

**THE BLUES BROTHERS AND THE AMERICAN
CONSTITUTIONAL PROTECTION OF HATE SPEECH:
TEACHING THE MEANING OF THE FIRST
AMENDMENT TO FOREIGN AUDIENCES**

Julien Mailland *

I. CONSUMING CULTURE IN COMPARATIVE LEGAL STUDIES.....	444
II. <i>THE BLUES BROTHERS</i> AND AMERICAN NAZIS.....	451
CONCLUSION.....	460

Skokie, Illinois, 1978. A retired black and white police car is stuck in traffic before a bridge where a political rally is being held by Nazis of the American Socialist White People’s Party. In the car, two men, wearing black suits, black hats, and black sunglasses, stand idle. The Nazis’ venomous leader delivers a racist and violence-mongering speech, which infuriates the onlookers. The Nazis are protected from the angry crowd of hecklers by a line of police. One of the men in black calmly states: “I hate Illinois Nazis,” as the other slams the gas pedal, charges the ranks of the brownshirts and stampedes them off the bridge into the water, to the cheers of the crowd. As they drive off, the soaked Nazi commander vows revenge.¹

This scene from the 1980 blockbuster comedy *The Blues Brothers*² is a popular cultural expression of a uniquely-American legal provision: the constitutional protection of hate speech by virtue of the free speech clause of the First Amendment to the United States Constitution. The legal regime for hate speech in the United States has no equivalent anywhere in the world

* Assistant Lecturer & Annenberg Fellow, University of Southern California, Annenberg School for Communication & Journalism. LL.M., New York University School of Law; M.C.J., LL.B, University of Paris II Assas School of Law. Many thanks to Josh Kun, as well as to Sarah Banet-Weiser, Tom Goodnight, Philip Spencer, Matt Ward, and the participants in the Consuming Culture seminar at the USC Annenberg School for their thoughtful comments on earlier versions of this draft. I am also grateful to Barbara Hall and the archivists at the Margaret Herrick Library, Academy of Motion Pictures Arts & Science, Beverly Hills, California, for organizing the John Landis papers on my behalf. Work on this article was supported by the USC Annenberg Graduate Fellowship Program. Author contact email: jmailland@yahoo.com.

1. THE BLUES BROTHERS (Universal Studios 1980). Long Synopsis, LANDIS COLLECTION, on file with the Margaret Herrick Library, Academy of Motion Pictures Arts & Science, Beverly Hills, California.

2. *Id.*

and is baffling to non-Americans. Europeans, in particular, whose countries served as the locus of Nazism's horrors, tend to hold the U.S. constitutional protection of hate speech in disbelief, before shaking their heads in contempt and concluding something along the lines of "those crazy Americans." This protection of hate speech, however, makes a lot of sense in the American context. In this paper, I argue that the aforementioned scene from *The Blues Brothers* has great potential to elucidate the meaning of the constitutional protection of hate speech, and, more broadly, of the First Amendment, for a non-American audience. I propose that the scene be used by comparative jurists teaching the First Amendment to the United States Constitution. I focus the comparison between the United States and France, for "France and the United States start from such different assumptions regarding freedom of speech and the relationship between speech and other rights that it is virtually impossible to reconcile their competing approaches,"³ a situation that creates deep cultural misunderstandings, which in turn can be reconciled using this case study. France is also relevant because it is one of the countries that has taken the most aggressive stance against American companies in the context of Nazi speech distributed globally over the Internet, which has resulted, in particular, in Yahoo!, Inc. and its executives being criminally prosecuted in France for violation of anti-hate speech laws.⁴ Fostering mutual understanding between the U.S. and France is therefore particularly important in this age of global digital information distribution.

In Part I, I first theoretically ground the argument that consumption of cultural artifacts is a prerequisite to understanding the law of a country, and beyond it, the country's people and society themselves (I). Part II involves a detailed case study of the aforementioned scene from *The Blues Brothers* as such an artifact, in order to lift the veil on the cultural signified hidden beyond the legal signifier that is the First Amendment, and foster mutual understanding between the people of the United States and other peoples (II). I conclude that the *Blues Brothers*' Nazi scene should be used by comparative jurists teaching the meaning of the First Amendment to foreign audiences, as an aid to shine a light on the cultural, social, and political principles that ground the constitutional protection of hate speech in the United States.

I. CONSUMING CULTURE IN COMPARATIVE LEGAL STUDIES

Muhammed was a merchant in Mecca, a trading city in what is now Saudi Arabia. During his thirties, he became interested in virtuous living

3. Russell L. Weaver, Nicolas Delpierre & Laurence Boissier, *Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives*, 41 TEX. TECH L. REV. 495, 516 (2009).

