

# SPEECH ALONG THE ATROCITY SPECTRUM

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“You may shoot me with your words, you may cut me with your eyes, you may kill me with your hatefulness, but still, like air, I’ll rise.”

— Maya Angelou<sup>1</sup>

## I. INTRODUCTION

In the abstract, speech may have much intrinsic value. It can facilitate human interaction, organization, education, autonomy, self-actualization, tolerance and democratic governance.<sup>2</sup> Certain speech in certain contexts, however, can be quite deleterious—promoting division, ignorance, retarded growth, hatred, self-loathing, violence and anti-democratic governance.<sup>3</sup> Within the crucible of atrocity, speech may be similarly Janus-faced. Its power to prevent mass violence is indubitable.<sup>4</sup> But its capacity for enabling mass violence is similarly unquestionable.<sup>5</sup> So the issue arises: when and how may speech work for good or ill in relation to patterns of atrocity? This Article will grapple with that question.

And the answer depends on both timing and speech quality. More specifically, the relationship between speech and atrocity might be analyzed within a two-axis matrix. The first axis relates to chronology and divides into “process” (referring to the cycle of atrocity) and “pre-process” (or pre-atrocity) phases. The “pre-process” phase indicates a potential target group is successfully integrated into the social fabric and not subjected to untoward

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<sup>1</sup> Maya Angelou, *Still I Rise*, AMERICAN POEMS (June 4, 2004), [http://www.americanpoems.com/poets/Maya\\_Angelou/13470](http://www.americanpoems.com/poets/Maya_Angelou/13470).

<sup>2</sup> See Deana Pollard Sacks, *Snyder v. Phelps, The Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193, 199 (2010) (arguing that, like tort law, “[f]reedom of speech furthers the American ideals of an open and honest democratic process, discovery of the truth, self-actualization, and avoidance of injustice and furtherance of tolerance in a pluralistic society”).

<sup>3</sup> See Katharine Gelber, *Reconceptualizing Counterspeech in Hate Speech Policy*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 198, 211 (Michael Herz & Peter Molnar eds., 2012) (“Speech is able both to enhance the development of our capabilities and, under the right circumstances, to imperil the development of capabilities.”).

<sup>4</sup> See, e.g., *Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296 (1941) (suggesting that speech could prevent violence in the context of a labor dispute).

<sup>5</sup> See, e.g., Rachel Weintraub-Reiter, Note, *Hate Speech Over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 170 (1998) (noting that hate speech may incite others to violence).

degrees of prejudice or discrimination. The “process” (or mass atrocity cycle) phase consists of three critical junctures: (1) identification; (2) action; and (3) execution. The second axis is qualitative and entails classifying speech as both “salutary” and “inimical.” Returning to the chronology axis, during the pre-process phase, the focus must be on disseminating salutary speech. Such speech can go a long way toward preventing prejudice, discrimination and the formation of extremist groups.<sup>6</sup>

Dissemination can be achieved through various means, including fostering education with an emphasis on teaching pluralistic values, establishing pro-tolerance non-governmental organizations active in engaging with the citizenry, and safeguarding free access to channels of public communication.<sup>7</sup> During the “identification” stage—when prejudice and discrimination are on the rise—promoting salutary speech may still play an important role in preventing atrocity.<sup>8</sup> The question during this stage becomes whether salutary speech is still capable of negating inimical speech.<sup>9</sup> During the “action” stage—when pre-atrocity persecutory measures are being enacted—negating inimical speech may no longer be possible.<sup>10</sup> And during the “execution” stage, when speech is in the service of ongoing violence or directed toward inciting it, the primary goal becomes preventing inimical speech through legal action—most realistically, through externally imposed punishment.<sup>11</sup> Such punishment may have a significant deterrent effect and help combat the culture of impunity.<sup>12</sup>

This Article will proceed in four parts. Part II will consider the nature and parameters of the concept of “speech” and its classification into “salutary,” “neutral,” and “inimical.” It will further break down the concepts of salutary and inimical speech into sub-categories and demonstrate that inimical speech can be classified along a spectrum that includes more innocuous variations of communication that are borderline “neutral” and more direct communications that either hint at or actually constitute calls for exclusion, disenfranchisement, or violence.

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<sup>6</sup> See Sacks, *supra* note 2, at 199.

<sup>7</sup> See Nicole Simmons et al., *HIV/AIDS in the Horn of Africa*, in PUBLIC HEALTH ASPECTS OF HIV/AIDS IN LOW AND MIDDLE INCOME COUNTRIES (David D. Celentano & Chris Beyrer eds., 2008) (analyzing speech-focused public awareness campaigns in the context of eradicating HIV/AIDS).

<sup>8</sup> See discussion *infra* Part IV.A.

<sup>9</sup> See discussion *infra* Part IV.A.

<sup>10</sup> See discussion *infra* Part IV.B.

<sup>11</sup> See discussion *infra* Part IV.B.

<sup>12</sup> See discussion *infra* Part IV.B.

Part III will examine the chronological axis. It will sketch out a series of steps that may lead to mass atrocity and generally break down into the “pre-process” and “process” stages. As before, it will propose sub-categories—this time within the process phase. Those sub-categories will consist of the “identification,” “action,” and “execution” phases.

Finally, Part IV will examine the interaction between the two axes. It will demonstrate that salutary speech will always be the proper tonic for an incipient tide of discrimination against a victim group in the pre-process stage. It will also show that societies with more developed democratic institutions may rely on salutary speech to reverse the persecutory effects of the early process stage. Nevertheless, even in democratically advanced societies hijacked by hate-mongering strongmen, there comes a juncture when a persecutory campaign, and speech used in support of it, reach critical mass. At that point, when channels of communication are monopolized by the government and inimical speech goes largely unanswered, legal action is in order. In all likelihood, punishment in the form of prosecutions on charges of instigation, persecution, or incitement will be the most effective remedy for inimical speech. And given that the sitting government is implicated in the atrocities, barring regime change, such punishment will likely be externally imposed. Nevertheless, punishment in the form of criminal prosecutions respecting due process will provide deterrence and expressive condemnation, thereby making significant inroads against the culture of impunity.

## II. CATEGORIES OF SPEECH

### A. *Neutral Speech*

Most speech in everyday life does not implicate pernicious forms of target-group hatred, discrimination, persecution, exclusion, or violence. Thus, it may be categorized as “neutral.”<sup>13</sup> With respect to non-neutral speech, this Article will classify it as either “salutary” or “inimical.”<sup>14</sup> These two speech rubrics will be the focus of this Article’s analysis.

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<sup>13</sup> Similarly, speech uttered in private, even if discriminatory, must be classified as neutral given that its slight or non-existent impact on the target group is counterbalanced by privacy and free expression concerns.

<sup>14</sup> This bifurcation is often described as the difference between “good speech” and “bad speech.” See Arielle D. Kane, Note, *Sticks and Stones: How Words Can Hurt*, 43 B.C. L.

### B. *Salutary Speech*

Salutary speech is rather straightforward. This Article posits that it may be “focused” or “non-focused.” Regarding the latter, any form of expression that generally promotes policies of tolerance, pluralism, or inclusion vis-à-vis potential target groups, or casts discrimination or persecution against them in a negative light, should qualify.<sup>15</sup> In other words, it is salutary speech that is not specifically offered in response to inimical speech.<sup>16</sup>

“Focused” salutary speech, on the other hand, is uttered explicitly in response to inimical speech. Put another way, if discriminatory, persecutory, or exclusionary statements are made against a target group, this category of speech represents a form of “counter-speech” meant to expose as problematic and thereby marginalize the statements.<sup>17</sup>

### C. *Inimical Speech*

This Article posits that “inimical” speech can be categorized as follows: (1) general statements; (2) harassment; and (3) incitement. Each of these shall be treated in turn.

#### 1. *General Statements*

Inimical speech consists of three major points along a spectrum. On one end, one would find its mildest forms—general statements casting aspersions on a target group.<sup>18</sup> In this more innocuous form, the speech could perhaps be considered borderline “neutral.” For example, statements suggesting a group makes less of a contribution to the health of a country’s economy than other groups in the country (e.g., “The Tutsis engage in far less research and development activity than the Hutus”).

