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BOOK REVIEW

RETHINKING THE CONTEXT OF HATE SPEECH REGULATION

ROBERT A. KAHN*

THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING RESPONSES
AND REGULATIONS. Edited by Michael Herz and Peter Molnar.
CAMBRIDGE UNIVERSITY PRESS. 2012. PP. 544.

I. INTRODUCTION

In the early 1990s, I was in graduate school at Johns Hopkins University studying Holocaust denial litigation.¹ A friend in the department from Canada told me that I supported freedom of speech for deniers because the United States was a big country that, unlike Canada, could afford to ignore international treaties banning hate speech.² After several conversations, I decided to focus my disserta-

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¹ My dissertation, which looked at Holocaust denial litigation in France, Germany, Canada and the United States, was published in 2004. See ROBERT A. KAHN, *HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY* (2004).

² For example, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and Article 20 of the International Convention on Civil and Political Rights call for bans against hate speech. See International Convention on the Elimination of All Forms of Racial Discrimination,

tion on criminal procedure rather than freedom of speech.³ Quite simply, the back and forth over which approach to hate speech—American, Canadian, or European—was “better” did not strike me as that much fun.⁴ At the same time, I had to admit there was something to my friend’s argument. In the arguments for and against freedom of speech that I read in the United States, following international treaties did not take pride of place. Perhaps this was because, as a large country, the United States was free to ignore international norms.⁵

I thought about this question a great deal while reading Michael Herz and Peter Molnar’s fascinating volume of essays: *The Content and Context of Hate Speech: Rethinking Regulation and Respons-*

G.A. Res 20/2106, at 48, U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965); International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), at 55, U.N. Doc. A/RES/2200 (XXI) (Dec. 16, 1966).

³ While most of my book views Holocaust denial litigation from the vantage point of comparative criminal procedure, I added a section suggesting that attitudes toward freedom of speech shaped the informal types of censorship taken against Holocaust denial. See KAHN, *supra* note 1, at 121–152.

⁴ As Eric Heinze describes, only partially tongue in cheek:

European conferences on hate speech follow a similar pattern. A few Americans make impassioned speeches about the values of freedom and democracy. The Europeans dutifully listen and applaud. Then come tea and biscuits, where the pros and cons of various positions are exchanged with tepid enthusiasm. All delegates are then thanked for having attended an event that “will surely provide food for thought.” The Europeans depart with the same views they held when they arrived; and the Americans leave crestfallen from a missionary venture that failed to convert a single soul.

Eric Heinze, *Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY*, 182, 182 (Ivan Hare & James Weinstein eds., 2009).

⁵ Meanwhile, Canada is not only a small country; it is a small country next to the United States, something that has shaped Canadian attitudes toward hate speech regulation. See Robert A. Kahn, *Hate Speech and National Identity: The Case of the United States and Canada*, U. OF ST. THOMAS LEGAL STUDIES RESEARCH PAPER SERIES, No. 08-02, 8-14 (2010), <http://ssrn.com/abstract=1104478> (describing Canadian fears that U.S. “racism” will undermine Canada’s multicultural society).

es.⁶ The volume covers a wide range of subjects, including defamation of religions, Holocaust denial, state-sanctioned incitement to genocide, and the problems posed by satellite transmission of hate.⁷ Many leading scholars in the field appear on these pages, such as Robert Post, Bhikhu Parekh, Jeremy Waldron, and the late Ed Baker and Ronald Dworkin.⁸ The geographic scope of the volume is impressive. Contributions feature the law of sub-Saharan Africa⁹ and the countries of the post-Soviet world.¹⁰ The book includes excellent descriptive analyses of the treatment of hate speech under the Amer-

⁶ THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES (Michael Herz & Peter Molnar eds., 2012) [hereinafter "THE CONTENT AND CONTEXT OF HATE SPEECH"].

⁷ See Julie Suk, *Denying Experience: Holocaust Denial and the Free-Speech Theory of the State*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 144–63; Kwame Antony Appiah, *What's wrong with Defamation of Religions?*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 164–83; Irwin Cotler, *State-Sanctioned Incitement to Genocide: The Responsibility to Prevent*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6 at 430–55; Monroe Price, *Orbiting Hate? Satellite Transponders and Free Expression*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 514–37.

⁸ See *Interview with Robert Post*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 11–36; Bhikhu Parekh, *Is there a Case for Banning Hate Speech?*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 37–56; Jeremy Waldron, *Hate Speech and Political Legitimacy*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 329–40; Ed Baker, *Hate Speech*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 57–81; Ronald Dworkin, *Reply to Jeremy Waldron*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 341–44.

⁹ See Yared Legesse Mengistu, *Shielding Marginalized Groups from Verbal Assaults*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 352–77 (describing the case law of Ethiopia, Rwanda and South Africa).

¹⁰ See Andrei Richter, *One Step Beyond Gate Speech: Post-Soviet Regulation of "Extremist" and "Terrorist" Speech in the Media*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 290–305 (discussing examples from Russia and other former CIS states). In addition, Mengistu and Cotler in separate chapters each do a very nice job describing the hate speech cases arising out of the Rwandan Genocide. See Cotler, *supra* note 7, at 438–45; Mengistu, *supra* note 9, at 372–74. Meanwhile, Cotler and Price each take up hate speech in the Middle East. See Cotler, *supra* note 7, at 445–54 (describing Iran's state sponsored campaign to dehumanize Jews, Zionists and Israel); Price, *supra* note 7, at 520–30 (describing broadcasts aimed at Egypt, Saudi Arabia, Iraq, and Kurdish groups).

ican Convention on Human Rights,¹¹ in the policy pronouncements of the Council of Europe (including in the jurisprudence of the European Court of Human Rights),¹² and in the case law of a variety of countries including the United States, Canada, the United Kingdom, Germany, and Hungary.¹³

There is also a great deal of theory-building in the volume. This theory-building is striking for its originality as well as its diversity. Alon Harel proposes treating speech more leniently when it is “deeply rooted” as part of a “comprehensive and valuable form of life” of the speaker.¹⁴ Fredrick Schauer challenges the assumption dating back to John Stuart Mill that a society always benefits by protecting demonstrably false speech.¹⁵ Katharine Gelber, seeking a middle ground between legal sanctions and official neutrality, would like to see the state help victims and bystanders respond to hate speech with “counterspeech.”¹⁶ Meanwhile, Toby Mendel calls on in-

¹¹ See Eduardo Bertoni & Julio Rivera Jr., *The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 499, 501–06.

¹² See generally, Tarlach McGonagle, *Council of Europe Strategies for Countering Hate Speech*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 456–98.

¹³ Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 242–72.

¹⁴ Alon Harel, *Hate Speech and Comprehensive Forms of Life*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 306. Harel argues that otherwise the state can be seen as condemning the speaker’s core identity. *Id.* What is particularly noteworthy about Harel’s argument is what he does with speech acts that do not fit this category: Stray insults, and speech “deeply rooted” in a “comprehensive way of life” that is not “valuable” (i.e. Nazi and KKK speech) are given less protection, *id.* at 306–07, language recalling the discussion of “low value” speech in mid-twentieth century U.S. cases such as *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (concluding that punishing fighting words presents no constitutional problem since it plays “no essential part of any exposition of ideas”) and *Beauharnais v. Illinois*, 343 U.S. 250, 256–57 (1952) (applying the same principle to a group libel statute).

¹⁵ Frederick Schauer, *Social Epidemiology, Holocaust Denial, and the Post-Millian Calculus*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 129–43.

¹⁶ Katharine Gelber, *Reconceptualizing Counterspeech in Hate Speech Policy (with a focus on Australia)*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 210–16.

ternational courts to provide a clearer interpretive framework for regulating hate speech.¹⁷

Another major theme is context. Stephen Holmes, commenting on the clash between Ronald Dworkin and Jeremy Waldron over the legitimacy of hate speech bans, raises the possibility that their differences reflect a greater acceptance of hate speech in Europe than in the United States.¹⁸ Jamal Greene, taking a political science approach, views the U.S. preference for protecting hate speech as resting on potentially changeable attitudes (rather than on immutable traditions).¹⁹ Finally, Arthur Jacobson and Bernhard Schlink, looking at Title VII, U.S. college campuses, and broadcast regulation in the United States, argue that the United States punishes hate speech as much as Europe does, but it does so in different ways.²⁰

The volume is the product of collaboration between U.S. and Hungarian legal scholars. It grew out of a conversation between Hungary's Representative on Freedom of the Media for the Organization for Security and Cooperation in Europe, Miklos Haraszti, and Monroe Price, former dean of Cardozo Law School, about the "wildly divergent approaches to 'hate speech.'"²¹ The conversation led to conferences in New York and Budapest during which Peter Molnar, an activist, writer, and former member of Parliament in Hungary, played a leading role. Molnar conducted four interviews with leading

¹⁷ Toby Mendel, *Does International Law Provide Consistent Rules on Hate Speech?*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 417-29.

¹⁸ Stephen Holmes, *Waldron, Machiavelli, and Hate Speech*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 345-51.

¹⁹ Jamal Greene, *Hate Speech and the Demos*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 92-115.

²⁰ Arthur Jacobson & Bernhard Schlink, *Hate Speech and Self-Restraint*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 217-41.

²¹ THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at xxiii. Peter Molnar refers to "hate speech" in quotes as an expression of skepticism about the ability of the state to define the boundaries of hate speech with legal precision. See Peter Molnar, *Responding to "Hate Speech" with Art, Education, and the Imminent Danger Test*, in THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at 183, n. 2. Tarlach McGonagle in his article adopts Molnar's practice of putting "hate speech" in quotation marks. See, e.g., McGonagle, *supra* note 12, at 456 (using quotation marks around "hate speech" in the title and four other times he uses the term).

scholars, writers, and lawyers: Yale Law School Dean Robert Post,²² British writer Kenan Malik,²³ former ACLU president Nadine Strossen,²⁴ and civil rights litigator Theodore Shaw.²⁵

While the interviews covered a wide range of subjects, Molnar always directed the questioning to a 2008 gay pride parade in Budapest that was attacked by “counter-demonstrators” with rocks, acid-filled eggs, and bottles.²⁶ Before the parade, members of extreme right-wing groups used the Internet to encourage their supporters to block the parade, by force if necessary.²⁷ At the parade itself, the counter-demonstrators accompanied the attack with homophobic and anti-Semitic remarks.²⁸ After describing the parade, Molnar asked his interviewee a series of questions, often varying the facts to pose additional challenges to his interviewee. These responses offer a rarity in comparative legal studies—leading experts discussing a common fact pattern rather than talking past each other.²⁹

²² Interview with Robert Post, *supra* note 8, at 27.

