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## The Banality of Evil and the First Amendment

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# THE BANALITY OF EVIL AND THE FIRST AMENDMENT

*W. Bradley Wendel\**

DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS. By *Alexander Tsesis*. New York: New York University Press. 2002. Pp. x, 246. \$40.

## INTRODUCTION

In the late spring and early summer of 1994, hundreds of thousands of people in Rwanda — an estimated ten percent of the population — were brutally murdered by their fellow citizens, generally for the “crime” of belonging to the socially and economically dominant, but numerically minority Tutsi ethnic group.<sup>1</sup> The slaughter followed a systematic propaganda campaign coordinated by the Rwandan government, dominated by members of the Hutu ethnic group, who had long harbored grievances against Tutsis. The campaign demonized Tutsis as “devils,” stirred up fear among the largely rural and poor Hutu population by propagating false information about a Tutsi campaign to exterminate Hutus, and stated that killing Tutsis was a civic duty for Hutus.<sup>2</sup> Using the pretext of a plane crash that killed the Rwandan president (which was falsely blamed on Tutsi insurgents), Hutu extremists organized a countrywide effort by ordinary Hutus to kill Tutsis, savagely, methodically, and in a chillingly routine manner — peasant “workers” reported for duty in the morning, spent the day hacking Tutsis to death with machetes, and then retired for the evening to eat, drink, and sleep.<sup>3</sup> When the killing finally ended in July, an estimated 800,000 were dead, legions of refugees had swarmed into neighboring countries, and Rwanda was in shambles.

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1. See generally PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

2. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 559-61 (1998).

3. See GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 255-56 (1995).

The Rwanda massacre took its place alongside other massive, systematic, coordinated attempts to eliminate entire classes of people, in a century already reeling from horrors such as the Armenian genocide, the Holocaust, the Cambodian killing fields, and the murders ordered by Stalin.<sup>4</sup> The slaughter at Srebrenica would happen in the next year.<sup>5</sup> To many observers, these events revealed the fragility of the very preconditions of civilization — trust, empathy, reason, and understanding. Their occurrence inspires a kind of collective helpless silence, recalling Theodor Adorno's admonition that, after Auschwitz, to write a poem is barbaric.<sup>6</sup> The complicity of numerous "ordinary" people in the bureaucratically organized killings continues to demand our reflection on the capacity for evil that seems innate in human nature.<sup>7</sup> Of course, earlier moral catastrophes such as slavery and the slave trade and smaller-scale but nevertheless evil acts such as rapes and lynchings deserve our critical reflection as well. Despite the modern resources of education, culture, and the rule of law, civilization appears to be a thin veneer for a pervasive human capacity for brutality and an endless appetite to cause suffering.

An alternative response to the failure of social institutions to restrain human cruelty is to persist in the optimistic belief that we can still do more. Optimism need not be the naïve Panglossian faith that this world is already in its best possible state.<sup>8</sup> Rather, it can consist of a conviction that improvements in education, culture, or the law can do a better job at keeping our capacity for violence in check. Alexander Tsesis<sup>9</sup> is an optimist in the latter sense. He holds fast to ideals that demand that the world be different — ideals such as equality, human dignity, peace, and toleration. In his view, decent society must refuse to permit certain kinds of statements to be uttered, namely those that express "hatred toward groups because of their racial, historic, cultural, or linguistic characteristics" (p. 81). Tsesis argues that violence against ethnic minorities and other outsider

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4. For a sampling of the grim catalogs of modern savagery, see JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* (1999), and SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

5. See JAN WILLEM HONIG & NORBERT BOTH, *SREBRENICA: RECORD OF A WAR CRIME* (1996).

6. See THEODOR ADORNO, *NEGATIVE DIALECTICS* 360-62 (E.B. Ashton trans., The Seabury Press 1973) (1966).

7. See SUSAN NEIMAN, *EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY* 254-55 (2002).

8. See GOTTFRIED W. LEIBNIZ, *THEODICY: ESSAYS ON THE GOODNESS OF GOD, THE FREEDOM OF MAN, AND THE ORIGIN OF EVIL* (E.M. Huggard trans., Austin Farrar ed., Open Court Publ'g 1985) (1951). The character of Pangloss in Voltaire's satire *Candide* is intended to mock Leibniz's claim that all events in God's creation happen for the best.

9. Visiting Scholar, University of Wisconsin-Madison, School of Law, Institute for Legal Studies and Visiting Assistant Professor, Chicago-Kent College of Law.

groups never occurs in isolation, but is legitimated and made more likely by a background of social beliefs, customs, imagery, metaphors, and stereotypes that degrade and dehumanize the outsiders.<sup>10</sup> These beliefs, in turn, are a product of the “emotive response elicited by the repeated expression of disrespectful images about the ethical, political, sexual, religious, or familial qualities of targeted groups” (p. 82). It is an essential function of hate speech to lay the groundwork for violence against disfavored groups by shaping the unconscious web of beliefs of citizens — who will be willing to turn against their neighbors, or at least to turn a blind eye to the resulting atrocities. For this reason, Tthesis proposes criminalizing at least that subset of hate speech that has a “realistic probability of inciting discrimination or violence” (p. 199), even if the pernicious effects of the speech take a long time to materialize. “The longer destructive messages about minorities are given free rein, the more likely it becomes that the hated group will be considered unworthy of essential human rights” (p. 137). A speaker whose words are not immediately acted upon should not be immune from prosecution because, for all we know, his words may contribute to a culture of bigotry that eventually sets the stage for acts of violence.