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REV. 159, 190 (2001) (alluding to the notion that “good speech” is thought to combat “bad speech” in U.S. constitutional jurisprudence).

<sup>15</sup> *Webster’s Third New International Dictionary* defines “salutary” as “producing a wholesome, corrective, or ultimately beneficial effect.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2006 (1993).

<sup>16</sup> “Focus” is defined as “a central point . . . a center of activity or attraction or one drawing the greatest attention and interest . . . a point of concentration.” *Id.* at 881. By implication, “non-focused” refers to something that is not a point of concentration.

<sup>17</sup> See Gelber, *supra* note 3, at 206.

<sup>18</sup> See PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS AND CONTROVERSIES 35 (2010).

Other statements within this rubric can be more easily classified as inimical. For example, such statements could consist of the republication of explicitly negative racial, ethnic, or religious stereotypes. This may be referred to as “group libel,” which entails attacking or defaming a group that suffers from social prejudice and creating a general climate more receptive to animosity toward and violence against the group.<sup>19</sup> These are general statements not necessarily directed at any person in particular. Such statements may include efforts to ascribe to the group overall negative qualities such as greed, laziness, poor hygiene, criminal propensity, and mendacity. More seriously, they could comprise statements dehumanizing the victim group through techniques of “verminization” (equating the group with parasitic, pestilent sub-human creatures such as lice or locusts), “pathologization” (analogizing the group with disease), and “demonization” (ascribing to the group satanic or other comparable evil qualities).<sup>20</sup>

## 2. *Harassment*

Moving further along toward the other end of the spectrum, in the middle, statements voiced directly at the victims can be categorized as “harassment.”<sup>21</sup> Such statements would be addressed to the collective group (e.g., “You do not belong here” or “You are parasites”) or to particular individuals (e.g., “You filthy residents of the Biryogo are making the rest of society dirty and disease-infested. You are destroying our country.”).<sup>22</sup>

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<sup>19</sup> See Kent Greenfield, *Group Libel Laws*, in *DICTIONARY OF AMERICAN HISTORY* 67 (Stanley I. Kutler ed., 3d ed. 2003).

<sup>20</sup> See Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 *SANTA CLARA L. REV.* 607, 639–41 (2010). The cited passage in this Article refers to dehumanization as a method of incitement. This is a matter of degree. Less virulent forms of dehumanization may not amount to calls for action and can therefore be categorized as general hate speech. The language must be parsed on a case-by-case basis to determine the proper category.

<sup>21</sup> See NORMAN E. BOWIE & ROBERT L. SIMON, *THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY* 136 (1998) (describing speech at specifically targeted individuals as a form of harassment).

<sup>22</sup> In the United States, the most speech-protective country in the world, such speech might be deemed “fighting words” not deserving of First Amendment protection. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 255–57 (1952) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems. These include . . . the insulting or ‘fighting’ words . . . it has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

### 3. *Incitement*

The final point in this direction along the spectrum entails advocacy directed toward third persons, i.e., “incitement.”<sup>23</sup> Such messages are designed to provoke action vis-à-vis the victim group.<sup>24</sup> This kind of incitement bifurcates into two forms: (1) incitement toward non-violent action; and (2) incitement toward violent action.<sup>25</sup> Regarding the former, one can discern three general relevant non-violence categories: (1) incitement to hatred; (2) incitement to discrimination; and (3) incitement to persecution.<sup>26</sup>

Incitement to hatred urges the majority group to develop general feelings of animosity toward the victim group.<sup>27</sup> It is similar to group libel but takes a more active tone in encouraging the majority group to despise the minority. For example, the Rwandan pop singer Simon Bikindi’s pre-Rwandan genocide song *Njyewe nanga Abahutu* (“I Hate the Hutu”) actively encouraged extremist Hutus to develop feelings of contempt for moderate Hutus who were supporting Tutsis in the period leading up to the genocide (both moderate Hutus and Tutsis were victim groups during this time). Incitement to discrimination urges the majority group to mistreat the victim group in particular non-violent ways. It could be a call to the majority group to refuse medical treatment or service in restaurants or discourage marriage with members of the victim group. For example, a Nazi pamphlet distributed

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Similarly, advocating illegal conduct to third-parties in the United States will not be protected if it seeks “imminent” action and is reasonably likely to provoke such action imminently. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech advocating lawless action is protected unless it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). Thus, looking at the analogy to domestic laws, it is no surprise that incitement, next along the spectrum after harassment, would also be considered more serious than general hate speech. Continuing with the United States as a point of reference, of these types of speech, only general hate speech would presumably find absolute protection under the First Amendment.

<sup>23</sup> *See* Ian Leigh, *Homophobic Speech, Equality Denial, and Religious Expression*, in *EXTREME SPEECH AND DEMOCRACY* 375, 379 (Ivan Hare & James Weinstein eds., 2009).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (discussing the breakdown of incitement in the context of the Netherlands Criminal Code).

<sup>27</sup> *See* Gregory S. Gordon, *Hate Speech and Persecution: A Contextual Approach*, 46 *VAND. J. TRANSNAT'L L.* 303, 343–44 (2013); *see also* Wibke Timmerman, *The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law toward Criminalization of Hate Propaganda?*, 18 *LEIDEN J. INT'L L.* 257, 276 (2005).



to German teenagers warned them not to “mix” with Jewish people or marry them for fear of race “defilement.”<sup>28</sup>

Incitement to persecution is incitement to discrimination on a broader and more systematic scale.<sup>29</sup> This is advocacy to exclude the victim group from participation in society and enjoyment of civil rights in a comprehensive way.<sup>30</sup> In pre-genocide Rwanda, for example, Hassan Ngeze published the infamous *Ten Commandments of the Hutu* in a 1990 issue of *Kangura*.<sup>31</sup> One commentator has described this document as an appeal to “Hutus to separate themselves from the Tutsis.”<sup>32</sup> In fact, it was a call for comprehensive exclusion of Tutsis from society: (1) Hutu males must not have close personal or work relations with Tutsi women; (2) Hutu women are superior to Tutsi women; (3) Hutu women must fraternize only with Hutu men; (4) Tutsis are dishonest and no Hutus should conduct business with them; (5) all high-level positions in society should be occupied by Hutus only; (6) the education sector should be majority Hutu; (7) the military must be exclusively Hutu; (8) the Hutus should stop having mercy on the Tutsis; (9) all Hutus must have unity and solidarity; and (10) the ideology of the 1959 and 1961 revolution (when many Tutsis were disenfranchised, forced to leave Rwanda or massacred) must be taught to Hutus at all levels.<sup>33</sup>

The other major form of incitement is to violence. There are two varieties—explicit and non-explicit.<sup>34</sup> Since incitement to violence is often effectuated via code, non-explicit calls are quite common.<sup>35</sup> William Schabas has observed that those who incite to mass atrocity “speak in euphemisms.”<sup>36</sup>

Such non-explicit methods can be myriad in form and include:

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<sup>28</sup> *You and Your People*, GERMAN PROPAGANDA ARCHIVE, <http://www.calvin.edu/academic/cas/gpa/du.htm> (last visited July 28, 2012).

<sup>29</sup> See David L. Neressian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity*, 43 STAN. J. INT’L L. 221, 263 (2007) (describing persecution as discrimination on a widespread or systematic basis).

<sup>30</sup> *Id.*

<sup>31</sup> *The Verdict: Summary Judgment from the Media Trial*, in THE MEDIA AND THE RWANDA GENOCIDE 279–81 (Allan Thompson ed., 2007).

<sup>32</sup> THE PATH TO GENOCIDE (2005), available at <http://www.un.org/en/preventgenocide/rwanda/text-images/Panel%20Set%20%20Low%20Res.pdf>.

<sup>33</sup> See SAMUEL TOTTEN ET AL., DICTIONARY OF GENOCIDE: A-L 200 (2008).

<sup>34</sup> See Gordon, *supra* note 20, at 638–39 (discussing the difference between explicitly calling for violence and the more indirect method of predicting violence).

<sup>35</sup> *Id.* at 638–44.

<sup>36</sup> William A. Schabas, *Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT’L L. 529, 530 (1999) (speaking of incitement to genocide).

