Positive Obligations, Hate Speech, and the Reconfiguration of Free Expression at the European Court of Human Rights

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This paper examines how the European Court of Human Rights' (ECtHR or Court) hate speech jurisprudence has been structurally reoriented by the Court's response to an increasing number of applications brought by victims of hate speech. Whereas earlier case law predominantly assessed hate speech under Article 10 of the European Convention on Human Rights, focusing on the permissibility of restrictions on expression, recent victim-initiated claims have directed the ECtHR's analysis towards Articles 8 and 14 and thus towards the question of State responsibility for protection against harm caused by third-party speech.

Through a reading of the ECtHR's case law, this paper shows how the Court's response to this applicant-driven expansion has recalibrated the balance between dignity, equality, and freedom of expression. The paper argues that the resulting framework risks limiting the doctrinal safeguards traditionally associated with Article 10 analysis. In addition, there has been an increasingly expansive understanding of who qualifies as a "victim" of hate speech, extending this qualification beyond direct targets who are in protected groups to include individuals who are merely associated with such groups. The paper argues that the Court's expanding expectation of positive obligations owed by States to their citizens in relation to the exercise of their rights may incentivize over-intervention by domestic authorities and chill legitimate public debate.

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Introduction

The European Court of Human Rights (ECtHR or Court) is the regional court for the Council of Europe, comprised of 46 States, including all the European Union States as well as others such as Turkey, Moldova, Ukraine, Azerbaijan, and Armenia. In March 2022, after 26 years of membership, Russia was suspended from the Council of Europe as a consequence of the country's invasion of Ukraine.[1] It ceased

[1] *The Russian Federation Is Excluded from the Council of Europe*, COUNCIL OF EUR. (Mar. 16, 2022), https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe.

to be a Contracting Party to the European Convention on Human Rights (ECHR or Convention) on September 16, 2022.[2]

The regulation of hate speech within the jurisprudence of the ECtHR has long occupied a contested space, situated at the intersection of freedom of expression, equality and human dignity.[3] While much of the Court's case law has traditionally focused on the permissibility of restricting speakers under Article 10 of the ECHR, which concerns the right to freedom of expression, recent developments reveal a significant yet under-theorized jurisprudential shift that partly emanates from the increased number of applicants whom the Court has found to be the victims of hate speech. These developments pertain to applications brought under Article 8 of the ECHR (the right to private and family life) in conjunction with Article 14 (the prohibition of discrimination). This uptick in hate speech allegations has created a space for the ECtHR to expand State obligations *vis-à-vis* the protection of individuals and groups from hate speech. The way in which the Court has chosen to assess this question has led to serious implications for the freedom of expression in Europe, including a recalibration of the balance between Articles 8 and 14, on one hand, and Article 10, on the other.

While the Court has long acknowledged that Convention rights may be violated by the actions of private actors, responsibility under the Convention remains mediated through the States.[4] The doctrine of positive obligations reflects this structure: States may be found in violation of the ECHR if they fail to secure the effective enjoyment of rights, including by not providing an adequate legal framework for or judicial response to private conduct. The Convention thus does not constitutionalize private relationships directly but, rather, imposes duties of protection on States.

Unlike the Court of Justice of the European Union (CJEU), the ECtHR does not operate as a constitutional court of general jurisdiction, nor does it adjudicate

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[2] *Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights*, EUR. CT. HUM. RTS. (Mar. 22, 2022), https://perma.cc/W44T-L62N.

[3] Leandro Silva et al., *Analyzing the Targets of Hate in Online Social Media*, 10 PROC. INT'L AAAI CONF. WEB & SOC. MEDIA 687, 688 (2016).

[4] *See, e.g.*, X & Y v. Netherlands, App. No. 8978/80, 91 Eur. Ct. H.R. (ser. A) (Mar. 26, 1985).

disputes between private parties. Rather, it functions as a supervisory court exercising subsidiary review over State compliance with the Convention.[5] Its jurisdiction is limited to determining whether a Contracting State has fulfilled its Convention obligations, and it lacks the authority to impose Convention duties directly on non-State actors.[6] Nevertheless, the Court's expanding interjection of positive obligations in hate speech cases means that States are increasingly required to intervene against private expression in order to avoid Convention liability.

In the context of hate speech, the expansion of positive obligations enhances the burdens on States to police speech. Moreover, the applicants' use of Articles 8 and14 in cases brought by victims of hate speech has enabled the Court to sidestep some of the doctrinal safeguards that typically accompany analyses of freedom of expression. In determining whether there has been an interference with Article 10 of the ECHR (right to freedom of expression), the Court assesses the interference's legality, legitimacy and necessity.[7]

Interferences with freedom of expression must be subject to strict judicial scrutiny, ensuring that any restriction is prescribed by law, pursues a legitimate aim and is necessary in a democratic society, a test requiring the demonstration of a pressing social need, the provision of relevant and sufficient reasons, and a proportionate response to the legitimate aim pursued. [8] In conducting this assessment, the Court has placed particular emphasis on contextual factors, including the nature of the expression, the identity of the speaker, the forum in which the speech occurred, the intended audience, and the likelihood and severity of any harm resulting from the expression. Against this jurisprudential background, the framework examined in this paper risks displacing these established safeguards by prioritizing broader regulatory objectives and systemic risk assessments over the contextual and proportionality-based analysis that has traditionally characterized Article 10 adjudication.

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[5] Dean Spielmann, *Whither the Margin of Appreciation ?*, 67 CURRENT LEGAL PROBS. 49 (2014).

[6] ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3–6 (1st ed. 2004).

[7] Sunday Times v. United Kingdom (No. 1), App. No. 6538/74, 30 Eur. Ct. H.R. (ser. A) (Apr. 26, 1979).

[8] *Id.* ¶¶ 65–67.

Such a shift may reduce the level of judicial scrutiny applied to restrictions on expression and weaken the procedural and substantive guarantees that have long formed the cornerstone of the Court's freedom of expression jurisprudence.

While positive obligations are formally framed as State duties of ensuring effective protection of rights rather than as mandates to censor speech, their practical effect is an indirect speech restriction. Domestic courts are increasingly expected not only to provide remedies in abstract, but also to assess the cumulative impact of expression such as hate speech, failing which a Convention violation may be found. This higher expectation being levied by the Court places national authorities in a precarious position, particularly in the absence of a clear or uniform definition of hate speech under the ECHR.

Despite the significance of the jurisprudential developments assessed in this paper, existing scholarship has largely focused on the Court's treatment of cases brought by speakers alleging Article 10 violations to their freedom of expression. These cases have considered whether Article 10 permits speech restrictions. Far less attention has been paid to the structural consequences of the Court's expanding positive obligations framework, particularly in hate speech cases where the boundaries between protection, prevention, and suppression are inherently blurred. This lacuna in the scholarship is especially problematic given the broader regulatory environment in which the ECtHR now operates, one marked by the proliferation of laws restricting hate speech, heightened intermediary liability, and increasing pressure on States to combat discriminatory expression both online and offline.

This paper offers an analysis of the ECtHR's evolving approach to positive obligations in hate speech cases. It argues that, while the Court's victim-centered approach to hate speech is motivated by legitimate concerns of personal dignity and equality, it risks undermining diluting freedom of expression protections in the absence of clearly articulated thresholds and limiting principles for its imposition of positive obligations. By mapping the doctrinal foundations of this framework, the paper aims to help construct a more principled understanding of the role positive obligations should play in this contested field.

I. POSITIVE OBLIGATIONS, HATE SPEECH, AND ARTICLES 8 AND 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECtHR has long accepted that the protection of Convention rights may require States not only to refrain from interference, but also to take positive measures aimed at securing effective enjoyment of those rights.[9] The corresponding doctrine of positive obligations, first articulated in the Court's early jurisprudence, has gradually expanded in both scope and intensity. While initially developed in cases concerning physical integrity,[10] environmental harm,[11] and protection from violence by private actors,[12] positive obligations have increasingly been used by the Court to structure its approach to hate speech. In this context, Articles 8 and 14 of the ECHR have emerged as the principal doctrinal vehicles through which State responsibility is articulated by the Court.

Article 8 of the European Convention on Human Rights provides the following:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
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> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court interprets Article 8 as a broad and evolving guarantee. The Court has repeatedly emphasized that private life is a wide concept that cannot be exhaustively defined, encompassing not only intimacy and autonomy but also physical and psychological integrity, personal development, and aspects of social identity.[13] From an early stage of the Court's existence, it has recognized that private life includes the right to establish and develop relationships with others as well as the manner in which individuals perceive themselves and are perceived by society.[14]

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[9] Marckx v. Belgium, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A) (June 13, 1979).

[10] *See, e.g.*, X & Y, App. No. 8978/80, 91 Eur. Ct. H.R. (ser. A); Costello-Roberts v. United Kingdom, App. No. 13134/87, 247-C Eur. Ct. H.R. (ser. A) (Mar. 25, 1993).

[11] López Ostra v. Spain, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) (Dec. 9, 1994); Öneryıldız v. Turkey, App. No. 48939/99, 2004-XII Eur. Ct. H.R. (Nov. 30, 2004); Fadeyeva v. Russia, App. No. 55723/00, 2005-IV Eur. Ct. H.R. (June 9, 2005).

