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Hate Speech, Genocide, and Revisiting the
“Marketplace of Ideas” in the Digital Age

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I would like to thank the organizers of the Conference, particularly Kenneth Marcus and Alexander Tsesis, for the gracious invitation to speak to what is undoubtedly one of the most pressing themes commanding our attention—hate speech, incitement, and genocide. This Symposium comes at a time when historical truth struggles to endure in the face of attacks insidiously couched in human rights rhetoric. For example, Iranian President Mahmoud Ahmadinejad’s recurring and unequivocal assertions that Israel “should be wiped off the map,”¹ an incitement to ultimately commit genocide,² was—not coincidentally—tactically justified in human rights terms, as freedom of expression, *inter alia*.³ These occurrences are by no means isolated. Rather, they echo similar calls for the Jewish state’s annihilation during

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1. Ewen MacAskill & Chris McGreal, *Israel Should Be Wiped Off Map, Says Iran’s President*, GUARDIAN, Oct. 27, 2005, at 17, available at <http://www.guardian.co.uk/iran/story/0,12858,1601413,00.html>.

2. Such an incitement was in violation of several international treaties and conventions. See, e.g., U.N. Charter art. 2, para. 4 (“All members shall resolve their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”); *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260(III)(A), U.N. GAOR, 3d Sess., 179th plen. mtg., at 174, U.N. Doc. A/810 (Dec. 9, 1948) (stating that genocide is an act that “shall be punishable”); Rome Statute of the International Criminal Court, art. 33, para. 2, July 17, 1998, 2187 U.N.T.S. 3 (“[O]rders to commit genocide or crimes against humanity are manifestly unlawful.”).

3. See *Holocaust Denial Sparks Outrage*, BBC NEWS (Dec. 14, 2005, 6:15 PM), http://news.bbc.co.uk/1/hi/world/middle_east/4529198.stm (“Mr. Ahmadinejad made the comments while speaking on live TV in the south-eastern city of Zahedan. ‘They have created a myth today that they call the massacre of Jews and they consider it a principle above God, religions and the prophets’”).

the so-called “Apartheid Week,” which itself was incredulously masked and promoted as a human rights event.⁴

Indeed, genocidal affirmations of various incarnations are increasingly cast in human rights terms⁵ as a religious right or a right of the oppressed to self-defense or self-determination.⁶ Furthermore, they are often preceded by the denial of previous atrocities perpetrated against the vilified group.⁷ Denial of victimization therefore becomes a *first* rather than a final stage in the genocidal “process,” as Gregory Stanton correctly explains.⁸

4. See, e.g., *Human Rights Demonstration*, ISRAELI APARTHEID WEEK, <http://apartheidweek.org/en/node/431> (last visited Dec. 14, 2011) (exemplifying the widespread and well-organized nature of “Israeli Apartheid Week”); *Israeli Apartheid Week Information Booth*, ISRAELI APARTHEID WEEK MONTREAL, <http://montreal.apartheidweek.org/fr/node/457> (last visited Nov. 19, 2011) (showing further evidence of the “Israeli Apartheid Week’s” expansive reach). “Apartheid Week” is a “vicious campaign of unrestrained Israel-bashing which has a long record of intimidating students and other bystanders” *Expose the Bullies of Israel Apartheid Week and Their Double Standards*, CIC SCENE (Mar. 2, 2010), <http://www.cicweb.ca/scene/2011/03/expose-the-bullies-of-israel-apartheid-week-and-their-double-standards/> (offering a more detailed explanation and critique of “Apartheid Week”).

5. Canadian Prime Minister Stephen Harper’s speech on Parliament Hill to a gathering of international parliamentarians and experts attending a conference aimed at combating antisemitism is on point. See *Excerpt: Harper’s Speech on Israel, Anti-Semitism*, NAT’L POST (Nov. 8, 2010, 5:59 PM), <http://news.nationalpost.com/2010/11/08/excerpt-harpers-speech-on-israel-anti-semitism/> (“Harnessing disparate anti-Semitic, anti-American and anti-Western ideologies, it targets the Jewish people by targeting the Jewish homeland, Israel, as the source of injustice and conflict in the world, and uses, perversely, the language of human rights to do so.”).

6. See, e.g., *The Covenant of the Islamic Resistance Movement*, Aug. 18, 1988, pbml., available at http://avalon.law.yale.edu/20th_century/hamas.asp (“Israel will exist and will continue to exist until Islam will obliterate it”); see also Michael Herzog, *Can Hamas be Tamed?*, FOREIGN AFF., Apr. 2006, at 84, available at <http://www.foreignaffairs.org/20060301faessay85207/michael-herzog/can-hamas-be-tamed.html> (noting that the Hamas ideology was set forth in its 1988 covenant, which defines Palestinian nationalism and the conflict with Israel in religious terms).

