Section B

A European Perspective on Free Speech/Free Press Freedoms

As the following excerpt suggests, Europeans (and some U.S. scholars) have found much to admire and much to criticize in various aspects of U.S. free speech/free press doctrine. Writing in the late 20th century, Errera describes the developing European law on freedom of speech, discusses the constitutional and philosophical development of free speech theories in France and the United States, and compares U.S. and French law in two areas: libel and regulation of hate speech. (Section D in this Chapter provides additional discussion of the constitutional law of libel in several systems.) While praising the more systematic development of theories of the First Amendment in the United States, he is critical of the U.S. posture on regulation of hate speech.


[We are witnessing not a convergence but a limited rapprochement of concepts and social attitudes on both sides of the Atlantic, as illustrated in three areas: commercial speech; the libel of public officials; and the protection of journalists' sources of information. On the other hand, there remain deep differences regarding general principles— and, in particular, extremist forms of political expression and prior restraints.

THE FIRST CENTURY OF FREEDOM OF EXPRESSION: THE UNITED STATES AND FRANCE

The reciprocal influence of United States and French constitutional ideas in the last quarter of the eighteenth century have been the subject of a substantial volume of literature. The history of those ideas in the United States and in France during what may be called the “first century” is less known and less adequately appreciated. In the United States this period extends from the adoption of the First Amendment.
Amendment to the 1920s, when the Supreme Court began to extend the protection of the Fourteenth Amendment to freedom of speech and to develop a philosophy of the First Amendment. In France, a comparable significant period covers almost exactly one hundred years, from the Declaration of the Rights of Man and of the Citizen (1789) to the enactment of the 1881 statute on freedom of the press.

France: 1780–1881

Almost one hundred years separate the Declaration of the Rights of Man and of the Citizen from the 1881 statute on freedom of the press. There are three main features of that century that are relevant to this discussion:

1. Most French constitutions of the period incorporated the 1789 declaration and thereby its clauses on the freedom of the press. It is important to recall these clauses, because throughout the last century they shaped the minds and actions of those who wrote and acted in favor of freedom of speech and of the press in France.

Article 11 of the 1789 declaration states that "the free communication of thought and of opinion is one of the most precious rights of men; every citizen may speak, write, and publish freely, but he is responsible for the abuse of that freedom in cases determined by law." This provision was echoed in later constitutions. For example, Article 8 of the 1848 Constitution declared that:

"Citizens have the right to associate, to assemble peacefully and without weapons, to send petitions and to express their thoughts through the press or by other means. The only limit to the exercise of such rights is the rights of others and public security. The press may not, in any case, be subjected to censorship."

Many of the clauses emphasized freedom of expression before mentioning freedom of the press. This is a fact of salient importance in modern France. The resemblance between Article 8 of the Constitution of 1848 and the U.S. Constitution's First Amendment is evident. Such formulations could have been the basis of a general law on freedom of speech, of which freedom of the press would have been a special category. This, however, was not the case. The law relating to the press, to demonstrations, to public meetings, or to associations was contained in different instruments. That is one of the main differences between United States and French law today.

2. These constitutional declarations did not provide effective constitutional protection. There was no judicial review. More important, perhaps, the constitutional clauses themselves provided that the relevant statute (la loi) could define the scope of freedom of the press. Worse, the existence of authoritarian or illiberal regimes or tendencies resulted in unchecked restrictions on the freedom of the press. Even in 1881, the guarantee then afforded was no more than a very liberal and comprehensive statute; the law continued to define the freedom of expression.

3. The trial of press crimes by the jury was deemed of great importance throughout the nineteenth century. Tocqueville and Pierre Royer-Collard, a leading liberal author, saw a direct link between the legal status of an essential freedom, such as of the press, and political institutions in general. In an 1835 speech Royer-Collard mentioned "the great achievement, the national achievement, by which press trials go before a jury," and stated that "the members of the jury are those entitled to vote. . . . Like you, they are repositories of sovereignty. If you do not trust them today, they might in their turn not trust you." He added:

"The jury is not one of those everyday courts of law, that depend entirely on what the legislator will decide and what he may place in a very high or in a very low position. The jury is not, in fact, a court of law [Ce n'est même pas une juridiction]; it is a political institution. It represents, like you and in the same degree, the sovereignty of the country itself.

A generation later another liberal author, A. Prévert-Paradol, maintained that "to discover whether the press is free in such or such a country, we never think first of the relevant statute that applies to it. Without hesitation, at once, ask: Who trims?" Prévert-Paradol also thought that the jury was the "topical and natural judge of the press.

