Rethinking The Context of Hate Speech Regulation

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Rethinking the Context of Hate Speech Regulation (Book Review)

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In the early 1990s I was in graduate school at Johns Hopkins University studying Holocaust-denial litigation.1 A friend in the department from Canada told me that I supported freedom of speech for deniers because the United States was a big country which, unlike Canada, could afford to ignore international treaties banning hate speech.2 After several conversations, I decided to focus my dissertation on criminal procedure rather than freedom of speech.3 Quite simply, the back and forth over which approach to hate speech – American, Canadian, or European – was “better” did not strike me as that much fun.4 At the same time, I had to admit there was something to my

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2 For example Article 4 of the International Convention on the Eradication of Racial Discrimination and ICERD and Article 20 of the International Convention on Civil and Political Rights call for bans against hate speech.

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

4 As Eric Heinze describes, only partially tongue in cheek: European conferences on hate speech follow a similar pattern. A few Americans make impassioned speeches about the value 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
friend’s argument – in the arguments for and against freedom of speech I read in the United States, following international treaties did not take pride of place. Perhaps this did owe something to the United States being a “big” country, one that could do what it wanted in a variety of settings.\footnote{5}

I thought about this question a great deal while reading Michael Herz and Peter Molnar’s fascinating volume of essays The Content and Context of Hate Speech: Rethinking Regulation and Responses.\footnote{6} The volume covers a wide range of subjects, including defamation of religions, Holocaust denial, state-sanctioned incitement to genocide, and the problems posed by satellite transmission of hate.\footnote{7} Many leading scholars in the field appear on these pages such as Robert Post, Bhikhu Parekh, Jeremy Waldron and the late Ed Baker and Ronald Dworkin.\footnote{8} The geographic scope of the volume is impressive. Contributions feature the law of sub-Saharan Africa,\footnote{9} and the countries of the post-Soviet world.\footnote{10} The book includes excellent descriptive analyses of the treatment of hate speech under the American Convention of Human Rights,\footnote{11} in the policy pronouncements of the Council of Europe (including in the jurisprudence of the European Court of Human Rights)\footnote{12}

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5 Meanwhile, Canada is not only a small country, it is a small country next to the United States, something that has shaped Canadian attitudes toward hate speech regulation. See Robert A. Kahn, “Hate Speech and National Identity: The Case of the United States and Canada,” U of St. Thomas Legal Studies Research Paper 08-02, posted to the Social Science Research Network, Mar. 10, 2010 (http://ssrn.com/abstract=1104478) at 8-14 (describing Canadian fears that US “racism” will undermine Canada’s multicultural society).


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

11 Eduardo Bertoni and Julio Rivera Jr., The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression, in in Herz and Molnar, THE CONTENT AND CONTEXT OF HATE SPEECH 499-513

and in the case law of a variety of countries including the United States, Canada, the United Kingdom, Germany and Hungary.\(^13\)

There is also a great deal of theory building in the volume. Alon Harel proposes treating speech more leniently when it is “deeply rooted” as part of a “comprehensive and valuable form of life” of the speaker.\(^14\) Fredrick Schauer challenges the assumption dating back to John Stuart Mill that a society always benefits by protecting demonstrably false speech.\(^15\) Katharine Gelber, seeking a middle ground between legal sanctions and official neutrality, would like to see the state help victims and bystanders respond to hate speech with “counterspeech.”\(^16\) Meanwhile, Toby Mendel calls on international courts to provide a clearer interpretive framework for regulating hate speech.\(^17\)

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

The volume is the product of a collaboration between US and Hungarian legal scholars. It grew out of a conversation between Hungary’s Representative on Freedom of the Media for the Organization for Security and Cooperation in Europe Miklos Haraszti and Monroe Price, former

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\(^{14}\) Alon Harel, *Hate Speech and Comprehensive Forms of Life* in Herz and Molnar, *The Content and Context of Hate Speech* 306-26 (at p. 306). Harel argues that otherwise the state can be seen as condemning the speaker’s core identity. *Id.* What is particularly noteworthy about Harel’s argument is what he does with speech acts that do not fit this category: Stray insults, and speech “deeply rooted” in a “comprehensive form of life” that is not “valuable” (i.e. Nazi and KKK speech) are given less protection, *id.* at 306-07, language recalling the discussion of “low value” speech in mid-twentieth century US cases such as *Chaplinsky v. New Hampshire*, 319 U.S. 568, 571-72 (1942) (concluding that punishing fighting words presents no constitutional problem since it plays “no essential part of any exposition of ideas”) and *Beauharnais v. Illinois*, 343 U.S. 250, 256-57 (1952)(applying the same principle to a group libel statute).


\(^{16}\) Katharine Gelber, *Reconceptualizing Counterspeech in Hate Speech Policy (with a focus on Australia)* in Herz and Molnar, *The Content and Context of Hate Speech* 198-216.

\(^{17}\) Toby Mendel, *Does International Law Provide Consistent Rules on Hate Speech?* in Herz and Molnar, *The Content and Context of Hate Speech* 417-29


dean of Cardozo Law School, “about the wildly divergent approaches to ‘hate speech.’” The conversation led to conferences in New York and Budapest during which Peter Molnar, an activist, writer, and former Member of Parliament in Hungary played a leading role. Molnar conducted four interviews with leading scholars, writers and lawyers: Yale Law School Dean Robert Post, British writer Kenan Malik, former ACLU president Nadine Strossen, civil rights litigator Theodore Shaw.

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

In addition, the chapters – while taking up wildly divergent topics – coalesce around a number of themes that collectively advance our understanding of hate speech regulation. In the rest of this essay I will focus on three themes in particular. First, as Part I shows, by taking “context” seriously, the contributors raise the important question of the role “context” can or should play in

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21 Peter Molnar and Michael Herz eds. THE CONTENT AND CONTEXT OF HATE SPEECH at xxiii. Several contributors follow Peter Molnar’s lead and refer to “hate speech” in quotes as an expression of skepticism about the ability of the state to define the boundaries of hate speech with legal precision. See Peter Molnar, Responding to “Hate Speech” with Art, Education, and the Imminent Danger Test in THE CONTENT AND CONTEXT OF HATE SPEECH 183-97 at 183, n. 1.