4. See case *infra* note 59.

and meditated extensively. Around the age of forty, following visions during these meditations, he became a prophet and called first his wife and friends and later a broader community to monotheism.⁵

So starts the chapter on Egyptian law in a casebook entitled *Law in Radically Different Cultures*. This opening reveals the role that the understanding of culture plays in the comprehension of foreign laws. The law is an expression of culture, and one cannot understand the law if one does not grasp the underlying culture. The field of comparative law is entangled with the field of cultural studies because culture is a cornerstone of legal systems. The consumption of foreign culture, therefore, is a condition precedent to understanding foreign law, a remark echoed by Yale law professor James Whitman.⁶ Yet, as Professor Pierre Legrand, a law professor at the University of Paris I Sorbonne remarks, most pieces published as so-called “comparative legal studies” are simple descriptions of a foreign legal system, or a foreign law.⁷ Mere descriptions cannot bring insight. As Roland Barthes,⁸ building on Ferdinand de Saussure’s work,⁹ pointed out quite clearly, what matters is the signified, not the signifier, and the description of a signifier, without any deeper analysis, is fruitless. The description of a foreign law not supported by a comparative cultural analysis not only lacks insight, but also leads to errors. Citing American legal scholar John Dawson’s analysis of a 1951 German legal case,¹⁰ and pointing out the numerous errors of interpretation by Dawson that stemmed from the fact that his analysis of German law was performed using American legal and cultural concepts, Professor Vivian Grosswald Curran writes: “That even a scholar of such skill and erudition should ‘misread’ is . . . illustrative of the degree to which underlying cultural phenomena, often considered extrinsic to law, influence legal analysis and the conception of law.”¹¹ And Pierre Legrand to conclude that the incompetence of comparative law can most aptly be explained by the incompetence of comparative lawyers.¹² Thankfully, superb work on comparative theory has

5. JOHN H. BARTON, JAMES GIBBS, VICTOR LI & JOHN HENRY MERRYMAN, *LAW IN RADICALLY DIFFERENT CULTURES* 16 (1983).

6. See generally James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000).

7. M. Pierre Legrand, *Comparer*, 48 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 279 (1996).

8. ROLAND BARTHES, *MYTHOLOGIES* (Annette Lavers trans., 1957).

9. See generally FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1916).

10. See John P. Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 *B.U. L. REV.* 1039 (1983).

11. Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 *AM. J. COMP. L.* 43, 79 (1998).

12. See Legrand, *supra* note 7.

also been produced, from the Italian school of Rodolfo Sacco,¹³ the French school of René David,¹⁴ the German school of Zweigert and Kötz,¹⁵ to numerous American scholars starting with Rudolf Schlesinger.¹⁶ Most of the post-World War II work focused on defining practical uses for comparative law, from functionalism¹⁷ to global legal harmonization as a tool of the search for world peace.¹⁸ The aforementioned body of work presumed, however, that comparative lawyers were properly trained to put comparative law to its proper use, which, as we have observed, is a bold presumption. Scholars such as Legrand and Curran, therefore, have focused on comparative legal methodology itself, and have defined a number of qualitative approaches for comparative law, which can be grouped under the general overarching umbrella of “immersion.”¹⁹

Implicitly building on Roland Barthes,²⁰ a leading semiotician, Legrand calls for the practice of legal hermeneutics that would require the study of politics, economics, and ethnography as integral to the understanding of any given legal system.²¹ History and historiography are also prime tools of analysis. As Yale law professor Robert Gordon points out, there even exists “a tradition of historiography called ‘legal functionalism.’”²² And just as hermeneutics and historiography make use of symbolic analysis in order to reach beyond the signifier, comparative law does the same. On a domestic level, Robin Kelley, for example, examined traditions of black folklore such as the “zoot suiters of Los Angeles or Detroit”²³ in order to make sense of a “privileging of ethnic identity and masculinity, and a rejection of subservience”²⁴ and to understand the construction of “an identity in which their gendered and racial meanings were inseparable”²⁵ Barthes, still on a domestic level, analysed the content of the French guide book, *The Blue*

13. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991).

14. See RENÉ DAVID & JOHN E. C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (3d ed. 1985).

15. See KONRAD ZWIEGERT & HEIN KÖETZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 1998).

16. See RUDOLPH B. SCHLESINGER ET AL., *SCHLESINGER’S COMPARATIVE LAW: CASES, TEXT, MATERIALS* (7th ed. 2009); Richard M. Buxbaum & Ugo A. Mattei, *Rudolph B. Schlesinger 1909-1996*, 45 AM. J. COMP. L. 1 (1997).

17. See generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

18. See ZWIEGERT & KOETZ, *supra* note 15.

19. See Legrand, *supra* note 7; see also *COMPARATIVE LAW: AN INTRODUCTION* (Vivian Grosswald Curran ed., 2002).

20. See BARTHES, *supra* note 8.

21. See Legrand, *supra* note 7.

22. Gordon, *supra* note 17, at 58-59.

23. ROBIN D.G. KELLEY, *RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS* 65 (1994).

24. *Id.*

25. *Id.* at 66.

Guide, beyond the first semiological system to decrypt how “by reducing geography to the description of an uninhabited world of monuments,”²⁶ and by overstressing hilliness “to such an extent as to eliminate all other types of scenery,”²⁷ the *Guide* becomes, “through an operation common to all mystifications,”²⁸ the very opposite of what it advertises, an agent of blindness and of perpetuation of the Roman-Catholic tradition as a dominant frame through which French society plays out. Legrand applies the same methods of interpretation “to the confrontation of phenomena which happen on each side of the demarcation lines that separate two language frames of reality,”²⁹ a reference to legal traditions as representations of cognitive frames. For example, Legrand opposes the “monumental symmetry of the perspective” that characterizes the French gardens, to the English gardens and bouquets of flowers which are organized only as the result of impulse, in order to reveal the difference between the common law, marked by pragmatism, to the civil law, dominated by systems and rules that reflect the French quest for order and harmony.³⁰

