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WHY DO EUROPEANS BAN HATE SPEECH? A DEBATE BETWEEN KARL LOEWENSTEIN AND ROBERT POST

*Robert A. Kahn**

European countries restrict hate speech, the United States does not. This much is clear. What explains this difference? Too often the current discussion falls back on a culturally rich but normatively vacant exceptionalism (American or otherwise) or a normatively driven convergence perspective that fails to address historical, cultural, and experiential differences that distinguish countries and legal systems. Inspired by the development discourse of historical sociology, this Article seeks to record instances where Americans or Europeans have argued their approach to hate speech laws was more “advanced” or “modern.”

To that end, this Article focuses on two authors whose writing appears to make these claims: Karl Loewenstein and Robert Post. A German Jewish émigré fleeing Nazi Germany, Loewenstein warned Americans that fascism was a new, modern phenomenon that required a new democracy, one that could protect itself by restricting speech. Post’s position on democracy is quite different—he finds hate speech restrictions largely incompatible with democratic legitimacy. While at times Post shows an exceptionalist unwillingness to judge Europe for its lack of hate speech laws, at other points he is quite willing to say that a stable successful democracy does not ban hate speech. Tracking the competing claims of Loewenstein and Post opens the door to a more fluid analysis of European and American positions on hate speech—one that is both comparative and normative.

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I. INTRODUCTION: WHO PUNISHES HATE SPEECH AND WHY?

A. *"The Innocence of Muslims" and the Poverty of Comparative Law*

Last year an anti-Muslim video, "The Innocence of Muslims," was circulated in the Middle East.¹ The video infuriated Muslims and was initially linked to the attack on the U.S. Consulate in Benghazi.² The response has also triggered a discussion about the American practice of freedom of speech and how it compares to the rest of the world. Often this discussion took the form of lecturing. If only Arabs (and Europeans) understood the nature of the First Amendment, and the values behind it, all would be well. For example, MSN host Rachel Maddow told her television audience: "What we ought to be wanting them to get right is

1. For the story of how the film was made, see generally Michael Joseph Gross, *Disaster Movie*, VANITY FAIR, Dec. 27, 2012, <http://www.vanityfair.com/culture/2012/12/making-of-innocence-of-muslims>.

2. See David Kirkpatrick, *Anger over a Film Fuels Anti-American Attacks in Libya and Egypt*, N.Y. TIMES, Sept. 12, 2012, at A4.

not just defending free speech, but explaining it in a way that makes sense to the world.”³ She had just explained that, in the United States, “stupid and offensive and provocative speech” is not illegal; therefore, government-controlled Egyptian television, among others, should not mistake the absence of censorship for government support of the video.⁴

While one can take issue with Maddow’s description—at one point she appears to suggest that *no* speech is illegal in the United States⁵—her call to “explain” American freedom of speech points to a continuing dialogue between Americans and the world over the permissibility of laws that ban hate speech. Simply put, most advanced industrialized democracies punish some form of hate speech, while the United States does not.⁶ There have been explanations for this—especially with regard to Europe. In the 1990s, Samuel Walker traced the legal protection of hate speech to the civil rights movement and the opposition to the Vietnam War—experiences lacking in Europe.⁷ More recently, Robert Post has traced Europe’s willingness to ban hate speech to a greater deference to authority as compared to the United States.⁸ While Walker and Post’s specific arguments differ, they both trace distinctions between American and European treatment of hate speech to what Post calls “sociology.”⁹

If, however, American and European approaches to hate speech depend on different social structures, historical experiences, and cultures, where does this leave Rachel Maddow’s call to “explain” hate speech “in a way that makes sense to the world?” Maddow might reply that *explaining* is different from *justifying*, or *converting*. On this view, she is not arguing that the world should follow the United States and tolerate most hate speech. Rather, she is suggesting that full-throated defense of free speech by many Americans is not a defense of the video, but reflects how Americans approach free speech issues. In comparative law terms, Maddow would be making an argument for exceptionalism.¹⁰

3. Rachel Maddow, TUMBLR, <http://www.tumblr.com/tagged/rachel-maddow?before=1347670636> (last visited July 18, 2013).

4. *Id.*

5. *Id.*

6. See ERIK BLEICH, *THE FREEDOM TO BE RACIST? HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM* 17-18, 21-22 (2011).

7. SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 14-16, 161-62 (1994).

8. Robert Post, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 123, 137 (Ivan Hare & James Weinstein eds., 2009) [hereinafter Post, *Hate Speech*].

9. *Id.*

10. The concepts of “exceptionalism” and “convergence” are loosely drawn from Roger P. Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 MICH. L. REV. 1071, 1074, 1084 (2008) (reviewing RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-*

America has its own, particular way of dealing with speech issues; so does Europe. The goal of the analyst is to increase understanding. If the world understands America's free speech culture, they will also understand American responses to global disputes involving freedom of speech.

There is much to recommend this vision of comparative law. Exceptionalism helps us see the diversity of legal institutions and cultures that have developed across the world. It supplies explanations that can defuse otherwise contentious moments. If Americans supported an Egyptian-born producer's right to release an offensive, anti-Muslim video,¹¹ they also accepted—among other things—the right of neo-Nazis to march through Skokie, Illinois, a Chicago suburb with a high percentage of Holocaust survivors.¹² On this view, Americans take a tolerant approach to offensive speech, an approach that is not right or wrong—it is just different.

Exceptionalism has its limits, however. One limit is pragmatic. In a world connected increasingly by the Internet, social media, and Twitter, the speech rules of one society spill across national lines and legal cultures of speech regulation. The change over the past thirty years has been breathtaking. In the early 1980s, the Canadian government tried to revoke Holocaust denier Ernst Zundel's right to send mail after pamphlets of his wound up in West Germany.¹³ Today, Google, YouTube, and Facebook have to decide whether to make offensive videos like the "Innocence of Muslims" available to viewers in Muslim countries.¹⁴ As the *New York Times* writer Somini Sengupta points out,

CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (2006)). I share Alford's concerns about what he calls "the curse of dimensionality"—i.e., how does one know what to compare if every country is "exceptional?" *Id.* at 1081-82, 1084. But a narrow focus on statements that can be "scientific[ally]" verified risks conclusions that lack substance. *See id.* at 1085 (stating that "[e]ach country is different from the United States, but each country is also different from one another"). One can often learn more about foreign legal systems by following cross-national debates of specific legal issues, such as the death penalty, the adversarial legal system, or the legal regulation of hate speech.

11. For an argument defending the film as protected speech, see Andrea Peyser, *Appeasing Thugs by Trampling Our Rights*, N.Y. POST, Sept. 17, 2012, at 7 (stating that the "Innocence of Muslims . . . may not be a good film, but it has every right to exist—a right guaranteed by no less than the US Constitution"); *see also* Serge F. Kovaleski & Brooks Barnes, *From Man Who Insulted Muhammad, No Regret*, N.Y. TIMES, Nov. 26, 2012, at A1.

12. For an overview of the Skokie affair, see DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 68-78 (1985).

13. For more, see STANLEY R. BARRETT, IS GOD A RACIST? THE RIGHT WING IN CANADA 160-61 (1987). The postal charges against Zundel were eventually defeated because Zundel had not been accused of a crime. *Id.*

14. *See* Somini Sengupta, *Free Speech in the Age of YouTube*, N.Y. TIMES, Sept. 23, 2012, at 4SR.

“[h]ate speech is a pliable notion and there will be arguments about whether it covers speech that is likely to lead to violence (think Rwanda) or demean a group (think Holocaust denial), just as there will be calls for absolute free expression.”¹⁵

So, in an interconnected world it might not be enough to say that America is different, at least when internet companies like Facebook and YouTube ban some hate speech.¹⁶ This leads to a second, more principled concern with exceptionalism. Is American support for the free speech principle really limited to the territorial confines of the United States? While one can distinguish YouTube and Facebook’s hate speech policies as the informal censorship of non-state actors—something always a part of the American response to offensive speech¹⁷—is not there also a sense of disappointment that social media outlets are not living up to classic American ideals, especially the idea that the best response to bad speech is more speech? In other words, if the “tolerant society” is good for the United States,¹⁸ why is it not good for the world as a whole?

One can certainly read Maddow’s comments in this way. While she calls for “explaining” the American approach to freedom of speech, she is also presenting it as the preferred alternative—at least to societies like Egypt with a long tradition of state censorship.¹⁹ Adopting a broader approach to free speech would show that Egypt is moving in a more democratic direction. In another context, Peter Teachout has argued that even if European laws against Holocaust denial and hate speech had a purpose immediately after 1945, with time the need for these laws

15. *Id.*

16. *Id.* According to Sengupta, YouTube bans speech that “attacks or demeans a group,” while Facebook bans speech attacking people on the basis of their identity. *Id.*

17. By informal censorship, I mean a situation where a non-state actor takes action against speech that is legally protected. For example, in 2007, radio personality Don Imus was fired after using a racial slur to describe the Rutgers University women’s basketball team. Steve Guttenberg, *CBS Fires Don Imus over Racial Slur*, CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/2100-201_162-2675273.html. For a discussion of informal censorship in the context of Holocaust denial, see Robert A. Kahn, *Informal Censorship of Holocaust Revisionism in the United States and Germany*, 9 GEO. MASON. U. C.R. L.J. 125, 126-29 (1998).

18. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 6-11 (1986). Bollinger argues that allowing extremist speech can strengthen the society’s capacity for tolerating dissenting views. *Id.*

19. See, e.g., Khaled Diab, *Egypt’s Heavily Censored Media Continues to Take on the Regime*, GUARDIAN, Feb. 9, 2012, <http://www.guardian.co.uk/commentisfree/2012/feb/09/arabic-press-freedom-censorship>; David Stanford, *Egypt Faces New Media Censorship*, AL JAZEERA, Aug. 7, 2008, <http://www.aljazeera.com/focus/2008/08/20088791952617974.html>.

should dissipate.²⁰ This will signal Europe's readiness to join the ranks of mature, stable democracies.²¹

This argument is also common in comparative law. It rests on the idea that, over time, the legal systems of the world will converge on a set of common norms. While the specific dimensions of the norm are hard to define, and will likely change as new legal problems emerge, the convergence thesis raises the possibility that some approaches to a legal issue—such as the regulation of hate speech—are better than others. As such, it is less static than exceptionalism, which, after identifying differences across societies, can have little to say. By contrast, if the convergence analyst believes that the adversarial system leads to fairer outcomes in criminal justice,²² or that freedom of speech should be extended except when there is an imminent likelihood of immediate lawless action,²³ interesting questions emerge about how to get from here to there.

Yet, convergence has its difficulties. One problem is hermeneutic. The analyst comes from a given culture and cannot help but view the legal question at hand from that perspective.²⁴ Post here offers an instructive example. While respectful of the diversity of ways in which one could approach speech issues,²⁵ Post largely bases his protection of

20. Peter R. Teachout, *Making "Holocaust Denial" a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 690-91 (2006).

21. *Id.* at 692.

22. See, e.g., STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 44-47 (1984). See generally MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* (1997) (critiquing the adversary system).

23. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam).

24. See Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 415 (1985) (critiquing the "rigorous rationalist" who, in searching for "conceptual or evolutionary functional universals," winds up giving "her world-view and norms, her language and biases only a different label"). To be fair, Frankenberg is equally critical of the "rigorous relativist who naively deludes herself into believing that cultural baggage and identities can be dropped at will" and, consequently, "oscillate[s] between ventriloquism and mystification." *Id.* In response, Frankenberg calls for a "self-reflective" approach to comparison, one that involves a distancing from "the dominant legal consciousness." *Id.* at 443, 447-48. I would argue that, in their own way, both Loewenstein and Post engage in this critical, self-reflective distancing.