22 Peter Molnar, Interview with Robert Post, supra note 8.

23 Peter Molnar, Interview with Kenan Malik in Herz and Molnar, THE CONTENT AND CONTEXT OF HATE SPEECH 81-91.


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

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

28 Indeed, the results of the questioning were very interesting – showing points of divergence and consensus. Robert Post noted the freedom of the gay protesters to express their point of view while rejecting any attempt by the state to restrict the counter-demonstrators on “expressive” grounds. He did, however, draw a line at attempts to intimidate or exclude the gay pride marchers – this could be criminalized even if expressive. Id. at 27-29. Malik compared the counter-demonstrators to anti-globalization protesters who trash Starbucks stores and burn cars and supported tolerating anything short of physical violence. Molnar, Interview with Kenan Malik, supra note 22, at 86. Nadine Strossen and Molnar had a spirited discussion about the legal state of mind required to prosecute the counter-demonstrators. Specific intent to harm the protesters was not required; but more than negligence was necessary. Molnar, Interview with Nadine Strossen, supra note 24, at 396. Theodore Shaw also focused on the state of mind of the counter-demonstrators, saying that he could live with a “knew or should have known standard.” Interview with Theodore Shaw, supra note 25, at 412.
an increasing globalized world. Second, as Part II shows, taken as a whole the Herz and Molnar volume suggests the United States is less of an outlier on hate speech regulation than we often assume. To put it another way, it turns out that despite its size, the United States, far from ignoring the fight against hate speech, at times vigorously fights such speech — albeit in non-legal ways. Third, the contributors take a nuanced approach to “responses” society takes to hate speech. As Part III shows, not all criminal sanctions are alike and there are a wide variety of non-legal responses — including public shunning, the use of art to educate people about the dangers of hate, and state supported counterspeech. Although the varying contexts, complicated role of the United States, and multiple ways to combat hate speech suggest suggest chaos, the contributors agree on a number of points, as I will show in the Conclusion.

In the Conclusion, I will also suggest next steps for the comparative study of hate speech regulation: These include bringing more world regions into the analysis as well as exploring the impact of globalized social media on hate speech regulation.

I. The Tension between Context and Convergence in the Internet Age

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

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

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

29 See infra Part I.
30 See infra Part II.
31 Id.
32 See infra Part III.
33 See infra Conclusion.
34 Id.
36 Koltay, supra note 35, at 7-8 (describing Hungarian hate speech regulations). The clear and present danger test was developed by Justice Oliver Wendell Holmes. While it was used to suppress speech in Schenck v. United States, 249 U.S. 47, 52 (1919), the same case in which Justice Holmes said one does not have the right to yell “fire” in a crowded theater, id., during the 1920s and 30s the doctrine became associated with protecting speech. For an overview of this period, see Wallace Mendelson, Clear and Present Danger: From Schenck to Dennis, 42 COLUM. L. REV. 313, 314-20 (1952); Koltay, supra note 35, at 2-6.
“hate speech” is spoken. Further this search must focus on the most effective law and policy against such speech.\(^\text{37}\)

This call for a “detailed understanding” of “the historical and cultural content” of regions, countries and continents resonates throughout the book. Under Molnar’s gentle questioning Robert Post relaxed his view that legitimate democracies do not punish speech that is part of the public discourse.\(^\text{38}\) Instead, taking a “highly contextualist” approach, Post concedes that: “In some contexts hate speech might so delegitimize democracy as to justify excluding hate speech from the formal definition of freedom of speech.”\(^\text{39}\) Another strong defender of free speech, First Amendment attorney Floyd Abrams makes a similar concession; “[As] I have observed previously, I cannot condemn or even criticize states such as Germany and India which have acted [to ban hate speech] in light of their own historically demonstrated needs.”\(^\text{40}\)

On the other hand, Miklos Haraszti, fresh from six years of protecting the media from state encroachment, takes a more skeptical approach towards context. While not denying the benefits that come from “diplomatic bargaining between local and global ‘values,’” he warns that: “The international community may pay too high a price for too few concessions if it legitimates local taboos and abandons insistence on every person’s right’s to beliefs that are unpopular, even ugly, as long as they do not infringe on other people’s rights.\(^\text{41}\) What is more, “the territorial jurisdiction over media content has evaporated” raising questions about the meaning of national or regional context in an increasingly interconnected world:

Thanks to the Internet and other global platforms, “organized” hate speech can now be delivered right at home, anonymously, without being restrained by distance, rules or culture. (I wonder how the proponents of “extensive regulation” actually imagine curbing hate speech online. Can they avoid the only known “solution” to controlling the Internet – already realized by China and Iran – which is the carving up of the global network into nationally controlled intranets?)\(^\text{42}\)

Another concern about context was raised by Ronald Dworkin. Responding to the claim that had he been born in Europe, he would have supported hate speech bans, Dworkin said that an

\(^{37}\) Molnar, \textit{Responding to “Hate Speech”}, supra note 21, at 184.


\(^{39}\) Molnar, \textit{Interview with Robert Post}, supra note 8, at 25. Post goes on to say that in other times, punishing hate speech would constitute “censorship.” \textit{Id}.

\(^{40}\) Abrams, supra note 25, at 126.


\(^{42}\) Haraszti, \textit{supra} note 41, at xvi.
“explanation of a conviction’s genesis is not an argument for its truth.” To put it another way, context can only go so far. Many of the arguments in The Content and Context of Hate Speech are universal in scope, or apply in ways that do not neatly align with national borders. For example, Alon Harel’s argument that the state should give greater protection to “deeply rooted” expressions of “comprehensive forms of life” is not logically limited by culture, history, or geography. While Frederick Schauer addresses context in his discussion of harmful falsity, the context in question is occupational, not regional: The harm posed by falsity is much greater in the general public than in the ivory towers of academia, where it can be rebutted.

Context raises also practical hazards. For instance, a focus on context makes it harder to enforce international standards, which can give courts too much flexibility. Describing the jurisprudence of the European Court of Human Rights, Toby Mendel complains that the court rulings “often spend very little time analyzing the impugned speech itself” and provide “little legal analysis of their holdings.” Indeed, continues Mendel, “It sometimes appears as if the decision hinges primarily on whether the content and intent of the speech in question appears to be of a racist character.”

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

In addition, the idea that the only response to online hate is for states to tear up the information highway and replace it with their own, much smaller “intranets” is subject to question. Monroe Price’s discussion of the regulation of satellite transponders suggests that, with help from the private sector, states can take steps to regulate online hate short of breaking up the Internet. While jamming frequencies – the satellite equivalent of breaking off from the Internet – has been used, it is often short term

43 Dworkin, supra note 8, at 344. Dworkin was responding to Stephen Holmes’s characterization of American free speech absolutism as a form of “cultural anthropology.” Holmes, supra note 18, at 346.
44 See Harel, supra note 14.
45 See Schauer, supra note 15, at 140-41.
46 Mendel, supra note 17.
47 Id.
49 To give a local example, I live in Minnesota where cursing is referred to as the F-bomb and is largely frowned upon. As such, a curse word could well suggest an intent to intimidate. By contrast, on the East Coast, where I used to live cursing is more common and would not necessarily indicate a hostile intent. One well established guidebook warns tourists to Baltimore that the locals use harsh language in ordinary interactions. See GEOFF BROWN, MOON BALTIMORE (2009).
50 Price, supra note 7, at 531-32 (describing efforts at regulation).
and done in conjunction with other policies. Finally, while the danger that states will follow China and Iran and carve up the Internet is real, the type of nationalism implied in this effort is very different from the use of context to understand why a given nation responds to hate speech in a particular way.

