3 The legal reasoning in hate speech court proceedings

1 Introduction

As a consequence of the Holocaust against Jews (1941–1945), hate speech prohibition was placed at the heart of modern international human rights. A look at the Universal Declaration of Human Rights (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and the International Covenant on Civil and Political Rights (1966), to name but a few key universal standards in the field of international law, shows a heated debate on the extent to which the right to freedom of opinion and expression should provide its protective mantle to speech that is used to destroy the rights to dignity and equality of other people (cf. Delgado & Stefancic 2018; Tsesis 2009). Although international human rights standards drive democratic societies worldwide, hate speech prohibition has developed differently on both sides of the Atlantic, as discussed in Chapter 2.

This chapter analyses the key foci of hate speech legal reasoning across different jurisdictions. Due to spatial constraints, the scope of the analysis is reduced to the United States and the European Union, as they provide representative examples of different approaches to hate speech in common law and civil law jurisdictions. The selection of landmark cases from different decades is intended to indicate some permanent and long-lasting issues, such as the balance the courts of justice on both sides of the Atlantic must find between the competing interests of the right to freedom of opinion and expression and the right to dignity, and more particularly the difficulties that face legal practitioners in applying the imminence standard in US law. Besides, since the legal cases under discussion all reached the higher courts of justice, they also illustrate the lack of consistency in hate speech legal reasoning and decisions across jurisdictions. The chapter begins by analysing several landmark decisions of the United States Supreme Court and the United States Court of Appeals for the Armed Forces. Then, some significant legal decisions of the European Court of Human Rights (ECHR) are discussed. Finally, the chapter contrasts the key foci of legal reasoning in hate speech cases in the United States with those in the European Union.

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2 The United States Supreme Court

The United States Supreme Court is considered the gatekeeper of the Federal Constitution. It is the highest court in the land and, for this reason, the court of last resort for those seeking justice. The Supreme Court plays an essential role in protecting civil rights and liberties by striking down State laws that violate the Constitution. In addition, it ensures that the changing views of a majority do not undermine the fundamental values common to all Americans – that is, freedom of speech, freedom of religion and due process of law.

In the following sections, I analyse some landmark decisions[56] of the United States Supreme Court and the United States Court of Appeals for the Armed Forces, to learn how the courts balance the right to freedom of expression under the First Amendment and other fundamental rights when deliberating on hate speech cases.

2.1 The case of Terminiello v. Chicago (1949)

Terminiello v. Chicago (1949)[57] is a landmark court case[58] in US jurisprudence in which the United States Supreme Court held that a breach of the peace ordinance of the city of Chicago was unconstitutional under the First Amendment. The case grew out of a speech by Arthur Terminiello, a Catholic priest under suspension and an anti-Semite, who railed against Jews and communists in an auditorium in Chicago under the auspices of the Christian Veterans of America. By way of illustration, I quote two excerpts from his inflammatory speech, excerpts which are included in the Supreme Court's judgment:

> It is the same kind of tolerance if we said there was a bedbug in bed, "We don't care for you" or if we looked under the bed and found a snake and said, "I am going to be tolerant and leave the snake there." We will not be tolerant of that mob out there. We are not

56 A landmark decision is a decision that is often cited because it changes, consolidates, updates, or summarises the law on a particular topic.

57 US Supreme Court. Terminiello v. Chicago, 337 US 1 (1949). Terminiello v. Chicago. No. 272. Argued 1 February 1949. Decided 16 May 1949. https://supreme.justia.com/cases/federal/us/337/1/ (accessed 18 August 2020).

58 A landmark case is a court case that has historical and legal significance. The study of landmark cases improves understanding of how past judicial decisions have affected the law and how they will be applied to current cases. US law is a common law system in which judges base their legal decisions on previous court rulings in similar cases. Consequently, previous legal decisions by a higher court are legally-binding and become part of case law.

> going to be tolerant any longer. So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from (Terminiello v. Chicago, 337 US 1 (1949), p. 337 U.S. 21).

While the auditorium was full, a furious crowd of about one thousand people had gathered outside in order to picket and protest against the meeting. Although a cordon of police officers tried hard to maintain order, they could not prevent a riot. Terminiello's speech inflamed the crowd, and fights broke between the audience members and the protesters outside. As a result, the police arrested Terminiello for riotous speech. He was judged and found guilty of violating Chicago's breach of the peace ordinance. This ordinance banned speech which stirs the public to anger, invites a dispute, or creates a disturbance. Terminiello appealed the local court's decision, claiming that the ordinance violated his right to freedom of expression under the First Amendment. The Illinois Appellate Court and the Illinois Supreme Court upheld the guilty verdict. Nevertheless, the United States Supreme Court overturned the conviction on the grounds of the First Amendment.

At the heart of the legal discussion were two critical issues for the Supreme Court to deliberate. The first issue was whether Chicago's breach of the peace ordinance was unconstitutional. The second issue was whether Terminiello's right to freedom of expression had been violated in the case or, on the contrary, he had abused this right by uttering fighting words – that is to say, words that, by their very utterance, inflict injury or tend to incite violence and hence are not protected by the First Amendment.

The majority opinion reversed Terminiello's conviction, holding that the First Amendment protected his speech and that the ordinance, as construed by the Illinois courts, was unconstitutional because it invaded the province of freedom of speech. The majority opinion explained that the function of free speech is to invite dispute, even when it induces a condition of unrest or even stirs people to anger. The majority opinion further argued that the right to speak freely and to promote diversity of ideas is, therefore, one of the chief distinctions that differentiate democratic societies from totalitarian regimes.