(1) predictions of destruction (in the Media Case Trial Chamber Judgment, for instance, certain RTLM emissions that predicted liquidation of the Tutsis were among those broadcasts deemed to constitute incitement);<sup>37</sup>

(2) so-called “accusation in a mirror” (which consists of imputing to the victim the intention of committing the same crimes that the actual perpetrator is committing, as in Leon Mugesera’s November 1992 speech: “These people called *Inyenzis* are now on their way to attack us . . . they only want to exterminate us.”);<sup>38</sup>

(3) euphemisms and metaphors (in the Rwandan genocide, for instance, “go to work,” a common mass slaughter directive, meant “kill Tutsis”);<sup>39</sup>

(4) justification during contemporaneous violence (this amounts to describing atrocity already taking place in a manner that convinces the audience its violence is morally justified—Nazi leaders, for example, described to potentially complicit Germans the “humaneness” of their massacres, torture, death marches, slavery, and other atrocities);<sup>40</sup>

(5) condoning and congratulating past violence (RTLM announcers, such as Georges Ruggiu, would congratulate the “valiant combatants” who engaged in a “battle” against Tutsi civilians);<sup>41</sup>

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<sup>37</sup> Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment, ¶ 405 (Dec. 3, 2003) (“Thus when day breaks, when that day comes, we will be heading for a brighter future, for the day when we will be able to say ‘There isn’t a single *Inyenzi* left in the country.’”).

<sup>38</sup> Mugesera v. Canada, [2005] 2 S.C.R. 100 (Can.), ¶ 18; see also Gordon, *supra* note 20, at 641–42; Kenneth L. Marcus, *Accusation in a Mirror*, 43 LOY. U. CHI. L.J. 357, 359 (2012).

<sup>39</sup> See, e.g., Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(iv) (June 1, 2000); see also Gordon, *supra* note 20, at 642.

<sup>40</sup> See 3 RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 1010 (1961); Gordon, *supra* note 20, at 642.

<sup>41</sup> Ruggiu, Case No. ICTR 97-32-I, ¶ 44(v); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, ¶ 142, Judgment and Sentence (May 16, 2003); see also Gordon, *supra* note 20, at 642–43.

(6) asking questions about violence (Simon Bikindi asked Hutu militia over a truck loudspeaker “[h]ave you killed the Tutsis here”? and he further asked whether they had killed the “snakes.”),<sup>42</sup> and

(7) more virulent forms of verminization, pathologization, and demonization (RTLTM announcer Georges Ruggiu admitted that the word *Inyenzi*, as used in the socio-political context of the time of the Rwandan genocide, came to designate the Tutsis as “persons to be killed.”).<sup>43</sup>

Of course, the most serious form of incitement consists of explicit calls for violence. These are relatively rare in mass atrocity cases but certainly the most chilling and evocative of the possible horrors surrounding hate speech.<sup>44</sup> A prominent example is Kantano Habimana’s June 4, 1994, broadcast in which he asked listeners to exterminate the “Inkotanyi,” or Tutsis, who would be known by height and physical appearance.<sup>45</sup> Habimana then added: “Just look at his small nose and then break it.”<sup>46</sup> Another disturbing example comes from Iranian President Mahmoud Ahmadinejad, who urged Israel’s destruction when he told the Iranian people in October 2005 that Israel “must be wiped off the map.”<sup>47</sup>

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<sup>42</sup> Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 423 (Dec. 2, 2008); see also Gordon, *supra* note 20, at 643.

<sup>43</sup> Ruggiu, Case No. ICTR 97-32-I, ¶ 44(iii); see also Gordon, *supra* note 20, at 639–44.

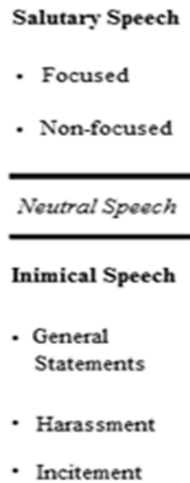
<sup>44</sup> It should be noted that general hate speech not calling for violence can be transformed into incitement when closely anchored to speech calling for violence. See Marcus, *supra* note 38, at 391 n.200.

<sup>45</sup> Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment, ¶ 396 (Dec. 3, 2003).

<sup>46</sup> *Id.*

<sup>47</sup> See Nazila Fathi, *Iran’s New President Says Israel Must Be ‘Wiped Off the Map,’* N.Y. TIMES, Oct. 27, 2005, at A8. Certain commentators have disputed that this constitutes direct and public incitement to commit genocide. See, e.g., Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485, 490–91 (2008) (“Ahmadinejad’s speech was reprehensible and perhaps even dangerous, but did not constitute incitement to genocide, in my view.”). But given Iran’s support of terrorist attacks against Israel, it may have constituted CAH-persecution. See, e.g., Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran’s President for Advocating Israel’s Destruction and Piecing Together Incitement Law’s Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 880–82 (2008) (analyzing whether this constitutes CAH-persecution).

FIG. 1 – CATEGORIES OF SPEECH
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### III. CHRONOLOGICAL ANALYSIS

Assessing how to deal with the various categories of speech, it is submitted, depends entirely on the timing and context of the speech's utterance. As alluded to above, this Article posits that timing and context may be divided into two phases—"pre-process" and "process."<sup>48</sup> To the extent the "process" phase deals with atrocity, during which salutary speech may be of limited value, the pre-process phase is centered exclusively on the beneficial effects of salutary speech.<sup>49</sup>

#### A. *The Pre-Process Phase*

But what are the nature and parameters of the "pre-process" phase? In general, it may be characterized as a period predominantly non-discriminatory or non-persecutory for any potential target group.<sup>50</sup> In other

<sup>48</sup> See discussion *supra* Part I.

<sup>49</sup> See discussion *supra* Part I.

<sup>50</sup> See Natalie Vladi, *Race, Ethnicity, and Workplace Diversity*, in ORGANIZATIONAL BEHAVIOUR IN A GLOBAL CONTEXT 295, 315–16 (Albert J. Mills et al. eds., 2007) (analyzing positive treatment of minorities in the non-persecutory environment of Canada).

words, in general, the target group is permitted meaningfully to participate in the civic, social, cultural, and economic life of the nation and be protected by its laws.<sup>51</sup>

In such a scenario, under a more or less functional equal protection legal regime, the group's members are able to hold and espouse their political, social, and religious beliefs; engage in commercial activity, both as providers and consumers; seek employment and employment benefits in all sectors of the economy; have access to decent educational opportunities, housing, and health care; vote for, seek and hold public office; and enjoy the protections of due process and the fundamental freedoms and rights recognized by the Universal Declaration of Human Rights.<sup>52</sup> Such societies tend to have a developed civil society sector; rule of law; a separation between civilian and military functions; and open access to communication media in terms of a non-monopolized, vigorous press and citizen access to various public speaking fora.<sup>53</sup>

Of course, there may be gradations in this scenario. Certain societies, for instance, possess various degrees of equal protection and/or due process deficits.<sup>54</sup> And groups in those communities may be victimized in a variety of ways, including being subjected to inimical speech.<sup>55</sup> Such a situation might be an ideal breeding ground for extremist groups pursuing a discriminatory, persecutory, or exclusionary agenda vis-à-vis certain

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<sup>51</sup> *Id.*

<sup>52</sup> See Universal Declaration of Human Rights, G.A. Res. 218 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>; see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>53</sup> See Lara Appicciafuoco, *The Promotion of the Rule of Law in the Western Balkans: The European Union's Role*, 11 GERMAN L.J. 741, 752 n.43 (2010) (noting that a successful democratic rule of law regime includes "the separation of powers, particularly the independence of the judiciary and the legislature from the executive; pluralism [including] the independence of media, a free press, and respect for freedom of association and assembly; good governance, particularly by supporting administrative accountability and the prevention [of] and fight against corruption; participation of people in civil society and economic life and politics; and separation among civilian and military functions.").

<sup>54</sup> See *Introduction*, in IDENTITIES IN AN ERA OF GLOBALIZATION AND MULTICULTURALISM 1, 3 (Judit Bokser de Liwerant ed., 2008) (suggesting that societies may offer different frameworks related to tolerance towards ethnic minorities).