His proposal is sufficiently radical that a reader might be tempted to dismiss it outright, as wildly impractical ivory-tower theorizing, at least in the U.S. legal system. Indeed, although Tthesis sometimes seems to underplay the resulting disruption to existing constitutional law, the acceptance of his criminal statute would require a great deal more than marginal doctrinal tinkering. In Part I, I briefly describe the chasm between modern First Amendment principles and a comprehensive regulatory approach to the long-term harm created by hate speech. Cases such as *Brandenburg v. Ohio*<sup>11</sup> and *New York Times v. Sullivan*<sup>12</sup> are generally interpreted as underwriting a broad protection for caustic criticism and advocacy that falls short of incitement to commit imminent violent acts.<sup>13</sup> Moreover, a reform like

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10. P. 138; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *Unconscious Racism*] (arguing that racial discrimination is the result of unconscious racial motivation that is the product of cultural factors such as mass-media portrayals, parental beliefs, and peer influences).

11. 395 U.S. 444 (1969) (per curiam).

12. 376 U.S. 254 (1964).

13. HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 228-31 (Jamie Kalven ed., 1988). Tthesis relies on a narrow interpretation of the holding of *Sullivan* that is technically correct — namely, that it applies only to defamation actions against public officials. P. 146. However, Kalven’s broader reading, that *Sullivan* creates a zone of protection for unorthodox or critical ideas, even those that are extremely offensive, is borne out by subsequent cases such as *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

the one Tthesis favors has been tried in a related context, namely the attempt to suppress pornography in order to prevent violence against women.<sup>14</sup> Although he does not discuss this episode, the Seventh Circuit's invalidation of an Indianapolis antipornography statute, and its summary affirmance by the Supreme Court, have been understood as foreclosing the attempt to prevent violence by addressing its roots in the false beliefs that result from pervasive exposure to hateful messages.<sup>15</sup> But the natural response to this critique is that it gives undue weight to the status quo, and that Tthesis is making a normative argument that stands apart from existing doctrine and provides a perspective from which the law can be criticized (pp. 130, 138). Although he does not self-identify as a critical scholar, his book follows the critical methodology of unmasking the law's pretensions to neutrality and inevitability.<sup>16</sup> An adequate response to his argument must accordingly be normative, not merely the emphatic reassertion of legal rules.

The normative response I wish to consider in Part II centers on the moral notion of responsibility and the consequences of the ascription of blame to a significantly expanded set of actors. As an optimist, Tthesis believes legal institutions can be reformed to address the problems of stereotyping, discrimination, ethnocentricity, racial scapegoating, and intolerance. Because these pathologies have such complex etiologies, however, an adequate legal response must end up targeting a vast domain of expression, including children's books that play to stereotypes,<sup>17</sup> much of the Western canon of literature,<sup>18</sup> jokes,<sup>19</sup> and popular music, movies, and television shows.<sup>20</sup> Because

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14. See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) [hereinafter MacKinnon, *Pornography*].

15. See *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). A summary affirmance is technically a decision on the merits by the U.S. Supreme Court, as distinguished from a denial of certiorari. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 313 n.101 (1989).

16. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 254-58 (1977).

17. As Tthesis admits, "[c]hildren's acquisition of cultural dislikes and antagonisms results from complex perceptions of multiple external stimuli: defamations about minorities, experiences with how persons of other races are treated, parental cues about who are appropriate companions, and the extent of interracial intercourse." P. 107. Stereotypes in children's literature are surely one of those stimuli, as Charles Lawrence's moving first-person account of the psychic harm caused by the children's book, *Little Black Sambo*, shows. See Lawrence, *Unconscious Racism*, *supra* note 10, at 317-19.

18. Tthesis mentions the stereotypical Shylock from the *Merchant of Venice* and Fagin from *Oliver Twist*. P. 111.

19. Sufficiently pervasive and severe racist jokes can create a hostile work environment in violation of federal antidiscrimination statutes. See, e.g., *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001). Even joking not rising to the level of racial harassment can have the cultural-conditioning effect that Tthesis describes, by reinforcing stereotypes and permitting dominant groups to distance themselves from the butts of the jokes. Pp. 102-03.

hardly anyone can claim not to be involved at some level with the perpetuation of pervasive cultural stereotypes, Tsesis's proposal spreads a layer of blame that is a mile wide and an inch deep. In moral terms, this diffusion of responsibility risks turning into a process of collective exoneration for the genuine evils of racism. For, as Hannah Arendt has argued, "where all, or almost all, are guilty, nobody is."<sup>21</sup> In short, Tsesis is right that racism touches everyone, and that violence can spring from a climate of acceptance of racist beliefs, but he is not justified in concluding that legal sanctions ought to be applied on the basis of that complicity.

This criticism should not obscure the genuine accomplishment of Tsesis's book, which is to focus the hate speech debate on explicitly normative issues. Of course, the Court engages in policy-based decisionmaking all the time, but it refuses to acknowledge as much, which leads the justices into baroque doctrinal attempts to justify regulation of speech on the basis of anything but its substance — witness the secondary-effects doctrine,<sup>22</sup> the captive-audience rule,<sup>23</sup> and the permissibility of regulating the time, place, and manner of speech.<sup>24</sup> By demanding a normative argument for regulating, say, adult movie theaters but not Ku Klux Klan rallies, Tsesis is continuing the scholarly efforts of not only Stanley Fish,<sup>25</sup> but also a number of outsider scholars who have consistently challenged the moral basis for purportedly neutral legal principles.<sup>26</sup> If neutrality and the appeal to principled adjudication is just a mask for a particular ideological agenda, it is fair to demand a moral justification for that agenda.

In the end, though, Tsesis is vulnerable to the argument that the criminal law is too blunt an instrument to deal with the diffuse and unconscious racism that critical race-theory scholarship has uncovered so effectively. Consider this provocative excerpt from a speech by Richard Delgado:

[P]owerful white-dominated institutions . . . benefit, and on a subconscious level they know they benefit, from a certain amount of low-grade racism in the environment. If an occasional bigot or redneck calls

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20. See, e.g., Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003).

21. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 274 (rev. ed. 1964).

22. *Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

23. *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

24. *United States v. O'Brien*, 391 U.S. 367 (1968).

25. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO* (1994).

26. See, e.g., MacKinnon, *Pornography*, *supra* note 14; Gary Peller, *Race-Consciousness*, in *CRITICAL RACE THEORY* 127 (Kimberlé Crenshaw et al. eds., 1995).

one of us a nigger or spic one night late as we're on our way home from the library, that is all to the good. . . . This kind of behavior keeps nonwhite people on edge, a little off balance. . . . It prevents us from digging in too strongly, starting to think we could really belong here. It makes us a little introspective, a little unsure of ourselves; at the right low-grade level it prevents us from organizing on behalf of more important things.<sup>27</sup>

If Delgado's claim is true — and it very well might be — then it forces Tthesis into an uncomfortable bind. Either he advocates locking the whole white power structure of the institution up in jail, or he focuses his criminal penalties on the “occasional bigot or redneck” whose speech differs from all the rest only by making explicit what the others already believe. Evil is banal when “many are prepared to play small parts in systems that lead to evils they do not want to foresee.”<sup>28</sup> Racism is similarly banal when it is so pervasive and subtle that it becomes ordinary, expected, and invisible to those who are complicit in it. In that case, the legal system is forced either to regard everyone as guilty, or to focus only on the most egregious cases of people who act on racist beliefs. Tthesis favors the former, but the ironic result is that by deeming everyone guilty, his conception of complicity in the harms of racism excuses everyone.

## I. RETHINKING FIRST AMENDMENT DOCTRINE, FROM THE GROUND UP

About halfway through the book, after discussing the historical evidence that hate speech has played a causal role in some of history's greatest moral disasters, Tthesis proposes to unsettle several bedrock principles of free-speech jurisprudence. “The First Amendment value of messages is significantly greater when they further justice, equality, and social contentment than when their triumph in the marketplace [of ideas] is solely based on the dominant power of proponents, no matter how unethical they may be” (pp. 136-37). Read as a descriptive statement, this sentence is so far off the mark that it might as well be describing constitutional law on Venus.

In American First Amendment law, content- and viewpoint-based regulation of speech is presumptively unconstitutional,<sup>29</sup> so there is no

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27. RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 186 n.88 (1997) (quoting Richard Delgado, Address to the State Historical Society (Apr. 24, 1989)). Tthesis echoes this argument. P. 113 (“Destructive messages are critical for a dominant group seeking to consolidate its power.”).

28. NEIMAN, *supra* note 7, at 286.

29. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Boos v. Barry*, 485 U.S. 312 (1988); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Geoffrey Stone, *Content Regulation and the First Amendment*, 25

basis for favoring messages that are favorable toward justice, equality, and contentment over those that express a negative view;<sup>30</sup> the power a speaker has in the marketplace of ideas is not a sufficient ground for limiting the speaker's expressive freedom;<sup>31</sup> and some pretty base messages, which do nothing to "further[] tranquility" (p. 139), are permitted to go unpunished — consider flag burning,<sup>32</sup> non-assaultive cross-burning,<sup>33</sup> vulgar and abusive language,<sup>34</sup> and insinuating that Jerry Falwell had sex with his mother in an outhouse.<sup>35</sup> "True threats" of violence, consisting of a serious expression of intent to commit an imminent act of violence against an identified individual or group, may be punished,<sup>36</sup> but it has been almost an axiomatic First Amendment principle for decades that the Constitution protects a core of criticism, advocacy, and political agitation falling short of incitement to imminent violent action.<sup>37</sup> Finally, to the extent the harms of social

WM. & MARY L. REV. 189 (1983). Naturally there are abundant examples of permissible content discrimination in First Amendment law, which is the basis for Stanley Fish's argument that there are no principled distinctions that can be drawn in this field. See STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* (1999). Whatever one thinks of Fish's argument that all law is politics, as a matter of the rhetoric that is internal to legal reasoning, none of the instances of permitted content regulation would encompass something as broad as a blanket prohibition on all racist speech. Cases involving hate crimes, such as *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *Virginia v. Black*, 538 U.S. 343 (2003), do establish a principle that a defendant's racist beliefs may be taken into account as aggravating factors in sentencing. But both *Mitchell* and *Black* addressed conduct that would be criminal whether or not accompanied by an objectionable speech act. They do not permit making speech (or belief) a crime independent of some other act.

30. Cf. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

31. *Buckley v. Valeo*, 424 U.S. 1 (1976) (calling "foreign to the First Amendment" the view that the expenditures of wealthy people can be restricted in order to enhance the voice of less affluent citizens). For critiques of *Buckley* that emphasize the value of equality, see, for example, Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470 (1997); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055 (1999).

32. *Texas v. Johnson*, 491 U.S. 397 (1989).

33. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); cf. *Black*, 538 U.S. at 343 (2003) (upholding state statute prohibiting cross burning with an intent to intimidate). Justice Thomas, in dissent in *Black*, contended that there is no such thing as non-assaultive cross burning and, analytically, cross burning should be treated as conduct instead of speech. See *Id.* at 388 (Thomas, J., dissenting).

34. *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).

35. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

36. See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 774 (1994); *Watts v. United States*, 394 U.S. 705, 708 (1969).

