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Amy Kristin Sanders
University of Texas at Austin

THE "EXCEPTIONALIST TRAP": WHY THE FUTURE FIRST AMENDMENT MUST TAKE FUNDAMENTAL HUMAN RIGHTS INTO ACCOUNT

Amy Kristin Sanders*

ABSTRACT

Other countries do not have the same approach to freedom of expression as the United States. The American approach to freedom of expression wields influence around the world. Sanders argues the United States' unwillingness to consider alternatives to the current categorical approach to free speech can no longer be justified. This Article explores the possibility of better aligning free expression jurisprudence in the United States with other liberal democracies. Sanders argues that alignment will result in the elevation of other human rights in the United States including privacy, dignity, and autonomy.

* Associate Professor of Journalism and Media, University of Texas at Austin, PIT-UN Social Justice Fellow.

INTRODUCTION

More than six years ago, I packed all my worldly belongings—including nearly two dozen copier-paper boxes filled with casebooks, treatises and academic monographs—and moved 7,095 miles across the globe to the Middle East. Some might call it my academic mid-life crisis. Just a year after earning tenure, I had found myself with more questions about my academic future than answers. Little did I know that five years teaching and researching media law in Qatar would change my entire scholarly perspective. I had boarded the fourteen-hour flight to Doha as a First Amendment scholar, but somewhere amid the scorching temperatures and the sandstorms, I matured into a comparative free expression scholar.

It took nearly five years to undo three decades of First Amendment indoctrination—an education in freedom of speech and press that began in middle school with my early interest in journalism. Like many Americans who graduate from journalism school or go to law school intent on studying free speech, I spent a majority of my scholarly life focused on what law professor Timothy Zick refers to as the "intraterritorial"[1] First Amendment—contemplating the limits of free expression within the geographic boundaries of the United States—unaware of the global implications of American free speech jurisprudence. Even more, for a significant portion of that scholarly life, I had been steeped in the trappings of First Amendment exceptionalism—the misguided idea that our perspective on the five freedoms is vastly superior to other countries' approaches simply because it protects more speech. As noted, First Amendment scholar Frederick Schauer wrote in 2005:

> [T]he American First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails. In numerous dimensions, the American approach is *exceptional* . . . in ways that may also reflect an exceptional though not necessarily correct understanding

1. TIMOTHY ZICK, THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES 25 (2014). "The *intraterritorial* First Amendment governs the exercise of expressive and religious liberties within the territorial boundaries of the United States (including its territories)." *Id.* (emphasis in original).

> of the relationship between freedom of expression and other goals, other interests, and other rights.[2]

Schauer went on to explain how this exceptionalism distances us from other liberal democracies—a divergent path that has only widened since his chapter was first published in 2005.

As American free expression doctrine has matured, the consequences of living in a globally connected world have become even more evident. First, a unanimous U.S. Supreme Court invoked the marketplace of ideas metaphor to strike down two provisions of the Communications Decency Act as unconstitutional restrictions on internet speech in its 1997 *Reno v. ACLU* decision.[3] Fourteen years later, Chief Justice John Roberts and seven colleagues ruled the First Amendment immunized the Westboro Baptist Church from liability for its hateful protests outside military funerals in *Snyder v. Phelps*.[4] Our nation's hands-off approach to internet regulation and its insistence that hate speech be tolerated have widened the rift between the United States and its peers. Only one term prior to *Snyder*, in *United States v. Stevens*,[5] Chief Justice Roberts noted the Court's decision in that case did not preclude the Court from expanding the categories of unprotected speech, but he did so with some reluctance:

> Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First

2. Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 30 (Michael Ignatieff ed., 2005) (emphasis in original).

3. 521 U.S. 844 (1997) (holding unconstitutional two provisions prohibiting the transmission of content harmful to minors via the internet).

> The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Id. at 885.

4. 562 U.S. 443 (2011) (holding the First Amendment protected church members from tort liability for their hateful protests outside a funeral for a dead member of the military).

5. 559 U.S. 460 (2010) (holding a federal law criminalizing the creation, sale or possession of animal crush videos was overbroad and unconstitutional under the First Amendment).

> Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.[6]

But the same Court refused to provide relief for Lance Corporal Matthew Snyder's family, who had been confronted outside his funeral by members of the conservative Westboro Baptist Church holding signs that included myriad hateful slogans, including "God Hates Fags," "Thank God for Dead Soldiers," "You're Going to Hell," "Thank God for 9/11," and "Priests Rape Boys."[7] As this article will discuss, this act and others like it would not have been protected as free speech in many countries, including several well-known liberal democracies.

6. *Id.* at 472.
7. *Snyder*, 562 U.S. at 448.

This disconnect between the United States' exceptional approach to free speech and other countries' desires to protect citizens from hate speech or elevate individual privacy, dignity, and autonomy to equal standing has significant consequences for international relations. As Zick notes in an article published since his book:

> [O]ur First Amendment has another critically important dimension. Speech traverses and transcends international borders, citizens and non-citizens commingle across territorial boundaries for expressive and religious purposes, states and localities weigh in on matters of global concern, and the First Amendment is discussed, invoked, and defended in various global forums. Further, the fact that speech is increasingly subject to the laws of several nations at once raises challenging jurisdictional and conflict of laws questions. Foreign libel judgments . . . are also creating distinctive challenges for courts and other U.S. officials concerns about preserving the exceptional First Amendment protections.[8]

These dimensions came into sharp focus during my time in the Middle East, where citizens do not enjoy the same speech liberties that I had been raised to revere. As a U.S. citizen living and working in Qatar, I was keenly aware of the limits that existed. Despite the guarantees of academic freedom associated with employment at an American university, I routinely engaged in self-censorship in both my personal and professional life. Was it necessary? I'll never know the answer to that question, but I was certain that I did not want to become the expat making headlines in the local newspaper. "Qatar court finds parents guilty of defamation over online insults,"[9] "Slandering on social media: Expat gets QR10,000 fine,"[10] and similar stories provided regular reminders that I was living outside the protections

8. Timothy Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, 76 OHIO ST. L.J. 705, 706 (2015).

9. Peter Kovessy, *Qatar Court Finds Parents Guilty of Defamation Over Online Insults*, DOHA NEWS (May 15, 2015), https://www.dohanews.co/qatar-court-finds-parents-guilty-of-defamation-over-online-insults/ [https://perma.cc/6J85-VU5V].

