

**THE RIGHT TO POLITICAL SPEECH
AND THE BAN ON HATE SPEECH**



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ABSTRACT

The Right to Political Speech and the Ban on Hate Speech

This thesis contributes to the debate on hate speech by arguing for a compromise solution. It breaks with the absolutist solutions under which either all hate speech should be banned or all should be protected. The prohibition of some hateful expressions is assumed to be legitimate. This follows the European constitutional tradition. However, the prohibitionist norm should be reconciled with the right to political speech. This flows from the normative importance of free political expression that is widely endorsed. The research relies on three theoretical pillars. First, it defines the strongest democratic justificatory case for political speech in liberal democracies. Then, it argues for a richer understanding of what should count as political speech. The proposed approach assigns more weight to the political circumstances than to the sheer content of speech. The argument then proceeds through investigating the strongest objections against protecting hate speech. These prohibitionist arguments assert that hate speech incites against, silences or vilifies vulnerable groups, moreover that hate speech harms democracy. The thesis disputes these objections as applied to political hate speech. The conclusion is that political hate speech narrowly defined should be an exception from the otherwise legitimate ban on hate speech. In the final two chapters, the theoretical findings are applied to the case law of the ECtHR and to the United Kingdom's statutory hate speech regulation. The critical evaluation of hate speech judgments and statutes is coupled with suggestions how to reform the broadly prohibitionist position that these jurisdictions had come to endorse.

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CDA	UK Crime and Disorder Act 1998
CE	Council of Europe
CPS	The Crown Prosecution Service
BNP	British National Party
DPP	Director of Public Prosecutions (England and Wales)
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
FPÖ	Freedom Party of Austria
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
MSZP	Hungarian Socialist Party
POA	UK Public Order Act 1986
RRA	UK Race Relations Act
SPD	Social Democratic Party of Germany
UNHRC	United Nations Human Rights Council

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Chapter One

INTRODUCTION

1. Intuitions

Hate speech has been a topic of controversy for decades among theorists, politicians and courts. Reducing the controversy to the ultimate question of prohibition would do injustice to the complexity of the debate that touches on free speech justifications, on the rationales of hate speech bans or the scope and efficacy of such speech regulations.¹ In response, a vast literature has developed with diverging opinions in the US and in Europe coupled with a growing body of case law. The question seems to be more topical than ever before with the recent political events that saw the emergence of previously fringe political parties into the mainstream.

This thesis aims at contributing to this controversy for a European audience. In doing so, this thesis will try to reconcile two seemingly contradictory features in the hate speech debate. The first is European jurisdictions' long-standing adherence to the regulation of hate speech. Second is the same European jurisdictions' adherence to the normative importance of political speech. Despite the second allegiance, European jurisdictions often only pay lip service to freedom of speech in light of the dangers associated with hate speech. This thesis aims for a different solution.

¹ In recent times, two major essay collections enriched the literature: Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech* (CUP 2012). About the various types of regulations see: Arthur Jacobson and Bernhard Schlink, 'Hate Speech and Self-Restraint' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech* (CUP 2012). For an illuminating comparative analysis of hate speech laws see: Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence – A Comparative Analysis' *ibid.* For the question of justification and rationales see. Eric Heinze, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9/4 *Int.J.L.C.* 590.

This introduction will clarify some assumptions and ideas such as the compromise sought in this thesis, the concept of hate speech, the European constitutional background norm of prohibition and the deadlock that characterises the debate on hate speech. Before tracing through these issues, a couple of hate speech cases and starting intuitions shall be presented to set out the conundrum at the heart of the thesis. We will contrast three recent hate speech cases from three comparable European jurisdictions.

1.1 Recent Examples of Hate Speech

Last year Geert Wilders, the leader of the Dutch far-right, was prosecuted for the following speech held in a public meeting: ‘Do you want more or fewer Moroccans in this city and in the Netherlands?’ To which the crowd predictably shouted ‘Fewer! Fewer!’ Mr Wilders assured his followers that ‘I’ll take care of that.’² Despite no violent incident erupting upon Wilders’ speech, the judges in The Hague found him guilty of incitement to discrimination on basis of ethnicity and religion. Perhaps somewhat surprisingly the judges opted not to impose any criminal sanction on the guilty politician, but the media impact of the judgment was quite considerable. It was not the first time that Wilders had got into trouble for being on the wrong side of hate speech laws, but it was one of the few times that he was found guilty.

Contrast the widely mediatised Dutch judgment with the recent hate speech sentencing of Paul Gascoigne, the former English football star. In one of his public appearances Gascoigne cracked an off-hand racist joke in front of a large audience when saying to the black security guard on the stage: ‘[c]an you smile please? Because I can’t see you!’ The ex-footballer pleaded guilty for using racially aggravated threatening,

² Zack Beauchamp, ‘The Dutch politician convicted of inciting anti-immigrant rage is going up in the polls’ (*Vox.com* 9/12/2016) <<http://www.vox.com/world/2016/12/9/13898534/geert-wilders-convicted-incitement>> accessed 1/1/2017.

abusive or insulting words, which is an offence under the UK's Public Order Act 1986. Gascoigne received a fine of £1000 upon which he immediately apologised for his ill-considered remark.³

Finally consider another English hate speech case: *Regina v Relf and Cole*.⁴ In the small English town of Leamington Spa, two citizens of the town wrote, printed and plastered around the town, racist leaflets on the walls of the street and shop windows. The leaflets portrayed black people as apes, along with harsh racist messages, for instance linking criminality with the local West-Indian community. According to the judgment some of these racist leaflets were 'seen in the Leamington Spa area, mostly in or near areas where coloured people lived.'⁵ The perpetrators were prosecuted quickly for a public order offence, which is Britain's main hate speech law (the same law that Gascoigne ran into). The judge argued that even though no public disorder or violence was sparked, the repetition of racist lies had the potential of wreaking havoc, as the Nazi propaganda, mainly against Jews, demonstrated amply in this century. One academic observer of the case described the sentencing in vivid terms:

I remember seeing a racist agitator sentenced to a short prison term in England in the late 1970s, under the Race Relations Act, for festooning the streets of Leamington Spa with posters depicting Britons of African ancestry as apes. After his conviction by the jury, he was sentenced by a crusty old English judge, who (one might have imagined) would have little sympathy with this new-fangled hate speech legislation. But the judge gave the defendant a stern lecture to the effect that we cannot run a multiracial society under modern conditions if people are free to denigrate their fellow citizens in bestial terms.⁶

³ 'Paul Gascoigne fined over racist "joke" aimed at security guard at his one-man show' (*The Telegraph* 19 June 2016) <http://www.telegraph.co.uk/news/2016/09/19/paul-gascoigne-pleads-guilty-to-racially-aggravated-abus-after> accessed 11 March 2017

⁴ *Regina v Relf and Cole* (1979) 1 Cr. App. R. (S.) 111.

⁵ *ibid* 113.

⁶ Jeremy Waldron, *The Harm in Hate Speech* (HUP 2012) 58.

It should be emphasised that the defendants were not members of any political party or other organised movement. Their speech was purely meant as intimidation and amounted to a form of racist propaganda that invaded the town, including places where people of West Indian and Indian origins lived. Accordingly, the defendants said at the court that they wanted ‘to challenge the system’ with their leaflets.⁷

All three cases were prosecuted on account of the speeches’ racist content, albeit in different countries. None of the cases turned on the potential of violence attributed to the impugned speeches. Yet beyond these similarities, the cases may be thought to be pulling in quite different directions.

Paul Gascoigne was performing his one-man show in front of an audience and cameras caught his arguably incautious but unintended remark. In the case of Gert Wilders, the remarks were certainly intended as a political message aimed at a wide audience or even the public at large, as the speaker knew well that the media would carry his message. On the other hand, the “system-challenger” leafletters in Leamington Spa tried to spread their message with maximum efficacy and low exposure. The tone of the racist messages varied in the three cases, but one could plausibly argue that the least harsh statements, expressed in the Dutch case, might have more persuasive power than the outrageous racism exhibited in the *Leamington SPA case* or the tasteless joke of an ex-footballer.

Naturally such differences could be taken properly into account in the sentencing stage in all the cases. But the general jurisdictional approach on hate speech in Europe assigns dominant importance to the prejudiced content of the speech, and thus lumps together all such cases under the label of hate speech. Against this admittedly broad-

⁷ (1979) 1 Cr. App. R. (S.) 111, 113.

brush portrayal of European jurisprudence (about which more in Chapter Five) we are setting out three intuitions to oppose this lumping together. The illustrative cases may turn out to be rather dissimilar, contrary to the common label of hate speech.

The first intuition is that the speakers in the cases above do not have an equally strong claim for free speech protection against the hate speech ban. Conversely, the generally justified norm of hate speech prohibition does not hold with equal force in all cases. These differences largely depend on the circumstances in which the speeches were expressed.

Related is an intuition about the primacy of political speech in the normative landscape of freedom of speech. It is a widely shared opinion that the right to freedom of speech has come to protect a range of overlapping speech interests, ranging from political, artistic to religious or even commercial expression. Political speech is intimately linked with democracy and, for that reason, enjoys distinguished protection from courts. It follows though that not all, only some speeches are political, and should enjoy on that account the heightened protection. Perhaps many speeches are political, but some have stronger claim for protection than others.

The final intuition is about the demands of realism when writing about freedom of expression and hate speech in the second decade of the 2000's. As this thesis will argue, the widely accepted European prohibition on hate speech is normatively justified but might sit ill with the state of contemporary politics. No one can deny that race, religion, immigration or sexual orientation animate many of our political debates. Moreover, it is also undeniable that part of the electorate, along with some politicians, feed off the ideas of racism, xenophobia and homophobia. This poses a conundrum for democracies. In a nutshell, a commitment to the rule of the people and to the equality of citizens may pull in opposite directions.

This research follows up on these admittedly raw intuitions in a quest for answers. At this point it suffices to shed light and cast some doubts on the three illustrative hate speech cases in a tentative sense to set the stage for the broader inquiry.

The criminal case of the ex-footballer, Paul Gascoigne, for hate speech does not seem to exhibit any political characteristic in any meaningful sense. Therefore, it would be difficult to take issue with Gascoigne's sentencing on the grounds of political speech. His ill-taste joke could deservedly be labelled low value in accordance with the prevailing doctrinal standard used by the ECtHR or British Courts. This assessment does not derive solely from the racist content of his remark – this could be said about all the cases. Rather the non-political context of the joke matters as it does not provide any defence embedded in *political* speech. Notice that this assessment would not go against a plausible defence of Gascoigne, namely that government coercion should not be used against an off-hand distasteful joke for which the defendant immediately apologized. The point is a narrow one here: such a prudential defence would be justified on other grounds than a concern for political speech.

In contrast Geert Wilders' sentencing for hate speech should be looked at very differently. The defendant-speaker was a national political figure who expressed his views in a typical political forum – a political rally – on a political topic (immigration). There is no question that the xenophobia of the leader of the Party for Freedom rightly appals many, as it amounts to the rejection of liberal democracies' cornerstone value of equality. But censoring the message of politicians in a clearly political setting is very different from punishing an ill-taste joke in a social context. Setting content similarities aside, the prohibition of Wilders may square badly with a right to (political) free speech while that of the ex-footballer might be unobjectionable on the same account.

But intuitions alone do not resolve difficulties with a sleight of hand. The Leamington Spa case arguably could pose problems as one could argue in both directions. The case might be thought to be closer to Geert Wilders' political hate speech because the leafletters' goal was certainly political. They wanted to make a point about race and immigration, which continue to be an imminent public debate just about everywhere in Europe. Yet they did so in a less public way than a politician declaring his views in a public meeting. Displaying threatening leaflets as a token of society's rejection in the streets and places where the targeted minorities live seems closer to sheer intimidation than to political speech.

2. The Concept of Hate Speech

The term 'hate speech' was coined and came into broader usage in the 1980's amidst the debate on campus speech codes in the US.⁸ Ever since it has become a term of art to designate one sort of content-based restriction on racist speech. The legal scholar Michel Rosenfeld defines it as 'speech designed to promote hatred on the basis of race, religion, ethnicity, or national origin.'⁹ Similarly the United Kingdom's hate speech law mentions the 'stirring up of racial and religious hatred,' and hatred based on sexual orientation.¹⁰

In a nutshell, hate speech expresses prejudice against vulnerable groups defined by race, ethnicity, religion, nationality or sexual orientation.¹¹ Yet there are several ways to approach the concept. All definitional attempts are contestable, but we do not mean

⁸ Mari J. Matsuda's oft-cited article from a prohibitionist perspective provides an account of the 1980's battle around campus hate speech codes. Mari J. Matsuda, 'Public Response to Racist Speech: Considering The Victim's Story' (1988-1989) 87 Mich. L. Rev. 2320, 2332-2334.

⁹ Rosenfeld (n 1) 242.

¹⁰ UK Public Order Act 1986 Part 3, 3A.

¹¹ We use race, racist or racism throughout the thesis most frequently, but this only aims to make the text more readable. Racism could be replaced by any other prejudices such as xenophobia or homophobia as we treat all prejudices and thus all hate speech categories similar. Unless mentioned otherwise whatever is held for racism goes for other prejudices as well.

to settle substantive issues by definitional fiat, hence a couple of non-contested features of the concept will be set out. These features apply to virtually all hate speech laws.

(1) The victims of hate speech are members of vulnerable groups defined by race, ethnicity, religion or sexual orientation. (2) Hate speech represents a direct denial or rejection of one's belonging to the community, one's equal standing or dignity. (3) The concept of hate speech does not comprise frontal and personal attacks even if they are of prejudiced content.

The “rejection feature” is key for understanding the hate limb of the term – even though it surely is not accepted unanimously. Robert Post criticised hate speech laws starting from the hate limb. He opined: ‘[t]o prohibit hate speech, then, is to forbid expression of extreme intolerance or extreme dislike.’¹² Post thus put the heightened negative emotional state, i.e. hate, at the centre of the definition at the expense of the group feature.

It is true that hate speakers often express emotionally charged opinions. Yet hate as an emotional state sits ill with the concept. Speech can be sparked by heightened emotions targeting injustice, unfairness or, say, high taxes – none of which makes such emotionally charged speech analogous with hate speech. Moreover, many well-known forms of hate speech are presented as plainly non-emotional: Holocaust-denial is the case in point. The emotional state of a Holocaust-denier's mind is just irrelevant, the racist prejudice matters for the concept. Therefore, the ban on hate speech is often framed as ‘incitement to discrimination,’ or ‘stirring up of hatred,’ but the ban always focuses on the prejudice rather than the state of mind of the speaker. To ban speech for its

¹² Robert Post, ‘Hate Speech’ in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 123.

immediate consequences is to ban incitement to violence that is nowhere protected speech.

Notice that the concept only mentions some and not all possibly identifiable groups in society. One explanation is that these groups share the property of a level of vulnerability in society that others such as, say, ‘soldiers’ do not.¹³ Trouble is that there are other groups that are common in anti-discrimination laws yet amiss from the concept. The examples in point are gender and disability. Extending hate speech bans onto gender would not be objectionable conceptually in the way the extension to soldiers would. Yet because few hate speech laws explicitly include these groups, and none in the observed jurisdictions of this thesis (ECtHR, United Kingdom), sexist and anti-disability hate speech will be omitted.¹⁴

The narrow concept of hate speech adopted here is not without alternative. Various ‘extreme speeches’ are often lumped together as a group. It would include hate speech pornography, incitement to violence, glorification of terrorism, condoning of violence, and apology of totalitarian regimes.¹⁵ All of these extreme speeches are primarily objectionable on account of their content being similar to hate speech. They are also conceptualised as low value expressions deserving minimal if any protection. Yet in key respects these miscellaneous sets of speeches are not analogous with hate speech. For one hate speech is an offense to the dignity of a group of people, whereas glorification of terrorism and violent speeches are not. In this regard pornography might be closer to hate speech, but the analogy is debatable.

¹³ See the discussion of cases where soldiers were subject of group insults in the German cases of *Tucholsky I* and *II*. They are discussed in Rosenfeld (n 1) 270-271

¹⁴ The exception is for instance France’s anti-discrimination law that applies across the board including to gender and disability.

¹⁵ Council of Europe ECtHR Press Office, *Factsheet – Hate Speech* (CE March 2017) http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf accessed 12/3/2017.

A well-developed thread in feminist literature argues for pornography objectifying women in a way that deprives them of dignity. In this way pornography, especially violent pornography, may be thought as sexist hate speech. Of course, this opinion is far from consensual. Many within and outside of feminist scholarship strongly dispute this charge.¹⁶ We take that the function of pornography conceptually is to do with sexual gratification and not with the expression of prejudice; hence the analogy does not hold.

The main difference with other categories of extreme speech lies in their relation to political ideas. Hate speech is conceivable as the expression of recognisable political ideas such as xenophobia, homophobia or racism. Liberals rightly oppose racists, xenophobes and sexists but that does not make these ideas less political. At a basic level they express a varying level of rejection of equality. At least some hate speech is an expression of a clear viewpoint on equality.

One could make an argument that the same goes for the glorification of terrorism. A plausible distinction remains that physical violence is central to the glorification of terrorism which makes it a singular case. Yet, this distinction can be disputed in turn by holding that racism or xenophobia are just different variations of violence. This thesis remains agnostic about this question but nothing of importance depends on it.

Finally, it should be highlighted that not all racist, xenophobic or homophobic speech amounts to hate speech in the conceptual sense. Hate speech qua concept,

¹⁶ See from the liberal tradition a pertinent critique: Leslie Green, 'Men in the Place of Women, from Butler to Little Sisters' (2006) 44 *Osgoode Hall L. J.* 1. The famous feminist philosopher Judith Butler's position on pornography is for instance opposite of the anti-pornography trend. See Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997) chapter 4.

therefore, should not be conflated with two further types of prejudiced speech.¹⁷ First, hate speech is different from frontal verbal attacks. The idea is well captured by the American constitutional law doctrine of ‘fighting words,’ according to which the victim is hurled at speech which she cannot escape physically.¹⁸ The doctrine thus hinges on the physical proximity between the speaker and the victim. The content of fighting words may be racist (though it need not be) but it will not turn it into hate speech.

Second, speech with racist content may target someone personally without the element of physical proximity. This instance of racist speech amounts to personal (racist) harassment. Harassment is a form of intimidation that conceptually hinges on speech targeting in person its victims. The typical example would include racist harassment in the form of bullying in school or at workplace.

Despite these conceptual difficulties, some in the critical literature draw the lines somewhat less stringently. Some extrapolate the very tangible harms of personal harassment or ‘fighting words’ to the harms in hate speech and thus blur the line between hate speech and the other two categories. The well-known prohibitionist essay of Charles R. Lawrence offers a good example for such a vague extrapolation.¹⁹ He introduced the notion that hate speech forces its victims to choose from ‘fight-or-flight response.’ The arguably dreadful personal experience of facing up to a personal racist attack that leaves the victim with the pseudo-choice of ‘fight or flight’ is supposed to play out the same way for hate speech. Yet this vague extrapolation is not tenable. The harms

¹⁷ For instance, see the famous prohibitionist essay of Richard Delgado, ‘Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling’ (1982) 7 Harv. C. R.-C. L. L. Rev. 133. Delgado starts his essay by drawing an analogy between an employment harassment case and a public political speech case (the *Skokie* case: *National Socialist Party of America v Village of Skokie*, 432 U.S. 43 (1977)).

¹⁸ The origins of the concept go back to the seminal case of *Chaplinsky v New Hampshire* 315 U.S. 568 (1942). In *Chaplinsky* the appellant Jehovah’s Witness shouted at a policeman ‘You are a God-damned racketeer’ and ‘a damned Fascist.’

¹⁹ See for the discussion of the ‘fight or flight response’: Charles R. Lawrence III, ‘If He Hollers Let Him Go: Regulating Racist Speech in Campus’ (1990) 3 *Duke Law Review* 431, 456. See the poignant critique of this extrapolation by Heinze *ibid* 138-139.

in harassment and in ‘fighting words’ stems primarily from the frontal or personal nature of encountering offensive speech, which in turn makes such attacks unavoidable and the psychological harm real. In the recent literature Eric Heinze criticised convincingly this tendency in the prohibitionist literature:

One prohibitionist fallacy is, then, to extrapolate, without empirical support, from evidence about face-to-face, ‘fighting words’ situations to general expression within public discourse.²⁰

Therefore, there is no straight analogy between hate speech on the one and personal harassment, frontal verbal attack on the other. The concept of hate speech will be used in this sense throughout this thesis.

2.1 Multiple Forms of Hate Speech Ban

The ban on hate speech in European jurisdictions is widespread and takes many legal forms. In the United Kingdom criminal laws deal with hate speech: the Public Order Act of 1986 and the Crime and Disorder Act of 1998. The former includes the above mentioned public offences, which ban speech that is likely to stir up racial or religious hatred and hatred based on sexual orientation.²¹ Germany has a general criminal offence against incitement that is interpreted broadly to encompass the particular case of Holocaust-denial as well.²² Interestingly for the time that the US allowed for hate speech regulation on the constitutional level, it was a similar type of criminal law that existed in the State of Illinois to the effect of banning the portrayal of ‘depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion.’²³

Criminal law of incitement is not though the only possible vehicle for prohibiting hate speech. In France, the preferred legal vehicle is group defamation in both criminal

²⁰ Eric Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016) 131.

²¹ Part 3 and Part 3A of the Public Order Act of 1986.

²² ‘*Volkserhetzung*’ §130 Criminal Code (‘incitement of the masses’).

²³ *Beauharnais v Illinois* 343 U.S. 250 (1952).

and civil law.²⁴ Moreover, France was the first country to insert into law a specific hate speech provision about Holocaust-denial in 1990: the *Loi Gayssot*.²⁵

Some authors in the literature emphasise the difference in the various legal ways to ban hate speech. For instance, Alexander Brown distinguishes ‘ten clusters of laws, regulations and codes that constrain uses of hate speech regulation’ that include, *inter alia*, group defamation, expression of hatred, incitement to hatred or Holocaust-denial laws.²⁶ Brown explicitly takes issue with treating hate speech laws ‘as a homogenous lump.’²⁷ Yet such sophistication may have the cost of underappreciating the common feature to all hate speech bans. There are laws that incidentally restrict hateful expressions but only hate speech laws target them specifically, on account of their distinctive characteristic: that they embody racial, religious and other prejudices. For the thesis, this property of hate speech laws matters more than the variety of legal forms in use to ban such expressions.

3. The Background Norm: The Prohibition of Hate Speech

The thesis addresses to a European constitutional background and importantly it ignores the US. This is significant because the thesis takes the European tradition of legally banning hate speech as its departure point and not its target. It is clear that a prohibition norm exists in Europe that allows the ban on hate speech as a matter of principle.²⁸

²⁴ Code Pénal Article R. 624-3.

²⁵ Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe.

²⁶ Alexander Brown, *Hate Speech Laws* (Rutledge 2015) 19.

²⁷ *ibid.*

²⁸ The notable exception in Europe is Hungary. Upon the democratic transition (1989-1990) an activist Constitutional Court gave a very expansive constitutional protection to free speech. In the historical decision of 30/1992 (V.30.) the Constitutional Court declared a criminal hate speech law unconstitutional on grounds of violating content-neutrality. This gave birth to a stream of judgments protecting hate speech in the expansive American way. See some further judgments of the Court: 18/2004. (V.25.) and 95/2008. (VII.3.) One disconcerting implication of the Hungarian constitutional position is the one-sidedness of free speech protection tilted towards hate speech. See my short take on the issue at Tamás Szigeti, ‘Why Shouldn’t a Hungarian Historian Call Jobbik Neo-Nazi?’ (*Free Speech Debate* 10 July

The prohibition norm is deeply embedded in the European constitutional tradition, epitomised by legislative interest in increasing the grounds of hate speech bans (e.g. the inclusion of sexual orientation as a new ground) and various constitutional courts' endorsements of the norm.²⁹ This turns any frontal challenge of the norm into a mere theoretical one, divorced from constitutional practice of European jurisdictions. Independent of its historical entrenchment, the prohibitionist norm has its own merits and thus it is normatively justified.

One can find many plausible rationales to justify the ban on hate speech. These rationales are often clustered into consequentialist and deontological groups.³⁰ The following consequentialist arguments are the most often mentioned in the literature.

Hate speech is thought to exercise silencing effect on its victims, making hate speech a form of speech restriction for racial, ethnic, religious or sexual minorities.³¹ A variation of this harm-based argument purports to establish that hate speech mounts a barrier for autonomous life for its victims. It might obtain this effect by stigmatising its targets in society.³²

Others argue, notably in critical race theory, that hate speech causes psychological or emotional harm. The verbal assault that hate speech represents causes

2013) «why-shouldnt-a-hungarian-historian-call-jobbik-neo-nazi» accessed 1/12/2017. For an overall critical assessment of the Hungarian constitutional jurisprudence see Michel Rosenfeld and Andras Sajó, 'Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies' (2005) *Cardozo Legal Studies Research Paper* (No. 144).

²⁹ The increase in scope foremost means that the number of grounds covered changed from the original racial, ethnic grounds to encompass religion and in many cases sexual orientation. On the other hand, there is not any recorded modification in the other direction of narrowing hate speech legislation. See the Chapter Six on the United Kingdom.

³⁰ A good discussion of the various prohibitionist arguments can be found in Eric Heinze (n 178) 125-180.

³¹ See Chapter 4.5 on the 'Silencing Objection'

³² Bhikhu Parekh, 'Is There a Case for Banning Hate Speech?' in Herz M and Molnar P (eds), *The Content and Context of Hate Speech* (CUP 2012) 44.

‘defensive psychological reaction’ and creates a ‘state of semi-shock’ and thus an ‘emotional injury.’³³

Others adopt a middle position, where hate speech act against an intrinsically valuable social goal. Michel Rosenfeld argues that hate speech has a corrosive effect on social cohesion and degrades society’s commitment to pluralism in multiracial societies.³⁴

Naturally, the problem with many of these arguments is that their claims are couched in causal language and thus are difficult to prove in any satisfactory way (for instance through statistics). This point about evidence will be revisited in Chapter Four, but it suffices here that there is no easy way to identify a causal link between numerous forms of disadvantages that vulnerable groups suffer in contemporary societies and hate speech *per se*.

In our view the best rationale for banning hate speech lies in the deontological harm that hate speech inflicts, so to say that hate speech is an intrinsic wrong. This wrong may be couched in terms of equality but it is more suitable to put it in terms of dignity. Dignity is a notoriously elusive concept that has infinite possible variations. This thesis does not aspire to analyse them one by one, rather stresses the most plausible dignitarian rationale underpinning the prohibitionist norm.

Jeremy Waldron’s argument about dignity as a basic status or social standing is illuminating for the dignity rationale.³⁵ Hate speech is wrong because it denies the equal membership of people belonging to vulnerable groups. Waldron writes:

³³ Lawrence III (n 19) 452,461

³⁴ Rosenfeld (n 1) 285

³⁵ For Jeremy Waldron’s recent work on hate speech see (n 6). We find much valuable to build on in Waldron’s argument yet it has its own problems that will become clearer later in this thesis.

[D]ignity in the sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction.³⁶

The point is to distance an attack on one's dignity from sheer offense. The concept of dignity here seems to build on Stephen Darwall's seminal distinction between appraisal and recognition respects. Darwall writes about the latter that '[persons as such] are entitled to have other persons to take seriously and weigh appropriately the fact that they are persons in deliberating about what to do.'³⁷ Therefore, hate speech is a form of denial of the equal or dignitarian status that everyone ought to enjoy. Of course, the disadvantaged social condition of vulnerable groups that hate speech attacks is instrumental in turning hate speech into a denial of dignity. In our contemporary societies group characteristic works as a powerful proxy to transmit the harm onto the individuals. Hence the harm lies with the individuals and not with the groups.

We will, therefore, accept that this rationale provides a sufficient ground for justifying the European prohibition norm on hate speech in general.

4. Deadlock in the Hate Speech Debate

It is often misleading to write about one single national or regional conception as if there were a single prevalent position. Nonetheless, opinions of theorists and court decisions on hate speech in America and in Europe may be just such a rare case. Hate speech is a divisive issue, where the gap could not be wider between a European and an American conception of free speech. The quasi totality of European jurisdictions, including the European Court of Human Rights (ECtHR), constitutionally allows the regulation of hate speech and has a broad judicial case law of proscribing hate speech.³⁸ This stands in

³⁶ *ibid.* 105

³⁷ S Darwall *Two Kinds of Respects*, *Ethics* 88 (1):36-49 (1977) 38

³⁸ One may argue that the contrast would only be perfect if the 'European position' amounted to a positive duty to ban

sharp contrast with the American constitutional position that rejects as unconstitutional all regulation of hate speech in the public sphere, broadly conceived. The Supreme Court's position is clear and unchanged since the *Brandenburg v Ohio* (1969) and the *National Socialist Party of America v Village of Skokie* (1977) judgments.³⁹

One should be even more careful to impute a unique academic position to Europeans or Americans. Yet it is still the case that the theoretical literature is equally divided on the issue. It is often the case that European writers argue for a ban on hate speech and Americans against it.⁴⁰ This division led Eric Heinze to coin the suitable pair of labels of 'prohibitionist' and 'oppositionist' positions. Prohibitionists subscribe to the broad proposition of banning hate speech on the basis of its content, while oppositionists oppose the ban. The two sides in the debate neatly map on the dominant European and American constitutional positions.⁴¹

A remarkable feature of the literature is the pervasive absolutist nature of both sides' positions. On the one hand, the strong European prohibitionist position is epitomised by the ECtHR's Article 10 (freedom of expression) and Article 17 (abuse of rights) case law that seem to adhere to an unequivocal ban on hate speech on account of its sheer content, or *ratione materiae* incompatibility with the Convention in the Court's language. In sharp contrast, the American Supreme Court endorses the quintessential oppositionist stance on the First Amendment. According to the US Supreme Court all

hate speech, but it need not be the case. First, there is already a *de facto* hate speech ban in European states given that all states subscribe to one form or the other. Second some judges at the ECtHR, most notable Judge Pinto de Albuquerque in *Vona v Hungary* has already argued for 'an international obligation' to ban dissemination of hate speech. See separate Opinion of J Pinto de Albuquerque in *Vona v Hungary* App no 35943/10 (ECHR, 9 July 2013).

³⁹ *Brandenburg v Ohio* 395 U.S. 444 (1969), *National Socialist Party of America v. Village of Skokie* (n 17).

⁴⁰ For a colourful but skeptical description of the divide see Eric Heinze, 'Wild-West Cowboys versus Cheese Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech' in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (OUP 2010) 182.

⁴¹ See Heinze, *Hate Speech and Democratic Citizenship* (n 178) 69. The terms are too good to ignore. Therefore, we will use them as shorthand versions for these positions. They are not just handy but reflect a European position where the prohibitionist position is the default one.

viewpoint-based restrictions are thus suspicious and require heightened scrutiny, which is almost always fatal to the discriminatory law.

The prominent reason why the debate is characterised by absolutist positions is the overwhelming focus of judges and theorists on the question of content and their basing normative judgment dominantly on the content of speech. One may riposte that it is only natural: what else could be at the centre of free speech cases than what the impugned speech really means? But there is a question of principle at the background of the content question, which is content neutrality. Content neutrality, in the hate speech context, means to forbid the government from discriminating between speakers based on their viewpoints. Whereas the American jurisprudence endorses the principle, the European rejects it for the purposes of hate speech. It means for the former, that any content discrimination is fatal for a law under the First Amendment. Conversely, in prohibitionist jurisdictions, courts treat the question of content as conclusive for the question of whether free speech should be deemed protected or not. Judges focus on whether the impugned speech qualifies as a matter of content for hate speech and disregard any further potential considerations. Therefore, at the ECtHR if the content discrimination is the right kind of discrimination, i.e. it properly criminalises hate speech, then the applicant will be effectively blocked from Article 10 protection. This unique focus on the question of content epitomises accurately the deadlock between prohibitionist and oppositionist positions.

The absolutist nature of the arguments means that the debate resembles an either-or debate where one would be either compelled to accept or reject the ban on hate speech as a matter of principle. In view of this the hate speech debate seems to be in a deadlock given the unbridgeable gulf between prohibitionists and oppositionists.

5. A Compromise Solution

We think that the deadlock is regrettable because it sets up the two positions on hate speech as mutually exclusive. This thesis aims at breaking the deadlock by proposing a compromise solution. The compromise pursued here should be neither *ad hoc* nor arbitrary but a justified one.

To achieve such a justified compromise, this thesis will primarily look at the scope of application of the two sides' arguments. Should one zoom in, they are not as mutually exclusive as they are often presented in the literature. The force of the normative arguments respectively for the prohibitionist and the oppositionist position depends more on the context of the speech than on the content *per se*.

We do not pretend to start from a totally neutral position and strike whatever compromise we find. The thesis takes as axiomatic the normative significance of political speech within democracy. The stakes are tilted towards political speech so to say. Moreover, our hypothesis is that some hate speeches are political while others are not, as our intuitions above already betrayed. This thesis will aim at setting up the best political free speech case and define its scope of application to the justified background norm of prohibitionism. The thesis looks to define an exception of political hate speech to the otherwise justified prohibition of hate speech.

6. A Pluralist Outlook on Free Speech

A fundamental doctrinal premise about free speech should be clarified here. The thesis takes a pluralist outlook on the right to free speech. Freedom of speech came to represent many loosely connected free speech interests both in practice and in theory. It might be the sign of success that free speech covers so many divergent expressive interests that one single guiding justificatory label does not suffice to justify all of them.

Thomas M. Scanlon argued for this position with regard to the First Amendment. He thought it doubtful whether even the central guiding free speech interests ‘could be helpfully subsumed under any single label,’ meaning justificatory values such as democracy, autonomy or the search for truth.⁴²

By different speech interests we mean one’s interest in political speech, in artistic or in religious expression, in civic expression furthering debates of public interest or even in commercial speech.⁴³ One’s interest in artistic self-expression cannot be compound with one’s interest in political speech, in one’s interest in general communication or with academic expression. The point is not that these interests are separated by firewalls. Many overlaps exist - e.g. artistic works often carry direct political messages. Yet at the justification level different free speech justifications protect different speech interests. As a result, speech can be protected *qua* political speech, *qua* artistic speech or *qua* commercial speech.

Courts do not ignore this pluralist outlook on free speech. Actually, the practice of human rights and constitutional courts such as the European Court of Human Rights abundantly reflects this pluralist approach. It is customary for the ECtHR to emphasise the self-standing importance of various speech interests. The importance of political speech and debate under Article 10 is the most often cited one: ‘[F]reedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.’⁴⁴ In relation to artistic speech the Court opines:

⁴² Thomas M. Scanlon, ‘Why Not Base Free Speech on Autonomy or Democracy’ (2011) 97 Virginia Law Review 541, 543.

⁴³ Civic expression might strike as an unclear category at first. A leading textbook describes this way the broad category compress ‘expression that claims to be in the public interest’ but is not political. For instance, in *Patutrel v France* a journalist made critical allegations about the methods of anti-sect association dedicated to former Jehovah Witnesses members. *Patutrel v France* App no 54968/00 (ECHR, 22 December 2005); David Harris, Michael O’Boyle and Colin Warbrick (eds), *Law of the European Convention on Human Rights* (OUP 2009) 458.

⁴⁴ *Linges v Austria* App no 9815/82 (ECHR, 8 July 1986) § 42.

[Article 10] includes freedom of artistic expression [...] which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.⁴⁵

This pluralism has doctrinal consequences. The Court regularly applies different standards of protection to different speech interests. For example, a lower standard prevails for artistic speech than for political speech. A leading textbook sums this up well:

as compared with political expression, the decision-making policy of the Court is to accord a less privileged position to artistic expression.⁴⁶

Similarly, the Court regularly sets the bar lower for regulation of commercial speech than for other speech interests.⁴⁷ Advertisements surely have political effects on their audience somewhere down the line. If nothing else than ads may spark fascination or criticism about consumer society. Yet that does not make their protection grounded in a political justification for free speech. The point is that the varying standards of protection reflect the similarly different normative force of each one of the speech interests one has.⁴⁸

For the present thesis the pluralist outlook is a cornerstone and we will accept it as a conceptual background to the thesis. It will shape pervasively this thesis' argument. It follows from it that not all speech worthy of protection should be lumped into the same basket of protection. The consequence of taking free speech pluralism seriously is twofold.

A right to free speech, as it is recognized in liberal democracies, contains several speech rights such as the right to political speech. By narrowing the focus on political

⁴⁵ *Alinak v Turkey* App no 40287/96 (ECtHR, 29 March 2005) § 42.

⁴⁶ Harris, O'Boyle, Warbrick (eds), *Law of the European Convention on Human Rights* (Oxford University Press 2009) 458.

⁴⁷ The ECtHR's leading case on commercial speech is *Barthold v Germany* App no 8734/79 (25 March 1985), which states that the due protection for commercial speech is lower than for political expression.

⁴⁸ The leading US authority is *Central Hudson Gas & Electric v Public Service Commission* 447 U.S. 557 (1980). The Court accepted a restricted rationale in regulating commercial speech while recognising constitutional protection.

speech, the thesis turns a blind eye to other speech interests. Applying this to hate speech means our focus will be exclusively on hate speech that relates to one's interest in political speech. Furthermore, a focus on political speech means that the level of protection associated with such expression is the highest.

7. The Agenda

Finally, we shall define the agenda and the question of the thesis. The first three chapters will be theoretical, dealing with the right to political freedom of expression. Chapter Two, Three and Four thus constitute the theoretical framework. Chapter Five and Six will be case studies, where the theoretical findings shall be applied to existing laws.

Chapter Two will lay the normative foundations of a strong protection of political speech. The first theoretical chapter sets out to define a normative justificatory account that justifies the protection of political speech by tracing through the most important democratic justifications for free speech in the literature. The free speech account we look for should focus tightly on political speech and be morally appealing.

Once a strong and tightly political justificatory account of free speech is defined, Chapter Three will elaborate on what speech should be regarded as political. It is one thing to make a theoretical case for defending political speech, and quite another to identify those instances in practice. This is the bridge question: How theory should inform practice? We will challenge some prevailing answers to the bridge question and define a subset of political speech that deserves privileged protection within the land of political speech.

The last theoretical chapter turns to the other side of the thesis – i.e. to hate speech. Chapter Four will set against each other the strong conception of political speech, developed in previous chapters, with the prohibitionist norm on hate speech. We

will trace through the four main prohibitionist arguments and apply them to the right to political speech. The point of this collision is to find out whether there is a justified case for treating political hate speech as an exception to the otherwise justified prohibitionist norm.

Finally, the last two chapters will apply the theoretical findings to the European Court of Human Rights' jurisprudence (Chapter Five) and to the hate speech regulation and case law of the United Kingdom (Chapter Six). It is not our intention to test the theoretical findings on the case law in the sense of a quest for a close fit between the theoretical findings and the case law, where the latter might be altered to fit better the former. We turn the tables for the benefit of the theoretical findings about political speech. Thus, the goal here is to see whether the practice lives up to the theoretical demands of a robust right political speech.

The questions of the thesis will be: (1) Is there a case to protect political hate speech in face of the otherwise justified ban on hate speech? (2) Are the jurisdictions' case law under scrutiny in line with our theoretical findings?

Chapter Two

THE RIGHT TO POLITICAL SPEECH

1. The Challenge of Justifying the Right to Political Speech

Chapter One finished on the idea of a pluralist approach to free speech. The idea is that ‘one single label’⁴⁹ cannot justify the diversity of free speech interests and cases in practice. Hence “departmentalizing free speech” into different speech interests makes analytical sense, both for theory and for practice. Freedom of speech is rightly justified by different values, so is its burgeoning legal practice. Only a pluralist approach to free speech can do justice to such diversity of free speech interests.

The type of free speech protection varies from one speech interest to another. This pluralist way of conceptualizing free speech is helpful for understanding free speech in general and hate speech specifically. Seemingly different hate speech cases are regularly lumped into the same category and treated alike which is problematic. Before moving to the discussion of hate speech, first the idea of a political speech centred free speech account will be investigated in this chapter. This will be the first theoretical step in defining a uniquely political speech account that justifies the right to political speech.

This chapter faces the following task. A narrow political speech account is needed for this thesis that answers to three desiderata. (1) The protection to political speech should be narrow and not collapse into a general free speech account. (2) Political speech should tightly fit the justification as opposed to holding that political speech

⁴⁹Thomas Scanlon wrote about the First Amendment that ‘I doubt whether these guiding interests, even the ones that figure centrally in our actual First Amendment jurisprudence, can be helpfully subsumed under any single label.’ Thomas M. Scanlon, ‘Why Not Base Free Speech on Autonomy or Democracy?’ (2011) 97 Va. L. Rev. 541, 543.

serves democracy in general somewhere down the line. We ought to have at least an approximate account of how free speech makes democracy work or better. (3) Finally, the political speech account ought to be morally attractive.

Some explanations are in order. What is meant by political speech account? A political speech account is a normative free speech justification that gives a theoretical basis for a right to freedom of political speech. For this thesis, it is first important to define such a political speech account in order to proceed further in approaching the question of political hate speech.⁵⁰

The free speech account we are looking for should argue for the protection of political speech that is valid for political speech and only for political speech. For that a tight link should exist between the justificatory account and political speech. Let us elaborate on this requirement further.

There are numerous general justificatory accounts of free speech. They are grouped into three categories. Historically the first one focused on the discovery of truth made famous by John Stuart Mill's magnum opus *On Liberty*.⁵¹ Another recent set of justifications is based on the value of autonomy. In a nutshell autonomy accounts argue that freedom to speak is integral to one's leading an autonomous or a flourishing life.⁵² James Griffin puts the point eloquently: '[t]o deny me freedom to express my own taste may eventually threaten my status as a self-determiner.'⁵³ Griffin puts his account of

⁵⁰ Political hate speech will be extensively discussed in Chapter Four.

⁵¹ John Stuart Mill, *On Liberty* (first published 1859, OUP 2008) 20-61 (chapter two).

⁵² The most influential recent such attempt is Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford J. Legal Stud.* 303. A different conception of autonomy justifying free speech is C. Edwin Baker, *Human Liberty and Freedom of Speech* (OUP 1992).

⁵³ James Griffin, *On Human Rights* (OUP 2008) 170.

human rights under the core value of ‘personhood’ but terminology should not cloud his concern being for an autonomous life – one which includes freedom of expression.

Finally, many argue from the footing of democracy to justify the protection of free speech.⁵⁴ Democracy is hard to imagine without citizens’ right to free speech through which they express their views and hold their elected officials accountable.

All these general justificatory accounts, be posited on truth, autonomy or democracy, suppose that somewhere down the line these justificatory values are served or fulfilled by free speech. Yet it is often not clear how these values actually relate to free speech. In contrast with these general justifications, this chapter seeks to find a justificatory account in which the relation between the protected speech and their justification is tighter than in a general justification.

The focus of this thesis will be uniquely on democratic justifications for two reasons. First, many of us would find it intuitively right that the free discussion of public or political issues has to do more with democracy than with autonomy or truth-seeking. Perhaps this is why democracy is the most widely accepted justificatory account of free speech in the literature. Frederick Schauer writes accordingly:

[t]he argument from democracy views freedom of speech as a necessary component of a society premised on the assumption that the population at large is sovereign. This *political* basis for a principle of freedom of speech leads to a position of prominence under the argument for speech relating to public affairs, and even more prominence for criticism of governmental officials and policies.⁵⁵

But intuitions are not everything. We have a strong reason that justifies this methodological choice. Democratic justifications are by far the most popular with courts.

⁵⁴ Historically one of the first such theorist was Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper 1948).

⁵⁵ Frederick Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982) 35.

Judges presume that free speech is exceptionally important for democracy. As Lord Nichols held in the seminal defamation case of *Reynolds v Times Newspapers Ltd and others*:

My starting point is freedom of expression. The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in this case. At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country.⁵⁶

The European Court for Human Rights (ECtHR) has likewise emphasised consistently that '[f]ree elections and freedom of expression, *particularly freedom of political debate*, together form the bedrock of any democratic system'.⁵⁷ Or elsewhere the Strasbourg judges declared that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'.⁵⁸ This is not an argument for denying the importance of other free speech justifications. Rather to highlight the close fit between the democratic justification in theory and the practice in courts.

Furthermore, the democratic justification also seems to be very popular amongst theories. Eric Barendt even went on to say that 'the justification from participation in democracy [is the] *most fashionable* free speech theory in modern Western democracies'.⁵⁹

Narrowing down our inquiry to democratic justification has the necessary consequence that some pressing contemporary free speech issues will fall outside of the scope of protection. This follows from the finding that not all speech is political. If all speech is political then the category encompasses every single speech and thus the

⁵⁶ [2001] 2 AC 127, 200.

⁵⁷ *Bowman v UK* App no 141/1996/760/961 (ECtHR, 19 February 1998) § 42 (emphasis added).

⁵⁸ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) § 42 (emphasis added). Nonetheless, it should be added that the Court seldom also mention 'individual's self-fulfilment and progress' as another underlying interest in article 10 of the Convention.

⁵⁹ Eric Barendt, *Freedom of Speech* (2d edn, OUP 2007) 18.

category loses its meaning. (It adds up to treating no speech as political.) As was stated at the beginning: ‘political speech should be protected qua political speech’ as opposed to ‘political speech be protected qua general free speech’. So not all speech is political, and not all free speech interests are protected as one’s interest in political speech. Such non-political but protected speech interests include among others religious expression, artistic or commercial speech. Such a narrow focus and the resulting exclusion may only pose problems to those committed to a single (i.e. general) justificatory outlook on free speech (as opposed to a pluralist one), which is not a position advanced here.

The narrow focus on democratic justification and political speech does not resolve all questions about a political speech account. Free speech can relate to democracy in multiple ways. Some propose that free speech is instrumentally good for democracy. This view could be approximately summarised as follows: it is only under conditions of free speech that the electorate is in a position to form an informed view about political choices and ultimately to exercise the franchise. Moreover, it is under that condition that power can be held accountable.

Others disagree and look for explanations unrelated to the benefits that free speech reserve for democracy. Free speech could rather be thought of as a legitimacy condition of a democratic polity⁶⁰ or that free speech may be constitutive of democracy.⁶¹ For these authors the concern for democratic legitimacy and free speech are intimately connected.

⁶⁰ Theorists adhering to deliberative democracy intimately link free speech and legitimacy. The origins of this school of thought go back to Jurgen Habermass’ seminal *The Structural Transformation of the Public Sphere* (MIT Press 1989). However, recent academics have focused more closely on the link between free speech and democratic legitimacy, for instance Robert Post and James Weinstein. Each authors’ views will be discussed later in the chapter.

⁶¹ Ronald Dworkin held ‘the constitutive view’ of free speech to democracy ever since Part Six of his seminal *A Matter of Principle* (HUP 1978). We will trace through Dworkin’s view on legitimacy in detail later in the chapter.

Democratic legitimacy at a basic level means that ‘the authorization to exercise state power must arise from the collective decisions of the members of a society who are governed by the power.’⁶² The community has to make up its own mind as a community to make legitimate decisions. Free speech makes for one of the necessary conditions of legitimate democratic authority. If the free speech condition (of course along with others) obtains the operation of government, which often means coercing people, becomes morally permissible. Therefore, without free speech government is undemocratic, even tyrannical. One could surmise free speech to be a negative constraint on what the government is allowed to do.⁶³ Overall it should be clear that within the group of democratic justifications there are competing explanations as to why speech is to be protected.

Yet something suspicious still remains about the democratic justification. That political speech should be protected for the sake of democracy may strike many as obvious or even as a truism. This may wake up healthy suspicions about the intelligibility of political speech as a category. Perhaps the case for the strong protection of political speech is nothing more than a slogan devoid of meaning? This chapter aims at dispelling this suspicion by developing the best account for political speech by tracing a genealogy of the democratic argument for free speech. The reasoning will roll through some of the major democratic justifications for free speech, which more or less developed in response to gradually perceived deficiencies.⁶⁴ The point here is neither history nor

⁶² Joshua Cohen, ‘Procedure and Substance in Deliberative Democracy’ in Thomas Christiano (ed) *Philosophy and democracy: an anthology* (OUP 2003) 17.

⁶³ At this juncture, there is a distinction to be aware of. Many suppose that the respect for some rights (be it human, constitutional or political) is a necessary condition of political legitimacy. Ever since John Rawls’ seminal *Theory of Justice* and later on his *Political Liberalism* the respect of rights (one of which is freedom of speech) or as it was in the *Theory of Justice*, ‘the priority of liberty’ or ‘equal liberty’ became a standard condition of legitimacy under democratic government. In contradistinction to this general duty to respect fundamental rights, legitimacy powered free speech arguments assume a more immediate, intimate or direct link with democratic legitimacy and free speech.

⁶⁴ There is one influential broad free speech account of democratic vintage that will be omitted here, namely deliberative democracy. We bracketed this issue for no pure theoretical reason. Discussing this school of thought

selecting the best theory, but rather the continuing refinement of a political speech account. Tracking this genealogy provides a way of answering the question of this chapter, to wit whether we have reasons to protect speech qua political at all. Let us recall that the answer to this question bears considerably on this thesis because it works with the idea that different speech interests exist, and only one concerns politics directly amongst other expressive interests. Should the attempt to justify the protection of speech qua political fail there would be no case for political speech.

At last, a warning should be added about what the argument in this chapter does *not* purport to establish. If we indeed have a narrow and appealing justification for political speech, what will that mean for hate speech or for any other contentious speech issue like defamation? At best it will establish a *pro tanto* protection of political speech without providing a universally applicable solution, let alone an absolute protection, to the particular speech issue.⁶⁵ In later chapters we will follow on by asking whether any hate speech would amount to political speech. Moreover, whether there are overwhelming reasons justifying the restriction of hate speech. Chapter Three and Four will undertake these issues, but before then we should get a handle on political speech.

2. The Instrumental Approach to Democratic Justification

Democracy is commonly understood as the rule of the people, which stands in contradistinction to the rule of kings or of oligarchs. Democracy means self-government of the people. One of the first attempts to base free speech on self-government was

would have taken this thesis in a different direction without furthering the overall argument. However, some related arguments will be addressed in Chapter Four. The influential articles in this thread of literature include Owen Fiss, 'Free Speech and Social Structure' (1985-6) 71 Iowa L. Rev. 1405; more recently Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1993).

⁶⁵ About *pro tanto* protection and the crucial difference between *pro tanto* and *prima facie*, see: George Letsas, 'The Scope and Balancing of Rights: Diagnostic or Constitutive?' in Eva Brems, Janneke Gerards (eds) *Shaping Rights: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 38.

provided by the American philosopher Alexander Meiklejohn.⁶⁶ Meiklejohn stresses, some would say excessively,⁶⁷ the natural connection of people's self-government with freedom of speech. Meiklejohn exploits the widely shared intuition that without free speech people just could not meaningfully rule themselves.⁶⁸ To put it otherwise: free speech should be understood in conjunction with the constitutional structure in which the right to free expression is recognised. Meiklejohn proposes that the First Amendment's speech guarantees are better understood not as protecting freedom to speak, rather as the protection for 'those activities of thought and communication by which we govern.'⁶⁹ Robert Bork, a follower of Meiklejohn, opined similarly:

[t]he entire structure of the Constitution creates a representative democracy, a form of government that would be *meaningless* without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.⁷⁰

Meiklejohn relies on a supposed instrumental necessity of freedom of speech in a democracy. For him, the consequences of free speech are essential for the procedures by which people govern themselves. These procedures are straightforwardly modeled on a certain idea of democracy: the traditional American town meetings, where decisions were taken jointly by the whole of the community. Meiklejohn thinks that this participatory democracy is the one that the First Amendment should endorse:

⁶⁶ Meiklejohn spelled out his theory in two main works in which the central thesis remained unaltered. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper 1948) and his later article and book 'The First Amendment is an Absolute' (1961) *Sup. Ct. Rev.* 245; Alexander Meiklejohn, *Political Freedom: the Constitutional Powers of the People* (OUP 1965).

⁶⁷ Jeremy Waldron opined quite poignantly in relation to Meiklejohn that '[w]e find in the literature a number of arguments linking the protection of free speech to the flourishing of self-government in a democracy. Some say little more than that, though they say it sonorously and at great length.' Furthermore, '[Meiklejohn] elaborates on [this relation] at considerable length without really producing a sharp and compelling argument.' See Waldron, *The Harm in Hate Speech* (HUP 2012) 173, 267.

⁶⁸ Meiklejohn wrote about the US Constitution, nonetheless his writings will be explored as general proposition about free speech.

⁶⁹ Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245, 255.

⁷⁰ Robert H. Bork, 'Neutral Principle and Some First Amendment Problems' (1977) 47 *Ind. L.J.* 1. 23 (emphasis added).

The institution [*of the traditional town meeting*] is commonly, and rightly, regarded as a model by which free political procedures may be measured. It is self-government in its simplest, most obvious form.⁷¹

Such a participatory decision-making process can only work, Meiklejohn writes, if people share and listen to each other's opinions on issues the community faces. Meiklejohn writes that 'all facts and interests relevant to the problem shall be fully and fairly presented to the meeting,'⁷² which means for him that no speech can be banned with mere regard to its value or its dangerousness. The point of sharing the views of the participants (i.e. the whole of the community) with each other is to enhance their capacity (or 'wisdom') to make collective decisions. So the function of freedom of speech is to enable people to acquire the necessary knowledge for informed decisions.

[I]n that method of self-government, the point of the ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the wise decision. The voters must be made as wise as possible.⁷³

Meiklejohn takes a quite literal meaning of the town meeting, which should be first organised and maintained. For such a meeting to be efficient some 'rules of order' ought to be enforced. His favourite is the ban of 'irresponsible interruptions.' He found here an essential distinction between two types of rules governing speech. On the one hand rules banning speech for the sake of enforcing these rules of order so that the meeting could take place and proceed. On the other hand no norm of substance should twist the speech of the participants, lest such rules result in the 'mutilation of the thinking process of the community.'⁷⁴ Meiklejohn suggests that this categorisation should be a model for the First Amendment. The two types of speech norms sit comfortably with the absolute speech protection of the First Amendment, which should be reconciled

⁷¹ Meiklejohn, *Free Speech and Its Relation to Self-Government* (n 66) 23.

⁷² *ibid* 24.

⁷³ *ibid* 25.

⁷⁴ *ibid* 26.

with the need for some ‘other’ speech not to be protected or at least not with the same vigour.

As influential as Meiklejohn’s account may be, it is open to some crucial criticisms. For a start the parallel between modern democracy and a town meeting is strikingly inaccurate. In a modern representative democracy, as opposed to the 19th century small towns’ meetings of New England, the analogy with debating meetings holds at best in times of elections or on occasions of referendums. Meiklejohn only assumes that the town meeting is the ‘simplest’ and ‘most obvious’ model for democracy, but never actually cared to argue for it.

More crucially, it is not at all clear that democracy understood as self-government should be primarily about decision-making, as suggested by this account. It is not the case that no collective endeavour has unique focus on the decisions at hand. Such processes are recognisable for instance in courtrooms, in administrative commissions (say, school boards), or in parliamentary procedures. All these decision-making instances are pointed towards a straightforward vote at the end. If we were to understand democracy as a simple decision-making process, then one would be compelled to see the electorate, to follow Frederick Schauer’s characterisation, as a ‘national debating society,’⁷⁵ which decides between one side and the other each time it gathers. And this is precisely how Meiklejohn thinks about democratic society, with the moderator having the right to adjourn the meeting. However, the public debate in a democratic society is pervasive, permanent and need not focus on imminent decisions. A similar point can be made about the standard of what counts as relevant for Meiklejohn. He assumes that the moderator has the knowledge to censure what is irrelevant because ‘[w]hat is essential is

⁷⁵ Schauer, *Free Speech: A Philosophical Enquiry* (n 55) 44.

not that everyone shall speak, but that everything worth saying shall be said.⁷⁶ But it is very dubious that one can assume relevance standard because we generally do not know what will be relevant in a free-floating debate. One could also remark the tension between Meiklejohn's assumption of relevance standard and his stance against viewpoint censoring. There may be viewpoints that are simply irrelevant for the case at hand, what should a moderator do then?

Thomas M. Scanlon also picked up the issue with the structure of the debate in his important critique. He pointed out that debates, even ones on crucial issues, are not bound to a decision but rather limitless in time and space in democracies. He wrote: '[u]nlike a decision where to build a road, this is an issue that need not be resolved by a clear decision *at any one time*.'⁷⁷ By this Scanlon makes the distinction between the 'continuing process of informal politics'⁷⁸ and the formal process such as an election or a referendum. The trouble with Meiklejohn's account is that he only recognised, or at least privileged the latter to the detriment of the former. Robert Post made a similar point:

[t]he difficulty with Meiklejohn's analysis, therefore, is that it reflects an insufficiently radical conception of the reach of self-determination, which encompasses not merely the substance of collective decisions, but also the larger framework of function within which such collective decision-making is necessarily conceived as taking place.⁷⁹

Interestingly, Meiklejohn in his later work allowed for the extension of the protection of speech beyond the strict limits of the imagined town meeting. He acknowledged that as in a mass democracy voters should be equipped with as sufficient

⁷⁶ Meiklejohn, *Political Freedom: the Constitutional Powers of the People* (n 66) 75.

⁷⁷ Thomas M. Scanlon, 'Freedom of Expression and Categories of Expression' (1978-1979) 40 U. Pitt. L. Rev. 519, 545 (emphasis added).

⁷⁸ *ibid* (internal quotation omitted).

⁷⁹ Robert Post, 'Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse' (1993) 64 U. Colo. L. Rev. 1109, 1117. Post highlights a further related point, which is that Meiklejohn assumes that the moderator has an agenda setting power, which may be problematic for democratic discourse. *ibid* 1118.

information as the town meeting participants, many forms of human communications should be protected.

[T]he voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgement of their freedom.⁸⁰

Without much explanation Meiklejohn proposed an exemplary list of speeches, which would achieve this goal – those include education or ‘public discussion of public issue’.⁸¹ Nonetheless, this extension seems to put in question the original proposition’s force. The conservative legal scholar Robert Bork rejects the extension precisely because the sort of speech Meiklejohn came to deem ‘necessary for the voters’ does not seem to further the project of representative government in the same direct or narrow sense as his earlier version. To put the argument back into the original shape, Bork suggests that only ‘explicitly and predominantly political speech’⁸² should be covered by the First Amendment, by which he means:

[c]riticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.⁸³

There is something to this firm line. The drive to limit narrowly the field of protected speech to ‘explicitly and predominantly’ political speech was thought to be necessary by Bork to avoid collapsing all speeches together into one protected group lest all speech becomes protected. Bork did not elucidate on how ‘explicit and predominantly political speech’ should be constructed, other than that pornography should not be included under any circumstance. However, he shed light on a dilemma for any democracy-inspired speech account. Given that all speech influences people’s decision-

⁸⁰ Meiklejohn, ‘The First Amendment is an Absolute’ (n 66) 256.

⁸¹ *ibid* 257.

⁸² Bork (n 70) 26.

⁸³ Elsewhere Bork further includes ‘a wide range of evaluation, criticism, electioneering and propaganda.’ *ibid* 28.

making, a democratic speech argument should make it clear what it takes to be normatively significant in speeches, lest it collapses all speeches into the category of political speech. This is the boundary challenge for all democratic theories. Meiklejohn's original town-hall suggestion delineated the scope of political speech impossibly narrowly to later inflate it impossibly. His original motivation for restricting speech to town hall type of deliberation was the strive for 'wise decisions', which is an implausible normative ground for free speech. Yet Meiklejohn's suggestion to conceptualise political speech as one in an easily identifiable political setting is an interesting one that we shall return to in the next chapter.

What is instructive in this dispute is that in the American constitutional context, given the stringent literal meaning of the First Amendment, writers assume that the coverage and the protection of the First Amendment are the same.⁸⁴ At the same time, everybody takes that some speech in the ordinary sense should, nonetheless, fall outside of the constitutional meaning of speech, and hence be regulated. Therefore, the natural pull of the American debate is towards sharply defining the scope of the First Amendment. In this light, the debate between the exclusionary 'explicitly political speech' partisan Bork and Meiklejohn who wish to extend the protection further is instructive and it marks out an important conundrum for any theory that argues from the footing of democracy for free speech.

Another flaw in Meiklejohn's audience-focused account is the lack of explanation as to *how* the audience will benefit from speech. Meiklejohn's account steps onto shaky ground here. His assumption is that the more, and presumably the newer information or opinions are presented to an audience, better decisions will be taken. On the one hand

⁸⁴ On coverage and protection see: Frederick Schauer, 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 Vand. L. Rev. 265, 267.

this would exclude protesting speech whose importance does not lay in the novelty of the argument. Ronald Dworkin expresses this concern eloquently:

[s]uppose a speaker wishes not to advance any new arguments or grounds for his opinion, but simply to bear witness that he, like many others, holds it. This is, in fact, the motive of many protesters.⁸⁵

For one, Meiklejohn might be unable to accommodate speech that aims at protesting against an opinion or to mobilize within his theory. Neither protesting nor mobilizing speech puts on the table new information or opinion. These speeches do not mean to convince new people through persuasion, as town hall participants do with their arguments, yet these types of speech are part and parcel of political speech as we usually know it.

On the other hand, Meiklejohn assumes that opposing censorship based on viewpoint guarantees that all relevant information be told, heard and, consequently, ‘wise decisions’ be taken. The problem lies with lightly assuming that the free sharing of any opinions will lead to ‘wise decisions.’ Exposing audience to as many ill-formed or uninformed views mixed with pertinent ones does not necessarily strike as conducive to wise decisions. There may be reasons to let political speech of all viewpoints be heard, but its effectiveness for furthering ‘wise decisions’ is not one of them.⁸⁶

To conclude, we are left pondering what the reasons are for us to adopt the model of 19th century participatory democracy of town hall meetings. (Not insignificantly a town hall debate limited by race and gender.) The strive for wise decisions is not a promising normative goal. It seems that at best, Meiklejohn’s account’s attraction

⁸⁵ *ibid.* Dworkin’s discussion here did not bear on Meiklejohn, but on audience centric arguments in general, still the point is spot-on when applied to Meiklejohn.