<sup>55</sup> *Id.*

groups.<sup>56</sup> But as long as these groups still have basic access to legal redress and open channels of communication, salutary speech should serve as an effective counter to the inimical speech proffered by extremist groups or other hate-mongering individuals.<sup>57</sup>

Nevertheless, in certain societies, the equal protection and/or due process degradation may be more severe.<sup>58</sup> At some point, verbal attacks on the target group may not be neutralized by salutary ripostes.<sup>59</sup> In many cases, determining when this takes place may be quite challenging because societies in violent transition may often linger in a twilight zone between protection and non-protection for the target group. Still, as attacks on the group pick up and its civil liberties are more and more restricted, a society will enter the early stages of the “process” phase. And the cycle leading to the occurrence of mass atrocity will have begun.

### *B. The Process Phase*

Mass atrocity does not typically happen overnight—it usually takes time for the necessary groundwork to be laid.<sup>60</sup> And thus it tends to consist of different stages that lead to the eventual orgy of violence. This Article posits that these stages form a “process” that can be subdivided as follows: (1) identification; (2) action; and (3) execution.

This cyclical triad is in part derived from Professor Gregory Stanton’s genocide prediction/prognosis model titled “The 8 Stages of Genocide.”<sup>61</sup> According to Stanton’s model, the genocidal process unfolds as follows: (1) classification (use of categories to distinguish those discriminating and those discriminated against (target group) into “us and them” by ethnicity,

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<sup>56</sup> See Katerina Dalacoura, *Islamic Terrorism and the Middle East Democratic Deficit: Political Exclusion, Repression, and Causes of Extremism*, DEMOCRATISATION 13, no. 3:508–25.

<sup>57</sup> See Paula Franzese et al., *Censorship on the Internet: Do Obscene or Pornographic Materials Have A Protected Status?*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 323 (1995) (noting that good speech is effective in countering bad speech as long as there is sufficient time for the good speech to have its effect).

<sup>58</sup> See MOHAMED NIMER, THE NORTH AMERICAN MUSLIM RESOURCE GUIDE: MUSLIM COMMUNITY LIFE IN THE UNITED STATES AND CANADA 17 (2002) (pointing out, for example, that Muslim minorities have been denied equal treatment across Europe, Asia, and Africa).

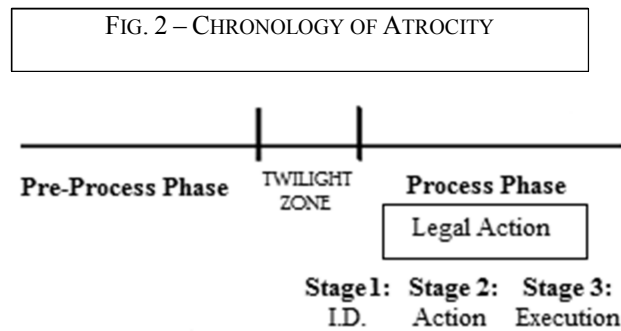
<sup>59</sup> *Id.* (going on to observe that certain minority groups have eventually been subjected to genocide or otherwise massive destruction of life and property).

<sup>60</sup> See Gregory H. Stanton, *The 8 Stages of Genocide*, GENOCIDE WATCH, <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html> (last visited Dec. 14, 2012) (observing that genocide takes place over time in a series of stages).

<sup>61</sup> *Id.*

race, religion, or nationality—e.g., German and Jew, Hutu and Tutsi); (2) symbolization (assigning symbols to the classification—i.e., associating with or foisting upon a target group certain colors or apparel, such as the golden Star of David patch for Jews in Nazi Germany or the blue scarf for Eastern Zone residents in Khmer Rouge Cambodia); (3) dehumanization (equating the target group with animals, vermin, insects or diseases); (4) organization (e.g., establishing militia and drawing up lists); (5) polarization (e.g., broadcasting hate propaganda or forbidding social, civic or economic interaction with the target group); (6) preparation (the target group is segregated, its property expropriated and death lists are drawn up); (7) extermination (the actual killing of the dehumanized victims begins); and (8) denial (it always follows a genocide and is a signal that additional killings of the victim group are intended).<sup>62</sup>

For purposes of speech analysis, these eight stages can be agglomerated into the identification, action, and execution groupings alluded to above. “Identification” would include “classification,” “symbolization,” and “dehumanization.” “Action” would comprehend “polarization” and “preparation.” And “execution” would consist of “extermination” and “denial.”



#### IV. COMBINING SPEECH AND CHRONOLOGY

The ultimate goal of this Article is to examine how the two axes of speech and chronology might interact. To do that, it is helpful to divide the speech analysis along the chronological axis in terms of “pre-process” and “process.”

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<sup>62</sup> *Id.*

### A. *Speech in the Pre-Process Phase*

As demonstrated above, the “pre-process” phase entails the target group’s experiencing minimal amounts of discrimination.<sup>63</sup> Nevertheless, this can be a period of mounting inter-ethnic, racial, or religious tension.<sup>64</sup> In fact, it is most likely during the pre-process phase that extremist groups are formed, leading to prejudice and discrimination fanned through incipient inimical speech, when racist slogans are coined and at least preliminarily circulated.<sup>65</sup> Significantly, this is when salutary speech is at its most potent.<sup>66</sup>

#### 1. *Non-Focused Salutary Speech*

In societies that are proactive, “non-focused” salutary speech can be strategically disseminated before extremist groups achieve critical mass in terms of stoking prejudice and discrimination.<sup>67</sup> This may be achieved through various means. One of the most important actors in this regard is civil society.

Civil society has been defined as “a public space between the state, the market and the ordinary household in which people can debate and tackle action.”<sup>68</sup> Robert Pekkanen defines civil society as the “organized, non-state, nonmarket sector.”<sup>69</sup> That could include any voluntary collective activity in which people combine to achieve change on a particular issue—but not political parties, even though civil society has a political dimension.<sup>70</sup> By this definition, civil society includes entities such as charities, neighborhood self-help groups, social activity clubs, civic improvement campaigns, civil rights defenders, and non-governmental organizations.<sup>71</sup>

These actors can distribute “non-focused” salutary speech in a multitude of ways: public discussion forums, informational pamphlets, social media

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<sup>63</sup> See discussion *supra* Part III.A.

<sup>64</sup> See discussion *supra* Part III.A.

<sup>65</sup> See ALEX ALVAREZ, GOVERNMENTS, CITIZENS, AND GENOCIDE: A COMPARATIVE AND INTERDISCIPLINARY APPROACH 83 (2001) (describing this phenomenon within the context of the Rwandan genocide).

<sup>66</sup> *Id.* (suggesting, by implication, that this would be the case).

<sup>67</sup> See discussion *supra* Part II.B.

<sup>68</sup> *What Is Civil Society*, BBC WORLD SERVICE (July 5, 2001), [http://www.bbc.co.uk/worldservice/people/highlights/010705\\_civil.shtml](http://www.bbc.co.uk/worldservice/people/highlights/010705_civil.shtml).

<sup>69</sup> ROBERT PEKKANEN, JAPAN’S DUAL CIVIL SOCIETY: MEMBERS WITHOUT ADVOCATES 3 (2006).

<sup>70</sup> *What Is Civil Society*, *supra* note 68.

<sup>71</sup> *Id.*



blasts, minority-majority group joint exercises (such as civic works projects—e.g., a neighborhood clean-up campaign, jointly undertaken), citizen-new immigrant coffee klatches, school house presentations, and tolerance awareness drives.<sup>72</sup>

Educational institutions can also play a decisive role in this regard.<sup>73</sup> School curricula can be designed to promote pluralistic values and tolerance.<sup>74</sup> This can be achieved consciously and effectively through, *inter alia*, course selection and design, individual lesson plan development, reading materials, bringing in outside speakers, organizing special events and commemorative days, and assigning relevant extra credit extra-curricular activities.<sup>75</sup>

Governments and international organizations can also help by establishing institutions to spread a positive message about tolerance and integration.<sup>76</sup> This can include directly establishing government agencies or setting up funding mechanisms for civil society groups and educational institutions.<sup>77</sup> Governments can also work to ensure pluralistic political participation and exercise of free speech and press rights.<sup>78</sup>

Related to this, the press can also make a valuable contribution.<sup>79</sup> Providing coverage with respect to the above activities and providing space for commentary and op-eds circulating ideas for promoting tolerance, diversity and non-discrimination constitutes another important piece of the mosaic of pre-process, non-focused salutary speech.<sup>80</sup>

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<sup>72</sup> See JOSEPH M. BESSETTE ET AL., *AMERICAN GOVERNMENT AND POLITICS: DELIBERATION, DEMOCRACY AND CITIZENSHIP* 829 (2012) (providing some examples).