10. *Slandering on Social Media: Expat Gets QR10,000 Fine*, GULF TIMES (July 16, 2016, 9:36 PM), https://m.gulf-times.com/story/502662/Slandering-on-social-media-Expat-gets-QR10-000-fine [https://perma.cc/3M6T-TEYS].

of the First Amendment. More importantly, those stories—involving Filipino and Indian expatriate workers, respectively—reinforced the real dangers of starting an international incident with a thoughtless quip.

None of this is to say that the United States should revert back to its pre-*New York Times Co. v. Sullivan*[11] days of strict liability for defamation or criminal punishment for seditious libel. Rather it is to say, as Zick, Schauer, and others[12] have said, that well-intentioned reflection on the state of the First Amendment in the United States is clearly warranted. As I will explore in the following pages, the possibility of better aligning our free expression jurisprudence with that of other liberal democracies offers much promise—including the elevation of other human rights, including privacy, dignity, and autonomy, in American society.

11. 376 U.S. 254 (1964) (holding that public officials must prove actual malice to recover damages in a libel lawsuit).

12. *See, e.g.*, Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449 (2014); Catharine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

I. AMERICAN FREE SPEECH EXCEPTIONALISM—THE PROBLEMATIC PREFERRED POSITION DOCTRINE

In reality, First Amendment rights in the United States have never been static. They have evolved over time as the Supreme Court has interpreted the meaning of the forty-five words and the scope of the five freedoms. Despite the occasional dissent by Justice Hugo Black[13] or Justice William Douglas,[14] the Court has never read the words "Congress shall make no law"[15] to be an absolute prohibition against the regulation of expression. For 134 years after the Bill of Rights was ratified, states were not required to adhere to the First Amendment's free speech mandate.[16] It would take another six years for the Court to incorporate press freedom against the states.[17] But in 2020, we take as settled law that state actors face limits when they seek to limit our expressive rights:[18]

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13. Perhaps Black's most famous articulation of his absolutist interpretation can be found in his dissent in *Konigsberg v. State Bar of California*, 366 U.S. 36, 61 (1961):

> As I have indicated many times before, I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field . . .
>
> The Court, by stating unequivocally that there are no 'absolutes' under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the 'balancing test' and that therefore no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgment. In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed, our entire structure of government rest. *Id.* at 67-68.

14. Justice Douglas, dissenting in *Roth v. United States*, 354 U.S. 476, 514 (1957), wrote: "The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position."

15. U.S. CONST. amend. I.

16. *See* Gitlow v. New York, 268 U.S. 652 (1925) (holding the First Amendment did not bar the state of New York from punishing political speech directly advocating the overthrow of government).

17. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (holding that a Minnesota law designed to prevent the publication of a newspaper amounted to First Amendment violation).

18. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019) (holding a private entity running a public access channel may prohibit speech based on its content because they are not state actors who fall within the prohibitions of the First Amendment).

> The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this court applies what is known as the state-action doctrine. Under the doctrine . . . a private entity may be considered a state actor when it exercises a function 'traditionally exclusively reserved to the State.'[19]

First articulated in *The Civil Rights Cases*,[20] the state-action doctrine has since been applied, clarified, and interpreted with numerous decisions adding nuance and further defining its parameters.[21]

In a similar manner, the law of libel—now clearly falling within the ambit of the First Amendment's protection in certain instances—has developed throughout our nation's history. The very act of jury nullification[22] that took place in John Peter Zenger's 1734 trial on charges of seditious libel set into motion a lengthy series of events across nearly

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19. *Id.* at 1926 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)).

20. 109 U.S. 3 (1883) (holding the Fourteenth Amendment did not permit the federal government to prevent private actors from engaging in discrimination).

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.

Id. at 11.

21. *See, e.g.*, Edomson v. Leesville Concrete Co., 500 U.S. 614 (1991).

22. The National Park Service shared this account of Zenger's trial as part of an exhibition at Federal Hall, which stands on the site of the historic trial:

> The Attorney General opened the case, saying that the defendant had pleaded not guilty to printing and publishing a false, scandalous, and seditious libel against Governor Cosby. Chief Justice DeLancey then said to the jury, 'The laws in my opinion are very clear; they cannot be admitted to justify a libel.' When Andrew Hamilton spoke, he was made famous for arguing that 'the truth is a defense against libel.' When the jury withdrew to deliberate, DeLancey was drawn into an argument with Hamilton, perhaps reflecting that Hamilton's argument had some merit. When the jury returned, the Clerk asked whether they agreed on the verdict and whether John Peter Zenger was guilty of printing and publishing libels. The jury's foreman, Thomas Hunt, replied, 'Yes. The verdict is 'Not Guilty'.'

The Trial of John Peter Zenger, NAT'L PARK SERV. (Feb. 26, 2015), https://www.nps.gov/feha/learn/historyculture/the-trial-of-john-peter-zenger.htm [https://perma.cc/2C4X-BU5Y].

three centuries that have resulted in our ability to negligently print false statements about public officials and public figures without fear of liability.[23] Along the way, the development of the actual malice standard—which requires public official and public figure plaintiffs to prove reckless disregard for the truth[24] to recover damages in a libel lawsuit—has influenced other countries' libel jurisprudence.[25]

Indeed, libel is not the only area in which U.S. free speech/free press exceptionalism has influenced countries around the world. Our statutory Freedom of Information Act (FOIA), passed in 1966 and rooted in the idea that citizens and the press need access to government information to hold their leaders accountable, helped lay the foundation for a global movement in favor of government transparency.[26] Comparative media law scholars Kyu Ho Youm and Toby Mendel catalog not only the early influence of the American right-to-information law, but they also point out how FOIA—and ultimately the United States'—struggles to substantively keep up with its

23. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that public officials must prove actual malice to recover damages in a libel lawsuit); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162 (1967) (Warren, J., concurring) (arguing that the First Amendment requires that public figures must prove actual malice to recover damages in a libel case, rather than "highly unreasonable conduct" as the majority suggested).

24. *See* St. Amant v. Thompson, 390 U.S. 727 (1968) (where the Court ruled that actual malice required a showing that the defendant had entertained serious doubts about the veracity of the statements that had been published).