²³ Interview with Kenan Malik, in *THE CONTENT AND CONTEXT OF HATE SPEECH*, *supra* note 6, at 81–91.

²⁴ Interview with Nadine Strossen, in *THE CONTENT AND CONTEXT OF HATE SPEECH*, *supra* note 6, at 378–97.

²⁵ Interview with Theodore Shaw, in *THE CONTENT AND CONTEXT OF HATE SPEECH*, *supra* note 6, at 399–413. The book also contains a defense of the “American” perspective on hate speech regulation by First Amendment attorney Floyd Abrams. Floyd Abrams, *On American Hate Speech Law*, in *THE CONTENT AND CONTEXT OF HATE SPEECH*, *supra* note 6, at 116–26.

²⁶ See Interview with Robert Post, *supra* note 8, at 27–30; Interview with Kenan Malik, *supra* note 23, at 85–86; Interview with Nadine Strossen, *supra* note 24, at 396; Interview with Theodore Shaw, *supra* note 25, at 410–11. Molnar also discusses the parade in his own contribution. Molnar, *supra* note 21, at 194–96.

²⁷ Interview with Robert Post, *supra* note 8, at 27.

²⁸ *Id.*

²⁹ Indeed, the results of the questioning were very interesting—showing points of divergence and consensus. Robert Post noted the freedom of the gay protesters to express their point of view while rejecting any attempt by the state to restrict the counter-demonstrators on “expressive” grounds. He did, however, draw a line at attempts to intimidate or exclude the gay pride marchers—this could be criminalized even if expressive. *Id.* at 27–29. Malik compared the counter-demonstrators to anti-globalization protesters who trash Starbucks stores and burn cars and supported tolerating anything short of physical violence. *In-*

In addition, the chapters—while taking up wildly divergent topics—coalesce around a number of themes that collectively advance our understanding of hate speech regulation. In the rest of this Article I will focus on three themes in particular. First, as Part II shows, by taking “context” seriously, the contributors raise the important question of the role “context” can or should play in an increasingly globalized world.³⁰ Second, as Part III shows, taken as a whole, the Herz and Molnar volume suggests the United States is less of an outlier on hate speech regulation than we often assume.³¹ To put it another way, it turns out that despite its size, the United States, far from ignoring the fight against hate speech, at times vigorously fights such speech—albeit in non-legal ways.³² Third, the contributors take a nuanced approach to “responses” society takes to hate speech. As Part IV shows, not all criminal sanctions are alike and there are a wide variety of non-legal responses—including public shunning, the use of art to educate people about the dangers of hate, and state supported counterspeech.³³ Although the varying contexts, complicated role of the United States, and multiple ways to combat hate speech suggest chaos, the contributors agree on a number of points.³⁴ Part V will suggest next steps for the comparative study of hate speech regulation, including bringing more world regions into the analysis as well as exploring the impact of globalized social media on hate speech regulation.³⁵

interview with Kenan Malik, supra note 23, at 86. Nadine Strossen and Molnar had a spirited discussion about the legal state of mind required to prosecute the counter-demonstrators. Specific intent to harm the protesters was not required; but more than negligence was necessary. *Interview with Nadine Strossen, supra* note 24, at 396. Theodore Shaw also focused on the state of mind of the counter-demonstrators, saying that he could live with a “knew or should have known standard.” *Interview with Theodore Shaw, supra* note 25, at 411.

³⁰ *See infra* Part II.

³¹ *See infra* Part III.

³² *See id.*

³³ *See infra* Part IV.

³⁴ *See infra* Part V.

³⁵ *See id.*

II. THE TENSION BETWEEN CONTEXT AND CONVERGENCE IN THE INTERNET AGE

Similar to Canada, Hungary is a small country and subject to the whims of international treaties. As such, it punishes hate speech and, more recently, Holocaust denial.³⁶ However, unlike Canada, the Hungarian Supreme Court has taken a libertarian approach to hate speech, one that makes direct reference to the U.S. “clear and present danger” doctrine.³⁷ The tension between these two approaches is reflected in the themes raised by the two Hungarian contributors to the volume about the role of context in hate speech regulation.³⁸

On one hand, Peter Molnar takes a very post-modern, tolerant, forgiving approach to context. In his chapter, “Responding to ‘Hate Speech’ with Art, Education and the Imminent Danger Test,” Molnar expresses a hope that could apply to the volume as a whole:

This chapter suggests that we start a new phase in the discourse on responses to “hate speech.” It proposes that discussion be based on a detailed understanding of the historical and cultural *context* of each country, region, or continent in which the “hate speech” is spoken. Further, this search must focus on

³⁶ For a discussion of Hungary's hate speech laws, see András Koltay, *The Appearance of the Clear and Present Danger Doctrine in Hungarian Hate Speech Laws and the Jurisprudence of the European Court of Human Rights*, SOCIAL SCIENCE RESEARCH NETWORK PAPER (2014), <http://ssrn.com/abstract=2457903>.

³⁷ *Id.* at 7–8 (describing Hungarian hate speech regulations). The clear and present danger test was developed by Justice Oliver Wendell Holmes. While it was used to suppress speech in *Schenck v. United States*, 249 U.S. 47, 52 (1919), the same case in which Justice Holmes said one does not have the right to yell “fire” in a crowded theater, *id.*, during the 1920s and 30s the doctrine became associated with protecting speech. For an overview of this period, see Wallace Mendelson, *Clear and Present Danger: From Schenck to Dennis*, 52 COLUM. L. REV. 313, 314–20 (1952); Koltay, *supra* note 36, at 2–6.

³⁸ Miklos Haraszti, *Foreword: Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)*, in THE CONTEXT AND CONTENT OF HATE SPEECH, *supra* note 6, at xv–xvi. Molnar, *supra* note 21, at 184.

the most effective law and policy against such speech.³⁹

This call for a “detailed understanding” of “the historical and cultural content” of regions, countries, and continents resonates throughout the book.⁴⁰ Under Molnar’s gentle questioning, Robert Post relaxed his view that legitimate democracies do not punish speech that is part of the public discourse.⁴¹ Instead, taking a “highly contextualist” approach,⁴² Post concedes that “[i]n some contexts, hate speech might so delegitimize democracy as to justify excluding hate speech from the formal definition of freedom of speech[.]”⁴³ Another strong defender of free speech, First Amendment attorney Floyd Abrams, makes a similar concession: “[A]s I have observed previously, I cannot condemn or even criticize states such as Germany and India, which have acted [to ban hate speech] in light of their own historically demonstrated needs.”⁴⁴

On the other hand, Miklos Haraszti, fresh from six years of protecting the media from state encroachment, takes a more skeptical approach towards context. While not denying the benefits that come from “diplomatic bargaining between local and global ‘values,’” he warns that “[t]he international community may pay too high a price for too few concessions if it legitimates local taboos and aban-

³⁹ Molnar, *supra* note 21 at 184 (emphasis added).

⁴⁰ For example, Rosenfeld, while not taking “a purely contextual approach” to hate speech regulation, states that “*where* and *under what circumstances* hate speech is uttered” can “make a difference” in whether or not to prohibit it. Rosenfeld, *supra* note 13, at 243, 246. See also Holmes, *supra* note 18, at 346 (arguing that Euro-American differences in approach to hate speech regulation reflect “different historical experiences”).

⁴¹ *Interview with Robert Post*, *supra* note 8, at 23–26. Post takes a much narrower position in his earlier writing. See Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 287 (1991) (suggesting that “successful” and “stable” democracies do not restrict access to the public discourse). For more on Post’s evolving views, see Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 568–84 (2013).

⁴² *Interview with Robert Post*, *supra* note 8, at 24.

⁴³ *Id.* at 25. Post goes on to say that in other times, punishing hate speech would constitute “censorship.” *Id.*

⁴⁴ Abrams, *supra* note 25, at 126.

dons insistence on every person's right to beliefs that are unpopular, even ugly, as long as they do not infringe on other people's rights."⁴⁵ What is more, the "territorial jurisdiction over media content has evaporated," raising questions about the meaning of national or regional context in an increasingly interconnected world. Thanks to the Internet and other global platforms, "organized" hate speech can now be delivered right at home, anonymously, without being restrained by distance, rules, or culture.⁴⁶

Ronald Dworkin raised another concern about context. Responding to the claim that had he been born in Europe, he would have supported hate speech bans, Dworkin said that an "explanation of a conviction's genesis is not an argument for its truth."⁴⁷ Put another way, context can only go so far. Many of the arguments in *The Content and Context of Hate Speech* are universal in scope, or apply in ways that do not neatly align with national borders. For example, Alon Harel's argument that the state should give greater protection to "deeply rooted" expressions of "comprehensive . . . form of life" is not logically limited by culture, history, or geography.⁴⁸ While Frederick Schauer addresses context in his discussion of harmful falsity, the context in question is occupational, not regional—the harm posed by falsity is much greater in the general public than in the ivory towers of academia, where it can be rebutted.⁴⁹

Context also raises practical hazards. For instance, a focus on context makes it harder to enforce international standards, which

⁴⁵ Haraszti, *supra* note 38, at xv. There is also a Foreword by Adam Liptak, Supreme Court reporter for the New York Times. See Adam Liptak, *Foreword: Hate Speech and Common Sense*, in *THE CONTENT AND CONTEXT OF HATE SPEECH*, *supra* note 6, at xix–xxii.

⁴⁶ Haraszti, *supra* note 38, at xvi. I wonder how the proponents of "extensive regulation" actually imagine curbing hate speech online. Can they avoid the only known "solution" to controlling the Internet—already realized by China or Iran—which is the carving up of the global network into nationally controlled intranets?

⁴⁷ Dworkin, *supra* note 8, at 344. Dworkin was responding to Stephen Holmes's characterization of American free speech absolutism as a form of "cultural anthropology." Holmes, *supra* note 18, at 346.

⁴⁸ See Harel, *supra* note 14, at 306.

