Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Extreme Speech

Eric Heinze, Queen Mary University of London
Wild-West Cowboys *versus* Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech

© Eric Heinze, 2009
Wild-West Cowboys *versus* Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech

© Eric Heinze (2009)

*Published as Chapter 10 in* *Extreme Speech and Democracy*, James Weinstein & Ivan Hare, eds., Oxford University Press, 2009, pp. 182 – 203.

**Introduction**

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.

European debates on hate speech are likely to remain a trans-Atlantic affair. Few issues divide so blatantly into one approach followed under US law, pitted against an opposite approach in Europe and, effectively, the rest of the world. But it is questionable whether the trans-Atlantic dialogue is going well. Many Europeans view American tolerance of hate speech as another quirk from across the pond: ‘Americans prize liberty above everything, even above dignity. Perhaps that wild-west freedom is good for them, but it’s not for the rest of us.’ To many European eyes, the American approach reflects the callousness that one would expect from a country that maintains a racially discriminatory death penalty1, shuns essential social and economic protections for the needy2, or commits torture under the guise of ‘extraordinary renditions’.3 And impressions in the other direction are no better. Any red-blooded Yank will see European hate speech bans as hypocritical posturing from a continent of cheese-eating surrender monkeys who cheerfully sacrifice liberty for any paltry measure of security, or even for sheer decorum.

Although Euro-American comparisons are frequent, and sometimes gentler, little attention has been paid to questions of comparative method. Given the limited enforcement of hate speech bans in Europe, and given that freedoms of speech are, practically speaking, very similar in the United States and Western Europe, one might wonder whether a trans-

---

Atlantic comparison serves any purpose at all. Yet various contributions in this collection suggest that the sheer differences in principle are of intrinsic interest. Under the case law of the US Supreme Court, hate speech bans are inconsistent with free speech. European legislatures and courts have found hate speech bans to be compatible with individual freedom, and even affirmatively required to promote it. It is tempting to believe that those surface differences in legal norms must somehow correlate to deeper cultural differences. While some real cultural differences are, no doubt, at work, we must avoid simplistic understandings of them.

In this chapter, I shall argue that seemingly black-and-white differences in US and European approaches to hate speech turn grey once they are situated within their societies’ political and social realities. As a descriptive matter, trans-Atlantic differences on the regulation of extreme speech point to genuine, but still very limited, cultural differences. Therefore, as a prescriptive matter, we should avoid hasty conclusions to the effect that the abolition of bans ‘may be fine for Americans, but could never work for Europeans.’

Precisely because of my doubts about fundamental cultural differences on this issue, I might just as easily have drawn the opposite prescriptive conclusion: if the underlying cultural differences between European and American approaches to speech are really rather minor, then there are no reasons why hate speech bans could not be adopted as easily in the US as in Europe. I shall suggest, however, that there are reasons other than cultural difference for not drawing that conclusion. I shall argue that, in terms of broader cultural histories and attitudes, no particular stance is inevitable for either side of the Atlantic. Questions about whether to adopt hate speech bans should therefore be decided on grounds of democratic principle.

Using Robert Post’s chapter in this collection as a point of departure, I shall examine some problems of trans-Atlantic comparison arising at the intersection of formal law and social life. Comparative analysis is indispensable, but we must avoid what I shall identify as the twin traps of cultural essentialism and ahistoricism. We must apply legal realism to some of the formalisms of free-speech doctrine. I begin by inquiring into the specific interest of a comparison between the US and Europe. In rejecting hate speech bans, the US contrasts with most of the world’s legal systems. Why, then, focus on a comparison to Europe? Next, I consider Post’s notion of institutional, anti-democratic elitism, and the role it plays on both sides of the Atlantic, either to promote or to combat restrictions on speech. I then turn to Post’s concept of the ‘public sphere’, and its relevance to hate speech bans. I compare ‘formalist’ and ‘realist’ understandings of the public sphere, and the problems of cultural essentialism that can arise if we fail to distinguish them. Finally, I examine an assumption underlying hate speech bans, namely, that formal restrictions on freedom serve to enhance substantive freedoms. I argue that, just as black-letter norms must be read in a broader social context, they must also be situated within their historical context; just as a legal-realistic
analysis is required to overcome essentialism, it also serves to avoid ahistoricism in transnational comparisons.

The Locus of Comparison

Whom shall we compare with whom? The title of a 2001 article by the human rights advocate Kevin Boyle hits the nail on the head: ‘Hate Speech: The United States versus the Rest of the World?’. The 1960s witnessed worldwide acceptance of hate speech bans as set forth in international human rights treaties. Boyle and other scholars deemed that initiative successful: virtually all states had adopted national, regional or international restrictions on hate speech. The US is the one major power that has continued to oppose hate speech bans.

For example, article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ The US was the one major power opposed to that provision. The US did not ratify the ICCPR until 1992—‘very late’, in Boyle’s view. Upon submitting its instrument of ratification, the US included a reservation stating ‘[t]hat article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.’ The US thereby collapsed the international norms binding upon its national free-speech laws into a tautology (or a vacuity). The reservation meant that the US would recognise any requirements arising under ICCPR article 20 as binding upon the US only to the extent that the US Constitution would be interpreted by the Supreme Court to permit precisely the same requirements. The Supreme Court may, of course, uphold domestic legislation adopted pursuant to an ICCPR obligation. However, under the reservation, the Supreme Court remains free not to do so; or indeed to

---

7 See Boyle, n. 4 above, at 493 – 6.
9 See UNHCHR, supra note 8.
10 See Boyle, n. 4 above, at 483.
11 See information on reservations, understandings and declarations of States Parties to the ICCPR, provided by the Office of the United Nations High Commissioner for Human Rights (UNHCHR), http://www2.ohchr.org/english/bodies/ratification/4_1.htm (visited 04/10/2009). Interestingly, some other democracies, such as Australia, Belgium, New Zealand, and the United Kingdom, submitted similar reservations. Their statements have received less attention, however, presumably because those states’ domestic laws do in fact concede some ground to hate speech bans. See id.
reverse an earlier decision to do so. Contrary to the treaty’s aim to create internationally binding obligations, the US reservation consigns the ultimate question of the binding character of those obligations to its domestic judiciary.

