

HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS: WHAT INTERNATIONAL AND DOMESTIC LAWS CAN TEACH THE UNITED STATES. By Thomas David Jones. Boston: Martinus Nijhoff, 1998. \$115.00.

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The field of international and comparative law has long been concerned with “transplants,” that is the moving of law from here to there.¹ International bodies borrow laws from states’ law and practice, and in the same vein states borrow laws from each other.² State-based projects, commonly termed “rule of law” endeavors,³ attempt to transplant laws, and in some cases entire legal systems, from one place to another. The transfers are usually made from a country perceived as working properly to one deemed to be in great need. At times this process can be said to be utterly without coercion as states freely look outside their boundaries for guidance on law reform, using other states’ laws wholesale,

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1. The seminal text on “transplants” is ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974) (defining legal transplants as “the moving of a rule or a system of law from one country to another, or from one people to another”).

2. See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 486–87 (1995). Tracing the history of laws he notes:

There was the reception of Roman law in later Europe, the spread of English law through the colonies of the British Empire, even into parts of the United States which had never been under British rule, and the tremendous impact of the French Civil Code on other civil law systems in Europe and abroad, and latterly, the spread of American law to Europe

Id. at 486.

3. The “hallmark of the rule of law [is] the claim most commonly made for it, namely, that under the rule of law the exercise of all power, both private and public, is limited by law.” John Reitz, *Constitutionalism and the Rule of Law: Theoretical Perspectives*, in *DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE*, 111, 113 (Robert D. Grey ed., 1997). The independence of the judiciary is an important aspect of the rule of law. See Ralf Dahrendorf, *A Confusion of Powers: Politics and the Rule of Law*, 40 *MOD. L. REV.* 1, 9 (1977) “such independence of the ‘judicial department’ may indeed be regarded as the very definition of the ‘rule of law’ If the law and the judiciary come under government control, they cease to be necessary as such; if courts become a part of political struggles, they merely simulate parliament and parties and lose their function.” *Id.*

or more frequently, adapting the provisions that suit their own needs.⁴ However, the legal transplant process is generally marked by some form of coercion or at least heavy political and economic incentives. Those states that adapt their laws to conform with the laws of politically powerful states are rewarded with economic assistance, advantageous trade arrangements, and other political plums; while those that do not are penalized.⁵

The first wave of legal transplant projects occurred after World War II when the victorious allies rewrote the constitutions of the vanquished to conform to their own ideologies.⁶ The second wave occurred in the 1960s, a time optimistically labeled a “Decade for Development” by the United Nations.⁷ During this period of decolonialism, “departing colonial powers hastily imposed carbon copies of their own documents [and laws], which evolved from different cultural and historical backgrounds.”⁸ At the same time, the law and development movement, crafted by American academics and private foundations, sent throes of American lawyers abroad. These American lawyers were mainly sent to Latin America and Africa to train problem-solving legal engineers⁹ and to promote a modern vision of law as an

4. See Nathan J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 L. & SOC'Y REV. 103, 105 (1995) (stating that “[s]ince imperialism often worked through, around, or in spite of local elites, we must consider the possibility that those elites may have played an independent role in . . . erecting new legal systems”).

5. Cf. Jonathan E. Sanford, *Foreign Debts to the U.S. Government: Recent Rescheduling and Forgiveness*, 28 GEO. WASH. J. INT'L L. & ECON. 345, 383–84 (1995) (explaining that international financial institutions and “Congress [have] often placed broad political or economic conditions on a country’s receipt of . . . foreign aid”).

6. See, e.g., John M. Maki, *The Japanese Constitutional Style*, 43 WASH. L. REV. 893, 898 (1968) (explaining that following the Second World War, “it immediately became clear that the victorious allies led by the United States were determined to uproot both militarism and authoritarianism”).

7. IAN SMILLIE, *THE ALMS BAZAAR: ALTRUISM UNDER FIRE—NON-PROFIT ORGANIZATIONS AND INTERNATIONAL DEVELOPMENT* 7 (1995).

8. Lis Wiehl, *Constitution, Anyone? A New Cottage Industry*, N.Y. TIMES, Feb. 2, 1990, at B6.

9. Advocates of the law and development method frequently used the words of law professor Karl Llewellyn to describe the movement as follows:

The essence of our craftsmanship lies in skills, and wisdoms; in practical, effective, persuasive, inventive skills for getting things done, *any kind of thing in any field*; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, *any kind of man, in any field* . . . We are the trouble shooters.

instrument of development policy along capitalist and democratic lines.¹⁰

The law and development movement featured various models for transfer, including the following:

- (1) direct transfer of legal institutions and instruments, (2) indirect transfer of legal concepts and models, (3) invited legal transfer, where the initiative and encouragement for the legal transfer process comes from the recipient legal culture, . . . (4) imposed or uninvited legal transfer at the initiative of the “exporting” legal culture[,] . . . (5) infused—“premeditated” or “planned”—processes of legal transfer, direct or indirect, wherein the initiative comes from the exporting legal culture, [and] (6) more occasional ad hoc borrowing. . . .¹¹

None of these models worked well to foster positive social change in Latin America. One of the major failings of the law and development movement was its failure to understand that multiple kinds of law can co-exist in society. Law reformers from the outside cannot begin to understand how unwritten community codes for behavior intersect with and influence formal law.¹² As a result, they cannot see how their proposed legal changes will be filtered through more powerful social networks and other social structures. Another failure of the law and development movement was the inability to appreciate that locals act according to their own self-interest. Local people are actors and not mere subjects; they “generally [turn] American legal assistance to their own

JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 14 (1980) (quoting from Karl N. Llewellyn, *The Crafts of Law Revisited*, 15 ROCKY MTN. L. REV. 1, 3 (1942)).