⁸⁶ Meiklejohn’s assumption may be buttressed by one of the most pervasive slogans in First Amendment literature, that of the marketplace of ideas. The marketplace of ideas does not strictly relate to democratic justification, moreover its currency has rightly declined since Meiklejohn. See for example: Stanley Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ (1984) 1 *Duke L.J.* 1 Hence the marketplace of ideas will be bracketed in this thesis.

stemmed from its simplicity and a certain egalitarian ideal, mixed with the ethos of participation. Assuming some moral attraction in Meiklejohn's account, it remains very vague about how political speech would achieve its normative goals. Yet Meiklejohn should be credited for making an effort to mount a tightly political speech focused argument by striving to explain the normative role political speech plays for furthering the democratic goal. Moreover, his argument identifies and tries to answer, albeit wrongly, the boundary question by suggesting the town hall model of speech.

3. Public Discourse Account

Robert C. Post has in recent years advocated an alternative democracy-based account to Meiklejohn's. Post argued for a public discourse justification of free speech in various works that meant to remedy a number of deficiencies in Meiklejohn's account.⁸⁷ His account is closely attached to the American constitution, hence particular emphasis is put on the descriptive power, or the *fit dimension*, with First Amendment jurisprudence. Nonetheless, his account will be taken as a general theoretical argument for freedom of speech as opposed to a sheer doctrinal one, confined to the particularities of American constitutional law.⁸⁸

⁸⁷ The latest formulation of his argument can be found in Robert Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (YUP 2013); and Robert Post, 'Participatory Democracy and Free Speech' (2011) 97 Va. L. Rev. 447. For previous versions: Robert Post, *Constitutional Domains: Democracy, Community, Management* (HUP 1995); Robert Post, 'Racist Speech, Democracy, and the First Amendment' (1990-1991) 32 Wm. & Mary L. Rev. 267; Robert Post, 'The Mistake of Meiklejohn Individual Autonomy and The Reform of Public Discourse' (1993) 64 U. Colo. L. Rev. 1109. Of course, it is by no means to suggest that public discourse narrative does not have strong theoretical antecedents. Jurgen Habermas's seminal *The Structural Transformation of the Public Sphere: An Inquiry into a category of Bourgeois Society* (first publication in German in 1962, MIT 1989) is commonly pointed out as the cradle of all such theories.

⁸⁸ Whether this description does fully justice to Post's own views is open to debate. Eric Heinze has recently labelled Post's position on general free speech questions as 'open-ended pluralism' or a form of political relativism. 'Despite the abstract universal, liberal legal subject that readily emerges from strong First Amendment defences of speech, Post now proclaims agnosticism about the superiority of American approaches for other democracies. "It could be", he concedes, "that participation in opinion formation in certain ways, in certain countries, in certain national contexts, destabilizes democracy rather than legitimizes it." Eric Heinze, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9/4 International Journal of Law in Context 590, 593. This is not the place to take up this question and we will give Post's view a more general understanding.

Public discourse, or ‘public domain’ as Post puts it, is the central speech category for political speech because it is through this discourse that public opinion is formed. It is also this speech domain that stands at the center of modern First Amendment jurisprudence, and Post’s account takes as its task to justify its prominence. Public discourse comprises:

[t]he communicative processes necessary for the formation of public opinion, whether or not that opinion is directed toward specific government personnel, decisions, or policies.⁸⁹

Unlike Meiklejohn, Post does not take the view that wise collective decisions should be the goal of freedom of speech neither that democracy’s point is merely to make decisions. He indeed explicitly rejects these arguments:

[T]he conclusions of early democracy theorists [i.e. *Meiklejohn*] imagined that the basic principle of American democracy was majoritarianism, as expressed through elections. But majoritarianism and elections are merely mechanisms for making decisions. American democracy does not rest upon decision-making techniques, but instead upon the value of self-government, the notion that those who are subject to law should also experience themselves as the authors of law.⁹⁰

Post proposes that self-government of the people requires government to be responsive to public opinion.⁹¹ This relationship is what stands at the centre of democracy according to Post. If a government is not responsive, then it cannot be democratic. The question is how this responsiveness of government relates to the free formation of public opinion? Public discourse cannot be a mere gathering basket for useful information for later communal decisions. After all this Meiklejohnian instrumental justification was explicitly discarded by Post himself.

⁸⁹ Robert Post, ‘Racist Speech, Democracy, and the First Amendment’ (n 87) 288.

⁹⁰ Robert Post, ‘Democracy, Expertise, Academic Freedom’ (n 87) 17.

⁹¹ Post uses public discourse, public opinion formation and occasionally political speech as interchangeable.

For Post, public discourse is an ongoing, open and dynamic process, a permanent prelude to democratic governance. Public discourse is essentially a ‘collective self-definition that will necessarily precede and inform any specific government action or inaction.’⁹² The freedom of public discourse is a condition for legitimate government decisions. Freedom of political speech or the free formation of public opinion is the condition that in turn renders coercive collective decisions morally enforceable i.e. legitimate. Post understands by legitimacy the moral permissibility for the community to impose and enforce communal decisions on its members.

Yet not all kinds of public discourse achieve democratic legitimation. One could surmise that every political community has some public opinion. Even North Korea or the People’s Republic of China have one – albeit a grotesquely censored and manipulated one. The kind Post has in mind is an autonomous and free public discourse, which means that states should not use coercion in the public domain for the sake of influencing the formation of public opinion.

No doubt the argument possesses intuitive appeal. Many would find it objectionable precisely on the grounds evoked here if, say, a law banned the advocacy of dramatic tax hikes on the rich or the nationalization of banks (say, out of fear of socialism) and the upcoming elections were to be won by a libertarian party with anti-tax, anti-bank regulation agenda. The objection against this arguably Orwellian example could be mounted on the grounds that public opinion was not freely formed prior to the elections. From this Post infers that any collective goals that are commonly supposed by

⁹² Post, ‘Racist Speech, Democracy, and the First Amendment’ (n 87) (internal quotation marks omitted) 288.

collectivist theories of speech are violating the freedom of public discourse.⁹³ Post argues thus for public discourse to be radically ‘indeterminate:’

[t]he internal logic of self-government implies that with regard to the censorship of speech the state must act as though the meaning of collective identity were perpetually indeterminate within the medium of public discourse, where the debate as to what is legitimate and what is illegitimate must necessarily remain without any guarantor and without any end.⁹⁴

It seems that for Post all attempts to influence public discourse by the government, be it for disfavouing a political ideology or for positing as a goal the increase of information, or wise decisions (Meiklejohn), count as illegitimate interference. This is so because democratic legitimation ‘requires that public opinion remain continuously open to revision’⁹⁵ or, as he puts it elsewhere, it ought to remain an ‘open-ended process reflecting the boundless possibility of social-constitution.’⁹⁶ Post might mean either a narrower point, that all government attempts to coercively suppress speech (that influence public discourse) are objectionable; or more broadly that any government attempt of influencing public opinion-formation through, say, public awareness campaigns for advancing government policies are equally objectionable. In the end, if the concern is the open-endedness of public discourse, then government has no business meddling in it, in any way. The question of government’s communication to inform, and influence, the public is a notoriously contentious one. Yet it will be bracketed, as Post

⁹³ See his argument in general developed in Robert Post, ‘The Mistake of Meiklejohn Individual Autonomy and The Reform of Public Discourse’ (n 87).

⁹⁴ *ibid* 1116-1117 (internal quotations omitted).

⁹⁵ Post, *Democracy, Expertise, Academic Freedom* (n 87) 20.

⁹⁶ Post, ‘Racist Speech, Democracy, and the First Amendment’ (n 87) 326. A number of other adjectives aimed to recapture the same idea: public opinion ought to remain ‘sovereign;’ or ‘government decision should be subordinated to public opinion.’

certainly objects to the government's coercive suppression of speech independent of his view on the broader question of the government's public communication.⁹⁷

Finally, it should be clarified that the point of public discourse does not lie in creating some distant sociological or ontological entity, but to allow citizens to communicate their opinions, which in turn creates the legitimacy condition for government. Post explains: '[a] necessary condition for democratic legitimacy is therefore that persons be free to participate in the formation of public opinion.'⁹⁸ This highlights another shift from Meiklejohn's audience centred account: the public discourse account appreciates the participants' (i.e. the speakers') interests.

To conclude the discussion so far: Post's account represents three important shifts compared to the instrumental account. Each one of them remedies a deficiency in the instrumental account. First, for Post, the central point of democracy in a free speech account should not be decision-making but democratic legitimacy. Relatedly, Post breaks with the instrumental justification and takes that speech ought to be protected not for its good consequences. Lastly Post's focus is on participant or speaker and not on the audience's interests which avoids the trap that audience-centred accounts seem to run into. Despite all these considerable improvements, the public discourse account remains vulnerable.

⁹⁷ See a recent take on the question of government communication: Jacob Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps' (2016) 25 *The Journal of Political Philosophy* 22. A plausible distinction lies between a government communicating for the sake of advancing an adopted public policy (say, advocating the use of safety helmets) and a government sending letters to citizens for arguing its policy goals (say, proposing to enhance penalties for drug-use). *ibid* 24. Post's objection for government meddling in the free formation of public opinion might easily extend to the latter type of communications.

⁹⁸ Robert Post, 'Understanding the First Amendment' (2012) 87 *Wash. L. Rev.* 549, 553. In another place, Post writes similarly: 'The essential point I wish to emphasize, however, is that if persons are prevented even from the possibility of seeking to influence the content of public opinion, there is little hope of democratic legitimation in a modern culturally heterogeneous state.' Post, *Democracy, Expertise, Academic Freedom* (n 87) 18.

The first criticism is a majoritarian one. Post's account works on the assumption that his argument's validity does not depend on the result of the free formation of public opinion. Let us call it the result-independence of the argument. One should test this argument with the classical paradox of negative liberty. What if, at the end of the free formation of public opinion, the result is such that, say, free speech should be restricted precisely based on viewpoint(s) that is taken to be objectionable. Would the account allow for that? If Post's argument is predicated on an unconstrained majoritarian premise, the answer must surely be affirmative. But this is a rather easy challenge to meet. Post conceives rights in the American tradition as counter-majoritarian constraints. Chief amongst these rights is freedom of speech that lays beyond the reach of self-government.⁹⁹

But there are more important challenges ahead. Post makes the freedom of public opinion formation the benchmark by which one draws the scope of free speech protection. If a speech counts as a contribution to the public discourse, the speech is constitutionally curtailed from regulatory attempts. As some critiques pointed out in the literature, the trouble is precisely that it is not obvious that a public discourse account can generate the distinctions needed to draw the line between contribution and non-contribution.¹⁰⁰

Part and parcel of the problem is that labels such as public discourse are not self-explanatory. What counts as an instance of public discourse or as political speech? Post

⁹⁹ Post himself dispenses with this objection rather easily: 'Even though the very object of the First Amendment is to restrict the laws that a majority may enact, its purpose is to protect the free formation of public opinion that is the *sine qua non* of democracy.' Post, *Democracy, Expertise, Academic Freedom* (n 87) 15. Schauer makes a similar point Schauer, *Free Speech: A Philosophical Enquiry* (n 55) 41.

¹⁰⁰ See Eugene Volokh, 'The Trouble with "Public Discourse" as a Limitation on Free Speech Rights' (2011) 97 *Virginia Law Review* 595.

reaches back to a range of seminal American judgments from *The New York Times v Sullivan* to *Hustler Magazine v Falwell*.¹⁰¹

American law on defamation, emotional distress and even professional malpractice are to be constitutionally limited where the impugned speech falls within the boundaries of public discourse.¹⁰² A good recent example of this is provided by the recent Supreme Court speech case of *Snyder v Phelps*.¹⁰³ *Snyder* concerned the offensive speech uttered by members of a church who were protesting nearby the funeral of an American soldier killed in Iraq. The handful of protesters expressed their opinion that the killing of American soldiers was a sign of God's punishment for tolerating the sin of homosexuality in the US. Under normal circumstances this would be a good case for the tort of emotional distress. Yet because the issue raised by the protestors bore on an important public matter (i.e. the war in Iraq), the speakers were not liable legally for the tort of emotional distress, according to the Supreme Court.

Advocates of public discourse account assert that in these cases courts carve out exceptions to protect free speech because of the importance of public discourse. The trouble is that Post just assumes that one knows when it is appropriate to assign the protective coat of political speech. At times he points to the context or to the content as determinative. However, which criteria to apply for the context and content that define public discourse situations is left open. Reading Post, it is tempting to think that American judges hold the key to the answer and just get it right automatically. But the

¹⁰¹ *New York Times Co. v Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine v Falwell* 485 U.S. 46 (1988). See Post, 'Participatory Democracy and Free Speech' (n 87) 481-2; James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from *the Masses*' in: Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 492-7.

¹⁰² See Post's hypothetical pair of examples that lie between (1) a dentist advocating for the broader public the legalisation of a certain procedure (in his example the use of 'dental amalgams') which is banned by law; (2) a dentist proposing such a procedure for a patient that would be a clear case of malpractice according to Post. Post, *Democracy, Expertise, Academic Freedom* (n 87) 12-3.

¹⁰³ *Snyder v Phelps* 131 S. Ct. 1207 (2011).

job of judges is first and foremost doctrinal, and the distinctions drawn are always contested. For instance, Eugene Volokh offers a convincing interpretation of the case law that conflicts with Post's interpretation.¹⁰⁴ This need not be surprising, theories and doctrines are debated and contested all the time. But Volokh goes further in his critique and points to *circularity* in Post's argument. Post seems to regularly point to external arguments that determine what counts as an instance of public discourse or political speech. He writes that 'First Amendment coverage should extend to all efforts *deemed normatively necessary* for influencing public opinion.'¹⁰⁵ But one wonders by whose authoritative judgment? He merely acknowledges that those boundaries are 'perennially controversial.'¹⁰⁶ Volokh rightly points out that whether a speech:

[i]s to be protected is indeed a matter of normative constitutional characterization. But it is a matter that is *not* closely connected to "[t]he boundary between public discourse and non-public discourse," at least if "public discourse" is to be a useful *analytical* tool rather than a *conclusory* label for that speech which is most protected.¹⁰⁷

Circularity is a serious criticism against a free speech account, which aims at proposing a normatively appealing model, rather than just describing an existing legal practice.¹⁰⁸ Post is left with emphasizing the 'profound national commitment to robust public debate', which might be a historically accurate statement of American

¹⁰⁴ Volokh (n 100) 568. Volokh uses for instance copyright infringement cases that are according to both Post and Weinstein clearly not protected by public discourse. Yet Volokh pointed out examples where the Court differed and judged the matter differently. Volokh stresses that the disjunction between case law and public discourse account is not due to misapplication but to the fact that the Court does not toe the lines that Post and Weinstein draw for the First Amendment protection.

¹⁰⁵ Post, Democracy, Expertise, Academic Freedom (n 87) 18 (emphases added).

¹⁰⁶ Post, 'Understanding the First Amendment' (n 98) 562.

¹⁰⁷ Volokh (n 100) 575 (emphases added). Edwin Baker and Joseph Blocher raised the same point about circularity. '[P]articular social practices [according to Post] are protected to the extent that they constitute public discourse, while public discourse is protected to the extent that it consists of those social practices.' Joseph Blocher, 'Public Discourse, Expert Knowledge and The Press' (2012) 87 Wash. L. Rev. 409 Further on circularity see C. Edwin Baker, 'Is Democracy a Sound Basis for a Free Speech Principle?' (2012) 87 Wash. L. Rev. 515, 516.

¹⁰⁸ To be fair, on this point Post seems rather agnostic. As it was pointed out by Eric Heinze, in a recent contribution Post seems to commit himself to a relativist position vis-a-vis free speech doctrine, which naturally would sap the ground for taking it as a candidate free speech theory. See Eric Heinze, 'Hate Speech and the Normative Foundations of Regulation' (2013) 9/4 International Journal Law in Context 590.

constitutional law.¹⁰⁹ Yet he falls short of meeting the higher ambition of offering a normatively appealing political speech account.

To recap, it seems that the public discourse account has a better focus (on public discourse, instead of decision-making) and appeal (grounded in legitimacy, and not shaky instrumental reasoning) than the one put forth by Meiklejohn. The trouble is not that its proposition does not cut doctrinal ice. All doctrines are contested and can always be improved. But the public discourse account offered by Post lacks a clear moral foundation. He rather falls back on American constitutional history, which hardly makes up for the normative vacuum. To put it bluntly one does not know what reasons we have to follow this free speech account, other than that it is adopted in the US.¹¹⁰

3.1 Participation as Justifying Public Discourse

There might be a normative candidate to remedy this deficiency at hand. James Weinstein wrote extensively about an ideal of ‘participatory democracy’ that may lay the missing normative foundations for public discourse account.¹¹¹ Can participation fill the gap in the argument?

Weinstein asserts that we might be divided on what democracy really means, yet there are some non-contentious elements of this widely shared concept from which one can derive ‘a core free speech right of democratic participation.’¹¹² He posits thus that along with popular sovereignty such an element is ‘the right of each citizen to participate

¹⁰⁹ Robert Post, ‘Participatory Democracy and Free Speech’ (n 87) 447-8.

¹¹⁰ A generous reading would have it that Post’s ambitions are solely doctrinal. Hence his explanation would be locked in American constitutional law. We remain ambivalent as Post seems to intend his argument to have wider ambitions.

¹¹¹ James Weinstein, ‘Participatory Democracy as the Central Value of American Free Speech Doctrine’ (2011) 97 *Virginia Law Review* 491; James Weinstein, ‘Extreme Speech, Public Order and Democracy: Lessons from *The Masses*’ in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009).

¹¹² Weinstein, ‘Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*’ (n 111) 25-30.

in the process by which society's collective decisions are made.'¹¹³ Elsewhere he writes that:

[t]his basic participatory right includes at least the right to be free from coercive laws forbidding speakers from expressing some particular view on a matter of public concern and laws that seek to prevent audiences from hearing certain views because the government fears that they will be persuaded to support some unwise policy.¹¹⁴

He also characterises this as a right to 'formal participation in the political process.'¹¹⁵ Weinstein is no doubt right that without an engaged, debating electorate democracy seems rather pointless. As Hans Kelsen's famous aphorism goes: 'a democracy without public opinion is a contradiction in terms.'¹¹⁶ Weinstein seems to be content to point out that this core or 'bare minimum' enjoys a 'consensus' or 'general agreement'.¹¹⁷ However, neither aphorisms nor presumed consensus establish what is needed here. Participation still lacks teeth.

For participation to be an underlying moral value for public discourse account, it should have some intrinsic normative significance. A republican version of participation would satisfy this to the extent that it might take participation in common decisions to be the factor to measure the decision's legitimacy. Thus, low turnout at elections represents a downward pull on legitimacy.¹¹⁸ Be that as it may, many doubts arise as to what Weinstein's concept of participation amounts to. It is worth quoting him at length here:

If an individual is excluded from participating in public discourse because the government disagrees with the speaker's views or because it finds the

¹¹³ *ibid* 25.

¹¹⁴ Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine' (n 111) 506.

¹¹⁵ *ibid*.

¹¹⁶ Hans Kelsen, *A General Theory of Law and State* (3^d edn The Lawbook Exchange Ltd 2009) 288.

¹¹⁷ Weinstein, 'Extreme Speech, Public Order and Democracy: Lessons from *The Masses*' (n 111) 506.

¹¹⁸ A recent argument from participation for democracy was advanced in Niko Kolodny, 'Rule Over None I: What Justifies Democracy?' (2014) 42/3 *Philosophy & Public Affairs* 192. A much influential account of republicanism that takes participation beyond mere popular participation is Philip Pettit, *Republicanism – A Theory of Freedom and Government* (OUP 1997).

ideas expressed too disturbing or offensive, any decision taken as a result of that discussion would, as to such an excluded citizen, lack legitimacy. So, if someone is barred from expressing a view on a proposed tax increase; or about whether the nation goes to war; or on the country's immigration policy; or about pending civil rights legislation; then to that extent and with respect to that citizen, the government is no democracy, but rather an illegitimate autocracy. This explains free speech doctrine's fierce opposition to viewpoint-discriminatory restrictions on public discourse.¹¹⁹

Upon reading it one has doubts whether Weinstein merely objects to the restriction of participation. Weinstein rather seems to object to certain types of exclusions, namely ones based on viewpoint discrimination. Discrimination might be directly discriminatory (i.e. targeted) or indirectly and thus produce that effect. It is not clear whether Weinstein would find both equally objectionable. What matters here is that under this reading Weinstein's concern might not lie with mere participation, rather with certain *objectionable justifications* for excluding participants. These exclusion-justifications are rejected on egalitarian grounds.

This clarification is important because the two concerns (the egalitarian and the participatory) diverge and lead to different conclusions for a public discourse account. One could argue for viewpoint-based restriction of participation in order to exclude intimidating racist speakers for the sake of securing participation of those who would be otherwise intimidated.¹²⁰ Hence the goal would be maximizing overall participation.

To this objection one could retort by seemingly blending the two concerns together and posit that an equal right to participation buttresses public discourse. But such an answer will not do. Without further explanation as to what equality achieves, an

¹¹⁹ Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine' (n 105) 498.

¹²⁰ This is in a nutshell the silencing argument to which we shall return later in Chapter Four section 5. For an excellent discussion of silencing see Caroline West, 'Words that Silence? Freedom of Expression and Racist Hate Speech' in Ishani Maitra, Mary Kate McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (OUP 2012).

appeal to equality may be just, to follow Joseph Raz's famous explanation, a rhetorical egalitarian claim derived from the necessary generality of any rights.

All principle of entitlement generate equality (in some respect) as an incidental by-product since all who have equal qualification under them have an equal right.¹²¹

We want everyone to participate, which is not different from stating that we want participation. Equality does not advance the argument. Therefore, we need a further reason to make the argument from equality work.

To conclude: the argument ran full circle to return to square one. The original objection against the public discourse account of Robert Post still holds. Yet Post's argument was helpful for developing a political speech account by moving away from the instrumentalist approach embedded in Meiklejohn's argument. To put it plainly, the point of protecting political speech cannot be to reach wise decisions. This shapes fundamentally the political speech account even though Post's account lacks a morally appealing and clear justificatory value because neither sheer participation nor formal equality suffices to remedy this. Moreover, Post moved on from conceptualising political speech as town hall deliberation to all speech that occur in the public domain. This lead him to encounter the boundary-challenge that already plagued the latter version of Meiklejohn's account.

4. Egalitarian Justification of Political Speech

The public discourse accounts presented above helpfully moved away from the crude instrumental portrayal of political speech as a vehicle for wise decisions and turned to pursue a legitimacy-oriented argument. Thus, both Post's and Weinstein's arguments had an appealing structure for the legitimacy argument. Freedom of political speech

¹²¹ Joseph Raz, *The Morality of Freedom* (Oxford Clarendon Press 1986) 228.

represented a condition for legitimate democratic government. However, its normative basis remained quite unclear. To remedy this deficiency we now turn to Ronald Dworkin's argument for a robust conception of free speech.¹²²

Dworkin offered multiple justifications for the protection of free speech. They are diverse and intertwined with his broader theory about political legitimacy. They are characteristically premised on an egalitarian conception of justice. As we will see, not all of his rationales are equally suitable for justifying the narrow political speech-focused account that this chapter is looking for. This is the case because the right to freedom of speech relates to legitimacy in more than one way.

On the one hand for Dworkin free speech has an active role in the political process because speech counts as a contribution to politics, political changes such as election results or more broadly public opinion. In this regard the respect of political speech is necessary for the political process, so that it results in legitimate government whose decisions citizens have reasons to abide by and follow. This is the “process focused requirement” of legitimacy concerning free speech.

On the other hand, according to Dworkin, there are objectionable reasons which the community may put forth, in adopting laws that may give rise to other concerns that relate to legitimacy in different ways. Dworkin calls these the ‘banned reasons’ that are never valid justifications for laws restricting individual rights. This broader approach may apply to free speech. This is the “status-focused requirement” of legitimacy. Overall

¹²² Dworkin wrote on free speech extensively hence the following list of references is not exhaustive, rather these contributions represent his core argument. Ronald Dworkin, ‘Is There a Right to Pornography?’ (1981) OJLS 177; *Freedom's Law - The Moral Reading of the American Constitution* (OUP 1996) 214-226 and 227-239; ‘The Right to Ridicule’ *The New York Review of Books* (New York 23 March 2006); ‘Forward’ in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) vii-ix; ‘Reply to Jeremy Waldron’ in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech* (CUP 2012) 341-344; *Justice for Hedgehogs* (HUP 2011) 369-373.

three distinct free speech justifications can be distinguished in Dworkin's theory that will be put under scrutiny.

4.1 Dignity as Ethical Independence

Dworkin posits that individuals have a right to ethical independence, which stands for one's right to choose for oneself what a good life is.¹²³ He defined this right for the first time, still referring to it as 'moral independence', in the following way:

[p]eople have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong. I shall call this (putative) right the right to moral independence.¹²⁴

He later on made the right to ethical independence one fundamental facet of his rich conception of dignity; hence we shall refer to this as the dignity rationale.¹²⁵ The dignity rationale has important bearings on free speech. Dworkin elaborated on it thusly:

[g]overnment must not restrict freedom when its justification assumes the superiority or popularity of any ethical values controversial in the community. (...) The freedom to speak or write honestly as your conscience or conviction or belief requires is foundational. In some circumstances, moreover, political censorship can be justified only by ethical assumptions.¹²⁶

Dworkin's general conception of rights has a strongly anti-perfectionist dimension. Any coercive norm of the community that is based on a chosen ethical value about the good life and thus imposed on its unwilling citizens is a breach of that right. It is objectionable because people are not treated with equal concern and respect, which is the bedrock principle of Dworkin's political theory. Naturally one of the key areas of application of this requirement is freedom of speech. Let us just think about anti-

¹²³ In earlier works Dworkin referred to this as 'moral independence' with the same content. See for instance in Ronald Dworkin, 'Is There a Right to Pornography?' (n 122) 194-195.

¹²⁴ *ibid.*

¹²⁵ Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 191.

¹²⁶ *ibid.* 369.

pornography laws, which provided the context for Dworkin's first articulation of this rationale, or to blasphemy laws as free speech issues.¹²⁷ Such speech-restrictive laws are problematic for the dignity rationale because they embody an ethical view that is coercively enforced on unwilling citizens. The argument may be at its clearest when applied to blasphemy laws. Blasphemy laws meant to protect the ethical view of one religion, namely typically that of Christianity, under the pain of criminal punishment. Dworkin asserted a similar position against anti-pornography laws because they embodied an ethical view about sexuality that free and equal citizens should be able to choose for themselves and not be coerced by the community's law.

This rationale stipulates that such laws are offensive to human dignity qua one's status, in and of themselves independent of further restrictive consequences of such laws. We can imagine that a blasphemy law would also make life harder for people of different religion than the one protected by blasphemy. For instance, they might have to conceal their expressive religious practices in fear of the law. However, the dignity rationale focuses on the loss of dignity that blasphemy laws necessarily inflict, independent of further potential speech restrictions that such laws involve.

Note that the status-focused legitimacy requirement holds sway over issues other than free speech. The best example may be the example of sodomy laws against gay people. For Dworkin these laws should be challenged on the same grounds as blasphemy or anti-pornography restrictions: they unjustifiably interfere with one's ethical choices in life: namely who to love (and not what to say). Another obvious non-speech example is the denial of equal marriage for same sex couples: these laws are just wrong because they deny dignity (or ethical independence) on account of one's sexual orientation.

¹²⁷ Dworkin, 'Is There a Right to Pornography?' (n 122).

The problems with the dignity rationale for our present quest are the following. It may result in a strong protection for speech yet it does not concern political speech *tightly enough*. Under it, all speech interests are conflated into the one interest in dignity. Consequently, this rationale amounts to a single normative label that is broad enough to apply across the board. This goes against the stipulated goal of the thesis of defining political speech as tightly as possible so to bring out its normative particularities. Therefore, this rationale embodies a general account for all free speech interests where speech is censored for objectionable reasons.¹²⁸ It is enough to mention that Dworkin himself relied on this justification for free speech issues that could not be further from politics, like pornography.¹²⁹ He right away acknowledges that pornography raises concerns unrelated to political speech:

No one (I think) is denied an equal voice in the political process, however broadly conceived, when he is forbidden to circulate photographs of genitals to the public at large, or denied his right to listen to argument when he is forbidden to consider these photographs at his leisure. If we believe it wrong to censor these forms of pornography, then we should try to find the justification for that opinion elsewhere than in the literature celebrating freedom of speech and press.¹³⁰

Furthermore, there is a related practical objection against the dignity rationale. Dignity is notoriously difficult to apply in law as an operating principle, let alone a right. Consider the following. The presumption under the dignity rationale is that we have a way to construe the purposes of laws. Alas this is not the case, so difficult construction (or perhaps reconstruction) work lies ahead before one could assess a law's legitimacy in

¹²⁸ For the description of reason-blocking rights see Jeremy Waldron, 'Introduction' in J Waldron (ed), *Theories of Rights* (OUP 1984) 14-5. For a critical assessment of Dworkin's theory see Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 Am. J. Juris. 93.

¹²⁹ Dworkin, 'Is There a Right to Pornography?' (n 122) 177. A clarification is needed here. We do not mean that an opinion *about* pornography as such would not amount to political speech. Incidentally such political speech may contain pornographic speech (or more likely images), but there is a difference between using pornography simpliciter (typically for sexual gratification) and pornography used as political speech. Scanlon tried to make a similar distinction in Thomas M. Scanlon, 'Freedom of Expression and Categories of Expression' (1978-1979) 40 U. Pitt. L. Rev. 519, 542.

¹³⁰ Dworkin, 'Is There a Right to Pornography?' (n 122) 177.

light of its relation to human dignity. Few are the obvious speech targets under this rationale such as blasphemy law. Even pornography seems rather contentious. What exactly makes it the case that banning the consumption of pornography interferes with one's ethical independence? Nevertheless, Dworkin seems to have fallen back onto precisely the dignity rationale in his last article arguing against hate speech laws. He wrote:

[s]o regulating hate speech is not, after all, a matter of balancing. Government may not violate the rights of any citizen to the ethical independence from government that dignity requires. It is no excuse that it does so to enforce a particular collective opinion about what forms of respect individual human beings owe one another just as human beings; that "excuse" only confirms the mistake.¹³¹

Be that as it may, for a free speech account that aims at justifying political speech narrowly, such as the one that is sought here, a process-focused justification is a better fit than a status-focused one like the dignity rationale. Freedom of political speech should matter for what it does in politics: speech should be an active component of politics. Whereas the status-focused dignity rationale scans for laws that demean one's status as speaker, independent of further restrictions on speech. Take the ancient speech crime of lese-majesty that protected the monarch from criticism under very severe punishment. For the dignity rationale lese-majesty would objectionably restrict free speech as it demeans one's moral status as speaker by forbidding the uttering of criticism on one's ruler. That is about as far as the dignity rationale is concerned. It follows that the dignity rationale turns a blind eye to the law's further consequences on politics. To wit that lese-majesty forbids the influencing of politics in an important aspect, i.e. criticizing one's ruler. It mutilates politics as a process.

¹³¹ Ronald Dworkin, 'Reply to Jeremy Waldron' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech* (Cambridge UP 2012) 342-3.

4.2 Political Transformation Rationale

Dworkin also links free speech and political legitimacy in a different way, which is more suitable for the kind of account that is pursued here. Some in the literature call this rationale altogether the ‘legitimacy argument’ precisely for speech’s direct link with legitimacy.¹³² Actually, Dworkin offers two slightly distinct rationales on these grounds: the ‘political transformation’ and the ‘bearing witness’ rationales, which will be discussed separately in turn.¹³³

The ‘political transformation’ rationale is set to remedy the deficiency of majoritarian decision-making. In a political community, we need to make collective decisions under the condition of deep moral disagreement. Unanimity is not possible precisely because of the disagreement that characterizes any modern and large-scale political community. Given that unanimity is not possible, the best available procedure is the majoritarian one that is premised on the egalitarian ideal of one person-one vote. But one has to provide a reason for those who were not in the majority, because the majority’s decision will be imposed on the dissenters as much as on the consenters. The question is then why should the minority (the dissenters) see the collective decision as legitimate and not as tyrannically imposed? Recall that Robert Post proposed the free formation of public discourse to which all contribute on equal terms as a justification for accepting collective decisions as legitimate. Dworkin claims similarly that a broad right to

¹³² Zoltan Miklosi, ‘A Puzzle about Free Speech, Legitimacy, and Countermajoritarian Constraints’ (2014) 20 *Res Publica* 27, 28. The description of the two rationales are from Miklosi and we will draw substantially on his explanation.

¹³³ At this point a terminological clarification is needed. ‘Transformative constitutionalism’ has become a dominant theme in South African constitutional law and beyond. As the former Chief Justice of South Africa, Justice Pius Langa, linked the idea with his country’s foundational constitution’s preamble that mandates a future ‘founded on the recognition of human rights, democracy and peaceful co-existence and development of opportunities for all South African irrespective of colour, race, belief or sex.’ Transformational constitutionalism captures the thriving towards these noble goals. See Justice Pius Langa, ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch L. Rev.* 351, 352. The notion of speech as transformational tool that was deployed above captures an ultimately very different, somewhat more formal meaning of transformation. Speech may transform current minorities into future majorities. Dworkin’s theory is silent about the goals that minorities and majorities subscribe to. The point is about keeping political minorities and majorities open through free speech. Therefore, the two uses of transformation are fairly apart from each other.

free speech is a necessary (but by all means not sufficient) condition of democratic legitimacy because the majority vote is never enough for imposing the community's will on dissenting citizens. And here is where freedom of speech gains its special normative importance. Dworkin suggests that:

[t]he majority has no right to impose its will on someone *who is forbidden to raise a voice* in protest or argument or objection before the decision is taken.¹³⁴

Therefore, people must have 'not just a vote but a voice.'¹³⁵ The argument seems straightforward, yet on a deeper level the question persists: what does free speech actually *do* to confer legitimacy? Or to put it bluntly: what is the point of having a voice? There seem to be two plausible explanations. The first focuses on the current minorities' right to win over future majorities through political speech. Zoltan Miklosi put this idea forward with clarity. Building on Dworkin's legitimacy argument he developed further the following insight:

[t]he significance of free political speech is that, as a vehicle of persuasion and mobilization, *it has the potential of making political majorities fluid*. Members of the dissenting minority have no valid ground of complaint because even though they are currently in the minority, they are at the same time members of possible political majorities, given the freedom to state their views in public, so that other members of the community can hear them.¹³⁶

Miklosi asserts that Dworkin's argument 'locates the legitimacy-conferring significance of free speech in its providing a *normatively special channel* for political minorities to become majorities.'¹³⁷ It places free speech in an attractive light because it is the persuasive or mobilizing force of citizens' speech that shapes political change in the community. This is as close as one can get to the ideal of responsive government. As a

¹³⁴ Dworkin, 'Forward' (n 122) vii-viii.

¹³⁵ *ibid.*

¹³⁶ Miklosi (n 132) 30 (emphasis added).

¹³⁷ *ibid.* 31 (emphases added).

result, democracy's crude majoritarian character looks more acceptable. Free speech makes political outcomes not entrenched but responsive to changing political majorities and minorities. That seems a very attractive explanation for protecting the right to political speech. It should also be highlighted that this explanation centres on the active contribution of political speech. Political speech is a tool of transforming politics through persuading new citizens to share our position and through mobilizing citizens who are already convinced to push for our desired political change. This puts political speech in a morally attractive light. Political change happens through persuasion and mobilization and not by, say, random 'demographic change, immigration or any external shocks' by which electoral composition of a polity shifts along with political outcomes.¹³⁸

4.3 Bearing Witness to Injustice

Dworkin also hints at another potential explanation. It is distinct from the previous ones even though he only cursorily described this justification for free speech.¹³⁹ Dworkin wrote:

[a] majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, *not just in the hope* of influencing others (though that hope is crucially important), but also *just to confirm his or her standing as a responsible agent* in, rather than a passive victim of, collective action.¹⁴⁰

This description links the political transformational and the bearing witness rationales in an interesting way. The latter might be thought of as the passive aspect of political speech, while the former the active one. One has the right to give voice to her outrage or felt injustice, not because it might change or influence anything. Bearing

¹³⁸ Miklosi (n 132) 30.

¹³⁹ Zoltan Miklosi explored this explanation as a separate one. He recognised it as separate argument in Dworkin's work: 'It is of utmost moral significance, for instance, that one can bear public witness on matters of public importance, simply to make a statement about herself, and not necessarily with a view to changing minds.' Miklosi (n 132) 42.

¹⁴⁰ Dworkin, *Foreword* (n 122) vii-viii (emphases added).

witness is a somewhat marginal rationale for political speech. For Dworkin, everyone must have a right to mark her disagreement with the community's decisions or what she sees as injustice, in order to affirm 'her moral standing as a responsible agent in, rather than a passive victim of, collective action'.¹⁴¹ This markedly differs from having an active, transformational voice in the community, which focuses on speech's influence on public discourse and consequently on collective decision, as opposed to just registering one's defiant stance.

The two rationales might sound similar, but in truth they differ significantly in nature. They mark different functions of political speech. The bearing witness rationale conceives free speech not as a dynamic tool to influence politics, rather as a passive instrument to register one's moral standing without the prospect of influencing the community in any way. The distinction may strike as too abstract. Dworkin has in mind the position of someone living in a dictatorship where, by definition, no-one's voice counts because government is blatantly unresponsive to public discourse.¹⁴² However, it would be preposterous if the speaker's free speech could be denied on the grounds that her voice does not count in a dictatorship anyway. The bearing witness rationale provides an elegant solution to this problem.

The distinction between the two rationales depends on one point. The passive feature of the bearing witness account makes it unfit for justifying a political speech account where speech ought to play an active role in the process of shaping politics. To bear witness through speech about injustice committed against one is instrumental to affirm one's moral standing, but is inert as to what happens in the community prospectively. To put it differently, its importance is independent of any further effect

¹⁴¹ *ibid* vii.

¹⁴² *ibid*.

speech may exercise on others. Arguably many political statements have transformative effect *and* give voice to one's opinion about injustice inflicted at the same time. Yet the two play different roles.

To conclude, the political transformation rationale makes the best normative case for an account that aims at justifying speech qua political. This speech rationale is not vulnerable to the challenges that were mounted against the instrumental and the public discourse accounts.

It relies on an appealing conception of democracy. Democracy is not, falsely, reduced to imminent decision-making. Instead political speech shapes and transforms politics through public discourse. Furthermore, political speech is not protected for its speculative instrumental benefits (e.g. wise decisions) but for its transformative power vis-à-vis the public discourse. Political speech is instrumental for political change. It is their speech that transforms democratic politics, not random or passive events outside of the control of citizens. Finally, the right to political speech has a strong normative foundation in equality that is not exhausted by a claim for formal equality. People should enjoy not just an equal vote but voice to make communal decisions democratically legitimate.

One remaining challenge should be mentioned though. Meiklejohn was the only theorist who hinted, at least in the original version of his argument, what speech would count for political speech. It was an arguably restrictive narrow set of speech, modelled on town hall meetings, geared towards decision-making. Nevertheless, the other theories left the boundary challenge wholly unanswered.

The consequence of this lacuna shall be explored in details in the next chapter. Moreover, a political speech account might be complete only if it addresses not just the speakers' but the listener interests as well.

5. The Argument for Listeners' Interests

The free speech justification of Ronald Dworkin offers a strong political speech account. However, it has a unique focus on speakers' interests and neglects audience interests. Is that a problem? A comprehensive political speech account should encompass audience interests, provided that the reasons for protecting them are independent from and compatible with the speaker's interests. T.M. Scanlon's revised theory of freedom of expression may just be such an account.¹⁴³

Scanlon had famously proposed a through and through audience-centric democratic free speech theory. His goal was to face head-on the traditional arguments, which censorious governments commonly evoked in justifying censorship. Chief amongst them the ancient argument that dangerous speeches would mislead or 'provoke into dissatisfaction.'¹⁴⁴ Governments, for centuries, drew the conclusion that they have the 'duty to protect the citizens from such harms.'¹⁴⁵ Against this argument Scanlon proposed a basic speech norm that he labelled the *Millian Principle* (after John Stuart Mill), which was meant to substantiate a limit on government authority in speech matters. In a nutshell that principle holds the following. The harms that are caused by (i) people 'coming to have false beliefs' and (ii) the consequent acts undertaken because of (i)

¹⁴³ Thomas M. Scanlon gradually changed his theory. The first statement appeared in Thomas M. Scanlon, 'A Theory of Freedom of Expression' (1972) 2 *Philosophy & Public Affairs* 204. He later substantially narrowed his theory down in T.M. Scanlon, 'Freedom of Expression and Categories of Expression' (1978-1979) 40 *U. Pitt. L. Rev.* 519. See also some later comments of his on the theory in Thomas M. Scanlon, 'Why Not Base Free Speech on Autonomy or Democracy' (2011) 97 *Virginia Law Review* 541.

¹⁴⁴ Scanlon, 'Freedom of Expression and Categories of Expression' (n 143) 529.

¹⁴⁵ *ibid.*

should not count as legitimate reasons for restricting speech.¹⁴⁶ Scanlon took that legitimacy in relation to free speech is a matter of respecting the listeners' autonomy in making up their own mind and thus the government has no business to interfere with the process of evaluating speech that listeners may hear.

The theory proved influential, although mostly because of the strong criticism it attracted.¹⁴⁷ The crucial criticism that Scanlon himself came to concede was the overboard nature of his principle. Its application was meant to be generally applicable across all speech issues not just political ones. This ambition, however, led to implausible results for the principle.¹⁴⁸ Consider the case of prohibiting cigarette advertising. Prohibiting such advertisements came to be seen as a generally accepted public health measure that bears public benefits by influencing people precisely in the way that the *Millian Principle* objects to. Cigarette ads (a form of speech) influence people and prompt them to form positive or at least to allay negative opinions about smoking. Hence the prohibition should fall afoul of the Millian Principle and count as an illegitimate interference with listeners' autonomy.

Another example concerns speech restrictions on public safety grounds that are widespread and commonly accepted. For example, the information restriction about 'how to make your own nerve gas' would be objectionable on account of the Millian

¹⁴⁶ 'There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consist merely of the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.' Scanlon, 'A Theory of Freedom of Expression' (n 143) 213.

¹⁴⁷ See e.g. Robert Amdur, 'Scanlon on Freedom of Expression' (1980) 9 *Philosophy & Public Affairs* 287.

¹⁴⁸ Scanlon, 'Freedom of Expression and Categories of Expression' (n 143) 532-4. Other criticisms concerned Scanlon's reliance on 'autonomy' and its unique focus on audience interests. These are not strictly relevant issues for discussion here, hence we will leave them at that.

Principle even though they are thought to be uncontentious.¹⁴⁹ Relying on these examples, critiques rightly pointed out that Scanlon's Millian Principle just could not apply as a general free speech principle valid across the board.¹⁵⁰

Yet these criticisms did not deal a lethal blow to the whole theory. Scanlon later narrowed the scope of application of his theory to the issues that had sparked his initial inquiry, namely 'the discourse about how we are governed' or more broadly political speech.¹⁵¹ Hence the revisited version of the Millian Principle only applied to political speech. The assumption is that Scanlon's revisited argument should not run into the same criticism as the original version. Scanlon offers two supporting arguments.

First, according to Scanlon there is something particular about government's attitude to political speech. Governments have been historically wrong in accurately measuring political dangers caused by political speech. It is especially true in opposition to other free speech questions involving, say, public safety, where the historical record may look better. Scanlon asserts that '[t]he difference is that where political issues are involved governments are notoriously partisan and unreliable.'¹⁵² Therefore, the threat of government blocking critical speech is just constant.¹⁵³ The danger with heavy-handed speech restriction need not necessarily come from government's partisan fervour but from the typical overreaction to political speech's potential for people 'coming to have false beliefs.' This cautionary attitude is not acceptable with the high prize we put on political speech and democratic politics in general. This prudential argument is far from

¹⁴⁹ *ibid* 534.

¹⁵⁰ See Amdur's article in (n 147).

¹⁵¹ Scanlon, 'Why Not Base Free Speech on Autonomy or Democracy?' (n 143) 547.

¹⁵² Scanlon, 'Freedom of Expression and Categories of Expression' (n 143) 534.

¹⁵³ One may object that independent institutions such as courts may alleviate these concerns. Though governments and legislature may have just as much leeway to shape courts' decision, not last by the laws they adopt, and therefore the edge of the objection seems less sharp.

implausible even if somewhat exaggerated. It might overtly rely on an American historical interpretation than a universal truth about government action. Scanlon's other argument is more convincing.

The deficiency in Scanlon's original theory resulted from generalising an audience norm from the singularities of political speech. Scanlon wrote:

[m]y mistake was that in an effort to generalize Meiklejohn's theory beyond the category of political speech, I took what were in effect features peculiar to this category and presented them, under the heading of autonomy, as a priori constraints on justifications of legitimate authority.¹⁵⁴

The peculiarity of political speech partly stems from a paradox about audience interests. The paradox is that total control (or 'autonomy') over what one can listen to can be contrary to one's own objective interests. Not being exposed to a diversity of views locks one up in an echo chamber. Following this thought, he came to think that the central audience interest in politics is best seen as having a 'good environment for the formation of beliefs and desires' as opposed to total control.¹⁵⁵ To expose audiences to political views they may not choose to encounter in the first place may sound strange. The root of this idea goes back to Mill's concern about the negative effects of people coming to accept and share truths thanks to progress. Mill thought that people should be exposed to arguments against, as it was, the discovered truths through devil's advocates to keep their critical senses and understanding of the matters alive.¹⁵⁶ The idea of exposing unwilling audiences to a diversity of views is an especially desirable thing in politics. Scanlon posited that, in politics, it is especially important that people hear

¹⁵⁴ *ibid* 535.

¹⁵⁵ *ibid* 527.

¹⁵⁶ The famous quote from Mill is the following: 'So essential is this discipline to a real understanding of moral and human subjects, that if opponents of all important truths do not exist, it is indispensable to imagine them, and supply them with the strongest arguments which the most skillful devil's advocate can conjure up.' John Stuart Mill, *On Liberty* first published 1859, OUP 2008) 43.

potentially dangerous or even false or at least conflicting views. The argument here is confined to suggesting that erring on the side of exposure to a variety of views in politics is better than letting audiences lock unwanted opinions out. This concern about partisan echo chambers strikes as a very timely one. If the negative effect of hyper-partisanship on democracy, and that of the unchallenged and vacuous reverence of liberal democracy are real, then Scanlon's audience-centred norm is spot-on. The underlying values of liberal democracy get undermined if orthodoxy settles and people stop inquiring about the basis of their adherence in the comfort of their echo-chambers.

Finally, it should be added that Scanlon's audience-focused norm is at its strongest in politics because the case for letting citizens making up their own minds about political messages is very strong. Therefore, it complements Dworkin's transformation rationale from the perspective of the audience.

Is this listener-centric account compatible with Dworkin's political transformation rationale? The answer should be firmly affirmative. Both accounts squarely focus on legitimacy. Scanlon defines a process-focused legitimacy requirement as much as Dworkin's does through his procedural transformation rationale. Free speech is an active tool in political transformation under both accounts though. In a way, the two accounts represent two sides of the same coin. The transformative view of speech assumes what the audience-centric argument establishes: that there is a point in speaking as people can be persuaded through arguments. For that dynamic to obtain between speakers and listeners people are to be respected as speakers as well as listeners in politics. This is the core tenet of the political speech account.

6. Conclusion

This thesis is about political hate speech. Its primary question is whether there are normative reasons to carve out an exception to protect political hate speech. To turn it into a question format: Should political hate speech be an exception from the otherwise justified legal ban on hate speech?

This chapter was the first of the three theoretical chapters. Chapter Two and Three uniquely focus on the right to political speech, while the other side of the question, that is hate speech, will be introduced in Chapter Four.

The introduction in Chapter One demonstrated the need to think about free speech questions from a pluralist perspective, separating free speech interests. This chapter embarked on examining democratic free speech theories that focus on political speech. It did so by painting the development of democratic free speech justifications from its instrumentalist origins (the theory of Alexander Meiklejohn) through the public discourse account of Robert Post till the egalitarian democratic accounts of Ronald Dworkin and T.M. Scanlon. These theories were scrutinised through two criteria: whether they justify tightly political speech; moreover whether the theory itself is morally appealing.

The normative political speech account endorsed here follows the democratic justifications shaped by the influential works of Dworkin and Scanlon. In a nutshell, this combined account centres on the contribution to the public opinion or public discourse that political speech makes. Political speech is a necessary condition of political legitimacy, because those who lose out in the democratic process remain free to spread their opinion and to convince the rest of the polity about their position be it about multiculturalism, immigration policy or tax reform. Political speech is, therefore, a

transformational tool for citizens of a democracy. The free exercise of political free speech is partly what makes being defeated in politics legitimate for those who remain in minority. However, a comprehensive free speech account should not just touch upon the speakers' rights. Listeners' rights are also important. People should be free to make up their own minds about politics. It requires that government does not come to judge the merits of political speech for citizens. What follows from this account is that any restriction of political speech ought to meet a high threshold for restricting political speech.

Chapter Three

HIGH-KEY POLITICAL SPEECH

1. Introduction

The previous chapter identified an account of a theory of robust free speech. At its centre stands freedom of political speech, understood as an expressive tool for transforming politics. Political speech transforms politics by ‘contributing to the ‘public or political debate’ or, as one might say, to the ‘public discourse.’¹⁵⁷ Respect for this right by the government is a necessary condition of legitimacy in a liberal democracy.

The account in the previous chapter was theoretical in nature and normative in its conclusions. As a consequence, it duly omitted the problem that theoretical statements do not self-execute in practice. An abstract declaration that political speech is protected does not tell us what speech actually counts as political in real life. As long as we want these theoretical accounts (“up there”) to inform our decisions in practice (“down here”) we need to bridge the two levels. To put this challenge into real-life terms: How should a judge apply the right standard to political speech without knowing whether the speech is truly political?

Answering the “bridge question” is essential for a thesis that aims to examine real-world case law through a normative lens. A bridge has to be constructed between lofty theory and faulty human institutions to know indeed which speech is political . This might be framed as a doctrinal question, yet one towards which even courts do not show great sensitivity. It is curious because seemingly a great deal depends on that question. To

¹⁵⁷ These terminologies will be used interchangeably.

maintain the generally accepted privileged position of political speech, one has to draw a line between speech that is political and non-political. Unless a distinction is made, all or no speech is political and as a consequence the supposed privileged position becomes meaningless or the derived heightened protection may be allocated wrongly.

This chapter will first present how the question of building a bridge between theory and practice can be possibly answered. Courts traditionally use indicators or factors to determine the political pedigree of a speech. They fall into two groups, depending on whether the indicators regard the content (or the subject matter) or the circumstances (or the context) of a given speech. The former group is seemingly straightforward, while the latter seems at first glance messier because it is less obvious what circumstances are relevant to the political nature of a speech. Upon laying out the possible indicators of political speech, we shall propose a tighter political speech cluster, which will present significant advantages. Content and circumstance regarding indicators will be combined to define the upper layer of political speech, which we shall label *high-key political speech*.

2. The Content Regarding Indicators

The most natural way of detecting political speech is to look at what it says. At first sight, no reasonable person would have a problem distinguishing a recipe for baking wholemeal bread from a cooking book and a protestor's tirade against the War in Iraq. One might hope intuitions could as easily settle the question in all cases. Perhaps that is why courts oftentimes pretend that the issue is too obvious to argue about and just assume a speech to be 'political' in light of its content.

This tendency is reflected in the widespread use of the label ‘high and low value’ speech by courts such as the European Court of Human Rights.¹⁵⁸ The ECtHR assigns speech a high-value status based on whether the expression is on a matter of political or public importance, because the freedom of expression on political matters is always of high value.¹⁵⁹ The doctrinal consequence is that courts allow for the narrowest restriction on high-value speech. In contrast, courts treat hate speech, along with pornography or gratuitous insults as low value and accordingly they assign them very little, if any, protection.¹⁶⁰

The use of a simple, speech-value hierarchy may be intuitively appealing. Yet it is question-begging at its core, because the ECtHR pretends that what is of political/public importance is self-evident. In light of its importance in assigning heightened or lower scrutiny, one may expect a more thorough explanation of what makes a speech political. Indeed, the broad theoretical literature on free speech does not suffer from a scarcity of propositions about how to identify political speech. Some of the important proposals that offer content-regarding solutions as to how to identify political speech are discussed below. It remains to see whether any of these are convincing.

2.1 All Speech Matter

One extreme proposition is to cast the net widely. From discussions at the local pubs or private exchanges between friends through columns in political magazines to politician pep talks at rallies, all seem to contribute to the formation of political opinion in a way.

¹⁵⁸ British courts follow suit since the adoption of the Human Rights Act of 1998. The distinction is also used in the US constitutional system. Cass Sunstein captures that by writing about ‘two-tier first amendment’ dividing speech into high and low value. See Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1993) chapter five 121-166.

¹⁵⁹ A distinction might exist between speech on political matters and the broader category of expression on matters of public interest. Yet the two certainly overlap to a large extent, and often overlooked, therefore for the sake of readability, it will be treated as a distinction without a difference here.

¹⁶⁰ Jacob Rowbottom, ‘In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online’ (2014) Public Law 491, 493.

Why should it not follow that all of the things that influence the formation of public opinion should count as political speech?

Accordingly, one theoretical position consists in arguing that (almost) everything of communicative value feeds into the public debates and thus is political in the requisite sense. Be it the oration of a promising young politician, the pictures in an erotic magazine, the sound bites of TV ads or a friendly chat at dinner table, all feed into politics through their micro-influence. The best way to make sense of this ‘all-in approach’ is to focus on the influence speech may exercise on people’s view about larger questions.

Jane Mansbridge holds a version of the “all-in approach” in the context of discussing deliberative democracy. She offers the example of a married couple’s exchange at home during which the wife calls out her husband for his male chauvinist remarks.¹⁶¹ It is beyond doubt that our everyday communications, such as the retort in Mansbridge’s example, intimately feeds our thinking about politics, community and values. Yet it is not very difficult to imagine why this view may be unpersuasive. For one, it denies any difference between public and private communication. Perhaps somewhere down the line ordering a pizza online influences one’s thoughts about technological progress or prompts her to think about alienation in capitalist societies, but that still seems very far from her immediate communicative goal, to order a pizza. Hence, Mansbridge’s suggestion amounts to making all speech political at the price of doing away with the conceptual difference between private and public and as a consequence

¹⁶¹ Jane Mansbridge, ‘Everyday Talk in the Deliberative System’ in Stephen Macedo (ed), *Deliberative Politics – Essays on Democracy and Disagreement* (OUP 1999) 219. Mansbridge’s argument specifically applies to deliberative democracy. Her point is to emphasize the important role private speech plays in the larger discourse along with, and not as opposed to, more public speech. We will discount the aspect of her article that relates to deliberative democracy and only focus on the core idea about the importance of private speech.

turns all speech into political, hence effectively rendering the category redundant. This solution falls into the pitfall of over-inclusiveness.

2.2 Important Issues to the Public

The opposite and more popular way to make sense of what belongs to political debate is to confine political speech to typical political topics. It is not hard to imagine some core examples here: politicians debating issues of national interest, criticism of government or of public policy. This view could be suitably labelled as ‘important issues to the public approach.’ The American constitutional lawyer, Robert Bork, endorsed a position close to this approach while discussing the scope of the First Amendment protection. According to Bork, only the likes of legislative proposals or criticisms of public officials ought to count as political under the First Amendment.¹⁶² He deemed such communicative instances ‘explicitly and predominantly political’, thus constitutionally protected.¹⁶³

Setting aside the implausibly narrow interpretation of politics in Bork’s argument, it is easy to imagine a more permissive version of it. Judges should treat as political any communication that concerns already known political issues, be it racial injustice or budget proposals. Lady Baroness Hale of Richmond provided such a definition in the seminal privacy case of *Campbell v MGN Ltd*:

[t]here are undoubtedly different types of speech (...) some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters *relevant to the organisation of the economic, social and political life of the country is crucial to any democracy*. Without this, it can scarcely be called a democracy at all.¹⁶⁴

¹⁶² Bork’s proposition will be treated here as a general proposition and not as a mere interpretation of American constitutional law doctrines.

¹⁶³ Robert H. Bork, ‘Neutral Principle and Some First Amendment Problems’ (1977) 47 Ind. L.J. 1. 23, 26.

¹⁶⁴ *Campbell v MGN Ltd* [2004] UKHL 22, §148 (emphases added).

This more-permissive, content-regarding test can often be detected in operation by courts. The ECtHR's *Oberschlick (no 2) v Austria* is a case in point.¹⁶⁵ An Austrian far-right politician was mocked by a journalist in defamatory terms following a suspiciously revisionist talk by the politician. The politician's speech stirred quite a debate about how politicians should approach the country's Nazi past. The ECtHR recognised that although he used defamatory terms, because his speech contributed to an issue of general interest the applicant journalist was rightly not found liable for defamation.

This more permissive version of the public issue approach gets the right outcome but holds a faulty structure. It remains an unpredictable and subjective solution, because no one knows generally or in advance what ought to count as a political issue, let alone an issue of public interest. This is the pitfall of unpredictability. Furthermore, the danger is real that the dominant standards in society will be paraded as exhaustive in order to exclude issues that are marginalized, unpopular or just uncomfortable. The point of Robert Bork's narrow definition of political speech was to flatly deny free speech coverage from erotic and pornographic literature.¹⁶⁶ This approach may thought to be intuitively appealing yet exhibits two major pitfalls: subjectivity in judging what is of political matter and the resulting indeterminacy.

2.2.1 The Misfit with Hate Speech

There is another reason why pegging political speech to important political matters may not work satisfactorily. Applying such a test to hateful content leads to a highly implausible outcome that cast doubts on the test itself.

¹⁶⁵ *Oberschlick (no 2) v Austria* App no 20834/92 (ECtHR, 1 July 1997).

¹⁶⁶ It would be a stretch beyond the limits of this thesis to argue about free speech and pornography in details. Enough to add here, that Bork's under-inclusive notion of political speech would exclude not just the contentious versions of pornography, but *all* erotic content from the scope of free speech protection. We assume here that such a blanket ban is deeply objectionable on free speech grounds.

The idea in a nutshell is the following. Hate speech at its core bears on issues of intense public debate such as race, religion and sexual orientation. Consequently, to the extent that prejudiced remarks give voice to political views, albeit bigoted ones, they ought to be automatically treated as political. This idea of treating all hate speech as automatically political is very close to the American constitutional position: hate speech is intrinsically political and thus it automatically attracts First Amendment protection. For the purposes of the First Amendment, the racist viewpoint is just one among many.¹⁶⁷

Under this view, statements like ‘taking our country back from foreigners’ or ‘sending home swarms of refugees’ unmistakably capture political viewpoints. Such remarks contribute to public debate about immigration, multiculturalism or refugee policies just to name the most obvious ones. Hence a logical suggestion is that hate speech is intrinsically political as a matter of content, and therefore, hate speech should always count as political speech.

The public/political issue test itself seems incapable of dealing with this implausible outcome. Given the indeterminate nature of the political/public issue test it is not clear at all how to resist the implausible outcome of treating all hate speech as political.

Let us sum up the discussion so far. The first two solutions to the bridge question started from the content of the speech and were discarded because of subjectivism, over-inclusiveness or indeterminacy. Moreover, hate speech itself showed the deficiencies of relying on content for identifying political speech.

¹⁶⁷ See the difficulties involved in cross-burning as the symbol of prejudice against African-Americans and an intimidation tool. See the leading case: *R.A.V. v. St. Paul* 505 U.S. 377 (1992) 205.

Be that as it may, it is unlikely that the bridge question could be answered without any regard to the content of speech. What we established so far is that exclusively relying on the content would be a mistake. It, therefore, seems to be a sensible option to also accord importance to the circumstances of the speech.

3. Circumstance-Regarding Indicators

The way courts and theorists identify communication as political speech is based mostly on its content. The bridge question is usually answered by looking at the content. In a nutshell, if the speech is on a matter of public or political interest courts treat it as high-value political expression. But courts move swiftly beyond content: a political content pedigree does not provide an absolute shield from liability.

The picture is, however, considerably more complicated as to what circumstantial factors are used in free speech cases and to what end they are used. All potentially relevant circumstance-regarding indicators would be impossible to list in an exhaustive fashion. They may relate to the position of the speaker, the nature of the audience, the intention of the speaker, the medium of the expression or the relation of the speaker to those who find the speech objectionable. There are ones that unequivocally betray the political nature of the speech, but not all of them are relevant for this determination. The challenge here is to distinguish two ways in which speech circumstances (or contextual circumstances) influence the free speech analysis. The first is the proportionality or balancing analysis, which puts into the mix all sort of relevant circumstances to strike a balance between the interests competing with free speech. But some of these circumstances can be used more directly, as opposed to being put in the mix of the proportionality analysis, in order to assert the political nature of a speech.

First, the proportionality analysis will be critically described through an example taken from British defamation law. This will then be contrasted with the use of directly political circumstances.

3.1 Balancing the Relevant Circumstances

Contemporary rights adjudication turns on the balancing of various factors counting in favour or against one side or the other. This is as much true in Article 10 cases at the European Court of Human Rights as in British courts measuring privacy or defamation claims against freedom of expression. The point of the proportionality analysis is to decide whether the right to political speech outweighs the conflicting interests or rights. And one important reason that one's right to reputation, for instance, can be outweighed in favour of freedom of expression is that the speech is high-value political speech and thus deserves enhanced protection.