25. *See, e.g.*, Edward Carter, *Actual Malice in the Inter-American Court of Human Rights*, 18 COMMC'N L. & POL'Y 395 (2013) (noting that although the Inter-American Court of Human Rights did not use the term "Actual Malice," the standard it adopted contained similar protections); Kyu Ho Youm, *The "Actual Malice" of* New York Times Co. v. Sullivan*: A Free Speech Touchstone in a Global Century*, 19 COMMC'N L. & POL'Y 185 (2014) (outlining the influence of the actual malice standard on courts around the world); Benjamin Herskovitz, *Speaking Truth to Power: Criminal Defamation Before the African Court on Human and Peoples' Rights*, 50 GEO. WASH. INT'L L. REV. 899 (2018) (discussing the court's ruling in *Konate v. Burkina Faso*).

26. Kyu Ho Youm & Toby Mendel, *The Global Influence of the United States on Freedom of Information*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 249 (David E. Pozen & Michael Schudson eds., 2018).

> Today, dozens of constitutions recognize the right [to information] and, in addition, leading courts in many countries have read it into other constitutional guarantees, most commonly the right to freedom of expression.
>
> The United States is increasingly an outlier in this regard. The U.S. Constitution does not explicitly recognize a right to access information held by public authorities. The U.S. Supreme Court has held that this right cannot be read into the First Amendment right to free speech of any other constitutional guarantee as a general matter.

Id. at 253-54.

modern counterparts' recognition of the fundamental right to access information.[27] They note that other liberal democracies have since surpassed the United States, recognizing the right to information as either a constitutional or fundamental human right while the United States refuses to do so.

Noting, in 1987, that 160 nations had used the United States Constitution as a model, *Time* magazine celebrated its bicentennial by dubbing it "a gift to all nations."[28] For better or worse, the American approach to freedom of expression garners attention and wields influence—a quality that can either advance or impede meaningful conversation about global norms. As Columbia University President and noted free speech scholar Lee C. Bollinger points out, "[T]he Court must appreciate the power of the example that the First Amendment sets for the world."[29] Former Israeli Supreme Court Justice Aharon Barak confirms the value of looking outside his country's borders to inform his legal decisions: "I have found comparative law to be of great assistance in realizing my role as a judge. The case law of the Courts of the United States, Australia, Canada, the United Kingdom, and Germany have helped me significantly in finding the right path to follow."[30]

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27. *Id.* at 249-55.

28. John Greenwald, *The World: A Gift to All Nations*, TIME, July 6, 1987, at 92.

29. LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 117 (2010).

30. AHARON BARAK, THE JUDGE IN A DEMOCRACY 197 (2006).

But some commentators have raised concern over the waning influence of the United States and its Constitution on the world stage.[31] Despite being amended twenty-seven times—as recently as 1992—the more than 200-year-old document appears not have aged well when compared with more recent constitutions. Constitutional law scholars David Law and Mila Versteeg wrote:

> Once global constitutionalism is understood as the product of a polycentric evolutionary process, it is not difficult to see why the U.S. Constitution is playing an increasingly peripheral role in that process. No evolutionary process favors a species that is frozen in time. At least some of the responsibility for the declining global appeal of American constitutionalism lies not with the Supreme Court, or with a broader penchant for exceptionalism, but rather with the static character of the Constitution itself. If the United States were to revise the Bill of Rights today – with the benefit of over two centuries of experience, and in a manner that addresses contemporary challenges while remaining faithful to the nation's best traditions – there is no guarantee that other countries would follow its lead. But the world would surely pay close attention.[32]

Law and Versteeg discuss many factors, including American exceptionalism, that have likely contributed to the decline in the document's impact.[33] Chief among them is the post-WWII rise of international documents affirming fundamental human rights—an approach not taken in the U.S. Constitution. As a result, more recent constitutions seem to incorporate at least some of this human rights approach, even if no single document can be said to be highly influential.[34] Even the late Supreme Court Justice Ruth Bader Ginsburg, known as a champion of equal rights, has been quoted as saying, "I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012."[35]

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31. *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).
32. *Id.* at 855.
33. *Id.* at 851.
34. *Id.* at 843, 850.
35. *Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently*

In many ways, this combination American exceptionalism and our nation's reluctance to adopt a fundamental human rights approach to protecting fundamental freedoms lays the groundwork for my argument that future First Amendment jurisprudence must begin to take global norms into account. Each year, the Department of State and the United States Agency for International Development spend millions of dollars on programs focused on "upholding Western democratic principles such as separation of powers, the rule of law, independent media and civil society, freedom of expression and freedom of conscience."[36] I would argue that for the United States to regain its persuasive standing in the global community, it must adopt a fundamental human rights approach in its advocacy of democratic ideals—including freedom of expression. Doing so suggests the United States must yield some of its First Amendment exceptionalism in favor of a balancing approach that protects other goals, interests, and rights. As Schauer wrote:

> [T]he principles of freedom of expression impose entrenched second-order constraints not merely upon pernicious attempts to control communication, and not even merely upon well-intentioned but misguided attempts to control communication, but also, and most important, upon actually well-designed and genuinely efficacious attempts to control speech and the press in the service of important first-order policy preferences.[37]

To escape this *exceptionalist trap*, Americans must turn our gaze outward to study the free expression protections of other liberal democracies who,

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Adopted Constitutions of Other Nations?, STATE NEWS SERV., May 29, 2013; *US Supreme Court Justice Ruth Bader Ginsburg to Egyptians: Look to the Constitutions of South Africa or Canada, Not to the US Constitution*, MEMRI TV (Jan. 30, 2012), https://www.memri.org/tv/us-supreme-court-justice-ruth-bader-ginsburg-egyptians-look-constitutions-south-africa-or-canada [https://perma.cc/DM44-7ZHC]. For more about Justice Ginsberg's seemingly controversial remark, which many argue was taken out of context, *see* Talk of the Nation, *Should U.S. Constitution Be An International Model?,* NPR (July 4, 2012), https://www.npr.org/2012/07/04/156186033/should-u-s-constitution-be-an-international-model [https://perma.cc/RSK3-CYU3].

36. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION: FOREIGN OPERATIONS FISCAL YEAR 2020 APPENDIX 2, at 24 (2020), https://www.usaid.gov/sites/default/files/documents/1881/FY-2020-CBJ-State-and-USAID-Appendix-2.pdf [https://perma.cc/9UM7-5BL2].