37. KALVEN, *supra* note 13, at 229; STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANING OF AMERICA* (1999). In Kalven's view, the state of constitutional law following *Brandenburg* and *New York Times* is best stated by Judge Learned Hand's *Masses* opinion. As Hand wrote:

conditioning can be traced to the beliefs and actions of individual citizens, not government actors, these harms cannot be balanced against the expressive freedoms guaranteed by the First Amendment, because state action is not implicated in societal racism.<sup>38</sup>

Tsisis is well aware that existing American constitutional law gives a “virtually unlimited license for hate speech” (p. 180), so it would be incorrect to read his analysis of the law descriptively. His argument is a normative one, that the law should be modified in light of the empirical evidence he mounts up in the first half of the book. For example, tragedies such as the Holocaust, the slave trade and slavery (both historically in the United States and in contemporary societies such as Mauritania), and the forcible removal of Native Americans from western lands were caused, in part, by the spread of messages that the victims deserved it — that they were subordinate or even subhuman and their interests could be disregarded at will (pp. 3, 29, 51-52, 86, 101-02, 105-06, 116-17). In none of these cases did a single speaker incite imminent lawless action. Rather, the climate grew increasingly hostile by a process of accretion, in which countless individuals repeated, relied upon, and made respectable the negative cultural stereotypes that eventually legitimated acts of brutality. Tsisis frequently emphasizes the gradualness of the changes, observing that in Germany, for example, anti-Semitic attitudes began as isolated bigotry, but subsequently became entrenched as broader social intolerance, then oppression, and finally genocide (p. 18). If a similar climate began to develop today, Tsisis worries that there would be no single expressive flashpoint that could effectively be suppressed, consistent with existing constitutional norms, to prevent mass murder. The Rwandan disaster might serve as an illustration of this thesis, with anti-Tutsi propaganda fanning the flames of somewhat subdued inter-group animosity which had never manifested itself in violence until 1959.<sup>39</sup> Hateful speech was not the only cause of the genocide, but the steady bombardment of messages that Tutsis were devils, cockroaches, “outside the human race,” and that the world could be made a better

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Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.

See *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917). Substituting “hate speech” for “political agitation” in this passage provides a direct refutation of Tsisis’s thesis, if it is understood descriptively.

38. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 444-49 [hereinafter Lawrence, *If He Hollers*] (criticizing the public/private distinction).

39. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. REV. 1221, 1244-45 (2000) [hereinafter Drumbl, *Punishment*].

place by exterminating Tutsis, certainly helped break down ordinary human moral restraints against killing.<sup>40</sup>

To the extent violence has its roots in beliefs that are communicated by language or symbolic expression, American law prohibits the government from responding to the threat of violence by regulating speech, unless the speech can be characterized as an incitement to *imminent* lawless acts. This proposition is borne out not only by *Brandenburg* and its accepted interpretation,<sup>41</sup> but also by the history of the effort by some feminist critics of the First Amendment to regulate certain kinds of pornography. A statute to address racist violence by combating nonassaultive “misethnic”<sup>42</sup> speech resembles the attempt to reduce violence against women by outlawing pornography that eroticizes violence against women. According to Catharine MacKinnon, pornography harms women in several ways, two of which are particularly relevant for our purposes. The first is by standing in some causal relationship with violent sex crimes against women; these crimes, MacKinnon argues, would not have occurred but for the existence of pornography.<sup>43</sup> The second is a kind of intrinsic harm to women, not necessarily connected to physical violence, resulting from being socially constructed as nothing more than objects for the sexual pleasure of men.<sup>44</sup> In the first case, the thesis that some sexual violence is caused by exposure to pornography could be subjected to empirical testing; the evidence on this point is ambiguous, owing to the difficulty of isolating any one of the many causes of violent sexual behavior in men.<sup>45</sup> Similar studies can presumably shed light on Tsesis’s claim that exposure to racist ideas leads to an increase in violence against members of disfavored minority groups, which he

40. GLOVER, *supra* note 4, at 120-22; POWER, *supra* note 4, at 330, 338-40; Drumbi, *Punishment*, *supra* note 39, at 1244-47.

41. KALVEN, *supra* note 13, at 119 (arguing that, after *Brandenburg*, speech can be characterized as harm only if it becomes so closely linked to force that we perceive it as the exercise of force).

42. Misethnicity is Tsesis’s neologism for institutionalized hatred of ethnic groups; it includes “consistently disapproving, hypercritical, and oft-reiterated generalizations about groups and persons belonging to them.” Pp. 2, 81. Similarly, I use the term “hate speech” throughout this review to denote “any expression of an idea that color marks a person as suspect in morals or ability, unworthy of first-class respect and consideration, or unfit for company or society.” See Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992).

43. See MacKinnon, *Pornography*, *supra* note 14, at 43-50, 52-53.

44. *Id.* at 7-8, 17-18, 27, 54-56; see also Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321 (1984) [hereinafter MacKinnon, *Not a Moral Issue*].

45. See, e.g., 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* 150 (1985) (taking a skeptical view of the claim that pornography has a substantial causal role in sexual violence); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 597-600 [hereinafter Sunstein, *Pornography*] (summarizing studies and calling the evidence suggestive, but not dispositive).

occasionally makes in a very strong form, arguing that “[a]lthough hate speech does not always lead to organized supremacism, it is a necessary ingredient to that end.”<sup>46</sup> The second kind of harm is entirely different, because it relies on an intrinsic injury, which we might call “inequality constructed by hateful speech,” to justify restrictions on expression. On this view, speech is discrimination, degradation, and an attack on the personhood of victims.<sup>47</sup> Tsesis relies on both kinds of harm to make the case for criminalizing hate speech.<sup>48</sup>

Despite the best efforts of what I have labeled “the new left First Amendment critics,”<sup>49</sup> courts generally conceptualize these harms as cognitive responses to persuasion, not harm per se.<sup>50</sup> To put it crudely, courts imagine the sequence of events:

speech → listener forms belief → acts on belief to cause harm  
rather than the sequence imagined by the new left critics:

speech → harm

Once the intermediate step involving persuasion is entrenched into our thinking about the First Amendment, a welter of familiar principles seem to follow inexorably: There is no such thing as a false idea,<sup>51</sup> the government must be prohibited from discriminating on the basis of viewpoint,<sup>52</sup> offense alone is not a sufficient justification for restricting speech,<sup>53</sup> and above all that “the theory of our Constitution” is that government must rely on the marketplace of

46. P. 170. For a sophisticated discussion of various ways to interpret Tsesis’s causal claims, see Anuj C. Desai, *Attacking Brandenburg with History: Does the Long-Term Harm of Biased Speech Justify a Criminal Statute Suppressing It?*, 55 FED. COMM. L.J. 353, 367-79 (2003) (reviewing *Destructive Messages*).