British defamation law offers an instructive example about the use in proportionality analysis of a wide range of circumstance-regarding factors. The qualified privilege defence protects against defamation claims defamatory speech that is nonetheless in the public interest to be published. In this way courts balance the legitimate interest of one's reputation against the right to freedom of expression. These clashes revolve around the question whether the public interest in disclosure outweighs the harm caused by the alleged defamation. This is analogous to the question whether the speech is political (i.e. the bridge question), because political speech deserves heightened protection.

The well-known public interest test concerns the defence of qualified privilege in defamation law that was spelled out in the seminal *Reynolds v Times Newspapers Ltd*

judgment.¹⁶⁸ *Reynolds* offers an extensive list of circumstantial factors to be taken into account in balancing the plaintiff's right to reputation and the defendant's freedom of speech.¹⁶⁹ Lord Nicholls of Birkenhead specified the following ten relevant circumstances:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.¹⁷⁰

The test in *Reynolds* speaks to the importance of a multitude of relevant factors about the speech under review. They aim at balancing the harms and the benefits of publishing a *prima facie* defamatory statement. The *Reynolds defence* achieves this by encouraging professional journalistic standards that focus on the defendant's handling of the publication. Therefore, most factors measure the accuracy and fairness of the publication (3, 4, 5, 7, 8) that contains the defamatory statements. The verification of the sources of information and the inclusion of the plaintiff's side of the story carry important weight. Another set of factors measure the scale of damage caused by the publication (1, 9). On that account, the seriousness of the allegation and the tone are central. An opposite group of factors gives weight to the countervailing legitimate

¹⁶⁸ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (House of Lords).

¹⁶⁹ The *Reynolds defence* is tailored to the world of English defamation law, the particularities of which are of no particular interest for us here. For instance, the qualified privilege defence against defamation claim is available in absence of the 'justification defence' i.e. proving the defamatory fact true.

¹⁷⁰ *Reynolds* (n 168) § 205.

interests on the defendant's side to publish the defamation under urgent conditions (6, 10).

Most circumstantial factors speak to considerations that are unrelated to whether or not the speech is political. Notice that the only clearly political speech indicator on the list asks about the extent to which the subject matter is of public concern – i.e. the content inquiry about political speech. Instead of measuring the political nature of the speech, British courts consider the totality of circumstances to strike a balance. In other words, the test works as a balancing exercise.

Yet, the way balancing works is far from clear. Notice that the *Reynolds* defence does not incorporate any narrowly political circumstances. The Court rather considers a multitude of unrelated contextual factors. The judgment in *Reynolds* turned uniquely on the accuracy of reporting, while the other factors did not seem to have been given as much weight if at all. In the UK edition of *The Times*, the article on the political crisis surrounding the former Irish prime minister (the plaintiff himself, Mr Reynolds) omitted his account of the story – unlike in its Irish edition. The omission diminished the accuracy of the reporting and that tilted the balance against the defendant newspaper. Yet the issue of inaccuracy might be legitimately dwarfed by the importance of the issue, which was the background story of the fall of the government in Ireland. The criticism against this method lies in its opacity; which circumstance-regarding factors are balanced and how just remains unknown.

3.2 The Directly Political Circumstances

Let us recall that this chapter started off by presenting the bridge question: how do we know a speech to be political? Content is certainly relevant for this question but circumstances could shed further light on the political nature of a speech. Thus we skimmed through an example showing how proportionality analyses use circumstances in

balancing free speech with concurring claims. Yet there exist more political circumstance-regarding indicators that assign political pedigree on a speech in a more direct way.

First, we will see how intention may be important in revealing the political nature of speech and what are its shortcomings. After that the three main directly political circumstantial indicators will be described.

3.2.1 Message Intended and Received as Political

Cass Sunstein answers the bridge question by relying on intention. He rejects the ‘all-in approach’ and proposes that the intention of the speaker be the criterion in assigning a political label to speech. Sunstein places the speaker’s and the audience’s intention at the heart of the test:

For the purposes of the Constitution, the question is whether speech is intended and received as a contribution to political deliberation, not whether it has political effects or sources. Thus, for example (...) [t]here is a difference between personal, face-to-face racial harassment by an employer of an employee, which is not entitled to full protection and a racist speech to a crowd, which indeed falls within the core, and cannot be regulated in the absence of a clear and present danger.¹⁷¹

Contrary to the approaches that scrutinise the important issues to the public, Sunstein does not rely on the implausible assumption that we already have a ready-made list of important public issues. Yet assessing the intention of speaker and especially its understanding at the audience side is more problematic than allowed by Sunstein. In a jurisdiction where calls for violence and sheer threats are legitimately outlawed, as they should be, intention may not function as a correct proxy to capture the political character of speech. The hate speaker may honestly intend his words as contribution to public debates, yet her audience might just take them as adding up to a true threat or a call for

¹⁷¹ Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1993) 153-4.

violence. This mismatch between speaker's intention and its perception looks like the default situation in hate speech cases and not the exception.

3.2.2 The Direct Political Circumstances

The analysis of intention may not achieve what it purports to do, but aims at the right target: inferring the political nature of a speech from a circumstantial factor. However, other direct, through and through political circumstances can be easily found. Some of them have even emerged in the jurisprudence of the ECtHR, even though the Court does not use some of them in any systematic way; however, it often highlights the following circumstances as betraying the political character of the speech independent of the content. The following circumstances certainly do not exhaust the possible range. They rather epitomise the best-known circumstantial factors that directly betray the political nature of speech.

a) Who? The Speaker

The first one is the simplest political indicator that focuses on the role of the speaker. The Court often asks about the institutional role of the speaker. In *Castells v Spain* the Court explained:

[w]hile freedom of expression is important for everybody, *it is especially so for an elected representative of the people*. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.¹⁷²

As the Court rightly points out MPs, elected officials and candidates should enjoy broad protection because their speech aims at contributing to public discourse on account of their role. Even though *Castells* only mentions elected members of parliament, but it should apply to politicians and politically oriented public speakers in general, as the

¹⁷² *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) § 42 (emphases added).

same rationale for speech protection applies to them as well. Consequently, the political speaker category should be given a broad interpretation to include political activists, NGOs, union members or any organized societal forces that aim at influencing public debates in those capacities.¹⁷³

b) What? The Process

For the sake of qualifying speech as political, the place of the speech might be just as relevant as the speaker's identity. It can thus be asked whether the speech occurs in a formal, institutional political setting dedicated to political debate. This second indicator teases out the nature of the process in which the speech occurs. The clearest political processes in democracies are election campaigns and debates in Parliament. The institutional political process is part and parcel of democratic politics. Hence speech that occurs during that process should be clearly identified as political and the speech within it clearly marked as political. Focus need not be uniquely on politicians though.

This broader interpretation of who counts as a participant is well captured by the British ECtHR case of *Bowman v the United Kingdom*.¹⁷⁴ The applicant was a pro-life campaigner unaffiliated with any political party who distributed leaflets in the streets during an election campaign. He wished to impart information about the parliamentary candidates' records on abortion. The applicant's speech was recognized by the Court as a genuine attempt to use political speech for influencing politics and thus as political speech.

c) When? Political Event

¹⁷³ See the following authoritative judgment: *Abmet Sadik v Greece* App no 18877/91 (ECtHR, 15 November 1996) (a Greek MP circulating a pejorative communiqué about Turkish minority).

¹⁷⁴ *Bowman v the United Kingdom* App no. 141/1996/760/961 (ECtHR, 19 February 1998).

One can assume that anyone in the 2010s would deem a concept of politics exhaustively made up by institutional processes as unacceptably quaint. Focusing solely on formal politics would unduly narrow the field of politics as we commonly know it. It naturally extends to more informal but distinctly political circumstances such as public rallies and campaigns. Thomas Scanlon helpfully defined this space of politics as the ‘continuing process of informal politics in which the opposing groups attempt to alter or to preserve the social consensus through persuasion and example.’¹⁷⁵ This space might even be the most visible features of our political life. Consequently, courts regularly treat communicative activities in public rallies, protests and the like as political through and through. Therefore, what goes for the institutional political process should also apply to informal political events. The point of these events is to further political aims through communications hence their importance as political speech. The ECtHR case of *Plattform “Ärzte für das Leben” v Austria* offers a good example of such speech.¹⁷⁶ The question was whether Austria breached a positive duty to protect the expressive activity of marchers against the activities of counter-demonstrators, which the court answered in the affirmative. The applicants were pro-life demonstrators in a rural Austrian city. During their peaceful demonstration, violent counter-demonstrators insulted and physically threatened the marchers. Crucial for the Court’s judgment in *Plattform* was that the protestors exercised their right to political speech in the continuing process of informal politics, which enjoys a heightened protection in the scheme of freedom of expression.

3.3 Ad-hoc balancing and lack of transparency

These directly political circumstances are occasionally relied on in practice. However, the currency of the political nature of speech often passes under-appreciated. This is a

¹⁷⁵ Thomas M. Scanlon, ‘Freedom of Expression and Categories of Expression’ 40 (1978-1979) U. Pitt. L. Rev. 519, 545 (internal quotation marks in the original).

¹⁷⁶ *Plattform “Ärzte für das Leben” v Austria* App no. 10126/82 (ECtHR, 21 June 1988).

problematic outcome by the ECtHR's own account. Political speech is taken to be of high value, which raises the bar of protection for political speech. Yet it is not clear from the jurisprudence how the assignment of high value to political speech actually raises that bar. As one observer put it: '[t]he value of the expression is often cited as a factor in Article 10 decisions, but it is not always evident what role it plays in deciding the outcome of the case.'¹⁷⁷ The risk is that the Court only pays it lip service and uses 'high value' as a label for its conclusion as opposed to an operational principle.

The broader problem lies with the variety of factors that courts take into account for deciding cases. On the one hand, in the proportionality analysis it is natural that all sorts of circumstances are set against each other. However, the cost of this methodology goes beyond untidiness. It is unclear how different types of circumstantial factors matter in comparison to each other. It is implausible to suppose that all factors ought to have the same weight. For instance, how should the tone of the speech weigh in comparison to the fact that it was a politician who uttered it? They just seem incommensurable. This is perhaps why in *Reynolds* the House of Lords after enunciating all the possible factors only elaborated on a single one, namely the lack of comment sought from the plaintiff in deciding the case.

This criticism might be too harsh. Courts need to be pragmatic in solving legal and not theoretical problems. Some untidiness in judging might just be warranted for courts. However, by relying mostly on the content analysis in identifying political speech and weighing all sort of circumstances in the balancing process, courts run the risk of losing sight of the normative distinctiveness of political speech.

¹⁷⁷ Jacob Rowbottom, 'In the Shadow of the Big Media...' (n 160) 493. Chapter Five will be entirely on the ECtHR's jurisprudence.

3.4 An Alternative: Deference to Social Practice

Here at the end of discussing the political circumstantial indicators, it should be made clear that not everyone assigns to the bridge question such crucial importance as is assumed here. In his recent book on the subject, Eric Heinze treats the question as a pragmatic one with ever-changing boundaries. According to him, the bridge question can be answered in different ways in different countries depending on, *inter alia*, prevailing institutional arrangements and social practice in a given polity. There always will be questions about the grey zone of what is in and what is out of public discourse; or to put it differently, what is political speech and what is not. But treating such questions of boundary delineation as the important ones gives the false impression that the problem only arises at the fringes. Heinze writes that:

[s]uch line-drawing complexities may differ from one democracy to another, and indeed from one situation to another, but in no way diminish the core proposition that, in each LSPD [*long standing and prosperous democracy*], there must remain some *genuine public sphere* within which citizens may speak without fear of viewpoint-selective penalties imposed by the state, hence upon an individual as a citizen.¹⁷⁸

Notice that Heinze writes about the 'genuine public sphere'. One may guess that the likes of Human Rights Watch denouncing the secret rendition programme of the UK government should count as a contribution to public discourse. Or covering the question time of the Prime Minister in Parliament might count as an instance of speech in the genuine public sphere. But these are only intuitive examples with no general explicatory power about the perimeters of the public sphere.

Nevertheless, Heinze's argument clearly puts the bridge question into a different dimension. The boundaries of genuine political debate cannot be traced with universal validity, and hence the bridge question should be answered by deference to social practice.

¹⁷⁸ Eric Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016) 85 (emphases added).

Let us sum up the main points so far. In light of the normative findings of Chapter Two, it is of a great deal of import what speech counts as political. Two types of indicators or factors can be used for that end. The content-regarding analysis is deficient in many ways but it should unavoidably figure in any answer to the bridge question. Nevertheless, precisely because of its pitfalls it ought not to be relied upon as the sole criterion for political speech. Circumstantial factors are abundant and courts use them widely in proportionality analysis. Balancing is nothing else than tracing through all the relevant contextual factors. Amidst the multitude of the contextual factors, however, it is not clear which circumstantial factors are relevant for the bridge question, that is, which are the ones used for identifying political speech.

The challenge is twofold for a better way of using circumstantial factors in identifying political speech. The alternative should make better use of the circumstantial factors than the proportionality analysis. This requires more transparency as to why circumstantial factors matter. Additionally, the alternative solution should identify political speech in a way that is normatively superior to both proportionality and the social practice deference view of Eric Heinze.

4. High-Key Political Speech

In this section, an alternative answer will be presented to the bridge question that meets the challenge described above. It entirely relies on the political factors that have been presented so far, but they will be recast in a normatively attractive way.

It was argued above that some factors directly bring out the political nature of speech: the speaker, the process and the event of the speech. These thoroughly political circumstances focus on the speaker, the political process in which the speech occurred,

and the nature of the informal event. Typical instances of political speech under these indicators would include the following stylized examples:

- The leader of the opposition shares his thoughts with a journal in an interview.
- A politician gives a rousing speech on her campaign trail to an audience of supporters.
- An advocacy group's spokesman argues for nuclear disarmament at a public meeting.

What is omitted so far though is that these political factors exhibit shared distinctive normative features that could be overlooked if put in the mix of the general proportionality approach. Putting emphasis onto these political circumstances when identifying political speech demarcates the top layer of public political speech. The proposition put forth here as an alternative solution to the bridge question is that these political factors identify a special set that will be labelled *high-key political speech*.¹⁷⁹

'High-key' is meant to emphasise the high profile of speech in political life. High-key political speech does not exhaust the entire range of possible political speech let alone all protected speech. Many instances of political speech are not high-key and they still deserve protection. If political speech were put onto a scale of intensity, high-key political speech would be at its highest end on account of three interlinked normative features that shall be presented here: functional publicness, the exposition to the audience's judgment and to criticism.

4.1 Functional Publicness versus Publicity

What is common within the political factors? These circumstances express the publicness of the speech. Publicness does not equal publicity. The distinction is relevant for the normative characteristics of high-key speech and hence it should be clarified.

¹⁷⁹ We will refer to 'high-key political speech' and 'high-key speech' interchangeably.

The level of publicity is measured by the number of people a speech reaches. Commercial advertising, tabloid stories as well as the speeches of political leaders typically reach large audiences and thus enjoy a high level of publicity. On the other hand, dinner table conversations have a low level of publicity. The level of publicity is one of the relevant factors for regulation of speech. The fact that commercials enjoy high publicity makes their regulation more desirable or justified as the risk of harm in manipulation or deception increases with the level of publicity.

The political factors that define high-key speech do not relate to the level of publicity but rather to the *functional publicness of speech*. Publicness indicates that the function of a speech is to influence public debate. High-key speakers most likely intend to reach publicity but whether they succeed is irrelevant. The three political circumstances scan for decidedly public speeches that at least aspire to reach the public but their normative status does not depend on whether they achieve high publicity.

It is easiest to explain functional publicness through the political speaker indicator. It indicates that the speaker by her profession or her institutional position is dedicated to contributing to public or political debate. Her 'job description' so to speak includes speaking to the public in an attempt to influence people. A non-exhaustive list of such speakers would include politicians, elected officials or political campaigners. The position of political speakers is distinct from an *ad hoc* speaker who reaches the public incidentally and not on account of her position. Such an incidental public speaker might be a university professor who during his lecture lashes out at critical student movements who protest against the university's failure to come to term with its past, namely of accepting donations from a slave owner and erecting a statue in gratitude. The professor's speech surely touches upon important public issues but this does not

substitute for the fact that the function of university professors in a lecture hall is primarily educational.

Contrast this scenario with the following. A student protest group is slowly getting organised around the issues of social justice and equality of opportunity at their university. The group stages a moderately successful public rally in the pouring rain in front of the university. Even though the rally had lower participation than the university lecture on which the professor denounced the student body's subversive agenda, it is the protestors' speech that should count as high-key on account of its sole function being to influence public debate. The pertinent difference is that the student protestors' speech functionally means to gain publicity on account of the role that public protests have in democracy.

In light of this example, the interrelation between functional publicness and publicity should become clearer. The political factors do not forecast that high-key political speech will necessarily reach the public at large. High-key speech rather builds on the potential of reaching large audiences on account of the functions of the political speakers, processes and events without guaranteeing that publicity.

Lastly, a clarification is needed about the target of high-key political speech. Who is its proper target of high-key speech? In a nutshell, it is the public at large. 'The public' need not mean the national or the local public let alone the hypothetical median voter. The public is meant in a functional sense.

One might object that a single leaflet posted through the door to a citizen may not qualify as addressed to the public at large as it technically only targets that one person. In contemporary politics, the notion of public may come under increasing pressure. Political parties increasingly use sophisticated techniques to personally tailor

their messages to individual voters, or voters with the right profile. Hence one may think that the public at large is a conceptual relic of the past.

However, targeted voters still receive leaflets on account of the fact they constitute the public, i.e. as voters, as opposed to being, say, consumers (and thus be solicited by ads), or the target of an angry neighbour's complaint. So to say that the functional roles remain unaltered: a political high-key speaker still attempts to influence the public. Therefore, the relation of the citizen-audience and the high-key speaker remains unchanged despite the ever-changing methods of communications.

4.2 Public Accountability

The second normative feature of high-key political speech is the exposure to the judgment of the audience or public accountability. High-key political speech can take the form of a political leaflet posted through a citizen's door or a candidate's tweet aiming to mobilize her partisan supporters. By putting a contribution out to the public the speaker exposes herself to the judgment of the listener. The public thus is in a position to pass judgment and hold her accountable for her views. Exposure to the public's judgment is embedded in the political circumstances that define high-key speech.

Exposure is important because it allows the listener to judge the message for herself. In the previous chapter, we traced through Thomas Scanlon's idea about the audience's side of a political free speech account. We found that political speech is important for the audience (or listener) because it allows them to make up their own minds about politics. The emphasis on the judgment of the audience is crucial because the function of political speech is not to simply make noise or to provide sheer entertainment but to allow citizens in the polity to make up their minds about the business of community through weighing the merits of different propositions in public

life. High-key speech is such an essential part and parcel of politics in society that the citizen-audience should be allowed to judge for themselves.

One caveat should be inserted here. Certainly not all communications of political actors are public. Not even all political communication of politicians, parties or busy bodies are meant to reach the public. Parties communicate internally with their members with the well-justified exclusion of the public. These communications do not count for high-key speech although they look political. It would be troubling if the argument for high-key political speech would result in these political communications to be unprotected. But this does not follow from the argument pursued here. High-key speech does not cover the totality of political speech let alone the whole range of protected speech in the universe. To return to the example: internal party communications are not protected as high-key speech as they are not public communications. Political organisations certainly have legitimate interests in protecting their private business from prying eyes. Something like the principle of organisational autonomy looks to be the proper ground for protecting internal communications with members and activists.

4.3 The Potential of Counter-Speech

A related normative feature of high-key speech consists in its exposure to criticism. The speech of politicians or agitation of rallies typically spark reactions from other public speakers as it plays out in public. The implication is that high-key political speech is more thoroughly scrutinised than other political speech. It is a relevant characteristic to assess the potential harms that “bad” high-key speech may cause. One of the most famous quotes about free speech in history stresses this feature of public speech and harm:

[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.¹⁸⁰

Justice Louis Brandeis's famous quote speaks to the 'popular and jurisprudential preference for more speech' as a way of tackling misguided or bad speech.¹⁸¹ It has always been the essence of any instrumental free speech account to postulate beneficial outcomes at the end of the battle of ideas. Be that outcome the pursuit of truth or finding solution to collective problems. The point is, however, narrower here.

The functional publicness of high-key speech has the potential of 'counter-speech' or 'speaking-back' as a correcting mechanism against bad speech. The idea of counter-speech emerged from recent academic literature. Katharine Gelber was one of the first ones to conceptualise counter-speech as an alternative remedy to the legal prohibition of hate speech.¹⁸² The literature is widespread and cuts into various directions. Counter-speech might mean that victims of hate speech respond directly to attacks or that the state takes positive steps in enabling them to speaking up. The point is a more elementary one here: the potential of taming the harmful effects of unavoidable "bad speech" is at its best when applied to high-key speech. Consider the following argument.

High-key political speech scans for speech processes, events and speakers that are in positions to influence public debate arguably better than everyday low-key speakers because of the former's institutional position and access to wider audience. Without doubt many speakers will use their high publicity for spreading hateful messages with

¹⁸⁰ *Whitney v California*, 274 U.S. 357 (1927) 386.

¹⁸¹ It is Laura Beth Nielsen's formulation in her 'Power in Public: Reactions, Responses, and Resistance to Offensive Public Speech' in: *Speech and Harm*, Ishani Maitra and Mary Kate McGowan (eds) (OUP 2012) 148.

¹⁸² See the pioneering work of Katharine Gelber, for instance her: "Speaking Back": The Likely Fate of Hate Speech Policy in the United States and Australia' in: *Speech and Harm*, Ishani Maitra and Mary Kate McGowan (eds) (OUP 2012) 50.

equal efficiency as “good speakers.” Hence the benefits in counter-speech may be just illusory for tackling, say, hate speech to the extent of high-key political speakers. The hope is that public exposure of ideas will exercise taming effect on “bad” high-key speakers. The question is a hard one when put in terms of hate speech. The next chapter will discuss that challenge at length.

Here it will suffice to put the dilemma in contrast between high and low-key speech. Let us contrast the speech of a politician with the anonymously circulated hate pamphlets of low-key speakers. Such hateful messages often reach the already converted who may feel their worldviews reinforced and not challenged in their echo chambers. The low profile of such hate speech may effectively contribute to group radicalisation/polarisation in absence of the counterweight of publicness. As a result, the dynamic of low-key speech may be more alarming for the victims of hate speech. Let us think about the typically anonymous low-key hate speech of the likes of a racist poster in someone’s window or a slogan sprayed on a wall. It is passed as the opinion of a silent but powerful portion of the population. Precisely because of the non-public property of such speech counter-speech is not available. Contrast this with the potential of countering similarly hateful high-key speech. Because of its publicity, such speech might gain higher publicity but it also has a face and thus could be frontally challenged by other speakers, especially high-key speakers. Therefore, the potential of speaking back to “bad speakers” may be higher with high-key speakers.

4.4 An Analogy: the Parliamentary Speech Privilege

In order to better grasp the high-key speech category it is best to reach back to an old constitutional institution that bears striking similarities. High-key speech might be thought to amount to the expansion of parliamentary immunity.

Parliamentary immunity (or privilege) offers the closest analogy with high-key speech on two accounts.¹⁸³ On the one hand, the parliamentary privilege was historically justified on similar grounds to the normative reasons we advanced for high-key speech's privileged status. On the other hand, parliamentary privilege has the right structure for high-key speech. A recent comparative study of the European Council's Venice Commission sums up the concept helpfully:

[t]he basic idea [*of parliamentary immunity*] is that the elected representatives of the people need certain guarantees in order to effectively fulfil their democratic mandate, without fear of harassment or undue charges from the executive, the courts or political opponents.¹⁸⁴

The institution traditionally had two separate parts: non-liability for political speech and inviolability from formal arrest without the consent of the Parliament.¹⁸⁵ The Venice Commission defines the former as:

[m]eaning immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office, or in other words, a wider freedom of speech than for ordinary citizens.¹⁸⁶

MPs, therefore, enjoy immunity against legal proceedings against their speeches *qua* MP. Naturally the extent of parliamentary immunity varies from jurisdiction to jurisdiction in many regards. Yet our contention is that it is possible to discern the essence of this constitutional institution, which will be instructive for high-key speech.

MPs enjoy immunity against legal actions, such as defamation or breach of privacy, brought against them on account of their speeches in Parliament. Immunity serves as a bulwark against intimidating MPs from fulfilling their functions freely: mainly their duty to debate public matters in Parliament without constraints. The best-known

¹⁸³ The terms 'immunity' and 'privilege' will be used interchangeably.

¹⁸⁴ European Commission for Democracy Through Law (Venice Commission), *Report on the Scope and Lifting of Parliamentary Immunities* (adopted at its 98th plenary session in Venice on 21-22 March 2014) §7.

¹⁸⁵ The inviolability does not concern us here and we will omit its discussion for lack of relevance.

¹⁸⁶ *ibid* (n 178) §10.

version of parliamentary privilege is embodied in the English Bill of Rights from 1689. Tellingly it was declared under the label of ‘Freedom of Speech’ in the Bill of Rights’ article 9:

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.

The nature of the speech privilege is absolute and extensive. Absolute because parliaments cannot suspend it vis-à-vis individual MPs and the legal privilege extends as much to civil as to criminal cases. Extensive because it often offers the same protection to non-MPs who partake in parliaments’ deliberation typically as witnesses (such as in the UK), or in some jurisdiction even to regional assemblies’ elected representatives (e.g. Austria and Belgium).¹⁸⁷

Two points are somewhat more contentious about speech non-liability. First, non-liability does not always extend to all speech offences. The Venice Commission found some discordance as to the inclusion of criminal defamation and hate speech in the scope of non-violability.¹⁸⁸ However, in the UK, a recent legislative review sparked by the infamous expense scandal of MPs, the government reiterated the constitutional position that the parliamentary privilege covers not just civil cases of defamation, but also public order criminal speech offences such as the ones contained in ‘Part 3 on Racial Hatred’ of the Public Order Act of 1986, Britain’s hate speech legislation.¹⁸⁹

The other dispute concerns what ‘performance of the parliamentarian’s mandate’ or ‘the discharge of parliamentary function’ covers. There are examples of strict

¹⁸⁷ Venice Commission, *Report on the Regime of Parliamentary Immunity* (adopted at its 27th meeting in Venice on 17-18 May 1996) § 48.

¹⁸⁸ Germany offers an example where ‘anti-constitutional speech’ is explicitly excluded from the scope of non-violability.

¹⁸⁹ HM Government, *Parliamentary Privilege* (Cmnd 8318, 2012 April) §§ 116-125.

conceptions such as the British one that limit the non-liability to the confines of the Houses of Parliament. Yet as the Venice Commission noted this restrictive conception is not the only one:

[i]n many countries, the place in which the contested statements were made is not relevant and it is sufficient that the expression takes place within the context of parliamentary activity. The privilege of special freedom of speech is therefore not limited in space, and applies to all remarks made by the member of parliament that are in some way related to the exercise of the parliamentary mandate, whether inside or outside of parliament, including appearances in the media or in public meetings and debates.¹⁹⁰

What is important for the purposes of this thesis is that parliamentary immunity for MPs' free speech closely maps on the essence of high-key political speech both in its justification and its structure. The work of members of parliaments is to deliberate on public matters and to take decisions accordingly. A free debate is necessary for these purposes *even if* the type of speech occurs in the debate that would normally attract legal sanctions.

The analogy with high-key speech is twofold. On the one hand, high-key speakers fulfil similar function as members of parliament. Their contributions feed into public debates too. On the other hand, the analogy is structural. Parliamentary immunity is a *privilege* as the British designation suggests. It means that the privilege renders otherwise illegal speech legal. It posits an exception that is justified on account of overriding reasons.

Of course, there remains some significant dissimilarities. Parliamentary immunity often does not extend to speaking activities of MPs outside of Parliament. A recent UK government report reiterated this strict view:

¹⁹⁰ *Report on the Scope and Lifting of Parliamentary Immunities* (n 184) § 64. The range of these countries include: the Netherlands, Norway, Italy, Spain and Portugal.

This freedom of speech exists only in parliamentary proceedings, which includes (among other things) debates, committee hearings and published reports, but *does not apply* to anything said by an MP or a peer outside parliamentary proceedings.¹⁹¹

Nevertheless, the spatial scope of privilege wildly varies in Europe. For instance, Hungary offers a contrasting constitutional position to the UK. Hungarian MP's speech immutability relates to the parliamentarians' function and not to the premises of Parliament.¹⁹² Furthermore, it should be added that parliamentary immunity has a serious separation of powers element that is independent of the free debate rationale. Privilege keeps courts from meddling into the affairs of parliament. Yet it also means that in some countries immunity does not preclude the imposition of non-legal parliamentary disciplinary measures on MPs.¹⁹³ Finally, an obvious dissimilarity should also be spelled out. MPs are the elected few with immense decisions on their hand, which is quite far apart from the speakers of high-key speech.

Yet none of these objections should derail our attempt at treating parliamentary immunity as a blueprint for high-key speech. Parliamentary privilege originated at a time when public debates were largely confined to MPs sitting in parliaments. But parliaments are not as dominant forums of public debates in our times as they once were. Hence confining immunities strictly to MPs as persons or to parliaments as buildings is rather quaint in our time. Political participation and public debate acquired a vastly broader meaning than back at the time.

¹⁹¹ *ibid* § 17.

¹⁹² See the case law of the ECtHR: *A v United Kingdom* App no 35373/97 (ECtHR, 17 December 2002) and *Cordova v Italy (no 2)* App no 40877/98, 45649/99 (ECtHR, 30 January 2003). While the Court argued for a broader interpretation of parliamentary privilege in the British case, it subsequently qualified it in the latter case.

¹⁹³ Yet once again the practice varies from country to country: *Report on the Scope and Lifting of Parliamentary Immunities* (n 190) § 55: 'However there are also some parliaments where the rules on non-liability (freedom of speech) provide protection even against all or most forms of internal disciplinary measures.'

What ought to be emphasised is that parliamentary privilege has the right structure for high-key political speech. Privilege in the form of members of parliament non-liability for speech explicitly recognises that it shields MPs from liability for otherwise objectionable, illegal or harmful speech. Accordingly, instead of arguing away the harm in speech, immunity is based on an overriding justification in favour of tolerating the harm in speech. Structurally it is precisely what this thesis is arguing for high-key speech: a limited exception to the default of the hate speech ban. Furthermore, since its original conception privilege protected high profile public speech that traditionally animated the restricted public debate of the time. From these distant origins, it is not a big leap to discover in it a pre-concept of high-key speech.

Be that as it may, the analogy between high-key speech and parliamentary privilege is not watertight and our argument only extends to hold that it serves as historical inspiration and not as justification.

4.5 Advantages over Proportionality and the Practice Deference View

Conceptualising the top layer of political speech as high-key offers significant advantages over the proportionality approach as well as over the social practice deference view advocated by Eric Heinze.

Courts predominantly identify political speech through its content by asking whether the speech is on a matter of political or public interest. They also rely on a number of circumstances, including political ones, to account for the political character of speech in their decisions. The methodology is proportionality, which aims at balancing all relevant considerations. Yet the shortcoming of this methodology is the lack of transparency as to how courts reach their decisions. Giving weight explicitly to the political circumstances described here would be a more transparent way of identifying political speech. This much would bring more clarity into the decision-making process

on political speech. This clearly represents an advantage over the general proportionality approach.

The proposed approach of high-key speech fares better than the deference to social practice advocated by Eric Heinze. Heinze thinks that as long as there is a social practice that upholds a 'genuine public sphere' questions about the boundaries do not matter. These vary across time and space, hence it is pointless to theorise about. The trouble with this approach is that it turns a blind eye to any normatively significant difference within the range of political speech. The proposition of treating separately the top layer of political speech, high-key speech, precisely shows that not all political speech is normatively equal. The three normative features described above (publicness, public accountability and counter-speech) prove that we can have good normative reasons to think differently about various layers of political speech.

4.6 What Protection for Low-key Political Speech?

It is argued here that high-key speech offers a better answer to the bridge question than the alternatives. While high-key speech covers a broad range of political speech, it does not exhaust the whole range of political speech worthy of free speech protection in liberal democracies. Nevertheless, one might object that an argument that splits political speech into a privileged category where heightened protection is the rule and another where a non-privileged one might allocate speech protection unequally. Protection for high-key speech might just crowd out protection for low-key political speech. Hence the worry is that low-key political speech will be under-protected even though we commonly recognise these instances of speech as political. For illustrations, just think about the following instances of typical low-key political speech instances: the political comment of a large company's CEO in a newspaper; a citizen's political post on Facebook; or

someone displaying a political poster on her window. The question is therefore whether it is a problem that these speeches will not be protected as high-key political speech?

Excluding any political speech from heightened protection admittedly and rightly strikes one as suspicious nowadays. Yet the proposition here may sound more radical than it actually is. The proposed approach breaks with conceptualising political debate and speech as one single unit. It recognises that all political speech just cannot be put into the same basket. The distinction is made between a privileged high-key end of political speech from other non-privileged yet political speech. This way of proceeding does not deny that convincing orations in a university debate, a punchy tweet about social justice on Twitter or a forceful political slogan painted in the street may well contribute to public debate. There are very good reasons to protect such low-key political speech and the proposition of privileging high-key speech does not aim at annulling that protection.

It is worth recalling that this discussion happens to the background of political speech being protected as part and parcel of a broader right to free speech. Political speech can be conceived on a spectrum of intensity. By narrowing the focus on high-key political speech one observes political speech at its strongest end. The narrow focus is not arbitrary. It is justified on the basis of the normative property of functional publicness, public accountability and counter speech that high-key speech exhibits. This arguably set them apart to the extent that that low-key political speech does not obtain these features.

The proposition is, therefore, confined to demarcating a set of privileged speech within the broad range of political speech. In practical terms, it means that the restriction of high-key speech requires stronger justification than for other political speech. The natural follow-up question is how much stronger? Would that protection amount to

absolute protection? We will face to these questions in relation to hate speech in the upcoming chapter.

5. Applications to the Media

The primary interest of this thesis lies in individual freedom of expression. Yet most of the political speech citizens receive is mediated by the media. One might rightly surmise that this thesis might look incomplete if it remained mute on the media. How should high-key speech then apply to the media? The fact that the argument for political speech is grounded in the right to freedom of speech has important consequences for its application to the media. In this section, the most significant mediated contexts of high-key speech will be presented to show how it may apply to the media.

Conceptually, the simplest instance of high-key speech concerns individual speakers exercising their right to free speech. In this instance, the broadcast media or news websites do not mediate the expression of the individual. The typical case on which high-key speech would bear is one where a speaker would be prosecuted on account of his speech at a public event. The argument for high-key speech applies without qualification to such instances, which we will refer to as the ‘basic scenario’.

Speech in the media or the press is quite different. Specific constraints regularly apply to them, especially to the mass media, on the basis of their impact on audience, the interest in media pluralism, the concern with the concentration of media power or the pervasiveness of broadcast media just to name the principal ones. It follows that further the speech is from the basic scenario, the more medium-specific considerations occur that might justify interference with the content. One may have the right to hold a statement as a matter of freedom of expression but the same need not follow as a matter of media freedom.

5.1 Divergent Justifications

The principal argument here is that the justification of free speech and of free media fundamentally diverges. (For the sake of clarity, we shall equate freedom of the press and freedom of the media in this discussion.) Freedom of the media is primarily an instrumental good, unlike free speech. Judith Lichtenberg lays down the basis of the strong distinction with clarity:

[u]nlike freedom of speech, to certain aspects of which our commitment must be virtually unconditional, freedom of the press should be contingent on the degree to which it promotes certain values at the core of our interest in freedom of expression generally. Freedom of the press, in other words, is an instrumental good: it is good if it does certain things and not especially good (not good enough to justify special protections, anyway) otherwise.¹⁹⁴

Freedom of the press serves the social good of democracy in a way that puts the question of its legal regulation into a different dimension than the restriction of speech. A free press is an instrumental good, thus government regulation should be judged on that basis – i.e. whether or not it really serves its democratic goal of, say, furthering a pluralist media. In contrast, censoring an individual speaker through criminal law always raises the prospect of undue restriction independent of the social goals that one may hope from free speech. The idea put concisely is that one's right to publish or to broadcast is always parasitic on the broader normative goods in a direct way that is not true for individual speakers.

It follows that the negative duties are more intimately associated with free speech than with media freedom. Whereas the right to free speech puts mainly (negative) duties of non-interference on states, freedom of the press and the media bestow a host of positive duties on the media for the sake of the instrumental goals free press is meant to serve. This has far-reaching consequences for hate speech regulation in the media.

¹⁹⁴ Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' (1987) 16/4 *Philosophy & Public Affairs* 329, 333.

Therefore, the question of interference with speech in the media is not directly analogous to the question of interference with unmediated speech.

5.2 The Broadcast Media

At first sight it is not clear how high-key speech applies to the mass media and the press, i.e. to television and radio, in light of the radical difference at the justification level.¹⁹⁵ On the one hand, the media is obviously political. Citizens typically gather their political information through the coverage, analyses and debates on TV, radio and the written press. On the other hand, it would be objectionable to apply the commonly accepted rationale to further pluralism or taming the media's intrusiveness onto individual speakers.

Yet the conflict is clear: the regulation of mass media may constrain the freedom of expression of high-key speakers when they use the broadcast media.

First, it is important to note what does not follow from the argument for high-key political speech. The influence and high publicity that mass media enjoy does not turn broadcasters and newspapers automatically into high-key political speakers. It does not follow from the argument so far either that all expressions in the mass media would qualify as high-key speech. As we argued above, it is not on account of the level of publicity that high-key political speech is assigned but the functional publicness of the expression. Modern mass media actors are either large commercial corporations whose interests in broadcasting are typically economic, or public service broadcasters (e.g. BBC) that pursue public goals such as informing the public about public affairs. Contrast this

¹⁹⁵ Admittedly the question of regulation for the written press is not the same as that of the broadcast media. Nevertheless, in comparison with free speech, more intrusive regulation of the mass media and the press is generally thought to be acceptable. To strengthen the analogy, it suffices to think about the institutional power of the large press outlets that is analogous with the broadcast media's similar influence.

with the interest of high-key political speakers whose interest in speaking consists in influencing politics in accordance with their viewpoints.

An essential distinction about the two types of expression in the media should help to make sense of how high-key speech will apply in the media. The media's role is different when it reports another speaker's opinion than when it advocates a viewpoint.

5.2.1 The Messenger: Media as Reporter

As far as reporting is concerned the media does not propagate the message, rather it carries the messages of other speakers. In this role the media is traditionally circumscribed by the requirements of 'civility' and the demands of impartial coverage. These requirements are impossible to evaluate in the abstract as they heavily depend on the normative foundations of media regulation that vary from country to country.

Note the way these reporting norms might collide with high-key speech. Reporting norms regulate the speech of the reporting media, not that of the high-key speakers directly. The speaker *per se* has no right to the platform, let alone to positive coverage. Yet it would be still objectionable if these duties associated with reporting would lead to censorship of the message of high-key speakers, say, by not reporting about them. For instance, civility or anti-stereotype requirements could potentially serve as grounds for such censoring. Such a restriction would restrict the fair value of free speech of some speakers but not others' systematically. Yet the sheer fact that reporting about high-key speakers (who for instance use hate speech) should be contextualised in the media and critically balanced does not amount to such censorship. In and of itself it is not objectionable that extremist political speakers should pay a higher price, such as their speech be contextualised. The precise level of acceptable inference with a high-key speaker's speech is not possible to set once and for all, but there is no reason to doubt that the right to political speech can be respected while upholding standards of reporting.

This follows closely on the European Court of Human Rights' standard laid down in *Jersild v Denmark* on media reporting on hate speech.¹⁹⁶ In *Jersild*, the Court was reviewing the case of a TV journalist reporting about a group of young extremists in Denmark. The journalist was prosecuted for hate speech because of his report in which he interviewed members of the group who aired their prejudices. The reporter was found guilty for aiding and abetting the hate speakers. The ECtHR found for the journalist, whose Article 10 rights were violated. The Court, first, distinguished the case from propagating hate speech or incitement to violence in the media as opposed to impartial and contextualised reporting. Two main principles follow from the ECtHR's jurisprudence. The media cannot become a 'mere conduit for hate speech' and a level of detachment should be displayed in its reporting while fulfilling the media's watchdog function.

5.2.2 Media as Advocate

Advocacy in the media, in the form of a broadcast program or even in the newspaper is a different matter than reporting. *Jersild* drew the line at propagating hateful views and ideas as opposed to reporting on them. The mass media is thought to have a persuasive effect on the audience, thus the strong case for regulation. To put it otherwise, the mass media have a high influence on people. It follows that advocacy of some objectionable speech, such as hate speech, might be antithetical to these goals and hence could be legitimately regulated.

The question is what exactly banning the 'advocacy of hate speech' really means. A weak version of the ban on advocacy would have it that the media is restricted as a speaker. Thus TV, radio and perhaps newspapers would be barred from propagating, and

¹⁹⁶ *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994). See also the discussion: James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from *the Masses*' in: Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (OUP 2009).

advocating their own hateful opinions. Hateful editorialising would be banned so to say. This weak version of an advocacy ban seems to be unproblematic from the perspective of our argument for high-key speech. As we argued above, this follows from the different interests that the media as speakers and individuals as speakers have.

Alternatively, one could imagine a stronger version of a ban on hateful advocacy. This would be a general blanket ban on hateful content in the media. A blanket ban might be proposed to prevent the intrusive effects that the broadcast media have. Consequently, this logic would lead to hate speakers, e.g. far right politicians, be barred from using the media's platforms to propagate their views on account of the effect of their content.¹⁹⁷ The restriction would thus operate as a full-scale platform ban on hate speakers. Such a blanket ban might collide with the right to political expression of high-key speakers. Two instances of potential collisions will demonstrate this.

There are eminently political programs in the broadcast media such as political debates. Content restriction on the mass media might apply to such debates. If a high-key speaker participant is barred from or restricted in her participation in these debates on account of her political message, that restriction would amount to undue restriction of political speech. If a high-key speaker were restricted from holding her views in an eminently political debate, the fair value of her political speech would be illegitimately reduced. Politicians, elected officials or activists are such high-key speakers whose message should always be judged by her citizens, not by courts.

This way of assessing advocacy in the media applies to the second example, which concerns political party ads or political election broadcasts. It is a common practice in many democracies to provide airtime to political parties in election time and

¹⁹⁷ *ibid* 611.

to regulate political ads in some other ways. The proposition of high-key speech applies easily to such direct political messaging because it is not the media, rather the political speaker who is advocating her viewpoint. In the case of political advertising, the media is neither reporting, nor advocating on a political view, it is rather granting a platform for the political speakers.

The case in point for demonstrating this collision is the seminal British political advertisement case, *Pro Life Alliance v BBC*.¹⁹⁸ Pro Life Alliance was an anti-abortion single-issue party that qualified for enough individual seats in the general election to have the right for a political election broadcast on TV. The video that the Alliance submitted to various TV channels, such as to the BBC, for broadcasting included dramatic scenes of an abortion. As the Court wrote it contained ‘prolonged and deeply disturbing images of aborted fetuses’ that were unanimously deemed by TV channels to be ‘offensive to public feeling.’¹⁹⁹ The broadcasters considered that such content would breach the legally binding programme standards of decency and good taste. The Court of Appeal found for the claimant political party, whereas the House of Lords turned the decision and thus sanctioned the broadcaster’s decision. The ground of refusal in *ProLife Alliance* was not hate speech but decency, but the two issues are analogous. The case revealed many arguments around statutory construction and the role of the Human Rights Act that are not central to the discussion here. But Lord Hoffman writing for the majority framed the issue in the following helpful way:

[t]he real issue in the case is whether the requirements of taste and decency are a discriminatory, arbitrary or unreasonable condition for allowing a political party free access at election time to a particular public medium, namely television.²⁰⁰

¹⁹⁸ Regina (ProLife Alliance) v British Broadcasting Corporation [2003] UKHL 23.

¹⁹⁹ *ibid* § 51.

²⁰⁰ *ibid* § 62.

The question that Lord Hoffman asked was one about viewpoint discrimination. Thus, this framing of question directly bears on the issue of hate speech. Lord Hoffman argued that the criterion used for discrimination was a reasonable and neutral one as it had been ‘part of the country’s cultural life’ that created expectations on the part of viewers in terms of offensive content.²⁰¹

In sharp contrast to Lord Hoffman one dissenting judge saw the question differently. Lord Scott of Foscott did not ponder about the neutrality or reasonableness of the criterion used to discriminate against the claimant’s video. He rather made a pertinent argument about political speech that precisely applies to high-key political speech and the importance of the listeners’ side of political speech:

[t]he importance of the general election context of the Alliance’s proposed programme cannot be overstated. We are fortunate enough to live in what is often described as, and I believe to be, a mature democracy. In a mature democracy political parties are entitled, and expected, to place their policies before the public so that the public can express its opinion on them at the polls. The constitutional importance of this entitlement and expectation is enhanced at election time.²⁰²

Lord Scott of Foscott’s argument values political speech for the right reason: voters should be the judge of such high-key speeches and not media owners. This type of political speech was functionally public speech as the speaker was clearly a political speaker whose message was ‘directed at the electorate.’²⁰³ The importance of such political speech in a ‘mature democracy’ outweighed the public interest in not offending the voters. Although the dissenting judge did not elaborate on what would outweigh the importance of political speech, but offense was clearly not one of them. As he wrote: ‘in

²⁰¹ *ibid* § 70 This was still the better argument in comparison. Lord Hoffman went on to add the rather baffling remark that abortion was not a party political issue in this country, and in the name of common sense cast doubt on the claimant’s genuine intent to fight election: ‘[t]he election merely gave [the claimant] an opportunity to publicize its views in a way which would have been no more or less effective at any other time.’ § 68.

²⁰² *ibid* § 97.

²⁰³ *ibid* § 95.

my opinion, the public in a mature democracy are not entitled to be offended by the broadcasting of such a programme.²⁰⁴ This dissenting opinion relied on one of the key normative features of high-key speech: in a democracy the audience should be the judge of political speeches such as party advertisements.

Let us sum up the main points. Not all political speech in the broadcast media qualifies as high-key speech. There are numerous legitimate restrictions on the media that affect but do not collide with a high-key speaker's right to speak. Yet it follows from our argument that when it is about the speech of high-key speakers, the otherwise justified media regulations should not unduly restrict the political messages of high-key speakers.

5.3 Leaflets, Posters, Writings

The argument of high-key political speech naturally applies to leaflets, posters and other written political materials such as election manifestos. Yet all leaflets, posters and materials bearing on politics do not qualify as high-key speech. To assess whether a written material counts as high-key speech everything turns on the circumstances in which posters are displayed or leaflets distributed. A couple of examples will shed light on that assessment.

Leaflets and posters that relate to political parties, politicians or activists should be separated from low-key speakers' leaflets and posters. The leaflet of a political party advocating its viewpoint will benefit from extra protection in comparison with, say, anonymous leaflets posted through one's door or posters plastered on street walls even if their content is similar.

One might, however, legitimately worry about speaker discrimination. This concern is real but could be alleviated. First of all, in practice the political speaker

²⁰⁴ *ibid* § 98.

category should be understood flexibly. A local campaign group would just as much qualify as high-key speaker for the purposes of protecting leaflets as an established politician. Moreover, the distinction between various speakers is not arbitrary and the discrimination illusory. It rather captures the publicness of the role the speakers have. The British hate speech case of *R v Relf and Cole* might offer a good example here.²⁰⁵ The defendants were two citizens unaffiliated with political parties who plastered overnight the walls of the small English town of Leamington SPA with racist posters representing black people as apes. Even assuming that the content bore on a matter of public interest (say of local crimes), the defendants were not public speakers who could plausibly claim to contribute to the public debate with their political speech as high-key speakers.

Contrast this with another British case: *Kendall v South East Magistrates' Court*.²⁰⁶ The British National Party displayed its posters in the high street of an English town. The posters contained typical anti-immigrant messages linking criminality with immigration. The difference with the previous case is that the speaker was a political party that was clearly identifiably displayed in a public place where people had an expectation of encountering such content.

Perhaps some would find this focus on the identity of the speaker exaggerated. Arguably the line between leaflets that qualify for high-key speech and those that do not is difficult to draw. It should be stressed though that indicators other than the identity of the speaker should be taken into account in the analysis. For instance, the location of posters may matter as much for its qualification as high-key political speech. In the BNP poster case it was a relevant factor that the poster was displayed in the high street of the town as opposed to a residential area. This difference becomes clearer if *Kendall* is

²⁰⁵ (1979) 1 Cr App R (5) 111.

²⁰⁶ [2008] EWHC 1848 (Admin).

contrasted with another high profile British hate speech case, *Norwood v DNP*.²⁰⁷ In this case, a BNP-inspired racist political poster was displayed in the window of a house located in a residential area. It suffices to stress this difference with *Kendell* to signal that grey zones exist when applying political circumstance factors.

This section about the media was meant to demonstrate that high-key speech can apply beyond the basic individual speech scenario. With some adjustment the circumstantial indicators that define high-key speech can meaningfully apply to various media platforms.

5.4 Online Speech

This section on applications of high-key speech to the media started from the premise that the medium heavily conditions the normative judgement of speech be it an opinion piece in *The Guardian* or a verbal outburst on a TV show. This is nowhere truer than on the Internet and especially on social networks, where the medium intimately shapes the content of the speech.

The regulation of online content undoubtedly became the most topical free speech issue in the 2010s. Naturally the thorny question of hate speech (e.g. speech on social media) stands at the centre of many academic and policy debate. Hence that question naturally arises for this thesis: how should the conceptual framework of high-key speech apply to online speech or to online hate speech?

As intriguing as online speech regulation may be the conceptual and regulatory challenges are so significant that this thesis cannot offer a comprehensive answer. For that, one would need to have a convincing theory of online speech. In absence of such a theory some cautious inferences will be drawn as to how the proposed framework

²⁰⁷ [2002] EWCH 1564 (Admin).

should influence the regulation of online speech. The goal here is to provide some cautionary suggestions instead of hard and fast rules for content regulation.

Any theoretical discussion of online speech should clarify at the outset the similarities and dissimilarities with offline speech. The temptation is understandable to treat online speech like offline. Both amount to communication and it certainly would be easier to treat them as being on the same spectrum of communication. Alas it is more complicated than that. To start with, we speak spontaneous and ill-considered remarks just about all the time. Yet the very same remarks online stick and the medium turns it into a sort of premeditated communication. One commentator rightly pointed out that ‘there is also a danger that a greater quantity of people’s everyday expression is likely to be subject to legal regulation.’²⁰⁸

The direct transposition of offline speech rules to the online world cannot be substantiated due to constitutive features of online speech that radically set apart digital speech from its offline ancestor. Before setting out these features, the consequences of this difference should be made clear. If one accepts that fundamental differences exist between online and real-world speech, then the gap between free speech theories and online speech reality becomes daunting warranting extra caution. Root of the problem is the fast-changing nature of the online space makes any theoretical claims outdated by the time it is typed. There is an especially jarring gap between the democratic free speech theories underpinning this thesis and the online reality of political speech. All these theories were written to a conceptual backdrop that took constitutive features of offline speech granted and theorised on that basis. Most democratic free speech theories relied on in this thesis, did not know about anonymous online chatrooms, Facebook posts

²⁰⁸ *ibid* 356

available at large to the world, let alone irresistible attention-grabbing Tweets – in short: all what became the dominant fora for discussing politics by now. The absence of plausible normative guides on online speech embedded in democratic free speech theory poses a puzzle for applying the proposed high-key framework.

It should be noted that not all free speech theories face this challenge. The anti-regulation cyber-libertarians who worship unfettered digital liberty, such as John Perry Barlow, find their ideals buttressed by the structure of Internet.²⁰⁹ Yet, we have discarded such types of marketplace of ideas or extreme libertarian rationales for free speech at the outset and see no reason to revisit them.

5.4.1 Conceptual Elements of Online Speech

In a broad sense, every single publicly available communication on the Internet amounts to online speech. In this sense the online version of *The Guardian*, a private blog with scant following, a widely read Tweet and all content on Facebook are variations on the theme of online speech. This approach runs the risk of losing focus of the most interesting and challenging subset of online speech: the user uploaded content on social media platforms be it Facebook, Twitter, YouTube, popular chatrooms (such as Reddit) or blogs. It is this large subset of online speech that can be genuinely set apart. Their constitutive features could be defined with the help of an influential UNESCO study on the subject:

- stickiness (or permanence);
- anonymity (and pseudonymity);
- interactivity;

²⁰⁹ This is well captured in Barlow's manifesto: 'Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.' A Declaration of the Independence of Cyberspace available at <https://www.eff.org/cyberspace-independence> accessed 10/10/2017

- infinite quantity.²¹⁰

Stickiness. Online speech once uttered stays available indefinitely – and thus retraceable to the speaker.²¹¹ In the real-world speech can come out without consideration but helpfully flying away instantly—not so much online. This makes holding one accountable for what one says in digital easier than the who-said-what in the offline world. In the pre-online world, the standard of liability for spoken words was typically more stringent than written ones as writing was thought to embody more calculations. This distinction gets lost online due to this stickiness.

Anonymity and Pseudonymity. If stickiness upgrades accountability online in theory, anonymity all but upends it in practice. It is often forgotten that comments, posts, entries and tweets emanate from accounts and instead of from real people to start with. This already creates an important detachment from offline world. Ari Ezra Waldman puts it aptly:

When interacting anonymously online, we interact with avatars, symbols, or screen names. This makes people online seem disembodied; they are “accounts” rather than whole persons.²¹²

Furthermore, despite some efforts to enforce real-name policies in social media, notably on Facebook, anonymous and pseudonymous speech remains widespread. Moreover, non-identifiable speech is widely used for contentious speech.

The cost and benefit of anonymity relate to the same phenomenon: the absence of social control. In the early days of Internet cyber-libertarians argued for the

²¹⁰ Iginio Gagliardone, Danit Gal, Thiago Alves, Gabriel Martinez, Countering Online Hate Speech (UNESCO Series on Internet Freedom 2015) 13-15 The report’s conceptual clustering slightly differs though. It highlights permanence, itinerancy, anonymity and the transnational reach as the key factors.

²¹¹ It is still the case even if, as is the case on some platforms, users may edit or delete their already posted content.

²¹² Ari Ezra Waldman, ‘The Dangers of Anonymity on the Internet’ (Forward, 10 Nov 2016) <<http://forward.com/shma-now/tochecha-rebuke/353506/the-dangers-of-anonymity-on-the-internet/>> accessed 10/10/2017. More on anonymity critically: Ari Ezra Waldman, ‘Durkheim’s Internet: Social and Political Theory in Online Society’ (2013) 7 N.Y.U. J.L. & Liberty 345.

widespread benefit for speakers' liberation who may thus escape the pervasive silencing control of the offline world ridden with prejudice, hierarchy and the resulting oppression. Anonymity passed for the magic liberating tool for the unjustly suppressed minorities. Yet this early optimistic picture should be complemented with its negative side by now. Anonymity allows the escaping of all social consequences – including the socially useful ones such as civility and decency. If one has a shield against the reputational cost to pay for socially unacceptable utterances such as misogynistic then it may unleash hidden or ill-formed opinions.²¹³

Interactivity. Of course, influential tracts under *nom de plume* and anonymous books have been in use since letters were put on paper. But it is the combination with the instant interactivity social media offers that make online speech a genuinely novel phenomenon. Interactivity, though, may increase accountability by making the forum available for replies instantly. J.S. Mill's ideal about truth-seeking through critical discussion resonates well with this feature. However, this idealisation should be balanced with the potential for irrational campaigns and online mob phenomena such as trolling and hate campaigns, which are in turn empowered by the absence of social control. At any rate, interactivity as an online speech feature should be qualified. The level of openness and thus interactivity varies from platform to platform. In an open but less popular Reddit chat room and in a large but only members Facebook group interactivity may play out very differently. Moreover, there is nothing “natural” in ordering what appears on social media platforms for people to interact with. Social networks order the

²¹³ We are just flagging up an opposing pair of arguments in the literature on this question. On the one hand, some argue for the interest in 'knowing your enemy' by not putting obstacles for people to utter what they really think – especially in terms of misogynistic or racist thoughts. On the other hand, some argue precisely from the opposite end for driving underground the socially unacceptable attitudes and thus ensuring a decent and secure environment for all. The former position can be assigned to Nadine Strossen, while the latter to Jeremy Waldron. This important question would drag the focus of this thesis to a different direction, hence we leave it at that. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal* (1990) 3 *Duke Law Journal* 484; Jeremy Waldron (n 6). We borrowed the term unleashed from Cass Sunstein's working paper on the subject: Cass Sunstein, 'Unleashed' (SSRN August 22, 2017) available at <https://ssrn.com/abstract=3025749> accessed 10/10/2017

appearance of online speech (posts, tweets, comments and shares) by complex and not transparent algorithms. Hence the level of interactivity is very much conditioned on, for instance, the way trending topics are set up on Twitter. To put it in plain English what types of speech is exposed to any audience depends increasingly on private social networks' algorithms. It may be obvious but still worth emphasising: offline analogy with this dynamic interaction just does not exist.

Infinite quantity. Internet is a fast-moving speech machine that makes ever-increasing quantity of content available. This seemingly trivial point is important to keep in mind when evaluating the impact of digital speech. One consequence is that the astonishing speed of online content production submits online speech to the “law of diminishing return:” just because something is available online it need not mean that anyone pays attention to it. Hence the more speech is “out there”, the higher the bar for speech to gain impact. The European Court of Human Rights seems to have given voice to this opinion with regard to online comments placed on media websites in the recent article 10 judgment of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu v Hungary*:

For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals – *a consideration that reduces the impact* that can be attributed to those expressions.²¹⁴

A recently reported UK online speech case touched upon precisely this question. In the ‘Twitter joke trial’ case a passenger annoyed by his flight’s cancellation took to Twitter with an intended humorous tweet about blowing up the airport.²¹⁵ The police launched an investigation against the frustrated passenger for his threatening tweet days

²¹⁴ §77 (emphases added)

²¹⁵ Jacob Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71/2 The Cambridge Law Journal 355, 356

after the incident. It is fair to assume that the world got to know about the threatening tweet days after the threat was meant to scare people simply because no one noticed it.²¹⁶

Similar remarks leave people's lips every second and vanish immediately without impact. It is fair to surmise that most tweets share the same fate with the characteristic difference that they are recorded, hence can be searched and traced back. There is no easy inference to draw from the infinite quantity of online speech, if not a warning to avoid confusing the impact and availability of a digital speech amidst the infinite sea of online speech.

5.4.2 Challenges for the New Speech Regulation

Finally, as important as these conceptual differences may be, “the regulatory approach” towards online speech may just dwarf these questions. Online speech take place surely not in a lawless space, but in the entirely private digital infrastructure. Professor Jack Balkin described the prevalent ‘new school speech regulation’ as one that focuses on the *ex-ante*, low salience regulation of the digital architecture (i.e. mostly intermediaries) that is contrasted with the old school regulation that is characterised by *ex post* punishment of the speakers. Balkin sums this up:

[t]he central innovation is a shift from restraints that target speakers to restraints that target owners of private infrastructure; the goal is to get owners of private infrastructure to do the work of surveillance, blocking, and filtering.²¹⁷

The way to control speech shifts from the speaker to the vicarious liability of intermediaries. Filtering, blocking and opaque algorithms take the place of traditional legal procedure with the speaker at its centre.

²¹⁶ See discussion of *Chambers* at Chapter Four 4.4 Online Hate Speech Cases.

²¹⁷ Jack M. Balkin, ‘Old-School/New-School Speech Regulation’ (2013-2014) 127 *Harv. L. Rev.* 2296, 2320

The constitutive features of online speech had one clear consequence for harmful speech on the Internet: the pursuit of harassment and hate campaigns became much easier. The recent American misogynistic harassment campaign of *Gamergate* demonstrated the toxic combination of anonymity and a platform algorithm gone amok, that kept increasing the impact of harassing Tweets and posts, which resulted in an outpour of harassment with devastating real-life consequences.²¹⁸

However, a recent empirical study shed a more nuanced light on the intricate dynamics of online hate speech. A group of researchers set out to monitor the Kenyan cyberspace for occurrences of hate speech during the Kenyan presidential elections in 2013. Kenya had repeatedly experienced devastating election cycle violence, hence the specific interest.²¹⁹ The findings of the Umati project provide interesting insights to our thinking about the dynamics of online speech. It found that hate speech occurrences showed a radical disparity depending on the platform's architecture. Most hate speech occurred on Facebook, where people can post on separate groups, pages and threads without leaving a mark on their timeline, thus in theory accessible to a larger audience. Consequently, Facebook's architecture allows for like-minded people to gather and shun contradictory voices: the echo chamber allows breeding space for hate speakers. Interestingly, this stands in sharp contrast to the 'singular conversation stream architecture' of Twitter, where everyone can see one's tweets and reply to it.²²⁰ Therefore, the discussions are not exclusive to like-minded users on Twitter, which gives opportunity for speakers to talk back. The Umati researchers found that due to a

²¹⁸ *Gamergate* stemmed from a controversy in the video game culture during which several women in the industry were subject of vicious harassment attacks. The anonymous attackers primarily used the hashtag '#GamerGate' for the large-scale effect of their harassing messages. An excellent summary of the Gamergate can be found in: Angela Nagle, *Kill All Normies – Online Culture Wars From 4Chan and Tumblr to Trump and the Alt-Right* (Zero Books 2016) 19-27.

²¹⁹ iHub Research, *Umati Final Report* (2013) <http://www.research.ihub.co.ke/uploads/2013/june/1372415606__936.pdf> accessed on 01/11/2017.

²²⁰ *ibid* 24.

powerful trend in countering hate speakers, the backlash to hate speakers was such on Twitter that it was by and large clean from hate speakers. While one should not read too much into one empirical report, the Umami Report shows the complex dynamics of hate speech online.