<sup>73</sup> See Ana Carolina Bonifacio et al., *Mainstreaming Climate Change Through School Education: Perspectives and Challenges*, in *COMMUNITY, ENVIRONMENT, AND DISASTER RISK MANAGEMENT* 147 (Rajib Shaw et al. eds., 2010) (quoting the UN International Strategy for Disaster Reduction: “Schools are the best venues for forging durable collective values; therefore they are suitable for building a culture of prevention.”).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., 2000 U.N.Y.B. 54, U.N. Sales No. E.02/I.1 (noting that the UN promotes tolerance and respect for diversity); JOHN B. RONEY, *CULTURE AND CUSTOMS OF THE NETHERLANDS* 88 (2009) (“The early modern Dutch Republic practiced tolerance . . . the Dutch are at the forefront of social engineering, especially regarding persistent social problems.”).

<sup>77</sup> See RONEY, *supra* note 76, at 88.

<sup>78</sup> *Id.*

<sup>79</sup> See EUGENIA SIAPERA, *CULTURAL DIVERSITY AND GLOBAL MEDIA: THE MEDIATION OF DIFFERENCE* 63 (2010) (“Scientifically, the studies showed that the relationship between media and cultural diversity was one in which the former played a determining role.”).

<sup>80</sup> *Id.*

## 2. *Focused Salutary Speech*

During this phase, and perhaps more so during its end-stages, focused salutary speech takes on greater significance.<sup>81</sup> It is unrealistic to think that, even in the most optimal circumstances of the pre-process period, where non-focused salutary speech is thriving, inimical speech will be entirely absent.<sup>82</sup> And thus, when it does rear its ugly head, focused salutary speech is an essential component of preserving a pre-process state of affairs.<sup>83</sup>

As noted previously, focused salutary speech serves as a direct and explicit counter to inimical speech. And its value is one of the fundamental underpinnings of the free-speech-oriented metaphor of the “marketplace of ideas,” which has particular resonance in the United States, routinely considered the world’s most speech-protective country.<sup>84</sup> Why do Americans so vigorously protect freedom of expression?

The First Amendment to the U.S. Constitution provides that the government may “make no law . . . abridging the freedom of speech, or of the press.”<sup>85</sup> The United States, unlike perhaps any other nation, has relied on freedom of expression, as opposed to suppression, to expose inimical ideas, marginalize them, and thereby promote and safeguard democracy. In 1919, Justice Holmes issued his famous dissent in *Abrams v. United States* in which he introduced the “marketplace of ideas” metaphor to encapsulate the U.S. concept of freedom of speech.<sup>86</sup> In the marketplace metaphor, ideas compete against one another for acceptance—with the underlying faith that truth will prevail in such an open encounter. Borrowing from John Milton’s “Areopagitica” (1644) and John Stuart Mill’s “On Liberty” (1859), Holmes wrote in his *Abrams* dissent:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the

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<sup>81</sup> See discussion *supra* Part II.B.

<sup>82</sup> See discussion *supra* Part II.B.

<sup>83</sup> See discussion *supra* Part II.B.

<sup>84</sup> See Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223, 232 n.39 (2005) (noting the United States has the most speech-protective theory of the limits on freedom of expression encountered not only in domestic constitutional systems, but also internationally).

<sup>85</sup> U.S. CONST. amend. I.

<sup>86</sup> 250 U.S. 616, 630 (1919).

best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>87</sup>

Implicit in this notion of the “free trade in ideas” is that focused salutary speech will challenge inimical speech head on and triumph in the encounter.<sup>88</sup> But what if the delivery systems for focused salutary speech appear less responsive, or worse, outright atrophied? That might signal the pre-process phase is coming to an end. Or perhaps it means the “process” has begun.

### *B. Speech in the Process Phase*

As mentioned previously, the “process” phase consists of three stages—identification, action, and execution.

#### *1. The Identification Stage*

The identification stage, which breaks down into the “classification,” “symbolization,” and “dehumanization” segments, may not be completely immune to the positive effects of salutary speech.<sup>89</sup> This is the twilight zone along the spectrum, where reference to other factors may be helpful in discerning the value or not of salutary speech. In this sense, the work of Carol Pauli and Susan Benesch is particularly enlightening.<sup>90</sup> Pauli’s research uses communications theory postulates, such as the “ritual model,” “the spiral of silence,” and “the cognitive-transactional model,” to suggest when the marketplace of ideas may no longer be functioning, i.e., when salutary speech is of little or no value.<sup>91</sup> In the context of distinguishing between incitement to genocide and the legitimate exercise of free speech, Benesch has similarly formulated a set of criteria that provides guidance with respect to the value of salutary speech within an extreme discriminatory

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See discussion *supra* Part III.B (derived from Stanton’s “The 8 Stages of Genocide”).

<sup>90</sup> See, e.g., Benesch, *supra* note 47; Carol Pauli, *Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention*, 61 ALA. L. REV. 665 (2010).

<sup>91</sup> See Pauli, *supra* note 90, at 672–73, 679–85.

environment.<sup>92</sup> The collective work of Pauli and Benesch suggests the following criteria as indicating the marginal value of salutary speech in the early process phase:

- (1) MEDIA ENVIRONMENT: Implying the impotence of salutary speech in a coercive media environment with an absence of competing messages and frequent message repetition;
- (2) POLITICAL CONTEXT: Indicating the limited value of salutary speech when political instability, transition or repression heightens audience dependence on the communication media and thereby strengthens the influence of inimical speech on audience members;
- (3) AUDIENCE CHARACTERISTICS: Suggesting inimical speech may be impervious to salutary speech where the audience is young or unsophisticated, already inclined toward prejudiced views or highly networked along such lines as tribal membership and religion;
- (4) AUTHORITY OF MESSAGE SOURCE: Where the source of inimical speech is a person of authority in the eyes of the audience, salutary speech may be futile;
- (5) PRIOR SIMILAR MESSAGES: Implying salutary speech cannot stand up to inimical speech when the audience has been receiving the same inimical message repetitively and on a consistent basis;
- (6) CHANNEL OF COMMUNICATION: Indicating that the value of salutary speech is diluted when inimical speech is disseminated by pervasive channels of communication such as broadcast and social media;
- (7) MESSAGE CONTENT: Where inimical speech consistently advocates for persecution or violence, salutary speech is shorn of its remedial effects.<sup>93</sup>

With respect to the above list, some elaboration is in order regarding political context and message content. Regarding political context, the

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<sup>92</sup> See Benesch, *supra* note 47, at 519–25.

<sup>93</sup> See generally Pauli, *supra* note 90; Benesch, *supra* note 47 (providing these criteria through their respective analyses).

circumstances surrounding instability, transition, and repression can be quite varied. Certain societies can be transitioning into democracy from authoritarian and/or human rights violator regimes. But for some that transition may be less successful than others. Countries such as Brazil, South Africa, and Indonesia have been cited as examples of successful transitions.<sup>94</sup> Thus, in such countries, perhaps it makes sense to give the benefit of the doubt to successful operation of the marketplace of ideas.

