

# HATE SPEECH, DEMOCRATIC LEGITIMACY AND THE AGE OF TRUMP

(reviewing Eric Heinze. *Hate Speech and Democratic Citizenship*.

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Review by

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**Summary:** Should democracies punish hate speech? Eric Heinze, Professor of Law and Humanities at Queen Mary, University of London, has written an important new book on this subject, *Hate Speech and Democratic Citizenship*. At the center of Heinze's book is a revolutionary idea: Instead of debating whether democracies per se can or cannot legitimately ban hate speech (which assumes all democracies are the same), we should only condemn hate speech as illegitimate in those democracies that are longstanding, stable and prosperous. In this essay, I show how Heinze's idea frees the debate over hate speech regulation from the Europe vs. America dichotomy that has haunted it for years, while carrying a special poignancy for the United States in the age of Trump.

**Keywords:** Eric Heinze, Hate Speech, Democracy, Legitimacy, Trump

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## 1 Introduction

Should democracies punish hate speech? If Francis Fukuyama was correct when he said, in his famous essay *The End of History*, that the “end point” of human evolution was “the universalization of Western liberal democracy,”<sup>2</sup> then one might expect democratic states around the globe would reach consensus on this question. Yet they do not agree; rather, there is a split between the United States, which does not allow bans on hate speech, and most other democracies, which allow such bans.<sup>3</sup> For the past 30 years, scholars from the United States

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2 Fukuyama, Francis. *The End of History*, *The National Interest*, 1989, no. 16, p. 4.

3 The divergence between American and European approaches to hate speech regulation is traced back to the 1950s and 60s when, in response to the Civil Rights movement, the

and Europe have struggled to account for this lack of a common “end point.” In general, the arguments have taken two forms: either one explains the divergence by specific cultural tendencies in the countries involved (the exceptionalism argument); or one adopts a universal answer to the question of hate speech regulation, and then fault those societies that fail to follow that standard.<sup>4</sup>

Neither approach is satisfying. Exceptionalism runs into questions about causation – what does it mean to say the United States tolerates hate speech because of its political culture? How do we distinguish causation from correlation? What if there are multiple causes, how do we single out one as more important than another? Universalist or convergence approaches to the question, meanwhile, tend to generate endless debates because hate speech regulation becomes a question of principle. If democracies must converge upon a shared norm, the world becomes a dull, uniform place, in which difference is by definition heretical.<sup>5</sup> In the process, supporters of globalizing, convergence approaches fail to ask a key question: Are all democracies equally justified in tolerating or banning hate speech?

Wandering into this debate, Eric Heinze, Professor of Law and Humanities at Queen Mary, University of London, has written an important new book, *Hate Speech and Democratic Citizenship*.<sup>6</sup> Heinze’s book offers a path-breaking advance over the tired debate between exceptionalism and convergence. At the center of Heinze’s book is a revolutionary idea: Instead of debating whether democracies *per se* can or cannot legitimately ban hate speech (which assumes all democracies are the same), we should only condemn hate speech as illegitimate in those democracies that are longstanding, stable and prosperous.<sup>7</sup> Not only does this idea free the debate over hate speech regulation from the Europe vs. America dichotomy that has haunted it for years, it carries special poignancy for the United States in the age of Trump.

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US struck off on a more libertarian approach to speech regulation, including hate speech. See Walker, Samuel. *Hate Speech: The History of an American Controversy*. University of Nebraska Press, 1994, pp. 106–33. However, one can find Euro-American differences dating back to the 1930s and 40s. See KAHN, Robert. Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post, *Hofstra Law Review*, 2013, vol. 41, p. 566 (describing how sociologist David Riesman, writing in the 1940s, sought to explain US resistance to speech regulation as a function of America’s “capitalistic” tradition).

4 For an extended discussion of exceptionalism and universal/convergence based theories of hate speech regulation, see KAHN, Why Do Europeans Ban Hate Speech?, pp. 547–51.

5 For an extended critique of convergence approaches to hate speech regulation, see KAHN, Robert. Flemming Rose’s Rejection of the American Free Speech Canon and the Poverty of Comparative Constitutional Theory, *Brooklyn Journal of International Law*, 2014, vol. 39, pp. 692–94.

6 Heinze, Eric, *Hate Speech and Democratic Citizenship*. Oxford: Oxford University Press, 2016.

7 *Ibid.*, pp. 69–78.

