 3 February), which were expanded in 2004 (Law 204 of 9 March), illustrate how closely these laws can mirror American practices. French law permits additional penalties for a list of infractions (ranging from threats and theft to torture and murder) if they were committed 'because of the belonging or non-belonging, real or supposed, of victims in a determined religion, ethnic group, nation, or race'. Police, prosecutors and judges are directed to look for expressions such as 'words, writings, images or acts' that indicate a bias, evidence of which triggers the possibility of significantly more severe punishment, such as five years' imprisonment and a €75,000 fine for theft instead of three years and a €45,000 fine, or life in prison instead of 30 years for murder (Ministère de la Justice 2004: 3–5).

Of all the European countries that have enacted such laws over the past decade and a half, none looked more closely at American practices than Great Britain, whose civil servants studied model legislation in the United States.<sup>16</sup> After considering a variety of options, Britain pursued two paths through its 1998 Crime and Disorder Act. First, it established nine new crimes that explicitly depend on racial aggravation, including crimes of assault, criminal damage, public order offences and harassment, which carry higher maximum penalties than their non-racially aggravated counterparts (see Sections 29–32 of the 1998 Crime and Disorder Act). These crimes go beyond penalty enhancement provisions by linking the racial aspect to the very definition of the crime in a way that other European countries have not done.

Second, sections 28 and 82 of the law provide that any offence can be considered racially aggravated if the prosecution proves that it was motivated by racial hostility. This is similar to many countries' penalty enhancement statutes. But British law goes

further by declaring that racial aggravation can be triggered merely by showing that the perpetrator demonstrated racial hostility toward the victim during *or immediately before or after* the crime. Thus, if a white person says 'I hate blacks' and then walks over to a black man and commits a crime against him, he will be punished not only for the crime, but also for the racist motive if his statement of opinion is taken as evidence of racial hostility.<sup>17</sup> In these cases, the judge is required to declare in open court that the crime was racially aggravated, thereby shaming the perpetrator by branding him a racist. He or she is also required to impose a stiffer sentence within the maximum allowable range for the underlying crime.

Looking beyond hate crime laws, European countries have also restricted racist speech in additional ways in recent years. A number of nations have statutes that exceed the traditional incitement provisions outlined above. For example, Belgian law penalises public announcements of intention to discriminate, hate or perpetrate violence against an individual or group because of race, colour, origin, descent or nationality. Danish law forbids public statements that threaten, insult or degrade on account of race, skin colour, national/ethnic origin, faith or sexual orientation. Italy has outlawed the dissemination of ideas based on superiority or racial and ethnic discrimination, while Sweden punishes racial agitation, which includes expressions that threaten or demonstrate contempt on the grounds of race, colour, national/ethnic affiliation or religious belief (see OSCE/ODIHR 2005: Annex E for an overview of a wide variety of national laws). In each of these cases, the wording of these statutes provides wide latitude for curtailing public expressions of racism, should prosecutors and courts decide to do so.

In addition to these examples, developments since 2005 illustrate that the boundaries of free expression continue to be challenged, even if there is contention surrounding these new proposals. The British government sought to limit potentially inflammatory speech in its 2006 Racial and Religious Hatred Act. This law overturned the 40-year old anomaly in Britain of forbidding incitement to racial hatred without prohibiting incitement to religious hatred. The initial government proposal involved extending to religious groups the precise protections granted over time to racial groups, namely that prosecutions could occur based on reckless as well as intentional statements and that 'threatening, abusive, or insulting' words or behaviour were out of bounds.<sup>18</sup> However, these elements were viewed with alarm by the majority of the House of Lords and by many Members of Parliament. They were also sharply criticised by civil society groups and especially by comedians (such as Blackadder star Rowan Atkinson), who feared that religious jokes would cross the legal line. The Labour government suffered an embarrassing public defeat when they lost a crucial House of Commons vote over these provisions.<sup>19</sup> In the end, the Act instituted protections only against intentionally threatening expressions of religious hatred, not against those that were merely abusive or insulting, nor those that are reckless and likely to stir up hatred (see Art. 29 of the 2006 Racial and Religious Hatred Act). The law was thus limited, but the law passed.

