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Dignity versus Liberty: The Two Western Cultures of Free Speech

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DIGNITY VERSUS LIBERTY: THE TWO WESTERN CULTURES OF FREE SPEECH

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ABSTRACT

This Article offers an original comparative model for assessing freedom of expression among Western democracies through the combined lenses of human dignity and liberty. Such a new model is necessary because of two fundamental flaws in our current understanding of free expression: incoherence and inaccurate terminology.

This Article addresses the pervasive confusion of free expression terminology by first establishing a concrete theoretical framework for the meaning of human dignity and liberty. This makes possible a coherent discussion of freedom of expression across legal systems.

This Article next challenges the adequacy of Robert Post's Constitutional Domains model as a comparative free speech model and explains why human dignity and liberty serve as the best criteria for comparative assessment of free speech.

To implement its model, this Article then turns to Germany and the United States as paradigmatic examples of dignity-based and liberty-based systems respectively. It analyzes these two prominent legal systems and then explores essential traits of the free speech principles in these systems.

Finally, the Article demonstrates why most Western democracies lie in closer proximity to the German dignity-based model than to the American liberty-based model and why the United States is expected to remain isolated vis-à-vis other Western democracies due to its exceptional treatment of free speech.

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I. INTRODUCTION

What is the best way to assess freedom of expression through a comparative lens? Which concepts best serve to evaluate and encapsulate different nations' attitudes toward freedom of expression? Attempts to offer a comprehensive theory that generalizes fundamental understandings of patterns of freedom of expression are ambitious and inherently inaccurate, as "grand theories of speech tend to oversimplify the terrain they purport to cover."[1] Nonetheless, putting labels on different approaches is useful to understand the profound differences among Western democracies' varied attitudes toward protection of free speech. This Article offers a new framework to assess freedom of expression from a comparative perspective.

Part II lays the groundwork for "human dignity" and "liberty" by (roughly) sketching their contours. Part III differentiates the model proposed herein from Robert Post's Constitutional Domains model, and explains the need to diverge from his theory. Part IV elucidates how human dignity and liberty are reflected in the free speech jurisprudence of Germany and the United States respectively. These two countries represent nations that are at opposite ends of the liberty-human dignity continuum. Part V briefly demonstrates how human dignity trends increasingly influence most Western democracies, and that the United States is becoming increasingly isolated in its free speech doctrines. The Article concludes with the propositions that the rest of the Western world does not accept the American free speech approach and that American Exceptionalism in the realm of free speech only sharpens as years go by.

II. REFRAMING THE ANALYSIS – "HUMAN DIGNITY" AND "LIBERTY" AS PRISMS FOR CONSTITUTIONAL COMPARISON

The choice of human dignity and liberty to describe the tension between freedom of expression and values relating to communitarian and individual dignity, equality, civility, and respect is not self-evident. The same tension may be approached differently under various legal systems. For example, in the United States, a great deal of this conflict may be framed in terms of due process and equal protection.[2] Yet, each and

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[1] Jordan M. Steiker, *"Post" Liberalism*, 74 TEX. L. REV. 1059, 1063 (1996) (reviewing ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995)). *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 16 (1995).

[2] *See infra* Part IV.C.3 (discussing the "incorporation hypothetical"); *cf.* Guy E. Carmi, *Comparative Notions of Fairness: Comparative Perspectives on the Fairness Doctrine with Special Emphasis on Israel and the United States*, 4 VA. SPORTS & ENT. L.J. 275, 290-93 (2005) (presenting the Absolute Model and the Public Debate Model). *See generally* Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT 582 (Catharine MacKinnon & Reva B. Siegel eds., 2004)

every legal system has its own set of contending values and has constant debates over balancing and reconciling these values. The pendulum swings, whether between human dignity and liberty or due process and equal protection. The centrality, meaning, and content of each of these values changes throughout time. Human dignity and liberty, due process and equal protection, or any other comparable combination serve as "the Ying and the Yang" of their respective legal systems and require persistent reassessment and balancing.[3]

Yet, the choice of human dignity and liberty as the values that best represent the underlying tensions that this paper addresses is suitable for several reasons. Freedom of expression is normally classified as a classical liberty, and the legitimacy of the mere application of other values when regulating freedom of expression may be questionable, as the American example aptly shows. The protection of core fundamental rights and the principle of nonintervention by the state are deeply rooted in Western rights' discourse, especially in the writings of English speaking philosophers, such as Locke, Hobbes, Berlin, and Nozick.[4] Their philosophical heritage leans on natural rights, liberalism, and a teleological conception of rights.[5] "Liberty" encapsulates this tradition, and explains why, absent special circumstances, rights in general, and free speech in particular, ought not to be limited.

Similarly, "human dignity" represents the influence of European thinkers, such as Hegel and Kant, on European rights discourse, as well as the increasing trend towards viewing human dignity as both a source of, and a constraint on, human rights.[6] As opposed to the natural rights philosophical heritage, deontological and communitarian viewpoints characterize these philosophers.[7] Also, the choice of dignity and liberty terminology reflects the core constitutional commitments in current Western constitutionalism.[8] It aptly recapitulates the basic tension this model aims to

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(demonstrating how same constitutional issues are framed in human dignity terms in Europe while framed in equality terms in the United States).

[3] This view of constitutional law is also referred to as "the living constitution." *See* HOWARD LEE MCBAIN, THE LIVING CONSTITUTION 3 (1937); *see also* POST, *supra* note 1, at 17.

[4] *See, e.g.*, Isaiah Berlin, *Two Concepts of Liberty*, *in* LIBERTY 166, 170 (Henry Hardy ed., 2002); Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, *in* EUROPEAN AND US CONSTITUTIONALISM 75, 77-78 (Georg Nolte ed., Council of Europe Publishing 2005); George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONT. L. REV. 171, 173 (1984).

[5] Berlin, *supra* note 4, at 170; Bognetti, *supra* note 4, at 77-78; Fletcher, *supra* note 4, at 173.

[6] Bognetti, *supra* note 4, at 77-78; *see generally,* Fletcher, *supra* note 4.

[7] Bognetti, *supra* note 4, at 77-78; *see generally,* Fletcher, *supra* note 4.

[8] Guy E. Carmi, *Dignity – The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 987 (2007) [hereinafter Carmi, *Dignity - The Enemy from Within*].

address. The model was structured to address weaknesses present in alternative models,[9] while synthesizing the concepts of existing models. Therefore, the articulation of free speech theory and practice in the Western world through the use of human dignity and liberty may bring us a step forward in understanding the underlying differences and tensions among Western countries' protection of free speech.

The choice of human dignity and liberty as themes through which to assess freedom of expression doctrines from a general comparative perspective, while partially based on some existing theories, is also innovative. Other scholars have played with similar or comparable themes, but did so either in confined settings or with different terms. For instance, Edward Eberle approaches the themes of "dignity" and "liberty" when comparing German and U.S. constitutional understandings, yet he does not offer a comparative analysis that goes beyond these two legal systems.[10] The same themes also feature in James Whitman's analysis of privacy laws in Europe and the United States.[11] In a similar fashion, Kent Greenawalt addresses themes of "individuals" and "communities," yet primarily focuses on Canadian and American freedom of expression understandings.[12] A similar endeavor by Karla Gower speaks in terms of "liberty" and "authority" when comparing Canadian and American free speech.[13] Robert Post's Constitutional Domains theory indeed offers a comprehensive constitutional theory, yet his "community," "democracy,"

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[9] *See infra* Part III (criticizing Robert Post's Constitutional Domains model).

[10] *See generally* EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002); *see also* scholarship by Donald Kommers that proceeds along these lines, such as DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY *passim* (2d ed. 1997); Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980).

[11] *See generally* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151 (2004) [hereinafter Whitman, *The Two Western Cultures of Privacy*]. Whitman refers to additional scholars who understand the tension between privacy law in Europe and the United States in terms of dignity and liberty. *Id*. at 1160-61 nn.42-43. Among the scholars he mentions is Robert Post, who distinguishes "between privacy as an aspect of dignity and privacy as an aspect of liberty." *Id*. at 1161. As Post himself qualifies his offered taxonomy of three different, and in some respects incompatible, concepts of privacy: "The first connects privacy to the creation of knowledge; the second connects privacy to dignity; and the third connects privacy to freedom" (which Post defines as "best conceived as an argument for liberal limitations on government regulation."). Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001) [hereinafter Post, *Three Concepts*].

[12] *See generally* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1989) [hereinafter GREENAWALT, FIGHTING WORDS].

[13] *See generally* Karla K. Gower, Liberty and Authority in Free Expression Law: The United States and Canada (2002).

(and "management") domains differ from the categorization of dignity and liberty presented herein.[14] Therefore, while this attempt to offer a framework for comparing different legal systems' freedom of expression doctrines arises from similar scholarly endeavors, it synthesizes and re-conceptualizes existing theories into a more adequate comparative framework.

The prisms of dignity and liberty offer a more accurate mechanism for comparison than other models, namely, Post's Constitutional Domains model, in two important ways. First, the proposed model is more descriptively accurate, since it offers a better reflection of contemporary Western constitutional law terminology. Secondly, it addresses some ideological difficulties with Post's use of "democracy" as a justification for free speech protection. These aspects, which require a revision to Post's model, are discussed below.

A. *Human Dignity and Liberty – A General Layout*

Both human dignity and liberty are vague constitutional terms that occupy legal scholars around the world, including in the United States.[15] Each legal system fills these concepts with different content, and even within each legal system views differ as to the exact meaning that should be ascribed to these terms. This vagueness is typical when abbreviations such as "dignity," "liberty," "equality," and other similar concepts are used to describe pivotal terminology that usually entails an ideological interpretation.[16] Nonetheless, these abbreviations are useful and necessary for conducting meaningful discussions on fundamental issues.[17] This vagueness makes it necessary to chart the meaning of these terms for our discussion in order to create a common baseline. The interpretations I attach to these terms may be contested, and I concede that there are other possible interpretations. My primary goal in outlining these terms is to avoid confusion as to their meaning within this discussion.[18]

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[14] *See generally* POST, *supra* note 1. *See also* discussion and criticism of Post's model, *infra* Part III. Please note that while Post's Constitutional Domains model endeavors to explain constitutional differences in a broader context, the model presented herein focuses on freedom of expression concerns.

[15] Ronald Dworkin, for example, sees human dignity as one of the underlying pillars of the American Constitution. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 205 (1977).

[16] Steiker, *supra* note 1, at 1075-77. *See, e.g.*, Berlin, *supra* note 4, at 204 ("Social and political terms are necessarily vague. The attempt to make the vocabulary of politics too precise may render it useless.").

[17] *See, e.g.*, David Walsh, *Are Freedom and Dignity Enough?: A Reflection on Liberal Abbreviations*, *in* IN DEFENSE OF HUMAN DIGNITY: ESSAYS FOR OUR TIMES 165 (Robert P. Kraynak & Glenn E. Tinder eds., 2003); Berlin, *supra* note 4, at 204; references in text, *supra* note 1.

[18] For the danger in "term confusion," *see* Carmi, *Dignity – The Enemy from Within*, *supra* note 8, at 982-86; Berlin, *supra* note 4, at 172, 200-01.

B. *Defining Human Dignity and Liberty*

1. Human Dignity and Community

Human dignity is a relatively new constitutional term in contemporary human rights discourse. Its modern reemergence occurred in the mid-twentieth century, at the end of World War II.[19] Yet, it surfaced as a visible pivotal right among many Western democracies only in recent years. Human dignity plays a role both at the international and state levels. On the international level, the Universal Declaration of Human Rights opens with the statement that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[20] Other prominent international documents and covenants rely upon human dignity as a leading value.[21] Kretzmer & Klein rightly note that "[t]he concept of human dignity also plays a significant role in the debate over the 'universalism' or 'relativism' of human rights."[22] In the contemporary human rights discourse within the international arena, human dignity is highly visible.[23]

At the national level, human dignity became a central concept in many modern constitutions.[24] One could say that human dignity pervades con-

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[19] James Q. Whitman, *On Nazi 'Honour' and the New European 'Dignity'*, *in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 243, 243 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003) [hereinafter Whitman, *On Nazi 'Honour' and the New European 'Dignity'*]; Bognetti, *supra* note 4, at 78. *See* David Kretzmer & Eckart Klein, *Forward*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE v (David Kretzmer & Eckart Klein eds., 2002); William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 60 (Michael J. Meyer & William A. Parent eds., 1992).

[20] Universal Declaration of Human Rights, G.A. Res. 217A (III), preamble, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[21] *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), preamble, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), preamble, U.N. Doc. A/6316 (Dec. 16, 1966); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res 2106 A (XX), preamble, U.N. Doc. A/6014 (Dec. 21, 1965); *see* David Kretzmer & Eckart Klein, *supra* note 19, at v.

[22] Kretzmer & Klein, *supra* note 19, at v.

[23] *See, e.g.*, Jochen Abr. Frowein, *Human Dignity in International Law*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 19, at 121-32.

[24] *See, e.g.*, Grundgesetz [GG] [Constitution] art. 1 (F.R.G.) *English translation available at* http://www.servat.unibe.ch/law/lit/the_basic_law.pdf; S. Afr. Const. arts. 1, 10 *English translation available at* http://www.info.gov.za/documents/constitution/1996/a108-96.pdf; Basic Law: Human Dignity and Liberty, arts. 2, 4, 1992, S.H. 150 (Isr.) *English translation available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm; Eesti Vabariigi põhiseadus [Constitution] art. 17 (Est.) *English translation*

stitutional law in an increasing number of Western democracies.[25] Among the most noticeable examples of nations that positioned human dignity at the center of their constitutional order are Germany and South Africa. In Germany, human dignity is framed in an absolute manner, similar to the American First Amendment.[26] This "provision in the German Basic Law has been interpreted as referring to the most fundamental of the rights of man," which cannot be violated under any circumstances.[27] South Africa has also placed human dignity as a robust right and constitutional value. It appears several times in its constitution, as a

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available at http://www.servat.unibe.ch/law/icl/en00000_.html; De Belgische Grondwet/La Cosntitution Belge/Die Verfassung Belgiens [Constitution] art. 23 (Belg.) *English translation available at* http://www.lexadin.nl/wlg/legis/nofr/eur/lxwebel.htm; Constitución [Constitution] arts. 10, 18(1) (Spain) *English translation available at* http://www.servat.unibe.ch/law/icl/sp00000_.html; Konstytucja Rzeczpospolitj Polskiej [Constitution] arts. 30, 47 (Pol.) *English translation available at* http://www.servat.unibe.ch/law/icl/sp00000_.html; Ustav Republike Hrvatski [Constitution] art. 35 (Croat.) *English translation available at* http://www.sabor.hr/Default.aspx?art=2408; A Magyar Köztársaság Alkotmánya [Constitution] art. 54 (Hung.) *English translation available at* http://www.sabor.hr/Default.aspx?art=2408; 1975 Syntagma [SYN] [Constitution] art. 2(1) (Greece) *English translation available at http://www.hri.org/MFA/syntagma/artcl25.html#A2*; Constituição da República Portuguesa [Constiution] art. 1 (Port.) *English translation available at* http://www.servat.unibe.ch/law/icl/sz00000_.html; Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution féedérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, art. 7 (Switz.) *English translation available at http://www.admin.ch/ch/e/rs/c101.html*; Charter of the Fundamental Rights of the European Union, O.J. C 364/1, art. 1 (2000), *available at* http://www.europarl.eu.int/charter/pdf/text_en.pdf.

[25] Notably, with the fall of the Iron Curtain, many East European countries chose to adopt human dignity as part of their new constitutions, following European models for their constitutions. The geographical proximity to Western European countries, as well as the newly formed democracies' desire to become members of the European Union, made them prefer a European influence on their constitutional schemes. *See*, *e.g.*, Est. Const., *supra* note 24, at art. 17; Pol. Const., *supra* note 24, at arts. 30, 47; Hung. Const., *supra* note 24, at art. 54; Satversme [Constitution] art. 95 (Lat.) *English translation available at* http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html; Lietuvos Respublikos Konstitucija [Constitution] art. 21 (Lith.) *English translation available at* http://www.lrkt.lt/Documents2_e.html; Ustava Republike Slovenije [Constitution] arts. 21, 34 (Slovenia) *English translation available at* http://www.servat.unibe.ch/law/icl/si00000_.html; Ústava Slovenskej Republiky [Constitution] arts. 12, 19 (Slovakia) *English translation available at* http://www.servat.unibe.ch/law/icl/lo00000_.html; Croat. Const., *supra* note 24, at art. 35.

[26] "The dignity of man inviolable. To respect and protect it is the duty of all state authority." Grundgesetz, *supra* note 24, at art. 1. *See also* discussion on Germany *infra* Part IV.B.

[27] *See* Kretzmer & Klein, *supra* note 19, at vi, and discussion on Germany *infra* Part IV.B.1.

positive right, a constitutive principle, and a limitation on the restriction of rights.[28]

The term human dignity also has theological origins that may effect its interpretation and understanding. The concept of human dignity has deep roots in many religions, as well as in moral and political philosophy.[29] Human dignity played a historical part in the development of religious and philosophical approaches to human rights.[30] Immanuel Kant is probably the most prominent and influential among philosophers who dealt with human dignity.[31]

Kant's articulation of dignity situated it in a communitarian setting and attributed to it an absolutist approach. Kant's deontological philosophy rejects the violation of human dignity under any circumstances, and views the state as having the duty to protect human dignity even in cases where the violation of dignity stems from a private actor.[32] Kantian theory implies an obligation to respect the freedom of others. Kant sees dignity "as an innate capacity of each person, which imposes obligations on us as members of an organized society."[33]

Yet, Kant's deontological interpretation of human dignity is not the only way human dignity is perceived. Most Western democracies do not follow the extreme Kantian interpretation.[34] Instead, they balance

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[28] "Everyone has inherent dignity and the right to have their dignity respected and protected." S. Afr. Const., *supra* note 24, at art. 10. *See also* Hugh Corder, *Comment*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 4, at 113, 115; Kretzmer & Klein, *supra* note 19, at v-vi.

[29] Kretzmer & Klein, *supra* note 19, at vi. Human dignity can be traced back to principles in Christianity, Judaism, and Islam. *See e.g.,* Matthew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 303-306, 334 (2000).

[30] *See* Kretzmer & Klein, *supra* note 19, at vi; *see*, *e.g.*, Chana Safrai, *Human Dignity in a Rabbinical Perspective*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 19, at 99, 99-100.

[31] *See, e.g.*, Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 165 (1997); Fletcher, *supra* note 4, at 171. It is, however, important to note that Kant's earlier works were based upon more individualistic notions, and that his change of mind is lead by "peculiar evolution." *See, e.g.*, Berlin, *supra* note 4, at 198.

[32] *See, e.g.*, Wells, *supra* note 31, at 165-69; Dierk Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, 3 GLOBAL JURIST FRONTIERS 1, 10-11 (2003), *available at* http://www.bepress.com/gj/frontiers/vol3/iss1/art1.

[33] Wells, *supra* note 31, at 169. *See also* Winfried Brugger, *Comment*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 4, at 69, 72 (claiming that the Kantian approach is dominant in Europe) [hereinafter Brugger, *Comment*].

[34] Germany is exceptional in its treatment of human dignity in a Kantian absolute perspective. *See* discussion on Germany, *infra* Part IV.B.1. *See also* Michel

between human dignity and other rights and values.[35] This view of human dignity is teleological, since it recognizes considerations other than human dignity. Nonetheless, the balancing tests these countries deploy still give considerable weight to human dignity (or comparable concepts, such as equality).[36] The balancing formulas among most Western democracies lead to similar outcomes to the German-Kantian approach to human dignity, even in the absence of an absolute approach to human dignity. Once human dignity considerations are "balanced vis-à-vis freedom of expression concerns, it almost automatically leads to speech-restrictive results."[37] Therefore, the introduction of human dignity into freedom of expression rulings is detrimental to free speech, even in the lack of an absolutist approach to human dignity.[38]

Despite (or maybe because of) all of these different sources for human dignity, there is little agreement on what human dignity actually entails. The ambiguity of the term human dignity is a cause for concern, since it raises difficulties in predicting rulings that rely upon this constitutional term. As Kretzmer and Klein put it, "[w]hile the concept of human dignity now plays a central role in the law of human rights, there is surprisingly little agreement on what the concept actually means."[39] Bognetti further notes that "so far, there has been no systematic re-elaboration of the concept of human dignity which has been able to command if not universal, so [sic] at least widespread acceptance."[40] Some even contest the categorization of human dignity as a right, instead offering it as a justification for rights.[41] Also, since there is no concrete content that stems from human dignity, its meaning is set in each constitutional or

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Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1549 (2003) ("[T]he German constitutional system is immersed in a normative framework that is more Kantian than Lockean, thus requiring a balancing of rights and duties not only on the side of the state but also on that of the citizenry.").

[35] *See* discussion *infra* Part V.B. (discussing balancing in Western constitutional adjudication).

[36] For the similarities between human dignity and equality see discussion *infra* Part IV.C.3.

[37] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 999; Rosenfeld, *supra* note 34, at 1549 (referring to the Kantian influences on German law).

[38] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 979-82 and *passim*.

[39] Kretzmer & Klein, *supra* note 19, at vi.

[40] Bognetti, *supra* note 4, at 79. *See also* Joseph E. David, *Preface*, *in* QUESTIONING DIGNITY: ON HUMAN DIGNITY AS SUPREME MORAL VALUE IN MODERN SOCIETY, *supra* note 25, 9, 10; EBERLE, *supra* note 10, at 46, 50 (referring to the American context).

[41] *See* Doron Shultziner, *Human Dignity – A Justification, Not a Right*, 21 HAMISHPAT L. REV. 23, 25-28 (2006).

international document according to the political consensus at the time of its establishment.[42]

The ambiguity surrounding human dignity often leads to an inaccurate discourse and opens room for manipulation.[43] This is why my scholarship consistently warns of its use in certain constitutional contexts before clarifying its content.[44] While everyone can agree that preserving "human dignity" is unobjectionable, few can agree on its content. This is one of the reasons that, as Bognetti accurately observes, "human dignity has been used to express underlying philosophical beliefs of quite different kinds for the purpose of reinforcing them with its powerful appeal."[45]

Human dignity seems to possess "a significantly larger role in Europe" than in the United States.[46] In the rare occasion that human dignity was mentioned by the U.S. Supreme Court, it was used as a limited background concept. As Nolte notes:

> The US Supreme Court has indeed used and applied the term human dignity in a number of its judgments. The most important of them concern the delimitation of what is cruel and unusual punishment in the sense of the Eighth Amendment, the establishment of rights to a hearing under the Due Process Clause, the extent of the right to privacy (in the abortion context) and, finally, the free speech area. In all these cases, however, the concept of human dignity has remained in a rather limited role as a background concept. It has not been transformed into an operational legal term, as some dissenting opinions have suggested it should. This situation contrasts starkly with the role of human dignity in the German constitutional context in particular where voices have warned that the term not become "small change" in constitutional interpretation.[47]

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[42] *Id.* at 29. *See also* EBERLE, *supra* note 10, at 50 ("Since human dignity is a capacious concept, it is difficult to determine precisely what it means, in law, outside the context of a factual setting. It is one of those terms best understood through application and not definition.").

[43] *See, e.g.*, Arthur Chaskalson, *Human Dignity as a Constitutional Value*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE *supra* note 19, at 134-35 (noting that "the breadth of [human dignity's] meaning and the difficulty of defining its limits" may be seen as problematic, and that human dignity as a residual right "might be thought to have an open-ended quality which would be unmanageable.").

[44] *See, e.g.*, Carmi, *Dignity - The Enemy from Within*, *supra* note 8, at 982-86.

[45] Bognetti, *supra* note 4, at 79.

[46] Georg Nolte, *Introduction – European and U.S. Constitutionalism: Comparing Essential Elements*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 4, at 9, 17.

[47] *Id.* at 15-16 (internal citations omitted).

The tension between human dignity and liberty exists in most Western democracies, including in the United States.[48] But in the United States, human dignity is a value, whereas in most modern constitutional regimes that were established since the second half of the twentieth century, human dignity serves as a specific enumerated right.[49] Human dignity as a value, as opposed to a right, is an important distinction, since it, at least from a theoretical perspective, affects the balancing between human dignity and other rights.[50] Furthermore, rights are enforceable, whereas values simply affect constitutional discourse in a weaker manner.[51]

The constitutional jurisprudence of Justice Brennan was probably the most serious attempt to introduce human dignity into American jurisprudence, and it peaked during his tenure on the Court.[52] Although Justice Brennan referred to dignity in numerous opinions and speeches, he never offered a comprehensive definition of the term.[53] The 1960s and 1970s were also characterized by an approach that was more susceptible toward foreign and external sources.[54] Accordingly, it is not surprising to find

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[48] *See* Walter F. Murphy, *Ordering of Constitutional Values*, 53 S. CAL L. REV. 703, 708 (1980); BRAD STETSON, HUMAN DIGNITY AND CONTEMPORARY LIBERALISM 11-12 (1998); Leon Sheleff, *Two Models of Human Rights Guarantee: An American Model Versus A Possible Israeli Model*, *in* LAW IN ISRAEL – A PROSPECTIVE APPROACH 199, 277 n.77 (Yedidia Stern & Yaffa Zilbershatz eds., 2003); Parent, *supra* note 19 at 47.

[49] *See* Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 150 (1984); Parent, *supra* note 19 at 47. It is noteworthy that some State Constitutions (such as Montana, *see* MONT. CONST. art. II, § 4) explicitly enumerate Human Dignity as a right. Yet, the Federal Constitution prevails when it comes to freedom of expression, so the likelihood that state courts would balance human dignity and freedom of expression as rights is minuscule. *See* Clifford, *supra* note 29, at 303-306, 334; Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 MONT. L. REV. 133, 137, 144-46 (2003).

[50] On the balancing between rights and values, *see* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 993; Iddo Porat, *From Interests-Based Balancing to Rights-Based Balancing: Two Models of Balancing in the Early Days of American Constitutional Balancing* (2007) (unpublished article, on file with ExpressO), http://works.bepress.com/iddo_porat/1/.

[51] *See* Carmi, *Dignity – The Enemy from Within*, *supra* note 8, at 993.

[52] *See, e.g.*, Paul v. Davis, 424 U.S. 693, 734-35, n.18 (1976) (Brennan, J., dissenting) (regarding the right to privacy); Furman v. Georgia, 408 U.S. 238, 305-06 (1972) (Brennan, J., concurring) (regarding the death penalty); Goldberg v. Kelly, 397 U.S. 254, 264- 65 (1970) (opinion by Brennan, J.) (regarding welfare benefits).

[53] *See* Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined through Each Country's Leading Abortion Cases*, 11 TULSA J. COMP. & INT'L L. 491, 501 (2004).

[54] *See e.g.,* Fredrick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 51-2 (Michael Ignatieff, ed., 2005) [hereinafter Schauer, *Exceptional First Amendment*].

some international influence in the form of human dignity, which received an increased global awareness at that time. Brennan's jurisprudence treated human dignity as an implicit constitutional principle that gave rise to broad unenumerated individual rights, including privacy and the right to life.[55] Justice Brennan mentioned the term "dignity" in more than sixty of his rulings, yet the majority of these rulings involved the Eighth Amendment.[56] Brennan drew parallels between cruel and unusual punishment and human dignity, and believed that the death penalty was unconstitutional *per se*.[57]

After Brennan retired in 1990, his human dignity legacy was largely forsaken. The Rehnquist Court did not place human dignity at the center of its constitutional scheme, and it appears that the Roberts Court is following a similar path.[58] Most indicators point out that the majority of current justices treat the human dignity vocabulary that Brennan introduced to the Court as empty rhetoric.[59]

Yet, even if the Court had continued to develop Brennan's human dignity jurisprudence, it would still have been quite different from its European counterpart. The perception of human dignity that predominates European constitutional jurisprudence, which includes communitarian aspects and views human dignity as an absolute and inalienable right,[60] did not resonate in Brennan's jurisprudence, with the possible exception of the death penalty.[61] Furthermore, the U.S. Constitution, as well as fundamental understandings embedded in American constitutional law, "seems to offer less protection [for] values and rights associated with the idea of human dignity than the average European constitution."[62]

Even from a theoretical standpoint, the manner in which human dignity is perceived in the United States and Europe differs tremendously.[63] American scholars tend to confuse human dignity and autonomy, and

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[55] *See. e.g.*, Paul, 424 U.S. at 735, n.18.

[56] Brennan also dealt with dignity in his rulings regarding privacy, welfare support, etc., especially in regard to the Fourth, Fifth and Sixth Amendments. *See*, *e.g.*, Paul, 424 U.S. at 735, Goldberg, 397 U.S. at 265, Schmerber v. California, 384 U.S. 767, 1834 (1966).

[57] *See* Furman, 408 U.S. at 305 (Brennan J., concurring).

[58] *See, e.g.*, Raoul Berger, *Justice Brennan, "Human Dignity," and Constitutional Interpretation*, *in* THE CONSTITUTION OF RIGHTS, *supra* note 19, at 129, 130, 134.

[59] *See, e.g.*, *id.* at 129, 134 (describing the limits of Brennan's human dignity legacy).

[60] Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 989-91.

[61] Unlike Brennan's view of human dignity as a factor that is balanced vis-à-vis other rights and interests in issues such as Fourth and Fifth, and Fourteenth Amendment cases. *Compare* Schmerber, 384 U.S. at 769-70 (opinion by Brennan, J.) *with* Furman 408 U.S. at 305 (Brennan, J., concurring).

[62] Bognetti, *supra* note 4, at 89.

[63] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 983-85 and *passim*.

