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A Shifting Balance: Freedom of Expression and Hate-Speech Restriction

Jean Stefancic* &
Richard Delgado**

INTRODUCTION

This timely book appears just as the controversy over hate speech is reaching crescendo proportions. In the United States, scholars, journalists, civil rights activists, and constitutional law experts are sharply divided over the wisdom and legality of campus conduct codes that regulate hateful speech.¹ States and cities are experimenting with statutes and ordinances penalizing hate-motivated behavior.² Recently, the Canadian Supreme Court upheld statutes penalizing pornography³ and certain types of hate speech.⁴ The United States Supreme Court took a different direction. In *R.A.V. v. City of St. Paul*,⁵ the Court declared unconstitutional a disorderly conduct ordinance under which the defendant had been convicted of cross-burning.

Striking A Balance is a groundbreaking collection of papers delivered at the first major international conference on hate speech and freedom of expression.⁶ Published in London by ARTICLE 19, International Centre Against Censorship, the book features an impressive list of contributors, among them major figures in the international human rights community, delegates from European and Third World nations, and legal scholars from

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1. Compare Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484 (opposing regulation); Chester Finn, *The Campus: An Island of Repression in a Sea of Freedom*, Commentary, Sept. 1989, at 18 (opposing regulation); George Will, *Liberal Censorship*, Wash. Post, Nov. 5, 1989, at C7 (opposing regulation) with Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343 (1991) (supporting regulation); Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 (supporting regulation); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) (supporting regulation).

2. E.g., Laura Shapiro, *When Is a Joke Not a Joke? Shouts and Swastikas are Getting the Last Laugh*, Newsweek, May 23, 1988, at 79. For discussion of efforts to regulate hard-core pornography, see Andrea Dworkin & Catharine MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (1988). Readers interested in up-to-date information and statistics on hate crimes may communicate with the Nat'l Inst. Against Prejudice & Violence, located in Baltimore, MD.

3. *Regina v. Butler*, 89 D.L.R. 4th 449 (1992) (Can.).

4. *Regina v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

5. 112 S. Ct. 2538 (1992).

6. *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (Sandra Coliver ed., 1992) [hereinafter *Striking a Balance*].

the United States and other countries. All are struggling with the challenge encompassed in balancing liberty and community; freedom of expression and freedom from discrimination; and the marketplace of ideas and the right of minority groups to self-respect.⁷

This essay reviews these efforts with two hopes in mind. First, the experiences of these other nations might shed light on disputed factual premises that figure prominently in our own national debate. For example, opponents of regulation often argue that suppressing racism will cause it to go underground, only to emerge in even more virulent forms later.⁸ For their part, proponents of regulation assert that without legal rules and prohibitions, bigotry and intolerance will simply increase.⁹ The experiences of the various other countries documented in *Striking A Balance* enable us to begin analyzing such assertions.

Second, this collection of documents can clarify a theoretical insight that some scholars have put forward. They point out that hate speech is most pernicious when concerted and deployed by a powerful majority against a relatively weak minority.¹⁰ This suggests that homogeneous nations with a strong sense of community may not need strictly drawn rules regulating what may or may not be said.¹¹ These cultures may more easily tolerate scathing speech because there is less likelihood that it will contribute to serious repression. The essays, international standards, country experiences, and policy statements from human rights organizations presented in *Striking A Balance* enable us to evaluate this hypothesis.

Part I of this essay gives a brief description of the organization and contents of the book, focusing particularly on ways in which the international community has attempted to balance liberty and equality. Part II explores lessons the United States can learn from those experiences, paying special attention to their impact on disputed factual premises similar to the ones mentioned above. Part III addresses the communitarian insight. Do the accounts in *Striking A Balance* bear out the supposition that the more tightly integrated a community, the more tolerant its citizenry, the less the need for hate-speech controls? Can nations that are sharply divided into dissenting factions of race, ethnicity, or religion tolerate scathing speech, or is some form of regulation an essential aspect of maintaining community?

7. See *id.* at 413-17. For notes on the sponsoring organization, see *id.* at iv, viii-ix.

8. See *infra* note 17 and accompanying text.

9. See *infra* notes 105-07 and accompanying text.

10. *E.g.*, Delgado, *supra* note 1, at 383-84.