The most contentious French development aimed at restricting offensive speech is a Parliamentary bill that proposes penalising denial of the Armenian genocide. Its forerunner was Law 2001-70 of 29 January 2001, which stated simply that 'France publicly recognizes the Armenian genocide of 1915'. Since then, the Council of Europe passed a 2003 protocol to its cybercrime convention (CETS No. 189, Art. 6) that encouraged signatories to outlaw a wide variety of racist actions on the internet. Extending the logic of national Holocaust denial legislation, it called for states to punish the denial, minimisation, approval or justification of all genocides or crimes against humanity recognised by international bodies. As of summer 2010, 32 of the 47 Council members had signed the protocol and 18 had ratified it (including France and Armenia).

France's National Assembly turned to these issues in 2006, but limited its legislative proposals to forbidding denial of the Armenian genocide. When the bill was first introduced, the President of the National Assembly took the highly unusual step of suspending discussion before the law came to a vote (*Nouvel Observateur*, 18 May 2006). In its second incarnation of October 2006, it was overwhelmingly approved by a cross-section of deputies from both the left and the right.<sup>20</sup> In part, supporters argued that it was highly offensive to Armenians to be subjected to signs proclaiming that the genocide was a lie, and that such statements aimed to 'complete the genocide' by erasing it from the collective memory. At least one proponent made the case that it was not possible to punish denial of the Jewish genocide while ignoring the Armenian genocide. On the other side of the debate, a number of nationally known historians organised themselves into a group called Freedom for History and declared that this proposal threatens 'freedom of thought and expression'. The government itself did not look favourably on this bill, with then-Prime Minister de Villepin declaring at the time 'It is not a good thing to legislate on questions of history and memory'. Responding to some of these concerns—all also voiced in *Le Monde* or *Le Figaro*, 13 October 2006—an amendment was introduced that would have exempted teachers and researchers from the law, but it was intensely opposed by a number of deputies and was ultimately rebuffed. This legislation was eventually approved by the National Assembly but it has since been held up by the Senate. Yet it elicited a striking amount of sympathy, suggesting that passage of such a law—or of the even-more-general ban as proposed by the Council of Europe—may be in France's and in many European countries' future.<sup>21</sup>

### **Assessing the Provisions: Enforcement as the Key**

What has been the effect of these developments? Do laws penalising racist speech and racist opinion-as-motive serve as a bulwark against intolerance, or do they merely limit speech and opinion without preventing societal divisions? These questions are not easy to answer. Examining how hate speech statutes are applied in practice can provide a first step toward understanding whether the laws impinge upon a great number of speech acts, or whether they are less of a threat to free expression than

they may at first appear. Legislation against incitement to racial hatred, group libel, racial defamation and Holocaust denial appear to be used relatively infrequently in the major European liberal democracies.<sup>22</sup> Bindman (1992: 259–60) and Oyediran (1992: 248–9) point out, for example, that, between 1965 and the early 1990s, there were only a handful of prosecutions per year for racial incitement in Britain. According to information provided by the Attorney General in the run-up to the 2005 Religious Hatred Bill, between 1994 and November 2004 there were 37 prosecutions for incitement to racial hatred.<sup>23</sup> As of the 1980s, there were somewhere between 100 and 150 prosecutions for incitement and defamation per year in Germany, with Hofmann (1992: 166) reporting that, in 1982, 12 per cent of all prosecutions for right-wing extremists were on these grounds, and that, in 1987, there were 1,447 prosecutions related to right-wing extremism. More-recent statistics from France show that, for the three years from 2005 to 2007, there were on average 208 convictions per year for pure hate-speech offences, up from just over 100 per year in the five-year period from 1997 to 2001.<sup>24</sup>

Examples of actions that have run afoul of the law include the distribution of a 'blood libel' leaflet by an 80-year-old British woman, a German teacher's in-class assertion that there were no concentration camps or killings of Jews in the Nazi era, and the publication in France of well-known Holocaust denier Robert Faurisson's views that 'the myth of the gas chambers is a wicked act' (see Bindman 1992: 260; Errera 1992: 155; Stein 1986: 294). The penalties for these infractions were relatively light. The aged widow was discharged on condition of six months' good behaviour, the teacher received a six-month suspended sentence, and Faurisson's 100,000 franc fine was suspended provided he did not re-offend within five years; the heaviest penalty in these cases was a 310,000 franc (or roughly \$50,000) fine levied on the editor of the publication that printed Faurisson's statement. Moreover, French data reveal that, in 2007, there were 258 guilty verdicts, of which 139 resulted in a fine (which averaged €726), 58 led to a suspended jail sentence, and three culminated in actual jail time with an average sentence of less than two months (Commission Nationale Consultative des Droits de l'Homme 2009: 68). By comparison, British data between 1986 and 1990 reveal 18 prosecutions and 16 convictions, of which only three cases resulted in actual time served in jail (Oyediran 1992: 249). This suggests that the laws are used, but are not used oppressively, and that liberal democracies are able to maintain their commitment to free expression while at the same time forbidding divisive or harmful racist speech.