So important is culture that the analysis and understanding of the foreign law can only be performed appropriately using the ethnographic method and the immersion approach.³¹ And because, as German comparatist Bernhard Grossfeld points out, “there are no intercultural synonyms,”³² “there are no identical trains of thought in two languages,”³³ and “several languages are not as many designations of one thing, they are different views of the same,” comparative legal analysis requires bilingualism: only by mastering the foreign language can one understand the cognitive framework under which the designer of the signifier has proceeded, which is a condition precedent to piercing beyond the signifier and revealing the signified. Once the comparatist has understood, felt, and lived the foreign signified, she must transmit it to the people of the world where she comes from. Only then can differences be explained and understood, which is a prerequisite to fostering mutual understanding between people of different traditions. The comparatist must translate the culture itself: “‘the translation of culture may leave the sons of the desert riding on horses instead of camels, in the village instead of the oasis, with church towers instead of minarets.’ Comparative law . . . requires an exchange of images. We must allow the concepts of the

26. See BARTHES, *supra* note 8.

27. *Id.*

28. *Id.*

29. See Legrand, *supra* note 7, at 279 (translation by author).

30. *Id.* at 292 (translation by author).

31. See Legrand, *supra* note 7.

32. BERNHARD GROSSFELD, CORE QUESTIONS OF COMPARATIVE LAW (Vivian Grosswald Curran, trans., 2005) (1996) (originally titled Kernfragen der Rechtsvergleichung).

33. *Id.*

foreign law to become images and then describe them in our language.”³⁴ Here again appears the entanglement between the study of comparative law and the consumption of culture. Pierre Legrand suggests, for example, that one who would want to understand the French system of government, a paternalistic, top-down model³⁵ which stresses the role of the State as a protector of the people,³⁶ should spend time looking at the 1812 portrait of *The Emperor Napoleon in His Study at the Tuileries* by Jacques-Louis David.³⁷ Said portrait, herein reproduced, portrays Napoléon in his office, drafting the Civil Code only helped by the dim light of a candle. It is a fiction of course, since the Code was not itself drafted by Napoléon, though Napoléon was the driving force behind its principles.



Figure 1: Jacques-Louis David, THE EMPEROR NAPOLEON IN HIS STUDY AT THE TUILERIES, (oil on canvas, 1812)

34. *Id.*

35. Carlton Hayes speaks of “centrifugal forces,” something Eugene Weber remarks “assumes an existing ‘center.’” EUGENE WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE 1870-1914 96 (1976) (quoting CARLTON J.H. HAYES, FRANCE: A NATION OF PATRIOTS 3-5 (1930)).

36. For example, see article 5 of the Declaration of the Rights of Man and the Citizen, which declares that “[t]he Law has the right to forbid . . . those actions that are injurious to society.” DECLARATION UNIVERSELLE DES DROITS DE L’HOMME ET DU CITOYEN art. 5 (Fr. 1789). See generally Julien Mailland, Note, *Freedom of Speech, the Internet, and the Costs of Control: The French Example*, 33 N.Y.U. J. INT’L L. & POL. 1179 (2001).

37. Jacques-Louis David, THE EMPEROR NAPOLEON IN HIS STUDY AT THE TUILERIES, (oil on canvas, 1812).

For the curator of the U.S. National Gallery of Art,³⁸

David, in a letter to the patron of this portrait, Alexander Douglas, the tenth Duke of Hamilton, explained that his appearance was designed to show that Napoléon had spent the night in his study composing the Napoleonic Code, an impression enforced by details, such as the flickering candles that are almost extinguished, the quill pen and papers scattered on the desk, and the clock on the wall which points to 4:13 a.m. David strategically placed the sword on the chair to allude to Napoleon's military success, while the prominent display of the word 'Code' in his papers, suggests his administrative achievements. Other decorative details—the heraldic bees and the fleurs-de-lys—are symbols of French absolutism, and imply Napoleon's power as ruler.³⁹

“Here is a portrait,” Legrand noted, “which acts as a ‘cultural intermediary.’”⁴⁰ And he concluded that iconography is not just “finery,” it is also a “great purveyor of lessons.”⁴¹ In this case, it helps to contrast the civil law with the common law system, and helps to understand that French law is not framed from the ground up, as in the common law tradition, but from top down, as, symbolized, in the portrait, by the Emperor drafting the Code.

The foregoing methods are effective ways to inform Americans' understanding of French laws which Americans meet with disbelief: the criminal prohibition of presenting a substance as having the effects of narcotics,⁴² the criminal prohibition to broadcast in a language other than French,⁴³ criminal press offenses such as insulting the President of the Republic,⁴⁴ or the fact that the French pre-Web digital information network, the *Minitel*, while packet switched, was subject to censorship through a centralized network-design controlled by the State.⁴⁵ In all of the above cases appears the paternalistic hand of the state as materialized in Article 5 of the Declaration of the Rights of Man and the Citizen. The Declaration, which declares that “[t]he Law has the right to forbid . . . those actions that are injurious to society,” and revealed to the uninformed onlooker by an

38. Nat'l Gallery of Art, *The Emperor Napoleon in His Study at the Tuileries—Notes*, http://www.nga.gov/cgi-bin/tinfo_f?object=46114&detail=note (last visited Aug. 29, 2012).