10. See *id.* (explaining that because much of the Third World had adopted constitutions drafted by the colonial powers, specifically France and England, “American legal assistance would function not through the direct export of specific American legal institutions and instruments, but through legal assistance, legal education, and the indirect transfer of underlying legal models, concepts, values, and ideas”).

11. *Id.* at 21–22.

12. See, e.g., Spencer Weber Waller & Lan Cao, *Law Reform in Vietnam: The Uneven Legacy of Doi Moi*, 29 N.Y.U. J. INT’L L. & POL. 555 (1997). For example, in Vietnam, the government’s “acknowledgment that the formal law of the central government must defer to the informal law of the village has led to an over-concentration of political and economic power in metropolitan areas and to the underdevelopment of the countryside.” *Id.* at 564. Additionally, this dichotomy “forms the operational code of Vietnam, a reality frequently overlooked by Western law reformers and foreign investors.” *Id.*

ends.”¹³ For example, authoritarian forces in Latin America used the law and development movement to solidify power and control. Ultimately, the agenda backfired because instead of promoting democracy, the law and development movement served to strengthen the hold of anti-democratic elites.¹⁴

The fall of Soviet-dominated states in the late 1980s and early 1990s has ushered in a new wave of legal transplants¹⁵ that repeats the techniques of earlier times. An example is sending in lawyers, mainly from the United States and also from Western European states, in an attempt to reconstruct the local legal system in a manner more compatible with U.S. and Western European interests.¹⁶ The earlier focus on transporting U.S. methods of legal education has been retained, and a new and bolder emphasis on the wholesale rewriting of local law has been added.¹⁷

The transferor/transferee equation has been simplified in recent times. With few exceptions, it can be said that the

13. GARDNER, *supra* note 9, at 287.

14. See José E. Alvarez, *Promoting the “Rule of Law” in Latin America: Problems and Prospects*, 25 GEO. WASH. J. INT’L L. & ECON. 281, 302 (1991); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1083 (1975) (explaining that “[l]aw and development scholars, somewhat belatedly, are beginning to realize that even in developed societies, and thus the United States, the formal neutrality of the legal system is not incompatible with the use of law as a tool to further domination by elite groups”).

15. For the history of borrowing of Western legal models in Central and Eastern Europe, see Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995).

16. See, e.g., Sherri Kimmel, *For Export Abroad: American Legal Know-How*, PA. LAW., Mar.-Apr. 1998, at 10, 10; James Podgers, *Helping Keep a Peace*, A.B.A. J., Sept. 1997, at 94, 94; Molly Stephenson, *Real Property Lawyers Promote Reform in Central Europe*, PROB. & PROP., May-June 1997, at 12, 12; Joan Davison, *America’s Impact on Constitutional Change in Eastern Europe*, 55 ALB. L. REV. 793, 793-94 (1992); Charles-Edward Anderson, *Exporting Democracy: U.S. Lawyers Help Eastern Europe Draft New Constitutions*, A.B.A. J., June 1990, at 18, 18.

17. The A.B.A. Central and East European Law Initiative (CEELI) plays a central role in such efforts. Funded by the U.S. Agency for International Development (USAID), the American Bar Association (ABA), and other public and private organizations, CEELI supports law reform by sending volunteer lawyers to work with local parliamentarians, judges, law schools and law offices onsite; organizing workshops, training and exchanging judges and lawyers inside the country and in the United States; providing legal assessments of draft legislation and of proposed structural changes in the legal system, with a focus on privatization and commercial law. See *1996 Annual Report*, 1996 A.B.A. SEC. CENT. & E. EUR. L. INITIATIVE 4 [hereinafter *1996 Annual Report*].

actors from the United States and the politically powerful Western European countries are on the transferring end of the equation; that is lawyers and politicians from the United States and Western Europe are pushing for other states to change their laws.¹⁸ Few expect that the other state will copy outsider laws, although that would be acceptable in many cases, but merely expect the other state to reform the provisions of its law that violate the most fundamental aspects of *good law* (U.S. or Western European law).¹⁹ Actors from all other countries, but in particular those from politically and economically weak areas, find themselves on the transferee side of the equation.²⁰ Penalties are applied and rewards are given based on their willingness to engage in law reform in this one-directional process.²¹ In the late 1980s and early 1990s, the transferring U.S. and Western European governments and international financial institutions pressured the governments of Eastern Europe to adopt laws consistent with a political democracy and a free market economy.²² By complying formally, if not in practice, with these demands, the governments were rewarded with economic assistance²³

Many U.S. and Western European scholars have been compliant with this dominant one-directional process, studying the ways in which constitutions and laws in Eastern Europe can, should, and have been reformed to adapt to U.S. and Western European standards.²⁴ As consultants, U.S. and Western European lawyers travel to eastern outposts to offer advice on changes that should be made to administrative,

18. See GARDNER, *supra* note 9, at 50, 240–41 (finding that the initiative for this legal transfer movement was almost exclusively American with minimal requests for help from the developing nations).

19. See Alvarez, *supra* note 14, at 288 (explaining that current efforts are “intended to encourage reforms sought by beneficiary countries” rather than trying to create exact replicas of the U.S. system abroad).