Other countries, such as Libya, Egypt, and Burma most recently, have struggled with incipient transitions to democracy and the rapid spread of inimical speech in those countries should perhaps more readily signify that the marketplace has shut down.<sup>95</sup> Similarly, countries once authoritarian and then seemingly democratic may be in the process of backsliding. The Republic of the Maldives, where a democratically elected president took over in 2008 after thirty years of autocratic rule and then was ousted in a 2012 military coup, may be the perfect example in that regard.<sup>96</sup> In such situations, one should be more willing to reject the viability of the marketplace in an environment of pervasive inimical speech. As the ousted president noted with respect to the country's authoritarian backsliding and the climate for inimical speech:

At the same time, new laws guaranteeing freedom of speech were abused by a new force in Maldivian politics: Islamic extremists. The former president's cabinet members threw anti-Semitic and anti-Christian slurs at my government, branding as apostates anyone who tried to defend the country's

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<sup>94</sup> See WILLIAM H. FREDERICK, *INDONESIA: A COUNTRY STUDY* 305 (2011) (offering that Indonesia "has successfully navigated a transition to democracy, minimizing the military's direct political influence, amending the constitution, holding multiple credible elections, and embarking on an unprecedented decentralization of power"); EDWARD D. MANSFIELD & JACK SNYDER, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* 8 (2005) (discussing South Africa and Brazil).

<sup>95</sup> See Bruno Phillip, *Ethnic Violence Mars Transition for Rohingya in Burma*, *GUARDIAN*, June 26, 2012, available at <http://www.guardian.co.uk/world/2012/jun/26/burma-rohingya-persecution-ethnic-violence> (discussing violence arising as Burma has adopted political reforms); Steven Sotloff, *Libya's Road to Democracy: Expect a Bumpy Road*, *TIME*, Aug. 29, 2011, available at <http://www.time.com/time/world/article/0,8599,2090994,00.html>; *The Uncertain Future of the Arab Spring*, *BALTIMORE SUN*, Oct. 13, 2011, available at [http://articles.baltimoresun.com/2011-10-13/news/bs-ed-egypt-20111013\\_1\\_egyptian-army-cairo-s-tahrir-squ-are-coptic-christians](http://articles.baltimoresun.com/2011-10-13/news/bs-ed-egypt-20111013_1_egyptian-army-cairo-s-tahrir-squ-are-coptic-christians) (considering the difficulties in Egypt).

<sup>96</sup> See Mohamed Nasheed, *The Dregs of Dictatorship*, *N.Y. TIMES*, Feb. 8, 2012, available at [http://www.nytimes.com/2012/02/08/opinion/in-the-maldives-strangled-democracy.html?\\_r=0](http://www.nytimes.com/2012/02/08/opinion/in-the-maldives-strangled-democracy.html?_r=0).

liberal Islamic traditions and claiming that democracy granted them and their allies license to call for violent jihad and indulge in hate speech.<sup>97</sup>

Message content also deserves additional consideration. Recall that inimical speech runs along a spectrum of less to more severe with the following key classifications: (1) general hate speech; (2) harassment; and (3) incitement.<sup>98</sup> In an environment in which inimical speech is predominantly characterized by general hate speech, all things being equal, the marketplace of ideas is more likely to be operational.<sup>99</sup> This is less likely to be the case when the speech at issue consists primarily of harassment.<sup>100</sup> Finally, when it comes to a speech environment suffused with incitement, it is hardest to imagine a functional marketplace of ideas.<sup>101</sup> Perhaps the marketplace still works if the incitement is sparse, indirect and focused on discrimination (as opposed to persecution or violence).<sup>102</sup> However, in cases of widespread incitement to persecution, and especially incitement to violence, it should be safe to assume the marketplace has shut down and bad speech presumptively emasculates good.<sup>103</sup>

## 2. *The Action and Execution Stages*

During the action and execution stages (covering Stanton's "organization," "polarization," "preparation," "extermination," "denial"), the movement toward atrocity has become inexorable and salutary speech no longer serves a palliative function.<sup>104</sup> Segregation, persecution, and violence, among other serious human rights violations, are now taking place.<sup>105</sup> At this juncture, speech serves the exclusive purpose of attacking the target group, whether through persecutory or violent means. The goal thus becomes to stop such speech through legally coercive means.<sup>106</sup> So new paradigms for dealing with speech then emerge: civil action and punishment.

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<sup>97</sup> *Id.*

<sup>98</sup> See discussion *supra* Part II.C.

<sup>99</sup> See discussion *supra* Part II.C.

<sup>100</sup> See discussion *supra* Part II.C.

<sup>101</sup> See discussion *supra* Part II.C.

<sup>102</sup> See discussion *supra* Part II.C.

<sup>103</sup> See discussion *supra* Part II.C.

<sup>104</sup> See discussion *supra* Part III.B.

<sup>105</sup> See discussion *supra* Part III.B.

<sup>106</sup> See discussion *supra* Part III.B.

*a. Civil Action Options*

To the extent there are remnants of authority opposed to the atrocity planning, preparation, or execution, and assuming violence is underway, these officials can attempt to enjoin the offensive speech.<sup>107</sup> Such injunctions must be narrowly tailored and specifically justified by ongoing or imminent violence.<sup>108</sup> If injunctions are not feasible, civil actions could be another option. For example, a complaint could be lodged with an anti-discrimination commission empowered to enjoin further dissemination of inimical speech or order a public apology, retraction, or other remedies, including fines and educational efforts.<sup>109</sup> Finally, perhaps the least efficacious of non-criminal actions could be a tort lawsuit, which could include a demand for punitive damages.<sup>110</sup>

However, it is unlikely sufficient enforcement authority would exist to realistically pursue such non-criminal remedies. Typically, government officials planning atrocities—the relevant time period per this Article’s analysis—monopolize power and are operating pursuant to state policy. As William Schabas has noted regarding mass atrocity cases before the international tribunals: “Essentially all prosecutions have involved offenders acting on behalf of a State and in accordance with a State policy.”<sup>111</sup> During the identification and execution stages, then, there is not likely to be anyone capable of enforcing prior restraints or civil remedies related to the dissemination of inimical speech.

*b. Criminal Options*

As a result, barring sudden regime change, resort to criminal law will have to be imposed externally. In particular, speech in service of atrocity planning, preparation, or execution must be prosecuted as instigation, crimes against humanity (persecution), or direct and public incitement to commit genocide.

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<sup>107</sup> See, e.g., Greg Mitchell, *Court Upholds Hate Speech Gag*, RECORDER (Aug. 3, 1999), available at <http://www.law.com/jsp/article.jsp?id=900005511828&slreturn=2013111923205>.

<sup>108</sup> *Id.*

<sup>109</sup> Gelber, *supra* note 3, at 202.

<sup>110</sup> See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C.L. L. REV. 133, 179–81 (1982) (describing possible tort remedies and punitive damages for racial insults).

<sup>111</sup> William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 954 (2008).

*i. Instigating, Ordering, Soliciting, and Inducing*

Instigating, ordering, soliciting, and inducing are rather straightforward. They are part of the “individual criminal responsibility” sections of the ICTR Statute (Art. 6(1))<sup>112</sup> and the Rome Statute of the International Criminal Court (Art. 25).<sup>113</sup> Art. 6(1) of the ICTR Statute, for example, declares: “1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.” Art. 25(3)(b) of the Rome Statute states that “a person shall be criminally responsible if that person . . . [o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted.”

To establish this mode of criminal liability, then, the prosecution need prove that the defendant verbally encouraged or ordered a third party to commit one of the Statute’s core crimes (i.e., crimes against humanity, war crimes, or genocide) and the third party then committed the crime. This is to be distinguished from persecution and incitement, analyzed below, which do not require resultant violence for liability to attach.

*ii. Crimes Against Humanity (Persecution)*

Criminal advocacy has long been prosecuted as a crime against humanity. Beginning with the Nuremberg prosecution of top Nazi leaders, international law has recognized that inimical speech targeting groups on pernicious discriminatory grounds may constitute the crime against humanity of persecution.<sup>114</sup> The International Military Tribunal at Nuremberg convicted Nazi newspaper publisher Julius Streicher of this offense owing to his

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<sup>112</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 Jan. 1994 and 31 Dec. 1994, Annex to S.C. Res. 955, art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

<sup>113</sup> Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* 1 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records (1998) [hereinafter Rome Statute].