11. See *infra* Part III for further discussion of this hypothesis. On recent assessments of the United States's progress in this area, see, e.g., Andrew Hacker, *Two Nations* (1992) (arguing that some progress has been made, yet many barriers remain); Leon Higginbotham, *In the Matter of Color* (1978) (same); Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987) (arguing that much work remains to be done). On the recent factionalization of Europe, see Thom Shanker, *New Iron Curtain of Hate Enshrouds Eastern Europe*, *San Francisco Examiner*, Sept. 20, 1992, at B6.

I

The book begins with two overviews of the international situation, one by Kevin Boyle, Professor of Law and Director of the Human Rights Centre, University of Essex,¹² the other by Paul Gordon, Senior Research Officer, Runnymede Trust.¹³ Boyle's essay succinctly poses the issue with which the remainder of the book is concerned: namely, how recent outbreaks of racial, ethnic, and religious hostilities require society to reconsider the relationship between freedom of expression and freedom from verbal harassment for minority groups.¹⁴ He notes that the United States stands virtually alone in extending freedom of expression to what has come to be called hate speech.¹⁵ Most countries tolerate some degree of regulation. But First Amendment jurisprudence and our unique "history as a society born in rebellion against . . . censorship" militate against regulation of any but the most pernicious forms of speech in the United States.¹⁶ Boyle reminds us that "[t]here is a communal as well as an individual dimension to human rights and freedoms," and that "[T]he individual's right to promote racist views must . . . be defended [not only] in terms of individual rights, but in terms of the communal interests in equality."¹⁷ He implies that a sensible society would limit speech when it begins to endanger these latter interests.¹⁸

A second essay, by Paul Gordon, focuses on European racism and xenophobia.¹⁹ Gordon describes the nature and extent of racist violence, identifies the affected parties, and relates these conflicts to the larger political context of emerging nationalism and the end of the Soviet empire.

A final group of essays discusses international treaties and declarations concerning freedom from discrimination and freedom of expression, such as the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR).²⁰ Commentaries by noted human rights advocates, including Karl Josef Partsch, Danilo Turk, and Louis Joinet, examine the history of these documents and their current interpretations.²¹ Pertinent excerpts from some of them appear in Annexe A. Declarations and reservations to CERD and ICCPR by various countries appear in Annexe B.

Although the preceding part will undoubtedly prove of great use to scholars wishing to acquaint themselves with the international dimension of

12. Kevin Boyle, Overview of a Dilemma, *in* *Striking a Balance*, supra note 6, at 1-8.

13. Paul Gordon, Racist Violence: the Expression of Hatred in Europe, *in* *Striking a Balance*, supra note 6, 9-17.

14. See also Shanker, supra note 11, at B6.

15. Boyle, supra note 12, at 4-6.

16. *Id.* at 4.

17. *Id.* at 7.

18. *Id.* at 5-8; see also Sharyn Ch'ang, Legislating Against Racism, *in* *Striking a Balance*, supra note 6, at 87, 100 (discussing Australia's similar perspective).

19. Gordon, supra note 13, at 9-17.

20. *Striking a Balance*, supra note 6, at 21-71.

21. *Id.* at 21-28 (Partsch), 35-54 (Turk & Joinet).

hate-speech law, the next part, an imposing 240-page compilation of Country Experiences, is likely to prove of greater benefit to scholars studying the problem in the United States.²² In this section, twenty-five legal scholars and human rights activists present the experiences of fifteen countries in coping with racial, ethnic, and religious violence, and the legal framework each has put into place to deal with the problem. The countries include: Argentina, Australia, Canada, the Commonwealth of Independent States (formerly the Soviet Union), Denmark, France, Germany, India, Israel, the Netherlands, South Africa, Sri Lanka, the United Kingdom, the United States, and Uruguay.

Following the country reports, policy statements appear from eleven national human rights organizations, such as the ACLU (U.S.) and ARTICLE 19 (UK), and from ethnic and religious defense organizations such as the American-Arab Relations Committee and the Anti-Defamation League of B'nai B'rith.²³

A short concluding part contains essays evaluating laws against insult and incitement, including a summary by the book's editor, Sandra Coliver, an American lawyer who serves as legal officer to ARTICLE 19 in London.²⁴ Michael Banton, Professor of Sociology, University of Bristol, United Kingdom, discusses the interrelation of racially-insulting speech and patterns of social interaction. Professor Banton concludes that laws against racism may create norms and shape behavior.²⁵ The book ends with various annexes, a selected bibliography, and notes on contributors.