## 2 Determinism and the Debate over Hate Speech Regulation

For Heinze, the global debate over hate speech regulation is too deterministic.<sup>8</sup> If hate speech regulation is the norm in Europe but not in the United States, the reason must rest on cultural or historical reasons that determine how a country responds to this question. Therefore, if the United States has largely tolerated hate speech since the 1960s, this is because of deep-rooted causes that go back to the founding of the country and are, for that very reason, unchangeable. The same applies to Europe: If Germany, France or Austria ban hate speech (or Holocaust denial) this is rooted in factors – such as the Nazi past – that an outsider could not possibly understand, let alone try to change.<sup>9</sup> As early as 2009, Heinze understood the problem when he described academic conferences on hate speech regulation as meetings taking place between American “wild west cowboys” and European “cheese eating surrender monkeys” who talk past each other.<sup>10</sup> In 2016 he adds that these “implausibly essentialist”<sup>11</sup> descriptions of Europe and America, even if correct in part,<sup>12</sup> push the discussion about hate speech regulation into a “determinist dichotomy between semi-civilized Americans revering aggressive individualism above all other values versus lethargically timorous Europeans yoked to government-dictated notions of the collective good.”<sup>13</sup>

To be sure, Heinze is not the only one struggling to break free of the confining grasp of the Euro-American dichotomy. On the one hand, Yale University Law School Dean Robert Post has argued that hate speech bans have no place in any democracy.<sup>14</sup> A country that regulates hate speech is simply not democratic; on this view, Germany and France are – in theory, at least – no different from North Korea.<sup>15</sup> The reason for this rests on the nature of democratic legitimacy:

8 Heinze, *Hate Speech and Democratic Citizenship*, pp. 181–94.

9 For example, Deborah Lipstadt, while opposing speech restrictions on Holocaust denial more generally, expressed some sympathy for countries that, because of their experiences with the Holocaust, enact such laws. See Kahn, Robert. *Holocaust Denial and Hate Speech*. In Hennebel Ludovic, Hochmann, Thomas (eds). *Denials and the Law*. Oxford: Oxford University Press, 2011, pp. 93–94 (describing Lipstadt’s views). For his part, Heinze observes that, given the Nazi predilection for book burning, the Nazi experience could just as easily counsel speech protection. Heinze, *Hate Speech and Democratic Citizenship*, p. 64.

10 Heinze, Eric. Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech. In Hare, Ivan, Weinstein, James (eds). *Extreme Speech and Democracy*. Oxford: Oxford University Press, 2009, p. 182.

11 Heinze, *Hate Speech and Democratic Citizenship*, p. 181.

12 Heinze concedes that “Europe and the US take currently take opposite approaches to viewpoint-punitive bans within public discourse.” *Ibid.* at 183.

13 *Ibid.*, p. 187.

14 See, e.g., Post, Robert. Religion and Freedom of Speech, Portraits of Muhammad. *Constellations*, 2007, Vol. 14 (arguing that Denmark’s anti-blasphemy bans were illegitimate for a democracy to enact).

15 *Ibid.*, p. 74. For a critique, see Kahn, Why Do Europeans Ban Hate Speech?, pp. 576–81. To be fair, Post takes a more contextually sensitive approach in his interview with Peter

Imposing a democratic outcome on a citizen can only be legitimate if the he or she has had a chance to express his or her opinion.<sup>16</sup>

On the other side, Jeremy Waldron, in his 2012 book, *The Harm in Hate Speech* makes a dignitary-based case justification of hate speech bans, one that like its democratic counterpart applies in all times and places.<sup>17</sup> This formulation leaves the United States a global scofflaw that, unlike smaller countries (such as Canada), has the luxury of ignoring international agreements.<sup>18</sup> At the same time, this type of argument leads back to the exceptionalism parlor game: Why is the US different? Is this due to a wilderness psychology of frontier settlements in the American West,<sup>19</sup> or the way in which the “melting pot” model of assimilation forged US citizens who were oblivious to the ethnic insults that are a staple of hate speech<sup>20</sup> Or are other factors in play?<sup>21</sup>

Worse still, the dueling proponents of convergence, like their exceptionalism-based predecessors, still talk past each other. This comes from a tendency – on both sides – to fetishize the American experience of free speech “absolutism.”<sup>22</sup> If the United States, the paradigmatic liberal democracy, gets along without hate speech bans, perhaps Europe should as well. Alternatively, the failure of the United States to punish hate speech is just another drop in the bucket for a country known, as Heinze himself points out, for its police brutality, death penalty, and large prison population.<sup>23</sup> In this regard, the United States is that poor

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Molnar. See Interview with Robert Post. In Herz, Michael, Molnar, Peter (eds). *Rethinking the Content and Context of Hate Speech: Regulation and Responses*, New York: Cambridge University Press, 2012, p. 23 (expressing a desire to be “cosmopolitan” in assessing hate speech policies across the globe).

16 Post, Robert. Racist Speech, Democracy and the First Amendment. *William and Mary Law Review*, 1991, Vol. 32.

17 Waldron, Jeremy. *The Harm in Hate Speech*. Cambridge, MA: Harvard University Press, 2012. While Waldron opens his book with the hypothetical example of a Muslim family encountering hate speech during a walk in New Jersey, and more generally can be seen as writing for a US audience, *ibid.*, pp. 1–6, the arguments in his book are not limited to the United States – or any other democratic society.