20. See GARDNER, *supra* note 9, at 6–12 (providing an overview of the law and development movement which intended to use this transfer of law process to help Third World countries develop their legal systems).

21. See Sanford, *supra* note 5, at 383–84.

22. See Ajani, *supra* note 15, at 112 (relating the requirements for acceptance of Central and Eastern European countries into the International Monetary Fund (IMF) and World Bank programs).

23. See Davison, *supra* note 16, at 794 (stating that “the United States government . . . requires democracy, freedom, and a right to private property as a prerequisite for assistance”).

24. See DE CRUZ, *supra* note 2, at 488 (noting the history of holding constitutions as supreme sources of law).

tax, corporate, criminal, and family laws, and to suggest improvements to the overall structure of legal systems, legal education, and law enforcement.²⁵ Many consultants are self-critical, questioning in particular the efficacy of their own work. Nonetheless, few critiques are made of the assumption that the U.S. and Western European models should or can be transplanted. As in earlier times, little recognition is made of the ways in which informal social networks and other mechanisms intersect with formal legal changes. Even fewer critiques are made of the notion that the other state is the one in need of reform and that as such it has little to offer American and Western European legal systems. While many Western European legal scholars, responding to pressures for European unification, examine how their own legal systems could adapt to the practice of other Western European states,²⁶ fewer U.S. scholars appear interested in how the U.S. legal system can learn from the experience of other states.²⁷

Thomas David Jones is an exception to this general trend. He is a legal scholar committed to law reform in the United States, focusing in particular on issues pertaining to racism and economic and social rights. He is also a scholar of international human rights. While Jones, like many of his colleagues, is interested in the application of international human rights law in domestic courts,²⁸ he adds a unique dimension to law reform analysis. He engages in both a study of international law and a comparative analysis of domestic

25. See generally *1996 Annual Report*, *supra* note 17 (detailing a nation by nation overview of the volunteer program sponsored by the American Bar Association assisting Central and Eastern European nations with their legal reformation efforts).

26. See DE CRUZ, *supra* note 2, at 488 (recognizing how the European Union (EU) is following the U.S. model of federalism in that “[t]he European Court of Justice has the power to set aside national laws that conflict with Community law so that like American Federal law, it reigns supreme in certain areas of endeavour”).

27. See LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 129 (1978) (suggesting that the United States must have learned from abroad since “[r]espect for the individual is not a Western monopoly, and, moreover, it did not come naturally to the West. It had to be nurtured there”).

28. See, e.g., Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT’L L. 543 (1989) (discussing the history of human rights in the United States, and the current trends in the courts).

laws.²⁹ In the days of U.S. consultants going abroad and teaching others about American law, Jones is a rare reverse transplanter. He studies the legal practice in other states such as Nigeria, and gleans lessons that could be applied back home.³⁰ The originality of *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*³¹ rests in his use of the tools of comparative and international law to propose narrowly tailored regulation of racial defamation in the United States.

Other commentators have focused on the international treatment of hate speech, speech that is “abusive, insulting, intimidating, harassing and incites to violence, hatred or discrimination’ against a group or a person based on race, religion, ethnicity or national origin.”³² The subject matter of Jones’s study is much narrower. Instead of tackling the broad topic of hate speech, he examines a specific form of group defamation, “racial or ethnic defamation.”³³ Throughout the book, the terms “group libel,” “group defamation,” and “ethnic defamation” are used synonymously.³⁴ At the start, group defamation laws are defined to “include defamatory utterances against groups based on race, nationality, ethnic origin, sex, and religion.”³⁵

The first chapter of *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* engages in an overview of the nature of international protection of human rights and its application to freedom of expression and group

29. See THOMAS DAVID JONES, *HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS* 34–42, 87–223 (International Studies in Human Rights).

30. See *id.* at 214–24.

31. *Id.* at 29.

32. Stephanie Farris, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 3 n.4 (1996) (quoting Sandra Coliver, *Editorial Note*, in *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* at v, (Sandra Coliver et al. Eds., 1992)); see also Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT’L L. 57, 58–59 (1992) (discussing the varying responses to hate speech taken by the United States and by other democratic nations); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2321–23 (1989) (balancing the First Amendment protections against the harm of racist hate speech and concluding that sanctions should be imposed on racist speech).

33. JONES, *supra* note 29, at 4.

34. *Id.* at 15 n.6.

35. *Id.*

defamation. In a brief discussion about the origins of the idea of universal human rights, Jones underscores the governments' long-standing commitment to the principle of human rights and the rise of global concern for the concept in recent times.³⁶ He concludes with a flat rejection of cultural relativism,³⁷ warning that “[o]ne must not succumb to the position of those who would do injury to [the idea of universal human rights] in the furtherance of political expediency or for the purpose of justifying violations of fundamental human freedoms.”³⁸ Quoting Louis Henkin, Jones accepts the premise that the concept of individual human rights finds support in all cultures:

Legitimate claims of cultural pluralism and some measure of ethical relativism must not be allowed to dilute essential values and reduce them to matters of opinion or taste. Cultural differences and traditions may explain, even justify, different ways of giving expression to the values accepted by all in the international human rights documents; they cannot explain or justify barbarism and repression. No civilized culture—Eastern or Western, old or new—justifies torture or detention, unfair trials and other injustice, and broad denials of civil rights and liberties or even of political freedoms. Respect for the individual is not a Western monopoly, and, moreover, it did not come naturally to the West. It had to be

36. *See id.* at 3–14.