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

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

II. How Exceptional is the United States When It Comes to Regulating Hate Speech?

The essays in The Content and Context of Hate Speech undermine the defensive approach United States lawyers and scholars have taken in international discussions about hate speech regulation. As Adam Liptak puts it: “The United States’ commitment to the protection of hate speech is distinctive, deep and authentic – and also perhaps reflexive, formal, and unthinking.” This reflects a history of viewing the United States and Europe as polar opposites. On the traditional view Europe punishes hate speech, the rest of the world does not, the rest of the world does not matter, and somebody has to be right.

51 Id. at 523-24 (describing how a combination of jamming and threats led Deutsche Telekom to stop broad casting Islah or Reform radio, which the US government claimed supported terrorism).
53 Dworkin, supra note 8, at 344.
54 Id.
55 Holmes, supra note18, at 346.
56 Id.
57 Liptak, supra note 10.
Added to this descriptive view of the world, are normative defenses of freedom of speech. Freedom of speech is seen as necessary to reach the truth, ensure for democratic legitimacy and protect personal autonomy.58 Supporting these defenses are maxims about the way the world works that serve to deepen the argument for tolerating speech. These include the fear that restricting one type of speech would lead to the restriction of other speech (the slippery slope argument), 59 fears that the government would use hate speech bans against the very minority groups the speech was meant to protect,60 a self-confidence that exposure to hate speech made citizens braver, more resilient and tolerant of difference61 and a belief that the best response to bad speech is more speech.62

It is worth briefly thinking about what the traditional view leaves out. There is little discussion about why the United States developed the way it did, and about whether the United States might – at some point in the future – adopt hate speech bans. Nor does the traditional view have room for the possibility that the US vs. Europe comparison might actually be wrong, that – in other words – there might be pockets in the United States where hate speech is pursued (and repudiated) with the same vigor as in Europe.63 Meanwhile, Europe is seen as a monolith – Europeans punished hate speech and this is bad. There is little appreciation of the differences among European countries (say the United Kingdom vs. Germany) or between types of hate speech law (Holocaust denial and blasphemy bans were “hate speech” in the same way a ban on inciting to violence based on race or religion was). Finally, the part of the world that is not Europe or the United States did not exist – especially Latin America and South Asia which have their own rich tradition of hate speech regulation but have received little attention in the US legal academy.64

One way to decenter the Euro-American dichotomy is to add more countries. For example, Eduardo Bertoni and Julio Rivera Jr. view the treatment of hate speech in the Inter-American Convention on Human Rights as considerably more libertarian than the International Convention on Civil and Political Rights, and European hate speech bans more generally.65 This reflects the context in which the Convention was adopted, a time of “authoritarian governments” and the

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58 For the classic overview of this position, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY. 11-15 (1982).
59 Kahn, Flemming Rose’s Rejection of the American Free Speech Canon, supra note 48, at 667.
63 Not everyone took this view. See ERIK BLEICH, THE FREEDOM TO BE RACIST? HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM (2011)(suggesting that the gap between Europe and the United States is not so wide as is commonly understood).
64 For an exception, see Tanya Katerí Hernández, Hate Speech And The Language Of Racism In Latin America: A Lens For Reconsidering Global Hate Speech Restrictions And Legislation Models, 32 U. Pa. J. Int’I L. 805 (2014). In addition to an extensive discussion of hate speech regulation in Brazil, Katerí Hernández also relates the widespread presence of hate speech restrictions in Latin America into a broader argument that there is a growing global consensus in favor of regulating hate speech in some way. Id.
65 Bertoni and Rivera, supra note 11, at 503.
involvement of US lawyers and diplomats in the drafting of the treaty. At the same time, Article 13(5) of the Inter-American Convention bans “advocacy of national, racial, or religious hatred that constitute incitement to lawless violence.” This language, so close to Brandenburg v. Ohio, which lets the state ban speech “likely” to incite imminent violence, complicates efforts to divide the world into a tolerant United States and a Europe that has draconian hate speech bans.

Another decentering takes place at the level of theory building. We have already seen how, in his conversation with Peter Molnar, Robert Post conceded that the legitimacy of hate speech bans may depend on context. This may owe something to Peter Molnar’s persuasive skills – which are manifest -- but it also reflects a certain tension in Post’s democratic legitimacy theory, a tension perhaps present in all locally rooted theories. Simply put, Post’s theory offered a response critical race theorists who argued in the 1980s and 90s for campus based speech codes. As some critical race theorists pointed to Europe, Post offered a distinctly American defense of hate speech, one rooted in the constitutional experiences of the United States. At the same time, however, Post – especially in the aftermath of the Danish Cartoon controversy – presented his theory as global in scope. While Post has since retreated into contextualism, his experience raises a question that haunts The Content and Context of Hate Speech: Has the age of First Amendment absolutism – if it ever existed – finally come to an end?

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

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66 Id. at 512.  
68 Andrei Richter’s somewhat terrifying account of sweeping media regulations in post-Soviet Russia reinforces the same conclusion from the opposite direction. When compared to Russian media laws that give prosecutors great discretion to close radio and TV stations, and punish journalists who interview suspected terrorists, see Richter supra note 10, at 294, 296-300, the mainstream European Court of Human Rights regime seems quite tame. For example, in Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A)(1994), the ECHR held that it violated Article 10 to prosecute a journalist who interviewed skinheads under Danish hate speech laws. See McGonagle, supra note 12, 460-61(describing Jersild).  
69 See Molnar, Interview with Robert Post, supra note 8.  
70 I base this on personal conversations with Peter Molnar (he is a very engaging person) as well as his ability to draw out the best in the people he interviewed fort he book.  
72 See RICHARD DELGADO AND JEAN STEFANIC, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT, 121-30 (1999)(describing the experience of other countries, largely in Europe, that adopted hate speech bans).  
73 See Post, Racist Speech, supra note 38, at 279-85.  
74 Robert Post, Religion and Freedom of Speech: Portraits of Muhammad, 14 CONSTELLATIONS 72 (2007); for a critique, see Kahn, Why Do Europeans Ban Hate Speech?, supra note 38, at 576-81.  
75 Rosenfeld, supra note 13, at 288.
courts.” Toby Mendel combine concerns about the “abuse” of hate speech laws with a rejection of the slippery slope argument. Finally, Peter Molnar, although emphasizing the importance of art and education in responding to hate speech, also calls for banning hate speech when the surrounding circumstances suggest “imminent danger of violence.”