7. Irwin Cotler, *Human Rights and the New Anti-Jewishness*, JUSTICE, Spring 2004, at 25–26, available at <http://www.intjewishlawyers.org/main/files/Justice%20No.38%20Spring%202004.pdf> [hereinafter Cotler, *Human Rights*]; see also Irwin Cotler, *Human Rights and the New Anti-Jewishness*, FRONTPAGEMAGAZINE.COM (Feb. 16, 2004), <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=12191> [hereinafter Cotler, *New Anti-Jewishness*] (referring to “existential or genocidal anti-Semitism”).

8. See Gregory H. Stanton, *The Eight Stages of Genocide*, GENOCIDE WATCH, <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html> (last visited Nov. 18, 2011) (“DENIAL is the eighth stage that always follows a genocide. It is among the surest indicators of further genocidal massacres.”). Stage three is also relevant to this discussion: “Dehumanization overcomes the normal human revulsion against murder.” *Id.*; see also Irwin Cotler, *The Human Rights Revolution and Counter-Revolution: A Dance of the Dialectic*, 44 U.N.B.L.J. 357, 369 (1995) (“[T]he Holocaust denial movement, the cutting edge of antisemitism old and new as Bernie Vigod would put it, is not just an assault on Jewish memory and human dignity in its accusation that the Holocaust is a hoax, but it is an international criminal conspiracy to cover up the worst crimes in history. Here is the most tragic, bitter and ironic historiography of the Holocaust, a historiography in its ultimate Orwellian inversion. For we move from the genocide of the Jewish people to a denial that the genocide ever took place; then, in a classic Orwellian cover-up of an international conspiracy, the Holocaust denial movement whitewashes

Quite simply, it would appear that, in the aftermath of the Holocaust, the re-conceptualization of democracy from procedural to substantive—or what Lorraine Weinrib eloquently deems a new “constitutional paradigm”⁹—is increasingly subject to a disturbing distortion. The immediate purpose of constitutionally recognizing and enshrining rights such as dignity and equality at the domestic level was presumably to render devoid of legal force any majoritarian decision unjustifiably violative of these supreme values.¹⁰ This post-war “constitutionalization”—intended to protect the vulnerable or unpopular from the procedural manipulation of democracy—risks being progressively inverted to justify the “freedom” to deny and promote genocide. Even worse, such assertions can be inconspicuously buried in human rights rhetoric,¹¹ effectively disarming any critics who would dare accuse its proponents of racist incitement.

Constitutionalism—the anticipated safeguard against the devastation of democracy from within—may itself be co-opted for that very purpose. Inversions of this nature, particularly the usurpation of human rights language towards genocide denial and incitement, form the backdrop of my reflection today.

This talk further suggests that the marketplace of ideas doctrine,¹² so prevalent in American thinking and case law, may not lend itself to the

the crimes of the Nazis, as it excoriates the crimes of the Jews. It not only holds that the Holocaust was a hoax, but maligns the Jews for fabricating the hoax.”).

9. Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionality*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 89 (Sujit Choudry ed., 2006) (affirming that the “postwar constitutional paradigm” gave rise to the emphasis on equality of citizenship and respect for inherent human dignity); see also Lorraine E. Weinrib, *Canada’s Rights Revolution: From Legislative to Constitutional State*, 33 *ISRAEL L. REV.* 13, 14 (1999) (discussing the significance of the transition from procedural to substantive democracy); Lorraine E. Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada’s Constitution*, 80 *CAN. BAR REV.* 699, 701 (2001) (discussing the postwar redesign of the democratic state) [hereinafter Weinrib, *Supreme Court*].

10. See Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 16, 149 (2002) (“We, the judges in modern democracies, are responsible for protecting democracy both from terrorism and from the means the state wants to use to fight terrorism.”); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 150 (1977) (arguing that individuals have a fundamental right to equal respect and concern, owed to them by the government); JOSEPH E. MAGNET, *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: REFLECTIONS ON THE CHARTER AFTER TWENTY YEARS* 19 (2003) (discussing how proponents of the belief system of the Westminster model of majoritarian political process reject expansion of the judicial role to enforce rights guarantees); Weinrib, *Supreme Court*, *supra* note 9, at 710 (explaining Canada’s transition to rights-based democracy, as well as the “age of rights” and the implied bill of rights).

11. See, e.g., RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* 12 (1996) (articulating France’s challenge in balancing the push for constitutional reform centered around human rights with maintaining political tradition).

12. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]hat the best test of truth is the power of the thought to get itself accepted in the competition of the

digital age—where truths are virtually indistinguishable from lies and racist incitement (the latter benefitting from disproportionate exposure and “whitewashing”)—and therefore begs rethinking.