II

The debate in the United States on hate speech and hate crimes is heated and still unresolved.²⁶ The recent *R.A.V.* decision signaled, in no uncertain terms, that regulations of insulting or terror-provoking symbols and expression must be carefully constructed and drafted.²⁷ Courts will examine searchingly any empirical premises that underlie these regulations. Similarly, equality concerns which lie at the heart of the controversy require that those arguing against restraints on hate speech justify their own premises and claims.²⁸ Both sides of the debate make a number of assertions with great confidence, yet without much reference to empirical data.²⁹ The experiences of other nations can illuminate the truth or falsity

22. *Id.* at 75-312.

23. *Id.* at 315-46.

24. Sandra Coliver, *Hate Speech Laws: Do They Work, in Striking A Balance*, *supra* note 6, at 363-74. Ms. Coliver, a U.S.-born lawyer, received her law degree from U.C.-Berkeley and has taught law in a number of schools in the San Francisco area. *Id.* at 413 (Notes on Contributors).

25. *Id.* at 349-57.

26. *See supra* note 1 and accompanying text.

27. In *R.A.V.*, the Court held the St. Paul ordinance irredeemably content-based and not adequately narrowly tailored to promote the compelling state interest of protecting basic human rights. *R.A.V. v. City of Saint Paul*, 112 S. Ct. 2538, 2544-45, 2547-50 (1992).

28. *See Delgado*, *supra* note 1, at 345-48, 381-83; Boyle, *supra* note 12, at 1-8.

29. *See Delgado*, *supra* note 1, at 358-61, 364-71 (discussing these assertions).

of particular empirical assertions.

A. ASSERTIONS ASSOCIATED WITH THE ANTI-REGULATION POSITION

1. *Suppressing racist speech will cause it to go underground only to surface in more virulent forms later.*³⁰

The experiences detailed in the book do not sustain this “hydraulic” view of racism frequently put forward by opponents of regulation in the United States.³¹ Most countries find that all but a small group of extremists accept some regulation, agreeing that such regulation is a step toward restoring and maintaining racial harmony. The sole exceptions are two countries with long histories of racial or ethnic oppression, South Africa³² and Sri Lanka,³³ where censoring hate speech does seem to increase the incidence of ethnic hatred.

2. *Hate speech is not the root of the problem; regulating it is a diversion.*³⁴

Some opponents of United States regulation of hate speech urge that laws against racial insults divert attention from what should be the main goal—getting at the core of discrimination itself.³⁵ They maintain that better means, such as education, counseling, teaching, voluntary restraint, and civil rights litigation, are available.³⁶ Focusing on hate-speech regulation can deflect us from other more important tasks.³⁷ Though most countries appear to agree that these other measures are necessary and useful, only two (Israel and South Africa) argue that “efforts to fight racism should be concentrated on racist and discriminatory actions”³⁸ and not hate speech itself. Most nations appear to find that regulating hate speech is a useful adjunct to other measures for maintaining intergroup harmony. The experiences of most of the nations covered in the book appear not to support a “diversion” charge.

30. *Striking a Balance*, supra note 6, at 308-09, 322.

31. *E.g.*, Nadine Strossen, Address to Judicial Conference, Tenth Circuit Court of Appeals (July 1992); Delgado, supra note 1, at 372 (discussing this view); *see also* *Striking the Balance*, supra note 6, at viii—Frances D’Souza, Director, ARTICLE 19 puts forth this view (ARTICLE 19 is a London-based international organization dedicated to preserving freedom of expression. *Id.* at iv, viii-ix).

32. *Striking a Balance*, supra note 6, at 222, 235-36, 237.

33. *Id.* at 242.

34. *Id.* at 305, 312, 322.

35. *See* Delgado, supra note 1, at 361.

36. *See* supra note 17 and sources cited therein.

37. *Id.*

38. *Striking a Balance*, supra note 6, at 195, 235.

3. *Societies inevitably turn rules against race hatred against minorities or political dissidents*³⁹

The experience of more progressive countries like Canada does not bear out the claim that regulation backfires—harming those it is designed to protect.⁴⁰ In more repressive societies, however, such as South Africa and the former Soviet Union, ruling majorities have deployed laws against hate speech to stifle minority-group members and blacks who spoke out against oppression.⁴¹ Under apartheid, virtually all reported prosecutions were of those on the left wing of the political spectrum; black victims of racial abuse by whites rarely found protection in these laws.⁴² Israel⁴³ and Sri Lanka⁴⁴ report similar experiences. Whether the United States experience would follow suit remains an open question.