37. *See id.* at 10–13. In doing so, he accepts Fernando Tesón's definition of cultural relativism:

In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society. A central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable. . . . [R]elativists claim that substantive human rights standards vary among different cultures and necessarily reflect national idiosyncrasies. . . . Alternatively, the relativist thesis holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.

Id. at 26 n.64 (quoting from Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 870–71 (1985) (citations omitted)).

38. *Id.* at 13.

nurtured there; it has equally fertile soil elsewhere and can be nurtured there.³⁹

“Even if the historical record [shows] that individual human rights were the unique property of the West,”⁴⁰ Jones contends the Western doctrine of human rights is not static; all countries are moving toward its embrace.⁴¹

“Although there has been significant success at the international level in the characterization and codification of human rights,” Jones acknowledges, “the effective implementation of these rights has been fraught with difficulties.”⁴² The main difficulty Jones points to is “[f]aith in the ‘Westphalian legal order,’ a legal order that idolizes the interests of the state and sovereignty.”⁴³ In other words, a state-focused international system keeps enforcement of human rights in state hands. Nonstate entities are increasingly playing a role as participants in all aspects of international law, including the identification of human rights norms pertaining to racial discrimination and group defamation.⁴⁴ Nonetheless, Jones reminds us, that states have the responsibility for enacting domestic legislation to address racial discrimination and group defamation.⁴⁵ Many do not do so for fear of infringing on freedom of expression. This fear, Jones contends, is misplaced.⁴⁶

Jones frames the purpose of his work as reconciling “two potentially conflicting legal rights that are also human rights: the right to be free from racially defamatory falsehood or

39. *Id.* (quoting from HENKIN, *supra* note 27, at 129).

40. *Id.* at 14. (quoting from Hedley Bull, *The Universality of Human Rights*, 8 MILLENIUM J. INT’L STUD. 155, 159 (1979)).

41. *See id.* at 13–14.

42. *Id.* at 14.

43. *Id.* (citations omitted).

44. *See, e.g.*, Leon Gordenker & Thomas G. Weiss, *Pluralising Global Governance: Analytical Approaches and Dimensions*, 16 THIRD WORLD Q. 357, 360 (1995) (discussing nongovernmental organizations and their ability to address a host of global problems); John Spanier, *Who are the “Non-State Actors”?*, in *THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS* 43, 50 (William Clinton Olson ed., 8th ed. 1991) (stating that “the proliferation of nonstate actors has led some to conclude that states are of declining importance and that nonstate actors are gaining in status and influence”).

45. *See generally* NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* (1991) (detailing the history of group rights and discrimination, as well as the laws implemented by states to protect the rights of individuals and groups).

46. *See* JONES, *supra* note 29, at 62–76 (discussing the First Amendment and freedom of expression rights).

group defamation and the principle of freedom of expression.”⁴⁷ Such reconciliation is relatively easy, as Jones’s own analysis proves, because neither of these norms constitutes absolute human rights. The “right to be free from racially defamatory falsehood or group defamation,” is not a fundamental human right in and of itself. Rather, it can be conceived as a component or element of other human rights, including equal protection and the right to be free from discrimination. Similarly, the “right to be free from racially defamatory falsehood or group defamation” arguably falls under the exceptions to the right of free expression. Thus, the actual tension to be examined is a struggle between two nonabsolute sets of international norms.

The framing of the issue sharpens in the second chapter, which explores the legality of legislation prohibiting group defamation under international law. “The right of free speech,” Jones observes, “stands as a general norm of customary international law.”⁴⁸ Jones notes that provisions protecting freedom of expression appear in most of the world’s domestic constitutions.⁴⁹ He provides a wide-ranging listing of such provisions, focusing on African, Asian, and Islamic constitutions.⁵⁰ In addition to, freedom of expression is listed as a fundamental human right in all of the major international human rights instruments,⁵¹ including the Universal Declaration of Human Rights,⁵² the International Covenant on Civil and Political Rights (ICCPR),⁵³ the

47. *Id.* at 4.

48. *Id.* at 37.

49. *See id.* at 40.

50. *See id.* at 40–42.

51. *See*, Beth Ann Isenberg, Comment, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadzic Actions*, 60 ALB. L. REV. 1051, 1051 (1997). Treaty law may provide one source of evidence for the existence of customary international law. *See* Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT’L L. 973, 1017 (1995).

52. *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948). “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” *Id.* art. 19, at 74–75.

53. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),⁵⁴ the American Convention on Human Rights (American Convention),⁵⁵ the Banjul Charter of Human and Peoples' Rights (Banjul Charter)⁵⁶ and the Racial Discrimination Convention.⁵⁷

While international instruments trumpet free expression guarantees, they also make it clear that this right is not absolute.⁵⁸ To be legitimate under international law, a restriction on freedom of expression must meet the criteria of legitimacy, legality, and democratic necessity.⁵⁹ It is implicit

ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." *Id.* art. 19(2), at 178.

54. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention]. "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." *Id.* art. 10(1), at 230.

55. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter American Convention]. "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." *Id.* art. 13 at 148-49.

56. Organization of African Unity: Banjul Charter of Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter Banjul Charter]. "Every individual shall have the right to express and disseminate his opinions within the law." *Id.* art. 9(2), at 60.

57. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Mar. 12, 1969) [hereinafter Racial Discrimination Convention]. The treaty stipulates the "right to freedom of opinion and expression." *Id.* art. 5(d)(viii), at 222.