The limited number of prosecutions and penalties is also an indication that laws against racist speech serve both a symbolic *and* a practical function. Legislation has a strong declarative effect when it is enacted: in these cases, it asserts that certain expressions are deemed unacceptable by the country as a whole and reassures vulnerable groups that their interests and identities are considered worthy of national acknowledgement. Some sympathetic observers have argued that hate speech laws' primary function is symbolic and educational, and that they can do more harm than good if 'enacted or applied with excessive zeal' (Parekh 1992: 359). However, if the

laws were merely symbolic and not backed by any prosecutions or convictions, they would soon lose their effectiveness, as they would be revealed as empty rhetoric. Banton (1992), for example, points to the potential setbacks involved in *failed* prosecutions under the law in addition to problems generated by a state's reluctance to prosecute in the first place.

Judicious enforcement is therefore critical to the success or failure of these laws, in terms both of achieving the desired social values and of not unduly limiting freedom of expression. If there are *too few* convictions, there will be little reason for potential perpetrators to alter their activities and no independent benefit from the false symbol of the law. If there are *too many* cases brought to court, there may be a perception among citizens that the laws are overly-burdensome restrictions on speech, which may generate a backlash against the minority groups viewed as their main beneficiaries. Striking a careful balance signals to vulnerable groups, to perpetrators and to the nation that the laws will *be* enforced and that highly divisive speech or actions will not be tolerated. And judicious enforcement with moderate penalties also reassures the nation that free speech is not on the chopping block, which helps to legitimise the modest restrictions that these laws often represent.<sup>25</sup>

## Conclusions

Freedom of expression and freedom of opinion remain core values in Western Europe and in the United States, and there is still wide latitude in these countries to express racist views. Yet there has been a notable trend since the 1960s—and especially since the 1990s—toward penalising racist speech and racist opinion-as-motive. These developments have amounted to significant limits on a core liberal value in states where identity and belonging are complicated by racial, ethnic and religious diversity. Yet, forbidding these forms of racism is not gathering steam at an exponential rate. Rather, the pace of change has more closely resembled a slow creep than a slippery slope. Prohibitions against racism have been inching forward and making inroads into territory once firmly held by advocates of liberal freedoms. Over time, proscriptions against incitement to racial hatred and additional penalties for the racist element of crimes have become taken-for-granted where they had once been deemed unnecessary restrictions on expression or opinion. The trend is perhaps the most clearly encapsulated in the progress of laws against Holocaust denial. These began in late-1940s Austria, spread to Germany in embryonic form in 1985 and then to half a dozen other countries by the 1990s, and now may be poised to become institutionalised in many more Council of Europe countries in a significantly expanded form.

Although the steps taken to limit freedom of opinion and expression so far have been measured rather than extreme, there are two reasons for concern. Because this shift has unfolded slowly over the decades, each individual step has seemed moderate at the time it was enacted. Typically, additional laws are merely extensions of old principles into new areas, such as the series of moves from libel laws to group libel

laws, to provisions against approving the Holocaust, to laws banning Holocaust denial, to recent proposals to forbid contesting the Armenian genocide or all legally recognised war crimes or crimes against humanity. Cumulatively, however, there has been a significant chipping away at freedom of opinion and of expression over the past 20 to 40 years in many countries. If we project the current trends another few decades into the future, will citizens be comfortable with the eventual outcome?

Compounding this problem are recent systemic developments that risk increasing the pace of change in the near future. The British government has used the 'war on terror' to justify expanding its laws to cover incitement to religious hatred. It has also enacted provisions to punish the glorification of terrorism, which could prohibit statements made against racial, ethnic or religious groups that have been the targets of attacks. In the context of the permanent war on terror, future atrocities may be used to justify further curbs on speech deemed to threaten national cohesion or public order. In a different vein, French efforts to outlaw contestation of the Armenian genocide demonstrate that laws against Holocaust denial have opened the door to claimants who want to establish their victimhood as legally unassailable. If group after group demands protection for its history, it may prove politically difficult to rebuff successive claims because of the precedents set by earlier decisions.