4. *Hate-speech regulation will lead to further erosion of freedom of speech.*⁴⁵

Many in the United States who take the position that hate-speech laws are unwise argue that such measures inevitably lead down the “slippery slope” to greater regulation of speech.⁴⁶ Although some of the essayists mentioned this concern, no country report did. Indeed, the experiences of Canada, Denmark, France, Germany, and the Netherlands—countries whose commitment to freedom of inquiry arguably is comparable to that of the United States—imply that limited regulation of hate speech does not invariably cause deterioration of the respect accorded free speech.⁴⁷ Citizens seem to regard anti-hate-speech laws as limited exceptions comparable to libel or official-secret rules necessary to preserve a decent society.

5. *Talking back is better.*⁴⁸

Some opponents of hate-speech regulation argue that laws are substitutes for a much preferable response to hate speech, namely, encouraging victims to speak out and denounce the practice.⁴⁹ This argument appears not to be in broad currency as no country report addressed this assertion. In the meantime, recent reports of minority-group members who were attacked and seriously injured as a result of talking back to their harassers cast doubt on the wisdom of this counsel.

39. *Id.* at 259, 307.

40. *Id.* at 109.

41. *Id.* at 138, 221.

42. *Id.* at 223.

43. *Striking a Balance*, *supra* note 6, at 194.

44. *Id.* at 240.

45. *Id.* at 304.

46. *E.g.*, Strossen, *supra* note 31; Delgado, *supra* note 1, at 371 (discussing the “snowball effect”).

47. *See Striking a Balance*, *supra* note 6, at 106-29, 140-70, 201-07.

48. *Id.* at 309-10, 322.

49. Strossen, *supra* note 31; *see* Jon Wiener, *Racial Hatred on Campus*, *The Nation*, Feb. 27, 1989, at 260, 262 (advocating that university leaders also speak out).

6. *Laws against hate speech will chill discussion, especially in sensitive settings like university campuses.*⁵⁰

This argument, analogous in structure to the "slippery slope" argument discussed earlier, receives similar treatment in the country reports. France⁵¹ and Germany⁵² argue that academic freedom is not absolute and therefore must be weighed against such countervailing values as the human dignity of students. In the new South Africa, however, "race issues and politics substantially overlap. . . . Regulation of . . . speech and publications would, therefore, [unacceptably] chill political debate within that country."⁵³ Like other slippery-slope concerns, the likelihood that these laws will chill vital expression depends on how societies view hate speech. If it is perceived as abhorrent and far removed from speech's core functions, most will believe they may regulate it without chilling other speech.

7. *Criminal prosecution of hate speech is not effective; other means should be tried first.*⁵⁴

Many opponents of hate-speech regulation in the United States cite the fear that criminal prosecution is too rigid. Moreover, they suspect that it will prove ineffective because judges and others will shy away from interpreting the laws as legislators designed them to be interpreted.⁵⁵ Nine countries addressed this concern, most agreeing with the proposition cited. Australia found that there was a generalized reluctance to convict.⁵⁶ In Canada there were few prosecutions for a long time. Recently, however, more have occurred, coinciding with an increase in racial unrest in that country.⁵⁷ In the recent case of *Regina v. Keegstra*,⁵⁸ the Canadian Supreme Court upheld a section of the national criminal code that penalized various forms of hate speech in the case of a teacher who described Jews in disparaging terms to his pupils and declared that the Holocaust did not happen. In Russia, prosecutors have not enforced laws against nonviolent acts provoking ethnic hatred; hostile speech is virtually never prosecuted.⁵⁹ In Denmark,⁶⁰ Germany,⁶¹ the Netherlands,⁶² England,⁶³ Northern

50. *Striking a Balance*, supra note 6, at 304.

51. *Id.* at 155.

52. *Id.* at 168.

53. *Id.* at 234; *but see* Gilbert Marcus, *Racial Hostility: The South African Experience*, in *Striking a Balance*, supra note 6, at 208-22 (pointing out that in the old regime, hate-speech laws were used actively, but always against blacks).

54. *Striking a Balance*, supra note 6, at 307, 321-22.

55. Strossen, supra note 31 (arguing that such laws are likely to backfire).

56. *Striking a Balance*, supra note 6, at 99, 104.

57. *Id.* at 121.

