

Criminalising Hate Speech

Eric Heinze
Editor

Criminalising Hate Speech

A Comparative Study



ASSER PRESS



Springer

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ISBN 978-94-6265-653-6 ISBN 978-94-6265-650-5 (eBook)
<https://doi.org/10.1007/978-94-6265-650-5>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

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The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

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Foreword

This important volume constitutes an invaluable, unique resource for exploring the increasingly significant topic of “hate speech” and its regulation all over the world, in both traditional and online media.

The quotation marks underscore a point that is highlighted in the book’s illuminating Introduction by its editor Eric Heinze, drawing upon his service as General Rapporteur on the Criminalisation of Hate Speech for the International Academy of Comparative Law. As Prof. Heinze observes, there is no single, universally accepted definition of “hate speech,” and there are “many uncertainties plaguing” that concept. Nonetheless, as Prof. Heinze also notes, the term itself—which “only gained currency among jurists and scholars in the 1980s”—has since then “rapidly internationalised and is now acknowledged across the globe, often in the form of directly translated neologisms.” Even more fundamentally, notwithstanding differing specific definitions in various legal regimes, this term has received “a core of consistent usage... across national jurisdictions and within leading international organisations.”¹

In a nutshell, mirroring the way the term tends to be used in everyday speech, multifarious legal regimes around the world apply it to expression that conveys discriminatory views about people on the basis of various personal characteristics. Beyond *reflecting* discriminatory ideas, such speech is widely feared to *foster* such ideas, which in turn could fuel discriminatory conduct, including violent conduct. Correspondingly, widespread restrictions on such expression reflect the hope that these restrictions could promote equal rights. In contrast, those who advocate only narrow restrictions on hate speech, including US Supreme Court Justices from across the ideological spectrum throughout the past half-century, maintain that broader restrictions are the worst of both worlds: they abridge free speech rights but do not materially promote equality rights. These debates have become even more consequential in the context of burgeoning online expression, including social media, and will be enhanced by the significant information that this book presents.

¹ See this book, p. 3.

The Book's Contributions to the Ongoing Debates

This book gathers together summaries and analyses of the legal authorities governing hate speech and its regulation in more than twenty diverse countries primarily in Europe, but also representing four other continents (Africa, North America, Oceania, and South America). For each country, the book details the multiple pertinent sources of national and international law, ranging from administrative regulations to international human rights norms, and including judicial rulings that interpret and enforce the standards that other sources of law set out. The authors have responded to a comprehensive questionnaire about these matters, generating each of the country-specific chapters. The result is a treasure trove of transnational information for analyzing and comparing myriad hate speech laws and their enforcement.

In the recent past, the global power of social media and other online platforms has been paralleled by growing efforts to rein in online hate speech in national, regional, and international legal systems. As has been true of all debates about the hate speech concept since its 1980s emergence, the current debates focus on the impact of various regulations, and specifically whether their costs to free speech are justified by their benefits to equality. Essential as these philosophical debates have been, they have been marked by a paucity of systematic empirical evidence about the actual implementation and impact of various hate speech restrictions. Too often, scholars, advocates, and policymakers alike have relied solely or primarily upon assumptions about the relative importance of free speech and equality rights, and about the impact that hate speech regulations would have upon each set of rights. At a more basic level, these debates too often have been waged in the absence of specific information about the array of actual hate speech laws and their enforcement records in various jurisdictions.

Given the lack of information about various countries' hate speech laws and their implementation that have characterized the rampant hate speech debates until now, this new book makes a novel contribution. The collected materials should serve as critical resources for policymakers and scholars who are designing and studying hate speech regulations.

Significant as this book is because of its detailed information about hate speech laws in multiple countries, it also has added significance in laying a foundation for future similar studies. It should inspire future scholarship that chronicles future developments in the jurisdictions that this volume includes.

Having been intensely engaged in both research and advocacy about hate speech restrictions since their advent upon the US legal and cultural scene in the 1980s, I look forward to drawing upon the wealth of newly available source materials that this book collects, to enrich my understanding.

The Real Problem: Not *Whether* But *When* Hate Speech Should Be Restricted

Contrary to the false binary that is too often postulated in debates about hate speech restrictions—*whether* hate speech should be restricted—the real question is *when* it should be restricted. After all, even proponents of the strongest protection for hate speech—including the many US Supreme Court Justices who, since the 1960’s, have consistently held that government may not restrict such speech solely due to its hateful content or message—have nonetheless recognized that government may restrict such speech consistent with what is often called the “emergency” standard: when, considered in context, the speech directly causes or imminently threatens certain specific, serious harm, such as intentionally inciting imminent violence by supportive listeners,² or intentionally or recklessly instilling a reasonable fear on the part of directly addressed audience members that they will be subject to imminent violence.³

Consistent with this book’s comparative lens, it is worth underscoring that even US First Amendment law—which is often described as “exceptionalist” in its strong protection of hate speech⁴—permits government to restrict hate speech in many factual contexts, consistent with the emergency standard. For many proponents of hate speech restrictions, the paradigmatic situation in which they advocate such restrictions is when speakers deliberately aim racist epithets at members of a racial minority group. Therefore, it is noteworthy that such intentionally targeted insulting, discriminatory expression is subject to punishment under four specific First Amendment doctrines that implement the general emergency standard. Elsewhere I have described these as follows⁵:

1. First, as just noted, if the expression intentionally or recklessly makes the targeted persons reasonably fear that they will be subject to violence, it constitutes a punishable “true threat,” even if the speaker did not intend to commit any violent act.
2. Second, if the expression intentionally harries or annoys the targeted persons by intruding upon their privacy or freedom of movement, it constitutes punishable harassment.

² See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 US 886 (1982); *Brandenburg v. Ohio*, 395 US 444 (1969).