This should be a warning sign about the little understood dynamic of interaction on social media platforms. One factor to take certainly into account when applying high-key speech online should be that in cyberspace it has become much easier to organise hate and harassment campaigns effectively with devastating offline consequences.

5.4.3 High-key Political Speech Online?

We now turn to the high-key political speech online. Let us recall that the starting point for our inquiry was to distinguish political speech from other forms of speech that may be protected as artistic, commercial or religious speech but not as political per se. After assuming the pluralistic free speech outlook, we faced up to the subsequent challenge as to what amounts to political speech in real-life (the “epistemic question” as we called it). The answer to this challenge was twofold. First, merely looking at the content in and of itself does not suffice for assigning the label of political speech to a given communication. Second, it followed that circumstance-regarding political factors were necessary to identify truly political speech.

The deficiency of a mere content regarding test for political speech is obvious when applied to online speech. Cyberspace is a wild discussion forum, where digital speech one way or another relates to politics. Hence the risk is high that one ends up at the implausible cyber-libertarian corner by arguing against all regulation on account of all content being political and thus demanding the enhanced protection that traditionally is assigned to political speech. This may indicate that the more diverse framework of high-key speech that relies on political circumstances sits especially well with digital speech.

To some extent it is certainly true. There surely exist clear instances of application where the high-key framework applies online without much difficulty. Political speakers' speech on political topics during elections should count as high-key speech online as much as offline. But we certainly need not restrict our analysis to speakers be them politicians, candidates, activists or engaged intellectuals. A political mobilisation website to stop the War in Iraq or a campaign website for animal welfare should be encompassed as much by high-key political speech. Contrast this with political speech in chat forums or a spontaneous political debate under a punchy Facebook post. These latter instances are certainly examples of political speech, but ones that lack the added normative layer that the high-key examples exhibit.

Alas, the reality of online speech is more complicated than to be solved by these core examples where the framework applies easily. The systematic application of political circumstance regarding factors, that define high-key political speech, is a serious challenge when applied online. The idea behind an open list of political circumstances was that it allows flexibility for practice to combine them liberally rather than fixing a hard category as high-key speech. The trouble is that not all offline political circumstances translate easily to cyberspace, therefore the combination of various circumstantial factors is hard to implement. Let us take one by one the three political circumstances introduced in this chapter.

Speech that relates to political process. The chief political processes that gave way to this circumstance regarding criterion are election campaigns and formal deliberative forums such as Parliaments, local councils and the likes. Even if deliberative forums do not have direct online equivalent, elections do. One suggestion regarding election campaigns could be to transform the offline political process circumstance into a "time licence" rule for the duration of election campaigns. It would mean that during election

campaigns all speech with political content would amount to political speech by dint of the election time. The problem with that position is its questionable workability. Few countries peg their campaigns to a rigid period of time (the exception may be Britain) and many countries live in permanent election cycle (such as the US) which would defeat the point of time-bound licence. These difficulties are just compounded by the fact that online speech by and large ignores geography, hence a systemic application of a “time licence” rule is doomed.

But this need not discourage our inquiry: there are ranges of political speeches during election time that are easily identifiable and sit well with high-key political speech framework. This would be the case of political mobilisation websites, election clips and videos on election debate and online extensions of the political campaign materials such as leaflets.

Speech that relates to political events. Public protests make up bulk of the informal politics offline. Hence, as long as a communication acts occur in the context of a, say, public protest it should be taken as an instance of political speech. The example in point would be campaign website (or perhaps such a Facebook page), campaign videos, or even online uploads about the protest. Think about a single-issue group that stages a protest (say an animal welfare group) that shoots a video of the events to use it later on for campaigning purposes.²²¹ However, the criterion of “political events” runs into considerable difficulties beyond this core circle of application. Political campaign speech online strikes us as rather limited examples of digital speech. It is thus not clear how this political factor would apply in a systemic way to cyberspace to single out high-key speech.

²²¹ See the British case that inspired this example: *S v DPP* [2008] EWHC 438 (Admin). The case is extensively discussed at 294-298.

Speech that emanates from political speakers. The political circumstance regarding factor concerning speaker's identity is an interesting but somewhat controversial one. The straightforward application of this factor would be that the speech of politicians, campaigners and public intellectuals should count as political speech as long as they relate to public issues. Two inferences could be drawn with regard its online application.

First, political speakers online would be more protected than non-political speakers as only the formers' speech would amount to high-key political speech. This raises the perspective of arbitrary speaker discrimination. This difficulty already existed offline but was tamed by the fact that various political circumstances could be applied jointly so that the political speaker criterion not be the exclusive political speech factor. This solution is not available online. Therefore, it can only tentatively be inferred from our framework that political speakers' online speech is likely to amount to protected high-key political speech.

One inference can be drawn with certitude though from the identity of speakers that may have momentous implications online. For political speech to be subject to public accountability and the ensuing potential of counter-argument or speech, which are the justifying normative values for high-key political speech, the speaker must be identifiable, that is not anonymous. Anonymous speech certainly has social benefits and carries important normative values such as protecting privacy. However, anonymity stifles the type of public accountability that public speakers should be submitted to in stable or mature democracies. Privacy should not be a shield from criticism, at least not for those who aspire to influence politics in the open contest and thus qualify for high-key political speaker.

A possible and familiar objection to the speaker identification requirement is that in oppressive regimes anonymity may allow citizens living in fear from retaliation to air

their grievances. Speaking truth to power in oppressive regimes surely require protection that anonymity may guarantee. Yet our argument is confined to long-standing and stable democracies that are roughly devoid of such forms of oppression.

Finally, it should be clear what the speaker identification requirement does *not* mean. It does not follow that anonymous speech should be devoid of any protection or that our argument requires the end of the widespread anonym speech culture in cyberspace. It merely means that speakers with shielded identity do not get the extra level of protection that high-key political speakers do.

Let us note what this means for hate speech online. It is generally accepted that hate campaigns are driven by anonymous social media accounts that escape not just legal consequences, but equally any social control or public accountability – *Gamergate*, the large scale and long sustained misogynistic harassment campaign, is the case in point. The conceptual framework of high-key political speech applied to cyberspace, therefore, does not give cover for orchestrators of hate and harassment campaigners. This follows from the application of the high-key speech framework to cyberspace.

However, it should be emphasised once more that it would be an overstretch to infer more about cyberspace from this thesis as it is essentially tailored to offline speech. It suffices to state that it should not be impossible to define political speech circumstances that do not only relate to content but also to circumstances. For that, however, more empirical research is needed. For instance, on how counter-speech and interactivity play out in a cyberspace that is mostly governed by private companies' rules.

6. An Objection: Gap, Formalism and Privilege

At the end of this chapter, we should tackle a potent objection that strikes at the heart of the normative framework built up over the last two chapters. It points out a gap between the theoretical political speech account advanced in Chapter Two, and the high-key speech conceptual framework that was just set out. The argument goes the following way. High-key speech identifies speech based on a set of restrictive and somewhat formalistic political circumstances. Under these circumstances speech is highly protected and as such it may resemble to a privilege to speak rather than a right to speak. However, the normative political speech account, defined along the writings of Ronald Dworkin, is based on the free speech *rights* of citizens.²²² Moreover, the respect of the free speech right of all citizens is partly what secures legitimacy for governments to use coercion against its citizens. Therefore, either the narrow conceptual tool to identify political speech is unfit to the normative democratic account, or the latter is too demanding for the concept of high-key political speech.

A concession is in order at the beginning. It may be true that the high-key speech framework does not follow necessarily from the democratic normative account advanced by Dworkin, Post or Weinstein.²²³ In a sense, the underlying motivation of all these democratic free speech theories is to expand rights broadly or to “democratize speech.” Hence the frequent reference to citizens’ *rights* to free speech that marks the general nature of the entitlement at stake, namely to speak freely. It is thus plausible that the

²²² See the analysis of Post’s theory in chapter 2 under section 3. “Public Discourse Account.” For Post’s list of related works see footnote 87. For the analysis of Dworkin’s argument see in the chapter 2 under section 4. “Egalitarian Justification of Political Speech” and especially 4.2 for the political transformation rationale; and footnote 122 for Dworkin’s related works.

²²³ For the analysis of Weinstein’s theory see section 3.1 “Participation as Justifying Public Discourse” in chapter 2.

theorists who inspired our normative account would themselves object to the high-key speech framework.

Let us recall that the normative theories that ground free speech in democracy play out their argument at a high level of abstraction. This is a necessity for theory but a curse for its direct application to human affairs. We flagged up this issue as the boundary challenge: what counts as political speech? None of the democratic speech theorists met this epistemic challenge. Meiklejohn's original argument should be praised for its honesty to grapple with the problem by confining political speech to the town-hall meeting model. Even if he did not mean it literally, he hinted towards a formalist understanding of what political speech should include – roughly speech in the style of formal deliberation. Robert Post was content to coin the term 'public domain', where political speech thrives, and thus he could contradistinguish it from all other speech domains, but at the price of letting political speech at a highly abstract level. He merely offered the question-begging answer to the boundary challenge by stating that whatever is *deemed normatively necessary* for influencing public opinion amounts political speech. Dworkin conceived political speech as the tool for those who lose out in politics for transforming the balances of power in the future (i.e. the transformation rationale). His writings arguably hint towards a broad conception of political speech given that the argument is framed as a thoroughly rights-based one. Yet he did not engage with the question of what should and what should not count as political speech. It is certainly true that the epistemic question of boundaries of political speech is secondary to normative theorists' concerns. Consequently, it also strikes us as evident that no obvious answer flows from any democratic theory to the boundary challenge.

The objection can be broken down into two parts. The first concerns formalism. It charges the concept of high-key speech of being formalistic by relying on the political

identity of the speaker, the political process or event in which speech occurs. Instances of high-key speech include politicians, protestors in the street or activists' leaflets. One might find this list of speeches to be akin to Meiklejohn's town-hall meeting. It is true that our concept of high-key speech shares Meiklejohn's motivation to define political speech as unambiguously political. Therefore, deliberative instances of political speech, suggested by Meiklejohn, surely count as high-key speech. But the analogy stops there. Meiklejohn's argument was geared towards deliberation conducive to wise decisions. Whereas our concept aimed at clarifying communicative instances that are political in the sense of the normative account. For that, we used benchmarks to identify political speech. These benchmarks cannot only rely on the content but necessarily include the context of the speech. Therefore, the circumstance-regarding factors screen the context of the communication in order to decide whether speech is tantamount to political speech. It is only formal in this sense – but not in the sense one would, rightly, criticize Meiklejohn's town-hall concept of speech.²²⁴

There is a similar way to answer this objection. The proposed framework of high-key political speech is possibly biased towards representative democracy set in contradistinction to populist democracy.²²⁵ It is even possible that the latter would be closer to Dworkin, Post or Scanlon's views on free speech.²²⁶

The bifurcation of political speech into high and low key embodies a broad conception of representative democracy. It assigns higher protection to speakers who take upon themselves to stand up for political views in particularly salient political

²²⁴ The famous argument of Meiklejohn was put described in section 2. 'The Instrumental Approach to Democratic Justification' under chapter 2. For his related works see footnote 65.

²²⁵ For lack of a better term, we will stick to populist that is not meant in any pejorative way. To make it clear we treat demagoguery and populism as separate notions: while the former is of undoubtedly negative value, it is not the case for the latter.

²²⁶ For Scanlon's audience-centric argument see section 5 in chapter 2.

circumstances – or, to put it otherwise, to represent ideas or interests in politics. This conception arguably confines politics to certain settings. Yet it also opens the gates of representative democracy wider than for instance Meiklejohn’s town hall conception. One could say that high-key political speech “maximizes” representative democracy instead of replacing it with a through and through populist version. Is this a problem? Representative democracy understood broadly has an advantage for the European context where hate speech ban is entrenched as a matter of principle. Signalling out a narrower, but highly protected set of political speech may just work as a “systemic pressure valve” and may be a way for reconciling concurring normative demands on the political community. Legitimacy is guaranteed by allowing political speech to be free where it matters the most: at the central stages of politics. As long as that “top-tier” of political speech is drawn in a reasonably liberal and non-arbitrary way, the condition of free speech that transfers legitimacy is met in a constitutional context where some speech restrictions are rightly upheld on a principled basis. Therefore, the high-key framework may offer an attractive way for achieving a compromise solution between the normative demands of free speech described in Chapter Two and the prohibition norm entrenched in European constitutionalism.

The charge of formalism piggybacks on the critique that high-key speech defines protected speech restrictively. This restriction is a relative one though. The list of political circumstances was purposefully defined open-endedly and not exclusively. The goal was not to find an eternal set of political circumstances set in stone but rather to define obvious instances of political speech. Consequently, the move away from a purely content-based concept to a richer and more contextualised understanding of political speech is more important than the actual list of circumstances. However, the instances of high-key speech defined by the three circumstance factors, would undoubtedly count as

political under all democratic speech theories as they are public in nature, political in content and open for challenges. Furthermore, the selection of political circumstances allows for a wide range of political speech to be captured under the concept. This requires a careful balancing exercise, but one that is not unusual for judges.

Second, the objection takes issue with high-key speech being a privilege rather than a right, hence contradicting the normative foundations it is supposed to stand on. The objection thus assigns a particular meaning to “right.” It suggests that to have a right to free speech means that its exercise cannot depend on the context. This strikes us as an unrealistically demanding rights conception with an absolutist tinge. Rights are weighty reasons that feed into the adjudication process. Our conceptual framework is limited to defining circumstances under which the weight assigned to the right to free speech is higher than in other circumstances. This does not mean that all other counterweighing rights are necessarily overridden – far from it. Notice how comfortably this way of understanding rights sits with the adjudication method of balancing. High-key speech highlights instances where political speech *of anyone* amounts to a weightier reason in the reasoning process than in low-key speech settings. The right to political speech, cast in this way, provides more certainty for balancing without doing away with its main advantage of flexibility.

7. Conclusion

This chapter is the second of the three theoretical chapters. Let us pull the strings of the arguments so far together. The previous chapter defined a narrow political speech account that was morally appealing and tightly political. This chapter then further built on the findings of the previous chapter on political speech. An epistemic problem was found in identifying political speech – the bridge question: What should count as political speech? An alternative solution was offered for identifying a set of highly political

speech, which we labelled high-key political speech. It relied more heavily on political circumstance-regarding factors as opposed to solely on the content of speech in identifying political speech.

High-key political speeches are thoroughly political speech. It is the speech of politicians, campaigners and protestors. Identifying political speech in an arguably narrower way is, however, not arbitrary. High-key political speech embodies normatively significant features that set it apart from other speech. It epitomises functionally public speech that attracts criticism, reactions and counter-speech. It can be seen structurally as a speech privilege for political speakers, political process and political events that are by nature or function dedicated to animating public debates and politics.

This discussion is not conclusive for the broader question of the legal permissibility of hate speech. It will be the task of the final theoretical chapter to inquire whether the privileged protection of high-key speakers should extend to political hate speech. What we can infer from this discussion is that the bar for restricting hate speech in high-key speech situations is higher than for low-key political speech.

Chapter Four

OBJECTIONS TO PROTECTIONS FOR POLITICAL HATE SPEECH

1. Introduction

The preceding chapters aimed at providing a deeper understanding of political speech. After going through some normative justificatory accounts of political speech, we turned to a narrower set of political speech: high-key political speech. The discussion will now define the perimeter of the protection of high-key speech.

First, some conceptual diversity will be introduced into our understanding of hate speech and the conflict between the high-key political speech and the prohibition norm explained. Then, political hate speech will be finally brought to the table. The discussion will scrutinize important prohibitionist arguments against the proposition of carving out exceptions from the default norm against hate speech for *political* hate speech. These arguments will be labelled “objections.” If these objections fail, political hate speech *should be* a privileged exception to the main rule of banning hate speech. The goal of this analysis is to see to what extent the general prohibitionist arguments are valid when narrowly applied to high-key political speech. Some objections may be good arguments for banning hate speech generally, but not strictly against political hate speech.

2. The Conflict Between Political Speech and the Hate Speech Ban

After so much discussion of political speech, it is time to get one step closer to the core question of this thesis. What does the protection of the right to political speech entail? And is it necessarily in conflict with the prohibition norm against hate speech?

This thesis is about the right to freedom of expression and not about freedom of expression as a public good. However, the concept of ‘right’ does not automatically provide what protection follows from it. The practice of free speech in liberal democracies is helpful to the extent that one could infer that the right’s protection amounts to a bundle of negative and positive rights. A complete account of political speech would require a long list of such rights. Such a complete account is not warranted here though. Instead, the focus shall be on one particular aspect of the right to political speech that seems to be in collision with laws that ban hate speech.

Hate speech laws have one distinctive characteristic: they ban speech on the ground of their content: racist, xenophobic, homophobic and so forth. There are other laws that incidentally restrict such expressions but only hate speech laws target them specifically. Their rationale is that uttering racist words is morally wrong or even harmful to others, therefore it should be legally banned. The legal forms hate speech laws take vary quite considerably ranging from criminal to civil laws, but none diverge from this characteristic feature.²²⁷

The submission here is that this characteristic feature inevitably collides with the right to political speech. This is so because the prohibition may eliminate one political

²²⁷ Some authors, like Alexander Brown, underappreciate the importance of this common point to all hate speech bans when stressing the normative dissimilarity of hate speech regulations. Alexander Brown, *Hate Speech Laws* (Rutledge 2015) chapter two.

view from the public debate. One could rightly retort by asking, at this point, *what debate is meant here?*

One could easily accept the proposition that some hate speech may amount to political opinion more than others, although hate speech laws ban such expressions irrespective of the difference. It would be rather odd to assert that every racist speech at any time and place should count an opinion in a presumed colossal societal debate about equality. Criminal law prohibitions on racist harassment or burning crosses on the property of a black family or spraying swastikas on the walls of public streets should not be considered undue restrictions on political speech. Yet this need not follow for expressions of racist views that constitute a genuine political stance. Let us imagine a politician affirming his intention to introduce discriminatory religious tests for immigration, because immigrants are destroying the country by smuggling drugs, forming gang and committing violent crimes. One can imagine a politician describing this policy in more, or less inflammatory terms without changing the hateful message he is peddling. It is likely that such a hateful speech from, say, a candidate to a political office would run into a ban on hate speech, for example because it incites discrimination. Such a censoring of political speech would then amount to the exclusion of an opinion from the political debate. This exclusion is what seems to be running against the core justificatory tenet of political speech: hate speakers are denied the privileged tool of speech to attempt to transform public opinion. If this is true, then the consequences of the exclusion are far-reaching: legitimacy of communal decisions will not obtain vis-a-vis the excluded ones.

The setup of the conflict seems clear from here: the requirements of political speech (grounded in legitimacy) is in collision with a prohibitionist norm grounded in equality. On the one hand it strikes us as convincing that the right to political speech should hold out protection against the exclusion of opinions in political debates. On the

other hand, harm should always be a legitimate basis to limit rights as long as the harm is real.

This should not be otherwise for the privileged end of political speech that is high-key speech. How should one proceed from here to resolve the conflict? This thesis will attempt to resolve the conflict by narrowing its focus. The focus will be only on hateful speech uttered as high-key speech, which is defined by the three indicators discussed above. We shall call these instances of hate speech: *political hate speech* for the sake of readability.

This methodological strategy has the advantage of being in sync with the starting premise of this thesis, namely that the prohibition norm is valid against a vast amount of speech including some that is political (notably, speech that is considered political solely on account of its content). Therefore, the argument of this thesis will not amount to a frontal challenge to the prohibition norm that is deeply entrenched in European constitutionalism. This reflects what the introductory chapter stated about the compromise-seeking nature of this thesis.

It remains to be seen whether it is justified to carve out an exception to political hate speech from the prohibition norm. It is the challenge for the remaining parts of this chapter. But before delving deeper into the question whether it is justified to carve out an exception to political hate speech from the prohibition norm a quick diversion is in order to provide examples of political hate speeches.

3. The Core Cases of Political Hate Speech

The concept of hate speech does not lend itself to an automatic categorisation of hate speech. Let us take for instance an anti-Muslim remark. Such a remark may amount to an expression of personal animosity as much as an attempt to contribute to public debate

depending on the circumstances of the speech. Instead of separating these different categories of hate speech, the literature and the case law generally lumps all hate speeches into the same basket defined by its content. However, this variety has not passed completely unnoticed in the literature. The political philosopher Caleb Yong argued in a recent article for a ‘disjunctive definition of hate speech’ that would take into account this variety:

[The] broad definition of ‘hate speech’ is unsatisfactory since different kinds of speech acts, all of which may plausibly be termed ‘hate speech’, involve very different kinds of *free speech interests*, and may cause very *different kinds of harms*.²²⁸

This thesis will take a similar approach and argue for a similar disjunctive concept of hate speech that will rely heavily on the dissimilar speech contexts. For the purposes of the thesis, we will only draw a line between political hate speech and all other types of hate speeches that will be labelled ‘societal hate speech’. A comprehensive research about hate speech would certainly require a more diverse categorisation of hate speeches. Yet grouping all non-political hate speech into one is defensible given the thesis’ distinctive focus on political hate speech.

As it was described earlier the political hate speech is one that meets the indicators of high-key political speech. To make the conceptual distinctions between political and societal hate speech clear, three typical cases from the ECtHR will follow. Each judgment epitomises, respectively, a core political hate speech case (*Féret v Belgium*),²²⁹ a clearly non-political hence societal one (*Vejdeland v Sweden*),²³⁰ and one case from the grey zone (*Norwood v the United Kingdom*).²³¹

²²⁸ Caleb Yong, ‘Does Freedom of Speech Include Hate Speech?’ 17 (2011) *Res Publica* 385, 386 (emphases added).

²²⁹ *Féret v Belgium* App no 15615/07 (ECHR, 16 July 2009).

²³⁰ *Vejdeland and Others v Sweden* App no 1813/07 (ECHR, 9 February 2009).

²³¹ *Norwood v United Kingdom* App no 23131/03 (ECHR, 16 November 2004). The judgment of the British court is:

3.1 The Core Political Hate Speech Case: *Féret v Belgium*

Féret v Belgium is an unusual case because it meets all high-key indicators; hence it is the perfect example of political hate speech. Daniel Féret MP, the leader of the Belgian far-right *Front National*, distributed leaflets and held speeches during his re-election campaign. He was found guilty of fomenting hatred against Muslims and immigrants. The impugned speeches proposed a ‘national preference’ policy for employment that would give priority to Belgians and Europeans, a repatriation of migrants, the eradication of refugee protection system; while other comments amounted to a rant against the country’s ‘Islamisation’ and its Muslim community. For instance, one cartoon called Muslims by the derogatory term ‘*le couscous clan*’ and blamed all Muslims for the 9/11 terrorist attacks. No doubt these were clearly xenophobic or racist expressions – yet ones that represented Daniel Féret’s political stance on immigration policy and multiculturalism at the midst of an election campaign.

3.2 The Societal Hate Speech Case: *Vejdeland v Sweden*

Vejdeland v Sweden is the perfect example of societal hate speech. In Sweden a group of religious volunteers took upon themselves to counter-balance what they saw as a too-tolerant stance by the education system towards homosexuality. They set out to distribute homophobic leaflets at a school in the lockers of students. The leaflets urged students not to believe their teachers, who were trying to downplay the ‘morally destructive effect of homosexuality on society’ and were hiding the truth about ‘the spread of HIV through gays’ promiscuous lifestyle’ and that the homosexual lobby try ‘to play down paedophilia’ and so on.

No doubt that homosexuality is bound to be an issue on which society divides and debates. However, not one of the political indicators seems to apply to an

Norwood v DPP [2003] EWHC 1564 (Admin); [2003] Crim. L.R. 888 (DC).

educational institution. Of course, under different circumstances leaflets of the group could have amounted to contributions to public debate, say in a public street, but the premises of a school, an educational facility, did not represent such a place. A high school functionally does not constitute a public forum. Therefore, their speech amounted to societal hate speech.

3.3 The Grey Zone: *Norwood v United Kingdom*

Anthony Norwood was a regional organiser of the British National Party, who displayed a poster reading ‘Islam Out of Britain – Protect the British People’ in his home window at a residential area in a small town. Upon complaints from passers-by Norwood was prosecuted and found guilty on the basis of UK’s hate speech laws.

What makes the case difficult to categorise is that the speech in *Norwood v United Kingdom* bears on a political issue (immigration broadly speaking) and the speaker is rather a public speaker, yet one could argue that the case should not qualify as privileged political hate speech. Recall that it does not suffice for a speech to bear on public interest alone to count as political speech. The three other political speech indicators are just as important because they reveal whether the speech is open to challenges and thus to be a strong political speech. It seems significant that Norwood’s speech occurred in a non-political environment, i.e. in a residential area, where people may have an expectation of protection from offensive material. Because it was on a poster overlooking a residential area, it made the viciously xenophobic statement insulated from challenging counter-speech. This stands in contrast with, say, political rallies or even a speech at a public corner. The case might have been different if there were a social practice in the UK of using flat windows even in residential area to promote one’s political agenda. As we will discuss it later, this is a plausible argument to make

about the UK – yet mostly in relation to election time. Overall, Norwood stands, precisely for these reasons, as an example of the grey zone.

The three examples showed three separate types of hate speech that relate to overall concept of political hate speech differently. Féret and Vejdeland epitomise the two opposites: the former within, while the latter being far from the concept; while Norwood cast light on the difficulties in the grey zone. We will return and refer to these examples during the upcoming discussion.

4. The Objections to Political Hate Speech

This chapter will tackle the main theoretical question of the thesis. Is it justified to carve out an exception to political hate speech from the default prohibition norm? The answer will depend on the strength of the arguments for banning political hate speech. The next sections will scrutinise the most significant prohibitionist arguments *as applied to* political hate speech. These are the silencing, the incitement, the vilification and the democratic arguments against hate speech. Each one of them purports to establish that hate speech is harmful on its own terms. These arguments will be labelled *objections* because they aim at objecting to the protection of political hate speech under the right to political speech.²³²

The objections thus embody various general harm arguments. They generally purport to ban hate speech indiscriminately. The upcoming sections will inquire into the extent to which objections are tenable as applied to political hate speech. Therefore,

²³² Many arguments buttressing hate speech had to be omitted in this thesis. On the one hand, there is a necessity to make shortcuts in light of the considerable academic interest in the topic. On the other hand, we had to bracket some objections to keep the argument as focused as possible on hate speech that is tightly linked to politics. The following notable arguments fell victims to our discrimination: arguments based on cultural diversity, autonomy, truth seeking or self-realization.

much will depend on whether the harm argument in each one of the objections applies better, if at all, to political or to societal hate speech.

The stakes are very high for the argument of this thesis. If the objections succeed, political hate speech should not be treated as a privileged exception and should be targeted by the default norm of prohibition. Should they fail, political hate speech ought to have a *pro tanto* protection under the right to freedom of expression.

5. The Silencing Objection

The first objection concerns the negative impact that political hate speech may have on the political participation of groups targeted by hate speech.

Historically, the silencing argument originated from anti-pornography feminist literature and the discussion of the objection here draws on this literature heavily.²³³ Rae Langton sums it up thus: '[i]f pornography silences women, then it prevents women from doing things with their words'.²³⁴ In a nutshell the idea is that because pornographic speech is widespread in contemporary societies, women's words do not obtain the intended effects. For instance, a woman's reply of 'no' to sexual advances would not obtain her intended aim of refusal. As Langton puts it emphatically: '[the] refusal would be made unspeakable for a woman.'²³⁵

This is not a place to dwell either on pornography's various silencing effects or on whether pornography amounts to hate speech. It suffices that the concept of

²³³ See Rea Langton, 'Speech Acts and Unspeakable Act' (1993) 22 (4) *Philosophy & Public Affairs* 293.

²³⁴ *ibid* 314.

²³⁵ *ibid* 324.

silencing is fit for describing the disadvantage that vulnerable groups may suffer because of political hate speech.²³⁶

One of the first scholars who transposed the concept of silencing from the anti-pornography literature onto the question of hate speech was Owen Fiss, who formulated it in the following way:

[p]olitical hate speech *discourages them [target groups] from participating* in the deliberative activities of society. They feel less entitled and less inclined to voice their views in the public square, and withdraw onto themselves. They are silenced as effectively as if the state intervened to silence them.²³⁷

Fiss distinguished two types of silencing: ideational and sociological. The former consists in simply silencing people with the idea that the speech embodies. Fiss was reluctant to accept that the expression of any idea would be thus effective in silencing. As he put it: '[s]aying something does not make it so.'²³⁸ Instead silencing works as a social dynamic. The assertion is that such a sociological silencing may ensue from hate speech and impact target groups. Fiss infers from it that a ban on hate speech would strengthen the robustness of public debate as opposed to weaken it by eliminating silencing which works as a barrier of participation. It is though important to note that Fiss ignores entirely the question of *how* hate speech obtains its participation-specific silencing impact. Alexander Brown in his recent monograph on hate speech helpfully sums the silencing

²³⁶ The idea has already shifted away from its original feminist version in the literature. For an example of silencing argument applied in the hate speech context see Caroline West, 'Words That Silence? Freedom of Expression and Racist Hate Speech' in Ishani Maitra and Mary Kate McGowan (eds) *Speech and Harm* (OUP 2012) 222 Ian Cram describes similarly an 'inclusive participative' view on free speech, according to which some expression such as racist speech amounts to a 'barrier to black participation in social affairs.' Ian Cram, *Contested Words* (Taylor and Francis 2006) 111, 132.

²³⁷ Owen Fiss, 'The Right Kind of Neutrality' in David S. Allen, Robert Jensen (eds) *Critical Perspectives on Freedom of Expression* (NYU Press, 1995) 85 (emphases added). The match between the objection and Fiss' criticism is not perfect because his concept of hate speech was broader than the political hate speech that we use, but we will leave this discrepancy at that.

²³⁸ Owen Fiss, 'Freedom and Feminism' 80 (1991-1992) *Geo. L.J.* 2041, 2059.

argument up: '[c]ertain forms of hate speech can deter or inhibit members of targets groups from functioning as ordinary deliberative democrats.'²³⁹

These formulations have to be slightly modified to fit into the mould of this thesis. The narrower question here only concerns political hate speech's potential silencing impact and not the silencing impact of all hate speech. The silencing objection accordingly asserts that political hate speech, understood as high-key speech with hateful content, is objectionable because it significantly contributes to the creation of a hostile climate in which hate speech target groups find it more difficult to participate in public life. Principally it becomes more difficult to speak up in politics, which is taken to be an important feature of political participation.

Two qualifications should fine-tune the objection. Silencing as a social phenomenon has two ends so to speak: an input and an output. The input signifies what triggers the mechanism and the output is what the mechanism results in, to wit: a type of silencing. At both ends the silencing objection discussed here is significantly qualified.

First, if societal hate speech (as input) leads to silencing (as output), then it might well be a pertinent ground for banning societal hate speech. Yet a different question is asked here. The question here is whether *political* hate speech silences minority political participation. As a matter of input only political hate speech, understood as high-key speech with hateful content, will count for the present objection and not all hate speech touching on political issues, which would represent a much wider pool. This qualification means that the likes of racial harassment, personal racial affronts, painted swastikas in the streets, anti-immigrant comments in the workplace or homophobic leaflets tucked in kids' lockers at school are not considered as inputs as such. Restricting such societal hate

²³⁹ Brown (n 26) 198.

speeches would *not* be objectionable under the argument of this thesis. Moreover, one could even easily surmise that a ban on societal hate speech, properly enforced, would go a long way to address the ills of silencing effects. In contrast, politicians' discourses on the campaign trail or in interviews or in institutional settings epitomise the type of speech-input that is under scrutiny here.

The objection is equally qualified at the output end. What the silencing objection puts at its centre is the impact of political hate speech on the target group's political participation.²⁴⁰ To make the objection stronger, participation should be given its broadest sense. Silencing obtains its impact if targets do not exercise their right to political speech and thus miss out on participating in public debate. On this ground, silencing is often described as a free speech restriction in the literature.²⁴¹ Thus the conflict is located between two rights to free speech: the right of the hate speaker and the right of the people who belong to target group.²⁴²

The force of this objection cannot be underestimated for any political speech account that relies on the normative importance of free political speech. If a target group in society is prevented from partaking in the formation of public discourse, the legitimising effects of free public discourse loses its force for the targeted group.

²⁴⁰ Other potentially objectionable silencing effect should not count for the outcome. It may be that, say, the speech of xenophobic politicians silence migrants in society by undermining their credibility in the eyes of non-target people, but this would add up to a different objection. Such an objection will be discussed below at section 8 in this chapter.

²⁴¹ E.g. Carline West pursues such a free speech argument against hate speech. See West C, 'Words that Silence? Freedom of Expression and Racist Hate Speech' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (OUP 2012).

²⁴² This has an imminently strategic aspect in the US because of the preponderance of the First Amendment and free speech in American Constitutional law: to counter an objectionable speech one needs another speech claim.

5.1 Silencing as Intimidation

Four arguments will follow to counter the case for the objection. The first cuts against the broad concept of silencing per se, while the others more particularly attempt to refute the case of political hate speech having a silencing effect.

The case for silencing is significantly weakened if it is pushed to its logical conclusion. At the core of the objection lies intimidation that may well work as a disincentive against speaking. But is it a sufficient condition for banning speech that it intimidates others from speaking? Or to put it another way: Is it convincing to suppose that intimidating speech necessarily disincentives speech?

In his discussion of silencing Cass Sunstein pointed out that there are lots of reasons why speakers could be intimidated and as a result would be less inclined to speak. For instance, in the case of a climate where people ‘vigorously challenge’ each other, silencing mechanisms may kick in that are similar to political hate speech–induced silencing.²⁴³ Consider another example along the same lines. In some communities giving voice to an opinion that offends prevailing positive morality (e.g. prejudices) may have severely negative consequences for the speaker. For instance, the speaker’s reputation may suffer damage as a result and thus the hostile environment could work as a powerful disincentive against speaking out. This could be the case in a closely-knit deeply conservative community where such disincentives might operate very forcefully. It seems beyond doubt that speaking out for pro-choice activists or gay-marriage proponents may be very difficult indeed. Yet such environmental disincentives should not serve as a ground for denying free speech for the people who are creating such a climate. A helpful analogy can be drawn with the landmark freedom of protest case from the ECtHR. In

²⁴³ Cass Sunstein, *Democracy and the Problem of Free Speech* (n 171) 220.

*Plattform "Ärzte für das Leben" v Austria*²⁴⁴ a group of anti-abortion doctors organised a march in the small town of Stadl-Paura, during which counter-demonstrators tried to disrupt the march. The police intervened several times to reinstate order by separating the two sides and taking steps against the violent members of the counter-protest. The Court ruled that the state has a positive duty to protect the marchers and at the same time to respect the right of counter-protesters to protest – to the limit of violence when the police rightly intervened. Although *Plattform* generally stands in the literature for the positive duty to protect protesters, the judgment should be also read for the following proposition as well. Freedom of expression bestows a duty on states to protect speech rights of opposing sides even if the exercise of speech rights is more difficult for one side in face of the other's strenuous, even intimidating opposition.²⁴⁵ It requires the accommodation of speakers that are hostile to each other.

It seems that the challenge for the objection is to demonstrate that the silencing mechanism has something special that goes beyond the hostility of the environment to some speakers which in and of itself does not suffice to justify restriction of speech.

5.2 The Silencing Mechanism

Hate speech expresses a deep sense of rejection of the equal human worth of the targeted people. Yet words do not automatically obtain their intended objectives, but rather do so through complex mechanisms. Thus, all uttered speeches are 'mediated through certain attitudes and belief'²⁴⁶ both on the part of the speaker and the listeners in the process of transmitting communication. But for these social, linguistic mediations, speech would not have any of its intended effects.

²⁴⁴ *Plattform "Ärzte für das Leben" v Austria* App no. 10126/82 (ECtHR, 21 June 1988).

²⁴⁵ See for instance: David Harris, Michael O'Boyle and Colin Warbrick (eds), *Law of the European Convention on Human Rights* (OUP 2009) 517.

²⁴⁶ Brown (n 26) 199.

This leads to the second deficiency in the silencing argument. It is generally true that we do not come close to understanding how silencing as social mechanism really works. The gaps in the explanation are often plugged by speculative shortcuts. Even on the assumption that hate speaker intentions are truly to silence targeted groups, it remains uncertain what makes hateful words so effective in achieving their intended goals, i.e., silencing the targeted people. In other words, why should we be so certain that political hate speech actually obtains its objectives?

One reasonable concession would be to assert that political hate speech is not the only or even the main contributing factor to the silencing climate, but one that can be changed by law. Yet note, that this comes at the cost of continuing to ignore the *how* question. With no plausible answer, the proposition that political hate speech must necessarily figure in the chain of causation, on par with the lamentable socio-economic disadvantage of vulnerable groups, remains unconvincing.

Alexander Brown responds to this conclusion with an interesting argument in defence of the silencing objection. He disputes that the difficulty in accounting for the social attitudes and beliefs that mediate the effects of hate speech is conclusive against the silencing arguments. He draws an intriguing parallel with the uncontroversial question of banning speech that causes clear and present danger:

It is clearly not the case that we never think it right to make decisions about whether to protect or to constrain speech on the basis of social attitudes that play a crucial part in the causal story. Most people concede that it should be illegal to shout 'fire' in a crowded theatre, but here the effects are mediated through a sort of social attitude, namely *hear the word 'fire' and start panicking*. (...) So sometimes social attitudes are parts of chains of events that do not justify legalistic constraints on speech, but sometimes they are parts of chains of events that do justify legalistic constraints on speech. Therefore what matters is the moral standing of the chain of events, for example, not the social attitude itself.²⁴⁷

²⁴⁷ *ibid* 199-200.

Brown's bottom-line argument is that uncertainty about the causation need not in and of itself always serve as a ground against restricting speech. The logic of Brown's proposition applied to silencing is the following. (1) All speech is mediated through various mechanisms to obtain their effects. (2) We have typically insufficient knowledge as to how the mediation works. (3) Yet we commonly accept some speech restrictions about which we have insufficient knowledge. On this ground Brown concludes that the insufficient knowledge about causation should not be conclusive against the argument of silencing.

The analogy is intriguing but ultimately unconvincing. Brown tries to put on the same plate all forms of social mediations that occur in communication. Yet this way of reasoning is problematic. When someone shouts 'Fire!' in a crowded theatre, an impulsive psychological panic reaction starts that mediates between the word and the ensuing actions. It is also significant that this reaction can be verified empirically. In 1913 seventy-three men lost their lives in a stampede when somebody falsely cried 'Fire!' in a crowded gathering of workers in Michigan (US). The tragedy came to be known as the 'Italian Hall Disaster.'²⁴⁸

In contrast, silencing obtains its effects, if at all, less automatically and through more complex conditioning and social factors. The chain of causation is infinitely more complex and remote than at examples of theatre panic. Therefore, the analogy does not hold water.

5.3 The Societal Climate of Silencing

It would be foolish to deny the existence of deeply racist, religiously intolerant or homophobic societies where hate speech may silence target groups and thus a total ban

²⁴⁸ Steve Lehto, 'The Italian Hall Disaster: One Reason to Observe a Silent Night This Christmas Eve' (*Huffington Post* 21/12/2011) http://www.huffingtonpost.com/steve-lehto/the-italian-hall-disaster_b_1120771.html accessed 1/1/2017.

on political hate speech would be justified. This is certainly the case in post-conflict countries, or in democracies in transition, where ethnic tensions may run so high that high-key political speakers could effectively silence vulnerable groups and their speech may even lead to racial violence.

The disastrous example of the Rwandan genocide is the extreme case in point. Notorious hate-monger radios like the *Radio Mille Collines* along with other racist political propaganda conditioned the public toward ethnic prejudice for a long time. In turn, the omnipresent hate speech prepared part of the population for the genocide of the Tutsi.

One may also think about apartheid South Africa or the deep South of the US in the 1950s. Officially sanctioned hate speech pervaded social life thoroughly. For instance, signs of ‘whites only’ in shops and in public places were present everywhere. This permanent visual feature of everyday life, endorsed and promoted by governments of the time, accurately captures a state of social climate where hate speech can effectively silence target people.²⁴⁹

From these examples two constitutive features of effective silencing can be discerned. If hate speech *saturates* a community or adds up to a *permanent* feature of social climate, then it is plausible that hate speech indeed obtains a silencing effect on a scale that suffices for the objection to succeed.²⁵⁰

²⁴⁹ The example was originally used by Catharine MacKinnon in her *Feminism Unmodified: Discourses on Life and Law* (HUP 1987) 194. Ever since the example became a standard reference in the hate speech debate. See for example: Mary Kate McGowan, ‘On ‘Whites Only’ Signs and Racist Hate Speech: Verbal Acts of Racial Discrimination’ in Ishani Maitra and Mary Kate McGowan (eds) *Speech and Harm: Controversies Over Free Speech* (OUP 2012).

²⁵⁰ Saturation and permanence were first famously used by Catherine A. MacKinnon to describe pornography. The term was recently appropriated by Waldron and applied to hate speech. See Catherine MacKinnon, *Only Words* (HUP 1994) 25-6 and Jeremy Waldron, *The Harm in Hate Speech* (n 6) 73-4.

Sporadic hate speech incidents cannot create a silencing climate on the level the political community as they do not saturate social life.²⁵¹ The impact hate speech has on target people and thus leading to silencing depends on the frequency in which hate speech occurs in society. Saturation captures the high frequency, because then hate speech ceases to be a transient phenomenon and becomes widespread.

There are good reasons to think that these conditions do not obtain for liberal democracies. The Rwandan genocide happened in a deeply unstable state deprived of constitutional institutions, fraught with violent ethnic tensions. In apartheid South Africa and in the deep South racial segregation and violence was state-sponsored. The political institutions tolerated such violence instead of protecting its vulnerable citizens. Such historical conditions strike us as radically different from liberal democracies to which this thesis applies. Eric Heinze aptly distinguished ‘long-standing stable prosperous democracies’ from other unstable polities.²⁵² The category describes countries that are ‘adequately equipped to protect vulnerable groups from violence or discrimination’ and have functioning democratic political processes.²⁵³ Liberal democracies thus are characterised by institutional stability, a capacity to defuse violence and a strong constitutional commitment to anti-discrimination. In absence of such conditions, hate speech can shape the social climate differently, and it stands a chance of saturating society in a permanent fashion. The distinction between stable and unstable democracies is not meant to dismiss the historical warnings, rather to signal that their lessons are limited to their special socio-political conditions.

²⁵¹ Sporadic but direct racist verbal attacks be it harassment or other intimidations may obtain silencing effect *vis-à-vis* that person, but this would qualify as societal hate speech which a category of speech that is not protected qua political speech.

²⁵² Eric Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016) 69-78.

²⁵³ *ibid* 70.

In liberal democracies, racism and xenophobia are very far from extinction and battles for equality continue to be much needed. But it would be wrong to infer that contemporary liberal democracies are like apartheid South Africa or the Deep South of the US in the 1950s. The objection's incapability to account for the mechanisms of silencing cannot be saved by a reference to saturation of hate speech that does not obtain in stable liberal democracies.

5.4 Is Silencing Inevitable?

Finally, one may want to scrutinise the claim of the objection that silencing results from hate speech as a logical necessity. There is no doubt that if one feels unwelcomed in a conversation, chances are lower that one would want to partake in it and speak one's mind. This sense of being unwelcome may be on the increase in Western European liberal democracies, where xenophobic, anti-immigration and outright racist-nativist parties undoubtedly have been gaining ground. Consequently, politicians from the *Front National* in France, the *Liga Nord* in Italy or the *UKIP* in the United Kingdom have been putting out their hateful views increasingly in last years. Therefore, in our societies where group differences on grounds of race, ethnicity or origins persist it is possible (so the objection goes) that targeted people feel increasingly scared about politics due their being regularly scapegoated in the public debates.

However, this logic seems too deterministic. Why should we work on the assumption that target people necessarily feel disinclined to go against speech that intends to silence them instead of asserting themselves? Why should we conclude hastily that the intimidation is the logical reaction that target people may betray? It is equally conceivable that the logic is inverted: political hate speech may attract counter-reaction and thus operate as an incentive for target groups (and people opposing the hate speakers) to oppose political hate speech. Importantly, we have ample such historical

precedents. The Civil Rights Movement in the US led by courageous black leaders fought back against state-sponsored racism. Political hate speech of the likes of the Republican candidate to the presidency in 1964 Barry Goldwater, an ardent racist Senator from Arizona was pervasive. If it were true that political hate speech logically must lead to silencing, the Civil Right Movement should have never occurred let alone be victorious.

The historical example should not be overstressed though. In a stable liberal democracy we need not expect the heroic sacrifices that Martin Luther King Jr., Rosa Parks or Ralph Abernathy exemplified. The conditions of a liberal democracy may spark counter-speech rather than silencing. So that it is not just a faint hope, one should stress that in stable liberal democracies the spaces of public discourse should be open and safe in principle for everyone – unlike in the cited historical example of 1960s in the South in the USA. Furthermore, no valid free speech objection is endorsed in this thesis against outlawing societal hate speech that may be a more significant barrier to participation of minorities in public life. Consequently, should we discount societal hate speech, targeted groups may feel more secure to intervene in public life despite utterances of political hate speech in their community.

6. The Incitement Objection

The incitement objection is based on the attraction of the commonly used term of incitement. The objection holds that hate speech should never count as political speech because it does not contribute to politics at all; instead it incites people to hatred, violence and hostility.

6.1 The Strict Conception of Incitement

The force of the objection stems from the solid consensus in the literature that incitement ought not to be protected. It has never been seriously doubted, at least since

John Stuart Mill formulated his famous example of ‘instigation’ against corn-dealers in his *On Liberty*:

[E]ven opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.²⁵⁴

Interestingly Mill only gave a short shrift to what was special about violence.²⁵⁵

Mill hints at one explanation, namely that some speech is rather action than speech (and ‘[n]o one pretends that actions should be as free as opinions²⁵⁶’), but he probably thought the matter too obvious to argue for and left it at that. The two constitutive elements of incitement should be highlighted: (1) violence is a special kind of danger and (2) its close proximity to coming to realisation. In a nutshell, this is the strict conception of incitement.

In the 20th century the strict conception with its constitutive elements reappeared in the famous American case of *Schenck v United States*.²⁵⁷ Justice Holmes proposed that the First Amendment only allows the restriction of free speech in case of ‘a clear and present danger’. Holmes supported his proposition by the example of a person *falsely* shouting fire in a crowded theatre. The link with Mill’s ‘instigation’ is straightforward: clear and present danger makes otherwise unobjectionable speech acceptable to be banned. Holding an opinion (‘corn-dealers are thieves’) or telling a factual lie (e.g., the theatre is on fire) are protected speech under normal circumstances.

²⁵⁴ John Stuart Mill, *On Liberty* (first published 1859, OUP 2008) 62.

²⁵⁵ Mill wrote about ‘mischievous acts.’

²⁵⁶ *ibid.*

²⁵⁷ 249 U.S. 47 (1919).

6.1.1 *The Rationales of the Strict Conception*

It is beyond doubt that restricting the incitement of an angry mob or a falsely alarming speech of a spectator in a theatre is warranted. Yet, Mill and Holmes only offered intuitive examples. The underlying rationale for banning speech in these situations of obvious dangers remains unclear.

Mill hinted at the lack of time for preventing violence as the core rationale for banning. But what exactly would one do if time abounded? One might think that under these circumstances calling the police would be possible, but Mill probably had another idea in mind. Time would allow the dissuasion of the excited mob with further discussion. But when people are on the edge of committing violence, the conditions are just not ripe for such discussion. So Mill relied on the belief that dissuasion should succeed but for the lack of time in an emotionally charged environment. Justice Brandeis famously echoed that view:

[if the evil is] so imminent that it may befall before there is *opportunity for full discussion*. If there is time to expose through discussion the falsehoods and fallacies to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.²⁵⁸

The explanation from the lack of time coupled with the hope for potential dissuasion through rational arguments became the commonly accepted justification for restricting incitement.²⁵⁹ The trouble is that people do not always seem to respond to rational arguments even if the circumstances make it for a proper discussion. Mill expected that the excited mob would cool down if the corn-dealer had enough time to explain that he is no starver of the poor, but merely pursues a legitimate business, which is sensitive to the ups and downs of supply and demand at the market and have led to

²⁵⁸ *Whitney v California* 274 U.S. 357 (emphasis added).

²⁵⁹ See for instance, Owen Fiss who subscribe to such a rationale as well: 'Incitement occurs when individuals are being urged to engage in the proscribed conduct and the matter has passed beyond the deliberative sphere. There is no more room for speech.' Fiss, 'Freedom and Feminism' (n 238) 2058.

such high prices that the poor could not afford food. Would it appease the excited mob? One may have serious doubts.

Perhaps this is too stylized a response and the time rationale is not so hopeless after all. To the extent that it concerns the example of the packed theatre, the time rationale may be just spot on. In this case, more time would allow the discussion of what is really happening, and it would lead to the avoidance of the looming tragedy. If we had time, and thus *people would not start to panic*, it would indeed be possible to check whether a fire has lit up and challenge the person who shouted “*Fire!*”.

Recall what connects the two examples. Both utterances of a false fact and a political opinion are perfectly legitimate to say but for the immediate danger. It is difficult though to come up with one single explanation as to why incitement should be banned in these two pristine examples. It might be the case that another rationale must account for each example, or alternatively the two examples might turn out to represent dissimilar cases.

There seems to be an alternative way to justify the proscription of incitement indeed: let us call it the prudential rationale. The excited mob will not cool off upon rational arguments because the situation is just too remote from a rational debate. The heat of the moment coupled with the physical proximity of the ‘target’ (the corn-dealer), blinds people to rational judgment. As a result, the listeners will not act rationally and they can be provoked into preposterous action. Under normal circumstances, the very same people, however, would not commit such actions.

Both rationales—the time and the prudential rationales—explain that under certain circumstances the likelihood of danger increases for reasons to do with the exceptional situations: either due to a lack of time, or the proximity of the target. It is not

the case though that the two rationales are completely separate. In both cases the chain of causation for actions is uninterrupted: speech triggers the ensuing catastrophes directly.

The strict conception of incitement to violence relies on solid neutral grounds to justify speech restriction independent of the content of the speech. It applies equally across the board without regard to the type of speech interest at play (i.e. whether political, artistic or societal speech). One core example involved casual societal speech ('Fire!'), while the other a political message ('*Corn-dealers are starvers of the poor!*'). Such a general speech restriction does not go against the assumption that political hate speech can be an instance of protected speech. Incitement to violence as a strict conception is outlawed for reasons other than the ones that justify hate speech laws. Therefore, political hate speech can be justifiably restricted.

6.2 The Broad Conception of Incitement

The objection, however, seems to embody a different conception of incitement. It cannot be easily assigned to a single author because its use is so widespread and casual in the literature. Bhikhu Parekh's casual phrasing is typical in this regard: 'Hate speech expresses, encourages, stirs up, or *incites* hatred against a group of individuals.'²⁶⁰ Parekh goes on to distance incitement in the new, broader sense from the strict one:

Although hate speech breathe the spirit of exclusion and violence, it does not necessarily or by definition result in violence or public disorder. (...) It is therefore a mistake, commonly made, to define hate speech as only that which is likely to lead to public disorder and to proscribe it because or only when it is likely to do so.²⁶¹

The prominent critical race theorist Mari Matsuda documented a similar shift from the strict to a broader conception in international human rights documents such as

²⁶⁰ Parekh (n 32) 40.

²⁶¹ *ibid.*

the United Nations Charter and the Universal Declaration of Human Rights, where the proponents of the strict conception (chief amongst them the US) were defeated.²⁶² The United Kingdom's first hate speech provision offers the best example.²⁶³ In its Race Relations Act of 1965 the UK enacted a criminal provision (Section 6) with the title of 'Incitement to Racial Hatred' for publishing, distributing or using publicly 'threatening, abusive or insulting language'. The provision seamlessly reflects the broad incitement conception because it omits any reliance on notions of proximity of violence.

As examples show the new version of the objection rejects both constitutive elements of the strict conception. The broad conception of incitement is broad for two reasons.

First, the focus is broadened from incitement to violence (i.e. the strict conception) to incitement to discrimination and hostility or hatred.²⁶⁴ Hate speech is taken to incite to discrimination and racial hostility in a systemic way. One may ask why discrimination or racial hostility should count as grave a danger as violence? Discrimination and racial hostility clearly go against equality, a cornerstone value of all liberal democracies. The prevalence of racial hostility and discrimination in contemporary societies may be thought to represent a form of non-physical violence.

Second, the objection does not assert that hate speech occasionally amounts to incitement under imminent circumstances, rather that hate speech *generally* incites. It is, so to speak, the essence of hateful speech to incite. Therefore, it follows that the danger is no longer tied to circumstances that bring the danger close to realisation. A concurring

²⁶² Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' in Matsuda (ed), *Words That Wound* (Westview Press 1993) 27-29.

²⁶³ The UK's hate speech legislations will be closely scrutinised in Chapter Six.

²⁶⁴ We only mention „racial” discrimination here but we understand the same goes for discrimination and hostility on other grounds such as religion (e.g. anti-Muslim), sexual orientation (e.g. homophobic) or non-nationals (e.g. xenophobic).

legal opinion in the well-known *Faurisson v France* decision of the UN Human Rights Council is revealing with regard to the broad conception.

However, there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that *do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement* against a given racial, religious or national group (...)²⁶⁵

The ‘pattern of incitement’ goes beyond the strict conception: the immediate circumstances of the speech are irrelevant. Instead the prevalence of racism replaces the circumstances. Therefore, the broad incitement changes the focus from the *proximity* to the *gravity* of danger. Under this new understanding societal racism makes up for the immediate circumstances of the speech.

This is certainly not a disagreement about language, hence no dictionary can do it justice. The two conceptions clearly pull in different directions. More importantly, in contrast with the strict, the broad conception adds up to a frontal objection to political hate speech, because it leads to the conclusion that all hateful high-key speech is objectionable. Therefore, the success of the objection to political hate speech will depend on whether the conception of broad incitement is tenable or not.

6.2.1 Arguments against the Broad Conception of Incitement

After presenting the case for the broad conception, we turn now to set three counter-arguments against it.

First, the broad conception of incitement may be taken to be an empirical claim. It states that the more hate speech is uttered in a society the more likely it is that hate

²⁶⁵ Concurring Opinion of Evatt, Kretzmer and Klein, in *Faurisson v France*, Communication No. 550/1993, 8 November 1996, CCPR/C/58/D/550/1993 (emphases added).

crimes and discrimination will occur. Hate speech is seen as *social conditioning* for violence.²⁶⁶ For many it seems very plausible that hate speech leads to such consequences. The tragedy of the Weimer Republic is the case in point. In the 1930s Germany hate speech was widespread and is thought to have played a key role in the Nazis' climb to power. However, it is not at all clear how the example of an unstable democracy should inform our general judgment on freedom of expression in *stable* liberal democracies. In the prohibitionist literature, it is often the case that causal consequences of hate speech are explained through linear deductions presented as empirical claims. Bhikhu Parekh's conjecture about how hate speech works is typical in this regard:

[B]ecause of its negative qualities, the target group is viewed as an undesirable presence and a legitimate object of hostility. It cannot be trusted to be a local member of a society and present a threat to its stability and well-being. Because society would be better off without it, it may legitimately exterminate or expel the target group. And if that should prove impossible, it may rightly discriminate against and tolerate it as an unavoidable evil confined to a shadowy existence on the margins of society. Thus, hate speech encourages and purports to justify discrimination.²⁶⁷

Hate speech does not just express hatred, it directly leads to negative social consequences. The causal argument which aims to establish that a certain amount of hate speech leads to harmful social outcomes such as more hate crimes or more discrimination does not sound implausible. But the fact of the matter is that we just do not have sufficient empirical evidence to buttress such an extensive claim, more importantly it is quite unlikely that such a causal claim could ever be proven. L.W. Sumner explains it lucidly:

[w]e are obviously dealing here with an alleged causal relationship between the incidence of hate speech within a society and the

²⁶⁶ This is what L.W. Sumner calls the indirect harm of hate speech because it mainly affects non-target parts of society, who will be more inclined to inflict harm on targeted people. L.W. Sumner, 'Incitement and the Regulation of Hate Speech in Canada' in Ivan Hare, James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 209.

²⁶⁷ Parekh (n 32) 41.

discriminatory treatment of that society's target minorities. This connection has a strong basis in common sense since hate speech often openly advocates an unequal social status. (...) But no serious scientific attempt has been made to factor out and measure the extent of this contribution, nor is it easy to see how this could be done.²⁶⁸

In addition, it is significant that the debate on hate speech is very rarely fought on the grounds of empirical evidence. Eric Heinze observes that often 'rhetorical consequentialism' flourishes in the place of empirical evidence in the literature. It consists in 'assuming without explaining the salutary effects of hate speech ban'.²⁶⁹ This trend is most typical in prohibitionist criticism towards the absolutist American free speech jurisprudence. Heinze points out that the rhetorical consequentialism is part and parcel of this criticism, one that he tellingly labels the 'pseudo realist fallacy'.²⁷⁰ Many prohibitionists criticise the American First Amendment protection from a realist vantage point for using empirical sounding evidence, while at the same time being content to *assume* without much argument the beneficial effects of hate speech bans in European countries.

Second, even if we had a better grasp of the empirics, it could not provide a conclusive argument for whether or not to ban hate speech. Let us assume for a moment, that racist hate speech has some causally negative impact on society in terms of increasing discrimination and racial hostility. What follows from this assumption? It is not clear that this alone would establish that it is right to ban hate speech because we do not think about rights only in utilitarian terms – i.e. whether they yield positive or negative consequences.²⁷¹ Indeed, few conceptions of rights follow such a strong consequentialist logic that would make permissibility solely depend on the societal

²⁶⁸ Sumner (n 266) 210.

²⁶⁹ Eric Heinze, 'Hate speech and the normative foundations of regulation' 9(4) (2013) *Int'l J of Law in Context* 590, 608.

²⁷⁰ *ibid* 607-609.

²⁷¹ The strongest proponent of this take on rights is Ronald Dworkin. He wrote about question of banning pornography in this spirit: '[I]t cannot be a reason for banning pornography that it contributes to an unequal economic or social structure, even if we think it does.' Ronald Dworkin, *Freedom's Law* (OUP 1996) 219.

consequences of speech. Yet, as Jeremy Waldron rightly points out, it would be odd to propose, with regard to hate speech, that consequences *never* matter.²⁷² Without doubt the consequences of hate speech should not be completely outside of our reasoning about rights and their limits. But this is still compatible with holding that no empirical study would conclusively answer questions about rights. This argument need not concern us further, as the lack of evidence for or against the ban should suffice to shift the focus away from its consequences.

Third, even if legal instruments adopt incitement in the broad sense it is not clear how this conception should work as a legal norm. To put it bluntly what speech should be categorised as inciting And what speech should be left unpunished? The challenge is to define a legal standard for incitement that is neither question-begging (i.e. too precise) nor objectionably vague (leading to a chilling effect or self-censorship). This argument primarily expresses a rule of law concern. Incitement is generally seen as a criminal offence, therefore what speech should fall into the prohibited range of speeches should be *a priori* clear for speakers subject to criminal penalties. Related to the rule of law concern is the important free speech principle against overbroad regulation leading to chilling effects on speech. In a nutshell, if speakers do not know what speech counts as incitement to racial hostility than they will err on the side of silence, which amounts to an objectionable restriction of their free-speech rights. Related to the point about self-censorship is a background assumption about hate speech laws, namely that these laws should allow for some intolerant speech lest they ban an impossible range of speech, from Shakespeare's stereotypical depiction of Shylock the Jewish moneylender in *The Merchant of Venice* to tasteless jokes.

²⁷² Waldron (n 6) 180-181.

The case of law of some international human rights bodies bear out these worries. The example in point is the UN Human Rights Council (UNHRC), which has mandate to interpret the ICCPR. The UNHRC has struggled to come up with any meaningful standard to interpret ‘incitement.’ Toby Mendel explains that the UNHRC ‘often appears to be establishing that they understand the speech in question as to be racist, not that it qualified as incitement’ and it thus it failed to ‘undertake a specific assessment of whether or not it [i.e. the impugned speech] incited the result’.²⁷³

Furthermore, it cannot be lightly excluded that there is a conceptual necessity for any incitement to necessarily fall back on a notion of danger, which would in turn defeat the original broadening of the incitement. A recent example from UK law bears this point out. The UK implemented the Council of Europe’s Convention on the Prevention of Terrorism (CECPT) through the Terrorism Act of 2006. The Act controversially introduced a speech ban on ‘incitement to terrorism.’ The criminal offence went as far as banning the ‘indirect encouragement of terrorism’ such as the ‘glorification of terrorism.’²⁷⁴ As Adrian Hunt explains, the point of the law was ‘to catch speech which would not be caught using the principles associated with incitement.’²⁷⁵ These principles put incitement in UK law close to the strict and danger-proximity regarding understanding of the concept. Yet according to Hunt the problem with this broadening is that it is not clear what indirect encouragement should rely on doctrinally so as to be different from strict incitement. The problem became obvious when the Act remained conspicuously silent on the doctrinal question. Interestingly this legislative silence stood in contrast with the CE Convention itself, which explicitly stated that encouragement to

²⁷³ Toby Mendel, ‘Does International Law Provide for Consistent Rules on Hate Speech?’ in Michael Herz, Peter Molnar (eds), *The Content and Context of Hate Speech* (CUP 2012) 428.

²⁷⁴ UK Terrorism Act of 2006 ss1 (3) (a), (b) and 2(4) (a), (b).

²⁷⁵ Adrian Hunt, ‘Criminal prohibitions on direct and indirect encouragement of terrorism’ (2007) *Criminal Law Review* 441, 448.

terrorism (Article 5) should be understood to ‘*cause a danger* that one or more such offences may be committed’. This way of understanding incitement makes use of a notion of actual danger, which was reinforced by the CE’s own Explanatory Report on encouragement.