In France the political and legal debate during the nineteenth century was intense and of high quality; it was almost nonexistent in the United States. Also, in France there was a sharp contrast between the continued repetition of constitutional proclamations and the absence of effective constitutional protection for freedom of speech or of the press. Both countries, however, shared a common element, which ultimately proved to be of great importance. Each country had an authoritative text from the beginning—the First Amendment in the United States, and Article 11 of the 1789 Declaration in France. Lawyers, the courts, and politicians might have been slow to discover the full legal implication of those texts. After Giliel in the United States and, much more recently, the 1984 decision of the French Conseil constitutionnel, the full import of those texts has been recognized.

FREEDOM OF EXPRESSION IN FRANCE: CONSTITUTIONAL STATUS, WITH A LIMITED GUARANTEE

Today freedom of expression has constitutional status in France as in the United States, but in France it provides only a limited guarantee.

The constitutional status of the freedom of the press is based not only on Article 11 of the 1789 Declaration but also on the fact that such freedom constitutes, in French constitutional law, one of the "fundamental principles recognized by the laws of the Republic." This is declared in the preamble of the 1946 Constitution (recognized as an integral part of that Constitution) and has been adopted by the Constitution of 1958 which is in effect today.

The Constitutional Council's decisions concerning freedom of expression can be summed up as follows. As stated in Article 11 of the 1789 Declaration, the communication of ideas and information was a basic freedom. Consequently, under Article 34 of the Constitution, which defines the legislative jurisdiction of Parliament, Parliament (and not the executive) has exclusive jurisdiction to enunciate the rules relating to the fundamental guarantees of the exercise of such a freedom. In doing so, Parliament may not go beyond what is deemed necessary—an important affirmation of the principle of necessity and proportionality. Therefore, decisions relating to the monopoly of the
state over broadcasting, and the authorization needed by private broadcasters granted by the government or by an independent authority had to take account of the freedom of communication, technical constraints, and three objectives, each of constitutional character: the needs of public order, respect for the freedoms of others; and the preservation of what the Constitutional Council called "pluralism," taking into full consideration the special character of broadcasting in this respect.

On October 10–11, 1984 the Constitutional Council rendered a landmark decision. A new statute on the press had just been passed by Parliament. The statute required newspapers and press companies to make public certain information on ownership. The statute also sought to limit economic concentration. The discussion of the bill in Parliament and in the press itself had been the occasion of a long and sometimes heated debate, and the opposition in Parliament did not conceal its intention to refer the bill to the Constitutional Council, whose decision set forth many elements of a general concept of the freedom of the press.

First, the obligation to make public certain information on ownership (referred to as transparency in France) is not inconsistent with, and does not limit, freedom of the press. On the contrary, such information tends to reinforce an effective exercise of the freedom of the press. By informing the public about the identity of the real proprietors (dirigeants) of press companies, about financial transactions relating to them, and about related economic interests, readers will be in a position to decide freely among newspapers. Public opinion will be fully informed of what the press offers.

As regards the dispositions of the statute limiting economic concentration in the press (pluralism), the Constitutional Council quoted Article 11 of the 1789 Declaration: "The free communication of thought and of opinion is one of the most precious rights of man; every citizen may speak, write and publish freely, but he is responsible for the abuse of that freedom in cases determined by law." The Council used this article not only to assign limits to the 1984 statute, but also to assign them to any future statute on the subject. The Council affirmed that Parliament has exclusive jurisdiction to legislate with respect to the exercise of a fundamental freedom, such as the freedom of communication (Art. 34 of the Constitution). But there are limits to the powers of Parliament. Legislation may have only two legitimate purposes: to facilitate the exercise of freedom of expression and to reconcile it with other constitutional rules or principles.

The Council noted that the exercise of freedom of expression "is one of the essential guarantees of the respect for other rights and freedoms and for national sovereignty." The reference to national sovereignty apart, those words echo those used by Justice Cardozo in 1937 when he justified the freedom of speech as a fundamental liberty. Freedom of expression was "the indispensable condition of nearly every other form of freedom." That passage in the Constitutional Council's decision did not go unnoticed and we may anticipate its influence in the coming years.