25. For example, in a recent interview, Post describes his view towards hate speech as "highly contextualist," adding that "'A' can be a right in country 'B' but not country 'C' if the history, customs, traditions, and political circumstances of the two countries are relevantly different." *Interview with Robert Post, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* 11, 24 (Michael Herz & Peter Molnar eds., 2012) [hereinafter *Interview with Robert Post*]. Post's respect for other societies' interpretation of speech is not new. In his seminal 1991 article on hate speech in the United States, he cited articles about freedom of speech in Israel and Germany as contrasts to the "unique" nature of the First Amendment. See Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 286 n.100 (1991) [hereinafter *Post, Racist Speech*] (citing Gary Jacobsohn, *Alternative Pluralisms*:

hate speech on a distinctly American model of public discourse, one based on First Amendment doctrine.²⁶ Post's First Amendment focus fits well with his 1991 discussion of campus hate speech codes in the United States.²⁷ That same focus is potentially problematic, however, when Post applies his model to speech controversies outside the United States, such as the 2006 debate over the Danish cartoons.²⁸

A second, related problem with convergence is that it tends to foster abstract discussions of disputed global norms. On one level, this is unavoidable. To argue that global legal systems should converge on a norm requires a starting point. These norms, however, can differ from person to person. Post argues that preserving democracy should be the norm.²⁹ Jeremy Waldron views the norm as assuring all citizens—especially vulnerable minorities—that they are welcome in society.³⁰ Convergence then becomes a clash over these competing *a priori* visions.

This clash of *a priori* visions can be productive—especially when the participants apply their vision to a set of specific questions about hate speech. For example, Waldron helpfully distinguishes different types of hate speech according to their degree of severity.³¹ But the benefit of clashing ideals is limited if not linked to specific debates between Europeans, Americans, and others over the proper scope of hate speech. To give a personal example, last May I met with a visiting delegation from Bulgaria as part of the Department of State Visitor Program. The purpose of the meeting was to discuss hate speech laws.³² The delegates explained that Bulgaria had recently tightened its laws and wondered why the United States had not done the same. They also lamented the lack of dialogue between Americans and Europeans over the scope of hate speech laws. I left the meeting thinking of ways to enhance this dialogue.

Israeli and American Constitutionalism in Comparative Perspective, REV. POL., Spring 1989, at 159, 159, and Donald P. Kommers, *The Jurisprudence of Free Speech in the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 691 (1980)).

26. Post, *Racist Speech*, *supra* note 25, at 278.

27. *Id.* at 323-24.

28. See Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72, 72, 83-84 (2007) [hereinafter Post, *Religion and Freedom of Speech*].

29. For a good overview of Post's position, see James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493 (2011).

30. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 100-04 (2012).

31. *Id.* at 188-90.

32. The Minnesota portion of the International Visitors Program is run out of the University of Minnesota. The meeting took place on May 3, 2012.

B. *The Euro-American Debate over Hate Speech Regulation*

If the goal is to encourage dialogue, neither exceptionalism nor convergence quite fit the bill. Exceptionalism will explain differences between the United States and Bulgaria but will not point a path to the future. Convergence theory offers the promise of generalizable conclusions but risks degenerating into unproductive sessions dominated by a clash of values. This Article hopes to shift the discussion of Euro-American differences on hate speech regulation away from exceptionalism and convergence to the underlying debate itself.

The Euro-American debate over hate speech laws has been ongoing and more varied than one might expect. In the 1930s, German émigré Karl Loewenstein came to America to warn that democracies were losing the struggle against fascism, and called for laws—including restrictions on hate speech—that would let democracies defend themselves.³³ Loewenstein was not an exceptionalist; faced with Hitler's Germany, he was not satisfied with merely classifying countries by their restrictions on extremist speech. He also had a legislative agenda—one that, among other things, called for prohibiting party uniforms, the wearing of arms, party-based military organizations, and the protection of the personal honor of public officials against defamatory acts.³⁴ At the same time, Loewenstein's call for speech restrictions did not come from *a priori* principles. Rather, he was deeply concerned with the concrete challenge posed by Nazi Germany and other fascist states.³⁵ He was joined in this effort by a University of Buffalo law professor who, while acknowledging the American discomfort with criminalizing group libel, nevertheless stressed the importance of adopting some restrictions on speech in the fight against Nazi Germany.³⁶ His name was David Riesman.³⁷

33. Writing in the *American Political Science Review* in 1937, Loewenstein warned that "[f]ascism [was] no longer an isolated incident in the . . . history of a few countries." Karl Loewenstein, *Militant Democracy and Fundamental Rights I*, 31 AM. POL. SCI. REV. 417, 417 (1937) [hereinafter Loewenstein, *Militant Democracy I*]. Rather, it was a "universal movement" that, like "European liberalism against absolutism after the French Revolution," had a "seemingly irresistible surge." *Id.*

34. See Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies II*, 38 COLUM. L. REV. 725, 725-26, 746-48 (1938) [hereinafter Loewenstein, *Legislative Control II*].

35. To oppose the rising tide of fascist powers, Loewenstein calls for a "democratic International" based on an "awareness of the common danger" that fascism poses as a "world movement." Karl Loewenstein, *Militant Democracy and Fundamental Rights II*, 31 AM. POL. SCI. REV. 638, 658 (1937) [hereinafter Loewenstein, *Militant Democracy II*].

36. Daniel Horowitz, *David Riesman: From Law to Social Criticism*, 58 BUFF. L. REV. 1005, 1027-28 (2010).

37. For an overview of Riesman's professional career during the 1940s, see *id.* at 1006-11.

Today the scenario has been flipped. Instead of Europeans telling Americans to ban some hate speech, Americans now tell Europeans to consider scrapping their hate speech laws. For example, responsibility for the Danish cartoons controversy has been laid by some at the feet of Denmark's hate speech and anti-blasphemy laws.³⁸ Both Teachout and Post have criticized European laws banning Holocaust denial.³⁹ Meanwhile, American-style free speech values have been enjoying a wave of support in Europe, at least among the right-wing populists like Geert Wilders, who has called for a First Amendment for Europe.⁴⁰

The snapshots of the 1930s and today reveal the dynamic nature of the discussion about speech regulation. Not only did Loewenstein start from the presumption that restrictions on speech were necessary, he was open to the possibility that the United States might adopt them.⁴¹ Likewise, the current opponents of European hate speech laws are not simply saying—as Post sometimes seems to suggest—that the logic of democratic dialogue has no place for hate speech laws. They are also saying that Europeans, on their own terms, would be better off without hate speech laws.⁴² At its best moments, the debate avoids the pitfalls of both a stand-on-the-sidelines exceptionalism and an up-in-the-clouds convergence theory.

C. The Concept of Uneven Development

Comparative law is not the only field with this problem. Historical sociology is the study of how individual societies have developed over time.⁴³ One can compare military development, class structure, and the

38. See, e.g., Richard N. Winfield, *An Editorial Controversy Metastasizing: Denmark's Hate Speech Laws*, in *IT'S A CRIME HOW INSULT LAWS STIFLE PRESS FREEDOM* app. 1, at 301-04 (Marilyn Green ed., 2007), available at http://www.wpfc.org/site/docs/pdf/It's_A_Crime.pdf.

39. Post, *Hate Speech*, *supra* note 8, at 127; Teachout, *supra* note 20, at 691-92.

40. Geert Wilders, Address Before the Gatestone Institute: The First Amendment Is What We Need in Europe (Apr. 30, 2012), available at <http://www.gatestoneinstitute.org/3042/geert-wilders-first-amendmen>. Likewise, Flemming Rose, former culture page editor of the *Jyllands Posten*, the Danish newspaper that ran the Mohamed cartoon, has called for an end to all insult laws. Flemming Rose, Lecture at the Johns Hopkins University: Tolerance and Freedom of Expression in a Globalized World (Nov. 17, 2010), available at http://legacy2.sais-jhu.edu/academics/regional-studies/middle-east/events/Flemming_Rose_Summary_11-17-10.pdf. I plan to take up the arguments of Rose and Wilders against European hate speech laws in future work.

41. See Loewenstein, *Militant Democracy II*, *supra* note 35, at 651-53, 658.

42. While Rose and Wilders have called for a First Amendment, they have not generally relied on Post's theory of democratic dialogue. For example, Wilders sees Europe's problem as one of "cultural relativism" rather than lack of democracy. Wilders, *supra* note 40. For his part, Rose sees the problem as involving "insult fundamentalism," where people are unable to adapt to the rough and tumble nature of an increasingly globalized world. See Rose, *supra* note 40.

43. The ideas in this paragraph are drawn from Justin Rosenberg, *Why Is There No International Historical Sociology?*, 12 EUR. J. INT'L REL. 307 (2006). Much of what follows is also

like. When, however, one tries to speak of “international” historical sociology, comparative analysis starts to fall apart.⁴⁴ The difficulty involves how to account for the role of the international environment on the development of countries while accepting that the environment itself can change. To help resolve the tension, Justin Rosenberg relies on Leon Trotsky’s concepts of “uneven and combined development.”⁴⁵ Trotsky used these concepts to explain why capitalist development in Russia differed from development in England and France.⁴⁶ According to Trotsky (and Rosenberg), the very existence of England and France meant that Russia’s development would be different.⁴⁷ This was because Russia was facing a changed international environment.⁴⁸

From the perspective of comparative hate speech regulation, this approach has two advantages. First, it is developmental. It suggests that approaches toward hate speech regulation, and speech regulation more generally, develop over time. This is consistent with what Teachout suggests when he hopes that Europe will outgrow its Holocaust denial laws, and what Post says when he makes free speech protection the *sine qua non* of democracy.⁴⁹ This is an improvement on static exceptionalism and abstract convergence theory. It better reflects the reality of the debate on the ground. Europeans and Americans are

inspired, somewhat less directly, from Perry Anderson’s classic work in the field. PERRY ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* (1974). Particularly interesting for the current context is Anderson’s discussion of why capitalism first developed in the West rather than in the Islamic or Chinese worlds. *See id.*

44. Either studies focus on changes within one society over time, or they look at multiple societies at a single time. Rosenberg, *supra* note 43, at 311-12. Rosenberg explores the complexity of a truly dynamic, comparative approach by building on Eric Wolf’s hypothetical traveler of the year 1400. *Id.* at 314-19 (discussing ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* (1982)). While Wolf focuses on the different societies the traveler sees, Rosenberg adds to this the different stages of development of each society. Rosenberg, *supra* note 43, at 329-31. For another work that presents a comparative, yet dynamic discussion of a social phenomenon, see generally MICHAEL W. DOYLE, *EMPIRES* (1986) (explaining the late-nineteenth century scramble for Africa in terms of conditions in the African periphery, domestic coalitions in the metropolitan countries, and a changing international system).

45. Rosenberg, *supra* note 43, at 309. The most controversial aspect of Rosenberg’s approach involves the term “development,” which can be read to imply that some societies have “progressed” more than others. *Id.* at 329-30. Rosenberg, however, has a more modest view of development that does not assume normative superiority, only change over time. *Id.*

46. *Id.* at 334.

47. *Id.* at 309.

48. *Id.* Rosenberg, like Trotsky, argues that changes in the international environment can make a country, like Tsarist Russia, appear to leap ahead of other societies. *Id.* at 309, 334. In this Article, I want to make a variation of this argument—a changed international environment can make societies that tolerate hate speech appear to leap ahead (i.e., appear more developed) than societies that ban it.

49. *See* Teachout, *supra* note 20, at 691; *see, e.g.,* Post, *Racist Speech*, *supra* note 25, at 279-80, 282-83 (developing a justification of freedom of speech based on democratic deliberation).

making claims about whose approach to hate speech law works better. There may not be an answer, but there is clearly a debate.

Second, it is dynamic. Just as capitalist development in Russia took place in an environment different from the one faced by France, the current European move toward liberalization of hate speech laws (if there is one) is taking place in a different environment than the one faced by Justices Oliver Wendell Holmes, Jr. and Louis Brandeis. This has shaped the international current debate over hate speech. For example, in his 2007 article explaining how—from the perspective of democratic dialogue—there is no justifiable reason to prosecute the publication of the Danish cartoons, Post makes reference to “[c]lassic historical examples” of how governments might abuse speech restrictions.⁵⁰ The only example he gives is distinctly American: the passage of “statutes prohibiting the advocacy of Communist doctrine” because it “might cause a future revolution.”⁵¹ To give another example, Danish publisher Flemming Rose justified his role in the publication of the Danish cartoons with American jurist Holmes’s “fire in a crowded theater” analogy.⁵² Rose added that, if there is a “fire,” not only is one allowed to “yell,” but one has the obligation to put the fire out, something Rose claimed he did by publishing the cartoons.⁵³ Both examples show how European debates over hate speech are taking place in a shadow cast by American experiences with hate speech, much like Russia, in its economic development, had to take into account the presence of advanced capitalist economies in Britain and France. In this environment, the “classic” history of American freedom of speech has played a dominant role, generating stories, analogies, and metaphors that form the discursive universe Europeans operate in.