47. See also DELGADO & STEFANCIC, *supra* note 27, at 47-48; Lawrence, *If He Hollers, supra* note 38, at 442-44.

48. For the first type of harms see, for example, p. 117 (“Beliefs about the purported irremediable evil or insignificance of outgroups drives negative attitudes to a frenzy that can blow up into cataclysmic consequences. . . . Cultural preparation for perpetrating crimes against humanity takes time and is vastly more dangerous than fighting words that lead to fisticuffs.”); p. 168 (“Hate speech rarely results in only short-term harms. More commonly, it is developed by succeeding generations and becomes part of social interaction and political culture.”). For the second category of harms see, for example, p. 89 (“Misethnic mental devices reduce an entire segment of the population into profligate, pernicious, and dastardly subhumans, quite different from ingroup members.”); p. 166-68 (cataloging harms such as “undermining a sense of personal integrity,” “making people feel unwelcome,” and “marking off people as appropriate for shunning and exclusion”).

49. See W. Bradley Wendel, “*Certain Fundamental Truths*”: *A Dialectic on Negative and Positive Liberty in Hate-Speech Cases*, LAW & CONTEMP. PROBS., Spring 2002, at 33.

50. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 191 (1993); Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL’Y 461 (1986).

51. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

52. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

53. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

ideas to certify the truth of ideas.<sup>54</sup> As Tsesis rightly points out, many of these doctrines implicitly rely on skepticism in the realm of moral epistemology (pp. 130-35) — courts assume that per se harms are the result of false beliefs and the government should not be in the business of regulating speech that might persuade people to form false beliefs.<sup>55</sup> Even a nonskeptical court might admit that a belief is false, but nevertheless be unwilling to empower the government to make decisions about the truth or falsity of ideas, for fear that it might abuse that power.<sup>56</sup>

I have never found this argument terribly satisfying, at least in the weak form it is usually offered. Government officials make value-laden regulatory decisions all the time, sometimes on the basis of ambiguous evidence,<sup>57</sup> and yet the ordinary response by citizens and commentators to a misbegotten government decision is not to wave the *Barnette* flag and cry “imposition of orthodoxy!” Rather, critics attack the policy on its merits, on factual and normative grounds. In the weak form of the argument, the government ought not to take a position on moral issues, because there is no such thing as objectivity in the domain of moral reasoning. As Judge Easterbrook puts it in *Hudnut*, the government should not be “the great censor and director of which thoughts are good for us.”<sup>58</sup> Tsesis gives the obvious response throughout his book: a policy that is based on the inhumanity of Jews or African Americans is vastly more wrongheaded and harmful than one that is based on an erroneous view of the relationship between an environmental pollutant and the risk of developing cancer. It is incoherent to permit the government to exercise discretion in the latter kind of case but not the former, if the reason for precluding it from making normative decisions in the first case is the fear that it will make the wrong one. (The strong form of the argument, that the government is systematically not as capable of private actors of making any decisions, on moral or empirical matters,<sup>59</sup> is more plausible, but few people seem consistently to rely on it.) To the extent we grant the government power at all, civil libertarians would

54. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

55. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

56. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-31 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); cf. Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 414 (1989) (arguing that abstraction in constitutional decisionmaking is justified by the desire to remove discretion from a decisionmaker).

57. See Sunstein, *Pornography*, *supra* note 45, at 600-01 (discussing decision by OSHA to reduce permissible levels of industrial exposure to benzene, despite lack of clear evidence of a causal connection between exposure at the existing level and increased cancer risk).

58. *Hudnut*, 771 F.2d at 330.

59. See, e.g., F.A. HAYEK, *THE ROAD TO SERFDOM* (1944).

seem to have the burden of establishing why that power should not be used to prevent the harms that flow from pornography and hate speech, which are certainly as serious as other harms that we permit government to act to eliminate.

## II. LEGAL RESPONSES TO THE BANALITY OF RACISM

One reason we might not want to involve the legal system in mitigating the harm of hate speech is that the underlying problem is not amenable to the kinds of legal responses advocated by Tsesis. Not every social ill can be redressed through the means of criminal punishment.<sup>60</sup> This is not equivalent to several familiar arguments against regulating racist speech, such as that it is impermissible to regulate morality, that regulating speech is a distraction from the real business of remedying social inequality,<sup>61</sup> that criminalizing hate speech will just drive racist messages underground,<sup>62</sup> or that it involves the government in scary thought control. Rather, the normative argument against hate-speech regulation depends on conceptions of complicity and responsibility that deserve deeper investigation.