The United Nations Human Rights Committee, which supervises States Parties’ adherence to the ICCPR\(^\text{12}\), has adopted no detailed view about whether that reservation violates the object and purpose of the Covenant.\(^\text{13}\) Instead, in its first report on the United States in 1995, it stated, in general terms, that it ‘regrets the extent’ of the US ‘reservations, declarations and understandings . . . taken together, they intended to ensure that the United States has accepted only what is already the law of the United States.’\(^\text{14}\)

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD\(^\text{15}\)), described by Boyle as ‘more radical and far-reaching’,\(^\text{16}\) requires that States Parties,

‘(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour of ethnic origin . . . .

‘(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.’

The US ratified CERD in 1994, almost three decades after it had been opened for signature.\(^\text{17}\) The government again included a reservation precluding any effect on speech more restrictive than that of the US Constitution.\(^\text{18}\)

States Parties’ performance under CERD is monitored by the UN Committee on the Elimination of Racial Discrimination. In its 2001 report on the US, the Committee stated that it was ‘particularly concerned’ about the US ‘reservation on the implementation of article 4’.\(^\text{19}\) The report continued,

\(^{12}\) See ICCPR pt. IV (providing for the establishment of the UN Human Rights Committee).
\(^{13}\) But see UN Human Rights Committee, ‘General Comment 24 (52)’, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (concerning inter alia issues relating to reservations made upon ratification or accession to the Covenant). In para. 1, the Committee criticises reservations which, in their number, content or scope, would ‘undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties’. According to Boyle, Gen. Comment 24 is ‘widely regarded’ as having been published in anticipation of the first US submission of 1994. See Boyle, n. 4 above, at 495.
\(^{16}\) Boyle, n. 4 above, at 496.
\(^{17}\) See UNHCHR, supra note 8.
\(^{18}\) See UNHCHR, supra note 11.
The prohibition of dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that a citizen’s exercise of this right carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas. The Committee recommends that the State party review its legislation in view of the new requirements of preventing and combating racial discrimination, and adopt regulations extending the protection against acts of racial discrimination, in accordance with article 4 of the Convention.\textsuperscript{20}

The US position on hate speech looks increasingly like an anomaly. It may seem arbitrary, then, to compare only Europe with the US. In their overall conception, European hate speech bans differ little from those of many non-European states. Australia, Canada, India or South Africa also have Western-style democracies with hate speech bans, and can provide interesting contrasts to the American civil liberties position. Why, then, focus on Europe? The post-World War II emergence of European democracies, within integrated Council of Europe and EU systems, has made Europe a ‘centre of gravity’—a crucial political and cultural counter-weight to the US. I shall therefore examine a Euro-American divide, while noting that the basic observations in this chapter would apply to other states.

The distinction between European and American centres of gravity arises in various contexts. On issues as diverse as the death penalty or the welfare state, recent decades have seen Europe and the US grow ever further apart. And yet, even on those issues, trans-Atlantic differences can turn out to be hazier than superficial comparisons would suggest. For example, not all American jurisdictions provide for the death penalty, nor are all identical in their levels of social services, so comparisons between Council of Europe jurisdictions and ‘the American approach’ become more complex from the outset.

On hate speech, by contrast, the Euro-American divide seems absolute. All European states maintain at least minimal hate speech regulation pursuant to national, European or international law.\textsuperscript{21} Meanwhile, over several decades, the US Supreme Court has moved strongly towards a civil-libertarian position, as described both by Post and by Weinstein & Hare in their contributions to this collection. When the dominant norms on free speech appear to divide Western democracies so starkly, it becomes tempting to assume that the difference reflects a deeper cultural divide—an unbridgeable chasm between European and American attitudes towards rights, freedom, pluralism or democracy. I shall argue, however, that such conclusions may be exaggerated insofar as the deeper social and cultural realities

\textsuperscript{20} Id.

are far subtler than the yes-or-no black-letter norms (‘Europe requires bans, the US forbids them’) might suggest.

Informal Power

Blasphemy laws provide a useful point of reference. Rooted in age-old religious doctrine, they have been salvaged by today’s secular European democracies on grounds similar to the secular rationales invoked to justify hate speech bans.\(^\text{22}\) Post cites the example of Denmark, a state often seen as progressive in the protection of human rights. He observes that, albeit arising from different histories and social contexts, blasphemy laws and hate speech bans are functionally equivalent. Both kinds of statutes require that government officials pass judgment on the intrinsic merits of ideas, distinguishing ‘speech that merely expresses disagreement from speech that degrades.’\(^\text{23}\) Neither type of ban ‘punishes speech that expresses critique, but each sanctions speech that insults.’\(^\text{24}\) That distinction, in turn, can be drawn ‘only by reference to the social norms that in Denmark define respect.’\(^\text{25}\) The same observation applies to bans in any state.

On Post’s view, the state withdraws those decisions from open, public debate when it enforces blasphemy laws or hate speech bans:

> Once we understand that even in Denmark such norms are contested . . . we can also see that both blasphemy and hate speech regulation must necessarily enforce social norms that represent the well-socialized intuitions of the hegemonic class that controls the content of the law. This would be true even in a society that purported to adopt a “multicultural” perspective enforcing norms of respect among disparate groups.\(^\text{26}\)

In the United States today, no blasphemy law could survive judicial review on the secular rationale of ‘not causing offence’.\(^\text{27}\) Even purely secular hate speech bans fail First Amendment scrutiny, insofar as they regulate communication within public discourse solely on grounds that the speech is offensive.

A preliminary point arises from Post’s suspicion towards ‘the hegemonic class that controls the content’ of European hate speech bans. To be sure, a hegemonic class controls speech as much in the US as in Europe. On both continents, an elite exercises disproportionate control over informal, social spheres as well as formal, legal ones. In 2003, Cable News Network’s (CNN) reporter Christiane Amanpour claimed that the network had


\(^{23}\) R. Post, ‘Hate Speech’, in this collection, _____.

\(^{24}\) Ibid.,____.

\(^{25}\) Ibid.,____.