This is not necessarily bad. Given the increased sharing of thoughts, ideas, and values across national boundaries, it is perhaps inevitable. Indeed, the study of comparative freedom of speech would be richer if it paid more attention to how, over the years, European and American ideas have taken turns dominating the conversation over hate speech regulation.

To that end, Part II of this Article looks at the 1930s and early 1940s, a time when, as noted above, the shoe was on the other foot. It

50. Post, *Religion and Freedom of Speech*, *supra* note 28, at 83.

51. *Id.* To be fair, his quote comes from a paragraph that begins: “In America, the First Amendment would prevent the state” *Id.*

52. Robert A. Kahn, *Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT’L L.J. 253, 276-77 (2010) [hereinafter Kahn, *Flemming Rose*].

53. Flemming Rose, Op-Ed., *A False Analogy*, COPENHAGEN POST, Feb. 27, 2009, at 6; *see also* Kahn, *Flemming Rose*, *supra* note 52, at 276-77 (2010).

was Loewenstein, a European, who told Americans how a democracy—at least one faced with internal and external fascist threats—should treat the question of anti-democratic speech. Loewenstein's story is noteworthy for two reasons. First, it shows how it was not always the Americans who did the lecturing on freedom of speech. Second, it shows how there was a time when restricting speech appeared to be the more "advanced" path for democracies.

Part III turns to Post, who created a justification of freedom of speech based on democratic dialogue. The argument, well developed in his 1991 article on campus hate speech laws, rests on a deceptively simple principle: for a democracy to be legitimate, citizens must be able to express themselves fully on all public subjects (i.e., issues members of society could conceivably vote on).⁵⁴ Hate speech laws violate this principle by restricting a type of commentary on public issues—for example, those inspired by theories of racial inferiority.⁵⁵ What matters here is less Post's specific claims than how he anchors them in a specifically American set of experiences. This American anchoring has led to tension over the past several years as Post has begun to apply his model to issues outside the United States, such as the Danish cartoons controversy.

The goal of these parts is exploratory. The discussion of Loewenstein helps show that the current international discourse surrounding hate speech laws has a particular shape by reminding us that, in the 1930s, the discourse was quite different. The discussion of Post's work is meant less as a critique of Post himself and more as an illustration of the difficulties anyone—American or European—has in taking a position on comparative hate speech that goes beyond description, while at the same time respecting the diversity of approaches to the issue. To put it another way, is there a way that Post could make a stronger case for the applicability of his democratic dialogue theory outside of the United States?

Before going on, let me make some caveats. First, I am going to use "America" and "American" interchangeably with "United States." This is both because there is not a good adjective for the noun "United States," and because identity—in this case U.S. national identity—is tied into American/European debates over hate speech. This, however, is not meant to deny the importance of the Canadian role and example in hate speech discourse.⁵⁶

54. Post, *Racist Speech*, *supra* note 25, at 279, 282-83.

55. *Id.* at 290-91.

56. For a comparison of the United States and Canada, see Robert A. Kahn, *Hate Speech and National Identity: The Case of the United States and Canada* (U. St. Thomas Sch. of Law, Working

Second, I realize that “American” and “European” are gross generalizations. Not every scholar based in the United States favors broad protection of hate speech. Alex Tsesis, for example, has written sympathetically about the need for pluralist democracies to regulate hate speech.⁵⁷ Moreover, the use of “America” and “Europe” risks displacing agency from individuals—academics, judges, and lawyers—to large, amorphously described groups. Yet, broad terms are justifiable where they reflect recognizable patterns of political culture. “European” and “American” are labels that help inform the debate over hate speech. While this debate is becoming more global, and one day we may speak of “speech absolutists” or “hate speech supporters” rather than of “Americans” and “Europeans,” that time is still in the future.

II. EUROPE LECTURES AMERICA: KARL LOEWENSTEIN AND THE TOTALITARIAN THREAT

A. *Karl Loewenstein: European Apostle of Militant Democracy*

During the 1930s and 1940s, Europeans and Americans debated how democracies should respond to the threat posed by Nazi Germany and totalitarianism, more generally. This debate included restrictions on speech. While the most relevant for our purposes are group libel laws, there were also restrictions on demonstrations, wearing clothing of a certain color, and attempts to subvert the military.⁵⁸ These debates are interesting for two reasons. First, they shed light on the democratic dialogue rationale for freedom of speech. While Post argues that a legitimate democracy requires protecting most forms of hate speech,

Paper No. 08-02, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104478.

57. See, e.g., Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 508-09 (2009). In addition, Tsesis and others focus on the role of racist hate speech in supporting slavery and segregation, which opens the door to a different type of comparative argument—one suggesting that American laws against hate speech have at least as much historical justification as European hate speech laws inspired by the Nazi experience. ALEXANDER TSEIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 28 (2002). In this context, it is interesting to reflect on the number of speech restrictions based on efforts to restrict the growth of the Ku Klux Klan—especially in the 1920s (only a few years before the Nazi march to power in the Weimar Republic). See generally DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* (1976) (accounting, on a state-by-state basis, for the growth of the Ku Klux Klan and the state law measures taken against it).

58. Loewenstein, in his two *Columbia Law Review* articles, gives a very extensive list of the legal measures involved. See Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies I*, 38 COLUM. L. REV. 591, 619 (1938) [hereinafter Loewenstein, *Legislative Control I*]; Loewenstein, *Legislative Control II*, *supra* note 34, at 725-26, 732.

Loewenstein and Riesman used a somewhat different concept of democracy to justify (if not require) the same type of laws.

Second, the World War II era discussion seemed more dynamic than the current debate. For one thing, if Loewenstein—like a good exceptionalist—recognized that the United States had a distinctive, libertarian perspective on speech regulation, this did not mute his call for restricting speech to defend democracy. Meanwhile, the European Loewenstein and the American Riesman had a give and take that seems missing from the current debate. For example, while Riesman was largely sympathetic to Loewenstein's project, he drew the line at criminalizing group libel and saw racism, not fascism or anti-Semitism, as the most serious threat facing the United States.⁵⁹

On one level, Loewenstein is an unusual person to compare with Post. Currently Dean of Yale Law School, Post sits at or close to the apex of American legal academia. Over the past 30 years, he has written countless articles on speech issues, including hate speech.⁶⁰ Loewenstein, by contrast, was something of an outsider. A German Jewish refugee, he arrived in the United States in 1933 and, like many German Jewish law professors, he found a position not in law, but in political science—first at Yale, later at Amherst.⁶¹ The American legal academy at the time (like today) was undergoing a period of retrenchment, which limited the attractiveness of émigré German public law professors whose training did not match well with the demands of American law schools, like Yale, that serve as training grounds for elites.⁶² Nor was Loewenstein more successful in winning a following for his 1957 magnum opus—*Political Power and the Governmental Process*.⁶³ According to a recent biography, the work has had “limited”

59. See David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 733 n.29 (1942).

60. Post has written on more than just hate speech. See, e.g., Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203 (2012) (discussing academic freedom); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000) (discussing anti-discrimination law); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555 (2006) (discussing commercial speech).

61. Kyle Graham, *The Refugee Jurist and American Law Schools, 1933-1941*, 50 AM. J. COMP. L. 777, 787, 799-800 (2002) (discussing the struggles German law professors faced to find jobs in American legal academia).

62. *Id.* at 784 & n.40, 799-800. Loewenstein, who was unfamiliar with the case method and who, in Germany, had taught courses with titles like “Institutions of Democratic Government” and “Development and Evolution of the Constitutional Law in Our Time,” was not seriously considered for a position at Yale Law School. *Id.* at 784 n.40, 800.

63. Devin O. Pendas, *An Atlantic Giant*, H-NET, <http://www.h-net.org/reviews/showrev.php?id=29918> (last visited July 18, 2013) (reviewing MARKUS LANG, KARL LOEWENSTEIN: TRANSATLANTISCHER DENKER DER POLITIK (2007)).

influence because “it is neither a German nor an American work, not a jurisprudential but also not a political science book.”⁶⁴ A reviewer of the book on H-Net concurred, concluding that Loewenstein was a highly “idiosyncratic figure” whose biography may not be representative of the experience of twentieth century exiles.⁶⁵

But in one area Loewenstein made a lasting imprint. In the aftermath of the collapse of the Weimar Republic, Loewenstein coined the term “militant democracy” to describe how democracies ought to respond to the threats posed by totalitarian movements.⁶⁶ Central to the militant democracy position is the idea that a democratic state can take steps against internal movements that would destroy it without losing its democratic legitimacy.⁶⁷ To the contrary, it may be obligated to take such steps.⁶⁸ Typical militant democracy measures include restricting extremist political parties, banning pro-Nazi activities (including hate speech), and monitoring extremist groups.⁶⁹

The militant democracy concept has generated an extensive literature in Europe.⁷⁰ For example, in 2004 Andras Sajó published an edited collection of essays on the subject under the title, *Militant Democracy*.⁷¹ Furthermore, German scholar Martin Klamt used the concept to test the constitutional arrangements of six modern European states (Germany, Austria, Italy, Greece, Spain, and Portugal) that had past experience with authoritarian rule.⁷² Klamt’s specific findings matter less than his use of the militant democracy concept as a framework to anchor his research.⁷³

Not only that, but in the late 1930s, Loewenstein acted on his militant democracy concept by alerting American attention to the danger that totalitarian forces—especially Nazism—posed to Western democracies. He made his case in a series of articles in the *American Political Science Review* and the *Columbia Law Review*, articles that

64. *Id.*

65. *Id.* at 2.

66. See Svetlana Tyulkina, *Militant Democracy* 13 (2011) (unpublished S.J.D. dissertation, Central European University), available at http://www.etd.ceu.hu/2012/tyulkina_svetlana.pdf.

67. *Id.* at 15.

68. *Id.*

69. *Id.* at 31-33 (describing different types of militant democracy measures).

70. *Id.* at 4-5 (describing militant democracy as a concept that is not “withering away”).

71. See *MILITANT DEMOCRACY* 1 (Andras Sajó ed., 2004).

72. See Martin Klamt, *Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions*, in *EXPLORATIONS IN LEGAL CULTURES* 133, 140 (Fred Bruinsma & David Nelken eds., 2007).

73. *Id.* Interestingly, Klamt found that Germany—the state with the most visceral experience with Nazi rule—was the one state that did not incorporate explicitly anti-Nazi (as opposed to anti-totalitarian) provisions into its militant democracy provisions. *Id.* at 152.

came out as events in Europe reached a fever pitch. For example, his first *American Political Science Review* article came out in June 1937, a year after the remilitarization of the Rhineland;⁷⁴ his second *Columbia Law Review* article came out in May 1938, two months after the Anschluss, the occupation of Austria by Nazi Germany.⁷⁵ Events were unfolding so rapidly that Loewenstein would often open his articles with a footnote explaining the time period each article covered. For example, he informed his readers that his May 1938 *Columbia Law Review* article included events up until January 1, 1938.⁷⁶

Timing may be important here. It is common to attribute German (and European) bans on hate speech to a reaction (even if a delayed one) to the Holocaust.⁷⁷ While this explains the bans on Holocaust denial and likely explains some of the motivations behind the enactment of hate speech laws more generally,⁷⁸ Loewenstein was writing *before* these events happened. While this prevented him from pointing to the Holocaust as an example of where Nazi theories of racial inferiority would lead,⁷⁹ Loewenstein was also writing before the defeat of Nazi Germany in 1945; in fact, he was writing before the outbreak of the Second World War in 1939.

This added an element of urgency to his writings. If the authors of the postwar hate speech laws were, in part, trying to prevent a revival of Nazi Germany, Loewenstein was haunted by the fall of the Weimar Republic. In the meantime, the democracies faced an international National Socialist movement supported by Hitler's Germany, a powerful state that, from the perspective of 1936, 1937, or 1938, looked as if it

74. Loewenstein, *Militant Democracy I*, *supra* note 33.

75. Loewenstein, *Legislative Control I*, *supra* note 58.

76. Loewenstein, *Legislative Control II*, *supra* note 34, at 725 n.†.

77. See, e.g., Teachout, *supra* note 20, at 661. In her dissertation on militant democracy, Svetlana Tyulkina writes how "it took time and many lives" to learn the lesson that "[d]emocracy should not remain silent about attempts to damage it from inside . . ." Tyulkina, *supra* note 66, at 3.