I have been discussing the example of Rwanda, because it shows how a massive number of individuals can be complicit in the most horrendous crimes — hundreds of thousands of police officers, members of the armed forces, militia members, civil servants, and ordinary citizens personally participated in the massacres while, and millions of others passively acquiesced in the violence.<sup>63</sup> It was also strongly connected with speech, with government-operated media outlets constantly exhorting Hutus to kill Tutsis (which were referred to as “cockroaches”) and Hutus enthusiastically following those instructions.<sup>64</sup> The Rwanda case shows that the appropriate legal response to pervasive evil must be carefully considered in light of the social goals of preventing its recurrence, reconciling victims and aggressors who must continue to live together in society, and

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60. Cf. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

61. See DELGADO & STEFANCIC, *supra* note 27, at 111-19.

62. See SHIFFRIN, *supra* note 37, at 81.

63. Drumbl, *Punishment*, *supra* note 39, at 1246-47.

64. GLOVER, *supra* note 4, at 121-22 (discussing radio station which broadcast messages such as, “The grave is only half full. Who will help us to fill it?”); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶¶ 123, 148-49 (Sept. 2, 1998), available at <http://www.ict.org> (I am grateful to Mark Drumbl for this reference). Radio stations also broadcast names, addresses, and license plate numbers of Tutsis and moderate Hutus. See POWER, *supra* note 4, at 333. This practice is chillingly similar to the so-called “Nuremberg files” web site, which posted identifying information about doctors who perform abortions. See Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541 (2000).

attributing the appropriate measure of moral responsibility to the perpetrators of harmful acts. Tsesis uses similar grave humanitarian catastrophes, such as the Holocaust and African slavery, to challenge the assumption in First Amendment law that the wrong of suppressing racist speech exceeds the wrong that results from it.

But it is important not to overstate these comparisons. Even Tsesis does not argue that racist speech usually works as it did in Rwanda. Rather, the harm accrues gradually, though successive generations, as stereotypes become ingrained at an unconscious level in the belief systems of a large number of individuals (pp. 168, 193, 198). It becomes part of the background set of assumptions that a person simply accepts as given.<sup>65</sup> Thus, the evil of racism becomes banal in Hannah Arendt's sense of that word. Philosopher Susan Neiman has applied the banality of evil concept to the Nazi genocide:

Jurisprudence views heinous crimes as those done with malice and forethought. Both these components of intention were often missing in many agents who carried out the daily work of extermination. Sadists, and particularly venomous antisemites, were present among the murderers, but the SS sought to avoid using those who took obvious pleasure in murder, and most of it was carried out as routine. Vicious hatred was far less in evidence than might be expected among the lower echelons of those who took over the killing. The opportunity to avoid being sent to fight at the front enlisted far more concentration camp guards than did the opportunity to torment Jews. At the highest levels, not only malice, but clear view of the consequences of one's actions was often missing as well. Eichmann is only the most famous Nazi official whose initial goals had nothing to do with mass murder and everything to do with petty desires for personal advancement. At every level, the Nazis produced more evil, with less malice, than civilization had previously known.<sup>66</sup>

In a case like the Holocaust, social and institutional structures that tended to diffuse responsibility acted to amplify the potential for harm created by a few highly motivated and malicious individuals. The crucial disconnect is between the goals of individuals, such as the desire for personal advancement, and the harms that accrue as a result of their actions. Similarly, where racism is unconscious and taken for granted, the explanation for violence against members of disfavored groups is more complex than the malevolence of a single racist speaker and those who hear the message and react. In other words, there is no neat one-to-one causal connection between the motivations and desires of actors and imminent harm, as the *Brandenburg* test demands before the speech of individuals can be regulated.

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65. Cf. DELGADO & STEFANCIC, *supra* note 27, at 71-72; Lawrence, *Unconscious Racism*, *supra* note 10, at 322; MacKinnon, *Not a Moral Issue*, *supra* note 44, at 325-29.

66. NEIMAN, *supra* note 7, at 270-71.

One of the problems with Tsesis's attempt to prevent harm by targeting speech is that racist messages only have salience, and therefore power, when they resonate with categories and beliefs that are already entrenched. "Years of anti-Semitic speech in Germany preceded the rise of National Socialism and the perpetration of the Holocaust," he observes.<sup>67</sup> The problem with using this correlation to establish causation is that anti-Semitism preceded anti-Semitic speech; if that were not true, no one would have paid attention to anti-Semites. Imagine a rather confused bigot who tried to whip up discrimination on the basis of stereotypes and images that no one else shared — say, that all Irish people are greedy or that all gay men are lazy. The result would only be ridiculous, and would certainly not contribute to an environment of hostility against the targeted groups. Perhaps a carefully coordinated and consistently maintained campaign could succeed at stirring up hatred against a group that wasn't already the object of social opprobrium,<sup>68</sup> but in the cases Tsesis describes, the targets of hate speech (and later the victims of physical violence) were groups that had long been persecuted by the majority.

In the usual case, hate speech requires racist beliefs as a precondition for its effect, so it is not nearly as dangerous unless a history of scapegoating, exclusion, disparagement, and discrimination has already laid the groundwork for people to act on the basis of the messages that are communicated. Tsesis admits as much when he notes that "[t]he Nazis effective[ly] utilized nineteenth-century anti-Semitic slogans . . . to gain political power, pass the Nuremberg laws, and attempt to exterminate the Jews" (p. 139). Thus, he is caught in the dilemma mentioned previously; he must either criminalize every act that contributes to the entrenchment of damaging stereotypes (telling racist jokes, using broad and demeaning characterizations in popular media portrayals of racial and ethnic minorities, and so on), or target his remedy more narrowly but with less effect on the resulting harm. A closely tailored remedy might be called for, and indeed Tsesis cites examples from other Western democracies to show that criminal penalties for hate speech are not incompatible with a relatively free society (Chapter Twelve). His insistence that hate speech be punished only when the speaker has "intentionally encouraged persons to commit inhumane acts against an identifiable outgroup" (p. 203) also suggests a narrow approach.

