THE CRIMINALIZATION OF SPEECH: COMPARATIVE PERSPECTIVES

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Over the centuries, societies have struggled with whether, and when, speech should be subject to criminal sanctions. The struggle began very early in human history. Even though Gutenberg’s invention of the printing press in the fifteenth century enabled greater communication of thoughts and ideas, governments restricted its use.¹ For example, the British government imposed licensing restrictions which required a printer to obtain a license to print, and (of course) allowed the government to withhold permits from those whose views it found objectionable (often materials critical of the government).² English authorities also criminalized speech. In 1606, in *de Libellis Famosis*,³ the Star Chamber created the offense of seditious libel⁴ which made it a crime to criticize the government or governmental officials (and, at one point, the clergy as well), and enforced that prohibition through criminal sanctions.⁵ The crime was justified by the idea that criticism of the government might cause “disrespect for public authority.”⁶ Moreover, since the goal was to maintain respect for public authority, and true criticism could undermine respect as easily as false criticism, truth was not a defense in a seditious libel prosecution.⁷ Indeed, since true criticisms might be more believable than lies, and

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³ 77 Eng.Rep. 250 (Star Chamber 1606).


⁶ *Id.*

therefore were potentially more harmful, they were punished more severely. There were similar restrictions in the American colonies.

The criminalization of speech might have made sense in the fifteenth and sixteenth centuries when European nations were dominated by monarchies who claimed to have been placed on their thrones by God, and who argued that their actions and decrees were manifestations of God’s will. If kings were “divinely inspired” in their actions, why would ordinary people be allowed to question or criticize what they have done, or what God has done through them? However, with the dawning of the Enlightenment, the concept of Divine Right was challenged and rejected, as was the right of hereditary succession. Divine Right was gradually replaced by democratic principles as reflected in the U.S. Declaration of Independence. Charting a new direction, and a new basis for government, the Declaration moved the emerging nation in the direction of democratic government: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”


See Right to Speak Ill, supra note 14, at 6-7.

See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 96 (1996) (noting that “centuries ago” there was a “belief that the monarch served by divine right”).

See Paine, supra note 25, at 6 (“There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required.”). Thomas Paine, who was British born, but who was in the American colonies during the Revolutionary period and who wrote extensively, expressed serious reservations regarding the British monarchy’s claim to rule by Divine Right: “no man in his senses can say that their claim (the British monarchs’ claim to the throne) under William the Conquerer is a very honorable one. A French bastard landing with an armed banditti, and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original. – It certainly hath no divinity in it.” Id., at 13-14.

Even if the British monarchy had been legitimately established, Paine had grave reservations regarding the desirability of granting the monarchy the right of hereditary succession: it “is an insult and an imposition on posterity. For all men being originally equals, no one by birth could have a right to set up his own family in perpetual preference to all others for ever. . . . Most wise men, in their private sentiments, have ever treated hereditary right with contempt; yet it is one of those evils, when once established is not easily removed . . .” Id. at 12-13.

U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).

Id.
As democracies began to take root, people began to regard freedom of speech as a fundamental component of a free society. As one commentator noted, freedom of expression is not just “politically useful,” it is “indispensable to the operation of a democratic form of government.” As another American scholar observed, “The entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies.” As a result, the First Amendment protects not just the “freedom to speak,” but all “activities of thought and communication by which we ‘govern.’”

Despite the critical role of free speech in representative democracies, there has always been an uneasy relationship between free speech and the criminal law. Virtually all societies criminalize certain types of speech. For example, child pornography is banned in most countries because of its damaging impact on vulnerable children. However, some nations also restrict what can only be regarded as political speech, including artistic routines that involve comment on current affairs. For example, some nations ban certain political symbols (e.g., Nazi symbols), and prohibit individuals from denying the Holocaust. For example, the French Gayssot law (named for the bill’s sponsor) prohibits anyone from denying the Holocaust, as well as from challenging the findings of the Nuremberg War Crimes Tribunal. Likewise, some nations


19 See Alissa J. Rubin, For Hateful Comic in France, Muzzle Becomes a Megaphone, International New York Times A4 (Mar. 12, 2014) (noting that anti-Semitic comedian Dieudonné M’bala M’bala’s performances have been banned in some cities in France).