78. For an argument that German sensitivity toward the Nazi murder of the Jews played a role in Germany's adoption of its 1960 hate speech law, see ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 66-67 (2004) [hereinafter KAHN, HOLOCAUST DENIAL AND THE LAW].

79. Those who argue that Hitler's intention to murder the Jews was clear from a reading of *Mein Kampf* could argue that Loewenstein and his audience should have known what was coming. But even then, an observer in 1937 or 1938 would be hard pressed to imagine the sheer magnitude of the Holocaust. In addition, many scholars take the view that the decision to undertake the Holocaust emerged out of the events of the Second World War. See CHRISTOPHER R. BROWNING, THE PATH TO GENOCIDE: ESSAYS ON LAUNCHING THE FINAL SOLUTION 3-5 (1992) (distinguishing intentionalists who see Hitler's murder of the Jews as following a premeditated plan set out in the 1920s from functionalists who trace the Holocaust to cumulative radicalization caused by the chaotic decision-making process in the Third Reich).

was going to remain on the European political scene for a considerable period of time. Loewenstein's law review articles, in which he gave blow-by-blow descriptions about how the restrictions against Nazi propaganda in Switzerland or France were deficient, illustrate the depth of the risk.⁸⁰ While we today know that neither Switzerland nor France succumbed to internal Nazi movements, Loewenstein did not have the advantage of hindsight.

As Loewenstein made his case to an American audience that the threats posed by National Socialism require that democracies fight fire with fire,⁸¹ he took up a number of issues related to freedom of speech. In a discussion of legislation protecting democratic institutions, he made the claim that "[t]he most efficient method in the vast repertory of fascist devices consists in disparagement of the democratic system, ridicule of its values, and vilification of its official agents and symbols under the guise of a laudable zeal for reform."⁸² He added that fascists undermine "the public reputation of the democratic state by 'invoking . . . free speech . . . for intrinsically subversive aims.'"⁸³ He praised the efforts of Czechoslovakia, which passed a series of laws protecting the honor of public officials, suggesting that, had similar laws been in place in Germany, Hitler would have had a more difficult path to power.⁸⁴ Other proposals covered restricting attacks on personal honor, the spread of false news, and stemming the spread of foreign propaganda.⁸⁵

In presenting these points to an American audience, Loewenstein recognized that he would encounter obstacles. The laws he was describing might "offend[]" the "traditional American conception of the fundamental values in liberal democracy"⁸⁶ He sought to overcome this tension in a variety of ways. Like the American exceptionalism writers, he traced Europe's rejection of what he calls "liberal fundamentalism" to structural causes (some European countries like England and France did not formally guarantee rights) and cultural

80. For example, Loewenstein faulted the French for being "unable to drive fascism from the . . . political scene" and warned that Switzerland "is less protected against subversive movements of the right than any other European democracy." Loewenstein, *Legislative Control I*, *supra* note 58, at 614, 616.

81. Loewenstein, *Militant Democracy II*, *supra* note 35, at 656.

82. Loewenstein, *Legislative Control II*, *supra* note 34, at 738.

83. *Id.*

84. *Id.* at 740-41 & n.66.

85. *Id.* at 746-48 (discussing statutes from various countries that restrict attacks on personal honor); *id.* at 749 (discussing statutes from various countries that make it an offense to publish false news); *id.* at 762-65 (discussing statutes from various countries that prevent the spread of foreign propaganda).

86. *Id.* at 767.

causes (he mentions here the “residuary spirit of the police state”).⁸⁷ Together these make Europeans more skeptical than Americans of “legislative limitations of abstract notions of liberty.”⁸⁸ The latter point is somewhat similar to Post’s argument that Europeans tolerate hate speech laws because they have greater deference to authority.⁸⁹

But Loewenstein was more than a European exceptionalist. While he hoped his readers would accept the legitimacy of the militant democracy measures enacted in countries like Czechoslovakia, this was not his only goal. Loewenstein warned his American audience that “[t]he statute book is only a subsidiary expedient of the militant will for self-preservation.”⁹⁰ Without this will to survive, “[t]he most perfectly drafted and devised statutes are not worth the paper on which they are written”⁹¹ A purely exceptionalist argument about how countries with differing legal traditions differ in their approach to hate speech laws would not summon the necessary will.

Therefore, Loewenstein made a second argument, one he hoped would lead his readers to act. In the *Columbia Law Review* he explained that the “political tension in Europe in recent years has caused the emergence of a novel philosophy of government and the state, which could not but result in a shift of values.”⁹² This new philosophy required new measures—including “fighting fire with fire.”⁹³ Accordingly: “Liberal democracy, style 1900, slowly gives way to ‘disciplined’ or even ‘authoritarian’ democracy of the postwar depression pattern.”⁹⁴ Anyone who criticizes this development—for example, as a cure worse than the disease—is “under the delusion that democracy is a stationary and unchangeable form of government.”⁹⁵ To the contrary, just as free competition has faded in favor of state intervention, so political pluralism is in retreat in the face of “the full display of the coercive powers of the state.”⁹⁶

By arguing that “a novel philosophy” has emerged in Europe, Loewenstein is not simply explaining that Europe and America are different; he is suggesting that the European experience is more relevant,

87. *Id.* at 767-68.

88. *Id.*

89. See Post, *Hate Speech*, *supra* note 8, at 137.

90. Loewenstein, *Militant Democracy II*, *supra* note 35, at 657.

91. *Id.*

92. Loewenstein, *Legislative Control II*, *supra* note 34, at 767.

93. *Id.* at 774. Note that, while in Holmes’s famous analogy about yelling fire in a crowded theater fire is something to avoid, Loewenstein appears to embrace fire.

94. *Id.*

95. *Id.*

96. *Id.*

especially for the future. In this regard, Loewenstein is making a convergence argument—with disciplined, authoritarian democracy as the norm. But Loewenstein's version of convergence seems less abstract than many current arguments about freedom of speech.

In part, this comes from the urgency of the events he has lived through and is describing; but it also comes from how Loewenstein talks about time. As we shall see, Post's democratic dialogue theory can be read as suggesting that restrictions on hate speech are illegitimate in all democracies, regardless of time and place.⁹⁷ By contrast, Loewenstein's claim is historically specific—while “postwar depression” democracies need restrictions on speech, the same was not true of earlier democracies. As societies evolve over time, the requirements of their legal systems evolve as well. This allows Loewenstein to concede that the United States is different precisely because it is so out of touch with the realities of the modern era.⁹⁸

Consider in this light Trotsky's argument about Russia.⁹⁹ Although Trotsky had a very different view of politics from Loewenstein, he shared a common dilemma. Marx had expected a proletarian revolution to begin in advanced capitalist countries like Britain or France.¹⁰⁰ To justify a revolution in Russia, Trotsky had to argue that something new had occurred, something that changed Marx's theory as a whole—not simply something that exempted Russia from its operation. As we saw, Trotsky argued that the very existence of Britain and France changed Russia's possibilities.¹⁰¹ This enabled him to argue that historical materialism, properly understood, allowed for revolution in Russia—which, meanwhile, went from being a backwater to becoming the cutting edge of Marxist theory.¹⁰² Likewise, Loewenstein does not merely make a special pleading for European militant democracy laws. He argues the rise of fascism placed Europe and militant democracy on the cutting edge of legal theory. As we shall see in Part III, Post at times does something similar—only this time with the roles reversed.

97. See *infra* Part III.

98. At other moments, Loewenstein is a little more impatient. He ends his second *American Political Science Review* article by suggesting that, given the global nature of fascism, it was worth asking “whether legislative measures against incipient fascism are perhaps required in the United States.” Loewenstein, *Militant Democracy II*, *supra* note 35, at 658. But, pulling back, Loewenstein concedes that this would take him beyond the scope of his current study. *Id.*

99. See *supra* notes 44-48 and accompanying text.

100. Michael Burawoy, *Two Methods in Search of Science: Skocpol Versus Trotsky*, 18 *THEORY & SOC'Y* 759, 780 (1989).

101. See *supra* notes 44-48 and accompanying text.

102. See Burawoy, *supra* note 100, at 779-80.

*B. David Riesman: Adapting Militant Democracy to
American Circumstances*

Before turning to Post, it is worth deepening the discussion of militant democracy by taking up Riesman's discussion of group libel laws in the 1940s. Considering the work of Riesman has several benefits. First, Riesman's 1942 *Columbia Law Review* article, *Democracy and Defamation*, builds on Loewenstein's earlier work.¹⁰³ This shows a genuine give and take between a European and American author. Second, Riesman talks explicitly about group defamation statutes—a subject Loewenstein, for all his discussion of militant democracy, does not discuss at length.¹⁰⁴ Finally, the date of the article is significant. By the time Riesman's article was published, the Second World War had been ongoing for almost three years and both the United States and Soviet Union were at war with Nazi Germany. While Riesman calls on his readers to reexamine “the American heritage of middle-class individualistic liberalism,” the tone is less apocalyptic than Loewenstein's.¹⁰⁵

Like Loewenstein, Riesman had an uneasy relationship with the American legal academy—although the causes were different. Nor did Riesman, best known for his sociological work about American middle class culture, *The Lonely Crowd*, seem a likely conversation partner for Loewenstein.¹⁰⁶ Riesman was born into a German Jewish family but described himself as “without a trace of religious connection . . . [or] ethnic sentiment.”¹⁰⁷ During the 1930s he attended Harvard Law School and clerked for Justice Brandeis, with whom he argued about the Zionist movement, which Riesman compared to fascism.¹⁰⁸ After his clerkship, he joined the faculty of Buffalo Law School, where he taught criminal law but did not like legal realism or the case method—something he shared with Loewenstein.¹⁰⁹

Instead, Riesman was pulled toward psychology and sociology. In 1939, while still at Buffalo, he started weekly psychoanalysis sessions with Erich Fromm, whose world-view was deeply impacted by the Nazi experience.¹¹⁰ The outbreak of World War II deepened Riesman's concerns about German fascism, and in 1941, he took up a research

103. See Riesman, *supra* note 59, at 732-33.

104. *Id.* at 732, 739-45.

105. See *id.* at 734.

106. Horowitz, *supra* note 36, at 1006.

107. *Id.* at 1007 (alteration in original).

108. *Id.* at 1008.

109. See Graham, *supra* note 61, at 799, 800 n.160; Horowitz, *supra* note 36, at 1026-27.

110. Horowitz, *supra* note 36, at 1010.

fellowship at Columbia University.¹¹¹ The following year, the *Columbia Law Review* published his article *Democracy and Defamation*, an article which combined his legal interests with his concern about National Socialism.¹¹²

Like Loewenstein, Riesman warned Americans about developments in Europe. While defamation has a long history, the manipulation of “mobile public opinion” by “the systematic . . . use of calculated falsehood and vilification” was new.¹¹³ This method was crucial in the Nazi rise to power; Riesman outlined the libels against Weimar Republic President Friedrich Ebert in the 1920s, and a more general tendency of Nazis to libel authority figures as Jews or Poles.¹¹⁴

Citing Loewenstein’s earlier summary of European efforts to restrict “subversive” defamation, Riesman proposed “to canvass the traditional techniques for the control of defamation, and to see what these have accomplished and what they have to offer for the control of defamation against groups.”¹¹⁵ The bulk of his article described enacted laws and litigation involving group libel.¹¹⁶ And, like Loewenstein, Riesman drew heavily from Europe, focusing not only on the failed Weimar Republic but also on other European countries such as France, Switzerland, and Austria.¹¹⁷ But Riesman discussed American efforts to restrict group libel, including the 1935 New Jersey group libel statute overturned in *State v. Klapprott*,¹¹⁸ and gave an extensive accounting of the 1931 Supreme Court holding in *Near v. Minnesota*,¹¹⁹ in which the Supreme Court rejected prior restraints on publication in the context of a newspaper with a reputation of attacking Jews.¹²⁰

While Riesman accepted Loewenstein’s general conclusion that the threat posed to democracy required restrictions on speech, he had a narrower set of limits. For example, he concluded that criminal prosecutions for group libel were “clumsy weapons for the intricate social regulation involved in anti-democratic defamation.”¹²¹ In language that would foreshadow later debates over hate speech

111. *Id.* at 1009, 1027.