[12] Osman v. United Kingdom, App. No. 23452/94, 1998-VIII Eur. Ct. H.R. (Oct. 28, 1998); Opuz v. Turkey, App. No. 33401/02, 2009 Eur. Ct. H.R. (June 9, 2009).

[13] Pretty v. United Kingdom, App. No. 2346/02, 2002-III Eur. Ct. H.R. ¶ 61 (Apr. 29, 2002); Denisov v. Ukraine, App. No. 76639/11, ¶ 95 (Eur. Ct. H.R. Sept. 25, 2018), https://hudoc.echr.coe.int/?i=001-186216.

[14] Niemietz v. Germany, App. No. 13710/88, 251-B Eur. Ct. H.R. (ser. A) ¶ 29 (Dec. 16, 1992).

Elements central to personal autonomy and self-definition, including sexual orientation and sexual life, fall within the personal sphere protected by Article 8, as is the case with a person's reputation, honor, and dignity, reflecting the close connection between identity and social recognition.[15] For example, *X & Y v. Netherlands* (1985) involved the sexual assault of a sixteen-year-old mentally incapacitated girl in a private care facility. Her father went to the police station to file a complaint and the police officer on duty at the station who received the father's statement said that, since the father considered his daughter unable to sign the complaint due to her mental condition, he could sign the statement himself. However, the domestic framework did not allow her father to file a complaint on her behalf for that specific class of offense. As a result, criminal prosecution of the case was not able to be initiated. The daughter and father brought a case before the ECtHR on the grounds of a violation of Article 8. The Court ruled that the concept of "private life" extends to physical and psychological integrity, thereby imposing a positive obligation on Contracting States to maintain functional, protective criminal frameworks capable of deterring severe personal trauma from being inflicted by private actors. [16]

In the landmark judgment of *Fedotova v. Russia* (2023), the ECtHR crystallized the States' duty to provide legal recognition and protection for same-sex couples. In this case, three same-sex couples had applied to marry at three different domestic registry offices spread geographically across Russia, which each summarily rejected the application it received on the grounds that national family law strictly defined marriage as a union between a man and a woman. The applicants argued that the complete absence of any alternative legal framework, such as civil partnerships or unions, left them in a legal vacuum, denying them fundamental rights related to inheritance, housing, and next-of-kin status.

The Court ruled that under the "private and family life" aspect of Article 8, member States of the Council of Europe have a positive obligation to provide persons with a legal framework allowing same-sex couples to have their relationships

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[15] Fedotova v. Russia, App. No. 40792/10, ¶ 142 (Eur. Ct. H.R. Jan. 17, 2023), https://hudoc.echr.coe.int/?i=001-222750; Medžlis Islamske Zajednice Brčko v. Bosnia & Herzegovina, App. No. 17224/11, ¶ 76 (Eur. Ct. H.R. June 27, 2017), https://hudoc.echr.coe.int/?i=001-175180; Kaboğlu v. Turkey, App. No. 1759/08, ¶ 65 (Eur. Ct. H.R. Oct. 30, 2018), https://hudoc.echr.coe.int/?i=001-187565; Beizaras v. Lithuania, App. No. 41288/15, ¶ 117 (Eur. Ct. H.R. Jan. 14, 2020), https://hudoc.echr.coe.int/?i=001-200344.

[16] *X & Y*, 91 Eur. Ct. H.R. (ser. A).

formally recognized and protected. Much like the Article 8 baseline established in *X & Y*, the ECtHR's finding in *Fedotova* underscores how Article 8 positive obligations were historically engineered by the Court to compel States into remedying severe structural deficits in their domestic legal systems that directly undermined an individual's personal dignity, institutional security, and relational stability. Contrasting this with contemporary developments, the core critique of this paper remains that a doctrinal tool originally created to ensure security for the private life of persons living within the Council of Europe region has been decoupled from structural civil frameworks and reconfigured into a mandate for the speech-restrictive State policing of public discourse.

At the same time, the Court has stressed that not every interference in an individual's enjoyment of their rights will suffice to engage Article 8. In certain areas of private life, including reputation, for an alleged violation to warrant Article 8 intervention, the offense must have "attain[ed] a certain level of seriousness" and have been carried out in a manner that caused tangible damage to the individual's "enjoyment of the right to respect for . . . private life."[17] This threshold requirement should theoretically play a critical role, where the protection of private life must be carefully balanced against competing Convention interests such as the right to freedom of expression.

Further, Article 8 is not confined to protecting solely against direct State interference. The Court has consistently held that effective respect for private life may require States to adopt positive measures designed to protect individuals from serious interference by private actors.[18] Unlike cases initiated by those accused of uttering hate speech, where the ECtHR examines whether the State has legitimately restricted the impugned speech, applications lodged by victims of hate speech require the Court to evaluate whether national authorities have put in place effective administrative and/or legislative and/or judicial frameworks capable of safeguarding individuals from the horizontal harm inflicted by hurtful expression originating from private actors (individual-individual). Although the Convention is formally addressed to States, the Court has long rejected a purely vertical (State – individual) conception of Convention obligations.

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[17] *Beizaras*, App. No. 41288/15, ¶ 109.

[18] *X & Y*, 91 Eur. Ct. H.R. (ser. A) ¶ 23.

In *X & Y v. Netherlands*, as discussed above, the Court held that effective protection of private life may require States to adopt measures regulating relationships between private individuals.[19] In the sphere of hate speech, the implementation of Articles 8 and 14, outlined below, requires States to ensure that individuals are protected from any serious harm that could be caused by expression emanating from private actors. This obligation extends beyond the mere provision by States of legal remedies to such harm. As will be demonstrated below, national authorities are therefore required to engage substantively with claims alleging discriminatory expression, to recognize hateful motives where present, and to conduct a genuine balancing exercise between personal dignity and freedom of expression.

In hate speech cases, the assessment under Article 8 of whether a State's positive obligations have been satisfied is done in conjunction with Article 14 of the ECHR, which provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Discrimination arises where persons in analogous or relevantly similar situations are treated differently without an objective and reasonable justification, or where a failure to treat persons differently results in substantive inequality.[20] Article 14 is not applied as a standalone provision but is applicable only in conjunction with another Convention right. Nevertheless, the Court has consistently emphasized that Article 14 plays a fundamental role in ensuring that Convention rights are enjoyed and individuals are protected against unjustified differential treatment.[21]

The Court has repeatedly held that particularly weighty reasons are required to justify any differences in treatment that are based on grounds such as race, ethnic origin, religion, or sexual orientation.[22] When States fail to respond adequately to expression targeting individuals or groups on such grounds, this failure may

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[19] *Id.*

[20] Willis v. United Kingdom, App. No. 36042/97, 2002-IV Eur. Ct. H.R. ¶ 48 (June 11, 2002).

[21] Belgian Linguistic Case, App. Nos. 1474/62 et al., 6 Eur. Ct. H.R. (ser. A) ¶ 9 (July 23, 1968).

[22] Smith v. United Kingdom, App. Nos. 33985/96 & 33986/96, 1999-VI Eur. Ct. H.R. ¶ 90 (Sept. 27, 1999).

amount not only to an interference with the victims' private life, but also to a discriminatory denial of protection of private life.[23] The combined application of Articles 8 and 14, thus, enhances the scrutiny applied to State inaction.

The combined application of Articles 8 and 14 has facilitated a dignity-centered model of protection in hate speech cases. Although dignity is not explicitly mentioned in the Convention (aside from in Protocol 13, which concerns the abolition of the death penalty), it has emerged as a central value underpinning the Court's interpretation of private life and non-discrimination.[24] In cases involving different types of hate speech, the Court has emphasized the vulnerability of targeted groups and the historical context of exclusion and marginalization.[25] At the same time, the Court has struggled to articulate clear thresholds for engaging Article 8 in this context. While it has repeatedly been stated that not every offensive or shocking statement will interfere with private life, the criteria for assessing severity remain underdeveloped and context-dependent.[26] This lack of conceptual clarity is further complicated by the accessory nature of Article 14, which strengthens protection once engaged but does not independently define the scope of prohibited harm.

II. From State Restraint to Structural Protection: The Construction of Positive Obligations in Hate Speech Jurisprudence

Since the time of the now defunct European Commission on Human Rights which operated from 1954 to 1998, the dominant analytical framework for the ECtHR's assessment of hate speech cases was Article 10, with the Court asking whether restrictions on expression could be justified as necessary in a democratic society. Harm suffered by the targets of hateful expression was acknowledged but rarely treated as an autonomous trigger of State responsibility. This changed with the increase in incoming applications to ECtHR by victims of hate speech. The gradual emergence of positive obligations in ECtHR hate speech cases can, therefore, be seen as a structural reorientation of Convention analysis inspired by the

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[23] Behar v. Bulgaria, App. No. 29335/13, ¶¶ 91–94 (Eur. Ct. H.R. Feb. 16, 2021), https://hudoc.echr.coe.int/?i=001-207929.

[24] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).