European and American scholars seem to mean very different things when referring to human dignity.[64]

In any case, the First Amendment's robust protection would "immunize" it from balancing.[65] First Amendment discourse negates balancing of freedom of expression even with more established rights, such as equality.[66] Therefore, even if human dignity had been recognized as a right in American constitutional law, its affect on First Amendment law would have been marginal at best. As Whitman notes, "[P]rotecting people's dignity is quite alien to the American tradition."[67]

While human dignity seemingly plays a limited role in the United States, its content and understandings are fundamentally different than in Europe. Unlike the U.S.'s limited experience with human dignity, Germany has developed an established human dignity jurisprudence that dominates its constitutional law, as well as its free speech doctrines.[68] James Whitman observes that "German constitutional scholars had developed, in the 1950s, a powerful body of Kantian thought on the nature of human dignity."[69] It is characterized by a communitarian understanding that views the protection of human dignity, at the expense of the liberty of speech, as a constitutional must.[70] Human dignity is perceived as a positive right that protects not only the speaker, but also the audience.[71] This perception pervades free speech law itself, and its contours are marked by these principles.[72]

Although the roots of the contemporary dignity-based constitutional discourse in Europe may seem to be entirely a post World War II reaction, it is far more entrenched in European tradition. James Whitman traces the origins of contemporary dignity to French and German ideas of "personal honor."[73] Whitman argues that the French and German laws of insult, which revolve around the idea that there is a protectable interest in personal "honor," are largely descended from the old law of dueling.[74] He finds traces of this approach in The French Revolution of

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[64] *See Id.* at 976-82 (regarding Dworkin and Greenawalt).

[65] *See, e.g.*, Susan Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 322 (1998). *But cf.* Robert M. O'Neil, *Rights in Conflict, The First Amendment's Third Century*, 65 LAW & CONTEMP. PROBS. 7, 11-12 (2002).

[66] *See generally* CATHARINE MACKINNON, ONLY WORDS (1993).

[67] Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1221.

[68] *See* elaborated discussion *infra* Part IV.B.1.; James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1333, 1339 (2000) [hereinafter Whitman, *Enforcing Civility and Respect*].

[69] Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1339; Rosenfeld, *supra* note 34, at 1549.

[70] Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 989-91.

[71] *Id.* at 993-96.

[72] *See* elaborated discussion *infra* Part IV.B.1.

[73] *See generally* Whitman, *The Two Western Cultures of Privacy*, *supra* note 11.

[74] Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1285.

1791,[75] and in Nazi Germany, where the Nazis made protection of personal honor a core commitment of their legal ideology.[76] Many bodies of Continental law, primarily French and German, aim to protect "personal honor."[77] Therefore, Whitman argues that the roots of many continental protections for dignity lie in the historic protection of personal honor, and that the history of the development of "dignity" in European law should be seen as a largely continuous history, one that includes developments during the Nazi period.[78]

But Germany is not alone. An increasing number of nations have adopted human dignity as a right in their constitutions and are following the German example, if not to the letter, then at least in spirit.[79] The common perception of human dignity in Western constitutionalism is akin to the German approach, in the sense of communitarianism, positive rights, and acknowledgment of audience rights.[80] Germany is usually set apart by its "absolutist commitment" to human dignity, as enumerated in Article 1 of its constitution.[81] But, Germany was successful in influencing most Western democracies regarding human dignity's nature and characteristics.[82]

According to this common perception, human dignity is characterized by a communitarian foundation that pervades constitutional debate

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[75] Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1220 ("[W]hile on the Continent they focus on the ambition to guarantee everyone's position in society, to guarantee everyone's 'honor.' This was already true in 1791, in the French Revolution of Jérôme Pétion, and it remains true today.").

[76] Whitman, *On Nazi 'Honour' and New European 'Dignity,' supra* note 19, at 243, 245, 247. Nazi Germany used the terminology of "honor" for depriving certain groups of fundamental rights. Thus, for example, a law passed "for the protection of German blood and honor" disallowed Jews from marrying or having sexual relations with German citizens. At the same time, the Nazi regime expanded the honor typically reserved for aristocrats to the rest of the (Aryan) citizens, through labor law legislation and law of insult. *See* Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1327-28; *see* Whitman, *On Nazi 'Honour' and New European 'Dignity*,*' supra* note 19, at 252.

[77] Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1284-85.

[78] Whitman, *On Nazi 'Honour' and New European 'Dignity,' supra* note 19, at 265. *Also cf.* Gerald L. Neuman, *On Fascist Honour and Human Dignity: A Skeptical Response*, *in* DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS, *supra* note 19, at 267 (doubting whether the Nazi period can plausibly be understood as continuous with what preceded or followed it).

[79] *See, e.g.*, Brugger, *Comment*, *supra* note 33, at 72 ("Germany's Article 1 Section 1 of the Basic Law is a fitting example of this world-wide tendency which can be observed in many new constitutions and human rights treaties."). *See also* discussion *infra* Part V.A. (relating to recent tendencies among Western democracies).

[80] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 988.

[81] *Id.* at 988-89.

[82] *See* elaborated discussion *infra* Part V.A.

amongst many of the Western democracies formed in the twentieth century. It often entails a non-liberal rights discourse, which includes positive rights, and the limitation of rights for the good of the community. It is also typically accompanied by a balancing of rights that affords great weight to human dignity, or at least as a right equal to freedom of expression. This understanding of human dignity, which is the most common worldwide, is the understanding that I refer to in my model. Other understandings, such as the underdeveloped American dalliance with the concept of human dignity, are peripheral and uncharacteristic of the common understanding attached to this term.

Therefore, a legal system that bases its free speech doctrines along the lines of human dignity and community would limit speech that stands at odds with the dignity, respect, and civility of other people.[83] Government seeks to sustain and advance collective values, including in the free speech arena, in various ways.[84] Normally, such legal systems have a combination of speech-restrictive legislation and judicial deference.[85] Strict defamation rules, criminal prohibition of hate speech, incitement of violence, and possibly pornography, would all be an integral part of the legal system. This would also entail a content-based approach that affords greater lenience towards certain kinds of speech, and attaches governmental value judgments regarding unpopular kinds of speech. The enforcement of a civil and polite public discourse would be enforced by law, and not only by societal norms.[86]

Although this portrayal of dignity-based free speech laws may seem unflattering, all these aspects can be found among all Western democracies, with the exception of the United States, where *liberty* is at the forefront of speech rights.

2. Liberty and Autonomy

Liberty is also an unclear term. Classic liberalism, also known as libertarianism, used to encompass the central meaning of the word "liberty." Although the classic liberal view of the negative perception of rights still

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[83] *See, e.g.*, POST, *supra* note 1, at 9 ("Recent Canadian decisions upholding regulations of public discourse prohibiting pornography and hate speech are typical of the tendency of other nations legally to subordinate public discourse to fundamental community values of respect and civility.").

[84] *Cf.* Steiker, *supra* note 1, at 1062.

[85] *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 7-8.

[86] *See, e.g.*, POST, *supra* note 1, at 138; Lawrence Lessig, *Court and Constitution: Post Constitutionalism*, 94 MICH. L. REV. 1422, 1436, 1440, 1450-51 (1996) (reviewing ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995)).

lies at the heart of the perception of liberty,[87] it is not the only use or affixed understanding of liberalism. As Dworkin rightly notes, "the word 'liberalism' has been used, since the eighteenth century, to describe various distinct clusters of political positions, but with no important similarity of principle among the different clusters called 'liberal' at different times."[88]

In contemporary American political discourse, being "liberal" does not mean that you are a libertarian.[89] Progressive liberal perceptions differ from classic liberalism, and when we discuss liberalism, we need to choose which definition we embrace. In particular, the Critical Legal Studies movement, as well as the radical feminist movement, have challenged existing free speech paradigms as maintaining subordination of minorities and supporting the status quo.[90] And although some contemporary "liberals" would hold "libertarian" views vis-à-vis freedom of expression,[91] others may hold different interpretations, which may favor the regulation of speech under certain conditions.[92] Yet, progressive liberal thought that calls for free speech restriction—whether to prevent possible harm to minorities or women,[93] in order to ameliorate public discourse by enabling access for certain groups or by restricting the

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[87] *See* Berlin, *supra* note 4, at 207 (Within the realm of possible interpretations to liberty: "No doubt every interpretation of the word 'liberty', however unusual, must include a minimum of what I called 'negative' liberty.").

[88] Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 115 (Stuart Hampshire ed., 1979). *See also* Berlin, *supra* note 4, at 168-69, 208 (claiming that historians of ideas have recorded more than 200 senses of freedom and liberty).

[89] *See*, *e.g.*, Dworkin, *Liberalism*, *supra* note 88, at 113.

[90] *See*, *e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 125, and the works of Catharine MacKinnon.

[91] *Cf.* Dworkin, *Liberalism*, *supra* note 88, at 120-22.

[92] *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 152. The writings of Andrea Dworkin and Catharine MacKinnon support this proposition. *See*, *e.g.*, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1989); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 148, 156 (1987); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 15–17 (1985); *see generally* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Yet, as the discussion below will demonstrate, all these interpretations may fall under the category of "positive liberty."

[93] *See, e.g.,* MACKINNON, FEMINISM UNMODIFIED, *supra* note 92, at 156.

affects of certain powerful groups[94]—falls within the category of positive liberty.[95]

The roots of liberalism rest in the classical interpretation. Libertarians such as Locke, Mill, Constant, and Tocqueville asserted "that there ought to exist a certain minimum area of personal freedom" which must never be violated.[96] Liberty in this sense is the condition in which an individual has immunity from the arbitrary exercise of authority. It presupposes some frontiers of freedom that nobody should be permitted to cross.[97] Mill and Constant went even further than requiring the minimum, and demanded "a maximum degree of noninterference compatible with the maximum demands of social life."[98]

The concept of liberty is more closely related to freedom of expression, than to most other rights. Liberal thinkers, such as Benjamin Constant, declared that at the very least, the liberty of opinion and expression, among others, "must be guaranteed against arbitrary invasion."[99]

Contemporary scholars continue to view the guarantees of freedom of expression as lying at the "very center of liberal democracy."[100] The existence of free speech is considered a prerequisite for democracy, since one of its main features is to maintain public awareness of governments' acts, sustain transparency, and enable citizens to receive valuable information for participation in the democratic process.[101]

Governmental interference with free speech is feared more than governmental interference with practically any other right. Distrust of governmental authority and the belief in human freedom are primary themes for political liberalism.[102] This includes distrust of democratic govern-

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[94] *See*, *e.g.*, Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. AND PUB. AFF. 3 (1991); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-11, 1415 (1986); POST, *supra* note 1, at 268-288.

[95] *See* discussion *infra* Part II.B.2 (on positive liberty). My model classifies progressive liberal conceptions outside of the realm of liberty, and within the domain of human dignity, since they try to impose community norms.

[96] Berlin, *supra* note 4, at 171, 186 ("If I go too far, contract myself into too small a space, I shall suffocate and die.").

[97] *Id.* at 210 ("Genuine belief in the inviolability of a minimum extent of individual liberty entails some such absolute stand.").

[98] *Id.* at 170, 207 ("The wider the area of non-interference the wider my freedom.").

[99] *Id.* at 173.

[100] *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 124.

[101] See discussion on "the argument from democracy" and on the checking value argument in Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 971-72; POST, *supra* note 1, at 272.

[102] POST, *supra* note 1, at 130; *see also* Wells, *supra* note 31, at 163 ("Autonomy in this sense translates into individual freedom from governmental interference."). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

ment, as democracy can crush individuals as mercilessly as any dictatorship, and for the man whose liberty is deprived, it makes little difference if his liberty is taken by a monarch or by a set of oppressive laws. Therefore, the identity of the oppressor bears no real significance.[103]

Isaiah Berlin, in his influential (and inspiring) essay *Two Concepts of Liberty*, articulated the distinction between positive and negative liberty.[104] In a nutshell, he defined negative liberty as an "area within which a man can act unobstructed by others" and is not coerced.[105] In contrast, positive liberty is, as Berlin aptly shows, a justification for coercion. It is a paternalistic notion that the state can impose laws it views as "rational," which, if a person were acting rationally, she would have chosen for herself.[106] For example, if racism and bigotry are not "rational," and a rational person would not choose this path unless she is "blind or ignorant or corrupt," the state could ban this behavior for the speaker's best interest.[107] It is requiring people to be at their best behavior, that which they would rationally choose, or as Berlin puts it, as substituting your real self for your self "at its best."[108] Positive liberty may also be understood in notions of self-direction and self-control, by conceptualizing the coercion as binding oneself to rationality, which can be found either in one's "best self" or in society and the law.[109] In this sense, following orthodoxy is "liberation by reason."[110]

The parameters of the negative liberty area of personal freedom are a matter of negotiation and haggling.[111] Yet freedom must have limits, otherwise, the freedom of some may conflict with the freedom of others.[112]

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[103] *See* Berlin, *supra* note 4, at 208-10.

[104] *See generally*, *id*.

[105] *Id.* at 169. Of course Berlin himself recognizes that the sphere of negative liberty has borders which are necessary to avoid anarchy and infringement of other peoples' rights. *See id.* at 195, 201.

[106] *See id*. at 178-81.

[107] *Id*. at 179; *see also id*. at 193 (claiming that following the rational-based laws will "only seem irksome to those whose reason is dormant, who do not understand the true 'needs' of their own 'real' selves.").

[108] *Id*. at 193.

[109] *See id*. at 190; *see also id*. at 192 ("Freedom is self-mastery, the elimination of obstacles to my will, whatever these obstacles may be – the resistance of nature, of my ungoverned passions, of irrational institutions, of the opposing wills or behavior of others.").

[110] *Id*. at 190-91. Berlin further notes that this perception lies at the heart of many of the nationalist, Communist, authoritarian, and totalitarian regimes. *Id*; *see also id*. at 194.

[111] *Id*. at 171.

[112] *Id*. ("[T]he liberty of some must depend on the restraint of others."); *see also id.* at 173 ("Yet it remains true that the freedom of some must at times be curtailed to secure the freedom of others.").

The only ones who support unlimited negative liberty are Anarchists.[113] Liberty "must be weighted against the claims of many other values," such as "equality, [ ] justice, [ ] happiness, [ ] security, [and] public order," and therefore it cannot be unlimited.[114] Most liberal thinkers have grappled with the issue of these limits. Mill's "harm principle" is among the most noted examples of a liberal theory for rights' restriction,[115] yet there are many other liberal theories regarding the limits of rights in general and of free speech in particular.[116] After all, "individual freedom is [not], even in the most liberal societies, the sole, or even the dominant, criterion for social actions."[117]

Liberalism's limits are an issue of line-drawing. And in connection with free speech, there are two questions: first, whether speech belongs in the sphere of immunity and total liberty; and second, if not, what are the limits of free speech protection?

It seems that some contemporary philosophers, like Ronald Dworkin,[118] stop at the first question. The notion of state neutrality and the prohibition upon the state to not promote any certain conception of "good life" stand at the base of this idea.[119] It is anti-perfectionist in the sense that it recognizes that no scale exists for assessing which views should be advanced and which should be banned.[120] Furthermore, liberal thinkers put great emphasis on the neutrality of the state and its duty to treat all those in its charge as equals.[121] Therefore, the ramifications of state-imposed censorship are far greater than the alleged harm that hate speech by private individuals may cause to minorities.[122] The structure of First Amendment jurisprudence resonates this understanding in its "abso-

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[113] *Id.* at 195.

[114] *Id.* at 215.

[115] *See, e.g.*, Berlin, *supra* note 4, at 208; RAPHAEL COHEN-ALMAGOR, THE BOUNDARIES OF LIBERTY AND TOLERANCE: THE STRUGGLE AGAINST KAHANISM IN ISRAEL 129-151 (1994); JOHN STUART MILL, ON LIBERTY 208 (1869).

[116] *See, e.g.*, COHEN-ALMAGOR, *supra* note 115, at 40-59, 107-54; Berlin, *supra* note 4, at 211.

[117] Berlin, *supra* note 4, at 214.

[118] *See, e.g.*, Ronald Dworkin, *Liberty and Pornography*, N.Y. REV. BOOKS Aug. 15, 1991, at 12-15; Dworkin, *Liberalism*, *supra* note 88, at 142 (Dworkin's latter works, which play on the theme of dignity, may be understood as a (poor) reverberation of his old views and of Berlin's understanding that positive liberty pre-assumes that individuals are incapable of knowing what is good for them, and is therefore degrading).

[119] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33, 48, 51, 271-74 (1974); COHEN-ALMAGOR, *supra* note 115, at 68-69; Dworkin, *Liberalism*, *supra* note 88, at 142.

[120] *See, e.g.*, COHEN-ALMAGOR, *supra* note 115, at 75.

[121] *See, e.g.*, Dworkin, *Liberalism*, *supra* note 88, at 125, 142.

[122] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("[S]ilence coerced by law – the argument of force in its worst form .").

lute" stance towards speech protection.[123] It is helpful to view the First Amendment as granting immunity, in its Hohfeldian meaning,[124] to speakers. The First Amendment reflects the Lockeian understanding that, in matters of faith, there is room for immunity for each person to follow her own beliefs without intervention.[125]

Yet some contemporary philosophers reject this concept of state neutrality in the realm of free speech, and answer the first question (of whether speech belongs to the protected sphere of negative liberty) negatively. Joseph Raz, for example, believes that some perfectionist elements in free speech laws are warranted to prevent worthless and degrading views.[126] In his view, it is inevitable for the state to use some perfectionist elements in a democracy, which entail judgmental views regarding various kinds of speech.[127] Most Western democracies' laws and practices also follow this logic. For them, the realm of expression is not inherently free. Free speech in contemporary Western constitutionalism holds both negative rights and positive rights characteristics, which enable regulation of speech, at least to a certain extent.

An important element in deciding whether freedom of speech should belong to the sphere of the negative protection of liberty is the manner in which we perceive free speech.[128] The more we believe speech is essential to our needs as human beings, the more we will be inclined to classify it as belonging to the sphere of negative liberty. By contrast, the more we believe that speech is not a vital ingredient in our lives, or that it comes at the expense of other, more important, values, we will be inclined to sacrifice it.[129]

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123 *See, e.g.*, Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 291-92.

124 *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, *in* LAW AND PHILOSOPHY: READINGS IN LEGAL PHILOSOPHY 127, 140-42 (Edward Allen Kent ed., 1970) (defining immunity as "one's freedom from the legal power or 'control' of another as regards some legal relation").

125 *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 124-49 (who believes this is still true for religion, but not necessarily for speech).

126 *See generally* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986). Perfectionism is a moral theory that starts from an account of the good life, or the intrinsically desirable life. It characterizes this life in a distinctive way. *See* THOMAS HURKA, PERFECTIONISM 3 (Oxford Univ. Press 1993).

127 *See, e.g.,* RAZ, *supra* note 126, at 404.

128 *See, e.g.*, EBERLE, *supra* note 10, at 189-90 ("Speech or expression, umbrella terms for the process of thought and communication at the core of human personhood, are, in many ways, the most fundamental of liberties.").

129 As Berlin eloquently put it, "To protest against the laws governing censorship or personal morals as intolerable infringements of personal liberty presupposes a belief that the activities which such laws forbid are fundamental needs of men as men, in a good (or, indeed, any) society. To defend such laws is to hold that these needs are not essential, or that they cannot be satisfied without sacrificing other values which come higher – satisfying deeper needs – than individual freedom, determined by some

An important aspect of speech that must be borne in mind when deciding whether it belongs to the sphere of total liberty, is that we can probably all agree that our thoughts are within this impervious sphere. No one can regulate our thoughts or their content. Indeed, if it were possible to regulate thought, it is doubtful whether we would be agreeable to such regulation. Speech is our means of expressing our thoughts. It is the manifestation of our inner selves. Therefore, regulating speech is the closest society gets to regulating thoughts,[130] and it undoubtedly entails a judgmental role for the government to discriminate among its citizens based upon their convictions: views that the government sanctions are allowed within the public sphere while views that the government rejects are disallowed, entailing stigma and even punishment. Punishing someone based upon what she says is punishing her for what she thinks or believes in. This kind of governmental intrusion is too powerful. Its

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standard that is not merely subjective, a standard for which some objective status – empirical or a priori – is claimed." Berlin, *supra* note 4, at 215.

[130] The brief discussion here brings up a distinction that may prove to be important for our discussion regarding three concepts: thought, speech, and action. The interrelationship between the three are crucial to understand the argument that speech should (or should not) be regulated. Speech is an intermediate step between thought (which we all agree belongs to the sphere of negative liberty) and action (which we all agree may be regulated). The liberal-perfectionist view puts thought and speech on the same side of the equation, rendering both immune from governmental intervention. This view is reflected in the speech-action distinction in American law. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17-18 (1970). *But cf.* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 70-73 (1989). Yet, the argument that restricting speech is the equivalent of thought control may be an oversimplification, since (luckily) we do not necessarily say all that we think. Nonetheless, it is a helpful oversimplification, since speech is responsible for the development of our thought, and for gaining legitimacy for our thoughts. Undoubtedly, speech is more closely-related to thoughts than to actions. But speech may also lead to action, and speaking about certain things may make them more likely to occur. Although sometimes the speech phase is skipped, and thoughts turn into action without being articulated out loud, this is rarely the case. Thus, for example, banning hate speech may not fully suppress racist thoughts, but it is likely to somewhat diminish racist acts (assuming, of course, that it does not have a backlash effect that actually makes racism appealing to some groups because it is outlawed). Therefore, paralleling thought and speech tends to lead to viewing speech as belonging to the fully protected sphere of negative liberty, while understanding speech as leading (and closely-related) to action will often lead to the contrary conclusion. While I believe that the parallelism between speech and thought is warranted, I submit that it is over-simplistic. It is, nonetheless, crucial in order to understand the tensions that each of us may feel regarding the appropriateness of speech regulation. *See, e.g.*, KENT GREENAWALT, CRIME, SPEECH, AND THE USES OF LANGUAGE 46 (1989) [hereinafter GREENAWALT, CRIME].

implications are far-reaching. It resembles Orwellian thought control.[131] It maintains the dogma of the society's mainstream, as understood and implemented by its law enforcement agencies.

Fully independent human beings should be entitled to make their own choices in life, based upon their purposes and convictions, whether these are rational or not. An autonomous person should be treated as such by his government and fellow citizens. To deny this is an insult to a person's self-conception and worth as a human being.[132] For these reasons, the proponents of the classification of freedom of expression as a negative liberty believe that the essentiality of freedom of expression in our lives justifies this result. The powerful words of Berlin seem adequate for summarizing the idea of free speech as a negative right. As he noted:

> Pluralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great disciplined, authoritarian structures the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognise the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform.[133]

There is a strong link between autonomy and liberty, especially in relation to free speech. This link is also manifested in liberalism's emphasis on the individual. Liberal individualism insists upon respecting each individual's capacity to make his or her own choices.[134] Free speech facilitates the flow of information to and from individuals and is viewed as a prerequisite for the true existence of autonomy. Denying a person access to certain views impairs her ability to receive full information and hinders the existence of true autonomy.[135] Similarly, denying someone's opinion

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[131] *Cf.* Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS Oct. 21, 1993, at 40-41 ("So if we must make the choice between liberty and equality that MacKinnon envisages—if the two constitutional values really are on a collision course—we should have to choose liberty because the alternative would be the despotism of thought-police.").

[132] *Compare* Berlin, *supra* note 4, at 203 (claiming that paternalism is an insult to conception as independent human being) *with* Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 57 (who uses dignity to articulate the same rationale).

[133] Berlin, *supra* note 4, at 216.

[134] *See* GREENAWALT, FIGHTING WORDS, *supra* note 12, at 135.

[135] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 352 (1985) [hereinafter DWORKIN, MATTER OF PRINCIPLE]; RAZ, *supra* note 126, at 204.

is viewed as paternalistic and unjust by liberals.[136] "[O]nce conceived of as a negative liberty, autonomy becomes closely associated with speakers,. . . [and]. . . means freedom of the speaker to say whatever he wants."[137]

The link between liberty, autonomy, and individualism is reflected in the works of Ronald Dworkin, Robert Post, and Joseph Raz, among others. There are some possible variations in this link. Ronald Dworkin assumes the existence of the liberal autonomous free speech environment in which government cannot single out certain kinds of speech.[138] Robert Post emphasizes concepts other than liberty,[139] and offers a broader definition of "democracy."[140] Post's democracy domain is not necessarily individualistic, and therefore may render a different view of the nexus between free speech and liberty.[141] Yet, Post's democracy domain in the American context leads to identical results as Dworkin's view, since Post identifies U.S. democracy as distinctively individualistic.[142] Therefore, in the American context there is no substantial difference between Post's and Dworkin's views. Yet outside the U.S. context, both views may lead to different outcomes. Finally, an emphasis on autonomy that is not coupled with strict individualism may lead to speech restriction, as Joseph Raz's scholarship demonstrates.[143]

As Greenawalt correctly notes, "[a]ny country's dominant culture will place more or less emphasis on individuals or communities, and this will affect the kind of latitude the political branches and courts will afford to speech."[144] The United States is exceptional in its individualistic approach to free speech, and virtually all other democracies leave more room to community norms in its free speech laws.[145] The "community-free zone" that is characteristic of First Amendment law is unparalleled.[146]

Therefore, the "liberty" domain offered as part of the model presented herein conjoins negative liberty, autonomy, and individualism. Unlike

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[136] DWORKIN, MATTER OF PRINCIPLE, *supra* note 135 at 353.

[137] Wells, *supra* note 31, at 163; *see also* Rosenfeld, *supra* note 34, at 1529-30.

[138] DWORKIN, MATTER OF PRINCIPLE, *supra* note 135, at 356.

[139] *See, e.g.*, POST, *supra* note 1, at 135.

[140] POST, *supra* note 1, at 6-7 (defining democracy).

[141] Post himself recognizes that traditional First Amendment doctrine is a "quaint focus on autonomy" POST, *supra* note 1, at 289. *See also id*. at 268-69, 278 ("Traditional First Amendment jurisprudence uses the ideal of autonomy to insulate the process of collective self-determination from" suppressing speech within public discourse for the sake of imposing a specific version of national identity).

[142] POST, *supra* note 1, at 9-10.

[143] RAZ, *supra* note 126, at 18-19.

[144] GREENAWALT, FIGHTING WORDS, *supra* note 12, at 8-9.

[145] *See id.* at 14 ("Among political societies, the United States is perhaps the most individualist.").

[146] *See* POST, *supra* note 1, at 9-10.

Post's model, it does so independently of a specific legal setting (such as the U.S. legal system). Other Western democracies are less individualistic, and more communal, than the United States' heritage.[147] Therefore, unless we presuppose individualism as an integral part of the "liberty" domain, the libertarian nature of free speech is not preserved. A communitarian perception of political society may warrant speech restriction, through the imposition of shared values or the promotion of the common good.[148]

"Liberty" also stands at the base of freedom of expression from a theoretical standpoint, although a free speech principle must be distinct from a principle of general liberty.[149] Nonetheless, the core of freedom of expression's classical understandings is heavily linked to the conception of liberty, especially since freedom of expression's roots emanate from a libertarian era.[150] This issue has been discussed in detail elsewhere and the analysis will not be repeated here.[151]

Nonetheless, "liberty" is not a free speech justification *per se*. Scholars, such as Fredrick Schauer, claim that freedom of speech is different than other freedoms, and accordingly warrants special protection.[152] The philosophical justifications for free speech further serve the goal of free speech protection, and help explain why freedom of expression deserves its special status.[153] Therefore, while "liberty" is a general justification for avoiding governmental infringement of fundamental rights, it plays a special role in free speech protection. This is why liberty is closely linked to freedom of expression. This view is also reflected in the manner freedom of expression is protected through the due process clause in the United States.[154]

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[147] *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 146 (comparing Canada and the United States).

[148] *Id*.

[149] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 7-8 (1984) [hereinafter SCHAUER, PHILOSOPHICAL ENQUIRY]; Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 121-23 (1989) [hereinafter Greenawalt, *Free Speech Justifications]*. For elaboration on classical negative rights see the discussion in Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 995-96.

[150] *See, e.g.,* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 34-5 (1996) (noting that the First Amendment "has long served as the breeding ground of libertarian sentiment.").

[151] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 963, 965-66.

[152] *See* SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 149, at 7-8; Frederick Schauer, *Speaking of Dignity, in* The Constitution of Rights: Human Dignity and American Values, *supra* note 19, at 179-180; *see, e.g.*, Brison, *supra* note 65, at 320; GREENAWALT, FIGHTING WORDS, *supra* note 12, at 3; Greenawalt, *Free Speech Justifications, supra* note 149, at 120.

[153] For elaboration on free speech justifications, see Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 968-74.

[154] *See infra* Part IV.C.3 (discussing the incorporation hypothetical).

Furthermore, I share Robert Post's claim that we could understand a great deal more about free speech by "understanding the connection of speech to the specific social orders, . . . than by searching for any general 'free speech principle.'"[155] Rather, the quest for understanding free speech through its philosophical justifications and through the prism of "domains" (or "heritages" or "traditions") is complementary. These understandings reveal a fuller picture of free speech from a theoretical viewpoint.

This is why "liberty" may serve as a better tool for understanding the principles behind free speech than the theoretical justifications. This is especially true from a comparative perspective, since the use of "liberty" and "dignity" aptly captures the primary values that are at stake in free speech protection in a given society, and embody the basic commitments of their society.[156] No society embodies the principle of liberty in its free speech jurisprudence better than the United States.

The supremacy of liberty as an American constitutional value is evident. As Edward Eberle portrays it, "Americans believe in individual liberty more than any other value. For Americans, this means freedom to do what you choose."[157] Eberle recognizes freedom of speech as the clearest embodiment of the value of liberty in the American legal system. In his words, "[f]ree speech functions legally, as well as symbolically, in promoting this vision of individuality. In this sense, free speech is the embodiment of the preeminent value of American society: liberty."[158]

American constitutional law was shaped in a libertarian period, and these sources continue to affect American constitutional law in general and First Amendment doctrine in particular through the present time.[159] In addition, American constitutional history is embedded with references

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[155] POST, *supra* note 1, at 16.