18 See Kahn, Robert. Hate Speech and National Identity: The Case of the United States and Canada, U. of St. Thomas Legal Studies Research Paper, No. 8–02 (posted: March 10, 2008). [online]. Available at, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1104478](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104478)>, Accessed: 22.06.2017, pp. 20–21 (describing the argument of Canadian scholars that the United States tolerates hate speech because it, unlike Canada, has the power to ignore international treaties).

19 *Ibid.*, pp. 18–20.

20 *Ibid.*, pp. 5–8.

21 Canadian scholars also attribute the lack of hate speech laws in the US to its problems with race relations. *Ibid.*, pp. 8–18.

22 See, e.g., Abrams, Floyd. On American Hate Speech Law. In Herz, Michael, Molnar, Peter (eds.) *Rethinking the Content and Context of Hate Speech: Regulation and Responses*, New York: Cambridge University Press, 2012, p. 126 (concluding that the American model of free expression “may not be for all nations” but it has “served the United States well”).

23 Heinze, *Hate Speech and Democratic Citizenship*, p. 13.

performing schoolchild who is damned by George W. Bush's "soft bigotry of low expectations."<sup>24</sup> Absolutism isn't a model to emulate, it's a sign of a problem – a serious one.<sup>25</sup>

### 3 Long-Standing, Stable, Prosperous Democracies

Against this backdrop, Heinze's *Hate Speech and Democratic Citizenship* is a much-needed breath of fresh air. Instead coming to praise (or bury) the United States as a global democracy, he places the question of when democracies can punish hate speech in a broader, global context.<sup>26</sup> In place of the First Amendment, Heinze discusses the First World (and the Second and Third Worlds as well). In place of the American wilderness,<sup>27</sup> the racist melting pot,<sup>28</sup> or America's supposed lack of an aristocratic culture,<sup>29</sup> Heinze poses a question that can be answered in Israel, Ireland and India: Does a society have the resources to protect vulnerable minorities from the harm posed by hate speech?<sup>30</sup> In a way, Heinze echoes Brandeis in his *Whitney v. California* concurrence,<sup>31</sup> who famously stated: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>32</sup> For Heinze, the key variable is not time but social capital. In other words, does a democracy "maintain sufficient legal, institutional, educational, and material resources to admit all viewpoints into public

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24 Bush made the speech during his visit to the NAACP national convention in 2000. For a transcript, see Text: George W. Bush's Speech to the NAACP, *Washington Post*, 10 July 2000. [online] <<http://www.washingtonpost.com/wp-srv/onpolitics/elections/bushtext071000.htm>>. Accessed: 22.06.2017.

25 See, e.g., Hutchinson, Allan, C. *Waiting for Coraf: A Critique of Law and Rights*, Toronto: University of Toronto Press, 1995, p. xii ("[D]espite its claim to be a standard bearer of rights, the record of the United States on issues of race and violence is less than exemplary; it remains one of the most divisive and troubled countries in the world.")

26 For example, in his introduction Heinze expresses his desire to overcome the assumptions that the debate over hate speech bans involves "a standoff between 'America' and 'European' approaches" to the issue and that the allowing hate speech is "suited only to US law and culture." Heinze, *Hate Speech*, *supra* note 5, at 6–7. To the contrary, Heine observes that, because of their democratic solidity, "Northern European social-welfarist democracies will prove to be the best situated to abolish hate speech bans." *Ibid.*, p. 7.

27 Kahn, *Hate Speech and National Identity*.

28 *Ibid.*, pp. 5–18.

29 See Heinze, *Hate Speech and Democratic Citizenship*, pp. 12–13 (rejecting the argument that the US tolerates hate speech because of its more democratic, anti-aristocratic nature). As Heinze points out, the aristocratic vs. democratic distinction is overstated in part because for a long time the US had its own aristocracy. See BALTZELL, E. Digby. *The Protestant Establishment: Aristocracy and Caste in America*. New York: Random House, 1964 (describing the rise and fall of the White Anglo Saxon Protestant elite in the United States). One view of the Trump presidency is that it seeks to reestablish the WASP elite.

30 Heinze, *Hate Speech and Democratic Citizenship*, p. 70.

31 *Whitney v. California*, 274 U.S. 357, 372 (1924) (Brandeis, J., concurring).