The Constitutional Council declared the protection of "pluralism"—that is, the prevention of excessive economic concentration—in the

newspapers a constitutional objective. "The objective is that readers, who form an essential part of the beneficiaries of freedom of expression proclaimed by Article 11 of the 1789 Declaration, be in such a position as to choose freely without any interference from private interests or from the government and this cannot be made a business matter." The 1984 statute imposed a limit of 15 percent of the total national circulation as the maximum that any newspaper can control. The Constitutional Council construed this limitation narrowly, as applying only to growth due to takeovers and mergers, not to growth due to success in the market. The Council also stated that the statute applied only to future acquisitions. As an English commentator wrote, "It considered that upsetting existing arrangements could only be constitutionally appropriate where the situation had been illegally created, or where calling it into question was "really necessary to ensure the realization of the constitutional objective pursued," neither of which applied to the present case.

It is important to recognize the legal and political significance of the Constitutional Council's statement on freedom of expression in general. When the statute of 1981 was passed it covered essentially the printing profession and newspapers; it made no reference to press companies and readers. What may seem surprising to us today was entirely understandable then. After generations of battles for freedom to publish, forgetting the economics of the press and the interests of readers was natural. Such an oversight would not occur today.

A Limited Protection

Constitutional protection of freedom of expression in France is limited by certain features of the French legal system:

(1) For reasons rooted in French legal and political history, the law governing freedom of the (written) press and freedom of association and assembly and the law relating to marches and demonstrations do not form a unified law. The different freedoms are governed by different statutes passed at different times, and in some respects they are very different in their content and construction. A unifying principle such as that of the U.S. constitution's First Amendment is absent.

(2) A comparison of court decisions and the legal literature of freedom of the press and of expression in the United States and in France yields one major difference. On the European side there is not the range of reflection and discussion on the philosophical, political, and social foundations of such freedoms and on the related social values that are found in American writings and court decisions. . . . In the French judicial tradition, court decisions are extremely common. They usually aim at philosophical or social arguments of the kind familiar to United States court decisions. . . .

Recent decisions of the Constitutional Council provide a welcome and much-needed departure from earlier habit. But whereas the body of important U.S. Supreme Court decisions on freedom of speech is more than half a century old, French constitutional case law is recent. . . .
Toward the end of the twentieth century the central elements for a European concept of freedom of expression are Article 10 of the European Convention on Human Rights and the case law of the European Human Rights Commission and the European Court of Human Rights in Strasbourg on the enforcement of that article. That case law is not impervious to United States influence and can provide a basis for comparison with the philosophy and the case law of the First Amendment.

The European Convention requires the high contracting parties to “secure to everyone within their jurisdiction” the rights and freedoms defined in the Convention. Most of the rights defined are not absolute. Every article enunciates a basic freedom as well as the legitimate restrictions that may be placed on it.

Article 10 of the Convention provides:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. 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, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the prevention of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The cases applying Article 10 have articulated several considerations for a philosophy of free expression. An important element in such a theory is the concept of a ‘democratic society’ invoked in Article 10: “The court’s supervisory function obliges it to pay the utmost attention to the principles characterizing a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of any man.”

The Court referred to the phrase “in a democratic society” as contemplating “the demands of pluralism, tolerance, and of that broadmindedness without which there is no ‘democratic society.’” Article 10 is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as offensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.” In a democratic society, “every ‘freedom’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”

The notions of pluralism and tolerance are indeed essential. I would suggest, however, that pluralism is a necessary condition of a democratic society; it is not a sufficient condition. Without consensus on the kind of society in which we want to live and on certain basic values that must be respected and protected, pluralism is nothing more than a confession of tendencies or interests, and tolerance becomes a kind of interference with that society.

According to Article 10(2), in a democratic society the exercise of freedom of expression ‘carries with it duties and responsibilities’ that depend on all of the circumstances including the means used for the exercise of the freedom. Therefore the exercise of freedom is subject to “formalities, conditions, restrictions or penalties” imposed by public authority, irrespective of their nature (administrative, civil, or criminal) or their source (administrative, legislative, or judicial).

These restrictions and their elaboration by the European Human Rights Commission and the European Human Rights Court have also contributed elements to a general concept of freedom of expression:

1. Restrictions on freedom of expression must be ‘prescribed by law’.
First, the law must be adequately accessible. The citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences a given action may entail. Those consequences need not be foreseeable with absolute certainty...

2. The only legitimate restrictions on the freedom of expression are those enunciated in Article 10(2): the interests of national security; the prevention of disorder or crime; the protection of health or morals; the protection of the reputation or rights of others; the protection of confidential information, and the authority and impartiality of the judiciary. This article must, however, be read in conjunction with other articles of the Convention, such as the provisions permitting derogation from rights in a time of public emergency (Art. 15) and the permissible limitations on the political activities of aliens (Art. 16).

