

## SHOULD HATE SPEECH BE ALLOWED ON THE INTERNET?

### A Reply to Raphael Cohen-Almagor

*Stephen L. Newman\**

In his recent article, “Holocaust Denial is a Form of Hate Speech,” Raphael Cohen-Almagor argues that so-called ‘revisionists’ and others who deny the historical reality of Hitler’s attempt to wipe out European Jewry should be barred from the Internet, their Web sites dismantled and their pages removed from Facebook and other social networking sites.<sup>1</sup> His rationale for ridding the Web of these miscreants is that Holocaust denial is hateful *per se*. In his words, it represents a deliberate campaign to promote “enmity against an identifiable group based on ethnicity and religion” and is designed “to underestimate and justify murder, genocide, xenophobia and evil,”<sup>2</sup> thus distinguishing it from the expression of “vilifying and outrageous views” or the use of “derogatory words and discriminatory adjectives” against persons or groups whom the speaker dislikes. The latter, though it may sink to depths deserving moral condemnation, is protected by the free speech principle. Cohen-Almagor assures us that the appropriate way to combat “discriminating and damaging opinions” is by speaking out against them, “not by silencing and censoring speech.” Forbearance in these cases, he tells us, “is the essence of tolerance.”<sup>3</sup>

In contrast, Holocaust denial, as a form of hate speech, may be proscribed without offending against the free speech principle. According to Cohen-Almagor, that’s because hate speech is especially “harmful.” Not only is it “offensive,” but “it *potentially* silences the members of target groups and interferes with their right to equal respect and treatment.” Moreover, hateful remarks “are so hurtful that they *might* reduce the target group member to speechlessness or shock them into silence.” Hate speech “*might* undermine the individual’s self-esteem and standing in the community.” And hate speech “*might* lead to hate crimes.”<sup>4</sup> Virtually all liberal theories of free expression concur that harm is the correct standard to employ when placing limits on speech. Establishing the harmfulness of any particular utterance can be notoriously difficult, and Cohen-Almagor’s article displays sensitivity to the importance of the context in establishing the significance of the utterance

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\* *Stephen L. Newman is Associate Professor of Political Science at York University in Toronto, Canada where he teaches political theory. He is the author of Liberalism at Wits’ End: The Libertarian Revolt Against the Modern State (Ithaca, NY: Cornell University Press, 1974) and the editor of Constitutional Politics in Canada and the United States (Albany, NY: State University of New York Press, 2004).*

<sup>1</sup> R. Cohen-Almagor, “Holocaust Denial is a Form of Hate Speech,” *Amsterdam Law Forum*, Vol. 2, No. 1 (2009), pp. 33-42. Accessed on line at <http://www.amsterdamlawforum.org/>.

<sup>2</sup> *Ibid.*, p. 35

<sup>3</sup> *Ibid.*, pp. 34-35.

<sup>4</sup> *Ibid.*, p. 36 (emphasis added).

and the weight of its consequences. Hateful utterances capable of literally silencing the speaker's intended targets or so completely undermining their self-esteem as to render them incapable of asserting their rights or acting effectively as members of the civic community undoubtedly constitute a serious harm. The same may be said of utterances that threaten to unleash a contagion of hatred jeopardising the physical security of a vulnerable minority. Note, however, that Cohen-Almagor does not say that hate speech invariably results in these harms, only that it *might*. Presumably this is because he believes that the circumstances of the speaker and his auditors and the context in which the words are spoken have a bearing on their impact. If Cohen-Almagor is to remain consistent with the liberal free speech principle that he himself affirms, he cannot treat hate speech as a proscribed category but must proceed on a case by case basis and show a connection between the impugned utterances and the substantive harms which are alleged to result from them.