⁴⁹ See Schauer, *supra* note 15, at 140–41.

can give courts too much flexibility. Describing the jurisprudence of the European Court of Human Rights, Toby Mendel complains that the court rulings “often spend very little time analyzing the impugned speech itself” and provide “little legal analysis for their holdings.”⁵⁰ Indeed, “[i]t sometimes appears that the decision hinges primarily on whether the content and intent of the speech in question appears to be of a racist character,” continues Mendel.⁵¹

But if context can be misused, the pressures of globalization can be overstated. While some scholars like Ruti Teitel see an emerging global convergence of norms,⁵² these “global norms” still have to be applied in concrete contexts. While Haraszti is correct that the Internet can deliver information unrestrained by “distance, rules, or culture,” the impact of that speech on the society in question will be shaped by these factors.⁵³ In other words, even if the Internet sends the same hate messages to computer screens in New York, Budapest, or Toronto, the impact of this speech on the surrounding society will vary in ways that will depend heavily on the type of contextual factors Molnar and many of the contributors to *The Content and Context of Hate Speech* emphasize.⁵⁴

In addition, the idea that the only response to online hate is for states to tear up the information highway and replace it with their own, much smaller “intranets” is subject to question. Monroe Price’s discussion of the regulation of satellite transponders suggests that, with help from the private sector, states can take steps to regu-

⁵⁰ Mendel, *supra* note 17.

⁵¹ *Id.*

⁵² See Robert A. Kahn, *Flemming Rose’s Rejection of the American Free Speech Canon and the Poverty of Comparative Constitutional Theory*, 39 BROOK. J. INT’L. L. 657, 687–92 (2014) (discussing Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2571 (2007)).

⁵³ Haraszti, *supra* note 38, at xvi.

⁵⁴ To give a local example, I live in Minnesota where “fuck” is referred to as the F-bomb and is largely frowned upon. As such, a curse word could well suggest an intent to intimidate. By contrast, on the East Coast, where I used to live, cursing is more common and would not necessarily indicate a hostile intent. One well established guidebook warns tourists to Baltimore that the locals use harsh language in ordinary interactions. See GEOFF BROWN, *MOON BALTIMORE* 222 (2009).

late online hate short of breaking up the Internet.⁵⁵ While the tactic of jamming frequencies—the satellite equivalent of breaking off from the Internet—has been used, it is often short term and done in conjunction with other policies.⁵⁶ Finally, while the danger is real that states will follow China and Iran and carve up the Internet, the type of nationalism implied in this effort is very different from the use of context to understand why a given nation responds to hate speech in a particular way.

Perhaps a more difficult objection to the use of context is Dworkin's. While context can explain why a given individual, group or society objects more or less strenuously to a given type of speech—for example, why Southern states are particularly sensitive to cross burning and Ku Klux Klan activity⁵⁷—it does not make a given approach to speech regulation “true” or “false.”⁵⁸ To the extent that context is used to dismiss the validity of an opposing viewpoint by attributing it to an American “First Amendment tic”⁵⁹ or European concern with Nazism,⁶⁰ it has a limited role to play. But when Stephen Holmes argues that one reason liberals in the United States supported free speech so vigorously during the 1950s and 1960s was to avoid being associated with Communism, and that this “compromise” produced a Leftism in the United States that supported liberty but was unable to challenge the power structure,⁶¹ I do not see him making an argument about the validity of a particular approach to freedom of speech. Rather, I see him as providing context that will help observers around the world understand what makes freedom of speech seem so attractive to people in the United States.

⁵⁵ Price, *supra* note 7, at 531–32 (describing efforts at regulation).

⁵⁶ *Id.* at 523–24 (describing how a combination of jamming and threats led Deutsche Telekom to stop broadcasting Islam or Reform radio, which the US government claimed supported terrorism).

⁵⁷ See Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163 (2006).

⁵⁸ Dworkin, *supra* note 8, at 344.

⁵⁹ *Id.* at 343–44.

⁶⁰ Holmes, *supra* note 18, at 346.

⁶¹ *Id.*

The debate over the use of context in the Herz and Molnar volume is a rich one. Precisely because they take context into account, the contributors to *The Content and Context of Hate Speech* find themselves in arguments about the strengths and limitations of context-based approaches to hate speech regulation. As we shall see in the next section, the openness to context also helps the contributions call into question one of the established truths of the field—namely the idea that when it comes to hate speech regulation, the United States is an outlier.

III. HOW EXCEPTIONAL IS THE UNITED STATES WHEN IT COMES TO REGULATING HATE SPEECH?

The essays in *The Content and Context of Hate Speech* undermine the defensive approach that United States lawyers and scholars have taken in international discussions about hate speech regulation. As Adam Liptak puts it, “The United States’ commitment to the protection of hate speech is distinctive, deep, and authentic—and also perhaps reflexive, formal, and unthinking.”⁶² This reflects a history of viewing the United States and Europe as polar opposites. In essence, Europe punishes hate speech; the United States does not. On this view, the rest of the world does not matter. Instead, the argument focuses on who has the “right” approach to hate speech regulation.

Added to this descriptive view of the world are normative defenses of freedom of speech. Freedom of speech is seen as necessary to reach the truth, ensure democratic legitimacy, and protect personal autonomy.⁶³ Supporting these defenses are maxims about the way the world works that serve to deepen the argument for tolerating speech. These maxims include the fear that restricting one type of speech would lead to the restriction of other speech (the slippery slope argument),⁶⁴ fears that the government would use hate speech bans against the very minority groups the speech was

⁶² Liptak, *supra* note 45, at xix.

⁶³ For the classic overview of this position, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY*, 11–15 (1982).

⁶⁴ Kahn, *supra* note 52, at 667.

meant to protect,⁶⁵ a self-confidence that exposure to hate speech made citizens braver, more resilient and tolerant of difference,⁶⁶ and a belief that the best response to bad speech is more speech.⁶⁷

It is worth briefly thinking about what the traditional view leaves out. There is little discussion about why the United States developed the way it did, and about whether the United States might, at some point in the future, adopt hate speech bans. Nor does the traditional view have room for the possibility that the U.S. versus Europe comparison might actually be wrong, that—in other words—there might be pockets in the United States where hate speech is pursued (and repudiated) with the same vigor as in Europe.⁶⁸ Meanwhile, Europe is seen as a monolith. There is little appreciation for the differences among European countries (*e.g.* the United Kingdom vs. Germany) or between types of hate speech law (Holocaust denial and blasphemy bans vs. general laws that ban racial or religious incitement). Finally, the part of the world that is not Europe or the United States did not exist in the traditional view, especially Latin America and South Asia, which have their own rich traditions of hate speech regulation, but have received little attention in the U.S. legal academy.⁶⁹

⁶⁵ Nadine Strossen made this point in a 1990 law review article. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 482, 555–57 (1990).

⁶⁶ See LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986). See also Kahn, *supra* note 52, at 668 (describing maxims of speech protection).

⁶⁷ United States Supreme Court Justice Louis Brandeis made this observation in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁶⁸ Not everyone took this view. See ERIK BLEICH, *THE FREEDOM TO BE RACIST? HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM* (2011) (suggesting that the gap between Europe and the United States is not so wide as is commonly understood).

⁶⁹ For an exception, see Tanya Katerí Hernández, *Hate Speech And The Language Of Racism In Latin America: A Lens For Reconsidering Global Hate Speech Restrictions And Legislation Models*, 32 U. PA. J. INT'L L. 805 (2014). In addition to an extensive discussion of hate speech regulation in Brazil, Katerí Hernández also relates the widespread presence of hate speech restrictions in Latin America into a broader argument that there is a growing global consensus in favor of regulating hate speech in some way. *Id.* at 808.

One way to decenter the Euro-American dichotomy is to add more countries. For example, Eduardo Bertoni and Julio Rivera Jr. view the treatment of hate speech in the Inter-American Convention on Human Rights as considerably more libertarian than the International Convention on Civil and Political Rights, and European hate speech bans more generally.⁷⁰ This reflects the context in which the Convention was adopted, a time of “authoritarian governments” and the involvement of U.S. lawyers and diplomats in the drafting of the treaty.⁷¹ At the same time, Article 13(5) of the American Convention on Human Rights bans “advocacy of national, racial, or religious hatred that constitute incitements to lawless violence.”⁷² This language, so close to the language in *Brandenburg v. Ohio*⁷³ that lets the state ban speech “likely” to incite imminent violence,⁷⁴ complicates efforts to divide the world into a tolerant United States and a Europe that has draconian hate speech bans.⁷⁵

Another decentering takes place at the level of theory-building. In his conversation with Peter Molnar, Robert Post conceded that the legitimacy of hate speech bans may depend on context.⁷⁶ This may owe something to Peter Molnar’s persuasive skills—which

⁷⁰ See Bertoni & Rivera, *supra* note 11, at 503.

⁷¹ *Id.* at 512.

⁷² Pact of San Jose, Costa Rica (B-32), American Convention on Human Rights, art. 13(5), Nov. 22, 1969, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

⁷³ 395 U.S. 444 (1969).

⁷⁴ *Id.* at 447.

⁷⁵ Andrei Richter’s somewhat terrifying account of sweeping media regulations in post-Soviet Russia reinforces the same conclusion from the opposite direction. When compared to Russian media laws that give prosecutors great discretion to close radio and TV stations, and punish journalists who interview suspected terrorists, see Richter, *supra* note 10, at 294, 296–300, the mainstream European Court of Human Rights regime seems quite tame. For example, in *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A)(1994), the ECHR held that it violated Article 10 to prosecute a journalist who interviewed skinheads under Danish hate speech laws. See McGonagle, *supra* note 12, 460–61 (describing *Jersild*).

⁷⁶ See *Interview with Robert Post*, *supra* note 8, at 25.

are manifest⁷⁷—but it also reflects a certain tension in Post’s democratic legitimacy theory, a tension perhaps present in all locally rooted theories. Simply put, Post’s theory responded to critical race theorists who argued in the 1980s and 1990s for campus-based speech codes.⁷⁸ As some critical race theorists pointed to Europe,⁷⁹ Post offered a distinctly *American* defense of hate speech, one rooted in the constitutional experiences of the United States.⁸⁰ At the same time, however, Post—especially in the aftermath of the Danish Cartoon controversy⁸¹—presented his theory as global in scope.⁸² While Post has since retreated into contextualism, his experience raises a question that haunts *The Content and Context of Hate Speech*: Has the age of First Amendment absolutism—if it ever existed—finally come to an end?