3. The Court seems to resist the notion of ‘balancing’ the freedom of expression against the public good, a principle familiar in the jurisprudence of the United States. The Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.

4. In judging restrictions, the Court has been alert to its own role: It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10(2) which has been invoked. Neither is it sufficient that the interference was imposed because its subject-matter fell within a particular
category or was caught by a legal rule formulated in general or absolute terms. The Court has to be satisfied that the interference was necessary with regard to the facts and circumstances prevailing in the specific case before it. [Sunday Times]

The general theory of the freedom of expression has been applied in a number of cases involving restrictions claimed to be justified under Article 10(2):

(a) The protection of morals. The Handyside case involved the seizure, forfeiture, and later destruction, as obscene, of copies of the Little Red Book for Schoolchildren, which a British company had proposed to publish. The Court found the interference with the publisher’s freedom of expression to be “prescribed by law” (i.e., the Obscene Publication Act, 1959 and 1964) and “necessary in a democratic society” for the protection of morals.

(b) The prevention of the disclosure of information received in confidence. The editor of a Swiss daily was sentenced and fined for publishing a classified report by the Swiss secret services regarding espionage. The European Human Rights Commission held that under the circumstances this was not a violation of the Convention.

(c) The protection of the reputation or rights of others. The law of libel—an historical curiosity in most countries today—led, in Great Britain, to the conviction of participants to a fine and to a suspended sentence of imprisonment for publishing a poem on alleged homosexuality. The Commission concluded that Article 10 of the Convention had not been violated.

Two Austrian cases of libel led to important decisions contributing to the theory of freedom of expression. In the first case, the Austrian Human Rights Commission held that the Austrian law obliging the press to publish only what can be proven true did not go beyond what is reasonably necessary in a democratic society. The full measure of the law was to be brought into play only when allegations of an objectively defamatory character had been made against a particular person. In the Läng case, the Commission held that Article 10 had been violated. Bruno Kreisky, the former chancellor of Austria, initiated criminal proceedings against a journalist who was subsequently convicted of public defamation. The journalist had criticized Kreisky’s political behavior and some of his statements, in particular his relations with Peter, a leader of the Austrian Liberal party, and Peter’s alleged past involvement with the Nazi movement; there was no reference to any conduct within Kreisky’s private life. The journalist was convicted on the grounds that he had described Kreisky’s behavior as coming close to the “ugliest opportunism,” and as “immoral” and “undignified.” ... [The Court] found that the interference with the journalist was not “necessary in a democratic society ... for the protection of the reputation ... of others.”

The Commission rejected the application in a case involving the conviction of applicants for possessing racist pamphlets. Quoting Article 17 of the European convention, the Commission said that its general purpose was “to prevent totalitarian groups from exploiting, in their own interests, the principles enunciated in the Convention.” In another case, the Commission upheld German defamation laws prohibiting the publication of literature denying the genocide of the Jews.

Maintaining the Authority and Impartiality of the Judiciary

This was the issue in the Sunday Times case decided by the European Court of Human Rights in 1979. In that case, distillers had marketed a drug, “thalidomide,” which had been taken by a number of pregnant women who later gave birth to deformed children. Writs were issued by the parents and a lengthy period of negotiations followed without the case proceeding to trial. A weekly newspaper, The Sunday Times, began a series of articles with the aim of assisting the parents in obtaining a more generous settlement of their actions. One proposed article was to deal with the history of the testing, manufacturing, and marketing of the drug, but the Attorney-General obtained an injunction restraining publication of the article on the ground that it would constitute a contempt of court. The injunction had been granted in the High Court of Lords. The publisher, editor, and a group of journalists of the Sunday Times filed an application claiming that the injunction infringed on their right to freedom of expression.

The Court held that Article 10 of the Convention had been violated. After examining at length the English law of contempt, the Court found that the interference with the applicants’ freedom of expression was prescribed by law within the meaning of Article 10(2). But was the law, as applied to this case, “necessary in a democratic society”? Did it respond to a pressing social need? Was it proportionate to the legitimate end pursued? Under the circumstances the Court found that the law did not meet those standards. The proposed article was couched in moderate terms and did not present just one side of the evidence. Its publication would not have had adverse consequences for the “authority of the judiciary.” The Court added:

There is general recognition of the fact that the Courts cannot operate in a vacuum. Whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas but the public also has a right to receive them.