<sup>114</sup> See London Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279 (declaring that “persecutions on political, racial or religious grounds” constitute Crimes against Humanity within the IMT’s jurisdiction).



consistent calls for the extermination of Jews in his newspaper *Der Stürmer*.<sup>115</sup>

The ICTR Statute also classifies persecution as a crime against humanity. Article 3 declares that persecutions on political, racial, and religious grounds, when committed as part of a widespread or systematic attack against any civilian population, constitute crimes against humanity.<sup>116</sup> In *Prosecutor v. Ruggiu*, in sentencing an RTLM broadcaster who had pled guilty to a persecution charge, the Tribunal specified the elements of the crime: (1) those elements required for all crimes against humanity under the Statute; (2) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 3; and (3) discriminatory grounds.<sup>117</sup> The Tribunal then found that Ruggiu's broadcast satisfied these elements:

[When] examining the [admitted] acts of persecution . . . it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the [Tutsi ethnic group] on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.<sup>118</sup>

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<sup>115</sup> See IMT Judgment, Oct. 1, 1946, reprinted in 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 501–02 (1946). However, the IMT acquitted Hans Fritzsche, Head of the Nazi Propaganda Ministry Radio Section, on the same charges for a purported lack of evidence of clear incitement and an alleged lack of control over formulation of propaganda policy. *Id.* at 525–26.

<sup>116</sup> ICTR Statute, *supra* note 112, art. 3.

<sup>117</sup> *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment (June 1, 2000), ¶ 21 (citing *Prosecutor v. Zoran Kupreskic*, Case No. IT-95-16, Judgment (January 14, 2000)).

<sup>118</sup> *Id.* ¶ 22. In contrast, a Trial Chamber for the International Criminal Tribunal for the former Yugoslavia found in *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Feb. 26, 2001) that the hate speech alleged in the indictment did not constitute persecution because it did not rise to the same level of gravity as the other enumerated acts. *But see* Gordon, *supra* note 27, at 303 (taking issue with the ICTY Trial Chamber's analysis in *Kordic*).

The *Nahimana* judgment specified that persecution is not a provocation to cause harm—it is the harm itself.<sup>119</sup> Thus, “there need not be a call to action in communications that constitute persecution [and thus] there need be no link between persecution and acts of violence.”<sup>120</sup>

*iii. Direct and Public Incitement to Commit Genocide*

The other crime that may be charged is direct and public incitement to commit genocide. In a series of decisions beginning in 1998, the ICTR set forth the elements of the offense. In *Prosecutor v. Akayesu*, the ICTR found that speech could be considered “public” if addressed to “a number of individuals in a public place” or to “members of the general public at large by such means as the mass media, for example, radio or television.”<sup>121</sup>

And the message could be deemed “direct” if, when viewing the language “in the light of its cultural and linguistic content, the persons for whom the message was intended immediately grasped the implication thereof.”<sup>122</sup> Mens rea consists of a dual intent: (1) to provoke another to commit genocide; and (2) to commit the underlying genocide itself.<sup>123</sup>

Significantly, causation is not an element—in other words, to establish liability, it is not necessary for the advocacy to result in genocide.<sup>124</sup>

The most complex—and controversial—aspect of the crime centers on its key descriptor: “incitement.” In defining it, the Tribunal has grappled with distinguishing between free exercise of legitimate speech (regardless of how offensive) and corrosion of such speech into criminal advocacy. The *Nahimana* Trial Chamber explicitly identified two analytic criteria to

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<sup>119</sup> *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment, ¶ 1073 (Dec. 3, 2003), <http://www.refworld.org/cgi-bin/telex/vtx/rwmain?docid=404468bc2>.

<sup>120</sup> *Id.* The International Criminal Court also has Crimes against Humanity (Persecution) within its subject matter jurisdiction. See Rome Statute, *supra* note 113, art. 7. The chapeau of Article 7 of the Rome Statute also consists of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.” And then subsection (h) of the enumerated acts includes: “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” The ICC has yet to decide if hate speech qualifies as persecution under the Rome Statute.

<sup>121</sup> *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 556 (Sept. 2, 1998), <http://www.refworld.org/docid/40278fbb4.html>.

<sup>122</sup> *Id.* ¶¶ 557–558.

<sup>123</sup> *Id.* ¶ 560.

<sup>124</sup> *Id.* ¶ 553; see also *Nahimana*, Case No. ICTR 99-52-T, ¶ 1015.

determine whether discourse could be categorized as either legitimate expression or criminal advocacy: its purpose (encompassing, on one end of the continuum, patently legitimate objectives, such as historical research or dissemination of news, and, on the other end, clearly criminal ends such as explicit pleas for violence) and its context (circumstances surrounding the speaker's text—such as contemporaneous large-scale interethnic violence, and the speaker's tone of voice).<sup>125</sup>

My scholarship has identified two additional criteria implicitly used by the *Nahimana* Trial Chamber in formulating its analysis: text and the relationship between speaker and subject.<sup>126</sup> The Trial Chamber's discussion of the "text" element was an implicit part of its "purpose" subheading analysis. Applying this element involved a parsing and exegetical interpretation of the key words in the speech.<sup>127</sup>

With respect to speaker and subject, the Tribunal revealed that the analysis should be more speech-protective when the speaker is part of a minority criticizing either the government or the country's majority population (and less so in other situations).<sup>128</sup>

My scholarship has also advocated bifurcating the context criterion into "internal" and "external" components.<sup>129</sup> Internal context refers to characteristics of the speaker herself: her background and professional profile, her previous publication/broadcast history, and her personal manner of transmitting the message (including tone of voice).<sup>130</sup> How did this particular speaker, given her background and manner of expressing herself, convey the information on this specific occasion?

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<sup>125</sup> *Nahimana*, Case No. ICTR 99-52-T ¶¶ 1000–1006 (discussing purpose of speech); *id.* ¶¶ 1004–1006 (analyzing a spectrum between legitimate and criminal purposes); *id.* ¶ 1022 (discussing the context in which the speech occurs). The space between the legitimate and the criminal ends of the spectrum clearly invites contextual analysis. And the Tribunal has proposed certain evaluative factors such as surrounding violence and previous rhetoric. *See id.* ¶ 1004 (speaking of massacres taking place surrounding the speakers utterance); *id.* ¶ 1005 (focusing on previous conduct to reveal purpose of text).

<sup>126</sup> *See* Gregory S. Gordon, "A War of Media, Words, Newspapers, and Radio Stations": *The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 172 (2004); Gregory S. Gordon, *Defining Incitement to Genocide: A Response to Susan Benesch*, OPINIO JURIS (Apr. 17, 2008), <http://opiniojuris.org/2008/04/17/defining-incitement-to-genocide-a-response-to-susan-benesch-2/>.

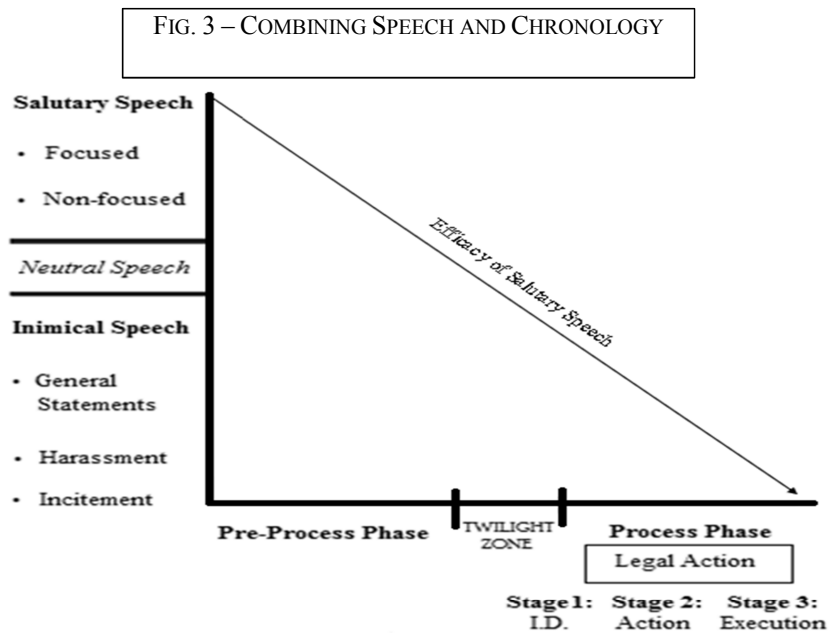
<sup>127</sup> *Nahimana*, Case No. ICTR 99-52-T, ¶ 1001.

<sup>128</sup> *Id.* ¶ 1006.