[156] *Cf.* Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1220 (claiming that, "[i]n practice, [ ] the real choice in the Atlantic world at least, is between social traditions strongly oriented toward liberty and social traditions strongly oriented toward dignity. This is a choice that goes well beyond the law of privacy: It is a choice that involves all the areas of law that touch, more or less nearly, on questions of dignity.").

[157] EBERLE, *supra* note 10, at 6; s*ee also id*. at 191 ("Free speech captures the spirit of being American.").

[158] *Id.* at 7; *see also id.* at 6 ("No American principle of law demonstrates this concept of individual liberty better than the idea of free speech. . . . . Free speech thus becomes a zone of near absolute freedom."). Eberle contrasts this view of American constitutionalism with the German view on constitutionalism ("We can speak of a German constitution of dignity as compared to an American constitution of liberty . . . ."). *Id*. at 7.

[159] *Id.* at 16-17, 46-48. Eberle even calls the U.S. Constitution "a constitution of liberty." *Id*. at 17; *see also* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 961-63; FISS*, supra* note 150, at 34 (noting that the First Amendment "has long served as the breeding ground of libertarian sentiment."); *but see generally* RISA L.

to liberty, starting with the founding fathers' generation, notably, Thomas Jefferson.[160] The notion of negative liberty is associated most strongly with the classical English political philosophers (e.g., Locke, Hobbes and Smith) while positive liberty is similarly associated with continental European thinkers such as Hegel, Rousseau, Herder, and Marx.[161] Thus, it is not surprising that American constitutional philosophy leans towards liberty, whereas European constitutionalism tends to lean more towards dignity.[162] Europeans and Americans seem to differ when dealing with the concepts of human dignity, autonomy, and liberty.[163]

Liberty is an integral part of the free speech ethos and rhetoric established in early twentieth century First Amendment rulings by Louis Brandeis, Oliver Wendell Holmes and John Harlan,[164] as well as the later writings of William O. Douglas, Hugo Black and William J. Brennan,[165] among others.

We must bear in mind that in the realm of freedom of expression, the U.S. law holds a relatively narrow definition of liberalism, parallel to the classical liberal view presented above.[166] This is expressed, for example, in Post's analysis of First Amendment jurisprudence, which is "exceptional in the intensity of its commitment to the social order of democracy,"[167] and has a "classic commitment to individualism."[168] Greenawalt similarly notes that the U.S. free-speech "vision was distinctively liberal; it stressed personal integrity and self-direction and the restricted authority of government."[169]

GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007) (reviewing U.S. constitutional law development prior to *Brown*).

[160] *See, e.g.*, Letter to Archibald Stuart, Dec. 23, 1791, *selection available at* http://www.monticello.org/reports/quotes/liberty.html ("I would rather be exposed to the inconveniencies attending too much liberty than to those attending too small a degree of it."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (Jefferson's choice of "Life, Liberty, and the pursuit of Happiness" as unalienable rights).

[161] *Cf.* Berlin, *supra* note 4, at 170.

[162] *See* EBERLE, *supra* note 10, at 7; Brugger, *Comment*, *supra* note 33, at 72-74; Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1220.

[163] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 982-86 (regarding "term confusion").

[164] *See, e.g.*, *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 624- 631 (1919) (Holmes, J., dissenting); Patterson v. Colorado, 205 U.S. 454, 465 (1907) (Harlan J., dissenting).

[165] *See, e.g.*, Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 291 n.82.

[166] *See, e.g.*, EBERLE, *supra* note 10, at 191 (noting that "the Supreme Court has constructed speech as a presumptively protected zone of freedom, free from ordinary restraints, such as those applicable to conduct, in which citizens are able, quintessentially, to think, feel, and say what they like without fear of punishment. In this sense, it is the archetypal American liberty, representing the idea of freedom.").

[167] POST, *supra* note 1, at 9.

[168] *Id.*

[169] *See* GREENAWALT, FIGHTING WORDS, *supra* note 12, at 125.

Since my scholarship focuses on free speech, which receives an almost libertarian approach in current First Amendment jurisprudence, I have adopted this understanding of liberalism for the purpose of my comparative model. As I have demonstrated extensively elsewhere, First Amendment jurisprudence is based upon a *laissez-faire* approach.[170] In addition, free speech is perceived as a negative right, and receives a robust protection.[171]

Arguably, the classification of liberty as classical liberty when referring to free speech also can be justified when looking outside of the U.S. Dworkin, for example, claims that "freedom of speech, conceived and protected as a fundamental negative liberty, is the core of the choice modern democracies have made . . . ."[172] Free speech is often referred to as a "liberty" by foreign courts, many of which adopt a protective *laissez-faire* approach in certain areas, such as prior restraint, that is comparable to the U.S. approach.[173]

It is not surprising that when Western democracies started to develop their free speech jurisprudence in the past ten to twenty-five years,[174] they usually started with the more traditional aspects of free speech, such as prior restraint. When these aspects are concerned, the classical paradigms seem applicable among all democracies. At that time, the United States was the only legal system with an advanced free speech jurisprudence, from which other legal systems could borrow.[175] But in recent years, as free speech rulings have touched upon non-traditional issues (such as pornography, silencing, etc.), Western countries have started to drift apart from the classical paradigm.[176] As more and more Western

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[170] Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 963.

[171] *See id.* at 960-68.

[172] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 221 (1996); Dworkin, *Liberty and Pornography*, *supra* note 118, at 13 (Dworkin qualifies this claim by saying, inter alia, "It is by no means universally agreed that censorship should never be based on content."). Although this perception may be philosophically desirable, it has little support in the laws and practice of Western democracies, excluding the United States. *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 993-94.

[173] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 963 n.22 (also see the accompanying text).

[174] Free expression jurisprudence in other Western systems started to develop relatively recently, starting approximately twenty-five years ago in Europe, twenty years ago in Canada, and around ten years ago in other countries. *See* Fredrick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 4, at 47, 54 [hereinafter Schauer, *Freedom of Expression Adjudication*].

[175] *See* Schauer, *Exceptional First Amendment*, *supra* note 54, at 31.

[176] *See, e.g.*, *id.* (noting that other Western democracies have deliberately chosen a different course than the United States, after considering the American alternative).

democracies have started to independently develop their free-speech jurisprudence, to reflect their commitments (which fall under the umbrella of dignity), alternatives to the American paradigm have grown.[177] Today, most Western democracies extensively borrow free speech ideas, and the United States has lost its exclusivity (and relevance). This relatively new phenomenon can be traced to the late 1980s.[178]

In the international arena, all speech protective instincts rest upon the traditional perception of liberty and fear of governmental control. In the United States, the same natural tendencies that gave birth to the First Amendment's unique free speech protection are still attached to it. Although contemporary "liberalism" in the U.S. has grown apart from its classical roots, in the realm of free speech, the current doctrine still lies in the classical interpretation of liberalism. This is why it is correct to view liberty in its classical interpretation in the context of freedom of expression, notwithstanding all other possible meanings that may be ascribed to this term. In the context of freedom of speech, classical liberalism still remains a useful paradigm to assess freedom of expression through a comparative lens.

In conclusion, a legal system that bases its free speech doctrines along the lines of liberty avoids limiting speech except for extreme circumstances, such as a clear and immediate danger arising from that speech.[179] Speech that stands at odds with the central societal values is not restricted by law, although it may be socially unacceptable. Libel laws are lax, requiring at a minimum a preponderance of evidence,[180] and give strong protection to speech that is directed at politicians and public figures.[181] In addition, libel is primarily conceived as a civil tort, and not as a criminal offence.[182] Also, there are no criminal prohibitions on hate speech, incitement for violence, and pornography. This would also mean a content-neutral approach that is impartial regarding unpopular kinds of speech.[183] The enforcement of a civil and polite public discourse would be outside the limits of the law. This portrayal of liberty-based free

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[177] *Id*.

[178] *Id*. at 54.

[179] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (the Clear and Present Danger test); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (the Fighting Words doctrine).

[180] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974) (discussed further in dissenting opinion).

[181] *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 270-72 (1964) [hereinafter Sullivan].

[182] *See, e.g.*, Fredrick Schauer, *On the Relationship Between Press Law and Press Content*, *in* FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION 51, 52-57 (Timothy E. Cook ed., 2005) [hereinafter Schauer, *Press Law and Press Content*].

[183] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 386-87 (1992); *see also* discussion on content-neutrality *infra* in Part IV.C.2.

speech laws is characteristic to only one democracy in the world: The United States of America.

Now that the theoretical framework for my model has been presented, it is time to examine the interrelationship between human dignity and liberty.

C. *The Interrelationship between Human Dignity and Liberty*

Although human dignity and liberty are distinctive, they are nevertheless interrelated in important and systematic ways.[184] All democracies, without exception, recognize the inherent tension between the two, and are constantly attempting to reconcile them. Western free speech laws reflect an amalgamation of community norms and libertarian instincts. But as academics, our role is to analyze free speech laws and practices and to expose the underlying tensions behind them. The fact that laws and practices frequently reflect a certain dignity-liberty balance makes neither dignity nor liberty indistinguishable.

It may, at times, appear that the distinction between human dignity and liberty is blurred. Thus, the collimation that is often made between human dignity and autonomy[185] pulls human dignity closer to liberty; and the progressive understandings of liberalism pull liberty closer to human dignity.[186]

Edward Eberle's insightful analysis of the German and American constitutional visions as resting on dignity and liberty respectively is an important piece of scholarship in the mapping of freedom of expression attitudes in the West. Yet, his claim that liberty and dignity are "converging values," which "blend together in the constitutional jurisprudence of both Germany and the United States," is inaccurate.[187] While his argument that "[c]laims to liberty are usually rooted in respect for dignity, just as the realization of dignity requires the exercise of liberty"[188] may be true, it does not necessarily follow that dignity and liberty are converging. Theoretical clarity requires a distinct dichotomy between dignity and liberty, although, in reality, they may seem combined.[189]

What may seemingly make things more difficult is the vagueness that surrounds the terms "human dignity" and "liberty," as discussed at length

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[184] POST, *supra* note 1, at 13-15.

[185] *See*, *e.g.*, Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 985.

[186] *See id*. at 975-82 (dealing with different understandings of the autonomy-dignity nexus); *supra* text Part II.B. (dealing with progressive liberal understandings).

[187] Donald P. Kommers, *Introduction* to EBERLE, *supra* note 10, at xi-xii.

[188] *Id*. at xii.

[189] *See infra* Part III for my criticism concerning Post's constitutional domains model, which lacks a clear and convincing line-drawing mechanism to distinguish certain behaviors as belonging to an exclusive "domain." Eberle still keeps a distinction between human dignity and liberty, but like Post, his line-drawing mechanism is flawed. EBERLE, *supra* note 10, at 6-7.

above. The content of each of these values is culture-specific and varies among different legal systems. Neither human dignity nor liberty carry the same meaning in the United States, Germany, or elsewhere.[190] Due to human dignity's and liberty's vague nature there is often no consensus within each of these systems as to their exact meaning, scale, and scope. This fact makes the task of comparing these terms across the different systems almost unattainable, and requires particular attention as to the differences between the terms' meanings. The model presented herein helps avoid the discrepancies among different legal systems' approaches to dignity and to liberty by offering a classification of these terms that is free from constraints of any specific legal system.

Some American First Amendment scholars like to think that free speech laws are off-limits from the control of community norms,[191] although that is not quite the case. Even the United States of America, which is by far the most liberty-oriented, has community norms that regulate the periphery of its protected speech sphere. Obscenity is a prime example of speech that was carved out of the free speech arena because of community norms.[192] The determination whether or not certain materials are obscene is made by a jury applying "contemporary community standards."[193] Thus, the boundaries of free speech are set by community standards.

Another example of the affect of community norms on the contours of free speech protection in the U.S. is low-value speech, such as commercial speech and libel, which allow certain content-based restriction.[194] The full picture of First Amendment law reveals that the exceptions from speech in U.S. law are influenced by non-liberal aspects. Perhaps Justices Black's and Douglas's absolutist approach is the only one which conforms with a total inclusion in the liberty domain.[195]

But for maintaining coherence in First Amendment law, and in order not to disturb the current discourse that raises fears of line-drawing, slippery slope, and content neutrality, to name a few of the tenets of American free speech discourse, the free speech exceptions are usually regarded

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[190] *Cf.* EBERLE, *supra* note 10, at 50 (noting that "[s]ince human dignity is a capacious concept, it is difficult to determine precisely what it means, in law, outside the context of a factual setting. It is one of those terms best understood through application and not definition.").

[191] POST, *supra* note 1, at 10.

[192] *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49, 57-62 (1973) (formulating the contemporary community standards test for obscenity). *See also infra* Part IV.C.2 for elaborated discussion on obscenity in the United States ,.

[193] *Miller*, 413 U.S. at 24.

[194] *See, e.g.*, GEOFFREY STONE, ET AL., CONSTITUTIONAL LAW 1112-233 (4th ed. 2001).

[195] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 866-67, 874-75, 881 (1960); *See* Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 291-92.

as outside the scope of the First Amendment, and are often artificially viewed as "non-speech."[196] This strategy may actually be wise, since it maintains clearer boundaries than a balancing discourse. Yet, it is less sincere and transparent.[197]

Democracies may vary in the ways they choose to balance dignity and liberty, but all democracies eventually have to make these choices based upon their history, constitutional jurisprudence, and societal commitments.[198] This balance is by nature "unstable and contestable."[199] How the tension between dignity and liberty is resolved depends, in part, on how each country conceptualizes the individual, the state, and their interrelationship.[200] Other parameters that affect this balance are the place of positive rights in a country's constitutional jurisprudence and the extent to which the audience is perceived as holding rights vis-à-vis speakers.[201]

Finally, the importance of history should not be underrated. It is the primary predictor of a legal system's attitude towards speech restriction. This is often referred to as "path dependency."[202] The favorable attitude of Western democracies towards speech restriction and the American tendency to recoil from it are deeply rooted, from different philosophical backgrounds,[203] to current practices.[204] To borrow a metaphor from Whitman, American law is a body caught in the gravitational orbit of

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[196] See for example the conduct-speech distinction as discussed in *supra* note 130.

[197] *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 174, at 52-53 (presenting claims that the non-American constitutional discourse of balancing, which also applies to free speech, is more honest and transparent than the American discourse under the First Amendment).

[198] Post also holds a similar view, calling it "authority." *See* POST, *supra* note 1, at 12-13.

[199] *Id.* at 14.

[200] Gower, *supra* note 13, at 222. ("The more faith placed in individuals and their autonomy and the more distrust of the state, the greater the protection for freedom of expression. The more individuals are seen as part of society and the more the state is trusted, the greater the restriction on expression for the protection of public safety and welfare.").

[201] For a more thorough discussion of these issues see Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 992-95.

[202] Carmi, *Comparative Notions of Fairness, supra* note 2, at 307; Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, 8 U. PA. J. CONST. L. 255, 268-69 (2006); *see, e.g.*, Schauer, *Press Law and Press Content*, *supra* note 182, at 64.

[203] The American free speech roots lack a philosophical tradition of human dignity, similar to that found in Europe, and especially Germany. *See* discussion *infra* Part IV.B.2.

[204] *See also* Whitman, *Two Western Cultures of Privacy*, *supra* note 11, at 1221 ("We can reject the notion that differing societies should have different standards. But if we take that tack, we must face the fact that we will not succeed in changing either world unless we embark on a very large-scale revaluation of legal values."); *see also* Schauer, *Press Law and Press Content*, *supra* note 182, at 64.

liberty values, while European law is caught in the orbit of dignity.[205] Yet the distance between the American and Western approaches can often "stretch into the unbridgeable."[206]

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Since Robert Post's Constitutional Domains model is probably the most comparable model to the one offered herein, it is important to distinguish my model from Post's, and explain why I decided to depart from his insightful analysis. While Post's Constitutional Domains generally offers a viable analytical tool for examining the disparities among different legal systems' free speech attitudes, I believe that it is insufficient in its current form. The revised model I propose addresses some of the weaknesses of Post's model, and thus offers a less controversial comparative analysis for freedom of expression in Western democracies.

III. Post's Constitutional Domains – A Revision

A. *Post's Model in a Nutshell*

Robert Post states that there are three social domains of constitutional law: (1) Community and Human Dignity, (2) Management and Instrumental Reason, and (3) Democracy and Human Freedom.[207]

In a nutshell, Post posits that these three distinct forms of social order constitute the considerations in framing constitutional doctrines in every legal system. These three social orders are in constant interaction, and the differences between the doctrines of different legal systems may be explained by the varying weight given to each social order in a particular system, or even in a particular field, such as freedom of expression.[208] Post's model also addresses the constant interplay between constitutional law and society, and implies that understanding constitutional law requires cultural analysis.[209]

While I find Post's model to be stimulating and helpful in examining the differences between diverse legal systems' approaches to freedom of expression, I decided to deviate from his model in structuring my own.

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[205] Whitman, *Two Western Cultures of Privacy*, *supra* note 11, at 1163 ("There are certainly times when the two bodies of law approach each other more or less nearly. Yet they are consistently pulled in different directions, and the consequence is that these two legal orders really do meaningfully differ: Continental Europeans are consistently more drawn to problems touching on public dignity, while Americans are consistently more drawn to problems touching on the depredations of the state.").

[206] *Id.*

[207] *See* Post, *supra* note 1, at 2, *passim*.

[208] *See id.* at 14-15.

[209] Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1275 (1999).

Post defines his community domain as the attempt to enforce norms and mores that are believed to be shared by the members of society.[210] My "human dignity" approach is quite parallel to Post's community social order, due to the communitarian traits I have illustrated, and due to Post's own affiliation of human dignity with his community category.[211] Nonetheless, the choice of "dignity" rather than "community" as the shorthand version for this "domain" is important. It puts a greater focus on actual constitutional law doctrines and rights abroad, and lends more credence to the constitutional reality in many Western countries.

It also reflects the shift in contemporary human rights discourse from the old communitarian enforcement of morals,[212] to the new dignity-based discourse of rights' protection.[213] In contrast, "community" is a broader philosophical term that bears little or no legal significance in rights discourse.[214] But in terms of the contents of the dignity/community domain, Post and I share a similar vision and understanding.

Post's Management Domain serves as a reminder that sometimes the motivations of governmental actions are not ideologically driven, but are instrumentally driven by rationality, efficiency, or professional values.[215] They serve as a powerful tool to understand the influence of "professional values" (such as *stare decisis*, positivism, formalism, textualism, etc.) on the issues at hand, and isolate them from the value-judgment debate which the two other social orders entail. Nonetheless, Post's managerial social order is in the background of my model and not an integral part of it, since the model's purpose is to focus on the two other "social orders."[216] Since the managerial arguments are ideologically neutral vis-à-vis these traditions, there is no need to include them as part of the model, and their background implementation is sufficient.

The pivotal point where my model departs from Post's is in the structuring of the domain in which free speech is supposed to thrive. For Post, it is "democracy" that encapsulates this sphere. Yet the manner in which

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[210] *See* POST, *supra* note 1, at 3-4.

[211] *See*, *e.g.*, *id*.

[212] For a glimpse at the "old paradigm" of enforcement of morality, see the classic writings of H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963), and in particular his disputes with Lord Devlin described throughout the book.

[213] *Cf*. KARLA K. GOWER, LIBERTY AND AUTHORITY IN FREE EXPRESSION LAW: THE UNITED STATES AND CANADA 25, 190-91, 207-08 (Eric Rise ed., 2002), who chose "authority" to capture the application of community norms. I believe that this choice is incorrect, since it reflects the old human rights discourse, and not the current emerging dignity paradigm. Perhaps because Gower's research focused on Canada, which does not use human dignity in the same manner as other Western democracies, such as Germany and South Africa, she was unaware of these emerging trends, although they are followed by Canada as well.

[214] POST, *supra* note 1, at 4-5.

[215] *Id.* at 4-6.

[216] *Id.*

Post defines "democracy's" setting is inapt for serving as a comparative mechanism to analyze and explain free speech in Western democracies.

B. *Why "Liberty" and not "Democracy"*

The subtleties of Post's democracy domain are complex. He departs from the traditional libertarian rationale for free speech, and uses another basis to advocate for nearly the same views and goals.[217] Instead of the right of individuals to freely speak due to their negative liberty from governmental interference,[218] Post shifts his focus to the legitimacy of the democratic process. He does so, inter alia, to refute "collectivist theories" of the First Amendment.[219]

1. Post's Model as a Collectivist Model

Post defines his democracy domain as "collective self-determination,"[220] and views "the "essential problematic of democracy as the reconciliation of individual and collective autonomy."[221] When Post says that democracy "attempts to reconcile individual autonomy with collective self-determination by subordinating governmental decision-making to communicative processes sufficient to install in citizens a sense of participation, legitimacy, and identification,"[222] he means that we are willing to accept the majority's decision, even if it is different from our own, because we are able to express our thoughts in the decision-making process. He views a regulated public discourse as undermining the legitimacy of the democratic process.[223] Such regulation is only justifiable where it does not contradict its democratic purpose, such as benign con-

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[217] *Compare* POST, *supra* note 1, at 273–74 ("[I]f the state excludes communicative contributions on the grounds of a specific sense of what is good or valuable, the state stands in contradiction to the central project of self-determination.") *with* Berlin, *supra* note 4, at 169, 178-81, 190-92, *and supra* text accompanying notes 105—120.

[218] *See supra* Part II.B.2. (defining "liberty and autonomy"); *see also* POST, *supra* note 1, at 322 ("[T]his invitation to balance ought to be declined. This is not because balancing can be ruled out in advance by some "absolutist" algorithm; the attraction of a purely formal democracy may itself in certain circumstances no longer command limitless conviction.").

[219] *See* POST, *supra* note 1, at 268–89 (Post defines "collectivist theories" as those that "subordinate individual rights of expression to collective processes of public deliberation").

[220] *Id*. at 6 (quoting Karl Marx, CRITIQUE OF HEGEL'S "PHILOSOPHY OF THE RIGHT" 31 (Annette John and Joseph O'Malley, trans., 1970).

[221] *Id*. at 7.

[222] *Id*. at 273.

[223] *See id*. at 275 ("No particular objective can justify the coercive censorship of public discourse without simultaneously contradicting the very enterprise of self-determination.").

tent-neutral regulation.[224] Since public discourse is the medium of collective self-determination, censorship precludes citizens from expressing their views on issues that affect them.[225] Post sees public discourse as "an arena within which citizens are free to continuously reconcile their differences and to (re)construct a distinctive and ever-changing national identity."[226] The public discourse arena is a means of resolving collective identity; therefore no particular vision of national identity can justify suppression of public discourse.[227] Post is very clear on this issue: "the state must always regard collective identity as necessarily open-ended."[228]

Another way to understand Post's argument is to refer to "public discourse" as a unique forum in which the democratic process is maintained.[229] This is the only forum in which there can be no rules limiting scope or content. It may be considered an area of negative liberty. It has a distinctive character that distinguishes it from other *fora*. It is "the last redoubt of self-governance."[230] If Post had been satisfied with articulating this argument as a reason to afford robust protection to free speech, it would have been less problematic.[231] As such, Post's insights are illuminating. But instead of stopping there, Post turns this argument into the center of his theory. If the basis behind Post's approach falls, the alternative is the interplay between two domains that carry speech-restrictive features. This would eventually lead to a weak protection for free speech. And, as shown below, the basis behind Post's theory is weaker than it may appear at first sight, especially outside the U.S. context.

2. Post's Ambiguity

Post doubts whether any content-based speech restriction can ever be reconciled with the purpose of democracy.[232] He believes that, "the value of individual autonomy is inseparable from the very aspiration for

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[224] *Id*. at 277. Such regulation is equivalent to H.L.A. Hart's "coordination norms," *see* H.L.A. HART, THE CONCEPT OF LAW 84-85 (1961), or what is known in American First Amendment jurisprudence as content-neutral regulation (such as time, place and manner regulation). POST, *supra* note 1, at 277–78.

[225] POST, supra note 1, at 273.

[226] *Id*.

[227] *See id*. at 277.

[228] *Id*. at 278.

[229] *Id.* at 277.

[230] *Id*. at 284.

[231] *Cf*. SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 149, at 7–8 (relating to the question of "why speech is different."); Schauer, *Speaking of Dignity*, *supra* note 152, at 179.

[232] *See* POST, *supra* note 1, at 285–86 ("To be frank, I am uncertain whether appropriate criteria of autonomy can ever be satisfactorily established, for the tension between democracy and the attempt to justify the collectivist theory by denying the autonomy of citizens is so very fundamental.").

self-government."[233] Nonetheless, Post seems sympathetic to progressive liberal and feminist critiques on free speech, and he gives the impression of openness to the possibility of restricting speech.[234]

Post views the old libertarian paradigm as obsolete.[235] Yet he claims that the newly proposed collectivist paradigms for free speech are not yet ripe to displace the traditional First Amendment jurisprudence.[236] Still, he is open-minded to the possibility of a paradigm shift, if not at present, then in the foreseeable future.[237] He attempts to reply to the progressive liberal critique within its own logic.[238] He recognizes some (or a large part, depending on the book's chapter) of its rationale, but still rejects most of it.[239] As Steiker notes, "Post is thus fairly regarded as a skeptical defender of the status quo. He stands outside the current doctrine, but is unable to resist or escape it."[240]

As Post rightly notes, "[M]any who practice empirical political science would no doubt object to the identification of democracy with the value of autonomous self-government. But within the world of constitutional law this identification stands virtually unchallenged, perhaps because of the absence of serious alternative normative accounts of democracy."[241] He is right about the absence of serious normative accounts to substitute the liberal paradigm, but he fails to follow the logic of his own claim. Post's non-liberal model suffers from the same difficulties as the collective models he criticizes.[242] And although his account is among the best and most articulate outside the liberal paradigm, it is unpersuasive. Its inherent ambiguity, as Post himself expresses on several occasions, makes the argument feeble that the protection of an unfettered free speech is desirable per se.[243]

This is the purpose Post believes the social order, which is competing with his collectivist "community domain," should support.[244] This base for Post's democracy domain is broad and manipulable. It may host free speech absolutism or free speech restriction, depending on the content poured into it, particularly the role of individualism within this domain.[245] Furthermore, although Post's model is speech-protective, the protection

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233 *Id*. at 277.

234 *Id.* at 112-116. This ambivalence in Post's writings is discussed further below. *See infra* text accompanying notes 248—63.

235 *See* POST, *supra* note 1, at 289.

236 *Id*.

237 *See, e.g.*, POST, *supra* note 1, at 116, 289, 331.

238 *See id*. at 268-289.

239 *See id.*

240 Steiker, *supra* note 1, at 1085.

241 POST, *supra* note 1, at 278; *see also id*. at 288–89.

242 *See* POST, *supra* note 1, at 268–89.

243 *See, e.g.*, Lessig, *supra* note 86, at 1462.

244 POST, *supra* note 1, at 179-196.

245 *Id.* at 9–10.

it affords free speech falls short of its classical liberal counterpart. As Steiker rightly noted, "Post's seemingly contingent defense of individual autonomy is much less secure than one that proceeds from foundationalist, individualist premises."[246]

Post's ambiguity is also manifested by the manner in which he is perceived by his colleagues. He is characterized by his critics as a collectivist (or neo-collectivist),[247] a civil libertarian,[248] and having a method that is in part realist and in part post-realist.[249] He is attacked from both the right and the left, either claiming he is too individualist[250] or claiming that he is a communitarian.[251] These different understandings of Post's theory, and the mixed signals Post sends in his writing, makes one wonder whether Post is a chameleon. Perhaps this great disparity in the way Post is understood stems from the richness and complexity of his model, which is more consistent than he is given credit for. But a more likely explanation is that the ambivalence reflected throughout his book can lead to the clear conclusion that Post is unclear.

Post confesses his deep ambivalence and conflict,[252] which is duly noted by critiques of his work.[253] Although Post always arrives at the same conclusions, it often feels as if he reaches this destination reluctantly.[254] Per-

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[246] Steiker, *supra* note 1, at 1078.

[247] *Id*.

[248] Frank I. Michelman, *Must Constitutional Democracy Be "Responsive"?*, 107 ETHICS 706, 711 (1994) (reviewing ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995)).

[249] Lessig, *supra* note 86, at 1423.

[250] *See, e.g.*, Morris Lipson, Note, *Autonomy and Democracy*, 104 YALE L.J. 2249 (1995) (Lipson defends collectivism against Post's arguments, which Lipson casts as resting on individualism); Lessig, *supra* note 86, at 1436. Frank Michelman's affinity towards Post's views is mixed. Michelman characterizes Post as a civil libertarian, *see* Michelman, *supra* note 248, at 710, but at the same time characterizes Post's democracy domain as resting on *quasi*-communitarian foundations. *See id.* at 710–11; *but cf. id.* at 718 (claiming that the "Postean" responsive-democratic free-speech jurisprudence has a "libertarian temper").

[251] *See, e.g.*, Steiker, *supra* note 1, at 1078.

[252] *See, e.g.*, POST, *supra* note 1, at 293 ("I should add that writing this essay has been difficult and painful. I am committed both to principles of freedom of expression and to the fight against racism. The topic under consideration has forced me to set one aspiration against the other, which I can do only with reluctance and a heavy heart.").

[253] *See, e.g.*, Steiker, *supra* note 1, at 1075 & n.78; Michelman, *supra* note 248, at 715. *See also* Lessig, *supra* note 86, at 1462 ("[H]e has no firm conclusion about whether hate speech should be regulated, because he fully well understands the strongest reason to regulate hate speech. . . [O]ne feels the struggle in his thought as he works through the problem.").