The Court underlined the fact that the thalidomide disaster was a matter of undisputed public concern,... Fundamental issues concerning protection against and compensation for injuries resulting from scientific developments...were raised and many facets of the existing law on those subjects called into action.

The theory that emerges from Article 10, as illustrated in these cases, cannot be articulated in a single phrase, like that in the First Amendment to the United States Constitution—a phrase that has also required and continues to require definition and interpretation. The emerging European concept, as articulated in the paragraphs of Article 10 of the European Convention on Human Rights, is also being defined
wherein inhabitants included survivors of the Holocaust, violated the First Amendment. 130

The philosophy behind the prevailing United States attitude today to extreme forms of political expression is twofold. There is the stated analogy between economic liberalism and total freedom of expression. In Abrams, Holmes said:

When men have realized that time has upset many fighting beliefs, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—than the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

That at any rate is the theory of our Constitution.

This led Justice Powell to write, half a century later, that "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

One might conclude that a second element in United States thinking, linked to the first, is an inveterate social and historical optimism.

I suggest that a liberal society should not tolerate simply any form of expression: freedom of expression has limits, and these and their rationale should be stated and justified. The European philosophy and attitude are very different from those that have prevailed in the United States. Our societies, I think, rest ultimately on essential moral values. Among them perhaps none must be given to respect for the dignity of the individual and concern for the rights of minorities. Throughout this century, these values have been pitted against currents of thought whose aim has been their outright destruction. Even when Europeans disagree on today's policies or on the future of their societies (as they do), they know what they do not want to see, what they refuse, and what is their culture.

Indeed, we owe a great deal to Alexander Bickel, a great United States lawyer and thinker, for one of the best criticisms of what passes for the main United States creed regarding respect to moral values. In commenting on the advocacy of genocide or speech urging the segregation and the expulsion of certain minorities, Bickel said:

One may allow such speech on one of two premises; either the cynical premise that words don't matter, that they make nothing happen and are too trivial to bother with; or else the premise taken by Justice Brandeis in Whitney v. California that "discussion affords ordinarily adequate protection against dismemberment of ordinary doctrine." The first premise is inconsistent with the idea of the First Amendment. If speech does not matter we might as well suppress it, because it is sometimes a nuisance. As to the second, we have lived through too much to believe it.

130 Callin v. Smith, 516 F.2d 1187 (7th Cir. 1975), cert. denied, 429 U.S. 916 (1976)
He continued:

Disastrously, unacceptably noxious doctrine can prevail, and can be made to prevail by the most innocent sort of advocacy. Holmes recognized as much in the passage in the Gitlow dissent in which he said that "eloquence may set fire to reason." According to him, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

Bickel disagrees:

If in the long run the belief, let us say, in genocide is destined to be accepted by the dominant forces of the community, the only meaning of free speech is that it should be given its chance to have its way. Do we believe that? Do we accept it?

I agree with Bickel that:

There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated. . . .

This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible, . . . Where nothing is unspeakable, nothing is unattainable.

These insights reveal a deep understanding of the nature of speech and its effects in our societies. Reflecting experience during this century and a somewhat different social philosophy, these insights can be taken as representing the dominant state of mind in today's Europe. That is why there are group libel laws in many countries, sometimes the banning of extremist groups or of some of their activities, while the Supreme Court's acceptance of group libel laws in Beauharnais v. Illinois is now deemed questionable and its refusal to review the Skokie case has been deemed to reflect current law in the United States.

No doubt the Skokie case would have been decided differently in Europe and on different grounds. What is striking to a European reader about the court's decision is that the village did not invoke the needs of public order and relied mainly, in its argument, on the "falsity" of Nazism and on the issues of Beauharnais. When we in Europe read the famous Holmes dictum in Gitlow, cited by Bickel ("they should be given their chance and have their way") and Meiklejohn's comment in 1946 ("That is Americanism"), our response is that that, at any rate, is not the theory or practice in Europe. And indeed Article 17 of the European Convention on Human Rights embodies Europeans' attitudes in law. . . .