20 See Andreas Stegbauer, The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code, 8 German L.J. 173, 182 (2007); see also All Things Considered (NPR radio broadcast, Dec. 3, 1992).

21 La loi Gayssot, No. 90-615 (July 13, 1990) (France).

22 Id.

23 Id. The findings of the NWCT have been integrated into French law and are regarded as res judicata. See Article 7 of the Statutory Regulations of the Nuremberg International Military Tribunal Annexed to the August 8, 1945, London Agreement. See also October 6, 1945,
prohibit blasphemy, as well as speech that “degrades human dignity,” and criminalize certain types of speech.

In this short article, we examine how two nations, France and the U.S., diverge in terms of their criminalization of free speech. As we shall see, they have adopted quite different approaches to the handling of free expression.

I. FRENCH CRIMINALIZATION OF SPEECH

In France, it is not at all unusual for authorities to invoke criminal law sanctions against speech that is regarded as unacceptable or impermissible. This criminalization is illustrated by the criminal charges brought against anti-Semitic comedian Dieudonné M’bala M’Bala. Not only has Dieudonné been criminally sanctioned, his performances have been banned. Dieudonné is known for doing the quenelle, essentially an inverted Nazi salute in which he uses one arm to hold down the hand that is performing the inverted Nazi salute (much as Dr. Strangelove did in the James Bond film). Many regard the quenelle as anti-Semitic, not only because of its association with Nazism, but also because the word “quenelle” can refer to a Jewish food. Dieudonné explains the quenelle as “anti-system” or a “defiance of authority.” Following the Charlie Hebdo attacks in Paris, when many were uttering the words “Je suis Charlie” (I am Charlie) in an effort to show support for those who were killed in the attacks,

Decree of the provisional government of the French Republic. This integration is important because French law prohibits individuals from discrediting a court decision through words, images, or actions of any kind under such circumstances as to cause damage to the authority of justice or its independence. French Criminal Code, Article 434-25. The crime is punishable by a 3,750 Euro fine. Because the Nuremberg Tribunal’s findings are binding under French law, the Gayssot law makes the French criminal law applicable to the NWCT’s findings.


Id.

See Rubin, supra note 20.

Id.


Id.
Dieudonné expressed support for Charlie Coulibaly, the killer.\textsuperscript{31} For his statements, Dieudonné was convicted of “condoning terrorism” and given a two-month suspended jail sentence and a fine of 30,000 Euros.\textsuperscript{32} Viewing Dieudonné’s humor as “inciting racial hatred,” the French government has banned his performances.\textsuperscript{33}

Similarly, France has not hesitated to criminally charge individuals who deny the Holocaust, degrade human dignity, or trivialize crimes against humanity. Jean-Marie Le Pen, former President of the French National Front, has been criminally convicted a number of times for such crimes as “public abuse,” “incitement to racial hatred,” “praising war crimes,” and “trivializing crimes against humanity” for making comments about the Holocaust.\textsuperscript{34} In the famous “le detail” (the detail) case, Le Pen was criminally convicted for making the following statements: “I'm asking myself a certain number of questions. I'm not saying that gas chambers did not exist. I haven't been able to see some myself. I haven't studied the question in depth. But I think that they are a detail in the history of the Second World War. . . . Indeed, they are a detail in the War! Are you telling me that it is a disclosed truth that everyone has to believe, that it is a moral obligation? What I'm saying is that there are historians who are debating those issues.”\textsuperscript{35} For these statements, Le Pen was convicted of “trivializing crimes against humanity” and “giving his consent to horrible deeds,” and ordered to pay money to the plaintiffs, as well as the costs of the trial and the cost of publishing the court decision (condemning him) in five national daily

