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where would that lead? Perhaps to things more ominous than the restoration of capital punishment. Whatever one may think of European moralizing, it is not based on reasoned analysis of “hard questions.” Europeans are afraid of open debate.

We in America, who have a better history, still have to face serious threats. We may overreact. We may make mistakes. But we have proven ourselves reasonably good at protecting individual rights while still defending the community that guarantees those rights. We do not rely on the

United Nations for our security. To measure our constitutional standards by foreign opinion is to fall back on the false notion that the world at large is evolving toward better answers than we have or could find for ourselves. It is, in effect, to be defensive about being different. If we start thinking that way, we won't be Americans.

We should tell Justice Ginsburg that if American policies cause her discomfort at gatherings of foreign judges, there is an easy remedy: Stay home. Dealing with furious foreigners is John Bolton's job. ♦

# Illiberal Europe

*The long and growing list  
of things you can't legally say*

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BY GERARD ALEXANDER

**O**n February 20, an Austrian court sentenced the notorious British writer David Irving to three years in prison for denying in a 1989 speech that Auschwitz contained gas chambers. Many American observers had mixed reactions. They saw Irving as a loathsome anti-Semite but were uncomfortable with the thought of a person serving time behind bars for something he wrote or said, no matter how noxious. Journalist Michael Barone probably spoke for more than a few when he said that he “shuddered” at the news of Irving's imprisonment, “yet I can understand why Austria, like Germany, has laws that criminalize Holocaust denial and glorification of Nazism. History has its claims—heavy ones, in the cases of Germany and Austria.” In other words, criminalizing speech might not be the American way of doing business, but it's understandably Austria and Germany's way of dealing with their unique Nazi past.

The trouble is that Austria's anti-Nazi legislation is the tip of an iceberg of political speech laws across Europe. Of course, all governments restrict some speech. But free expression is so foundational to democ-

racy that there is usually a strong bias against restricting speech unless it poses a compelling and even imminent danger to others. The most pervasive and durable restrictions meet that test, applying to things like child pornography, false statements that result in demonstrable harm (defamation), the exposure of national security information, commercial fraud, and the proverbial shouting of “Fire!” in a crowded theater.

In addition, European countries have never had America's strong free-speech tradition. Nevertheless, three disturbing trends now underway in Europe together represent the greatest erosion of democratic practice in the world's advanced democracies since 1945. First, anti-Nazi laws are being adopted in places where neo-Nazism poses no serious threat. Second, speech laws have been dramatically expanded to sanction speech that “incites hatred” against groups based on their religion, race, ethnicity, or several other characteristics. Third, these incitement laws are being interpreted so loosely that they chill not just extremist views but mainstream ones too. The result is a serious distortion and impoverishment of political debate.

After 1945, Germany in particular passed strict anti-Nazi laws, making it illegal not only to form a neo-Nazi party but also to champion Nazi ideology, downplay Nazi crimes, print *Mein Kampf*, or even air the Nazi musical anthem, the “Horst Wessel” song. At the time, many believed that these restrictions met the test of

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averting immediate danger. Given what had happened between 1933 and 1945, it seemed airing pro-Nazi or anti-Semitic views was the equivalent of shouting “Fire!” in the crowded theater of Austria and Germany’s troubled cultures. As it turned out, neo-Nazis proved too marginal even to come close to posing a serious danger to Germany or Austria’s new democracies, with real neo-Nazis never winning even 5 percent of the vote. So the necessity for these restrictions became less and less clear with time.

But instead of being pared back, anti-Nazi legislation spread. Laws criminalizing Holocaust denial or minimization were adopted well into the 1990s in France, Switzerland, Belgium, Spain, and other European countries (and several countries outside Europe). What these laws could accomplish was unclear, since they were adopted when neo-Nazism’s prospects seemed more remote than ever. In all these countries, including Germany and Austria, governments don’t really have to ban neo-Nazis; voters do it for them through indifference. Nonetheless, anti-Nazi laws have proved uncontroversial, maybe because their sanctions fall on unsavory figures from Europe’s anti-Semitic fever swamps.

This is unfortunate, because anti-Nazi laws gradually expanded to cover other historical events. In 1993, Bernard Lewis, the eminent Princeton historian of the Middle East, was asked in an interview with *Le Monde* about the mass murder of Armenians in Turkey during World War I. He readily acknowledged that terrible massacres took place but questioned whether the murders were the result of a predetermined—that is, genocidal—plan. That conclusion brushed up against French laws that now prohibit denial of more crimes against humanity than just the Holocaust. Several activist groups in France filed complaints. Two civil and one criminal suit were dismissed, but Lewis was found guilty in another civil suit and condemned by the court for having not been “objective” regarding events that the European Parliament and other bodies had officially certified as a “genocide.”