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

A. Supporting the First Amendment While Opposing Hate Speech

Let me begin with a caveat. There are some contributors who come close to an absolutist position – at least when discussing the United States. For example, Ed Baker maintained a steadfast opposition to hate speech bans – largely on pragmatic grounds; the furthest he went was to support laws against discrimination (which, conceivably, could include speech based hostile work environment claims). However, Baker saw anti-discrimination measures as an alternative to hate speech regulation, rather than something that complements it. Nor has Ronald Dworkin changed

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76 Haraszti, supra note 41, at xiii.
77 Mendel, supra note 17, at 417, 425. See also Parekh, supra note 8, at 49 (noting that in ordinary life “we make exceptions all the time” without sliding from side to side unable to stop). According to Mendel: While there are cases of overbroad hate speech laws being abused, there are no examples of well-drafted laws gradually leading to greater restrictions on free speech. Democracies around the world have been applying hate speech laws for decades and, while the rate of prosecutions may fluctuate in different countries and at different times, there has been no general trend toward greater and broader application of these laws.

78 Molnar, Responding to “Hate Speech” supra note 21, at 195-96. Significantly, Molnar does not require that the speaker “intended” to cause violence – knowledge is enough. Id. at 195.
79 Baker, supra note 8, at 75.
80 Id. at 75-76 (describing how in his experience the same politicians who show their sensitivity on racial matters by supporting hate speech bans oppose anti-discrimination bans). The strength of Baker’s opposition to hate speech bans may rest on his autonomy-based justification of free speech. Id. at 63. While Frederick Schauer can identify situations in which the search for truth is balanced by competing justifications, Schauer, supra note 15, and Robert Post can identity situations in which the speech act in question is outside the public discourse (or necessary in a weak or emerging democracy), Molnar, interview with Robert Post, supra note 8, at 24, human autonomy is harder to balance – at least when the speech act does not lead to imminent violence. Flemming Rose, who also defends freedom of speech on a similar – albeit more romantic – concept of personal autonomy likewise takes a largely absolutist position on hate
his opposition to hate speech laws – although he is open to restrictions on racial violence and content neutral “time, place, and manner” restrictions on hate speech. This is because in a modern democratic society “I must accept the right of others to hold me in contempt.” Finally, Floyd Abrams while expressing sympathy for countries that punish hate speech, is not willing to change his “personal opposition to hate speech restrictions” which for him is “an issue of principle.”

Nadine Strossen is another story. On the surface, the former ACLU President plays the part of a free speech traditionalist. Nor was she, in her interview with Peter Molnar, at all reticent in candidly challenging his arguments. Asked whether hate speech should be justified to “prevent grave harms to marginalized groups,” Strossen took issue with Molnar’s premise, arguing that it is “insulting” to assume that the target of racial or ethnic insult cannot respond on his or her own. When Molnar suggested that a supporter of hate speech bans might respond that “not everyone has the education and, as a result, the critical capacity of, say, a white lawyer,” Strossen rejected this argument as “such an elitist statement” and “Unbelievable!” While Strossen made special offense to the suggestion that “someone of a certain demographic group...is less capable of understanding,” she also rejected the idea that responding to hate speech with counterspeech requires a certain level of education.

At the same time, Strossen makes statements that might surprise a free speech traditionalist. For one thing, her rejection of hate speech bans in the United States comes with a series of responsibilities. Those who reject hate speech legislation as “merely symbolic” have a duty “to advocate [for] some real measures to counteract discrimination” including “appropriately tailored affirmative action to specifically single out those [disadvantaged] groups.” Here Strossen reverses the stance of Baker’s racial conservative; instead of supporting hate speech bans to avoid facing the reality of discrimination, Strossen sees strong anti-discrimination laws as the cost of protecting hate speech.

However, Strossen’s biggest departure from the traditional position involves the practice of non-state actors – newspapers, the media, and Facebook users – that “punish” hate speech outside the legal system. During the 1990s college newspapers across the country debated whether to run ads denying the Holocaust. A number of papers ran the ads, arguing that the First Amendment

speech restrictions. For more, see FLEMMING ROSE, THE TYRANNY OF SILENCE (2010); Kahn, FLEMMING ROSE’S REJECTION OF THE FREE SPEECH CANON, supra note 48, at 678-81.
81 Dworkin, supra note 8, at 342.
82 Id. at 342.
83 Abrams, supra note 25, at 126.
84 Molnar, Interview with Nadine Strossen, supra note 24, at 378. Strossen went on to say: “We are not somehow automatically diminished just because some bigot says something negative about us.”
85 Id. at 379.
86 Id. at 379-80.
87 Id. at 382.
88 See Baker, supra note 8, at 75-76. One wonders what the general public in the United States would prefer if asked Baker’s hypothetical conservative position (hate speech bans but no affirmative action) or Strossen’s position (affirmative action but no hate speech bans).
89 See KAHN, HOLOCAUST DENIAL AND THE LAW, supra note 1, at 121-35.
left them no choice. While other papers refused, compared to non-state actors in countries that punished hate speech and/or Holocaust denial, the US papers were reluctant to engage in acts of “informal censorship.” One might, then, expect a US traditional libertarian to take a similar position and oppose all restrictions – non legal as well as legal – against hate speech.

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

I do not necessarily disagree with using “social sanctions” to discourage hate speech. Politeness and civility are critical parts of living together in a fast paced, crowded, complicated, and diverse world. But “social sanctions” can be very severe – especially with the growing role of the social media – to be fair, a development that has blossomed only after Strossen’s 2010 interview with Peter Molnar. Consider, for example, the members of the Sigma Alpha Epsilon (SAE) fraternity at the University of Oklahoma who were caught on videotape singing a racist chant. They did not violate any hate speech laws; but the University of Oklahoma suspended the fraternity and expelled the students who performed the chant from school. Or the two male computer programmers who at a Python computer convention in Santa Clara, California made what the woman seated behind them thought was a sexist joke – once again, behavior protected by the First Amendment. Yet the women got their attention, snapped a photo, and sent it on Twitter after which the “jokers” were fired.

Among the many arguments against restricting hate speech is that such restrictions will have a chilling effect on speakers. Alon Harel argues that legal sanctions risk repudiating the values of the speaker, which is problematic when the speaker’s views are “deeply rooted” in a

90 Id. at 121-35. Interestingly, by the time of the Danish Cartoon controversy, attitudes had changed. The vast majority of adult and college newspapers refused to run the images of Muhammad. See News Value, Islamophobia, or the First Amendment? Why and How the Philadelphia Inquirer Published the Danish Cartoons, U. of St. Thomas Legal Studies Research Paper, No. 10-07 (posted Feb. 9, 2010)(http://ssrn.com/abstract=1548705).