32 *Ibid.*, p. 377.

discourse, yet remain adequately equipped to protect vulnerable groups from violence or discrimination”? If the answer is “yes,” then viewpoint-punitive bans of hate speech in that country violate norms of democratic legitimacy.<sup>33</sup>

Were this all Heinze did, his book would be a great advance on the current US-centered state of the literature; but he goes a step further by operationalizing his argument. A democracy should have the resources to combat the discriminatory effects of hate speech if it is *longstanding*, *stable* and *prosperous*.<sup>34</sup> By *longstanding*, Heinze refers to an unspecified period of time “during which the norms, practices and expectations of democratic citizenship penetrate a substantial portion of the population.”<sup>35</sup> To reach this condition, a state must “maintain, through anti-discrimination regimes, enforceable policies of civic and social pluralism; being “value neutral” on these questions will not cut it.”<sup>36</sup> A *stable* democracy is one that can “police itself, according to independently (e.g. judicially) reviewable criteria.”<sup>37</sup> Finally, a prosperous democracy is one that is “sufficiently wealthy” that “controversial political or cultural events can proceed, with speakers, audiences, and dissenters alike protected from violence.”<sup>38</sup>

These terms, moreover, are capable of quantification; using international measurements such as the Democracy Index Report published by the *Economist*, one can distinguish states that are first-order democracies from those struggling to become genuinely democratic.<sup>39</sup> This allows for the argument that an advanced democracy (such as the United States) might be able to tolerate speech that would pose problems for less well-entrenched democracies (such as Israel and India).<sup>40</sup> Heinze also allows the possibility that what he calls LSPD’s (long-

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33 Heinze, *Hate Speech and Democratic Citizenship*, p. 77. Another noteworthy feature of Heinze’s book is how he anchors legitimacy not on a liberal notion of rights, but in democracy. *Ibid.*, p. 9 (distinguishing between “a liberal or human *right* of expression and a democratic citizen *prerogative* of expression”)(emphasis in original). On one level, therefore, an LSPD is free to enact hate speech bans, or other speech restrictions. The consequence of this, however, is that the “state stops being an LSPD.” *Ibid.*, p.72.

34 *Ibid.*, p. 77 (“A *longstanding, stable, and prosperous democracy can be fully held to its legitimating expressive condition, which requires the citizen’s prerogative of non-viewpoint-punitive expression within public discourse*”)(emphasis in original).

35 *Ibid.*, p. 73.

36 *Ibid.* This carries a special relevance in the US given the growing critique of colorblindness. See Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press, 2010, pp. 240–41 (distinguishing between Martin Luther King Jr’s dream of being “able to see beyond race to connect spiritually across racial lines” from taking the position “that one does not care about race” at all). To the extent the US is “colorblind” – i.e., value neutral – it has not reached a place where the most vulnerable groups in society are genuinely protected from discrimination.

37 Heinze, *Hate Speech and Democratic Citizenship*, p. 73.

38 *Ibid.*

39 *Ibid.*, pp. 69–70 (describing the indicators used in the report and listing those countries that are highly ranked).

40 *Ibid.*, p. 79, n.35

standing, prosperous, stable democracies) may have moments of backsliding – such as the time of troubles in northern Ireland – which might justify the use of hate speech bans on security grounds.<sup>41</sup>

In this respect, Heinze builds on Robert Post's insight that hate speech regulations that intrude on the public discourse have no place in a democracy,<sup>42</sup> while unraveling the American exceptionalism puzzle that has so bedeviled Post. While Post deserves great credit for his public discourse theory – one that opens the door to the regulation of hate speech in private realms such as employment and educational settings,<sup>43</sup> an area of convergence between European and American approaches to hate speech law,<sup>44</sup> his rationale for his theory rests on the specifically US experience with the First Amendment.<sup>45</sup> Given this, can Post's theory have a genuinely global reach, especially in a "cosmopolitan" world in which, as Post acknowledges, there are many different paths to the truth?<sup>46</sup> Heinze resolves this tension by shifting the focus from the United States to the global community as a whole, without giving up Post's emphasis on democratic legitimacy.

Moreover, Heinze is unafraid to make critical comments about political and social institutions in the United States. In response to Richard Posner's argument tracing European hate speech laws to "the *less democratic cast* of European politics,"<sup>47</sup> Heinze asks: "Is democracy in Alabama or Mississippi something other than a 'newcomer'? Do the histories of Denmark or the Netherlands reveal a 'less democratic cast' than the histories of Texas or Georgia, or indeed

41 *Ibid.*, pp. 78–80.

42 Post, *Racist Speech*, pp. 279–285 (stating the general principle that speech restrictions in the public discourse are illegitimate) and p. 301 (stating that group harm is the price individuals may need to pay for "the political constitution of community identity").

43 *Ibid.*, p. 289 (allowing hate speech bans in employment settings) and pp. 317–25 (suggesting there may be a role for banning hate speech in educational settings).