I. MANIPULATING HUMAN RIGHTS DISCOURSE IN ORDER TO SUBVERT DEMOCRACY

With regard to the co-opting of what I will call the Henkian narrative,¹³ the difficulty lies not with the advent of a rights culture, but with the potential for its cynical manipulation. In the words of Andreas Kalyvas: “In a democratic age, where the idea of popular self-government enjoys a vast ideological hegemony . . . the effective challenge can only come from within.”¹⁴ Therefore, Kalyvas continues, instead of directly attacking democracy, genocide deniers and proponents of violence against vulnerable peoples opt for a more deceptive and cunning strategy of inner attrition.¹⁵

An early example of the manipulation of human rights rhetoric in Canada is that of Ernst Zundel, a Holocaust denier and one of the largest distributors of hate literature in the world. In the multiple proceedings against him, Zundel consistently posed as the noble champion for freedom of expression. As Former President of the Canadian Jewish Congress Mark Freiman eloquently recounts, Zundel and his attorney appeared in bulletproof vests, acting as victims of what they characterized as the enemies of free speech and historical truth.¹⁶

Moreover, blatantly racist rhetoric,¹⁷ masked as the exercise of constitutionally enshrined rights, is widespread within higher-learning institutions, epitomized by recurring high-profile events such as “Israel Apartheid Week.” Its disturbing but clear implication is that Israel—the ancestral home to a people victimized in unspeakable proportions by the greatest racist enterprise—is *itself* a racist entity that must be dismantled as a “human rights” gesture. The campaign further insinuates that

market . . .”); see, e.g., *Reno v. ACLU*, 521 U.S. 844, 847 (1997) (rejecting the Government’s argument that it had a “significant” interest in fostering the Internet’s growth sufficient to infringe on First Amendment rights by limiting the communication of certain “offensive” forms of online material).

13. Professor Louis Henkin is known as the “Father of Human Rights Law.” See, e.g., Clyde Haberman, *Lessons in a Life Well Lived, and Values Upheld*, N.Y. TIMES, Oct. 19, 2010, at A21.

14. Andreas Kalyvas, *Carl Schmitt and the Three Moments of Democracy*, 21 CARDOZO L. REV. 1525, 1528–29 (1999).

15. *Id.*

16. Mark Freiman, *Litigating Hate on the Internet*, CAN. HUM. RTS. COMM’N, http://www.ccdp-chrc.ca/proactive_initiatives/hoi_hsi/page6-en.aspx (last updated Aug. 18, 2011).

17. See, e.g., Emily Mathieu, *Videotape adds rift in Jewish community*, TORONTO STAR, Jan. 15, 2009, at AA03 (reporting on a video released by the Canadian Jewish Congress in which some protesters are heard repeating the medieval antisemitic libel that Jews drink blood).

supporters of the Jewish state (including, but not limited to, Jewish and Israeli students and faculty who have not disowned their heritage) must be greeted with opprobrium as proponents of vile racism by any peace-loving individual (as would, for example, a segregationist South African).

Perhaps most disturbing are the antisemitic affirmations voiced on certain campuses in the context of these events. These affirmations not only operate to intimidate and silence Jewish students on campus but are progressively cloaked in human rights discourse. Classic antisemitic, even genocidal, motifs are made palatable to the well-meaning ear when craftily phrased in terms of freedom of expression or a right of the oppressed to self-determination. This incitement, evoking familiar themes of Jewish power and domination,¹⁸ is often preceded by the denial of atrocities perpetrated against the vilified group and veiled in rights rhetoric.

In more practical terms, the human rights narrative disturbingly usurped by proponents of racist incitement and discourse misleadingly but convincingly suggests that the only rights at stake and worthy of protection are their own—to the exclusion of the rights of the vilified group to equality and to an environment of dignity, free of harassment.¹⁹

In other words, the narrative in this context rests on the premise that restraints on inciters' speech *alone* pose a threat to a constitutionally protected value. Instead, in keeping with the Canadian Supreme Court's decision in *R. v. Keegstra*,²⁰ it may be argued that if permitted to proceed uninhibited, certain forms of speech—particularly racist and harassing falsehoods such as “Israel Apartheid”²¹ or the depiction of the

18. For example, posters on campuses often paint Jewish might as the source of world conflict or evoke blood libel imagery, with Arab children substituting their historical Christian counterparts. See Cotler, *Human Rights*, *supra* note 7, at 28 (noting that an indicator of a new anti-Jewishness is apparent in the new “totalitarian Arab anti-Semitism,” evidenced by the “critical mass of this trafficking hate—this teaching of contempt and demonizing of the other in the mosques,” among other factors); Cotler, *New Anti-Jewishness*, *supra* note 7 (referring to “existential or genocidal anti-Semitism”); see also, e.g., Adina Levine, *Harvard Prof Condemns ‘Misguided’ Political Attacks Against Israel*, HARV. L. REC. (Dec. 4, 2003), <http://www.hlrecord.org/24463/harvard-prof-condemns-misguided-political-attacks-against-israel-1.579953>.