The clear thrust of his book, however, is in favor of significantly broader prohibitions. He says that legal rules should be "drafted to prevent disparaging stereotypes from ingraining themselves in the

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67. P. 136; *see also* pp. 200-01 (noting that hate speech "draw[s] upon and buttress[es] social hierarchies and age-old schemata that have been used for perpetuating enslavement, exploitation, and subjugation").

68. *See* FEINBERG, *supra* note 45, at 149.

social conscience” (p. 198), and that “charismatic leaders should be prohibited from harnessing racist, xenophobic, and anti-Semitic ideologies to further discrimination and achieve ruinous objectives” (p. 203). Although his proposed statute includes language limiting it to “inciting” utterances, Tsesis is not using incitement as a term of art invoked in Hand’s *Masses* opinion and in *Brandenburg* to protect a core of criticism, protest, rebellion, and advocacy short of a call for imminent violent action.<sup>69</sup> Instead, he drops any requirement of immediate harm causally related to the utterance, insisting that even “when no imminent threat of grand-scale racial and ethnic intolerance looms, legislative policy should still prohibit hate speech” (p. 203). He emphasizes that the true social dangers associated with hate speech are not fisticuffs (as the *Chaplinsky* fighting words test<sup>70</sup> imagines) or a mob incited to violent acts, but the long-term entrenchment of disparaging beliefs that tends to legitimize discrimination and even violence against disfavored groups (pp. 4, 117, 130, 137-39, 168-69, 193, 198, 201, 204). There is simply no way to understand his book as anything other than a utopian attempt to root out racism from the hearts and minds of individuals, by attempting to suppress language that tends to have the effect of creating racist beliefs.<sup>71</sup> It is precisely the banality of racism that Tsesis is attacking. His hope is that aggressive enforcement, through the criminal law, targeted at language that transmits misethnic messages, will make racism exceptional, rather than pervasive and practically invisible.

I am not an expert in the cognitive and social psychology of racism, discrimination, the formation of racist ideologies, and the connection between holding racist stereotypes and acting on them. Disregarding those empirical issues, however, the potential effectiveness of his proposals is complicated further by the political history of racism in the United States. Steven Shiffrin’s cautionary analysis is worth keeping in mind.<sup>72</sup> In light of the resentment that many whites already

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69. Cf. KALVEN, *supra* note 13, at 127-28, 229-31.

70. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Charles Lawrence has argued that face-to-face racist speech ought to be understood as the functional equivalent of fighting words, because it has the same immediate impact. Lawrence, *If He Hollers, supra* note 38, at 452-55. Questions of whether *Chaplinsky* is still good law are irrelevant to the analysis of Tsesis’s book, because he advocates legal prohibition of words that extends far beyond the fairly limited category of fighting words.

71. Although Tsesis claims his proposed anti-hate speech statute is “tailored narrowly enough to protect First Amendment rights, but . . . is also sufficiently farseeing to prevent future harms to identifiable outgroups,” p. 199, I do not think he can thread that needle. Given his definition of the harm of hate speech, as the subtle, almost imperceptible cultural shift that gradually makes bigotry seem normal, there is no way to prevent it with a statute that is tailored to take account of existing First Amendment principles. As a normative argument, Tsesis’s book is interesting; as a brief filed in an appellate court, unfortunately, it would not fare very well.

72. See SHIFFRIN, *supra* note 37, at 82-85.

feel toward what they (wrongly) perceive to be the government's efforts to help racial and ethnic minorities, and the almost mystical reverence that Americans feel toward the First Amendment,<sup>73</sup> it could be dangerous to effectively make racists into martyrs for free expression and individuals' resistance to the power of an overbearing state. The result would be to increase long-term racism, precisely what Tsesis is concerned to avoid. It is significant that Shiffrin traces this backlash effect to the diffuse racism that affects American society as a whole.<sup>74</sup> In a sense, he and Tsesis are looking at the same empirical data but interpreting it very differently — Shiffrin as a reason to move cautiously in the domain of legal regulation, Tsesis as a reason to enact even more sweeping prohibitions. I do not know how to settle this interpretive dispute, but I would like to close this Review with some thoughts about what might be morally attractive in Tsesis's approach, and what might be problematic.

The constitutional law governing regulation of hate speech shares with mainstream moral philosophy a strong emphasis on making individualistic judgments of accountability. As Christopher Kutz argues, in opposition to this tradition, significant harms occur as a result of institutional structures that serve to diffuse responsibility by creating bureaucratic impediments to individual accountability.<sup>75</sup> The conventional position in ethics is that a person is morally blameworthy for a harm only if what that person did made a difference to the outcome — that is, if she could have produced it or prevented it by actions within her control.<sup>76</sup> This approach means that individuals can regard harm as “not my problem,” but of course the occurrence of the harm depends on the passive acquiescence or indifference, if not the active participation, of a critical mass of individuals. Similarly, under the *Brandenburg* test in constitutional law, an utterance may be punished only if there is a tight connection between the words and an imminent lawless act, so that, in effect, the speaker could have avoided the outcome by not uttering the words. Kutz urges that we should understand the ascription of responsibility differently, so that it tracks intentional participation in wrong, rather than an individual's ability to cause or prevent harm.<sup>77</sup> Thus, we would blame individuals morally when they act with “participatory intention,” that is, with a view

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73. See Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 175, 193 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (observing the unique symbolic value of the First Amendment in public discourse).

74. SHIFFRIN, *supra* note 37, at 85.

75. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000).

76. *Id.* at 116.