[25] Beizaras v. Lithuania, App. No. 41288/15, ¶¶ 120–25 (Eur. Ct. H.R. Jan. 14, 2020), https://hudoc.echr.coe.int/?i=001-200344.

[26] Denisov v. Ukraine, App. No. 76639/11, ¶ 95 (Eur. Ct. H.R. Sept. 25, 2018), https://hudoc.echr.coe.int/?i=001-186216.

type of applicants and their point of departure, that being their status as victims of hate speech. This reorientation began hesitantly, gained momentum, and has culminated in a jurisprudence where State inaction is itself capable of incurring a Convention violation. That trajectory is best understood by examining the ECtHR's treatment of six key moments: *Aksu v. Turkey* (2012), *Beizaras v. Lithuania* (2020), *Behar v. Bulgaria* (2021), *Budinova v. Bulgaria* (2021), *Minasyan v. Armenia* (2025), and *Ilareva v. Bulgaria* (2025).

A. Positive Obligations in Article 10 Jurisprudence: Protection, Restriction, and Ambivalence

Before turning to a systematic analysis of the Court's hate speech jurisprudence in the framework of Articles 8 and 14, it is worth noting that the doctrine of positive obligations has also appeared, albeit infrequently, in cases brought by speakers under Article 10. These points of reference help illuminate how the Court currently conceptualizes the relationship between freedom of expression, the protection of the rights of others, and a State's regulatory role in cases involving hate speech. The discussion below does not seek to provide a full doctrinal analysis of each case, but rather to identify how and why positive obligations surface in this strand of the Court's jurisprudence.

The earliest example is *Glimmerveen v. Netherlands* (1979), decided by the now-obsolete European Commission of Human Rights (EComHR). The applicants, who were the president and vice-president of the far-right Dutch People's Union, challenged their criminal conviction of possessing racist leaflets intended for distribution and asked the Court to overturn the national judiciary's decision to bar them from standing as candidates in elections. The leaflets advocated the removal of foreign workers, including Surinamers and Turks, from the Netherlands. The EComHR held that the applicants' activities fell within the scope of ECHR Article 17's prohibition on abuse of rights and were, therefore, excluded from protection under Article 10. In reaching this conclusion, the EComHR reasoned that allowing the unrestricted dissemination of such ideas would amount to encouraging racial discrimination, which is prohibited under Article 14 of the Convention and international human rights law more broadly. Although the Commission did not explicitly frame its reasoning in terms of positive obligations, the logic underpinning the decision implies that States are required to prevent the promotion and normalization of discriminatory ideologies.[27]

This early case thus foreshadowed later ones in which the Court held that restrictions on expression can be justifiable when enacted in the interest of protecting the rights of others in so far as restrictions are necessary in a democratic society, prescribed by law and are legitimate. A different use of positive obligations emerged several decades later in *Dink v. Turkey* (2010), a case in which the Court found the State had violated Article 10. The applicant was a journalist and editor-in-chief of a bilingual Turkish-Armenian newspaper. He was prosecuted and convicted for denigrating "Turkishness" in a series of articles addressing Armenian identity, collective trauma, and relations between Armenians and Turkish society. The conviction was upheld by domestic courts, and Dink was then murdered following a sustained campaign of hostility against him. In unanimously finding a violation of Article 10, the Court stressed that States have positive obligations to protect freedom of expression and noted that the right to freedom of expression presupposes that States create:

> [A]n enabling environment by allowing for everyone to take part in public debate and express their thoughts and opinions free from fear even if such thoughts and opinions are contrary to those held by official authorities or a significant segment of the public and even if such opinions shock or disturb the public.[28]

Unlike the other cases discussed in this section, *Dink* thus illustrates how positive obligations can operate not only as a justification for restricting speech, but also as a requirement on States to safeguard speakers actively, particularly those expressing minority or dissenting views in hostile social and political contexts.

The Court's use of positive obligations to justify restrictions on expression resurfaced almost a decade later in *E.S. v. Austria* (2019). The applicant, a public speaker, was prosecuted for inciting hatred. She was finally convicted of disparaging religious doctrines and fined. In finding no violation of Article 10, the ECtHR reiterated the importance of freedom of expression, including speech that shocks, offends, or disturbs, but it emphasized that, in the context of religious beliefs, States

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[27] Glimmerveen v. Netherlands, App. Nos. 8348/78 & 8406/78, 18 Eur. Comm'n H.R. Dec. & Rep. 187 (1979).

[28] Dink v. Turkey, App. Nos. 2668/07 et al., ¶ 137 (Eur. Ct. H.R. Sept. 14, 2010), https://hudoc.echr.coe.int/?i=001-100384.

have a duty to ensure the peaceful enjoyment of the rights guaranteed under Article 9 (the right to freedom of thought, conscience, and religion). The Court highlighted the absence of a uniform European approach to protecting religious feelings and accordingly afforded States a wide margin of appreciation. This margin was closely linked with a positive obligation for the State to ensure peaceful coexistence and mutual tolerance between religious groups.[29]

Most recently, in *Atamanchuk v. Russia* (2020), the applicant—an entrepreneur, politician, journalist, and founder of a newspaper—was convicted for publishing an article explaining his decision not to vote in elections. The article contained strongly worded and overtly discriminatory statements directed at non-Russians, portraying them as a destructive and threatening presence within Russian society. The applicant was convicted of inciting hatred and enmity and of debasing human dignity; as a result, he was fined and prohibited from engaging in journalistic or publishing activities for two years. When assessing the proportionality of this sanction, the ECtHR referred explicitly to the State's positive obligation to protect the rights of individuals, making direct reference to Article 8.[30]

As such, while positive obligations are far more systematically developed in Article 8 jurisprudence, they also play a role, albeit a limited and inconsistent one, in Article 10 cases brought by speakers. Most often, the Court's approach to positive obligations is relied upon to justify restrictions on expression, particularly where speech is discriminatory, racist, or perceived as undermining the rights of others. *Dink* stands as a rare but important exception, illustrating that the same doctrinal framework can also be used to require that States protect freedom of expression by ensuring a safe and enabling environment for public debate.

Whether *Dink* and *Atamanchuk* can be reconciled remains a point of deep doctrinal friction. On one hand, a structural reconciliation would necessarily view States as dynamic regulators of pluralism, meaning they must protect vulnerable speakers from majoritarian violence (*Dink*) while simultaneously restricting speakers who spread exclusionary vitriol. On the other hand, these outcomes are arguably in fundamental conflict, exposing a tension in the Court's reasoning that leads

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[29] E.S. v. Austria, App. No. 38450/12, ¶ 47 (Eur. Ct. H.R. Oct. 25, 2018), https://hudoc.echr.coe.int/?i=001-187188.

[30] Atamanchuk v. Russia, App. No. 4493/11, ¶ 70 (Eur. Ct. H.R. Feb. 11, 2020), https://hudoc.echr.coe.int/?i=001-200839.

to unpredictable rulings. By swinging between robust speaker protection and State-sanctioned censorship under the exact same doctrinal banner, the Court fails to provide a cohesive internal logic.

The Court's response to *Dink* in particular remains inseparable from the exceptional gravity of that case, given that the journalist was ultimately murdered following a sustained campaign of hostility. When held against its Article 8 focus in other cases, the Court's holding in *Dink* appears to suggest that the Court only prioritizes the protective dimension of positive obligations under Article 10 in the most extreme circumstances, leaving the doctrine fractured and case-dependent.

B. Article 17, Abuse of Rights, and the Exclusion of Article 10

The cases discussed above demonstrate that, even within its Article 10 jurisprudence, the Court has deployed positive obligations in divergent and at times contradictory ways. Yet, in a significant subset of hate speech cases, the Court does not engage in this balancing exercise at all. Instead, when seeking to exclude certain forms of expression from the scope of Article 10 altogether, it often relies on the doctrine under Article 17 that prohibits abuse of rights. Understanding this doctrinal move is essential to assessing both the limits of freedom of expression in ECtHR hate speech cases and the broader implications of the Court's expanding positive-obligations framework.

Article 17 provides that:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

It operates as a doctrine of categorical exclusion, enabling the ECtHR to deny coverage under Convention rights where it deems the expression or conduct at issue to be fundamentally incompatible with the Convention's underlying values. In the field of freedom of expression, Article 17 has been applied most consistently in cases concerning Holocaust denial and historical revisionism, which the Court has treated as paradigmatic abuses of rights.[31] The Court has underlined that there exists a "category of clearly established historical facts—such as the Holocaust—

[31] *See, e.g.*, Witzsch v. Germany, App. No. 7485/03 (Eur. Ct. H.R. Dec. 13, 2005), https://hudoc.echr.coe.int/eng?i=001-72786; Garaudy v. France, App. No. 65831/01 (Eur. Ct. H.R. June 24, 2003),

whose negation or revision would be removed from the protection of Article 10 by Article 17."[32] When Article 17 is triggered, freedom of expression is rendered legally irrelevant at the threshold stage, with no analysis conducted of the restriction's necessity or proportionality under Article 10(2). Article 17 thus functions as a gatekeeping mechanism designed to prevent applicants from invoking Convention rights in ways perceived by the Court as undermining the Convention's (undefined and ever-broadening) foundational values.[33]

The application of Article 17 to Holocaust denial is often justified by reference to Europe's historical experience with totalitarianism and the fact that the Council of Europe's foundations were constructed in the aftermath of the Second World War. However, this anchoring is not without its challenges, not only from the position of viewpoint restrictions but also when compared to other historical tragedies. Drawing a comparison with *Perinçek v. Switzerland* (2015) is instructive here, as it exposes the hierarchies embedded in the Court's use of Article 17.[34] In *Perinçek*, the Court declined to apply Article 17 to a denial of the Armenian genocide, citing, among other things, the absence of a European consensus on whether or not that conflict is classified as a genocide. This differentializing treatment of the Armenian genocide versus the Holocaust reveals a Court-constructed hierarchy of historical traumas, whereby certain atrocities are allowed to be discussed only in certain ways while speech about other tragedies remains subject to contextual balancing under Article 10(2). Such an approach is normatively problematic, as it renders the scope of free speech protection dependent less on the nature or effects of the expression itself than on the symbolic and historical weight attributed by the Court to particular events. A fuller examination of these historical hierarchies and their implications for freedom of expression would merit separate and sustained analysis but lies beyond the scope of the present paper.