39. Legrand, *supra* note 7, at 289.

40. *See supra* note [Legrand] at 289, translation by author.

41. *Id.*

42. CODE, DE LA SANTÉ PUBLIQUE art. L3421-4 (Fr.).

43. Loi n^o 94-665 du 4 août 1994, J.O. du 5 août 1995, p. 11392.

44. Loi du 29 juillet 1881 sur la liberté de la presse, J.O., du 30 juil. 1881, p. 4201, art 26.

45. *See generally* Mailland, *supra* note 36, at 1186-95.

analysis of the Emperor's portrait by Jacques-Louis David. In the same manner, these methods are apt at shedding light for non-Americans on why certain American legal principles such as the constitutional protection of hate speech, while being repugnant to most Europeans for historical reasons,⁴⁶ make sense in the American setting. There has, however, been very little published on that topic by way of thoughtful comparisons, and, along the lines of Legrand's lamentations, one must observe that mere descriptions of U.S. positive law do nothing to foster mutual understanding between the United States and other countries.⁴⁷ James Whitman, in the introduction to his comparative analysis of the culture of civility and respect in the United States, France,⁴⁸ and Germany,⁴⁹ made an equivalent observation, albeit from the standpoint of an American analyzing European hate-speech laws:

France in particular, we have been told, with its pattern of courtesy and respect, is a more 'mature' or more 'civilized' place than the United States. But it has to be said that these comparative observations have been made in a naïve way. Authors generally summarize the cold black letter of foreign 'hate speech laws' . . . they make no effort to explain how or why the regulation of civility appears in some societies and not in others. It is all well and good to remark that foreigners regulate hate speech. Before we cite foreign statutes in any discussion of American law, though, we really need to know more. We need to know how hate speech regulation, which seems so objectionable in the United States, came to seem acceptable elsewhere . . . In neither France nor Germany is it right to view hate-speech regulation in isolation from other patterns of behavior, for in both

46. While James Q. Whitman acknowledges Friedrich Kübler's argument that European hate speech legislation is "largely a product of the second half of the twentieth century," that is, an expression of the "high ideals of tolerance that have grown up since the Holocaust," he traces the origins of French hate speech legislation to the 18th century "revolutionary redistribution of honor" that was previously reserved to aristocracy. *Supra* note [Whitman] at 1395-1396, 1398, quoting Friedrich Kübler, *How Much Freedom for Racist Speech?*, 27 HOFSTRA L. REV. 335 at 336, 366 (1998) ("Specific laws against racist hate speech are largely a product of the second half of the twentieth century. In part, their origins are shaped by the specific national experience. This is particularly obvious in Germany, where its approach is primarily dictated by the trauma of the Holocaust.")

47. The same holds true of other aspects of American constitutional law. For example, the Monica Lewinski case was generally misunderstood by the French as being a reflection of perceived American puritanism, rather than as a manifestation of the rule of law. An insightful French-American comparative analysis of the Nixon and Clinton cases is provided by ELISABETH ZOLLER, *DE NIXON À CLINTON: MALENTENDUS JURIDIQUES TRANSATLANTIQUES* (1999).

48. *Id.*, citing Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 1, 9 n.4 (1998) (describing France, in contrast to the "regressed" United States, as a "postadolescent civilization.").

49. *See supra* note [Whitman] at 1395-96, 1398.

countries the regulation of hate speech is only one aspect of a more complex cultural pattern.⁵⁰

In the same manner, the explanation of the meaning of the free speech clause of the First Amendment to foreign audiences requires an exploration of the cultural patterns that support the constitutional protection of hate speech in the United States. It further requires, as Bernhard Grossfeld suggested,⁵¹ translating said culture through images that can be grasped by the foreign audience. But as Whitman mentioned, “[w]ithin our swelling civility literature there has not been much in the way of careful comparative law.”⁵² The second half of this article, therefore, aims at filling that gap by applying comparative methodology—and the consumption of culture as a focus—to the understanding by a non-American audience, particularly a Western European audience, of the American constitutional protection of hate speech, through a case study of the aforementioned scene from *The Blues Brothers*.

II. *THE BLUES BROTHERS* AND AMERICAN NAZIS

The 1980 musical comedy *The Blues Brothers*,⁵³ John Landis’ fourth film as a director and his first international blockbuster, features the adventures of Jake and Elwood Blues, two characters as talented at playing the blues as they are at running afoul of the law. The Blues Brothers are on a mission to raise \$5,000 to save the orphanage where they grew up, and they set out to fulfill that mission by putting back together their old eponym band and playing music. As they do so, they manage to find themselves chased by a number of groups, from abandoned ex-girlfriends to country-music-playing rednecks, to the entire police force of the State of Illinois at 47’39’’ into the movie, on their way to find the last two band members, Jake and Elwood run into a political rally being held on a park bridge by Nazis of the local American Socialist White People’s Party. Their venomous leader delivers a racist and violence-mongering speech which infuriates the onlookers.⁵⁴ The Nazis are protected from the angry crowd of hecklers by a line of police, which creates a traffic jam in which the Blues Brothers’ car gets stuck. As a policeman walks by their car, Jake engages him, and the following dialog takes place:

50. Whitman, *supra* note 6, at 1281-82 (emphasis omitted).
51. See GROSSFELD, *supra* note 32, at 32.
52. Whitman, *supra* note 6, at 1281.
53. See *BLUES BROTHERS*, *supra* note 1.
54. See *id.*

Jake: Hey what's going on?