\(^{26}\) Ibid.,____ (internal citations omitted).

\(^{27}\) Ibid.,____.
been “‘intimidated” by the Bush administration in its coverage of the war in Iraq.’28 She maintained that CNN had ‘muzzled’ her through ‘a combination of the White House and the high-profile success of the controversial pro-war news network, Rupert Murdoch-owned Fox News.’ In her view, ‘the administration and its foot soldiers at Fox News’ had imposed ‘a climate of fear and self-censorship in terms of the kind of broadcast work we did.’29 Similarly, the BBC’s director general, Greg Dyke, had been ‘shocked’ by ‘how unquestioning the [US] broadcast news media was during this war’.30

If a ‘hegemonic class’ includes agents beyond the specific members of the government or the judiciary, then Amanpour and Dyke certainly point to an American hegemonic class that is able to censor speech of paramount public and political importance, whilst avoiding (as one would expect a hegemonic class to be able to do) any formal conflicts with the American Constitution’s guarantee of free speech, which restrict only government, but not powerful non-govermental institutions such as CNN.

In today’s world, even that distinction between ‘governmental’ and ‘non-governmental’ institutions is arbitrary. The news media count among our most vital links to government. Our opinions about what government is, does, and should be are shaped more by the media than any other force. When an elite exercises covert control over the content of broadcasts, that informal control is arguably more pernicious than control through formal laws limiting speech. The latter may be inappropriate for a democratic society, but at least the laws will be public, open to scrutiny and debate. The covert controls described by Amanpour and Dyke, if detected at all, may be inferred only obliquely and after the fact. The most dangerous controls are the ones we can’t see.

Formal Law

To be sure, Post makes no claim to be assessing the informal operation of hegemonic elites. His interest in hate speech bans follows their customary form, as formal law through which governments adopt an official, moral choice broadly condemning certain expressions of intolerance. In that context, ‘hegemonic class’ generally equates with ‘governing elites in their official governing capacity’.

Then let’s consider America’s judicial elite. In the 1952 case of *Beauharnais v. Illinois*31, decided over a decade before the US Supreme Court had taken a more civil-libertarian approach. A majority of the Court adopted the concept of group defamation to uphold a law that banned any publication that “portrays depravity, criminality, unchastity, or lack of virtue

---

29 Ibid.
30 Ibid.
of a class of citizen of any race, color, creed, or religion.” There is no evidence that the
Court’s ruling met with the overall disapproval of the American people, who presumably still
resembled Europeans in thinking that government has a role to play in curbing at least some
forms of provocative speech.

Nor, by the time the Court had changed course, was it obvious that the Justices were
speaking for a majority of Americans. Quite the contrary. Central to the Court’s position in
recent years is the view that the Constitution protects minority views from majority
pressures.32 (The same can be said of other individual, higher-law rights, which, today, are
expected not merely to rubber-stamp majority opinion, but to insulate individuals from
majorities.33) Admittedly, a generation or two now having passed, the current position may
well represent the majority US view today.34 The fact remains that the requirement of
government neutrality in the public sphere was introduced by the Court acting as an elite
corps irrespective of, if not actively opposing, the majority will. In other words, both the US
and European approaches are the products of elites—as is, of course, virtually all law today.

Still, Post’s suspicions about European elitism are not without foundation. An attraction
of the American civil liberties position (and this is perhaps how Post’s views should be read)
is that its elitism has a crucially anti-elitist strain: the only viewpoint it imposes is that
government may not officially impose viewpoints within the overall sphere of public
discourse. European legal systems use the law to punish one intellectual position (such as
offence to religion35, or Holocaust denial36, or a belief in the superiority of heterosexuality37)
in order to impose, coercively, a contrary opinion (such as, respectively, the need to protect
religious feelings, or to honour the memory of Holocaust victims, or to combat homophobia).
European elitism uses state coercion to penalise offensive viewpoints, and thus to enforce the
viewpoint that certain viewpoints are, as a matter of law, superior or inferior.

But the problems raised by Amanpour and Dyke do not go away so easily. They were
speaking about a particular issue arising at a sensitive time—important, for sure, but not

32 James Weinstein has rightly pointed out that it is in the early 1970s that the US Supreme Court begins to adopt
concepts of “content neutrality,” “viewpoint discrimination” and the requirement that government cite a
“compelling” interest if it is to regulate speech on grounds of its viewpoint. See, e.g., Police Dep’t of Chicago v.
majority disapproval of homosexuality in Northern Ireland did not justify criminal penalties). See generally, e.g.,
34 See, e.g., L. B. Nielsen, License to Harass: Law, Hierarchy and Offensive Public Speech (Princeton: Princeton
University Press, 2004) (suggesting ambivalence towards legal regulation of hate speech in the US, even among
target groups).
Kingdom, 1996 ECHR 60 [1996].
36 See, e.g., the German ‘Auschwitzlüge’ (Holocaust denial) case, BVerfG 90, 241 (1994); Faurisson v. France,
37 See, e.g., Jan-Peter Loof, ‘Freedom of Expression and Religiously-Based Ideas on Homosexuality: European
and Dutch Standards’, in Religious Pluralism and Human Rights, T. Loenen & J. Goldschmidt, (eds.) (Antwerp,
id. at 295 – 309.
necessarily typical of the more ordinary, everyday sphere of American public discourse. Post’s interest is in the character of the public sphere as an arena for the robust exchange of views and ideas. Certainly, our comparison of formal norms suggests that US law endows the American public sphere with a freedom qualitatively superior, from a civil-libertarian perspective, to a European sphere in which states coerce, through threat of legal penalties, the silencing of certain provocative or offensive views. The real question, then, is: how do those differences in formal norms reflect real freedoms of expression, as actually exercised, in Europe and the US?

Realism and Essentialism

Post describes an ideal of ‘public discourse’, in civil-libertarian terms, as ‘a unique domain in which the state is constitutionally prohibited from enforcing community norms.’ He claims that, in the United States, ‘public discourse is an arena for the competition of many distinct communities, each trying to capture the law to impose its own particular norms.’