Beyond Holocaust denial, the Court has extended the application of Article 17 to other forms of hate speech, generating further doctrinal and normative concerns.

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https://hudoc.echr.coe.int/eng?i=002-4830; M'Bala M'Bala v. France, App. No. 25239/13 (Eur. Ct. H.R. Oct. 20, 2015), https://hudoc.echr.coe.int/eng?i=001-160358.

[32] *See, e.g.*, Lehideux v. France, App. No. 24662/94, 1998-VII Eur. Ct. H.R. (Sept. 23, 1998); *Garaudy*, App. No. 65831/01.

[33] Natalie Alkiviadou, *Article 17: Free Speech and the Guillotine—The Countdown to* Lenis v Greece, 37 INT'L J. FOR SEMIOTICS L. 2257 (2024).

[34] Perinçek v. Switzerland, App. No. 27510/08, 2015 Eur. Ct. H.R. (Oct. 15, 2015).

In *Norwood v. United Kingdom* (2004), the Court relied on Article 17 to exclude Islamophobic speech from protected expression, noting that

> a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.[35]

The exclusion of Islamophobic speech from protected expression generates further doctrinal and normative concerns, which may feel to the reader like the author is in favor of Islamophobic speech in particular.

More recently, in *Lenis v. Greece* (2023), the Court applied Article 17 to homophobic hate speech for the first time, thereby extending the scope of that Article's abuse clause even further. The applicant's statements, described homosexual people as "not humans" and "the scum of society" and urged readers to "spit on them," were found to be "capable of stirring up violence against them." Invoking Article 17, the Court reiterated that the function of that Article is "to make it impossible for [groups and individuals] to derive from the Convention a right to engage in any activity . . . aimed at destroying any of the rights and freedoms set forth in the Convention, [36] concluding that it was "immediately clear that the statements [at issue] sought to deflect Article 10 from its real purpose . . . for ends clearly contrary to the values of the Convention."[37]

This expansion is problematic not only because the criteria governing the Court's application of Article 17 remain opaque and inconsistently articulated, but also because the use of that Article forecloses the structured analysis ordinarily required by Article 10, including considerations of speech's context, intent, necessity, and proportionality.[38] As cases such as *Lenis* illustrate, categorical exclusion of expression from protection risks normalizing a model of speech regulation in which the values of expression are sidelined rather than weighed, with consequences extending beyond the individual case. When this logic is combined with the Court's expanding positive-obligations jurisprudence under Articles 8 and 14, the effects

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[35] Norwood v. United Kingdom, App. No. 23131/03, 2004-XI Eur. Ct. H.R.(Nov. 16, 2004).

[36] Lenis v. Greece, App. No. 47833/20, ¶ 38 (Eur. Ct. H.R. June 27, 2023), https://hudoc.echr.coe.int/eng?i=001-226442.

[37] *Id.* ¶ 52.

[38] Hannes Cannie & Dirk Voorhoof, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*, 29 NETH. Q. HUM. RTS. 1 (2011).

are amplified: States are being required to adopt broader regulatory frameworks and strict enforcement mechanisms reshaping the expression environment as a whole.

Finally, it deserves emphasis that Article 17 is not invoked by victims of hate speech but operates exclusively as a doctrinal filter applied by the Court to prevent speakers from relying on Article 10. The provision does not confer substantive rights or remedies; rather, it functions solely to exclude certain forms of expression from Convention protection at the threshold stage. The brief discussion of Article 17 included here is therefore intended to situate the Court's positive-obligations jurisprudence within the broader structure of the Convention and to clarify the limits of Article 10 protection in hate speech cases. Articles 8 and14 cases examined in this paper frequently concern forms of expression that are not self-evidently excluded from Article 10 protection, including generalized stereotyping, association-based prejudice, political rhetoric, and speech framed as moral or social critique. The concern raised here is thus not confined to the doctrinal availability of Article 10 in individual cases, but instead brings into focus the cumulative impact of an obligations framework that prioritizes personal dignity and equality while leaving the implications for expressive freedom largely unarticulated, particularly in borderline cases where the reach of Article 17 may eliminate any interest in free expression that exists specifically in the individual circumstance.

This categorical approach highlights a profound, transatlantic conceptual divide regarding how the boundaries of expressive freedom are defined. From an American constitutional perspective, the absolute exclusion of entire categories of speech via Article 17 stands in sharp contrast to the framework articulated by the U.S. Supreme Court in *United States v. Stevens* (2010). In *Stevens*, the Supreme Court explicitly rejected the notion that Congress could strip protection from a category of speech, whether by laying claim to a "freewheeling authority" or by conducting an "ad hoc balancing" of the category's expressive value against its societal costs. The Supreme Court noted in particular that the First Amendment itself reflects a value judgment that the benefits of free speech inherently outweigh those costs.[39]

Where Article 17 allows the ECtHR to expand its threshold exclusions by identifying speech deemed contrary to foundational Convention values, the U.S. model

[39] United States v. Stevens, 559 U.S. 460 (2010).

restricts denial of speech protections to a longstanding and narrow list of subjects. However, any deep structural comparisons to be made between these two legal systems are inherently limited and constitutionally awkward. Unlike a single-nation supreme court bound by a unified domestic constitution, the ECtHR operates as a multi-jurisdictional, regional, supervisory body tasked with guiding diverse States, and frequently defers to their domestic authorities through the margin of appreciation. Consequently, while an American constitutional lens would view the threshold mechanism of Article 17 as an impermissible content-based exclusionary tool, within the unique architecture of the European Convention, the doctrine is conceptualized as a structural firewall designed to protect the collective democratic order from internal subversion.

C. **Aksu v. Turkey***: The Conceptual Opening Without Operational Commitment*

With this backdrop in view, we turn now to the Court's heightening of State obligations in hate speech cases brought by victims, our starting point being its judgment in *Aksu v. Turkey* (2012). The applicant, of Roma origin, challenged government-funded publications and dictionary definitions that perpetuated entrenched negative stereotypes of Roma people. [40]

Specifically, the following statements were included in a book funded by the Turkish Ministry of Education and published under the title "The Gypsies of Turkey." Therein, a professor described what he deemed to be the customs and lifestyle of the Roma minority in Turkey. These descriptions characterized Roma persons as, amongst other things, being involved in "illegal activities," and referred to them as "thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers" and as "polygamist and aggressive." The applicant argued that such statements insulted the ethnic group to which he belonged. He also filed a complaint requesting the removal of definitions given in the "Turkish Dictionary for Pupils" and the "Turkish Dictionary," which he felt had similarly negative, discriminatory, and prejudiced connotations about the Roma community. Some of the entries regarding the word "Gypsy" included:

> "Gypsy" (*Çingene*): 1. an ethnic group or person belonging to an ethnic group originating from India, whose members lead a nomadic way of life and are widely dispersed in the world. 2. (metaphorically) miserly.

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[40] Aksu v. Turkey, App. Nos. 4149/04 & 41029/04, 2012 Eur. Ct. H.R. (Mar. 15, 2012).

"Gypsy tent" (*Çingene çergesi*) (metaphorically): a dirty and poor place.

"Gypsy wedding" (*Çingene düğünü*): a crowded and noisy meeting.

"Gypsy fight" (*Çingene kavgası*): a verbal fight in which vulgar language is used.

The applicant had commenced civil proceedings, seeking the withdrawal of the Ministry-funded book and non-pecuniary damages, in several courts along the judicial hierarchy. His claims had all been dismissed by the respective reviewing bodies. The reasons given by the courts included the purportedly scientific nature of the book and the generalized nature of the professor's statements.