Cop: Ah, those bums won their court case, so they're marching today.

Jake: What bums?

Cop: The fucking Nazi party.

Elwood: Illinois Nazis . . .

Jake: I hate Illinois Nazis.

At this point, Elwood slams the gas pedal, “the bluesmobile charges the ranks of the brownshirts and stampedes them off the bridge into the water, to the cheers of the crowd. As Jake and Elwood drive off, the soaked Nazi commander vows revenge.”⁵⁵

The scene is a direct reference to the famous *Skokie* case that took place in the same State of Illinois in 1978, two years prior to the release of the movie.⁵⁶ As has been summarized elsewhere,

1978 was a year of legal triumph for neo-Nazis in the city of Skokie, Illinois. The city had refused to issue a permit for a demonstration the National Socialist Party of America intended to conduct in a Jewish neighborhood, [heavily populated by holocaust survivors.] At the core of the city's rationale for refusing permission was the harm that such a demonstration would cause the Jewish community in general and to local Holocaust survivors in particular. The Supreme Court of Illinois held that the refusal was unconstitutional as it violated the First Amendment.⁵⁷ This was a remarkable case because it featured the most ignominious of speech and the severest of harm. By refusing to hear Skokie's petition,⁵⁸ the U.S. Supreme Court made it clear that the freedom of speech was a value so integral to the [U.S.] democratic way of life as to withstand virtually any form of legal balancing.⁵⁹

55. *Id.*

56. The script explicitly locates the scene in Skokie, Illinois. John Landis, *THE BLUES BROTHERS*—script 1979 6-Scene 31, (Apr. 25, 1979) (unpublished script containing rough outline of plot) (John Landis Papers, circa 1978-1998, 2-f.15, on file with the Margaret Herrick Library, Academy of Motion Picture Arts and Science).

57. Mailland, *supra* note 36, at 1183 n.5 (citing *Smith v. Collin*, 439 U.S. 916, 916 n.6 (1978) (Blackmun, J., dissenting) (mem.)).

58. “In Justice Blackmun's dissent to the Court's decision not to grant certiorari, he asserts that ‘the present case affords the Court an opportunity to consider whether . . . there is no limit whatsoever to the exercise of free speech.’” Mailland, *supra* note 36, at 1183 n.6 (quoting *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting) (mem.)).

59. Mailland, *supra* note 36, at 1183. For Carl Cohen, then an ACLU Director, “[t]he principle that ‘Congress shall make no law’ . . . is perennially tested by American Nazis. . . .

Up until 2000 when the highly publicized French *Yahoo!* case,⁶⁰ which featured neo-Nazi websites hosted on U.S. servers and accessed from France, made apparent to the world that hate speech is constitutionally protected in the United States, any statement to that effect used to be received by most Europeans with not just disgust, but disbelief. The cultural clash, however, was revealed in this case. The U.S. company was prosecuted in a French court for displaying Nazi items on its auction pages and for hosting several xenophobic pages on Geocities, Yahoo's free webpage hosting service, in contravention of anti-hate speech provisions of French law. Tim Koogle, *Yahoo!*'s CEO, was also personally prosecuted for being an accessory to the dissemination of Holocaust-denial materials, though he was later cleared of that charge by the French courts.⁶¹ Tension surrounding the distribution of Nazi speech over the Internet was also particularly palpable in Germany, where a similar case had recently taken place.⁶² To Western European audiences, and particularly French and German audiences, the fact that speech which would likely be considered in

By presenting the extreme case, these Nazis provide an instructive test of a very good principle." Carl Cohen, *Skokie—The Extreme Test*, THE NATION, Apr. 15, 1978, at 422, 428.

60. Mailland, *supra* note 36, at 1208 n.110 (citing Union des Etudiants Juifs de France [UEJF] & Ligue Contre le Racisme et L'Antisémitisme [LICRA] v. Yahoo!, Inc. & Yahoo! France, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, (Fr.)), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte>, available in English at <http://www.lapres.net/yahen.html>; Mailland, *supra* note 36, at 1208 n.110 (citing Union des Etudiants Juifs de France [UEJF] & Ligue Contre le Racisme et L'Antisémitisme [LICRA] v. Yahoo!, Inc. & Yahoo! France, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, (Fr.)), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>, available in English at <http://www.lapres.net/yahen11.html>.

61. See generally Mailland, *supra* note 36 (for a detailed account of the Yahoo! case).

62. As summarized by John McGuire, in 1995, American Internet service provider Compuserve blocked access to 200 chat groups for fear of prosecution under Bavaria's obscenity laws. Because Compuserve did not have the technology to ban the group only to its 220,000 customers in Germany, it had to ban the groups worldwide, suspending access to four million subscribers in 147 countries. The ban occurred after internet-surfing police in Munich executed a search warrant on Compuserve's Munich office . . . [w]hile the prosecutor denied pressuring Compuserve into compliance, Compuserve stated it had no choice but to shut down the sites . . . Munich prosecutors followed with charges that Compuserve general manager Felix Somm was an accessory to the dissemination of pornography and extremist propaganda, alleging that customers had access to forbidden images and Nazi symbols.

