

## **Banning Hate Speech Poses Hidden Risks**

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The Council of Europe recently adopted a treaty that criminalizes “acts of a racist and xenophobic nature committed through computer systems.” The Hate Speech Protocol is now open to ratification by countries around the world. From an American perspective, the Protocol is problematic because it clearly contradicts the First Amendment’s guarantee of free speech. But from a Jewish perspective, the Protocol’s prohibition of Holocaust denial appears laudable, at least at first glance. A closer look, however, suggests that this seemingly salutary provision may come back to haunt us.

The Protocol is intended to prevent the distribution of hate speech over the Internet. Article 3 of the Protocol requires signatories to ban the distribution of racist and xenophobic materials to the public through a computer system. Article 4 prohibits racist or xenophobic motivated threats, while Article 5 outlaws racist or xenophobic insults. The Protocol’s Article 6 deals with Holocaust denial. It directs each signatory to criminalize the distribution over the Internet of “ material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity.... ”

Because the Protocol requires the restriction of speech based on its content, the United States government has declared that the First Amendment of Constitution prevents it from joining the Protocol. In fact, several European countries originally wanted the provisions of the Protocol included in a broader Council of Europe cybercrime convention signed last year, but the U.S. indicated that it could not join the cybercrime convention if it contained the hate speech provisions. Accordingly, the Council of Europe decided to place the hate speech provisions in a separate instrument.

The position of the U.S. government is correct as a matter of First Amendment jurisprudence; any U.S. law implementing the Protocol’s requirements would be plainly unconstitutional. Moreover, the Protocol runs contrary to the American tradition that robust discussion is far more effective at discrediting bad ideas than legal suppression of the ideas.

Indeed, given the history of anti-Semitism in Europe, and its recent resurgence, the Protocol’s promulgation by the Council of Europe seems somewhat hypocritical. The Europeans appear to use their hate speech laws to deflect charges of current anti-Semitism, as well as responsibility for the actions of their parents. “How can we be accused of anti-Semitism,” they ask, “when our laws prohibit us from even uttering anti-Semitic statements?” Moreover, some Europeans have used the Protocol as an opportunity to bash the U.S.; they have suggested that America’s reluctance to sign the Protocol proves that Europeans care more about the rights and feelings of minorities than do Americans.

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Notwithstanding an American philosophical unease with the Protocol, as well as suspicion of the motives that underlie it, the Protocol's ban on Holocaust denial is very compelling. Holocaust denial is a particularly offensive form of anti-Semitism because it questions the veracity of a fact at the core of modern Jewish identity. Recognition of the odious nature of Holocaust denial in an international treaty makes Jews feel less isolated in their effort to combat anti-Semitic propaganda.

Moreover, maybe the American belief in the power of the marketplace of ideas is wrong. Maybe good ideas don't always win out, and bad ideas, like anti-Semitism, can best be defeated by legal fiat.

But despite the comfort a ban on Holocaust denial might give us, the Protocol may be used against us as well. The Protocol targets the denial of all genocide, not just the Holocaust. Thus, historians of the Israeli War of Independence could find themselves prosecuted for "denying" the plight of the Palestinian refugees. Likewise, journalists could be prosecuted for "minimizing" the scope of the "massacre" in Jenin this past April.

The risk of prosecution is magnified because the Protocol requires implementation and enforcement on a national, rather than international, level. This means that prosecution and adjudication will be in the hands of the Norwegian or Malaysian legal system, for example, not an impartial international tribunal sitting in Geneva or the Hague. In this age of moral equivalence, the Hate Speech Protocol is likely to do us more harm than good.