The expansion of the speech laws beyond the Holocaust is revealing. Especially once it became evident that neo-Nazis were politically marginal, it was unclear exactly what risk Holocaust deniers posed. An alternative interpretation is that bans on denial were never really about averting the menace of Nazi revivalism. They were motivated instead by the fact that good people were offended by Holocaust denial. That this is really what’s at work is confirmed by laws prohibiting denial of events like the Armenian murders—cases that pose no risk of old genocidal agendas’ being revived.

So genocide-denial laws can now be used to sanction professional historians whose research leads them to

findings that these laws classify as unacceptable. And the anti-Nazi slope has proven more slippery than that. Denial laws have been supplemented by new laws that are even more prone to sanctioning reasonable people.

Especially since the 1970s, Western Europeans have been passing bans on speech that “incites hatred” based on race, religion, ethnicity, national origin, and other criteria. These were adopted or beefed up in the 1980s in the face of rising violence against minorities and rising far-right parties like the French National Front. Such laws are now in place in Germany, Austria, Belgium, Sweden, Norway, France, Britain, and elsewhere. France’s 1972 Holocaust denial law was expanded by the 1990 Gayssot law, which extended sanctions to denial of other crimes against humanity and points of view deemed racist. France’s Conseil Supérieur de l’Audiovisuel monitors broadcasters for any statements that might incite racial hatred. Earlier British legislation against incitement of racial hatred was expanded in 1986 and was extended again in February 2006, this time to criminalize intentionally “stirring up hatred against persons on religious grounds.” This is spreading to the European Union level, where a stream of rules now prohibits the broadcast, including online, of any program or ad that incites “hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” or—crucially—is “offensive to religious or political beliefs.”

The highest-profile prosecutions under these laws have been of people and organizations very vulnerable to the charge of racism. Incitement charges have repeatedly been brought against the French National Front’s Jean-Marie Le Pen, who regularly trades in slurs against blacks and Arabs. Similar charges were leveled against the Vlaams Blok, a Flemish nationalist party advocating the breakup of the bilingual Belgian state, which sometimes luridly stereotyped immigrants from the developing world as predisposed to criminality and welfare dependency. In November 2004, Belgium’s highest court found the party guilty of racism, allowing the government to deny it state funding and access to television, in effect forcing the Blok to dissolve and re-form under a new name. At the time, the Blok was jockeying for first place in polls among Belgium’s Flemish voters.

But the anti-incitement laws now regularly target people who are well within the political mainstream. This is political correctness backed up with prison time. Britain’s then-home secretary Jack Straw remarked in 1999 on criminal activity by people many of whom *posed* as gypsies or “travelers”—hardly a slur on all gypsies even without that qualifier. But a Travelers’ group filed a complaint of inciting racial hatred, prompting a formal



AP / Sayid Azim

Protesting the Danish cartoons, Nairobi, Kenya, February 10, 2006

investigation and extensive media coverage asking whether Straw was racist. In 2002, the prominent French novelist Michel Houellebecq was charged with inciting racial hatred in a novel and interview in which he referred to Islam as “the stupidest religion.” Veteran Italian journalist Oriana Fallaci was motivated by 9/11 to criticize Islam as violent and subversive of traditional European mores. As a result she faced a French attempt in 2002 to ban her book as racist, and she is scheduled to stand trial in Italy in June for statements “offensive to Islam.” One of her accusers, in turn, faces charges for calling the Catholic Church a “criminal organization.”

In May 2005, *Le Monde*, France’s premier center-left newspaper, was found guilty of defaming Jews in a 2002 editorial that criticized Israeli policies while referring to Israel as “a nation of refugees.” The appeals court found such juxtapositions made Israelis synonymous with Jews, so criticism of the former constituted incitement of hatred against the latter. After it published a series of controversial cartoons of Muhammad, the Danish newspaper *Jyllands-Posten* was formally investigated to determine whether the cartoons constituted prohibited racist or blasphemous speech.

This swirl of speech-law charges, lawsuits, and investigations is now sustained by an “antiracism” industry. Dozens of antiracism groups and self-appointed representatives of religious and other communities, like France’s Movement Against Racism and for Friendship Between Peoples (MRAP) and the Muslim Union of Italy, readily file complaints and suits and sometimes are the direct beneficiaries when fines are imposed. Their

complaints provoke investigations by an alphabet soup of government agencies, like Belgium’s Center for Equal Opportunities and Opposition to Racism and Britain’s Commission for Racial Equality. These in turn feed into the court system. If America had practices like these, the debate over, say, the Dubai ports deal would almost certainly have sparked a shower of civil suits and criminal investigations against elected officials and columnists charged with “anti-Arab . . . anti-Muslim” bigotry (to quote the Council on American-Islamic Relations).