The case before the ECtHR was framed under Article 8, read in conjunction with Article 14, with the applicant arguing that the impugned material attacked his identity and dignity. The Court's reasoning in response was, at times, ambivalent. On the one hand, it made a crucial conceptual move by accepting that negative stereotyping of a group may affect the private life of individuals who identify with that group. It interpreted private life broadly, as encompassing identity, self-perception, and the light in which individuals are perceived by society. This recognition alone marked a departure by the ECtHR from a strictly individualized conception of harm, which was common to its jurisprudence up until this point. On the other hand, the Court refused to translate this recognition into a demanding obligation. It emphasized the academic nature of the book, the absence of intent to insult, and the book's stated aim of shedding light on a misunderstood community. The harm resulting from the book was thus framed as indirect, with the Court deferring heavily to domestic judicial assessments. Article 14 played a largely decorative role in its analysis, referred to but not operationalized.

Aksu therefore opened the conceptual door without walking through it. The Court recognized that dignity-based harm can, in principle, engage Article 8 and trigger positive obligations for a State, but it declined to articulate when those obligations crystallize. This hesitation is doctrinally important. As we will explore below, demurring in *Aksu* allowed the Court later to claim continuity with its previous jurisprudence even while it radically lowered the threshold for invoking a State's responsibility to protect in hate speech cases.

D. **Beizaras v. Lithuania*: From Concept to Obligation***

The above-described threshold was decisively lowered in *Beizaras v. Lithuania* (2020). The applicants, a same-sex couple, posted a photograph on Facebook of themselves kissing. The image attracted hundreds of comments, many of which included explicit death threats and calls for violence. Specifically, according to the applicants, the photo went viral, accumulating more than 2,400 likes and more than 800 comments. Examples of the comments included:

> "These faggots fucked up my lunch; if I was allowed to, I would shoot every single one of them" . . .
>
> "Scum!!!!!! Into the gas chamber with the pair of them" . . .
>
> "Hey fags – I'll buy you a free honeymoon trip to the crematorium." . . .
>
> "Oh for fuck's sake – get the fuck out of Lithuania and don't shame us, you fucking capon; we should put your head under a car and into the noose, you fucking faggot"

The domestic authorities (the public prosecutor and courts) refused to initiate a criminal investigation, characterizing the comments as "improper words" that were used to express disapproval of homosexual people. Moreover, it was found that the "mere use of obscenities" was not enough to incur criminal liability under the Lithuanian Criminal Code.[41]

The ECtHR unanimously found a violation of Article 8, read in conjunction with Article 14. In its judgment, the Court noted that the comments "affected the applicants' psychological well-being and dignity"[42] and that the comments included "undisguised calls for violence"[43] against the applicants and the homosexual community. It underlined that those calls emanated from the

> very same discriminatory state of mind [that] was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner.[44]

The ECtHR thus argued that the authorities failed to acknowledge the homophobic bias involved in the speech itself and that, without a strict approach to dealing with such bias:

> [P]rejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence or even connivance in hate crimes.[45]

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[41] Beizaras v. Lithuania, App. No. 41288/15, ¶ 20 (Eur. Ct. H.R. Jan. 14, 2020), https://hudoc.echr.coe.int/eng?i=001-200344.

[42] *Id.* ¶ 117.

[43] *Id.* ¶ 129.

[44] *Id.*

[45] *Id.* ¶ 155.

The Court found that the comments constituted "hate speech and incitement to violence" and that such a fact "may in principle require the State to take certain positive measures."[46]

As such, several developments occurred simultaneously in *Beizaras*. First, the Court explicitly recognized that hate speech can undermine psychological integrity and personal dignity, thereby engaging Article 8. Second, Article 14 was operationalized by the authorities' failure to recognize the speech's homophobic motive—a failure deemed by the Court to be discriminatory indifference. The ECtHR's holding in *Beizaras* therefore framed institutional passivity as a Convention violation. Post-*Beizaras*, positive obligations in the ambit of hate speech cases are thus no longer hypothetical (as they were post-*Aksu*). The ECtHR requires effective State investigation and recognition of bias in cases of alleged hate speech.

E. **Behar v. Bulgaria** ***and*** **Budinova v. Bulgaria*****: When an Identifiable Victim Is Absent***

Two Bulgarian cases, *Behar v. Bulgaria* and *Budinova v. Bulgaria* (both decided on February 16, 2021), represent the most sophisticated articulation of the ECtHR's positive obligations framework to date. The applicants belonged to Jewish and Roma communities respectively, and challenged xenophobic propaganda disseminated by Volen Siderov, the founder and leader of the far-right party, "Ataka." In civil discrimination proceedings, the plaintiffs asserted that Siderov's activities constituted harassment and incitement to discrimination against their communities, demanding both an apology and an injunction mandating him to refrain from such behavior. The national courts rejected the applicants' claims, based on Siderov's entitlement to freedom of expression.

In both Bulgarian cases, the Court developed a multi-factor test to assess whether expression reaches the threshold required for applying Article 8. To evaluate the severity of Siderov's statements and determine their status under Articles 8 and 14, the Court looked at the groups targeted by the speech and at the content and impact of the speech. It considered several factors, with no single factor deemed determinative. These included the size, homogeneity, and vulnerability of the group and status of the speaker; the content of the statements, in particular "the degree to which they could convey a negative statement about the group as a whole,

[46] *Id.* ¶ 125.

and the specific content of that stereotype;"[47] the form and context in which the statements were made; the extent of their reach; the status of the speaker; the expression's potential impact on the core identity and dignity of the group; and the broader sociopolitical context.[48]

This was the first time that the Court had articulated such a structured methodology in a hate speech case outside Article 10. Adopting essentially identical reasoning in both cases, the Court found a violation of Article 8 in conjunction with Article 14's nondiscrimination provision, concluding that the domestic courts had failed to fulfill their positive obligation of providing redress for the discriminatory public statements made by the politician.

In applying the test, the Court concluded that the impugned speech involved in the *Behar* case explicitly targeted Jews as a collective. Some statements included the following (all from books written by Siderov):

> "[Judaism] . . . is an elitist, xenophobic, racist and theomachist philosophy"
>
> "Elitism is the basis of the Judaic, Talmudic worldview. It comprises the notion that to rob the 'other' – the non-Jew – is a feat rather than a sin. That to ruin him is a good deed rather than a sin."
>
> "'Shoot the louses on the spot!' was Ulyanov's order to the war commissar Leo Bronstein-Trotsky. And the Russian Jew-mason, a member of the Grand Orient lodge, carried out the order with sadistic contentment."
>
> "The 'Holocaust' lie is also very lucrative. According to *Der Spiegel* (issue 18 of 1992), since 1952 the Federal Republic of Germany has paid out to Jewish Zionist organisations a total of 85.4 billion German marks!"

The ECtHR held that the statements constituted "extreme negative stereotyping meant to vilify Jews and to stir up prejudice and hatred towards them."[49] They

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[47] Behar v. Bulgaria, App. No. 29335/13, ¶ 67 (Eur. Ct. H.R. Feb. 16, 2021), https://hudoc.echr.coe.int/fre?i=001-207929; Budinova v. Bulgaria, App. No. 12567/13, ¶ 63 (Eur. Ct. H.R. Feb. 16, 2021), https://hudoc.echr.coe.int/eng?i=001-207928.

[48] *Behar*, App. No. 29335/13, ¶ 60; *Budinova*, App. No. 12567/13, ¶ 56.

[49] *Behar*, App. No. 29335/13, ¶ 71.

were described as "virulently antisemitic,"[50] involving "timeworn antisemitic narratives"[51] such as "denying the Holocaust and casting it as a story contrived as [a] means for financial gain."[52]

In *Budinova*, the Court found that the statements at issue in that case targeted Roma, a group "long acknowledged as disadvantaged and vulnerable, and in need of special protection."[53] Siderov's anti-Roma statements were deemed to be "deliberately couched in inflammatory terms,"[54] portraying Roma as "exceptionally prone to crime and depravity."[55] The Court noted that Siderov depicted the Roma community as "immoral social parasites" who exploited their rights, "lived off the back of the Bulgarian majority," engaged in systematic violence and crime, and "aimed to take over the country." These statements were considered by the Court to constitute "extreme negative stereotyping meant to vilify Roma . . . and to stir up prejudice and hatred."[56]

Given the speaker's position as a rising parliamentary party leader with significant media presence, the Court found across the two cases that his statements had a substantial impact on the identity and self-worth of Jewish and Roma individuals.[57] In the above context, the ECtHR held that the domestic courts were obligated to balance the applicants' right to seek redress for the statements against the speaker's right to freedom of expression.[58] The Court deemed it to be a violation of the Convention that the domestic courts had prioritized the protection of freedom of expression while neglecting to balance it adequately with the right to private and family life.

The Court specifically observed that,

> [b]y in effect ascribing considerable weight to Mr Siderov's right to freedom of expression in relation to the statements impugned by the applicants, and by playing

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[50] *Id.* ¶ 69.

[51] *Id.*

[52] *Id.* ¶ 70.

[53] *Budinova*, App. No. 12567/13, ¶ 64.

[54] *Id.* ¶ 65.

[55] *Id.*

[56] *Id.* ¶ 65.

[57] *Behar*, App. No. 29335/13, ¶ 72; *Budinova*, App. No. 12567/13, ¶¶ 67–68.

[58] *Behar*, App. No. 29335/13, ¶ 100; *Budinova*, App. No. 12567/13, ¶ 89.

