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FREEDOM OF EXPRESSION

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Freedom of speech has traditionally been an ally of the liberals. In the recent times, however, it is the liberal elite calling for new restrictions on freedom of expression. The evidence of this is an ever growing body of hate speech laws being enacted and enforced in many European countries. It comes as no surprise that the three main areas in which "hate speech" laws are being applied pertain to: (1) abortion protests, (2) criticism of homosexual conduct, and (3) criticism of Islam. Yet in defending free speech, our position needs to be one of principle. We are not arguing for freedom of expression for Christians only, but for everybody, even those we are in sharp disagreement with. And while acknowledging together with Sir Winston Churchill that "[f]ree speech carries with it the evil of all foolish, unpleasant, and venomous things that are said,"[1] freedom of expression echoes the inherent dignity of every human being endowed with a free mind and conscience.

The crucial question we are facing is whether a government has or should have a power to restrict speech, which a certain group finds offensive or insulting. My answer to that question is crystal clear: it should not. As the U.S. Supreme Court Justice Robert Jackson put it in the *Youngstown* case, although in a different context "such power either has no beginning or it has no end."[2]

The most important freedom in the constitutional system of any democratic country is freedom of speech. Without free speech there is no discussion and without discussion there is no democracy.

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[1] Sir Winston Churchill, Former British Prime Minister, Speech in the House of Commons (Jul. 15, 1952) (transcript available in THE ESSENTIAL CHURCHILL, COLLECTED WORDS, SPEECHES, AND SAYINGS OF SIR WINSTON CHURCHILL 25 (Duckworth & Co. 2012).

[2] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952).

Any possible restrictions on speech have to meet three basic conditions set by the wording of Article 10 § 2 of the European Convention on Human Rights (here and after "the Convention") reflected in a settled jurisprudence of the European Court of Human Rights[3] (here and after "the Court"). They have to be:

1. prescribed by law,
2. tailored to one of the legitimate aims described in Article 10 § 2 of the Convention, namely to the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
3. necessary in a democratic society.[4]

I would argue that prosecuting "hate speech" does not meet the second and third prongs of the Court's test.

The most troublesome issue is that there is no *legitimate aim* upon which free speech is being restricted in hate crime cases. The one most

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[3] "The European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights." European Court of Human Rights (ECtHR), COUNCIL OF EUROPE, http://www.coe.int/t/democracy/migration/bodies/echr_en.asp (last visited Dec. 18, 2013).

[4] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, E.T.S 5 (entered into force Sept. 3, 1953), *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf [hereinafter European Convention]. The standard three prong test has its basis in the wording of Article 10 § 2 of the Convention, which states (with emphasis added):

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are *prescribed by law* and are *necessary* in a democratic society, *in the interests of* national security, territorial integrity or public safety, for the *prevention of disorder* or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

readily susceptible is "the protection of the reputation or rights of others."[5] If a person is blackmailed then the protection of reputation may trigger a restriction on speech. Of course, nobody has a right to exercise free speech in your living room, because that would run contrary to your rights guaranteed by the Convention, namely the right to respect one's home[6] and the right to property.[7] The other potential legitimate aim—"prevention of disorder"—wouldn't do the trick either. There has never been any evidence introduced to suggest that a radical expression of views may spur violent action.

The problem therefore rests with identifying a right guaranteed by the Convention that is breached by "hate speech." Indeed, there is no societal group that has a right guaranteed by the Convention against "insulting" speech which can cause traumatic emotional pain. In fact, a large portion of opinions in the body of politics or in other public fields do cause emotional pain. If we would allow criminal prosecution for any opinion that is capable to cause emotional pain to a certain group in the society, free speech would depend upon a whim of whoever has an immediate majority in a national legislature. Furthermore, if we would be willing to restrict speech for the protection of other rights, not only those explicitly guaranteed by the Convention, we could effectively strike Article 10 from the Convention. After all, the basic goal of the cited provision is to stop the legislative power restricting free speech beyond the scope allowed by Article 10 § 2.

According to a well-settled jurisprudence of the Court, the "adjective *"necessary"* [w]ithin the meaning of Article 10 § 2, [i]mplies the existence of a "pressing social need.'"[8] The member states have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision exercised by the Court. The Court has emphasized that although freedom of expression may be

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[5] *Id.*

[6] *See* European Convention, *supra* note 4, art. 8 (stating that "[e]veryone has the right to respect for his private and family life, his home and his correspondence.").

[7] *See* Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S 9 (entered into force May 18, 1954), *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf [hereinafter Protocol 1] (stating that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.").

[8] Perna v. Italy, 2003-V Eur. Ct. H.R. 333, ¶ 39 (2003), *available at* http://echr.coe.int/Documents/Reports_Recueil_2003-V.pdf (emphasis added).

subject to exceptions, they must be "narrowly interpreted" and "the necessity for any restrictions must be convincingly established."[9] The tailoring to one of the legitimate aims therefore has to be pretty much a "custom fit" not a loose summer beach style.