Drawing the line around the freedom for racists to express themselves or to be free from punishments for their opinions (even when they serve as motives to criminal acts) is a difficult task in ethnically diverse states. For liberal purists, there are few justifications for restricting racists' rights to think, say and act according to their beliefs. For others, the marginal restrictions on racist expression or penalties for racist motives are acceptable because they help to preserve community cohesion and public order or because they prevent undue harm to victims and protect their dignity. There is no simple resolution to this long-standing debate. As I have argued elsewhere (Bleich 2011; Modood *et al.* 2006), I believe that democracies must judge the issues on a case-by-case basis, taking into account the domestic political context of the era. And each citizen has the responsibility to articulate his or her own position and to take part in broader discussions about how to balance the fundamental values of liberal democracies.

In light of the evidence of this study and as a contribution to the on-going debate, my position is that restrictive laws are the most easily justified if they punish racist expression or racist opinion-as-motive when it inflicts significant harm to individuals or if it incites violence or stirs up extreme hatred, but not when it is merely offensive, even if hurtfully so (see Bleich 2011). This perspective focuses on assessing the level of harm of particular events in a way that has seldom been systematically done before. Moreover, once statutes are on the books, enforcement becomes a critical component of the equation. Successful prosecutions prove that the state is serious about curbing racism, while avoiding heavy prison sentences and excessive fines demonstrates that the laws are not overly intrusive. Striking a careful balance in legislation and enforcement is possible. It is also the key to placing limits on racism that do not fatally compromise the cornerstone values that liberals have cherished for centuries.

## Notes

- [1] The English Bill of Rights extends these freedoms to debates in Parliament: 'That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament'. France's Declaration of the Rights of Man and of the Citizen (1789) and the First Amendment of the American Bill of Rights (1789) broaden the coverage to all, in formulas similar to that adopted by the UN in 1948, Article 19 of which reads: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'
- [2] I use racist here in a broad sense to mean demonstrations of racial, ethnic or religious bias or hatred. By opinion-as-motive, I mean racist opinions that are translated into a motive to act, such as in a hate crime.
- [3] For cognate arguments about the trajectory of the human rights revolution at the global level and of the minority rights revolution at the American level, see Kymlicka (2007); Skrentny (2002).
- [4] Although some countries' existing laws could have been deployed to curb public racism, they rarely were. For example, Weimar Germany had laws criminalising religious insult and incitement to violence against 'classes of the population'. Yet, the editor of *Der Stürmer* was frequently able to minimise or to avoid penalties by arguing that his attacks against Jews were protected speech because they were levelled on *racial* instead of *religious* grounds and that they were protected as part of a *political* agenda (Levitt 1993; Showalter 1982).
- [5] In addition, the Football Act of 1991 prohibits indecent or racist chanting at matches.
- [6] For the Federal Ministry of Justice's English-language text of the German Criminal Code, see <http://www.iuscomp.org/gla/statutes/StGB.htm#86a>. The text of Article 86a forbids 'in particular, flags, insignia, uniforms, slogans and forms of greeting', and declares that 'symbols which are so similar as to be mistaken for those' listed above are deemed equivalent. Other European countries have similar provisions banning Nazi symbols.
- [7] Article 130 prohibits writings that incite hatred or violence or which insult, maliciously malign or defame 'segments of the population or a national, racial or religious group, or one characterised by its folk customs'. The forerunner to this aspect of Article 130 was Article 131 which, when established in 1973, prohibited racist writings (Hofmann 1992: 164).
- [8] Ministry of Justice Archives, Folder '*Diffamation Raciale; Réponse à M. Jean Foyer*'.
- [9] Switzerland, Liechtenstein, Portugal and Spain also have generic laws against denying genocides and, once they became fully fledged democracies in the 1990s, a number of East European countries—such as the Czech Republic, Poland and Slovakia—also crafted laws banning forms of Holocaust denial (Whine 2009: 544–6).
- [10] It is important not to overlook the political motives behind such laws, such as wrong-footing the opposing party or staking a claim to antiracist leadership for electoral purposes. Yet, these motives do not explain the specific form of the proposals—there are many ways to achieve those political goals in a liberal democracy which do not involve placing highly controversial limits on freedom of expression.
- [11] This logic applies in different ways to two types of Holocaust denial within Germany. Simple Holocaust denial, such as asserting 'The Holocaust never happened', is considered constitutional non-speech, as such statements merely assert facts without attaching an opinion. Because these facts are plainly wrong—so the argument runs—they have no value as 'speech' and can easily be banned within the constitutional framework if they are deemed harmful (Brugger 2003: 32–3). Qualified Holocaust denial includes statements that attach a political opinion to the historical argument—such as 'We should do something about those Jews who spread lies about Auschwitz'. These expressions are deemed 'low-value speech'