By contrast, the dissenting opinion drew attention to the fact that Terminiello had abused his right to freedom of expression by uttering fighting words. For instance, Terminiello vilified Jews by calling them "slimy scum", "dirty kikes", "bedbugs" and "snakes", while he praised fascists leaders. For the dissenting opinion, Terminiello's speech comprised utterances that are not an essential part of any exposition of ideas. The speech contained anti-Jewish stories expressed through

inflammatory language that incited hatred and violence. For the dissenting opinion, reversing Terminiello's conviction implied a dogma of absolute freedom for irresponsible utterances so provocative that they even challenged the power of local authorities to keep social order and peace. Justice Jackson's dissent, in this case, is most famous for its final paragraph, which summarises the controversial debate around the need to set limits on the right to freedom of expression if individuals abuse it:

> This Court has gone far towards accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the citizen's liberty. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is a danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact (Terminiello v. Chicago, 337 US 1 (1949), p. 337 U.S. 37).

2.2 The case of Brandenburg v. Ohio (1969)

Brandenburg v. Ohio (1969)[59] is another landmark case in US jurisprudence in which the Supreme Court established the imminence standard, also known as the Brandenburg test, for speech that advocates violence (see Chapter 2). The case is considered most significant because of its ongoing effect on the application of the law in cases associated with hate speech. In Brandenburg v. Ohio (1969), the imminence standard superseded the clear and present danger standard (Schenck v. the United States 1919),[60] which until then had been the doctrine used by the Supreme Court to determine under what circumstances limits can be placed on First Amendment freedoms of speech, press, or assembly. The distinct elements of the Brandenburg test are (1) intent to speak, (2) imminence of lawlessness and (3) likelihood of lawlessness. The imminence standard involves more protection to freedom of expression than the clear and present danger standard, because of the temporal restriction it enacts – that is, advocacy of violence can only be banned if it is intended to incite the commission of imminent lawless action, and it is likely to result in such lawless action.

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59 US Supreme Court. Brandenburg v. Ohio, 395 US 4444 (1969). Brandenburg v. Ohio. No. 492. Argued 27 February 1969. Decided 9 June 1969. https://supreme.justia.com/cases/federal/us/395/444/ (accessed 18 August 2020).

60 US Supreme Court. Schenck v. the United States, 249 US, 47 (2019). Schenck v. the United States. No. 437, 438. Decided 3 March 1919. https://supreme.justia.com/cases/federal/us/249/47/ (accessed 20 August 2020).

The case record showed that Brandenburg, a Ku Klux Klan leader in rural Ohio, contacted a reporter at a Cincinnati television station and invited him to cover a Ku Klux Klan rally that would take place on a farm in Hamilton County. As a result, portions of the rally were broadcast on the local station and a national network. The prosecution's case rested on the footage and testimony identifying Brandenburg as the person who spoke with the reporter and at the rally. The footage showed objects such as firearms, ammunition and a Bible. Specifically, one scene of the first film showed twelve hooded figures, some of whom carried firearms. They were gathered around a large burning cross. Although most of the speech uttered during this scene was unintelligible, some statements could be distinctively understood. The speech contained derogatory terms directed at African Americans and the Jewish people:

> How far is the nigger going to – yeah.
> This is what we are going to do to the niggers.
> A dirty nigger.
> Send the Jews back to Israel.
> Let's give them back to the dark garden.
> Save America.
> Let's go back to constitutional betterment.
> Bury the niggers.
> We intend to do our part.
> Give us our state rights.
> Freedom for the whites.
> Nigger will have to fight for every inch he gets from now on (Brandenburg v. Ohio, 395 US 4444 (1969), p. 395 U.S. 449).

According to the case record, another scene in the first film showed Brandenburg, whose red hood identified him as a leader within the Ku Klux Klan, giving a speech. I here quote the speech excerpt examined by the Supreme Court:

> This is an organisers' meeting. We have had quite a few members here today which are – we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organisation. We're not a revengent [sic] organisation, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken (Brandenburg v. Ohio, 395 US 4444 (1969), p. U.S. 446).

The second film showed six hooded figures one of whom was Brandenburg repeating a speech very similar to the one in the first film, except for one significant difference. Whereas the possibility of "revengeance" was omitted, one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel" (Brandenburg v. Ohio, 395 US 4444 (1969), p. US 447).

The speech in the first film explicitly referred to the possibility of "revengeance", an obsolete form of the word "vengeance", against African Americans, the Jewish people and those who supported them. In the context in which the speech was uttered, the sentence: "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken", could be interpreted as a threat because it states an intention to inflict injury on African Americans and the Jewish people as a response to the civil rights they have been given by US authorities. Brandenburg was charged under Ohio's Criminal Syndicalism Statute, banning the advocacy of violence or crime as a means of political reform, for his participation in the rally and for his inflammatory speech. On appeal, the Ohio First District Court of the United States of Appeal affirmed Brandenburg's conviction, rejecting his claim that the statute violated his right to freedom of expression. The Supreme Court of Ohio dismissed his appeal without opinion. However, the Supreme Court of the United States overturned Brandenburg's conviction. This controversial legal decision held that the local government could not constitutionally punish abstract advocacy of force or law violation unless directed to incite or produce imminent lawless action, and such advocacy is likely to produce or incite such action.