Mailland, *supra* note 36, at 1201 & n.84 (quoting John F. McGuire, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 769 (1999)); see also Brandon Mitchener, *Ex-Compuserve Official Convicted in German Court*, WALL ST. J., May 29, 1998, at B7 (describing background and trial of head of Compuserve Germany).

such jurisdictions as criminally reprehensible speech, and that would cause so much harm to innocent victims,⁶³ would be protected under what the French tend to refer to with disdain as “that sacrosanct freedom of speech,”⁶⁴ is baffling. France is one of the Western democracies where the positive, paternalistic role of the government is most salient. French sovereignty rests in the Nation,⁶⁵ whose will is expressed by Parliament. The Declaration of the Rights of Man and the Citizen declares that “[t]he Law has the right to forbid . . . those actions that are injurious to society.”⁶⁶ Further, “The Law protects the people against the arbitrary abuse of power. The relationship, therefore, is one of trust placed in Parliament by the people. It is a faith that Laws will protect the general populace against the abuses of liberties by some. With regard to hate speech, the positive role of the French government is manifested in the Law of July 29, 1881 on the Freedom of the Press (Law on the Press of 1881), which criminalizes the expression of racist ideas.⁶⁷ The prohibition of hate speech is a consequence of the belief that harm will result from such speech and that Parliament has a *duty to protect* the people against such harm.”⁶⁸ French positive law offers many more examples of content control through operation of criminal laws, as mentioned in Part I, *supra*. Such an approach to civil liberties, and, generally, to state-society relations, is the product of a long history of centralization, which the scope of this paper is too narrow to address.⁶⁹ Suffice it to say that centralization and a vertical, top-down mode of government have become pillars of the French State through a long period of history that encompasses the fall of the Western Roman Empire in 496, the barbaric chaos that ensued, and the establishment of the Capetian

63. The Illinois demonstration was planned in the city of Skokie, at the time heavily populated with Holocaust survivors. On the topic of harm as part of First Amendment Jurisprudence, see generally RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (New York Univ. Press 1997); see also, on Skokie specifically, the excellent docudrama by Herbert Wise: *SKOKIE* (Titus Productions 1981).

64. Julien Raynaud, *Sacro-sainte liberté d'expression*, *ANNUAIRE DE DROIT EUROPEEN* 775 (2008).

65. For Eugen Weber, “national unity is perceived as the expression of a general will.” WEBER, *supra* note 35, at 95.

66. Mailland, *supra* note 36, at 1184 & n.11 (quoting DECLARATION UNIVERSELLE DES DROITS DE L’HOMME ET DU CITOYEN [Universal Declaration of the Rights of Man and of the Citizen], art. 5 (Fr.)), available at <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>, available in English at <http://www1.umn.edu/humanrts/education/frdeclaration.html>.

67. Mailland, *supra* note 36, at 1184-85 & n.12 (citing Loi du 29 Juillet 1881 sur la Liberté de la Presse [Law of July 29, 1881 on the Freedom of the Press] art. 24 (Fr.)), available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=vig>, available in English at http://beta.genocidepreventionnow.org/Portals/0/docs/Laws_Banning_Holocaust%20Denial_blog.pdf.

68. Mailland, *supra* note 36, at 1185.

69. See generally Weber, *supra* note 35; see generally JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 1-342 (1998).

monarchy in 987, through the reigns of Louis XIV and Napoléon, to the Third Republic and the current Fifth Republic, centralization and a vertical, top-down mode of government have become pillars of the French State. “[I]t was centralization,’ said Alexandre Sanguinetti, ‘which permitted the making of France despite the French’”⁷⁰ Referring to the design of French roads, Yale historian James Scott suggested that they were designed to “facilitate central control.”⁷¹ The “centralizing aesthetic” of the plan “severed or weakened lateral cultural and economic ties by favoring hierarchical links.”⁷² State policy resembled such “a ‘hardwiring pattern’”⁷³ that centralization and top-down government planning and oversight of social relations have come in the modern era to be felt as a visceral need by the French people. This explains why individuals raised in the French cognitive frames have a very difficult time grasping why the constitutional protection of hate speech would make sense to Americans.

Making sense of the American way would require going deep into not only legal but also historical, religious, and economic considerations.⁷⁴ Such exploration eventually uncovers two fundamental pillars of First Amendment (free speech clause) jurisprudence, which make the American way, in that respect, unique. First, First Amendment jurisprudence rests on the concept of a “marketplace of ideas.” As its name indicates, this concept is a replica of traditional capitalist thought in the field of intellectual commodities. Just like the marketplace of traditional commodities is meant to find its equilibrium and self-regulate in efficient ways as long as it is free from governmental interference, under the concept of marketplace of ideas, the best ideas (intellectual commodities) will prevail and rise from the marketplace, as long as said marketplace is free from governmental interference; that is, as long as the government does not pick, on behalf of the citizenry, the good ideas from the bad.⁷⁵ If the government was to interfere, the market would be unnaturally distorted, and, as a result, would not be able to produce the best ideas. In the field of hate speech, this leads to the

70. WEBER, *supra* note 35, at 113 (footnote omitted).

71. See SCOTT, *supra* note 68, at 75.

72. *Id.* at 76.

73. *Id.* at 73.