37. Schauer, *supra* note 2, at 29.

"in their turn, have learned from American law."[38]

II. FINDING VALUE IN A FUNDAMENTAL HUMAN RIGHTS PERSPECTIVE – PROTECTING PRIVACY, DIGNITY AND AUTONOMY

After accepting my job in Qatar, I was lambasted by one American colleague in particular, who was appalled that I would be willing to teach in a country with such a dismal human rights record. "They don't treat women as equals there," I recall her saying. "They basically enslave poor workers from developing countries while paying them pennies." In some regards, she was right. Only two years before I moved, advocacy group Human Rights Watch had reported that "[h]undreds of thousands of mostly South Asian migrant construction workers in Qatar risk serious abuse, sometimes amounting to forced labor."[39] But like many things in life, this is not merely a black and white issue. It is clothed in myriad shades of gray, as I would learn during my five years abroad. One need only look at the abuses that occur with the United States' H-2 visa program, which allows temporary workers in the United States. As Vice reported in 2016:

> The report found that temporary workers both documented and undocumented were subjected to verbal abuse and curfews, and workers reporters having their wages stolen or being paid less than they were initially promised, as well as not being paid overtime. Employers also threatened undocumented workers that they would expose the workers' immigration status to authorities.[40]

And yet Americans continue to enjoy seafood dinners despite repeated media reports about the seafood industry's exploitative work practices. In 2015, *Buzzfeed* launched a massive investigation into the H-2 visa program, which it called "The New American Slavery." Reporting on the program

38. BARAK, *supra* note 30, at 204.

39. *Qatar: Migrant Construction Workers Face Abuse*, HUMAN RIGHTS WATCH (June 12, 2012, 3:45 AM), https://www.hrw.org/news/2012/06/12/qatar-migrant-construction-workers-face-abuse [https://perma.cc/389J-M4PM].

40. Wyatt Marshall, *There's Forced Labor in the US Seafood Industry, Too*, VICE (June 10, 2016 1:00 PM), https://www.vice.com/en_us/article/78md7b/theres-forced-labor-in-the-us-seafood-industry-too [https://perma.cc/E25M-3P4M].

designed to fill menial jobs with cheap, foreign labor, the journalists found:

> Thousands of these workers have been abused – deprived of their fair pay, imprisoned, starved, beaten, raped, and threatened with deportation if they dare complain. And the government says it can do little to help.[41]

In reality, for low-wage foreign workers doing menial work, the job prospects are dim whether they find themselves in Qatar or the United States. Yet one country—relatively new in its independence and industrialization[42]—finds itself the target of numerous exposés[43] leading up to the 2022 World Cup while the other—a member of the G7 who boasts the first written constitution and is more than 200 years removed from its industrial revolution—has routinely escaped scrutiny for the exact same labor practices.

At first glance, it is easy to believe that the United States protects human rights while countries like Qatar do not. But the concept of human rights is multi-faceted, requiring observers to engage in a deeper analysis before drawing conclusions. It is hard to dispute that American free speech exceptionalism means more protection for speech—including defamation, sexually explicit speech and hate speech—in the United States than it would get in Qatar. But freedom of expression is only one of myriad fundamental human rights. The United Nations notes that "[h]uman rights include the

41. Jessica Garrison et al., *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED NEWS (July 24, 2015, 10:47 AM), https://www.buzzfeednews.com/article/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f [https://perma.cc/YQF5-J34N].

42. Previously a British protectorate since World War I, Qatar gained its independence in 1971. Located on the Persian Gulf, the small island nation spent nearly two decades surrounded by war in nearby Iraq and Kuwait. In 1995, the ruling leader, Sheikh Khalifa was deposed in a bloodless coup. His son, Hamad, soon launched a series of modernizations that included launching Al Jazeera, holding municipal elections and ratifying the country's first written constitution in 2005. *See generally* MEHRAN KAMRAVA, QATAR: SMALL STATE, BIG POLITICS (2015).

43. *See, e.g.*, Pete Pattisson, *Migrants Claim Recruiters Lured Them into Forced Labour at Top Qatar Hotel*, GUARDIAN (Oct. 29, 2018 3:00 AM), https://www.theguardian.com/global-development/2018/oct/29/agents-duped-us-into-forced-labour-at-top-qatar-hotel-say-migrant-workers-marsa-malaz-kempinski [https://perma.cc/JV8T-7UW7]; Vivek Chaudhary, *"We're Cheated, First in India, Then in Qatar": How World Cup Workers Are Deceived*, GUARDIAN (Mar. 18, 2017, 8:02 PM), https://www.theguardian.com/world/2017/mar/19/qatar-world-cup-workers-india-nepal-cheated-deceived [https://perma.cc/5HG5-HK63]; Barry Meier, *Labor Scrutiny for FIFA as a World Cup Rises in the Qatar Desert*, N.Y. TIMES (July 16, 2015), https://www.nytimes.com/2015/07/16/business/international/senate-fifa-inquiry-to-include-plight-of-construction-workers-in-qatar.html [https://perma.cc/VQ5F-8D4K].

right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more."[44] Other organizations and instruments would count the right to privacy, the right to autonomy, and/or the right to dignity among the list of fundamental human rights as well.

From the outset in the United States, our belief that the First Amendment occupies a "preferred position" places some of these rights—among them speech and press—higher than others—namely, privacy, dignity, and autonomy—in many instances. The Supreme Court has, in essence, created a hierarchy of rights. Justice Cardozo's opinion in *Palko v. Connecticut* contains an explicit reference to the creation of this hierarchy:

> The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty.[45]

One year later, in a now-famous footnote, Justice Stone argued that the Court should more closely scrutinize legislation that targets some rights that, unlike economic rights, are fundamental: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[46] Specifically, Justice Stone singles out several First Amendment rights, including "restraints upon the dissemination of information . . . interferences with political

44. *Human Rights*, UNITED NATIONS, https://www.un.org/en/sections/issues-depth/human-rights/#:~:text=Human%20rights%20include%20the%20right,to%20these%20rights%2C%20without%20discrimination [https://perma.cc/4LP9-VTCJ].

45. 302 U.S. 319, 325 (1937) (holding that protection against double jeopardy was not a fundamental right).

46. United States v. Carolene Prods. Co., 304 U.S. 1, 152 n.4 (1938) (holding that Congress needs only a rational basis to regulate interstate commerce).

organizations . . . prohibition of peaceable assembly."[47] As G. Edward White goes on to explain, the concept took off from there:

> The term "preferred position case" refers simply to any case in which an opinion of the Court used language either openly declaring that First Amendment rights occupied a preferred position or stating that such rights should receive greater judicial solicitude because of the fundamental nature of speech rights or the "indispensable connection" between speech rights and democratic theory. . . . [T]he precise constitutional meaning of preferred position was never fully clarified in the decisions.[48]

In particular, this elevation of expressive rights took off during the Warren Court, when Justices Black and Douglas' broad views of the First Amendment echoed loudly. During these years, the Court constitutionalized libel law with landmark decisions in *New York Times Co. v. Sullivan*,[49] *Garrison v. Louisiana*,[50] and *Curtis Publishing v. Butts*.[51]

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47. *Id.*

48. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299, 328 n. 85 (1996).