2.3 The case of National Socialist Party v. Skokie (1977)

The case of National Socialist Party v. Skokie (1977)[61] contains a landmark decision of the US Supreme Court related to freedom of opinion and expression and freedom of assembly. According to the case record, a leader of the National Socialist Party of America (NSPA) – a Neo-Nazi group – repeatedly held demonstrations in Marquette Park where the party had its headquarters. The Chicago authorities sought to block his plan to hold yet another of these white power demonstrations by requiring the NSPA to post a public safety insurance bond and by banning political demonstrations in Marquette Park. The NSPA leader then filed a claim against the city of Chicago for violating his rights under the First Amendment. In addition, the NSPA leader sent out letters to the park districts of the North Shore suburbs of Chicago requesting permits for the NSPA to hold a white power demonstration. Some suburbs decided to ignore the letters, while the village of Skokie, which was the home to many Holocaust survivors, decided to respond. The village of Skokie successfully filed for an injunction against the NSPA and passed several ordinances to prevent any future requests like the NSPA's. Whereas one of the

61 US Supreme Court. National Socialist Party v. Skokie (1977). No. 76–1786. Decided: 14 June 1977. https://caselaw.findlaw.com/us-supreme-court/432/43.html (accessed 18 August 2020).

ordinances stated that people could not wear Nazi uniforms or display swastikas during demonstrations, the two other ordinances banned distributing hate speech material. The ordinances ensured that demonstrations could be held, provided that the organisers paid for a substantial public safety insurance bond. In effect, the ordinances rendered it impossible for the NSPA to hold the demonstration.

The NSPA leader used both the injunction and the ordinances as an opportunity to claim infringement upon his First Amendment rights and subsequently demanded to protest in Skokie for the NSPA's right to freedom of expression. On behalf of the NSPA, the American Civil Liberties Union (ACLU) challenged the injunction on the grounds of infringement upon the First Amendment rights of the marchers. The ACLU appealed on behalf of the NSPA, but both the Illinois Appellate Court and the Illinois Supreme Court refused to stay the injunction.

The ACLU then appealed the refusal to the United States Supreme Court, which *granted certiorari*.[62] Skokie's attorneys argued that for the Holocaust survivors, seeing the display of swastikas was like receiving a physical attack. The Supreme Court rejected the argument, ruling that the display of swastikas is a symbolic form of free speech entitled to First Amendment protections and determined that displaying swastikas did not constitute an imminent threat. The Supreme Court's ruling allowed the NSPA to march. Furthermore, as a result of litigation in the federal courts (Collin v. Smith 1978),[63] the village's ordinance was declared unconstitutional for infringement upon First Amendment rights.

2.4 The case of Virginia v. Black (2003)

The case of Virginia v. Black (2003)[64] arises from the criminal conviction of three Ku Klux Klan members in two separate cases for violation of a statute of Virginia State outlawing the burning of crosses, either on the private property of another or in public places, with the intent to intimidate or place other

62 In the US Supreme Court, if four Justices agree to review the case, then the Court will hear the case. This act is referred to as *granting certiorari*. The legal term *certiorari* comes from Latin and means to be more fully informed. The term *certiorari* is also used in the legal expression *writ of certiorari*, which orders a lower court to deliver its record in a case so that the higher court may review it.

63 Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978). Decided 22 May 1978. https://law.justia.com/cases/federal/appellate-courts/F2/578/1197/448646/ (accessed 18 August 2020).

64 US Supreme Court. Virginia v. Black, 538 US 343 (2003). Certiorari to the Supreme Court No. 01–1107. Decided 7 April 2003. https://supreme.justia.com/cases/federal/us/538/343/ (accessed 24 August 2020).

people in fear of bodily harm. In the first case, the subject attempted to light a cross on the property of a Black person. In the second case, the applicant held a Ku Klux Klan rally on private property. During the rally, derogatory terms were used against African Americans and a cross burned. Upon their convictions, each subject appealed to the Supreme Court of Virginia, contending that the statute was facially unconstitutional because it viewed the physical act of burning a cross as sufficient evidence of intimidation (*prima facie* evidence).[65] The Supreme Court of Virginia declared the statute unconstitutional because its *prima facie* evidence provision posed the risk of prosecuting the legitimate exercise of symbolic expressions and petitioned the decision to the United States Supreme Court. At the heart of the legal deliberation was the question of whether or not Virginia's statute violated the right to freedom of expression, because of its *prima facie* evidence provision. In the following, I summarise the most relevant aspects of the Supreme Court's legal reasoning.

On the one hand, the Supreme Court's majority opinion argued that Virginia's statute was constitutional because it was based on the First Amendment exception known as the true threat doctrine. According to this doctrine, the conduct restriction in the statute pursued a compelling Government interest related to the suppression of burning crosses. The First Amendment permits a state to ban true threats, which encompass those statements where the speaker communicates an intent to commit an act of unlawful violence against a group or against an individual who belongs to a legally-protected group. Unlike Brandenburg v. Ohio (1969), in this case, the Supreme Court pointed out that the speaker need not intend to carry out the threat. For the Supreme Court, a prohibition of true threats protects individuals from the fear of being a target of violence and the possibility that the threatened violence will occur. Besides, the Supreme Court regarded intimidation as a type of true threat: a speaker directs a threat to a person or group of persons with the intent to cause the victim fear of bodily harm or death. While the burning of a cross does not inevitably convey a message of intimidation, the cross-burner often intends that the recipients should fear for their lives. The Supreme Court determined that burning crosses should be considered a criminal offence in such cases.

On the other hand, the Supreme Court's majority opinion argued that the content of the *prima facie* evidence provision was unconstitutional because such provision carries the pragmatic presupposition that the burning of a cross must be automatically interpreted as an intent to intimidate the target group:

65 In Common law, *prima facie* evidence means evidence that, unless rebutted, would be sufficient to prove a particular proposition or fact.