91 Molnar, Interview with Nadine Strossen, supra note 24, at 380.

92 See Id. at 388-89 (reproducing statements from President Bill Clinton and Harvard University President Derek Bok).

93 Id. at 393.

94 Id.

95 Molnar interviewed Strossen in her office on Nov. 4, 2009; Strossen later expanded on her interview. Molnar, Interview with Nadine Strossen, supra note 24, at 378.

96 Hailey Branson-Potts and Matt Pearce, Expelled University of Oklahoma student in racial chant video deeply sorry, LOS ANGELES TIMES, Mar. 10, 2015; Elliott C. McLaughlin, “Disgraceful” University of Oklahoma fraternity shuttered after racist chant. CNN. Mar. 10, 2015. I say likely because if the conference was employment related, the joke could form part of a hostile work environment claim under Title VII.

97 See Dana Liebelson and Tasneem Raja, Donglegate: How One Programmer’s Sexist Joke Led to Death Threats and Firings, MOTHER JONES, Mar. 22, 2013. The woman who tweeted the joke was also fired, a fact that only further demonstrates the poser of social media. Id.

98 Id.
“comprehensive form of life.”99 Compared to what the speakers in these examples actually suffered – expulsion, suspension of the fraternity, loss of job – wouldn’t legal sanctions be far less frightening? One could argue that legal sanctions are more problematic because in a society that is still racist, the legal system might either fail to punish hate speech or disproportionately punish minority speakers under purportedly neutral hate speech bans.100 But this would not explain the failure to take notice of similar dangers posed by shunning and other powerful non-legal sanctions. That said, my main point isn’t to critique Strossen, but merely to show how far it is removed from the traditional view in which the United States is near absolutist in its protection of speech.

Finally, when discussing Brandenburg v. Ohio with Peter Molnar, Strossen shows a surprisingly European willingness to allow for the punishment of some forms of incitement-based hate speech. Asked about the gay pride march in Budapest, Strossen – instead, the ACLU took the

presents”).

The Content and Context of Hate Speech and likely within the emerging mainstream of the global discourse on hate speech regulation.

Other US contributors also depart from the traditional view – albeit less dramatically. Robert Post would punish speech that displays an intent to intimidate and in other writing speech that falls outside the public discourse – a potentially broad category that includes the workplace and possibly college campuses.104 Theodore Shaw, a voting rights litigator with the NAACP Legal Defense and Education Fund, takes a very similar position to Strossen on incitement, and argues – similar to Harel

Harel, supra note 14.

See Molnar, Interview with Nadine Strossen, supra note __, at 391 (questioning whether hate speech bans would be enforced given elected officials, and judges, and where juries “represent cross-sections of the community”). To me, the stronger argument would be that in a society, as the events in Ferguson demonstrate, where local police departments enforce vagrancy and quality of life offenses in a blatantly discriminatory manner, often with a profit motive at hand, hate speech restrictions will most likely be used against African-Americans. See Elliott C. McLaughlin, Justice Dept. Echoes Ferguson Residents’ Complaints, CNN, Mar. 4, 2015 (available at http://www.cnn.com/2015/03/04/us/ferguson-missouri-police-racial-bias-justice-department-report/index.html).

Indeed, opponents of the fighting words doctrine have raised the danger of discriminatory over-enforcement. See Burton Caine, The Trouble with “Fighting Words”: Chaplinsky v. New Hampshire is a Threat to the First Amendment and should be Overruled, 88 MARQ. L. REV. 441, 445 (2004)(arguing that state courts have stretched the doctrine “beyond all recognition” in order to “protect the police from criticism, with all of the inherent dangers such an approach presents”).

See Molnar, Interview with Nadine Strossen, supra note 24, at 396-97.

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

Recall that this was the position of Miklos Haraszti, the OSCE rapporteur on media freedom who introduced the volume. See Harasztí, supra note 41, at xiii.

Molnar, Interview with Robert Post, supra note 8, at 26, 29. See Post, Racist Speech, supra note 38, at 318 (conceding that [t]he regulation of racist speech within public institutions of higher learning...does not turn on the value of democratic self-governance and its realization public discourse”).

99 Harel, supra note 14.

100 See Molnar, Interview with Nadine Strossen, supra note __, at 391 (questioning whether hate speech bans would be enforced given elected officials, and judges, and where juries “represent cross-sections of the community”). To me, the stronger argument would be that in a society, as the events in Ferguson demonstrate, where local police departments enforce vagrancy and quality of life offenses in a blatantly discriminatory manner, often with a profit motive at hand, hate speech restrictions will most likely be used against African-Americans. See Elliott C. McLaughlin, Justice Dept. Echoes Ferguson Residents’ Complaints, CNN, Mar. 4, 2015 (available at http://www.cnn.com/2015/03/04/us/ferguson-missouri-police-racial-bias-justice-department-report/index.html).

101 See Molnar, Interview with Nadine Strossen, supra note __, at 397. The case in question was Berhanu v. Metzger, 850 P.2d 373, 375-76(Or. Ct. App. 1993).

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104 Molnar, Interview with Robert Post, supra note 8, at 26, 29. See Post, Racist Speech, supra note 38, at 318 (conceding that [t]he regulation of racist speech within public institutions of higher learning...does not turn on the value of democratic self-governance and its realization public discourse”).
— that racist speech is “without value”, although he would be “very, very careful” before banning hate speech — although he sees this as a possible alternative.\textsuperscript{105} Shaw also shares Yared Legesse Mengistu’s position that speech targeting historically disadvantaged minority groups is more worthy of punishment than speech that targets the majority.\textsuperscript{106} Indeed, Shaw goes a little further in questioning whether African American speech targeting White people is hate speech — as opposed to expressions of frustration at White dominance and exploitation.\textsuperscript{107}

\textbf{B. The United States Already “Punishes” Some Hate Speech Informally}

A second unsettling of the traditional perspective focuses on institutions, rather than individuals. In an enlightening essay, Arthur Jacobson and Bernhard Schlink describe three US institutions that restrict hate speech: Employers, who because of Title VII, operate as surrogate enforcers of hate speech standards;\textsuperscript{108} broadcast and cable regulators who censor themselves based on standards that are established and enforced privately;\textsuperscript{109} and campus speech codes, which often contain sweeping definitions, broad obligations to self-report hateful speech, and potentially draconian punishments.\textsuperscript{110} The result is a distinctly “American” model of hate speech regulation which “suppresses hate speech only incidentally, only as part of other purposes, not specifically, and never by name” but works within institutions where the possibility of hate speech is the greatest.\textsuperscript{111} Jacobson and Schlink conclude that “the American way may...wind up suppressing...more speech, more effectively than...other constitutional democracies.”\textsuperscript{112} As a result, the forces opposed to hate speech in American life do not need criminal sanctions — entrenched in employers, networks and the college campus they have already seized the “commanding heights” of a democratic society.\textsuperscript{113}