Consider the following evidence from the contributors. After studying the hate speech laws of the United States, Canada, Britain, Germany, and Hungary, Michel Rosenfeld, a Cardozo Law Professor, concluded that “in a world that has witnessed the Holocaust, various other genocides, and ethnic cleansing, all of which were surrounded by abundant hate speech, the American way seems definitely less appealing than its alternatives.”⁸³ Miklos Haraszti, while sympathetic to media protection, still holds to the position that “[a]ctual instigations to actual hate crimes must be criminalized” and leaves open the possibility that other “offensive speech” could be handled “in civil courts.”⁸⁴ Toby Mendel combines concerns about the “abuse” of hate

⁷⁷ I base this on personal conversations with Peter Molnar (he is a very engaging person) as well as his ability to draw out the best in the people he interviewed for the book.

⁷⁸ See, e.g., MARI J. MATUSDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (1993).

⁷⁹ See RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT*, 122–31 (1999) (describing the experience of other countries, largely in Europe, that adopted hate speech bans).

⁸⁰ See Post, *supra* note 41, at 279–85.

⁸¹ See generally *infra* note 101.

⁸² Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 *CONSTELLATIONS* 72 (2007); for a critique, see Kahn, *supra* note 41, at 576–81.

⁸³ Rosenfeld, *supra* note 13, at 288.

⁸⁴ Haraszti, *supra* note 38, at xiii.

speech laws with a rejection of the slippery slope argument.⁸⁵ Finally, Peter Molnar, although emphasizing the importance of art and education in responding to hate speech, also calls for banning hate speech when the surrounding circumstances suggest “imminent danger of violence.”⁸⁶

Faced with this, a free speech traditionalist from the United States would have to concede that he or she is sailing upstream. While European bans of Holocaust denial may be outside the global mainstream, the volume reveals the strength of the emerging consensus that speech which intimidates or threatens violence based on race, religion, or ethnicity can be punished. What might be even more shocking to the traditionalist is the extent to which some of the U.S. contributors, without necessarily supporting European hate speech laws (and in some instances vigorously opposing them), have nevertheless taken positions that in their own way support this emerging consensus. As if this were not bad enough, there is also evidence that the United States punishes some forms of hate speech

⁸⁵ Mendel, *supra* note 17, at 417, 425. See also Parekh, *supra* note 8, at 49 (noting that in ordinary life “we make such exceptions all the time” without sliding from side to side unable to stop). According to Mendel:

While there are cases of overbroad hate speech laws being abused, there are no examples of well-drafted laws gradually leading to greater restrictions on free speech. Democracies around the world have been applying hate speech laws for decades and, while the rate of prosecutions may fluctuate in different countries and at different times, there has been no general trend toward greater and broader application of these laws.

Mendel, *supra* note 17, at 425. While Mendel may be right in a general sense, the growth of memory laws in France during the first decade of this century, with laws passed banning denial of colonialism, the positive elements of French experience in Algeria, and the cruelties of the trans-Atlantic slave trade all within a couple of years suggests that the scope of hate speech bans can expand fairly rapidly under favorable circumstances. See Robert A. Kahn, *Does it Matter How One Opposes Hate Speech Bans? A Critical Commentary on Liberté pour l'Histoire's opposition to French Memory Laws*, 15 WASH. U. GLOBAL STUD. L. REV. (forthcoming 2016).

⁸⁶ Molnar, *supra* note 21, at 195–96. Significantly, Molnar does not require that the speaker “intended” to cause violence—knowledge is enough. *Id.* at 195.

every bit as severely as the Europeans, albeit outside the legal system.

A. Supporting the First Amendment While Opposing Hate Speech

To be fair, some contributors take a very strong, almost absolutist position to freedom of speech—at least when discussing the United States. For example, Ed Baker maintained a steadfast opposition to hate speech bans, largely on pragmatic grounds.⁸⁷ The furthest he went was to support laws against discrimination (which, conceivably, could include speech-based hostile work environment claims).⁸⁸ However, Baker saw anti-discrimination measures as an alternative to hate speech regulation, rather than something that complements it.⁸⁹ Nor has Ronald Dworkin changed his opposition to hate speech laws—although he is open to restrictions on racial violence and content-neutral “time, place, and manner” restrictions on hate speech.⁹⁰ Dworkin states that this is because in a modern democratic society “[he] must accept the right of others to hold [him] in contempt.”⁹¹ Finally, Floyd Abrams, while expressing sympathy for countries that punish hate speech, is not willing to change his “per-

⁸⁷ Baker, *supra* note 8, at 75.

⁸⁸ Baker, *supra* note 8, at 75.

⁸⁹ *Id.* at 75–76 (describing how in his experience the same politicians who show their sensitivity on racial matters by supporting hate speech bans oppose anti-discrimination bans). The strength of Baker’s opposition to hate speech bans may rest on his autonomy-based justification of free speech. *Id.* at 63. While Frederick Schauer can identify situations in which the search for truth is balanced by competing justifications, Schauer, *supra* note 15, and Robert Post can identify situations in which the speech act in question is outside the public discourse (or necessary in a weak or emerging democracy), *Interview with Robert Post*, *supra* note 8, at 24, human autonomy is harder to balance—at least when the speech act does not lead to imminent violence. Flemming Rose, who also defends freedom of speech on a similar—albeit more romantic—concept of personal autonomy likewise takes a largely absolutist position on hate speech restrictions. For more, see FLEMMING ROSE, *THE TYRANNY OF SILENCE* (2010); Kahn, *supra* note 52, at 678–81.

⁹⁰ See Dworkin, *supra* note 8, at 343.

⁹¹ *Id.* at 342.

sonal opposition to hate speech limitations" which for him is "an issue of principle."⁹²

Nadine Strossen is another story. On the surface, the former ACLU president plays the part of a free speech traditionalist. In her interview with Peter Molnar, she was not at all reticent in candidly challenging his arguments.⁹³ When asked whether hate speech laws should be justified to "prevent grave harms to marginalized groups," Strossen took issue with Molnar's premise, arguing that it is "insulting" to assume that the target of racial or ethnic insult cannot respond on his or her own.⁹⁴ When Molnar suggested that a supporter of hate speech bans might respond that "not everyone has the education and, as a result, the critical capacity of, say, a white lawyer," Strossen rejected this argument as "such an elitist statement" and "unbelievable!"⁹⁵ While Strossen took special offense to the suggestion that "because someone is a member of a certain demographic group that person is less capable of responding," she also rejected the idea that responding to hate speech with counterspeech requires a certain level of education.⁹⁶

At the same time, Strossen makes statements that might surprise a free speech traditionalist. For one thing, her rejection of hate speech bans in the United States comes with a series of responsibilities. Those who reject hate speech legislation as "merely symbolic" have a duty "to advocate [for] some *real* measures to counteract discrimination," including "appropriately tailored affirmative action to specifically single out those [disadvantaged] groups."⁹⁷ Here Strossen reverses the stance of the hypothetical racial conservative Baker describes in his book chapter; instead of supporting hate speech bans to avoid facing the reality of discrimination, Strossen

⁹² Abrams, *supra* note 25, at 126.

⁹³ See *Interview with Nadine Strossen*, *supra* note 24, at 378.

⁹⁴ *Id.* Strossen went on to say: "We are not somehow automatically diminished just because some bigot says something negative about us." *Id.*

⁹⁵ *Id.* at 379.

⁹⁶ *Id.* at 379-80.

⁹⁷ *Id.* at 382.

sees strong anti-discrimination laws as the cost of protecting hate speech.⁹⁸

However, Strossen's biggest departure from the traditional position involves the practice of non-state actors—newspapers, the media, and Facebook users—that “punish” hate speech outside the legal system. During the 1990s, college newspapers across the country debated whether to run ads denying the Holocaust.⁹⁹ A number of papers ran the ads, arguing that the First Amendment left them no choice.¹⁰⁰ While other papers refused, compared to non-state actors in countries that punished hate speech and/or Holocaust denial, the U.S. papers were reluctant to engage in acts of informal censorship.¹⁰¹ One might, then, expect a U.S. traditional libertarian to take a similar position and oppose all restrictions—non-legal as well as legal—against hate speech.

Strossen did not do this. Instead, the past president of the ACLU said that it is “very, very important to use speech to marginalize the ideas of the hate speakers.”¹⁰² Nor was this a stray comment. To the contrary, she repeatedly called on political leaders and university presidents to condemn hate speech,¹⁰³ welcomed taboos against making racist statements, and called for the application of “social and cultural pressure against . . . the expression of discrimina-

⁹⁸ *Id.*; see Baker, *supra* note 8, at 75–76. One wonders what the general public in the United States would prefer: Baker's hypothetical conservative position (hate speech bans but no affirmative action), or Strossen's position (affirmative action but no hate speech bans).

⁹⁹ See KAHN, *supra* note 1, at 121–35.

¹⁰⁰ *Id.* at 121.

¹⁰¹ *Id.* at 121–35. Interestingly, by the time of the Danish Cartoon controversy, attitudes had changed. See, e.g., Robert A. Kahn, *News Value, Islamophobia, or the First Amendment? Why and How the Philadelphia Inquirer Published the Danish Cartoons*, U. OF ST. THOMAS LEGAL STUDIES RESEARCH PAPER SERIES, No. 10-07, (2010), <http://ssrn.com/abstract=1548705>. Most newspapers in the United States refused to run the images of Muhammad. *Id.* at 7.

¹⁰² *Interview with Nadine Strossen, supra* note 24, at 380.