19. See, e.g., *Students Threatened with beheading at U of T's Israeli Apartheid Week*, JEWISH TRIB. (Mar. 10, 2009), http://www.jewishtribune.ca/TribuneV2/index.php?option=com_content&task=view&id=1454&Itemid=38 (describing how at the University of Toronto, known as the “birthplace of Israeli Apartheid Week,” an incident occurred where a Jewish student was threatened with beheading); Karen Eltis, Parliamentary Panel Inquiry Submission (unpublished manuscript), available at www.cpcca.ca/eltis.pdf (providing a more detailed report of such incidents on Canadian campuses).

20. [1990] 3 S.C.R. 697 (Can.).

21. The term “Israel Apartheid” absurdly compares a state that boasts members of its Arab minority on its Supreme Court and as Deputy Speaker of its Parliament with a state where black

Jewish state as a blood thirsty Nazi state—serve not only to undermine Jews' equality and dignity, but effectively threaten their freedom of speech. It muzzles all who would disagree with certain (and ironically racist) positions and prevents them from participating in community life and debate.²²

On point, a U.S. court dealing with antisemitic comments in the workplace recently opined that the *accumulation* of vilifying and derogatory comments creates an atmosphere of fear, silencing, and shame for victims exposed to this propaganda.²³ Ultimately, it stands to reason that this sort of demonization leads to—and subsequently excuses—barbarous acts such as the firebombing of a Jewish school in Montreal²⁴ and the horrific torture and murder of young Ilan Halimi in France, who was presumably targeted and brutalized simply because he was Jewish.²⁵

With this in mind, democracies are duty-bound to take corrective action to not only prevent infringement of the freedom of speech of inciters (as most constitutional democracies and their institutions have done already), but also to protect victims' affirmative rights to expression, dignity, equality, and, ultimately, life and security. In this case and in the balance of rights, the latter must prevail.²⁶ In the words of Professor Shalom Lappin: "If one group of students is permitted to engage in violent harassment of another without the decisive intervention of the University's administration, then the conditions for a free and unfettered exchange of ideas are completely undermined, and the primary purpose of university life is betrayed."²⁷

citizens were denied every possible basic human right, let alone the highest political or judicial office.

22. See also *Excerpt, supra* note 5 ("Anti-Semitism has gained a place at our universities, where at times it is not the mob who are removed, but the Jewish students under attack. And, under the shadow of a hateful ideology with global ambitions, one which targets the Jewish homeland as a scapegoat, Jews are savagely attacked around the world—such as, most appallingly, in Mumbai in 2008.").

23. See *Cutler v. Dorn*, 955 A.2d 917, 920 (N.J. 2008) (ruling in favor of plaintiff's allegation of religion-based, hostile work environment discrimination and emphasizing that "[t]he threshold for demonstrating a religion-based, discriminatory hostile work environment is no more stringent than the threshold that applies to sexually or racially hostile workplace environment claim").

24. *Teen pleads guilty to Jewish school firebombing*, CTV NEWS (Dec. 16, 2004, 11:30 PM), <http://www.ctv.ca/CTVNews/CTVNewsAt11/20041216/firebombing041216/>.

25. Kim Willsher, *Brutal Murder was Anti-Semitic Crime Says Sarkozy*, GUARDIAN, Feb. 2, 2006, at 17, available at <http://www.guardian.co.uk/world/2006/feb/22/france.mainsection>.

26. See A. BARAK, *PURPOSIVE INTERPRETATION IN LAW* 178–80 (2005) (explaining the concept of vertical versus horizontal balancing).

27. Letter from Shalom Lappin, Professor, King's College, to Dr. Mamdouh Shoukri, President & Vice Chancellor, York University, available at http://thentherewaslight.com/412_uk-professor-cancels-talk-york-university-failure-condemn-attack/. Shalom Lappin courageously cancelled his scheduled appearance at York University and sent its president a letter of withdrawal condemning the institution's lamentable failure to take much-needed measures to

Plainly put in the broadest, abstract terms, and in terms of the applicable normative framework, the balancing is not between freedom of speech—the “First Freedom”—and some other ill-defined interest. It is instead a question of *rights versus rights*,²⁸ as well as the proper balance to be achieved between freedom of expression (freedom from improper infringements) and the right to express oneself (proffered as an affirmative right), integral to social equality.