Not all cases, of course, result in punishment. Le Pen has been fined hundreds of thousands of dollars, neo-Nazi groups banned, Holocaust deniers and anti-Semites jailed in

several countries, and the Vlaams Blok de facto dissolved. *Le Monde* was found guilty, but sanctioned with only a symbolic fine; Bernard Lewis with somewhat larger costs. The investigation of Straw was dropped; Houellebecq was acquitted; and the Danish prosecutors decided not to press charges against the *Jyllands-Posten*. But an increasing number of European intellectuals, politicians, journalists, and even scholars have had uncomfortable and expensive brushes with speech laws. In many cases, their reputation is tarnished; afterward their Wikipedia entry, so to speak, is never complete without mention of the official investigation for bigotry.

So the real danger posed by Europe’s speech laws is not so much guilty verdicts as an insidious chilling of political debate, as people censor themselves in order to avoid legal charges and the stigma and expense they bring. And the most serious chill is not of fringe racists but of mainstream moderates and conservatives.

First of all, it turns out that some denials and incitements are more equal than others in Europe. For all the trials on charges of Holocaust denial, it is not clear that anyone has been charged with denial or minimization of crimes committed by Communist regimes. And the laws banning incitement of hatred on grounds of race, religion, ethnicity, or national origin do not ban incitement based on political orientation or economic status. Moreover, these laws protect speech that incites hatred against Americans and some others. And while there have been some convictions of Islamist radicals for inciting hatred against Jews and others, Europeans have been shy to

move against the incitement pervasive in Islamist circles.

In other words, Europe's speech laws are written and applied in ways that leave activists on the political left free to whitewash crimes of leftist regimes, incite hatred against their domestic bogeymen of the well-to-do, and luridly stereotype their international bogeymen, often with history-distorting falsehoods such as fictitious claims of genocide said to be committed by the United States and Israel. It may be no coincidence that Socialist and extreme-left parties have played central roles in the design of speech laws. The crafter of France's 1990 Gayssot law, for example, was Jean-Claude Gayssot, a longtime Communist party officeholder. All this matters. It sends an important signal to the broader culture when Hitler is the symbol of evil while Stalin and Mao are given a pass, and when, in effect, Pat Buchanan's ideas risk indictment while Michael Moore's are protected.

But the more serious bias comes out when anti-incitement laws are allowed to degenerate into the sanctioning of speech that causes "offense." It's not clear why avoiding offense should be a top priority to begin with. But when it is, the most important consequence is likely to be the chilling not of racist speech but of moderate and conservative thinking about major social problems. After all, two views tend to cause offense in our day and age. The first is the speech of bigots who denigrate members of other groups, calling them, say, inherently delinquent. The second is speech by modern moderates and conservatives who believe that problems like poverty, delinquency, and poor health can often—not always, but often—be traced to bad choices and mores and dysfunctional subcultures. Sometimes, problems are disproportionately concentrated within groups—of whatever class, race, ethnicity, or religion. Identifying these causes assumes they can be corrected; so identifying them is a prerequisite to improvement. This is the furthest thing from racism. It is the non-bigotry of high expectations.

But in our hypersensitive age, this sort of speech is prone to being construed as prejudice—much more prone than the left's traditional language, which attributes people's problems to discrimination and other forces beyond their control. Moderate and conservative speech is even more likely to be tagged as bigoted when that tag is wielded cynically by political opponents. In



Trafalgar Square, London, March 25, 2006

the politically tilted world of Europe's media, intellectuals, and NGOs, this happens all the time. We know this is often cynical, because European speech-law advocates like Jean-Claude Gayssot are perfectly capable of criticizing Israel while insisting this doesn't mean they're anti-Semitic.

Laws against any speech that causes "offense" are biased because they have the insidious effect of conflating bigoted speech and constructive criticism, two kinds of speech that should be sharply distinguished from each other. The result is the stigmatization of certain kinds of thinking about social problems and public policy that American conservatives, moderates, and even many liberals recognize as a legitimate part of serious debate. These speech laws won't ultimately silence extremists, whose careers won't end if they're called bigots and who often seek out controversy. But they can silence reasonable people who don't want that label and don't want a scandal.