Of course, ‘public discourse’ as ‘an arena for the competition of many distinct communities’ is no American invention. It has long stood as an aim of law in European states. The increasingly secular, post-Westphalian European order arose largely from devastating wars of religion. John Locke came to argue that it was ‘toleration’ that must stand as ‘the chief characteristic mark of the true church.’ Voltaire embodies the European Enlightenment—for some, he embodies Europe itself—when he praises Peter the Great for having ‘favorisé tous les cultes dans son vaste empire’.

Under the European Convention on Human Rights, freedoms of religion (art. 9) and speech (art. 10), have certainly generated controversial case law. But so has the US First Amendment. One would be hard pressed to find, in the respective European and US case law as the whole, evidence of fundamentally different freedoms on either side of the Atlantic. Europe and the US have long shared the background aim of securing a public sphere for the robust exchange of ideas. Everyday experience equally supports my preference for trans-Atlantic cultural comparisons that are more grey than black-or-white. One need merely look at the public sphere throughout most European states as it actually exists, and not merely as it might be speculatively theorised. While hate speech bans are indeed of genuine concern for the legitimacy of law in a democratic society, let us not forget that virtually all open discussion and debate that can be waged in the US can be, and is, waged throughout the

---

38 Post, (n. 23 above), _______.
39 For a classic account, recall F.Schiller, Geschichte des dreissigjährigen Krieges (Zürich, CH: Manesse, 1998).
established European democracies. I have yet to find myself scurrying over to Amazon.com (i.e., the US branch) because it can provide massive quantities of books banned on Amazon.co.uk, Amazon.de or Amazon.fr.

If we consider issues that have dominated political discussion in recent decades, from national elections, to social welfare, to armed conflict, to third-world development, to environmental pollution, to education, drugs, smoking, abortion, gay rights, or countless other issues of public concern, it would be ludicrous to suggest that fundamental freedoms of public participation are identifiably stronger—or the outcomes of such open debates identifiably better—on one or the other side of the Atlantic. That is not to deny the genuine problem that arises if, for example, someone wishes to read or hear, say, racist material, or an argument denying the Holocaust. Speakers able to disseminate such views freely in the US may be barred from doing so in Europe. Post rightly suggests that such exclusion poses problems of democratic principle, or democratic ideals of equal citizenship. It does not, however, indicate significantly lower levels of overall freedom of speech in Europe. Post continues:

The [US Supreme] Court has . . . interpreted the freedom of expression clause of the First Amendment in a manner analogous to the Amendment’s Establishment Clause, which requires government to be neutral as between the many different religious sects that in America have sought to control the state. Since the 1940s, the Supreme Court has refused to allow the state to enforce community norms in public discourse, thus requiring that the state be neutral with respect to the many competing communities that seek to control the law by enforcing their own particular ways of distinguishing decency from indecency, critique from hatred.43

Of course, that observation, too, is subject to qualifications. The Supreme Court’s rationales for upholding general prohibitions even on obscene materials not depicting children or non-consenting adults44 cannot easily be reconciled with the concept of a mature citizenry responsible for autonomous choices in matters of mental-emotional experience and expression. It suspends any notion of content neutrality, allowing the state to enforce community norms in public discourse. In maintaining that obscenity plays ‘no essential part of any exposition of ideas’, the Court altogether imposes upon public discourse some assumption about what counts as an ‘idea’.45 Nevertheless, in areas of political and social

---

43 Post, (n. 23 above), ____.
45 Id. at 20. Not entirely helpfully, the Court in Miller adopts the following criteria to decide which non-‘ideas’ might be excluded by government from the public sphere, as ‘obscenity’, without violating the Constitution: ‘The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.’ Id. 24 at (internal citation deleted). On problems that arise in applying that standard, see id. at 37 (Douglas, J., dissenting) (discussing problem of vagueness). See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting) (discussing problems of vagueness and overbreadth).
concern, as more traditionally understood, Post does state a dominant principle of US free-
speech jurisprudence that has prevailed since its civil-libertarian turn.

Insofar as Post is elucidating a constitutional principle, he describes (A) ‘the public
sphere in America’ as ‘an arena for the competition of many distinct communities’. On first
glance, that statement may seem broad. Insofar as it is true, however, it can only mean
something rather narrower, namely, (B) ‘the public sphere in America is an arena for the
formally even-handed competition of many distinct communities’. In other words, that
‘competition’ need not be substantively even-handed—each community allowed only to
participate with equal resources, which would require a totalitarian level of state control, and
even then would hardly be practicable. Rather, it is even-handed ‘competition’ in the sense
that each ‘community’ has a chance to use the public sphere to put its case.

The difference between (A) and (B), then, is two-fold. On the one hand, if there is value
to the First Amendment’s hostility towards the state-sponsored enforcement in public
discourse of the norms of any particular community, it lies in the value of fair play—in a
formally equal chance for each of those communities to speak. Hence a legally imposed
requirement of equal treatment of all such communities, insofar as speech is concerned. On
the other hand, the First Amendment does not require, for example, that poorer or otherwise
disempowered communities or individuals be funded to provide material equality with
wealthier ones; or that less powerful entities be given greater air time in order to offset their
lack of influence vis-à-vis more dominant ones.

That distinction between formal norms and their social contexts is crucial. Of particular
concern to the American civil liberties tradition, as Post notes, is the risk that viewpoints of a
dominant community might be enforced to the detriment of less influential communities. It
has never been the case, however, that norms of strictly formal neutrality, even of
constitutional stature, can fully avert that risk. They do so only imperfectly, since informal,
social inequalities can operate as coercively as formally discriminatory norms. Nowhere has
that discrepancy emerged more forcefully than in the Southern United States, whose
governments long acquiesced in the values and practices of white supremacy—i.e., in
preferring the norms favoured by one community—regardless of any First Amendment
requirement of purely formal government neutrality with respect to various communities’
conflicting values. The landmark cases of Heart of Atlanta Motel, Inc. v. United States46 and
Katzenbach v. McClung47 showed how, well into the 1960s, racial segregation still dominated
Southern American life with at least a passive imprimatur of state and local law. Those cases
involved businesses typical in the South from the 19th century through to the 1960s, which
openly refused to provide equal services for blacks and whites. They mirrored, in the

commercial sphere, the doctrine of ‘separate but equal’ which had been enshrined as constitutional precedent in the 1896 case of *Plessy v. Ferguson*.\(^{48}\) Those cases show that, even if certain manifestations of political, economic and social power imbalances may not be enforced within formally enacted law (or within other government conduct, insofar as judicially reviewable), social and economic power imbalances may nevertheless prevail in countless ways that are supported within the overall apparatus of the legal system.