The burning of a cross in the United States is indeed intertwined with the history of the Ku Klux Klan. Besides, it is common knowledge that the Klan has often used burning crosses as a tool of intimidation and as a threat of impending violence against African Americans. Nevertheless, the Supreme Court argued that burning crosses have also remained a distinctive political symbol of shared group identity and ideology in Klan gatherings. Although the act of burning a cross stands as a symbol of hate, it may have at least two possible meanings: (a) a person is infringing the law by performing an act of intimidation or (b) a person is engaged in political speech. The majority opinion stated that through the analysis of the specific contextual elements in each case, the actual intended meaning of burning crosses could be proven. Consequently, the Supreme Court ruled that the *prima facie* evidence provision was unconstitutional because it blurs the distinction between constitutionally banned true threats and protected political symbols.

There were two interesting dissents in the case of Virginia v. Black. Whereas the former argued that the act of burning a cross should be a First Amendment exception due to its historical association with intimidation and violence against African Americans, the latter counter-argued that burning crosses, even if it is proved that they are intended to intimidate, should not be a crime because of the statute's content-based restriction.[66] In this case, the Supreme Court only struck down the Virginia statute to the extent that it considered burning crosses as *prima facie* evidence of an intent to intimidate (a true threat).

3 The United States Court of Appeals for the Armed forces

3.1 The case of United States v. Wilcox (2008)

Wilcox[67] had been convicted for conduct that was to the prejudice of good order and discipline and discredit upon the armed forces. Wilcox appealed to the United States Court of Appeals for the Armed Forces, claiming infringement upon his First Amendment rights. The issues before the Court of Appeals for the Armed Forces were two. The first issue was determining whether the evidence at

66 In US law, a content-based restriction restricts the exercise of free speech based on the subject matter or type of speech. Such a restriction is permissible only if based on a compelling state interest and is so narrowly worded that it achieves only that purpose.

67 United States Court of Appeals for the Armed Forces. United States v. Wilcox. No. 05–0159. Crim. App. No. 20000876. Decided 15 July 2008. https://www.armfor.uscourts.gov/opinions/2008Term/05-0159.pdf (accessed 19 August 2020).

trial demonstrated that Wilcox's statements on government, race and religion constituted a crime under Article 134 of the Uniform Code of Military Justice (UCMJ). The second issue asked whether Wilcox's speech was protected under the First Amendment. At the heart of the case were the profiles the applicant had posted on an internet platform. The profiles included the following statements together with a hyperlink to a website associated with white supremacy ideologue David Lane, who had been convicted for murdering a journalist:

> I'd also like to say [. . .]
>
> I am a Pro-white activist doing what I can to promote the ideals of a healthier environment [sic]. I do not base my deeds on hate but on love for my folk's women and children. Political Affiliation is none – This government is not worth supporting in any of its components. Natures [sic] and God's laws are eternal – Love your own kind and fight for your own kind. There's no "HATE" in that!
>
> Personal quote: "We must secure the existence of our people, and a future for white children" THE 14 WORDS[68] – www.14words.com (United States Court of Appeals for the Armed Forces 2008: 31).

After reviewing the case, the majority vote of the Court of Appeals for the Armed Forces held that the evidence presented at trial was insufficient to meet the element of either service-discrediting behaviour or conduct detrimental to good order and discipline under Article 134 (UCMJ). The Court of Appeals also held that Wilcox's speech, though obscene, was under the protection of the First Amendment. I will now elaborate on the legal reasoning of the Court of Appeals. The majority vote concluded that the evidence presented at trial was insufficient to show a direct connection between Wilcox's statements and the act of directly and explicitly discrediting the military mission or environment. Besides, the reach of Wilcox's statements on the internet platform was considered too small to have an effective impact of service-discrediting on an American audience, whether troops or the general public, who may not even understand the racist tenor of the statements.

Second, it was argued that the First Amendment protects the right to freedom of expression even if it involves expressing ideas that the vast majority of society finds offensive or distasteful. Wilcox's statements, though obscene, were not found to meet any of the standards for classifying them as unprotected

68 "THE 14 WORDS" refers to the white supremacist slogan coined by David Lane, a member of the white supremacist terrorist group known as The Order. The fourteen words are: "We must secure the existence of our people and a future for white children". This slogan reflects the primary white supremacist worldview in the late 20th and early 21st c. The slogan urges to take immediate action against non-white people to prevent the alleged extinction of the white race. https://www.adl.org/resources/hate-symbol/14 (accessed 22 July 2022).

fighting words. In other words, for the Court's majority vote, the applicant's statements did not constitute dangerous speech – that is, words aimed at creating a clear and present danger (Schenck v. the United States 1919) or speech directed to inciting or producing imminent lawless action and likely to produce such action (Brandenburg v. Ohio 1969). The majority opinion also argued that even if a lower standard pertains in the military context, this had no application to the case. Wilcox's questioned statements were neither meant an impediment to the orderly accomplishment of any military mission, nor did they present a clear and explicit danger to military values such as loyalty and discipline.

The dissenter held that, from a legal sufficiency standpoint, direct proof of service-discrediting upon the Army was not needed. It was argued that the negative effect of Wilcox's conduct on the Army's social status could be inferred from the circumstances surrounding the case. Any person reading his profiles on the internet could understand that a member of the military – a representative of the United States – criticised the government and was a white supremacist activist. In addition, the dissenter focused attention on the huge social impact any message published on the internet can have:

> Indeed, where the internet is concerned, the impact of the metaphorical back alley protest may be magnified in time and distance in a manner distinct from that taking place in an actual back road or alley. Persons from all over the world may see it, and at a time when the street protester in uniform has long ago put the placard away, the racist message on the internet lingers (United States v. Wilcox 2008: 29).