49. 376 U.S. 254 (1964).

50. 379 U.S. 64 (1964) (holding the First Amendment require the same level of proof in criminal libel cases as it does in civil libel cases).

51. 388 U.S. 130 (1967) (holding that the First Amendment requires that public figures must prove actual malice to recover damages in a libel case).

Few countries, if any, prioritize freedom of expression at the expense of other fundamental human rights in the same manner that the United States does. The Islamic values that inform Qatar's culture provide much stronger protection for the rights to privacy, dignity, and autonomy than the right to free expression.[52] One example of this is criminal prohibitions on public photography. Article 331 of the Penal Code states:

> Whoever spreads news, photographs or comments related to a person's private life, or that of his family, even if true shall be liable to imprisonment for a term not exceeding a year in prison and a fine not exceeding five thousand Qatari Riyals (5.000QR), or one of these two penalties.[53]

Even more recently, a cybercrime law was added to the Penal Code, specifying the penalties for crimes that involve use of the internet.[54] A further amendment made it illegal to take or share photos of accident scenes. As one Qatari attorney noted:

> The new provision will help protect people against the misuse of pictures and video clips and the subsequent spread of rumours and allegations. It is not a matter of personal freedom and the right to take pictures, but rather a matter of showing respect for victims and families who may not want to take personal matters to the social media.[55]

Another lawyer stated, "We now hope that the new provision will help with respecting the privacy of others."[56] Qatar is not alone in its regulation of public photography; the United Arab Emirates also has restrictions on

52. Norah Abokhodair et al., *Privacy and Twitter in Qatar: Traditional Values in the Digital World*, Conference Paper at ACM WEB SCIENCE CONFERENCE (May 2016), https://arxiv.org/pdf/1605.01741.pdf [https://perma.cc/FKL8-BK9R].

53. LAW NO. 11 OF PENAL CODE art. 331 (Al Meezan 2004) (Qatar), https://www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=277&lawId=26&language=en [https://perma.cc/JQ79-A34P].

54. CYBERCRIME PREVENTION Law No. 14, Commc'ns Reg. Authority (2014) (Qatar), https://cra.gov.qa/en/document/cybercrime-prevention-law-no-14-of-2014 [https://perma.cc/6BQE-SZUY].

55. Habib Toumi, *Qatar Bans Taking Pictures at Accident Sites*, GULF NEWS (Sept. 17, 2015, 11:22 AM), https://gulfnews.com/world/gulf/qatar/qatar-bans-taking-pictures-at-accident-sites-1.1585446 [https://perma.cc/9WDC-QQ2L].

56. *Id.*

public photography.[57] And many countries, even the United States, limit the ability to profit off another's image or likeness without consent. Nearly every state recognizes either the tort of appropriation or a statutory right of publicity[58]—though many require the appropriation be for commercial purposes as outlined in the Restatement (Second) of Torts:

> The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.[59]

The issue of balancing privacy with freedom of expression also arises in the context of personal data. The European Union's increased protection of personal information through the General Data Protection Regulation (GDPR) has made headlines and caused significant consternation in the United States, where freedom of expression carries the day. An article in *The Atlantic* details how the data protections were used against Romanian journalism start-up *Rise*, which had broken a story about a high-powered politician who was involved in a massive fraud:

> In its enforcement letter, the Romanian authorities said that Rise journalists had violated GDPR in publishing the videos, photos, and documents—in essence, the private data of Romanian citizens—to support the reporters' allegations against Dragnea. The letter directed them to

57. Lindsay Carroll, *Be Wary of UAE's Photography Laws, Lawyers Say*, NAT'L (Nov. 19, 2014), https://www.thenational.ae/uae/be-wary-of-uae-s-photography-laws-lawyers-say-1.477146 [https://perma.cc/4YWQ-VJKD].

58. *See generally* Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity,* LOYOLA LAW SCHOOL, https://www.rightofpublicityroadmap.com/ [https://perma.cc/KR9X-5YQX].

59. Restatement (Second) of Torts § 652C Appropriation of Name or Likeness, cmt. B. (1977).

> turn over the identity of the tipster. It also ordered them to explain how they had obtained the information, how they stored it—this was the data-protection authority, after all—and whether they had in their possession further private details on Dragnea and his associates. The big blow was the penalty: a fine of up to 20 million euros ($22 million), the maximum that can be applied against a small publisher in a GDPR case, if the reporters failed to fully comply.[60]

In its defense, the European Commission issued a warning, telling Romania that its actions were tantamount to abusing the data protection regulation.[61] In the wake of Romania's actions, the European Commission is investigating how Romania implemented the GDPR to ensure it is respecting Article 85, which says: Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic, or literary expression.[62] Unlike the United States, freedom of expression does not enjoy a preferred position in the EU, as is evidenced by Article 85's language and directive to Member States to strike the balance largely as they see fit. The European approach, it seems, ensures the balance gives adequate weight to privacy.

Journalists and news organizations have also scorned Article 17—the GDPR's erasure provision—saying it elevates privacy over freedom of expression.[63] Under the provision, EU citizens have a limited right to request the removal of certain data—a right that has already been contested

60. Bernhard Warner, *Online-Privacy Law Come with a Downside*, ATLANTIC (June 3, 2019), https://www.theatlantic.com/ideas/archive/2019/06/europes-gdpr-elevated-privacy-over-press-freedom/590845/ [https://perma.cc/9DCD-PBH9].

61. Nikolaj Nielsen, *EU Warns Romania Not to Abuse GDPR Against Press*, EU OBSERVER (Nov. 12, 2018 5:19 PM), https://euobserver.com/justice/143356 https://euobserver.com/justice/143356 [https://perma.cc/Q7KD-AXDN].

62. Council Regulation 2016/79 of Apr. 27, 2016, On the Protection Of Natural Persons With Regard to the Processing of Personal Data and On the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1532348683434&uri=CELEX:02016R0679-20160504 [https://perma.cc/6VQH-BQZS].