44 Jacobson, Arthur, Schlink, Bernhard. *Hate Speech and Self-Restraint*. In Herz, Michael, Molnar, Peter (eds). *Rethinking the Content and Context of Hate Speech: Regulation and Responses*, New York: Cambridge University Press, 2012, pp. 217–41 (describing similarities in US and European regulation of hate speech in the workplace and on television); Bleich, Erik. *The Freedom to be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism*. Oxford: Oxford University Press, 2011, pp. 106–33 (describing similarities between European hate speech bans and US anti-discrimination laws).

45 While recognizing that "first amendment doctrine is neither clear nor logical," Post, *Racist Speech*, p. 278, he nevertheless argues that the debate over hate speech regulation "ought not to be settled without serious engagement with the values embodied in that doctrine." *Ibid.*, p. 279.

46 At times, the conflict leaves Post left standing on the sidelines, rather than making judgments about the balances struck between free speech and hate speech in other societies. See Kahn, *Why Do Europeans Ban Hate Speech?*, pp. 581–83.

47 Heinze, *Hate Speech and Democratic Citizenship*, p. 12 (quoting Posner, Richard. *The Supreme Court, 2004 Term—Foreword*, *Harvard Law Review*, 2005, vol. 119, p. 86 (emphasis added by Heinze)).

of Connecticut or Illinois?”<sup>48</sup> The problem, according to Heinze, with this type of celebratory analysis is not whether it is correct but that the “trophy” for free speech liberalism, “ends up being awarded to a land steeped in corporate dominance, military adventurism, botched death sentences, abusive incarceration and police brutality.”<sup>49</sup> Later, when critiquing the idea that political legitimacy should depend on the popularity of an institution, Heinze asks: “In the Southern US, slavery and then racial segregation once enjoyed ‘popular support’ in white majority states. Did those institutions therefore become legitimate?”<sup>50</sup>

As someone in the United States living through mass incarceration, police brutality – and now the Trump presidency – I find Heinze’s frank critiques of our political and social problems refreshing. Heinze also deserves credit for breaking free from the originalist taint of Post’s argument. America is not the Ur-democracy, or the fabled city on a hill;<sup>51</sup> rather, the United States is a democratic country with its own problems. In this regard, it is no different from its democratic friends France, Canada, the United Kingdom – or any other country on the Economist’s index of democratic states.<sup>52</sup> America’s constitutional moment may be foundational for the United States; but from a global perspective it is not foundational for the justification of freedom of speech – it is merely one way to reach Nirvana. Nothing more, nothing less.

#### **4 America in the Age of Trump – Still an LSPD?**

Heinze’s untangling of free expression from a discourse of American triumphalism is likely to appeal to those supporters of free speech who have doubts about the suitability of the United States as a role model of free expression. At the same time, Heinze’s LSPD model raises questions about whether, after the 2016 elections and the rise of Donald Trump, the United States is still a “long-standing, stable, prosperous democracy.” Might it, instead, be facing its own “time of troubles”? Sitting in the United States, watching journalists face felony charges for covering Trump’s inauguration, I wonder about this.<sup>53</sup> Here, the

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48 Heinze, *Hate Speech and Democratic Citizenship*, pp. 12–13.

49 *Ibid.*, p. 13.

50 *Ibid.*, p. 44.

51 For instance, Post argues – without much documentation – that “the ability to forge new communities” is a trait that is “quintessentially American.” See Kahn, *Why Do Europeans Ban Hate Speech?*, pp. 574–75 (quoting Post, *Racist Speech*, p. 294, n.145).

52 Interestingly, three of the top four countries on the list are from Scandinavia (Norway, Sweden and Denmark), Heinze, *Hate Speech and Democratic Citizenship*, p. 70, a region that – for all its democratic institution building – also has issues with welcoming Muslim migrants, as the Danish cartoon controversy demonstrates. See Kahn, Robert, *The Danish Cartoon Controversy and the Exclusivist Turn in European Civic Nationalism*, *Studies in Ethnicity and Nationalism*, 2008, vol. 8, no. 3, pp. 528–34 (describing anti-immigrant measures in Denmark in the years leading up to the controversy).

53 Bromwich, Jonah Engel. *Felony Charges for Journalists Arrested at Inauguration Protests Raise Fears for Press Freedom*. *New York Times*, 25 Jan. 2017. [online] <<https://>

democratic legitimacy argument – both Post’s version and Heinze’s refinement – seems to come up short: If one believes the United States is entering an era of “soft authoritarianism,”<sup>54</sup> wouldn’t protecting speech be more important than ever? More generally, does the democratic legitimacy model which was born in the 1980s and 90s,<sup>55</sup> a time when democracy was riding on the crest of a “third wave”<sup>56</sup> that was supposed to carry democracy to all corners of the globe, have an answer for the age of Trump?

