



United States Mission to the OSCE

OSCE Meeting on the Relationship between Racist, Xenophobic and Anti- Semitic Propaganda on the Internet and Hate Crimes

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Thank you Mr. Moderator for that introduction.

Thank you also to my co-panelists, Suzette Bronkhorst (INACH) and Judge Nedelec (French Judge).

The purpose of this panel is to explore the efficacy of the criminalization of certain racist websites.

We – the panelists and delegates to this week's meeting – without exception start from the shared premise that Racism, Anti-Semitism and Xenophobia are born of ignorance and hatred, and must be condemned. Collectively, we long to see a world in which racial, religious, and similar prejudice play no role in our politics, our citizenship, and our measures of individual worth.

Our differences, rather, come in answer to the question "how do we get there from here?" They are differences of procedure. But of course, as any lawyer will tell you, procedure is often as important as the substantive outcome. This is such an instance.

This debate is particularly fitting for this forum, a discussion presented by the Council of Europe, along side the meeting of the Organization for Security and Cooperation in Europe. The OSCE – or rather its forbear, the Committee for Security and Cooperation in Europe – is widely credited with playing a pivotal role in lowering the iron curtain. In 1975, at Helsinki, the Soviet Union acceded to the Final Act, which established the CSCE. In addition to pledging participants to security and economic cooperation, it also recognized the importance of the dissemination of information, the "essential and influential role of the press, radio, television, cinema and news agencies and of the

journalists working in those fields.” Dissidents across Eastern Europe pointed to these concessions as justification for their own struggles, and demanded that their terms be honored. And, they did so despite the fact that their expression was often illegal.

Today, we are here to discuss a different medium of expression, one unimaginable only one half-century ago. The Internet has multiplied our communicative abilities thousands-fold: No medium in history has reached so many, with so much, so quickly. Not, perhaps, since Guttenberg has communication leaped forward at such a pace. And as is often typical with rapid change, we now look with apprehension on its possibilities. Our task is to decide whether to let this new medium run its course or to restrict its use.

The United States, as a rule, does not pursue the latter option. We do not suppress through regulation speech that we deem offensive. The First Amendment to the United States Constitution sets a high bar for the criminalization of speech. In the case of *Brandenberg v. Ohio*, the Supreme Court held that speech may be made criminal only when it incites to imminent lawless action and is likely to produce such action. This contrasts with the *Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems*, which calls on participating States to criminalize the publication of racist and xenophobic materials, and the public insulting of an individual or a group on a racial or ethnic basis.

Yet, the gap that divides us is not necessarily as broad as has been portrayed. In a decision handed down only six weeks before *Brandenberg*, *Watts v. United States*, the U.S. Supreme Court made clear that at least one form of “pure speech” may be criminalized – that constituting a “true threat.”

On this basis, United States law does, in fact, make criminal what many free expression purists might view as protected speech. Just this past year, in the case of *Virginia v. Black*, the Supreme Court concluded that the act of burning a cross – a most expressive activity – could be criminalized. Cross burning, for those of you not familiar with the American civil rights struggles of the 1950s and 1960s, has long been a tool of oppression of religious and racial minorities.

In *Black*, the Justices noted that a “true threat” can exist even where the threatening party has no intention of carrying out the threat. Rather, the law can act to protect against “the fear of violence,” and from “the disruption that fear engenders.” This conclusion is particularly relevant to my own work. The

Civil Rights Division of the United States Department of Justice enforces federal laws against the use of fire as a tool of racial intimidation. Since 2001, we have prosecuted criminally nearly 50 defendants for this offense.

Federal authorities have similarly found criminal liability for direct threats in a number of cases, including some employing the Internet. For instance:

- In *United States v. Machado* (1996), a college student was prosecuted for sending an e-mail signed “Asian Hater” to 60 Asian students, threatening to “find and kill everyone . . . of you personally.”
- In *United States v. Kingman Quon* (1999), another college student pleaded guilty to sending threatening messages to Hispanic professors, students, and employees, again threatening to “come down and kill” them.
- Also in 1999, Carl Johnson was convicted on four felony counts for sending threatening e-mails to federal judges.
- In *US v. Grey* (2000), a Maryland teenager pleaded guilty to sending e-mails threatening to kill a school administrator and his family and to burn down their home.

Attorneys under my charge are responsible for prosecuting federal bias crimes, which include crimes of this nature. Just last month, we obtained an indictment against a Texas man who sent an e-mail to an Islamic Center in which he threatened to blow it up if hostages in Iraq were not immediately freed within three days.

My attorneys are presently looking at similar internet-born threats of racially motivated violence.

One particularly fascinating case is the 1997 appellate court decision in *Rice v. Paladin Enterprises, Inc.*, which concluded that the First Amendment did not protect the publisher of a “how to” book for being a “hit man.” Rather, after a contract killer meticulously followed the book’s instructions for a particularly gruesome triple murder, the Court found the publisher liable for civil “aiding and abetting” through its speech.¹

¹ Federal courts have similarly found criminal liability for aiding and abetting through mere spoken words in a number of cases where individuals lectured on means of circumventing the tax laws. See *U.S. v. Kelley*, 769

In that case, the Court, perhaps prophetically, noted:

Were the First Amendment to offer protection even in these circumstances, one could publish, by traditional means or even on the internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with impunity.

How timely these words seem seven years later, when terrorist websites do precisely that – publish “how to” manuals for everything from operating an AK-47, to carrying out demolitions operations, to constructing a radiological device.

Not surprisingly, these principles have been applied to the internet. In the widely discussed case of *Planned Parenthood v. American Coalition of Life Activists*, the Court of Appeals found a website presentation titled “The Nuremberg Files,” which listed the names, addresses, and other personally identifying information of abortionists, civilly liable when several were murdered. While these listings did not threaten in so many terms, the context of the website created the necessary fear and apprehension in their objects to move the speech outside the protections of the First Amendment.