63. *See* Michael J. Oghia, *Information Not Found: The 'Right to be Forgotten' as an Emerging Threat to Media Freedom in the Digital Age*, CTR. FOR INT'L MEDIA ASSISTANCE (Jan. 9, 2018), https://www.cima.ned.org/publication/right-to-be-forgotten-threat-press-freedom-digital-age/ [https://perma.cc/W4CC-KPF3].

in court, with the European Union Court of Justice recently ruling in *Google v. CNIL* that Google need not remove links on its non-European domains.[64] In practice, the right might allow a person who had been arrested but never charged to get a news report of the arrest removed. Arguments in favor of the practice cite the fundamental rights of life and liberty in explaining that the right to erasure allows people to move on with their lives and more easily reintegrate into society.[65] To be sure, the right has been popular, with Google alone receiving more than 1 million requests to de-list more than 3.8 million URLs since May 2014.[66] The company's data show it has honored forty-seven percent of requests to de-list, with one reason for choosing not to de-list being that the information is strongly in the public interest:

> Determining whether content is in the public interest is complex and may mean considering many diverse factors, including—but not limited to—whether the content relates to the requester's professional life, a past crime, political office, position in public life, or whether the content is self-authored content, consists of government documents, or is journalistic in nature.[67]

Given American First Amendment jurisprudence, it is largely unsurprising that Google, an American company, uses a "public interest" justification to elevate freedom of expression over privacy, dignity and autonomy in some of its decisions. The concept of the public interest appears frequently in cases where U.S. courts have favored freedom of expression over privacy.[68]

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64. Case C-507/17, Google LLC v. Commission Nationale de l'informatique et des Libertés, ECLI:EU:C:2019:772 (Sept. 24, 2019), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-507/17 [https://perma.cc/6J9C-ZT9M].

65. For a comprehensive look at how digital criminal and court records create lifelong stigma for those who are named in them, *see* SARAH ESTER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE (2020). In 2017, researchers found that criminal record clearance provided both external and internal benefits, including lowering barriers to employment and affirming new identities as valued members of society. Ericka B. Adams, Elsa Y. Chen & Rosella Chapman, *Erasing the mark of a criminal past: ex-offenders' expectations and experiences with record clearance,* 19 PUNISHMENT & SOC'Y 23 (2017).

66. *Requests to Delist Content Under European Privacy Law*, GOOGLE TRANSPARENCY REPORT, https://transparencyreport.google.com/eu-privacy/overview?hl=en [https://perma.cc/EX72-SEDP].

67. *Id.*

68. For an in-depth discussion of this balancing, *see* Alexander Tsesis, *Balancing Free*

What is perhaps more surprising is that some American lawmakers—particularly those in California—have begun to elevate privacy rights by passing state laws that have given residents rights similar to those found in the GDPR.[69] California's "online eraser" law was the first to take effect in 2015, giving the state's minors the right to request removal of content from any site where they are registered users.[70] Although a few exceptions exist, the law is quite sweeping in granting minors a broad right to remove content. In many ways, this enhances the dignity and autonomy of young adults—allowing them the opportunity to recover from foolish childhood missteps. More recently, the California Consumer Privacy Act, a data privacy law akin to the GDPR[71], took effect in January 2020 to elevate the privacy rights of adults.[72] and the California Privacy Rights Act passed in November 2020 will expand those protections even further.

Speech, 96 BU L. REV. 1 (2016).

69. Although an in-depth discussion of those laws is outside the scope of this article, a solid overview can be found in Grace Park, *The Changing Wind of Data Privacy Law: A Comparative Study of the European Union's General Data Protection Regulation and the 2018 California Consumer Privacy Act*, 10 U.C. IRVINE L. REV. 1455 (2020).

70. SB 568, 2013–2014 Leg., (Cal. 2013), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568 [https://perma.cc/D5F2-WF75]; CAL. BUS. & PROF. CODE § 22581 (2015).

71. Dimitri Sirota, *California's new data privacy law bring U.S. closer to GDPR,* TECHCRUNCH (Nov. 14, 2019), https://techcrunch.com/2019/11/14/californias-new-data-privacy-law-brings-u-s-closer-to-gdpr/ [https://perma.cc/YLE8-MSPT].

72. Assemb. B. 375, 2017–2018 Leg., (Cal. 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375 [https://perma.cc/2TRK-7ZMT]; CAL. CIV. CODE §§ 1798.100-1798.199 (2018).

Further, some U.S. news organizations are voluntarily making decisions to unpublish certain content and changing policies about how they cover crime stories. In 2018, the *Cleveland Plain Dealer* and *Cleveland.com* announced a trial that would remove some content from their archives, citing the ubiquity of internet content in negatively affecting people's lives:[73]

> In the old days, stories such as those appeared in print and were promptly forgotten. You could find them only by sifting through microfilm at your library. Today, through the Internet, the stories are at your fingertips, any time, anywhere. Because our platform at cleveland.com is so huge, our stories often are the first to appear in Google searches. Thus, our stories about mistakes made long ago become the first thing people see when they search on people's names, causing them no end of distress.[74]

In addition, acknowledging that mug shots likely reinforce discriminatory stereotypes, the news organization has dramatically altered its practice. Instead of using them for all crime stories, the editors have decided they should only be used for "the most notorious of crimes."[75] In addition to removing the names of people who have had their records expunged, the reporters will no longer name people accused of minor crimes.[76]

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73. Chris Quinn, *Right To Be Forgotten: Cleveland.com Rolls Out Process To Remove Mug Shots, Names from Dated Stories About Minor Crimes*, CLEVELAND.COM (June 12, 2019), https://www.cleveland.com/opinion/2018/07/right_to_be_forgotten_clevelan.html [https://perma.cc/2YZG-SRVY].