58. [1990] 3 S.C.R. 697 (Can.).

59. *Striking a Balance*, supra note 6, at 133.

60. *Id.* at 141.

61. *Id.* at 164.

62. *Id.* at 206.

63. *Id.* at 248, 257, 259.

Ireland,⁶⁴ and generally throughout Europe, prosecutions are infrequent. In sum, most countries do appear to eschew harsh criminal sanctions as the main line of defense against hate speech and the milder forms of hate crime. Restrictions are more likely to be enforced if civil in nature, or, if criminal, only if they contain mild penalties. The recent decision in *R.A.V.* bears out this generalization. The municipal ordinance provided relatively severe penalties for bias-motivated disorderly conduct as mild as writing graffiti.⁶⁵ The United States Supreme Court recently declared the ordinance unconstitutional.

8. *Prosecution makes hatemongers into martyrs.*⁶⁶

Other opponents of hate-speech regulation argue that punishing utterers of racial insult and invective simply focuses attention on hatemongers and enables them to paint themselves as martyrs,⁶⁷ making matters worse. If acquitted, they claim vindication; if convicted, they portray themselves as hounded and harassed victims of intolerance. The country reports contained in this volume provide some support for this assertion. In two countries, Canada⁶⁸ and the United Kingdom,⁶⁹ prosecution of hate groups produced this effect. Yet, other countries did not report such experiences. Moreover, Great Britain and Canada did not see fit to discontinue their approach to regulation because of the occasional racist martyr it produced. The country experiences, therefore, offer only minor support for this supposition.

B. ASSERTIONS ASSOCIATED WITH THE PRO-REGULATION POSITION

1. *Racism is increasing throughout the world and needs to be addressed through law.*⁷⁰

Most United States proponents of regulation, and even some detractors, believe that hate speech and hate crimes are increasing. In particular, many believe that the last few years have witnessed a strong upsurge.⁷¹ Reports from nine other countries verify that this is so. Indeed, since 1990, racial and religious incitement appears to have increased around the world, most markedly in democratic societies.

64. *Striking a Balance*, supra note 6, at 249.

65. The punishment could include five years in prison. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2541 n.1 (1992).

66. *Striking a Balance*, supra note 6, at 308, 322.

67. Strossen, supra note 31; Michael Greve, Address at Michigan State University Dep't of Political Science (Oct. 1992).

68. *Striking a Balance*, supra note 6, at 122.

69. *Id.* at 259.

70. *Id.* at 284.

71. See supra note 1 and sources cited therein; Ronna Schneider, Hate Speech in the United States, in *Striking a Balance*, supra note 6, at 269; Gordon, supra note 13, at 9-17 (arguing that racism is increasing rapidly in Europe; the increase may even be under-reported by a factor of nine or ten).

In Canada, a recent unprecedented rise of anti-Semitism, Holocaust denial, and revisionism resulted in the historic litigation of a trilogy of cases.⁷² An escalation of inter-ethnic conflict has emerged in the former Soviet Union,⁷³ while a wave of xenophobia and violence against immigrants and refugees has swept over Denmark.⁷⁴ In France, Africans and Jews are targets for group libel and incitement.⁷⁵ Publications advocating Holocaust revisionism and outbreaks of violence against aliens, asylum seekers, Jews, and Gypsies are occurring more frequently in Germany⁷⁶ and throughout Europe.⁷⁷ India, though remarkably successful in creating a diverse democratic society, nonetheless has suffered considerable incitement to religious and communal hatred in recent years.⁷⁸ Jewish-Arab hostilities in Israel also increased over the past several years.⁷⁹ Sri Lankans —Buddhists, Tamils, and Muslims —have struggled through an ethnic and religious civil war during the past seven years.⁸⁰ In the United Kingdom, an estimated 70,000 racist attacks occur per year and hate propaganda is increasing.⁸¹ In Europe, one in three citizens believes that there are too many persons of other races or nationalities living in that citizen's country; only 19% disapprove completely of racist movements.⁸² In Austria, nearly one-half believe the Jews were partly to blame for their own prosecution.⁸³ The German reporter described the situation in his country as a "frightening revival."⁸⁴

2. *Suppressing hate speech will reduce the underlying impulse: racism.*

Though this is a leading position in the psychological literature,⁸⁵ the country reports offer it little support. Although attaching penalties to any conduct presumably causes at least some actors to refrain from it, the worldwide increase in racism and other acts of group-hatred dwarfs this effect. No society reported that adoption of anti-hate laws produced a dramatic reduction in hate crimes and speech, much less in racism itself. It is possible, of course, that without laws the increase would be even greater. But the efficacy of hate-speech regulation must remain an open question at the present.