As Canadian law professor Jean-Francois Gaudreault-DesBiens powerfully argued in a different context: “[T]he dilemma [of inhibiting speech] becomes *a duty to regulate against abusive forms of expression*, because a constitutional democracy cannot tolerate radical denials of the humanity of some of its citizens”²⁹ The danger of hijacking human rights narratives in the interest of racist incitement is not unprecedented. The lessons of France’s Vichy regime—which, as Richard Weisberg demonstrated, appropriated legal language associated with profound pre-existing social values in order to seamlessly subvert those very principles and lay the foundation for their destruction—are very informative.³⁰

If constitutionalism is to serve the purpose for which it was intended—to safeguard substantive democracy—we must not be fooled by the cynical invocation and manipulation of human rights values. History teaches the importance of the precautionary principle as it relates to incitement to hatred against historically vulnerable and unpopular groups. The Canadian Supreme Court has embraced this view by upholding carefully drafted anti-hate provisions. It bears repeating that in Canada, the willful promotion of hatred under certain circumstances is deemed a justifiable and proportional limit on free expression in light of its deleterious effects upon the dignity and

protect members of the campus community from the intimidation served under the guise of a “political” anti-Zionist stance. He further chastised the administration for its double standard, safeguarding the intimidators’ freedom of speech while doing nothing to protect the affirmative rights to speech, dignity, equality, and even physical integrity (safety) of the attacked and vulnerable. *Id.*

28. Irwin Cotler, *Terrorism, Security and Rights: The Dilemma of Democracies*, 14 NAT’L J. CONST. L. 1, 13 (2002). Professor Cotler argues that counter-terrorism measures and legislation, for instance, have “been characterized—if not sometimes mischaracterized—in terms of national security versus civil liberties, a zero sum analysis, when what is involved here is ‘human security’ legislation that purports to protect both national security and civil liberties, including the most fundamental of rights: the right to life, liberty, and security of the person.” *Id.* at 1–2.

29. Jean-Francois Gaudreault-DesBiens, *From Sisyphus’s Dilemma to Sisyphus’s Duty? A Meditation on the Regulation of Hate*, 46 MCGILL L.J. 1117, 1117 (2001) (emphasis added).

30. See WEISBERG, *supra* note 11, at 63 (discussing the subversion and misappropriation of legal language during the Vichy Regime more generally); see also Vivian Grosswald Curran, *The Legalization of Racism in the Constitutional State: Democracy’s Suicide in Vichy France*, 50 HASTINGS L.J. 1, 2 (1998) (adding further discussion to the legal language during the Vichy Regime).

equality of the vulnerable and society as a whole. The hope is not to criminalize hate speech elsewhere per se, but to raise awareness of the problem and to prompt meaningful intervention. The current challenge for political leaders, university administrators, and, generally, civil society, is to prevent constitutionalism from being undermined by the very narrative it conceived.

II. ENTER THE DIGITAL AGE

The Internet, particularly the so-called Web 2.0,³¹ and information sharing via social networking, blogging, and similar innovative, interactive endeavors, only serve to radically compound the above-mentioned difficulties. The ability to reach and corrupt even the most educated³²—let alone innocent—minds by distorting information respecting “race,” particular genocides, or the Holocaust itself, is amplified by the lack of editorial oversight online.³³ It is indeed the medium’s very structure that tends to bestow the appearance of legitimacy and veracity on even the most mendacious of sites, in the absence of gatekeepers or other traditional controls.³⁴ Therefore, as a medium, it may help legitimate the most pernicious forms of hate and incitement, if only due to the arduous task of distinguishing between reliable, authoritative cyber sources, and those peddling racism and fabrications,³⁵ under the guise of respectability, that the networked environment uniquely imparts.

For “online” truth, which now, with the “Internet of Things,”³⁶ extends far beyond the computer screen to everyday items, is both

31. For a general description, see Tim O’Reilly, *What Is Web 2.0*, O’REILLY NETWORK (Sept. 30, 2005), <http://www.oreillynet.com/lpt/a/6228>.

32. See Gauldrault-DesBiens, *supra* note 29, at 1118.

33. See generally RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY (2011), available at <http://www.law.louisville.edu/sites/www.law.louisville.edu/files/weaver-gutenberg-internet.pdf>.

34. See, e.g., Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 MISS. L.J. 1263, 1263–64 (2011) (articulating how easy access to technology has led to the decimation of communication “gate-keeping,” causing political and social consequences and consequentially the Internet has also been used as a forum by extremist groups to “propagate hate speech”).

35. This is not surprising, since the most popular “go to” address for cyber-research seems to be Wikipedia (or a Google search leading to Wikipedia), a site that itself “expressly makes no guarantee of the validity of the information it contains.” WIKIPEDIA: GENERAL DISCLAIMER, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (last visited Dec. 11, 2011). Instead, the “About” page expressly warns users that not all articles are “encyclopedic quality from the start” and “may contain false or debatable information.” WIKIPEDIA: ABOUT, <http://en.wikipedia.org/w/index.php?title=Wikipedia:About&oldid=329127169> (last visited Dec. 2, 2011).