That insight has long stood as a cornerstone of ‘outsider jurisprudence’, including Critical Legal Theory, Critical Race Theory, LatCrit, radical feminism, or queer theory.\(^{49}\) Those movements bar us from claiming, ‘Well, yes, *purely social factors* may “enforce” such imbalances, but the *law* does not follow suit’, since, in such instances, no clean and simple line can be drawn between ‘law’ and ‘society’. Insofar as broader social practices are effectively supported (even if not expressly endorsed) within the full framework of law, they cannot be said to exist in a universe utterly distinct from law. The problem is not merely that ‘the law cannot be perfect, and will falter in practice even when its norms are sound in principle.’ The problem is that those norms can only ever encompass part of the problems they are supposed to solve—certainly in the United States, where the Constitution, both in its black letter and in its subsequent interpretation, avoids tampering even with overwhelming social power imbalances.\(^{50}\)

Post’s analysis does, then, present US constitutional ideals of strictly formal neutrality, and their underlying attitudes of government non-preference for the norms of certain communities over others. However, those ideals reveal little about the social and economic realities of a society whose legal regime has, throughout history, sustained colossal social and economic power imbalances. Those social and economic power imbalances assure that the values and norms of dominant communities are overwhelmingly enforced through the legal regime that sustains their power and privilege. It would be a simplistic essentialism to assume (and Post rightly avoids making any such assumption) that a First Amendment norm of formal neutrality expresses overall patterns of political, economic or cultural even-handedness within the broader American society; that poor blacks, for example, enjoy the same effective freedom of expression enjoyed by wealthy whites, even if they all enjoy the same formal freedom of expression.

I shall re-formulate Post’s observations, then, not to contradict them, but to display more explicitly the limits of formal norms from a legal-realist perspective (the italics representing my interpolations to Post’s words quoted above):

\(^{48}\) *Plessy v. Ferguson*, 163 US 537 (1896).
\(^{49}\) On the concept of outsider groups and outsider jurisprudence, see, e.g., See, e.g., M. Matsuda (n. 8 above), 18 – 20.
\(^{50}\) On the proposition that the US Constitution does not include or imply social or economic rights, i.e., individual rights to compel government provision of social services, see, e.g., De Shaney v. Winnebago Social Services. Dept., 489 U.S. 189 (1989).
Formally, the First Amendment requires that the state be neutral with respect to the many competing communities that seek to control the law by enforcing their own particular ways of distinguishing decency from indecency, critique from hatred, even if in practice within the broader society and culture that are held in place by that same legal system, such enforcement of particular communities’ norms may be present and even pervasive. Accordingly, in the United States public discourse is an arena for the formally even-handed competition of many distinct communities, even if such differentials as status, class, wealth, ethnicity, gender, or sexuality, also held in place within the totality of the legal system, systemically preclude even-handedness in practice.

My aim is not to deny all reality to Post’s view of the American public sphere, although he describes a First Amendment ideal that departs dramatically from the reality actually lived by socially and economically disempowered communities and individuals within that legal regime. I overwhelmingly endorse the American civil libertarian approach to free speech, but we must avoid any conclusion that current First Amendment jurisprudence creates ‘an arena for the competition of many distinct communities’ of a kind that does not fundamentally exist in the legal regimes of other Western democracies. Hate speech bans are indeed incompatible with the ideal of such an arena, but, as implemented in most European states, are far from wholly destroying it. For the most part, US approaches to free speech promote ‘an arena for the competition of many distinct communities’ precisely in the ways that European approaches promote such an arena. US civil libertarian norms promote that open, participatory ‘arena’ through formal norms, largely indifferent to gross material inequities; European social welfare states promote their own open, participatory ‘arenas’ through attention to actual material circumstances, sometimes sacrificing the formal even-handedness of the First Amendment. Whilst I would maintain that European states can achieve the same result without making that sacrifice, I would not maintain that the European public sphere is, in view of the totality of formal and real conditions, less free or open than the American. Nor would I dismiss Post’s view as ‘idealistic’ in a derogatory sense. Values and ideals matter in law. They maintain an ongoing and fluid relationship with everyday attitudes and practices. In the US Supreme Court, sheer ideals hold enormous power to influence social practices and attitudes. Nevertheless, as Tolstoy warned, we must be wary of a ‘science of jurisprudence’ that risks treating ‘the State and power as the ancients regarded fire—namely, as something existing absolutely.’

51 See generally, e.g., Dworkin (n. 33 above).
52 L. Tolstoy, ‘Second Epilogue’, in War and Peace (trans. L. Maude & A. Maude, Ware, UK: Wordsworth Classics, 1993), 936. ‘[T]he State and power’, Tolstoy continues, ‘are merely phenomena, just as for modern physics, fire is not an element but a phenomenon.’ Ibid.
a complex society, whose social patterns do not always mirror the Court’s dominant values, and may actively thwart them.

For reasons that Post has rightly stated in various writings, European hate speech bans raise real concerns about government regulation of public discourse in societies that depend upon an open and transparent system of participatory democracy for the very legitimacy of their laws; however, the ways in which European social democracies may have enhanced substantive even-handedness in political empowerment and participation by rectifying gross social or economic balances must be considered if trans-Atlantic legal ideals are to compared not in a vacuum, but as real social forces operating in real societies. There is no straightforward sense in which one or the other continent achieves greater overall even-handedness in the power and influence of their constituent communities. The American First Amendment does provide more rigorous, formal even-handedness to all speakers, albeit against a backdrop of strong deference to substantive, material imbalances that allow gaping disparities in the real power and influence of privileged communities. The established European democracies admittedly allow very limited compromises of formal even-handedness, but, unlike the US, have actively sought to promote greater substantive even-handedness by overcoming excessive social and economic disparities—certainly, though misguided, through restrictions on speech thought to exacerbate those disparities, but also, more importantly, through greater minimum social and economic protections (themselves, to be sure, stronger in some European states than others). Indeed, as I have argued elsewhere, longstanding, stable and prosperous European social welfare states can and should eliminate hate speech bans, not because, as Post may appear to suggest, they somehow lack any fundamental overall even-handedness that the United States possesses, but because hate speech bans simply fail to serve their aims of achieving greater social or economic balance.