¹⁰³ See *Id.* at 387–89 (reproducing statements from President Bill Clinton and Harvard University President Derek Bok).

tory ideas."¹⁰⁴ While rejecting legal sanctions, Strossen is quite accepting of social sanctions.¹⁰⁵

Social sanctions may have a role to play in discouraging hate speech. Politeness and civility are critical parts of living together in a fast-paced, crowded, complicated, and diverse world. But social sanctions can be very severe—especially with the growing role of social media.¹⁰⁶ Consider, for example, the members of the Sigma Alpha Epsilon (SAE) fraternity at the University of Oklahoma who were caught on videotape singing a racist chant.¹⁰⁷ The fraternity members did not violate any hate speech laws, but the University of Oklahoma suspended the fraternity and expelled the students who performed the chant from school.¹⁰⁸ Or consider the two male computer programmers who, at a Python computer convention in Santa Clara, California, made what the woman seated behind them thought was a sexist joke.¹⁰⁹ Although this behavior is protected by the First Amendment, the woman got their attention, snapped a photo, and sent it on Twitter after which the “jokers” were fired.¹¹⁰

Among the many arguments against restricting hate speech is one that such restrictions will have a chilling effect on speakers. Alon Harel argues that legal sanctions risk repudiating the values of

¹⁰⁴ *Id.* at 393.

¹⁰⁵ *Id.*

¹⁰⁶ To be fair, this is a development that blossomed only after Strossen’s 2010 interview. See *Interview with Nadine Strossen*, *supra* note 24, at 378 (Molnar interviewed Strossen in her office on Nov. 4, 2009; Strossen later expanded on her interview.).

¹⁰⁷ See, e.g., Hailey Branson-Potts & Matt Pearce, *Expelled University of Oklahoma student in racial chant video deeply sorry*, L.A. TIMES (Mar. 10, 2015), <http://www.latimes.com/nation/la-na-oklahoma-fraternity-fallout-20150310-story.html>; Elliott C. McLaughlin, “Disgraceful” University of Oklahoma fraternity shuttered after racist chant, CNN (Mar. 10, 2015), <http://www.cnn.com/2015/03/09/us/oklahoma-fraternity-chant/>.

¹⁰⁸ See Hailey Branson-Potts & Matt Pearce, *supra* note 107; Elliott C. McLaughlin, *supra* note 107.

¹⁰⁹ See Dana Liebelson & Tasneem Raja, *Donglegate: How One Programmer’s Sexist Joke Led to Death Threats and Firings*, MOTHER JONES (Mar. 22, 2013), <http://www.motherjones.com/politics/2013/03/pycon-2013-sexism-dongle-richards>.

¹¹⁰ *Id.* The woman who tweeted the joke was also fired, a fact that only further demonstrates the power of social media. *Id.*

the speaker, which is problematic when the speaker's views are "deeply rooted" in a "comprehensive . . . form of life."¹¹¹ Compared to what the speakers in these examples actually suffered—expulsion, suspension of the fraternity, loss of job—wouldn't legal sanctions be far less frightening? One could argue that legal sanctions are more problematic because in a society that is still racist, the legal system might either fail to punish hate speech or disproportionately punish minority speakers under purportedly neutral hate speech bans.¹¹² But this would not explain the failure to take notice of similar dangers posed by shunning and other powerful non-legal sanctions. That said, my main point is not to critique Strossen, but merely to show how far it is removed from the traditional view in which the United States is near absolutist in its protection of speech.

Finally, when discussing *Brandenburg v. Ohio* with Peter Molnar, Strossen shows a surprisingly European willingness to allow for the punishment of some forms of incitement-based hate speech. When asked about the gay pride march in Budapest, Strossen said that in interpreting the "imminent lawless action" standard in *Brandenburg*, she takes a very functional approach.¹¹³ For example, in an

¹¹¹ Harel, *supra* note 14, at 306.

¹¹² See *Interview with Nadine Strossen*, *supra* note 24, at 391 (questioning whether hate speech bans would be enforced given elected officials, and judges, and "where juries represent cross-sections of the community"). To me, the stronger argument would be that in a society, as the events in Ferguson demonstrate, where local police departments enforce vagrancy and quality of life offenses in a blatantly discriminatory manner, often with a profit motive at hand, hate speech restrictions will most likely be used against African-Americans. See Elliott C. McLaughlin, *Justice Dept. Echoes Ferguson Residents' Complaints*, CNN (Mar. 4, 2015), <http://www.cnn.com/2015/03/04/us/ferguson-missouri-police-racial-bias-justice-department-report/index.html>. Indeed, opponents of the fighting words doctrine have raised the danger of discriminatory over-enforcement. See Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire is a Threat to the First Amendment and should be Overruled*, 88 MARQ. L. REV. 441, 445 (2004) (arguing that state courts have stretched the doctrine "beyond all recognition" in order to "protect the police from criticism, with all of the inherent dangers that such an approach presents").

¹¹³ See *Interview with Nadine Strossen*, *supra* note 24, at 396–97. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of

Oregon case involving a California hate publication that incited the killing of African-Americans, the ACLU did not insist that the jury acquit the defendant; instead, the ACLU took the position that if the facts satisfied *Brandenburg*, and there was no “less restrictive” means of preventing violence, the state could punish the speaker.¹¹⁴ In other words, in the right circumstances, Strossen was willing to let the state punish hate speech that incited violence.¹¹⁵ This position places her well within the mainstream of the authors of *The Content and Context of Hate Speech* and likely within the emerging mainstream of the global discourse on hate speech regulation.

Other U.S. contributors also depart from the traditional view—albeit less dramatically. Robert Post is willing to punish speech that displays an intent to intimidate and, more generally, is willing to punish speech that falls outside public discourse—a broad category that includes the workplace and possibly college campuses.¹¹⁶ Theodore Shaw, a voting rights litigator with the NAACP Legal Defense and Education Fund, takes a very similar position to Strossen on incitement, and like Harel, argues that racist speech is “without value.”¹¹⁷ Although Shaw would be “very, very careful” before banning hate speech, he sees legal regulation as a legitimate alternative.¹¹⁸ Shaw also shares Yared Legesse Mengistu’s position that speech targeting historically disadvantaged minority groups is more worthy of punishment than speech that targets the majority.¹¹⁹ Indeed, Shaw goes a little further in questioning whether African-

the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action . . .”).

¹¹⁴ *Id.* at 397. The case in question was *Berhanu v. Metzger*, 850 P.2d 373, 375–76 (Or. Ct. App. 1993).

¹¹⁵ Recall that this was the position of Miklos Haraszti, the OSCE rapporteur on media freedom who introduced the volume. See Haraszti, *supra* note 38, at xiii.

¹¹⁶ *Interview with Robert Post*, *supra* note 8, at 26, 29. See Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 318 (1991) (conceding that “[t]he regulation of racist speech within public institutions of higher learning . . . does not turn on the value of democratic self-governance and in realization public discourse”).

¹¹⁷ *Interview with Theodore Shaw*, *supra* note 25, at 404, 409.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 408–09; Mengistu, *supra* note 9, at 352–77.

American speech targeting White people is hate speech—as opposed to expressions of frustration at White dominance and exploitation.¹²⁰

B. The United States Already Informally “Punishes” Some Hate Speech

A second shift in the undermining of the traditional view that the United States protects hate speech focuses on institutions, rather than individuals. In an enlightening essay, Arthur Jacobson and Bernhard Schlink describe three U.S. institutions that restrict hate speech: employers, who, because of Title VII, operate as surrogate enforcers of hate speech standards;¹²¹ broadcast and cable regulators who censor themselves based on standards that are established and enforced privately;¹²² and campus speech codes, which often contain sweeping definitions, broad obligations to self-report hateful speech, and potentially draconian punishments.¹²³ The result is a distinctly “American” model of hate speech regulation which “suppresses hate speech only incidentally, only as part of other purposes, not specifically and never by name” but works within institutions where the possibility of hate speech is the greatest.¹²⁴ Jacobson and Schlink conclude that “[t]he American way may . . . wind up suppressing more types of speech more effectively than occurs in the other constitutional democracies.”¹²⁵ As a result, the forces opposed to hate speech in American life do not need criminal sanctions—entrenched in employers, networks and the college campus, they have already seized the “commanding heights of a democratic public.”¹²⁶

Even if the anti-hate speech forces have not won, the traditional image that contrasts a freedom-loving United States and an overly restrictive Europe is in tatters. For one thing, the volume

¹²⁰ *Interview with Theodore Shaw, supra* note 25, at 409.

¹²¹ Jacobson & Schlink, *supra* note 20, at 219–27.

¹²² *Id.* at 227–32.

¹²³ *Id.* at 227, 232–39.

¹²⁴ *Id.* at 239.

¹²⁵ *Id.* at 240.

¹²⁶ *Id.* at 241.

shows how the Europe versus U.S. contrast is incomplete—it leaves out the rest of the world. Moreover, the United States censors more speech than the First Amendment absolutists have led us to believe. Finally, the U.S. lawyers, scholars, and legal academics who have contributed to *The Content and Context of Hate Speech* have shown an increasing willingness to come out of their trenches and meet Europe—and the rest of the world—in the middle. If hate speech cannot be criminally regulated, shunning is a possibility. While content-based bans on hate speech are unlikely in the United States in the near future, even a former ACLU president is willing to allow punishment of speech that incites—provided it is done in the least restrictive means possible.¹²⁷ In the future, the discussion over hate speech regulation will move to this middle ground. One place where the middle ground is growing the fastest is in the area we shall discuss next: how states can or should respond to hate speech.

IV. HOW DO SOCIETIES ACTUALLY RESPOND TO HATE SPEECH?

It is easy to declare that one is “for” or “against” hate speech bans. As a practical matter, however, what does supporting or opposing hate speech bans actually mean? Do supporters of hate speech bans want to sentence all hate speakers to hard labor—as German Holocaust denier Ewald Althans was?¹²⁸ Do all opponents of hate speech bans insist on strict state neutrality, so that any departure from strict neutrality—such as Strossen’s call for political leaders to publicly repudiate acts of hate speech—is illegitimate?¹²⁹ Many opponents of hate speech bans (or Holocaust denial bans) call for public education or good speech to drown out bad speech. Are these calls meant to be taken seriously? Or are they better understood as afterthoughts—concessions the critic makes after explaining why hate speech laws are unworkable?¹³⁰

¹²⁷ *Interview with Nadine Strossen, supra* note 24, at 396–97.

¹²⁸ KAHN, *supra* note 1, at 81.

¹²⁹ *Interview with Nadine Strossen, supra* note 24, at 382.