72. *Striking a Balance*, supra note 6, at 123-24.

73. *Id.* at 130.

74. *Id.* at 140.

75. *Id.* at 148.

76. *Id.* at 159, 165.

77. *Striking a Balance*, supra note 6, at 9-17.

78. *Id.* at 171, 178-79.

79. *Id.* at 182.

80. *Id.* at 239.

81. *Id.* at 257.

82. *Striking a Balance*, supra note 6, at 15.

83. *Id.*

84. *Id.* at 159.

85. See Gordon Allport, *The Nature of Prejudice* 470-71 (25th Anniversary ed. 1979) (arguing that laws deter whomever is deterrable).

3. *Hate speech harms its victims.*⁸⁶

The efficacy of racism, however, is not in question. Though some disagree on the extent of the harm, few disagree that hate speech injures its victims. The Supreme Court of Canada acknowledged this by using a harm-based rationale to justify criminalizing hate speech in the *Keegstra* decision.⁸⁷ The French country report recognized that, in addition to psychological and moral harm, hate speech damages the individual and collective reputations of its victims.⁸⁸ Germans view a racial or ethnic attack as an affront to a person's core identity.⁸⁹ Uruguay professes to have one of the few laws that expressly acknowledges the pain caused by racist words or acts.⁹⁰ The Netherlands recognizes racist statements as insulting and distressing;⁹¹ South Africans, that the racial insult "harms souls";⁹² and in the United Kingdom, racial vilification is a form of defamation.⁹³

4. *Hate speech harms society.*⁹⁴

Canadian, French, and German statutory documents affirm a corollary proposition about the broader effect of hateful speech on the community. The *Keegstra* decision notes that hate propaganda can harm society as a whole.⁹⁵ In France, the preamble to a longstanding statute on group libel declares that such "aggression is directed against the whole body politic and its social and moral fabric."⁹⁶ Article 131 of the German Criminal Code seeks to protect the "social harmony" endangered by incitement to racial hatred. Common law in the United Kingdom restricts racist speech in part to avoid harm to the public order.⁹⁷

5. *Regulating hate speech will send a symbolic message to potential offenders.*⁹⁸

Although it is difficult to show any immediately discernible deterrent effects of anti-hate-speech laws, many societies remain convinced that they serve an important symbolic function. Hate-speech laws place offenders on notice that racial vilification will earn official disapproval. Hate-speech laws also strengthen those in the society who promote racial harmony. The reporter for the Soviet Union writes that laws against hate speech are an

86. *Striking a Balance*, supra note 6, at 290-91, 293-94.

87. [1990] 3 S.C.R. 697 (Can.).

88. *Striking a Balance*, supra note 6, at 156.

89. *Id.* at 160, 163, 169.

90. *Id.* at 200.

91. *Id.* at 204.

92. *Id.* at 209.

93. *Striking a Balance*, supra note 6, at 262.

94. *Id.* at 287, 290.

95. [1990] 3 S.C.R. 697, 745-49, 758, 811-12 (Can.).

96. *Striking a Balance*, supra note 6, at 156.

97. *Id.* at 245.

98. *Id.* at 294.

essential tool for curbing ethnic hostilities.⁹⁹ Reporters for Israel declare that its new law “has reinforced anti-racist ideology and influenced modes of behavior through its normative proscription against racism.”¹⁰⁰ A government report from the Netherlands states that the purpose of its hate-speech regulation is to bring about a change in social attitudes.¹⁰¹ British¹⁰² and Australian¹⁰³ officials justify the outlawing of hate speech by emphasizing that proscription symbolically expresses official condemnation of bigotry and ethnic hatred.

6. *Racism unchecked gets worse.*

Some proponents of hate-speech regulation offer this argument,¹⁰⁴ which in some respects mirrors the slippery slope argument opponents of regulation raise.¹⁰⁵ The country reports provide evidence that racism is increasing around the world,¹⁰⁶ but it is not clear what role laws against hate speech play in checking that increase. A few country reports, as well as the editor’s conclusion,¹⁰⁷ suggest that a coordinated program of anti-racist measures, including speaking out, strict enforcement of existing laws against harm to persons or property, and regulations aimed at the most virulent forms of hate speech, may do some good. But the validity of even this supposition is open to question. There seems to be no magical cure for the current tide of racism.