Concerning the constitutional question, the dissenter argued that the question was whether the First Amendment protects a soldier's speech if he makes racist, service-discrediting statements publicly while holding himself out as a member of the Army. The dissenter agreed with the majority vote in that the clear and present danger standard (Schenck v. the United States 1919) or the imminence standard (Brandenburg v. Ohio 1969) were unworkable in the context of a service-discrediting case involving racist speech. In his view, the application of content-based restrictions was appropriate for the case, provided that the essential needs of the armed forces and the right to freedom of expression of Wilcox as a free American were balanced. The dissenter pointed to three national interests that are at stake in the case and enable the restriction of the right to freedom of expression of a soldier who, as a state representative, must demonstrate exemplary behaviour: (a) preventing the advent and spread of hate groups within the armed forces, (b) fostering the social image of the military as a race-neutral, politics-neutral and disciplined body and (c) recruiting and sustaining high profile members to provide for the nation's security over time.

4 The European Court of Human Rights

The European Court of Human Rights (henceforth, ECHR) is an international court based in Strasbourg, France. It consists of several judges who sit individually and are entirely independent of their country of origin. The number of judges is equal to the number of states of the Council of Europe that have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth, the Convention). The Convention lays down how the ECHR functions, and contains a list of the rights and guarantees that the states have undertaken to respect. Amongst the rights to be protected by the Convention and its Protocols are (a) the right to a fair hearing in civil and criminal matters, (b) the right to respect for private and family life, (c) the right to freedom of expression and (d) the right to freedom of thought, conscience and religion. An application may be lodged with the Convention whenever a citizen thinks there has been a violation of the rights and guarantees set out in the Convention or its Protocols. The alleged violation must have been committed in one of the states bound by the Convention.

The task of the ECHR in exercising its supervisory function is not to take the place of the competent domestic courts, but rather to review under the articles of the Convention for the Protection of Human Rights and Fundamental Freedoms the decisions they have taken in line with their power of appreciation. In particular, the Court has to ensure that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied legal standards that conformed with the Convention.

In what follows, I analyse the legal reasoning of the ECHR in a short sample of relevant cases associated with hate speech.

4.1 The case of Jersild v. Denmark (1994)

The case of Jersild v. Denmark (1994)[69] originated in an application against Denmark lodged by a Danish journalist claiming infringement of his right to freedom of expression. As a result of the publication of an article in the serious press describing the racist attitudes of "the Greenjackets" in Østerbro (Copenhagen), Jersild invited three Greenjackets and a social worker employed at the local youth centre to take part in a television interview conducted by him. During the

69 The European Court of Human Rights. Case of Jersild v. Denmark. Application No. 15890/89. Judgment. Strasbourg. 23 September 1994. Official English version of the judgment.

interview, the three Greenjackets made abusive remarks about immigrants and ethnic groups in Denmark. The interview was broadcast by Danmarks Radio as part of the Sunday News Magazine and hence, had a large audience. After the Bishop of Ålborg complained to the Minister of Justice about the television interview, the case was investigated. Subsequently, the Public Prosecutor started criminal proceedings against the three youths interviewed by Jersild, charging them with incitement to racial hatred for having made the statements cited below, which have been obtained in their English version from the ECHR's judgment. In these statements, Black people and immigrants, in general, were portrayed as wild animals:

> The Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals.
>
> Just take a picture of a gorilla, man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and all kinds of things.
>
> A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.
>
> It is the fact that they are "Perkere", that's what we don't like, right, and we don't like their mentality [. . .] what we don't like is when they walk around in those Zimbabwe clothes and then speak this hula-hula language in the street.
>
> It's drugs they are selling, man, half of the prison population in "Vestre" are in there because of drugs [. . .] they are the people who are serving time for dealing drugs.
>
> They are in there, all the "Perkere", because of drugs (Jersild v. Denmark. Application No. 15890/89. Judgment. Strasbourg, 23 September 1994, p. 9).

Jersild was charged with aiding and abetting the dissemination of the Greenjackets' racist views, and the same charge was brought against the head of the news section of Danmarks Radio. The three Greenjackets, Jersild and the head of the news section were convicted in the city court. Jersild and the head of the news section appealed against the city court's judgment to the High Court of Eastern Denmark. The appeal was dismissed. Subsequently, Jersild and the head of the news section appealed to the Supreme Court. Jersild claimed that the programme aimed to draw public attention to a new phenomenon in Denmark at the time: racism and xenophobia practised by socially disadvantaged youths. He explained that he had deliberately included the offensive statements in the programme not to disseminate racist opinions but to counter them through public exposure. He also pointed out that within the context of the broadcast, the offending remarks had the effect of ridiculing their authors rather than promoting their racist views.

The Supreme Court confirmed Jersild's conviction. In the justices' opinion, Jersild had failed to fulfil his duties and responsibilities as a television journalist because he had irresponsibly encouraged the youths to make racist statements and had failed to appropriately counteract such statements in the programme.

Jersild lodged an application to the ECHR claiming a violation of his right to freedom of expression under Article 10 of the Convention. For the Court, this was the first time they had been concerned with a case of dissemination of racist remarks that deny the quality of human beings to a large group of people. At the heart of the deliberation was to balance Jersild's right to impart information and the protection of the reputation of those who have to suffer racial hate speech. For the majority opinion, the reasons given in support of Jersild's conviction were insufficient to support that the interference with his right to freedom of expression obeyed a compelling state interest. It was argued that the punishment for the statements made by another person would seriously hinder the contribution of the press to the discussion of matters of public interest. In addition, it was undisputed that Jersild's purpose in compiling the broadcast in question was not to disseminate racist ideas but to open social debate on an emerging social problem. Therefore, the majority opinion attributed more weight to Jersild's right to freedom of expression than to the rights of those who have to suffer racial hate speech.