- because, although they may represent deeply held political convictions, many Germans have concluded that such arguments lead to “pogrom”, “massacre” and “genocide” (quoted in Brugger 2003: 34).
- [12] *Beauharnais v. Illinois*, 343 US 250, 258–59 (1952). Frankfurter went on to discuss multiple examples of racial strife in Illinois that could presumably justify passage of the state law.
- [13] In 1972, the Court further eviscerated the fighting words principle when it overturned the conviction of men found guilty for levelling at police officers terms that included ‘white son of a bitch’, ‘God damned m— f—’, and ‘black m— f— pig’ (Walker 1994: 111).
- [14] The exception is the ‘clear and present danger’ principle, wherein a speaker’s expression ‘immediately incites others to criminal or dangerous activity’, such as shouting ‘fire’ in a crowded theatre (Gould 2005: 19). Even this principle has been flexibly interpreted in US history, and at one point constituted a much greater threat to freedom of speech (Greenawalt 1995: 18–19). See *Dennis v. United States*, 341 US 494, 510 (1951).
- [15] Officially called the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, in earlier incarnations it was known as the Local Law Enforcement Hate Crimes Prevention Act.
- [16] Interview with Neil Stevenson, Home Office, Community Relations Unit, 19 November 2003.
- [17] According to the 1998 Crime and Disorder Act, protected groups are those defined by reference to race, colour, nationality (including citizenship) or ethnic/national origins. Article 39 of the 2001 Anti-Terrorism, Crime and Security Act extended protections to religious groups, creating the category of ‘religiously aggravated offences’.
- [18] See House of Commons, Racial and Religious Hatred Bill, with the Home Office’s Explanatory Notes (Bill 11–EN), available at <http://www.publications.parliament.uk/pa/cm200506/cmbills/011/2006011.htm>. For the final text of the Act and the Explanatory Note, see <http://www.opsi.gov.uk/acts/acts2006/20060001.htm>.
- [19] *BBC News*, 1 February 2006. The Home Office made clear that such jokes would not be caught by the law, writing in Bill 11–EN ‘The offences will not encompass material that just stirs up ridicule or prejudice or causes offence’.
- [20] These deputies may have been responding to the potential votes of the 500,000 descendants of Armenian origin in France (*Le Figaro*, 13 October 2006), some of whom are organised in the Committee for the Defense of the Armenian Cause (CDCA). They may also have been motivated by general anti-Turkish sentiment generated by fears of its joining the European Union (see *Le Monde*, 9 October 2006).
- [21] A leading advocate from the Armenian community believes that the law will eventually pass (interview with M. Alexis Govciyan, 20 May 2008); as noted in fn. 9, Switzerland, Liechtenstein, Portugal and Spain already have generic laws against denying genocides.
- [22] There are no systematic comparative data available on complaints, investigations, indictments, prosecutions and convictions for such crimes; such data would be necessary for a complete analysis of law enforcement.
- [23] Lords Hansard text for 13 December 2004, ‘Incitement to Racial Hatred: Prosecutions’, response to question by Lord Lester of Herne Hill, col. WA56.
- [24] Calculations for the 2005 to 2007 period come from the Annual Reports of the Commission Nationale Consultative des Droits de l’Homme, which produces statistics on convictions where the sole offense is a hate speech offense. There are also data on convictions where hate speech was one among two or more elements of the crime; if included, the number of convictions roughly doubles. Data from 1997 to 2001 are from the Commission Nationale Consultative des Droits de l’Homme (2003: 573).
- [25] Opponents of this view, such as Coliver (1992), argue that such laws are simply too risky to support. However, by Coliver’s own admission, these laws ‘do not appear to have been seriously abused’ by the established liberal democracies she reviews (1992: 365).



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