Between Europe's speech laws, hypersensitivity, and cynical demagoguery, constructive criticism can become virtually impossible, and self-censorship the norm. The effects are plain to see. European politicians, media outlets, and university discussions are routinely uncomfortable airing information—say, about rates of crime—that reflects unfavorably on the members of groups such as citizens of African or Middle Eastern descent, for fear that it will fuel negative stereotypes of these groups and open the broadcaster to charges of inciting hatred. Last fall, many French politi-

cians and commentators carefully avoided characterizing the identities of the “youths” rioting in dozens of French cities and towns, and did not aggressively pursue that issue when peace was restored. This leaves it unclear even now who did what and why in the rioting—knowledge that is a prerequisite for a serious policy response to what happened.

Consider the case of Alain Finkielkraut, a distinguished French philosopher. Last November, Israel’s *Haaretz* newspaper interviewed him about the French riots. In blunt language, he said that poverty and discrimination could not explain the rioters’ behavior since most poor communities in France did not torch cars. He believed public debate should acknowledge head-on that the rioters were heavily of Arab and African descent and bore aggressively anti-Western attitudes. He specifically insisted that neither all “blacks and Arabs” nor Islam as a religion were implicated in that statement. And he proposed that it was imperative to signal the rioters that calls for opportunity within a society had to be matched with a sense of responsibility to that society.

Given that most French commentators flinched from serious engagement with the rioters’ thuggish assault on France’s public spaces, Finkielkraut’s was a point of view that badly needed to be expressed. But after *Le Monde* offered the public a biased sample of his words, MRAP moved immediately to file legal charges against him, withdrawing the threat only when Finkielkraut appeared to apologize. While Finkielkraut has not renounced his original words, he and others like him have since been less outspoken. Public debate on an urgent matter was deprived of a viewpoint that identified where the real hatred resided, sought ways to retrieve segments of French youth from its grip, and exhorted France to expect more of its own people.

The same deprivation can be seen in the initial handling of the recent kidnapping, 24-day torture, and then murder of Ilan Halimi, a young French Jew. For days after Halimi’s body was found, authorities tried to avoid discussing the possibility that the kidnappers were Muslim and that anti-Semitism partly motivated them, despite powerful signs pointing in that direction. Officials wanted to combat anti-Semitism but not to paint Muslims in France as unattractively anti-Semitic. Many German authorities are similarly unsure what to do when young Germans of Turkish descent loudly cheer *Valley of the Wolves*, the new anti-American and anti-Semitic Turkish hit film. Criticism might offend Turks, but silence risks offending Jews. The compromise is prevarication. The side effect is disrespect for morally flabby authority figures. And the result is impoverishment of public debate.

The good news is that Europeans are questioning their illiberal speech laws as never before. For several years, scholars and intellectuals in France especially have been circulating petitions and counter-petitions regarding the wisdom particularly of the laws creating official accounts of history. Such skepticism has received a huge boost from the events surrounding the Danish cartoons. After their publication, a concerted campaign to drum up outrage in the Muslim world triggered demonstrations and riots in numerous places. With that violence as a backdrop, many Muslims inside and outside Europe have been insisting that European governments ban the cartoons. As models for this, they cite not only censorship rules in Middle Eastern countries but also Europe’s own speech laws. Many are bewildered that speech offensive to Jews is banned but not speech offensive to Muslims.

In response, many Europeans have found it difficult to justify these inconsistencies. Several European governments take the expected and untenable middle road: They refuse to ban the cartoons but plead with their media not to publish them either. Other Europeans, though, seem to be using their discomfort over the idea of banning the cartoons to ask whether they shouldn’t get out of the business of banning political speech altogether.

If they try, they won’t have the backing of international law. The International Covenant on Civil and Political Rights—the code the U.N. Human Rights Committee is charged with enforcing—insists on the banning of “advocacy of national, racial or religious hatred.” They also won’t command the support of the world’s best-known human rights organization. Amnesty International accepts speech laws as legitimate, so it generally excludes from its list of “prisoners of conscience”—that is, people “imprisoned solely for the peaceful expression of their beliefs”—anyone imprisoned for “advocacy of hatred.”

But reform-minded Europeans would have the example of U.S. practice, which tolerates even loathsome speech. They would also have the example of a rival human rights organization. Taking a principled stand in the face of a great deal of international practice, Human Rights Watch insists that governments should ban speech only when it “constitutes imminent incitement” to violence and other unlawful acts and urges reform of these laws, including repeal of Holocaust denial laws. Europeans of all political stripes should want to seize this opportunity to reverse the most dangerously illiberal trend in the world’s advanced democracies. That would cease to make Europe a role model for censorship and restore it as a model of core democratic rights instead, expanding and not contracting its moral authority in the world. ♦