For purposes of this panel, then – focusing on websites similar to the “Hit Man” book or the Nuremberg Files, American law may have an answer.

This is, however, as far as our law will go. While some speech – threats and aiding and abetting – may be criminalized, the United States does not criminalize more broadly the pure dissemination of information.

The regulatory view, accepted widely in Europe, is that freedom of expression is a right to be considered in balance with other rights, not the least of which is the right of others to be free from insult to their personal dignity. This is perhaps best captured in Article 10 to the European Convention on Human Rights which, while allowing for freedom of expression, further provides that:

F.2d 215 (4th Cir. 1985); *U.S. v. Rowlee*, 899 F.2d 1275 (2d. Cir. 1990); *U.S. v. Moss*, 604 F.2d 569 (8th Cir. 1979).

The exercise of these freedoms, since it carries with it duties and responsibilities may be [restricted] by law . . . for the protection of health or morals, [or] for the protection of the reputation or the rights of others.

The American system takes a different view. Freedom of expression is non-mitigable. American courts, therefore, have protected a host of speech that may be criminal in many other countries.

For instance, in *Reno v. American Civil Liberties Union*, the Supreme Court struck down a statute intended to protect minors from offensive materials. The interest in free expression was such, the Court held, that protections considerate to minors were impermissible to the extent that they barred otherwise legitimate communications among consenting adults.

And, in *R.A.V. v. City of St. Paul*, the Court held that while cross burning generally might be proscribable, a legislature could not single out only a few motives for doing so – such as hatred of race or religion – and punish only them.

It is the American view that the best means of fighting such obnoxious speech and expression is with *more* speech and *more* expression. United States courts have long subscribed to the notion of the marketplace of ideas, where the purveyors of myriad creeds and ideals compete with each other for customer-adherents. And, that system is premised on the confidence that our democratic and egalitarian ideals are sufficiently powerful that they will ultimately defeat the hate-mongers and race-baiters.

In the American view, balancing freedom of expression with other rights, such as the right to be free from insult or impugning of personal dignity, weakens us all. In such a balancing, the right to speak is in fact taken from both speaker *and* listener. This loss, ultimately, will be felt more grievously by the minority it was intended to protect. For the majority, many avenues of expression and communication remain open; for the minority, they are few, and should be jealously guarded.

Nowhere is this lesson better taught than in the development of the American Civil Rights movement. I want to linger for some moments on the Civil Rights movement. Some of our most heralded free speech decisions were necessary to protect minority expression – the vehicle by which oppressed races freed themselves. For instance, *New York Times v. Sullivan* shielded the media trying to report on the civil rights struggle. And *NAACP v. Button* protected a civil

rights' group's right to not report its membership – the right to not be coerced to speak. Without such freedoms, minority rights would have been much slower coming. No minorities ever gained in the United States by being told, along with the rest of the country, that they could not speak.

Although what-ifs are difficult, I pose the question – what if the speech that we so carefully guard today were not permitted during the civil rights struggles? Would those ideas have spread as quickly and as widely? Without the marketplace of ideas, would our society today have been better off?

In our view, not only is the freedom model superior to a regulatory approach, but in fact the regulatory approach is counter productive.

History bears this out. The regulatory regime – the criminalizing of speech – has long been the mainstay of oppressive and totalitarian regimes. Such governments have traditionally and swiftly banned speech critical of the regime. Indeed, right here in Paris sixty years ago, the Gestapo was busy suppressing speech, limiting the public to only their twisted message. Free expression usually ranks among the first casualties of dictatorship. It is often the first resort of those who perhaps lack the courage of their own convictions and fear that their ideas cannot compete with freedom and equality.

That is not to say, that modern restrictions are born of the same fear. But even well intentioned regulation may ultimately prove ineffective. As [French] Foreign Secretary Renaud Muselier recently observed in an article in *Le Figaro*, “No one wants censorship, and its effectiveness would in any case be illusory.”

Any benefit from censorship in fact is illusory. Where regulation succeeds in forcing an idea from the public square, it simply pushes the idea underground, far from the disinfecting light of public debate. Ideas so sequestered have an unfortunate habit of festering in the squalor and humidity of the dark corners and by-ways of human hatred. Criminalization and oppression lend even the most offensive ideas almost an air of respectability, and attract those who consider themselves similarly downtrodden. And, out of the way and out of sight, it becomes harder to debunk and defeat such ideas.

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This past week, America said goodbye to President Ronald Reagan. Let me close with a notion that was a favorite of his. Throughout his career, and in his farewell address to the nation, President Reagan borrowed a metaphor from

John Winthrop, an early American Pilgrim – the “shining city upon a hill.” As the President described it: “in my mind it was a tall proud city built on rocks stronger than oceans, wind-swept, God-blessed, and teeming with people of all kinds living in harmony and peace, a city with free ports that hummed with commerce and creativity, and if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here.”

That kind of city, and that kind of country – which relishes and flourishes in diversity, which welcomes all with the will and the heart to get there – is possible only by embracing, rather than hiding differences. And the former is possible only through understanding of differences. In short, as one American court recently put it, “Without the freedom to criticize that which constrains, there is no freedom at all.” *Rice v. Paladin Enterprises, Inc.*

Hate and bigotry – racism, xenophobia, and anti-Semitism, must be countered swiftly and thoroughly. They are repugnant doctrines. But, short of actual incitement or threat, the answer is not criminalization. Rather, the answer is rigorous debate, education, and public excoriation of such bankrupt ideas.

Thank you very much for the opportunity to speak today.