The aim of suppressing "hate speech" is to strengthen harmony in the society among various groups and shield these protected groups from emotional pain. The threat of prosecution should foster tolerance in the society. Such an argument is based on a premise that individuals confronted with radical expressions are so ignorant that they will readily identify with these opinions. And while tolerance among many groups is far from perfect in many countries, it is necessary to suppress the opposite – the possible rise of intolerance – even by a threat of a criminal sanction. The power to restrict speech based on an argument that truth has not yet prevailed has, however, one critical flaw—it implies the power of the government to decide where the truth lies. Furthermore, such an argument is in contradiction with the basic condition of free speech—namely that adult persons should be able to come to any conclusion upon which they can be persuaded in a free debate.

Criminal procedure and criminal sanctions represent the most heavy-weight means by which the government intrudes into individual freedoms. Criminal prohibitions are categorical—by using criminal law, government intends not just to put a price on conduct but to shut it off altogether. As Harvard Law Professor Charles Fried puts it: "a criminal law that says you may not say certain things, or seek to hear them, is a law that asserts a claim to control your mind."[10] Such an extreme intrusion into individual liberties does not meet a basic proportionality test when balanced against the hypothetical possibility of an insulting speech leading to violent acts. The causal link between a criminal ban on hate speech and the quantity of violent acts motivated by radical speech has never been established and is purely hypothetical.

The quest to find a principle clearly dividing constitutionally protected speech and speech that can be prosecuted is rather futile both at the national level, but also at the level of the Court.

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[9] Observer and Guardian v. the United Kingdom. A 216 Eur. Ct. H. R. ¶ 59 (1991), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57705.

[10] CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 87 (2005).

I will try to present this troubling situation on two very recent cases adjudicated by the Court—however with radically different reasoning and outcome.

The first case is *Vajnai v. Hungary*, in which the applicant was prosecuted for wearing five-pointed red star on his jacket.[11] He was convicted for the crime of "using totalitarian symbols" in a public place, but the court refrained from imposing a sanction for a probationary period of one year.[12] Here the Court found a violation of Article 10. The Court analyzed the restriction on speech under the two legitimate interests already described: prevention of disorder and the protection of the rights of others.[13] As to the prevention of disorder the Court employed a sort of a "real and present danger" test.[14] The Court found no evidence that wearing a Communist symbol can lead to "actual or even remote danger of disorder" and "a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a pressing social need."[15] On the legitimate aim of protecting the rights of others, the Court sounded like a real champion of free speech:

> [The Court] accepts that the display of a symbol which was ubiquitous during the reign of [Communist] regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression . . . In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling—real or imaginary—cannot be regarded as meeting the pressing social needs recognized in a democratic society.[16]

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[11] Vajnai v. Hungary, 2008-IV Eur. Ct. H.R. 173 (2008), *available at* http://echr.coe.int/Documents/Reports_Recueil_2008-IV.pdf.
[12] Vajnai v. Hungary, ¶ 8.
[13] *Id.* ¶ 55–57.
[14] *Id.* ¶ 49.
[15] *Id.* ¶ 55.
[16] *Id.* ¶ 57.

However, just three years later, the Court totally reversed its reasoning. The second case—*Vejdeland and Others v. Sweden*[17]—involved applicants who went to a secondary school and distributed leaflets in or near pupil's lockers. The leaflets criticized homosexual behavior—referring to it as "deviant sexual proclivity" which has a morally destructive effect on the substance of society"—and warned the pupils of "homosexual propaganda" allegedly being promulgated by teachers in the school.[18] The applicants were prosecuted for "agitation against a national or ethnic group" and eventually were given suspended sentences combined with fines.[19] The Court found no breach of Article 10. The Court based its decision on some kind of a "totality of circumstances" test—namely that the content of the leaflets contained "serious and prejudicial allegations"[20] and "the leaflets were left in lockers of young people who were at an impressionable and sensitive age."[21] The Court also emphasized, however, that "inciting hatred does not necessarily entail a call for an act of violence, or other criminal acts."[22]

What a U-turn that is with the reasoning in *Vajnai*.[23] There the Court held that a real danger for public order needs to be established before a restriction on speech would meet the requirements of Article 10.[24] So what was the difference between these two cases? The first involved an extreme left-wing politician, the second involved activists opposing homosexual lifestyle. Is the outcome of a case depending on how sympathetic the applicant is?