112. Riesman, *supra* note 59, at 728, 741, 751.

113. *Id.* at 728.

114. *Id.* at 728-29.

115. *Id.* at 732-33.

116. *See id.*

117. *See, e.g., id.* at 761-62, 764-66 (describing laws targeting libel against associations in Switzerland, France, and Austria). Riesman also described Canadian efforts at restricting group libel. *Id.* at 767.

118. 22 A.2d 877 (N.J. 1941).

119. 283 U.S. 697 (1931).

120. Riesman, *supra* note 59, at 776, 779.

121. *Id.* at 754.

prosecutions (especially over Holocaust denial), Riesman warned that “criminal actions” left the prosecutors a difficult choice: acquittal meant enhanced prestige for the accused, while demonstrating democratic weakness; conviction risked turning the accused into a martyr, especially if the sentence was short.¹²² While the prosecution might be a risk “worth taking” were fascist agitators consistently convicted, a society “so united that there [was] no chance of judicial defeat” would not “need repression in the first place”¹²³

In addition, Riesman drew distinctions between the United States and Europe. One distinction foreshadows Post and puts an interesting gloss on Loewenstein’s developmental arguments. According to Riesman, Americans give less weight to “pre-capitalist concepts of honor, family, and privacy.”¹²⁴ Because American tradition is “capitalistic,” not “feudalistic,” reputation in the United States “is only an asset,” rather than an “attribute to be sought after for its intrinsic value.”¹²⁵ This suggests that European speech restrictions reflect backwardness, rather than a new, more advanced social structure. On the other hand, Riesman appears less impressed with the emphasis in the United States on individualism, complaining that “[o]ur thinking is *still* in terms of the ‘individual’ and the ‘state,’ and our law of defamation, such as it is, is conceived of only as a protection for individual life and limb”¹²⁶ Here, it is the United States that lags behind Europe.

As noted above, Riesman’s reservations about group libel prosecutions, and his recognition of differences between Europe and the United States, have a strikingly contemporary sound to them. But, unlike modern critics of hate speech laws, his reservations do not lead Riesman to a wholesale rejection of the group libel concept. He does not, for instance, take the position of Ronald Dworkin, who argues that protecting freedom of speech requires sacrifices that “really hurt.”¹²⁷ Nor does he appear to share the distrust of state power that also figures in criticisms of hate speech laws.¹²⁸ In explaining why the restrictions on prior restraints in *Near* should be read narrowly, Riesman faulted “liberals” for relying on outdated attitudes on the struggle against “the absolutist state” and “the church” because “[i]n the more or less

122. See *id.* at 755.

123. *Id.* at 755-56.

124. *Id.* at 730.

125. *Id.*

126. *Id.* (emphasis added).

127. Ronald Dworkin, *The Unbearable Cost of Liberty*, 3 INDEX ON CENSORSHIP 43, 46 (1994).

128. See, e.g., Post, *Hate Speech*, *supra* note 8, at 137 (arguing that Americans have a greater distrust of state authority).

democratic lands . . . the threat of fascism and the chief dangers to freedom of discussion do not spring from the 'state,' but from 'private' fascist groups in the community."¹²⁹

Riesman's support for civil group libel laws also rests on specifically American concerns—most notably the issue of race. In the United States, discrimination against African-Americans "is both more serious and more . . . widespread than discrimination against Jews."¹³⁰ Riesman added that "[t]he Southerner's derogation of Negroes" is especially hard to control because it often gets expressed as a "style of greeting, as posture . . . or as a boycott so basic that it need not be organized . . ."¹³¹ While recognizing the need to balance "the devastating harm" defamatory speech causes to "racial or cultural minorities" against "freedom of discussion and political maneuver," Riesman sought to "eliminate as over-optimistic the belief that statements which defame large groups are mere idle blathering and do no harm to individuals."¹³²

In his discussion of race, Riesman puts a distinctively American cast to Loewenstein's basic concern about the power of private speech acts to undermine democracy. The same is true of Riesman's article as a whole. He accepts Loewenstein's premise that speech can threaten democracy, but is more critical of criminal prosecutions.¹³³ Agreeing that American liberals cling to an outdated individualism better suited to eighteenth century struggles against the church and absolutist state, Riesman connects the European concern about personal honor to an equally outdated feudal conception of social relations. So, while modernity is a value Riesman espouses, it is one that America and Europe both lack.

Walker might argue that this quality of Riesman's reflects an historical anomaly—in the 1940s and 50s American and European positions on hate speech were relatively close; today they are much further apart. This may be true, but the shift in the Euro-American debate over group libel and hate speech laws also reflects two other developments: (1) an increasing American self-confidence in the wisdom of the *Brandenburg/Skokie* solution¹³⁴ to the problem of hate

129. Riesman, *supra* note 59, at 779.

130. *Id.* at 733 n.29.

131. *Id.*

132. *Id.* at 771.

133. Interestingly, Riesman bases this opposition primarily on European experiences—a fact that shows a willingness to engage in an international discussion about speech prosecutions, rather than relying solely on exceptionalist theories of difference.

134. See *Brandenburg v. Ohio*, 395 U.S. 444, 454-56 (1969) (per curiam) (Douglas, J., concurring) (examining the development of the "clear and present danger" doctrine and concluding

speech; and (2) a tendency for Americans to discuss the hate speech issue in abstract, non-historically contingent ways that sweep the earlier period of convergence—and the debates it encouraged—under the rug. To explore the contours of this new debate, the Article now turns to the thoughts of Post.

III. AMERICA LECTURES EUROPE: ROBERT POST AND THE DEMOCRATIC NECESSITY OF FREEDOM OF SPEECH

A. *The Waning of the Totalitarian Threat*

By the time Post wrote his 1991 law review article on hate speech and democracy, the totalitarian threat so central to Loewenstein and Riesman's view of hate speech laws was pushed to the sidelines. The 1977-78 Skokie affair¹³⁵ symbolized this change in attitude. Frank Collin's Nazi group was small—precisely the type of “puny anonymity” Justice Holmes spoke of in his dissent in *Abrams v. United States*¹³⁶ While there was a concern about protecting the sensibilities of the Holocaust survivors who lived in Skokie, no one took Collin as a serious threat—in contrast to how neo-Nazis were viewed elsewhere.¹³⁷ Perhaps the highlight was Aryeh Neier's 1979 book *Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom*, in which—taking issue with Loewenstein—he pointed out how restrictions on the Nazis during the mid-1920s did not stop the Nazi rise to power.¹³⁸

that the doctrine should be abandoned in the regime of the First Amendment because its prior application was often interwoven with political circumstances such as World War I and the Cold War, and explaining that all matters of people's beliefs are sanctuaries beyond government invasion); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43, 44 (1977) (holding that a State cannot impose restraints on people's First Amendment rights without strict procedural safeguards).

135. See DOWNS, *supra* note 12, at 68-78 (detailing the right given to neo-Nazis to march through Skokie, Illinois, a Chicago suburb with a high percentage of Holocaust survivors).

136. 250 U.S. 616, 629 (1919) (Holmes, J., dissenting). For a brief overview of the Skokie affair, see Robert A. Kahn, *Cross Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 169-70 (2006).

137. One might, for example, compare the Skokie affair to Germany, where in the late 1970s the state began prosecuting Holocaust deniers—in part because of concerns about neo-Nazi revival. See KAHN, *HOLOCAUST DENIAL AND THE LAW*, *supra* note 78, at 14-16, 18-19 (discussing political and legal challenges posed by Holocaust denial). Likewise, concerns about neo-Nazi activity were also high in Argentina, where the trial of SS leader Adolf Eichmann led to an upsurge in anti-Semitism among Argentines who sought to “avenge” Eichmann's capture. See ROBERT WEISBROT, *THE JEWS OF ARGENTINA: FROM THE INQUISITION TO PERON* 246-47, 251, 271 (1979).

138. ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM*, 163-67 (1979). Neier is correct that, during the early 1920s, Germany enacted anti-Nazi laws, laws that did not ultimately stop the Nazi rise to power. This argument, however, does not completely respond to Loewenstein. During the prosperity of the mid-1920s, support for the Nazis dwindled and the laws were allowed to lapse. Yet Loewenstein's focus was on the

In the years that followed, Americans writing about hate speech regulation did not say much about the European experience. There were exceptions. In 1985, Kenneth Lasson, writing in support of a group libel ban, mentioned both the growing trend of Holocaust denial, and the problem neo-Nazis posed in Europe.¹³⁹ He then concluded that:

[i]t would cast contempt upon history . . . [to] ignore the most frightening paradox . . . that the utterly despicable Nazi philosophy was born . . . as a legitimate expression of political thought, and flourished amid the utterly civilized German culture, and was embraced by the utterly sophisticated German people.¹⁴⁰

Critical race theorists Richard Delgado and Jean Stefancic devoted a chapter of *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment* to pointing out that since other countries, especially in Europe, have hate speech laws, Americans could have them as well.¹⁴¹

But Lasson, Delgado, and Stefancic did not have much company.¹⁴² For example, in 1993, two Canadian scholars, Louis Greenspan and Cyril Levitt, published a series of comparative essays about the lingering impact of the Nazi experience under the title, *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries*.¹⁴³

Weimar's failure to rein in the Nazis after they reemerged on the political scene after the 1930 elections. See Loewenstein, *Militant Democracy I*, *supra* note 33, at 426-28 (describing the difficulty of enacting and enforcing anti-Nazi laws after the 1930 elections and concluding that an "atmosphere of illegality and high treason was created which ultimately killed the Republic").

139. Kenneth Lasson, *In Defense of Group-Libel Laws, or Why the First Amendment Should Not Protect Nazis*, 2 N.Y.L. SCH. HUM. RTS. 289, 290-91, 294 (1985).

140. *Id.* at 320.

141. See RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 122-31 (1997).

142. The claim here is narrow. I am arguing only that American scholars were loath to mention the Nazi experience and European hate speech laws. Europeans writing in American law reviews tended to refer to European developments at length. See, e.g., Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 305 n.*, 317-28 (1999) (writing as a Lecturer of Law at Kings College, London); Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 335, 341-46 (1998) (writing as a Professor of Law at University of Pennsylvania and Johann Wolfgang Goethe-Universität, Frankfurt am Main); see also Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 87-88 (1996). Farrior reviewed the debates over the hate speech provisions of a variety of human rights documents. References to Nazi past figured prominently. See *id.* at 12-13, 18-19 (citing references to Hitler and the Nazis from British and Soviet representatives during debates over the Universal Declaration of Human Rights). But she did not mention the Nazi past during her brief comments on the legitimacy of hate speech laws in the United States. See *id.* at 93-96.

143. *UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES* (Louis Greenspan & Cyril Levitt eds., 1993) [hereinafter *UNDER THE SHADOW OF*

The volume included a chapter by Donald Alexander Downs, an expert on the Skokie controversy, who concluded—without any discussion of the European experience—that American anti-discrimination laws, if rigorously enforced, would allow for “the present constitutional protection of racist rhetoric.”¹⁴⁴

Even when writers looked at European experiences, they often focused on the United Kingdom, which, unlike France, Germany, and Austria, never experienced Nazi rule. For example, Nadine Strossen, in her 1990 article on hate speech regulation, mentioned Britain’s experience with the Race Relations Act 1965¹⁴⁵ which, she points out, was used to punish black power leaders, trade unionists, anti-nuclear activists, and, in what she saw as the “ultimate irony,” anti-Nazi activists.¹⁴⁶ When Strossen turned to France, she discussed the prosecution of Emile Zola for his 1895 pamphlet *J’Accuse*, which defended Captain Alfred Dreyfus, who was accused by anti-Semites of treason.¹⁴⁷ Strossen, however, spent no time discussing Robert Faurisson, who was prosecuted in 1981 for making false statements about the Holocaust.¹⁴⁸

Finally, when a scholar does take up modern European developments—such as the trend to ban speech denying the Holocaust—the tendency is to either suggest, as Teachout does, that over time Europe will grow out of its obsession with the Nazi past, or to argue, as John C. Knechtle does, that Europeans are wrong to ban Holocaust denial for abstract reasons largely unrelated to Europe’s specific experiences, and consequently has limited power to convince Europeans to change their ways.¹⁴⁹ The response to the Danish cartoons controversy

WEIMAR].