The model might not, but Heinze does. The answer relates to a second admirable feature of *Hate Speech and Democratic Citizenship*, namely the depth of Heinze’s arguments. For example, he organizes his arguments for and against speech regulation into deontological and consequentialist categories. Banning hate speech might good or bad in and of itself; or the difficulty in restricting or tolerating hate speech might be practical in nature.<sup>57</sup> While Heinze is not the first person to view speech regulation in this manner, his approach is noteworthy for its rigor. Indeed, one of the most impressive qualities of *Hate Speech and Democratic Citizenship* is its rich, detailed typography of arguments for and against hate speech regulation.<sup>58</sup> Not only do these give Heinze’s book an ency-

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www.nytimes.com/2017/01/25/business/media/journalists-arrested-trump-inauguration.html?\_r=0> Accessed: 22.06.2017. The journalists were arrested because they were in an area where a car had been set on fire. Ibid. The charges against four of the six reporters arrested were quickly dropped. See Stack, Liam. Felony Charges Dropped against 4 Reporters Arrested at Inauguration Protests. *New York Times*, 30 Jan. 2017. [online] <<https://www.nytimes.com/2017/01/30/us/journalists-arrested-inauguration-charges.html>> Accessed: 22.06.2017. That said, the incident raises worrisome questions about the scope of press freedom in the United States, a trend reinforced by efforts across the nation to enact laws making protestors liable on felony charges for violent acts and property damage, even when done by outsiders. See Opinion: Arizona Republicans Want to Apply Racketeering Law to Protests. Can Someone Introduce Them to the 1<sup>st</sup> Amendment?, *LOS Angeles Times*, 24 Feb. 2017. [online] <<https://www.latimes.com/opinion/opinion-la/la-ol-arizona-protest-1stamendment-20170224-story.html>> Accessed: 22.06.2017.

54 FRUM, David. How to Build an Autocracy. *The Atlantic*, March 2017. [online]. <<https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/>> Accessed: 22.06.2017.

55 Post’s article, “Racist Speech”, was published in 1991 – two years after the fall of the Berlin Wall. More generally, there is a natural fit between the supposed global triumph of liberal democracy celebrated by Fukuyama and the triumph of democratic legitimacy as a rationale for justifying speech. With democracy on the march in Latin America, Africa and Eastern Europe, was there any reason to think that a theory of speech protection based on democracy would be anything less than global as well?

56 Huntington, Samuel P. *The Third Wave: Democratization in the Late Twentieth Century*. Norman, OK: University of Oklahoma Press, 1991.

57 Heinze, *Hate Speech and Democratic Citizenship*, p. 34 (using a chart to outline deontological and consequentialist arguments for and against hate speech).

58 For example, Heinze concludes his book with a list of 20 separate arguments for hate speech regulation and his opinion as to why they are wrong. Ibid., pp. 208–15.

clopedic quality, they also let him raise concerns about speech regulation that do not rely on the democratic legitimacy argument.

In this regard, the democratic legitimacy argument provides a floor of free speech protection – longstanding, stable prosperous democracies should not censor – but not a ceiling. An insufficiently democratic society might have a right to punish speech on security grounds, but it need not do this. There are also pragmatic arguments for protecting free speech, ones Heinze highlights in a compelling section of his book entitled “Consequentialist Oppositionism Revisited: Harms of Bans?”<sup>59</sup> Here Heinze argues, among other things: (1) that speech restrictions will still allow bigots to express the same ideas in slightly more guarded language – in effect “tutoring” extremist groups;<sup>60</sup> (2) alternatively, potential bans will drive potential bigots underground, where they will be harder to monitor;<sup>61</sup> and (3) bans will likely fall most heavily on “disempowered target groups.”<sup>62</sup> While these arguments are not entirely new – Nadine Strossen, for instance, raised the concern about targeting minorities decades ago<sup>63</sup> – Heinze presses his point home with a forcefulness and a sensitivity to the power of words to do harm. For example, Heinze notes how extremist groups, tutored by hate speech bans to act appropriately, will make comments about Islam as a religion that, in reality, target Muslims as an ethnic group.<sup>64</sup>

For citizens of wavering LSPDs, lapsed LSPDs, or countries simply struggling to become democratic in the first place, this separation of deontological and consequentialist arguments for speech regulation offers comfort in an age of rising right-wing populism across the United States and Europe.<sup>65</sup> At the same time, Heinze’s consequentialist arguments operate independently of his democratic legitimacy theory. In theory, for example, Heinze’s warning that states will use bans against minority groups applies with equal force in the LSPD context and the non-LSPD context. Could one, however, make an argument that – in an age of increasing autocracy and authoritarianism – freedom of speech is even more important in an imperfectly democratic state than it would be in an LSPD? More narrowly, might one argue that the risk of the state using speech restrictions to stifle dissent is greater in such a circumstance?

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59 Ibid., pp. 145–53.