Even if the anti-hate speech forces have not won, the traditional image that contrasts a freedom loving United States and an overly restrictive Europe is in tatters. For one thing, the volume shows how the Europe/US contrast is incomplete — it leaves out the rest of the world. Moreover, United States censors more speech, in more different ways, than the First Amendment absolutists have led us to believe. Finally, the US lawyers, scholars, and legal academics who have contributed to \textit{The Content and Context of Hate Speech} have shown an increasing willingness to come out of their trenches and meet Europe — and the rest of the world — in the middle. If hate speech cannot be criminally regulated, shunning is a possibility; while content based bans on hate speech are unlikely in the United States in the near future, even a former ACLU president is willing to allow punishment of speech that incites — provided it is done in the least restrictive means possible.\textsuperscript{114} In the future, the discussion over hate speech regulation will move to this middle ground. One place

\textsuperscript{105} Molnar, \textit{Interview with Theodore Shaw}, supra note 25, at 404, 409.
\textsuperscript{106} \textit{id.} at 408-09; Mengistu, \textit{supra} note 9.
\textsuperscript{107} Molnar, \textit{Interview with Theodore Shaw}, supra note 25, at 409.
\textsuperscript{108} Jacobson and Schlink, \textit{supra} note 20, at 291-27.
\textsuperscript{109} \textit{id.} at 227-32.
\textsuperscript{110} \textit{id.} at 232-37.
\textsuperscript{111} \textit{id.} at 239.
\textsuperscript{112} \textit{id.} at 240.
\textsuperscript{113} \textit{id.} at 241.
\textsuperscript{114} Post, \textit{Interview with Nadine Strossen}, supra note 24, at 396-97.
where the middle ground is growing the fastest is in the area we shall discuss next – how states can or should respond to hate speech.

III. How Do Societies Actually Respond to Hate Speech?

It is easy to declare that one is “for” or “against” hate speech bans. But what, as a practical matter does supporting or opposing hate speech bans actually mean? Do supporters of hate speech bans want to sentence all hate speakers to hard labor – as German Holocaust denier Ewald Althans was? Do all opponents of hate speech bans insist on strict state neutrality, so that any departure from strict neutrality – such as Strossen’s call for political leaders to publicly repudiate acts of hate speech – is illegitimate? Or, to phrase the question another way, a number of opponents of hate speech bans (or Holocaust denial bans) call for public education, or good speech to drown out bad speech. Most of these calls can read as afterthoughts. The critic’s main project is to explain why the speech prohibition in question is unworkable; the call for education is secondary. Indeed, to the extent the opposition to the legal prohibition takes the form of questioning whether the target group has actually suffered harm the call for education will fall particularly flat.

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

Then I will turn to non-legal measures. The contributors to *The Content and Context of Hate Speech* have discussed a rich set of non-legal possibilities including using art and education as a response to hate speech, having the government enable victims and bystanders to respond to the hateful speech by engaging in counterspeech, and using techniques such as public condemnation.

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117 For example, L. Bennett Graham of the Beckett Fund, an opponent of the Defamation of Religions concept, calls for education against Islamophobia. But this call is undermined by his argument that Muslims cannot experience hate speech in the same way African Americans do because religion, unlike race, is mutable. See Robert A. Kahn, *A Margin of Appreciation for Muslims? Viewing the Defamation of Religions Debate through Otto-Preminger-Institut v. Austria* (1994), 5 U. CHARLESTON L. REV. 401, 409-11 (2011)(discussing L. Bennett Graham, Defamation of Religions: The End of Pluralism, 23 EMORY INT’L L. REV. 69 (2009)). If Graham is serious about his substantive argument, why should he care about Islamophobia at all?
118 Molnar, *Responding to “Hate Speech,”* supra note 21, at 184.
119 Suk, supra note 7.
and shunning to socially isolate the hate speakers. Non-legal responses, however, face two challenges. First, are these measures effective in curbing hate speech (or as effective as a society has a right to expect)? Second, to the extent the measures are effective, do they raise concerns about chilling speech or violating state neutrality that led some observers to oppose hate speech bans in the first place?

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

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

But as the contributors to the Herz and Molnar volume show, the actual criminalization and prosecution of hate speech laws is considerably more complicated. In this regard, Julie Suk’s analysis of Holocaust denial legislation in France does a very good job in raising these complications. According to Suk, while France bans Holocaust denial, the number of cases prosecuted has been very small and many of the books that have been subject to litigation under France’s ban are available in French libraries. In effect, the French Holocaust denial ban is symbolic – the relatively small number of prosecutions under the law is less important than sending the message that the state can govern legitimately because it has put to rest its connection with the anti-Semitic Vichy regime. The French ban on Holocaust denial turns Robert Post’s theory of democratic legitimacy on its head: for Suk, and the French, it is the absence of a speech ban, not its presence, which would render French democracy illegitimate. At the same time, it shows how a law that is rarely used can have an important impact.

There are, however, limitations to the symbolic approach. Presented with Suk’s argument, Strossen replied that real anti-discrimination laws would be much more effective than a “symbolic” hate speech ban. Moreover, if a society is “engaging in symbolism,” they can “keep it at the symbolic level” by enacting non-binding statements calling on society to refrain from engaging in

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

121 Suk, supra note 7, at 153.

122 Id. at 145.

123 Post recognizes this but focuses primarily on the part of Suk’s essay that compares France to the United States, arguing that the American state is less neutral than Suk suggests. Molnar, Interview with Robert Post, supra note 8, at 39; Suk, supra note 7, at 162-64 (noting that in the United States discussions of past atrocities focus on groups rather than the state).

124 Molnar, Interview with Nadine Strossen, supra note 25, at 391.
hate speech. Moreover, while Suk is probably right that the French denial ban has “not removed the voice of Holocaust deniers from public discourse” it is unclear whether other Holocaust denial bans – most notably those in Germany, where prosecutions of Holocaust deniers are more common and are sometimes accompanied by prison sentences – have the same quality.

The argument gets even more difficult when one shifts from Holocaust denial to hate speech in general. Banning Holocaust denial sends a particular message about a national past, much like banning cross burning and masked demonstrations in the United States. While in theory a hate speech ban that was rarely used might be seen as symbolic, it is hard to see what message such a statute would convey. Even if my Canadian colleague from graduate school would likely answer that such laws show that Canada (unlike the United States) repudiates racism and follows its treaty obligations – a hate speech ban is a clumsy way to send this message.