\begin{quote}
\textsuperscript{32} Id.
\textsuperscript{33} See Deciphering the Quenelle, supra note ___.
\textsuperscript{34} See, e.g., Cour d'appel [CA] [regional court of appeal] Versailles, Sept. 19, 1999 (Fr.) (trivializing crimes against humanity); Cour d'appel [CA] [regional court of appeal] Versailles, Mar. 18, 1991 (Fr.) (same); Cass. crim., June 8, 1993 (inciting to racial hatred); Cass. crim., Dec. 7, 1993 (public abuse); Cass. crim., Jan. 14, 1971 (praising war crimes); Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Dec. 26, 1997 (Fr.) (trivializing crimes against humanity); Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Lyon, Jan. 1991 (Fr.) (disrupting public order); see also La Justice a Plusieurs fois Condamne le Chef du FN pour des Propos Racistes ou Antisemites, Le Monde, Apr. 24, 2002, available at http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type_item=ART_ARCH_30J&objet_id=752553 (providing an extensive list of court decisions against Le Pen).
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In 1997, Le Pen again referred to the gas chambers as “a detail” of history: “If you take a book of a thousand pages on the Second World War, in which 50 million people died, the concentration camps occupy two pages and the gas chambers ten or 15 lines, and that's what one calls a detail.” For these statements, Le Pen was again convicted of “trivializing crimes against humanity” and for “giving his consent to horrible things,” was ordered to pay a 300,000 French franc deposit to publish the court decision in newspapers and to make payments to plaintiff associations. The decision was upheld on appeal. In 2007, he was convicted of contesting crimes against humanity for stating that, “in France, at least, the German occupation was not particularly inhuman, although there were some blunders, inevitable in a country of 500,000 [square kilometers].” On February 7, 2008, Le Pen was found guilty of denying a crime against humanity and complicity in condoning war crimes, was fined 10,000 euros, and given a three-month sentence that was suspended.

The French approach to the criminalization of speech is explained, in part, by France’s approach to the right of free expression. France does not treat free speech as a “preferred right.” On the contrary, French free speech law is governed by Article IV of the 1789 French Declaration of the Rights of Man and of the Citizen which provides that: “Liberty consists for someone of being allowed to do anything as long as it does not harm someone else. As a consequence, every man’s exercise of his natural rights is limited only by those limits that ensure all other members of society the benefit of the same rights. The limits cannot be determined

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38 Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Dec. 26, 1997 (Fr.).


otherwise than by law.”

This statement, derived from the Enlightenment, exemplifies the spirit and ideals that have governed the French approach to fundamental rights since the French Revolution: tolerance and equality for all individuals in the exercise and enjoyment of their rights. Moreover, France does not maintain a hierarchy of rights. Not only does the Declaration of the Rights of Man and of the Citizen make clear that an individual’s rights can be restricted when the exercise of those rights infringes another individual’s rights, but the Conseil Constitutionnel specifically rejected the idea of a hierarchy of constitutional rights, as well as the notion that some constitutional rights should trump other rights. Commonly, French court decisions limit the exercise of rights when the exercise produces antagonism, or intrudes on another’s right in a disproportionate manner.

The French approach assumes that there will be limitations on freedom of expression. Not only because that right is contained in the 1789 Declaration, which specifically provides for the restriction of rights when they prevent another’s enjoyment of his/her rights, but also because Article XI of the Declaration specifically contemplates limitations on free speech: “Free communication of thoughts and of opinions is one of man’s most precious rights; any citizen may therefore speak, write, or publish freely, except that he must answer for the abuse of that freedom in the circumstances determined by law.” In this respect, French law is consistent with the European Convention of Human Rights (ECHR), which permits member states to limit the exercise of ECHR freedoms, including the right to free expression. In reliance on the ECHR,

42 French Declaration of the Rights of Man and of the Citizen, Article IV (1789).

43 Id.

44 See id.


46 See Paris Cour d’Appel, November 16, 2006, Section A, Esso c/Greenpeace France (The decision applied the free speech defense, but held that an individual’s free speech rights must be reconciled with respect for the rights of other individuals); Tribunal de Grande Instance Paris, July 9, 2004, SPCEA c. Greenpeace France, Greenpeace New Zealand and Internet.fr. (Although the Court accepted the defendants’ free speech defense, the court limited the defense to the extent that Greenpeace’s conduct defamed plaintiffs.).