General economic and social protections suffice to further those aims, without the necessity of restricting speech.

Marxists and many post-Marxist critical theorists would take the analysis a giant step further, arguing that US Supreme Court jurisprudence is nothing but ‘superstructure’ (Überbau), nothing but a fiddle played by forces that actively engineer the very inequalities that the Court may nominally purport to combat, but, in practice, only ever serves to perpetuate. We need not venture quite so far in our search for the real America lurking behind the elite, ‘hegemonic’ values of its legal culture. Today’s critical theorists generally recognise the real and distinct power of formal legal norms and processes. However, their

---

53 Post, (n. 23 above), _____.
54 See Heinze, (n.22 above) 578 – 81.
55 Cf. Heinze, (n. 6 above), pt. II.
writings warn against any culturally essentialist view that norms applied by courts straightforwardly recapitulate those that govern social or economic life.

Essentialism looms when one feature of a society is allowed to eclipse other, contrary elements. The First Amendment’s requirement of formal even-handedness does indeed promote the crucial democratic value of open and robust public discourse. However, it would be an exaggeration to infer that Europe’s hate speech bans alone, or even the broader moral choices they represent, suffice to destroy that value altogether, or even to weaken the equally robust sphere of controversy and debate in Europe. If we wish to understand the relationship between government and public discourse, in order to assess the health of public discourse on either side of the Atlantic, we must look at informal, social elements as well as the formal-legal elements that are relevant to that relationship. That is no easy task—which is why we must avoid any suggestion that differences in specific legal norms yield easy or obvious conclusions about broader cultural differences.

**Formal and Substantive Freedoms: An Age-Old Dilemma**

A classic political idea, notable from Plato through to Rousseau and Hegel, is that we achieve ‘real’ freedom through certain restrictions on freedom. A child loses free choice when compelled to attend school, to do homework, or to learn good manners; yet we commonly believe that the child’s overall empowerment, the child’s later horizons and opportunities—professional, personal, social—are enhanced through those sacrifices imposed early on. A child lacking such constraints is likely to find doors shutting later in life; and fewer choices mean less overall freedom throughout the individual’s lifetime. Famously arguing that society must sometimes ‘force one to be free’⁵⁶, Rousseau provided a counterpart to classical, liberal ‘hands-off’ notions that would equate state coercion with diminished freedom.

That ‘less is more’ ideal of freedom operates not only individually, but also collectively, when limits on the freedoms of some are seen as legitimate means of enhancing the freedoms of others. Advocates of hate speech bans often see such limits as utterly minimal diminution of liberty, on the view that no serious social value can be served by crude expressions of racism, anti-Semitism, Islamophobia, homophobia or other hate speech. The cost of what is seen as a wholly minimal restriction on the expressive activities of some speakers is deemed to be outweighed by the benefit of an enhancement of the real freedom of out-groups to participate more fully in democracy, without being hunted into the fringes of society through

⁵⁶ ‘Hence for the social compact not to be an empty formula, it tacitly includes the following engagement which alone can give force to the rest, that whoever refuses to obey the general will shall be constrained to do so by the whole body: which means nothing other than that he will be forced to be free; for this is the condition which, by giving each Citizen to the Fatherland, guarantees him against all personal dependence; the condition which is the device and makes for the operation of the political machine, and alone renders legitimate civil engagements which would otherwise be absurd, tyrannical, and liable to the most frightful abuses.’ J.-J. Rousseau, *The Social Contract, I.7*(8), in J. Rousseau, V. Gourevitch, trans. & ed. *The Social Contract and Other Later Political Writings* (Cambridge: CUP, 1997), 53 (emphasis added).
hostile public discourse. Many Europeans might well argue, just as American Critical Race Theorists have argued, that a reduction of the freedoms of hate mongers promotes the freedoms of out-groups by creating a more welcoming social environment. On that view, public discourse that casually accepts intolerant speech marginalizes out-groups, sending them subtle yet constant messages that they are not equal, full-fledged members of the political community, however much their purely formal rights and freedoms may suggest that they are. Hate speech bans aim at moving from purely formal rights of citizenship—fully enjoyed as real rights only for the privileged on top of the heap—to more inclusive rights that can genuinely be enjoyed by those at the bottom. By regulating such speech, the state sends a message to blacks or gays that their participation is welcome.

There are certainly some practical problems with that view. It makes a causal assumption that hate speech deters participation in public discourse, yet its proponents have never undertaken or cited serious empirical research to show that, in longstanding, stable and prosperous democracies any such causal relationship exists (as opposed to societies such as Rwanda or the former Yugoslavia, where undeveloped public discourse could indeed lead to mass atrocities), no more then it has been shown that violence in the media breeds systemic social violence. And it is questionable whether speech should be penalised on grounds of a wholly speculative causal link. In other words, there is no evidence that these aims of social inclusion are in fact promoted through hate speech bans.

That does not, however, make those aims unworthy. Through much of the 20th century, the Dutch system of verzuiling (‘pillarisation’) structured a state that, albeit geographically small, has long contained among the world’s highest population densities (at 16 millions today, its head count lags only slightly behind the combined population of Denmark, Sweden and Norway, making the Netherlands demographically more of a medium-sized than a small-sized European state) Centuries of rivalry among varieties of religious, secular and political groups—itself a microcosm of the broad social conflicts from which modern Europe had emerged—were acknowledged by the system of verzuiling. Control of important public functions, such as education and media air time, were delegated to various constituent communities, with considerable shares going to religious organisations. That attempt to avoid domination by any one group aimed at enhancing public participation overall.