Nowhere in the article does Cohen-Almagor present evidence linking Holocaust denial to the silencing of its Jewish targets or any loss of self-esteem or decline in levels of civic participation among Jews. Mention is made of historical Anti-Semitism in several European countries that currently have laws on their books criminally proscribing Holocaust denial and the willful promotion of hatred against identifiable groups, but no link is drawn between Holocaust denial and the revival of Anti-Semitism in Europe or elsewhere. Only once in the article does Cohen-Almagor attempt to demonstrate a connection between Holocaust denial and a hate crime --the murder of a security guard inside the U.S. Holocaust Memorial Museum in Washington DC in June of 2009 by 88 year old James von Brunn, a life-long white supremacist and Anti-Semite --but the evidence presented does not support the conclusion that von Brunn's murderous rampage was incited by his exposure to literature or Web sites denying the historical reality of the Holocaust.

This is not to say that evidence linking Holocaust denial to grave and substantial harms does not exist; only that Cohen-Almagor fails to make the case in his article. If such evidence can be found, it would justify measures, either formal or informal as circumstances warrant, to suppress Holocaust denial. However, to be consistent with the free speech principle, the refusal to tolerate hate speech must constitute a prudential exception to the rule supported by a showing of demonstrable harm. Fear of some merely possible or imaginable harm will not suffice.<sup>5</sup>

In his conclusion, Cohen-Almagor belatedly comes up with another reason for suppressing Holocaust denial. He worries about the "downsizing" of the Holocaust by future generations who might come to see the destruction of

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<sup>5</sup> For an elaboration of this claim, see Stephen L. Newman, "What Not to Do About Hate Speech: An Argument Against Censorship," in R. Beiner and W. Norman, eds., *Canadian Political Philosophy* (Oxford: Oxford University Press, 2001), pp. 207-215.

European Jewry as an event obscured by the passage of time. “Young people may grow to think critically about the Holocaust. As some say there was a Holocaust while others say there was not, they might be inclined to think the truth is in the middle.”<sup>6</sup> He may be right to worry, but it is far from clear that the remedy for historical ignorance lies in censorship. Education would seem a better prescription. The existence of bad histories and their malign use by evil individuals intent on sowing discord does not necessarily encourage the spread of historical or moral relativism. The distinguished French historian Pierre Vidal-Naquet argues that the appropriate response to those who deny the reality of the Holocaust is not to ban their works but to refute their claims. “In doing so,” he writes, “we are not placing ourselves on the same ground as our enemy. We do not ‘debate’ him; we demonstrate the mechanisms of his lies and falsifications, which may be methodologically useful for the younger generations.”<sup>7</sup>

As it turns out, education is Cohen-Almagor’s preferred reply to Holocaust denial. He favors it over legal proscription, saying that the law “is the last resort, never the first, certainly not the only.” A more effective course would be to have the Holocaust taught “at all high schools across the world, explaining the reasons for that particular phenomenon in history.” “Educating people about why anti-Semitism has been part of our lives for so long, why it is so pernicious, and exposing its web of lies and hatred will have a far greater impact than any set of laws that any given country would care to draft.”<sup>8</sup> Nonetheless, he urges Internet service providers and social networking sites to bar Holocaust deniers on a voluntary basis. It remains unclear from the article why he thinks it is insufficient to demonstrate the lies and mechanisms of the Holocaust denier’s falsifications, as Vidal-Naquet recommends, in order to combat them successfully. Why must Holocaust education be supplemented with voluntary censorship on the part of civil society actors (Internet service providers and the managers of social networking sites) when the harms that would justify proscription by the state are absent or have not been adequately demonstrated? And if Web sites put up by Holocaust deniers carry an irrebuttable presumption of harm that does away with the need for demonstrable injury, shouldn’t sites mounted by radical Islamists and fundamentalist Christians, if they are virulently Anti-Semitic, also be shut down? Indeed, why shouldn’t the same presumption of harm attach to any and every Web site that demonises its author’s enemies? And if it does, what becomes of the distinction Cohen-Almagor draws between impermissible hate speech and the expression of “vilifying and outrageous views,” which he thinks ought to be tolerated?

It might be argued (although Cohen-Almagor does not) that the harms posed by Holocaust denial as a form of hate speech manifest themselves over time

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<sup>6</sup> R. Cohen-Almagor, “Holocaust Denial is a Form of Hate Speech,” p. 41.