60 Ibid. p. 145 (for example, a bully that previously called his target “fatso” will use “beauty” instead).

61 Ibid., p. 146.

62 Ibid. p. 152.

63 Strossen, Nadine. *Regulating Racist Speech on Campus: A Modest Proposal*, *Duke Law Journal*, 1990, pp. 554–55.

64 Heinze, *Hate Speech and Democratic Citizenship*, p. 151.

65 For an overview of the situation in the aftermath of Trump’s electoral victory, see Askenas, Jeremy, Aisch, Gregor. *European Populism in the Age of Trump*. *New York Times*, 5 Dec. 2016. [online] [https://www.nytimes.com/interactive/2016/12/05/world/europe/populism-in-age-of-trump.html?\\_r=0](https://www.nytimes.com/interactive/2016/12/05/world/europe/populism-in-age-of-trump.html?_r=0) Accessed: 22.06.2017.

Here Heinze offers some interesting insights. In allowing non-LSPDs to punish hate speech, Heinze had in mind societies with “active inter-group rivalries and inadequate means to pacify them”, where speech restrictions might be a “necessary evil.”<sup>66</sup> His paradigmatic example is Northern Ireland, where the “time of troubles” justified British imposition of hate speech bans, albeit at the price of concluding the Britain was no longer an LSPD.<sup>67</sup> But in many divided societies (including the United States), there is no higher power, no Britain, to impose order. Under these circumstances, any legitimacy hate speech bans gain on the basis of state security, is lost because the state no longer represents all groups in society. Is the Turkish ban on acknowledgement of the Armenian genocide justified because Turkey is not an LSPD?<sup>68</sup> Or, as is more plausible, is the ban illegitimate, because by the very enactment of the law, the Turkish government excludes Armenians from full citizenship? Likewise, to the extent Trump succumbs to the extreme right-wing elements in his movement, and moves towards explicit white supremacy,<sup>69</sup> should he get the benefit of the greater governmental powers offered to non-LSPDs in conflict-ridden societies?

To be fair, part of the limits of Heinze’s theory is a function of the rapid change of conditions on the ground, in the United States and elsewhere. A few years ago, Frederick Schauer re-examined the idea that false speech might have harmful consequences.<sup>70</sup> To show the potential harm of false news, Schauer used a wide range of examples. While some of these were political (“President Obama was born in Kenya,” “President Bush knew in advance of the 9/11 attacks”),<sup>71</sup> others were not. For example, Schauer described those “who promote...diet slippers and diet earrings as sure-fire cures for obesity.”<sup>72</sup> Schauer wrote his article before “fake news” concept became associated with the rise of Donald Trump. To put it another way, Schauer wrote at a time when the United States was, to all appearances, a healthy, functioning LSPD. While Schauer chose his examples in part to demonstrate that Holocaust denial was not a special case – that all false information might theoretically cause harm<sup>73</sup> – he did not linger on the Kenya and 9/11

66 Heinze, *Hate Speech and Democratic Citizenship*, p. 80.

67 *Ibid.*, p. 81.

68 Article 301 of the Turkish Penal Code, which bans speech that “insults” Turkey, has been used to punish recognition of the Armenian genocide. For more, see Tate, Janisha. Turkey’s Article 301: A Legitimate Tool for Maintaining Order, Or a Threat to Freedom of Expression? *Georgia International and Comparative Law Review*, 2008, vol. 37, p. 181.

69 For an argument that the Trump administration is already starting to embrace white nationalism, see Bouie, Jamelle. Government by White Nationalism is Upon Us. *Slate*, 6 Feb. 2017. [online]. <[http://www.slate.com/articles/news\\_and\\_politics/cover\\_story/2017/02/government\\_by\\_white\\_nationalism\\_is\\_upon\\_us.html](http://www.slate.com/articles/news_and_politics/cover_story/2017/02/government_by_white_nationalism_is_upon_us.html)> Accessed: 22.06.2017.

70 Schauer, Frederick. Social Epistemology, Holocaust Denial and the Post-Millian Calculus. In Herz, Michael, Molnar, Peter (eds). *Rethinking the Content and Context of Hate Speech: Regulation and Responses*, New York: Cambridge University Press, 2012, pp. 129–43.

71 *Ibid.*, p. 140.

72 *Ibid.*

73 *Ibid.* pp. 142–43.

points because they were not politically salient. Today, when the President of the United States claims – without evidence – that millions voted illegally against him,<sup>74</sup> or that President Obama wiretapped his campaign,<sup>75</sup> “fake news” is a more relevant concept – one tied to deeper questions about the strength of democratic institutions in the United States. Consequently, Schauer’s article – while very informative – is likely the beginning, rather than the end, of the discussion about “fake news.”