74. See generally LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) (on the Skokie case in particular, and the constitutional protection of hate speech in general); see also DONALD A. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT* (1985); see also HATE SPEECH AND THE CONSTITUTION (Steven J. Heyman ed., 1996); see also ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979). But see generally DELGADO & STEFANCIC, *supra* note 62; Stanley Fish, *There’s No Such Things as Free Speech and It’s a Good Thing Too*, BOS. REV., Feb. 1992, reprinted in HATE SPEECH AND THE CONSTITUTION 180 (Steven J. Heyman ed., 1996).

75. See generally BOLLINGER, *supra* note 73; see also DOWNS, *supra* note 73; see also HATE SPEECH AND THE CONSTITUTION, *supra* note 73; see also NEIER, *supra* note 73; but see generally DELGADO & STEFANCIC, *supra* note 62; see also Fish, *supra* note 73.

belief that the best way to defeat hate speech is through allowing said speech to be expressed. Aryeh Neier, the former head of the American Civil Liberties Union when the ACLU represented Skokie's Nazis in court, and himself a Jew who escaped Germany in 1939, wrote,

I supported free speech for Nazis when they wanted to march in Skokie in order to defeat Nazis. Defending my enemy is the only way to protect a free society against the enemies of freedom . . . I could not bring myself to advocate freedom of speech in Skokie if I did not believe that the chances are best for preventing a repetition of the Holocaust in a society where every incursion on freedom is resisted.⁷⁶

Second, First Amendment jurisprudence relies on a related concept which permeates American state-society relations, that is, the feeling that government should generally not interfere with human activity. This pillar has its roots in particular in the fact that Puritan founders, including John Winthrop, the "brave leader of Christian tribes,"⁷⁷ were fleeing England in order to find religious freedom. As a result, as put by United States Supreme Court Justice Jackson,

[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.⁷⁸

Freedom, in the American model, is freedom *from* the government, rather than as in the French model, freedom *guaranteed, implemented, and monitored by* the government.⁷⁹ This notion that it is the people that must

76. NEIER, *supra* note 73, at 1-3.

77. JOHN WINTHROP, A MODELL OF CHRISTIAN CHARITY (1630) 33-48, *reprinted in* COLLECTIONS OF THE MASS. HISTORICAL SOC'Y (1838), *available at* <http://history.hanover.edu/texts/winthmod.html>.

78. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

79. James Whitman proposes a third explanation to the difference in approaches, in the field of hate speech, between France and Germany on one hand, and the US on the other:

This difference is one that I try to capture in a large sociological generalization: France and Germany, I argue, have witnessed, each in its own way, *leveling up*. In both societies, the cultural memory of an age of social hierarchy is strong, and the commitment to modern egalitarianism has been a commitment to the proposition that all persons should stand on the highest rung of the social hierarchy. Egalitarianism in France and Germany is an egalitarianism that proclaims *we are all aristocrats now*; and in practice this has been an egalitarianism of widely generalized norms of civil respect. American egalitarianism, by contrast, is, I suggest, an egalitarianism of *leveling down*, which proclaims, in effect, that *there are no more aristocrats-that we all stand together on the lowest rung of the social*

separate the true from the false, rather than the government, takes form in political science under the heading “popular sovereignty.” In France, sovereignty rests in the Nation, whose will is expressed by Parliament, which in turns leads to a vertical societal and governmental model where it is the State that decides which ideas are best and weeds out the “bad” ideas by criminalizing their expression. The State has gone as far as designating “official truths,”⁸⁰ such as the findings of the Nuremberg trials, and more generally the existence of the holocaust. The negation of these truths is a criminal offense with strict-liability provisions that do not provide for a truth defense.⁸¹ In other words, as a team of French and American authors has remarked, “the French government arrogates itself the power to declare ‘truth’ and to criminally punish those who disagree with governmentally declared truths.”⁸² By contrast, the U.S. model in this respect is best summarized by United States Supreme Court Justice Jackson: “[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”⁸³ Unlike in the French model, Americans are not concerned by potential abuses of free speech, by “risks” of freedom. Rather, as summed up by the late political scientist and First Amendment champion Alexander Meiklejohn, “in a society pledged to self-government, it is never true that, in the long run, the security of the nation is endangered by the people Freedom is always wise. That is the faith, the

ladder. One consequence is that this egalitarianism of the lowest rung has often proven to be an egalitarianism of lack of respect.

See Whitman, *supra* note 6, at 1285. And Whitman concluded that

[i]t is important to us, as political actors in everyday life, to refuse to show respect-to refuse to participate in what we perceive, more strongly than Europeans do, to be the hypocrisy of manners. In this sense we are the heirs of the great disrespecters of Antiquity, the Cynics, and some of the early Christians; and of the Quakers, too, who played such an important role in the formation of American social egalitarianism. And our free speech, to adopt a term from ancient cynic philosophy, tends to express itself as “parrhesia” -as speech that is not just about the sober expression of opinions, but also about the free and aggressive display of disrespect . . . Part of what the comparison with France and Germany can do is underline this association between the politics of egalitarianism and the reach of the regulation of civility.

See *id.* at 1397.

80. See Weaver, *supra* note 3, at 509.

81. *Id.* at 497.

82. *Id.* at 513.

83. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

experimental faith, by which we Americans have undertaken to live.”⁸⁴ In other words, to focus on hate speech, the security of the U.S. will not be endangered even if hate speech is allowed to be expressed, because the people are capable of determining for itself which ideas are good, and which are bad. It is the people, not the government, who will naturally reject the bad ideas as they emerge in the marketplace. To paraphrase Aryeh Neier, Americans must let the Nazis speak in order to defeat the Nazis.⁸⁵

Armed with such an understanding, the work of the non-American comparatist is only half done. As stated earlier, “comparative law . . . requires an exchange of images. We must allow the concepts of the foreign law to become images and then describe them in our language.”⁸⁶ I propose to use the aforementioned scene from the movie *The Blues Brothers* as the popular culture image through which to decrypt the meaning, and uncover the underlying cultural principles, of the First Amendment for a non-American audience. Such enterprise has been attempted once before, yet only in a footnote.⁸⁷ In this footnote to a 2002 paper published in the University of Miami International and Comparative Law Review, Joshua Spector remarks “that the only significant popular legacy of the Skokie Cases is found in mainstream cinema. To wit: in *THE BLUES BROTHERS* the two protagonists find their vehicle halted in order to allow a group of neo-Nazis to exercise their court-won right to march.”⁸⁸ Spector’s analysis of the scene is as follows: “[t]he protagonists may indeed interpret the march as ‘fighting words’ for they react by placing their vehicle in low gear and running the demonstrators off a bridge and into water, much to the delight of on-lookers and the duty-bound police.”⁸⁹ I disagree with this interpretation. In the United States, “fighting words” are not considered protected speech,⁹⁰ and suppression of and retaliation against such utterances lawfully come from the police, and subsequently the courts, not the people.⁹¹ The fact that the police are protecting the speakers in the scene indicates that the speech is not fighting words, but instead political speech.

84. *Testimony on the Meaning of the First Amendment: Hearing Before the Hennings S. Subcomm.*, 84th Cong. (1955) (statement of Alexander Meiklejohn), in ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 112 (3d ed. Greenwood Press 1979).

85. See NEIER, *supra* note 73.

86. See CURRAN, *COMPARATIVE LAW*, *supra* note 19, at 32.

87. Joshua Spector, Note, *Spreading angst or promoting free expression? Regulating hate speech on the Internet*, 10 U. MIAMI INT’L & COMP. L. REV. 155, n.42 (2002).

88. *Id.*

89. *Id.*

90. In the words of Supreme Court Justice Murphy, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or ‘fighting’ words.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, (1942) (emphasis added).

91. *Id.*

This speech must be protected by the police even if it leads to a crowd of hecklers breaching the peace, like in the *Terminiello v. Chicago*, decided by the Supreme Court in 1949.⁹² In this case,

[a] passionate message of racial hatred was delivered—also in Chicago, in 1949, by a Catholic priest under suspension—to a sizable audience in a large hall. Outside, a cordon of police struggled to control the infuriated counter-demonstrators, while Father Terminiello completed his speech. He was later convicted for creating a breach of the peace—a breach created not by him or his followers but by persons outside the lecture hall so maddened by his bigotry as to throw bottles and bricks at the windows as he spoke.⁹³

The Supreme Court ruled that the trial court erred in instructing the jury that “breach of the peace” included speech that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.” In fact, Justice Douglas stated in *Terminiello*’s famous majority opinion,

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. This is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.⁹⁴

I therefore propose the following interpretation of the scene. The Blues Brothers represent the American people. The bridge upon which the Nazis are standing represents the marketplace of ideas. The police are bound to let the ideas be expressed, as an application of the principles of the marketplace of ideas and of popular sovereignty. The cop might well hate the fucking Nazi [bums],⁹⁵ but because “the forefathers did not trust any government to separate the true from the false for us,”⁹⁶ he is precluded from suppressing the idea and instead must protect the speaker from the hecklers. Instead, it is the people who suppress the bad ideas in the marketplace. Because the Nazis are allowed to speak, they are in a position to get their ideas confronted by other ideas in the marketplace, something that would not be

92. *Terminiello v. Chicago*, 337 U.S. 1, 4-6 (1949). For Carl Cohen, “the application of the ‘fighting words’ doctrine would have to be so narrowly restricted to special circumstances as to have no bearing on a proposed demonstration by Nazis.” *See* Cohen, *supra* note 58, at 131.

93. *See* Cohen, *supra* note 58, at 129.

94. *See* *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

95. *See* Landis, Long Synopsis, *supra* note 1.

96. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

possible were the Nazis forced to meet and propagate their ideas in the shadows, as is the case in most of Europe. In this scene, the Blues Brothers running over the Nazis and forcing them off the bridge represents the operation of the marketplace of ideas and the will of the sovereign people. The Nazis are defeated, not by the government, but by the people.

CONCLUSION

The Blues Brothers' scene is apt at clarifying intricacies of the free speech clause of the First Amendment to the United States Constitution for a foreign audience. It is also apt at supporting comparisons between various models of relationship between a people and its government. In this case, between a state-society relations model that relies on popular sovereignty—in turn expressed in the constitutional protection of hate speech—on the one hand, and more vertical models in countries such as France—where hate speech is prohibited because the people leave it to the state to separate the right from the wrong on their behalf, and generally rely on the state for protection. I therefore propose that this scene be used in teaching the free speech clause of the American First Amendment to non-American audiences, particularly Western European ones, and more generally in discussing the American system of government and state-society relations with non-Americans. From a methodological standpoint, this case study also exemplifies the value of consuming culture in the process of understanding manifestations of complex foreign cultural and cognitive systems, and helps foster mutual understanding between peoples.