> down the effect of those statements on the applicants . . . , the Bulgarian courts failed to carry out the requisite balancing exercise in line with the criteria laid down in the Court's case-law.[59]

Interestingly, the Court noted that, in relation to the antisemitic speech, the "specific historical context in respect of Bulgaria, as opposed to that in respect of other European States, matters little in that regard,"[60] exhibiting the Court's aversion to antisemitic discourse even in an environment lacking a significant historical prevalence of antisemitism relative to other nations.

In the above cases, unlike in *Beizaras*, there were no identifiable individual victims and no explicit threats of violence. The Court nevertheless found violations of Article 8 in conjunction with Article 14. The violations did not stem from the absence of remedies or from prosecutorial inaction: Rather, they stemmed from the failure of Bulgaria's domestic courts to recognize prejudice. Specifically, in both cases, the Court held that:

> The manner in which the Bulgarian courts assessed the tenor of Mr Siderov's statements reflected on the way in which they balanced his right to freedom of expression against the applicants' right to respect for their private life. Although they recognized the tension between those two rights, the courts cannot be said to have properly weighed up their relative importance in the circumstances.[61]

As such, the evolution of the ECtHR's jurisprudence regarding positive obligations in hate speech cases originates from *Aksu*, where the Court set a theoretical framework under which Articles 8 and14 could be (but were not yet) relied upon in a hate speech case. The Court's approach, as developed in *Beizaras*, determined that a State's inaction can constitute acquiescence to discriminatory hate speech and underscored that State's duty to initiate prosecution. This represented a crucial advancement in the application of positive obligations to prevent hate speech from harming identifiable victims.

In 2021, the Court further developed its position in the Bulgarian cases, when hate speech was directed at vulnerable groups—specifically Jews and Roma—but without individually identifiable victims. In contrast to previous cases, the Court in *Behar* and *Budinova* concentrated on the wider impact of generalized stereotyping

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[59] *Behar*, App. No. 29335/13, ¶ 105; *Budinova*, App. No. 12567/13, ¶ 94.

[60] *Behar*, App. No. 29335/13, ¶ 105.

[61] *Id.* ¶ 105; *Budinova*, App. No. 12567/13, ¶ 94.

on community members and identified a breach of Article 8 in connection with Article 14, despite the lack of direct victims.

The transition from the ECtHR's result in *Aksu*, where a direct victim was also absent and the Court did not expand positive obligations, to its group-protective conclusion in the Bulgarian cases underscores the ECtHR's increasing openness to finding Convention violations in a State's less-than-careful response to generalized stereotyping and hate speech. By broadening the scope of positive obligations from covering only individual victims to spanning across entire communities, the Court has made evident a progressive expansion of its related framework.

In recognizing the harmful impact of stereotyping and hate speech on vulnerable groups, the Court has paved the way for States to take proactive measures combatting such expression. However, this doctrinal evolution also raises questions about the limits of State responsibility and the potential encroachment on freedom of expression resulting from an expansion of State obligations. While the Court's intention to protect vulnerable groups is commendable, the approach outlined above can inadvertently empower States to suppress dissenting or unpopular viewpoints under the guise of preventing harm. For example, the broad discretion afforded to States in defining what constitutes harmful expression risks embedding government-endorsed narratives within States' hate speech regulations. Imposing a positive obligation on States to protect people from hate speech thus creates fertile ground for State viewpoints to dominate the discourse on hate speech, allowing governments to shield dissent-suppressive actions under the rhetoric of protecting vulnerable groups.

The risk of conflating genuine harm with State preferences becomes acute, as seen in *Féret v. Belgium* (2009). In that case, inflammatory political speech critical of immigration policies was curtailed based on potential societal division, despite limited evidence of any actual harm being inflicted by its expression.[62] In such instances, the risk of conflating genuine harm with state preferences becomes acute, as seen in *Féret v. Belgium* (2009). In that case, inflammatory political speech, critical of immigration policies, was curtailed based on potential societal division, despite limited evidence of actual harm. This outcome underscores a notoriously

[62] Féret v. Belgium, App. No. 15615/07, ¶ 77 (Eur. Ct. H.R. July 16, 2009), https://hudoc.echr.coe.int/eng?i=002-1407.

blurry line within the Court's approach, namely the troubling ease with which intending to protect a specific group of people from prejudice can slide into insulating the government's own sociopolitical policies from exposure to robust public comment. When the Court deems restrictions to be justified on the vague grounds of preventing societal friction, State authorities are effectively permitted to shield controversial administrative strategies, such as immigration agendas, from necessary political critique. Consequently, the Court's mechanism of positive obligations risks turning States into ideological gatekeepers, transforming a duty to protect vulnerable minorities into a license to suppress legitimate—albeit sometimes aggressive—political dissent.

With the Court's expansion of positive obligations via the Bulgarian cases and the implications of its simultaneous permissiveness toward State speech regulation thus in view, we now will continue exploring its extension of State responsibility, which became even more pronounced in *Minasyan*, discussed below. In that case, as we will see, the Court moved beyond the protection of identifiable victims and vulnerable groups, and created a Convention violation for a State's failure to protect against association-based hate speech.

F. **Minasyan v. Armenia***: Consolidation Through Judicial Escalation*

The case[63] involved 14 applicants, including human rights activists, members of NGOs, journalists, and researchers working in the fields of LGBT[64] and women's rights. In May 2014, a right-wing Armenian newspaper published, on its website, an article titled "They Serve the Interests of the International Homosexual Lobby: The Blacklist of Enemies of the Nation and the State." The article accused the applicants of promoting homosexuality, labelled them as "internal enem[ies] of the Nation and the State," and explicitly incited discrimination against them. It included hyperlinks to their Facebook profiles and urged the public to take discriminatory actions, such as avoiding contact with them, refusing them employment, and preventing them from holding educational positions. The article referred to

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[63] Minasyan v. Armenia, App. No. 59189/15 (Eur. Ct. H.R. Jan. 7, 2025), https://hudoc.echr.coe.int/eng?i=001-240280.

[64] While the acronym "LGBT" was used in the Court's *Minasyan* judgment (and, for clarity in terms of what was discussed in the case, the same acronym is used throughout the relevant discussion herein), the author adopts the recommendation of GLAAD (among other groups), which notes that LGBTQ or LGBTQ+ are more inclusive as acronyms. *See Glossary of Terms: LGBTQ*, GLAAD, https://perma.cc/Y8Q3-WQM4.

LGBT activists as "gay-campaign-supporting zombies" and advocated for "zero tolerance" toward them. In response, the majority of the applicants requested that the newspaper retract the article, but the newspaper instead published another article in June 2014, mocking their request and escalating attacks on their activism.

The applicants subsequently filed a civil lawsuit, arguing that several of the statements made in the May 2014 article damaged their honor and dignity and that the article incited hatred and discrimination. During the litigation, *Iravunk*'s editor-in-chief organized an event via Facebook for the same day as a hearing in the case, calling on supporters of "traditional values" to rally behind the newspaper. On the set day, a group of protesters gathered outside the court in dissent to the hearing happening inside, displaying anti-LGBT signs and framing the case as a defense of national and moral values. The newspaper continued its campaign, publishing additional articles targeting the applicants. The domestic courts dismissed the applicants' claims, ruling that the articles fell within the bounds of the freedom of expression.

In 2025, the ECtHR delivered its judgment on the case, further embedding its evolving approach to hate speech into its doctrine of positive obligations rather than direct restrictions on expression. It unanimously determined that a breach of Article 8, both independently and in connection with Article 14, had occurred. The Court reaffirmed its holding from *Beizaras* that Article 8 creates affirmative responsibilities for the States to uphold respect for individuals' private life. It emphasized that, for Article 8 to be applicable in specific domains, such as reputation, the purported infringement must show a requisite degree of severity. The Court determined that the newspaper's May 2014 article was driven by animosity against LGBT individuals and that it clearly incited the public to perpetrate harmful discriminatory actions against the petitioners because of their activism. Specifically, the Court held that

> there is little doubt that the author of the article was motivated by hostility towards the LGBT community and that his intentions were to disrupt the show of support for, as well as the promotion and protection of, that community in Armenia.[65]

A significant element of this case was the question of the hostility's subject. It is important to note that the Court had not previously ruled on a hate speech case

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[65] *Minasyan*, App. No. 59189/15, ¶ 55.

where individuals were targeted solely due to their *perceived* characteristics or *association with* a protected group. The closest the Court had come to this narrow topic before *Minasyan* was *Lenis v. Greece* (2023), in which the applicant's speech was directed both at politicians supporting the LGBT community and at homosexual persons themselves. In this sphere, the ECtHR held that:

> Even the expressions of incitement directed against politicians who wished to vote for the legislation introducing civil unions between same-sex couples, such as "blacken them out", were in fact targeting homosexual people. As the domestic courts rightly pointed out, such phrases could not be seen separately but had to be read as directly connected with the applicant's intention to diminish homosexual people.[66]

In *Lenis*, therefore, while the Court found the speech at issue to be targeting a vulnerable group even when it was not exclusively directed to that group, that group was also present.