III

As was mentioned in the Introduction, recent scholarship sheds light on how expression and interpretation are interwoven with the idea of community. Robert Post writes that community is “a social formation that inculcates norms into the very identities of its members.”¹⁰⁸ Frank Michelman echoes the same theme when he states:

This view [civic republicanism] of the human condition implies that self-cognition and . . . self-legislation must, to a like extent, be socially situated; norms must be formed through public dialogue and expressed as public law. Normative reason . . . cannot be a solitary activity. Its exercise requires knowledge, including self-knowledge, obtainable only by encounter with different outlooks in public argument. Thus its requisite forum is ‘a political com-

99. *Id.* at 135.

100. *Id.* at 191.

101. *Striking a Balance*, *supra* note 6, at 207.

102. *Id.* at 254-55.

103. *Id.* at 104.

104. *E.g.*, Delgado, *supra* note 1, at 346; Lawrence, *supra* note 1, at 468-69. *See* Boyle, *supra* note 12, at 4; Gordon, *supra* note 13, at 15-16.

105. *See supra* Part IIA-4.

106. *See supra* Part IIB-1.

107. *Striking a Balance*, *supra* note 6, at 363, 365-66, 374.

108. Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 *Harv. L. Rev.* 603, 645 (1990).

munity of equals'¹⁰⁹

If this is so, it seems to follow that a culture that has achieved a desirable measure of community would resist perceived threats to that community, including ones from hate speech. Hate speech vilifies and excludes its victims. When class-based, as it generally is, it threatens to fracture community by raising levels of resentment and hostility. Moreover, as minority scholars such as Mari Matsuda¹¹⁰ and Charles Lawrence¹¹¹ have pointed out, hate speech, when concerted and extended over time, may create enduring castes that will prove highly resistant to change.¹¹²

A reasonable hypothesis, then, is that a nation which values a pre-existing harmony and fears an upsurge in racism or other types of group-hatred, will act reflexively to curb hateful utterances that endanger its own interpretive community. Certainly, these restorative measures could take many forms, only one of which is legal regulation.¹¹³ Yet, societies with a history of respect for legality are likely to turn to solutions of this sort if the threat to the community is persistent.¹¹⁴

The case for this proposition is not so much empirical as interpretive. Yet, viewing the responses of societies to ethnic and religious unrest as communities striving for self-preservation does seem to shed light on the complex web of arguments, counter-arguments, and resistance laid out in the United States's controversy and on the pages of the country reports in *Striking A Balance*. India, for example, has both a strong commitment to democracy and a recent history of bitter ethnic and religious conflict. The interpretive community hypothesis predicts that such a society would take strong action to curb violence, discourage racist speech, and restore the fragile interpretive community that is part of its democratic heritage and ideals; indeed, it has done this.¹¹⁵

A country like the former Soviet Union, by contrast, is marked by balkanization and a tradition of centralized repressive government. Such a society would not likely rely on shared expression, dialogue, and other forms of communication to bind itself together. Rather, centralized authority serves that purpose. When intergroup conflict breaks out, the impulse to restore a communicative paradigm will be weak. Consequently, laws against

109. Frank Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 27 n.86 (1986).

110. See Matsuda, supra note 1, at 2335-41 (arguing that revilement is an instrument of class subordination).

111. See Lawrence, supra note 1, at 453-56, 461 (arguing that hate speech is a means by which cultural meanings are inscribed and played out).

112. See *Striking a Balance*, supra note 6, at 177. On the resistance of ethnic imagery to change, see Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 Cornell L. Rev. 1258 (1991).

113. *Striking a Balance*, supra note 6, at 310, 319-22.

114. See *id.* at 197 (using Latin America as an example of such a relatively peaceful ethnic region). Of course, these societies may also value liberty, or free speech, or rugged individualism, and the right of speakers to say whatever is on their minds. In such societies, the response to an upsurge of social animosity is apt to be conflicted and complex. See *infra* notes 119-20 and accompanying text (discussing a matrix of factors).