58. See ICCPR, *supra* note 53, art. 19(3), at 178 (providing that "[t]he exercise of [freedom of expression] . . . carries with it special duties and responsibilities. It may therefore be subject to certain restrictions"); European Convention, *supra* note 54, art. 10(2) at 230 (providing that "[t]he exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law"); Banjul Charter, *supra* note 56, art. 9(2), at 60 (stating that the freedom of expression must operate "within the law"); American Convention, *supra* note 55, art. 13(2), at 149 (stating that under certain circumstances the exercise of expression "shall be subject to subsequent imposition of liability" when necessary to ensure certain protections); Racial Discrimination Convention, *supra* note 57, at 222.

59. See *The Right to Freedom of Opinion and Expression: Final Report by Mr. Dagilo Turk and Mr. Louis Joinet, Special Rapporteurs*, U.N. ESCOR, U.N. Commission on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 44th Sess., Agenda Item 4, at 12, U.N. Doc.

in Jones's argument that these three criteria are met with respect to group defamation.

First, legitimacy requires that free expression restrictions further one of the goals of the limitations expressly enumerated in international human rights treaties.⁶⁰ Many treaties permit restrictions on speech in such a way as to promote respect for the rights or reputation of others, national security, public order or safety, and the protection of public health and morals.⁶¹ Group defamation laws arguably meet the goals of promoting respect for the rights of others and of curbing public disorder. In addition, some international instruments—in particular both the ICCPR⁶² and the American Convention⁶³—explicitly include in their grounds for restrictions on freedom of expression the advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.⁶⁴ Moreover, Article 4 of the Racial Discrimination Convention expressly requires governments to outlaw “all dissemination of ideas based on racial superiority or hatred” as well as organizations “which promote and incite racial discrimination.”⁶⁵ Thus, it can be said that international law

E/CN.4/Sub.2/1992/9 (1992) [hereinafter *Right to Freedom of Opinion and Expression*].

60. *See id.* at 13.

61. *See* American Convention, *supra* note 55, art. 13(2) at 149 (describing permissible restrictions as those including laws to ensure “respect for the rights or reputations of others; or the protection of national security, public order, or public health or morals”); ICCPR, *supra* note 53, art. 19(3), at 178; European Convention, *supra* note 54, art. 10(2) at 230; Banjul Charter, *supra* note 56, arts. 27–29 at 63.

62. ICCPR, *supra* note 53, art. 20(2), at 178.

63. American Convention, *supra* note 55, art. 13(5), at 149.

64. Additional grounds for restriction of speech listed in the European Convention include the interests of territorial integrity, prevention of disorder or crime (a ground that may be particularly relevant to incitement in racial discrimination cases), prevention of the disclosure of information received in confidence, and the maintenance of the authority and impartiality of the judiciary. *See* European Convention, *supra* note 54, art. 10(2), at 230. The Banjul Charter contains its own unique grounds, including the affirmation that the rights of an individual shall be exercised with due regard to the common interest. *See* Banjul Charter, *supra* note 56, art. 27(2), at 63.

65. Racial Discrimination Convention, *supra* note 57, art. 4(a)(b), at 220. The U.S. State Department drafted a reservation to this provision. *See* JONES, *supra* note 29, at 15 n.6 (noting that the United States contended that “freedom of expression” problems are created by Article 4).

not only deems regulation of racially defamatory speech legitimate, but in some cases requires it.⁶⁶

Legality, the second requirement for restrictions on speech, requires that the restriction be “provided by law”⁶⁷ (ICCPR), “prescribed by law”⁶⁸ (European Convention), “expressly established by law”⁶⁹ (American Convention), or “within the law”⁷⁰ (Banjul Charter). Group defamation is “punishable as a crime under the laws of the majority of nations in the world,”⁷¹ and, as noted above, is prohibited by the Racial Discrimination Convention and other international instruments. Thus, it appears as if the legality requirement may easily be satisfied.

The only remaining requirement, democratic necessity, is less clear. Democratic necessity demands that the restriction demonstrate “respect for the principle of proportionality, as well as for the democratic principles of the rule of law and human rights.”⁷² Some commentators have suggested that the “test of democratic necessity will have to take into consideration different circumstances under which democracies function in different societies.”⁷³ Indeed, in weighing whether a country has met the democratic necessity requirement, the European Court of Human Rights employs the concept of a “margin of appreciation. What it means is that in respect to many matters, the [European] Convention leaves the contracting parties an area of discretion; that is,

66. See Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 297 (1985) (observing that under Article 4, reporting states have a “duty to legislate”).

67. ICCPR, *supra* note 53, art. 19(3), at 178.

68. European Convention, *supra* note 54, art. 10(2), at 230.

69. American Convention, *supra* note 55, art. 13(2), at 679.

70. Banjul Charter, *supra* note 56, art. 9(2), at 60.

71. JONES, *supra* note 29, at 42.

72. *Right to Freedom of Opinion and Expression*, *supra* note 59, ¶ 64 at 15. Article 29(2) of the Universal Declaration of Human Rights provides as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Universal Declaration of Human Rights, *supra* note 52, art. 29(2), at 77; see also European Convention, *supra* note 54, art. 10(2), at 230 (recognizing the concept of democratic necessity).