That said, Suk’s essay stands for an important larger point: all hate speech bans are not the same. While some countries enforce hate speech bans with frequent prosecution and prison sentences, other bans are symbolic. While symbolic bans will likely be problematic to a traditional civil libertarian – in part because part of the “symbolism” is the chilling of speech – they should be seen as less onerous than frequently used hate speech statutes. The same applies to administrative sanctions and civil litigation which because of streamlined procedures and lesser penalties allows for a greater flow of cases.

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

The discussion of non-legal responses in The Content and Context of Hate Speech is very rich. While Nadine Strossen has called on public figures to condemn racist hate speech Arthur Jacobson and Bernhard Schlink have argued that this type of shunning already takes place. Depending on one’s point of view, this could be good or bad. The social pressure shunning places on a hate speaker risks the repudiation of the speaker’s “comprehensive form of life” that Harel

125 Id. at 391-92. On one level, leaders who follow Strossen’s worldview do something very similar when they publicly condemn acts of hate speech. Id. at 387-89.
126 Here Suk makes an interesting observation about punishment. The French Holocaust denial ban is safely symbolic because most defendants face fines instead of prison time. Suk, supra note 7, at 153. Without agreeing entirely – a criminal prosecution is probably not a symbolic experience for most defendants – she is right that the lesser penalties make a difference in how the law is perceived. Suk’s position is also in line with the Parliamentary Assembly of the Council of Europe, which makes a distinction between criminal penalties and penal laws. McGonagle, supra note 12, at 486.
128 See Kahn, The Legal Regulation of Cross Burning, supra note 52.
129 In this regard, it is significant that Canada’s hate speech laws were enacted in the late 1960s, a time when international treaties such as the International Convention on Civil and Political Rights and the International Convention on the Elimination of Racial Discrimination were also being drafted.
130 Gelber, supra note 16, at 201-02 (describing civil liability for hate speech in Australia). The civil remedies for hate speech in Australia supplement rarely used criminal anti-vilification laws with civil litigation. Id. at 200.
131 Molnar, Interview with Nadine Strossen, supra note 24, at 382.
warns about. On the other hand, Ronald Dworkin, in opposing hate speech bans, argued that the citizen can ask the state, but not fellow citizens, to refrain from acts of disrespect — so perhaps Harel’s concern about respecting deeply rooted convictions would not apply to acts of repudiation or shunning, at least when done by private parties.

For her part, Strossen is sympathetic to Harel’s concern about repudiation — especially of religious groups. Writing in language that foreshadows today’s disputes over photographers, pizza shops, and cake makers who refuse on Christian grounds to have anything to do with gay marriage, Strossen gave her opinion that “there is an enormous amount of ignorant, negative, discriminatory prejudice against and stereotypes about members of the Christian right, fundamentalist Christians, who are, after all, a minority in the United States as a whole.” When these Christians are expelled from public schools for wearing t-shirts proclaiming that homosexuality is a sin, they are — according to Strossen — being repudiated in the way Harel describes.

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

132 Harel, supra note 14, at 306.
133 Dworkin, supra note 8 at 344.
134 On the other hand, if the President or the leader of a public institution such as a college or university following Strossen’s lead condemned an act of hate speech, a holder of a “deeply rooted” belief might legitimately claim that the state is condemning not just the speech but the speaker and his or her group. Indeed, a rebuke delivered by a popular politician or public leader might sting more than a misdemeanor type charge that resulted in a fine.
136 Molnar, Interview with Nadine Strossen, supra note 24, at 395.
137 Id.
138 Furthermore, when the racist, sexist or homophobic act involves violence — when, for example, the fundamentalist Christian throws eggs, or yells slurs at a gay pride parade, then Harel’s concern about protecting the sensibilities of holders of “deeply rooted” beliefs rooted in “comprehensive forms of life” should yield to the right of victims, bystanders and the society at large to speak out against the violent acts in question. To put it another way, I remember listening to the speech Strossen described that President Clinton made in the aftermath of the Oklahoma City bombing. Molnar, Interview with Nadine Strossen, supra note 24, at 387-88. I am glad he made it, even though the speech may have on the margins unfairly increased the alienation of the right wing militia movement which was surging in popularity at the time.
But shunning and public condemnation are not the only responses to hate speech. Peter Molnar, in a very interesting essay, raises the possibility that art can remedy hate speech – at least when the hate speech itself takes the form of art.139 As an example, Molnar describes how an African American character in the play The Guest at Central Park West views a statue on the grounds of the Museum of Natural History featuring US President Theodore Roosevelt, on a horse with a barefoot slave on one side and a barefoot native American on the other.140 The statue makes the character angry because it is a “symbol” – something that is “more dangerous than any bomb you could drop” and because it represents white supremacy and manifest destiny.141 After raising the possibility of suing to have the statue removed – which Molnar dismisses as unlikely – Molnar suggests alternatives that, without invoking the legal system, might resolve the problem.142

One possibility is to convert the statue – which now stands unadorned, without commentary – into an exhibit, in which the negative messages associated with the images could be put into historical, artistic and political context.143 Alternatively, one might add a counter-statue, Molnar suggests adding an additional statue of an African American and Native American who fought against discrimination.144 In addition to these private steps that the Museum of National History should take, there should be “broad nationwide efforts to examine all unexplored parts of related structures of subordination, both past and present.”145 These artistic efforts will help those offended by a particular piece of art; at the same time, the act of providing the commentary, or creating the counter-image could itself help relieve the tensions created by the “structures of subordination” by creating a space for public discussion.146

Another possibility – one suggested by Molnar’s proposal to create a new statue – is counterspeech. In a compelling essay Katharine Gelber makes a strong case for supported counterspeech, in which the state helps victims – and their allies – respond to hate speech with their

139 For an earlier discussion from, see Sanford Levinson, Written in Stone: Public Monuments in Changing Societies (1998)(describing controversies over public monuments such as the Confederate flag, and monuments to Civil War figures in a variety of different contexts).
140 Molnar, Responding to “Hate Speech,” supra note 8, at 188.
141 Id.
142 Id. at 190.
143 Id. at 190-91. This is not that different to what Germany is considering doing with Mein Kampf. The German copyright is expiring in 2015; there has been a debate whether the book should be banned, or released as it is. A panel of experts, however, have decided to release or release with commentary – in effect turning the book from a hate speech tract to a historical exhibit.
144 Molnar, Responding to “Hate Speech,” supra note 21, at 191.
145 Id.
146 For example, in the aftermath of the shooting of nine African Americans in a Charleston, South Carolina church, and the subsequent focus on removing the Confederate flag from the capitol in Columbia, South Carolina, the city of Minneapolis has considered renaming Lake Calhoun, given that John Calhoun (who the lake is named after) was a supporter of slavery. The surrounding conversation about whether to rename the lake, and if so what that name should be, has led to a wide ranging discussion of diverse groups, cultures and histories of the region. It has also led group involvement. For instance, an online petition of over 1,700 signatures has called for a restoration of the lake’s original Native American name –Mde Medoza (Lake of the Loons). See Steve Brandt, Lake Calhoun name change gets another look in Minneapolis, Minneapolis Star Tribune, Jun., 22, 2015.
full human capacities. Because the focus of supported counterspeech is on the victim, rather than as with shunning on the speaker, Gelber’s approach avoids the problem raised by Harel of repudiating the speaker’s “deeply rooted” views. For example, in the aftermath of a hate speech incident at a sporting event, communities would seek to publish a pamphlet on the subject; if it occurred on television or radio, the communities would seek alternative coverage to rebut the “negative stereotyping” contained in the broadcast. Supported counterspeech could be combined with other policies to ensure a comprehensive approach to regulating hate speech.