36. See, e.g., Kevin Ashton, *That ‘Internet of Things’ Thing*, RFID J. (July 22, 2009), <http://www.rfidjournal.com/article/view/4986> (arguing that data on the Internet is subject to deficiencies caused by the individuals who provide it without verifying its accuracy); see also Stephan Haller, *The Internet of Things Beyond the Buzz: Use Cases and Industry Trends*, SAP RES. (Sept. 2, 2009), at 5, <http://rainbow.i3s.unice.fr/~tigli/doku/lib/exe/fetch.php?media=>

easily ingested *on par* and confounded with insidious lies, thus arguably undermining the “marketplace of ideas” model that has of course predominated in the United States.³⁷ Accordingly, some, including distinguished constitutional law professor and staunch First Amendment defender Anthony Lewis, now suggest that “[i]n an age where words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in [Justice] Brandeis’s phrase, should be good ones.”³⁸ This is particularly true on the Internet. In other words, new technologies exacerbate some of the difficulties traditionally associated with the marketplace doctrine,³⁹ especially given the Internet’s infinite memory and potential for distorting information, cloaking falsehoods in the guise of truths, and portraying racism as “human rights.”

Most recently (and of particular note in the United States, which has, to many minds, shunned balancing and proportionality analysis),⁴⁰ New York University law professor Jeremy Waldron tendered the equality rights of victims as a countervailing interest to inciters’ freedom of speech. In his words, “[T]he question is about the direct targets of the abuse. Can their lives be led . . . and their worst fears dispelled, in a social environment polluted by these materials?”⁴¹ While of course very prevalent in most sister democracies, such an approach is arguably quite novel in the United States.

Presumably that is all the more true in the digital age: “The Internet is arguably a *true marketplace of ideas*, and one where ‘dangerous words’

keynote-haller.pdf (“A world where physical objects are seamlessly integrated into the information network, and where the physical objects can become active participants in business processes. Services are available to interact with these ‘smart objects’ over the Internet, query and change their state and any information associated with them, taking into account security and privacy issues.”).

37. The “marketplace of ideas” doctrine has been transposed to the Internet by successive case law.

38. ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 166 (2008).

39. The marketplace doctrine has been critiqued by scholars repeatedly outside the cyber context. *See, e.g.*, R. v. Keegstra, [1990] 3 S.C.R. 697, 748 (Can.) (“[I]n my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.”).

40. *See, e.g.*, Iddo Porat & Moshe Cohen-Eliya, American Balancing and German Proportionality: The Historical Origins (Sept. 23, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1272763> (discussing the differences between the U.S. and German approach to judicial “balancing” and the (formal) rejection of proportionality analysis by American courts).

41. Jeremy Waldron, *Free Speech & the Menace of Hysteria*, N.Y. REV. BOOKS, May 29, 2008, at 221.

may have a *disproportionate* impact.”⁴² Accordingly, the rationale of evenhandedness (ostensibly affording all speakers a platform and allowing the listener/reader to independently decide), though appealing at first glance, might in the online context merely provide an unfair advantage to those inciting hate or genocide, in turn allowing these “views” to prevail, as they flood the networked environment with their message, while good people proverbially do (or say) nothing.⁴³

42. Candida Harris, Judith Rowbotham & Kim Stevenson, *Truth, law and hate in the virtual marketplace of ideas: perspectives on the regulation of Internet content*, INFORMATION & COMM. TECH. L., June 2009, at 155, available at <http://www.tandfonline.com/doi/abs/10.1080/13600830902814943> (emphasis added).

43. For example, recurring and easily recognizable antisemitic themes can be found on various blog discussions. Three prominent themes are:

(1) Excessive Jewish Control/Power over Society/Government. The claim that Jews wield disproportionate power and influence over culture, the economy, media, and especially the institutions of government, a power that is injurious to the nation—often rising to the level of a Jewish conspiracy—is clearly antisemitic in nature. The U.S. State Department’s 2008 *Report on Global Anti-Semitism* notes that antisemitism includes “stereotypical allegations about Jews as such or the power of Jews as a collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.” U.S. STATE DEP’T, 2008 REPORT ON GLOBAL ANTI-SEMITISM, available at <http://www.state.gov/documents/organization/102301.pdf>; Adam Levick, *Anti-Israelism and Anti-Semitism in Progressive U.S. Blogs/News Websites: Influential and Poorly Monitored*, INST. FOR GLOBAL JEWISH AFFAIRS (Jan. 1, 2010), http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=3&DBID=1&LNGID=1&TMID=111&FID=624&PID=0&IID=3211&TTL=AntiIsraelism_and_antiSemitism_in_Progressive_U.S._Blogs/News_Websites:_Influential_and_Poor. Within polite circles Jews are no longer accused of “poisoning the wells.” Yet they are still often accused of running Hollywood, controlling the financial system, and manipulating U.S. foreign policy and public debate to blindly support Israel. This latter claim, in particular, is all too common in the commentary reviewed in this speech.