[254] Steiker, *supra* note 1, at 1063–64 ("Post invariably, albeit reluctantly, embraces the First Amendment status quo. . . . Post thus emerges as a thoughtful, anguished defender of traditional First Amendment values."); *see also id.* at 1075 ("In addressing

haps the best argument in support of this claim is that his conclusions often strike the reader with surprise.[255] Post shares the suspicion expressed in contemporary First Amendment scholarship of the largely individualist emphasis in existing First Amendment law.[256] He is quite sympathetic to the feminist writings of Catharine MacKinnon and Andrea Dworkin.[257] His empathy towards the application of community norms is highly ambivalent.[258] These traits are in an inevitable conflict with Post's individualistic absolutist approach. At times it feels as if Post has multiple personalities; one which is highly sympathetic towards restriction of problematic speech, and another which protects speech no matter how hurtful.

Post appears inconsistent,[259] or perhaps even deliberately vague.[260] But even if his internal logic is consistent, his linguistic choice of "democracy" as a name for one of his domains may cause confusion.[261] Post uses the word "democracy" in two separate manners: as a social domain that functions within a democratic legal system, and as the name for the democratic legal system itself.[262] This use is tautological, confusing, and misleading. "Democracy" may be more suitable for describing the outcome of the interaction of Post's three constitutional domains, but his dual use of the word democracy makes understanding his exact meaning difficult at times.[263]

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the contemporary debate concerning constitutional protection for racist speech, Post arrived at the traditional, liberal position only tentatively and only after exhibiting deep ambivalence about rejecting the collectivist justifications for regulation.").

[255] *See, e.g.*, *id*. at 1078 ("Post's seemingly contingent defense of individual autonomy is much less secure than one that proceeds from fundamentalist, individualist premises.").

[256] *Id.* at 1085.

[257] *See* POST, *supra* note 1, at 89–116; Steiker, *supra* note 1, at 1075.

[258] *See, e.g.*, Steiker, *supra* note 1, at 1067–68; *see also id.* at 1085 ("Post is thus fairly regarded as a skeptical defender of the status quo. He stands outside the current doctrine, but is unable to resist or escape it.").

[259] *See* POST, *supra* note 1, at 18–19 (disclaiming claims for consistency due to the patchwork nature of his book).

[260] Post's deep ambivalence towards speech restriction, and his sympathy for the application of civility rules, may also be reflected in the ambiguity as to whether his democracy domain can accommodate speech restriction. *See supra* text accompanying notes 252-63 (discussing Post's ambivalence).

[261] POST, *supra* note 1, at 14.

[262] *See, e.g.*, *id.* ("The continued health of *democracy* requires, therefore, that the law fix and sustain an appropriate boundary between *democracy* and community.") (emphasis added).

[263] As a response to Post, I would say that "democracy" can be used to describe the result of the balance between dignity and liberty that each free society prescribes for its free speech laws. *See supra* Part II.C. (regarding the interplay between human dignity and liberty).

Perhaps the greatest difficulty with Post's democracy domain is the obstacle in deciphering Post's intention regarding the scope of this domain; most importantly, whether a speech-restrictive legal regime may still be considered as operating exclusively under the domain of democracy.[264] Although Post believes that democracy and individualism are inseparable, he theoretically divorces the two.[265] Apparently, the democracy domain does not necessitate an understanding that democracy is inherently individualistic.[266] Therefore, if there is a plausible way to envision the democracy domain as non-individual,[267] and the "essential problematic" of democracy "lies in the reconciliation of individual and collective autonomy,"[268] a legal regime that restricts free speech in the name of "collective autonomy"[269] (whatever that is) may be considered as functioning solely within the democratic domain. But on the other hand, Post sees pluralism as fitting comfortably within the community domain.[270] Would Post always categorize speech restriction under the heading of community and human dignity? Apparently he would. But he leaves an opening within his democracy domain that may lead to a different viewpoint.[271] If a certain speech-restriction is conceived to be motivated by the underlying purposes of the democracy domain, it will fall within its scope. This distinction is crucial, since if Post's model accommodates speech restriction within the "democracy domain," it legitimizes a speech-restrictive regime, and gives little or no guidance for a theoretical framework that affords robust free speech protection.

Post's model lacks a clear taxonomy of which behavior exclusively belongs to a certain domain. Lessig also noted this weakness in Post's model, saying that "[T]he hard question is drawing the boundaries—finding a way convincingly to place one sort of activity within one domain, and to distinguish it from activities in another. . . . A question then might be whether the tools that Post provides give courts the capacity to so distinguish."[272] Therefore, even if Post has a clear vision regarding the

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[264] To be clear, I use "democracy" here as Post's domain, and not as a democratic legal regime. I am taking for granted that democratic legal regimes may restrict speech and remain democratic. *Cf.* Michelman, *supra* note 248, at 723.

[265] POST, *supra* note 1, at 7.

[266] *Cf. id.* at 6–10, 277. Post believes that the U.S. democracy *is* based on individualism, so within the American context, the theoretical divorce of democracy and individualism is practically meaningless. But when applying Post's model to other democratic countries (or alternatively when questioning the American commitment to individualism, *see* POST, *supra* note 1, at 116), this distinction is vital. *See also*, *id.* at 285–86.

[267] *See, e.g.*, Michelman, *supra* note 248, at 720-23.

[268] POST, *supra* note 1, at 7.

[269] *Id.*

[270] *See id.* at 19, 89-116.

[271] *Cf.* Tushnet, *supra* note 209, at 1277.

[272] Lessig, *supra* note 86, at 1445.

scope of the democracy domain, it may still be abused by others, due to the lack of a convincing classification rule that precludes *any* speech restriction from the democracy domain, even restriction that may be perceived as furthering democracy.

Thus, Post's democratic social order may introduce community norms through the back door, if understood more broadly than Post initially intended.[273] Such a possible understanding disarms this conflict by placing some of the community norms, in the form of progressive liberal conceptions, within the "democracy social order."[274] As demonstrated above, "democracy" can be easily perceived as accommodating speech restriction, if it is not based upon purely individualistic principles.[275] The validity of these principles in the American context, although eventually preserved by Post, is also questioned by him.[276] Therefore, the fear that the articulation of democracy as the source of speech protection would prove counterproductive is well founded.

3. What is Democracy?

Labels matter. Under the Postean American constitutional ethos, "democracy" is good (and "community" is bad?).[277] It is hard to oppose something that furthers "democracy."[278] If the restriction of speech is perceived as promoting "democracy"[279] and in alignment with the rationales behind the First Amendment, it would be easier to advocate a paradigm shift that leads to restriction of problematic speech in the United States. In contrast, if restricting problematic speech is viewed as furthering community norms and is conceived as contradictory to the existing paradigm, a paradigm shift is less likely to occur. Although Post's model in its current form does not classify speech restriction as fitting within the democracy domain, it can be easily altered, if the individualistic component is taken out of the equation. Post toys with this option throughout his book.[280]

I believe that it is wrong to classify this restriction under the heading of "democracy" and that we should call it what it actually is: restricting

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[273] *See infra* text accompanying notes 285-289 (discussing the "epistemic" understanding of democracy presented by Michelman).

[274] POST, *supra* note 1, at 6.

[275] *See infra* text accompanying notes 264-71; *see also infra* text accompanying notes 286-91 (regarding Michelman's critique of Post).

[276] *See, e.g.*, POST, *supra* note 1, at 116.

[277] *Id.* at 6-10.

[278] *Id.* at 6.

[279] *Id.*

[280] *See, e.g.*, *id*. at 116 ("To elect the pluralist option is not to abandon the First Amendment, but rather to forsake the individualist assumptions underlying contemporary First Amendment law. . . . We need to reexamine our commitment to a First Amendment informed primarily by individualist principles.").

speech is *always* a matter of applying community norms.[281] A non-individualistic democracy domain legitimizes speech restriction more than if the speech limitation is framed as an enforcement of community norms.

Post's understanding of democracy hangs by a thread. Several leading scholars, including Frank Michelman, Jordan Steiker, Lawrence Lessig, and Mark Tushnet, have commented on difficulties arising from Post's conception of democracy. Steiker in particular notes that Post's model "[r]ests on a deeply normative, contested account of democracy."[282]

Frank Michelman's critique questions Post's preconceptions and basic assumptions regarding the nature of democracy in general, and the American democracy in particular.[283] Michelman demonstrates how Post's democracy-autonomy nexus may be incompatible with certain conceptions of democracy.[284] He claims that Post neglects other plausible understanding(s) of "democracy," which do not conform to his underlying individualistic assumptions, and which may result in the regulation of speech.[285] For instance, Michelman notes that the "epistemic" perception of democracy, such as Jürgen Habermas' theory, stands at odds with Post's understanding of democracy.[286] Michelman believes that Post should have moderated his claim regarding the individualistic nature of the American democracy, which commits it to the absolutistic doctrine due to the plausibility of the competing accounts for democracy.[287] Although Michelman refrains from determining whether the "epistemic" account for democracy is applicable to the U.S. context, he certainly gives credence to this understanding.[288] Moreover, the "epistemic" account for democracy is undoubtedly applicable to other Western democracies, where the individualistic foundations behind Post's theory are absent.[289]

As Michelman aptly shows, the use of democracy as a justification for robust free speech protection is problematic. Post's use of "democracy"

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[281] *Cf. id*. at 19 ("[D]espite the claims of modern pluralists to respect the value of diversity, pluralism in fact fits comfortably within the authority of community.").

[282] Steiker, *supra* note 1, 1077.

[283] Michelman, *supra* note 248, at 708.

[284] *Id*.

[285] *Id*. at 723.

[286] *Id*. at 721-23. Habermas's "epistemic" theory does not rest legitimacy on any individual sense, so it may allow content-based speech-restriction under certain conditions. *See id*. at 722; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 447-48, 459 (William Rehg trans., The MIT Press 1996); *see also* Michelman, *supra* note 248, at 723 ("[T]he epistemic theory's implications for the racist-speech question appear to depart from the absolutistic anti-censorship leanings of both the responsive and identificational conceptions as developed by both Post and Dworkin.").

[287] Michelman, *supra* note 248, at 710, 723.

[288] *Id*. at 723.

[289] *See* discussion *infra* text accompanying notes 297—308 (regarding the inapplicability of Post's model on other democracies).

neglects tensions that arise from its use, and ignores the fact that many democracies regulate hate speech while still being widely viewed as democratic.[290] Therefore, Michelman doubts whether summoning democratic ideals in defense of the American practical wisdom of protecting hate speech is adequate.[291]

Michelman is joined by other scholars such as Steiker, who rightly notes that, "[w]e simply cannot declare, a priori, that 'democracy' demands exalting unfettered debate about political and societal issues over the collective judgment that genuine deliberative debate requires some limitations on speech."[292] Lessig also takes a critical view of Post's "democracy."[293] I share these scholars' critique of Post's model, and believe that "democracy" is unsatisfactory for encapsulating the speech-protective viewpoint that is practiced in the United States.[294]

Post's alignment of democracy and free speech absolutism is presumptuous, and follows an ideological path that is absent from my model. By summoning democracy to his side, Post attempts to glorify free speech protection. If free speech absolutism furthers democracy, it portrays this view as required in a constitutional democracy and, as such, unobjectionable. Aligning democratic interests with such a viewpoint of free speech further entrenches current paradigms in American First Amendment law and makes a paradigm shift harder to reach. Post's motive is quite apparent, and his passion is understandable, yet his model has an inherent ideological bias in favor of free speech.

While I share similar understandings and passions, I believe that the use of democracy is both misleading and counterproductive. In this respect, my model is more direct and genuine than Post's *Constitutional Domains*. It follows along more descriptive lines.[295] Nonetheless, freedom of expression is not necessarily located in a singular tradition or constitutional domain. Most Western democracies deploy community norms in their free expression jurisprudence to one extent or another. Such a combination is not wrong as a matter of principle, although the field of freedom of expression requires a minimal and cautious use of community norms.[296]

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[290] Michelman, *supra* note 248, at 720–23.

[291] *Id.* at 723.

[292] Steiker, *supra* note 1, at 1077.

[293] Lessig, *supra* note 86, at 1436 ("Now again, the sense of 'democracy' here is a bit counter-intuitive. Democracy does not refer to the processes of substance of collective deliberation. It refers to what we might call the necessary immunities that individuals must have to participate in this practice of democracy. From what do individuals have to remain free in order to be properly free citizens within a democratic system? How free must individuals be from norms of civility so as to maintain space for public deliberation?"). *Cf.* POST, *supra* note 1, at 6.

[294] POST, *supra* note 1, at 6.

[295] *Cf., e.g.*, Michelman, *supra* note 248, at 711; Tushnet, *supra* note 209, at 1280.

[296] *Cf.* POST, *supra* note 1, at 286.

4. Post's Model's Suitability to Serve as a Comparative Model

Another concern regarding Post's model is its applicability to other legal systems, and the ability to use his theoretical framework as a comparative model. Although Post's model seems a viable tool, capable of highlighting issues that are applicable to all legal systems, it is inadequate outside of the United States. As Mark Tushnet aptly notes, "[I]t is significant for Post's analysis that he refers to 'tradition' and 'First Amendment jurisprudence,' *locating his analysis in the specific U.S. context*, rather than 'principles of free speech,' a phrase looking more *globally or philosophically*."[297] Post's own language suggests that his constitutional domains model is meant to decipher American constitutional law, and not necessarily all constitutional law.[298]

American democracy is unique in its commitment to individualism.[299] Therefore, Post's democracy domain offers little guidance to other democracies which may want to base their free speech laws along absolutist lines. In the lack of the American autonomy-democracy nexus, Post's democracy domain is likely to produce speech-restrictive outcomes outside of the American context, and his model loses much of its purpose. Consequently, Post's work is (arguably) a manifesto for free speech only within the boundaries of the U.S.[300] This understanding goes hand in hand with Tushnet's remark that, "Post. . .would be understood to be offering not a description of what democracy transcendentally requires but what democracy as it has been constituted in the United States requires."[301]

Post's claim, that the tension between democracy and the denial of citizens' autonomy due to collectivist concerns is probably irreconcilable,[302] does not conform to the laws and practices of Western democracies. His logic, which may seem reasonable in American eyes, simply does not work abroad.[303] Germans, French, and Canadians do not claim that their democratic regimes are illegitimate or nondemocratic because they withhold certain views from public discourse.[304] As the critiques of Post's

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[297] Tushnet, *supra* note 209, at 1276 (emphasis added).

[298] *Cf., e.g.*, POST, *supra* note 1, at 1 ("Three distinct forms of social order are especially relevant to understanding *our* constitutional law.") (emphasis added).

[299] *See, e.g.*, *id*. at 9.

[300] *Id*. at 116; *cf*. Tushnet, *supra* note 209, at 1277.

[301] Tushnet, *supra* note 209, at 1280.

[302] POST, *supra* note 1, at 286.

[303] *See, e.g.*, Tushnet, *supra* note 209, at 1280 ("The German example shows that a democratic nation can be committed to a vision of democracy that is different from the one to which Post claims that the United States is committed.").

[304] *See, e.g.*, Lessig, *supra* note 86, at 1463–64 (referring to Germany); Tushnet, *supra* note 209, at 1279–81 (referring to Germany); *id*. at 1282 (referring to Canada and Great Britain).

work questioned his legitimacy argument as weak within the U.S. context,[305] it becomes even weaker outside of the U.S. context.[306]

The contextualization of free speech protection in "democracy," when democracy is tailored according to the American model brings little help to other democracies that want to adopt robust free speech protection.[307] Post's model cannot sufficiently support a firm commitment to a robust free speech protection outside the United States, because it stems from Post's understanding of the way the American society conceptualizes democracy.[308] Liberty, by contrast, enables other democracies, which hold a different vision of the nature of the democratic process than Post, to have a philosophical basis for a robust protection of free speech. Because Post's democracy domain is tailored to fit the American model, it is insufficient to serve as a valid justification for free speech protection elsewhere.

Finally, Post recently used dignity and liberty to describe the tensions behind the different concepts of privacy.[309] This usage suggests that Post may not object to a new taxonomy of his Constitutional Domains model along these lines.

To recapitulate the weaknesses in Post's democracy domain, his attempts to offer an alternative model to the classic liberal justifications for free speech, as a response to collectivist theories, suffers from similar deficiencies to the models he criticizes. Post's ambivalence in structuring his model is reflected on several levels. He seems indecisive regarding

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[305] *See, e.g.*, Michelman, *supra* note 248, at 723.

[306] *See* Tushnet, *supra* note 209, at 1279–80 ("[T]he mere fact that German constitutional law allows more substantial limits on free expression than U.S. constitutional law does not undermine the assertion that Germany is a democracy—a different kind of democracy from the United States, but a democracy even so."). This is yet another indication that Post's linguistic choice of "democracy" for one of his domains is problematic. POST, *supra* note 1, at 6.

[307] *See id.* at 6.

[308] *Cf.* Michelman, *supra* note 248, at 711–12; *see also* Steiker, *supra* note 1, at 1072 ("He nonetheless ultimately embraces the liberal orthodoxy based on *his* conception of democratic public discourse and *his* particular understanding of *American tradition* of free speech.") (emphasis added).

[309] Robert Post distinguishes between privacy as an aspect of dignity and privacy as an aspect of liberty. *See* Post, *Three Concepts, supra* note 11. Post himself qualifies his offered taxonomy of three different, and in some respects incompatible, concepts of privacy as follows: "The first connects privacy to the creation of knowledge; the second connects privacy to dignity; and the third connects privacy to freedom." *Id.* at 2087. Post defines the third concept of privacy as "best conceived as an argument for liberal limitations on government regulation." *Id.* The same themes also feature in James Whitman's, *The Two Western Cultures of Privacy*. Whitman refers to additional scholars who understand the tension between privacy law in Europe and the United States in terms of dignity and liberty. Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1160–61 nn.42–43.

the appropriateness of free speech absolutism, and therefore sends mixed messages throughout his book. Although he always gets to the same results, the scope of his democracy domain is unclear. This partly stems from his dual use of the word democracy. Several scholars have noted that Post's conception of democracy is shaky, particularly outside the U.S. context. His model, which is tailored to fit American democracy, is inadequate for comparative analysis, and provides little help when applied to other Western democracies.

My "liberty" domain recasts Post's "democracy domain" in a (classic) liberal mold. My model adapts Post's approach for comparative analysis of free speech among Western democracies, instead of primarily serving as an analytical tool to assess freedom of speech within the United States. My model reasserts the validity of the classical liberal paradigm for free speech and doubts whether nonliberal models can properly be substituted in its place in a theoretical framework for free speech. It should be understood as a new liberal theory for free speech from a comparative perspective.

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The abstract notions of "dignity" and "liberty" presented above do not exist, in their pure form, in any legal system. They are models that enable us to better understand the underlying differences between different democracies' free speech laws and perceptions. The best way to view "dignity" and "liberty" is as a continuum, on which different legal systems are located. Yet there are two influential legal systems that are paradigmatic examples for legal systems that are located at the two far ends of the continuum: Germany and the United States.

IV. "Liberty-based" American Free Expression Jurisprudence Versus A "Dignity-based" German Free Expression Jurisprudence

A. *Different Constitutional Ethos*

Each country has an ethos. The common history, ideologies, and beliefs are expressed in the central values a nation chooses to venerate, and put at the center of its constitutional scheme.[310] These represent its "spirit" or "*volkgeist.*"[311] It may be difficult to determine which single

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[310] *See, e.g.*, Ahron Barak, *The Israeli Legal System – Its Tradition and Culture*, 40 Hapraklit 197, 215-16 (1992).

[311] Literally, *volkgeist* is a combination of *volk* (people, usually refers to the German nation) and *geist* (which has no exact parallel in English, but may mean mind, spirit, or even ghost). Put together, *volkgeist* represents the spirit of a nation. *See, e.g.*, David J. Bederman, *The Foundations of Law: World Law Transcendent*, 54 Emory L.J. 53, 60 (2005); David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 Theoretical Inquiries. L. 541, 574 (2003).

value or small number of values is at the heart of a specific legal system, yet these values are discernible. In the case of Germany and the United States, the task of explicating these values, as they relate to freedom of expression, is relatively easy.

While the former emphasizes human dignity, the latter emphasizes liberty.[312] Whereas "liberty often trumps dignitarian values in. . . [the United States]. . ., dignity often trumps libertarian values" in Germany.[313] Another way of expressing this concept would be to "speak of the German constitution of dignity and the American constitution of liberty."[314]

Eberle's book is a profound exploration of the different ways in which dignity and liberty manifest in American and German laws, including in issues relating to privacy, abortions, and of course, freedom of expression.[315] Eberle's conclusions regarding the centrality of human dignity and liberty in Germany and the United States, respectively, are shared by several key scholars including, notably, Donald Kommers[316] James Whitman,[317] and Winfried Brugger.[318]

The American and German attitudes towards freedom of speech stand at the far ends of the continuum.[319] As a result, the American approach

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[312] EBERLE, *supra* note 10, at xi-xii.

[313] *Id.* In fact, one may view the German constitutional jurisprudence as a "dignity-based liberalism," while viewing the American constitutional jurisprudence as "liberty-based liberalism." *See id*. at xii.

[314] *Id*. at 7; Kommers, *The Jurisprudence of Free Speech*, *supra* note 10, at 674. *See also* EBERLE, *supra* note 10, at xi ("There is a textual basis for the difference. The U.S. Constitution celebrates the general value of liberty in no fewer than three crucial places (Preamble, Fifth and Fourteenth Amendments. Germany's Basic Law, by contrast, establishes dignity as its controlling value; it proclaims the 'inviolability' of 'human dignity' in its opening paragraph and envisions persons as the subjects of both rights and duties.").

[315] EBERLE, *supra* note 10, at 189-251.

[316] *See, e.g*., Kommers, *The Jurisprudence of Free Speech*, *supra* note 10, at 674-75; KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 359.

[317] *See, e.g*., Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1219-21. Please note that Whitman's and Brugger's conclusions, although focusing on Germany, are also related to other Western democracies. Whitman concentrated upon France and Continental Europe while Brugger went beyond that, deducing that most Western democracies as well as international bodies reflect this tension. *See* discussion *infra* Part V.A.

[318] *See* Brugger, *Comment*, *supra* note 33, at 72-74; Winfried Brugger, *Ban on or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 11 (2002) [hereinafter Brugger, *Ban on or Protection*]; Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law*, 4 GERMAN L.J. 1, 39 (2003) [hereinafter Brugger, *Treatment of Hate Speech*].

[319] *See, e.g.*, Brugger, *Treatment of Hate Speech*, *supra* note 318, at 33 n.94 ("The contrast is striking. In Germany, hate speech is prohibited as early as possible, [and] in the United States as late as possible.").

has received the label "American Exceptionalism.[320]" Yet, using the same logic, the German approach may also be considered exceptional, and referred to as "German Exceptionalism." This polarity between Germany and the United States makes them suitable to demonstrate these different traditions: they are the best legal systems to serve as the basis for comparative analysis and a broader comparative model.

B. *The "Dignity-based" Free Expression Jurisprudence in Germany*

1. The Primacy of Human Dignity in German Constitutional Jurisprudence

As mentioned earlier, human dignity stands at the heart of German constitutional law. Article 1 of the German Basic Law states that "[T]he dignity of man [is] inviolable. To respect and protect it is the duty of all state authority."[321] As Kommers notes, "human dignity is at the top of the Basic Law's value order. It is *the* formative principle in terms of which all other constitutional values are defined and explained."[322] The omnipotence of human dignity in German constitutional law is unparalleled, since human dignity is perceived as the root for all basic rights, and all basic rights are considered specific manifestations of the human dignity principle.[323]

In Germany, human dignity is framed in an absolute manner. This "absolutist" framing has been interpreted as referring to the most fundamental of the rights of man, which cannot be violated under any circumstances.[324]

This interpretation of human dignity draws heavily upon Kantian roots.[325] Krotoszynski rightly refers to human dignity as the "preferred freedom" in German constitutional law, and analogizes it to the status of

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[320] *See* Schauer, *Exceptional First Amendment*, *supra* note 54, at 30.

[321] Grundgesetz, *supra* note 24, art. 1; *see also* Craig Smith, *More Disagreement over Human Dignity: Federal Constitutional Court's Most Recent Benetton Advertising Decision,* 4 GERMAN L.J. 533, 533 (2003) ("Article 1 is the Basic Law's crown. The concept of Human Dignity is the crown's jewel.").

[322] KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 359; *see also id.* at 299-301, 321, 359 (mentioning the *Microcensus* case). The Human Dignity Clause cannot be amended or removed from the German Constitution. Art. 79(3) of the Basic Law forbids its amendment under *any* majority, and it is referred to as "Ewigkeitsgarantie" (i.e. the eternal clause or eternal guarantee).

[323] Ullrich, *supra* note 32, at 80.

[324] *See* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 312-13; Kretzmer & Klein, *supra* note 19, at iv.

[325] *See* discussion *supra* Part II.B.1. (discussing human dignity); *See also* Brugger, *Comment*, *supra* note 33, at 72 (describing the centrality of the Kantian influence on German free speech laws); Rosenfeld, *supra* note 34, at 1549 (claiming that the German constitutional system is immersed in a Kantian normative framework).

the First Amendment.[326] And indeed, Article 1 of the Basic Law is equivalent to the First Amendment in many respects. Human dignity occupies the position that liberty may be said to play in the American constitutional order and, in several cases, dignity is locked in significant tension with liberty. This tension also arises in the context of freedom of expression.[327]

The German Constitutional Court has purposely structured its constitutional jurisprudence with the supreme "*Grundwert*," human dignity, at its core.[328] This focus included the Court's development of freedom of expression, enumerated in Article 5 of the Basic Law.[329]

The hierarchy between human dignity and freedom of expression in the German legal system cannot be understated. German law intentionally subordinates freedom of expression to the promotion of values associated with dignity and community.[330] Article 5 of the Basic Law is the free speech clause.[331] But when Article 5 is compared with Article 1, the

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[326] Ronald J. Krotoszynski Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1577 (2004). *See also* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 26 (comparing the US and German treatment of free speech).

[327] KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 359. *See also* discussion *supra* Part III.A.

[328] Bognetti, *supra* note 4, at 81. *Grundwert* in German means fundamental value, basic worth, underlying worth, essential importance or usefulness. German free speech jurisprudence was shaped since its onset in the shadow of Article 1's human dignity. Bognetti further notes: "[I]n so shaping this system the Court went to great lengths to ensure that the supreme *Grundwert*, human dignity, was always duly considered and never compromised. This is particularly visible in the judicial development of . . . freedom of expression (Article 5)." *Id*. at 81.

[329] *See id*. at 82 ("The German law regarding freedom of expression must be explained in this context. This fundamental right has been appropriately recognized since the 1958 *Lüth* decision. Apart from the strong special limitations for the protection of the democratic order, other limits are directly related to the idea that the reputation, the privacy, and the intimate feelings of other persons must be vigorously defended. The defense originates from the inviolable value of human dignity.").

[330] Krotoszynski, *supra* note 326, at 1597.

[331] Article 5 (Freedom of Expression) of the Basic Law for the Federal Republic of Germany states:

> 1. Everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship.
> 2. These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honor.
> 3. Art and science, research and teaching are free. Freedom of teaching does not absolve from loyalty to the constitution.

Grundgesetz, *supra* note 24, art. 5.

superiority of the latter is evident. As Kommers notes, "[t]he German speech clauses, read together and in light of other constitutional provisions readily yield to a balancing analysis . . . . Indeed, the text itself appears to provide a set of scales on which various interests and values are to be weighted and assessed."[332] Elements of dignity and personal honor serve as both external and internal limitations on freedom of expression. The robust human dignity clause affects the interpretation of Article 5, but Article 5 itself specifically mentions the right for personal honor, among other things, as a limitation on free speech.[333]

Krotoszynski is right to notice that "[F]ree speech enjoys protection only to the extent it does not displace the Basic Law's principle concern: the protection of personal dignity and honor."[334] This legal approach reflects a deep-seated cultural fact that personal honor is simply more important to Germans than free speech.[335]

2. German History and its Impact of Free Expression Law

The German approach toward free speech and its subordination to human dignity should be put in context. Michel Rosenfeld traces the contemporary German approach to free speech as a product of two principle influences: "the German Constitution's conception of freedom of expression as properly circumscribed by fundamental values such as human dignity and by constitutional interests such as honor and personality; and by the Third Reich's historical record against the Jews, especially its virulent hate propaganda and discrimination which culminated in the Holocaust."[336] While it is true that the framers of the Basic Law wanted to prevent the rise of a nondemocratic regime from recurring,[337] and that honoring human dignity is primarily a reaction to the atrocities of World War II,[338] these characteristics only serve as partial explanations for the German speech-restrictive system.

It seems that an important explanation for the German approach to freedom of expression is missing from the above portrayal. The German tradition of honor plays a significant role in the manner in which human

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[332] KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 361.

[333] Grundgesetz, *supra* note 24, art. 5(2). *See also* Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, 8 GERMAN L.J. 173, 176 (2007).

[334] Krotoszynski, *supra* note 326, at 1583.

[335] *See id*. at 1607.

[336] Rosenfeld, *supra* note 34, 1548. *See also id*. at 1550 ("Undoubtedly, the German Basic Law's adoption of certain values and the consequent legitimacy of content-based speech regulation originated in a deliberate commitment to repudiate the country's Nazi past, and to prevent at all costs any possible resurgence of it in the future.").

[337] *See, e.g*., Brugger, *Treatment of Hate Speech*, *supra* note 318, at 6.