The result of such an act [*i.e. incitement*] must be to cause a danger that such an offence might be committed. When considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account in the sense established by the case-law of the European Court of Human Rights. The *significance and the credible nature of the danger* should be considered when applying this provision in accordance with the requirements of domestic law.²⁷⁶

It is revealing that the authors of the Convention, unlike the British legislators, took care to doctrinally build the proximity of the danger into the definition of encouragement in order to make it workable. This smuggling back of the danger-proximity consideration betrays the difficulty of adopting a truly broad conception of incitement.

To sum up this objection: two different understandings of incitement are presented here. The broad conception is rejected because it turns out to be too vague and unworkable for law, while the strict conception does not run into similar difficulties. The strict conception of incitement thus represents a legitimate restriction on free speech, including restriction on the right to political speech. Yet this ground of restriction does not put into question high-key political speeches in any way.

A caveat should be added to this conclusion. The broad conception of incitement to racial hostility and discrimination as applied to high-key speech amounts to a separate point against political hate speech. Politicians regularly speak ‘with megaphones:’ they

²⁷⁶ Council of Europe, Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism - Council of Europe Treaty Series - No. 196 (Warsaw 16 May 2005) § 100 (emphases added).

reach large audiences and claim authority for their message. Therefore, high-key speakers may incite more powerfully racial hostility and discrimination. The discussion of this point will be postponed till the end of the next objection on vilification due to some overlap in the arguments.

7. The Vilification Objection

The vilification objection is yet again one that can be raised against both societal and political hate speech. Our judgement will partly depend on how tightly the objection maps on political hate speech. It is important because vilification seems to come closest to the harm that societal hate speech may inflict.

On an intuitive level, vilification conveys a sense of blasting rejection that goes beyond usual criticism and it bears on some fundamental personal feature. Jeremy Waldron recently place vilification of vulnerable groups at the centre of his work on the subject.²⁷⁷ In a nutshell, hate speech directly attacks some fundamental or personal characteristics of groups. Waldron thinks that vilifying hate speech undermines the target's status as good standing citizens in society. Hate speech enacts this harm through viciously vituperative attacks on targets. The harm thus resides in lowering the esteem in which members of the group are generally held.²⁷⁸

However, it remains a fraught task to outline precisely the nature of the harm. Is it to do with the honour, the reputation or 'civic dignity' of people?²⁷⁹ We will settle at this point on the common view in the literature: vilification affronts dignity. It suffices to make clear that the unusual harshness of vilification goes beyond mere offense that one ought to shrug off in a liberal society. The point about vilification is not just the expression of disagreement about the inherent worth of, say, gay people. Vilification

²⁷⁷ Waldron uses several labels for his arguments casually. Vilification though captures best his argument.

²⁷⁸ See Waldron (n 6) Chapter 5 (105–143). Waldron's prohibitionist argument is intriguing and more complex than this paraphrasing allows. For instance, he relies on a key distinction between criminal and civil libel (42–43, 53); he builds up a theoretical background about 'political aesthetics' or the desirable outlook of a well-ordered society (73–75) or criticizes a binary understanding of political legitimacy (184–192). For the purposes of this thesis such issues can be omitted and the focus solely be on the core argument.

²⁷⁹ *ibid* 53.

rather aims at verbal annihilation of vulnerable groups. One cannot just disagree with it, like one could do with a pernicious policy proposition, say, of cutting social benefits for low-income families. Vilification rather lowers the esteem of the members belonging to that group. It affects the way that the community is seeing and ought to be treating them. As a further consequence disadvantaged groups may internalize the negative effects. Surely one may offer the rejoinder that there are other groups who are regularly held in lower esteem by society, like corrupt politicians or bankers, and no one really sees it as a problem. Yet persistent and comparative disadvantages only fall on the vulnerable groups like ethnic minorities and not bankers, which make their case for harm more convincing.

The harm in vilification may lay down the groundwork for banning societal hate speech. Recall that societal hate speech may range from racist graffiti on walls in the suburbs to artistic speech. For instance, a misguided artist's exhibition that mocks ethnic minorities may result in objectionable societal hate speech.²⁸⁰ At first sight, it is not clear why the same harm would *not* follow for political hate speech and compel us to ban it with equal force. Consider the example of a xenophobic party holding a rally in a small town with a sizeable immigrant community where the speaker warns about the wave of recent shopliftings committed by Muslims who, according to the speaker, lead a 'different way of life than us.' How is it that such political hate speech should weigh differently in the normative scale? To answer that question, we have to dig deeper into the mechanisms of vilification.

²⁸⁰ A Swedish artist was sentenced recently on hate speech grounds for his artworks exhibited in the city of Malmö 'Swedish Artist Sentenced for Racist Art' (*The Guardian*, 22/8/2014) <http://www.theguardian.com/world/2014/aug/22/swedish-artist-sentenced-racist-art-dan-park> accessed 10/11/2016.

7.1 Form-focused Vilification

Vilification may cause its harm through its harshness: that is through the form of the speech. According to this version racial epithets or otherwise prejudiced name-calling pointed at minorities are taken to be objectionable and thus the target of legal regulation. Calling, e.g. black people ‘niggers’ or animals (‘monkeys’), gays ‘faggots’ sets the vilification mechanism in motion. Waldron’s argument captures this by stressing the ‘viciously vituperative’ nature of words.²⁸¹ He connects form vilification with hate speech laws and maintains that these should primarily focus on restricting ‘viciously vituperative’ speech.²⁸² Waldron’s proposition thus tightly maps on the form version of vilification. He adds that the non-vituperative ways of holding the same opinion should be left unrestricted by law.²⁸³ Underlining that argument is the thought that form restriction achieves a minimal intrusion, which comes down as the least restrictive means. However, the form-focused restriction argument, as attractive as it may be, must fail to the extent that it is applied to political hate speech.

The first point to notice is the bifurcation of speech into content and form. It is not at all clear why the form’s normative importance would be different to the content. There is a broad judicial support for the opposite proposition, namely that form is just as inherent to speech as its substance. A recent British case put this proposition strongly in a recent free speech case:

[a] right to convey information to the public carries with it *a right to choose the language* in which it is expressed in order to convey the information most effectively.²⁸⁴

²⁸¹ See Waldron on vituperation (n 225) 53, 116-118, 182-183, 186-192.

²⁸² *ibid* 116.

²⁸³ *ibid* 190.

²⁸⁴ *O (A Child) v Rhodes and another* [2015] UKSC 32, [2015] 2 WLR 1373 §78.

The ECtHR has echoed this proposition in many cases, for instance in *Uj v Hungary*: ‘For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression.’²⁸⁵ In a recent decision about offensive online comments, the Court reconfirmed this position:

[f]or the Court, style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression.²⁸⁶

Furthermore, one may contend that the form is especially important for convincing the electorate in politics. If political speech is valued for the sake of legitimacy and hence its importance consists in providing a ‘normatively privileged political vehicle’²⁸⁷ for convincing others in order to bring about change in politics, then the form should be just as important as the substance. One may retort that this way populists gain licence to deploy their deceitful rhetoric. And it may well be so. However, it would be a misunderstanding to suppose that democracy necessarily produces good speech in the first place. Populists’ speech, regrettably, thrives on rhetoric instead of on noble ideas but it seems to be business as usual in contemporary democracies. Therefore, the bifurcation of speech into less protected form and more protected substance should be resisted.

Second, form vilification seems to attack a straw man. It is based on overvaluing the importance of epithets. The assumption is that racial epithets are somehow more damaging than non-vituperative yet racist propositions. In our view epithets might play such a primordial role in direct personal attacks such as racial harassment, but not in

²⁸⁵ *Uj v Hungary* App. 23954/10 (ECtHR, 17 July 2011) para 20. The case was about an excessive criticism written by a journalist against a state-owned wine producers’ product. The applicant wrote that it tastes ‘like pure shit’. However, we should note that the ECtHR does not extend protection to all vulgar or otherwise objectionable style of expression that it regards as ‘wanton denigration’ or ‘gratuitously offensive’. We will later critically examine the court’s jurisprudence on hate speech.

²⁸⁶ *Magyar Tartalomsgazdálkodók Egyesülete and Index.Hu Zrt v. Hungary* App no. 22947/13 (Judgment of ECtHR, 2 Feb 2016) §76.

²⁸⁷ Miklosi (n 132).

general. Critical theorists like Charles R. Lawrence III are quick to point out ‘the *immediacy* of the injurious impact of racial insults’ and ‘the *visceral emotional* responses’, ‘the state of semi-shock’ upon hearing hate speech.²⁸⁸ Yet these reactions are more plausible to occur as a result of immediate, face-to-face, personal encounters with hate speech and not as a result of indirect encounters.

The case in point to expose the mistakes of the form vilification argument is that of Holocaust denial. If form vilification is taken seriously then Holocaust denial should not be seen as ‘vicious vituperation’. It is highly implausible to think Holocaust denial to be anything other than outright anti-Semitism, yet it does not rely on any objectionable epithets or form. It rather amounts to seemingly argumentative and non-vituperative racist speech in substance.

Finally, an on-the-ground observation about political hate speech should be added against the relevance of form-based vilification as applied to political hate speech. It is a widely recognised fact about contemporary politics that openly racist discourse in most liberal democracies is part of the past, and few politicians would use such language nowadays. Antoine Buyse flags up this new challenge for hate speech regulation:

[i]n more recent times it would be more difficult to find explicit racism of this kind in the programmes of political parties. Politicians and others have become better versed in the use of terms that may negatively describe foreigners or people with a different religion without being blatantly racist. Openly anti-democratic party programmes are also rarer than during the Cold War. Moreover, unspoken consensus among European judicial decision-makers about the limits of permissible or forbidden expression might therefore be even more difficult to arrive at.²⁸⁹

²⁸⁸ The quotes are selected from Charles R. Lawrence III, ‘If He Hollers Let Him Go: Regulating Racist Speech in Campus’ (1990) 3 *Duke Law Review* 431, 452-456.

²⁸⁹ Antoine Buyse, ‘Contested Contours - The limits of freedom of expression from an abuse of rights perspective – Articles 10 and 17 ECHR’ in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2015) 194.

Perhaps the best example of this phenomenon is the recent the controversy created by Thilo Sarrazin's book in Germany that followed the publishing of his book 'Germany Abolishes Itself'.²⁹⁰ Sarrazin, a high-ranking SPD figure, published a seemingly reasoned book about how Turkish and other Muslim minorities in Germany are dragging the country down. Sarrazin elaborated on the inheritability of intelligence and seemingly backed up his findings with statistical evidence to prove the point that many saw as the genetic indictment of Muslims for being lazy, antisocial and impossible to integrate.

The Sarrazin controversy makes it clear that the form of speech might have changed but the racist content remains the same.²⁹¹ In the US this phenomenon is called the dog-whistle politics. The American academic, Ian Haney Lopez, analyses the Republican Party's use of such communication techniques:

[i]ts racial entreaties operate like a dog whistle – metaphor that pushes us to recognize that modern *racial pandering* always operates on two levels: inaudible and easily denied in one range, yet stimulating string reactions in another.²⁹²

Haney Lopez offers a wealth of examples from American politics where politicians resorted to 'racial pandering' with impeccable deniability against racism – coupled with the fruitful potential to blast 'political correctness'. A famous example is one about Ronald Reagan. He 'liked to tell stories about Cadillac-driving welfare queens'²⁹³ that was an unmistakably and damaging reference to poor African-Americans who had a significantly higher proportion receiving social benefits. Haney Lopez

²⁹⁰ See: 'Why Sarrazin's Integration Demagoguery Has Many Followers' *Spiegel Online* (6 September 2010) <<http://www.spiegel.de/international/germany/the-man-who-divided-germany-why-sarrazin-s-integration-demagoguery-has-many-followers-a-715876.html>> accessed 20/01/2016.

²⁹¹ Notice that a similar shift happened in the US. Importantly though it could not be due to statutory constraints (such as hate speech laws) because the First Amendment protects straightforwardly racist hate speech, but to significant change in social norms towards racism. The American example may teaches an important lesson about how speakers avoid falling foul of stringent social constraints, which can be even more powerful than legal ones, and yet manage to pass through their messages.

²⁹² Ian Haney Lopez, *Dog Whistle Politics: How Coded Racial Appeal Have Reinvented Racism and Wrecked the Middle Class* (Amazon Kindle Edition, 2015) line 254 (emphasis added).

²⁹³ *ibid.*

contends that similar rhetoric is still part and parcel of contemporary politics. For instance, a prominent politician recently called Barack Obama the ‘food-stamp President’, which conveyed the racist message without using any tainted word that Obama is only the president for blacks.²⁹⁴ Similar examples are easy to find everywhere. In the 2012 French presidential election campaign, then-president Nicolas Sarkozy introduced the highly mediatised and not too subtle measure to label halal food visibly with a ‘halal sticker’ presumably in order to increase the available information to French consumers.²⁹⁵ The policy was a scantily veiled anti-Muslim pandering.

These counterarguments suffice to debunk the form-based vilification objection. Nevertheless, this is not the end of the argument. A strong concern about vilification remains. As dog-whistle politics shows, racist speech does not cease to exist over time. It rather has mutated by toning down crude epithets and coding the message. Surely this sleight of hand should blind no one. If anything, this should intensify the fight against coded racist content. The new challenge lies in changing focus from style to content. Therefore, the question to ask is why not weed out all vilifying content?

7.2 Content-focused Vilification

Vilification may thus occur on account of the message or content of the speech as opposed to the sheer crudeness of the words. The content version of vilification, therefore, would be sensitive to messages that are coded. Two recent examples from the context of the European refugee crisis may provide helpful illustrations. In 2015, the Polish president declared that his country should not accept any refugees from the

²⁹⁴ ‘Newt and the food-stamp president’ (*The Economist* 8/1/2012) <http://www.economist.com/blogs/democracyinamerica/2012/01/newt-gingrich> accessed 10/11/2015.

²⁹⁵ Kim Willsher, ‘France’s Muslims hit back at Nicolas Sarkozy’s policy on halal meat’ (*The Guardian* 10/3/2012) <http://www.theguardian.com/world/2012/mar/10/nicolas-sarkozy-halal-meat-france-election> accessed 10/11/2015.

Middle East because they bring in ‘possible epidemics’.²⁹⁶ At the same time, the then British Prime Minister, David Cameron, vilified refugees when stating that ‘you have got a *swarm* of people coming across the Mediterranean’²⁹⁷ when explaining his refusal to accommodate more refugees. Given that ‘swarm’ generally describes flying insects, Cameron may have resorted to pandering to xenophobic feelings.

These statements are certainly offensive, and they may be even more dangerous than the ostentatiously aggressive name-calling. Both the coded speech of dog-whistle politics and ‘the apparently more rational forms of racist speeches’ that parade as arguments (e.g. Holocaust denial) are sadly elements of the public discourse of all liberal democracies.²⁹⁸ The contrast between crude, easy to recognize, racist name-calling and the apparently more convincing coded type reveals much about the latter’s danger. However, before rushing into prohibiting all hateful content it is necessary to zoom in on hateful high-key political speech. We will find a pragmatic and a substantive counter argument against the content-focused vilification objection.

First, the social reality of political hate speech offers an important lesson. It seems that much political hate speech contains an amalgam of arguments that inextricably mix up permissible political views such as the chastising of political elites or governments and hate speech. The pragmatic concern here is that the amalgamated opinions of high-key speakers gives voice to permissible points, tied to a political hateful

²⁹⁶ ‘Poland’s president warns of refugees bringing epidemics’ (*Al-Jazeera* 18/10/2015) <<http://www.aljazeera.com/news/2015/10/poland-president-refugees-epidemics-151018162358594.html>> accessed 8/11/2015.

²⁹⁷ E.g. ‘David Cameron description of migrant ‘swarm’ condemned as ‘irresponsible’ and ‘extremely inflammatory’ by human rights group’ (*The Independent* 30/7/2015) <<http://www.independent.co.uk/news/world/europe/calais-crisis-live-david-cameron-says-swarm-of-illegal-migrants-will-not-be-offered-safe-haven-10426083.html>> accessed 8/11/2016.

²⁹⁸ Stefan Sottiaux, ‘Bad Tendencies’ in the ECtHR’s ‘Hate Speech’ Jurisprudence’ (2011) 7 *European Constitutional Law Review* 40, 55.

message, which would also become restricted by hate speech laws. Andrew Altman makes the point lucidly:

[r]evolutionary denunciations of government are frequently based on the belief that the government has too cozy a relation with some racial or religious group or is even secretly controlled by the group. American neo-Nazis who call for revolution will say that Jews control the U.S. government. The denunciation of the government and the denunciation of Jews go hand-in-hand, and there seems to be no way of protecting neo-Nazi speech insofar as it denounces the government, but prohibiting it insofar as the speech denounces Jews.²⁹⁹

The exercise of separation of the permissible from objectionable would be delicate if not impossible, especially with regard the coded messages. Let us recall the core political hate speech example of *Féret v Belgium* from the ECtHR.³⁰⁰ The prosecution of the far-right political speaker was launched on account of his party's political program and his campaign speeches. They were addressed to the government that was, according to the impugned tract, 'prisoner of the far left and liberals' and insisted on changing the politics of 'Islamisation' and the 'pseudo-integration of immigrants' along with deprecatative references to the '*conscious clan*' responsible for terrorist attacks.³⁰¹

Importantly it is thoroughly *political* speech that could be the collateral damage of hate speech ban, as was arguably the case in *Féret v Belgium*. Such outcomes are highly problematic in light of political speech's crucial normative importance in democracies.

As important as the amalgam argument is, it only compels us to err on the side of free speech if an amalgamated speech cannot be disentangled and separated. Perhaps the cases of the British PM and the Polish president were such instances. Yet it would be an exaggeration to suggest that every instance of political hate speech run into the problem

²⁹⁹ Andrew Altman, 'Freedom of Expression and Human Rights Law: The Case of Holocaust Denial' in Ishani Maitra and Mary Kate McGowan (eds) *Speech and Harm: Controversies Over Free Speech* (OUP 2012) 37.

³⁰⁰ *Féret v Belgium* App no 15615/07 (ECHR, 16 July 2009).

³⁰¹ *Ibid* §§ 9, 10, 12.

of amalgamation. Another well-known European hate speech case may just expose this. *Le Pen v France*³⁰² was a case at the ECtHR that concerned the then-president of the extreme right-wing *Front National* who held in a newspaper that ‘when there will be twenty-five and not five million Muslims in France, they will be in charge’.³⁰³ Le Pen stated that Muslims are a source of danger and that there would be something unnatural or dangerous in the increase of Muslim population. Notice that he did not have to resort to racial epithets at all to communicate a deeply xenophobic or racist opinion. Even though Le Pen’s words come across as vilifying Muslims, it stands out that his speech is a genuine affirmation of his political position in a major public debate in Europe. Le Pen’s speech was genuine political speech because it bore on one of the most important political subjects of the time: immigration, multiculturalism and integration of religious minorities. Moreover, his speech was a high-key political speech that invited reaction and debate, as opposed to, say, anonymous anti-Muslim graffiti on the walls of a school in a Parisian *banlieu*.

The recent debate about gay marriage that unfolded in many liberal democracies bore similarities to immigration. Many hateful opinions were uttered from religious groups who opposed for one reason or another the extension of marriage to gays and lesbians. Religious or deeply traditionalist critics often assert that gay people’s acts are sinful and that they should not be equal members of the community. This assertion of a deeply prejudiced yet genuine opinion on a public debate was lost on British judges in the later much-criticised case of *Hammond v DPP*.³⁰⁴ Mr Hammond was an Evangelical Christian who was in the business of regularly protesting against homosexuality with

³⁰² *Le Pen v France* App no 18788/09 (ECtHR, 20 April 2010).

³⁰³ *ibid*.

³⁰⁴ *Hammond v DPP* [2004] EWHC 69 (Admin). The case was critically reviewed by James Weinstein, ‘Extreme Speech, Public Order, and Democracy: Lessons from *the Masses*’ in: Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (OUP 2009) 30-32.

some large signs that read: ‘Stop Immorality’, ‘Stop Homosexuality’ and ‘Stop Lesbianism’. In 2004, he was charged under section 5 of the Public Order Act.³⁰⁵ The court found him guilty for threatening, abusive or insulting within the hearing or sight of a person even though it would be hard to imagine how else Hammond could have given voice to his genuine opinion on the subject.

The speeches above on immigration and gay marriage are hard to characterise other than ones that embody the hateful opinions that the objection demands to weed out. Yet these speeches amount to vilification of gays precisely on account of the contribution they make to important public debates. As long as political hate speech is connected to a real, genuine public debate, its prohibition on the ground of vilification remains unacceptable as it would amount to silencing a genuine opinion in a debate.

7.3 Pure Vilification

However, it would be too soon to leave the objection there. We only concluded that not all political hate speech should be prohibited. It remains an open question what ought to be done about vilifications that are unconnected in any plausible sense to public debate or are otherwise not mixed up with permissible arguments. A good example of such *pure vilification* may be the baseless lie that the Holocaust never happened. Holocaust denial vilifies Jews through a seemingly factual statement that parades in the cloak of historical research and aims at casting negative light on Jewish people’s character. The pseudo-historical research feature of Holocaust denial can be set aside easily. Holocaust denial is just one of the many Anti-Semitic conspiracy theories like the Protocols of the Elders of Zion or the centuries-old ‘blood libel’ against Jews. The question for a political speech account is at its strongest if such despicable speech takes the form of political hate

³⁰⁵ In Chapter Six we shall return to the British case law and to some complications with *Hammond* that technically was not prosecuted the ground of sexual orientation-based hate speech but rather the neutral public speech offences provisions.

speech, for instance a politician denies the Holocaust.³⁰⁶ Should such pure vilifying speech be prohibited?³⁰⁷ On the one hand, it seems to us that the normative political speech account advocated here does not extend its protection to purely vilifying political hate speech because it is not connected in any loose way to any political issue or debate like immigration, race relations or religion just to name a few. Holocaust-deniers can hardly make any claim for engaging with a public issue, hence despite its political circumstances (i.e. pronounced by a politician), its non-political content disqualifies it from protection. On the other hand, a couple of prudential counter-arguments could weaken the case for prohibition.

First, a point about deceitful and false speech should be stressed. We take that many if not all pure vilification may rely on clear falsehoods that can be rebutted. Deception is generally thought objectionable because it deprives the listeners from the possibility of judging statements. Listeners will have to form their opinion on erroneous bases. Yet, it is not clear that this general picture about deception applies across the board. Concerning the Holocaust, the prospects of success for deception look rather slim in Western Europe. In virtually every Western liberal democracy, major public campaigns changed the public awareness for the better. However, this certainly does not apply to all false political speeches. Some recurring vilifications assert a link between criminality and ethnicity (“Gypsies are criminals”) with the clout of factual certainty. These may not be analogous to Holocaust-denial because such deceits’ chances to succeed are higher in a society where prejudice is deeply entrenched towards, for

³⁰⁶ This kind of speech is anything but unheard off. French European Parliament MP Jean-Marie Le Pen was found guilty of such speech. Henry Samuel, ‘Le Pen found guilty of Holocaust denial’ (*The Telegraph* 8/2/2008) (<http://www.telegraph.co.uk/news/worldnews/1578053/Le-Pen-found-guilty-of-Holocaust-denial.html>) accessed 10 January 2016.

³⁰⁷ We would leave open the possibility that a denialist speech could be mixed up with an on-going political debate, say, in the context of arguments about reparations for the horrendous crimes of the war. Such a scenario may alter the outcome because the political hate speech then would be attached to an ongoing public debate.

instance, the Roma people. Therefore, a case by case approach in assessing the harm in pure vilification should be prioritised.

Second, pure vilification targets many people. From that Jonathan D. Varat infers that the chances of rebuttal must also be higher given the large number of targeted people.³⁰⁸ For instance, we can imagine that a group that is oft-attacked in public organises political associations, platforms or even political parties to rebut effectively the likes of Holocaust denial.³⁰⁹ However, there might be an exaggerated optimism in this suggestion. For one, it would be odd to disregard the typical inequality between the vilifying speaker and the attacked victims and therefore have different capacity to convince. Such reasoning may serve as counter-argument against banning pure vilification only if the conditions for effective counter-speech securely obtain.

Be that as it may, the validity of these counter-arguments will heavily depend on local circumstances. For instance, the level of prejudice towards vulnerable groups in each society may tell us something about these circumstances and could potentially damage the validity of the counter-arguments. Let us consider a piece of relevant evidence in this regard. The European Commission regularly publishes statistics about discriminatory attitudes from all member states.³¹⁰ One persistent pattern of difference between older Western and newer Eastern European member states clearly emerges. In broad strokes one can infer from the data that population-wide prejudice against Roma, blacks or non-Christian religious minorities are significantly higher in new member states

³⁰⁸ Jonathan D. Varat, 'Deception and First Amendment' 53 (2005-6) UCLA L. Rev. 1107, 1117.

³⁰⁹ We have in mind organizations like the Anti-Defamation League or the Southern Poverty Center which monitor and raises the flag at politicians' vilifications of Jews and African or Hispanic Americans.

³¹⁰ European Commission, *Special Eurobarometer 437 "Discrimination in the EU in 2015* (Directorate General for Justice and Consumers, October 2015).

than in old Western European ones.³¹¹ Such local findings may weigh in favour of banning pure vilification in these countries.

Let us take stock of the objection. First, the objection was taken to focus on restricting objectionable forms of speech like racial epithets. However, the objection relied on the incorrect assumption that the form of speech is somehow less important than its substance. It is patently false in general but especially in politics. Moreover, hateful politics in our time have in general turned away from viciously vituperative speeches to seemingly reasoned speech epitomised by the dog-whistle politics. The objection then was taken to focus on the vilifying content. However, many political hate speeches are inextricably intertwined with permissible speech; and more importantly political hate speech is a genuine affirmation of the speaker's opinion on major public debates the censoring of which would be objectionable based on the political speech account endorsed here. Yet this does not apply to the residual category of pure vilification.

8. The Harm in Public Vilification and Incitement

It is time to return to an objection-argument about incitement to hostility. Its discussion was delayed because the argument overlapped with vilification. The idea is that hateful high-key speech might be especially dangerous because it powerfully incites racial hostility and other prejudices in society. This might be thought the case as hateful high-key speeches typically reach large audiences in the community. Let us imagine a politician railing publicly against mass immigration or letting same-sex couples marry. Moreover,

³¹¹ *ibid* 19, 21, 25, 33. We used parts of the Report for the general inference that bear on how uncomfortable would one feel with someone from different race or ethnicity (e.g. Roma) to be elected to higher office (19); to be a co-worker (21); or one's son/daughter's partner (25). The same questions were asked about people with different religion (33). Of course, national divergences exist even among the new member states, but the pattern is clear: Czech Republic, Bulgaria, Slovakia, Romania and Hungary score at the bottom while UK, France, Germany at the top in terms of tolerance.

dedicated public speakers often enjoy a certain authority that might be thought to make their speech even more dangerous than that of occasional non-professional public speakers. Just think about elected politicians with their megaphones spreading their messages. It suffices to conjure up the example of Jean Marie Le Pen, the founder of France's far-right *Front National*, who built his political brand on speeches like: 'when there will be 25 million Muslims in this country, they will be in charge [and not us]'.³¹² In sync with this objection, it can be often read in the literature that politicians have heightened responsibility in light of their public status and the large audience and their words reach. The ECtHR gave voice to this view in the seminal hate speech case of *Féret v Belgium*:

[t]he Court reiterates that it is of crucial importance that politicians in their public discourse avoid spreading comments that might feed intolerance. The Court believes that politicians *should pay particular attention* to defending the principles of democracy, as their ultimate goal is the conquest of that very same power.³¹³

The objection-argument gives voice to a broad incitement claim. Recall that the case for strict incitement has already been found largely unproblematic. It is not necessary to repeat the general arguments against broad incitement here, i.e. the lack of empirical evidence or the concept's unworkability for law. Instead, the objection-argument essentially goes as follows: in light of high-key speakers' access to large audiences coupled with their authoritative public status, hateful messages might influence *a fortiori* the community. Consequently, political hate speech may be even more of an effective vehicle for either inciting racial hostility or vilifying vulnerable minorities. We shall refer to this argument as the public speaker objection.

³¹² Le Pen was found guilty under France's hate speech laws for saying cited sentence that appeared in a French newspaper. See: *Le Pen v France* App no 18788/09 (admissibility decision, ECHR, 20 April 2010) (only available in French). The original French version is as follows: '*quand il y aura 25 millions de musulmans; ce sont eux qui commanderont*' (translation by T.Sz.).

³¹³ *Féret* (n 300) § 76 (emphasis added) (original in French, translated by T. Sz.).

8.1 The Rejection Strategy

Refuting the public speaker objection is difficult because it necessarily relies on many empirical variables, few of which are available. An empirically sensitive answer should distinguish the impact of societal and political hate speech; furthermore, it would clear all other societal variables that influence the level of prejudice against vulnerable groups in a given society. Alas the social science evidence is much too scarce to attempt to formulate an empirical answer.³¹⁴ Instead a cautious strategic rebuttal will be offered to the public speaker objection.

The objection can be taken to embody a strategic proposition in the fight against intolerance, prejudice and racism. Democracy would be better off if law were to reject public hate speakers and stop them from poisoning the wells of society. Therefore, hate speech bans should *a fortiori* apply to high-key speakers.

For those adhering to this strategy, a deep paradox remains to be faced when observing the last decades in Western European politics. On the one hand, hate speech bans became the universal norm in Western European democracies. Without exception all Western European countries define themselves in opposition to the American absolutist position when it comes to hate speech. There are differences in the legal form and the enforcement of these norms, but the prohibition norm is entrenched. On the other hand, the political landscape of these countries sits very uneasily with that legal reality, once fringe anti-immigration, racist and xenophobic political parties emerged from obscurity and established themselves as important political forces in recent decades. This happened against the background of a universally accepted prohibition norm that

³¹⁴ See the discussion of the paucity of empirical evidence in this chapter at section 6.2.1.

targeted prejudices that the once fringe parties adhered to: xenophobia, nativism and racism.³¹⁵ This seems to be a paradox that is difficult to explain away.

An analogy from political science with the isolation or *cordon sanitaire* (sanitation cordon) around extremist parties could be helpful here. The universally accepted anti-hate speech laws fit into the strategy of rejection that characterised many mainstream political parties' attitudes toward insurgent extremists. It consisted in denying these actors legitimacy by using legal restrictions and by denying platforms to the extremist parties. The political scientist William M. Downs' term is revealing: moderate parties treated these parties as 'pariah parties' that are 'beyond the pale of political acceptability.'³¹⁶ He sums up vividly what we could call the rejection strategy. The pariah party is 'ostracized, demonized, and rejected as unacceptable by the preponderance of other system actors.'³¹⁷ The analogy with hate speech laws is easy to see: these laws similarly aim at eradicating hateful speech by legally punishing racist, xenophobic, anti-Muslim and so forth ideas. The *cordon sanitaire* strategy can include reliance on hate speech bans in pursuing its goals of rejecting such pariahs.

Two particularly instructive political events from the 2000s demonstrate the rejection strategy at work. In 1999, the Austrian elections led to the usual stalemate between the right and left-wing centrist parties who tended to govern in some version of grand coalition. But the unusual denouement ensued when the notorious Jörg Haider's Freedom Party of Austria (*Freiheitliche Partei Österreichs*, FPÖ) entered into government with the right-of-centre Austrian People's Party. The moderate parties from across the European Union, both from the left and the right, rejected the unacceptable pact with

³¹⁵ Naturally many questions remain to be clarified. How did these political parties evade the ban? How much role did a lenient enforcement of the ban play? While it is important to study these variations among different countries, the outcome of no tangible impact on extremist politics remains beyond doubt.

³¹⁶ William M. Downs, *Political Extremism in Democracies – Combating Intolerance* (Palgrave Macmillan 2012) 14.

³¹⁷ *ibid.*

the pariah and put pressure on the Austrian chancellor. A diplomatic ‘*cordon sanitaire*’ was erected around the pariah party for the sake of political containment.

The infamous French presidential election’s second round in 2002 serves as another illustrative example. To general surprise the extreme right wing Front National’s Jean Marie Le Pen, made it into the second round of the presidential election, along with the incumbent Jacques Chirac, over the lacklustre Socialist prime minister. Le Pen had such an unprecedented electoral success despite having been subject of various legal sanctions for his hateful public speeches throughout his career. No political event better epitomised the strategy of rejection than Chirac’s denial to take part in any televised debate with the pariah. Faced with a unified front Le Pen was easily defeated by the incumbent president.

In his recent monograph, William M. Downs set up a helpful conceptual framework to analyse the potential responses to pariah parties, which he characterised by ‘a strategic choice between keeping clean hands and constructive engagement.’³¹⁸ Downs’s analysis is especially helpful as it focuses on political parties’ extremism, rather than wider societal racism, which is more relevant to dealing with political hate speakers. Surveying several recent European examples of the clean hands or the rejection strategy, Downs’s findings are highly critical:

[w]hile it is clear that no single strategy holds the key to combating party-based extremism in democracies, the evidence from select countries suggests that strategies of isolation, ostracism, and demonization *prove surprisingly ineffective at rolling back or even containing threats to the democratic order from party-based extremism.*³¹⁹

The best example come from the attempted containment of the Flemish separatist and xenophobic party the *Vlaams Blok*. From its first local electoral success the

³¹⁸ *ibid* 30 (internal quotation marks omitted).

³¹⁹ *ibid* 20.

Blok was subject of the ‘democratic world’s most explicit and enduring *cordon sanitaire*³²⁰ by all moderate Flemish parties. Interestingly, the *Blok* was prosecuted on grounds of a hate speech banning law applied to the party for its ‘permanent incitement to segregation and racism’.³²¹ The Belgian Supreme Court went on and effectively disbanded the *Blok*. This episode would be interesting enough solely for its illustration of the close link between the wider rejection strategy and hate speech bans. But the example is more telling. A few years after the disbanding of the party, a new slightly changed one was reborn under the name of *Vlaams Belang* (‘Flemish Interest’). To prove the rejectionist strategy wrong, the old-new extremist party went on to achieve unprecedented electoral successes.

Over a longer span of time, these two examples may also reinforce a critical assessment about the strategy of rejection. It is telling that approximately a decade and a half later in both Austria and France, the once pariah parties considerably increased their popularity. In Austria, the FPÖ’s presidential candidate lost by a few thousand votes the first presidential election in May 2016.³²² Whereas in France the *Front National* regularly polls as the most popular political party and few doubts that its candidate will make it into the second round of presidential elections. Therefore, it is not an exaggeration that the denial strategy including anti-hate speech laws bore very limited benefits against racist pariah parties.

Of course, many variables influence the outcome of such complex events as the popularity of a political party. But it is hard to deny that the rejection strategy reinforces the self-proclaimed martyr image of these political parties. As Downs explains:

³²⁰ *ibid* 85.

³²¹ *ibid* 94.

³²² The repeated vote in December 2016 was somewhat more decisively won by the more establishment candidate, Alexander Van der Bellen (Green Party), against the FPÖ’s Norbert Hofer on the 4th December 2016.

[M]any quarantined parties *effectively parlay their isolation into martyr's mantra*. They paint the political establishment as detached from the real concerns of everyday people, interested more in their own individual and organizational self-preservation than in being responsive to the electorate's policy preferences. It is hypocrisy, so the mantra goes, to deny power to democratically elected parties in the name of democracy.³²³

It would stretch past the limits of this thesis to mount a frontal case against the rejectionist strategy *per se*. Yet the noted failures may offer a valuable lesson for the narrower question about hate speech bans and the right strategy to pursue against public hate speakers.

8.2 The Alternative Strategy: Engaging the Extremists

If one wants to take the duty to deflate racial hostility and vilification of vulnerable groups seriously a new approach may be more appropriate than the rejectionist strategy. The alternative is the strategy of engagement.

It calls for engaging with extremist political speakers and parties as opposed to treating them as pariahs. Engagement offers the potential to do away with one of the assets of extremist parties, namely their appeal of insurgent outsiders, the martyrs of an unresponsive system. Engagement should necessarily involve complex political strategies that vary in time and place. It certainly demands from politicians to take the message that fringe politicians push seriously, debate them and ultimately defeat them the same way as politicians regularly do with their opponents. The quarantine strategy ends up isolating its initiators and not its target. Interestingly Downs, while discussing rather favourably engagement, only proposes 'constructive engagement' such as co-opting policies or even politically partnering up.³²⁴ He entirely omits the possibility of a critical and assertive engagement with the pariahs. Such an active engagement stands in contradistinction with the active ignorance and legal punishment embedded in the rejection strategy.

³²³ Downs (n 316) 109.

³²⁴ *ibid* 111-145.

The question of legal ban on high-key speakers is arguably only a limited one dwarfed by broader strategic issues. Yet hate speech laws offer a particular flashpoint with the engagement strategy. This is so because hate speech laws criminalise the messages that extremist politicians advocate. The consequence is that these laws turn extremist politicians into free speech martyrs allowing them a favourable outside victim status. Note that this happens independent of the frequency with which extremist politicians and high-key speakers are prosecuted. The leader of the anti-immigration Swedish Democrats gave voice to this sentiment on the eve of their first electoral success breaking into parliament:

[w]e were exposed to censorship, we were exposed to a medieval boycott, they...excluded us. We were denied advertising in many newspapers, we were in every possible way treated as something other than a political party.³²⁵

Therefore, one precondition for the success of the engagement strategy should be to modify hate speech laws as they apply to high-key speakers. This leads to the crucial question: whom should the engagement strategy target? One possible strategy would include the engagement with anyone holding extremist views. A version of the Millian rationale for free speech would have it that engaging in debates will lead us to the victory over racist ideas. However, we do not need such overambitious engagement. Such engagement strategy would add up to a full opposition to hate speech bans and not tailored to political hate speech. Moreover, engagement as a strategy against racism looks more promising when applied to high-key as opposed to low-key speeches and speakers.

The challenges of engagement with low-key speakers, even low-key political speakers, say a political activist who engages in political debate in a pub, seem to be considerable. Low-key political speakers are often the converts who profoundly believe

³²⁵ 'Sweden Democrats Vow Not to Cause Problems' (*The Local*, paper edition, 22/09/2010).

in their hateful messages. It would be too ambitious to suppose that the strategy of engagement would change the mind of those who have already adhered to prejudiced worldviews to the point of giving voice to them publicly. Even if the engagement were to happen with low-key speakers who are not converts and keep an open mind for persuasion, the difficulty of finding the place and terms of engagement might be overwhelming or straight impossible. Setting prudential reasons aside, these difficulties might just buttress the case for banning low-key hate speech as a better way of tackling hate speech.

However, these concerns with low-key speech disappear when the engagement strategy applies to high-key speech. It is considerably easier to imagine the terms and place of engagement with high-key political speakers. Defining the place and the manners of engagement should not pose unresolvable challenges as this speech is typically public, identifiable with a speaker and retraceable. As opposed to the engagement with low-key speech, engaging with high-key speech is not restricted to the here and now. Perhaps more importantly, engagement does not set the overambitious goal of converting the deep believers. The strategy of engagement rather targets the wider audience. To put it more eloquently it aims at convincing everyday citizens who are typically more responsive to arguments in debates than the partisans of racism.

Such an engagement strategy with high-key speech in and of itself will not suffice to reach the strategic goal of defeating racism. But it is an important precondition and grants the advantage of de-martyrizing opponents by breaking with the rejectionist strategy. High-key extremist speakers will not be able to evoke their persecution. Instead of granting hate speakers martyrdom, liberal democracies should allow them a platform and tackle them head-on.

To sum up this section: the public speaker objection is met with an admittedly indirect, strategic reply. We propose to imagine the objection as one possible answer to the strategic question of how to defeat racist politicians. The rejection strategy seems self-defeating in light of the recent surge of far-right political parties in the West. As Downs puts it, the risk is that ‘a wary electorate interprets [bans and quarantines] not as a defence of the liberal order but as self-preservation tactics by entrenched political elites.’³²⁶ Meanwhile the alternative engagement strategy was not flashed out in details, rather its pre-condition clarified: hate speech laws should be reformed to allow high-key speakers. Engagement with high-key speakers would come with the strategic dividend to tear down the martyrdom camouflage.

9. The Democracy Objections

The final cluster of objections differs from the previous ones in character. The silencing, incitement and the vilification objections shared the focus on potential harms to vulnerable groups. The two democracy objections instead look at the harm to democracy that political hate speech may inflict. On account of this shared concern for democracy the two objections will be discussed in the same section.

9.1 Constitutional Constraints

Politicians speak for a reason. They want to get elected, push their political propositions or bend public opinion towards their side. Political speech thus aims at influencing political outcomes. Yet in liberal democracies parliaments and governments do not enjoy absolute power about what laws they can adopt. Politics is succumbed to the authority of democratic constitutions.³²⁷ As Stephen Holmes wrote about the origins of the idea:

³²⁶ Downs (n 316) 49.

³²⁷ The British understanding political constitutionalism based on parliamentary sovereignty, of course, sits uneasily with this description. However, this is not the place to resolve this discrepancy.

[constitutionalism] involved not any possible organization of political life but an ideal form of organization that subordinated political incumbents to a higher law that they were forbidden, in principle, unilaterally to change.³²⁸

In modern constitutionalism this ‘higher law’ included the protection of fundamental rights typically via constitutional bills checked by judicial review. Liberal democracies are intimately committed to the normative values that these fundamental rights embody. Constitutions therefore express that not everything is up for grabs in politics: the respect of fundamental rights, rule of law, separation of powers lay beyond the political contest. It is true even though people regularly disagree about the meaning and extent of fundamental rights.

To this background the clash with political hate speech is not difficult to discern. Populist and far-right high-key speakers’ messages are often incompatible with constitutional constraints. Let us just think about far-right politicians’ regular demand for national preference over non-nationals in public services.³²⁹ Policies inspired by such origin-based discrimination would certainly fall foul of constitutional constraints of non-discrimination. Consequently laws and policies that political hate speakers advocate could never be adopted by parliaments due to constitutional constraints. The objection thus has it that political hate speech should not have a place in the public discourse on account of their incompatibility with constitutional constraints.³³⁰

³²⁸ Stephen Holmes, ‘Constitutions and Constitutionalism’ in Michel Rosenfeld and András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 192.

³²⁹ E.g. ‘*la priorité nationale*’ (national priority) is the lodestar policy of France’s *Front National* that it diligently hammers to any public policy that would distribute to non-citizens. See: Abel Mestre, ‘Le FN établit un projet global tourné autour de la priorité nationale’ (Le Monde, 20/11/2011) <http://www.lemonde.fr/election-presidentielle-2012/article/2011/11/20/le-fn-etablit-un-projet-global-autour-de-la-priorite-nationale_1606696_1471069.html> accessed 01/10/2016.

³³⁰ The objection in its clearly constitutional form is our own formulation. In formulating it we drew on the German scholar Peter Niesen’s work on the two models of militant democracy. He labeled them as anti-extremism and anti-republicanism. His categories reflect the historical German and Italian constitutional context. Peter Niesen, ‘Anti-Extremism, Negative Republicanism, Civic Society – Part I and Part II’ (2002) 3 German L.J. 40, 45.

This is a serious problem for the political speech because the objection asserts that political hate speech should be neutralised (i.e. restricted) by democratic constraints. If political hate speech is neutralised, it is not active or transformative but passive and inert. It was argued in Chapter Two that the normative importance of political speech stems from it offering an active transformational tool for speakers to influence public opinion and thus political outcomes. Furthermore, in liberal democracies political speech is not just one of many but a privileged tool for shaping public opinion. As Zoltan Miklosi, following on Dworkin, wrote:

[p]olitical speech is a normatively privileged vehicle of forming new political majorities, and therefore those disagreeing with the current majority's views are still bound morally to comply with them as long as they have this special vehicle at their disposal.³³¹

Yet political hate speech precisely seems to be losing its normative edge due to constitutional constraints. An inert political speech stands in contradiction with the normative demands of political speech described in Chapter Two. It is as though a wall encircles public debate to shut political hate speech out. Consequently, political hate speech is either active but then the constitutional constraints should be torn down;³³² or as the objection proposes the constraints remain and the political hate speech should not be protected. The dilemma is clear: one cannot have it both ways.

The objection may look attractive at first, but it is too rash in asserting incompatibility. First, the objection supposes that the only way that political speech can transform politics is through a direct, or as one may put it, 'propositional' way. It assumes that political speech must lead directly to some precise political outcomes to remain active and transformative. The picture is that politician 'A' proposes 'policy (a)'

³³¹ Miklosi (n 132) 42.

³³² For the sake of the discussion, we will accept the constitutional constraints and judicial review as legitimate. It follows that the conundrum we face here cannot be resolved from that end by doing away with judicial review.

and by dint of her speech the community eventually adopts policy (a). The constitutional constraints effectively shut down this way of influencing public debate for political hate speech. The Netherlands Party for Freedom (*Partij voor de Vrijheid*) recent election manifesto is an example in point. The party of the notoriously xenophobic Geert Wilders proposes the total banning of mosques and all religious symbols of Islam including the ban of the Koran.³³³ Further examples would include the call for a ‘total and complete shutdown of Muslims entering the United States’³³⁴ or mass deportation of foreign-born populations from European countries.

However, the propositional is a crude way to portray how political speech works. Political speech is capable of influencing in other way than the propositional and thus not falling foul of constraints. For instance, political speech may influence the position of other political agents by putting them on the spot on issues evoked by hate speakers. Moderate politicians would be called to clarify their position or approach important but difficult issues. By this way political speech exercises influence through setting the agenda *without* imposing the speaker’s preferred outcome. Of course, the diverging positions of the actors may shift towards the preferred outcome of the speaker, but this influencing is significantly different to the speaker imposing her own solution. Consequently, political hate speech need not lead directly to the preferred outcome of the speaker and yet remain active in public discourse. This is in line with the normative requirements of political speech.

Second, the objection pushed into its natural conclusion may strike one as unacceptably broad and restrictive. The constitutional objection suggests that any

³³³ For a concise summary see: Caroline Mortimer, ‘The Netherlands’ most popular party wants to ban all mosques’ (*The Independent* 28/8/2016) <<http://www.independent.co.uk/news/world/europe/netherlands-pvv-leader-geert-wilders-koran-islam-mosque-ban-holland-dutch-pm-favourite-a7214356.html>> accessed 10/10/2016.

³³⁴ ‘Donald Trump urges ban on Muslims coming to US’ (*BBC News*, 8/12/2015) <<http://www.bbc.com/news/world-us-canada-35035190>> accessed 10/10/2016.

political speech incompatible with the constitution could be banned on that ground alone. Examples to demonstrate the absurdity of such a requirement are not hard to come by. If it were true then, say, standing for republicanism in a monarchy or the sale of ‘The Communist Manifesto’ could be proscribed. Or advocates of ‘family vote’ schemes could also be silenced because they essentially propose a plural vote system in which parents exercise multiple franchises on behalf of their children, which would be a serious departure from the bedrock principle of ‘one man – one vote’. These examples suggest that the underlying idea of the objection is not acceptable in a liberal democracy.

Be that as it may one could infer from the discussion that the absurdly restrictive results originate from the over-broad scope of the objection, which subsequently could be altered in theory. It follows then to ask whether the objection can be trimmed down? The militant democracy objection sets its argument in motion at precisely that point.

9.2 The Objection from Militant Democracy

Before formulating the second objection we ought to clarify the concept of militant democracy. The language of defending democracy from its enemies is pervasive and naturally triggers references to militant democracy. Nonetheless, militant democracy-related arguments are anchored in history and no theoretical justification is easily available. Jan-Werner Müller writes accordingly that ‘there exists no general legal or, for that matter, proper normative theory of militant democracy,³³⁵ one that could solve the democratic paradox ‘namely the possibility of a democracy destroying itself in the process of defending itself.’³³⁶ Therefore, discussions about militant democracy are typically content with stressing the need for ‘self-protection’ and swiftly move on to examine legal tools such as banning extremist political parties, demonstrations or limiting

³³⁵ Jan-Werner Müller, ‘Militant Democracy’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1253.

³³⁶ *ibid.*

electioneering speech.³³⁷ John Rawls underlined the theoretical difficulty in his discussion of the toleration of the intolerant when writing that it ‘presents a practical dilemma which philosophy alone cannot resolve.’³³⁸ Be that as it may, the question remains valid: what makes the case for restricting extremists? We need at least a tentative answer to the theoretical question in order to formulate the objection against political hate speech.

At first sight, the potential consequences of extremists gaining power are so immense that the case for restriction looks overwhelming in a risk-averse, pragmatic calculation. One could sum up this reaction thusly: ‘We do not want those ideas, policies or politics to be out there because then we would run the risk of them gaining traction among people’. Put this way, the appeal of militant democracy is fixed on the danger of extremists gaining power. How would this explain the case for banning political hate speech? Consider an analogy with the ban on cigarette advertisements. The goal of such a ban is to make less people smoke because it is bad for health. Similarly, militant democracy proscribes extremist speech in the hope that less people will subscribe to these dangerous ideas.

However, such a danger-oriented explanation may leave some extremism unrestricted. Danger-oriented militant democracy may require restriction of rights only when danger really occurs (e.g. when such dangerous ideas gain traction). Under some circumstances, it may even be counter-productive to ban irrelevant extremists and turn them into martyrs or accord them undue attention. A good example is provided by the failed attempt to sentence Geert Wilders for incitement to racial and religious hatred.

William Downs summed up the boomerang effect:

³³⁷ For instance, two recent influential articles on the topic follow this structure. Samuel Issacharoff, ‘Fragile Democracies’ (2007) 120 Harv.L.Rev. 1406; Gregory H. Fox and Georg Nolte, ‘Fox and Nolte Response’ (1996) 37 Harv. Int’l L. J. 238.

³³⁸ John Rawls, *A Theory of Justice* (Harvard University Press 1971) 219.

[D]utch authorities turned to legal restrictions, sending Wilders to trial in 2010 on five charges of inciting racial and religious hatred (by likening Islam to fascism and, by extension, the Quran to Hitler's *Mein Kampf*). Acquitted in June 2011, Wilders' popularity spiked after the failed legal action against him.³³⁹

In contrast to the danger-oriented militant democracy, a strong version of militant democracy would have the restrictive measures danger-*independent*. As a stylized claim the strong militant democracy would run like this: 'We do not want extremists' speech out there because they deny our core values as a political community.' To draw once more on a well-known analogy, the strong militant democracy is thus akin to banning blasphemy in the past.³⁴⁰ The analogy highlights that militant democracy aims protecting something like the core of the *identity* of the community. Therefore, it is not about actual danger but about protecting our values as such. Some ideas are just unacceptable because they go against 'who we are'. It can be assumed that this version of militant democracy applies the strongest on the level of public debate where high-key political speakers may speak most loudly against this democratic communal identity. At the end of the day, a democratic community may want to keep the debate within the boundaries of its highly valued communal identity.

Finally, to close the argument we only have to accept the quite plausible proposition that equality as a value is part and parcel of such a democratic communal identity. In light of this discussion the militant democracy objection may run as follows. Equality as a foundational value is inherent to democratic communities' identity that renders some ideas, policies and politics unacceptable. Political hate speech of high-key

³³⁹ Downs (n 318) 43. In the instant case the boomerang effect may have been increased by the fact that the government lost the case in court. However, there enough successful cases show the opposite. Recall that it was upon the successful dissolution case of *Vlaams Blok* the successor party (*Vlaams Belang*) broke out from obscurity. See the discussion of *Vlaams Blok*'s transformation in section 8.1 in this chapter.

³⁴⁰ Of course, no militant democracy objection should be shoehorned into protecting gods. The similarity lies with blasphemy's structure.

speakers is a blatant rejection of this identity, which is in turn a legitimate ground for their restriction.

9.2.1 Countering the Militant Democracy Objection

The first reply to this objection reaches backward to build on an earlier argument. We held that it would not be acceptable to allow restrictions of political speech that oppose the form of government even if that is arguably an important aspect of the political identity of some communities. French take pride in their *République*, while the British strongly identify themselves with the monarchy. Denying someone to voice her opposition to the political identity of the community, which people typically do not join freely, raises deep problems of legitimacy at least under the political speech account advocated here. The problem is that the silenced speaker is neutralised in a debate on a political issue of crucial importance (i.e. the form of government) unlike other speakers who are free to contribute to the public debate. Perhaps the idea is clearer if moulded to a claim of fairness: the dice is unacceptably loaded to one side. An analogy to the militant democracy objection follows from here. Equality as a foundational value is a political matter of crucial importance. If a ban on political hate speech is introduced in order to protect our democratic identity, the same legitimacy concern pops up.

Furthermore, the militant democracy objection raises some deep ‘epistemic difficulties’. What kind of speech really flouts foundational values? It is safe to assume that no plausible militant democracy objection would go as far as aiming to weed out all political speech critical of foundational values. Such epistemic conundrums are certainly pervasive, but the nature of the harm, i.e. harm to the democratic community, makes the never-ending line-drawing challenge particularly hard to meet. Nonetheless, these concerns ought not to be conclusive. They represent at best auxiliary concerns and only a thoroughly sceptical epistemic approach would depend on it. It is worth noting though

that the highly abstract nature of the harm militant democracy postulates increases such difficulties.

The strongest argument against the militant democracy objection lies in the moral cost of exclusion of political high-key speakers. The militant democracy objection aims at weeding out racist, xenophobic and homophobic speech from politics because they go against 'who we are'. If the objection is taken seriously, these prejudiced views are not just unacceptable when rising to the level of danger but are always beyond acceptability in public debate and consequently they ought to be excluded.

The prejudiced views that the objection targets are sadly still prevalent in liberal democracies and it would be obtuse to deny that reality. It is important that the case is not just that such prejudices persist as marginal social phenomena in secluded social circles. Many citizens' political views are shaped by these prejudices and they understand crucial public issues through these tainted lenses. It suffices to think about the increasing support of far-right parties.³⁴¹ Moreover, it is undeniable that the fundamental characteristics that these prejudices attack, such as origin, religion or sexual orientation, are constitutive of many of the defining public debates of our times. The issues range from anti-discrimination legislation or school desegregation through the larger debate about multiculturalism to the debate on gay marriage. Is it plausible to suggest that sizeable part of the opposition to sheltering refugees from the Middle East in Europe or extending child adoption to gay couples *would not be* significantly shaped by prejudices? Militant democracy objection would lead to the exclusion of high-key speakers who give

³⁴¹ For a general chart about the data see: 'The rise of the far right in Europe' (*The Economist*, 24/5/2016) (<http://www.economist.com/blogs/graphicdetail/2016/05/daily-chart-18>) accessed 01/10/2016 The chart shows that in all fourteen European countries both from Eastern and Western Europe the support for far-right populist parties substantially increased between 2013 and 2016. A helpful scholarly explanation on the subject (examining the data till 2008) is provided by Elisabeth Ivarsson, 'What Unites Right-Wing Populists in Western Europe? Re-Examining Grievance Mobilization Models in Seven Successful Cases' (2008) 41 *Comparative Political Studies* 3. Hungary's far-right *Jobbik* party leads the emergency ranking raising from a national 2,2% in 2006 to 16,67% in 2010 and to 20,3% in 2014.

voice to these prevalent views that many subscribe to. In a modern democratic polity people's political views on public issues are mostly represented through their chosen politicians. Consequently, banning political hate speech would amount to *their* indirect exclusions from public debates. High-key speakers would be neutralised by law in the debate on crucial issues.

A potential rejoinder would hold that people holding prejudiced views are only required to refrain from using the entire range of their verbal weaponry. Recall though the earlier discussion about the failure of the form restriction. Seemingly reasoned (or coded) racism is even more dangerous than epithets so the rejoinder should be discarded.

Finally, we should make a quick digression here. Jeremy Waldron put forth an interesting argument against the legitimacy requirement as we presented so far.³⁴² Waldron proposes legitimacy to be understood as a matter of degree instead of a black and white absolute category. This would allow for trade-offs of legitimacy for the sake of protecting liberal democracy by banning some forms of hate speech (for Waldron the 'vituperative and extreme' ones).³⁴³ The trade-off argument is attractive, but ultimately fails. The problem is the same with any trade-offs. It begs the question what are the right terms of a trade-off? A plea for trade-off does not supplement a substantive argument for the rightness of the trade-off. Therefore, the trade-off argument looks to be a good framing tool to approach hate speech regulation. Yet it cannot generate a non-circular way of justifying the trade-off itself – one that is necessarily justified on other grounds than that it is a trade-off.³⁴⁴

³⁴² Jeremy Waldron, *The Harm in Hate Speech* (n 6) 186-192.

³⁴³ For Waldron, the gain from this trade-off is the protection of the dignitarian status of everyone, which he conceptualizes as part and parcel of a public order.

³⁴⁴ See another refutation of the trade-off argument: Ronald Dworkin, 'Reply to Jeremy Waldron' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech* (CUP 2012).

Where does that leave the objection? Perhaps it is needed to restate the obvious: it is lamentable that so many people share prejudiced political outlooks. All political communities stand on firm grounds in trying to change the mind of people with education or to oppose all prejudices through vigorous positive endorsement of constitutional values. Yet it remains the case that the bulk of our public debates bear heavily on questions that relate to race, ethnicity, religion and sexual orientation and for the foreseeable future there will be people who will maintain genuinely prejudiced opinions on those grounds. For that reason, the exclusion of hateful views through legal bans that the militant democracy objection requires comes with the moral cost of excluding many citizens – through their chosen politicians – from the public discourse on ground of their political opinion.

10. Protecting Political Speech within the Proportionality Analysis

It was argued that the default norm is the prohibition of hate speech, consistent with the European constitutional tradition, yet to the extent of political hate speech an exception should be introduced. It, however, remains unclear how the theoretical findings about political speech should be translated into terms of legal practice. Therefore, a suitable legal means to implement that exception ought to be proposed.

Let us notice that the thesis did not establish any absolute protection for political hate speech akin to the American First Amendment. The strategy of this thesis consisted in carefully weighing some of the major abstract arguments against protecting political hate speech. As we found in the previous section, the political speech protection does not extend to pure vilification and to countries where prevalent patterns of discrimination and deficient rule of law and democratic norms persist, typically in emerging democracies. These caveats would in any case undermine any absolutist proposition. Moreover, rights absolutism that might take the form of a statutory

exception is too inflexible for the European tradition of rights adjudication that rests on the method of proportionality, where conflicting human rights and legitimate public interests are routinely balanced against each other. Thus, the proposition of an absolute protection would sit uneasy with the dominant European adjudication tradition and in any case would not flow from the argument pursued here.

However, it follows that high-key political speech, including political hate speech, should receive heightened protection. The most suitable doctrinal place to implement this is within the European proportionality analysis. To be more precise it is at the balancing stage, or in ECtHR parlance at the stage where the court observes whether the restriction is necessary in a democratic society. In light of the context sensitive framework of political speech that was defended here, no hard-and-fast statutory exception would capture appropriately the argument. It would result either in overprotecting free speech in situations where protection is not due, or it would not protect speech sufficiently where protection is correctly due. Therefore, the task to adjudicate high-key political speech should in principle be reserved for courts. Courts are institutionally best suited to differentiate political from societal hate speech and as an extension to balance the freedom to political speech against concurring interests.

The flexibility coded in the proportionality method is fitting for our argument. Judges who decide upon free speech claims should take into account the normative importance of political speech at the balancing stage. This would require from courts to screen where political speech circumstances obtain (along with the requisite content regarding factor). When high-key political speech obtains, even though the content falls under the ban of the default norm, the court should nevertheless give heightened weight to political speech and balance it against the concurring rights. It means that paying lip service to the normative importance of political speech, while leaving it unprotected, will

not do. There is in fact nothing dogmatically new in it. Let us take a widely accepted free speech principle as analogy. The heightened protection for high-key political speech should work analytically similarly than the free speech requirement concerning public figures' duty to bear more criticism. The qualification as public figure precisely works as a weighty reason in the judicial argument and not as a conclusion.

One thing, however, should be highlighted here regarding online speech. In the previous chapter the high-key speech framework was applied to online speech. One of the many challenges that online speech poses for law and regulation is the shift to online intermediaries becoming judges over free speech. Intermediaries usually bear some form of secondary liability for user generated comments and their interest lie in profit making not balancing human rights. Thus, intermediaries are anything but courts and are ill-suited to carry out the fine-grained balancing exercise that this framework demands. It is not to suggest that a black-and-white rule akin to a system of statutory exception would be more fitting for intermediaries dealing with online hate speech. The complex liability system of intermediaries puts the institutional question in a very different light than offline speech and thus this question stretches well beyond the limits of this thesis.

11. Conclusion

This chapter closes the three theoretical chapters of the thesis. Chapter Two laid the groundwork for a through and through political conception of right to free speech. Chapter Three answered the more practical question about how the theoretical findings could be implemented in courtrooms. In that chapter, we identified the top end of political speech: high-key political speech.

This chapter faced up to the core question of the theoretical challenge. How can the universal background norm of hate speech proscription and the obligation of high

protection of political speech be reconciled? The chapter discussed notable objections from the literature. The case for a political hate speech exception was somewhat narrowed down (see section 7.3 on Pure Vilification). Yet the overall finding was affirmative: there is a case for protecting high-key political speech even if its content is hateful.

The upcoming Chapter Five and Six will test the theoretical findings using two sets of case law. First, the ECtHR's hate speech case law will be analysed, then the findings will be tested in the British statutory system of hate speech regulation. Both jurisdictions have sufficient case law that allows for deeper analysis.

Chapter Five

A CASE STUDY OF THE ECtHR

1. Introduction

This chapter will carry out the first of the two case studies of the thesis. The goal is to test the theoretical findings of Chapter Two, Three and Four on a real-world jurisdiction. The European Court of Human Rights (ECtHR) offers an ideal pool of hate speech cases.³⁴⁵ Moreover, the Court's judgments serve as reference in European constitutionalism. Therefore, it matters a great deal how the ECtHR deals with the question.