Such an arrangement would have been unthinkable in the US, under the Supreme Court’s Establishment Clause jurisprudence. Nor is that a surprise. The Dutch and American systems differed because their respective histories and demographics differed. Each grew out of attempts within political and legal institutions, over centuries, to learn from past ills and to

57 See generally, Mari Matsuda et al., eds., Words that Wound (Boulder, CO: Westview, 1993).
avoid future ones. Each reflects strong values, even if not precisely the same institutional balances, of democracy, republicanism, liberalism and pluralism. Certainly, by the 1960s and 1970s, those arrangement shad to yield to a system more attuned to changing politics, economics and demographics. Nevertheless, however irreducibly Dutch the specific concept of *verzuiling* may be, it vividly shows a European state pursuing an ‘arena for the competition of many distinct communities’, albeit in a way very different from the American.

Under the French concept of *laïcité*, the purely formal, “hands-off” approach of the US Supreme Court shows the US to be rather lukewarm in promoting the public sphere as an arena for the competition of distinct communities, insofar as US law fails to address the problem of the substantive, informal or social power of the more dominant communities. French law and practice require that the state-sponsored educational system be used for the systematic promotion of critical analysis of all belief systems, religious and secular. Again, as with US First Amendment principles, the precepts of *laïcité* are only ideals, which may not always reflect the concrete, socio-economic realities France’s marginalized, ‘out-group’ communities. Nevertheless, it is that injunction of critically-minded education which imposes upon the French state the task of providing primary schooling. By contrast, when dominant religious faiths or credos do slip into the American public sphere with the imprimatur of the Supreme Court, with no equitable representation of minority beliefs, the practice is approved on grounds of ‘tradition’, suggesting a comparative lack of vigilance over the neutrality of that ‘arena’ in comparison to French *laïcité*. While I do not propose to examine either the philosophical merits, or the execution in practice, of *laïcité*, it strikingly contrasts with the US in the way in which it envisages a rigorously neutral ‘arena for the competition of many distinct communities’. Much of the history of Europe, then, is nothing but an attempt to build such arenas, albeit not always in the ways Americans were doing it.

Cultural essentialism poses dangers on all sides of the hate speech debate: on the European side as well as the American; on the side of hate speech prohibitionists as well as the side of free-speech ‘absolutists’. For example, David Fraser, in this collection, endorses prohibitions on Holocaust denial in several European states, rejecting the US position. From (a) the evil of the Holocaust, Fraser infers (b) the evil of a legal norm that would permit certain forms of oral or written publication of (c) the evil of Holocaust denial. We can assume without discussion (a) the evil of the Holocaust, and (c) the evil of Holocaust denial. And we can assume that (c) follows from (a). It is questionable, however, whether (b)

59 ibid.
62 See Pena-Ruiz, (n. 60vabove), 96 – 116.
follows from (a), certainly as a matter of sheer logic, but, more importantly, as a matter of either utility or moral right. Michael Whine’s chapter in this volume, and Fraser’s as well, show that bans on Holocaust denial have by no means proved either effective or desirable as means of combating Holocaust denial. Prosecutions for Holocaust denial are precisely what nourish it: high profile trials engender sensational media attention, lending quasi-credibility to Holocaust deniers, which, in turn, contrary to the aims of the bans, actively encourages ongoing doubts about the existence or gravity of the Nazi extermination programmes. No American Holocaust deniers have attained anything like the stature of Robert Faurisson in France, or indeed David Irving throughout much of Europe. To the contrary, the absence of bans and the consequent absence of prosecutions in the US leave such figures consigned to the obscurity they deserve.64

Whilst this is not the place to examine that issue in depth, the only danger I would note is that advocates of bans on Holocaust denial may, too, slip into essentialist modes of argument. Once we have recognised that such bans would be doomed under the American First Amendment principles, arguments about essential differences between American and European culture, extrapolating wholly from black-letter norms, may provide an all-too-facile means of arguing that the American civil liberties approach, arising from an essentially alien legal and cultural mentality, is simply irrelevant to Europe: ‘It may be fine for Americans, but it’s not the way we in Europe do things’. As I’ve tried to suggest, such culturally essentialist reasoning does not invite engagement with the specific reasoning of American civil liberties principles, testing their applicability to European law, culture or democracy. It merely invites the jurist to dismiss them out of hand. And, of course, the problem of Holocaust denial is linked to questionable assumptions about a specifically ‘European’ history, a matter to which I shall return after a brief excursion into American history.

Ahistoricism

Post explains his view of a distinctly American public arena with the aid of the following quotation from *Cantwell v. Connecticut*, 65 a landmark Supreme Court case decided in 1940:

‘To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. / The essential characteristic of these liberties is, that under their shield many types of life,

64 Ibid.

character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.66

The Supreme Court in Cantwell provides a classic statement of the American civil liberties ethos. Even a harsh critic of US politics could not seriously challenge the force of such ideals in the history of American liberalism. Once again, however, there arises a question about the degree to which we can extrapolate from that ideal to an accurate depiction of the ways in which Americans have actually been able to enjoy such rights. When Cantwell was decided, racial segregation remained iron-clad law throughout the southern United States, under a ‘separate but equal doctrine’ that had been enshrined by the Supreme Court. An African-American could be lynched, with the complicity of the entire legal system, simply for failing to say ‘Yes Sir’ to a white man, let alone indulge in ‘vilification’, or standing on a street corner in Atlanta or Birmingham to plead for equal rights—which even a white person could not safely do. Nor in northern or other non-segregationist states did African Americans (and some other minorities) enjoy full civil rights in any real sense.67 For African Americans the formal existence of such constitutional ‘liberties’ failed to provide any meaningful kind of ‘shield’ under which ‘many types of life, character, opinion and belief [could] develop unmolested and unobstructed’. Nor did American law overall show much evidence that ‘this shield’ was indeed ‘necessary’ in an America ‘composed of many races and of many creeds.’ In no way was ‘the public sphere’ in America providing anything like ‘an arena for the competition of many distinct communities’. It is altogether unclear what ‘history’ the Cantwell Court is referring to, aside from a largely mythologized one—not in the sense of being wholly false, but in the sense of idealising one very partial reality while overlooking many realities that contradict it.