NOTE: UNITED STATES: DOCTRINE ON SOME ISSUES DISCUSSED BY PROFESSOR EBERERA

U.S. case law on the regulation of hate speech and defamation of public officials is discussed in detail below in Sections C and D. On other matters referred to by Eberera:

(a) Obscenity. The current U.S. doctrine on obscenity is set out in Miller v. California, 413 U.S. 15 (1973); States are permitted to make criminal the distribution of material as to which "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest," which "depicts or describes, in a patently offensive way, sexual conduct specifically defined in the applicable state law," and which "taken as a whole, lacks serious literary, artistic, political, or scientific value." Prosecutions for obscenity involving adults are rare, with most prosecutions since the 1960s focusing on pornography (a term referring to a class somewhat broader than obscenity) using children. For the basic case on child pornography, see New York v. Ferber, 458 U.S. 747 (1982). The dissemination of sexuality explicit materials via the Internet has presented a distinct set of questions, with the Court's doctrine concerned that regulations not deny access to non-obscene materials to willing adult consumers. See, e.g., Ashcroft v. Free Speech Coalition, 535 U.S. 334 (2002).

(b) Secrecy. The First Amendment has been construed to impose substantial limits on regulation aimed at preventing the dissemination of material described by applicable law as "confidential," which has nonetheless been obtained by the disseminator without violating the law. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Even disseminating material obtained through violation of the law is sometimes protected, where the disseminator was not the law violator. See Bartnicki v. Vopper, 532 U.S. 514 (2001). It seems generally accepted that the First Amendment does not shield from prosecution a person who breaks the law to obtain—and then disseminate—confidential information.

(c) Pending cases and criticism of the judiciary. U.S. conceptions do not allow prior restraints on reporting about cases before they are adjudicated, as occurred in the British libel nuisance case noted above. A sense of the American constitutional attitude is provided in Bridges v. California, 314 U.S. 252 (1941), which overturned the conviction for contempt of court of a labor leader who published a statement describing a judge's decision as "outrageous" and suggesting that his union would call a strike if a pending motion for a new trial was denied. Justice Black's opinion for the Court stated, "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [An] enforced silence . . . solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

QUESTIONS AND COMMENTS

1. Will different countries' regimes of free speech law ever come into conflict? One area in which conflicts have already emerged has been in Internet regulation. See, e.g., Tribunal de grande instance, Paris, France (May 22, 2000), Interim Order No. 0005309 (Fr.) (granting relief against
C. Free Speech and Hate Speech, with Notes on Commercial Speech and Campaign Speech

A particularly difficult issue in the United States and in other liberal constitutional democracies is the degree to which society should, or is required to, allow (or even protect) speech that is inconsistent with liberal norms of equality and tolerance. Does a system of free expression have to tolerate hate speech? Does it have to prohibit hate speech? The following materials on the constitutionality of regulating hate speech in Canada and the United States provide different perspectives on these difficulties. A Note on commercial speech is included as well, to permit further evaluation of Professor Greenwood's claims about the differences between the balancing called for by Canada's Charter Section 1 and the more "categorical" approach he saw U.S. courts using.

1. CANADA

Professor Greenwood focuses on textual and doctrinal differences between the U.S. and Canada in explaining differences in outcomes. He argues that the U.S. Constitution has tended to result in "categorical" forms of analysis, in which the critical distinction is in the classification of an act as "speech" or not, whereas the Canadian Charter permits a balancing approach in which acts can be more broadly recognized as speech and then regulated or not depending on the nature of the reasons for regulation.

The Kegesta opinion, which both Greenwood and Professor Kathleen Mahoney comment upon, is a leading Canadian decision analyzing criminal prohibitions of "hate speech" under the Charter. Later in this chapter, after reading R.A.V. v. City of St. Paul, 509 U.S. 377 (1993), reflect on the convergences and divergences in the approaches of both majority and dissent in these two cases.

Professor Mahoney places greater weight on differences in the overall purposes of the Canadian Charter that reflect cultural differences between Canada and the United States. She emphasizes Canada's provisions on equality, as well as the constitutional status given to protection of multiculturalism, as a reflection of Canada's emphasis on society as a "mosaic," as opposed to the U.S. view of society as a "melting pot." She argues that the Kegesta case can be understood as a reflection of a more positive approach to the assurance of multicultural influence in Canada. She condemns the reasoning in Kegesta, however, as unduly "categorical" in insisting on seeing hate speech as a form of speech rather than of violence.

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1 Similar questions arise with respect to tolerance or prohibition of political parties committed to nondemocratic principles.

2 He notes, for example, that content neutrality and rules against prior restraints are less significant in Canada than in the United States, while the distinction in whether the content is civil or criminal may be of greater importance in Canada than in the United States.