One of the dissenters pointed out that the protection of racial minorities whose human dignity has been attacked cannot outweigh the right to impart information. Another dissenter argued that Jersild had made no real attempt to challenge the racist statements he presented in his radio interview, which was necessary if their impact was to be counterbalanced, at least for the programme's audience.

4.2 The case of ES v. Austria (2019)

The case of ES v. Austria (2019)[70] originated in an application against the Republic of Austria lodged by an Austrian national for infringement of her right to freedom of expression. According to the case record, ES had given several seminars entitled "Basic Information on Islam" at the right-wing Freedom Party Education Institute. The seminars had been publicly advertised on the website of the Institute and widely disseminated. After a participant in one of the seminars, who

70 The European Court of Human Rights. Fifth section. Case of ES v. Austria. Application No. 38450/12. Judgment. Strasbourg. Final 18 March 2019. Official English version of the judgment.

turned out to be an undercover journalist, reported on the defamatory tone of the seminar's contents, a preliminary investigation was initiated against ES. The police then questioned ES concerning certain remarks she had made during the seminars, which were directed against the Prophet Muhammad. Later, the Vienna public prosecutor's office brought charges against ES for inciting religious hatred. Amongst the remarks that the court found incriminating were the ones quoted below, which have been obtained in their English version from the ECHR's judgment:

> I./ 1. One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards, he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system.
>
> I./ 2. The most important of all Hadith collections recognised by all legal schools: The most important is the Sahih Al-Bukhari. If a Hadith was quoted after Bukhari, one can be sure that all Muslims would recognise it. And, unfortunately, in Al-Bukhari the thing with Aisha and child sex is written.
>
> II./ I remember my sister, I have said this several times already, when [SW] made her famous statement in Graz, my sister called me and asked: "For God's sake. Did you tell [SW] that?" To which I answered: "No, it wasn't me, but you can look it up, it's not really a secret." And her: "You can't say it like that!" And me: "A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?" Her: "Well, one has to paraphrase it, say it in a more diplomatic way." My sister is symptomatic. We have heard that so many times. "Those were different times" – it wasn't okay back then, and it's not okay today. Full stop. And it is still happening today. One can never approve of something like that. They all create their own reality, because the truth is so cruel (Case of ES v. Austria. Application No. 38450/12. Judgment. Strasbourg. Final 18 March 201, p. 3).

ES was convicted of publicly disparaging an object of veneration of Muslims: the Prophet Muhammad. The domestic court found that ES's statements conveyed the meaning that Muhammad was a paedophile. The same court found that ES had intended to accuse Muhammad of having paedophilic tendencies by making those statements. Because paedophilia is socially ostracised and outlawed, ES's statements were capable of causing justified indignation amongst Muslims.

For the domestic court, ES's remarks were not statement of fact but derogatory value judgments that exceeded the permissible limits of free speech. The court concluded that the interference with ES's right to freedom of expression in a criminal conviction had been justified as such interference had been based on law and had been necessary to protect religious peace in Austria.

ES appealed, arguing that the questioned remarks were statement of fact rather than value judgments. ES claimed that her remarks were protected by the right to freedom of expression, which includes the right to express offensive, shocking or disturbing opinions. The Court of Appeal stated that the reason for ES's conviction was that she had wrongfully accused Muhammad of paedophilia. This accusation was conveyed through defamatory words and expressions, such as "child sex", "what do we call it, if it is not paedophilia", without providing any evidence. The Court of Appeal argued that although harsh criticism of religious traditions and practices is lawful, ES had exceeded the permissible limits of the right to freedom of expression by disparaging a religious doctrine.

ES lodged a claim to the ECHR alleging that her criminal conviction had given rise to a violation of her right to freedom of expression. The ECHR found that, in this case, the domestic courts had comprehensively balanced ES's right to freedom of expression (Article 10 of the Convention) with the rights of other people to have their religious feelings protected and to have religious peace preserved (Article 9 of the Convention). The ECHR considered that the domestic courts had demonstrated that ES's remarks were not phrased in a neutral manner aimed at making a public debate concerning child marriages, but contained elements of incitement to religious intolerance and were capable of stirring up prejudice and ultimately putting religious peace at risk. The ECHR also accepted that the domestic courts had put forward sufficient and relevant reasons to support the interference with ES's right to freedom of expression under Article 10 of the Convention. Such interference, in effect, corresponded to a pressing social need and was proportionate to the legitimate aim pursued. It was finally concluded that there had been no violation of Article 10 of the Convention.

4.3 The case of Fáber v. Hungary (2012)

According to the case record of Fáber v. Hungary (2012),[71] while the Hungarian Socialist Party (MSZP) was holding a demonstration in Budapest to protest against racism and hatred, members of Jobbik, a legally registered right-wing political party, assembled in an adjacent area to express their disagreement. Fáber, who was silently holding a so-called Árpád-striped flag in the company of other people, was observed by the police. Fáber was at the steps leading to

71 The European Court of Human Rights. Second section. Case of Fáber v. Hungary. Application No. 40721/08. Judgment. Strasbourg. Final 24 October 2012.

the Danube embankment, the location where Jews had been exterminated in large numbers during the Arrow Cross regime.[72] Fáber's position was close to the MSZP demonstration and a few meters away from the square where the Jobbik demonstration was being held. The police officers supervising the scene asked Fáber to remove the flag or leave. Fáber argued that the flag[73] was a historical symbol and that no law forbade its display. The result was that Fáber was arrested by the police and subsequently convicted of the regulatory offence of disobeying police instructions. On appeal, the domestic court upheld Fáber's conviction. The court found the display of the flag offensive in the circumstances and determined that Fáber's conduct had been provocative and likely to result in public disorder in the context of the ongoing MSZP demonstration. Therefore, the court determined that Fáber's right to freedom of expression had exceeded the permissible limits, causing prejudice to public order.