47 French Declaration of the Rights of Man and of the Citizen, Article IV (1789).

48 1789 Declaration, Article XI.

49 ECHR, Article X, Par. 2 (The ECHR declares the following regarding the protection of freedom of expression: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security,
France has restricted free speech (Loi pour la Securite Interieure) by prohibiting individuals from holding the French national flag or the French national anthem in contempt.\(^{50}\) The Conseil Constitutionnel upheld these laws as consistent with the need to strike an appropriate balance “between the protection of public order and the protection of the freedoms guaranteed by the Constitution.”\(^{51}\)

On that same basis, France makes it a crime to defame individuals “on the ground of their origin, or the fact that they belong to a particular ethnic group, nation, race or religion.”\(^{52}\) For example, the Cour de Cassation has held that allegations that American Jews exploit the “legend of the Holocaust” can be regarded as targeting a group of individuals because of their belonging to a particular religion, and therefore, the allegations can be prohibited without regard to their truth or falsity.\(^{53}\) Similarly, individuals can be prohibited from insinuating that some principles of the Catholic religion are anti-Semitic, and therefore encouraged the Holocaust.\(^{54}\) In cases involving defamation on the basis of race or religion, an individual can be convicted without regard to the truth of allegedly defamatory allegations.\(^ {55}\) The critical question is whether the allegations cause damage to the honor and esteem of an identifiable community.\(^ {56}\) Consequently, because the Gayssot law is designed to protect social peace and the honor and dignity of the targeted groups of individuals, the Gayssot law is less concerned with the protection of the truth than with protection of Holocaust victims.

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\(^{50}\) French Criminal Code, Art. 433-5-1.


\(^{52}\) See Law No. 1881-07-29 of July 29, 1881, art. 32, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], July 30, 1881, p. 4201.


\(^{55}\) Cass. crim., July 11, 1972, Bull. crim., No. 236.

II. CONTRAST WITH THE UNITED STATES

The U.S. approach to the criminalization of speech is quite different than the French approach. Because of a history of speech repression, not only in England, but also in the American colonies, Americans have always been skeptical of governmental authority. As previously noted, the nation’s founders rejected the concept of the Divine Right of Kings, and embraced representative democracy (much as the French did). As noted, the Declaration of Independence declares, “Governments are instituted among Men, deriving their just powers from the consent of the governed.” Interestingly, and somewhat paradoxically, many in the founding generation were highly distrustful of governmental power, even when it was grounded in democratic ideals. As a result, they sought to place limits on the scope of governmental authority. For example, they embraced the ideas of Baron de Montesquieu, the French philosopher, who is credited with articulating the doctrine of separation of powers. In his landmark book *The Spirit of the Laws*, he articulates the theory:

There is no liberty [if] the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

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58 Id.

59 See see Ralph Ketcham, The Anti-Federalist Papers and the Constitutional Convention Debates: The Clashes and Compromises That Birth to Our Government xv (1986); Paine, *supra* note ___, at 3 (1776) (“Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries by a government, which we might expect in a country without government, our calamity is heightened by reflecting that we furnish the means by which we suffer.”).


61 Id. at 152.
The doctrine of “separation of powers” is incorporated throughout the U.S. Constitution.\(^{62}\)

Interestingly, the Framers of the U.S. Constitution believed that they had created a government of limited and enumerated powers, one whose power was sufficiently checked by the doctrine of separation of powers and other limitations built into the new Constitution, and therefore decided that there was no need to create a declaration of rights.\(^{63}\) This decision was met with great resistance as the American people demanded an express articulation of rights. As a result, it rapidly became clear that the Constitution might not have enough support to gain ratification without the a statement of rights.\(^{64}\) In an effort to salvage the process, proponents urged ratification of the Constitution “as is,” but promised that the first Congress would create what became the Bill of Rights.\(^{65}\) Only then was ratification possible.\(^{66}\) As a result, the Bill of Rights entered the Constitution as an amendment rather than as a part of the Constitution itself.\(^{67}\)

Included in the Bill of Rights was the First Amendment which contained protections for freedom of expression. Despite the First Amendment, speech repression and speech criminalization was relatively common in the United States during the first two centuries.