(2) Dual Loyalty: Jews More Loyal to Israel than to the United States. One of the oldest antisemitic staples is that Jews are not sufficiently loyal to the countries where they reside but instead are more loyal to Israel. Indeed, this notion underlies the failure of European emancipation. From the Dreyfus Affair in France through the Nazis’ rise to power, Jews—no matter how devoted they actually were to their host countries—were viewed as outsiders lacking in national loyalty. Such *ad hominem* attacks against American Jews who support Israel are common within the blogs in question. The ‘Working Definition of Anti-Semitism’ of the European Monitoring Centre on Racism and Xenophobia defines as antisemitic: accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

(3) Israel as Nazi Germany. Since Israel has only been a state for sixty-one years, the theme of Israel as Nazi Germany is a much more recent manifestation of antisemitism. In most working definitions of antisemitism, however, charges that Israel’s behavior can be compared with the actions of Nazi Germany are considered antisemitic. A recent report by the Anti-Defamation League shows that such comparisons are increasingly common among anti-Israeli activists. Protests against Israel’s Gaza offensive in 2008–2009 included banners and slogans likening Israeli soldiers to German troops, the Gaza Strip to Auschwitz, and the Star of David to the swastika. As the U.S. State Department Report notes, “[T]he demonization of Israel, or vilification of Israeli leaders, sometimes through comparisons with Nazi leaders, and through the use of Nazi symbols to caricature them, indicates an antisemitic bias rather than a valid criticism of policy concerning a controversial issue.” U.S. STATE DEP’T, REPORT ON GLOBAL ANTI-SEMITISM (Jan. 5, 2005), available at <http://www.state.gov/j/drl/rls/40258.htm>.

The absurd result of such a policy can be seen in the case of a racist anti-Muslim page posted on Facebook, as discussed by Rabbi Abraham Cooper at a recent Ottawa conference on global antisemitism. Muslims rightly complained and the company initially agreed to take down the offensive page. Cooper's organization praised Facebook for doing so and asked that they do the same with regard to a similarly racist site targeting Jews. Not only did the company refuse, but in the purported name of fairness and freedom of speech, it claimed that it was an error to take down the initial page and proceeded to reinstitute the despicable anti-Muslim site.

III. WHAT MUST WE DO THEN? A FINAL THOUGHT

The exchange of information on the Internet operates in a manner that appears to significantly undermine the marketplace paradigm. Consequently, recognizing the augmented role of digital speech in shaping culture—particularly when it is disseminated in an unprecedented manner—prompts us to rethink speech theories developed with the traditional yet arguably archaic “marketplace of ideas” in mind. As a result, it is an opportune time to revisit and, perhaps even—in the case of the U.S.—adapt our theoretical paradigms of regulating expression in the digital age. While some consider it futile,⁴⁴ even “un-American,” others, even in the U.S., increasingly question the soundness of a rationale such as this, both normatively and descriptively,⁴⁵ given that in practice balancing and regulating does, to many minds, already occur. As James Weinstein observes:

One serious problem with the marketplace-of-ideas rationale is that the premise that a completely unregulated market of ideas will lead to discovery of truth is highly contestable. A more profound problem with characterizing the marketplace-of-ideas rationale as a core free speech norm is that it justifies free speech in terms of the good it will produce for society as a whole, not as a true individual right.⁴⁶

While a debate on the scope and purpose of the First Amendment far exceeds the very modest scope of this endeavor, I cite this passage only to underscore the difficulties associated with a “marketplace” rationale when applied to the networked environment in particular.

For our more narrow purposes, Professor Jack Balkin, a prolific scholar focusing on Internet governance, argues that since digital speech

44. *Hate in the Information Age: Hearing Before the U.S. Comm'n on Sec. & Cooperation in Europe (U.S. Helsinki Comm'n)*, 110th Cong. 1-9 (2008) (statement of Christopher Wolf, Chair, Internet Task Force of the Anti-Defamation League, Chair, Int'l Network Against Cyber-Hate).

45. Weaver, *supra* note 34.

46. James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 502 (2011).

alters our perspective on freedom of speech and technical innovation alters the social conditions of speech, we too must change the focus of free speech theory in a manner that would encompass “a larger concern with promoting a democratic culture.”⁴⁷

While some invoke the supposed futility of regulating online behavior,⁴⁸ the symbolic value of the collective condemnation of racist incitement cannot be discounted, particularly in terms of a communal statement helping to distinguish lies, such as genocide denial, from historical truths, a distinction even more important in an age where human rights discourse is being cynically inverted.

Legal historians observe that law represents the moral hegemony, thus assuming both a symbolic and an instrumental social function.⁴⁹

47. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6, 52 (2004).