115. *Striking a Balance*, supra note 6, at 171-81.

hate speech will not be in force. If they are, they are apt to be used eccentrically, as in the case of dissidents.¹¹⁶

Finally, the United States has a history of severe and prolonged friction embracing at least four ethnic minority groups and exceeding that found in most other developed nations.¹¹⁷ At the same time, the United States has a strong commitment to the use of a common language, common traditions, and common ideals and symbols as means of maintaining national identity. The commitment to free and open expression is quite strong. Moreover, the United States was founded, in part, as a reaction to the oppression of crown and church. Freedom of expression was a core Enlightenment value shared by many of the nation's Framers.¹¹⁸ In this respect, the United States resembles nations such as Australia and South Africa, which either do not enforce anti-hate laws or do so grudgingly. In the United States, demographic changes and the increasing political force of minorities, combined with diversity and multicultural movements on campuses, indicate that this unsettled situation will likely continue into the future until a new interpretive community and First Amendment paradigm are finally agreed upon.

This insight leads to a conclusion that the editors and authors of *Striking A Balance* may have overlooked. There may be no single balance that will work for all cultures, or even for the same culture at different times. The appropriate balance between equality and freedom of expression may be a complex, shifting matrix that includes several different forces: the value placed on community historically and aspirationally; the value placed on equality among the various national groups; the perception that minority populations are unfairly excluded or stigmatized; the degree to which speech is considered an important individual prerogative, rather than a means of achieving community; and finally, the perception that minority groups lack the means to assert and defend themselves against vilification.

A slight change in the strength of any of these components in a given setting may cause the balance and attitudes toward hate-speech regulation to shift. For example, many university campuses have witnessed an increase in the number of students of color and women seeking and gaining admission coupled with increased competition for slots and financial support. All the while, a sharp debate rages about the role of multiculturalism in admission, curriculum, and faculty employment. Racist speech and insults occur frequently. Institutions where these divisive events occur are likely to turn to speech regulation to preserve or restore peace and community. Yet, these same measures will draw fire from proponents of radical individualism¹¹⁹ and from those who benefit from the current

116. *Id.* at 130-35; *see also id.* at 238-39.

117. Delgado & Stefancic, *supra* note 112, at 1261-75. For histories and discussions of African American experiences, see Higginbotham, *supra* note 11; Bell, *supra* note 11.

118. *E.g.*, John Milton, *The Areopagitica* (Everyman's Library ed., 1927) (classic statement of case for freedom of expression).

119. Martin Redish & Gary Lippman, *Freedom of Expression and the Civic Republic Revival in Constitutional Theory: The Ominous Implications*, 79 *Cal. L. Rev.* 267, 302-03

regime.¹²⁰ The balance, then, is inherently unstable and likely to provoke repeated challenges.

CONCLUSION

To return briefly to the interpretive community hypothesis, it seems that liberty, including free speech, and community exist in a reciprocally dependent tension. Each presupposes the other. As defenders of hate-speech regulation argue, dialogue is fruitless without something approaching equality among the speakers.¹²¹ Defenders of protected speech point out, with equal justification, that free speech is an important instrument for achieving social justice—equality presupposes liberty.¹²² Either value may be used rhetorically, or in the real world, to suppress the other. The demand for community may lead to conformity, censorship, and group-think. Speech, if misused, can be used concertedly to oppress minority groups.

Thus, neither value seems logically prior to the other; each is necessary for the full expression of the other. Interpretive communities are necessary for speech; speech is a necessary tool to restore, adjust, and refine community. *Striking A Balance* lays out in its pages a dramatic portrait of societies struggling to reach that balance in light of their own needs, histories, and ethnic compositions. Perhaps the most valuable lesson to be gleaned from this valuable collection of essays is that there are no simple answers. Readers should distrust the facile urgings of both those who would dismiss the community and equal protection values at stake in the controversy over campus anti-racism rules as well as those who give little weight to the vitally important, historically-rooted values of free expression and free speech.

(1991); Nat Hentoff, *Free Speech on the Campus*, 53 *The Progressive* 12 (May 1989); Voodoo Constitutional Law, *Village Voice*, Aug. 29, 1989, at 20.

120. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *Harv. L. Rev.* 518 (1979) (arguing that the self-interest of elite groups accounts for most cases of racial change).

121. See Lawrence, *supra* note 1, at 467. *But see* Nadine Strossen, *Balancing the Rights of Expression and Equality: A Civil Liberties Approach to Hate Speech on Campus*, in *Striking a Balance*, *supra* note 6, at 311-12 (discussing and rejecting this view).

122. Strossen, *supra* note 1, at 484 (arguing in general that free speech is essential to democracy).