74. *Id.*

75. *Id.*

76. *Id.*

The *Plain Dealer* editors realized their decisions might be unpopular with other American journalists and news organizations, who have long asserted that removing truthful content is akin to changing history.[77] The decision clearly elevates interests in privacy, autonomy, and dignity. Editor Chris Quinn tackled the detractors head on:

> Many in our profession still feel this way. But anyone in our business with a conscience has been increasingly troubled by the situation. We have become the fulcrum for a lot of suffering. If stories did not remain on our sites, these people would not feel their pain. Who wants to cause that kind of pain?[78]

Recognizing the First Amendment prevents the government from requiring United States news organizations to engage in the content removal process, Quinn focused on the ethics of the issue by emphasizing the need to do what is right:

> What we hoped was that we would launch conversation in our profession, with an aim at defining best practices. The First Amendment guarantees that the government can never regulate what we do, something I'd defend to my final breath, but journalists have defined our own best practices when it comes to ethics and issues of fairness.[79]

Perhaps more importantly, Quinn's editorial recognized the power of Big Tech—an issue I will discuss in the next section—in elevating these stories to positions of prominence years after they have been published:

> I hope the next step is for the search engines to join the discussions. Instead of having dozens or hundreds of newsrooms grapple with this individually, I think Google, Yahoo and Bing could bring a lot to the table. And I think they have a duty to do so. Let's face it: the search engines

77. Chris Quinn, *Journalists Are Key to a Right to be Forgotten in the United States, and Cleveland.com is Helping Spur the Conversation*, CLEVELAND.COM (Mar. 11, 2020), https://www.cleveland.com/news/2019/10/journalists-are-key-to-a-right-to-be-forgotten-in-the-united-states-and-clevelandcom-is-helping-spur-the-conversation.html [https://perma.cc/25FL-3JH8].

78. *Id.*

79. *Id.*

> are where these stories cause the harm. If the search engines did not turn up our dated stories about people making mistakes, the people would not be haunted by those mistakes.[80]

News organizations, and by extension the Supreme Court, have long championed editorial discretion and journalistic decision-making—the very sense of ethics and fairness that Quinn wrote about—to advance their free expression (and free press) interests. But the rise of Big Tech has created dramatic changes in the free expression landscape—changes the Court has yet to fully grapple with in its jurisprudence. Taken as a whole, these actions by state lawmakers and news organizations suggest we should at least re-examine our elevation of free expression rights above other fundamental human rights.

III. THE RISE OF PRIVATE PLATFORM POWER

As Americans' use of technology and the internet has largely become ubiquitous, our law and policy have struggled to keep pace with the new ways that these tools and platforms can be used to negatively affect a person's life. Whether it is groups dedicated to hateful speech, made-up accounts used to quickly spread disinformation, or surveillance technologies used to track people without their knowledge, the internet has changed how we communicate in numerous ways that may suggest we need to re-think how it is regulated. Unlike previous mass media, the internet has allowed the average person the ability to spread information quickly and cheaply. Its search powers have all but eliminated the ability for information to be practically obscure, or hidden, in records that were once hard to access. Its networking capabilities have fueled shared cultures of hate and shaming. Its business structure has aided in the further consolidation of power (and valuable user data) in the hands of a small number of for-profit companies.[81] All of these characteristics, taken in conjunction with our history of differential regulation of media, suggest it is time to re-visit the hands-off

80. *Id.*

81. STAFF OF S. COMM. ON ANTITRUST, COM. AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 51-57 (Comm. Print 2020).

regulatory approach outlined by the Court in *Reno.*[82]

Rather than treating the internet like print, which the government has been loath to regulate, some scholars and regulators have asserted it is more appropriate to treat the internet like a broadcaster or common carrier. Although the U.S. Supreme Court refused to require a newspaper[83] to carry certain content, it has held the opposite in the realm of broadcasting.[84] Further, the Court has even permitted content restrictions in the broadcast sphere, ruling in *FCC v. Pacifica Foundation* that the First Amendment does not prevent the government from limiting broadcasters from airing indecent language during certain times of day:

> The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.[85]

Substitute "internet" for "broadcast media" and "hateful" for "indecent," and we've largely arrived at justification for mandating content regulation on the internet in ways similar to those undertaken in the European Union and other parts of the world.

Instead of heading down the *Pacifica* path that holds broadcasters liable for the content that airs and requiring the same of internet service providers and platforms,[86] the Court has upheld Congress' decision to immunize these tech companies through the enactment of Section 230 of the Communications Decency Act.[87] Rather than taking the approach adopted

82. *See* Reno v. ACLU, 521 U.S. 844 (1997).

83. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding unconstitutional a Florida law that required newspapers to publish the response of any political candidates they criticized).

84. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (holding the FCC's Fairness Doctrine, which required broadcasters to present balanced discussion of public issues to be constitutional under the First Amendment).

85. 438 U.S. 726, 748 (1978).

86. *Id.*

87. In relevant part, 47 U.S.C. § 230(c)(1) reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.*

in Germany,[88] France,[89] and other European countries that holds these companies liable for the speech that occurs on their platforms, the United States has waived third-party liability for myriad offenses that occur, including defamation,[90] failure to remove fake profiles,[91] or incorrect stock information,[92] and state tort claims related to threats.[93] As a result, American law offers little incentive for platforms to step in to prevent offensive or harmful speech even once they've been put on notice about it.

Although Congress has not yet stepped in to reform Section 230, lawmakers have certainly taken notice of its exceptionalism. In Summer 2020, Senate and House leaders called a number of Silicon Valley tech leaders to testify.[94] Further hearings were scheduled for late October.[95] A full accounting of all the legislative proposals[96] to reform Section 230 is outside the scope of this piece, but many experts agree that Section 230 will continue to garner serious attention from lawmakers.[97] Although no

88. In 2017, Germany implemented its Network Enforcement Act, which obligated social media platforms to remove hate speech—in some instances as quickly as twenty-four hours after being given notice. Under the law, companies faced fines as high as €50 million. In 2020, officials went even further, obligating platforms to forward suspected criminal speech to the federal police as soon as its reported. *See* Natasha Lomas, *Germany Tightens Online Hate Speech Rules to Make Platforms Send Reports Straight to the Feds,* TECHCRUNCH (June 19, 2020, 9:02 AM), https://techcrunch.com/2020/06/19/germany-tightens-online-hate-speech-rules-to-make-platforms-send-reports-straight-to-the-feds/ [https://perma.cc/4QAB-ULV8].

89. For example, French law forbids the sale of Nazi memorabilia, and a French court ordered Yahoo! to comply with the law by removing auctions of the merchandise or face fines. In January 2001, only months after a losing in a French court, the tech giant agreed to stop carrying Nazi artifacts and other hate-related items. *Yahoo! to Stop Auctions of Nazi Memorabilia,* GUARDIAN (Jan. 3, 2001, 8:01 AM), https://www.theguardian.com/technology/2001/jan/03/internetnews [https://perma.cc/H5T5-CQHJ].

90. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

91. Herrick v. Grindr, 765 F. App'x. 586 (2d Cir. 2019), *cert. denied*, S. Ct. 221 (2019).

92. Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 984-85 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000).