[338] *Id*. at 39 ("Having viewed the horrors of the Second World War . . . .").

dignity is currently perceived since some of the concepts that characterize traditional honor and modern dignity are overlapping. The post-World War II human dignity jurisprudence is in part a reaction to the War and in part a continuation of older German traditions pertaining to personal honor. The scholarship of James Whitman aptly demonstrates this connection.[339]

Whitman traces the origins of contemporary German dignity to ideas of "personal honor."[340] He argues that the origins of the German laws of insult, which revolve around the idea that there is a protectable interest in personal "honor," can be traced back to the Middle-Ages[341] and are largely descended from the old law of dueling.[342] He finds traces of this approach in the Weimar Republic[343] and in Nazi Germany, where the Nazis made protection of personal honor a core commitment of their legal ideology.[344] In fact, these attributes continue to be reflected in German law to this day.[345] For example, privacy law in Germany is quite sensitive to the protection of one's public face, unlike the American perception of privacy as primarily protecting a liberty interest.[346] Whitman therefore argues that the roots of many protections for dignity lie in the historic protection of personal honor, and that the historical development of "dignity" in European law should be principally seen as a continuous history, one that includes developments during the Nazi period.[347]

Whitman claims that the Nazis promised a redistribution of honor by "leveling up" the prestige of social classes. This was done by passing new

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339 *See* Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1165; Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1332; Whitman, *On Nazi 'Honour' and the New European 'Dignity', supra* note 19, at 243.

340 *See* Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1165.

341 Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1315-16 (Whitman traces Roman Law influences that affected the German laws of insult).

342 *Id.* at 1317.

343 Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1186. Erich Maria Remarque's novels such as DREI KAMERADEN (Three Comrades) (1937) and IM WESTEN NICHTS NEUES (All Quiet on the Western Front) (1929) depict the role of honor in Germany during World War I and the Weimar Republic. I thank my father for this insightful comment.

344 Whitman, *On Nazi 'Honour' and the New European 'Dignity', supra* note 19, at 244.

345 *Id. See also* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 297 (Harvard University Press 1991) (claiming that "[T]he legal profession of the Third Reich was not prepared to change its thinking, and those trained between 1933 and 1945 were probably not even capable of it. The resulting damage has made itself felt in the intellectual climate of German jurisprudence up to present day, and has proved to be one of the most lasting inherited defects."); Whitman, *Enforcing Civility and Respect, supra* note 68, at 1332-44 (demonstrating how hate speech laws in post-War Germany were affected by the laws of insult and the protection of honor).

346 Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1162.

347 *Id*. at 1162-63.

laws against insulting ordinary people, as opposed to older laws that protected the honor of aristocrats.[348] Remnants of these laws may still be found in current limits on free speech, as well as workplace harassment regulation.[349] He further suggests that the Nazi regime and contemporary German law share the German obsession with the right to an honorable image. Whitman acknowledges that "the European legal culture of human dignity is largely a product of the second half of the twentieth century."[350] Yet he rightly claims that an exclusive focus on the post-War period misses some of the foundations upon which this tradition was rooted.[351] Thus he claims that "the regulation of hate speech fits comfortably into the longstanding traditions of the law of insult. . . . [I]t retains the marks of the old body of doctrine aimed to providing legal protections for aristocratic honor."[352]

To be fair, Whitman's scholarship is viewed as controversial and "provocative".[353] Most scholars stick to the interpretation of modern human dignity as a post-World War II deflection from the legal conventions of the Nazi regime.[354] Germans take great pride in their legal system, and the affiliation of the current doctrines with the darker legacies of German legal history may tarnish the accomplished modern German legal system.[355] It is understandable that the recognition of the role which traditional honor plays in current doctrine may cause unease among German scholars, who justly want to detach themselves from the laws of the Nazi regime.[356] Therefore, the critique of Whitman should be taken as biased and its motives should be questioned. James Whitman's analysis is

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[348] Daniel Gordon, *Codes of Honour*, 7 GERMAN L.J. 137, 139 (2006).

[349] *Id*.

[350] Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1396 (quoting Friedrich Kubler, *How Much Freedom for Racist Speech?*, 27 HOFSTRA L. REV. 335, 336 (1998)).

[351] Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1396.

[352] *Id*. at 1384.

[353] *See* Neuman, *On Fascist Honour and Human Dignity, supra* note 78, at 267 (doubting whether the Nazi period can plausibly be understood as continuous with what preceded or followed it); Detlev F. Vagts, *How Much of Nazi and Fascist Law Survived in the New Europe?*, 7 GERMAN L.J. 237, 237 (2006). *See also* Mayo Moran, *"In the Glass Darkly": Legacies of Nazi and Fascist Law in Europe*, 7 GERMAN L.J. 206, 218-220 (2006) (reviewing Whitman's and Neuman's articles, but not taking a clear stand as to which of them is right).

[354] *See* Gordon, *Codes of Honour*, *supra* note 348, at 139 ("Gerald L. Neuman upholds the conventional position: European law since 1945 is a reaction against the Nazis; it proclaims the dignity of all persons, not just Germans.") (footnote omitted).

[355] *See, e.g*., MÜLLER, *supra* note 345, at 297 (demonstrating attempts to absolve the German legal system from guilt on its cooperation with the Nazi regime).

[356] *Id*.

insightful, and the critiques underestimate the subtlety of his interpretation.[357]

The traditional German attitudes toward the preservation of personal honor, along with the trauma of World War II, serve as a powerful combination for explaining the extreme German approach to freedom of expression. These two historical vectors seem to pull in different directions, but lead to a similar result: the enforcement of civility and respect.

3. Enforcing "Civility" and "Respect"

German law is quite speech restrictive in many respects.[358] Unlike many Western democracies, particularly of common law tradition, it goes beyond the regulation of decency and endeavors to enforce civility and respect.[359] Speech may be regulated even if it is not likely to cause measurable harm. Following is a demonstrative list, which reflects these features of German laws.

German law regulates speech based on its content, without regard to the potential harm it may cause. As Brugger aptly notes:

> German statutes specifically refrain from requiring that racist messages lead to a clear and present danger of imminent lawless action before becoming punishable. A distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself.[360]

Conceptually, the purpose of laws regulating speech in Germany is not necessarily to prevent substantial harm from occurring.[361] This is true not only when hate speech or security concerns are involved. Rather, Ger-

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[357] *See* Gordon, *supra* note 348, at 139 ("According to Whitman, European dignity law is indeed hostile to Nazi racial hierarchy, but the European emphases on civility and reputation, as distinct from the American accent on liberty and autonomy, is not new. It is an old aristocratic priority that has traveled into the present via fascist law.").

[358] *See, e.g.*, Rosenfeld, *supra* note 34, at 1551 ("Germany has sought to curb hate speech with a broad array of legal tools. These include criminal and civil laws that protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honor or integrity, damage to reputation, and disparaging the memory of the dead.").

[359] *See* Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1288-90.

[360] Brugger, *Treatment of Hate Speech*, *supra* note 318, at 39. *See also id*. at 29 (referring to the lack of probability elements in the crime of racial incitement); Rosenfeld, *supra* note 34, at 1551 (reviewing German statutes' requirements for squashing speech, and noting that the standards for speech restriction are easily met).

[361] *Cf. Brandenburg*, 395 U.S. at 447 (the Clear and Present Danger test in the United States). *See also* Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality*, 46 CASE W. RES. L. REV. 449, 455-56 (1996).

man law restricts speech because of the harm to dignity-related interests it may cause.

James Whitman differentiates between civility and decency.[362] While the latter is regulated across Western democracies, which, for example, forbid public nudity, the former is typically unregulated.[363] German law, by contrast, enforces civility, and forbids acting in a disrespectful manner. In this way, law serves as a tool for enforcing respect among the different members and groups in society. For example, "giving the finger" is a criminal offence in Germany.[364] But speaking in a disrespectful manner may also be considered criminal behavior.[365] Indeed, as Brugger rightly notes, Germany "has a tradition of state-sponsored civil discourse."[366]

The concept of "criminal insult" aptly demonstrates the speech restrictive nature of German law. The definition of criminal insult found in Section 185 is opaque and overbroad in American standards.[367] Cases which appeared in German courts include instances in which one person has informally addressed another (the German language uses "du" to address someone informally, and "Sie" to address a person respectfully).[368] Such actions have occasionally succeeded.[369] Other examples of punishable insults include the use of curse words and epithets such as "asshole," "jerk," and "idiot."[370] These examples illustrate how German law is dedicated to the preservation of a civil discourse, politeness, and the personal honor of the citizens. Although these suits usually end in a fine, the criminal insult offence is punishable by up to two years imprisonment.[371] This reflects the weight given to personal honor in the German society and in its legal system.

Although rhetorically, the German Constitutional Court acknowledges the special importance of speech rights,[372] it is normally an empty rhetoric. Other constitutional rights and values take precedence, predomi-

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[362] *See* Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1288-90.

[363] *See id*. In fact, most Western democracies find the regulation of civility as unsuitable for regulation by law. *See id*. at 1288, 1297-98.

[364] *Id*. at 1296-97, 1299; Brugger, *Treatment of Hate Speech*, *supra* note 318, at 24.

[365] *See* Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1299-300.

[366] Brugger, *Treatment of Hate Speech*, *supra* note 318, at 26.

[367] Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1297-98.

[368] *Id*. at 1299.

[369] *Id*.

[370] *See id*. at 1304 & nn.68-69

[371] Strafgesetzbuch [StGB][Penal Code] Nov. 13 1988, as amended, §185.

[372] *See, e.g*., Brugger, *Treatment of Hate Speech*, *supra* note 318, at 21-22, 35 (referring to the Holocaust Denial Case, where the Court said presumption in favor of free speech applies concerning issues of essential importance to the public). *Cf*. Holocaust Denial Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241 (F.R.G.) (reviewed by KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 382-387).

nantly human dignity, but also equality, the right to personhood, protection of youth, personal honor, etc.[373] The constitutional standards of review more closely resemble rational basis than strict scrutiny.[374] They involve case-specific balancing and proportionality.[375] Brugger parallels the German treatment of hate speech to "low value speech."[376] This is a useful analogy, since it captures the attitude toward speech restriction, which may allow such speech to prevail at times, but normally restricts it when other interests, especially those of individuals, are at stake.[377]

German protection of political speech exists in deep duality. On the one hand, political speech is supposed to receive priority.[378] On the other hand, the concept of "militant democracy" specifically targets political speech. Paradoxically speech that relates to the democratic process, which receives total immunity in the United States, is subject to severe scrutiny in Germany.[379] Thus, in practice, political speech is reasonably protected only if it falls under the category of mainstream political speech presented in a civil manner.[380] Otherwise, controversial political speech (such as hate speech) or even bad taste political satire may fall outside of the scope of protected speech.[381] The general prohibition of hate speech

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[373] Brugger, *Treatment of Hate Speech*, *supra* note 318, at 19-21.

[374] *See id.* at 21 (for a review of the "seesaw theory of reciprocal effect" (*Wechselwirkungstheorie*), which serves as the constitutional standard for review of speech restriction).

[375] *Compare id*. at 19-21 (describing the standard-based nature of German free speech rulings) *with* Schauer, *Freedom of Expression Adjudication*, *supra* note 174, at 53-54 (contrasting European non-rule based free speech adjudication with American rule-based free speech adjudication).

[376] Brugger, *Treatment of Hate Speech*, *supra* note 318, at 22, 39 (he also refers to it as "speech minus").

[377] *See id*.; Krotoszynski, *supra* note 326, at 1581 (noting that the "Federal Constitutional Court has protected speech when the countervailing dignity interest was diffused"). *See also* discussion *infra* regarding apparent German leniency towards speech restriction that does not infringe on the dignity of specific individuals (such as "Soldiers are Murderers cases" and the "National Anthem case").

[378] *See, e.g.,* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 7-8, 10; KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 381, 442 ("Freedom of speech enjoys wide protection under the Basic Law, particularly when political speech is implicated.").

[379] *See, e.g*., Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995); Brugger, *Treatment of Hate Speech*, *supra* note 318, at 5-6; Krotoszynski, *supra* note 326, at 1590-92.

[380] *See, e.g*. Brugger, *Treatment of Hate Speech*, *supra* note 318, at 21 (mentioning the choice of words and their context as considerations for the legality of speech).

[381] *Compare* The Strauß Caricature Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1987, 75 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 369 (F.R.G.), *translated in* 2 DECISIONS OF THE *Bundesverfassungsgericht* – Federal Constitutional Court – Federal Republic (1958)

applies to all kinds of speech, even if it addresses issues of high political importance.[382] In addition, German law is not satisfied with regulating speech, it also bans certain parties (such as Neo-Nazis) from being established.[383] Although this concept was exported to other Western democracies, it originated in Germany.[384]

Even political satire is subjected to the principle of dignity and personal honor. Thus, the depiction of a prominent politician (the Prime Minister of the State of Bavaria) as a pig engaged in sexual intercourse was ruled unlawful.[385] The Germans are sensitive to the dehumanization of persons and their portrayal as animals, such as pigs or rats, since the Nazi propaganda, under the orchestration of Minister of Propaganda Joseph Goebbels, used to depict Jews as rats and vermin.

Germany has enacted many legal provisions that regulate or criminalize hate speech. Among its penal code are laws that ban individual and collective defamation or insult.[386] These laws may even criminalize a truthful statement, if it is meant to demean the offended person.[387] The focus of these laws is to maintain a right to reputation and personal honor.[388] A specific criminal ban that deserves mention is the prohibition of the display of Nazi symbols and memorabilia.[389] The Penal Code establishes a far-reaching criminalization of hate speech. It includes

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of Germany (pt. 2), at 420 (1998) [Hereinafter 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] (where a caricature of the Bavarian Prime Minister as a pig engaged in sexual intercourse was ruled as unlawful) *with* Cohen v. California, 403 U.S. 15 (1971) (ruling that a shirt with the inscription "Fuck the Draft" is protected speech, and does not constitute "fighting words"). Another useful comparison is *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), ruling that an insulting caricature of a public figure (preacher Jerry Falwell), which portrayed him as a having a sexual rendezvous with his mother, is protected speech. For a comparison of the two cases, see Brugger, *Treatment of Hate Speech*, *supra* note 318, at 25-26.

382 Brugger, *Treatment of Hate Speech*, *supra* note 318, at 39.

383 This principle of "militant democracy" is regulated under Art. 21 of the Basic Law. *See* Krotoszynski, *supra* note 326, at 1590-92.

384 *See, e.g.*, Basic Law: The Knesset § 7A (Amendment No. 9), 1985, S.H. 196 (Isr.); Fox & Nolte, *supra* note 379; Ron Harris, *A Case Study in the Banning of Political Parties: The Pan-Arab Movement El Ard and the Israeli Supreme Court*, 3-5 (Berkley Electronic Press, Working Paper No. 349, 2004), *available at* http://law.bepress.com/expresso/eps/349/.

385 *Compare* The Strauß Caricature Case, BVerfGE at 369, *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 381, at 420, *with Hustler Magazine*, 485 U.S. 46, *and* N.Y. Times Co. v. Sullivan, 376 U.S. 254. *See also* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 25.

386 *See* Strafgesetzbuch [StGB] [Penal Code], Nov. 13 1998, Reichsgesetzblatt [RGBI]. I at 94 § 86a (F.R.G.); Andreas Stegbauer, *supra* note 33, at 173-74.

387 Brugger, *Treatment of Hate Speech*, *supra* note 318, at 15.

388 *See id*.

389 *See* Strafgesetzbuch [StGB] [Penal Code], Nov. 13 1998, Reichsgesetzblatt [RGBI]. I, §§ 185-200 (F.R.G.); Stegbauer, *supra* note 333, at 173-74.

(over)broad protection of public peace and the democratic order, and forbids both individual and group defamation.[390] Furthermore, German law limits the right of assembly so that authorities can ban or break-up demonstrations that are reasonably suspected of involving hate speech.[391]

Holocaust denial receives special attention by the Federal Constitutional Court, beyond that of "regular" hate speech.[392] The wholesale denial of the existence of the Holocaust is categorized as non-speech, unlike most hate speech, which, although limited, is still considered to be speech.[393] The special, and extreme, attitude toward Holocaust denial must also be viewed and understood in light of the historical role of Germany in World War II.

The German Civil Code provides for many speech restrictive remedies, including injunctions, and retraction from false factual statements.[394] Compensation may include elements of pain and suffering, and is applicable in many instances, for example, when hate speech is considered to impinge upon good morals.[395] The Civil Code, however, only serves as a supplemental tool for restricting speech, leaving a great deal of free speech litigation to the criminal realm.[396]

The right to personal honor and reputation is so strong in the German jurisprudence that it even prefers the reputation of the dead to the free speech interests of the living.[397] Kommers explains this approach as part of the role of German jurisprudence to preserve the public image of indi-

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[390] Brugger, *Treatment of Hate Speech*, *supra* note 318, at 16-17.

[391] *Id*. at 17.

[392] *See* Holocaust Denial Case, BVerfGE 247 (*reviewed by* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 382-87).

[393] *See* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 13. But Brugger doubts whether this distinction holds water. *Id*. at 32-38; Rosenfeld, *supra* note 34, at 1551-53.

[394] *See, e.g*., Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823 ¶ 2; Brugger, *Treatment of Hate Speech*, *supra* note 318, at 18.

[395] *Id.* at 18-19; Bürgerliches Gesetzbuch [BGB] [Civil Code], §§ 824, 826, 847, 1004.

[396] *See, e.g.*, Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1298 (referring to the fact that insult gives rise to *Privatklge* – a private criminal prosecution. Thus, an insulted person may privately submit a criminal prosecution without any requirement of the prior involvement of a state's attorney, under § 374 of the Code of Criminal Procedure. *Id.* at 1298 n.51. This mechanism transforms legal suits that are normally litigated in common law jurisdictions as private matters into criminal trials. Yet this private-criminal path is made quite burdensome by German legal officials who attempt to reduce the use of this draconian mechanism to a minimum). *Id*. at 1300.

[397] *See, e.g*., Krotoszynski, *supra* note 326, at 1582 (noting that even the reputation of a dead person usually trumps freedom of expression under German doctrine).

viduals, resting in part on Kantian ethics, as captured in the *Mephisto* case.[398]

Another aspect of the exceptional German free speech jurisprudence is the fairness doctrine.[399] Germany is the only democracy in the world in which the lack of governmental interference for assurance of a balanced public debate is viewed as unconstitutional.[400] All other democracies, with the possible exception of the United States,[401] leave this kind of governmental interference to the discretion of the executive branch, subject to judicial review.[402] This further illustrates how German law views the intervention in the free speech arena as more of a duty than an option.

Although German free speech rulings seemed to become more speech-protective during the 1980s,[403] in part thanks to the importation of American insights by American trained justices such as Dieter Grimm,[404] German free speech rulings remain quite restrictive. As Krotoszynski rightly notes, the "Federal Constitutional Court has protected speech when the countervailing dignity interest was diffused."[405] Thus, although the German Federal Constitutional Court demonstrated restraint in cases of par-

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[398] *See* The Mephisto Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 24, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 173 (F.R.G.) (*reviewed by* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 301-04); KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, at 304-05.

[399] *See* Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 300-05.

[400] *Id*. at 302.

[401] The constitutionality of the fairness doctrine in the United States is questionable, although it has never been overturned. Since the doctrine's repeal in the mid-1980s, the issue is purely academic. It seems as if current First Amendment doctrine stands at odds with the fairness doctrine, and chances are that a U.S. court would find such regulation to be unconstitutional, if it still existed. *See id*. at 284-300.

[402] *Id*. at 300-02.

[403] *See, e.g*., DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 202-07 (1994) (claiming that there was a trend to afford greater free speech protection in the Federal Constitutional Court rulings in the 1980s onwards as compared to the 1970s rulings). Krotoszynski disagrees with Currie, and calls his claims "overstated." Krotoszynski, *supra* note 326, at 1573. *See also id*. at 1580-82 (qualifying Currie's claims for an alleged improvement in German free speech protection as applying only to cases that do not involve the personal honor of specific individuals).

[404] *See, e.g.*, Tucholsky I Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1994, 21 Europaische Grundrechte-Zeitschrift [EuGRZ] 463 (F.R.G.) (a.k.a. "Soldiers are Murderers Case I") *reviewed by* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 388; Brugger, *Treatment of Hate Speech*, *supra* note 318, at 27-28; Krotoszynski, *supra* note 326, at 1582; and Rosenfeld, *supra* note 34, at 1553.

[405] Krotoszynski, *supra* note 326, at 1581.

ody against the national anthem[406] and contempt of the national flag,[407] for example, it remained speech restrictive when personal honor was at stake, or anti-Semitic speech was involved.[408] Insults that are directed at groups, except the Jews,[409] are more tolerated by the Constitutional Court.[410] Yet, when speech is directed at specific individuals it is more likely to be squashed if it infringes upon the human dignity of that person.[411] But in cases where group defamation is involved, the Court waxes and wanes between speech restriction and protection, leaving predictability unattained.[412]

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[406] *See* Flag Desecration, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1990, 81 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 278 (F.R.G.), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 381, at 437.

[407] *See* German National Anthem, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 7, 1990, 81 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 298 (F.R.G.), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 381, at 437.

[408] *See* Krotoszynski, *supra* note 326, at 1582. ("When the dignity interest involves a specific individual, however, the Federal Constitutional Court usually finds the reputation (even of a dead person) trumps the Article 5 interest in freedom of expression."); The Holocaust Denial Case, BVerfGE, *supra* note 372 (in which the German Federal Constitutional Court held that Holocaust denial is categorized as "non speech").

[409] *See* Rosenfeld, *supra* note 34, at 1553-54 (arguing that insults targeting groups other than the Jews are more tolerated by the Constitutional Court); The Holocaust Denial Case 1994.

[410] *See, e.g.*, The Tucholsky I Case, EuGRZ, *supra* note 404 (reviewed by KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE *supra* note 10, at 388).

[411] *See* Krotoszynski, *supra* note 326, at 1573 ("[T]he Federal Constitutional Court has upheld speech claims only when the personal insult was not targeted at any particular individual.") (*See also id*. at 1580-82); Brugger, *Treatment of Hate Speech*, *supra* note 318, at 26 (also noting that in some cases even hate speech that is directed to groups falls into the category of unprotected speech); Rosenfeld, *supra* note 34, at 1548 (giving several examples as to how the value of personal honor trumps free speech).

[412] *Compare* "Soldiers are Murderers Cases" (*reviewed by* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 388-394) (in which the German Federal Constitutional Court allowed pacifist protest against the German participation in wars, despite a plausible understanding of this protest as tarnishing German soldiers as "murderers") *with* The Fraudulent Asylum Case, Bayerisches Oberstes Landesgericht [BayObLG] Jan. 31, 1994, 952 (F.R.G.) (in which the German Federal Constitutional Court found a poem, that portrayed asylum seekers as imposters, drug dealers, criminals, and parasites, to be unlawful). While the former case yielded a speech-friendly result, the latter case yielded a speech-restrictive result. *See also* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 27-31, 30 n.89 (criticizing the disparity among these two cases). *See also id*. at 36-37 (expressing a similar critique regarding the Holocaust denial case).

The Tucholsky Cases (also known as "Soldiers are Murderers" cases) aptly demonstrate this tension. These cases involved the legality of the slogan "soldiers are murderers."[413] The first case (Tucholsky I) involved a pacifist bumper sticker using this phrase during the Gulf War, criticizing the German involvement. A three-judge panel, headed by Dieter Grimm, rendered a speech protective outcome, allowing the use of the sticker, and overruling the lower courts' determination that the sticker offended the human dignity of German soldiers.[414] The Court set forth a relatively robust free speech framework, affording a presumption favoring speech that contributes to a discussion on important public issues. In addition, the Court made an effort to interpret the statement as not applying to all soldiers, and as relating to soldier as victims, not just as offenders. Most commentators believe that this is a plausible interpretation, yet somewhat strained.[415]

The Court's ruling and interpretation led to widespread criticism from scholars, prominent political figures, and even the former Chief Justice of the Constitutional Court.[416] The Constitutional Court subsequently narrowed the speech friendly Tucholsky I case, a few years later, in a case known as Tucholsky II.[417] This case was adjudicated by the full Senate of the Constitutional Court, and consolidated four cases in which the "soldiers are murderers" slogan was used. The Court determined that public institutions are legitimate subjects of legal protection and that, in cases where the legitimacy and social acceptance of an institution are undermined; curtailing such speech may be warranted.[418] The Court made clear that defamatory remarks about particular institutions may not always qualify as protected speech, especially if the speech involved can be understood as degrading the honor and integrity of all the members of the assaulted institution.[419] Thus, criticism of governmental institutions is

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[413] This pacifist slogan is attributed to Kurt Tucholsky, an anti-Nazi activist in the 1930s, who was stripped of his German citizenship by the Nazi regime while in exile. *See* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 388. Its origin probably played a role in the relatively speech friendly approach the Court chose in these cases.

[414] *See id*. at 388-89.

[415] *See, e.g*., *id*. at 392; Brugger, *Treatment of Hate Speech*, *supra* note 318, at 27-28.

[416] *See* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 392-93 (Kommers refers to it as a "storm of protest.").

[417] *See* Tucholsky II Case (Soldiers are Murderers II), Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 266 (F.R.G.), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 381, at 659. This case is also discussed in KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 393-95.

[418] *See* KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 393-94.

[419] *See id*. at 394. The Court, both in Tucholsky I & Tucholsky II went to considerable lengths to interpret the "soldiers are murderers" slogan, as not having

limited in Germany even if no individual person is involved, though it is clear that the Court will afford such criticism greater protection. As Krotoszynski rightly points out, "Tucholsky makes clear that the protection of free speech critical of the government runs to critiques of government institutions and offices, and not to the individuals who staff them."[420] Therefore, claims that Germany has become more speech protective in recent years are unsubstantiated.[421] Some mild improvement in the periphery of German speech laws is uncharacteristic of the mainstream features of German public law.

Under such a legal regime, the concern of a chilling effect is quite apparent, and some German constitutional scholars have expressed their concern that these laws ought not to be used to support undue encroachment upon free speech.[422] But the German "ghosts" are so effective that the general approach toward free speech will remain unchanged. Furthermore, the effectiveness of such a speech restrictive regime is questionable, and hate speech offences in Germany are on the rise.[423]

In conclusion, Germany is probably the most speech-restrictive democracy in the Western world.[424] It regulates speech regardless of its potential harm, and in contexts that are unacceptable in many Western democracies, such as the criminalization of insults. The legal provisions

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been directed at specific soldiers, or the entire German Army. It is apparent that a clear and unequivocal statement that "all currently enlisted German soldiers are murderers" is fully punishable under German law, and even under the more speech-friendly ruling of Tucholsky I. As long as the speech involved is inapplicable to "readily identifiable soldiers" it receives greater protection. *Id.* at 393.

420 Krotoszynski, *supra* note 326, at 1583.

421 *See id*. at 1573 (arguing that "the optimism toward greater protection for the freedom of speech seems somewhat overstated.").

422 *See* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 24-25, 31-32, 40; KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE, *supra* note 10, at 394.

423 *See, e.g.*, Stegbauer, *supra* note 333, at 173 (referring to the rise of right-wing extremism in Germany since the beginning of the 1990s which corresponds to an increasing number of propaganda offences, escalating from 8337 reported cases in 2004 to 10881 in 2005).

424 An interesting exception to this claim is the German approach to pornography. The only Western democracy that chose to limit pornography is Canada. German free speech principles, along with the feminist critique of the harm it causes, should have resulted in similar restrictions within the German legal system. Nonetheless, this is unlikely to happen, since the German treatment of sex and pornography is quite open, and the suppression of pornography seems inconsistent with German cultural attitudes. Only recently (in 2000), the BGB was amended to include a provision making a contract for prostitution legal. Although arguably this can be seen as an act that protects prostitutes, since it enables them to enforce their contracts, and thus ensure their earnings (I thank Matthias Tresselt for this comment). Nonetheless, it seems that culture plays a role here that would keep Germany from restricting pornography, despite its general attitudes to the balancing of speech and equality.

that regulate speech are broad and over-inclusive.[425] They protect not only decency, but enforce civility and respect. They serve to tame the citizenry for maintaining a civil and respectful attitude towards each other. Although the German repression of speech may seem understandable in light of its recent Nazi history, some scholars believe it has gone too far.[426] The Germans have adopted a biased risk allocation philosophy that prefers to err in favor of speech restriction rather than hazard its possible outcomes, in a manner which many Western democracies would find unacceptable.

The polar opposite of Germany's free speech approach is, without doubt, the United States of America.

C. *The "Liberty-based" Free Expression Jurisprudence in the United States*

1. American Exceptionalism in the Realm of Free Speech

In the United States, freedom of expression enjoys a heightened stand.[427] The First Amendment affords unparalleled protection to freedom of expression, and this view has received the label "American Exceptionalism."[428] In fact, American Exceptionalism is a broader phenomenon, which describes American estrangement from foreign legal doctrines and international policies, including on issues such as the death penalty and the use of comparative law for the interpretation of the Constitution.[429] The First Amendment can be viewed as a specific manifestation of this phenomenon.[430]

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[425] *See* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 29 (comparing German free speech standards with American First Amendment rules).

[426] *See, e.g.*, Brugger, *Treatment of Hate Speech*, *supra* note 318; Krotoszynski, *supra* note 326.

[427] *See, e.g.*, EBERLE, *supra* note 10, at 190 ("In the United States today, free speech is one of the first freedoms, owing symbolically to its pride of place as one of the set of fundamental liberties enumerated in the First Amendment."); Krotoszynski, *supra* note 326, at 1577 (referring to freedom of expression as the "preferred freedom" in American jurisprudence).

[428] *See* Schauer, *Exceptional First Amendment*, *supra* note 54, at 29-30.