<sup>129</sup> Gordon, *supra* note 20, at 637.

<sup>130</sup> *Id.*

External context examines the circumstances surrounding the speech, which could include recent incidents of mass violence or the imminent outbreak of war (empirically an indicator of a genocidal environment).<sup>131</sup> How does the situation during that time and place affect the manner in which we understand the expression?



### 3. *The Special Case of “Denial”*

It should be noted that punishment with respect to the final stage of the “execution” phase—denial—may be controversial from the perspective of the most zealous free speech advocates. That depends on its context. Denial by direct perpetrators or their confederates as the end-phase of a genocidal cabal must be analyzed as a function of conspiracy law, not in terms of ordinary hate speech regulation. As Gregory Stanton observes:

<sup>131</sup> *Id.* at 638.

The perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They deny that they committed any crimes, and often blame what happened on the victims. They block investigations of the crimes, and continue to govern until driven from power by force, when they flee into exile. There they remain with impunity, like Pol Pot or Idi Amin, unless they are captured and a tribunal is established to try them.<sup>132</sup>

On the other hand, once the conspiracy has run its course, denial rhetoric must be seen in a different light. It is not part of a cover-up. And it is relatively less likely to cause fresh violence in the short term. Given this more tenuous connection to the original atrocity, free speech advocates oppose criminalizing denial.<sup>133</sup>

And there may be good reasons for that. Many feel that allowing deniers to spew their falsities exposes their absurdity, provides legitimate historians with opportunities to remind the populace of what really happened, and thus only strengthens the hold and sway of truth.<sup>134</sup> Moreover, to the extent there are atrocity-related details or aspects that remain more obscure, denial forces society to examine those particulars in greater depth and create a more fulsome and exacting historical record.<sup>135</sup> And, from a good governance perspective, permitting deniers to espouse their beliefs, however bogus, strengthens society's sense that its individuals are autonomous and capable of making important personal choices.<sup>136</sup> Finally, giving free rein to deniers gives society a mirror by which to inspect itself and understand whether, and to what extent, education may be wanting or extremist groups may be growing and/or gaining traction.<sup>137</sup> Such intelligence is crucial for effective and efficient governance and policy prioritization.

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<sup>132</sup> Stanton, *supra* note 60.

<sup>133</sup> See Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 MISS. L.J. 1263, 1288 (2011) ("For example, even though countries like France and Germany prohibit Holocaust denial, the United States does not (and probably cannot) impose criminal restrictions on Holocaust denials because of the First Amendment to the United States Constitution's guarantee of free speech.").

<sup>134</sup> See generally Robert Post, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 23, at 123–38 (pointing out the problems with genocide denial laws).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

On the other hand, not all countries are the same. Certain ones have particular histories that make criminalizing denial much more tenable, if not essential. Germany, for example, grappling with the heavy weight of the Nazi genocide of the Jews, had compelling reasons to enact Holocaust-denial laws.<sup>138</sup> And few would quibble when the new government of Rwanda, taking power after four months of unimaginable Tutsi mass slaughter, criminalized denial of the 1994 genocide.<sup>139</sup> The directly culpable and traumatized genocide forum country has a special and historic interest in outlawing related mendacity.<sup>140</sup>

Even the fiercest defenders of free expression voice sympathy for such laws in such post-conflict societies.<sup>141</sup> But they draw the line there. First Amendment attorney Floyd Abrams, for example, frowns on Holocaust denial laws for countries such as the United States and Canada, which are not the loci of the underlying massacres.<sup>142</sup> However, both of these countries have significant victim populations and anti-denial laws may be justified to safeguard the interests of those victims. As Katharine Gelber notes:

[In] the act of denying this historical truth [of the Holocaust], the deniers denigrate the Jewish people and memories of historical occurrences, suggest that those who accept the truth of the Holocaust lie, and relativize the suffering incurred. Thus, the act of Holocaust denial is not simply an expression of belief in what did or did not happen historically, given that the Holocaust has been historically verified. It is an act of vilification that denigrates and harms.<sup>143</sup>

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<sup>138</sup> See Gordon Butler, *The Essence of Human Rights: A Religious Critique*, 43 U. RICH. L. REV. 1255, 1300–01 (2009) (noting that Holocaust denial in Germany threatens democratic stability while that may not be the case in the United States).

<sup>139</sup> See Jennifer M. Allen & George H. Norris, *Is Genocide Different? Dealing with Hate Speech in a Post-Genocide Society*, 7 J. INT'L L. & INT'L REL. 146, 172 (2011) (“Given the short passage of time and the existence of militant groups that deny the genocide, a statute specifically outlawing genocide denial, similar to those found in Germany, Israel, and the EU, would be an important tool to help Rwanda overcome the racist attitudes that have fueled its violent past.”). However, as discussed *infra*, one may wonder whether, over time, such denial laws might outlive their original justification. *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., Floyd Abrams, *On American Hate Speech Law*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATIONS AND RESPONSES, *supra* note 3, at 116, 118.

<sup>142</sup> *Id.* at 125.

<sup>143</sup> Gelber, *supra* note 3, at 210–11.

Still, notwithstanding these considerations, in criminalizing denial other problematic issues remain. For example, while denial laws might make sense in the immediate aftermath of mass killing, while survivors are still with us, does a time come when, in light of the other considerations discussed herein, they outlive their utility?<sup>144</sup> Should they eventually be phased out? Also, assuming such laws are on balance still beneficial, are they being effectively enforced? Inadequate or inefficacious enforcement could tip the balance in favor of abolishing such laws or not enacting them in the first place.

Then again, if the absence of criminalization allows denial to flourish at some point in the more distant future, then a genocidal campaign might eventually have the impetus to regenerate itself. Gregory Stanton writes that denial “is among the surest indicators of future genocidal massacres.” And even if insufficient on its own, denial can often be used with other more direct techniques of incitement to create a potent cocktail very likely to stir violence. So definitive answers about the best way to deal with it are elusive indeed.

## V. CONCLUSION

Curbing or preventing verbal and/or physical expressions of animus toward target groups is a multi-faceted enterprise. Speech, which has been the focus of this Article, is only part of it. Still, speech plays an extremely significant role along the problem’s entire spectrum. Speech manages to insinuate itself at every stage, i.e., in conceiving, stoking, reifying, exposing, impeding, dissipating, and, in best case scenarios, ultimately extinguishing hatred. This Article has taken the position that, in most cases, the remedial powers of salutary speech are more than equal to the task of combatting inimical speech. In other words, more speech is the cure for prior speech’s ills. A well-informed, self-actualized, politically engaged, and autonomous citizenry, both vigilant and vibrant as it confronts and filters out noxious expression, is the ideal.

But, as the analysis of denial demonstrated, certain societies have special victim groups and historical circumstances. Jeremy Waldron makes a compelling argument that inclusiveness and dignity are social goods, like clean air and water, on which everyone relies, including members of victim

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<sup>144</sup> See Allen & Norris, *supra* note 139, at 172.

groups.<sup>145</sup> Hate speech, he contends, compromises if not eradicates these public goods and so, like businesses that consciously place poisonous products in the stream of commerce, its purveyors should be criminally prosecuted.<sup>146</sup> This does seem like a sweeping statement. But might it be true in certain societies under certain circumstances? And in all societies teetering on the brink of atrocity, in that twilight zone between pre-process and process, should laws be in place to supplement salutary speech in combatting inimical speech? It is beyond the scope of this Article to resolve those issues. What is certain, however, is that at some point the power of salutary speech to cure the ills of inimical speech will fail. In the later stages of the atrocity process, punishment, most likely externally imposed, must be the remedy.

Racial and ethnic prejudice, invidious discrimination, extremist group formation, a culture of impunity—these are inter-related problems and often successive steps along the same continuum. If left unchecked, that continuum leads to atrocity. Speech can serve as an important check with respect to each step on the continuum. But it can help effectuate and reinforce each step too. Keeping in mind the policy considerations elucidated in this Article, governments can exploit and regulate speech to strike a balance between atrocity prevention and respect for civil liberties. The latter need never be incompatible with the former.

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<sup>145</sup> JEREMY WALDRON, THE HARM IN HATE SPEECH 4–8 (2012).

<sup>146</sup> *Id.*