Before approaching the ECtHR's case law though, two methodological points should be clarified. It is not our intention to test the theoretical findings on the case law. At least not in the sense of a quest for "a close fit" between the theoretical findings and the practice (i.e. the case law). Neither is it to confirm the theoretical findings by discovering that judges indeed approve it in their opinions. Of course, the famous description of *fit* stems from Dworkin's seminal work: *Law's Empire*.³⁴⁶ Dworkin holds that a legal interpretation should negotiate between the dimensions of 'justification' and 'fit'. The theoretical or philosophical justification should show the practice in its best light, yet the requirement of 'fit' constrains the available justificatory options. The fish we fry here is different though. Instead of constraining the justification (i.e. the political

³⁴⁵ Earlier cases partly originated from the European Commission of Human Rights, the institutional predecessor of the Court, but we will refer consistently to "ECtHR" as including both the Court and the Commission.

³⁴⁶ Ronald Dworkin, *Law's Empire* (Hart Publishing 1986) Chapter 2 and 3.

speech account) to fit the practice, we turn the tables and aim to alter the practice for the benefit of the theoretical findings.

The political speech account described in Chapter Two and Three is admittedly based on “an outsider’s point of view,” i.e. one observing it from without the practice. The findings stem from the theoretical truth about political speech as, opposed to its presence in whichever case law. Hence, when the account will be applied, the concern with the *fit dimension* between theory and practice will be less strong and the demands of the theory take priority.³⁴⁷ Therefore, the goal of applying the theory is threefold. It is to identify (1) *whether* the case law diverges from the theory; (2) *where* these divergences can be justified, and where they cannot; (3) *how* a reform agenda to bring the practice in line with the theoretical findings should be anchored within the jurisprudence under scrutiny.

2. The Jurisprudence of the ECtHR

The ECtHR is often presented in the literature as the stronghold of prohibitionism of hate speech, in sharp contrast with the US Supreme Court’s absolutist stance.³⁴⁸ The text of the Convention itself reflects a non-absolutist conception of freedom of expression. The clause on freedom of expression (Article 10 (1)) is followed by a generous limitation clause. Article 10 (2) not only allows the restriction of freedom of expression for such broad interests as ‘the protection of morals’ or ‘the reputation or rights of others,’ but it emphasises that the right ‘carries with it duties and responsibilities.’ Moreover, Article 10

³⁴⁷ This statement should be qualified though: it would still be a serious defeat for the theoretical findings if they could not be anchored in the case law *at all*. We should also note that such an outsider’s point of view is functionally similar to critical and feminist legal studies’ critiques applied to the existing bodies of law such as to the First Amendment. Such a methodology underlays the famous work of Richard Delgado, ‘Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling’ (1982) 17 Harv. C. R.-C. L. L. Rev. 133.

³⁴⁸ For illustration see: David Kretzmer, ‘Freedom of Speech and Racism’ (1986-1987) 8 Cardozo L. Rev. 445, 475 (writing about a ‘non-absolutist textual approach’ to freedom of expression at the ECtHR as opposed to the US); Stefan Sottiaux, ‘Bad Tendencies in the ECtHR’s ‘Hate Speech’ Jurisprudence’ (2011) EuConst 40, 41 (speaking of ‘the Euro-American divide’); Eva Brems, ‘State Regulation of Xenophobia Versus Individual Freedoms: The European View’ (2002) 1(4) Journal of Human Rights 481, 494-495. For a colorful but skeptical description of the divide see Eric Heinze, ‘Wild-West Cowboys versus Cheese Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech’ in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (OUP 2010) 182.

(2) is coupled with the ‘Prohibition of Abuse of Rights’ clause at Article 17. These built-in limitations suggest a more permissive approach toward hate speech restrictions.

A cursory look at the case law bears this description out. The Court and its predecessor, the Commission, dealt with twenty-four broadly speaking ‘hate speech’ cases overall.³⁴⁹ The ECtHR only declared violation of Article 10 in four cases.³⁵⁰ In the remaining twenty cases the ECtHR ruled that the national courts were within their margin of appreciation when punishing hate speakers, usually by criminal law. Moreover, even the exceptional cases—where the Court did find a breach of Article 10—could be interpreted as penumbra and not core hate speech cases. Therefore, the Court’s main tenet in Article 10 cases can be summed up thus: if the applicant’s speech contains hateful content the Court is heavily inclined *against* finding violation of Article 10.

The notion of “hate speech case law” should be clarified. It is not easy to tally up the hate speech cases with precision at the ECtHR for two reasons. Historically many hate speech applications were dealt with at the admissibility stage, during which many complaints were discarded as inadmissible. Since many admissibility decisions are not published, the exact numbers are hard to come by. More importantly, the Court does not regularly use the term ‘hate speech’ in its judgments, which makes the task of categorising the appropriate cases rather challenging.³⁵¹ It was only in the most recent

³⁴⁹ See Appendix.

³⁵⁰ *Jersild v Denmark* App no 15890/89 (ECHR, 23 September 1994), *Lebidoux & Isorni v France* App no 24662/94 (ECtHR, 23 December 1998), *Fáber v Hungary* App no 40721/08 (ECtHR, 24 July 2012), *Perinçek v Switzerland* App no 27510/08 (ECtHR First Judgment, 17 December 2013).

³⁵¹ In contrast, the Press Office of the ECtHR regularly publishes factsheets on the Court’s hate speech jurisprudence to keep the public up to date about new judgments. For the last one see: Council of Europe ECtHR Press Unit, *Factsheet - Hate Speech* (online publication June 2016) available: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf accessed on 1 Nov 2016.

judgment of *Delfi AS v Estonia* that the impugned speech was explicitly labelled as hate speech.³⁵²

For the purposes of this research the category of hate speech will include all Article 10 judgments where the disputed speech expressed prejudice based on race, ethnicity, nationality, religion or sexual orientation. Moreover, the category will encompass penumbra cases, that are not quite hate speech cases but bear close similarity. Yet it will not include cases where the charge against the speaker was ‘minimizing war crimes’,³⁵³ apologising terrorism,³⁵⁴ incitement or call to violence,³⁵⁵ prohibition on the display of a Communist symbol³⁵⁶ or denigration of national identity.³⁵⁷ These cases are about various types of extreme speech, but none have the key hate speech element of prejudice against ethnic, national, religious or sexual orientation groups.

3. The First Period: the Dominance of the Abuse Clause

The jurisprudence of the ECtHR cannot be divorced from the historical origins of the Convention itself. It was drafted and signed by Western European governments as a reaction to the horrors of the Second World War and to the descending of the Iron Curtain across Europe. The horrors brought about by totalitarian ideologies deeply

³⁵² The first mention of the term was in *Delfi AS v Estonia* App no 64569/09 (ECtHR First Judgment, 10 October 2013) § 86. The Court then evoked the term more frequently on the appeal decision in *Delfi AS v Estonia* App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) §§110, 115, 117, 140, 151.

³⁵³ See e.g. *Orban a.o. v France* App no 20985/05 (ECtHR, 5 January 2009) (The author was a retired French general who wanted to justify the use of torture in the Algerian War of Independence. He was prosecuted for relativizing war crimes.) *Fatullayev v Azerbaijan* App no 40984/07 (ECHR, 22 April 2010) (Journalist published a non-traditional account of a national tragedy wherein he accused the Azeri military of sharing responsibility for the killings of Azeri citizens.)

³⁵⁴ See the leading case of *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008).

³⁵⁵ See e.g. *Sirek v Turkey* (No 1) App no 26682/95 (ECHR, 8 July 1999) (The publisher of a weekly paper vehemently condemned the military actions of the Turkish army in south-east Turkey accusing them of brutal suppression of the Kurdish people in their struggle for independence and freedom.) See more: *Incal v Turkey* App no 41/1997/825/1031 (ECtHR, 9 June 1998), *Zana v Turkey* App No. 18954/91 (ECtHR, 25 November 1997).

³⁵⁶ See *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008), *Fratanoló v Hungary* App no 29459/10 (ECtHR, 3 November 2011).

³⁵⁷ See e.g. *Dink v Turkey* App no 2668/07, 6102/08, 30079/08, 7072/09, 7124/09 (ECtHR, 14 September 2010) (A Turkish journalist of Armenian origin published in a weekly paper articles to express his views on the identity of Turkish citizens of Armenian origin for which he was found guilty for denigrating Turkish identity.)

influenced the ECtHR's course on hate speech. The wording of the Convention immediately betrays this anti-totalitarian sensibility. Its abuse clause of Article 17 perfectly reflects this:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

From the outset the ECtHR followed a strict approach against speakers and political actors who subscribed to totalitarian or extremist ideologies. This anti-extremist approach was nowhere clearer than at the first political party dissolution case in the 1950's. The Commission declared inadmissible the application of the *Communist Party of Germany (KPD) v Federal Republic of Germany*, which had been dissolved following the German Constitutional Court's ruling.³⁵⁸ The Court gave short shrift to the applicant's claim by asserting that the ideology of the party ran counter to the demands of the abuse clause.

Even though this decision concerned a separate clause on freedom of association (Article 11) they set the tone for Article 10 jurisprudence as well. From the historically first hate speech case of *Glimmerveen and Hagenbeek v Holland* (1978) till the Holocaust denial case of *Garaudy v France* (2003) the ECtHR opted in all but two cases for activating Article 17.³⁵⁹

The importance of this judicial choice cannot be underestimated: the abuse clause prevents the assessment of other arguments potentially in the applicant's favour. As a legal scholar put it, Article 17 operates as a 'trump card' that shortcircuits the

³⁵⁸ *Communist Party of Germany (KPD) v Federal Republic of Germany* App no 250/57 (European Commission of Human Rights, 17 August 1956).

³⁵⁹ *Glimmerveen and Hagenbeek v Holland* App no 8348/78, 8406/78 (ECHR, 11 October 1979), *Garaudy v France* App no 65831/01 (ECHR, 24 June 2003).

judicial reasoning process by automatically invalidating the complaint and typically leading to the inadmissibility of the application.³⁶⁰ By the same token, others wrote about the ‘guillotine effect of Article 17.’³⁶¹ The almost exclusive use of the abuse clause is the hallmark of the first period running from 1978 to 2003. The next sections will take a closer look at the judgment from this period.

3.1 The First Case: *Glimmerveen and Hagenbeek v Holland*

This first batch of cases are not just interesting for historical reasons, but also because they concerned very similar neo-Nazi, viciously anti-Semitic speeches. In these cases the Court exhibited its strongly worded refusal to offer protection for hate speakers. In the very first case of *Glimmerveen and Hagenbeek v Holland*, the Court received complaints from the leaders of the *Nederlandse Volks Unie*, a marginal white nationalist party. The application was twofold.³⁶² The party was prohibited from participating in municipal elections due to their inflammatory election leaflets. Moreover, the two applicants served short-term prison sentences for the same leaflets, for the criminal offence of ‘incitement to racial discrimination.’ The applicants challenged both decisions. The impugned leaflet addressed the ‘white Dutch people’ and contained the following excerpts: ‘[we] had enough of the presence in our country of the hundreds of thousands of Surinamese, Turks and other guest-workers’, ‘the undesired aliens [should] leave our country as soon as possible.’³⁶³

The Court ruled jointly on the question of Article 11 (restricting the party from participating in elections) and Article 10 (hate speech sentence) and unanimously rejected

³⁶⁰ Antoine Buyse, ‘Contested Contours—The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’ in Eva Brems, Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2015) 207.

³⁶¹ Hannes Cannie, Dirk Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Human Rights Convention: an Added Value for Democracy and Human Rights Protection?’ (2011) 29 *Neth. Q. Hum. Rts.* 54, 68.

³⁶² *Glimmerveen* (n 359).

³⁶³ *ibid* §4.

the applications as inadmissible. It evoked Article 17 along with the limitation clause of Article 10:

[t]he Commission is of the opinion that the duties and responsibilities referred to above [*in Article 10 (2)*] find an even stronger expression in a more general provision, namely Article 17.³⁶⁴

The Court saw the national court's criminal sentencing and dissolution of the party as justified because the applicants were pursuing totalitarian activities (in the sense of Article 17) by proposing racial discrimination as national policy, which was plainly 'contrary to the spirit and text of the Convention.'³⁶⁵

It is important to stress that the decision was exclusively formed on the basis of the content of the applicants' speech and no further contextual considerations were given any weight, such as the audience the applicants reached or the potential dangers caused by a marginal party. The Court equally declined to make any comments on the fact that the impugned leaflet's style did not amount to racial slurs or to vicious vituperation.³⁶⁶ The only question the ECtHR seemed to ask itself was whether the impugned speech was racist as a matter of message, which in turn sufficed to activate Article 17.

From *Glimmerveen* onwards the content question continued to be the exclusively relevant judicial consideration. Two strings of cases followed in the same footsteps: the neo-Nazi cases starting with *Kühnen v Germany* (1988) and the growing number of Holocaust denial cases from *Honsik v Austria* (1995).³⁶⁷

³⁶⁴ *ibid.*

³⁶⁵ *ibid.*

³⁶⁶ Recall the form focused vilification as justificatory basis for the hate speech ban see section 7.2 in Chapter Four.

³⁶⁷ *Kühnen v Germany* App no 12194/86 (ECHR, 12 May 1988), *Honsik v Austria* App no 25062/94 (ECHR, October 1995).

3.2 The Neo-Nazi Cases

The ECtHR ruled on the Convention-compatibility of laws in Germany and Austria that prohibited political activities related or inspired by National Socialist ideology. The National Socialism Prohibition Act (*Verbotsgesetz* 1947) in Austria and its equivalent laws in Germany aimed at the “denazification” of the two countries and at preventing any revival of Nazi politics. The three cases involve different sets of activities but given their commonality there is no need for separate analyses.³⁶⁸ In all cases the applicants were partly found guilty on grounds of disseminating pamphlets or journals that were ‘inspired by National Socialist ideas.’³⁶⁹ Furthermore, the applicants were members of disbanded unconstitutional far-right organisations. The impugned speeches expressed without ambiguity racial pride and aimed at justifying biological differences between races, often using stark Nazi terminology such as ‘*Lebensraum* for Germans.’³⁷⁰ The Court’s reasoning was parsimonious in all cases, merely highlighting that:

[t]he Commission notes that National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17.³⁷¹

The Court added that the applicants’ expressions went ‘against the spirit and the text of the Convention’ because the speakers aimed at the ‘destruction of the others’ rights.’ These formulations figured in all three judgments. Interestingly it was only in *Schimanek v Austria* that the ECtHR plainly relied on the abuse clause, whereas in the other two cases the Court formally also relied on the limitation clause of freedom of expression Article 10 (2).³⁷² However, in all cases it reasoned from the footing of Article 17, as the quote above demonstrates. In the literature, Antoine Buyse described this as

³⁶⁸ *Kihnen* (n 367), *B.H; M.W; H.P; G.K. v Austria* App no 12774/87 (ECHR, 12 October 1989), *Schimanek v Austria* App no 32307/96 (ECtHR, 1 Feb 2000).

³⁶⁹ *B.H; M.W; H.P; G.K. v Austria* (n 367) §1.

³⁷⁰ *ibid.*

³⁷¹ *ibid.*

³⁷² *Schimanek* (n 368).

the ‘indirect use of the abuse clause.’³⁷³ The abuse clause often figured indirectly in the Court’s reasoning, even though formally decided on the ground of the limitation clause.³⁷⁴ With reference to the *Kühnen* decision he explains that the difference between direct and indirect use of Article 17 was insignificant to the outcome. In the indirect Article 17 cases the impugned expressions were found similarly incompatible with the values of the Convention as in direct application cases.³⁷⁵

Interestingly on one occasion the ECtHR inserted a critical remark about the vagueness of the Austrian anti-Nazi law. Accordingly, the Austrian law’s wording that banned ‘activities inspired by National Socialist ideas [was] rather vague,’ but in light of the ‘historical experience’ that serves as the ‘immediate background of the Convention’ the ECtHR did not see it fitting to further extend the inquiry.³⁷⁶ This reinforces the impression that the Court was influenced by the Convention’s own historical genesis in giving short shrift to expressions tainted by neo-Nazi ideology.

3.3 The Revisionist Cases

The other string of cases where the Court was inclined to activate Article 17 were the ‘revisionist’ or Holocaust-denial cases. The applications typically concerned minor self-publications with limited circulation³⁷⁷ or a whole book of a former politician.³⁷⁸ In *Witzsch v Germany*, a protest letter sent to a Bavarian MP contained revisionist statements.³⁷⁹ The letter protested against a proposed legislative bill on incitement to

³⁷³ Antoin Buyse, ‘Contested Contours - The limits of freedom of expression from an abuse of rights perspective – Articles 10 and 17 ECHR’ in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2015) 199.

³⁷⁴ *ibid.*

³⁷⁵ Buyse mentions the following cases (n 373): *Le Pen v France* App no 18788/09 (ECHR, 20 April 2010), *Vejdeland and others v Sweden* App no 1813/07 (ECHR, 9 February 2009), *Kühnen* (n 367).

³⁷⁶ B.H; M.W; H.P; G.K. v Austria (n 343).

³⁷⁷ *Honsik* (n 368), *Remer* (n 382), *Pierre Marais v France* App no 31159/96 (ECHR, 24 June 1996).

³⁷⁸ *Garaudy* (n 359).

³⁷⁹ *Witzsch v Germany* App no 41448/98 (ECHR, 20 April 1999).

hatred laws themselves. Moreover, the applicant-speakers were found guilty the basis of various criminal laws, ranging from the general prohibitions against denying war crimes, the National Socialist Prohibition laws to laws specifically criminalising the denial of the Holocaust (e.g. the French '*Loi Gayssot*').³⁸⁰ Yet these factual and legal background differences did not bear on the outcomes in Strasbourg.

These writings went to great lengths to deny or relativize the existence or the scale of the mass extermination of Jewish people during World War Two. These pseudo-historical reasoning are epitomised by the applicant's statement in *Pierre Marais v France* that 'the alleged gas chambers were technically improbable.'³⁸¹

At least seven such applications reached the Commission and then the Court over the years.³⁸² In all of them the ECtHR rejected the applications as inadmissible either by directly or indirectly applying the abuse clause (Article 17). Unsurprisingly, the Court's reasonings were short and made use of the same couple of arguments. The most frequent dictum was that:

[the] statements of the kind the applicant made ran counter one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination.³⁸³

The Court also frequently mentioned the 'spirit and the text of the Convention' to which these statements were contrary. It was in the most often cited case of *Garandy v*

³⁸⁰ Loi N° 90-615 Du 13 Juillet 1990 *Tendant a Réprimer Tout Acte Raciste, Antisémitisme Ou Xénophobe* (JORF n° 0162 du 14 Juillet 1990, 8333).

³⁸¹ *Pierre Marais* (n 377) 186.

³⁸² *Remer v German* App no 25096/94 (ECHR, 6 September 1995), *Honsik* (n 368), *Pierre* (n 352), *Lebidoux & Isorni* (n 350), *Witzsch* (n 379), *Garandy* (n 359), *Dieudonné M'Bala M'Bala v France* App no 25239/13 (ECtHR, 20 October 2015) The exact number of such cases is possibly higher. In *Honsik* the Commission mentioned other non-published admissibility decisions.

³⁸³ *Witzsch* (n 379), *Remer* (n 382), *Pierre Marais* (n 377).

France where the Court asserted its position in the strongest possible terms: such statements are ‘incompatible *ratione materiae* with the provisions of the Convention.’³⁸⁴

The Commission, however, had to face up to a dilemma about the extent of its strong stance on revisionist speech. In the third revisionist case, *Lehideux and Isorni v France*, the Commission was compelled to rule on a newspaper advertisement that was akin to relativizing the Holocaust.³⁸⁵ As opposed to the crude revisionist cases before *Lehideux & Isorni* (e.g. to *Honsik* or *Pierre Marais*), the impugned writing fell into the penumbra of revisionist statements. It did not mean to falsify the Holocaust. Rather the one-page political ad in the daily, *Le Monde* praised France’s wartime leader Marshal Philip Pétain and argued for his rehabilitation from the status of war criminal. (Pétain had been sentenced in part for aiding the Holocaust after the War.) The French courts convicted the applicant of the offence of publicly defending ‘the crimes of collaboration with the enemy during the Second World War. A commentator noted that the important element for the conviction was that the courts inferred ‘the *mens rea* of the offence from the author’s failure to criticize Pétain’s authorization of the internment of Jewish people.’³⁸⁶ The ECtHR found against the French government in a split decision. Its judgement largely turned on the distinction between ‘ongoing debate among historians’ and:

[t]he category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.³⁸⁷

Following this distinction, the impugned writing in *Lehideux* did not necessitate the use of Article 17. The publication thus was accepted to count as a contribution to an

³⁸⁴ *Garandy* (n 359).

³⁸⁵ *Lehideux & Isorni* (n 350).

³⁸⁶ David Harris, Michael O’Boyle (eds), *Law of the European Convention on Human Rights* (OUP 2009) 450.

³⁸⁷ *Lehideux & Isorni* (n 350) § 47.

ongoing historical debate, even though its failure to mention Pétain's role in the Holocaust was 'morally reprehensible.'³⁸⁸ The lapse of time since World War II and the ad's explicit distancing from Nazi policies equally counted in the applicant's favour.

After *Lehideux* the 'clearly established historical facts' doctrine became common reference in dealing with revisionist cases. In *Garaudy v France*³⁸⁹ it held that '[t]here can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust [...] does not constitute historical research akin to a quest for the truth,'³⁹⁰ hence such statements were unprotected by the Court.

It is notable that the Court proposed the 'clearly established historical facts' as a general category not confined to the Holocaust. Yet no other historical event was ever categorised as such in the subsequent years. This confirms the supposition that neo-Nazi and revisionist speech form a unique category tied to the Convention's institutional history. Such cases were prevalent in the first period and were dealt with by the abuse clause.

4. The Second Period

The second period of the ECtHR's jurisprudence started with the judgment in *Seurot v France* (2004) and partly already with *Garaudy* (2003).³⁹¹ This second period runs till the Grand Chamber decision in *Delfi AS v Estonia* (2015).³⁹² The Court delivered overall thirteen judgments in this period.

³⁸⁸ *ibid* §54.

³⁸⁹ *Garaudy* (n 359).

³⁹⁰ *ibid* (emphasis added).

³⁹¹ *Seurot v France* App no 57383/00 (ECtHR, 18 May 2004).

³⁹² *Delfi AS v Estonia* App no 64569/09 (ECtHR Grand Chamber, 16 June 2015).

Three distinctive features stand out as period hallmarks. First, the judicial inquiry shifted away from Article 17 towards Article 10 (2). This doctrinal shift, which was not always followed, meant the adoption of a more regular approach in Article 10 cases with the focus on whether the legal restrictions were necessary in a democratic society. Second, this shift allowed for more diverse examinations of the complaints that even led to the first judgment where the Court found violation of freedom of expression. Third, the Court extended its jurisprudence to further prohibited grounds of hate speech: first to religion (*Norwood v United Kingdom*) and then to sexual orientation-based hate speech (*Vejdeland and Others v Sweden*).³⁹³

4.1 The Shifting Judicial Doctrine

As we saw in the first period hate speakers' complaints were often rejected through Article 17. Two legal scholars summed up the essence of this period this way:

[i]n such cases the applicants' statements are simply not considered under the protective scope of Article 10. Such decisions are mostly taken *prima facie* and are strongly content-based, with little to no attention being paid to contextual factors.³⁹⁴

This doctrinal course of action was heavily criticised in the literature for several reasons. The dominant critique was the absence of balancing in judging hate speakers' complaints.³⁹⁵

Antoine Buyse helpfully presented the underlying problem in the Article 17 approach by stressing the inherent tension between the proportionality analysis, which is the ECtHR's normal adjudication method, and the categorical refusal of examining complaints expressed through the abuse clause. Buyse wrote:

³⁹³ *Norwood v United Kingdom* App no 23131/03 (ECHR, 16 November 2004); *Vejdeland* (n 230).

³⁹⁴ *Cannie and Voorhoof* (n 361) 58.

³⁹⁵ This was the main angle of criticism of the following authors: Sottiaux (n 298), Buyse (n 373); *Cannie and Voorhoof* (n 361). Of course, by no means everyone agrees on that: see Uladzislau Belavusau, 'A Dernier Cri an Ever Formidable Challenge of Hate Speech (*Soulas & Others v. France, Leroy v. France, Balsyte-Lideikiene v. Lithuania*)' 16 (2010) *European Public Law* 373.

[E]ven when interfering with the acts of individuals or groups that seek to destroy fundamental rights, the state cannot act outside boundaries. Indeed, one cannot imagine that a life sentence in prison for someone who once denied the Holocaust in public (...) could ever be considered proportionate under the European Convention. This, however, poses problems vis-à-vis the categorical approach to Article 17.³⁹⁶

Buyse's criticism is a familiar one about Article 17 in general. In the seminal judgment of *Lawless v Ireland* the ECtHR found that the applicant terrorist cannot rely on Convention rights to engage in acts aimed at destroying any of the rights and freedoms yet he remains entitled to procedural guarantees.³⁹⁷ Therefore, Article 17 should not result in creating a legal vacuum wherein states can act without the constraints of the Convention. Buyse argued that the same risk occurs at hate speech cases as his quote above demonstrates.

Hannes Cannie and Dirk Voorhoof tellingly called this the 'structural dangers of the abuse clause.'³⁹⁸ Some signatory states tried to rely on the abuse clause in order to deflect the Court's scrutiny. Such was the case in *United Communist Party v Turkey*.³⁹⁹ During the turmoil of the 1990s in Turkey several radical Islamist and pro-Kurdish political parties, politicians and activists were prosecuted for essentially opposing the governments' policies. Despite the government arguing for the abuse clause, the ECtHR declined to follow suit and found violation of Convention rights. The same tendency was detectable in hate speech cases. For instance, in *Lehideux & Isorni v France* (of which later) the ECtHR declined to follow the Government's argument to apply Article 17.⁴⁰⁰ In fact, as we could see the Court seized the opportunity to narrow down the scope of the abuse clause and it even went on to find violation of freedom of expression in these cases.

³⁹⁶ Antoine Buyse (n 373) 189 (emphasis added).

³⁹⁷ *Lawless v Ireland* (No 1) App no 332/57 (ECHR, 14 November 1960) (The case concerned the question of detention without trial).

³⁹⁸ Cannie and Voorhoof (n 361) 71.

³⁹⁹ The leading cases are: *United Communist Party v Turkey* App no 19392/92 (ECHR, 30 January 1998).

⁴⁰⁰ *Lehideux & Isorni* (n 350) §31, 34.

The critiques in the literature, unsurprisingly, converged on proposing a more contextual or circumstance-regarding approach that the Article 10(2) examination expresses much better. The various scholarly proposals meant to alter the judicial analysis in a way to make room for circumstance-regarding considerations in the judicial examination that hitherto was dominated solely by the content-regarding analysis.

Hannes Cannie and Dirk Voorhoof proposed that the Court should take into account the standard factors in general free speech cases. They defined these factors rather generously to include the content, the context, the intention, the impact and the proportionality of the legal sanction inflicted by the national authorities.⁴⁰¹ Their proposal ultimately suggested that the Court altogether dispense with the use of Article 17 outside of the narrow cases that reflect ‘the original purpose’ of protecting democracy against ‘new emerging totalitarian regimes.’⁴⁰² In cases that fall outside of this narrow exception, the more generous appreciation of these factors would result in ‘examining the case as a whole.’⁴⁰³

Another scholarly proposal was Antoine Buyse’s ‘balanced contextual approach.’⁴⁰⁴ Buyse suggested ‘to systematically taking all relevant contextual factors into account.’⁴⁰⁵ He has in mind particularly the consequences of the speech for which speakers are prosecuted. For Buyse the Court often imputes the intention to the speaker without due regard to the possible consequences of the speech and that consideration alone exhausts the judicial examination. He suggests that a balanced contextual approach

⁴⁰¹ Cannie and Voorhoof (n 361) 81-81.

⁴⁰² *ibid* 62.

⁴⁰³ *ibid* 68.

⁴⁰⁴ Buyse (n 373) 208.

⁴⁰⁵ *ibid* 207.

would, for instance, allow to take into account more emphatically the marginal reach or general unimportance of some hate speakers.

Finally, Antoine Sottiaux also proposed a more diverse judicial approach that draws extensively on the Canadian Supreme Court's jurisprudence. He invites the Court to distinguish clearly between 'merely discriminatory' and directly or indirectly inciting speech in order to judge more severely the latter.⁴⁰⁶ He puts considerable emphasis on the intention element that should be inferred not uniquely from 'the nature of the words' but as much 'from the conduct of the speaker.'⁴⁰⁷ Moreover, drawing on the Court's Article 10 jurisprudence in (non-hate speech) extremist speech cases other contextual factors like 'the medium of the speech' and 'the authority of the speaker' should figure in the balance.⁴⁰⁸ Leaving aside some differences among these propositions, it is important to stress that these criticisms point into very similar direction.

4.2 The Results of the Second Period

With time the Court changed tack and followed the commonly preferred 'sounder approach' in the second period.⁴⁰⁹ The judicial inquiry did not focus exclusively on the content of the impugned expressions any more. As a textbook on the Convention put it: 'all forms and types of free speech, however hideous and appalling, are embraced within the scope of protection under Article 10 (2).'⁴¹⁰ Importantly, however, the Court stuck to the categorical line of the first period in neo-Nazi and Holocaust denial cases. It was in *Garaudy v France* where the doctrinally new approach occurred for the very first time.⁴¹¹ In it, the Court attempted to disentangle hate speech which attracted Article 17 rejection

⁴⁰⁶ Sottiaux (n 298) 59.

⁴⁰⁷ *ibid.*

⁴⁰⁸ *ibid.* 61.

⁴⁰⁹ This is the wording of a leading textbook on the Convention: Harris, O'Boyle & Warbick (n 386) 450.

⁴¹⁰ *ibid.*

⁴¹¹ *Garaudy* (n 359).

from other hate speeches that attracted Article 10 (2) scrutiny. As a result it continued to treat Holocaust denial under Article 17, but it henceforth examined ‘racially defamatory statements’ separately, under the limitation clause of Article 10 (2). This bifurcation of judicial scrutiny opened the door for weighing new factors in the judicial examination.

4.2.1 Reaching Beyond Content

In two early judgments, the Court assigned normative importance to the educational context in which the hateful expression occurred. In *Seurot v France*⁴¹² a high school teacher published a short piece of writing in the school’s internal newsletter wherein he laid bare his anti-Muslim views by writing about ‘Muslim hordes’ and ‘damned French from North Africa.’⁴¹³ A criminal investigation for incitement to discrimination led to a heavy fine and provided grounds for the teacher’s dismissal from the school. The applicant complained that his right to free expression was breached by the criminal sentence and his dismissal from the school. The Court *inter alia* argued that teachers had special professional duties related to their role and influence over pupils, which the applicant breached by his hateful speech against Muslim students. In a similar case, *Vejdeland v Sweden*, the Court was called to rule on a hate speech sentence against religious activists who distributed anti-gay political tracts in a secondary school.⁴¹⁴ In a nutshell the tracts expressed the view that ‘homosexual propaganda’ was distributed in schools, which is harmful for kids.⁴¹⁵ The tracts were left in the students’ lockers without the school’s permission. The ECtHR characterised the tracts as containing ‘serious prejudicial

⁴¹² *Seurot* (n 391).

⁴¹³ *ibid.*

⁴¹⁴ *Vejdeland* (n 230).

⁴¹⁵ *ibid* §8.

allegations' yet ones that did not amount to incitement to violence.⁴¹⁶ Furthermore and crucially the Court stressed the peculiar circumstance of the speech:

[t]he Court also takes into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them.⁴¹⁷

In both cases the Court accepted the national governments' argument for restricting Article 10, but it did so with regard to other consideration than to the content: the circumstantial factors the Court took into account were the educational settings.

In *Soulas v France* the impugned expression concerned a highly controversial book about immigration.⁴¹⁸ The disputed book was sold in large bookshops, unlike the self-published pamphlet writings typical of the first period. It sketched a very negative picture of immigration and ethnic tension for which the author exclusively blamed Muslim immigrants. Although the Court found that the restriction of Article 10 by a criminal sentence was compatible with the Convention, it stressed the public interest debate about immigration, which the author contributed to, as an argument in favour of the complaint.⁴¹⁹ Significantly the Court signalled that in light of the topic's importance it would even accept some exaggerations. Yet because of 'the military language' that 'designated Muslim immigrants as main enemies' the impugned speech went beyond acceptable exaggerations.⁴²⁰

Interestingly in another case the Court weighed non-content related argument, and thus examined the complaint under Article 10 (2), even in an Anti-Semitic hate speech case that almost certainly would have been straight rejected as inadmissible via

⁴¹⁶ *ibid* §54.

⁴¹⁷ *ibid* § 56.

⁴¹⁸ *Soulas et others v France* App no 15948/03 (ECtHR, 10 July 2008).

⁴¹⁹ *ibid* §§ 36-37.

⁴²⁰ *ibid* § 41.

Article 17 in the previous period. In *Balsyt-Lideikiend v Lithuania* at issue was a nationalist calendar that contained anti-Semitic (and anti-Polish) remarks with a heavily revanchist tone.⁴²¹ Along with asserting that the calendar expressed ‘aggressive nationalism and ethnocentrism,’⁴²² the Court emphasised the unstable geopolitical situation and the dangers shown by the diplomatic tension that arose upon its publication.⁴²³ Although these considerations militated against the speaker, they once again epitomised the shift from the exclusively content-regarding to that of circumstantial factors.

Finally, in two notable cases, circumstances proper to political speech were at the centre of the debate at the Court. One of them, the seminal *Féret v Belgium* judgment was already mentioned in Chapter Four as the core political hate speech case.⁴²⁴ The key debated circumstantial factor concerned a politician’s election speech on the campaign trail. The majority of the judges took this as a factor that counted against the applicant by asserting a special duty that befalls on politicians to avoid hate speech due to

the positions of candidates for election tend to become fixed and stereotyped formulas or slogans come in to take over reasonable arguments.⁴²⁵

Interestingly the dissenting three judges led by Judge András Sajó took the opposite view on the question. The dissenters suggested that the fact that a politician’s electioneering speech was restricted should weigh in his favour, in light of the normative importance of political speech.⁴²⁶ A similar disagreement divided the Court in *Willem v France*, which concerned an elected French politician’s (the local mayor) call for a boycott

⁴²¹ *Balsyt-Lideikiend v Lithuania* App no 72596/01 (ECHR, 4 November 2008).

⁴²² *ibid* § 79.

⁴²³ *ibid* § 78.

⁴²⁴ *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).

⁴²⁵ *ibid* §§ 75-76.

⁴²⁶ See Dissenting Opinion of Judge András Sajó Joined by Judge Vladimír Zagrebelsky and Judge Nona Tsotsoria in *Féret v Belgique* (n 399).

of Israeli products.⁴²⁷ The circumstantial argument once again turned on the role of an elected politician. The majority assigned a higher duty of caution for the speech of elected politicians, on account of their public authority whereas the dissenting Judge Karel Jungwiert advanced the opposite interpretation.⁴²⁸ He took into account in the applicant's favour that the speaker was a politician and that his speech occurred at the deliberation of the local council. For Judge Jungwiert the council meetings should have counted as 'privileged space for public debate' and thus buttressed the speaker's right to free political speech.⁴²⁹ This formulation resonates with the normative findings about political speech drawn up in Chapter Four.

This, of course, did not mean that the courts' shifting attention to circumstantial factors became exclusive as the content remained the main factor by which article 10 complaints were judged in Strasbourg. *Ginienski v France*, a French hate speech case, was an interesting judgment in this respect. The judges based their verdict uniquely on the content of the impugned expression and yet sided with the applicant.⁴³⁰ *Ginienski* was thus the first hate speech case in which the ECtHR found violation of article 10 of a speaker whose expression was allegedly hateful.

Ginienski concerned a polemical essay on the role of Christian theology in European anti-Semitism and the Holocaust. The writer asserted that Catholic theological doctrine inscribed in papal encyclicals, chiefly the so-called doctrine of the "fulfilment" of the Old Covenant in the New, contained the seeds of modern anti-Semitism that in turn fostered the idea of the Holocaust. Therefore, according to the author, Catholics bear some responsibility for the Holocaust. Not everyone agreed: a French Catholic

⁴²⁷ *Willem v France* App no 10883/05 (ECHR, 16 July 2009).

⁴²⁸ See Dissenting Opinion of Judge Karel Jungwiert in *Willem* *ibid*.

⁴²⁹ *ibid*.

⁴³⁰ *Ginienski v France* App no 64016/00 (ECHR, 16 January 2006)

association sued the author for group defamation against Catholics as a religious group before the French national courts and won it. However, the ECtHR took a different approach than the national courts and ruled in favour of the complainant declaring that there was a breach of article 10. To reach that conclusion the court relied on three content-related arguments. Accordingly, the impugned writing (1) did not amount to gratuitous offense, (2) it seriously engaged with an ongoing public debate, (3) which in turn importantly contributed to the search for historical truth.

As it will be discussed later, this judgment is in line with the jurisprudence on the penumbra hate speech cases, where the Court took a more lenient approach towards speakers in judging polemical expressions that somehow subscribed to the discovery of historical truth. For the purposes of our inquiry it should be highlighted that the Court did not take into account any political circumstance-related argument in *Gimiewski* and yet wound up siding with the alleged hate speaker. In light of the Court's overall jurisprudence on hate speech this judgment was rather an exception to the general tendencies.

4.2.2 Dissenting Voices: Vejdeland, Féret, Willem

Despite the continuing support for the prohibitionist stance at the Court, some dissenting judicial voices appeared in the second period. Apart from the already mentioned seminal dissent of Judge Jungwiert in *Willem*, two further separate opinions are worth discussing. The dissent of Judge András Sajó in *Féret* and a cluster of separate opinions in *Vejdeland* show that judges do not necessarily share the same opinion on hate speech.⁴³¹

⁴³¹ Dissent of Judge András Sajó Joined by Vladimiro Zagrebelsky and Judge Nona Tsotsoria in *Féret* (n 300), Concurring Opinion of Judge Spielmann Joined by Judge Nussberger in *Vejdeland* (n 350) and Concurring Opinion of Judge Zupancic in *Vejdeland* (n 230).

Without any doubt, Judge András Sajó expressed the most detailed internal criticism of the Court's dominant hate speech jurisprudence to date. It is worth recalling that in *Féret* the disputed expression was a core political hate speech case. The applicant was the head of a Belgian far-right political party, who was prosecuted for speeches he held on his campaign trail and for his campaign programs and tracts, distributed online and at rallies. It was the first heavily disputed hate speech judgment where the judges split 4:3.

Judge Sajó argued for a firm conception of political speech that flows from the Court's own jurisprudence. The dissent conceived politicians' speech as firmly falling into this category, which the majority failed to appreciate:

[s]uddenly the words of politicians, *once centerpiece of freedom of expression* (even for the judgment itself, see § 63), become the scapegoat and must be self-censored because of the responsibilities politicians bear.⁴³²

Political speech could only be restricted if the pressing social need for restriction is demonstrated. The dissent's underlying key argument is that the majority failed to demonstrate this social need at all.

The majority labelled the disputed speech incompatible with the spirit of the Convention because the speaker expressed his intolerant views towards migrants and particularly Muslims. However, for the dissent this exclusively content-regarding examination was itself open to challenges and erroneous as a judicial matter. The spirit of the Convention is just too vague a standard to offer appropriate criteria for deciding cases and such a test would be open to government abuse.

⁴³² Dissent of Judge András Sajó in *Féret v Belgique* (n 399) The translation and the added emphases added are ours. It should be added that the dissent contains somewhat of an ambiguity on this point. Judge Sajó mentions that militant democracy related justifications might be available for restricting political parties on grounds similar to hate speech. However, he stresses the difference between individual and political parties' speech. This distinction though seems rather contradictory given that the applicant was a politician speaking in the name of his party. But we will leave this ambiguity at that here.

Judge Sajó's dissent warns against automatically drawing analogy with the hate speech restrictions based on race and ethnicity that have firm historical roots in European history. The dissent rather demanded a more stringent analysis of whether there existed a pressing social need for other grounds which the Court can dispense with for racism, in light of the historical experience that led to the creation of the Convention itself.

Unless such a careful approach is followed, the Court might end up with reviving the questionable doctrine of punishing 'dangerous speech' where the potential of social harm from hate speech becomes 'inevitable.' The majority decision that mainly focused on criticizing the intolerant message seemed to be committing precisely this error. For Judge Sajó this approach amounted to prosecuting 'opinion crimes' (*délit d'opinions*) of politicians that are not compatible with the protection due to political speech. Interestingly, the dissent distinguished intimidation and harassment as legitimate grounds for restricting speech from the impugned speech in *Féret*. The Court should narrowly interpret these categories and scrutinize them carefully for fear of drawing them overly broadly.

Finally, an important disagreement divided the Court concerning the listeners' interest. The majority argued that in light of the dangers that 'less informed citizens' might be misled hateful messages could be banned. In contrast, the dissenting judges emphasized the importance that citizens be the judges of political messages and not courts.⁴³³ The dissenting judges responded directly to the manipulation argument:

[B]y moving away from its own conceptions of political discourse, the majority judge human beings and a whole social layer "simpletons" who are unable to respond to arguments and counter-arguments because of the irresistible urge of their irrational emotions. Should we, therefore,

⁴³³ *Féret* (n 300) mentions '*le public le moins averti*' at § 69.

accept to be constantly subjected to censorship, even though freedom of expression based on the assumption that the human mind is repelled by shameless lies?⁴³⁴

The dissent contained further points about online hate speech (one impugned speech was posted on the website of the applicant's party) and the proportionality of criminal sanctions. But what should be primarily emphasized here is the angle of criticism of the dissenting judges. They stressed the need for judicial examination to reach beyond the content-regarding analysis. This would assure that political speech is restricted only when a pressing social need is demonstrated. For the purposes of this thesis it cannot be stressed enough that the speech in *Féret* and the arguments in the dissent exactly mapped on the privileged type of political hate speech.

Apart from *Féret* and *Willem*, it was in the seminal judgment of *Vejdeland* that three judges voiced concerns in concurring opinions about the Court's general approach to hate speech. Importantly they disagreed with the majority's reasoning and not with the outcome (i.e. no violation of Article 10). *Vejdeland* concerned the unauthorized distribution of homophobic leaflets to high school students.

The divergence between the majority and the concurring opinion was about what the primary reason for refusing the complaint should be. The judgment primarily argued from the footing of criticizing the content of the impugned tracts. They contained 'serious prejudicial allegations'⁴³⁵ against gays such as calling homosexuality a 'deviant sexual proclivity'⁴³⁶ and '[having a] morally destructive effect on the substance of society.'⁴³⁷ As a secondary argument the Court also advanced that the place of

⁴³⁴ Dissent of Judge Sajó in *Féret* (n 300).

⁴³⁵ *Vejdeland* (n 230) §54.

⁴³⁶ *ibid* §8.

⁴³⁷ *ibid*.

distribution was a school and that the applicants' tracts targeted kids 'at an impressionable and sensitive age and who had no possibility to decline to accept them.'⁴³⁸

The concurring judges did not dissent in the outcome because there was valid and sufficient grounds for restricting speech. As Judge Zupančič wrote, high school was a 'protected setting' dedicated to education, hence the banning of an intrusive speech to a quasi-captive audience was legitimate.⁴³⁹ The three concurring opinions advanced the argument that the non-content, circumstance-regarding consideration should have been the 'predominant justification' of the judgment instead of leaving it as a secondary dictum.⁴⁴⁰

Moreover, the three judges also criticized the first footing of the Court's reasoning. Judge Spielmann and Nussberger referred to Judge Sajó's dissent in *Féret* and opined that the Court's criticism of the leaflet lacked clear criteria to judging hate speech and implicitly fell back on a pernicious test of compatibility with the spirit of the Convention, similarly to *Féret*. While admitting that the message was 'totally unacceptable,' the Court mistakenly inferred from the tracts' unnecessary offensiveness that they should be unprotected. According to Judge Spielmann and Nussberger⁴⁴¹ this hasty inference sits uneasily with the famous dictum of *Handyside v United Kingdom* that stands for protecting speeches even if they 'offend, shock or disturb the State or any sector of the population.'⁴⁴²

⁴³⁸ *ibid* §56.

⁴³⁹ Concurring Opinion of Judge Boštjan M. Zupančič in *Vejdeland* (n 230) §10.

⁴⁴⁰ Concurring Opinion of Judge Boštjan M. Zupančič in *Vejdeland* (n 230) §1 The other concurring opinion agreed: Concurring Opinion of Judges Spielmann Joined by Judge Nussberger in *Vejdeland* (n 230) §6.

⁴⁴¹ *ibid* §5.

⁴⁴² *Handyside v the United Kingdom* App no 5493/72 (ECHR, 7 December 1976) §49. Judge Zupančič argued similarly: See his Separate Opinion in *Vejdeland* (n 230) §12.

4.2.3 *Fáber v Hungary*

Fáber v Hungary is an oft-overlooked hate speech case, despite the fact that it is to date the most important hate speech judgment in which the ECtHR found violation of Article 10.⁴⁴³ It might be so because *Fáber* is rather a borderline hate speech case, where Article 11 (right to peaceful assembly) and 10 elements mingle. The Court had already ruled in favour of a presumed hate speaker in *Ginienski v France* as we mentioned earlier. Yet *Faber* is the first one in which circumstance-regarding political speech indicators were clearly played instrumental role in the Court's balancing.

The applicant took part in a counter-demonstration organised by the far-right *Jobbik* political party against a demonstration of the Hungarian Socialist Party – a then-governing party (“*MSZP*”) – to commemorate the Holocaust and to protest against racism and intolerance. The demonstrations did not lack symbolism. It took place on 9th of May, Victory Day, at the symbolic place of the Danube Embankment where the Hungarian pro-Nazi Arrow-Cross government had shot thousands of Jews in 1944. The counter-demonstration was held in the vicinity of the main demonstration, where many were holding the so-called *Árpád*-striped flag. Precisely, the display of that flag stood in the centre of the case. For many commemorators the flag represented an anti-Semitic provocation because it was the symbol of the viciously racist Arrow-Cross Party that was in power in 1944 and perpetrated heinous war crimes. However, the flag bears a historical interpretation as well: it is one of the ancient historical banners of Hungarian Kings.

On the day of the events that led to the Court case, the police ordered counter-demonstrators not to display their *Árpád*-striped flag openly near the commemoration, allegedly in order to prevent public disorder. Mr *Fáber*, however, defied the police order

⁴⁴³ *Fáber* (n 350).

and continued to hold his flag passively. He was subsequently arrested for disobeying the police order. After being taken into police custody he received an administrative fine for disobeying police orders.

The ambiguous meaning of the symbol at hand makes *Fáber* somewhat difficult to characterize as a hate speech case. Yet it is notable that the organising group, *Jobbik* was a notoriously anti-Semitic political party that used the flag to emphasize its “true Hungarian national belonging” which had a historically anti-Semitic connotation.⁴⁴⁴ Coupled with the fact that the demonstration was convened against a Holocaust commemoration, it is not far-fetched to attribute the racist and not the neutral historical meaning to the disputed flag. One should add though that the flag was not outlawed by the criminal law *per se* at the time, unlike other totalitarian symbols (e.g. swastika, SS insignia, red star).⁴⁴⁵ Whether or not to qualify *Fáber* as hate speech ultimately comes down to how broadly one defines the category itself. An analogy with dog-whistle speech is pertinent here: the disputed flag granted deniability of racism (it suffices to point out the historical meaning) while being capable of conveying an anti-Semitic message. Moreover, the police decision to remove the disputed flags was based on the racist content of expression that would offend the demonstrators. In the somewhat over-subtle description of the Court: “[t]he display was perceived as the expression of a political opinion by the demonstrators, who identified the applicant as being a fascist.”⁴⁴⁶

The Court’s reasoning focused almost exclusively on the circumstances of the expression and not on its content. The decisive circumstance was that no actual danger

⁴⁴⁴ The *Jobbik Party* and its notorious leader is not unknown to the ECtHR. In *Vona v Hungary* App no 35943/10 (ECtHR, 9 July 2013) the issue was the dissolution of an extremist racist organisation (Hungarian Guard Association). The group was intimately linked to the Jobbik party: it was founded and led by the Jobbik president (Gábor Vona, the applicant) and members. The Court found no violation of Article 11.

⁴⁴⁵ *Vajnai* (n 356).

⁴⁴⁶ *Fáber* (n 350) §52.

resulted from the applicant's symbolic expression. The Court put the emphasis on the fact that the applicant did not approach the demonstration, neither did he intimidate or incite violence. His activity was of a passive political protestor holding a banner that the anti-racist demonstrators objected to. Hence, the danger associated with the applicant's expression stemmed from a subjective perception of the demonstrators and was not born out by objective facts. Nonetheless, Judge Pinto De Albuquerque pointed to some deficiencies in the Court's reasoning:

[t]he judgment proposes three different criteria for assessing the proportionality of the interference: "clear threat or present danger of violence" (§ 44), "reprehensible act" (§48) and "capable of causing public disorder" (§ 53).⁴⁴⁷

Related to this point is the Court's assumption that the expression at hand added up to a political view that was open to disagreement and not *ratione materiae* incompatible with the Convention (in the spirit of Article 17 approach). Ever since the first period the Court tended to err on the side of defensiveness when judging an expression tainted by elements of hate speech. This element either disqualified the applicant's complaint wholesale or weighed heavily against it. Yet in *Fáber*, the Court erred on the liberal side and opted not to treat the potentially hateful message of the applicant as blocking the examination of further circumstances. According to the Court the question was whether the applicant's expression amounted to a 'reprehensible act.'⁴⁴⁸ The judges in the majority opined:

[t]he applicant's decision to display that flag in the vicinity of the MSZP demonstration must be regarded as his way of expressing – by way of a symbol – his political views, namely *a disagreement with the ideas of the MSZP demonstrators*. The display was perceived as the expression of a political opinion by the demonstrators. (...) ⁴⁴⁹

⁴⁴⁷ Concurring Opinion of Judge Pinto de Albuquerque in *Fáber* (n 350) footnote 2.

⁴⁴⁸ *ibid* §50.

⁴⁴⁹ *ibid* § 52.

Notice how far this statement is compared to the first period's typical assessment of hate speech. A fascist flag seems to have metamorphosed into a political opinion. It is a noteworthy difference, even if the ambiguity about the flag's meaning certainly influenced the judgment. In this regard, the disagreement of the judges is revealing. On the one hand, the dissenting Judge Keller interpreted the flag as a clearly 'racist and fascist message.'⁴⁵⁰ While Judge Pinto De Albuquerque opined that the impugned banner 'cannot be objectively mistaken for the flag of the Hungarian Arrow Cross Party.'⁴⁵¹ Be that as it may, the Court conceded that the participants of the commemoration could reasonably see in the flag a 'fascist symbol' yet it neither activated the abuse clause nor treated this content-regarding argument as conclusive.⁴⁵²

Instead of the focus being on the objectionable content, the judges assigned normative importance to the danger of 'the heckler's veto' blocking provocative or even offensive expressions.⁴⁵³ It was indeed not the first time that the Court had evoked the question of the heckler's veto. In a previous political symbol case the Court had already advanced the point, repeated in *Fáber*, that political expressions should not be restricted on the sole ground of some listeners' understandable fears. In *Vajnai v Hungary* the Court declared the following:

[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 recognised in a democratic society, since that society must remain reasonable in its judgment. To

⁴⁵⁰ The whole quotation is revealing about the depth of disagreement: 'What message other than a racist and fascist one could be conveyed by a flag that is associated in public opinion with the 1944/45 Nazi Regime in Hungary and is raised at a place where grave human rights violations were committed during the Second World War? In the light of Article 17 of the Convention (...) I have serious doubts as to whether the expression of such an opinion could attract the protection of the Article 10.' Dissenting Opinion of Judge Keller in *Fáber* (n 350) §12.

⁴⁵¹ Concurring Opinion of Judge Pinto de Albuquerque in *Fáber* (n 350) 29.

⁴⁵² *ibid* §57.

⁴⁵³ *ibid*.

hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.⁴⁵⁴

The majority in *Fáber* agreed with this concern and considered that police restriction of the flag amounted to a heckler's veto and thus found violation of freedom of expression (Article 10).

Fáber should be rightly interpreted as the judgment that pushed the lines the furthest possible among hate speech cases. The impugned expression was quintessentially political as to its content. More importantly for this thesis a protester at a political rally expressed the impugned message. Recall that both the speaker and the occasion were thus political in the requisite sense of high-key political speech. Therefore, it is highly relevant for the argument of this thesis that *Fáber* properly amounted to a high-key political hate speech case.

Nevertheless, the future relevance for the ECtHR's case law is unknown. The ambiguity around the meaning of the impugned symbol, the physical nature of a public demonstration and the arbitrariness of the police action render *Fáber* a borderline hate speech case.⁴⁵⁵ Bearing in mind these peculiar circumstances, it remains open to question how much of *Fáber's* arguments will bear on future jurisprudence.

4.2.4 Penumbra Cases

The penumbra hate speech cases offer some interesting insights into the evolution of hate speech case law. *Jersild v Denmark*, *Lehideux & Isrone v France* and *Perinçek v Switzerland* are not hate speech cases *per se*. Yet they bear some similarities to hate speech by dint of their (quasi) hate speech elements (*Jersild*, *Lehideux & Isrone*) or by analogy with Holocaust denial (*Perinçek*). Crucially the Court sided with the applicants and found

⁴⁵⁴ *Vajnai* (n 356) §57.

⁴⁵⁵ The Court mentioned that the *Árpád*-stripped flag was not outlawed *per se*, which leaves room for speculation as to how important this consideration was. *ibid* § 56.

violation of Article 10 in all of these cases. This further proves the point that the Court can take Article 10 complaints seriously and reach other conclusions than no violation of the right to freedom of expression.

The most widely discussed penumbra case is without doubt *Jersild*. Over time *Jersild* became one of the cornerstone references that ubiquitously figure amongst the evoked general principles of all freedom of expression judgments. In textbooks this judgment is usually treated as the exception to the default judgment of no violation of Article 10 in hate speech cases.⁴⁵⁶

In 1994 a serious investigative TV programme broadcast a report about a group of racist youngsters at a time when intolerant incidents were on the rise in Denmark. In the interview, members of the “Greenjackets” grouping made clearly racist remarks against immigrants. Upon the broadcasting of the programme, the journalist-producer was prosecuted and found guilty for ‘aiding and abetting the dissemination of racism.’⁴⁵⁷ The Court did not accept the national court’s reasoning. At closer examination the ECtHR argued that the intention of the speaker was crucial to the interpretation of the applicant’s complaint. The national court turned a blind eye to the true intention of the reporter who wanted to expose the social wrongs of racism and not to propagate it.⁴⁵⁸ For this reason the Court found violation of the journalist’s freedom of expression.

Although *Jersild* was not clearly a hate speech case, it suggested that the Court was willing to scrutinise overly broad, heavy-handed regulations of hate speech. In this

⁴⁵⁶ E.g. Harris, O’Boyle & Warbick (n 386) 449-450.

⁴⁵⁷ In a separate trial, the members of the group were prosecuted for their racist comments and their case was of no concern in *Jersild*.

⁴⁵⁸ The Court blasted the national court’s decision in the following terms: ‘[o]n the contrary, it clearly sought – by means of an interview – to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.’ *ibid* § 33.

regard *Jersild* was similar to the already mentioned *Lehideux & Isorni* case. In it, the Court sided with the applicant, who was prosecuted for relativizing war crimes and the Holocaust by calling for the rehabilitation of France's war time leader Marshall Pétain. The Court distinguished *Lehideux & Isorni* from revisionist cases because it did not question 'clearly established historical facts such as the Holocaust.'⁴⁵⁹

Perinçek v Switzerland directly relates to *Lehideux & Isorni* to the extent that the Court found violation of Article 10 of a Turkish politician on account of the 'clearly established historical facts' doctrine. The case concerned another memory-law, this time the Swiss criminal code that extended its memory offence's scope to the denial of the Armenian genocide committed by the Ottoman authorities in the 1910s. The speaker was the chairman of the Turkish Workers' Party, who denounced the genocide as an 'international lie' and subsequently was prosecuted for his public speech.⁴⁶⁰ The Court stressed several contextual factors that tipped its balance. Such was the fact that it was a politician who spoke about the tragedy of a different country, far away from the one in which he was prosecuted. Moreover, the applicant spoke in a foreign language (Turkish) that was unlikely to reach a vast audience in Switzerland. Concerning the content of the speech the Court crucially distinguished the case from Holocaust denial cases by pointing to a lack of consensus among historians and thus relying on the *Lehideux & Isorni* doctrine of 'clearly established historical facts.'

What one can infer from these cases is a tendency of the Court to explicitly distinguish penumbra cases from hate speech by narrowing down the scope of the latter to leave room for a more liberal approach in cases that are taken not to be precisely hate

⁴⁵⁹ *Lehideux & Isorni* (n 350) § 47.

⁴⁶⁰ *ibid* §13.

speech cases. The willingness of the Court to reach beyond the mere content and scrutinise with rigour the Article 10 complaints resulted in finding violations.

5. The Shortcomings of the Jurisprudence

5.1 Continuing Absence of Balancing

One would expect that there was more to the shift in the second period from Article 17 to Article 10(2) than sheer doctrinal pedantry. It might have logically implied to critiques a more generous appreciation of Article 10 complaints in hate speech cases. Yet this certainly did not happen despite some marked positive developments.

In general, increased attention was given to the impugned expressions' contexts and the first two judgments declaring violation of Article 10 appeared. *Giniewski* and *Fáber*, taken together with the penumbra cases, further affirmed this development. Finally, the self-reflection of the Court was apparent in the separate opinions attached to *Féret*, *Vejdeland* and *Willem*.

Nevertheless, the jurisprudence by and large remained unchanged over the second period with the Court in almost all cases refusing to side with the speakers - albeit upon more serious deliberations. Bar the penumbra cases, it was only in two (*Giniewski* and *Fáber*) out of the twenty-one purely hate speech cases that the ECtHR found violation. This suggests that the Court might have only paid lip service to balancing the speakers' rights with the rights of people offended by hate speech.

The last hate speech case seems to bear out this point. *Delfi AS v Estonia* was the first major online hate speech complaint judged in Strasbourg. The applicant was one of Estonia's largest news websites with considerable traffic. The news site was held responsible in a civil case for hosting twenty defamatory (in reality hate speech-like) user-generated comments posted in the separate comment section below a business report.

The report that attracted the comments dealt with the business of an Estonian ferry company. It shed an unflattering light on the owner of the ferry company, to which many furious users posted at times violently critical and on one occasion anti-Semitic comment. The site took down the user-generated comments upon being notified in line with its ‘notice-and-take-down’ policy that seems also to flow from the relevant EU legislation.⁴⁶¹ The national court, nonetheless, ruled against the website in a defamation case launched by the owner of the ferry company, who was the target of the comments. In contrast with the offline hate speech cases in *Delfi AS*, the question is framed in terms of the responsibility of the publishing website as intermediary and not of the speaker (i.e. the ones posting the comments). For the purposes of discussion here this particular consideration can be bracketed.⁴⁶²

The ECtHR refused to find violation of Article 10 and accepted that the news portal was held accountable for comments it did not author and took them down when notified. The Court went out of its way to emphasize that the comments amounted to hate speech and to incitement to violence.⁴⁶³ This heavy emphasis on the banned content was key for overruling the arguments favouring the applicant. This is evidenced by the next online comment case where the ECtHR found violation of Article 10 even though the case bore striking similarities to *Delfi AS*. In *MTE and Index.hu Zrt v Hungary* the comments once again involved a business owner targeted by revolted consumers.⁴⁶⁴ The

⁴⁶¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market Section 4 Article 14, 15. So far the European Court of Justice has not pronounced on similar comment issue, hence the uncertainty.

⁴⁶² We also assume that *Delfi AS* was a hate speech and not an individual defamation case even though the target of the comments was nominally the owner of the ferry company.

⁴⁶³ The Court also accepted that the website played an active role of inviting comments that increased the level of responsibility of the applicant. *Delfi AG* (GC judgment) (n 367) § 53.

⁴⁶⁴ *Magyar Tartalomsgéltatók Egyesülete and Index.Hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) We abbreviated the case name to ‘MTE’ for the sake of readability. The first applicant (MTE) is the Hungarian Content-producers Association, a lobby group, while the second is the biggest Hungarian news-portal.

Court, nonetheless, distinguished it from *Delfi AS* on the grounds that it was ‘free of the pivotal element of hate speech’ unlike the earlier Estonian case.⁴⁶⁵

The first period’s instinct to hastily characterize speech as ‘hate speech’ is also clear from reading *Delfi AS*. Even a cursory look at the impugned twenty comments reveals that there was only one anti-Semitic reference amongst the mostly vulgar and somewhat violent comments.⁴⁶⁶ Instead of separating the calls for violence, the vulgar but protected and the one minor hateful comment, the ECtHR presented them as a flood of hate speech which at the end prevented the Court from carrying out balancing properly.

Finally, at this juncture, Stefan Sottiaux’s warning about the dangers of the absence of balancing is spot-on. His assertion was that the Court’s reluctance to truly follow a multifaceted approach at the balancing stage inadvertently led the ECtHR to follow a ‘bad tendency test’ in hate speech cases that would be akin to the mistakes of the US Supreme Court’s early 20th century jurisprudence. He explains:

[t]he ‘bad tendency’ formula, which can be traced back to the English common law and the work of Blackstone, served to justify the suppression of a wide range of pacifist, socialist, communist and other utterances endangering the foundations of government. Today, it is seen as a misguided interpretation of the First Amendment because of its failure to protect legitimate political speech.⁴⁶⁷

Sottiaux did not take issue with ECtHR’s premise that harm can result from hate speech and thus it can be legitimately restricted. However, his assertion was that, without proper scrutiny and balancing, the Court runs the risks of turning a blind eye to the

⁴⁶⁵ *ibid* §70.