[429] *See* Atkins v. Virginia, 536 U.S. 304 (2002) (referring to the legitimacy of the use of international and comparative law for the interpretation of the Constitution regarding the constitutionality of executions of the mentally retarded); Roper v. Simmons, 543 U.S. 551 (2005) (referring to the legitimacy of the use of international and comparative law for the interpretation of the Constitution regarding the constitutionality of juvenile executions); Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 175, at 8-9 (reviewing different aspects of American Exceptionalism); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

[430] Nonetheless, American Exceptionalism in free speech may also be viewed as differing, to some degree, from other issues that relate to the broader phenomenon,

Many commentators have noted that "[t]he United States stands alone, even among democracies, in the extraordinary degree to which its constitution protects freedom of speech and of the press."[431] Fredrick Schauer notes that "the First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding to what the freedom of expression entails. In numerous dimensions the American approach is *exceptional*."[432] He rightly points out that "the American understanding of freedom of expression is substantially exceptional compared to international standards because a range of American outcomes and American resolutions of conflicts between freedom of expression and other rights and goals are strikingly divergent from the outcomes and resolutions reached in most other liberal democracies."[433]

The First Amendment being "first" is not a statement concerning its relative importance among all of initial constitutional amendments. Originally, the First Amendment was the "third amendment" within the list of the twelve amendments Congress submitted for ratification by the states in 1789.[434] This interesting historical anecdote is not widely known, and many may speculate that freedom of expression was purposely chosen as the first right to be enumerated in the Bill of Rights. Yet, at least from a psychological perspective, the modern primacy of the First Amendment may be affected by its position within the Bill of Rights.

Nonetheless, it seems that Americans simply place a higher value on speech than Europeans do, and do so not only legally, but culturally as well.[435] Reverence for free speech is an integral part of the American ethos and is deeply seated in American culture.[436]

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such as the death penalty. Many "liberals" would oppose the death penalty, but will advocate for a robust free speech protection, notwithstanding constitutional protection of free speech in other Western countries. Therefore, American Exceptionalism in the realm of free speech should be assessed separately from the wider phenomenon. Schauer, *The Exceptional First Amendment*, *supra* note 175, is a good example of scholarship that assesses this issue on its merits.

431 Dworkin, *The Coming Battles over Free Speech*, *supra* note 132, at 58.

432 Schauer, *Exceptional First Amendment*, *supra* note 54, at 30 (emphasis in original).

433 *Id.* at 30-31. Schauer further notes that other Western democracies have carefully considered the American model and have deliberately chosen a different course. *Id.* at 31.

434 *See* EBERLE, *supra* note 10, at 190 (noting that the position of the First Amendment was "an historical accident."); WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 19 n.32 (2001).

435 *See, e.g.*, ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 134 (2004) ("In the United States free speech is not only a legal norm, but also a powerful cultural norm. . . .").

436 *See generally* LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) (reviewing free speech in American

American Exceptionalism in the free expression realm manifests itself in several ways. While comparative scholarship usually focuses on hate speech and libel,[437] other issues such as media regulation and the fairness doctrine,[438] "Methodological Exceptionalism,"[439] and theoretical justifications[440] are also discussed in comparative literature. The following is a demonstrative list that reflects the "exceptional" features of the First Amendment.

First Amendment law generally opposes balancing freedom of expression vis-à-vis other rights.[441] The mere classification of the First Amendment as a rule or as a standard has been a source of fierce debate among absolutists, who viewed the First Amendment as a strict rule yielding to no balancing,[442] and others who viewed the First Amendment as "balanceable."[443] Dworkin demonstrates the unclear rule versus standard nature of the First Amendment:

> It is not always clear from a form of a standard whether it is a rule or a principle. . . . The First Amendment to the United States Constitution contains the provision that Congress shall not abridge freedom of speech. Is this a rule, so that if a particular law does abridge freedom of speech, it follows that it is unconstitutional? Those who claim that the first amendment is 'an absolute' say that it must be taken in this way, as a rule. Or does it merely state a principle, so that when

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society and its tolerance for hate speech); EBERLE, *supra* note 10, at 191 ("Free speech captures the spirit of being American.").

[437] *See, e.g.*, Schauer, *Exceptional First Amendment*, *supra* note 54; Schauer, *Press Law and Press Content, supra* note 182.

[438] *See, e.g.*, Eric Barendt, *The First Amendment and the Media*, *in* IMPORTING THE FIRST AMENDMENT: FREEDOM OF SPEECH IN AMERICAN, ENGLISH AND EUROPEAN LAW 29 (Ian Loveland ed., 1998); Carmi, *Comparative Notions of Fairness*, *supra* note 2.

[439] *See, e.g.*, Schauer, *Exceptional First Amendment*, *supra* note 54, at 53-56; Schauer, *Freedom of Expression Adjudication*, *supra* note 174.

[440] *See generally* Carmi, *Dignity—The Enemy from Within*, *supra* note 8; Rosenfeld, *supra* note 34.

[441] On the fear of "balancing" in the first amendment, see O'Neil, *supra* note 65, at 11 n.29 (Tony Mauro, *Odd Lot of Cases Tends to Favor First Amendment*, Freedom Forum, *at* http//:www.freedomforum.org/templates/document.asp?documentID=14397 (*last visited on* July 16, 2001)). *See also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996) [hereinafter Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*]; Eugene Volokh, *Freedom of Speech, Shielding Children and Transcending Balancing*, 1997 SUP. CT. REV. 141 (1997) [hereinafter Volokh, *Freedom of Speech, Shielding Children and Transcending Balancing*]; Schauer, *Exceptional First Amendment*, *supra* note 54, at 31.

[442] For the "absolutist view" *see, e.g.*, Black, *supra* note 195, at 866-67, 874-75, 881.

[443] *See, e.g.*, Porat, *From Interests-Based to Rights-Based Balancing*, *supra* note 50, at 32-37 (describing the Black-Frankfurter debate over First Amendment balancing).

> the abridgment of speech is discovered, it is unconstitutional unless the context presents some other policy or principle which in the circumstances is weighty enough to permit the abridgement? That is the position of who argue for what is called the 'clear and present danger' test or some other form of 'balancing.'[444]

The dispute among absolutists and non-absolutists regarding the nature of the First Amendment seems to be resolved. As David Faigman articulates, "[M]any 'rules' are really standards in disguise,"[445] and it seems that the absolutists have wrongly classified the First Amendment as a rule.[446] Nonetheless, the absolutist imprints on First Amendment jurisprudence are long-lasting. Surviving absolutist instincts heavily influence the treatment of the First Amendment as something that should not be bent, and the notion that free speech exceptions should be narrowly tailored.

Although the First Amendment is a standard and not a rule, First Amendment jurisprudence has developed this standard, over the years, to a quite clear set of rules.[447] This gradual development of rules was portrayed by David Strauss as the "Common-law Constitution."[448] Schauer suggests that the rule/standard disparity between the U.S. and other systems may partially stem from the different developmental stage in which freedom of expression jurisprudence has evolved and that in several decades other democracies may also derive more rules from their freedom of expression standards.[449]

Historically, the United States has gradually shifted from a more standard-based free speech adjudication of *ad hoc* balancing to the current

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[444] Ronald M. Dworkin, *Is Law A System of Rules? in* THE PHILOSOPHY OF LAW 38, 48 (Ronald M. Dworkin ed., Oxford University Press 1977).

[445] David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 841 (1993). He further notes that "[f]ailure to recognize the enormous normative content in case-by-case application of constitutional 'rules' inevitably distorts constitutional debate." *Id.*

[446] *See, e.g.*, Black, *supra* note 65, at 866-67, 874-75, 881; Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[447] *Cf.* EBERLE, *supra* note 10, at 191 (relating to the development of First Amendment doctrines in the twentieth century); Schauer, *The Exceptional First Amendment*, *supra* note 175, at 44 (commenting that despite the seemingly unequivocal language of the First Amendment, it has "numerous caveats, qualifications, exceptions, tests, doctrines, principles, and maxims").

[448] *See* David A. Strauss, *Freedom of Speech and the Common-Law Constitution, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 32, 44-47 and *passim* (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (describing the case-law development of First Amendment doctrine).

[449] Schauer, *Exceptional First Amendment*, *supra* note 54, at 56 (claiming that any mature legal systems derive over time rules from its standards).

rule-based jurisprudence.[450] The shift occurred around the transition period from the Warren Court to the Burger Court.[451] Furthermore, the ethos of the First Amendment places great importance upon avoiding the "chilling effect."[452] Freedom of expression rulings are characterized by a constant fear that overbroad or unclear boundaries would result in a censoring regime.[453] Thus, when it is unclear whether a certain expression is permissible or not, most people would prefer to refrain from expressing it due to risk aversion tendencies.[454]

American defamation laws are by far the most press-friendly in the Western world.[455] This is especially true when it comes to political speech and also of the general standard applied in all defamation cases. Since the landmark *New York Times Co. v. Sullivan* case,[456] the standard applied to defamation suits of public figures requires intentional falsity—a burden of proof almost impossible to meet.[457] Since *Sullivan*, the scope of "public figures" has been broadened to include pop stars, heroes of the

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[450] *Cf.* with Germany, for example, where ad hoc adjudication of free speech issues is an integral part of their free speech adjudication. *See* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 21 (noting that the German Federal Constitutional Court has developed working rules for the task of case-specific balancing.).

[451] *See* GREENAWALT, CRIME, *supra* note 130, at 201-14, 222-24, 234-35 (1989); *cf.* Peter Krug, *Justice Thurgood Marshall and News Media Law: Rules Over Standards*?, 47 OKLA. L. REV. 13, 31 n.103 (1994); Strauss, *Freedom of Speech and the Common-Law Constitution, supra* note 448, at 44-47 and *passim*.

[452] *See*, *e.g.*, Red Lion Broad. v. F.C.C., 395 U.S. 367 (1969); Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 74-75 (2003); Fredrick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

[453] John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1107-13 (2005) (describing laws that either restrict too much speech or do not restrict enough speech).

[454] *Cf.* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 605 (1992); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101 (1997).

[455] *See* Schauer, *Exceptional First Amendment*, *supra* note 54, at 38-42 (for a detailed review of the exceptional treatment of defamation law in the United States).

[456] *Sullivan*, 376 U.S. at 264. For a detailed description of this ruling and its background, *see generally* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

[457] The Court in *Sullivan* used the term "actual malice" (i.e. publication with knowledge of falsity). *See Sullivan*, 376 U.S. at 262. This requirement was fortified in subsequent rulings, *e.g.* St. Amant v. Thompson, 390 U.S. 727 (1968) (requiring that the publisher must have an "actual suspicion" of the falsity of the publication to establish liability). *See also* Schauer, *Exceptional First Amendment*, *supra* note 54, at 40 ("For all practical purposes the availability in the United States of remedies for public officials and public figures, even in cases of proven falsity, has come to an end.").

moment, and virtually anyone who the public may find interesting.[458] Attempts by journalists and lawyers to export the *Sullivan* case to other Western countries did not gain much success.[459] Many countries have contemplated the *Sullivan* standard and deliberately rejected it.[460] Furthermore, when defamation of "ordinary people" is involved, the United States is virtually alone among Western democracies in applying a negligence standard to defamation suits.[461] Other democracies normally apply a strict liability standard to their defamation laws. This standard is characteristic of common-law countries,[462] yet civil-law countries are similarly restrictive via their laws of insults.[463]

Another example of the exceptional American approach to free speech is its attitude towards the promotion of a fair and balanced public debate via regulation of public broadcasting.[464] Although the fairness doctrine

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458 *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (extending *Sullivan* to candidates for public office and office holders); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (extending *Sullivan* to public officials); Fredrick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984) (reviewing rulings that included pop stars and television chefs, inter alia, as "public figures" despite their virtual lack of effect on public policy and politics).

459 *See* Ian D. Loveland, Political Libels: A Comparative Study 83-86 (2000); Schauer, *The Exceptional First Amendment*, *supra* note 175, at 40-41.

460 *See, e.g.*, CA 4534 Shoken Network Ltd. V. Hertzikovitz [2004] IsrSC 58(3) 558 (discussing the possibility of importing the *Sullivan* ruling to Israeli free speech doctrine, and knowingly rejecting it); CA 9/77 Israeli Elec. Co. Ltd. V. HaAretz [1978] IsrSC 32(3) 377 (same); The Strauß Caricature Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1987, 75 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 369 (380) (F.R.G) (ruling that a caricature of the Bavarian Prime Minister as a pig engaged in sexual intercourse was ruled as unlawful, and the *Sullivan* case approach was rejected); Schauer, *Press Law and Press Content*, *supra* note 182, at 54-57 (reviewing the Australian Supreme Court assessment of the compatibility of *Sullivan* with its domestic free speech law).

461 Gertz, 418 U.S. at 323.

462 Schauer, *Exceptional First Amendment*, *supra* note 54, at 38 ("Traditionally, the United States shared with the rest of the common law world an English law heritage in which defamation was treated as a strict liability tort."). *See also* The Defamation Act, 5725-1965, 19 LSI 254 (Isr.) (applying a strict liability standard to libel tort claims).

463 *See* discussion *supra*, regarding the German laws of insult. There is some similarity in the approaches of civil law and common law countries to defamation, since both are rooted in the preference for civility and respect rather than for speech. *Compare* Schauer, *Exceptional First Amendment*, *supra* note 54, at 39 (claiming that civility and respect are given preference to speech at the expense of free speech) *with* Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1280 (claiming that enforcing civility and respect stands at the heart of European insult laws).

464 *See* ERIC BARENDT, BROADCASTING LAW: A COMPARATIVE STUDY 157-65 (1993) (discussing the fairness doctrine in the United States); Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 287-300 (same).

originated in the United States, it was repealed in the 1980s, and is considered to be obsolete in America.[465] Furthermore, unlike most Western countries that permit measures for enforcing due impartiality and balanced public debate,[466] and some which constitutionally require such media regulation,[467] the United States is the only democracy in which the fairness doctrine, if reinstated, is likely to be found unconstitutional.[468] Furthermore, the regulation of print media for fair and balanced coverage has always been considered unconstitutional under the First Amendment,[469] while many European countries may apply such standards to the media as a whole.[470]

The United States is out of sync with international norms pertaining to hate speech restriction. It consistently rejects provisions calling for restricting speech by expressing reservations at the time of signing, as well as during the ratification process of such treaties by the Senate. A good example of this approach is found in the U.S. treatment of the speech affecting components of the International Convention on the Elimination of All Forms of Racial Discrimination.[471] Although the U.S. has been a driving force behind the Convention, its reservations upon signature and ratification expose the gap in the limits on free speech restriction between the U.S. and other countries. The U.S. exempted itself from obligations under the Convention to criminalize hate speech, as well as incitement to violence and a ban on organizations and parties that incite racial violence.[472] Other examples include Article 20 of the International Covenant on Civil and Political Rights and the Protocol on the Criminalization of Acts of a Racist or Xenophobic Nature.[473] The United States virtually stands alone against an international consensus banning certain kinds of hate speech.[474]

Many Americans are probably unaware of the great disparities between the United States' and the Western world's treatment of

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[465] Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 287-300, 305-08.

[466] Among these countries are Israel, the United Kingdom, Italy, and France. *See id*. at 301-05.

[467] German constitutional law requires the existence of mechanisms such as the fairness doctrine to ensure a balanced public debate. *See id*. at 300-05.

[468] *Id*. at 305-08.

[469] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[470] *See* Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 284-87.

[471] ICERD, *supra* note 21. Reservations, *available at* http://www.ohchr.org/english/countries /ratification/2.htm#reservations. *See also* Matsuda, *supra* note 92, at 2341; Schauer, *The Exceptional First Amendment*, *supra* note 175, at 35.

[472] *See* ICERD, *supra* note 21, arts. 4, 7.

[473] *See* Schauer, *Exceptional First Amendment*, *supra* note 54, at 33-35.

[474] *Id*. at 35.

speech.[475] Yet, the internal American discourse that deals with these disparities is varied. Some scholars view American Exceptionalism as warranted and a source of pride.[476] Others treat American Exceptionalism as a factual issue, drawing no clear view as to the appropriateness of the American approach. Robert O'Neil's scholarship captures this narrative:

> Under the First Amendment, we highly value all speech. Almost alone among nations, we extend such protection fully to material that is racist, sexist, anti-Semitic, and homophobic. Even Canada, whose values are remarkably similar to ours in virtually all respects, imprisons virulent anti-Semites and racists. We still insist, at least in theory, that we do not recognize different levels of protection on the basis of favored and disfavored messages. Indeed, the teaching of R.A.V. is that even material which normally deserves less than full protection may somehow acquire such protection if it is targeted on the basis of its treatment of race, gender, religion, or sexual orientation.[477]

Only a few American scholars view American Exceptionalism negatively, which requires a paradigm shift. Among these scholars are Mari

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[475] *See, e.g.*, Whitman, *Enforcing Civility and Respect*, *supra* note 68, at 1297 & n.47 (describing the mutual surprise of typical Americans and Germans when exposed to the others' free speech laws).

[476] *See, e.g.*, Robert F. Turner, *American Unilateralism and the Rule of Law*, *in* TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 77, 100 (Ronald St. John Macdonald & Douglas M. Johnston eds, Martinus Nijhoff Publishers, 2005) ("The idea of American 'exceptionalism' may be traced back to Thomas Jefferson's vision of a just and enlightened America standing as a beacon of freedom for all the world to emulate."); Ignatieff, *Introduction: American Exceptionalism and Human Right, supra* note 429, at 8-9; Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 175, at 154-55 ("This confident, perhaps arrogant, self-conception as a moral beacon for the rest of the world has deep roots in U.S. history and seems as strong today as it has ever been. In contrast, many Americans are apt to be far less comfortable with the notion that when it comes to justice, we may have something to learn from other nations—that we may benefit from the importation, not just the exportation, of rights.") (citing David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579 (2002)); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1657 (2006) (criticizing this approach).

[477] O'Neil, *supra* note 65, at 30 (footnotes omitted). *See also* Robert M. O'Neil, *Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter?*, 22 FED. L. REV. 1 (1994). Fredrick Schauer's scholarship also falls under this category. *See, e.g.*, Schauer, *Exceptional First Amendment*, *supra* note 54.

Matsuda[478] and Susan Brison, who noted, "I think the fact that the United States is virtually unique among Western nations in providing legal protection for hate speech should prompt a response to the Court's doctrine that goes beyond unreflective self-congratulation."[479]

The exceptional U.S. treatment of hate speech is closely linked to a pillar of First Amendment jurisprudence: the content neutrality doctrine.[480]

2. Content Neutrality and Stringent Limitations Tests

The content neutrality doctrine, which can be traced back to *Mosley*,[481] has two facets: the government may not restrict speech due to its content,[482] and it may not use content as a basis for differential treatment of speech.[483] Governmental action that breaches these principles is "presumptively invalid" under the First Amendment.[484] In essence, content neutrality affords constitutional protection to virtually all kinds of speech, and the government is not permitted to distinguish protected speech from unprotected speech on the basis of the point of view espoused.[485] The content neutrality doctrine lies at the heart of the Court's protection of various kinds of speech, including flag burning,[486] racist protest directed

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[478] Matsuda, *supra* note 92, at 2347-48 (1989) ("Australia and New Zealand also have laws restricting racist speech, leaving the United States alone among the major common-law jurisdictions in its complete tolerance of such speech.").

[479] Brison, *supra* note 65, at 319.

[480] *See, e.g.,* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000) (observing that content neutrality "has become the core of free speech analysis"); Roger Errera, *Freedom of Speech in Europe and in the USA*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 4, at 37 (noting that "[T]he First Amendment case-law is, broadly speaking, based on the principle of 'content neutrality', unless speech is a direct incitement to unlawful behaviour likely to occur in the immediate future.").

[481] Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

[482] This aspect of the doctrine is also called "the rule against content regulation", *see* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650 (2002).

[483] This aspect of the doctrine is also called "the rule against content discrimination" or "viewpoint discrimination", *see id.*; *R.A.V.*, 505 U.S. at 377.

[484] *See* Heyman, *supra* note 482; United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000) (quoting *R.A.V.*, 505 U.S. at 382).

[485] Schauer, *Exceptional First Amendment*, *supra* note 54, at 35 (". . .for as a matter of formal legal doctrine and significantly as a matter of public opinion as well, the American understanding is that principles of freedom of speech do not permit government to distinguish protected from unprotected speech on the basis of the point of view espoused."). *See also* Errera, *supra* note 480, at 36-37.

[486] Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag-burning is protected under the First Amendment); United States v. Eichman, 496 U.S. 310 (1990) (same).

at minority groups,[487] cross-burning[488] (with minor exceptions),[489] and pornography.[490]

Another prominent aspect of First Amendment doctrine is the high burden required in cases where speech is to be suppressed. The Clear and Present Danger requirement,[491] established in *Brandenburg*,[492] still prevails for distinguishing between permitted advocacy and incitement, which may be regulated. Under this test, only the explicit advocacy for imminent lawless and violent action that is likely to occur can justify prior restraint. These requirements are virtually impossible to meet and enable *de facto* impunity for hate speech.[493]

In most Western countries, regulation of speech is made *according* to its content. Western jurists generally perceive the concept of content regulation as benign, and the fear of governmental intervention is much smaller than in the United States.[494] The biased risk allocation mechanism in the Clear and Present Danger test is unparalleled in other jurisdictions.[495] Even countries that mimicked the United States through a relatively high probability standard vis-à-vis other Western democracies for prior restraint have tamed their constitutional standards as compared to the stringent American standard.[496] Normally, foreign scholars perceive American-oriented limitation tests as too stringent and inappropri-

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[487] Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (upholding the rights of Nazis to march in Skokie, Illinois, with full Nazi regalia. Skokie is a suburb of Chicago that has a large Jewish population that survived the Holocaust.).

[488] *R.A.V.*, 505 U.S. at 377 (overturning an ordinance that banned cross-burning and other forms of hate speech).

[489] *See* Virginia v. Black, 538 U.S. 343 (2003) (for a slight deviation from *R.A.V.*) [hereinafter *Black*]. *See infra.*

[490] *See* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

[491] Nadine Strossen identifies two core principles of U.S. free speech law: viewpoint neutrality and the Clear and Present Danger requirement. *See* Nadine Strossen, *Hate Speech and Pornography*, *supra* note 361, at 454-56.

[492] *Brandenburg*, 395 U.S. at 448-451.

[493] *See, e.g.*, Schauer, *Exceptional First Amendment*, *supra* note 54, at 36 (commenting on the virtual impossibility for stifling speech under the Clear and Present Danger Test requirements).

[494] *See, e.g.*, Gower, *supra* note 13, at 222.

[495] *See, e.g.*, Reply by Ronald Dworkin, Letter: Free Speech and Its Limits (in response to Ronald Dworkin, *The Coming Battles over Free Speech,* N.Y. REV. BOOKS, June 11, 1992), N.Y. REV. BOOKS, Nov. 19, 1992, at 2 ("the Constitution insists that people should not be forced to err on the side of caution in what they say.").

[496] *See, e.g.*, Israel, which followed the American example for prior restraint by adopting, in the landmark *Kol Ha'Am* ruling, the "near certainty test" which closely resembles the Clear and Present Danger test, except for the immanency requirement. HCJ 73/53 Kol Ha'am v. Minister of Interior [1953] 7 IsrSC 871; Miriam Gur-Arye, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, *13* DUKE

ate.[497] For some democracies, however, sequestering speech does not entail even a preponderance of evidence probability standard.[498]

The content neutrality requirement and the Clear and Present Danger Test are deeply embedded in First Amendment jurisprudence and represent the general First Amendment framework. Yet there are two issues in which the United States may seem to fall short of its commitment to the content neutrality approach, and these issues deserve special attention: obscenity and cross-burning. Despite the seemingly asymmetric attitude with which these forms of speech are treated, these two exceptions do not affect the general approach to freedom of speech in the United States, and should be understood in context.

Obscenity probably serves as the best example to demonstrate that no legal system, even that of the United States, is immune to some sort of "dignity-related" rationale that has proved impervious to logic, politics or constitutional argument.[499] This relic of Puritanism[500] proves my earlier claims that the First Amendment is not a "community free zone" as Post claims,[501] but rather it is the exception that proves the rule.

The American ban on obscenity can be traced to its Puritan roots, and originally rested on moral-Victorian arguments.[502] Within the context of its inception—a period in which various kinds of speech were regulated in the United States—the ban on obscenity makes perfect sense. What is harder to explain is its durability over the years, especially in the twentieth-century when it has avoided being overturned by contemporary First Amendment doctrine.[503] Other kinds of speech that were frequently reg-

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J. COMP. & INT'L L. 155, 158 (2003) (discussing *Kol Ha'Am* and the "near certainty test").

[497] *See, e.g.*, Mordechay Kremnitzer, The Elba Case: The Law of Incitement to Racism, 30 MISHPATIM 105, 106-07 (1999) (in Hebrew) ("It is doubtful whether it makes sense to set such a high standard [the 'near certainty test'] for the limitation of free speech. Let us assume that a certain publication may risk human life with the probability of sixty percent: should we allow the publication? And if it is a risk that endangers the existence of the state, should we still require a threat that is almost certain, and every other expression that entails less danger will be allowed publication?") (author's translation).

[498] *See* discussion on Germany *supra* Part IV.B.3.

[499] *See* discussion *supra* Part II.C. (giving obscenity as an example that even the U.S. has some dignity-related norms).

[500] *See, e.g.*, Avihu Zakai, *The Puritan Rhetoric Contribution to the U.S. Democracy*, *in* AMERICAN DEMOCRACY: THE REAL, THE IMAGINED AND THE FALSE 252 (Arnon Gutfeld ed., 2002) (in Hebrew). For a historical review of obscenity laws in eighteenth-century U.S, see Roth v. United States, 354 U.S. 476, 482-84 (1957).

[501] *See* POST, *supra* note 1, at 10.

[502] *See* Zakai, *supra* note 500.

[503] *See, e.g.*, VAN ALSTYNE, *supra* note 434, at 729 (expressing surprise that, unlike other kinds of previously unregulated speech such as libel or commercial speech, First Amendment law has not evolved to cover obscene materials).

ulated in the past have been deregulated since the 1950s, with libel being the most obvious example.[504] Despite the Supreme Court's inclination during the 1960s to align obscenity with other kinds of speech that were previously beyond the reach of the First Amendment,[505] the trend to align obscenity laws with First Amendment concerns was reversed shortly thereafter.[506] The few voices that supported legalizing obscenity, which belonged to the absolutist camp, remained in dissent.[507]

The manner in which obscenity was carved out of the sphere of protected speech is somewhat forced, since it is defined as "non-speech," and, as such, is excluded from the protection of the First Amendment. Ever since Justice Murphy's dictum in *Chaplinsky*, in which he concluded that the prevention and punishment of obscenity have never been thought to raise a constitutional problem, not much has changed.[508]

Although the Court continued developing obscenity doctrines, such as the distinction between obscenity and child pornography,[509] much of the problematic features of obscenity laws remain unresolved. Laws limiting obscenity and child pornography are often overbroad and vague.[510] Community standards raise special difficulties in the Internet age,[511] and may lead to arbitrary enforcement. Despite contemporary literature

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[504] *See id.* at 726-29 (also reviewing other areas that were previously unregulated under the First Amendment but were gradually regulated under First Amendment specialized doctrines, such as with commercial speech and public employees speech).

[505] *See, e.g.*, *Roth*, 354 U.S. at 476.

[506] *See* VAN ALSTYNE, *supra* note 434, at 730-31 ("In 1973, however, the Court backed away. . . .it substantially reversed the contrary trend of the decisional law that had occurred during the previous fifteen year. And, briefly, this has since remained the prevailing view within the Supreme Court.").

[507] *See, e.g.*, *Roth*, 354 U.S. at 508-14 (1957) (Black & Douglas, JJ., dissenting); *Smith*, 361 U.S. at 155-160 (1959) (Black J., concurring); *Id.* at 167-169 (Douglas J., concurring).

[508] *Chaplinsky*, 315 U.S. at 571-72 ("[T]here are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a Constitutional problem. These include the lewd and obscene . . . those which by their very utterance inflict injury and tend to incite an immediate breach of the peace."). *See also Roth*, 354 U.S. at 481 (citing *Chaplinsky* that obscenity does not receive First Amendment protection); *Miller v. California*, 413 U.S. at 23 (reaffirming the *Roth* holding that obscene material is not protected by the First Amendment).

[509] *See* New York v. Ferber, 458 U.S. 747, 765-66 (1982) (holding that the government could restrict the distribution of child pornography to protect children from the harm inherent in making it); Osborne v. Ohio, 495 U.S. 103, 111 (1990) (extending *Ferber* to mere possession of child pornography).

[510] *See, e.g.*, Javier Romero, *Unconstitutional Vagueness and Restrictiveness in the Contextual Analysis of the Obscenity Standard: A Critical Reading of the Miller Test Genealogy*, 7 U. PA. J. CONST. L. 1207 (2005); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

[511] *See generally* David T. Cox, *Litigating Child Pornography and Obscenity Cases in the Internet Age*, 4 J. TECH. L. & POL'Y 2 (1999).

points out to the problems obscenity laws raise,[512] the stability of obscenity as an exception to the First Amendment is impressive. This logic has been ingrained into First Amendment doctrine to an extent that it is practically unquestioned by the Court. It seems that *Miller* and subsequent rulings closed the window of opportunity for a doctrinal change,[513] and lifting the ban on obscenity is unlikely under current trends.[514] When compared to other kinds of speech that were previously regulated under First Amendment doctrine, obscenity remains the most prominent outlier.[515]

One may only speculate as to the reasons why obscenity remains an exception to First Amendment doctrine, yet some justifications for the exception's survival come to mind. For example, despite the idealistic aspiration for content neutrality, many people believe that lines must be drawn somewhere, and that obscenity serves as this border in American legal culture.[516] Another concern that may have affected the treatment of obscenity's resilience is the fact that a large portion of the American populace is religious, and that lifting the ban would have offended them and stirred a political backlash similar to *Brown* and *Roe*.[517] Furthermore, the States' regulation of obscenity is considered to be a federalism issue, in which every State is an "experimental social laboratory" such a

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[512] *See, e.g.*, *id.*; H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity – Or Absurdity?* 15 ST. THOMAS L. REV. 517 (2003).