93. Delfino v. Agilent Techs., 145 Cal. App. 4th 790 (2006), *cert. denied*, 128 S. Ct. 98 (2007).

94. Ashely Gold, *Lawmakers Plot Another Section 230 Hearing*, AXIOS (July 21, 2020), https://www.axios.com/lawmakers-plot-another-section-230-hearing-5df71a6f-7320-446a-b151-9c0929c5724f.html [https://perma.cc/5GAZ-5RNF].

95 Taylor Hatmaker, *The Next Big Tech Hearing Is Scheduled for October 28*, TECHCRUNCH (Oct. 2, 2020 6:46 PM), https://techcrunch.com/2020/10/02/tech-hearing-section-230-october-date-dorsey/ [https://perma.cc/3SGW-KQVJ].

96. For more on various approaches, *see* Zoe Bedell & John Major, *What's Next for Section 230? A Roundup of Proposals*, LAWFARE BLOG (July 29, 2020, 9:01 AM), https://www.lawfareblog.com/whats-next-section-230-roundup-proposals [https://perma.cc/M9FZ-4E3L].

97. James Pethokoukis, *5 questions for Jeff Kosseff on Section 230 and online content*

consensus seems to currently exist regarding the best way to police harmful or offensive speech on the internet, many experts agree the platforms exert serious power. As law professor Danielle Citron writes:

> [T]here is good reason to worry about tech companies' influence over the ability of people to express themselves. The power online platforms have over digital expression should not proceed unchecked, as it does in crucial respects today. . . . In short, Section 230's immunity has allowed platforms to monetize destructive online activity without have to bear the costs wrought by their operations. It has also removed any leverage that victims might have had to get harmful content taken down.[98]

Still, legal experts express concerns about the impact removing platform immunity would have on free speech. Well-known internet law expert Jeff Kosseff was quoted as saying that the "major platforms came into existence because of 230. Without 230, their operations would have to be substantially changed."[99] In the same article, law professor Eric Goldman notes "[w]ithout [Section 230], a lot of things online we take for granted today will not work the way they currently work, and some things will no longer be available at all."[100] But Citron and co-author Benjamin Wittes believe the trade-off is anything but clear, "[i]t gives an irrational degree of free speech benefit to harassers and scofflaws but ignores important free speech costs to victims."[101]

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moderation, American Enterprise Institute (Jan. 6, 2021), https://www.aei.org/economics/5-questions-for-jeff-kosseff-on-section-230-and-online-content-moderation/.

98. Danielle Citron, *Digital Platforms' Power Over Speech Should Not Go Unchecked*, KNIGHT FOUND. (June 16, 2020), https://knightfoundation.org/articles/digital-platforms-power-over-speech-should-not-go-unchecked/ [https://perma.cc/D7US-CEDS].

99. Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have a Warning*, NPR (May 30, 202,0 11:36 AM), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning [https://perma.cc/PG8H-EAMV].

100. *Id.*

101. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

CONCLUSION

Unlike many free speech scholars, I do not purport to have the answers to questions about how to balance freedom of expression, privacy, dignity, and autonomy.[102] In fact, arriving back to the United States shortly before 2020's summer of civil unrest only further confirmed that I had just begun to ask the right question: How do we balance free expression rights against other fundamental rights? As our country—once again—attempts to reckon with the systematic discrimination that exists against Black Americans, Indigenous Americans, and other people of color, we must be mindful of the role that hate speech and other troublesome content plays in devaluing groups labeled as "the other"—whether it be based on race, ethnicity, national origin, religion, gender identity, or sexual orientation. We must engage in discussions about the impact of Big Tech and social media platforms on our democratic marketplace of ideas, giving deep scrutiny to the power of the internet to share falsities and promote harmful speech more widely and quickly than ever before.

Our historical fear of ad hoc balancing, or even case-by-case determinations, in free expression cases has held us back for too long. The categorical approach to regulating speech in the United States has proven challenging in several instances. Take for example Justice Potter Stewart's now famous remarks about obscenity in *Jacobellis v. Ohio*: "I know it when I see it." [103] Given the Court's numerous unsuccessful attempts to outline a coherent test, I have to wonder if that statement is really true. The conversation about how to manage these competing—yet fundamental—human rights, I suggest, must begin with a serious discussion of what former Israeli Supreme Court Justice Aharon Barak calls horizontal balancing:

> Horizontal balancing occurs between values and principles of equal standing. This balancing will happen, for example, when two constitutional human rights conflict with one another. Thus, the freedom of speech may conflict with the

102. *See, e.g.,* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You,* 52 STAN. L. REV. 1050 (1999-2000); Rodney Smolla, *Privacy and the First Amendment Right to Gather Information,* 67 GEO. WASH. L. REV. 1097 (1999); Erwin Chemerinsky, *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla,* 67 GEO. WASH. L. REV. 1152 (1999).

103. 378 U.S. 184, 197 (1964).

> rights of privacy, reputation, or movement. Horizontal balancing expresses the degree of reciprocal compromise that each of the fundamental principles must make, instructing judges to preserve the essence of the conflicting principles by crafting reciprocal compromises at the margins. This balancing attempts to ensure that the various compromises are proportionate and to give breathing space to each competing principle. One must avoid giving full expression to one fundamental principle at the expense of another.[104]

Rather than continuing to default free expression to its preferred position, we must now recognize that the exercise of many of the associated freedoms, by their very nature, can negatively impact the same "discrete and insular minorities" that Justice Stone was trying to protect in *Carolene Products*.[105]

Continuing to beat the drum of American free speech exceptionalism without engaging in meaningful conversations about the approaches taken by other liberal democracies—approaches that at least recognize privacy, dignity, and autonomy as equals to free expression—suggests we are simply tone deaf. The slippery slope argument—that it is impossible to regulate hate speech or other harmful speech because once we allow the government to start regulating speech, we will not be able to stop it—can no longer be used to justify our unwillingness to consider alternatives to our current categorical approach to protecting speech. In fact, as I have suggested, we have never fully embraced the idea that "Congress shall make no law" really mandates that we take an absolute position to our First Amendment freedoms. Fewer than 100 years ago, the First Amendment did not protect us from state infringement of our free expression rights and libel plaintiffs needed not prove fault to prevail. By today's standards, that view of the First Amendment seems laughably outdated. Perhaps 100 years from now, Americans will look back similarly at the time when the First Amendment did not protect us from hate speech and platforms were allowed to determine their own rules regulating the content that was shared on them.

104. BARAK, *supra* note 30, at 171.
105. U.S. v. Carolene Prods. Co., 304 U.S. 1 (1938).