⁴⁶⁶ *ibid* §18 Comment number 2 reads as follows: ‘bloody shiteheads... they bathe in money anyway thanks to that monopoly and State subsidies and have now started to fear that cars may drive to the islands for a couple of days without anything filling their purses. burn in your own ship, *sick Jew!*’ Comment number 9 sums up more accurately the general tone of the comments: ‘a good man lives a long time, a shitty man a day or two.’

⁴⁶⁷ Sottiaux (n 298) 141 (internal quotations omitted).

restriction of legitimate political speech, hence the label of bad tendency. If there is any case that proves the point that the current jurisprudence precisely runs such a risk, it is *Willem v France*.⁴⁶⁸

In *Willem* the left-wing mayor of the French town of Seclin applied to the Court following his criminal sentencing for incitement to discrimination (*provocation à la discrimination*) to a €1000 fine. The applicant-mayor was found guilty for announcing the locality's boycotting of Israeli products for Israel's military actions against Palestinians. The mayor gave voice to this political initiative in an open letter, then reiterated it at a meeting of the local council. The impugned speech made it amply clear that the applicant's intention was to protest against the politics of the Israeli government that, according to the applicant, is carrying out the 'genocide of the Palestinian people'.⁴⁶⁹ The letter made it clear that his intention was not to blame the Israeli people as such and condemned all allegations of anti-Semitism.⁴⁷⁰

To this factual background the Court acknowledged the preponderant importance of the political speech, especially that of an elected politician, and even added the importance of the public debate that the applicant raised.⁴⁷¹ Nevertheless, the Court did not find violation of Article 10. Two arguments seem to have overridden the arguments in favour of the applicant. The mayor was held not to have lived up to 'his duties of neutrality and reserve' with his 'discriminatory speech'.⁴⁷² This argument is plainly contradictory if put in contrast with the normative importance of the speech of

⁴⁶⁸ *Willem* (n 427).

⁴⁶⁹ *ibid* § 8.

⁴⁷⁰ It may import to clarify that the mayor was prosecuted for his speech, and not for the policy as such, hence the case was fully about the mayor's expression.

⁴⁷¹ *Willem* (n 427) §32-33.

⁴⁷² *ibid* §37 The quote reads in French as follows: 'conserver une certaine neutralité et dispose d'un devoir de réserve dans ses actes. Un maire ne doit pas inciter à dépenser [les fonds publique] selon une logique discriminatoire.'

an elected politician. Furthermore, according to the Court, the mayor was not really prosecuted for his opinion but for his incitement to discrimination without explaining its question-begging distinction. *Willem* stands for the dangers for political speech that the current jurisprudence holds. The Court overvalues, and often misjudges, the content and undervalues the contextual considerations in hate speech cases. It is just the opposite of what balancing should truly look like.

6. Assessing Political Hate Speech at the ECtHR

6.1 How to Assess?

Willem and *Delfi AS* are revealing judgments about the ECtHR's jurisprudence, but they fail to provide an answer to the research question of this thesis. The impugned speeches in the two cases just did not add up to proper political hate speech, i.e. the high-key political hate speech that is the focus of this thesis. Although *Willem* concerned political speech, it was highly questionable whether the mayor's speech should count as anti-Semitic and thus hateful, despite the Court's curious mischaracterisation. In contrast, the online comments in *Delfi AS* should certainly count as hate speech conceptually. Yet they were online comments from angry anonymous consumers. The comments might be political in content as they concerned a public issue that people clearly cared a great deal about. Even so, the anti-Semitic comment did not relate in any way to the issue of the ferry schedule, therefore, it might rather be characterised as pure vilification. More importantly, no circumstance pointed towards characterising the comments as high-key political speech: neither the speaker, nor the event or occasions marked the comments as political in the requisite sense. Therefore, the question of how the ECtHR's jurisprudence relates to the theoretical findings of this thesis on political speech remains unanswered.

Recall the conclusions of the theoretical findings in Chapter Three and Four. Political speech is at its most protected when it expresses high-key speech. High-key speech is based on three circumstance-regarding indicators: the speaker's role, the institutional process in and the political occasion on which the speech occurs. *Political hate speech* is high-key speech expressing hate speech as a matter of content in political circumstances. This arguably narrow notion of political hate speech leaves room for the hate speech prohibition norm that is justified and entrenched in European constitutionalism, while it does not undervalue the normative significance of political speech.

The description of the jurisprudence in the previous session made amply clear the diverse factual background of hate speech cases in Strasbourg. It serves as a helpful warning against a hasty conclusion in declaring the jurisprudence as such to be incompatible with the theoretical findings on political speech defended here.

The first step for assessing the case law is to deconstruct it into different clusters based on their compatibility with the requirements of the right to political speech described in earlier chapters. Ultimately the goal is to draw conclusions based on the analysis of case law as to what extent the ECtHR's jurisprudence is compatible with the high protection of political speech.

6.2 The Compatible Cluster

The first cluster includes cases that do not cause problems for the right to political speech for the simple reason that they are not political speech cases. They generally do not meet the stringent indicators of high-key political speech and rather amount to societal hate speech.

The cluster includes hate speech in educational setting: *Vejdeland v Sweden* and *Seurot v France*.⁴⁷³ The speakers (teacher) and the place of distribution of leaflets, i.e. a school, render the impugned speeches' circumstances non-political. For similar reasons *Norwood v the United Kingdom* could arguably be put into this category.⁴⁷⁴ *Norwood* concerned an anti-Muslim poster displayed in the window of a political activist in a residential area. The place and the permanent nature of communication (i.e. a poster in a window) turned *Norwood* into a societal and not political hate speech case. This finding might be challenged as the speaker himself was a member of a political party on the one hand, moreover, this type of expression is not uncommon in the UK, especially around election time. This argument though did not figure in the Strasbourg case. Nevertheless, *Norwood* will be further discussed in detail in the next chapter on the United Kingdom.

For different reasons a host of hate speech writings can be put into this cluster of compatibility. In this cluster of cases the impugned expressions concerned written materials such as an anti-Semitic journal (*Pavel Ivanov v Russia*), a similar calendar (*Balsyt-Lideikiend v Lithuania*) and on one occasion a book with harsh anti-immigration tone (*Soulas et others v France*).⁴⁷⁵ The aspect that would make these writings political is their link with public debate. Especially in the case of *Soulas* the book, which was sold in commercial bookstores, contained an elaborate argument against immigration albeit with harsh anti-immigration tone.

Yet, recall our earlier proposition that a speech should not count as high-key political speech solely on the grounds that it is connected with a political matter. This would make it safely to political speech, but not the privileged type we are concerned

⁴⁷³ *Vejdeland* (n 230), *Seurot* (n 391).

⁴⁷⁴ *Norwood* (n 231).

⁴⁷⁵ *Pavel Ivanov v Russia* App no 35222/04 (ECHR, 20 February 2007), *Balsyt-Lideikiend* (n 421), *Soulas* (n 418).

with in this thesis. The privileged status of high-key speech is triggered by political circumstances rather than content.

Both *Balsyt-Lideikiend* and *Pavel Ivanov* concerned lonely, fringe, private individuals who owned, edited and distributed their own publications. There was no circumstance that would point towards the political nature of the publications that would have made them into high-key political speech. It would have been different if they published for or on behalf of an organisation, or if they aimed at influencing a political occasion (such as an election) or an event (such as a demonstration). In the absence of any political circumstance, there is no reason to assign the privileged high-key status.

The last case, *Soulas et others v France*, is more difficult to categorise. It concerned a serious publication by a writer with expert credentials on a matter of public interest (Muslim immigration in Europe). Interestingly, the Court itself accepted this and for that reason rejected the French government's argument to discard the application on Article 17 grounds.⁴⁷⁶ Yet the ECtHR did not find violation of Article 10 because of 'the militant anti-Muslim language' that designated Muslims as 'principal enemies.'⁴⁷⁷ This argument without additional ones, say, that the book incited violence, would not suffice for restricting high-key political speech. Yet *Soulas* was not a high-key political speech case as no political circumstance obtained. Instead, one could make a good argument for such controversial books from the footing of freedom of academic expression. But that would require an altogether different argument than the one pursued here for high-key political speech.

⁴⁷⁶ *Soulas* (n 418) §§ 21-23, 48.

⁴⁷⁷ *ibid* §§ 41, 43.

6.3 The Compromise Cluster

A theory-based criticism that aspires to be relevant for the practice should take into account the particular institutional background of the practice it criticises. This might in turn limit the scope of the otherwise valid criticism vis-à-vis that particular instrument, be it a statute or a Convention. So to say that the institution that the critique interprets bears a certain historical mark that forces the critique to compromise. Let us call this the institutional compromise.

The European Convention on Human Rights was adopted in 1950 as a response to the horrors of World War II, the Holocaust and an emerging totalitarianism. This is the historical mark of the Convention that puts a constraint on any free speech criticism of its hate speech jurisprudence. The Court itself referred to the defeat of Nazi Germany, the Holocaust as ‘the historical past forming the immediate background of the Convention.’⁴⁷⁸ This background was often evoked by the Court in the neo-Nazi and the Holocaust denial cases and used as an argument for refusing the complaints of hate speakers.⁴⁷⁹ It follows that in crudely anti-Semitic, revisionist and neo-Nazi racist speech cases the Court was justified in declining Article 10 complaints on institutional grounds.⁴⁸⁰

The institutional compromise should hold for political hate speech as well. As a matter of fact, the case law does include a number of judgments where political speech indicators were made out and yet the Court flatly rejected the applications. For instance in *Kühnen* the activist of a neo-Nazi grouping published his speeches that argued for the

⁴⁷⁸ See for instance in: *Honsik* (n 368), *B.H; M.W; H.P; G.K.* (n 367).

⁴⁷⁹ See the reference to history in: *Honsik, B.H; M.W; H.P; G.K., Kühnen, Pierre Marais.*

⁴⁸⁰ Naturally this logic might extend to further political rights, such as right to freedom of association and peaceful assembly (Article 11). Yet it certainly should not apply in an across-the-board fashion. The case in point is *Zdanoka v Latvia* App 58278/00 (ECtHR, 16 March 2006), where the state put heavy restrictions on the right to run for office for people connected to the previous Communist regime.

reinstallation of the Nazi party and racialist politics in ‘markedly anti-Semitic tenor.’⁴⁸¹ Or in *Schimanek* it was the leader of another neo-Nazi organisation that attempted to recruit members for his through and through racist organisation.⁴⁸² Finally, in *Remer* a fringe proto-Nazi grouping was urging the reestablishment of the Nazi party.⁴⁸³ In these cases, even though the speakers were political speakers and therefore their speech could have amounted to political hate speech, nonetheless, the Court was justified in ruling against them on account of the institutional compromise.

The basket of the well-known revisionist or Holocaust denial cases would similarly fall within the institutional compromise. Recall that the previous chapter already made the case against Holocaust denial counting as political hate speech because it epitomises pure vilification, unrelated to any public debate. Hence the Court might be doubly justified in not finding violation of Article 10 in cases that range from the earliest *Honsik* through the wildly discussed *Garaudy* to the most recent *Diendonné v France*.⁴⁸⁴

The institutional compromise is what it says: a compromise. It relies on an external overriding reason to put otherwise valid complaints out of bounds. This would excuse the potential mismatch between the normative requirements derived from political speech and the case law.

6.4 The Incompatible Cases

Institutional compromise, however, cannot account for all discrepancies between theory and practice. Plenty of ECtHR judgments are clearly at odds with the right to political

⁴⁸¹ *Kühnen* (n 367) The factual background was similar in *B.H; M.W; H.P; G.K.* (n 343).

⁴⁸² *Schimanek* (n 368) Notice that in this case the applicant allegedly also attempted to organise a paramilitary group. Quite naturally that would in and of itself be enough basis to put the speaker outside of the protected realm of right to free speech.

⁴⁸³ *Kühnen* (n 367).

⁴⁸⁴ *Honsik* (n 368), *Garaudy* (n 359), *Diendonné M'Bala M'Bala* (n 382). In *Diendonné* the applicant comedian devoted a political show in a big concert in Paris to make fun of Holocaust.

speech. This is the cluster of incompatibles. If the normative arguments for the right to political speech are correct, then the ECtHR wrongly judged these cases and as far as it goes the jurisprudence is at fault with the theory. This cluster is made up by *Féret*, *Le Pen* and *Glimmerven*.

In all three decisions the speakers were politicians, and in two of them (*Féret*, *Glimmerven*) the debated speech occurred during the election campaign process. Recall that the role of the speaker and the institutional process in which the speech takes place rendered them high-key political speech. Given that the applicants were held responsible for their hateful speeches against Muslims and immigrants, the three cases are core political hate speech cases. It is important to note that these cases cannot be disqualified from free speech protection on the basis of pure vilification either.⁴⁸⁵ All of them related to the perhaps most lively and public debate of contemporary Europe: immigration and diversity. The opinions expressed contribute a point of view that may be deplorable but certainly not irrelevant to the public debate. The Court mentioned this point, albeit superficially, along with the importance of political speech in democracy, but it wound up prioritising its content-regarding consideration.

Despite this background, the Court refused to find violation of Article 10 on grounds of the limitation clause (Article 10 (2) in *Féret* and *Le Pen* or of the abuse clause (Article 17) in *Glimmerven*. The three cases stand clearly at odds with the right to political speech, hence the gap between theory and practice. The question is: can the gap be closed?

⁴⁸⁵ See the section on pure vilification (7.3) in Chapter Four.

6.5 Margin of Appreciation

One promising avenue to explain away the incompatibility is to rely on the doctrine of margin of appreciation. The historical *Handyside* decision explains the core idea:

by reasons of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion [...].⁴⁸⁶

Concerning political hate speech, the question looks the following way. On the one hand the normative ideal of political speech has universal appeal with general scope of application. Yet on the other hand, such universalism flies in the face of the institutional constraints of a supranational court, expressed in the doctrine of the margin of appreciation. Hence one way to resolve the conflict is the proposition that the doctrine account for the Court's deference to national courts in political hate speech cases.

However, at least two reasons weaken the force of the proposition. To begin with, the indeterminacy of the doctrine itself should weigh against it. At times the Court appears to take the doctrine as part of the substantive analysis of rights, at others it suggests that the doctrine bears on the structural role of an international court (see the quote in *Handyside*), or it is merely used as a conclusive label for rejecting complaints.⁴⁸⁷ In a nutshell, the Court's doctrine is not theorised enough to buttress the Court's stance in political hate speech cases.

Second, and more importantly, the dice is loaded towards political speech according to the Court's own jurisprudence. As an authoritative textbook on the Convention writes: '[p]olitical expression exercised by elected representatives or journalists has been given a privileged status because of its contribution to public debates

⁴⁸⁶ *Handyside* (n 442) §48.

⁴⁸⁷ For an illuminating discussion and the distinction between substantive and structural see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) Chapter 4.

on matters of general interest.⁴⁸⁸ According to its own standards, the margin of appreciation left for national authorities is the narrowest in political speech cases in comparison to other speech categories:

Whereas there is *little scope under Article 10 para 2 of the Convention (art. 10-2) for restrictions on political speech* or on debate of questions of public interest [...], a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.⁴⁸⁹

The reference to the ‘little scope under Article 10 (2)’ became one of the Court’s principles in political speech decisions that it usually evokes.⁴⁹⁰ It does not follow that the Court should always side with political speakers no matter what. Yet the Court’s strong general stance for protecting political speech should suffice to debunk the attempt to explain away the incompatibility with the margin of appreciation. Besides, the reduced margin of appreciation sits well with the normative demands of political speech endorsed in Chapter Two.

⁴⁸⁸ Harris, O’Boyle & Warbick (n 386) 455 (internal quotation omitted).

⁴⁸⁹ *Wingrove v the United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) §58 (emphases added) The instant judgment bore on artistic expression, but this was the first time the Court spelled out its judgment on the reduced margin left in political speech cases.

⁴⁹⁰ See further references in *Sürek* (n 355) §61, *Uj v Hungary* App no 23954/10 (19 July 2011) §17.

7. Conclusion: A Reform Agenda for the ECtHR

This chapter presented the first case study where the theoretical findings of the previous chapters were applied. The ECtHR is not famous for its protection of free speech in hate speech cases, but its jurisprudence on hate speech has evolved over time, as this chapter tracked that development. Yet it also highlighted the distance between the lofty theoretical findings and the practice of the case law. To shorten the distance, the cornerstones of a reform agenda will be presented in this conclusion. It will demonstrate that the case law could be changed from within for protecting political speech more extensively.

Courts do change course on legal issues all the time. Doctrines are seldom set in stone and the ECtHR is no exception. It emphatically conceives the Convention as a 'living tree' that evolves over time. However, any future change in the jurisprudence should be anchored in the flow of preceding judgments, doctrines and principles to make a successful claim for changing course. Without anchoring it in the past, any reform agenda will come out of thin air. Luckily though the Court has sufficient internal resources for such a reform agenda.

First, as we saw, the Court's case law already included one free speech protecting judgment in *Fáber* and various separate opinions in *Vejdeland* and *Féret* that all together laid the ground for a more protective approach. Similarly, more nuanced judgments arose from the penumbra of hate speech cases in *Lehideux & Isorni* and *Perinçek*. In all of these cases the Court showed more willingness to protect speech than in hate speech cases. In these opinions the Court gave more weight to the circumstance-regarding as opposed to

the purely content-regarding considerations. This more nuanced approach is instrumental for reforming the Court's approach.

Second, the Court should tighten the concept of political speech, hence approaching its position to the indicators of high-key political speech. As of now, the Court either does not categorise the speeches it judges or takes almost anything as political solely on the grounds that it relates to public debates. The Court made it plain in earlier cases involving politicians that their speech relates intimately to the normative importance of political speech. Its classical formulation is in *Castells v Spain*:

[w]hile freedom of expression is important for everybody, it is *especially so for an elected representative of the people*. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, *call for the closest scrutiny* on the part of the Court.⁴⁹¹

Similarly, in *Erbakan v Turkey*⁴⁹² and in *Vajnai*, the Court found for respectively the Turkish and the Hungarian politician in Article 10 cases, partly on the grounds that an acting politician's speech was at stake. Moreover, even the majority in *Féret* recognised the normative significance of politicians' speech – even though it failed to side with the applicant.⁴⁹³ Therefore, the highest protection should be applied to politicians' speech as they epitomise political speech.

Third, the Court should build on analogous extremist speech cases that do not fall into the category of hate speech. Primary regard should be given to *Vajnai* where the Court tended to provide more protection to political speech than at political hate speech cases. In *Vajnai*, the leader of a far-left political party in ex-Communist Hungary

⁴⁹¹ *Castells v Spain* App no 11798/85 (ECHR, 23 April 1992) § 40 (emphases added) See the same position expressed in *Lombardo v Malta* App no 7333/06 (ECtHR 24 April 2007) §53, *Ahmet Sadik v Greece* App 18877/91 (ECtHR, 15 November 1996) §18.

⁴⁹² *Erbakan v Turkey* App no 59405/00 (ECHR, 6 July 2006).

⁴⁹³ *Féret* (n 300) § 63.

displayed the Communist red star, which was banned under the country's criminal law for being a political symbol of totalitarianism. The Court found a violation of Article 10. It relied on circumstance-regarding considerations such as the lack of danger of a Communist takeover, and that the political party the applicant represented did not work in service of any totalitarian aim. Most importantly the Court enunciated for the first time a speech protective argument tailored to extremist speech: the defense against heckler's veto. The Court opined:

[The red star] may create uneasiness among 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 recognised in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.⁴⁹⁴

In principle there is no reason for the Court *not* to follow suit in political hate speech cases. *Vajnai* is not the only extreme speech case where the Court took a more nuanced view. In the thread of Turkish speech cases the Court endorsed a more speech-protective attitude than in other extreme speech cases. The most significant cases are *Incal v Turkey*,⁴⁹⁵ *Gündüüz v Turkey*⁴⁹⁶ and *Erbakan v Turkey*. The Turkish authorities prosecuted political speakers on the grounds of Kurdish separatist propaganda or religious sectarianism (often for religious hate speech). The Turkish cases are instructive for their meticulous balancing approach. For instance, the Court thoroughly scrutinised whether the impugned expressions amounted to calls to violence or contributed to risks of violence. It subsequently only sided with the national authorities if an actual danger of violence was sufficiently demonstrated.

⁴⁹⁴ *ibid* §57.

⁴⁹⁵ *Incal* (n 330).

⁴⁹⁶ *Gündüüz v Turkey* App no 35071/97(ECHR, 4 December 2003).

Finally, a reform agenda, in order to be anchored properly in the case law, should reach back to general principles. The ECtHR had announced a highly speech-protective principle in the historical case of *Handyside*, which figures in virtually every Article 10 judgment ever since:

[Article 10] is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.⁴⁹⁷

The famous adage in *Handyside* entrenches a broad liberal principle of freedom of expression into the ECtHR’s jurisprudence. *Handyside* properly stands for the proposition that speech should be protected even if serious objections can be mounted against it. To an extent *Handyside* became the victim of its own success: if a principle applies in all cases, its authority necessarily dulls. Surely, the principle was not born under auspicious circumstances, as the ECtHR had not found a breach of freedom of expression for the prosecution of a mildly explicit book on masturbation, homosexuality and all things sexual, on the grounds of defending public morals. However, *Handyside* remains the promising anchor for any liberal reinterpretation of freedom of expression and, therefore, any future reform will be anchored in it.

⁴⁹⁷ *Handyside* (n 442) §49.

Chapter Six

HATE SPEECH LAWS IN THE UNITED KINGDOM

1. Introduction

The UK was one of the first European jurisdictions to adopt legislation to ban hate speech. The complexity of the British hate speech regulation makes it an interesting material to test the normative findings about political hate speech. Chapter Five already carried out such an exercise on the jurisprudence of the European Court of Human Rights. The challenge is slightly different this time because a set of statutory laws will be under scrutiny here.

Instead of focusing merely on the case law, this chapter will look at the UK's hate speech regulation scheme as a whole. The aim is to assess whether this regulation is compatible with the right to political speech as defined in the preceding theoretical chapters, but the assessment is bound to proceed differently for a statutory regulation.

Before the substantive analysis, a swift look will be had at the legislative history. The historical antecedents to the current hate speech laws, which conditioned the path of legislation, will be examined. A bird's-eye view on the various legislative reforms will follow to shed light on the motives behind the statutes, and the major legislative rounds will be presented.

The British legislation is characteristically complicated, having two main statutory instruments.⁴⁹⁸ The first vantage point, therefore, must be to assess the legislative designs of these hate speech statutes. The analysis should bring out the theoretical potential of the British laws, i.e. what speech could be caught by these offences in theory? The statutory design is crucial for assessing the potential flashpoints affecting the right to political speech. Underlying the question of design are concerns about the paired notions of the negative chilling effect and positive deterrence. The premise of this thesis is that hate speech regulation is justified in principle except for political hate speech. It will thus depend considerably on the statutory design whether regulation winds up chilling legitimate political speech or rather rightly deterring prohibited hateful expressions.

The intended design of statutes ought not to be the conclusive endpoint of the scope of British hate speech regulation however. Their actual effect is seen in the case law itself. It gives a broad picture of what types of hate speech prosecutors target. Tracking the case law will help to define the dominant hate speech case profile that the statutes are used for. The question will remain whether hate speech laws are used to weed out high-key political hate speech.

2. The Outline of British Hate Speech Regulation

2.1. Historical Factors Conditioning Legislation

In the UK, hate speech has been conceptualised as a public-order issue historically, and less as an anti-discrimination measure. The successive legislations, at least in the beginning, were closely associated with the prevention of public disorder. This is evident with regard to the historical context of the 1930's that prompted the adoption of the first

⁴⁹⁸ The complexity of UK's regulation would become jarring if the jurisdictional differences were added into the tally that came to exist upon the devolution of powers. Even though the Scottish and the Northern Irish regulation somewhat differ from the rest of the UK, the emphasis here will be on England and Wales but occasional reference will be made to the other kingdoms' hate speech law.

Public Order Act of 1936. The British Fascist Movement of Oswald Moseley caused a great deal of public disorder in the streets that in turn shaped the law in the public order direction.

The immediate ancestors to hate speech laws further buttress their initial public order orientation. Seditious libel, the offence of public mischief and breach of the peace were meant to work as general criminal offences against inciting discontent leading to disorder in the realm of his majesty.⁴⁹⁹ As such, sedition could in theory cover instances of hate speech on account of its potential of causing disorder and violence against vulnerable groups. Such a case was, for instance, *R v Osborne* that concerned a blood libel against Portuguese Jews living in London.⁵⁰⁰

These factors towards a public order orientation were reinforced by the lack of alternative means to fight hate speech. In many other jurisdictions, defamation law took the lead of banning hate speech through group defamation.⁵⁰¹ Yet this avenue was blocked in the UK since the judgment in *Knuppffer v London Express Newspaper Ltd* in 1944.⁵⁰² The House of Lords found that the British tort of defamation could not be extended to groups (as opposed to individuals), which deterred Parliament and the regulation of hate speech remained stuck to criminal public order legislation.

The cradle of modern hate speech offences is without doubt the Public Order Act 1936. The legacy of this provision can still be found in the textual formulation of hate speech offences that bans the public use of ‘threatening, abusive or insulting’ words

⁴⁹⁹ For an excellent summary about the origins of British hate speech laws see Phillippe N.S. Rumney, ‘The British Experience of Racist Hate Speech Regulation: A Lesson for First Amendment Absolutists?’ (2003) 32 *Comm. L. World Rev.* 117, 120-124.

⁵⁰⁰ *R v Osborne* (1732) 25 Eng. Rep. 584.

⁵⁰¹ Such is the case for instance in France and Germany.

⁵⁰² *Knuppffer v London Express Newspaper Ltd* [1944] UKHL 1.

and behaviour. The formulation once again underlined the public-order orientation of hate speech law in the UK.

2.2 Defining Hate Speech Laws in the UK

Let us recall that the First Chapter introduced the loose criteria of the overall concept: hate speech embodies the rejection of the equal value or dignity of a group of people defined by race, ethnicity, religion or sexual orientation. These laws target the message and not the potential consequences (e.g. an eruption of violence).

Two statutes clearly fall into this category. The first is Part 3 ('Racial Hatred') and 3A ('Hatred against Persons on Religious Grounds or Grounds of Sexual Orientation') of the Public Order Act of 1986 (POA).⁵⁰³ For the sake of clarity we shall refer to this set of offences as the *racial (religious and sexual orientation based) hatred offences*. The other ones are the *racially and religiously aggravated public speech offences*, which were created by the Crime and Disorder Act of 1998.

2.3 The Development of British Hate Speech Legislation

2.3.1 The First Period: 1936–1965

The immediate antecedent of the current regulation scheme was the Public Order Act of 1936 (POA '36). The POA '36 was essentially the legislative response to the violent public disorder caused by the British Union of Fascists.⁵⁰⁴ It criminalised wide-ranging offences to tackle public disorder. Section 5 prohibited the use of threatening, abusive or insulting words and behaviour conducive to the breach of the peace. The offence had a catch-all nature with characteristically vague conduct element.

⁵⁰³ Sections 17- 29, 29A-29N of the Public Order Act of 1986.

⁵⁰⁴ A good historical account of the violent events leading to the passage of POA'36 is offered by Richard Thurlow in Richard C. Thurlow, *Fascism in Britain: From Oswald Mosley's Blackshirts to the National Front* (I.B.Tauris 1998) 81-87.

The societal effects of the law on the fascist movement are debatable, especially as to the impact of section 5. According to the historian Richard Thurlow the application of the law ran into definitional hurdles and the punishments meted out were ‘often derisory’ and ‘inconsistent.’⁵⁰⁵ However, considering the clear decline of the BUF in the late 1930s, the law might have played some role in it.

Section 5 of the POA ’36 remained in force until 1986, when the piecemeal public order legislation was completely overhauled. Interestingly this section remained in the books even though similar legislation came into force in the meantime.

2.3.2 1965–1986: The Race Relations Act of 1965

By the late 1950’s the country saw the re-emergence of racial tension. That period saw substantial immigration from the Commonwealth. A considerable opposition to immigration developed rather quickly. Violent race riots in urban areas started to occur and the old racist rhetoric made its way once again back into the public sphere. With tensions high, the pressure mounted on the government to act against discrimination against the black and Asian immigrant population in housing, education and in services. Racist propaganda was thought to fuel racial violence and in turn riots. Labour included into its 1964 election manifesto (‘The New Britain’) that a ‘Labour Government will legislate against racial discrimination and incitement in public places.’ This stance was taken in light of the assumption that the POA ’36 had proven ineffective in situations where racist propaganda went hand in hand with racial violence.

The Harold Wilson government passed the first modern anti-discrimination law: Race Relations Act 1965 (RRA ’65). The RRA ’65 included civil and administrative law provisions against racial discrimination in housing or employment and a wholly new

⁵⁰⁵ *ibid* 85.

criminal provision. Section 6 introduced the first *sui generis* hate speech provision into UK law: the offence of incitement to racial hatred.

The government's bill met with serious opposition. A monograph on the UK law gives a good account of the hostility:

[t]he proposal had gone accompanied by heavy opposition in both Parliament and the media that emphasised the offences dangers to freedom of speech in especially since no breach of the peace requirement was included. The Times warned that the offence would be an instrument of political censorship and would open the way to legal harassment of unpopular or officially deprecated opinions.⁵⁰⁶

The opposition attested the enduring cultural force of free speech tradition as much as the novelty of such law. A poignant proof of that tradition was the recurring reservation that subsequent UK governments attached to two major international human rights conventions at the time. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of Racial Discrimination (ICERD) covenants contained provisions obliging the signatory states to prohibit hate speech.⁵⁰⁷ The UK attached reservations to them to the effect that it would interpret the conventions' obligation to prohibit hate speech with due regard to the protection of freedom of expression.⁵⁰⁸

The racial incitement provision was moulded in the template of the POA '36, as it stuck to the original conduct formula of banning the use of threatening, abusive or insulting words along with publishing and distributing such materials. However, the

⁵⁰⁶ Lucia von Noorloos, *Hate Speech Revisited - A comparative and historical perspective on hate speech law in the Netherlands and England & Wales* (Cambridge Intersentia 2011) 288.

⁵⁰⁷ UN ICERD article 4 (a), (b), (c); ICCPR Article 20 (2).

⁵⁰⁸ he government's reservation to the UN ICERD ratified in 1969: 'Secondly, the United Kingdom wishes to state its understanding of certain articles in the Convention. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article *only in so far as it may consider with due regard to the principles embodied* in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention (*in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association*) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4.' The UK government attached a similar reservation to the ICCPR.

characteristic second limb of the offence, to wit that it was likely to provoke ‘a breach of the peace,’ was replaced by language that such communication was ‘likely to stir up hatred on grounds of colour, race, ethnic or national origins.’ The offence’s reach was considerably restrained by requiring the consent of the Attorney General for racial incitement prosecution in section 6 (3), which was widely seen as a procedural safeguard against the law running amok and unduly limiting free speech.

RRA ’65 did not replace the existing section 5 of POA’36, which signals another permanent feature of hate speech legislation, namely the continuous expansion of such laws. The subsequent legislative changes to the existing laws always intended to expand further prohibition often without any due consideration to the efficacy of the existing laws.

Parliament decided to fine-tune the law in 1976. The most consequential amendment concerned the abolition of the *mens rea* requirement from the offence that seemed to shackle prosecution. It was replaced with an easier-to-prove requirement whereby intention could be inferred from the circumstances.⁵⁰⁹

The amendment also brought conceptual clarity by inserting the racial incitement provision into the Public Order Act. A government report of the time betrayed clearly the government’s thinking at the time: the incitement to racial hatred provision was ‘concerned to prevent the stirring up of racial hatred which may beget violence and public disorder.’⁵¹⁰

⁵⁰⁹ Section 70 of RRA 1976.

⁵¹⁰ Home Office, *Racial Discrimination* (Cmnd 6234, 1975) § 125. Parliament extended the scope of the prohibited communications to public performances and theatre plays in the Theatres Act of 1968 (section 5). The provisions still make part of current legislation no case has ever been reported.

2.3.3 1986–1998: *The New Public Order Act*

In the 1980s, processions by some extreme right-wing groups caused street violence, while inland terrorist acts from Irish separatists continued unabated and football hooliganism peaked. All these sufficed to reinvigorate the question of public order legislation. At the same time a consensus emerged amongst experts about the need for a general overhaul of public order laws.⁵¹¹ Public order law was a patchwork of statutory provisions and common law offences typical of the time-honoured British law-making tradition.

Parliament tinkered with numerous parts of the hate speech provisions without changing them substantially. All changes pointed in the direction of further strengthening and extending the scope of the provisions. Parliament reinserted the *mens rea* requirement, which was thought to provide one additional option for prosecutors to press charges. The government intended to remedy the situation where proving that racial hatred was ‘likely to be stirred’ turned out impossible due to the composition of the audience, which was already made up of true converts to racism.⁵¹²

Racial incitement offences were extended to three different communicative activities. *Possession* of written material that is racially inflammatory, or *recordings* of visual images and sounds with a view to publish, *distribute or play* all became criminalised (section 23) and the ban was extended to broadcasting (section 22). Not unimportantly this provision was qualified with a *mens rea* requirement, which qualified the scope of the offence.

⁵¹¹ Parallel with the Public Order Bill, a separate bill on Northern Ireland was discussed that included more stringent provisions on incitement. The discussion of that bill will be omitted here.

⁵¹² The somewhat counter-intuitive thought was that such an audience’s racial hatred could hardly be stirred up *further*. In the debate the government argued that: ‘[t]here have been cases where, because of *the level-headed nature of those who receive this obnoxious material*, racial hatred is unlikely to have been stirred up. So we are extending the offence to where it is the intention of the accused to stir up such hatred.’ (emphasis added) HL Deb 13 June 1986 vol 476 cc517-518 (The Parliamentary Under-Secretary of State, Home Office (Lord Glenarthur)).

Another perceived loophole was closed by extending the offence to private places. Some concerns were voiced over the years that racist propaganda circulated in far-right private associations that could defend themselves by pointing out that they did not distribute their materials to the public at large.⁵¹³ The government extended the application of the law to private places, which in turn sparked concerns of privacy in Parliament. To parry such worries, a dwelling defence was inserted. Predictably this raised infinite practical objections from MPs along with some muted free speech concerns piggybacked on privacy.⁵¹⁴

2.3.4 1998–2013: The Doubling of Hate Speech Laws

Ten years after the passage of the new public order law, the issue became topical yet again. New Labour's 1997 election manifesto boded change:

Britain is a multiracial and multicultural society. All its members must have the protection of the law. We will create a new offence of racial harassment and a new crime of racially motivated violence to protect ethnic minorities from intimidation.

The upshot of the new legislative process was the Crime and Disorder Act 1998 (CDA). The CDA had an entire chapter on racially aggravated offences. In sync with the criminal policy agenda of the time, the focus was on the fight against racially motivated crimes or hate crimes.

CDA thus punished assault, criminal damage, public order offences and harassment more severely if committed for racial motives.⁵¹⁵ Section 31 of CDA created

⁵¹³ Patricia M. Leopold wrote that 'another effect of section 6 (1) [that defined public] was to increase the number of private book clubs. Section 6 (2) in effect permitted the distribution of the type of racist literature.' Leopold mentioned the example of the Viking Book Club which specifically stated that its purpose was to provide literature that the RRA made it impossible to circulate at large. Patricia M. Leopold, 'Incitement to Hatred – The History of a Controversial Criminal Offence' (1977) Public Law 389, 398.

⁵¹⁴ For instance: HL Deb 21 October 1986 vol 481 cc178-81. Dwellings served as a poor proxy for privacy as many pointed out: W.J. Wolfe, 'Values in Conflict: Incitement to Racial Hatred and the Public Order Act' (1987) Public Law 89, 90.

⁵¹⁵ CDA also retained the broad understanding of racial groups that the Race Relation Act had enacted in 1965. Racial group meant a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

racially aggravated versions for the otherwise not hate speech oriented public speech offences (sections 4 and 5 of the Public Order Act 1986 or POA). Section 4 of POA had banned the causing of fear or provocation of violence, while section 5 prohibited the causing of harassment, alarm and distress.⁵¹⁶ These offences were neutral in the sense that they did not embody the conceptual features of hate speech – they were not viewpoint discriminatory so to speak. Yet the CDA changed all that. Section 28 and 31 provided a remarkably broad definition of what was meant by racial aggravation. If the offender demonstrated hostility toward the victim based on the victim's (real or presumed) race; or the offence was otherwise motivated by that hostility, section 28 was made out.

Consequently, the aggravated version of the otherwise neutral public speech offences opened the possibility of prosecuting hate speech autonomously (that is independent of Part 3 of the POA) through a combination of the basic offences of public speech offences (Part 1 of the POA) combined with CDA's racial aggravation sections. Finally, it should be added that just a couple of years after CDA received the royal assent, Parliament amended the offence with an additional limb on religion, thus creating 'religiously aggravated offences.'⁵¹⁷

2.3.5 2006–2008: The Extension of the Public Order Act 1986

Upon the 2005 terrorist attacks in London, the Labour government introduced an extension to religious incitement in order to fight increased Islamophobia.⁵¹⁸ There was a specific argument for the extension. A controversial court decision in the anti-

⁵¹⁶ Part 1 of POA contained another offence from later on: section 4A the offence of 'causing intentional harassment, alarm and distress.' This was added by section 154 (Part XII) of the Criminal Justice and Public Order Act of 1994.

⁵¹⁷ See section 39 Anti-terrorism, Crime and Security Act of 2001 amending the CDA.

⁵¹⁸ The extensions do not apply in Northern Ireland and Scotland in the current constitutional setting. Northern Ireland already had provisions against religious incitement since 2004, see Part 3 of the Public Order (Northern Ireland) Order 1987. Interestingly the devolved Scottish government explicitly rejected the extension of hate speech offences towards sexual orientation.

discrimination case of *Mandla v Dowell Lee* found that mono-ethnic religions, though being primarily religious groups, receive protection against *racial* discrimination.⁵¹⁹ The distinction was adopted to racial incitement, thus creating ‘a gap in the law,’⁵²⁰ because mono-ethnic religious groups (mainly Sikhs or Jews) were protected from prejudiced expressions *qua* racial groups while multi-ethnic groups, mainly Muslims or Christians, were not. The extension was meant to tackle this unfairness.

The sexual orientation extension mostly resulted from intense lobbying from campaign groups such as *Stonewall* in 2008. Parliament accepted the assumption that homophobic incidents seemed to be on the rise and thus the time for extending hate speech legislation towards sexual orientation was ripe.⁵²¹

Parliament limited both extensions, however, and thus they significantly differ from racial hatred offences. Interestingly, explicit free speech defences were attached to the law to narrow the scope of offences (sections 29J, 29JA). As one commentator remarked: ‘[t]he Lords have pruned this statute so hard they have left it a stump.’⁵²²

Part 3A of the Public Order Act contains the incitement to religious hatred (section 29A) and hatred on the grounds of sexual orientation provisions (section 29AB).⁵²³

⁵¹⁹ *Mandla v Dowell Lee* [1983] UKHL 7.

⁵²⁰ Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70 *Mod. L. Rev.* 89, 94.

⁵²¹ See a good discussion about the legislative process: Kay Goodall, ‘Challenging hate speech: incitement to hatred on grounds of sexual orientation in England, Wales and Northern Ireland’ (2009) 13 *The International Journal of Human Rights* 211, 214.

⁵²² Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (n 520) 113.

⁵²³ The Race and Religious Hatred Act of 2006 amended the law to include the offence of stirring up religious hatred. The Criminal Justice and Immigration Act of 2008 (section 74 schedule 16) amended the POA by the offence of stirring up hatred on grounds of sexual orientation.

3. The Statutory Design

We turn to analysing in depth the statutory design of the two main offences: the racial, religious and sexual orientation–based hatred offences (POA Part 3, 3A) and the aggravated speech offences (POA Part 1 combined with CDA).

The previous section argued that amid continuous expansion of the hate speech ban, the core of the offences remained unchanged. Our task here will not be to track each amendment that tweaked the offence, but rather to assess through the core statutory design, the potential these offences had in restricting political hate speech. In the next section this static picture will be supplemented with a dynamic assessment of the case law. This will provide us with a broad picture about the impact the hate speech offences have had on high-key political hate speech.

Bifurcating the assessment into design and impact is necessary. Merely looking at the case law of a speech offence might give a distorted view about the actual offence. Criminal offences do not primarily aim at punishing but rather deterring future offenders by the sheer promise of future punishment. Speech offences are no exception. Assessing the net that hate speech offences cast serves as a proxy for the types of speech that the statutes will deter. The potential deterrent impact of criminal legislation has an even more pressing role in case of a speech offence. In free speech theory, the flip side of deterrence is a *chilling effect*. Virtually everyone accepts that some speech should be restricted by legal coercion (e.g. defamation or child pornography just to name the obvious ones). It then follows that there is value in statutes deterring harmful speech instead of merely punishing them *ex post facto*. Yet there is a fine line between deterring ‘bad speech’ and stifling legitimate expression, to wit a law having chilling effect on legitimate expression. Analysing the legislative design aims at finding out on which side the British hate speech offences fall. Do they deter hate speech that we have no reason

to protect under the normative framework on political speech defined in earlier chapter, or do they have a chilling effect on political hate speech?

3.1 Racial Incitement Offences

In this section, we will break down the racial incitement offence into the following building blocks: conduct element, mental element, substantive filters (defences) and procedural safeguards. The analysis will bear primarily on section 18 of the Public Order Act 1986, which defines the basic offence. All further offences are variations on this section.⁵²⁴ At present, it is the most often used legislative tool against hate speech. As section 18 reads:

(1) 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—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

3.1.1 Conduct Elements

Analytically the conduct element has two constitutive parts. On the one hand, it bans the use of specific words that have the quality of being threatening, abusive or insulting. On the other, those words should relate to a specific result, to wit ‘stirring up racial hatred.’ This result can be either intended subjectively by the offender or inferred from the circumstances.

⁵²⁴ Part 3 ‘Racial Hatred’ of the Public Order Act 1986 contains: sections 19 (Publishing or distributing written material), 20 (Public performance of play), 21 (Distributing, showing or playing a recording), 22 (Broadcasting or including programme in cable programme service), 23 (Possession of racially inflammatory material), 28 (Offences by corporations).

Part 3A ‘Hatred against persons on religious grounds or grounds of sexual orientation’ contains: sections 29B (‘Use of words or behaviour or display of written material’), 29C (‘Publishing or distributing written material’), 29D (‘Public performance of play’), 29E (‘Distributing, showing or playing a recording’), 29F (‘Broadcasting or including programme in programme service’), 29G (‘Possession of inflammatory material’).

The POA does not offer any help as to what words qualify as threatening, abusive or insulting. This is treated as a question of fact and not of law. Consequently, it is almost impossible to argue against such a qualification on appeal once a jury (or a magistrate judge) establishes it. According to the famously narrow standard of the *Wednesbury* test, unless the factual finding is so perverse that no reasonable person would have reached it, it cannot be turned over on appeal.⁵²⁵ Considering that ‘insulting’ or ‘abusive’ are liable to be interpreted very broadly (at least less than threatening), it is fair to say that the bar is set low for the first conduct element to be met. However, it should be noted that this does not go for all hate speech offences. It is only the use of threatening but not abusive and insulting words that are prohibited for the religious and the homophobic hatred version of the offence. This renders these offences considerably narrower than their racial version.

The other conduct element, that is, the stirring up of racial hatred, does not narrow the definition of conduct at all. Notice that it does not require the actual stirring up of hatred. It only requires its likelihood or that this result be intended. POA contains a definitional section about racial hatred (section 17) but it is wholly question-begging and leaves the factual question very vague.⁵²⁶ For instance, it remains open to question in whom hatred should be likely (or intended) to be stirred up, let alone what hatred really means. Moreover, the same applies here than to the first conduct part: it is treated as a question of fact with the difficulty of turning around a factual finding on appeal.

The Human Rights Act 1998 (hereafter HRA) brought about significant change about the POA’s interpretation. Under its sections 3 and 6 the HRA put the courts, and

⁵²⁵ This much was clarified in a famous case by Lord Read in *Brutus v Cozens* [1972] 3 W.L.R. 521. Even though the issue at hand was not about racial incitement, but breaching the peace (section 5 of Public Order Act 1936), the ruling is taken as authoritative for the racial incitement offences as well.

⁵²⁶ Section 17 of POA reads: ‘In this Part “racial hatred” means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.’

public authorities in general, under the duty of interpreting legislation in accordance with the European Convention on Human Rights such as its article 10. In *Debal v CPS* the Court derived from article 10 the requirement for the police to clearly establish the necessity to bring a criminal prosecution under POA (in the case it was section 4A).⁵²⁷

Justice Moses stated about the relation between POA and article 10:

[T]he criminal law should not be invoked unless and until it is established that the conduct which is the subject of the charge amounts to such a threat to public disorder as to require the invocation of the criminal as opposed to the civil law.⁵²⁸

Therefore, the HRA allowed courts to supervise whether the prosecutors' response, that is the restriction of Article 10 through criminal law, was a proportionate means to prevent public disorder.

It is to be highlighted that this principle is similar to the famous dicta of Sedley LJ in *Redmond-Bate v DPP* – it goes back to before HRA came into force. The case was about whether a police officer was justified in apprehending a Christian fundamentalist appellant for breach of the peace. The appellant preached before a cathedral and many passers-by took exception to the preaching and showed menacing hostility to the unwelcome preacher. Sedley LJ argued that for criminal action to be a proportionate response, it does not suffice to establish that the words were offensive. Their tendency to provoke violence should be established instead. In the oft-quoted words of the Lord Justice:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom to speak only inoffensively was not worth having.⁵²⁹

⁵²⁷ [2005] EWHC 2154 (Admin).

⁵²⁸ *ibid* 5§.

⁵²⁹ *Redmond-Bate v DPP* [2000] H.R.L.R. 249. 12§

Let us recap the point here. The possibility of challenging prosecutions on the basis of their compatibility with Convention rights was opened by the HRA. Following in the footsteps of *Redmond-Bate*, the *Dehal* judgment's interpretation of section 3 of HRA gave the task to the prosecution to set out clearly the reasons how an impugned speech could lead to public disorder.

An additional feature should also be mentioned: the new Public Order Act 1986 extended the place of commission to virtually everywhere: it can be committed not just in public (as it was in the original version) but as well in private places. It means that as opposed to previous times, the defendant could not any more argue that the expression or distribution was not for the public at large but for a closed circle (say for an association).

Two cautious inferences can be made about the design of conduct in the offence. It is defined very broadly. This broadness is accentuated by its being treated as a factual question by courts, hence it is liable to be decided in the first trial instance by the Magistrates' court.

However, it is not the end of the matter. It is not uncommon that the conduct element of a speech offence or tort is defined in broad fashion. It suffices to think about British defamation law. What counts for a defamatory statement is understood very broadly in British courts, hence the defamation cases usually do not turn on whether a statement was defamatory. British courts move on relatively quickly from that part of the inquiry. However, at further stages of the analysis, they do restrict the scope of defamation by considering further elements of the tort such as defences.

3.1.2 Mental Element

Historically, the mental element played a crucial role in limiting the broad application of the offence. The government made a concession during the legislative process in 1963 when requiring *mens rea* for the commission of the racial incitement offence, which finally passed in 1965. It meant that not even reckless behaviour sufficed for the commission of racial incitement offence. Prosecutors had to face the difficult task of establishing that the offender really intended to stir up racial hatred. In later years, the *mens rea* requirement widely came to be seen as the cause of unsuccessful prosecutions. To remedy this Parliament first deleted it from the offence (in 1976), then reinserted it back to the statute along with a more lenient circumstantial test (in 1986) as an alternative.⁵³⁰ Therefore, the 1986 legislation added that apart from the defendant intending the stirring up of racial hatred, it sufficed that ‘having regard to all the circumstances racial hatred is likely to be stirred up thereby.’⁵³¹ To this circumstantial limb, Parliament attached a qualifying mental requirement. According to section 18 (5):

A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

This provision thus set up an intention requirement about the first conduct element: the use of threatening, abusive or insulting words. The defendant must be at least aware (or intend) that his words be threatening, abusive or insulting without intending the result of stirring up racial hatred. This provision adds up to an ignorance defence as it can be relied on most effectively if one proves to have been unaware of the meaning of his words. At any rate, this provision attaches a minimal check to the application of the offence.

⁵³⁰ Section 70 Race Relations Act 1976 amended s 6 (1) of Race Relations Act 1965.

⁵³¹ Section 18(1) (b) POA 1986.

In the current state of the law the mental element does not fully operate as a filter. Juries and judges can bypass the difficulty that comes with proving intention by merely establishing the likelihood of hatred being stirred up from all the circumstances.

Once again this does not follow for all the hate speech offences. Similarly, to the conduct part it is also on the mental element that the newer religious and sexual orientation versions differ from the original racial hatred offence. In case of the new religious and homophobic offences the perpetrator is required to intend to incite hatred. This is a stricter requirement than the one at the racist version where establishing the likelihood of hatred being stirred up also suffices. If history is of any guidance this strong mental element will make the proving of these offences very difficult. Kay Goodall opined similarly on the workability of religious hatred offence:

The legislative history in Britain and Northern Ireland suggests that the new Part III A will be almost unenforceable. Without a confession, it will be very difficult to prove the purposive intention. Perhaps some extremist clerics who confess their intentions may be caught, which would be no bad thing; and much more legitimate than deporting them without trial. But those at whom the legislation was supposedly aimed – racist activists – will have little trouble adapting their rhetoric.⁵³²

3.1.3 Defences

Beyond the mental element, explicit defences may qualify the scope of a tort or an offence in theory. It is for instance the case in defamation law. Even if a statement is defamatory in substance, the respondent can still avail of the rather broad defences such as the truth justification defence or that of absolute or qualified privilege and the fair comment defence.

Section 18 contains some explicit defences. The dwelling defence is a rather narrow one that extends to statements of ‘a person inside a dwelling not heard or seen

⁵³² Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (n 520) 113.

except by other persons in that or another dwelling’ (section 18 (2)). The dwelling defence is based on a rather dated conception of privacy centred around one’s home. Its utility in practice is minimal as it only safeguards the most private type of communication. It just does not weigh considerably against the broadly defined offence.

Similar to the previous stages, the newer religious and sexual orientation–based hatred offences substantially differ from the racial version. The third difference is a true legislative novelty that Parliament attached to the new offences despite government opposition. Sections 29J (for religion)⁵³³ and 29JA (for sexual orientation)⁵³⁴ are saving clauses for freedom of expression. They are to date the clearest legislative expressions of free speech concerns operating as defences.

The saving clauses explicitly state their goal to clarify rather than qualify the reach of the offences (‘nothing in this Part shall be read or given effect in a way’, for 29J, and ‘for the avoidance of doubt’, for 29JA). They are framed in the negative: by pointing towards interpretations that should *not* be given to the offences for that sake of avoiding ‘restrict[ion of] discussion and criticism.’ The clauses achieve this through three steps.

The saving clause for religious incitement confirms that what is not threatening but only expressing ‘antipathy, dislike, ridicule, *insult or abuse*’ are not restricted by the offences. For the new offences only ‘threatening’ words trigger the offence, hence the

⁵³³ Section 29J reads: Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practicing their religion or belief system.

⁵³⁴ Section 29JA is often referred to as the Lord Waddington amendment. HL Deb 3 March 2008, Lord Waddington, col. 924.

‘(1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.’

affirmation of the freedom of insulting and abusive expression is the other side of that very same coin.

In the same vein, the saving clauses affirm that some typical expressive activities are not restricted by the hate speech offences. Section 29J explicitly states that proselytising or urging people not to adhere to a religion are not restricted by the statute. The other saving clause of 29JA contains an analogous limb that allows for ‘urging people to modify sexual practices’ as well as to the criticism of gay marriage.⁵³⁵

The key conceptual element lies in differentiating between religion or sexual orientation on the one hand, and the religious person or the person with a particular sexual orientation on the other. The saving clauses rely on this distinction to mark the line for what is fair game for criticism. Accordingly, harshly criticising a religion, its practices or a certain sexual orientation qua a religion or sexual orientation is not on par with doing the same towards the religious adherent or the homosexual person *qua* person. The distinction does not lack intuitive appeal, but it raises just as many difficulties.⁵³⁶ First, it captures an important albeit subtle distinction that operates on a high level of abstraction. The government argued resolutely against the saving clauses precisely because of their unworkability. It is not just the case that courts are badly equipped for philosophically sensitive distinctions, but that perpetrators can easily tweak their messages to fall within the saving clause while keeping up with their intended messages. Second, the distinction surely does not stand above criticism. It aims at de-personifying a key facet of personal identity and treating it separately from the person. It

⁵³⁵ Parliament inserted this additional statement after legalizing gay marriage. See The Marriage (Same Sex Couples) Act 2013 c. 30 Sch.7(2) § 28.

⁵³⁶ Stephen Darwell’s distinction between ‘appraisal respect’ and ‘recognition respect’ closely maps on the distinction used in the statute. See Stephen Darwell, ‘Two Kind of Respects’ (1977) 88 Ethics 36. See also Waldron (n 6) 86-87, 105-111.

is highly questionable if such a distinction makes any sense for a proud gay or a deeply religious Muslim whose core identities are at stake.

The saving clauses protect freedom of expression by qualifying the reach of the new offences. The clauses achieve this by clarifying expressive instances that possibly do *not* amount to ‘threats.’ The qualification is, therefore, content- and not circumstance-based. It enumerates examples of potentially prejudiced expressions (religious insult, abuse, criticism of sexual conduct etc.) that the offences cannot capture. Considering the design of such statutes, two inferences can be made about political hate speech.

The saving clauses are predicated on the idea that the harshness of speech, that is the form of the speech, should be at the focus of hate speech legislation. However, contemporary far-right politicians typically do not rely on harsh expressions but rather use more effective ‘dog-whistles’ for peddling the same message. As we saw in an earlier chapter (4.7.1 ‘Form-Focused Vilification’) the hateful content does not disappear but takes new cloak, or worse provides the licence of legitimate speech to hate speakers. In our opinion any gain by requiring the tone to be changed might be marginal. Therefore, the saving clauses embody the distinction between religion and the religious on the one, and the not-heterosexual *qua* person and sexual orientation as such. For the British legislators it appears that the oft-heard political slogans of ‘Islam out’ or ‘stop homosexuality’ might sound less harmful and more tolerable than its verbally cruder ‘threatening’ versions.

The British Parliament was conscious of the danger for freedom of speech that these offences represented. Yet instead of focusing on the speech circumstances that can justifiably render some political hate speech privileged, while allowing other objectionable ones to be restricted, they opted to draw a line based solely on the content of the speech. This thesis argues for the avoidance of this approach. Such attempts to

distinguish between various hateful content is like drawing a line in the sand. It will render the offence generally impossible to apply, while allowing racist messages to take new forms and live on.

3.1.4 Procedural safeguards

If the racial hatred offences were to include only the conduct and the mental elements and the rather toothless defences, the reach of the offences would be much wider and the number of prosecutions could run very high in absence of effective filters. But the British hate speech offences contain a very strong procedural safeguard. Section 6 (3) has a built-in procedural restriction that requires the consent of the Attorney-General for each prosecution under Part 3 and Part 3A of the POA.

The consent requirement meant to serve as a buffer against a flood of prosecutions. In the Parliamentary debate a Lord summarised correctly the purpose for that requirement:

[it is a]n important safeguard against proceedings being taken in circumstances which would penalise or inhibit legitimate controversy and will ensure that their use is confined to the ringleaders and organisers of incitement to racial hatred.⁵³⁷

Requiring consent from the Attorney-General is not unusual in the British criminal system. Moreover, this requirement does not predict how often the consent will be granted. It should be born in mind though that the Attorney-General's decision cannot be reviewed in court and thus her decision is entirely discretionary. One could surmise that the Attorney-General, herself a politician MP, might be put in a peculiar situation if solicited to consent to the prosecution of a fellow politician. This difficulty could cut in many ways. Apart from the danger of favouritism, the Attorney-General might use her filter power to safeguard political hate speech or precisely take a more rigid

⁵³⁷ H.L. Deb., Vol. 268, col. 1012. (Lord Stonham).

stance against politicians giving voice to hateful views and turning a blind eye to less public hate speakers in society.

3.2 The Racially Aggravated Public Speech Offences

The British hate speech legislation is bifurcated into two sets of offences. Aside from the racial hatred offences, another set of racial (and religious) aggravated offences developed in two steps. The public speech offences in Part 1 of the Public Order Act 1986 came to replace the old incitement offences that had been on the book since the first public order legislation of 1935. Then Parliament passed the Crime and Disorder Act (CDA) in 1998.⁵³⁸ The combination of CDA with the basic public speech offences created the second statutory instrument against hate speech. Importantly, however, the resulting statutory design was quite different. The punishment on CDA ground was more lenient than the ones for stirring up racial hatred offences in Part 3 of POA. More importantly the prosecution on the basis of CDA did not require the consent of the Attorney General.

3.2.1 The Basic Public Speech Offences

The public speech offences were moulded on the 1936 statute's template. The conduct part of the offences proscribed the use of threatening, abusive or insulting words along with further communicative activities such as behaviours, writings and the distribution or display of such writings.⁵³⁹ Yet in contrast with the old breach of the peace requirement, the new offences required the outcomes to be 'fear of unlawful violence' or 'fear of provocation of unlawful violence' (section 4), whereas for section 5 it required the causing of 'harassment, alarm and distress'.⁵⁴⁰ These offences came to be supplemented

⁵³⁸ Section 39(3) (a) Anti-terrorism, Crime and Security Act 2001.

⁵³⁹ The outliers were possessions, public performance and broadcasting. These communicative acts were only included in the Part 3 offences (*hatred offences*) but not Part 1 of POA.

⁵⁴⁰ As to further similarities Part 1 offences shared other features of Part 3 offences: they could be committed publicly or privately, but were qualified by a dwelling exception.

by the offence of causing ‘intentional harassment, alarm and distress’ in section 4A later on.⁵⁴¹ Section 4 resembles the previous breach of the peace offence as to its conduct element relates to violence and the fear of violence, hence it makes it arguably less applicable against hate speech. In contrast sections 4A and 5 offences make use of the broad notions of harassment, alarm and distress that are more amenable for application against hate speech. (For this reason, the discussion of section 4 will be bracketed hereafter.)

Section 5 captures communication that is ‘within hearing or sight of a person likely to be caused harassment, alarm or distress.’ Therefore, as a matter of design section 5 is confined to physical, typical face-to-face encounters. However, as we shall see, this is not its unique application. Its statutory design was left open for broader construction encompassing for instance communication at public demonstrations.

Sections 4A offences, on the other hand, designates its potential targets of communication. Section 4A requires that words should cause ‘*that* or another person’ harassment, alarm or distress. In absence of such target the offences do not obtain. Notice another contrast with section 5. Section 4A by not having a face-to-face, physical element, is seemingly open to be applied to the Internet. All taken into account, the features above put section 4A closer to the concept of harassment.

Concerning the mental element, sections 4A stand out with its stricter intention requirement (‘a person is guilty of [s 4A] offence if, *with intent to cause*’) compared to section 5, which lacks such a qualification. Both sections’ scope of application might be tamed though by a restrictive interpretation of the ‘threatening, abusive and insulting’ phrasing at the conduct part. The trouble, however, is the same as before for the racial

⁵⁴¹ Added by Criminal Justice and Public Order Act 1994 c. 33 Part XII s.154 (February 3, 1995) (emphasis added).

hatred offences (Part 3 of POA). Threatening might allow for a less subjective interpretation, but abusive and insulting are very vague terms. This situation was somewhat improved by a recent legislative amendment that deleted ‘insulting’ from section 5, but it still left the notoriously vague ‘abusive’ limb in place.⁵⁴²

3.2.2 Racial and Religious Aggravation

The public speech offences, embedded in Part 1 of the POA, reflected Parliament’s concern about public disorder and anti-social behaviours that do not raise freedom of speech concerns grounded in political speech. The situation came to be changed with the adoption of the CDA. Its legislative goal was to punish more severely crimes committed for racial and religious motives.⁵⁴³ CDA’s section 28 and 31 created racially (and later religiously) aggravated versions for the otherwise neutral public speech offences. The change in Part 1 of CDA rendered the offences open to hate speech applications. This is so because section 28 (1) of CDA provided a remarkably broad definition of racial aggravation:

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

It should be clarified that not all combinations of the joint application of POA Part 1 coupled with the CDA amount to criminalising hate speech – but some do. For instance, let us imagine someone publically using racist words in a public demonstration, one that is likely to cause harassment, alarm or distress and that someone witnesses the communicative act. Part 1 of POA coupled with CDA’s racial aggravation clause may

⁵⁴² Section 57 Crime and Courts Act 2013 amending section 5(1) and 6(4) of the Public Order Act 1986.

⁵⁴³ CDA also retained the broad understanding of racial groups that the Race Relation Act had enacted in 1965. Racial group meant a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

apply in this case. Section 28 (1) (a) could be used without much difficulty here: hostility towards a racial group can be derived from the mere words the speaker uttered.

This way, the aggravated version of the public speech offences opened the possibility of prosecuting hate speech not by dint of stirring up hatred but autonomously through the basic offence contained in Part 1 of POA combined with CDA's racial (and religious) aggravation clauses.