73. Dr. Amit Mukherjee, *International Protection of Journalists: Problem, Practice, and Prospects*, 11 ARIZ. J. INT'L & COMP. L. 339, 373 (1994).

the Court accepts that the state parties have a certain latitude in interpreting restrictions as necessary in a democratic society."⁷⁴ It is unclear what criteria Jones would employ to assess whether racial defamation laws should be regarded as a democratic necessity. In addition, he does not indicate whether the criteria are common for all countries. Jones does point out that racial defamation "potentially incites racial discrimination, racial hatred and violence."⁷⁵ Also, racial defamation has a chilling effect on the rights of racial minorities to use public accommodations and to participate in the political process.⁷⁶ These appear to be arguments in favor of the democratic necessity of regulating racially defamatory speech. In any event, if a democratic necessity argument can be made, a strong case can be put forth under international law for regulation.⁷⁷

After making his case for restrictions on speech under international law, Jones suggests an approach to racially defamatory speech that is far narrower than that permitted.⁷⁸ While international law might permit the regulation of hate speech directed at individuals, Jones restricts his argument to defamation directed at groups. Jones describes his theory as "constitutional minimalism" because he does not advocate the legal proscription of all derogatory hate speech. Only the subcategory of hate speech that fulfills the standard elements of proof found in a common law defamation claim could be prosecuted criminally by a government. He explains that

74. *Id.* at 374 (observing, for example, that it "is easier for governments to successfully argue that the limitations imposed on journalists are prescribed by law and that these have legitimate aims"); see also HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (International Studies in Human Rights, 1996), which focuses on, *inter alia*,

the methodologies by which the central authorities within the [Human Rights] Convention system decide upon the scope of their own supervisory powers, and consequently upon the scope of the discretion which will remain vested in the national authorities for the definition, interpretation and application of the basic human rights guarantees contained in the treaty.

Id. at 2.

75. JONES, *supra* note 29, at 44.

76. See *id.* (citing *Little Black Sambo* as an example of the worst kind of racial stereotyping because of its historical roots).

77. This is one area that Jones could develop in future work.

78. See, e.g., Farrior, *supra* note 32, at 14 (arguing that "[a]lthough the Universal Declaration does not contain an anti-hate speech clause, its equal protection provision arguably allows restrictions on hate speech").

“[g]roup defamation is that form of defamation (libel or slander) that is directed at racial minorities or individuals of specific nationalities or ethnic origins.”⁷⁹ In his analysis, Jones applies the common-law understanding of defamation, which includes proof of the following elements: “(1) a defamatory statement, (2) falsity, (3) publication to a third party, (4) malice or some other degree of fault, (5) damages, and (6) no defense of privilege.”⁸⁰

The core of Jones’s argument under U.S. law is found in Chapters III and IV. Jones takes as his starting point a relatively uncontroversial premise: “the First Amendment is not an absolute categorical imperative.”⁸¹ Consistent with that premise, the U.S. Supreme Court has found a number of legitimate justifications for the regulation of speech. The subject of Jones’s study, the law of defamation, “is [perhaps] the most obvious exception to the general rule that speech is protected by the First Amendment.”⁸² Court-crafted limitations on First Amendment guarantees include categorical exceptions (i.e. the “clear and present danger rule,”⁸³ fighting words, and obscenity), and the strict scrutiny balancing test (where the government must show that the regulation is necessary to further a compelling governmental interest).⁸⁴ Some commentators contend that the balancing approach applies only in cases of content-neutral abridgments of speech, not in cases of content-based regulations (such as prohibitions of speech with racially defamatory content).⁸⁵ Jones disagrees, siding instead with Laurence Tribe’s view that “determinations of the reach of first amendment protections on either track [content-based

79. JONES, *supra* note 29, at 15 n.6; *see id.* at 87–153 (discussing the law of group defamation and its historical development in the United States).

80. *Id.* at 15 n.6 (citing RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

81. *Id.* at 61 (finding this contrary to the plain meaning of the language of the First Amendment).

82. *Id.* at 68.

83. *Id.* at 69. The “clear and present danger” rule was first announced by Justice Holmes in *Schenck v. United States*, a case involving suppression of political speech. 249 U.S. 47 (1919). Justice Holmes stated that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” *Id.* at 52–53.

84. *See* JONES, *supra* note 29, at 71, 82 n.113 (arguing that it is “clear the compelling state interest standard is the appropriate standard for analyzing content-based” speech); *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 602 (1978) (discussing the “two-level theory” of speech regulation).

85. *See* JONES, *supra* note 29, at 71.

abridgment versus content-neutral abridgments] presuppose some form of ‘balancing’ whether or not they appear to do so.”⁸⁶

From his review of U.S. case law, Jones astutely notes that “[t]he rhetoric of absolutism and preferred position is observed in the breach when the United States Supreme Court determines [that] there is a justification for abridging free speech.”⁸⁷ The approach of U.S. courts then is a decidedly pragmatic one that, according to Jones’s reasoning, should be open to regulation of racially defamatory speech. He concludes as follows:

[T]he Supreme Court creates exceptions to the First Amendment right to free expression if it deems an exception necessary. A federal criminal statute proscribing group defamation would not require the creation of a new exception to the amendment. The government need only provide groups with the same protection accorded individuals—the right to be free from defamation.⁸⁸

The remainder of Jones’s analysis of U.S. law asserts that a carefully and narrowly drafted criminal group defamation statute would pass constitutional muster without conflicting with First Amendment rights. Jones reminds readers again that he is “not simply concerned with language that is racially derogatory, offensive, or hateful in nature.”⁸⁹ He explains as follows:

A speaker’s persistent emphasis of the fact that IQ test scores of African-Americans are fifteen points lower than those of White Americans might be considered racially derogatory by many people. It is especially derogatory when these respective scores are used as the basis for inferring that African-Americans are genetically inferior to White Americans. Nevertheless, Dr. William Shockley should not be civilly or criminally liable for constantly publicizing this test-score disparity. As to

86. *Id.* at 72 (alteration in original) (quoting *TRIBE*, *supra* note 84, at 583).