¹³⁰ Sometimes the calls for education are accompanied by doubts about whether the target group actually suffered harm. For example, L. Bennett Graham of the Beckett Fund, an opponent of the Defamation of Religions concept, calls for ed-

Fortunately, the contributors to *The Content and Context of Hate Speech* have done an excellent job focusing on the problem of response to hate speech, and in the process, moving the topic from an afterthought to a subject worthy of its own discussion. Peter Molnar's call at the start of his chapter to focus on the most effective law and policy to combat hate speech sets the tone for the entire volume.¹³¹ In what follows, I will first address legal responses to hate speech. In the traditional view, the very mention of the legal regulation of hate speech conjures up images of prisoners in leg irons. But as we shall see, there are a wide variety of approaches the law can take, ranging from prison sentences, to criminal fines, to civil court actions. One can also examine the frequency of prosecution and the possibility of largely, or purely, symbolic legislation against hate speech.¹³²

Second, I will turn to non-legal measures. The contributors to *The Content and Context of Hate Speech* have discussed a rich set of non-legal possibilities, including using art and education as a response to hate speech, having the government enable victims and bystanders to respond to the hateful speech by engaging in counterspeech, and using techniques such as public condemnation and shunning to socially isolate the hate speakers. Non-legal responses, however, face two challenges. First, are these measures effective in curbing hate speech (or as effective as a society has a right to expect)? Second, to the extent the measures are effective, do they raise concerns about chilling speech or violating state neutrality that led some observers to oppose hate speech bans in the first place?

ucation against Islamophobia. But this call is undermined by his argument that Muslims cannot experience hate speech in the same way African-Americans do because religion, unlike race, is mutable. See Robert A. Kahn, *A Margin of Appreciation for Muslims? Viewing the Defamation of Religions Debate through Otto-Preminger-Institut v. Austria*, 5 U. CHARLESTON L. REV. 401, 409–11 (2011) (discussing L. Bennett Graham, *Defamation of Religions: The End of Pluralism*, 23 EMORY INT'L L. REV. 69 (2009)). If Graham is serious about his substantive argument, why should he care about Islamophobia at all?

¹³¹ Molnar, *supra* note 21, at 184 (emphasis added).

¹³² Suk, *supra* note 7, at 144.

A. Rethinking Legal Measures Against Hate Speech: Prison, Fines, and Symbolic Legislation

The traditional view spends more time discussing whether hate speech should be punished than what the punishment should be. They spend very little time—except when discussing certain high profile cases—about the decision to prosecute. The assumption is straightforward: If there is a law on the books, we have to assume it is going to be used. If that law includes prison time, we have to assume the hate speaker will go to prison. Human history is sufficiently full of repressive governments imprisoning free-thinkers, journalists, and outspoken citizens for these fears to have some currency.¹³³ As the contributors to the Herz and Molnar volume show, however, the actual criminalization and prosecution of hate speech laws is considerably more complicated.

In this regard, Julie Suk's analysis of Holocaust denial legislation in France does a very good job in raising these complications. According to Suk, while France bans Holocaust denial, the number of cases prosecuted has been very small and many of the books that have been subject to litigation under France's ban are available in French libraries.¹³⁴ In effect, the French Holocaust denial ban is symbolic—the relatively small number of prosecutions under the law is less important than sending the message that the state can govern legitimately because it has put to rest its connection with the anti-Semitic Vichy regime.¹³⁵ The French ban on Holocaust denial turns Robert Post's theory of democratic legitimacy on its head: For Suk and the French, it is the absence of a speech ban, not its presence, which would render French democracy illegitimate.¹³⁶ At the

¹³³ For a good overview of this history of oppression, see LEONARD W. LEVY, *BLASPHEMY: A VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* (1995). While Levy is careful to present arguments on both sides, the impression one gets after reading 500 pages of offensive speech countered by legal condemnation and often cruel punishments is a sense of relief to be living in a modern society.

¹³⁴ Suk, *supra* note 7, at 153.

¹³⁵ *Id.* at 145.

¹³⁶ Post recognizes this but focuses primarily on the part of Suk's essay that compares France to the United States, arguing that the American state is less

same time, it shows how a law that is rarely used can have an important impact.

There are, however, limitations to the symbolic approach. Presented with Suk's argument, Strossen replied that real anti-discrimination laws would be much more effective than a "symbolic" hate speech ban.¹³⁷ Moreover, if a society is "engaging in [] symbolism," they can "keep it at the symbolic level" by enacting non-binding statements calling on society to refrain from engaging in hate speech.¹³⁸ Although Suk is probably right that the French denial ban has "not removed the voices of Holocaust deniers from public discourse,"¹³⁹ it is unclear whether other Holocaust denial bans—most notably those in Germany, where prosecutions of Holocaust deniers are more common and are sometimes accompanied by prison sentences—have the same quality.¹⁴⁰

The argument gets even more difficult when one shifts from Holocaust denial to hate speech in general. Banning Holocaust denial sends a particular message about a national past, much like banning cross burning and masked demonstrations in the United States.¹⁴¹ Although, in theory, a general hate speech ban that was rarely used might be seen as symbolic, it is hard to see what message such a

neutral than Suk suggests. See *Interview with Robert Post*, *supra* note 8, at 30; Suk, *supra* note 7, at 162–64 (noting that in the United States discussions of past atrocities focus on groups rather than the state).

¹³⁷ *Interview with Nadine Strossen*, *supra* note 24, at 391.

¹³⁸ *Id.* at 391–92. On one level, leaders who follow Strossen's worldview do something very similar when they publicly condemn acts of hate speech. See *id.* at 387–89.

¹³⁹ Here Suk makes an interesting observation about punishment. The French Holocaust denial ban is safely symbolic because most defendants face fines instead of prison time. Suk, *supra* note 7, at 153. Without agreeing entirely—a criminal prosecution is probably not a symbolic experience for most defendants—she is right that the lesser penalties make a difference in how the law is perceived. Suk's position is also in line with the Parliamentary Assembly of the Council of Europe, which makes a distinction between criminal penalties and penal laws. McGonagle, *supra* note 12, at 486.

¹⁴⁰ See Michael Bazylar, *Holocaust Denial Laws and Other Legislation Promotion of Nazism, GENOCIDE PREVENTION NOW* (2006), <http://genocidepreventionnow.org/Portals/0/docs/Bazylar-GPN-Original.pdf> (noting that German "anti-Nazi" laws are strictly interpreted).

¹⁴¹ See Kahn, *supra* note 57, at 163–64.

statute would convey. Even if my Canadian colleague from graduate school would likely answer that such laws show that Canada (unlike the United States) repudiates racism and follows its treaty obligations¹⁴²—a general hate speech ban is a clumsy way to send this message.

That said, Suk's essay stands for an important larger point: All hate speech bans are not the same.¹⁴³ Some countries enforce hate speech bans with frequent prosecution and prison sentences, while other bans are symbolic.¹⁴⁴ Although symbolic bans will likely be problematic to a traditional civil libertarian—because part of the "symbolism" is the chilling of speech—they should be seen as less onerous than frequently used hate speech statutes. The same applies to administrative sanctions and civil litigation, which because of streamlined procedures and lesser penalties, allow for a greater flow of cases.¹⁴⁵

¹⁴² In this regard, it is significant that Canada's hate speech laws were enacted in the late 1960s, a time when international treaties such as the International Convention on Civil and Political Rights and the International Convention on the Elimination of Racial Discrimination were also being drafted. For an overview, see Martine Valois, *Hate Propaganda, Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma*, 26 LA REVUE JURIDIQUE: THÉMIS 373, 383 (1992) (describing in influence of international laws on the deliberations of the Cohen Commission).

¹⁴³ Suk, *supra* note 7, at 144.

¹⁴⁴ *Id.* Some of the penalties can be quite steep. For example, France punishes hate speech violations with fines of up to 45,000 euros and/or one year imprisonment. Law of the Press of July 29, 1881, Art. 32. In Germany, hate speech (including Holocaust denial) is punished with up to five years imprisonment. See German Penal Code § 130. In addition, more extreme penalties are sometimes used. For example, a German court sentenced Ewald Althans, whose life in neo-Nazi circles was the subject of the documentary *Beruf: Neonazi* [profession neo-Nazi], to three and a half years of hard labor for denying the Holocaust. See KAHN, *supra* note 1, at 81. Bridgette Bardot has been fined repeatedly for violating France's hate speech laws. See BLEICH, *supra* note 68, at 30–34 (describing the prosecution of Bardot).

¹⁴⁵ Gelber, *supra* note 16, at 201–02 (describing civil liability for hate speech in Australia). The civil remedies for hate speech in Australia supplement rarely used criminal anti-vilification laws with civil litigation. *Id.* at 200.

B. Non-Legal Measures: Shunning, Art, and Counterspeech

The discussion of non-legal responses in *The Content and Context of Hate Speech* is very rich. While Nadine Strossen has called on public figures to condemn racist hate speech,¹⁴⁶ Arthur Jacobson and Bernhard Schlink have argued that this type of shunning already takes place.¹⁴⁷ Depending on one's point of view, this could be good or bad. The social pressure that shunning places on a hate speaker risks the repudiation of the speaker's "comprehensive . . . form of life" that Harel warns about.¹⁴⁸ On the other hand, Ronald Dworkin, in opposing hate speech bans, argued that the citizen can ask the state, but not fellow citizens, to refrain from acts of disrespect¹⁴⁹—so perhaps Harel's concern about respecting deeply rooted convictions would not apply to acts of repudiation or shunning, at least when done by private parties.¹⁵⁰

For her part, Strossen is sympathetic to Harel's concern about repudiation—especially of religious groups.¹⁵¹ Writing in language that foreshadows today's disputes over photographers, pizza shops, and cake makers who refuse on Christian grounds to have anything to do with gay marriage,¹⁵² Strossen gave her opinion that "there is an enormous amount of ignorant, negative, discriminatory

¹⁴⁶ *Interview with Nadine Strossen, supra* note 24, at 381–82.

¹⁴⁷ Jacobson & Schlink, *supra* note 20, at 227–37.

¹⁴⁸ Harel, *supra* note 14, at 306.

¹⁴⁹ Dworkin, *supra* note 8, at 342–43.

¹⁵⁰ On the other hand, if the president or the leader of a public institution such as a college or university following Strossen's lead condemned an act of hate speech, a holder of a "deeply rooted" belief might legitimately claim that the state is condemning not just the speech but the speaker and his or her group. Indeed, a rebuke delivered by a popular politician or public leader might sting more than a misdemeanor type charge that resulted in a fine.