48. See, e.g., *Briefing: Hate in the Information Age*, *supra* note 44 (“And it’s a fact that the blessings of our First Amendment also make the United States a safe haven for almost all kinds of hate speech. Therefore, shutting down a Web site in Europe or Canada through legal channels is far from a guarantee that the contents have been censored for all time. The borderless nature of the Internet means that, like chasing cockroaches, squashing one does not solve the problem when there are many more waiting behind the walls or across the border.”). Regarding Internet exceptionalism, one author has observed:

We present a strong resistance to Internet exceptionalism, or any arguments that new technologies can only be understood using novel intellectual frameworks. Like other revolutionary communication technologies, the Internet has changed the way we live, and fostering undreamt of new forms of social organization and interaction. But also like other revolutionary communication technologies, the Internet has not changed the fundamental roles played by territorial government. We are optimists who love the internet and believe that it can and has made the world a better place. But we are realistic about the role of government and power in that future, and realists about the prospects for the future.

Tim Wu, *Is Internet Exceptionalism Dead?*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 163, 181 (Berin Szoka et al. eds., 2010), available at <http://www.nyu.edu/projects/nissenbaum/papers/The-Next-Digital-Decade-Essays-on-the-Future-of-the-Internet.pdf>. Furthermore, he goes on to question:

Can the Internet remain, in this sense, exceptional? Whatever the Internet’s original ideas, it is easy to argue that all this, too, shall pass. The argument from transience suggests that all that seems revolutionary about the Internet is actually just a phase common to speech inventions. In other words, the Internet is following a path already blazed by other revolutionary inventions in their time, from the telephone to radio. Such disruptive innovations usually do arrive as an outsider of some kind, and will pass through what you might call a ‘utopian’ or ‘open’ phase—which is where we are now. But that’s just a phase. As time passes, even yesterday’s radical new invention becomes the foundation and sole possession of one or more great firms, monopolists, or sometimes, the state, particularly in totalitarian regimes like the Soviet Union or the Third Reich. The openness ends, replaced with better production value and tighter controls. It is, in other words, back to normal, or at least what passed for normal for most of human history.

Id. at 185.

49. MISHPAT VE’HISTORIYA [LAW AND HISTORY] (Daniel Gutwein et al. eds., 1999); see also HAIM H. COHN, *Din emet le’amito [The True Justice]*, in GEVUROT LE’ SHIMON AGRANAT [ESSAYS IN HONOR OF SHIMON AGRANAT] (Ruth Gavison et al. eds., 1986) (discussing the

Moreover, law and history are intertwined, for law, not unlike history, recounts facts and injects them with new meaning; any legal decision—even symbolic—can play a powerful role in establishing the truth in the collective consciousness.⁵⁰ In this manner, law joins the voices that build historical narrative; cases are not just decisions but become part of the historical record. Accordingly, courts' recognition of past genocides, chronicling and condemning the incitement leading thereto and sanctioning their denial, serves a particularly valuable purpose. It might in fact empower civil society and its most courageous members to rise up and "to condemn and react powerfully against the experience of discrimination,"⁵¹ particularly with regard to ostracized groups.

Given what was said about the Internet and its facilitation of incitement, as well as the rewriting of history, it is crucial that the law—and civil society first and foremost⁵²—do its part in ensuring that the instances of genocide and crimes against humanity in the twenty-first century are not "white-washed or ignored."⁵³

impact of law on the historical record and the history-making or history-keeping function of case law).

50. See Asher Maoz, *Historical Adjudication: Courts of Law, Commissions of Inquiry, and "Historical Truth,"* 18 *LAW & HIST. REV.* 559, 559–60 (2000) (discussing the intertwined nature of history and the law).

51. These are the words of Professor Nathalie Des Rosiers, who takes a somewhat different view to hate speech. However, her words on the importance of civil society condemning such parlance are most instructive, for in the end (and without discounting the importance of legal mechanisms prohibiting incitement), only a powerful civil society can avert hate: individual Canadians and Canadian civil society should be empowered to openly and robustly criticize speech they see as discriminatory. Fostering a culture of human rights and a culture of counter-speech, requires education, sensitization, and increased awareness.

52. See Nathalie Des Rosiers, *Rejecting Hate—Responsibility for Equality in a Free Society*, *CANADIAN DIVERSITY—DIVERSITÉ CANADIENNE*, no. 8, 2010, at 49, available at <http://ccla.org/wordpress/wp-content/uploads/2009/10/Responsibility-for-Freedom1.pdf> (stating the government, *civil society*, and individuals should be "extremely" concerned about allegations of rising prejudice against and identifiable group (emphasis added)).

53. See John Shamsy, *80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide*, 11 *J. TRANSNAT'L L. & POL'Y* 327, 376 (2002) (explaining that legislatures and historians often succumb to political pressure, and therefore an entity is needed to monitor crimes against humanity and ensure that they do not go unrecognized).