[513] *See, e.g.*, *Miller v. California*, 413 U.S. 15; *Paris Adult Theatre I v. Slaton*, 413 U.S. at 49.

[514] *See* VAN ALSTYNE, *supra* note 434, at 730-31.

[515] Other areas that seemingly do not bear directly on the First Amendment may still provoke related issues. Among these topics are sexual harassment and the possible conflict between intellectual property rights and free speech concerns. *See, e.g.*, Fredrick Schauer, *The Speeching of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 2, at 347 (discussing First Amendment implications of sexual harassment laws); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 56 (1999) (discussing the possible conflict between intellectual property and freedom of speech); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1062 (2001) (same).

[516] The distinction between pornography and obscenity eases the existence of the ban on obscenity. Moreover, even the most zealous supporters of free speech find it hard to justify the decriminalization of certain radical forms of speech which fall under the auspice of obscenity, such as child pornography or "snuff films." These two examples compel candid thought as to the necessity of some line-drawing mechanisms, as narrow as they may be, to regulate extreme, antisocial and illegal kinds of speech.

[517] *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (demonstrating the backlash effect of controversial rulings, in particular *Brown v. Board of Education* and desegregation).

book may be considered obscene in one state but freely read in another.[518] The local bans on specific materials are perceived as less dangerous to free speech than a nationwide federal censorship on certain materials. Nonetheless, when placed in a comparative context, the American ban on obscenity is narrower than the limitations other Western democracies impose on sexually explicit materials.

All democracies, without exception, ban obscenity. Yet the old moralist and religious motivations behind the ban have been restated to fit the contemporary feminist agenda in several Western countries, in which the ban was broadened to encompass pornography. Whereas the United States has rejected the regulation of pornography due to First Amendment concerns,[519] Canada's criminalization of pornography,[520] as well as the regulation of pornography in other Western countries,[521] demonstrates that the American approach is relatively mild.

Moreover, despite America's religious roots and the continued ban on obscenity and child pornography, it seems that in practice, pornography flourishes under the First Amendment and receives protection.[522] The pornography industry thrives under the current status quo. In certain states such as California, for example, the ban on obscenity is virtually

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[518] *See, e.g.*, *Roth*, 354 U.S. at 496-508 (Harlan J., concurring); Kingsley Int'l Pictures Co. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684, 702-708 (1959) (Harlan J., concurring).

[519] *See Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d at 325 (invalidating an Indianapolis ordinance that outlawed all speech meeting the ordinance's definition of "pornography," regardless of the "literary, artistic, or political qualities" of the speech). *See also* Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 594 (2003) ("In the United States, the courts have taken a very different approach to the problem of pornography. In *Miller v. California* and *Paris Adult Theatre I v. Slaton*, the Supreme Court reaffirmed the traditional morality-based approach. At least thus far, however, the courts have rejected an approach based on harm to women.").

[520] *See* R. v. Butler, [1992] S.C.R. 452, 479 (Can.) ("This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.").

[521] *See, e.g.*, HCJ 5432/03 SHIN v. Council for Cable & Satellite Broad. [2004] IsrSC 58(3) 65 (upholding a statute banning pornography on licensed cable and satellite networks); HCJ 4804/94 Station Film Co. v. The Film Review Bd. [1997] IsrSC 50(5) 661, 675 translation *available at* http://elyon1.court.gov.il/files_eng/94/040/048/z01/94048040.z01.htm (commenting on the treatment of pornography in Israeli jurisprudence).

[522] *See Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d at 325; Amy M. Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 695 (2007) (claiming that "in the escalating war against pornography, pornography has already won.").

nonexistent.[523] Thus, the ban on obscenity should be viewed in context, and not assessed for more than it's worth. A dignity-based exception to the First Amendment exists due to legal and historical developments, which is still far more protective of other similar speech than any other Western democracy. The ban on obscenity enables some mechanism of line-drawing that exists in every Western society, and it does not effectively curtail the robust free speech protection afforded by the First Amendment.

Another slight yet important exception to the principle of content neutrality relates to cross-burning. In *Virginia v. Black*,[524] the Supreme Court upheld a Virginia law prohibiting cross-burning, concluding that cross burning intended to intimidate constituted the kind of threat that the First Amendment does not protect. Arguably, *Black* stands at odds with *R.A.V.*,[525] in which the Court stated that singling out cross burning for special legal attention constitutes content-based discrimination.

The interpretation of *Black* may vary and its ramifications are viewed differently by different scholars. Thus, for example, Tsesis believes that *Black* is perhaps the best indicator that in recent years, the judiciary has become more amenable to the regulation of hate speech.[526] In fact, *Black* narrowed *R.A.V.*, but only to a mild extent.[527] The majority opinion tried to blur the apparent inconsistency by distinguishing *Black* from *R.A.V.*, but as Justice Souter rightly remarked, *Black* may be understood as a shift from the exceptions demonstrated in *R.A.V.* to a more flexible conception.[528] Yet, in precedential terms, *R.A.V.* is still good law.[529] The Court went to extra lengths to carve out the cross-burning exception and anchor it in existing rationales that allow for speech restriction, such as

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[523] *See* Alder, *supra* note 522, at 701-2.

[524] *Black*, 538 U.S. at 343.

[525] *R.A.V.*, 505 U.S. at 391 (holding that an ordinance banning fighting words singling out race, gender, color, creed, or religion, as opposed to an outright ban of fighting words, was improper content-based discrimination.). *Cf.* Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 150 n.58 (2005) (reviewing RICHARD DELGADO & JEAN STEFAMCIC, UNDERSTANDING WORDS THAT WOUND (2004)) (claiming that despite arguable inconsistencies between *Black* and *R.A.V.*, the Court in *Black* explicitly found its holding to be consistent with *R.A.V.*).

[526] *See* Tsesis, *supra* note 525, at 149.

[527] *See Black*, 538 U.S. at 361, 363 ("We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. . . . A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.") (emphasis in the original). *But see id.* at 384 (Souter, J., concurring in part and dissenting in part) ("On that understanding of things, I necessarily read the majority opinion as threatening *R.A.V.*'s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest.").

[528] *See id.* at 384.

[529] *See id*.

"true threats," intimidation,[530] and the specific history of cross-burning in America.[531] For example, *Collin v. Smith* (also known as the *Skokie* case),[532] in which a Nazi parade in a neighborhood predominantly inhabited by Jewish Holocaust survivors was deemed constitutionally protected speech, seems untouched by *Black* since Nazi regalia does not carry the same historical intimidating effect in American society.[533] Thus, *Black* hardly signals a paradigm shift and First Amendment doctrine remains protective of hate speech and other problematic speech, regardless of its content.

Black should be understood in context, and as most commentators agree, it does not symbolize a paradigm shift.[534] *Black* does not ban cross-burning outright. It even keeps the constitutional protection of cross-burning as a political message rather than as an intimidation technique.[535] In this sense, *Black* is consistent with the content-neutrality doctrine, since it does not disfavor the message behind the burned cross,[536] but rather the use of a burned cross as a means of intimidation. It would be a mistake to read into *Black* more than it says. The case

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[530] The Court cited *Brandenburg*, 395 U.S. at 449, implicitly analogizing the statute at hand that prohibits cross-burning with "fighting words". *See Black*, 538 U.S. at 359; Tsesis, *supra* note 525, at 150 n.56.

[531] *See, e.g.*, *Black*, 538 U.S. at 363 ("in light of the cross burning's long and pernicious history as a signal of impending violence."); Tsesis, *supra* note 525, at 149-50 ("These intimidations infringe upon the rights of targeted group members to live unmolested and can be used to put them in reasonable fear that threatening messages will turn into harmful action.").

[532] National Socialist Party of Am. v. Skokie, 432 U.S. 43 (1977) (per curiam); Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (the Courts upheld the rights of Nazis to march in Skokie, Illinois, with full Nazi regalia. Skokie is a suburb of Chicago that has a large Jewish population that survived the Holocaust.).

[533] Arguably, the audience in Skokie Illinois has a specific historic background that is quite parallel to the historic background that African-Americans and other minorities have to cross-burning in the United States, but the Jewish audience's experience was from the European Holocaust. This distinction is weak, yet apparently sufficient to protect African-Americans from seeing burning crosses, but not to protect Jews from seeing marching Nazis. *See, e.g.*, MACKINNON, *supra* note 66, at 82 (noting that the judges who ruled in Skokie had "never faced a pogrom piously").

[534] *See, e.g.*, Schauer, *Exceptional First Amendment*, *supra* note 54, at 35 n. 17; Fredrick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 55 SUP. CT. REV. 197 (2003).

[535] *See Black*, 538 U.S. at 366 ("Thus, '[b]urning a cross in a political rally would almost certainly be protected expression.'") (quoting *R.A.V.*, 505 U.S. at 402 n.4 (White, J., concurring) (citing *Brandenburg*, 395 U.S. at 449).

[536] In Germany, for comparison, Nazi regalia and memorabilia are strictly prohibited in such contexts, unless they serve to support anti-Nazi agenda. This illustrates that the United States still remains somewhat committed to the content-

established a narrowly-tailored context-specific ban, which should be understood as an attempt to confront both a longstanding racial problem in the United States and an abhorrent method of intimidation.

At first glance, *Black* may seem to be a poorly explained exception for cross-burning that offers a close analogy to the Western European treatment of Holocaust-denial. Yet the analogy between *Black* and Holocaust denial in Europe is limited at best. The common ground is that both the cross-burning exception in *Black* and the European ban on Holocaust denial stem from a problematic racial history.[537] This is especially true with regard to Germany, since it is highly sensitive to speech that offends Jews.[538] Yet, unlike in the United States where *Black* serves as the exception, in Western countries, the ban on Holocaust denial follows the rule.

All Western countries ban incitement to racial hatred and enforce, to some extent, a paternalistic civil discourse. The ban on Holocaust denial may be specific,[539] or may stem from broader, anti-hate-speech legislation.[540] Holocaust denial is a very distinct form of racial hatred, which falls within the core scope of such laws, and that in the lack of a specific prohibition thereof, would fall under the more general ban. Canada and Australia serve as good examples of Western democracies that ban Holocaust denial via their general laws. Thus, although Australia has no specific statutes prohibiting Holocaust denial, the Australian courts have made it clear that Holocaust denial is a form of anti-Semitism and vilification, which is prohibited by Federal anti-discrimination laws.[541] Canada also bans Holocaust denial by a lack of a specific statutory prohibition, following similar rationales.[542]

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neutrality principles even within the *Black* decision, since the racist speech remains protected.

[537] *See Black*, 538 U.S. at 362-67.

[538] *See* discussion *supra* Part IV.B.2-3.

[539] *See, e.g.*, Negationism Law, (1995) art. 1, amends. Of 1999 (Belg.); Prohibition of Holocaust Denial Law, 5746-1986, SH 196) (Isr.); Verbotensgesrtz-Nouvelle [National Socialism Prohibition Law] Bundesgesetzblatt [BGBl] No. 57/1947, 1992 § 3 (Austria).

[540] *See* Schauer, *Exceptional First Amendment*, *supra* note 54, at 34 (reviewing hate speech prohibitions in several Western democracies, including South Africa, New Zealand, Austria, Canada, and the United Kingdom, among others).

[541] *See* Racial Discrimination Act, 1975, § 18C (Austl.); Jones v. Toben (2002) FCA 1150 (Austl.) *available at* http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/1150.html (The case concerned a website of an extreme right wing group. The material published on the website denied the Holocaust and made anti-Semitic statements. These materials were held to be in breach of the Racial Discrimination Act 1975, as it was reasonably likely to offend, insult, or humiliate and intimidate Jews in Australia because of their origins.).

[542] *See, e.g.*, R. v. Keegstra [1990] 3 S.C.R. 697 (Can.); R. v. Zundel [1992] 2 S.C.R 731 (Can.).

The only aspect that deserves attention is that specific statutory bans exist primarily among European countries,[543] but this tendency can be explained in terms of historical sensitivities. Nonetheless, Holocaust denial does not receive differential treatment vis-à-vis other forms of distinct racist speech, since virtually all Western countries, including those with no direct link to the Holocaust, ban it *de facto*. Therefore, the analogy between *Black* and the European prohibition on Holocaust denial is limited, and *Black* is still quite far from the Western tendency to sequester undesirable speech.

After reviewing the unique protective traits of the First Amendment, it may be useful to step back and look at the broader constitutional picture. The following discussion facilitates demonstrating how the manner in which freedom of expression is perceived in the United States is inextricably linked to the principles of liberty and due process.

3. Liberty, Due Process, Equal Protection, and the Incorporation Hypothetical

The link between freedom of expression and liberty was discussed at length above.[544] In order to demonstrate the strong nexus between the concept of liberty and freedom of expression in the United States, it is useful, as a theoretical exercise, to ponder what would happen in the absence of the First Amendment? Let us toy with the following hypothetical: if freedom of expression were not an enumerated right, what would be the most appropriate strategy to incorporate it into the American Constitution? Although the answer to this hypothesis can be elaborated and expounded upon,[545] *the core* of freedom of expression would

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[543] *See, e.g.*, Negationism Law, (1995) art. 1, amends. Of 1999 (Belg.); Austria (§ 3 of the National Socialism Prohibition Law (1947, amendments of 1992)). Law of Mar. 23, 1995, Moniteur Belge [Official Gazette of Belgium], Mar. 30, 1995, p. 7996; Verbotsgesetz [Prohibition Act] Staatsgesetzblatt [StGB1] No. 13/1945, § 3(h) (Austria).

[544] *See, supra* Part II.B.2 (discussing "liberty"). *See also* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 960-68 (discussing the evolution of freedom of expression in the United States).

[545] Although the U.S. Constitution consists of several incorporation clauses, it seems that the current understanding of First Amendment jurisprudence, combined with the history of the incorporation on the states, gives an extremely strong indication that constitutional provisions other than the Due Process Clause will not accommodate this right appropriately. The Ninth Amendment may serve as an incorporation clause, although it is quite unlikely. The same may be said in regard to the Privileges and Immunities Clause, if the Courts were to rediscover it. *Cf.* VAN ALSTYNE, *supra* note 434, at 65. Incorporation via the Equal Protection Clause is extremely unlikely under current First Amendment jurisprudence. The Courts have so far rejected the application of equal protection in the realm of free speech, and did not even recognize a balancing between free speech and equal protection concerns. *See*, *e.g.*, MACKINNON, *supra* note 66, at 72-85.

have been incorporated, under this scenario, *distinctively* through the Due Process Clause.

The U.S. Supreme Court has dealt with a similar dilemma regarding the incorporation of the right of freedom of expression as it would apply to the States. The current incorporation doctrines were formed historically when it was unclear whether First Amendment obligations were incorporated upon the States.[546] The Supreme Court used the Due Process Clause to incorporate freedom of expression. Although the history of the Fourteenth Amendment does not suggest that freedom of speech was a concern which it sought to address, and a free-speech clause was not explicitly included, the Court did read a free speech right into the amendment.[547] As Eberle rightly observes, "[i]ncorporated into the idea of due process in 1925, the first of the civil rights so to be transformed, free speech became the premier fundamental freedom applicable to the country as a whole, reinforcing its status as the first freedom."[548]

The seeds for the incorporation of freedom of expression were sown at an even earlier stage. Justice Harlan, in his dissenting opinion in *Patterson,* articulated as early as 1907 the nexus between freedom of expression and due process:

> I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press.[549]

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[546] At that time, the incorporation doctrine was not fully developed. *See* STONE, *supra* note 194, at 698-709; Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947).

[547] *See* Strauss, *supra* note 448, at 39-40.

[548] EBERLE, *supra* note 10, at 191. The first ruling that actually incorporated freedom of expression into the Due Process Clause was Gitlow v. New York, 268 U.S. 652, 666-67 (1925). *See also* Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359, 368-70 (1931); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 298 n.27 (1989); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 315 n.101 (1998) ("During the period prior to the 1920's, of course, the first amendment had no application to the states. By convention the first case taken to indicate a contrary conclusion is *Gitlow v. New York*, 268 U.S. 652 (1925).").

[549] Patterson v. Colorado, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting). *See also* Schenck v. United States, 249 U.S. 47 (1919).

From the internal logic of the framework of the two primary incorporation clauses under U.S. law, historical legal support logically indicates that freedom of expression should be moored into the Due Process Clause. Even if it lacks historical legal support, it would nonetheless make sense to moor freedom of expression into the Due Process Clause. The primary reason for this would be the negative and individual traits of this right under U.S. law, and its perception as a core inalienable fundamental right.[550] The Equal Protection Clause would not be perceived as a proper setting for such incorporation, and even if some of the elements of this right would have been incorporated through this clause, it would be an exception, and might even affect the nature of this right under U.S. law.[551] Certainly, it would be unthinkable to incorporate freedom of expression *solely* through the Equal Protection Clause, since it would distort the current contours of freedom of expression under the First Amendment. The instinctive affiliation of freedom of expression with the due process protection of liberty is so strong and evident, that any other incorporation channel would be inapt by itself, and would fail to cover the current protection free speech receives under U.S. law.[552]

Arguably, content-neutrality may also be viewed as an equal protection issue, since it affords identical protection to speech, no matter which viewpoint it expresses.[553] This understanding aligns with the rationales expressed by the Supreme Court since the doctrine's inception.[554] This view is also consistent with *R.A.V.*'s holding that prohibits viewpoint dis-

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[550] Under current substantive due process theory, tradition and history play a role in determining whether certain rights should be read into the Constitution. Assuming that the history and tradition of robust free speech protection would exist in the U.S. even in the absence of the First Amendment, it would be read into the Constitution via the Due Process Clause under the current theory. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[551] It may be, for example, a source for reinstating the fairness doctrine into U.S. law, as part of the rationale of the Public Debate Model. *See* Carmi, *Comparative Notions of Fairness*, *supra* note 2, at 292-93.

[552] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 964 (noting that in the United States, free speech is conceived as a core liberty).

[553] *See, e.g.*, DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, *supra* note 172, at 238 ("First Amendment liberty is not equality's enemy, but the other side of equality's coin."). Dworkin also claims that "equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections," and that "[e]quality demands that everyone's opinion be given a chance for influence, not that anyone's opinion will triumph or even be represented in what government eventually does." *Id.* at 237. *See also* Heyman, *Spheres of Autonomy*, *supra* note 482, at 664 ("In these ways, First Amendment liberty and equality are closely related, and the two often can be understood as two sides of the same coin.").

[554] *See generally Police Dep't v. Mosley*, 408 U.S. at 99-102 (1972) (concluding that the content-based ordinance denied protesters the equal protection of the laws guaranteed by the Fourteenth Amendment).

crimination, and stresses that "the First Amendment does not permit [ ] to impose special prohibitions on those speakers who express views on disfavored subjects."[555] As far as the content-neutrality doctrine is concerned, equal protection remains applicable and relevant. Yet, as Steven Heyman rightly notes, "the doctrine of content neutrality finds its ultimate basis in the First Amendment rather than in the Equal Protection Clause."[556] Furthermore, equal protection does not cover all elements of free expression, but the deprivation of free speech automatically infringes upon due process. Therefore, the link between free speech and due process is more self-evident.

Whether the protection of free speech stems from the Due Process Clause or the Equal Protection Clause bears little significance in the American context; either interpretation would lead to similar results, which are remarkably divergent from Western conceptions of equality and human dignity. Moreover, while equal protection may add further tools for the incorporation of free speech, it cannot replace the primary incorporation channel. In this sense, due process lies at the core of the incorporation hypothetical and equal protection lies at the penumbra. Had a similar incorporation scenario been raised in other democracies, the answer would not be as clear-cut as it is in the American setting.[557] But whether it is equal protection or due process that protects speech, both are a manifestation of the principles of liberty, as discussed above.[558]

The fact that Americans think of freedom of expression in terms of liberty and due process, rather than in terms of dignity, is not sufficient, by itself, to explain the differences between the United States and other Western democracies in regard to free speech. Even if freedom of expression issues were framed through the prism of equal protection, most of the discrepancy between the U.S. and other democracies would still remain. The reason for this is the fact that issues pertaining to *equality* are framed differently in the United States than in other legal systems.[559]

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[555] R.A.V., 505 U.S., at 391.

[556] Heyman, *Spheres of Autonomy*, *supra* note 482, at 664.

[557] *See, e.g.*, HCJ 2557/05 Matte Harov v. Police Dep't [2006] IsrSC 59, 556 (Isr.) (incorporating free speech via the Human Dignity Clause within Basic Law: Human Dignity and Liberty).

[558] *See also* Heyman, *Spheres of Autonomy, supra* note 482, at 663-64.

[559] I discuss the risk of "term confusion" elsewhere. *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 981-86. A similar risk applies here: Europeans use equality and human dignity as synonyms. By contrast, human dignity is almost lacking from the American constitutional vocabulary, and equality (as well as its parallel constitutional term – equal protection) purport to cover a different meaning to the perception of equality, as discussed above. Therefore, when Europeans and Americans speak of equality, they speak of two different things.

The writings and ideas by Andrea Dworkin and Catharine MacKinnon,[560] which were rejected in the United States and accepted in Canada,[561] serve as a good example for the discrepancy between equality and human dignity. MacKinnon claims that First Amendment doctrine stands at odds with equality, and that "[u]ntil this moment, the constitutional doctrine of free speech has developed without taking equality seriously . . . ."[562] Despite MacKinnon's use of the term "equality," from a substantive point of view, she speaks about dignity.[563] This discourse is rejected in the United States as incompatible with the First Amendment, and embraced in Canada, due to the different perception of the concepts of equality and dignity.[564]

"Human dignity" is a broader term than "equal protection." Issues pertaining to equality are resolved in the American system via the Equal Protection Clause, while the same issues are conceptualized in other systems via different constitutional terms, mostly comparable to the rights of "equality" and "human dignity."[565] Therefore, the American constitutional jurisprudence surrounding equal protection would not render the same outcomes as its non-American counterparts. Distinctions such as *de facto* discrimination and *de jure* discrimination,[566] the intent requirement,[567] the state action doctrine[568] – all may lead to similar results as the

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[560] *See, e.g.*, DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN, *supra* note 92; DWORKIN & MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS, *supra* note 92; MACKINNON, FEMINISM UNMODIFIED; *supra* note 92, at 148, 156; Dworkin, *Against the Male Flood, supra* note 92, at 15–17.

[561] *Compare Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d at 324-325 (vacating a municipal ordinance promoted by Dworkin and MacKinnon that banned pornography), *with* R. v. Butler, [1992] 1 S.C.R. 452, 479 (Can.) (upholding a statute that criminalized pornography and accepting the MacKinnon-Dworkin feminist rationales for pornography restriction).

[562] *See* MACKINNON, *supra* note 66, at 71. *See also id*. at 85 ("So there never has been a fair fight in the United States between equality and speech as two constitutional values, equality supporting a statute or practice, speech challenging it.").

[563] *See, e.g.*, *id*. at 84 ("Employment, education, and human dignity are all on equality territory but went unmarked as such."). A possible explanation for MacKinnon's use of equality, rather than dignity, is that she addresses her arguments to an American audience, for whom the concept of dignity is less appealing.

[564] *See id*. at 97-106 (comparing Canadian and U.S. approaches to hate speech and pornography through the different manner in which the two legal systems perceive equality).

[565] *See generally* Baer, *Dignity or Equality?, supra* note 2.

[566] *See generally* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

[567] *See id*. *See also* Washington v. Davis, 426 U.S. 229 (1976).

[568] *See* Gardbaum, *supra* note 566. Most European countries view the public-private distinction in constitutional law less rigidly than in American constitutional jurisprudence. *Cf. id*. at 458.

due process analysis would provide, and still keep a distance between freedom of expression doctrines in the U.S. and abroad.[569]

The context in which "human dignity" is commonly discussed in the United States, is dissimilar to that of most other democracies.[570] The latter use human dignity to frame some or most aspects of equality in its broader context.[571] Although "human dignity" may be paralleled with constitutional terms such as "cruel and unusual punishment" in contexts such as the death penalty,[572] in the context of free speech, the most comparable constitutional term in the United States would be "equal protection." Therefore, the applicability of human dignity terminology in the American context is fairly limited, and the promotion of equality is governed by the equal protection perception rather than the more European understanding of human dignity. This profound difference is yet another obstacle in the way of aligning American freedom of expression doctrines with other Western democracies, which share a more proactive approach to the promotion of equality.

The approach towards freedom of expression is usually more libertarian than the approach toward other constitutional issues (such as affirmative action, education, etc.), perhaps since it is at the core of the classical rights.[573] Because U.S. law is more restrictive on issues such as affirmative action, as compared to other Western democracies,[574] we should not be surprised that these discrepancies persist in an even stronger manner when it comes to freedom of expression. Furthermore, because freedom of expression in most democracies is derived from general constitutional doctrines, rather than a separate constitutional field, First Amendment jurisprudence serves as a buffer that moderates the effects of equality in other constitutional fields to the freedom of expression field.[575]

These differences are so rooted in the American constitutional way of thinking, that it is doubtful if they can ever be bridged.[576] Yet, an important lesson this analysis may teach us is that in order to bring closer the freedom of expression doctrines in the United States and other Western

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[569] *See id*.; MACKINNON, *supra* note 66.

[570] *See* Bognetti, *supra* note 4, at 75-94.

[571] *See, e.g*., *id*. at 89 ("This all means that the U.S. Constitution, as interpreted by the Supreme Court, seems to offer less protection to values and rights associated with the idea of human dignity than the average European Constitution.").

[572] *See, e.g*., *Furman*, 408 U.S. at 305-06 (1972) (Brennan, J., concurring).

[573] *See* SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 149, at 9.

[574] *See, e.g*., Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003) (both reviewing affirmative action in the University of Michigan's admissions policy).

[575] *Compare* MACKINNON, *supra* note 66, at 73 (criticizing the inconsistencies between the approach to freedom of expression and other rights), *with* SCHAUER, PHILOSOPHICAL ENQUIRY, *supra* note 149, at 7 (discussing why speech deserves special protection).

[576] *See supra* text accompanying note 202 for a discussion on path dependence.

democracies, there is a need for bridging the gap in broader constitutional thought, and particularly in the way the right to equality is perceived and promoted. If the right to equal protection would better facilitate proactive advancement of equality, as some desire,[577] it would pave the way for a paradigm shift in the freedom of expression field as well. Thus, the broader constitutional context may affect freedom of expression to a great extent.

In conclusion, the United States is definitely the most speech-protective democracy worldwide. It protects speech almost regardless of its potential harm. For example, even hate speech, which is prohibited in many other Western democracies, is protected in the United States. Its legal provisions regulating speech are few and narrowly defined, thereby reflecting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[578] The American approach to speech should be understood in light of the modern tradition of the First Amendment, the individual and liberty-oriented features of the American ethos, and the American history of speech restriction during the Red Scare, McCarthyism, and the Vietnam War.[579] While most American scholars celebrate the First Amendment, some scholars believe that the current approach has gone too far.[580] The United States has adopted a biased risk allocation philosophy that prefers to err in favor of speech protection rather than preventing the hazards and harms of its possible outcomes, in a manner which most Western democracies would find unacceptable.

V. Free Speech in Western Democracies: Between Dignity and Liberty

The "dignity-based" German model and the "liberty-based" American model for free speech presented above represent two extremes on the dignity-liberty continuum. Western democracies fall between the two, often combining principles from both approaches.[581] But virtually all Western democracies, with the exception of the United States, lie closer to the dignity pole than to the liberty pole, leaving the United States in an

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[577] Some scholars have called for restricting speech in the United States due to feminist or egalitarian concerns. *See, e.g.*, Heyman, *Spheres of Autonomy*, *supra* note 482; Heyman, *Ideological Conflict and the First Amendment*, *supra* note 519; MacKinnon, *supra* note 66.

[578] *Sullivan*, 376 U.S. at 270.

[579] *See., e.g.*, Schauer, *Freedom of Expression Adjudication, supra* note 174, at 48 (reviewing historical influences that led to a robust First Amendment protection).

[580] *See, e.g.*, Heyman, *Ideological Conflict and the First Amendment*, *supra* note 519; Heyman, *Spheres of Autonomy*, *supra* note 482; MacKinnon, *supra* note 66; Mari J. Matsuda, *supra* note 92.

[581] *See* discussion *supra* Part II.C (analyzing the interrelationship between human dignity and liberty).

ever-growing isolation.[582] There are two primary reasons why most Western democracies fall closer to the dignity pole: the recent proliferation of human dignity or similar principles, and the Western constitutional approach to balancing. The combination of these two phenomena only widens the gap between the U.S. approach to free speech and other Western understandings, thereby preserving American Exceptionalism in the realm of free speech.

A. *The Rise of Human Dignity in Western Constitutionalism*

Western democracies vary in the protection that they afford free speech and the centrality they attribute to it. Yet, in recent years there is a growing tendency, shared by most Western democracies, to recognize human dignity concerns in free speech doctrines.[583] This is not necessarily accomplished through use of the words "human dignity." Some legal systems do not use human dignity jargon, because the terminology is absent from their constitutional documents or history.[584] Nonetheless, the principles they deploy when restricting free speech are identical, or at least close in nature, to the European human dignity principles. Thus, they fall under the category of human dignity in substance, if not by name.[585]

The common denominator of most Western democracies is the existence of criminal prohibitions on hate speech, and there is an international consensus regarding the necessity of a ban on hate speech.[586] As

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[582] *See* discussion *supra* in Part IV.C.1 (describing American Exceptionalism in the realm of free speech).

[583] *See, e.g.*, Brugger, *supra* note 33, at 72 ("Since the end of the Second World War, dignity has been a major and often the foremost value and right of the polity.").