¹⁵¹ *Interview with Nadine Strossen, supra* note 24, at 395.

¹⁵² There have been many incidents. *See, e.g.,* Michael McLaughlin, *Oregon Bakery Must Pay for Refusing to Make Wedding Cake for Lesbian Couple*, HUFFINGTON POST (Jul. 2, 2015) http://www.huffingtonpost.com/2015/07/02/sweet-cakes-by-melissa-fined-same-sex-wedding_n_7718540.html. For an attempt to balance these competing rights, see Anthony Walsh, *Tragic Choices in Ideological Battles—Gay Rights and Religious Freedom*, 17 JOURNAL OF RELIGION AND SOCIETY 1 (2015).

prejudice against and stereotypes about members of the Christian right, fundamentalist Christians, who are, after all, a minority in the United States as a whole."¹⁵³ When these Christians are expelled from public schools for wearing t-shirts proclaiming that homosexuality is a sin, they are, according to Strossen, being repudiated in the way Harel describes.¹⁵⁴

The difficulty here is in squaring Strossen's sympathy for fundamentalist Christians—even if they express homophobic views—from racists who, according to Strossen, should be marginalized. There are two ways out of this dilemma. One could try to distinguish fundamentalist Christian homophobia from White racism—a position I am not sure Strossen is eager to take. Alternatively, one could moderate Harel's position by distinguishing between condemning a group—even a racist group—based on a repudiation of the group's ideology (which would be off-limits), from repudiation that follows an act taken by a group member (which would be tolerated, even if it wound up indirectly repudiating the group in question). In this fashion, one could exempt the t-shirt wearing Christian from public shunning while still marginalizing a Christian who made an explicitly homophobic remark.¹⁵⁵

Shunning and public condemnation, however, are not the only responses to hate speech. Peter Molnar, in a very interesting essay, raises the possibility that art can remedy hate speech—at least when the hate speech itself takes the form of art.¹⁵⁶ As an example, Molnar

¹⁵³ *Interview with Nadine Strossen, supra* note 24, at 395.

¹⁵⁴ *Id.*

¹⁵⁵ Furthermore, when the racist, sexist, or homophobic act involves violence—when, for example, the fundamentalist Christian throws eggs, or yells slurs at a gay pride parade, then Harel's concern about protecting the sensibilities of holders of "deeply rooted" beliefs rooted in "comprehensive forms of life" should yield to the right of victims, bystanders and the society at large to speak out against the violent acts in question. *See Harel, supra* note 14, at 306. To put it another way, I remember listening to the speech Strossen described that President Clinton made in the aftermath of the Oklahoma City bombing. *Interview with Nadine Strossen, supra* note 24, at 387–88. I am glad he made it, even though the speech may have on the margins unfairly increased the alienation of the right wing militia movement, which was surging in popularity at the time.

¹⁵⁶ For an earlier discussion from *see* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998) (describing controversies over public

describes how an African-American character in the play *The Guest at Central Park West* views a statue on the grounds of the Museum of Natural History featuring U.S. President Theodore Roosevelt, on a horse with a barefoot slave on one side and a barefoot native American on the other.¹⁵⁷ The statue makes the character angry because it is a “symbol”—something that is “more dangerous than any bomb anybody could drop” and because it represents White supremacy and manifest destiny.¹⁵⁸ After raising the possibility of suing to have the statue removed—which Molnar dismisses as unlikely—Molnar suggests alternatives that, without invoking the legal system, might resolve the problem.¹⁵⁹

One possibility is to convert the statue—which now stands unadorned, without commentary—into an exhibit, in which the negative messages associated with the images could be put into historical, artistic, and political context.¹⁶⁰ Alternatively, Molnar suggests adding an additional statue of an African-American and Native American who fought against discrimination.¹⁶¹ In addition to these private steps that the Museum of National History should take, there should be “broad nationwide efforts to examine all unexplored parts of related structures of subordination, both past and present.”¹⁶² These artistic efforts will help those offended by a particular piece of art; at the same time, the act of providing the commentary, or creating the counter-image could itself help relieve the tensions created

monuments such as the Confederate flag, and monuments to Civil War figures in a variety of different contexts).

¹⁵⁷ Molnar, *supra* note 21, at 188.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 190.

¹⁶⁰ *Id.* at 190–91. This is not that different to what Germany is considering doing with *Mein Kampf*. The German copyright is expiring in 2015; there has been a debate whether the book should be banned, or released as it is. A panel of experts, however, has decided to release or release with commentary—in effect turning the book from a hate speech tract to a historical exhibit. See *‘Mein Kampf’ could return to German shelves in early 2016*, DW (July, 25, 2015), <http://www.dw.com/en/mein-kampf-could-return-to-german-shelves-in-2016/a-18607455>.

¹⁶¹ Molnar, *supra* note 21, at 191.

¹⁶² *Id.*

by the “structures of subordination” by creating a space for public discussion.¹⁶³

Another possibility, one suggested by Molnar’s proposal to create a new statue, is counterspeech. In a compelling essay, Katharine Gelber makes a strong case for supported counterspeech, in which the state helps victims and their allies respond to hate speech with their full human capacities.¹⁶⁴ Because the focus of supported counterspeech is on the victim,¹⁶⁵ rather than shunning the speaker, Gelber’s approach avoids the problem raised by Harel of repudiating the speaker’s “deeply rooted” views.¹⁶⁶ For example, in the aftermath of a hate speech incident at a sporting event, communities would seek to publish a pamphlet on the subject.¹⁶⁷ If the incident occurred on television or radio, the communities would seek alternative coverage to rebut the “negative stereotyping” contained in the broadcast.¹⁶⁸ Supported counterspeech could be combined with other policies to ensure a comprehensive approach to regulating hate speech.

According to Gelber, the objection to supported counterspeech comes from those who, in addition to supporting freedom of speech, take the position that the state should be neutral

¹⁶³ For example, in the aftermath of the shooting of nine African-Americans in a Charleston, South Carolina church, and the subsequent focus on removing the Confederate flag from the capitol in Columbia, South Carolina, the city of Minneapolis has considered renaming Lake Calhoun, given that John Calhoun (who the lake is named after) was a supporter of slavery. The surrounding conversation about whether to rename the lake, and if so what that name should be, has led to a wide ranging discussion of diverse groups, cultures and histories of the region. It has also led group involvement. For instance, an online petition of over 1,700 signatures has called for a restoration of the lake’s original Native American name—Mde Medoza (Lake of the Loons). See Steve Brandt, *Lake Calhoun name change gets another look in Minneapolis*, MINNEAPOLIS STAR TRIBUNE (Jun. 22, 2015), <http://www.startribune.com/lake-calhoun-name-change-gets-another-look-in-minneapolis/309249161/>.

¹⁶⁴ Gelber, *supra* note 16, at 213-14.

¹⁶⁵ *Id.* at 214.

¹⁶⁶ Harel, *supra* note 14, at 306.

¹⁶⁷ Gelber, *supra* note 16, at 215.

¹⁶⁸ *Id.*

in the competition between viewpoints.¹⁶⁹ Opponents of hate speech bans often place the responsibility of responding to speech squarely on the individual.¹⁷⁰ In response, Gelber calls for a positive conception of freedom of speech, one in which the individuals become “free” when they “are able to exercise their authority to speak.”¹⁷¹ While Gelber’s conception will not satisfy a strict proponent of neutrality, it might gain favor with those whose main concern about hate speech regulation involve the personal, financial, and moral costs of criminal sanctions, as well as those—like Robert Post and Ronald Dworkin—whose main complaint about hate speech bans is their failure to give opponents of anti-discrimination laws and other topics of public concern a chance to air their views.¹⁷²

Finally, in an extensive discussion of European policy initiatives relating to hate speech, Tarlach McGonagle looks at how government officials, lawyers, and academics can respond to hate speech directly and shape the legal academic discussion about it.¹⁷³ For example, Recommendation 97(20) calls on public officials to refrain from hate speech,¹⁷⁴ while the European Commission against Racism and Intolerance (ECRI) issues reports on specific topics related to hate speech regulation, such as racism on the Internet, rac-

¹⁶⁹ *Id.* at 206–07.

¹⁷⁰ *Id.* (citing JONATHAN RAUCH, *KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT* 159 (1993); DAVID A.J. RICHARDS, *FREE SPEECH AND THE POLITICS OF IDENTITY* 135–36 (1999)).

¹⁷¹ *Id.* at 209.

¹⁷² Asked about Gelber’s proposals in the context of anti-Roma speech in Hungary, Post is happy to have political figures in Hungary condemn such speech. He is also willing to see the state facilitate Roma speech in response if the Roma are otherwise excluded from the system. *Interview with Robert Post, supra* note 8, at 34–35. On the other hand, he is not willing to let the Roma use public fora while denying their opponents the same use. *Id.* at 35. One might respond by arguing that, under Gelber’s proposal, opponents of the Roma would gain access to public fora were they subject to hate speech—a formulation that renders her proposal content neutral. This possibility, however, would slip away if one took the approach of Yared Legesse Mengistu and treated only anti-Roma speech as hate speech. *See* Mengistu, *supra* note 9, at 353–77.

¹⁷³ McGonagle, *supra* note 12, at 474–97.

¹⁷⁴ *Id.* at 476.

ism in sports and anti-Semitism.¹⁷⁵ These initiatives, and others like them, advance the fight against hate speech in a productive, non-confrontational way.

Taken as a whole, the contributions complicate the traditional view whereby one either threw hate speakers in jail or ignored the problem entirely. There is a vast middle ground including non-penal criminal sanctions, symbolic laws, shunning, education and art, and counterspeech. These approaches each have strengths and weaknesses, especially when combined with an increasing diversity of efforts to define what types of speech acts should be subject to response.¹⁷⁶ What is more, the choice of which intermediate measures to adopt will likely depend on the historical, cultural, and political context of the locality, country, or international organization regulating the speech act in question. While the resulting array of options might appear overwhelming, the contributors carefully guide the reader through the new terrain these options open up.