There are numerous reasons why the CDA offences may offer advantages to prosecutors in comparison to the stirring up offences. First, the underlying public order speech offences are easier to prove. The requisite outcome of harassment, alarm, distress can be proven by a mere witness statement as opposed to getting into the complications of proving the likelihood of racial hatred being stirred up. Nevertheless, one could say that this advantage for CDA might be counter-balanced by the availability of the reasonable conduct defences in the CDA and the more lenient penalties. But the truth is probably that one procedural difference dwarfs in importance all else: the consent of the Attorney General is only required for prosecuting racial hatred offences (Part 3 of POA), but not for the public speech offences. In light of the bottleneck role the Attorney General plays, hate speech prosecutions were expected to shift towards the racially aggravated offences (CDA) from the racial hatred ones (Part 3 of POA).⁵⁴⁴

3.2.3 Defences

The broadness of section 5 is potentially counterbalanced by three built-in defences (section 5(3) (a), (b), (c), some of which are also available for the other offences. Once again, the privacy-inspired dwelling defence is such an offence, meaning that the offence

⁵⁴⁴ It should though be highlighted that the potential penalty is considerably higher for Part 3 (hatred offences) than for Part 1 (racial aggravation) offences. This thesis is not about criminal law, but free speech theory, hence the severity of penalty is secondary to the censoring of speech.

is not actionable if it occurs inside a dwelling and the offender has no reason to think that her message could be heard or seen by someone outside the house.

More importantly, a reasonableness defence is available against section 5 and 4A. The offender must argue that her conduct was reasonable. Given the vast room for interpretation about reasonableness this defence is conceptually a double-edged sword, especially when applied to political speech, or high-key political speech. A lot depends on how courts will interpret that defence. Either it is the content of the speech that makes the speakers' conduct reasonable, or the circumstances of the speech. In case of the latter, a political speaker could argue that his exercise of the right to political speech is a reasonable conduct and thus could avail of the defence. In contrast if content drives the analysis, the likelihood is that political hate speech will be discredited on account of the message. On the face of it, the defence leaves room for defending political speech in face of the very broad speech offence that section 5 at least potentially embodies.⁵⁴⁵

⁵⁴⁵ Lastly, section 5 (3) (a) provides an ignorance defence if one can prove that she had no reason to believe that anyone was within hearing or sight.

4. The Impact of the Hate Speech Ban

The analysis of the statutory design showed the characteristic broadness of the hate speech provisions. Prosecutors have a large discretion in shaping the law's impact, which must be assessed via the case law that has piled up since 1965. The question is whether the British hate speech laws have unduly restricted political hate speech.

There has been a notable scarcity of cases that have characterised the British hate speech legislation for decades.⁵⁴⁶ Both the overall number of prosecutions and especially the number of reported hate speech cases remained very low up until the 1990s. From the early 2000s, hate speech cases shifted towards involving the CDA's racial and religious aggravation and the volume of cases have significantly increased.

4.1 The Number of Cases

Hate speech prosecutions were very rare in the first period of the law's implementation between 1965 and 1977. The Attorney General gave 21 consents out of 106 requests for prosecuting hate speakers. The tally did not exceed two prosecutions per year and overall six judgments were reported, all from the years between 1967 and 1969.⁵⁴⁷

⁵⁴⁶ These are the publicly available sources that we relied on for combining the number of prosecutions. It should be bear in mind that sources partly contradict each other, but only marginally.

1965-1976: 20 prosecutions, 13 convictions. Sources: Kenneth Lasson, 'Racism in Great Britain: Drawing the Line on Free Speech' (1987) 7 B. C. Third World L.J. 162, 170; Leopold (n 513) 394; Rumney (n 499) 153 Rumney has slightly lower numbers for the period.

1976-1981: 22 prosecutions, source: Rumney (n 499) *ibid*.

1979-1986: 59 prosecutions, source: HC deb 19 March 1986, vol. 94, col. 88.

1987-2004: 76 prosecutions, source: Attorney General written response HL Deb 11 October 2005 vol 437 col 274.

⁵⁴⁷ Some argue that the prosecution of the '*Southern News*' in 1969 that ended with the acquittal of the editors of a right-wing association's periodical. That result seemingly put off the Attorney-General from giving his consent for further prosecutions. See Lucia Adriana van Noorloos, *Hate Speech Revisited - A comparative and historical perspective on hate speech law in the Netherlands and England & Wales* (Cambridge Intersentia 2011) 290-291.

Despite the 1976 amendment that was supposed to streamline prosecution, the numbers did not increase.⁵⁴⁸ Between 1976 and 1985, 23 prosecutions and 16 guilty verdicts were registered, and 6 judgments were reported.

Finally, in the period between the entry into force of the new Public Order Act in 1987 and 2004 overall 65 prosecutions were launched that resulted in 44 convictions and 5 acquittals, with the remainder resolved otherwise.⁵⁴⁹ From 2004, hate speech prosecutions shifted towards racial and religious aggravation offences under the CDA. Eight further judgments were reported between 2005 and 2014 that were prosecuted under the stirring up hatred on grounds of race and the new religion and sexual orientation offences.⁵⁵⁰

Overall in the 40 years from 1965 until 2004, 145 prosecutions were launched under Part 4 ('Racial Hatred') of the POA. This barely tallies up to four prosecutions per year, which is remarkably low by any standards. This shows another characteristic of the British hate speech regulation: its low rate of enforcement. The number of reported cases were even smaller to the point that between 1986 and the late 1990s there were no reported judgements at all. A judge in the 1998 case of *R v Robin Peter Gray* remarked on this scarcity of cases:

[i]t is noteworthy that the decisions summarized all derive from the 1970s or 1980s and that the most recent of them is a decision of this Court in 1986. Since that time public awareness and the public attitude to offences of this nature have moved on. The grave social damage done by offences and remarks of a racist nature is now perhaps better known than it was then.⁵⁵¹

⁵⁴⁸ See Nicholas Courtney, 'British And United States Hate Speech Legislation: A Comparison' (1993) 19 Brook. J. Int'l L. 727, 741.

⁵⁴⁹ In a rare official statistical briefing, the Attorney General in 2005 informed the House of Lords that between 1987 and 2004 overall 65 prosecutions were launched with his required consent. Attorney General written response HL Deb 11 October 2005 vol 437 col 274.

⁵⁵⁰ We will scrutinize cases reported up until 2014 as in the previous chapters.

⁵⁵¹ [1999] 1 Cr. App. R.(S.) 50.

The low enforcement rate answers at least one question about the law's impact. The considerable potential to prosecute hate speech extensively under the racial hatred offences certainly has not materialised.

The very few cases prosecuted under the new Part 3A of the Public Order Act, that are the offences of stirring up religious hatred and hatred on the ground of sexual orientation should also be mentioned. The two religious hatred and one homophobic offence cases were found – all ended with conviction. These numbers may just prove the point about the high-threshold for prosecuting these offences (e.g. special strict intent required) and thus the rarity of such prosecutions.⁵⁵²

The number of cases looks very different for the other facet of the hate speech provision. Both the public speech offences (Part 1 of POA) and its racially and religiously aggravated versions (section 28-32 CDA) were very extensively used in the last decades. The number of reported judgments is in the hundreds.⁵⁵³ Consequently, unlike the racial hatred offences, it cannot be *a priori* excluded that these statutory provisions were extensively relied on to censor hate speech.

Another feature makes the analysis of the case law's impact challenging. The reported judgments do not disclose much about the factual backgrounds of the cases. This is so because in the British criminal procedure, the lower courts (the magistrates' court) decide on whether the expression amounted to 'threatening, abusive or insulting

⁵⁵² The two religious hatred cases are: *R v Bilal Ahmad* [2013] 1 Cr. App. R. (S.) 17 and "*Satinderbir Singh and others*" case. The latter case was not reported but communicated by the CPS hereafter: https://www.cps.gov.uk/publications/prosecution/cases_of_inciting_racial_and_religious_hatred_and_hatred_based_upon_sexual_orientation.html accessed on 10/10/2017. The one and seemingly only case prosecuted on the basis of section s 29AB (sexual orientation) is *R v Ihjaz Ali, Razwan Javed, Kabir Ahmed* that also figures on the CPS website (above), and the facts of which can be retrieved from the sentencing remarks published by Westlaw UK: *R v Ihjaz Ali and others* 2012 WL 608645.

⁵⁵³ On Westlaw UK 164 judgements are available for section 5 POA for the period 1989-2014. The number of racial and religious aggravated public offences, that is section 31(1) (a)-(c) is around 56 (most of which concerned the aggravated version of POA section 5). These numbers are at best indicative as there are overlaps between the two sets of cases.

words' and whether they were likely (or intended) to stir up racial hatred. Since the landmark decision of *Brutus v Cozens* these are treated as questions of fact and not of law.⁵⁵⁴ Consequently, the standard for overturning the fact finding of a magistrates' court is exceptionally difficult.⁵⁵⁵ The appellant should prove that the lower court was not entitled, or it was not open to it, to reach such decision. That embodies the highly deferential standard of *Wednesbury* unreasonableness – no wonder that most of the appeals are on procedural or minor substantive points. This means that often not even the impugned speeches are reproduced in the judgments.

As we saw earlier, the HRA (sections 3 and 6) opened the possibility of challenging the prosecution on account of the principle in *Dehal*.⁵⁵⁶ So far there has been no reported POA Part 3 or CDA judgment that would have been effectively challenged on the basis of prosecutions not being proportionate to the prevention of public disorder. Yet it has to be acknowledged that *Dehal* may have had an effect indirectly on prosecutions by not setting higher standards for prosecution.

4.2 The Courts' Disregard for Political Circumstances

Despite these difficulties, some inferences can be drawn from the approximately twenty reported racial hatred offence cases (POA Part 3), the few religious and homophobic offences (POA Part 3A) and from the larger number of racial and religious aggravated public speech offence cases (CDA).

Societal and political hate speech cases are treated alike in the case law. Courts do not treat political speech cases separately. This is so because courts do not appear to give

⁵⁵⁴ [1972] 3 W.L.R. 521.

⁵⁵⁵ The other safeguard against arbitrary prosecution under Part 1 of POA is the *Dehal* requirement. The prosecution should make a case that the prosecution is necessary in light of the threat to public order. In practice, this meant a lax standard that can be met by providing some reason. There is no sign that this had been a hurdle for hate speech prosecutions.

⁵⁵⁶ *Dehal* (n 522)

any particular weight to political circumstances. This can be demonstrated through the group of cases where racially inflammatory pamphlets or short writings were prosecuted under racial hatred offences.

Overall ten such judgments were reported. To know whether a pamphlet or a short writing falls within the protection of political hate speech, primarily the circumstances of distributions should be scrutinised. Whose pamphlet is it? Under what circumstances was the material distributed? Provided that the content of the pamphlet does not amount to pure vilification but relates to public issues and political circumstances obtain then there can be a case for protecting the writing under free speech.

In the following cases, the courts rightly treated the hateful pamphlets as proper target of the law, as they amounted to societal hate speech. In *R v (Robert Hamilton) Edwards* the defendant distributed a cartoon that contained anti-Semitic, anti-Black and anti-Muslim content near an elementary school.⁵⁵⁷ It is already questionable whether the content simply did not amount to pure vilification, but setting that question aside, the place of distribution made the case a non-starter for a political hate speech defence and the distributor rightly found guilty.

The facts were more complicated in *R v Pearce* and in *R v Relf and Cole* but the outcome similar.⁵⁵⁸ In both cases private citizens placed posters on shop windows, walls and other public displays with harsh anti-immigration content. In *R v Relf and Cole*, the two defendants covered with a series of racist posters the streets of a small English town. They depicted black people as apes calling them ‘niggers’ and ‘muggers.’ The issue was

⁵⁵⁷ *R v (Robert Hamilton) Edwards* (1983) 5 Cr App R 145.

⁵⁵⁸ *R v Relf and Cole* (1979) 1 Cr App R (5) 111; *R v Pearce* (1981) 72 Cr. App. R. 295.

not primarily about the place of display or distribution as in *Edwards*. What turned these instances safely into societal hate speech was that no plausible circumstance pointed towards their political nature in the sense required by high-key political speech. Had they been displayed in an election campaign, as an attempt to promote a political party or as part of an organized political group the case might have been different.⁵⁵⁹ No such circumstance obtained, hence both cases should be better understood as racist agitations rather than political hate speech.

However, courts were insensitive to assessing political circumstances even when those actually occurred in cases. In *R v John Morse and John Tyndall* the courts found against the leader of the British National Party for producing party magazines and leaflets that had racist content.⁵⁶⁰ The Court failed to take into account the political circumstance, to wit that the magazine was clearly marked as expressing the viewpoint of BNP, thus it amounted to political hate speech.⁵⁶¹

Interestingly in one widely discussed case, the court acquitted the publishers of an association's magazine. The '*Southern News case*' concerned the periodic publication of a nativist political association with the telling name of Racial Preservation Society.⁵⁶² The impugned paper argued for 'return[ing] people of other races from this overcrowded island to their own countries.'⁵⁶³ The non-commercial periodical of a political association amounts to political hate speech, and thus it ought to benefit from increased protection. Yet it was not for this reason that the journal editors were acquitted. Rather the jury

⁵⁵⁹ Similar case: *R v Knight* (1980) 2 Crim. App. (S) 82 (Eng), but not enough facts are known to assess.

⁵⁶⁰ *R v John Morse and John Tyndall* (1986) 8 Cr App R (S) 369. Sadly, the content of the magazine was not reproduced in the judgment.

⁵⁶¹ Possibly a similar judgment was rendered in an early case about the leader of a far-right group for producing racist leaflet in *R v Colin Jordan and Pollard*, 26 January 1967 *The Times*. Caution is warranted though as the exact facts cannot be reproduced from 'The Times' reporting.

⁵⁶² *R v Hancock* 28, 29 March 1969 *The Times*.

⁵⁶³ Courtney (n 548) 734. According to Lasson: '[the paper] speculated that blacks were genetically inferior to whites, and that "race mixing" was a dangerous practice.' Lasson (n 546) 169.

refused to find the requisite *mens rea* for stirring up racial hatred, even though it was quite implausible that the content did not stir up racial hatred in light of the very low standard that courts came to apply. At any rate, it was not the political context of the case that led to acquitting the accused.

The one reported homophobic hatred case (under Part 3A) was an instance where the court did not seem to have given proper weight to truly political high-key speech. In *R v Ishaq Ali and others*, a couple of deeply religious Muslim men organised a wave of counter-protest against the upcoming Derby Gay Parade.⁵⁶⁴ They distributed leaflets some distressing with the header ‘Death Penalty?’ with graphic and textual reference to the 16th century UK law that punished homosexuality with hanging, others less so reading ‘Adam and Eve not Adam and Steve.’ Only the sentencing remarks are available, therefore caution is warranted for the arguments before the court. It appears that the political context though recognised but was easily overridden by the objectionable form of the speech. This thesis does not call for an absolute protection for political hate speech, but a proper appreciation of truly political speech in political context. Instead of such an appreciation rather the form of the speech was given overriding importance. *R v Ishaq Ali and others* unequivocally involved an instance of political speech on a deeply dividing political and religious issue, where homophobes are, thankfully, marking defeats after defeats. The court’s favouring the form of the speech at the expense of political speech was arguably a mistaken result of balancing.

Let us turn to the racially aggravated case law under CDA, where the refusal to distinguish instances of political hate speech was likewise exhibited. This can be shown

⁵⁶⁴ *R v Ishaq Ali and others* figures on the CPS website. The facts of the case can be retrieved from the sentencing remarks published by Westlaw UK: *R v Ishaq Ali, Razwan Javed, Kabir Ahmed* 2012 WL 608645. For the CPS website See: https://www.cps.gov.uk/publications/prosecution/cases_of_inciting_racial_and_religious_hatred_and_hatred_based_upon_sexual_orientation.html#b accessed on 10/10/2017.

through contrasting two cases involving political speech: *Norwood v DPP* with *Kendall v South East Magistrates' Court*.⁵⁶⁵ Both cases appear to be political but only one truly is even though the courts failed to take into account any of these arguments.

In *Norwood v DPP* a regional organiser of the BNP, a far-right party, displayed an anti-Muslim poster in his flat's window visible to the public. The poster 'contain[ed] words in very large print "Islam out of Britain" and "Protect the British people". And it bore a reproduction of a photograph of one of the twin towers of the World Trade Centre in flames on 9/11 and a Crescent and Star surrounded by a prohibition sign.⁵⁶⁶ The defendant was found guilty and fined for £300.

Kendall also concerned a BNP activist who plastered a series of BNP posters on the advertisement pillar of the town's high street. They read 'Illegal Immigrant Murder Scum, [...] [a]nother consisted of photographs of three black men, and a third gave telephone numbers and contact details for the British National Party.⁵⁶⁷ The posters evoked a highly publicised manslaughter case involving immigrant perpetrators.⁵⁶⁸ The court accepted the prosecutors' argument that the poster had a primarily racist message as it assigned the blame for a crime to all black immigrants in an inflammatory manner. The defendant was found guilty.

In both cases the speakers and their messages were political, as they expressed the stance of a registered political party on public issues, namely on immigration, national identity and public order. Therefore, *prima facie* both posters could count as political speech. The comparison of the two judgments show a difference in the assessment of

⁵⁶⁵ *Norwood v DPP* [2003] EWHC 1564 (Admin); *Kendall v South East Magistrates' Court* [2008] EWHC 1848 (Admin) See previous discussion of *Norwood* in Chapter Five sections 4 and 6.2.

⁵⁶⁶ *ibid* § 6.

⁵⁶⁷ *Kendall* (n 565) §2.

⁵⁶⁸ *ibid*.

tone: in *Norwood* the poster was deemed only ‘insulting,’ whereas in *Kendall* ‘threatening and abusive.’ This exemplifies the British courts’ deep concern for the tone of speech in judging hate speech. As it was argued earlier, this is a questionable position.⁵⁶⁹ For one, it may well be that the harsh tone works against the persuasive power of the message. Moreover, the tone of political speech is just as integral part of free speech as its substance. Besides these, the focus on the tone leads courts away from giving proper weight to the political circumstances. A good argument can be made that *Norwood* and *Kendall* should have been decided differently based on the place of displaying the leaflet. In *Norwood*, the poster was displayed in a residential area, where people rightly have an expectation of not being exposed to such messages. It is true that in an election context, it is customary to display posters of one’s political allegiance, but there was no such circumstance at the residential area of *Norwood*. In contrast, in *Kendall* the posters of a political party were displayed in the high street on an advertisement board, the most public place in a small town, where political messages are expected to be seen. Thus, courts overlooked the difference in the place of distribution even though this should have been a way of properly distinguishing between protected political hate speech from societal hate speech.

4.3 The Aggravated Public Speech Offences

The statutory design of the racial and religious aggravated public speech offences under CDA opened the possibility that they would be used against political hate speech. Yet a closer look at the case law shows that the dominant trend in the CDA case law was to punish racial harassments and face to face racist verbal assaults under section 4A and 5 coupled with CDA’s aggravation clauses (sections 28, 29). Hence, CDA’s application was by any large unobjectionable from the perspective of political hate speech.

⁵⁶⁹ See section 7.2 on in Chapter Four.

Most cases under CDA stemmed from heated private disputes between strangers during which one threw fleeting racist insults at the other resulting in face to face racial harassment cases. Unsurprisingly parking lots⁵⁷⁰ and public transport vehicles were typical scenes of such disputes.⁵⁷¹ Another basket of cases concerned police officers who fell victims of racial insults during police operations.⁵⁷²

A limited number of cases showed a degree of political motivation, but it would be a mistake to confuse them with political hate speech cases. In *DPP v Ramos*, the defendant was found guilty for writing two letters containing racially motivated threats of a bombing campaign addressed to an association that offered advice and assistance to the Asian community.⁵⁷³ In *R v Parker*, worshippers at a Muslim Community Centre were verbally attacked by sympathisers of the English Defence League, a white supremacist group.⁵⁷⁴ In both *Ramos* and *Parker*, the defendants might have had political motivation, but they used their expression to directly intimidate identifiable victims, which is not a form of protected political speech.

One inference can be drawn safely here. These baskets of cases clearly fall into the broad category of racial harassment. No argument grounded in political speech goes against racial harassment or verbal assaults being punished by enhanced sentences, let alone against punishment. Had the courts only applied the aggravated public speech offences in such cases of racial harassment, there would be no ground to conceive them as undue restriction of political hate speech. Yet there remains a set of cases where political hate speakers were unduly prosecuted under both CDA's aggravation racial

⁵⁷⁰ *R (DPP) v McFarlane* [2002] EWHC 485 (Admin) (dispute about the use of a disabled parking bay, defendant calling the man 'black bastard').

⁵⁷¹ *R v White (Anthony Delroy)* [2001] EWCA Crim 216.

⁵⁷² *R v Jacobs (Emma Lisa)* [2001] 2 Cr. App. R. (S.) 38.

⁵⁷³ *DPP v Ramos* [2000] Crim. L.R. 768; [2000] C.O.D. 287 (DC).

⁵⁷⁴ *R v Parker* [2011] EWCA Crim 3234 (CA (Crim Div)).

offences and POA's stirring up hatred offences. This set of cases might be problematic from the perspective of political speech defended here.

4.4 Online Hate Speech cases

Chapter Three described the difficulties of applying the framework of high-key political speech to online speech. These conceptual difficulties with online speech led to restricting our focus to cautious and limited inferences about online political hate speech. Nevertheless, the statutory framework regulating hate speech in the UK will be included in the analysis here with these limitations in mind.

The so far analysed two sets of anti-hate speech laws do apply to cyberspace. Moreover, they are supplemented by further statutes that are capable of being applied against hate speech. Chief amongst them is section 127 of the Communications Act of 2003 ('improper use of public electronic communications network').⁵⁷⁵ Section 127 (1) targets the act of sending (or causing to be sent) a message by means of a public electronic communications that is grossly offensive or of an indecent, obscene or menacing character.⁵⁷⁶ Grossly offensive or menacing are notions that are, in theory, capable of capturing hateful comments, hence this section's inclusion in the discussion.

The discussion of regulation of online hate speech in the UK should start with the general principle in *Ajit Singh Dehal v CPS*.⁵⁷⁷ *Dehal* was an offline public order case that derived a potentially far-reaching requirement from Article 10 of the Convention

⁵⁷⁵ Another potential law to be used against online hate speech is section 1 of the Malicious Communications Act of 1988 (MCA). We shall, however, not include this in our analysis for lack of relevant hate speech case law on the basis of MCA. Moreover, the MCA has a strict intent requirement, as opposed to section 127 of the Communications Act 2003, hence its use against hate speech, understood as a non-personally targeted speech, may be limited.

⁵⁷⁶ Section 127 (2) Communications Act sets out an offence against sending message 'for the purpose of causing annoyance, inconvenience or needless anxiety to another' by a message that he knows to be false. This version of the offence is tailored against cyber-stalking hence we shall bracket this issue here.

⁵⁷⁷ [2005] EWHC 2154 (Admin).

(through the HRA 1998) concerning when criminal law should be invoked against public disorder. *Dehal* wrote in §5 that Article 10 of the Convention requires that:

the criminal law should not be invoked unless and until it is established that the conduct which is the subject of the charge amounts to such a threat to public disorder as to require the invocation of the criminal as opposed to the civil law.

The *Dehal* principle is highly relevant for the regulation of online speech as it restricts the use of criminal law to the cases where the potential of public disorder is real.

Another key policy document is the Crown Prosecution Service's guideline on prosecuting communications on social media.⁵⁷⁸ CPS Guideline categorises hate speech types of communications, along with grossly offensive communications, that do not involve direct threats or menace, as 'Category 4' speech demanding the highest evidentiary threshold for prosecution. The Guideline emphasizes the potential chilling effect of prosecution on Article 10, hence it demands 'considerable caution' from prosecutors to proceed with Category 4 online speech cases. While maintaining this high evidential threshold the Guideline makes it clear that when the motives clearly involves hostility or discriminatory intent, i.e. has a hate crime element then the prosecution is more likely to be justified. Importantly, it directs prosecutors to focus on the harms to victims, and to the 'virtual mobbing' or harassment campaigns as the most likely ones to be prosecuted. Overall, the Guideline seems to set out a balanced view on using statutory regulation against online hate speech. The emphasize on the dangers of 'virtual mobbing' or harassment campaigns are in line with what was submitted about online hate speech earlier.⁵⁷⁹

⁵⁷⁸ CPS, Guidelines on prosecuting cases involving communications sent via social media (2014) (http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/#a05); accessed 01/11/2017

⁵⁷⁹ See Chapter Three 5.4 Online Speech.

Similar to offline case law, there are limited reported or known online hate speech, let alone political hate speech, cases available.⁵⁸⁰ The two cases involving Part 3A offences for stirring up religious hatred both amounted to non-political hate speech cases. *R v Bilal* was about a pseudonymous internet user whose impugned online speech included threats against Hindus on an extremist website, allegations of Indian men publicly smearing at young Muslims for wearing religious veils, and even solicitation to murder MPs who supported the UK's involvement in the war in Iraq.⁵⁸¹ The link to political issues as a matter of content may have obtained. Yet we argued that pseudonymous online speech cannot amount to high-key political speech. Moreover, solicitation to murder are not protected on grounds of strict incitement.

The other case (“*Satinderbirb Singh and others*”) concerned a thread of comments on Facebook that was of ‘such a nature as to incite religious hatred and were threatening in content’ according to CPS. Even without access to the exact wording of the impugned speech, there does not appear any plausible political circumstance. What appears though is racial/religious ‘virtual mobbing’ that led to actual acts of violence. Therefore, it is safe to conclude that this case falls into the category of societal hate speech.

One of the rare relevant cases may be *S v DPP*.⁵⁸² Even though it did not involve hate speech, but it still might be conceptualised as an online high-key political speech case. The defendant, an animal welfare activist, posted a photo montage of a security guard of a laboratory (known as the Covance Laboratory) on a campaign website with an unsavoury message placed over his photo. The photo was taken at a public protest at an animal testing clinic. The message plastered under the figure of the security guard who

⁵⁸⁰ Our search was based on Westlaw UK and Lexis UK legal databases.

⁵⁸¹ *R v Bilal Ahmad* [2013] 1 Cr. App. R. (S.) 17.

⁵⁸² *S v DPP* [2008] EWHC 438 (Admin).

was present at the protest read ‘C’mon I’d love to eat you! We’re the Covance Cannibals.’ The defendant was prosecuted under section 4A of the Public Order Act, which shows that the potential to apply section 4A online was actually realised in practice, hence turning the scope of application of section 4A of POA much wider than just the offline world. One interesting element of the case was the fact that the victim has not seen the impugned photo representing him online up until the police showed it to him. Yet the Court found the passing of time between the posting of the photo and the prosecution to be immaterial so long as the victim knew about it (he has been told about) and as a result of seeing it printed out by the police he was distressed. This conceptualisation of the impact of online speech might be debatable. More importantly for the purposes of this thesis, the court did not weight as a heavy reason that the speech came from a political activist on a political occasion. According to the high-key speech framework, the political setting of the speech reveals of a speech to be political. Of course, high-key political speech in itself should not be thought of giving absolute protection, but rather setting the bar higher for restricting speech. Perhaps framing the online speech question at hand this way might have helped the court to treat the issue other than mere harassment of a security guard. Even accepting that the message was distressing, the security guard stood there as a proxy for the laboratory, which was at the heart of the political controversy, namely experiments on animals. Even though *S v DPP* was not a hate speech case, it shows the potential of section 4A to be used against political speech in general, and that the restricting principle in *Dehal* might not limit the online application of public order laws.

One should avoid drawing far-reaching conclusions from one case. Section 4A as well as Part 3 of the Public Order Act (racial hatred offences) were relied upon against hate speech in a way that is unproblematic from the point of view of high-key speech. In

2012 it was reported that a young Twitter user was successfully prosecuted on the ground of racially aggravated section 4A for mocking a black football player's collapse on the pitch in racist terms.⁵⁸³ The prosecution might be thought somewhat heavy-handed, yet this type of racist speech is devoid of any plausible political speech characteristic, hence falling outside of the high-key speech framework.

The only one reported online speech case under Part 3 of POA is *R v Sheppard*.⁵⁸⁴ The facts are difficult to reconstruct fully, but *Sheppard* was about a neo-Nazi website and the prosecution was launched on the basis of racially inflammatory material, involving Holocaust-denial.⁵⁸⁵ Even with the difficulties of applying high-key speech online in mind, it was argued in earlier chapters that Holocaust-denial has no connection to any political issues, hence it may amount to pure vilification that is a proper target of regulation. Consequently, *R v Sheppard* is not a problematic case for this thesis.

In contrast to the demanding racial hatred offences, the third tool against hate speech online is seemingly easier for prosecutors to rely on. Section 127 (1) of the Communications Act only has a basic intent requirement and crucially, the message does not need to be read as the conduct element is limited to the act of sending (or causing to be sent) by means of a public electronic communication a message that is grossly offensive or of an indecent, obscene or menacing character.

The first intriguing online case under section 127 (1) was about an allegedly menacing tweet from an annoyed traveller whose flight was to be cancelled due to adverse weather conditions. *Chambers v DPP* was not a hate speech case but is an

⁵⁸³ See the reported stories at <https://www.theguardian.com/uk/2012/mar/27/student-jailed-fabrice-muamba-tweet> <http://blog.cps.gov.uk/2012/03/liam-staceys-conviction-for-tweet-about-fabrice-muamba.html> accessed 01/10/2017.

⁵⁸⁴ [2010] EWCA 2010 65.

⁵⁸⁵ 'Tales of the Holofoax contained words which were abusive, insulting and possibly threatening towards a racial group, namely Jewish people.' *ibid* §14.

instructive one for future online speech cases.⁵⁸⁶ The defendant sent a tweet that intended to be humorous while capturing his frustration. He wrote: ‘Crap! Robin Hood Airport is closed. You’ve got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!!’ The defendant was convicted at the Crown Court but appealed successfully. The High Court found for the defendant because the message correctly understood lacked menacing character. The Court seems to have followed *Dehal* without mentioning it when stressing the demanding contextual analysis that is required for finding an online message menacing. The court, *inter alia*, took into account that the sender was identifiable (unusual for a real terrorist) and the elapse of time between the tweet and the police’s action. The latter proved that no one seems to have mistaken the arguably bad joke for a serious menace. *Chambers v DPP* can be thought of as the proper application of the principle in *Dehal* onto a contentious speech in cyberspace.

Finally, on one occasion section 127 (1) of the Communications Act was used in a proper hate speech case. *DPP v James McConnell* was about the sermon of a Northern Irish Christian pastor attacking Islam and Muslims. The sermon was later on uploaded to the Internet hence it became a section 127 issue.⁵⁸⁷ The sermon gave a stereotypical characterisation of Muslims in general who are untrustworthy along with some scathing remarks about Islam. Pastor McConnell also went on to praise Enoch Powell for his stance against multi-religious society. The prosecution was launched for the pastor’s stereotypical characterisation of Muslims (not for his criticism of Islam). The Court acquitted McConnell on the ground that his words were offensive but not grossly offensive, thus restating the high threshold already identified in *Chambers* for the conduct

⁵⁸⁶ [2012] EWHC 2157 (admin).

⁵⁸⁷ *DPP v James McConnell* [2016] NIMag 1.

element of section 127 of the Communications Act of 2003 – i.e. what should count as menacing. Crucial was for the judgment to emphasize on Article 9 (right to freedom of religion) and 10 (freedom of expression). Based on it, the judge asserted the impugned speech to fall under the scope of these rights and shifting the burden to prosecution to demonstrate that it was not just offensive, that amounts to protected speech, but ‘grossly offensive’. Such argument was not offered, according to the judge, and the pastor was acquitted. The case involved religious and not political speech in a truly religious setting (a sermon in a church), but it is still important for this thesis that the court set a high threshold for infringing one’s expression as long as it recognisably falls under Article 10.

To conclude: both *Dehal* and the CPS Guideline set the threshold for prosecution online speech relatively high. The lack of systemic research of online hate speech cases in the UK coupled with the few reported cases make it impossible to draw general conclusions about the online speech case law. *McConnell* is encouraging as it stands for heightened protection of political speech. It is, however, overshadowed by *S v DPP* where the high-key political speech aspect was all but ignored. Finally, *Chambers’* argument for demanding a realistic assessment of online speech’s offline impact might serve as an important argument against heavy-handed prosecutions in cyberspace.

4.5 The Public Demonstration Cases

There is one cluster of the cases where political speech was regularly restricted: public demonstration cases. Courts have found speakers in political events such as public rallies guilty of racial hatred and aggravation offences. There are three trends in the case law that have led to political speech being restricted in these cases.

First, the assessment of risk of violence is often opaque or exaggerated when speakers’ message is offensive – such as hate speech. It becomes unclear whether the speaker is prosecuted for its message’s content or the real risk of violence.

In two early cases, black speakers were found guilty for racial incitement (hatred) offence against whites. In *R v Michael Abdul* the defendant, who was of West Indian origin, was an activist in a low-profile group who spoke at a Black Power meeting.⁵⁸⁸ His oration was filled with racist utterances against white people. At some point in his long tirade, he called upon black people to use violence against the ‘soulless whites’ in their fight against oppression if needed. In the somewhat similar ‘*Hyde Park Corner Agitator*’ case, only reported in newspapers, a speaker of the ‘National Coloured People’s Association’ gave inflammatory speeches at the Speakers’ Corner of Hyde Park in London.⁵⁸⁹ He apparently called upon black nurses to administer poisonous injections to white patients in hospitals.

Both in *R v Malik* and the ‘*Hyde Park Agitator case*’ the speakers made positive references to violent actions. The risk might have been real, even though apparently, no violence erupted following the speeches – at least this much can be established from the reports. The curiosity was the facility with which the courts accepted the risk of violence, instead of interpreting them as extreme political views expressed from a historically oppressed minority. Moreover, the court could have appreciated that at least in *Malik* the context was thoroughly political.

This overreaction against extremist speakers is traceable throughout the application of the public speech offences. Public speakers often were held responsible for counter-demonstrators’ action. Courts thus tended to validate the heckler’s veto in case of extremist speakers, such as political speakers. The cases in points are *Jordan v Burgoyne*, *Hammond v DPP* and *Abdul v DPP*.⁵⁹⁰ All of these cases are instances of

⁵⁸⁸ *R v Michael Abdul Malik* (1968) 52 Cr. App. R. 140.

⁵⁸⁹ Sources: Leopold (n 513) 394, she relied on reporting that appeared in *The Times*.

⁵⁹⁰ *Jordan v Burgoyne* (1963) 2 All ER 225, *Hammond v DPP* [2004] EWHC 69 (Admin), *Abdul v DPP* [2011] EWHC 247 (Admin).

privileged political speech, where speakers were found guilty of public speech offences because of the disorder caused by counter-demonstrators.

Jordan was prosecuted under section 6 of Public Order Act 1936, while *Hammond* and *Abdul* under section 5 of Public Order Act 1986. At the time of *Jordan* and *Hammond*, there was not yet applicable hate speech aggravation legislation in force, hence they were prosecuted under the neutral public speech offence. Yet in fact, they are political hate speech cases. *Abdul* is a political speech case, where the issue is closely analogous enough with the other two cases to be discussed together.

Jordan v Burgoyne concerned a public meeting of a far-right group. The meeting was met with opposition from various anti-fascist groups who ‘intended to prevent the meeting.’⁵⁹¹ The speaker read out his prepared anti-Semitic speech filled with offensive utterances about Jews and their world-endangering conspiracy. At some point the defendant speaker alleged that ‘more and more people...are opening their eyes and coming to say with us that Hitler was right... They are coming to say that are real enemies, the people we should have fought were not the Hitler...but the world of Jewry.’⁵⁹² The judgment explains that upon several occasions the authorities had to interrupt the speech due to the ‘outcry and general surge’ of the counter-demonstrators, who were in the audience with no separation from those who sympathized with the organizers. The judgment reads:

[t]here was disorder throughout the whole of the meeting mainly, but not exclusively, among the group of 200 or 300 young people, who repeatedly attempted to attack the platform, the speakers and their supporters.⁵⁹³

⁵⁹¹ *Jordan* ibid 744.

⁵⁹² ibid 746.

⁵⁹³ ibid 745.

In *Jordan v Burgoyne* the defendant was the speaker, after whose speech the meeting degenerated to the point that the police had to restore order. Subsequently, many people in the crowd were arrested on grounds of section 5. The High Court led by Lord Parker C.J. construed section 5 in a way that the speaker ought to take his audience as present, thus bearing the duty not to utter threatening, abusive or insulting words likely to occasion breach of the peace. As a matter of fact, the breach of the peace condition surely obtained upon the defendant's speech. But it was because of the opponents, counter-demonstrators of the speakers. Nevertheless, his Lordship held that:

[t]hose were words [*i.e. of the speaker-defendant*] which were intended to be and were deliberately insulting to that body of persons being restrained by the police and on that, and on that alone, it seems to me that there was a clear contravention of section 5 of the Act of 1936.⁵⁹⁴

The rationale upon which the decision stood, namely that the speaker should take its audience as it is, should not pass free speech muster. The problem is that according to Lord Parker's rationale the heckler's veto should count *against* the speaker.⁵⁹⁵ It suffices to think about how that standard would apply to once thought-to-be provocative yet undoubtedly protected public meetings like gay pride marches. His Lordship remained oblivious to this point even when contemplating the suggestive hypothetical in which 'a body of hooligans' were to intend to disturb a legitimate meeting. Lord Parker dug in his heels and suggested, very implausibly, that even in such a hypothetical the speaker should bear the burden and avoid insulting the body of hooligans into disorder.

The other political hate speech judgment is *Hammond*, in which an evangelical Christian preacher stood with various placards in the street of a town centre and preached passionately against homosexuality. The placards captured his message

⁵⁹⁴ *ibid* 749.

⁵⁹⁵ For a similar assessment see Leopold (n 513) 393.

perfectly: 'Stop Immorality,' 'Stop Homosexuality' and 'Stop Lesbianism.' After a while a hostile crowd formed around him. A constable had to intervene and ordered Hammond to cease the preaching. Subsequently Hammond was charged on grounds of breaching section 5 of POA and found guilty.

The defendant's speech and signs were unquestionably expressing his prejudice against sexual minorities. Yet he addressed a public crowd and did not directly target anyone in person, let alone incite anyone to violence. Moreover, his speech was open to challenges and was surely meant as a contribution to political debate. Similar to *Jordan v Burgoyne*, the fact that a hostile audience tried to silence the speaker with force was counted against the speaker even though it was a clear instance of validating the heckler's veto. To date this is the clearest example of POA restricting political hate speech.⁵⁹⁶

Lastly, in *Abdul* a group of Muslim demonstrators protested against the homecoming of British soldiers returning from Afghanistan. They shouted and displayed placard with signage like 'British soldiers go to hell' and 'shame on you', 'baby killers', 'rapists you all' and shouted 'murderers.' The demonstrators had a permission for protesting from the police who were present in high numbers. Nevertheless, members of the public started to direct abuses and threats to the anti-soldier protesters. The risk of violence and disorder was such that the police immediately ordered the demonstration to cease. Nevertheless, the demonstrators were charged with section 5 of the POA, months after the event. The judgment once again followed the similar logic as previously: although the disorder was clearly due to the members of the public who took offence in the protestors' slogans, it was counted against the demonstrators. But the judgment exhibited a novelty about the reasoning. The court emphasised that the application of

⁵⁹⁶ *Redmond Bate* (n 529) offers precisely on opposite analysis on how to blame for disorder a public protest of the crowd takes on itself to silence the annoying speaker. see *ibid* §2. Note that the case was a common law breach of the peace case and not a POA one.

section 5 in this case involved a balancing between the right of the public to demonstrate by honouring soldiers without experiencing insults and the right of the minority to protest. The court took it as crucial that opposition of the war could have been expressed less offensively.⁵⁹⁷ No matter that the disorder was due to the reaction of the public, the insulting manner of an otherwise legal demonstration overrode the fact that disorder was due to the hecklers. What is striking in this reasoning is not just its contrived logic, but once again it stresses the unique focus that British courts accord to the form of expression.

Given that hate speech conceptually runs against speech norms that guard ‘civility’, it is likely that British hate speech laws could extensively restrict political hate speech at demonstrations.⁵⁹⁸

A final element of the trend about the case law concerns the reasonableness defence. Recall that the public speech offences, and their racial and religious aggravated versions could be saved by a broadly worded reasonableness defence in section 5(3)(c). Furthermore, upon the passage of the Human Rights Act 1998, the reasonableness defence could have become the holding place for freedom of speech defence against certain prosecutions. However, up until now there was no sign of it. In this respect, Lord Auld’s opinion in *Norwood* might be revealing.⁵⁹⁹ For his Lordship it was difficult to envisage circumstances where the defence would apply because the lower court has to assess the defendant’s conduct *objectively* in the first place. This assessment should be erroneous in itself so that section 5(3) had any room to work. However, once the conduct of threatening, abusive or insulting speech is objectively established, unless it

⁵⁹⁷ *Abdul* (n 588) §52.

⁵⁹⁸ Andrew Geddis posits this trend of the jurisprudence as the ‘pro-civility’ approach that he contrasts with the ‘transformative approach. Andrew Geddis, ‘Free speech martyrs or unreasonable threats to social peace? - “Insulting” expression and section 5 of the Public Order Act 1986’ (2004) Public Law 853, 866.

⁵⁹⁹ *Norwood* (n 565) §§ 20, 37-39.

can be turned over on appeal, applying the highly deferential standard of *Wednesbury* reasonableness, there is no room for applying the defence. A conduct cannot be objectively threatening, abusive or insulting causing harassment, alarm and distress *and at the same time* reasonable.

This construction of the reasonableness defence turns it into a fifth-wheel, because as no room is left for the protection of political speech under the guise of the defence.

4.6 The Dominant Case Profile

The dominant type of cases is possible to infer from the few cases that were prosecuted under the hate speech offences over the years.

A UK government report on the race relations legislation in 1975 lucidly assessed that the racial hatred provision was effective against the crudest forms of racist speeches that the most bigoted speakers typically used.⁶⁰⁰ The government could not have been more right about that. By focusing on the low-hanging fruits of racial invective, name-calling and the like, prosecutors marked their targets clearly. Typically, speakers from marginal far right organisations were prosecuted. Similarly, on occasions Black Power activists were targeted.⁶⁰¹ This may reflect neatly the original public order rationale that linked fringe extremist groups with the breeding of violence and hate crimes. These fringe groups often provided breeding grounds for not just hate speakers but violent criminals. Yet, the point remains that these were easily prosecutable and marginal speakers that could be properly called racist agitators. The circumstance of their speech often had political elements, but their marginality in British public life made them rather insignificant.

⁶⁰⁰ Home Office, *Racial Discrimination* (Cmnd 6234, 1975) § 126.

⁶⁰¹ Recall Malik and the “Hyde Park Corner Case.”

This sharply contrasts with the complete lack of prosecution for any notable, non-fringe speaker. This curious absence of high-profile prosecutions was certainly not due to the absence of high-profile racist political speakers in the UK.

The best example is the well-known Tory MP, Enoch Powell. One of the most noted and discussed political speeches of the last century in British politics is Powell's 'Rivers of Blood' speech that he gave in 1968 for the Birmingham Conservative Association.⁶⁰² In it Powell took on the impending passage of the Race Relations Act. During his speech, he availed of all the anti-immigrant, xenophobic and racialist talking points that are still vivid parts of far right politicians' vocabulary. However, in sharp contrast with the low-profile fringe speakers' rhetoric, the ones who regularly found themselves on the wrong side of the law, Powell did not use crude vituperative verbalism. Nonetheless, it would be a mistake to hold it any less racist. Powell was calling for the urgency of action lest 'the black man will have the whip hand over the white man' and referred to migrants as 'alien elements' who are crowding out white people and are impossible to integrate.⁶⁰³

Enoch Powell was never prosecuted even though it is quite likely that his speech was more influential than the fringe speakers' crude racism. This ambiguity about the unclear effects of the legislation was highlighted by the above-mentioned prescient government review:

[D]uring the past decade, probably largely as a result of section 6 [of RRA 1965], there has been a decided change in the style of racialist propaganda. It tends to be less blatantly bigoted, to disclaim education and debate. Whilst this shift away from crudely racialist propaganda and abuse is welcome, it is not an unmixed benefit. The more apparently

⁶⁰² The speech is available: 'Enoch Powell's 'Rivers of Blood' speech' (*The Telegraph*, 6/11/2007) <<http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html>> accessed 1/2/2017.

⁶⁰³ Enoch's alarmism was increased by his remark that came to provide the shorthand title for his speech: 'As I look ahead, I am filled with foreboding; like the Roman, I seem to see the River Tiber foaming with much blood.'

rational and moderate is the message, the greater is its probable impact on public opinion.⁶⁰⁴

The ‘Rivers of Blood’ speech should be seen as the ‘rational and moderate appearing’ yet deeply prejudiced kind that could always evade prosecutions. Recall from Chapter Four the dog-whistle politics that came to replace the old and crude racial language in the 1980s without changing substance. Powell’s speech epitomises that tendency.

For the argument of this thesis, the dominant profile has two implications. On the one hand, fringe groups are often racial agitators, whose claim for free speech protection and especially high-key speech status should be treated with caution. These groups often are violent racist agitators as opposed to political groups. Yet, a low-profile group’s public event can count as political just as much and thus benefit from the political speech protection. For example, the leaflets of the British National Party would certainly add up to high-key speech that have been unduly restricted on several occasions.⁶⁰⁵

In contrast, influential high-key speakers such as Enoch Powell were never targeted. This is in line with the high protection that political speech ought to benefit in liberal democracy. Powell might be more influential and thus a political community should invest more political resources to tame his type of racism, but not at the price of silencing him. The trouble with the prosecution being tilted for protecting established or more influential politician is first, its arbitrariness. Second, it furthers hypocrisy, as if racism were a marginal political phenomenon. The British hate speech regulation’s excessive concern with the tone of speech has certainly contributed to this dynamic.

⁶⁰⁴ Home Office, *Racial Discrimination* (Cmnd 6234, 1975) § 126 (emphases added).

⁶⁰⁵ *R v Read* (1978) 7 January *The Times*; *R v John Morse and John Tyndall* (1986) 8 Cr App R (S) 369.

5. Conclusion

The British statutory hate speech regulation had its historical origins in public order law. However, this public order orientation was gradually transformed into a broad interpretation of what the defence of public order means in speech cases.

As a result, the statutory design of these laws was given very broad definitions, potentially capturing vast amounts of communications. Successive laws took a broad-brush approach to what types of hateful expressions merit criminalisation. This is partly counter-balanced by the recent freedom of expression defences that were attached to the extension of religious hatred offence and its sexual orientation version in Part 3A of POA. Given that from the early 2000s the aggravated racial and religious offences became the preferred tool to prosecute hate speech, freedom of expression defences, not being available in CDA cases, remained rather symbolic. Moreover, those statutory freedom of expression defences were based on the content of speech instead of relying on the circumstances. This cast serious doubts on whether high-key political speech could be protected by these defences in sync with the demands of a robust right to political speech.

Concerning the impact of the British hate speech regulation, the most important finding is the remarkably low rate of enforcement. It might just be indicative of the whole regulation that no sexual orientation-based or religious hatred offences has been reported since their adoption a decade ago. Regarding the offences in Part 3 and 3A ('Racial Hatred') of the POA, the low rate of prosecution is most likely a result of the cumbersome procedure where the Attorney General must consent to each one of the prosecutions. The positive consequence of this arrangement was the low number of high-key political speech cases. However, the research showed that while political hate

speakers were prosecuted, typically these were fringe actors and not established figures which in turn raises the concern of arbitrariness.

The impact of the other statutory instrument had a similar though shorter history. In one set of cases, the public demonstration cases, courts clearly had a tendency to overlook the relevant political circumstances in political speech cases and to disadvantage political speakers with extreme messages. This highlights the lack of effective in-built defences or safeguards to protect political speech within the statutory scheme of the British hate speech regulation.

Chapter Seven

CONCLUSIONS

At the time of typing these concluding words, hate speech has become a more pressing issue than ever before. The recent presidential election in the US, the Brexit vote in the UK, elections in the Netherlands, France and Germany are all reminders of the notorious place political hate speech has earned in contemporary politics. It is certain that a world without hate speech would be a better place. Yet it is one beyond our reach. Until then, the duty of a researcher is to dig into the matter and propose workable solutions.

The thesis did not attempt to tackle all aspects of hate speech or freedom of expression at large. Rather, we engaged only with political hate speech, that is hate speech that can plausibly claim a political pedigree. This methodological move had the benefit of sharpening the inquiry. The resulting thesis question was: Should political hate speech be an exception from the otherwise justified ban on hate speech?

The profound motivation behind this thesis was to transcend the intellectual complacency embedded in absolute solutions to hate speech. This was called the deadlock in the hate speech debate. European courts and academics are prone to short-circuit the debate by declaring that hate and free speech are simply incompatible. The historical and ethical motivation behind such a stance is fully understandable for a researcher from Hungary. Yet this absolutism mistakenly maps an ethically correct stance as the extent of a right. Surely, we have rights not just for ethically commendable acts. Moreover, this absolutism looks thoroughly incompatible with the contemporary

political reality, where even mainstream politicians and voters embrace xenophobic and other prejudiced views.

The opposite absolutism consists in denying the evident dangers and harms in hate speech. American scholars argue that hateful expression is just one of many opinions. It might be a bad apple but still an apple. Consequently, government has no authority to weed it out from the marketplace of ideas under the sacred First Amendment. The thesis takes this position to be a non-starter. We assume the European tradition of prohibitionism to be broadly correct: hate speech is indeed dangerous and legal measures should help to halt it. Hence, a compromise solution was attempted in this thesis.

The dangers of compromise are to leave all sides dissatisfied. Even so, we took that path in hope that the arguments leading up to the compromise will convince. Our solution may appear messy, but it fares better as applied to contemporary democracies than either of the alternative absolutisms.

In this conclusion, we will fly over the battlefield to highlight the turning points in the thesis and stress its original contributions to the debate in the academic literature. Finally, a handful of important criticisms will be discussed along with some emerging new avenues for further research.

The thesis started off with three theoretical chapters. The first two refined step by step the concept of political speech whereas the last introduced political hate speech into the discussion. Chapter Two presented a broad range of democratic speech theories that one way or another argue for the primacy and importance of political speech for democracy. We started the development of a democratic justification for free speech from the influential instrumentalist account of Alexander Meiklejohn. The discussion

then turned towards the public discourse accounts of Robert Post and the participation-oriented version of James Weinstein. Meiklejohn's argument helpfully presented the audience interests in a political speech account, while the public discourse theories veered the discussion towards democratic legitimacy. The argument settled on a combination of Ronald Dworkin and Thomas M. Scanlon's political speech accounts. Our reading showed that they are the two sides of the same coin: both posit that free political speech is a necessary condition of political legitimacy. Freedom of political speech is important, because the democratic process necessarily has losers and winners. As far as those who lose out in the process remain free to oppose the communal decisions by speaking out, the polity remains on legitimate grounds to enforce decisions on the dissenters. The same applies to the listeners' side of the argument. People should be free to make up their own minds about political speech they encounter. Government is well placed to judge and correct many types of speech, for instance to protect the safety or health of its citizens. An example in point is the ban on cigarette advertisements. Yet governments should not judge the merits of political propositions for its citizens, lest they lose the privilege to use coercion in pursuit of their goals. Hence any restriction of political speech ought to be treated as suspicious. Thus, Chapter Two established political speech securely in a morally attractive normative account.

However, this was not the end of the matter. Chapter Three revealed that it is all well to stand up for political speech yet there is no easy way to know what speech counts as political. We live in a universe of constant information noise to put it mildly, where all speech claims to be important, which is to say political.⁶⁰⁶ This posed an epistemic challenge to the thesis.

⁶⁰⁶ To put it less mildly we live in a time of bullshit. See Harry G. Frankfurt, *On Bullshit* (Princeton University Press 2009).

Chapter Three met the challenge by moving the needle from a content- to a circumstance-regarding approach to define political speech. This crucial move may appear counter-intuitive at first because we are so accustomed to assign the political speech pedigree if an expression touches on public issues. We preserved that loose content requirement but delegated it to the backseat, while political circumstances took priority in the definition of political speech. It is not an entirely novel approach. Courts, such as the ECtHR, do occasionally use political circumstances as benchmarks for stressing the political nature of expression. Chapter Three argued for treating that upper layer of political speech, defined by stringent political circumstances (the speaker, the process and the event), as a privileged layer. This methodological move was justified by the significant normative features that high-key political speech exhibits. This type of political speech is functionally public, meaning that in the grand scheme of expressions its function is to convince, persuade or mobilize in a political way, as opposed to, say, promoting the newest electronic gadgets for customers like commercial speech does; or to cater to sexual needs like pornography does. Moreover, high-key speech is exposed to the public's judgment. In light of the importance of the listener's right to judge political speech, this aspect of public accountability is crucial. Relatedly, high-key speech may attract counter-speech through its publicness.

Note that this was the second move towards isolating only political speech. In the next step, the focus shifted further towards the most protected layer of political speech by introducing circumstance-regarding factors.

In the final theoretical chapter, the core topic of this thesis was introduced: political hate speech. In the third narrowing step, we directed our scrutiny to high-key political speech with hateful content as opposed to all hate speech that claims to be political solely on account of its content. In Chapter Four, political hate speech thus

defined was put to the test of the strongest prohibitionist arguments. The silencing, incitement, vilification and democracy protection objections were tested against the proposition to treat political hate speech as a privileged exception from the hate speech ban. Some of these objections proved to be deficient in general (incitement), and others turned out to be unconvincing when applied to political hate speech (silencing, democracy protection) even if they might justify the prohibition of societal hate speech as opposed to the political.

Two findings stand out concerning the vilification objection. We argued against the popular yet untenable view that bases the hate speech ban on the form (or tone) of speech as opposed to its hateful content. The prevalence of dog-whistle or coded racist speech shows that the form-centricity is at best misleading, at worst counter-productive. The harm in speech does not lie with the form but the message. This led the argument to a considerable concession on pure vilification. Political hate speech, that is high-key political speech with hateful content, devoid of any link with public issues conceived broadly, does not have a claim for free speech protection. The example in point is Holocaust denial. It might well be thought that this exception muddies the waters. It is, however, best seen as a good counter-weight against assigning importance blindly to circumstances as opposed to the content. This would amount to commit a similar mistake, just the other way around, to conceive all speech to be political, but this time merely based on its circumstances. Chapter Four closed the theoretical inquiry. As a result, the research question was answered in the affirmative as to whether there was a case for protecting political hate speech as an exception from the prohibitionist norm.

The remainder of the thesis was devoted to one supranational and one national jurisdictions (the European Court of Human Rights and to the United Kingdom). The

aim was to apply the theoretical findings onto one treaty-based human rights jurisdiction and to one national legal system.

The ECtHR is well-known in the literature for its strong prohibitionist stance. This perception was borne out by the analysis. The Court has an entrenched tendency of showing deference to states on hate speech regulation. Two findings nuanced the broad picture. The ECtHR traditionally offers high protection to political speech. The Court tended to treat all hate speech as non-political in the first period of its jurisprudence by relying heavily on Article 17. This Article 17-based grip has eased in its second period and hate speakers' claims started to be treated as genuine complaints of violations of Article 10, even though they were almost always declined. With time, however, some dissents and unusual court decisions in political hate speech cases brought to light the internal disagreements in the Court. The seminal dissent in *Féret v Belgium* and the judgment in *Fáber v Hungary* stand for this alternative tendency that appreciates better the normative importance of political hate speech.

Chapter Six delved into the British regulation of hate speech. A tripartite analysis was followed starting with the history, the design and finally the impact of British hate speech laws. On the one hand, the British regulation is characterized by an overbroad design capable of capturing vast ranges of speech. This is tempered by procedural safeguards that makes their enforcement cumbersome. The analysis of the case law bore this out by highlighting a very low rate of enforcement up until the early 2000s. After that another statutory instrument (the racially and religiously aggravated offences) became the preferred tool for prosecutors. It resulted in an increase in the cases prosecuted. Concerning political hate speech, British law was devoid of almost any internal defences. As a result, on numerous occasions political speakers were prosecuted for their non-violent speech. The profile of the prosecutions shows that the statutes were

uniquely used against marginal fringe organizations and not high-profile hate speakers. It only meant that one set of political hate speakers were less disfavoured than another.

The key features of this research project and their criticisms should be laid bare here. It was established that political hate speech, meaning high-key political speech with hateful content should be a privileged form of hate speech. We did not deny the general negative effects of hate speech. Rather a narrow exception was argued for speeches where the case for the default prohibition norm is weaker. Bearing in mind the normative importance of political speech in liberal democracies, such speech exception sits better with democratic theories than the prohibitionist tendency. The *exception* formula emphatically underlies the compromise nature of this study's proposals.

The research applied a novel approach to the concept of political speech. It was based on the recognition that democratic free speech theories go at great length about political speech without saying much about what it really is. The thesis took this curious lacuna and argued for a multi-tier understanding of political speech with high-key speech at the top that ought to benefit from the highest protection. The distinction was based on sound normative reasons that high-key speech exhibits: functional publicness, the exposition to the audience's judgment and to criticism.

Nevertheless, one may still look at this exception for high-key political hate speech with suspicion. It may look as though it neglects vast amount of speech commonly referred to as 'political.' But the criticism is by and large misplaced. In human rights and free speech law, doctrinal categories are formed and used all the time. They may be debatable and messy at their margins, but vital for the practice. For instance, few would deny the free speech principle that public figures ought to bear more criticism than non-public figures. This, however, does not mean that non-public figures need not bear any criticism and should benefit from absolute protection. This difference between

the duty of tolerating criticism depending on the status of the person is far from precise yet it conditions the degree of protection of one's reputation (usually under defamation law). This is analogous with the multi-tier approach to political speech introduced here. The difference between high- and low-key political speech conditions the degree of protection of free speech *for different speakers*. The only point established was that high-key speech is the pinnacle of political speech, not that low-key should not be protected.

This leads to another related criticism. To what extent the thesis can be said to suffer from elitism? Behind such criticism stands the assumption that political circumstances will define established institutional political actors (i.e. the elite). This charge is not tenable though. In Chapter Six we found that the British regulation of hate speech was wanting despite the fact that it does not censor high-profile politicians, but only lower profile fringe organizations: high-key speech attempts to capture the functional publicness and not the institutional status of speech. Therefore, any public political event be it organized by a mainstream party or a handful of activists should benefit from the same heightened protection.

This thesis argued for a shift from a purely content-based to a circumstance-regarding approach when defining political speech. For this shift, three contextual benchmarks were put forth: the speakers, the process and the event of the speech. It was not defined precisely how these benchmarks should apply, whether singularly or cumulatively. Is one benchmark enough to make out high-key political speech? Or alternatively a combination of circumstances is required? These are understandable concerns for a practitioner, but ones that could be left loose for the practice to define. Ultimately a degree of balancing is unavoidable in applying any such tests.

This project can be further elaborated in many directions. Take for instance the application of political hate speech onto social media. High-key speech has a direct

application on social media platforms, but further arguments could fine-tune the circumstantial political factors for drawing the line between privileged and non-privileged hate speech. For that end, one should dig into the free speech justification of online speech bearing in mind the completely private infrastructure of the Internet that classic democratic free speech accounts could hardly imagine. Following on this suggestion, the political circumstantial benchmarks used here by no means represent the end of the discussion. As it was suggested above, other political circumstances could be possibly defined that strengthen the doctrinal foundations of the approach proposed in this thesis.

The goal of this thesis was probably overambitious. It aimed at breaking the deadlock in the hate speech debate. This is unlikely to have been achieved. The conflicting normative commitments with which participants typically enter this debate put such goals beyond a doctoral thesis' reach. Yet, a more modest goal may have been attained. The thesis questioned, pushed, and reformulated key features and assumptions about political speech in novel ways to tackle the old, and arguably unresolvable, problem of hate speech in liberal democracy. Perhaps this is as much one should hope from a doctoral project.

APPENDIX

The ECtHR's judgments in hate speech cases in chronological order:

1. *Glimmerveen and Hagenbeek v Holland* App no 8348/78 (ECHR, 11 October 1979)
2. *Kühnen v Germany* App no 12194/86 (ECHR, 12 May 1988)
3. *B.H; M.W; H.P; G.K. v Austria* App no. 12774/87 (ECHR, 12 October 1989)
4. *Jersild v Denmark* App no 15890/89 (ECHR, 23 September 1994)
5. *Remer v German* App no 25096/94 (ECHR, 6 September 1995)
6. *Honsík v Austria* App no 25062/94 (ECHR, October 1995)
7. *Pierre Marais v France* App no 31159/96 (ECHR, 24 June 1996)
8. *Lehideux & Isorni v France* App no 24662/94 (ECHR, 23 December 1998)
9. *Witzsch v Germany* App no 41448/98 (ECHR, 20 April 1999)
10. *Schimanaek v Austria* App no 32307/96 (ECHR, 1 Feb 2000)
11. *Garaudy v France* App no 65831/01 (ECHR, 24 June 2003)
12. *Seurot v France* App no 57383/00 (ECHR, 18 May 2004)
13. *Norwood v UK* App no 23131/03 (ECHR, 16 November 2004)
14. *Pavel Ivanov v Russia* App no 35222/04 (ECHR, 20 February 2007)
15. *Balsyt-Lideikiend v Lithuania* App No. 72596/01 (ECHR, 4 November 2008)
16. *Soulas et others v France* App no 15948/03 (ECtHR, 10 July 2008)
17. *Vejdeland and Others v Sweden* App no 1813/07 (ECHR, 9 February 2009)
18. *Féret v Belgium* App no 15615/07 (ECHR, 16 July 2009)
19. *Willem v France* Case App no 10883/05 (ECHR, 16 July 2009)
20. *Le Pen v France* App no 18788/09 (ECHR, 20 April 2010)
21. *Fáber v Hungary* App no 40721/08 (ECtHR, 24 July 2012)
22. *Perinçek v Switzerland* App no 27510/08 (ECtHR first inst., 17 December 2013)
23. *Diendonné M'Bala M'Bala v France* App no 25239/13 (ECtHR, 20 October 2015)
24. *Delfi AS v Estonia* App no 64569/09 (ECtHR GC, 16 June 2015)

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