What status are we to assign, then, to Cantwell’s lofty vision of the ‘shield’ of civil liberties for America’s diverse communities? Again, we must avoid both the idealist-essentialist Scylla of allowing sheer aspirations to speak for reality, and the materialist-reductionist Charybdis of refusing to see any reality at all in the ideals. Cantwell’s dictum was real if only because it was prophetic, foreseeing the gradual emergence of the ‘public sphere’, genuinely open to all Americans, that Post describes. But did that ‘public sphere’ ever fully emerge? On May 17, 1954, more than a decade after Cantwell, the Court took a decisive step in its steady break from Plessy with Brown v. Bd. of Education.68 Yet not even the most naïve formalist could maintain, and indeed no one has seriously argued, that a full-

66 Post, (n. 23 above), _____ (quoting Cantwell, 310).
fledged arena of open public discourse emerged that same day. No one makes that argument because no one can stretch quite so far in reading sheer legal norms, however momentous, into lived reality.

More than 20 years after *Cantwell*, the Supreme Court was still confronted with pervasive racial inequality, betokening fundamental social incapacities within the real ‘public arena’, whatever legal guarantees may have been functioning to protect a wholly formal, wholly idealized one. So when shall we say that a pervasively free and open American ‘public arena’ actually emerged? Any socially and culturally contextual reading teaches that such a question is not so much a matter of fact but of interpretation, indeed of highly controversial interpretation. As we have seen, many theorists within the various critical movements, while not denying some genuine gains, would argue that it still hasn’t fully emerged; that an abstract legal discourse of equality or inclusion means little when social forces, held in place through law, systematically undermine those values.

I do not wish to insist too strongly on an unbreachable chasm between the traditional civil liberties position and the insights of critical theory. Indeed, I have recently questioned that divide, and chastised some critical theorists for adopting, in their eagerness to dismiss altogether some core values of the American civil liberties tradition, a selective legal realism that can become as pernicious as wholly idealised formalisms. That is why, as I have mentioned, the force of First Amendment ideals should not be underestimated. Critical theorists have nevertheless persuasively suggested that inclusiveness and even-handedness within the public sphere are elusive, unstable, historically contingent ideals. Questions as to whether they exist at all are not amenable to a simple yes-or-no. The American public sphere that Post describes is a recent historical creation. Throughout most of US history, the public sphere was a debilitated place; nor can such a history be easily swept away by a relatively recent line of Supreme Court cases. The problem of ahistoricism arises, then, when a snapshot of one historical moment is used to provide a general depiction of the society, eclipsing other, contrasting histories. The emergence of the civil-libertarian ideal expressed in *Cantwell*, though clearly important, must not overshadow contrary social realities dating, in one form or another, from the founding of the United States to the present day. Any straightforward characterisation of ‘America’ shorn from that historical bedrock runs the risk of an ahistoricism entailing the same errors as the aforementioned cultural essentialism.

Like essentialism, ahistoricism poses dangers on all sides of the hate speech debate. Scepticism towards free speech in Europe, for example, is often explained in simplistically historical terms. It is often argued that the unbridled freedom to utter racist and anti-Semitic

---

70 See generally, *Delgado & Stefancic* (n. 67 above).
71 Heinze (n. 6 above).
hate speech under the Weimar Republic led to the most brutal, genocidal regime in history, showing that a rights-based democracy in itself provides no guarantee that free speech will generate any kind of robust ‘marketplace of ideas’; it may lead to the utter abrogation of such a society. However, that recourse to history is more ahistorical than historical in any critically-minded way. The Weimar democracy cannot seriously compare with today’s democracies in any relevant respect. Arguably, such a view assumes them to be similar for no reason other than that they all are nominally called ‘democratic’. Today’s Council of Europe world, in which Europeans are inculcated from the youngest age, in school and through the media, with values of rights and open debate, fundamentally differs from the 19th and early 20th century Concert of Europe world of authoritarian, bellicose states (and, in the case of Weimar, a notoriously weak one), more inclined to promote values of obedience and conformity than values of vigorous, broad-based discourse. Nor, by extension, is such historical reasoning valid to justify bans on Holocaust denial. It is for that reason as well that I do not advocate abolition of hate speech bans always and everywhere, but limit my focus to stable, prosperous and longstanding democracies—terms admittedly uncertain, but which have been given more precise meaning through general principles governing the derogations jurisprudence of such bodies as the European Court of Human Rights, pursuant to ECHR art. 15 or the UN Human Rights Committee, pursuant to ICCPR art. 4.

Attempts to draw such straightforward moral lessons from complex histories are generally hazardous. As an abstract proposition, one might indeed argue that the history of European fascism teaches the necessity of regulating speech; yet one might just as plausibly argue that European fascism teaches the necessity of avoiding any trace of that government-imposed content regulation which stands as a hallmark of the period. A sufficiently offhand or simplified historical account will support either view; which is why such accounts must not be used to short-circuit more serious examination of the character of the world’s various democratic societies, and how they may resemble, or differ from, other democracies in history.

Conclusion
Legal realism and critical theory have long taught that surface, black-letter norms may reveal little about lived reality, including the lived reality of the law. That insight must be carried over into cross-cultural comparisons of legal regimes and legal cultures. The ‘public sphere’ of open, democratic discourse is a real, yet also ineffable thing. We cannot draw a neat line around it, showing where it stops and starts. The realities that shape it do not reduce to the formal norms governing it. And if that observation applies to the public sphere within any one society, then it applies when we compare societies. No comparison of two or more societies’ respective public spheres can proceed solely on an analysis of black-letter norms.
Euro-American differences that may at first appear black-or-white can turn out to be more complicated—on both sides of the Atlantic, and on both sides of the debate about adopting or abolishing bans on extreme speech. Robert Post and James Weinstein join a host of American scholars who have provided trenchant arguments for preserving free speech as a matter of democratic legitimacy, many of which, in my view, transfer readily to the democratic cultures Europe and other societies. The reflections on democratic citizenship explored in much of their work can readily be assimilated into a European political, cultural and legal idiom, as long as we guard against reading vast cultural differences into the wholly limited differences of trans-Atlantic norms regulating hate speech.