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

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

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148 Id. at 214.
149 Harel, supra note 14.
151 Id. at 206-07.
152 Id. (citing JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 159 (1993) and DAVID A.J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY 135-6 (1999)).
153 Id. at 209.
154 Asked about Gelber’s proposals in the context of anti-Roma speech in Hungary, Post is happy to have political figures in Hungary condemn such speech. He is also willing to see the state facilitate Roma speech in response if the Roma are otherwise excluded from the system. Molnar, Interview with Robert Post, supra note 8, at 34-35. On the other hand, he is not willing to let the Roma use public fora while denying their opponents the same use. Id. at 35. One might respond by arguing that, under Gelber’s proposal, opponents of the Roma would gain access to public fora were they subject to hate speech – a formulation that renders her proposal content neutral. This possibility, however, would slip away if one took the approach of Yared Legesse Mengistu and treated only anti-Roma speech as hate speech. See Mengistu, supra note 9.
156 Id. at 475.
157 Id. at 490-92. As McGonagle points out the ECRI reports allow the group to focus on specific issues in considerable detail. Id. at 491-92.
and others like them, advance the fight against hate speech in a productive, non-confrontational way.

Taken as a whole, the contributions complicate the traditional view whereby one either threw hate speakers in jail or ignored the problem entirely. There is a vast middle ground including non-penal criminal sanctions, symbolic laws, shunning, education and art, and counter-speech. These approaches each have strengths and weaknesses, especially when combined with an increasing diversity of efforts to define what types of speech acts should be subject to response.\footnote{For example, the discussion here has focused on Harel’s concept of “deeply rooted” speech and Mengistu’s emphasis on hate speech that targets historically disadvantaged groups. \textit{See} Harel \textit{supra} note 14; Mengistu, \textit{supra} note 16.} What is more, the choice of which intermediate measures to adopt will likely depend on the historical, cultural and political context of the locality, country or international organization regulating the speech act in question. While the resulting array of options might appear overwhelming, the contributors carefully guide the reader through the new terrain these options open up.

\textbf{IV. Conclusion: Making Hate Speech Regulation Fun Again}

\textit{The Content and Context of Hate Speech} keeps to the promise of Miklos Haraszti and Monroe Price to explore “the wildly diverse” positions societies across the globe have taken on hate speech regulation.\footnote{Peter Molnar and Michael Herz eds. \textit{THE CONTENT AND CONTEXT OF HATE SPEECH} at xxiii.} At the same time, as one reads through the essays, one sees – in the midst of all the diversity – strands of convergence. One type of convergence is doctrinal. There is a striving for a common ground on hate speech regulation that would allow punishment of speech that incites to violence. While some contributors from the United States are not willing to give up on content-neutrality just yet, there is a growing sense even in New York, Los Angeles and Chicago that certain types of acts should be punishable – even if not as “hate speech.”

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

A final convergence is scholarly. While there are still some hard core free speech supporters among the contributors such as Ed Baker, Ronald Dworkin and Floyd Abrams, the overall tenor of the volume is better represented by Robert Post, Peter Molnar and Nadine Strossen. Like Post, many of the US contributors are increasingly willing to recognize the limited scope of the First Amendment model of absolutist (or near absolutist) protection of speech. While holding the United States to a different standard, Post and Floyd Abrams express a sympathetic understanding to the
circumstances of other countries that face different challenges. Meanwhile, Peter Molnar shows that one can support very limited hate speech bans while relying mainly on education, counterspeech and other, non-legal alternatives, while, Nadine Strossen shows that one can be a resolute opponent of racism, sexism and anti-Semitism while opposing hate speech bans.

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

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

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

See G.R. Thurbys, Hindu-Muslim Relations in British India, 9-72 (1975)(describing efforts of the colonial government during the early twentieth century to enact restrictions on the press).

To give a hint at what this would look like, consider the following statement of M.K. Gandhi, quoted in Thurbys, supra note 162, at 9.

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

One might also highlight the Salman Rushdie’s defense of speech based on the human need to tell stories which Danish Cartoon publisher Flemming Rose has relied on in his own theories of speech regulation. See Kahn, Flemming Rose’s Rejection of the Free Speech Canon, supra note 48, at 676, 690.

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

These questions will not be solved at once and they may well be solved outside the legal system. To give one small example, the auto-complete function on Google excludes racist terms. In other words, if I start typing “N...” I cannot
Third, the story of the computer programmers who were fired after telling a sexist joke highlights a potential area of conflict between hate speech and privacy. Traditionally, hate speech laws punish the public expressions. But in a world in which everyone has a smart phone, the line between public and private has started to break down. As the story of the programmers show, private conversations can become viral hate speech which may then be subject to legal punishment or informal sanctions. Added to this is a growing popularity of Internet-based shaming in society at large.\footnote{See Lauren M Goldman, \textit{Trending Now: The Use of Social Media Websites in Public Shaming Punishments}, 52 AMER. CRIM. L. REV. 415, 438-40 (describing parents who use social media to shame their children).} If our goal in opposing hate speech is to remove it from the public sphere, what is “the public sphere” in an age of smart phones that can record parts of social life previously thought to have been private?\footnote{One could argue that the programmers had no reason to expect privacy given that they were in a large, crowded convention hall – a quintessential public setting. Not only that, it was a work related event; as such, the programmers should have known better than to have told offensive jokes. What happens, however, if the programmers were heard not at a job convention but on a crowded subway car in Manhattan? On the one hand, the harm of the hateful comments is real; on the other hand, part of urban life – at least in a major metropolitan area – is that while you spend a large part of your day in proximity to other people, you will never see most of them again. This urban anonymity generates a sense of privacy – and a freedom to speak freely, since the other people in the subway car simply will not care what one says – that is in danger of being lost in an age of smart phones.}

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

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