Fáber filed a claim to the ECHR because, in his view, the prosecution conducted against him amounted to an unjustified interference with his rights under Articles 10 (freedom of expression) and 11 (freedom of assembly) of the Convention. In this case, Fáber's rights to freedom of expression and freedom of peaceful assembly had to be balanced with the MSZP demonstrators' right to protection against public disorder. Whereas the ECHR considered that the interference pursued the legitimate aims of maintaining public order and protecting the rights of other people, it also noted that in this context, it had not been argued that the presence of the Árpád-striped banner had resulted in a true threat or clear and present danger of violence. In other words, the display of the flag was provocative, but the domestic courts had not been able to demonstrate that it had disrupted the demonstration. Neither Fáber's conduct nor that of the other people present had been proven to be threatening or abusive, and it was only the holding of the flag that had been considered provocative. Given Fáber's passive conduct, the distance from the MSZP demonstration and the absence of any demonstrated risk of insecurity or disturbance, the ECHR determined that it could not be held that the reasons given by the national authorities to justify the interference complained of were relevant and sufficient.

72 The Arrow Cross Party was an extreme right-wing nationalist party, who actively supported the Nazis, and participated in atrocities against Jews, during their occupation of Hungary from 1939–1945.

73 In the US, the display of the Confederate battle flag also invites controversy. Whereas supporters associate this flag with pride in Southern heritage and historical commemoration of the American Civil War (1861–1865), opponents associate it with glorification of the American Civil War, racism, slavery, white supremacy and intimidation of African Americans.

Furthermore, the ECHR analysed whether the display of the flag in question constituted an unlawful act. Assuming that the Árpád-striped flag is a polysemic banner – it can be regarded as a historical symbol or as a symbol reminiscent of the political ideology of the Arrow Cross regime – the ECHR explained that in interpreting the meaning of an expression or symbol that has multiple meanings, the context in which the expression was uttered or the symbol displayed plays an important role. In the case under discussion, the demonstration organised by the MSZP was located at a site laden with the abhorrent memory of the extermination of Jews and was intended to combat racism and intolerance. Even assuming that some demonstrators may have considered the flag fascist, for the ECHR its mere display could not be interpreted as a true threat capable of causing public disorder.

After examining the case, the ECHR decided that the interference with Fáber's rights lacked justification and that the respondent state had breached Fáber's freedom of expression. The key foci of the legal reasoning were (1) the lawful form and political nature of the expression (the applicant was displaying a lawful flag), (2) the lack of imminent danger resulting from the expression, (3) the excessive character of the police's action and (4) the potential harshness of the sanction.

4.4 The case of A. v. The United Kingdom (2003)

On 17 July 1996, the Member of Parliament (henceforth, MP)[74] for the Bristol North-West constituency initiated a debate on municipal housing policy in the House of Commons. During his speech, the MP in question referred to a young Black woman (henceforth, A) releasing her name and home address to the public. The MP referred to A and her family as "neighbours from hell" and reported on their anti-social behaviour in the following derogatory terms:

> However, it is the conduct of [the applicant] and her circle which gives most cause for concern. Its impact on their immediate neighbours extends to perhaps a dozen houses on either side. Since the matter was first drawn to my attention in 1994, I have received reports of threats against other children; of fighting in the house, the garden and the street outside; of people coming and going 24 hours a day – in particular, a series of men late at night; of rubbish and stolen cars dumped nearby; of glass strewn in the road in the presence of [the applicant] and regular visitors; of alleged drug activity; and of all the other common regular annoyances to neighbours that are associated with a house of this type (Case of A. v. The United Kingdom. Application No. 35373/97. Judgment. Strasbourg. Final 17 March 2003, p. 4).

74 The European Court of Human Rights. Second section. Case of A. v. The United Kingdom. Application No. 35373/97. Judgment. Strasbourg. Final 17 March 2003.

The MP issued a press release of his speech to the local and national press. As a result, excerpts of the MP's inflammatory speech and photographs of A were broadly disseminated. Subsequently, A received hate mail addressed to her. One of the letters expressed racial hatred in these terms: "be in houses with your kind, not amongst decent owners" (Case of A. v. The United Kingdom. Application No. 35373/97. Judgment. Strasbourg. Final 17 March 2003, p. 4–5). Another letter threatened acts of violence against her and her family:

> You silly black bitch, I am just writing to let you know that if you do not stop your black nigger wogs nuisance, I will personally sort you and your smelly jungle bunny kids out. (Case of A. v. The United Kingdom. Application No. 35373/97. Judgment. Strasbourg. Final 17 March 2003, p. 5).