144. Donald A. Downs, *Racial Incitement Law and Policy in the United States: Drawing the Line Between Free Speech and Protection Against Racism*, in UNDER THE SHADOW OF WEIMAR, *supra* note 143, at 107, 129.

145. 1965, c. 73 (Eng.). See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 554-55 & n.359.

146. Strossen, *supra* note 145, at 556.

147. *Id.*

148. Strossen’s refusal to take up Holocaust denial in the text of her eighty-page article is more surprising given that she cites German scholar Eric Stein’s 1986 *Michigan Law Review* article on the subject. See *id.* at 556 n.371 (citing Stein, *History Against Free Speech: The New German Law Against the “Auschwitz”—and Other—Lies*, 85 MICH. L. REV. 277, 286 (1986)). Strossen cites Stein to discuss the refusal of German courts before 1945 to apply the insult provisions of the German criminal code to Jews—a relatively minor point in Stein’s article. *Id.* For more on the litigation against Faurisson in the late 1970s and early 1980s, see KAHN, HOLOCAUST DENIAL AND THE LAW, *supra* note 78, at 31-37.

149. John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. 41, 52-53 (2008); Teachout, *supra* note 20, at 690-92. Knechtle described the current laws against denial in some detail and rightly traces some of the European support for

has a similar quality. Stanley Fish, in defending Rose, argued that his “only” goal—as a newspaper editor—was “to stand up for an abstract principle—free speech.”¹⁵⁰ While a defensible position, Fish’s argument will not likely on its own persuade European critics of Rose’s actions. What is missing is an argument that is rooted in European experiences, one that might compel Europeans to take the American position on hate speech more seriously.

B. *An American Approach to Hate Speech Regulation*

This is where Post steps in. Post is a prolific scholar on First Amendment issues and one of the most thoughtful American writers on hate speech laws. Indeed, his 1991 article, *Racist Speech, Democracy, and the First Amendment*, was praised by Waldron as “a model . . . for his engagement with free-speech values . . . [and] for his open and sustained engagement with the arguments in favor of the regulation of hate speech.”¹⁵¹ More recently, Post has written about the Danish cartoons controversy, and discussed European and American differences as part of his more general writings on comparative hate speech law.¹⁵² As such, Post is a worthy successor to Loewenstein and Riesman.

That said, there is a certain tension in Post’s thoughts about hate speech laws, one that reflects both the self-confidence and abstraction reflective of the American side of Euro-American discourse. On the one hand, Post respects cultural differences of European and American positions on hate speech—especially in his recent work.¹⁵³ But much of Post’s writing on hate speech laws rests on a democratic dialogue model firmly based in American experience. In addition, he presents his model in broad, sweeping terms that suggests that countries that adopt hate speech laws are not democratic. In doing so, he feeds into a broader American trend that is unduly skeptical of hate speech laws.

Let us begin with Post’s democratic dialogue model. As Frederick Schauer observed thirty years ago, there are three basic rationales for protecting speech: (1) contribution to the truth; (2) promotion of

such laws to a concept of “human dignity.” Knechtle, *supra*, at 54-56. He defined dignity as “an innate quality of the individual that arises from within”—again, a reasonable conclusion. *Id.* at 58. He then concluded—without any discussion of actual European experiences—that Holocaust denial laws “cannot protect or enhance the dignity of the individual” *Id.* at 60. While Knechtle’s position is logically sound, it is unlikely to sway a European supporter of hate speech laws.

150. Stanley Fish, *Our Faith in Letting It All Hang Out*, N.Y. TIMES, Feb. 12, 2006, at C15.

151. WALDRON, *supra* note 30, at 263 n.8.

152. See, e.g., Post, *Religion and Freedom of Speech*, *supra* note 28, at 72; see also Post, *Hate Speech*, *supra* note 8, at 137-38.

153. See Post, *Hate Speech*, *supra* note 8, at 137-38; see also *Interview with Robert Post*, *supra* note 25, at 23-24.

personal autonomy; and (3) protection of democracy.¹⁵⁴ The argument that a free exchange of ideas is a necessary feature of democracy was, before Post came onto the scene, most notably associated with Alexander Meiklejohn. Writing at a time of increasing anti-Communist fervor in the United States, Meiklejohn argued in *Free Speech and Its Relation to Self Government* that the rise of America as a world power at the end of World War II required “clarity and reasonableness” in making public policy.¹⁵⁵ Therefore, unlike both the Communists and the Truman Administration who would suppress them, Meiklejohn trumpeted “the free exchange of . . . ideas,” adding that no idea should be rejected as “too ‘dangerous’ for us to hear.”¹⁵⁶

Post’s argument for democracy builds on Meiklejohn but is broader in scope and more deeply rooted in American history. Post begins by questioning the equation of democracy with majority rule.¹⁵⁷ As an alternative, he falls back on Austrian legal theorist Hans Kelsen’s definition of democracy as resting on self-determination.¹⁵⁸ The key, according to Post, is Kelsen’s insight that a subject is “politically free” only when his or her will is expressed in the “social order.”¹⁵⁹ This requires, according to Post and Kelsen, “a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter.”¹⁶⁰ As Post sees it, “democracy serves the principle of self-determination because it subjects the political and social order to public opinion, which is the product of a dialogic communicative exchange open to all.”¹⁶¹ In making the connection between dialogue and democracy, Post also draws (briefly), on Emile Durkheim, Jürgen Habermas, and John Dewey.¹⁶²

Post then explains how First Amendment principles act to “safeguard” the “structure of public discourse” from “majoritarian interference.”¹⁶³ In this regard, public discourse reflects First

154. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15, 35-36, 47-48 (1982).

155. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT*, at xii (1948).

156. *Id.* at xii-xiii.

157. Post, *Racist Speech*, *supra* note 25, at 279-80.

158. *Id.* at 280 (quoting NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* 137 (Peter Kennealy trans., Univ. Minn. Press 1989)) (citing HANS KELSEN, *GENERAL THEORY OF LAW AND THE STATE* 285 (Anders Wedberg trans., Russell & Russell 1973)).

159. Post, *Racist Speech*, *supra* note 25, at 281 (quoting KELSEN, *supra* note 158, at 285).

160. *Id.* (quoting KELSEN, *supra* note 158, at 287-88).

161. *Id.* at 282.

162. *Id.*

163. *Id.* at 283.

Amendment individualism by reconciling the individual to the public will.¹⁶⁴ It also requires protection because it is the process by which “‘private’ perspectives are transformed into public power.”¹⁶⁵ While Post recognizes a private realm, where hateful or racist speech might be excluded (for example, in the workplace), he is unwilling to ban “racist expression” as such from the area of public discourse.¹⁶⁶ While Post’s argument is quite subtle, and in a number of places concedes the possibility of some speech restrictions (especially in the university context),¹⁶⁷ his bottom line is consistent: restrictions on hate speech undermine the structure of public discourse by restricting personal identity of democratic citizens and, as such, cannot be tolerated in a democracy.¹⁶⁸

For Americans looking for a way to convince Europeans about the value of tolerating hate speech laws, Post’s argument—at first blush—looks rather attractive. The normative stake in democracy is hard to dispute and Post’s definition of democracy rests on an American’s interpretation of Kelsen and is adorned by references to other American and European social theorists. In Post’s 1991 article, at least, the theory is wielded with considerable nuance, and it has drawn considerable attention in the United States. In 2011, the *Virginia Law Review* published a symposium on Post’s theory, which included papers from leading First Amendment scholars in the United States including Eugene Volokh and Vincent Blasi.¹⁶⁹ While the symposium included criticism of the democratic dialogue rationale for protecting speech, little of that discussion focused on hate speech laws.¹⁷⁰ So on one level, Post’s approach is very compelling.

The problem Post has, with his 1991 article at least, is that he did not take his approach far enough. Fairly early on in his argument, Post writes: “A stable and successful democratic state will regulate the lives

164. *Id.* at 284.

165. *See id.*

166. *Id.* at 289.

167. *Id.* at 324. (“Thus, for example, nothing in the concept of critical education would prevent a university from penalizing malicious racist speech communicated *solely for the purpose of* harassing, humiliating, or degrading a victim.”). At another point, Post concedes that one might be able to ban “highly offensive racist epithets and names,” although this type of regulation “could only serve symbolic purposes.” *Id.* at 313.

168. *See, e.g., id.* at 301.

169. *See* Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531 (2011); Eugene Volokh, *The Trouble with “Public Disclosure” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011).

170. For example, Volokh expresses concern that Post’s narrow focus on “public discourse” will weaken protection for other, more private types of speech including teacher-student speech, speech between friends, and legal solicitation of clients. Volokh, *supra* note 169, at 572-75, 593-94.

of its citizens in ways consistent with the underlying principle of ‘their being viewed as free and equal persons.’”¹⁷¹ Germany and France have hate speech laws. What conclusions would Post draw from this? That Germany and France are not “stable” and “successful” democratic states? Or that German and French hate speech laws are a mistake and should be repealed?

Had Post explored this line of argument, some interesting possibilities would emerge. One of the arguments Germans (and Europeans) make about hate speech laws rests on a fear of a Nazi revival. If these fears are real, perhaps Post would be right to conclude that Germany (or Europe) is not securely democratic. It also puts an interesting gloss on Loewenstein’s militant democracy school of thought. While Loewenstein thought that “militant” democracies were more advanced than countries like the United States,¹⁷² where there was less acceptance of state intervention in public life, Post could turn the tables on Loewenstein and argue that the countries that still need “militant” measures are lagging behind the United States. This type of argument raises the leapfrog possibility that makes Trotsky’s argument about Russian development so attractive—what was once backward becomes cutting edge.

But, Post in 1991 did not take this step. Instead of engaging with evidence—European hate speech laws—that might challenge his model, he recognized their existence and moved on.¹⁷³ One reason for this was that Post anchored his model in America. He introduced his model as based on “[F]irst [A]mendment values,” rather than democratic theory.¹⁷⁴ When discussing the concept of self-determination, he drew on Madison’s contrast between Great Britain, where “the Crown was sovereign,” and the United States, where power rested with the people.¹⁷⁵ In explaining why equality interests do not trump speech, Post refers to “the overwhelming American commitment to the importance of ‘self-rule.’”¹⁷⁶ In discussing the harm hate speech poses to group identity, Post claims that Americans have a uniquely individualist

171. Post, *Racist Speech*, *supra* note 25, at 287 (quoting John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 230 (1985)).

172. See Loewenstein, *Legislative Control II*, *supra* note 34, at 774; see also *supra* notes 85-94 and accompanying text.

173. See Post, *Racist Speech*, *supra* note 25, at 286 n.100, 294 (contrasting American law with German and Israeli law).

174. See *id.* at 270.

175. *Id.* at 280-81 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274-75, 292 (1964)).

176. *Id.* at 292.

concept of group identity and that the ability “to forge new communities” is “quintessentially American.”¹⁷⁷

One of the troubling things about Post’s analysis is that he does not—in his 1991 article at least—go into detail about why America is different. For example, his discussion of group identity relies heavily on Frances FitzGerald’s 1986 book, *Cities on a Hill: A Journey Through Contemporary American Cultures*.¹⁷⁸ While FitzGerald briefly talks about group identity in Europe, the bulk of the book is focused on the United States.¹⁷⁹ Post’s failure to put his argument into a genuinely comparative context is a missed opportunity. Or, to put it another way, if Post’s argument is that hate speech laws in Europe do not matter because America is different, he should have said more about why that was the case.

Post’s 1991 article has a similar problem with time. As he points out, until about 1940, American restrictions on speech were much more restrictive.¹⁸⁰ This leads to the same type of question just discussed. If protection of the democratic process is how one tells whether a democratic state is “stable” and “successful,” was the United States not a full-fledged democracy before then? Once again, one could answer this question, “yes.” Especially given the lack of voting rights in the South, perhaps the United States was not a “stable” and “successful” democracy until the Civil Rights movement of the 1950s and 60s and the Voting Rights Amendment.¹⁸¹ This position fits in well with Walker’s argument about the role of the Civil Rights movement in expanding the scope of the First Amendment.¹⁸² Perhaps one could make a similar argument about the Jehovah’s Witnesses cases of the 1940s that extended both religious freedom and freedom of speech.¹⁸³ But Post does not raise the question.