\(^{62}\) See Ketcham, \textit{supra} note ___, at xv (“Also, mindful of colonial experience and following the arguments of Montesquieu, the idea that the legislative, executive, and judicial powers had to be ‘separated,’ made to ‘check and balance’ each other in order to prevent tyranny, gained wide acceptance.”).

\(^{63}\) See \textit{Wallace v. Jaffree}, 472 U.S. 78, 92 (1985) (White, J., dissenting) (“During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny.”).

\(^{64}\) \textit{Id.}

\(^{65}\) See \textit{McDonald v. City of Chicago}, 561 U.S. 742 (2010) (“But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.”).

\(^{66}\) See \textit{McDonald v. City of Chicago}, 561 U.S. 742 (2010) (“But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.”); \textit{Marsh v. Chambers}, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) (“The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.”).

\(^{67}\) See \textit{McDonald, supra}.  

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Although the very first Congress adopted the language of the First Amendment and sent it to the states for ratification, it also adopted the Alien and Sedition Act which made it a crime to publish “false, scandalous, and malicious writing [against] the Government of the United States [with] intent to defame, or to bring [them] into contempt of disrepute.” Although that Act was later repealed, and the fines repaid, its very passage reveals the contradictions inherent in societal approaches to free expression.

Inconsistencies regarding the criminalization of speech have hardly been limited to the founding generation. During and immediately after World War I, following the collapse of the Russian monarchy and the rise of the Bolsheviks, there were numerous prosecutions for “espionage” and “sedition.” In Schenck v. United States, a man was convicted under the Espionage Act for distributing circulars which analogized the military draft to the Thirteen Amendment, and urged potential inductees to resist the draft. Schenck was convicted even though there was no evidence that anyone had taken any actions in response to his appeals. In Frohwerk v. United States, a newspaper publisher was prosecuted for publishing articles questioning American support for the British in World War I, criticizing the draft, and lauding


69 See Weaver, supra note 1.

70 See New York Times Co. v. Sullivan, 376 U.S. at 276 (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, e.g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H.R.Rep.No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter ‘which no one now doubts.’ Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: ‘I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.’ Letter to Mrs. Adams, July 22, 1804, 4 Jefferson’s Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court.”).


72 249 U.S. 47 (1919).

73 249 U.S. 204 (1919).
those who resisted the draft. Relying on Schenck, the Court expressed concern that things can be said during a time of peace that cannot be said during a time of war, and that “it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.” In Debs v. United States, a presidential candidate was criminally prosecuted for a campaign speech that he gave in Canton, Ohio. In later cases, individuals were convicted of committing criminal anarchy, criminal syndicalism, and violations of the Smith Act (which prohibited advocacy or advice related to the overthrow of the U.S. government by force).

Over time, U.S. free speech law began to evolve. The process began with Justice Holmes’ dissent in Abrams v. United States. In that dissent, he argued that it “is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.” Holmes’ approach seemed to gain ascendance in the Court’s landmark decision in Brandenburg v. Ohio. In that case, the Court held that individuals could not be prosecuted for inciting illegal conduct unless it could be shown that they intended to cause imminent lawless conduct, and that their speech was likely to result in imminent lawless conduct. In other words, the mere fact that an individual encourages others to violate the law

74 Id. at 251. The articles condemned American support for the British and praised the “unconquerable spirit and undiminished strength of the German nation.” In addition, it blamed the war on Wall Street, and depicted “the sufferings of a drafted man, of his then recognizing that his country is not in danger and that he is being sent to a foreign land to fight in a cause that neither he nor any one else knows anything of, and reaching the conviction that this is but a war to protect some rich men’s money.” Draftees were lauded for resisting the draft.

75 Id.

76 249 U.S. 211 (1919).