77. *Id.* at 122.

toward contributing to a collective outcome.<sup>78</sup>

As Kutz recognizes, though, there are serious harms that cannot be characterized as the product of jointly intentional action, but as uncoordinated individual action that aggregates to produce some harm; he distinguishes this type of “unstructured collective harm,” such as the environmental degradation caused by millions of individual polluters, from easier cases such as hundreds of aircrew members participating in a bombing raid, where each individual shares the intention to drop bombs on the target.<sup>79</sup> Individual polluters often do not intend to cause harm, although they may be indifferent to it, while each bomber crew intends the resulting harm, although the individual contribution of each plane does not make a difference to the destruction of the target. The ascription of moral responsibility to individuals who act without participatory intention is a real stretch for ethics, because institutional mechanisms such as markets threaten to make everyone inevitably complicit in a great deal of suffering. The locus of environmental harms seems to be something like “capitalism,” “globalization,” or “technology” rather than anything specific to the individual agent which is usually taken to be the object of moral evaluation (Ted Kaczynski, the Unabomber, understood this!). For that reason, Kutz shifts the focus of analysis to “ways of life” or communities of individuals who share values such as conspicuous consumption, and maintains that this kind of sharing of values is sufficient to implicate individuals in a quasi-participatory manner of wrongdoing.<sup>80</sup> Ways of life arise from “unreflective confluences of habit and sentiment” and tacit agreements that are shaped by culture, environment, upbringing, and a host of other factors.<sup>81</sup>

This should sound familiar, because it is exactly the model of accountability for the harm caused by hate speech that Tsesis proposes. He also aims at collective institutions and expresses hope that criminal prohibitions on hate speech might work to alter individual commitments to racist ways of life. “Restrictions on misethnic speech communicate society’s disapprobation [of] movements that aim to harm vulnerable minorities” (p. 196). But there is a serious conceptual problem with simply mapping this conception of responsibility onto the problem of hate speech. Responsibility for collective harms, caused by tacit participation in one’s way of life, belongs to a morality of value, not obligation. Roughly, the morality of obligation adopts the third-personal

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78. *Id.* at 74-81.

79. *Id.* at 166-67.

80. *Id.* at 186-90.

81. *Id.* at 188-89.

standpoint of a spectator or critic who expresses moral judgments about the agent.<sup>82</sup> A morality of value, by contrast, takes a first-person perspective and evaluates the character of agents in terms of virtues or ideal conceptions of the good life. Just as Kutz wishes to focus on the harms caused by consumerism or globalization, Tsesis seeks to shift the object of evaluation from the intent and actions of individual speakers to the macro-structures of racism. This perspective-shifting move is controversial in philosophy precisely because it diverges from the predominant assumption of liberal individualism that collective goods have instrumental value only.<sup>83</sup> Liberalism imagines autonomous agents, standing apart from prior commitments and attachments, making uncoerced choices about what sorts of projects to pursue and what kinds of lives to lead.<sup>84</sup> Liberal premises are evident in such familiar First Amendment maxims as the requirement of viewpoint neutrality, the *Barnette* anti-orthodoxy principle, and the exclusion of certain kinds of emotive harms as the basis for restrictions on speech.

Rejecting individualism might mean adopting something like a communitarian perspective, in which collective and social goods and values are held to be prior to individual rights and duties.<sup>85</sup> These community values can then become the object of evaluation. Although Tsesis claims to be a contractarian (pp. 150, 196), he is far more prone to employ the rhetoric of communitarianism, speaking in terms of “further[ing] social contentment” (p. 136), “overall social well-being” (p. 138), and the value of “tranquility” as opposed to instability (p. 139). He is more interested in a morality of value than a morality of obligation and, when translated into the political and legal domain, this commitment leads him to embrace communitarianism. But, communitarian ideals such as shared identification with a common cultural and moral heritage tend not to lend themselves to coercive enforcement. Because the criminal law is primarily a concern of

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82. See Stuart Hampshire, *Fallacies in Moral Philosophy*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 51 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983). For the structure of a legal system dominated by a morality of obligation, see the four-volume *Moral Limits of the Criminal Law*, by Joel Feinberg. As he discusses in the summary of his argument that opens volume four, political liberalism begins with a presumption in favor of liberty, which can be overcome in favor of government coercion only where necessary to prevent certain kinds of harms. See JOEL FEINBERG, HARMLESS WRONGDOING ix-xx (1988).

83. See JOSEPH RAZ, THE MORALITY OF FREEDOM 198-203 (1986) (criticizing individualism).

84. See, e.g., MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 59-65 (1982).

85. See, e.g., STEPHEN MULHALL & ADAM SWIFT, LIBERALS & COMMUNITARIANS 15 (2d ed. 1996) (“According to this communitarian objection, the liberal sees society as nothing more than a cooperative venture for the pursuit of individual advantage.”); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988).

individuals, it is not well targeted to affect organic aspects of a community such as its value commitments. While it may be possible to reform the community as a whole, means subtler than the criminal law will be required. Examples could include: strengthening intermediate groups,<sup>86</sup> promoting decentralization and local control,<sup>87</sup> or ensuring that the voices of traditionally disempowered groups are heard in the lawmaking process.<sup>88</sup> In his discussion of the historical development of racist ideology, Tsesis has identified a real problem, but one that overwhelms the capacity of the criminal law to respond adequately.

### CONCLUSION

One might think that I am advocating a do-nothing stance in the face of a serious social problem. Isn't that letting a lot of people off the hook for the evils of racism? I think the answer is no, because criminalizing something so diffuse and pervasive — so banal — would potentially make criminals of everyone living in a society suffused by racism. To reply that only the most serious criminals should be charged would be to deny the power of Tsesis's historical analysis. Hate speech does its harm through a gradual process of making inhumanity conceivable, creating a belief structure that is taken for granted and invisible to people who operate within it. The problem with the criminal law is that it marks out conduct as violations — as acts that are extraordinary, and beyond the limits of tolerable behavior. By labeling racism as deviant, Tsesis might actually obscure the implications of his broader critique, which is that it affects all of us and is anything but extraordinary.

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86. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

87. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555-56 (1988).

88. See Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988).