The result is a tension in Post’s thought. On the one hand, his model draws on European social thought, and Post is aware that

177. *Id.* at 294 n.145.

178. *Id.* (quoting FRANCES FITZGERALD, *CITIES ON A HILL: A JOURNEY THROUGH CONTEMPORARY AMERICAN CULTURES* 389-90 (1986)).

179. See generally FITZGERALD, *supra* note 178 (exploring American subcultures).

180. Post, *Racist Speech*, *supra* note 25, at 286.

181. U.S. CONST. amend. XV.

182. WALKER, *supra* note 7, at 15-17.

183. For example, in a 1940 case involving solicitation by Jehovah’s Witnesses, the Supreme Court allowed solicitation without a license. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940). In 1943, the Supreme Court invalidated a flag salute requirement as it applied to the Jehovah’s Witnesses. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Although these cases were framed in terms of freedom of religion, they are seen as landmarks in the history of freedom of speech as well. See Tony Mauro, *Thank Jehovah’s Witnesses for Speech Freedoms*, USA TODAY, May, 30, 2000, at 17A.

Germans (and Israelis) take a different approach to hate speech. While his decision to base his theory on America—to become an American exceptionalist—is reasonable, he doesn't really explain how America differs from Europe. In fact, he does not talk about what the general proliferation of speech restrictions in pre-1940 America (bans on anti-slavery pamphlets, restrictions on obscenity, restrictions on seditious libel during World War I) says about the state of American democracy at that time.¹⁸⁴ To be fair to Post, little of this tension gets in the way of his main task in *Racist Speech, Democracy, and the First Amendment*, which is to discuss current day hate speech proposals in the United States. But, this tension would reemerge when, in the wake of the Danish cartoons controversy, Post and many other Americans began to turn their attention to Europe.

C. *A Bridge Too Far? Robert Post and the Danish Cartoons Controversy*

The reception of the 2005-2006 Danish cartoons controversy in the United States is something of a paradox.¹⁸⁵ On the one hand, most American newspapers—with some notable exceptions such as the *Philadelphia Inquirer*—did not run the cartoons, a marked contrast to Europe.¹⁸⁶ On the other hand, the controversy appeared to awaken Americans to the idea that Europe bans a wide variety of hate speech—including Holocaust denial. It also raised the possibility that European hate speech laws were, in fact, not a good idea. Some of this came from the nature of the controversy itself. Rose, the culture page editor of the *Jyllands Posten*, the paper that ran the cartoons, was a colorful figure.¹⁸⁷ He had served as a correspondent in the Soviet Union and saw the struggle against Muslim radicals in Denmark as an extension of the Cold

184. See generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997) (providing an overview of the development of American free speech culture before Justices Holmes and Brandeis).

185. The controversy arose after Rose, culture page editor of the *Jyllands Posten*, the largest newspaper in Denmark, ran twelve cartoons which depicted the Prophet Muhammad as the cartoonist saw him. Kahn, *Flemming Rose*, *supra* note 52, at 255-56, 262. The controversy led to protests by Danish Muslims, the refusal of Denmark to apologize for the cartoons, an embargo against Danish products, the republication of the cartoons in various mainstream European newspapers, and violence directed against Danish embassies in the Middle East. *Id.* at 262-63. See generally JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* (2009) (providing an excellent overview of the affair as a whole).

186. For a brief summary, see Robert A. Kahn, *News Value, Islamophobia, or the First Amendment? Why and How the Philadelphia Inquirer Published the Danish Cartoons*, 1-2, 7-12 (U. St. Thomas Sch. of Law, Legal Studies Research Paper Series, Research Paper No. 10-07, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548705.

187. For a description of Rose, see Kahn, *Flemming Rose*, *supra* note 52, at 258-60.

War.¹⁸⁸ After the controversy peaked in February 2006, Rose made several trips to the United States to explain his position.¹⁸⁹

Against this backdrop, Post wrote an article that appeared in *Constellations* in 2007 under the title *Religion and Freedom of Speech: Portraits of Mohammed*.¹⁹⁰ On one level, the article is quite impressive. Written shortly after the controversy broke,¹⁹¹ Post treats the reader to a comprehensive analysis of recent European Court of Human Rights rulings on freedom of speech and blasphemy.¹⁹² And the conclusion Post reaches, that none of the twelve cartoons appearing in the *Jyllands Posten* satisfies the standards for blasphemy or hate speech, is uncontroversial and most likely correct.¹⁹³

There were, on the other hand, some things about the article that did attract attention. First, he referred to those Muslims who opposed pictorial displays of Mohammed as “modern fundamentalist sects who now claim to speak for Islam,” a generalization that is somewhat out of keeping with Post’s commitment to a nuanced, contextual view of the world.¹⁹⁴ Second, he provided a link to the cartoons as a footnote to his article—a step taken by very few scholarly writers on the subject.¹⁹⁵

My interest, however, lies in the way in which Post’s discussion of Danish cartoons revealed a tension over how (or whether) to apply his democratic dialogue theory. At times he takes an exceptionalist approach. For instance, he said, somewhat bashfully, of the First Amendment protection of freedom of speech: “Alongside our commitment to the death penalty, it stands as an outstanding exemplar of American constitutional exceptionalism.”¹⁹⁶ He also recognized that

188. *Id.* at 258-59.

189. *Id.* at 265-66 (describing Rose’s travels to the United States).

190. Post, *Religion and Freedom of Speech*, *supra* note 28, at 72.

191. Given that *Constellations* is a peer-reviewed journal, Post likely finished the article before the 2007 publication date.

192. Post, *Religion and Freedom of Speech*, *supra* note 28, at 80-81 (describing the doctrine of “gratuitously offensive” speech as it applies to European Court of Human Rights case law on blasphemy).

193. *Id.* at 84.

194. *Id.* at 72. Undoubtedly, many of the opponents of pictorial representations of the Prophet are fundamentalists, and vice versa. But, are there not some Muslims whose opposition to pictorial representation is genuine? One piece of evidence that I find compelling was a 1955 request—a time well before the phrase “Muslim fundamentalist” became a household phrase—by Muslims to remove a statue that depicted the Prophet from a New York court building. Robert A. Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, 16 U. MIAMI INT’L & COMP. L. REV. 151, 177 (2009).

195. See Post, *Religion and Freedom of Speech*, *supra* note 28, at 84 n.1. Klausen wanted to include the cartoons in her book, *The Cartoons that Shook the World*, but Yale University Press, relying on a report from an anonymous panel, refused to allow her to do so. See Patricia Cohen, *Yale Bans Images of Muhammad in New Book*, N.Y. TIMES, Aug. 13, 2009, at C1.

196. Post, *Religion and Freedom of Speech*, *supra* note 28, at 73. Interestingly, he chose the

Europe has a long history of regulating blasphemy and many different justifications for protecting speech.¹⁹⁷

Most of the article, however, consisted of an extended application of his democratic dialogue theory to Europe. Although Post in 1991 stressed the American origins and character of his model, in his Danish cartoons article, he introduced it in much broader terms: “[B]ecause all European nations are committed to democratic self-governance, I shall in this paper seek to explore the compatibility of blasphemy regulation with the requirements of democracy.”¹⁹⁸ Post laid out his model much as he did in 1991. Post started by asserting that: “All agree that states aspiring to democratic legitimacy must extend some protection to freedom of speech.”¹⁹⁹ He then talked about autonomy, heteronomy, and self-determination in the same way he had sixteen years earlier.²⁰⁰ To fend off an objection that his was not the only possible model of democratic legitimacy, Post warned against defining democracies as those countries—he gave North Korea as an example—which “hold elections in which majorities govern.”²⁰¹ After explaining that the absence of any public discourse would make citizens feel alienated, Post concluded that “[i]n a modern democracy” citizens should be “free to engage in public discourse” so that, even if they do not prevail on a given question, they “can nevertheless maintain their identification with the state.”²⁰²

Having laid out his model, Post took up the cartoons, concluding that, “if free speech is to serve the value of democratic legitimation, the Danish cartoons ought to be immune from legal censorship.”²⁰³ That argument, as noted above, is not controversial. It also shows the weakness of Post’s comparative analysis—he has applied a model designed in America to Europe without explaining how this changed environment affects his model. If blasphemy regulation is alive and well in Denmark, and Denmark is, unlike North Korea, a genuine democracy, what in his model has to change to answer this?

While Post did not explicitly address this question, he made some concessions. For example, because his theory rests on the idea that a citizen can find his or her views expressed by the polity, the question of blasphemy—for Post—is less serious if all members of the society share

death penalty rather than the Establishment Clause.

197. *Id.* at 77-78.

198. *Id.* at 73.

199. *Id.*

200. *See id.* at 73-74.

201. *Id.* at 74.

202. *Id.* at 74-76.

203. *Id.* at 77.

the same religion, a rather odd conclusion given that one might expect calls for anti-blasphemy laws to be higher in societies experiencing some form of religious diversity and conflict, than in those where there is none.²⁰⁴ He also accepts the European idea that the manner of a speech act can figure into the question of what speech is banned, so long as “any such distinction [is] drawn in such a way as to minimize damage to the public debate.”²⁰⁵ Finally, Post accepts that “[h]ate speech is commonly regulated in Europe” and argues that such laws are on a stronger footing than anti-blasphemy laws, because, while the former rely on laws to define boundaries, the latter rely on religious boundaries.²⁰⁶

Towards the end of the article, Post shifts from the use of blasphemy laws to the harder question of whether the cartoons can be banned as an expression of Islamophobia.²⁰⁷ In doing so, he engages in some interesting theorizing that could sharpen his general theory. He isolates the key question as follows: Are Islamophobic acts, like the publication of the cartoons, connected to discrimination?²⁰⁸ For Post, this is “a question of contingent, historical fact”—just the type of question European, but not American, legal systems allow to serve as a justification for restricting speech.²⁰⁹ In explaining why Americans require tighter causation, Post has a number of reasons: (1) a “deep libertarian streak in the American character,” one reinforced by “[c]lassic historical examples” of state abuse of rights such as bans on advocating Communist doctrine; and (2) the greater legitimacy of the European state, one in which the “nation” or “republic”—rather than the people—is sovereign.²¹⁰

Because Post’s focus is on the permissibility of banning the Danish cartoons, a question not in doubt in Europe or the United States, Post does not push his analysis here. But, what he does say poses some interesting questions for his model. If a robust protection of speech is a sign of a state’s democratic legitimacy, what does it mean for Post to argue that a European state has greater legitimacy? Are democratic and

204. See *id.* at 78; see also RICHARD WEBSTER, A BRIEF HISTORY OF BLASPHEMY: LIBERALISM, CENSORSHIP AND ‘THE SATANIC VERSES’ 26-27 (1990) (arguing that the Anglican religion in Great Britain did not need blasphemy protection because the religion was so well accepted in British society that blasphemy was unimaginable).

205. Post, *Religion and Freedom of Speech*, *supra* note 28, at 81.

206. *Id.* at 82. This is an especially important concession because hate speech laws often take the manner in which the speech act is made into account.

207. *Id.* at 82-84.

208. *Id.* at 83.

209. *Id.*

210. *Id.*

statist forms of legitimacy different? Does the greater sense of security of the European state justify the presence of hate speech laws? (One might think quite the opposite; European states ban hate speech because they fear they are weak. Perhaps the question is one of perception versus reality—European states are “paranoid,” they fear they are weak but are actually strong.)

Post’s mention of “classic historical examples” is intriguing. First, if “a libertarian streak” is such an essential part of the American character, why do the classic examples exist? Indeed, one could view the history of United States up until *Brandenburg v. Ohio*²¹¹ as a series of alternating periods of freedom and censorship. The classic examples, far from being evidence of free speech liberalism, are examples of times the libertarian streak broke down. Second, what are the stakes of raising American examples for a European audience?

Let me be clear, this is not meant as a criticism of Post. Rather, it reflects the power of the American experience. The United States, since *Brandenburg*, has had a relatively continuous period of broad protection of political speech, one potentially compelling enough for Europeans to learn the key moments of the struggle—from the dissents in *Abrams*²¹² and *Gitlow v. New York*²¹³ and the concurrence in *Whitney v. California*,²¹⁴ to *Stromberg v. California*,²¹⁵ when, to quote Harry Kalven Jr., “[s]peech [s]tart[ed] to [w]in,”²¹⁶ through the setback of *Dennis v. United States*,²¹⁷ to the ultimate expansion of political protections of speech in the 1960s. It would be no different than the way Loewenstein relied on the experiences of the late Weimar period to ground his concept of militant democracy. But, just as Loewenstein and

211. 395 U.S. 444, 449 (1969) (per curiam) (holding for greater protection for freedom of speech than in previous cases).

212. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (finding that checks on freedom of expression should only exist in situations which imminently threaten “immediate interference with the lawful and pressing purpose of the law” where a check would be “required to save the country”).

213. 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting) (finding that the question in regards to freedom of speech is whether the words will create a “clear and present danger” of the occurrence of “evils that [the State] has a right to prevent”).

214. 274 U.S. 357, 373-78 (1927) (Brandeis, J., concurring) (finding that, in order to justify the suppression of free speech, there must be “reasonable ground to fear that serious evil will result . . . [and] that the danger apprehended is imminent”).

215. 283 U.S. 359, 369-70 (1931) (holding that a statute which is so vague on its face and construed such that it could result in the punishment of free political discussion is invalid).

216. HARRY KALVEN JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 167-69 (1988).

217. *Dennis v. U.S.*, 341 U.S. 494, 511 (1951) (holding that a conspiracy to advocate, and not just advocacy itself, is sufficient to satisfy the imminent danger test, and allow for the suppression of speech).

Riesman modified their theories when they applied them to the United States, Post should consider changes to his theory to make it apply better to Europe.

D. Robert Post Takes on Europe

To give an example of what this might look like, let me turn to Post's 2009 chapter on hate speech that appears in James Weinstein and Ivan Hare's edited volume, *Extremist Speech and Democracy*. Post's dialogic democracy model is much less in evidence. Instead, there are more places where Post compares America and Europe. He suggests that America is distinctive not only for its "marketplace of ideas," but also for its "marketplace of communities."²¹⁸ He recognizes that most European countries "have not repudiated the bad tendency test."²¹⁹ He even talks about Europe's "millennia-old forms of highly deferential structures of governance," which he contrasts to "individualism" and "mistrust of government" which "put[s] intense pressure on public discourse to legitimate governmental authority in the United States."²²⁰

This contextualist approach, if followed through, would be a major modification of Post's theory. In 1991 (and to a lesser extent in 2007), he presented his democratic dialogue model in naturalistic terms, i.e., as the only way one could ever imagine democratic legitimacy. In 2009, protection of speech appears more as a byproduct of a state with limited legitimacy. To me, the 2009 approach is a much more interesting way to think about freedom of speech. It opens the door to detailed normative and empirical studies about the relationship of freedom of speech to democratic legitimacy, studies that would be consistent with Post's stated contextual approach to questions of comparative law.²²¹

On the other hand, Post's 2009 article is still somewhat limited in its view of Europe. For example, he has little to say about the Weimar/Nazi experience—something critical for Loewenstein (and for many current-day Europeans)—and is a bit dismissive of European bans on Holocaust denial, saying that such laws are "rare" and "always

218. Post, *Hate Speech*, *supra* note 8, at 133.

219. *Id.* at 134.

220. *Id.* at 137.

221. Some very good contextualist work is starting to be done. *See generally, e.g.*, MARLOES VAN NOORLOS, *HATE SPEECH REVISITED: A COMPARATIVE AND HISTORICAL PERSPECTIVE ON HATE SPEECH LAW IN THE NETHERLANDS AND ENGLAND & WALES* (2011) (examining hate speech in post-2001 England, Wales, and the Netherlands); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* 242 (Michael Herz & Peter Molnar eds., 2012) (examining modern hate speech doctrines in the United States and internationally). The next step is modifying models, like Post's, to reflect this new contextualist scholarship.

problematic.”²²² Post’s statement about the “rarity” of Holocaust denial laws is unclear. If he is saying that denial laws are rare in Europe he is wrong—many European countries have such laws.²²³

If, however, by “rarity” he means that, compared to traditional hate speech laws, Holocaust denial bans are unusually hard to justify, he should say why. One can, like the center-right French deputies who argued against the passage of the Gayssot Law, view such bans as an effort to establish a Stalinist-style “official truth.”²²⁴ But, Holocaust denial bans do not rest solely on the truth or falsity of the deniers’ claims. They also rest on an understanding that the statement “only lice were gassed at Auschwitz” has become a symbolic statement that conveys hate, much like a swastika or burning cross.²²⁵

Let me be clear. Post need not decide that bans on Holocaust denial are legitimate. But he might say more about why so many European countries have such laws. Does this reflect a democratic deficit of some sort, a scar from the past that has yet to heal? Is it a reflection of the state’s experience in Europe of enforcing official truths (one suspects Post, if pressed, would find this explanation compelling)? Or is the duty of Post’s model normative? Is it to explain why bans on historical facts—like Holocaust denial or, for that matter, the Armenian Genocide—are not compatible with liberal democracy?²²⁶ Post hints at this when he claims that “[m]oderns are rightly embarrassed by the notion that simple disagreement can be taken as conclusive evidence of extremism or hatred.”²²⁷ But it would be nice to see a sustained discussion of this point.

What might explain Post’s reluctance to engage? Here a comparison with Loewenstein is instructive. Loewenstein’s articles in the *Columbia Law Review* on militant democracy are very specific. He goes into perhaps excessive detail about developments in a variety of European countries. He is not afraid to get very messy. The same goes

222. See Post, *Hate Speech*, *supra* note 8, at 127.

223. See Michael Whine, *Expanding Holocaust Denial and Legislation Against It*, 20 JEWISH POL. STUD. REV. 58, 61-63 (2008).

224. The Gayssot Law made it illegal to question the existence of the Holocaust. For a description of the legislative debate over the passage of the law, see KAHN, HOLOCAUST DENIAL AND THE LAW, *supra* note 78, at 105-08.

225. For an argument that Holocaust denial bans can be seen as a form of hate speech, see Robert A. Kahn, *Holocaust Denial and Hate Speech*, in GENOCIDE DENIALS AND THE LAW, 77, 99-100 (Ludovic Hennebel & Thomas Hochmann eds., 2011).

226. In 2012, the French passed a law banning the denial of the Armenian genocide, but it was struck down by the Constitutional Council. *French Genocide Law ‘Unconstitutional’ Rules Court*, FRANCE 24, Feb. 28, 2012, <http://www.france24.com/en/20120228-france-turkey-genocide-armenia-sarkozy-freedom-expression>.

227. Post, *Hate Speech*, *supra* note 8, at 127.

for Riesman's writing on group libel, and, for that matter, Post's 1991 article on hate speech in the United States where, despite his defense of "formal analysis," he in fact does engage in "the messy complications of the world."²²⁸

While part of this stems from a preference for formal theory, part of what holds Post back may be a desire to be a "cosmopolitan." In his interview with Peter Molnar, Post complained about how "the usual way" of discussing hate speech "tends to be in a universalist register."²²⁹ The all or nothing approach—either a right merited protection or it did not—while common in human rights discourse, left Post unsatisfied.²³⁰ Until Molnar's conference, which took a contextual approach to speech, Post felt like an "outlier."²³¹ And, at the level of formal theory, Post has gone further to expand his theory to potentially cover Europe. In the process, opposition to hate speech laws has been downgraded from an absolute to a default position—one that can be overridden if the "costs of hate speech to the overall democratic legitimation of the nation are so high"—a situation that might apply to Holocaust denial and other pro-Nazi speech in a country like Germany, in which the post-1945 political order rests on a repudiation of Hitler and National Socialism.²³²

What one hopes for, however, is that Post—or a follower—would go further and, in the manner of Loewenstein, get his or her fingernails dirty. How much regulation of hate speech is necessary before a country's democratic legitimation comes into question? Could it be that different states have more or less capacity to tolerate hate speech laws? (Post appears to suggest that the United States has less ability to tolerate such laws than Europe—what are the normative implications of this? Are there also differences among European countries?) Ideally, Post—or an accomplice—would ask these questions without, necessarily, losing the perspective that there is something special about the broad protection of hate speech in the United States. To put it another way, the focus should shift from differences in kind to differences in degree. Rather than criticizing all European hate speech laws, an American libertarian might ask, which European laws are most justifiable, which are least? In the 1940s, Riesman distinguished between criminal libel laws and civil ones. Does that distinction still hold water today?

228. Post, *Racist Speech*, *supra* note 25, at 326.

229. *Interview with Robert Post*, *supra* note 25, at 23.

230. *Id.* at 23-24.

231. *Id.*

232. *See id.* at 25.

IV. CONCLUSION: TOWARDS A MORE DYNAMIC APPROACH TO COMPARATIVE HATE SPEECH REGULATION

Let me briefly return to the dilemma of comparative law. This dilemma involves a choice between exceptionalism that is contextually sensitive but normatively vacant, and a convergence perspective, in which the actor presents a normative theory that, while persuasive, fails to pay attention to the historical, cultural, and experiential differences that distinguish countries and legal systems.

Loewenstein and Post struggled to break out of this dilemma. Loewenstein, a German Jewish émigré, encountered great difficulties gaining a position in the American academy, and his main body of work has a limited audience. And yet he was able, in the 1930s, to shape the debate over speech regulation by arguing that a democracy threatened by fascism had a duty to defend itself. In doing so, he accepted democratic self-defense (militant democracy) as a norm, but one various democracies would respond to in different ways.

Meanwhile, Post struggled to apply his model of democratic dialogue which suggested that hate speech laws threaten the democratic legitimacy of a state by imperiling its public discourse to countries in Europe where such laws are common. Post's early writings on the subject tended to have two distinct moods: (1) an exceptionalist moment in which freedom of speech was compared to the death penalty, as one of the oddities of American culture; and (2) a universalist moment in which he sought to apply a fairly rigid version of his model to the Danish cartoons controversy. By 2012, however, he was starting to modify his formal theory to account for European hate speech laws.

As such, Post points the way for the future, one that combines his normative stake in the value of public discourse with a context sensitive examination of the situations in which such discourse can be restricted. The need for this dual approach can be shown by a recent article in the *New York Times* discussing how Twitter has decided to block Germans from accessing certain Twitter accounts of neo-Nazis.²³³ One of the more striking responses came from Jillian C. York of the Electronic Frontier Foundation, a group one would ordinarily associate with American libertarian ideals, who said: "It's not a great thing, but it's a way of minimizing censorship. It's better for Twitter if they can keep countries happy without having to take the whole thing down."²³⁴ To "keep countries happy," while also keeping censorship at a minimum, a

233. Nicholas Kulish, *Twitter, Entering New Ground, Blocks Germans' Access to Neo-Nazi Account*, N.Y. TIMES, Oct. 19, 2012, at A10.

234. *Id.*

theory is required to determine when a country's complaint about hate speech is legitimate and when, to return to Maddow, it is a cover for countries like Egypt, where the government plays a role in determining what the press may publish. Both Loewenstein and Post have something to contribute here.²³⁵

Let me close by shifting from space to time. One of the greatest tasks in all comparative enterprises—comparative law as well as historical sociology—is to account for how norms change over time. Post is surely on to something when he traces the start of the democratic dialogue model to the Jehovah's Witnesses cases of the 1940s. Likewise, one can see a change from the 1930s—a time when speech restrictions appeared to be the modern, democratic wave of the future—and the current situation in which, at least from an American perspective, the converse appears to be true. The strongest accounts of the debate over hate speech laws will seek to explain these changes in the flow of the discourse. In doing so, they will benefit from Rosenberg and Trotsky, who saw how changes in the international environment (such as the rise of fascism in Europe or the long post-*Brandenburg* toleration of most hate speech in the United States) can change the pattern of the international debate.

235. Another case that raises even harder questions about “keeping countries happy” is unfolding in 2013. In January, a French court asked Twitter to reveal the names of people who made anti-Semitic and racist tweets. See Eric Pfanner & Somini Sengupta, *A Battle to Unmask Twitter Users*, N.Y. TIMES, Jan. 25, 2013, at B1. The case raises a number of difficult questions—including what standard should be used in deciding whether a tweet is “racist.” In answering this question in a way that gives Twitter some reliable guidance, Americans and Europeans will have to leave exceptionalist shells and make sustained arguments about the appropriate level of toleration afforded to hate speech.