77 See Gitlow v. United States, 268 U.S. 652 (1925) (prosecution based on publication of “The Left Wing Manifesto” and “The Revolutionary Age.”).

78 See Whitney v. California, 274 U.S. 357 (1927) (Whitney, who withdrew from the Socialist Party in order to help form the Communist Labor Party, was charged with being “a member of” and assisting “in organizing the Communist Labor Party of California.”).

79 250 U.S. 616 (1919) (Holmes, J., dissenting).

80 Id. at 628.


82 Id. at 447.
would not be enough to sustain a conviction. In only rare instances may individuals be prosecuted for “pure speech.”

The evolution of U.S. free speech doctrine came slowly, but began to decisively shift the nation’s approach to free expression. Over time, U.S. courts and commentators began to regard freedom of expression as an indispensable element of modern representative democracies. Fifteenth and sixteenth century press restrictions might have made sense in an era dominated by monarchies. However, as representative democracies gained ascendancy, people and political theorists rejected the idea that the government is the repository of all wisdom, as well as the idea that governments should be insulated from criticism. American society eventually accepted the idea that a citizen’s right to criticize goes hand-in-hand with the citizen’s right to vote. In the Court’s landmark decision in *New York Times Co. v. Sullivan*, the Court restricted the ability of public officials to sue media defendants for defamation. In *Garrison v. Louisiana*, the Court struck down a Louisiana statute that imposed criminal sanctions for libel. As the Court recognized in *West Virginia State Board of Education v. Barnette*, Justice Jackson stated that: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.” Justice Jackson’ sentiment has been reinforced in a number of subsequent United States Supreme Court decisions, and strongly reflects the bias against governmentally declared truth.

In the modern era, the U.S. Supreme Court has generally treated freedom of expression as a “preferred right” which the Court is unwilling to balance against all but the most compelling interests, and which the Court has rarely allowed the government to criminalize. The Court has held that the U.S. has a compelling interest in stamping out child pornography which allows the

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84 379 U.S. 64 (1964).

85 319 U.S. 624 (1943).

86 *Id.*, at 641.


88 *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

government to ban commercial sales of depictions of actual children engaged in sexual activity. In addition, although the Court has suggested that a limited number of other categories of speech can be prohibited, it has generally been unwilling to expand the number of categories of prohibitable speech. Indeed, in a number of recent cases, governments have urged the U.S. Supreme Court to exclude additional categories of speech from First Amendment protection, and the Court has generally refused to do so.

More particularly, the Court has generally refused to balance the interest in free speech against other competing interests. For example, in United States v. Stevens, the Court was urged to hold that depictions of animal cruelty are not protected under the First Amendment. In making that argument, the U.S. government proposed a simple balancing test for evaluating the value of free expression: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of speech against its societal costs.” The Court referred to the proposed test as both “startling and dangerous,” and flatly refused to engage in “an ad hoc balancing of relative social costs and benefits.” The Court emphasized that the “First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh its costs.” The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”

Interestingly, when the U.S. Supreme Court has been forced to balance free speech interests against so-called “dignity interests,” the Court has cut the balance decisively in favor of

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91 See, e.g., Virginia v. Black, 538 U.S. 343 (2003) (prohibitions on “true threats” permissible); Miller v. California, 413 U.S. 15 (1973) (prohibitions on “obscenity” permissible – although obscenity prosecutions are becoming exceedingly rare); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (prohibitions on fighting words permissible – although many fighting words convictions are overturned on vagueness or overbreadth grounds).


94 Id. at 470.

95 Id.

96 Id.

97 Id.
free expression. For example, in *Hustler Magazine v. Falwell*, the *Hustler Magazine* (a sexually-oriented magazine) parodied Jerry Falwell, a protestant minister, who was the founder of the political organization, The Moral Majority. The parody involved a fake advertisement, a take-off on real ads run by the liquor Campari, in which Hustler suggested that the first time that Falwell engaged in sex was in an outhouse with his mother. When Falwell sued Hustler for intentional infliction of mental distress, the Court rejected the challenge, noting that at “the heart of the First Amendment is the recognition of the importance of the free flow of ideas and opinions on matters of public interest and concern.” The Court emphasized that “in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.” The Court cited *Garrison v. Louisiana* for the proposition that “even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment.” The Court rejected Falwell’s contention that the publisher should be civilly liable because the parody of him was “outrageous.”