87. *Id.* (mentioning as an example *Waters v. Churchill*, 511 U.S. 661 (1994), a case involving the discharge of a nurse for allegedly making negative, critical, and disruptive comments to a co-worker regarding the obstetrics department).

88. *Id.* at 73.

89. *Id.* at 89 (arguing that while his concern goes beyond racial epithets, even such terms as “nigger” and “sambo” can, arguably, be deemed libelous).

the disparity in test scores, he is stating a fact; it could therefore never be libelous. However, Shockley's conclusions as to what the fact of this disparity in performance by African-Americans on IQ tests means may be characterized as defamation. . . . It may be argued that he has published an untruth that has set African-Americans up to 'ridicule, contempt, obloquy'—damaging the reputations of African-Americans and the public interest.⁹⁰

Jones uses specific examples to illuminate the problem of racially defamatory speech and to defend the legality and desirability of a criminal group defamation law. Even if racially defamatory falsehoods are considered to be within the ambit of the First Amendment, Jones argues that the United States has "an overriding, countervailing, and compelling governmental interest that would justify such an impingement."⁹¹

Jones contributes to the literature on racially defamatory speech by proposing his own federal group defamation law⁹²—a hybrid of concepts drawn largely from the British Public Order Act of 1986⁹³ and a Columbia Law Review Model Group Libel Statute.⁹⁴ The following formulation explains how the author's Model Statute is breached:

A person shall be guilty of an offense under this section if he intentionally, recklessly, or negligently utters in a public place a false, defamatory, and unprivileged statement concerning a racial, ethnic or national group, or if he publishes or distributes written matter which is deemed defamatory . . . and having regard to all circumstances, is inimical to the public interest, and which has a tendency to incite breaches of the peace.⁹⁵

90. *Id.* at 89 (citations omitted) (expanding on the important difference between speech that is derogatory or inflammatory on the one hand, and speech that constitutes defamation on the other).

91. *Id.* at 4 (suggesting that the U.S. position here is consistent with the "conception of free expression as embodied in international legal instruments and the domestic constitutions of other countries").

92. *See id.* at 283–86.

93. Public Order Act of 1986, pt. III, §§ 17–29 (Eng.), *reprinted in* JONES, *supra* note 29, at 269–76.

94. *See* JONES, *supra* note 29, at 283–86.

95. *Id.* at 105.

For definitions of criminal negligence and recklessness, Jones uses the definitions found in the Model Penal Code.⁹⁶ Although the subject matter of the author's inquiry is racial defamation, he explains that the Model Statute "could be easily expanded to include other forms of group defamation such as defamation based on sexual orientation or gender."⁹⁷

One of the most interesting aspects of Jones's analysis is his speculation as to how his statute could be applied to specific cases, such as "Sambo litigation" (actions against Sambo's Restaurant),⁹⁸ racially defamatory speech of the Nation of Islam,⁹⁹ the pseudo-scientific theories of William Bradford Shockley positing the racial inferiority of African Americans,¹⁰⁰ and racially derogatory speech on university

96. MODEL PENAL CODE § 2.02(2) (1985). The Model Penal Code defines "negligently" as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element [of a crime] exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Id. at § 2.02(2)(d).

"Recklessly" is defined as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element [of a crime] exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id. at § 2.02(2)(c).

97. JONES, *supra* note 29, at 106. For an interesting comparative legal analysis of hate laws pertaining to gender, see Brendan H. Tomlinson, *The Censorship of Misogynistic Rap Music—A Consideration of Gender-Based Harms and Free Speech*, 26 VICT. U. WELLINGTON L. REV. 531 (1996) (comparing the censorship of rap music in the United States with New Zealand while analyzing its effect upon women and the way in which free speech principles apply).

98. See JONES, *supra* note 29, at 107–17 (arguing that the courts could have more easily dispensed with the litigation had they analyzed the use of "Sambo" according to a social-historical approach).

99. See *id.* at 117–19 (demonstrating the defamatory nature of early religious doctrine with white-man-as-a-devil themes).

100. See *id.* at 119–22 (explaining that even though lower results by a certain race on I.Q. examinations may be a fact and consequently not libelous;

campuses.¹⁰¹ Each of these topics could be separate chapters or even books in themselves, but Jones's survey does serve to provide an overview of how his theory would be implemented under U.S. law.

Surprisingly, Jones offers only a brief discussion of how customary international law might educate domestic courts in the United States or abroad on these issues.¹⁰² He does, however, review the American position on Article 4 of the Racial Discrimination Convention,¹⁰³ the provision outlawing racially defamatory speech. The United States ratified the Convention with a broad reservation to Article 4 declaring that "nothing in this Convention shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practices of the United States."¹⁰⁴ In light of this reservation, it would have been particularly timely to provide a full discussion of how the norms embodied in the Racial Discrimination Convention and in other international instruments and practices could and should inform U.S. law on group defamation.¹⁰⁵ Further work of the genre of Jordan Paust's *International Law as Law of the United States*,¹⁰⁶ or scholarship that explores the role of international human rights law as a canon of statutory or

it is the assertion that the test disparity is due to genetic inferiority that can be considered defamatory).