[584] See, for example, common-law countries, such as Australia, New Zealand, and the United Kingdom, which lack human dignity in their constitutional vocabulary, but which de facto protect human dignity via their defamation and anti hate speech laws. Israel is also a good example of this tendency. Until 1992, when human dignity was enumerated in Basic Law: Human Dignity and Liberty, "human dignity" was barely mentioned, especially in the context of free speech. Shortly after "human dignity" was introduced into Israeli constitutional documents, it became prevalent in human rights discourse, as well as in freedom of speech cases. *See also* sources cited *infra* note 590 (regarding Canada).

[585] The Canadian Charter lacks a human dignity clause comparable to Germany's. Nonetheless, Ullrich demonstrates how even in the absence of an anchored right to human dignity, Canadian constitutional law developed along lines concurrent with Western human dignity jurisprudence. *See* Dierk Ullrich, *Concurring Visions, supra* note 32.

[586] *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 145 ("Most English-speaking and European countries have laws against racial vilification, and some widely adopted international treaties require them. Under the Convention on the Elimination of Racial Discrimination, which was signed but not ratified by the United States, parties are to make criminal 'all dissemination of ideas based on racial

Greenawalt remarks, "[m]any countries have reasonably concluded that suppression of messages of race and ethnic hate is warranted, at some cost to free speech, because values of equality and *dignity* are so central and so vulnerable."[587] The scope of legal systems banning hate speech is widespread, including even countries of common law origin, such as the United Kingdom, Canada, and Australia.[588]

Furthermore, defamation laws in most Western countries are far more speech-restrictive than in the United States.[589] The enforcement of community norms in the realm of free speech among these countries is normative, and their legal systems facilitate a civil public discourse. This is done via defamation laws or, in some cases, via criminal insult laws.[590] Many Western democracies, including Canada, Denmark, France, Germany, and the Netherlands, are constantly presented as examples of nations whose free speech laws aim at promoting and protecting human dignity.[591] Consequently, these democracies' laws preserve human dignity *de facto*, even in the absence of developed human dignity jurisprudence.

Nevertheless, as discussed above, human dignity jargon is increasingly prevalent among Western democracies. Most modern constitutions include a right to human dignity. It exists in virtually all contemporary constitutions, including those established since the 1990s in Eastern Europe in the aftermath of the fall of the Iron Curtain, in South Africa, and in Israel.[592] Furthermore, human dignity is awakening from a dormant state in several countries, such as Italy and France, where it existed as an enumerated right for many years, but has only recently been redis-

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superiority or hatred' and 'incitement to racial discrimination.' This principle reaches well beyond face-to-face vilification, and covers the expression of obnoxious ideas. The constitutional liberty our Court has suggested for hate speech is much broader than the speech treated as free in many other democracies.").

[587] *Id.* at 63 (emphasis added).

[588] *See, e.g.*, Race Relations Act, 1976 (Eng.); Racial Discrimination Act, 1975 (Austl.); Canada Criminal Code, R.S.C. ch. C 46, § 319 (1985).

[589] The prevalent standard for libel in common law countries is strict liability, unlike the negligence standard in the United States. *Sullivan* was generally rejected by other democracies, and even if some of them grant greater protection to speech relating to public figures, they still apply a more restrictive standard than the actual malice requirement in *Sullivan*. European insult laws are even more speech restrictive than the Anglo-American libel law standards. *See generally* Loveland, *supra* note 459 (reviewing libel laws in Western democracies); Schauer, *Freedom of Expression Adjudication, supra* note 174, at 40-41.

[590] *See* discussion *supra* Part IV.B.3 (discussing criminal libel laws in Germany).

[591] *See, e.g.*, Sandra Coliver, *Hate Speech Laws: Do They Work?*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 363, 363-66 (Sandra Coliver ed., 1992).

[592] *See* elaboration *supra* Part II.A (discussing human dignity).

covered and developed.[593] This combination of an ever growing number of constitutions that enumerate human dignity and place it as a prominent right or constitutional concept, and the common values these democracies share regarding the active promotion of dignity-related concerns, brings Western democracies closer together in their approach to the relationship between these values and free speech.[594]

Although Western democracies have been restricting various kinds of speech for many years due to considerations of civility, morality, and respect,[595] modern discourse has often replaced (and even buttressed) existing laws that limit free speech. The old discourse may have declined in contemporary society because it may be perceived as paternalistic, puritanical, and outdated. Instead, the new human dignity discourse reinvigorated speech-restrictive legislation and adjudication. In some instances it even broadened the scope of speech limitation.[596]

Contemporary scholarship increasingly recognizes the ideological divide between Europe and the United States in terms of dignity and liberty, and the two are recurring themes in current literature that compares American and European constitutional law.[597] Brugger, Whitman, and Rosenfeld are among the key scholars who expanded the human dignity and liberty concepts beyond the German and American legal systems. Yet none of these scholars have articulated theses differences in the form of a comprehensive comparative model.[598]

Michel Rosenfeld rightly remarks that "[i]f free speech in the United States is shaped above all by individualism and libertarianism, collective concerns and other values such as honor and dignity lie at the heart of the conceptions of free speech that originate in international covenants or in the constitutional jurisprudence of other Western democracies."[599] Simi-

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[593] *See* Bognetti, *supra* note 4, at 77.

[594] *See, e.g.*, Schauer, *Freedom of Expression Adjudication*, *supra* note 174, at 54 (relating to a growing number of Western free speech rulings in the past three decades).

[595] *See, e.g.*, HART, LAW, LIBERTY AND MORALITY, *supra* note 212.

[596] *See, e.g.*, R. v. Butler, [1992] 1 S.C.R. 452 (Can.) (upholding a Canadian restriction on pornography which is based upon concepts of women equality and human dignity); HCJ 5432/03 SHIN v. Council for Cable TV and Satellite Broad. [2004] IsrSC 58(3) 65 (restricting pornography under similar rationales).

[597] *See supra* text accompanying notes 588-610 (referring to literature that uses human dignity and liberty, or comparable terms, to evaluate constitutional law issues in the Western world).

[598] For another interesting article that offers a profound analysis of the differences between the American approach to free speech and the Canadian approach to free speech, with a special emphasis on the different narratives these approaches put forward, *see generally* Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425.

[599] Rosenfeld, *supra* note 34, 1523, 1541.

larly, Winfried Brugger contrasts the German and American approaches to free speech in terms of dignity and liberty, but briefly remarks that the dignity-based approach is "the dominant approach in Europe."[600] Elsewhere, when reviewing the treatment of hate speech, Brugger lists under what can be fairly characterized under my definition of dignity, as "shared by Germany, the member states of the Council of Europe, Canada, international law, and a minority of U.S. authors . . . ."[601]

James Whitman uses human dignity and liberty to evaluate privacy laws in the United States with Continental Europe, and in particular with Germany and France. He identifies dignity and liberty as the embodiment of the basic commitments in U.S. and Continental societies.[602] He further claims that, in practice, the real choice in the Atlantic world, is "between social traditions strongly oriented toward liberty and social traditions strongly oriented toward dignity. This is a choice that goes well beyond the law of privacy: It is a choice that involves all the areas of law that touch, more or less nearly, on questions of dignity."[603] Whitman further claims that while American law is a body caught in the gravitational orbit of liberty values, Continental European law is caught in the orbit of dignity.[604] Therefore, European law is consistently more drawn to problems touching on public dignity, while American law is consistently more drawn to problems touching on the depredations of the state.[605] Thus we can see that the ideological divide that splits Europe and the United States when it comes to privacy is basically the same divide when it comes to free speech.

The conclusion that can be drawn from the above discussion is that human dignity has colonized the Western constitutional discourse. The underlying values behind Western free speech doctrines are heavily substantiated on the values of human dignity and the active promotion of equality. These values are increasingly articulated in terms of "human dignity," and even when some other rationale, such as equality, is used to justify the restriction of speech, it serves substantively as human dignity. As a growing number of scholars are contrasting American and European approaches to different constitutional issues in terms of dignity and liberty, it is time to apply the same logic to freedom of expression.

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[600] Brugger, *supra* note 33, at 72.

[601] Brugger, *Treatment of Hate Speech*, *supra* note 318, at 2. Brugger further notes that these countries and scholars view "hate-filled speech as forfeiting some or all of its free-speech protection." *Id*.

[602] Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1220 and *passim*.

[603] *Id*. *See also id*. at 1161 ("On the Continent, the protection of personal dignity has been a consuming concern for many generations. By contrast, America, in this as in so many things, is much more oriented toward values of liberty, and especially liberty against the state.").

[604] *Id*. at 1163.

[605] *Id*.

B. *"Balancing" in Western Constitutional Adjudication*

The rise of human dignity, or of related rights, in Western constitutionalism is coupled with yet another aspect of Western constitutionalism: balancing.[606] Most Western constitutions and constitutional doctrines employ fairly relaxed standards of review when adjudicating free speech matters.[607] Unlike the United States, where relatively clear rules are supplied under First Amendment doctrine or where States attempting to abridge free speech are subject to strict scrutiny,[608] contemporary Western constitutionalism is characterized by open-ended balancing formulas that leave spacious room for the introduction of external rights and values into the free speech arena.[609] These balancing formulas often incorporate the principle of proportionality. Balancing and proportionality may even be used as synonyms.[610] Under a legal regime that employs such constitutional techniques, balancing freedom of speech with human dignity or equality will almost certainly lead to some degree of free speech restriction. This is true because when balancing the speaker's right to free speech against the audience's right for personal dignity (in the context of libel), group-based dignity or equality (in the context of hate speech and sometimes pornography), the principles of proportionality and balancing often lead to a compromise that limits speech in order to preserve the audience's rights.[611]

Another important factor that works against free speech among Western democracies is that they do not regard freedom of expression as

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[606] *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 12-14; Schauer, *The Exceptional First Amendment*, *supra* note 175, at 31; Schauer, *Freedom of Expression Adjudication*, *supra* note 174, at 59-61.

[607] *See* GREENAWALT, FIGHTING WORDS, *supra* note 12, at 12 (regarding Canadian free speech constitutional doctrines); Tushnet, *supra* note 209. Similar standards may be found, for example, in the ECHR and Israel.

[608] *See, e.g.*, GREENAWALT, FIGHTING WORDS, *supra* note 12, at 12-14; Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, *supra* note 441; Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, *supra* note 441.

[609] *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, §§ 1-2 (U.K.); S. AFR. CONST. 1996 art. 36; Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution] April 18, 1999, SR 101, art. 36 (Switz.); Basic Law: Human Dignity and Liberty, 1992, S.H. 1391 art. 8 (Isr.); Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 (hereinafter ECHR). *See also* Brugger, *Treatment of Hate Speech*, *supra* note 318, at 9-10 (referring to the open-ended nature of these tests); *id*. at 9 n.27 (referring to Canada and the ECHR).

[610] Brugger, *Treatment of Hate Speech*, *supra* note 318, at 10.

[611] *See* Carmi, *Dignity—The Enemy from Within*, *supra* note 8, at 992-96 (discussing individual rights speaker focus versus audience focus).

highly as Americans do.[612] Rather, in these countries, "freedom of expression appears to be understood as an important value to be considered along with other important values of fairness, equality, *dignity*, health, privacy, safety, and respect, among others . . . ."[613] Therefore, under a balancing constitutional discourse, freedom of expression does not enjoy any inherent strength vis-à-vis other rights, and in some cases, it is even considered as less important than other rights and values, primarily human dignity.[614]

An important distinction between First Amendment jurisprudence and freedom of expression jurisprudence in most other legal systems is that the former is rule-based and the latter is a non-rule-based approach.[615] This is part of what Schauer refers to as "Methodological Exceptionalism."[616] There are several possible explanations for this disparity.[617] Among the primary explanations is that, as a matter of legal evolution, the jurisprudential development of freedom of expression started in the U.S. in the early twentieth-century, whereas in most of the other democracies it began only twenty to thirty years ago.[618] Therefore, First Amendment jurisprudence is far more mature than in other systems, and reflects a long-term development and experience.

The rule-based American free expression jurisprudence limits judicial discretion, and the boundaries of free speech are more clearly demarcated than in a standard-based system. As a result, freedom of expression is better protected under a rule-based legal regime than a standard-based one. Under a standard-based regime, decisions are made *ad hoc*. It is true that a specific decision is not arbitrary, and that *stare decisis* plays a role in reaching to the specific decision, but the latitude afforded to the judiciary is greater under such a legal regime.[619]

David Fontana relates to the American recoil from balancing tests in free speech adjudication. He notes that "Canadian courts have more authority to conduct balancing tests. The United States, by contrast, may require 'rules' rather than 'standards' because it is a large, diverse republic with lower courts that rely on the Supreme Court for guidance, and

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[612] Schauer, *Exceptional First Amendment*, *supra* note 54, at 42 ("[I]n the United States the freedom of expression occupies pride of place, prevailing with remarkable consistency in its conflicts with even the most profound of other values and the most important of other interests.").

[613] *Id*. (emphasis added).

[614] *See* discussion *supra* Part IV.B.1 (discussing the primacy of human dignity in German constitutional law).

[615] *Cf*. Schauer, *Exceptional First Amendment*, *supra* note 54, at 55-56 (referring to this approach as a "standard-based approach" or a "principle-based approach"); EBERLE, *supra* note 10, at 196.

[616] Schauer, *Exceptional First Amendment*, *supra* note 54, at 53-56.

[617] *See id*.

[618] *Id*. at 56.

[619] *Cf*. GREENAWALT, FIGHTING WORDS, *supra* note 12, at 150.

because there is a substantial history of skepticism of judicial discretion."[620] Perhaps the U.S. legal system is more sensitive than other Western systems to the concern of judicial legitimacy, and the fear that open-ended constitutional tests may subject the judiciary to the accusation that it employs political views rather than the law.[621] Such fears of judicial activism and judicial constraints are probably the strongest in the U.S., and most other Western democracies are less distrustful of their courts.[622] This may explain a greater institutional need in the U.S. for a narrowly tailored standard for speech restriction.

Some of the American constitutional scholars, who speak about speech restriction in the U.S. context, do so in terms of balancing.[623] Although these scholars often invoke comparative law, their discourse primarily focuses on the internal logic of American constitutional law, and the American commitment to equal protection under the Fourteenth Amendment.[624] Nonetheless, the concept of balancing is not unfamiliar to Americans, despite its inapplicability in current First Amendment law. As Fontana notes, "American constitutional law, despite its claims of universality and categorical interpretive techniques, has always incorporated some form of balancing tests in recent times."[625] Other areas of

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[620] David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 611 (2001) (footnote omitted). The European approach of balancing produces more ad-hoc results, and is therefore more standard-based than rule-based. In contrast, U.S. law offers more applicable rules that may help anticipate the courts' rulings to a better extent than in Europe. *Compare* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating for a rule-based jurisprudence that promotes predictability of outcomes and judicial constraint) *with* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000) (describing judicial activism among European constitutional courts).

[621] *See* Guy E. Carmi, *A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review*, 21 CONN. J. INT'L L. 67, 80 (2005) (referring to the legitimacy problems judicial review faces in the United States, partially due to the manner in which the Supreme Court assumed judicial review authority on its behalf in *Marbury v. Madison*, without express authorization in the U.S. Constitution); Lessig, *supra* note 86, at 1446-50.

[622] *Compare* Schauer, *Freedom of Expression Adjudication*, *supra* note 174, at 60 ("American courts are far more reluctant explicitly to see themselves as weighing the full panoply of interests, facts, and factors that would support a careful proportionality analysis."), *with* ALEC STONE SWEET, GOVERNING WITH JUDGES, *supra* note 620 (describing judicial activism among European constitutional courts).

[623] *See, e.g.*, Brison, *supra* note 65, at 324; Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275 (1998); MACKINNON, *supra* note 66, at 71-110.

[624] *See, e.g.*, MACKINNON, *supra* note 66.

[625] Fontana, *supra* note 620, at 612. *See also id.* at 611 ("American courts already use balancing all of the time . . . .").

constitutional law, such as Fourth Amendment doctrine, apply balancing as an inherent part of their reasoning.[626]

The rule-based jurisprudence affects even the few areas in which First Amendment jurisprudence prescribes a standard that is similar to other Western free speech norms, such as in the case of the regulation of advertising. Since commercial speech is considered "low value" speech, American law enables its restriction with relative ease as compared to other kinds of speech. Although the tests for restricting commercials are strikingly similar in the United States, Canada,[627] and Europe,[628] the American implementation is far stricter, inter alia, due to the rule-based instincts the Court holds in the field of free speech.[629] Thus, the rule-based First Amendment adjudication even affects the implementation of standards.

An imbalanced risk allocation that affords speech overprotection also exists in other Western democracies, but to a far lesser extent. *Core* political speech is highly protected in the vast majority of established democracies.[630] Yet, as we get further into the *penumbra*, other democracies regulate and even prohibit "problematic speech" that receives protection in the United States.[631] These kinds of speech (e.g., hate speech, Holocaust denial, pornography) are limited in other democracies, to a certain extent, through the use of balancing, proportionality, and other standards.[632]

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[626] *See, e.g.*, Andrew T. George, Comment, *Rediscovering Dangerousness: The Expanded Scope of Reasonable Deadly Force After* Scott v. Harris, 93 VA. L. REV. IN BRIEF 145 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/07/09/george.pdf (discussing Fourth Amendment reasonableness standards).

[627] *See, e.g.*, Karla K. Gower, *Looking Northward: Canada's Approach to Commercial Expression*, 10 COMM. L. & POL'Y 29, 57 (2005) (reviewing central Canadian commercial speech cases and comparing the Canadian approach to the U.S. approach).

[628] *See, e.g.*, Andrew Oliver, *The Proposed European Union Ban on Television Advertising Targeting Children: Would it Violate European Human Rights Law?*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 501, 514 (2000) (providing a good insight into the European process of arbitrating commercial speech cases).

[629] *Compare* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (disqualifying restrictions on tobacco advertisements), *with* Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927 (Can.) (upholding a ban on advertising directed to children under a test similar to *Lorillard*). *See also* Gower, *supra* note 627, at 51.

[630] Some countries, such as Germany, actually apply severe restrictions even on political speech as part of the principle of "Militant Democracy," which fears the use of democratic means by non-democratic political parties to undermine the democratic regime. *See, e.g.*, Fox & Nolte, *supra* note 379, at 32.

[631] *See* BOLLINGER, *supra* note 436, at 76-103; Schauer, *Exceptional First Amendment, supra* note 54.

[632] *See generally* Errera, *supra* note 480.

The relative ease with which speech is restricted in Western democracies is analogous to the different outcomes that are likely to follow a decision whether to employ strict scrutiny or rational basis in a particular case. Judges that apply a rational basis standard are more likely to be deferential to decisions or laws that infringe upon rights than judges who deploy strict scrutiny, the latter being more likely to invalidate the infringing act.[633] The latitude courts have under lenient balancing tests is far greater than under more stringent tests, such as strict scrutiny. This analysis of a "conceptual approach" versus a "categorical analysis"[634] or "rules" versus "standards" (or a non-rule-based approach)[635] captures the main differences between American and Western free speech adjudication and constitutional methodology.

The Western balancing discourse on free speech facilitates the infiltration of human dignity concerns into Western free speech doctrines. This constitutional methodology is detrimental to free speech since it blends free speech concerns with human dignity and equality concerns, and does not enable a doctrinal separation between free speech and other rights and values. The same mechanisms that enabled the United States to reject the regulation of pornography and hate speech due to equality concerns, are absent from the Western constitutional tool box.[636] The Western constitutional methodology of balancing and proportionality, and the lack of a clearly demarcated set of rules that govern free speech adjudication, introduce human dignity into free speech issues through the back door.

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The combination of the proliferation of human dignity and the balancing mechanisms in Western constitutionalism are leading to a clear path of speech restriction whenever the content of the speech is harmful to the dignity or equality of others.[637] Thus, Western democracies limit hate speech, and some tend to restrict pornography, due to these rationales. The current tendencies are only expected to deepen as years go by,

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633 The common constitutional convention is that strict scrutiny is "strict in theory, but fatal in fact." Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

634 *See* GREENAWALT, FIGHTING WORDS, *supra* note 12, at 12.

635 Schauer, *Exceptional First Amendment*, *supra* note 54, at 31; Schauer, *Freedom of Expression Adjudication*, *supra* note 174, at 59-61.

636 For these reasons MacKinnon and Dworkin failed in their attempt to restrict pornography in the United States but prevailed in Canada. *Compare Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d at 325, *with* R. v. Butler, [1992] 1 S.C.R. 452, 479 (Can.); *see* MACKINNON, note 66, at 85, 92-110.

637 In this respect, the content neutrality doctrine that characterizes American First Amendment doctrine is quite unique. *See* discussion *supra* Part IV.C.2 (discussing the content neutrality doctrine).

because Western democracies that borrow from one another via the use of comparative law become more familiar with one another's approaches.[638] As the gap between these countries and the United States grows, the First Amendment becomes an irrelevant source for Western democracies in their comparative borrowing.[639]

VI. Conclusion

The understanding of freedom of expression in the Western world is quite complex. It requires a fundamental understanding of the underlying values and perceptions that characterize both rights' theories and constitutional approaches of leading Western legal systems, as well as familiarity with the constitutional traditions and instincts these legal systems inhabit. These traits are hard to distill, and may seem deceivingly simplistic.[640] Nonetheless, these traits do exist, and are represented in the model presented herein as two major and contradicting ideologies for free speech in the West: one that lies upon human dignity and one that lies upon liberty. Part II offers a theoretical analysis of these two approaches in a manner that is detached from any specific legal system, and presents a comparative model that enables the assessment of Western democracies' approaches to free speech on a comparative scale. The importance of an independent theoretical model is explained in particular due to the vague nature and content of "human dignity" and "liberty" among different legal systems and even among different scholars analyzing the same legal system. In this sense, Part II puts forward a unifying theory for free speech in the West, and facilitates clarity and common ground for evaluating free speech among different legal systems.

Human dignity has become a prominent component in the constitutional jurisprudence of many Western democracies, and its main characteristics are shared by most of them. These include a communitarian approach to human rights, the promotion of positive rights, paternalism, and the protection of audience rights. Thus, despite several possible

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638 *See* Schauer, *Freedom of Expression Adjudication*, *supra* note 174, at 54 (relating to a growing number of Western free speech rulings in the past three decades).

639 *See id.*

640 *See, e.g.*, Oscar G. Chase, Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context 50 (2005) ("Generalizations about the culture of any nation-state are problematic. . . . It is a generalization, with all the utility and limits that the word connotes."); Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1163 ("So it would be wrong to say that there is some absolute difference between American and continental European law. But the issue is not whether there is an absolute difference. Comparative law is the study of *relative* differences. Indeed, it is the great methodological advantage of comparative law that it can explore relative differences. No absolute generalization about any legal system is ever true."). *See also* sources cited *supra* note 1.

understandings of human dignity, this understanding is most common among legal systems that utilize human dignity as a central constitutional tool, and serves as the basis for my model. Under this understanding, the regulation of speech to promote social norms is warranted. In particular, the regulation of speech that is perceived as infringing upon dignity is advanced. Thus, the ban on hate speech is perceived as advancing the human dignity and equality of minorities, and the regulation of pornography is often perceived as promoting the same values for women. But this conception of dignity also comes into expression in maintaining the dignity and honor of individuals via defamation laws and, in some cases, via criminal insult laws. These characteristics of human dignity explain the ideology and motivation of virtually all Western democracies, with the exception of the United States, to regulate hate speech and libel, and, in some cases, to restrict pornography and promote civility.

In a similar fashion, liberty is characterized as a perception of rights that puts an emphasis on negative rights, content neutrality, and a focus on the rights of the speaker. This view of liberty, which adopts the conceptions of classic liberalism, is most akin to the American approach to freedom of speech, and accounts for the ideology behind First Amendment jurisprudence, which conjoins negative liberty, autonomy, and individualism. Despite the ambiguity surrounding the term "liberty," the choice of its classical interpretation for my model is explained at length. While it primarily stems from its compatibility with First Amendment principles, it also stems from an ideological statement that, at least as far as free speech is concerned, this perception of liberty is preferable. The model presented herein rests on philosophical foundations, and a special emphasis is given to the scholarship of Isaiah Berlin. Berlin's scholarship seems most appropriate to be at the focus of the model, since it is contrasted with "dignity," which holds traits of what Berlin calls "positive rights." Thus, Berlin's insights help demonstrate why a classical liberal approach to free speech is preferable.

Following the presentation of human dignity and liberty, the interrelationship between the two approaches is discussed. All Western democracies, bar none, combine elements from both approaches. Despite wrongful claims for consistency in the American approach to free speech, there are few dignity-based exceptions to First Amendment jurisprudence, with the treatment of obscenity being the most obvious example. Similarly, Western democracies that are considered speech-restrictive typically tend to defend political speech using liberty-based instincts and doctrines. As a matter of principle, the combination of some elements from both approaches may seem desirable, but any legal system that values freedom of expression should focus almost exclusively on the liberty-based approach. Otherwise, the room for speech regulation is expanded. Specific Western democracies can be located on a dignity-liberty continuum, and their place on this scale assists in assessing the level of protection these countries afford to free speech.

Part III reviews and criticizes Robert Post's Constitutional Domains model, and distinguishes it from the model presented herein. In particular, the criticism focuses on the inapt use Post's model makes of "democracy" for justifying First Amendment jurisprudence, both as an internal justification within American constitutional discourse, and as a comparative model for free speech. The model presented herein, which is in some senses a refinement of Post's original model, uses "dignity" and "liberty" instead of Post's "community" and "democracy." The discussion on Post's model is intended to differentiate between the two approaches and explain why dignity and liberty are superior to Post's terminology for a comprehensive comparative model for the assessment of free speech.

Part IV deals with the two extremes of the dignity-liberty continuum: Germany and the United States. At first, a brief discussion is presented, regarding the underlying values of free speech in these two nations, both of which correspond to dignity and liberty. Then, a detailed depiction of both legal systems' approaches to free speech is presented, in a manner that supplies content for the theoretical models presented in Part II, as well as their implementation in specific legal systems.

The discussion on Germany focuses on the primacy human dignity receives under German constitutional law, and the way it affects German free speech jurisprudence. The impact of German history, and in particular World War II, on German constitutional law is discussed. In addition, a special emphasis is given to German legislation that enforces a civic and respectful public discourse through criminal laws of insult, and the limitations German law puts on political speech.

The discussion of the United States focuses on the exceptional level of protection free speech is afforded, which is unparalleled in the Western world. A special emphasis is given to unique traits of First Amendment jurisprudence, in particular the content neutrality doctrine and the clear and present danger test. Special attention is also given to the treatment of obscenity which falls out-of-line with the general attitude toward free speech, and the treatment of cross burning in the aftermath of *Virginia v. Black*.[641] The nexus between liberty, due process and First Amendment jurisprudence is also analyzed through a discussion of the proper way to incorporate freedom of expression into the American Constitution independently from the First Amendment.

Part V explains why most Western democracies lie closer to the human dignity pole on the dignity-liberty continuum. Two primary reasons are given for the inclination of Western democracies to include many dignity-based features in their free speech doctrines. The first is the rise of human dignity in Western constitutionalism, which places human dignity as a central right and value among an increasing number of democracies in recent years. The values that are associated with human dignity, and related rights (such as equality), are shared by Western democracies.

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[641] *Black*, 538 U.S. at 343. *See* elaborate discussion *supra* Part IV.C.2.

Even Western legal systems that have no "human dignity jargon" share similar conceptions and values that affect their free speech approach. The second reason, that is coupled with the first, is that the Western constitutionalism approach to "balancing" and proportionality, as well as the perception of relative rights, often leads to speech restrictive results when free speech is balanced with other rights—predominantly human dignity. The rights discourse that is commonly applied, and the lenient constitutional tests for the infringement of free speech, lead to a weak protection of this fundamental right.

These common traits among Western democracies' free speech doctrines and attitudes are countered by the liberty-based American approach. It seems that the United States is at the far end of the liberty pole, with no nearby neighbor. Yet, the exceptional American treatment of free speech is not expected to be affected by its peculiarity nor to cause it to come closer to the approach adopted by other Western democracies. Assuming that the current tendencies continue, these gaps are only expected to widen, and the United States will remain in ever-growing isolation in its free speech treatment. This is not a judgmental assessment, in the sense that it calls for a paradigm shift either in the United States or among Western democracies. It is a realistic assessment that takes into account the ideological and constitutional differences that led the United States on a very different path than its Western democratic counterparts. The courses that the United States and Western democracies have taken are set, and are path dependent.[642] The profound differences the model herein describes are, for the most part, unbridgeable.[643]

Human dignity and liberty indeed serve as the best synopsis to describe and understand these fundamental differences. While it is true that all democracies have a mixture of the two approaches in their free speech doctrine, the choice the United States has made is clear, as is the choice of its Western democratic counterparts. It is liberty that takes the lead in the former and human dignity that takes precedence in the latter. The model presented herein makes this gap more visible and understandable.

Finally, while it is proper to view human dignity and community and liberty and autonomy as opposing concepts, and that the two sets of values are distinguishable and separate, there is still room to consider Paul Rabinow's insightful comment: "Autonomy contra dignity, dignity contra autonomy, antinomies linked in an uneasy seesaw, with neither tradition totally eliminating what the other valorizing."[644]

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[642] For discussion on path dependency see *supra* text accompanying note 202.

[643] *Cf.* Whitman, *The Two Western Cultures of Privacy*, *supra* note 11, at 1163 ("Indeed, as our many transatlantic conflicts suggest, the distances between us can often stretch into the unbridgeable.").

[644] PAUL RABINOW, FRENCH DNA: TROUBLE IN PURGATORY 93 (1999). *See also* Post, *Three Concepts of Privacy*, *supra* note 11, at 2092 (quoting Rabinow).