In *Minasyan*, however, the predominant portion of the speech in question was aimed at individuals advocating for the LGBT community. The *Iravunk* articles derogatorily called these activists, amongst other things, "the gay lobby," "Conchita's Witness," and "gay-campaign-supporting zombie[s]." The applicants also faced demands that they be discriminated against and excluded. The newspaper's prevailing message was that pro-homosexual lobbies undermine conventional and family values and portrayed the LGBT population as degenerate and repugnant. The remarks insulting the LGBT community were restricted but included labelling Austrian singer Conchita Wurst as "human garbage."

The Court extrapolated on the nature of the hostility in question, which it deemed to be a combination of hate speech by association and hate speech by assumption. Significantly, it held that

> a number of elements in the case suggest that the author [of the articles] may have regarded the applicants not only as LGBT activists but also as members of that community. The Court refers in this connection to a series of follow-up articles published by the same author in which he continued to attack the applicants. In one such article, the author appeared to mock the applicants' sexuality by questioning whether they could be described as male or female . . . and, in at least one applicant's case, openly implied that he was homosexual . . . . This, combined with the author's strong homophobic views and his obvious intentions to harm the LGBT community, leads the Court to believe that the applicants had at least an arguable claim before the domestic

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[66] *Lenis*, App. No. 47833/20, ¶ 43.

> courts that their perceived sexual orientation and close association with the LGBT community also played a role in the attacks on them.[67]

In terms of the contextual elements pertaining to Articles 8 and 14, the Court found that the disclosure of the applicants' identities and social media profiles, coupled with the campaign waged by *Iravunk* supporters to have them excluded from work and school, was a significant violation of their rights under Article 8. The Court determined that these assaults significantly affected the petitioners' personal dignity, psychological health, and reputation. It went further, however, because the applicants asserted a breach of Articles 8 and14, contending that the animosity they encountered was rooted in discrimination against their presumed sexual orientations and their affiliation with the LGBT community. The Court criticized the domestic courts for failing to acknowledge the hostile intent underlying the impugned articles and those articles' concrete impact on the applicants' private life. Namely, the Court held that

> the domestic courts failed to recognize the author's hostile tone and intentions and the impact that his statements had on the applicants' Article 8 rights. His expressions, which were meant to incite intolerance and hostility against the applicants with the clear intention of intimidating them and causing them real harm, were downplayed by the courts and regarded as legitimate expressions of "criticism" in the context of a debate on a matter of public interest. By doing so, the domestic courts failed to protect the applicants from speech advocating intolerance and harmful acts in breach of Article 8 of the Convention.[68]

U.S. jurisprudence, most notably under a standard established by the Supreme Court in its 1969 case *Brandenburg v. Ohio*, strictly dictates that a finding of incitement requires the relevant speech to have displayed a clear intent to provoke "imminent lawless action."[69] On the other hand, the ECtHR treats the incitement of abstract internal modes such as prejudice as intolerance as a trigger for State intervention. Consequently, by incorporating a positive obligation aspect to pre-empt hate speech, the ECtHR further pathologizes controversial public debate, codifying a legal obligation for States to suppress speech on the basis of its unpleasantness, rather than on the basis of whether it targeted a vulnerable victim.

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[67] *Minasyan*, App. No. 59189/15, ¶ 55.

[68] *Id.* ¶ 69.

[69] Brandenburg v. Ohio, 395 U.S. 444 (1969).

The Court further proceeded to integrate a discriminatory element into the speech in question, noting that

> by failing to address the discriminatory nature of the impugned statements, domestic courts failed to comply with their positive obligation to respond adequately to the applicants' alleged discrimination on account of their perceived sexual orientation and association with the LGBT community, as required under Article 14.[70]

Had *Minasyan* been evaluated by the Court as a defamation case, one where the issue at hand was reputational harm, the analytical framework applied would have been considerably narrower. The Court's characterization of the challenged expression as being driven by hostility toward LGBT individuals, however, fundamentally alters the legal assessment required. By putting front and center the fact that the applicants were targeted because of their activism in support of LGBT rights and potentially on the assumption that they shared characteristics with the LGBT community, the Court's analysis moves beyond the realm of reputational damage and into the more complex terrain of association-based discrimination and hate-motivated harm.

Minasyan marks an important moment in the Court's expanding hate speech jurisprudence, consolidating a framework in which State responsibility extends beyond protecting against harm inflicted by hate speech directly targeting individuals to encompass protecting against association-based and presumed-identity harms. While the Court's judgment reflects a legitimate concern with protecting individuals from discriminatory hostility, it also raises unresolved questions about the limits of positive obligations and their relationship with freedom of expression. Although formally grounded in Article 8, the Court implicitly recalibrates that provision's normative balance with Article 10, drawing on Article 14 without fully articulating the necessity or proportionality of such an approach.

The ECtHR thus is increasingly treating "hostility" as an actionable, systemic harm under Article 8. This move raises a profound structural dilemma: Protecting individuals entirely from an atmospheric concept like "hostility" risks tasking States with an impossible burden to police thoughts, deep-seated prejudices, and social friction rather than objectively observable, externalized acts. By elevating the prevention of a hostile social environment into a binding positive obligation on the

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[70] *Id.* ¶ 70.

State, the Court effectively is requiring domestic legal systems to intervene against speech that lacks any direct link to imminent violence or targeted harassment.

Consequently, the boundary between mitigating real-world harm and micromanaging the psychological terrain of public debate is becoming dangerously obscured, structurally incentivizing States to suppress unpopular or offensive ideas in order to prove compliance with their international obligations. The result is that States are not only allowed to intervene against expression that does not directly target identifiable victims, but are increasingly required to do so, such that the risk of overregulating and creating chilling effects on public debate is becoming more pronounced. Whether this broadened framework will meaningfully reduce prejudice or instead merely expand regulatory control over contentious speech remains an open and pressing question.

Even with the limitations to making directly applicable comparisons between the ECtHR and the U.S. Supreme Court noted above, the ruling in *Minasyan* underscores a profound transatlantic divide. Specifically, the sweeping collective protection mechanism deployed by the ECtHR in *Minasyan* finds its only real American historical parallel in the now-defunct doctrine of "group libel" established in *Beauharnais v. Illinois* (1952). In *Beauharnais,* the U.S. Supreme Court similarly prioritized societal peace and the protection of historically marginalized people over individual expression, upholding the conviction of a white supremacist organizer for defaming an entire class of citizens.[71]

However, while the ECtHR has consistently expanded its similarly protective, community-based framework under Articles 8 and 14, *Beauharnais* was swiftly abandoned in subsequent American jurisprudence. The modern U.S. model completely rejected group defamation and ad hoc balancing tests, firmly establishing that the government cannot manage social attitudes by punishing offensive expression. *Minasyan* thus, by contrast, illustrates how the ECtHR is firmly establishing the State as an active custodian of public discourse tasked with eradicating discriminatory hostility from the public sphere.

G. Ilareva v. Bulgaria*: Threatening Speech*

Ilareva v. Bulgaria (2025) marks a further step in the ECtHR's gradual expansion of hate speech doctrine. *Ilareva* blurs the boundary between hate speech and

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[71] Beauharnais v. Illinois, 343 U.S. 250 (1952).

threatening speech. Rather than treating the applicants primarily as victims of serious criminal threats, the Court analyzed the case through the lens of hate speech because the threats were motivated by the applicants' work in support of vulnerable groups. This shift is significant for the trajectory examined in this paper, as it demonstrates how hate speech doctrine is increasingly being used to encompass forms of expression that have traditionally been addressed through separate legal frameworks, thereby raising important questions about the conceptual limits of the Court's jurisprudence.

Valeria Ilareva, Lidia Staykova, and Krasimir Kanev are human rights defenders in Bulgaria. Ilareva worked as a lawyer in the field of immigration, Staykova volunteered with the State Agency for Refugees, and Kanev headed the Bulgarian Helsinki Committee.

In January of 2015, they were subjected to a barrage of Facebook posts that included explicit death threats and incitement to violence. One user wrote: "Damn, how these monsters mock us? . . . I feel like shooting them, there are loads of vermin to eliminate." Another said: "Die, carrion. Cyanide for you and for all traitors to the nation." A third posted: "I say hang them at Parliament, exhibit them there as Christmas decorations so that their bones hang there forever." Others suggested skinning the applicants alive or smearing them with honey and leaving them to be devoured in an ant nest. The messages spread quickly. A photomontage depicting the applicants as "Freaks of the Year" was shared over 120 times in four days.

The threats were not abstract. Ilareva's office address was easily findable online, and Kanev was later physically attacked in Sofia after appearing on television to criticize anti-immigrant rhetoric. They also filed complaints with the local prosecutor's office, arguing that the Facebook posts amounted to death threats, incitement to violence, and hate speech. Yet prosecutors only opened proceedings under the country's hate speech provision and declined to pursue the more obvious charge of threats, ostensibly because the posters' IP addresses could not be obtained, and the prosecutors dismissed the online comments as "negative assessments" that were not sufficient to cause "a justified fear that they would be carried out" because they had been made on the Internet. Importantly, in relation to hate speech, national authorities found that the applicants could not fall within the sphere of this article, as they did not qualify as victims under its ambit. To qualify, they would have had to be members of a protected minority group.