I first read *Hate Speech and Democratic Citizenship* in May 2016 and enjoyed it thoroughly. It is the book I wish I wrote, and a book to take to a desert island. Re-reading the book in March 2017, I still enjoyed it; but something is missing. The *Washington Post* now runs the words “Democracy Dies in Darkness” on its masthead.<sup>76</sup> If democracy is dying – or is facing a mortal risk – the LSPD theory tells me that it can legitimately impose restrictions on hate speech as a means of self-protection.<sup>77</sup> I get that. But at a time when President Trump has declared the media “the enemy of the American people”<sup>78</sup> there is a need for a theory of free speech (and hate speech regulation) that applies to states that are incompletely democratic, or at risk of slipping away into authoritarianism.

That said, Heinze’s robust defense of democratic prerogative represented by the LSPD concept is critical, not merely as an empirical concept but an aspirational one as well. The United States may indeed be in the midst of a “time of troubles” but if it wants to return to the LSPD ranks, it had best start acting like one.<sup>79</sup> Meanwhile, Heinze’s forceful, nuanced defense of free speech on conse-

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74 Liptak, Kevin, Merica, Dan. Trump believes millions voted illegally, WH says – but offers no proof. CNN, 25 Jan. 2017. [online] <<http://www.cnn.com/2017/01/24/politics/wh-trump-believes-millions-voted-illegally/>> Accessed: 22.06.2017.

75 Staglin, Doug, Guadiano, Nicole. Trump, without evidence, accuses Obama of wiretapping him; “Simply false, Obama spokesman says. *USA Today*, 4 Mar. 2017. [online]. <<http://www.usatoday.com/story/news/2017/03/04/trump-accuses-obama-wiretapping-him-before-election/98734316/>> Accessed: 22.06.2017.

76 Farhi, Paul. The Washington Post’s new slogan turns out to be an old saying, *Washington Post*, 24 Feb. 2017. [online]. <[https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5\\_story.html?utm\\_term=.4a17cd33243b](https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html?utm_term=.4a17cd33243b)> Accessed: 22.06.2017.

77 Heinze, *Hate Speech and Democratic Citizenship*, pp. 71–72 (describing emergency scenarios).

78 See Johnson, Jenna, Gold, Matea. Trump calls the media “the enemy of the American People.” *Washington Post*, 17 Feb. 2017. [online] <[https://www.washingtonpost.com/news/post-politics/wp/2017/02/17/trump-calls-the-media-the-enemy-of-the-american-people/?utm\\_term=.d9227654b168](https://www.washingtonpost.com/news/post-politics/wp/2017/02/17/trump-calls-the-media-the-enemy-of-the-american-people/?utm_term=.d9227654b168)> Accessed: 22.06.2017.

79 Interestingly, because Heinze grounds the defense of speech in citizen prerogatives in a well-functioning democracy, the task ahead is less about protecting speech – which is a byproduct of an LSPD. Instead, it is about ensuring that the country nurtures a democratic culture that gives citizens, and society at large, the strength to protect disadvantaged groups without resorting to speech bans. Heinze, *Hate Speech and Democratic Citizenship*, p. 72.

quentialist grounds<sup>80</sup> is an excellent starting point for how to think pragmatically about freedom of speech in an age when the civic culture of democracy may be wavering. As such *Hate Speech and Democratic Citizenship* is indeed a book for the age of Trump.

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80 Ibid., pp. 145–53. Perhaps the most obvious point of contact with the current situation is Heinze's concern about government misuse of speech restrictions. Ibid., p. 151. Equally powerful, however, is his idea that speech restrictions are ineffective because they "tutor" target groups to use coded language that, ironically, can be more harmful because it is less obviously offensive. Ibid., pp. 149–51. This offers both argument against state use of speech bans, as well as a warning to opponents who use isolated comments to stigmatize elements of Trumpism as "extremist." These efforts may make sense on an individual basis, as for example, when the Trump administration was criticized for failing to list the Jews as victims of the Holocaust. Solomon, Daniel L. Trump Doesn't Mention Jews in Holocaust Remembrance Day Message, *Fast Forward: Quick reads through a Jewish lens*, 27 Jan. 2017. [online], <<http://forward.com/fast-forward/361425/trump-doesnt-mention-jews-in-holocaust-remembrance-day-message/>> Accessed: 22.06.2017. On a larger scale, however, these efforts risk backfiring to the extent the Trump administration learns to express divisive ideas in more conventional ways, as for example, in his February 28, 2017 address to Congress, which won kudos from his critics for its supposed moderation even though it had a number of extreme ideas – including singling out undocumented immigrants who commit crimes. See Bouie, Jamelle. No, Trump's Speech Was Not "Reaganesque." *Slate*, 1 Mar. 2017. [online] <[http://www.slate.com/articles/news\\_and\\_politics/politics/2017/03/no\\_trump\\_s\\_speech\\_was\\_not\\_reaganesque.html](http://www.slate.com/articles/news_and_politics/politics/2017/03/no_trump_s_speech_was_not_reaganesque.html)> Accessed: 22.06.2017.

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