101. See *id.* at 122–26 (contending that many universities' harassment policies are "clearly constitutionally overbroad and void for vagueness").

102. For a different approach, see Viktor Mayer-Schönberger & Terec E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT'L & COMP. L. REV. 59, 90 (1995) (proposing "the international law principle of *jus cogens* as a potential basis for regulating speech content").

103. See JONES, *supra* note 29, at 144–47.

104. *Id.* at 146.

105. There is extensive literature on the Racial Discrimination Convention, but relatively little recent literature on how the norms of nondiscrimination, embodied in that Convention and elsewhere, could be applied to the analysis of group defamation laws in the United States such as that proposed by Jones. See, e.g., NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1980); NATHANIEL L. NATHANSON & EGON SCHWELB, THE UNITED STATES AND THE UNITED NATIONS TREATY ON RACIAL DISCRIMINATION (1975); Thomas Buergenthal, *Implementing the U.N. Racial Convention*, 12 TEX. INT'L L.J. 187 (1977); Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996 (1966).

106. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996).

constitutional interpretation, could explore these issues. For example, the starting point for many civil rights theorists that consider the topic of “hate speech” is that “equality as a fundamental democratic value trumps freedom of speech.”¹⁰⁷ A discussion as to how international human rights norms, including international norms pertaining to nondiscrimination, democracy, and free speech, weigh into such an argument would be enlightening.

Jones concludes his study with an analysis of the laws governing group defamation and speech provoking racial hatred in Great Britain, Canada, India, and Nigeria.¹⁰⁸ These countries have enjoyed some success in regulating group defamation through legislation.¹⁰⁹ The legislation adopted by these four countries is of the type required under Article 4 of the Racial Convention.¹¹⁰ All of the laws Jones studies are broader than the one he proposes. Nonetheless, Jones claims these examples serve to illustrate that restrictions on racially defamatory speech are “not destructive of free expression or the democratic way of life.”¹¹¹ Jones argues that countries that have adopted group defamation or incitement to racial hatred laws have done so with “[t]heir democratic forms of government remain[ing] intact . . . [as well as] their reverence for the sacrosanct principle of free expression.”¹¹²

Jones does not probe deeply into the historical, political, social, and economic differences among the various countries that may influence the ways in which they treat group defamation differently from the way it is treated in the United States. For example, the Canadian system, embodied in the

107. Anne Flahvin, *Can Legislation Prohibiting Hate Speech Be Justified in Light of Free Speech Principles?*, 18 U.N.S.W. L.J. 327, 333 (1995) (citation omitted). Some scholars, such as Akhil Amar, have analyzed hate speech provisions under the equality guarantees of the Thirteenth and Fourteenth Amendments, arguing that hate speech laws pertaining to race can be justified as attacking the “badges and incidents of slavery.” Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 161 (1992). A similar argument could be made under international law.

108. See JONES, *supra* note 29, at 183–223.

109. See *id.* at 152.

110. See *id.* at 189 (commenting that “Great Britain, Canada and India have promulgated legislation regulating group defamation or speech that incites racial hatred”); see also Racial Discrimination Convention, *supra* note 57 (mandating the condemnation of racial hatred and discrimination).

111. JONES, *supra* note 29, at 190. In future work, Jones’s commentary would be strengthened by providing a definition of the “democratic way of life.”

112. *Id.* at 153.

Canadian Charter of Rights and Freedoms,¹¹³ “is not the creature of 18th century ideas of natural law revolution but of Canada’s adoption of the international postwar and post-Holocaust idea of human rights.”¹¹⁴ The Canadian system, unlike the U.S. system, expresses “the postwar idea of respect for equal human dignity in the multicultural, liberal state.”¹¹⁵ In Canada, a stronger emphasis on collective rights has meant at times that individual expression should take a back seat to protection of group identity.¹¹⁶ These differences explain Canada’s greater receptivity to group defamation laws and other hate speech measures. By failing to discuss the context for law reform, Jones misses a crucial link in his comparative analysis: why would something that works in another country work in the United States? This crucial question cannot be overlooked.

Speech and the regulation of speech mean different things in different contexts. On the one hand, Jones recognizes this idea as he situates his arguments for U.S. law reform largely on U.S. constitutional analysis. Moreover, he does not advocate for any particular group defamation law to be imported from one entity to another. On the other hand, his analysis falls short in failing to grapple with the intricacies of legal transplants. The United States should look to international norms and to other states’ domestic laws and practices for guidance on how best to address defamatory speech. But how? And then what? There are many unanswered questions here. Jones’s work initiates the conversation and lays the foundation for future analysis.

113. See Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, pt. I. (Canadian Charter of Rights and Freedoms).

114. *Hate Speech Symposium: Protecting Rights, Protecting Hate? Comparative American, Canadian, and Israeli Approaches*, 6 *TOURO INT’L L. REV.* 1, 10–11 (1995) (quoting Professor Weinrib).

115. *Id.* at 11.

116. See Symposium, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 *BUFF. L. REV.* 337, 345 (1989) (quoting Kathleen Mahoney who explains, “there is growing acceptance of the view that an egalitarian society may be impossible to achieve when the dissemination of racist ideas is permitted”). One of the leading hate speech cases in Canada is *The Queen v. Keegstra* [1990] S.C.R. 697 (Can.) (upholding criminal hate speech law).