When their case reached the ECtHR, the Court noted the particular characteristics of digital platforms, including the speed, reach, and persistence of threats levied therein. The Court underlined that "States' human rights obligations to act in order to protect fundamental rights apply as much online as they do offline" and it found, as a result, that there was in this case a "public interest in the prosecution, which required an appropriate official response."[72]

More important to this paper's exploration of the ECtHR's jurisprudential trajectory is the result of the Court's holding in it: the incorporation of death threats into the Court's hate speech case law. In their appeal to the Court, the applicants relied on Articles 8 and 14 (as well as Articles 3 and 13). The ECtHR did not just examine the State's application (or lack thereof) of the Bulgarian Criminal Code as it related to death threats. Instead, the Court applied its hate speech doctrine to the applicants because of their professional association with groups possessing protected characteristics.[73]

As such, even death threats—which, by default, fall outside the protection of Article 10—can now be reframed as hate speech when directed at activists because of their associative role. Ultimately, the Court made a fundamental analytical misstep in this case by focusing heavily on Article 14 (discrimination), even though that provision's application to the activists was indirect and based entirely on their association with vulnerable groups, rather than treating the issue as a direct violation of Article 8 (the right to respect for private life and physical integrity), a protection that States owe to every individual regardless of their protected status, particularly in the face of a death threat.

The grave danger of the ECtHR's move in *Ilareva* is that it dramatically expands the reach of the Court's hate speech doctrine. By extending protection from hate speech to individuals merely associated with (and not part of) vulnerable groups, the Court risks eroding the distinction between threats directed at individuals and hate speech directed at the groups themselves. In this formulation, almost any hostile remark linked to prejudice may be subsumed into the hate speech framework, leaving the category overly broad and imprecise.

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[72] Ilareva v. Bulgaria, App. No. 24729/17, ¶ 40 (Eur. Ct. H.R. Sept. 9, 2025), https://hudoc.echr.coe.int/fre?i=001-244721.

[73] *Id.* ¶ 141.

Moreover, applicants to the Court are now being classified as victims of hate speech by association simply because of their professional or political work. Suppose an LGBTQ+ ally is told, "You deserve to be killed for supporting gay rights." The gravity of that expression lies in its explicit death threat. But under the Court's approach, such a statement could instead be reframed as association-based hate speech, because the activist is being targeted for their support of a vulnerable community. This frame-shifting not only creates conceptual confusion but could also create hierarchies within the category of death threats, an inherently abominable and unprotected speech act.

The speech at issue in *Ilareva* went far beyond being merely offensive or expressing generalized hostility. It contained clear and direct threats of lethal violence against identified individuals, was circulated widely, and carried real and immediate risks given the applicants' public profiles. As such, it lay entirely outside the scope of protection afforded by freedom of expression under the Convention. At the domestic level, the core flaw in the handling of the case was that the authorities failed to examine it as a matter involving death threats and instead treated it primarily as regarding hate speech. The threat element should have been the central concern for the Court as well.

The expansion of the hate speech umbrella thus risks overshadowing the independent gravity of death threats and stretching both hate speech doctrine and Article 14 into overbroad territory. The Court's message in *Ilareva*, rather than focusing on the applicants' association with vulnerable groups and extending to the activists protection by proxy, should instead have been unequivocal: it should have found that threats and harassment directed at activists are unacceptable in all circumstances, regardless of the underlying motivation.[74] The broader risk, however, is that hate speech will become an all-encompassing category, invoked whenever prejudice is thought to play some role, even if only in the background.

III. From Permission to Obligation: What States Are Now Required to Regulate

Taken together, ECtHR's recent jurisprudence marks a decisive shift for the Convention's role in the regulation of hate speech. This shift did not occur in a doctrinal vacuum. It was, to a significant extent, driven by the changing profile of

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[74] Natalie Alkiviadou, *Blurred Lines: Death Threats, Hate Speech, and the European Court of Human Rights*, BEDROCK PRINCIPLE (Sept. 22, 2025), https://perma.cc/K2C7-4WCE.

applicants before the Court. Whereas earlier hate speech cases were predominantly brought by speakers challenging speech restrictions under Article 10, the cases reviewed by the Court have increasingly originated either from victims of alleged hate speech or from individuals targeted because of their association (or perceived association) with protected groups.

This transformation has altered the Court's analytical point of departure: Instead of assessing the permissibility of State interference in expression, the Court started being asked to evaluate whether State *inaction* amounted to a Convention-violating failure to protect. The resulting expansion of positive obligations must therefore be understood as a response to the types of claims brought before the Court, rather than as the product of a fully articulated theory of when and why speech regulation becomes a Convention requirement. The Convention is no longer interpreted merely as permitting States to restrict certain forms of expression in order to protect the rights of others under Article 10(2). Rather, through the combined application of Articles 8 and 14, the Court increasingly interprets the Convention as *requiring* States to intervene against certain forms of expression originating from private actors. This move represents a structural transformation of the Convention system, with significant implications for freedom of expression.

The emerging framework can be synthesized as follows: A State may be found in violation of the Convention where

(a) expression targets a protected group, or individuals *associated with* or *perceived as belonging to* such a group;

(b) the expression is capable of affecting the dignity, psychological integrity, or social identity of those targeted; and

(c) domestic authorities fail to respond with sufficient seriousness, whether by refusing to investigate, by downplaying discriminatory motives, or by prioritizing freedom of expression without performing a meaningful balancing exercise.

Crucially, the Court does not require the presence of an identifiable victim, a direct call to violence, or demonstrable physical harm for positive obligations to arise. Generalized stereotyping, hostile narratives, and association-based targeting may suffice to trigger a State's responsibility to protect.

This doctrinal consolidation of Articles 8 and 14 has significantly lowered the hate speech threshold through the cumulative effect of the Court's case-by-case expansion of positive obligations. Whereas earlier hate speech cases focused on whether States *could* restrict expression without violating Article 10, the contemporary case law reframes the inquiry: States may now be found to have breached the Convention by *failing* to restrict or otherwise respond to expression that is deemed by the Court to have been sufficiently harmful. The margin of appreciation traditionally associated with Article 10 analysis has correspondingly been narrowed, as domestic authorities are increasingly assessed by the Court not for over-regulation but for insufficient intervention.

Conclusion

Assessed as a whole, the ECtHR's expanding positive-obligations framework reveals a particularly strained relationship with freedom of expression under Article 10. In theory, the Court has insisted that a fair balance must be struck between competing rights. In practice, however, freedom of expression often appears in the Court's analysis as a contextual consideration rather than as a right carrying equal normative weight to those protected by Articles 8 and 14.

The cumulative effect of this jurisprudence is a framework in which State responsibility may be triggered at relatively low thresholds of harm if domestic authorities fail to respond with sufficient seriousness to expression that is perceived as targeting protected groups, those who associate with them, or those who are perceived as sharing their protected characteristics. Domestic courts may be incentivized to err on the side of intervention and thus chill legitimate public debate without the safeguards traditionally associated with Article 10 interference analysis, namely legality, legitimacy and necessity. It is against this doctrinal background that the expanding positive obligation in the realm of hate speech must be understood.

While freedom of expression remains formally intact under the Convention, it is increasingly constrained by an architecture of State responsibility that prioritizes personal dignity and protection over freedom of expression. This shift could be compelling for some, particularly in light of the real and documented harms that hate speech can cause, which range from psychological injury and social exclusion to its presumed connection with hate crimes,[75] although the link between hate speech and physical violence remains insufficiently substantiated. The Court has not engaged with scholarly analysis on this last point, however, effectively endorsing the claim that a causal relationship exists rather than rigorously demonstrating it.

The ECtHR's trajectory of expanding States' positive obligation to protect against hate speech is further complicated by the absence both of a clear and consistently applied definition of hate speech in the Court's case law, and of boundary-setting lines between offence, prejudice, stereotyping, and demonstrable harm. The Court's tendency to rely on abstract assertions of harm, without sustained engagement of empirical evidence or contextual differentiation, weakens the justificatory foundations of its increasingly demanding obligations on States. As such, there is a real risk that heightened positive obligations may encourage overcautious domestic responses, producing chilling effects on public discourse and disproportionately burdening controversial, dissenting, or minority viewpoints.

Therefore, the challenge for the ECtHR is not currently whether to take hate speech seriously, but how to do so without hollowing out one of the very freedom it is tasked with protecting. A more coherent positive obligations framework would require clearer definitional boundaries, articulated harm thresholds, and a more rigorous engagement with both empirical evidence and the unintended consequences of overregulation. Moreover, by avoiding explicit engagement with Article 10 thresholds and necessity analysis in cases brought forth by alleged victims of hate speech, those who associate with them, or those who are perceived as belonging to a protected group, the Court risks further deteriorating the enjoyment of the fundamental right of free speech. Without recalibration, the ECtHR's expanding positive obligations jurisprudence thus is in danger of diluting freedom of expression, and ultimately weakening the democratic values that the Court seeks to defend.

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[75] *See, e.g.*, *Communication from the Commission to the European Parliament and the Council: A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime*, COM (2021) 777 final (Dec. 9, 2021), https://perma.cc/4GX5-HQTQ.