A similar decision was rendered in *Snyder v. Phelps*. That case involved members of the Westboro Baptist Church who protested at the funeral of Marine Lance Corporal Matthew Snyder. The protestors carried signs with messages such as “God Hates You,” “America is Doomed,” and “Thank God for IEDs.” Essentially, Westboro believed that soldiers were being killed because of the U.S.’s tolerance of homosexuality. Snyder’s father, who could not see the signs at the time of the funeral (the police prohibited the protestors from coming too close to the funeral), did see the signs on the nightly news. He claimed that the protests subjected him to emotional injuries, and caused him to become “tearful, angry and physically ill,” and to suffer severe depression. In *Snyder*, the Court overturned a trial court judgment awarding the father more than $10 million in compensatory and punitive damages. The Court emphasized that Westboro’s speech implicated matters of public concern, and conveyed Westboro’s positions on those issues. Although the Court recognized that Westboro’s speech caused distress, the Court emphasized that the speech was nonetheless entitled to “special protection” under the First Amendment because it involved a matter of public concern. Moreover, the government may not prohibit the expression of an idea simply because “it is upsetting or arouses contempt,” or

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99 Id. at 51.

100 Id. at 53.


102 485 U.S. at 53.

103 Id.

because society finds the idea itself offensive or disagreeable.”105 The Court rejected the idea that Westboro could be held liable on the basis that its speech was “outrageous”; “ ‘Outrageousness,’ however, is a highly malleable standard with ‘an inherent subjectiveness [which] would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’ ”106 The Court concluded that “Such a risk is unacceptable; ‘in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate “breathing space” to the freedoms protected by the First Amendment.’ ”107

Although decisions like Falwell and Snyder clearly suggest that the U.S. would balance the competing interests differently than France would balance them, there are additional reasons why the U.S. would not ban either Le Pen’s statements or Dieudonné’s comedic routine. In a number of recent decisions, the Court has made clear that the First Amendment prohibits content-based and viewpoint-based restrictions on free expression.108 Content-based and viewpoints restrictions are regarded as particularly pernicious because they “raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”109 In R.A.V. v. City of St. Paul,110 the Court condemned viewpoint discrimination as “censorship in its purest form,”111 and held that such discrimination “requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue.”112 “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”113

In France, in the case of both Le Pen and Dieudonné, the French government was clearly engaged in viewpoint discrimination. While it would be perfectly fine for Le Pen to affirm that

105 Id. at 458 (Quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).
106 Id.
107 Id.
109 Id. at 388 (Quoting Simon & Schuster, Inc. v. Members of N.Y. State Crimes Board, 502 U.S. 105, 116 (1991)).
111 Id. at 430.
112 Id.
113 Id. (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).
the Holocaust occurred, and to agree with the Nuremberg War Crimes Tribunal regarding the scope and extent of the Holocaust, it is criminal for him to deny that the Holocaust occurred or to attempt to minimize its scope. The latter viewpoint is prohibited. With Dieudonné, even though French citizens were permitted to express support for the victims of the Charlie Hebdo massacre, with their statements of “Je suis Charlie,” Dieudonné was criminally sanctioned for indicating that he identified with the attackers. In the U.S., in order to sanction such statements, the government would be required to meet a very high standard. Either it would be required to satisfy strict scrutiny (in the sense that it could show that a “compelling” or “overriding” governmental interest is implicated, and that the restriction on speech is narrowly tailored to be the least restrictive means possible to accomplish that objective), or it would be required to show that Dieudonné intended to incite imminent lawless conduct, and that his speech was likely to incite such conduct. It is extremely unlikely that the government could satisfy either standard on these facts.