A was also stopped in the street, spat on, and demonised by strangers calling her as "the neighbour from hell." Later, a report was prepared by the Solon Housing Association, which is in charge of monitoring racial harassment and attacks. According to the report, A and her family, whom the association had already moved to another house in the past because of racial abuse, were put in a dangerous situation because her name and address had been released to the public. The family was urgently re-housed again, and the children were moved to another school too. A wrote through her solicitor to the MP outlining her complaint. She denied the truth of the majority of the MP's remarks about her family. In addition, she stated that the MP had never attempted to verify the accuracy of his statements. The MP submitted the letter to the Office of the Parliamentary Speaker, who replied that the MP's remarks were protected by *absolute parliamentary privilege* (cf. Brown & Sinclair 2020):

> That the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament (the Bill of Rights 1688).[75]

Parliamentary immunity is then meant to serve a compelling state interest that is so important as to justify the denial of access to a court to seek redress. Finally, A lodged a complaint to the ECHR, arguing that the MP's absolute parliamentary privilege was disproportionate because it had violated her rights under Article 6

75 The Bill of Rights 1688. https://www.legislation.gov.uk/aep/WillandMarSess2/1/2 (accessed 28 August 2020).

(Right to a fair trial) and Article 8 (Right to respect for private and family life) of the Convention.[76]

The underlying issue for the ECHR in this case was whether an MP had immunity to defame and incite racial hatred against a national citizen. The ECHR confirmed that the MP's parliamentary statements, and the subsequent news reports of them, were each protected by a form of privilege. Whereas the MP enjoyed "absolute parliamentary privilege", press coverage is generally protected by a form of "qualified privilege". This type of privilege is lost only if the publisher has acted maliciously – that is, for improper motives or with reckless contempt for the truth. The ECHR agreed with A's complaint that the comments made about her in the MP's parliamentary speech and news reports had invaded her privacy, were defamatory, and had brought dramatic consequences for her family. The ECHR argued that these factors could not modify the conclusion regarding the proportionality of the parliamentary immunity because the creation of exceptions to that immunity would challenge the protection of parliamentary speech. Consequently, the majority opinion concluded that there had been no violation of A's rights under Articles 6 and 8 of the Convention. Regarding the MP's unprivileged press release, the majority opinion argued that A could have exercised her right to access a court of proceedings in defamation or breach of confidence.

For the dissenting opinion, absolute parliamentary immunity is a disproportionate restriction of the right to access a court. In this case, both the majority opinion and the dissenting opinion opened the debate on the need to find an optimal balance between the right to freedom of expression (Article 10 of the Convention) and the right to respect for private and family life (Article 8 of the Convention). The majority opinion claimed that the new concern of modern Parliaments should be to protect the freedom of expression of their members and reconcile that freedom with other individual rights. The dissenting opinion attracted attention to the potential danger that absolute freedom of speech poses to democratic societies:

> If the freedom of speech were to be absolute under any circumstances, it would not be difficult to imagine possible abuses that could amount to a licence to defame (Case of A. v. The United Kingdom. Application No. 35373/97. Judgment. Strasbourg. Final 17 March 2003, p. 33).

76 The European Convention on Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 4. XI. 1950. https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 28 August 2020).

As a final point, it is also important to note that the dissenting opinion emphasised that restricting irresponsible speeches in Parliament is also a way to protect individual rights and democratic values (cf. Brown & Sinclair 2020).

5 Conclusions

Finding a balance between the right to freedom of expression and other fundamental rights is a key focus of the legal reasoning in both US and European jurisdictions. Since the 1940s, the United States Supreme Court has consistently decided that the right to freedom of expression under the First Amendment to the Constitution of the United States should be protected as a hallmark of American liberty. The Supreme Court has even established a highly protective free speech standard – the imminence standard – which even extends the protective mantel of free speech to the expression of distasteful, offensive or hateful statements, provided that such statements are not able to cause imminent lawless action. Some legal scholars claim that time has come to loosen the First Amendment in light of landmark legal decisions such as those discussed in this chapter. Several books in recent years have advocated a more European attitude towards the regulation of hate speech, because current practices in the US rob the target groups of their dignity and equal protection under the law (Delgado & Stefancic 2018; Tsesis 2009).

On the other hand, in the ECHR's legal reasoning, one can observe the effort to establish a reasonable balance between the right to freedom of expression and other fundamental freedoms. It is also significant that in Europe, freedom of expression does not have overprotection. Although Article 10 of the Convention protects freedom of expression of distasteful, offensive, shocking or disruptive messages as a sign of promoting tolerance and open-mindedness in democratic societies, the ECHR is likely to confirm the interference with the right to freedom of expression when the specific circumstances unmistakably indicate that the exercise of freedom of expression has surpassed the lawful limits, as it was the case of the domestic court decision in ES v. Austria (2019) concerning the defamation of the Prophet Muhammad. In other cases, although the ECHR confirmed infringement of Article 10 (freedom of expression), the legal decision laid out some thought-provoking ideas inviting debate and change. For example, in the case of Jersild v. Denmark (1994), the protection of human dignity was tabled. In the case of A. v. The United Kingdom (2003), parliamentary immunity was brought into question and it was suggested that irresponsible speeches in Parliament should be restricted as a way to protect freedom of expression and democratic values from abusive behaviour leading to anarchy.

Furthermore, it was shown that in both the United States and European Union jurisdictions, when courts interpret hateful statements or expressions, they analyse the pragmatic meaning speech has in the context in which it is produced. Amongst the key linguistic foci courts use for the interpretation of hate speech, one can find constant reference to the context framing the statements or expressions – that is, the circumstances that form the setting for an event, statement or idea, and in terms of which the statement can be fully understood and its meaning interpreted adequately. Another key linguistic focus for the courts to deliberate upon is the speaker's communicative intention (the illocutionary act). The intended and likely effects of the hateful act on the recipients (the perlocutionary act) are also a key linguistic focus.

The key linguistic foci referred to above are, in effect, essential categories of the linguistic discipline of pragmatics. However, the courts hardly ever request technical assistance from a linguist, as they rely on their intuitive knowledge of language.

In the second part of this book, the author will revisit some of the landmark cases studied in this chapter. In doing so, various linguistic perspectives will be adopted, each one throwing light on a different side of the multi-faceted nature of hate speech. Our purpose is to target the language clues various linguistic theories can provide that make hate speech actionable.