<sup>7</sup> P. Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust* (New York: Columbia University press, 1992), p. 76.

<sup>8</sup> R. Cohen-Almagor, *Holocaust Denial is a Form of Hate Speech*, p. 40.

through the gradual corruption of impressionable minds and we would be foolish to wait until the poison had been absorbed before taking action to protect society. Reasoning of this sort is reflected in the “bad tendency test” employed by the United States Supreme Court in *Gitlow v. New York* to justify the suppression of speech deemed politically subversive, even though it was acknowledged at the time that the impugned speech posed no clear and present danger to the nation’s security.<sup>9</sup> More recently, the Canadian Supreme Court has adopted a similar logic in upholding that nation’s criminal proscription of hate speech.<sup>10</sup> Those who defend censorship on this ground frequently invoke --and as frequently exaggerate --the power of political propaganda and commercial advertising to shape opinion.

There are at least two problems with this line of justification, however. First, in over-emphasizing the deleterious effects of people’s exposure to hateful utterances it betrays a disturbing lack of faith in democracy. If significant numbers of our fellow citizens have so little respect for democratic values that they are liable to be “converted” by viewing expressions of extreme hatred on the Web, it is probably too late for even the most far-reaching censorship to do any good. Evil ideas have no magical properties. In the competition for our allegiance they must convince in order to win assent. Our faith in democracy rests on the belief that most if not quite all of our fellow citizens share our commitment to democratic values and are sufficiently rational to weigh the opinions to which they are exposed in light of their political and normative commitments. It is only for this reason that we have the confidence to fight words with words, believing that we can defeat evil ideas by exposing them for what they are.

Second, it is naïve to think that a disastrous contagion of hate will be unleashed through exposure to the ideas found on extremist Web sites, or prevented by shutting these sites down. Extreme hate speech is likely to be most influential where less extreme forms of prejudice already have wide currency. If we were serious about choking off the roots of hatred, it might make more sense to refuse toleration to mainstream religious bodies, virtually all of which claim an exclusive relationship with God and preach that there is no salvation for those who do not embrace the one true faith. Radical Islamist Web sites would disappear if there were no Islam. And it is arguable that there would have been no Holocaust without two millennia of Christianity. To be sure, in the mainstream, neither Islam nor Christianity preaches hatred; but, like nearly all religions, each in its own way encourages a kind of chauvinism that can nurture a prejudice against those who are not of the faith. And under the right circumstances, this prejudice contributes to the creation of an environment receptive to extreme hate speech. Indeed, the prejudices born of sincerely held religious beliefs might well constitute even more of a danger to social harmony than the venomous ideas peddled by

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<sup>9</sup> 268 U.S. 652 (1925).

<sup>10</sup> *R. v. Keegstra* 3 S.C.R. 697 (1990). For a comparative discussion of the American and Canadian case law, see Terry Heinrichs, “Gitlow Redux: ‘Bad Tendencies’ in the Great White North,” *The Wayne Law Review* 48.3 (2002): 1146-53.

hate mongers insofar as they are more “respectable” and thus spread more easily.

If it could be shown that extremist Web sites catalyze the prejudices found in the social mainstream, transforming a latent evil into an immediate danger, there would be a stronger case for censorship. Yet even if we grant that extremist Web sites can have this effect, there is still no reason to accept a categorical ban on Holocaust denial or hate speech *per se*. Rather, under the free speech principle, we are back to a case by case (or at the least, country by country) analysis that requires a showing of grave and substantial harm flowing directly from the suspect Web sites. Upholding the principle of freedom of expression is most necessary but also most difficult when the speaker is least worthy. Benign and uncontroversial utterances rarely evoke calls for censorship. It is freedom for the speech we abhor that challenges our commitment to the principle. But if Cohen-Almagor genuinely believes that the way to fight against the spread of personally offensive and socially destructive opinions “is by more speech, not by silencing and censoring speech,” then he ought not be so quick to call for banning Holocaust denial and other examples of hateful speech from the Internet.