Moreover, the idea of banning comedic performances, such as France did with regard to M’bala M’bala’s comedic routines, is inconsistent with the First Amendment. In general, the United States has prohibited prior restraints on speech. For example, in Nebraska Press Association v. Stuart, the Court struck down a trial court order imposing a gag order that prohibited the news media from publishing or broadcasting accounts of confessions or admissions made by defendant to law enforcement officers or third parties, as well as from publishing or broadcasting other facts strongly implicative of defendant. The Court emphasized that the First Amendment affords “special protection against orders that prohibit the publication or broadcast of particular information” or that impose a “previous” or “prior” restraint on speech. Likewise, in New York Times Co. v. United States, the Court lifted injunctions prohibiting publication of the “Pentagon Papers.” Although the government argued that publication of the papers would have an adverse impact on the nation’s security, the Court concluded that “the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.” Undoubtedly, the bans on Dieudonné’s performance would be regarded as a prior restraint on speech and would be struck down as unconstitutional.


117 Id. at 556.

118 403 U.S. 713 (1971).

119 Id. at 725-726.
CONCLUSION

The U.S. and France approach speech issues, especially when hate speech is involved, from quite different premises that lead them to very different results. From a U.S. perspective, France’s response to both Le Pen’s statements and Dieudonné’s statements and comedic routine, could be viewed as highly repressive and inappropriate. In a free society, the citizenry should be free to say what they think. If someone like Dieudonné wishes to do the quenelle, or express support for the Charlie Hebdo attackers, or if Le Pen wishes to minimize the Holocaust, he should be allowed to do so.

Moreover, it is not clear that France’s towards Holocaust denial, or Dieudonné’s routines, has had a measurable impact on French attitudes. Despite the Gayssot law’s prohibition against Holocaust denial, Holocaust deniers have not disappeared from France.120 Certainly, regarding Le Pen, the criminal sanctions imposed on him have not prevented him from continuing to deny or diminish the Holocaust. Indeed, within the last year, he has reasserted his allegation that the gas chambers are nothing more than a “detail” of history.121 Moreover, after having his performances banned by the French government, Dieudonné’s popularity has only grown,122 the quenelle has only gained in popularity, and is now being used by Dieudonné’s supporters, athletes and others.123

120 See Deciphering the Quenelle, supra note ___ (noting that “Dieudonné invited onstage at one of his shows Robert Faurisson, a ‘theorist’ of Holocaust denial, who argues that the extermination of the European Jews is a Jewish invention.”).

121 See Briefly, The International New York Times A-5 (Aug. 22, 2015) (“Under Ms. Le Pen's leadership, the National Front has moved toward the political mainstream, and Mr. Le Pen has increasingly become an embarrassment to her, especially after repeating his views on the Holocaust. He has told interviewers that the gas chambers were a ‘detail’ of history.’ ”).

122 See Alissa J. Rubin, For Hateful Comic in France, Muzzle Becomes a Megaphone, The International New York Times A4 (Mar. 12, 2014) (“Yet the campaign against him shows few signs of succeeding. Not only has he escaped conviction in many of the cases brought against him or, at worst, had to pay fines; he has also easily circumvented limits on his public appearances via the Internet and social media. One of his videos, posted in February, a riposte to the Interior Ministry and specifically Manuel Valls, the minister, received almost two million views in its first week. Perhaps more important, the attempts to silence Mr. M'bala M'bala seem to have fueled support for him within his core audience: a social and racial cross-section of French people who feel shortchanged by a ruling elite.”).

123 See Scott Sayare, A Surly Salute Tests Limits of Free Speech in France, The International New York Times A3 (Jan. 2. 2014) (“Fans of the performer, Dieudonné M'Bala M'Bala, send him photos of themselves performing the gesture, known as the quenelle, in front of historic monuments, next to unwitting public officials, at weddings, under water and in high
school class photographs, but also, increasingly, beside synagogues, Holocaust memorials and street signs displaying the word "Jew." At least one young man appears to have posed for a quenelle outside the grade school in Toulouse where, last year, four Jews were killed by a self-proclaimed operative of Al Qaeda.”).