IV. CONCLUSION: MAKING HATE SPEECH REGULATION FUN AGAIN

The Content and Context of Hate Speech keeps to the promise of Miklos Haraszti and Monroe Price to explore the “wildly divergent” positions societies across the globe have taken on hate speech regulation.¹⁷⁷ At the same time, as one reads through the essays, one sees that in the midst of all the diversity there are strands of convergence. One type of convergence is doctrinal. There is a striving for a common ground on hate speech regulation that would allow punishment of speech that incites to violence. While some contributors from the United States are not willing to give up on content-neutrality just yet, there is a growing sense even in New York, Los

¹⁷⁵ *Id.* at 488–92. As McGonagle points out the ECRI reports allow the group to focus on specific issues in considerable detail. *Id.* at 490–92.

¹⁷⁶ For example, the discussion here has focused on Harel’s concept of “deeply rooted” speech and Mengistu’s emphasis on hate speech that targets historically disadvantaged groups. See Harel *supra* note 14, at 306–26; Mengistu, *supra* note 9, at 353–77.

¹⁷⁷ THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6, at xxiii.

Angeles, and Chicago that certain types of acts should be punishable, even if not as “hate speech.”¹⁷⁸

A second type of convergence is functional. Although the United States relies less on criminal sanctions to respond to hate speech, it still “punishes” a fair amount of hate speech, provided that one interprets “punish” broadly enough to include informal censorship through the social media, nervous employers, overeager college administrators, and cable and broadcast networks, fearful of code and standard violations.¹⁷⁹ United States hate speech foes may not have seized the “commanding heights,” but they are certainly in the game. Thus, even if some traditional civil libertarians would prefer that the U.S. government was neutral in its treatment of speech, the contributions to *The Content and Context of Hate Speech* have shown how far that ship has already sailed.¹⁸⁰

A final convergence is scholarly. Although there are still some hard-core free speech supporters among the contributors such as Ed Baker, Ronald Dworkin, and Floyd Abrams,¹⁸¹ the overall tenor of the volume is better represented by Robert Post, Peter Molnar, and Nadine Strossen.¹⁸² Similar to Post, many of the United States contributors are increasingly willing to recognize the limited scope of

¹⁷⁸ For example, one might consider Philip Harris who placed a noose around a statue of James Meredith at Ole Miss. While one might view this as a classic example of free expression, a federal court in Mississippi did not. Instead, it sentenced Harris to six months imprisonment for intimidating African-Americans. See *Prison for Mississippi man who placed noose on civil rights statue*, NEW ORLEANS TIMES-PICAYUNE (Sept. 17, 2015) http://www.nola.com/crime/index.ssf/2015/09/prison_for_mississippi_man_who.html. Another sign is the willingness of Nadine Strossen—a former president of the ACLU—to accept that in some circumstances incitement might be punishable. *Interview with Nadine Strossen*, *supra* note 24, at 397. More generally, the Supreme Court ruling in *Virginia v. Black*, 538 U.S. 343 (2003) opened the door to restricting some forms of hate speech when it viewed cross-burning as a type of “true threat” that could in some circumstances be subject to regulation. *Id.* at 359–60.

¹⁷⁹ See Jacobson & Schlink, *supra* note 20, at 217–41.

¹⁸⁰ See THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 6.

¹⁸¹ See Baker, *supra* note 8, at 57–80; Dworkin, *supra* note 8, at 341–43; Abrams, *supra* note 25, at 116–26.

¹⁸² See *Interview with Robert Post*, *supra* note 8, at 11–37; Molnar, *supra* note 21, at 116–29; *Interview with Nadine Strossen*, *supra* note 24, at 378–99.

the First Amendment model of absolutist (or near absolutist) protection of speech.¹⁸³ While holding the United States to a different standard, Post and Abrams express a sympathetic understanding to the circumstances of other countries that face different challenges.¹⁸⁴ Meanwhile, Peter Molnar shows that one can support very limited hate speech bans while relying mainly on education, counterspeech and other, non-legal alternatives,¹⁸⁵ while Nadine Strossen shows that one can be a resolute opponent of racism, sexism, and anti-Semitism while opposing hate speech bans.¹⁸⁶

The next step is to expand the discussion. Let me suggest three areas. First, while the essays discuss Africa and the former Soviet Union, it would be very interesting to expand the discussion to South Asia, the home to some of the strongest bans on blasphemy and religious incitement.¹⁸⁷ Many of India's current bans on religious incitement and blasphemy relate to the period of British imperial rule.¹⁸⁸ What motivated these bans? How do they compare to the reasons Europeans ban, and some in the United States shun, hate speech? Finally, what types of opposition did these laws engender? Is there anything this South Asian experience would add to our catalogue of reasons to be skeptical of speech restrictions?¹⁸⁹

¹⁸³ See *Interview with Robert Post*, *supra* note 8, at 11–37.

¹⁸⁴ See *id.*; see also Abrams, *supra* note 25, at 116–26.

¹⁸⁵ See Molnar, *supra* note 21, at 116–29.

¹⁸⁶ See *Interview with Nadine Strossen*, *supra* note 24, at 378–99.

¹⁸⁷ While Bertoni and Rivera have written an excellent piece on the American Convention on Human Rights, country specific work on Latin America would also expand our understanding of hate speech regulation—especially given the different notion of racial identity in the region as well as the consolidation of democracies in post conflict societies such as Argentina and Guatemala which are now looking to their past. Bertoni & Rivera, *supra* note 11, at 499–513.

¹⁸⁸ See G.R. THURSBY, *HINDU-MUSLIM RELATIONS IN BRITISH INDIA*, 9–72 (1975)(describing efforts of the colonial government during the early twentieth century to enact restrictions on the press).

¹⁸⁹ To give a hint at what this would look like, consider the following statement of M.K. Gandhi:

Government protection will not make us tolerant of one another. Each hater of the other's religion will under a stiffer law seek secret channels of making vicious attacks on his opponents' religion, or writing vilely enough to provoke anger but veiled enough to avoid the penal clauses of the law.

Second, the development of social media and texting over the past five years has raised new questions. People who spend all day texting are eventually going to find “hate” directed against them. Does this require an ethos of “ignoring” hateful speech because life is simply too short to seek out every hateful comment on the Internet? Or do the platforms themselves have an obligation to take down hateful speech? To put it another way, many free speech theorists view “the Internet” in monolithic terms.¹⁹⁰ But are all Internet platforms the same? Is finding a racist comment in the comment section after reading that the Boston Red Sox lost yet again the same thing as seeing the same message on a racist website that I need to click through ten Google screens to find? How do either of these compare to receiving a racist Tweet or Facebook message? The time has come for us as a community to think about these questions with the same rigor we have devoted to traditional hate speech questions.¹⁹¹

Third, the story of the computer programmers who were fired after telling a sexist joke highlights a potential area of conflict between hate speech and privacy. Traditionally, hate speech laws punish public expressions. But in a world in which everyone has a smart phone, the line between public and private has started to break down. As the story of the programmers show, private conver-

THURSBY, *supra* note 188, at 9. One might also highlight the Salman Rushdie’s defense of speech based on the human need to tell stories which Danish Cartoon publisher Flemming Rose has relied on in his own theories of speech regulation. See Kahn, *supra* note 52, at 676, 690.

¹⁹⁰ For example, Richard Delgado and Jean Stefancic describe the different forms hate speech takes on email, traditional, websites, YouTube and blogs. Richard Delgado & Jean Stefancic, *Hate Speech in Cyberspace*, 49 WAKE FOREST L. REV. 319, 328–32 (2014). At the same time, however, their discussion of how to respond to hate speech still treats the Internet as a unitary whole. See, e.g., *id.* at 337 (“The Internet heightens one’s sense of separation from the momentary target of one’s venom.”). Is this sense of separation the same on Twitter as it would be in an email? What about Facebook? From a practical perspective, it is easier to fight hate speech on the Internet one platform at a time.

¹⁹¹ These questions will not be solved at once and they may well be solved outside the legal system. To give one small example, the auto-complete function on Google excludes racist terms. In other words, if I start typing “N...” I cannot come up with the N-word. This is one small example of how one can “regulate” hate on the Internet without government intervention.

sations can become viral hate speech that may then be subject to legal punishment or informal sanctions. Added to this is a growing popularity of Internet-based shaming in society at large.¹⁹² If our goal in opposing hate speech is to remove it from the public sphere, what is “the public sphere” in an age of smart phones that can record parts of social life previously thought to have been private?¹⁹³

One cannot fault the editors for not addressing these issues, especially since information technology has developed so rapidly over the past several years. Moreover, there is only so much one can include in any volume. With that said, the ideas raised in *The Content and Context of Hate Speech* will undoubtedly help a new generation of scholars answer these and other questions in the field of hate speech regulation. As a reading experience, I highly recommend the book. The essays were rich, detailed, and thought-provoking. If you can only take one hate speech regulation book with you on a desert island, this is the one to take (The book would also serve quite nicely as the basis for a course on Hate Speech and the Law).

Meanwhile, Herz and Molnar have done what I thought would be impossible. They made the study of hate speech regulation fun again.

¹⁹² See Lauren M Goldman, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AMER. CRIM. L. REV. 415, 438–40 (describing parents who use social media to shame their children).

¹⁹³ One could argue that the programmers had no reason to expect privacy given that they were in a large, crowded convention hall—a quintessential public setting. Not only that, it was a work related event; as such, the programmers should have known better than to have told offensive jokes. What happens, however, if the programmers were heard not at a job convention but on a crowded subway car in Manhattan? On the one hand, the harm of the hateful comments is real; on the other hand, part of urban life—at least in a major metropolitan area—is that while you spend a large part of your day in proximity to other people, you will never see most of them again. This urban anonymity generates a sense of privacy—and a freedom to speak freely, since the other people in the subway car simply will not care what one says—that is in danger of being lost in an age of smart phones. See Liebelson & Raja, *supra* note 109.

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AMENDMENT
LAW REVIEW

KEYNOTE ADDRESS

CURRENT THREATS TO FREE SPEECH ON CAMPUS

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A "COMPARATIVE" ANALYSIS OF THE ACADEMIC
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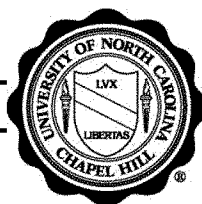
LITIGATING FREE SPEECH ISSUES IN THE TRENCHES

Robert M. O'Neil

CONTRIBUTING ARTICLE

ACADEMIC FREEDOM IN THE "GUARDED" INSTITUTION

*Douglas B. McKechnie
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