Thus the Court left us with no workable principle at all. The only "principle" at work is the ideological preference of the majority deciding

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[17] Vejdeland and Others v. Sweden, App. No. 1813/07, Eur. Ct. H. R. (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.
[18] Vejdeland and Others v. Sweden, ¶ 8.
[19] *Id.* ¶ 9–17.
[20] *Id.* ¶ 54.
[21] *Id.* ¶ 56.
[22] *Id.* ¶ 55.
[23] *Vajnai v. Hungary*, *supra* note 11.
[24] *Id.* ¶ 49.

a case. As ECHR Judge Andras Sajo pointed out in his dissenting opinion in *Féret v. Belgium*[25]:

> Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go "against the spirit" of the Convention. But "spirits" do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous.[26]

Without having a clear-cut principle, however, the case-to-case jurisprudence of national courts and the Court may well cause a chilling effect on free speech all around Europe. If the Court doesn't know where to draw the line, how can a citizen be safe in the exercise of his or hers freedoms?

I would therefore like to offer my insight on where to draw the line between protected and unprotected speech. I do admit that there may be alternative principles established, but the burden of proof lies extremely low in the case at hand—because there is no workable principle present in the current jurisprudence.

So, where to draw the line? It is clear that an expression of a Neo-Nazi in front of a Roma ghetto "let's go and lynch them" falls outside protected speech. The line between protected and unprotected speech must therefore lie between an *expression of an idea* and an *incitement to violent action*. Indeed, it may prove to be difficult to draw the line in some marginal cases, but that is not an argument for throwing outside constitutional protection a vast amount of speech that does not incite violent action at all.

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[25] Féret v. Belgium, App. No. 15615/07, Eur. Ct. H.R. (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93627.

[26] Féret v. Belgium, *supra* note 25.

Otherwise we grant the government the power to decide which opinions are bad and which of the bad opinions can the government prohibit expressing. That is to say that opinions supporting racial or religious tolerance are protected by freedom of speech, whereas opinions expressing racial or religious intolerance fall outside legal protection. In other words, the government would thus have the power to decide that if a group of extreme right-wing activists and Roma meets, one group (Roma) can insult the other (the far right), but it would be prohibited *vice versa*.

I am convinced that the government should not have the right to intrude into a debate in a discriminatory fashion.[27] To put it more metaphorically: the government should not prescribe one side of the discussion the rules for Greco-Roman wrestling and let the other side use the Freestyle.[28] The government should equally not have a power to arbitrarily decide that certain groups based e.g. on their national origin, religion, race, sexual orientation are protected against "hate speech" while other groups (based on sex, age, wealth, veteran status, political preferences, criminal record) can be verbally attacked *ad libitum*.[29]

The government should not be in a position to usurp our minds—what we believe in and what others can persuade us to believe. One of the basic conditions of freedom is a requirement that nobody restricts (or asks the government to restrict) somebody else's freedom only because he or she disagrees with the other's opinion on what is Good.[30] Nobody can be forced, in a free society, to accept or refute a particular theory of Good.[31]

As Justice Jackson wrote for the U.S. Supreme Court in *West Virginia State Board of Education v. Barnette*[32]:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . .

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[27] *See e.g.* R. A. V. v. City of St. Paul, 505 U.S. 377 (1992).
[28] *See id.* at 392.
[29] *See id.* at 391.
[30] Charles Fried, *Speech in the Welfare State: The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 236 (1992).
[31] *Id.* at 237.
[32] W. Va. State Bd. of Ed. v. Barnette, 319, 319 U.S. 624 (1943).

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[33]

With a view of having a principled jurisprudence on freedom of expression, the selection of the Court's judges is of paramount importance. Practically all judges elected to the Court are senior lawyers in individual member states. It is very unlikely that they will change their legal or judicial philosophies once on the Court. It is therefore vital to get information on their positions in advance. Unfortunately, the "living document" doctrine that is the basis of activist judiciary is not restricted to the United States. It is becoming orthodoxy in the last decades among many European constitutional tribunals, including the Court itself.[34] It goes without saying that when the judges at the Court choose to take ideological positions that go well beyond textual interpretation of the Convention, they usually take sides with the liberals. Therefore trying to get on the Court judges that are bound by the text of the Convention in the adjudication of individual complaints is essential.

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[33] W. Va. State Bd. of Ed. v. Barnette, 319 U.S. at 640–41.

[34] The "living document" doctrine emerged in the Court's decision in *Golder v. the United Kingdom*, in which the Court found an implied, unenumerated substantive right of access to courts in Article 6 § 1 of the Convention that grants a right to a fair hearing. *See Golder v. the United Kingdom*, App. No. 4451/70, Eur. Ct. H.R. (1975); European Convention, *supra* note 4, art. 6, para. 1. In *Tyler v. the United Kingdom*, the Court put the doctrine forward in unequivocally clear terms stating that "the Convention is a living instrument which … must be interpreted in the light of present-day conditions." *Tyler v. the United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. (1978).