³ See, e.g., *Counerman v. Colorado*, 600 US 66 (2023); *Virginia v. Black*, 538 US 343 (2003).

⁴ See, e.g., Jean Stefancic and Richard Delgado, “A Shifting Balance: Freedom of Expression and Hate Speech Regulation.” 78 *Iowa Law Review* 737 (1992–1993); Kevin Boyle, “Hate Speech: The United States versus the Rest of the World?” 53 *Maine Law Review* 487 (2001).

⁵ Nadine Strossen, *Free Speech: What Everyone Needs to Know*, Oxford: Oxford University Press, 2023, 167–168.

3. Third, if the expression intentionally provokes a retaliatory violent response, it constitutes punishable speech, commonly described by the US Supreme Court as “fighting words.”⁶
4. Fourth, when such expression occurs in settings where individuals are required to be—in particular, workplaces or educational institutions—it constitutes punishable “hostile environment harassment.” Accordingly:
 - a. Workplace expression may be punished on this ground if it is sufficiently “severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”⁷
 - b. In educational contexts, expression may be punished on this ground when it is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁸

Non-emergency Restrictions on Hate Speech

The foregoing analysis explains why, in the US as well as in other countries, debates about whether government and social media companies should restrict hate speech have centered largely on whether restrictions should extend even to hate speech that does not pose an emergency (which I dub “non-emergency” speech), given the uncontroversial nature of restrictions on speech that does pose an emergency.

To be sure, non-emergency hate speech may well cause harm, perhaps by undermining equality rights.⁹ Yet the problem with legal restrictions on such speech is that it cannot readily be shown to cause harm in any specific instance, let alone in the aggregate. *All* speech has both positive and negative potential impacts, with its specific impact in any situation turning on countless context-specific factors, ranging from the speaker’s intent to the audience’s perceptions. Given the dual positive and negative potential of all speech—even speech with heinous messages, such as hate speech—it remains uncertain whether any non-emergency hate speech restriction would have a net positive or negative impact, including on the very equality goals that are cited as justifying such restrictions.

By definition, non-emergency speech does not directly and imminently cause or threaten specific serious harm. For that very reason, such speech is not necessarily harmful in any given instance. Consider, for example, racially insulting remarks made by a powerful political figure. Members of the disparaged group, far from experiencing any lessened sense of self-respect, may lose respect for the disparaging speaker, particularly in a society where problems of racism and discrimination can

⁶ *R.A.V. v. City of St. Paul*, 505 US 377 (1992); *Chaplinsky v. New Hampshire*, 315 US 568, 572 (1942).

⁷ *Meritor Savings Bank v. Vinson*, 477 US 57, 67 (1986).

⁸ *Davis v. Monroe County Bd. of Ed.*, 526 US 629, 650 (1999).

⁹ See Strossen, above note 4, at 39–42.

be and are robustly debated. As lifelong gay rights champion Jonathan Rauch wrote: “If someone calls me a ‘fucking faggot,’ I interpret her as telling me that she needs counseling, not that I am a fucking faggot.”¹⁰ By extension, other members of the public, who previously might have supported that politician, could feel alienated and vote against him due to their realization of his racist ideas, which they repudiate.

Moreover, even if non-emergency speech were in fact harmful in any specific situation, it would not necessarily have a net harmful impact in the aggregate, considering all the situations in which it had a positive impact, as well as those in which it had a negative impact. Consider, for example, the notorious Unite the Right demonstrators who marched in Charlottesville, Virginia in 2017, chanting, “You will not replace us” and “Jews will not replace us,” widely understood to refer to conspiracy theories about plans to eliminate or reduce the ethnically white population.¹¹ Was the net impact of this speech positive or negative? Did it, on balance, recruit more white supremacist followers, or did it instead spur more antiracist government initiatives and grassroots activism?

The latter conclusion was supported by none other than Susan Bro, the mother of Heather Heyer, the counter-demonstrator who was murdered when a Unite the Right supporter ruthlessly drove his car into a crowd of counter demonstrators. In 2019, the driver was sentenced to life imprisonment plus 419 years for these crimes, and in 2021 an appellate court confirmed the conviction.¹² In a 2019 interview, Bro strongly supported the Unite the Right demonstrators’ free speech rights specifically because she believed that the airing of their racist views should have a net positive impact on the anti-racism cause for which her daughter’s life had been sacrificed:

[W]e walk into the room blindly if we don’t take the time to know what the other side is thinking... [H]ate groups ...want a violent reaction or they want no one to oppose them at all. [N]either approach is effective... [T]he effective approach is to show up in even larger numbers, without violence, to assertively say,“... We see you, we don’t like you [or] what you’re saying...” And we saw this in the second Unite the Right Rally in Washington when they showed up in very small numbers and ... were met with counter protesters... in... very large numbers, saying “go home, go away.”¹³

Even if we assumed that non-emergency hate speech did have a net harmful impact in the aggregate, non-emergency speech restrictions would not necessarily be justified. Rather, as a logical matter, such restrictions would only be warranted if all the following questions were also answered affirmatively:

1. Do these restrictions materially reduce the harmful impact of the targeted speech?

¹⁰ Jonathan Rauch, *The Constitution of Knowledge: A Defense of Truth* (2021) 202.

¹¹ See, e.g., Sheryl Gay Stolberg and Brian M. Rosenthal, “Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence.” *The New York Times*, Aug. 12, 2017. <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html> (accessed 2 Apr. 2024).

¹² “Man convicted in Virginia rally death in 2017 loses appeal.” *AP News*, Nov. 17, 2021. <https://apnews.com/article/sports-ohio-race-and-ethnicity-racial-injustice-virginia-05301c89ae9785b06c9e793417372fd5> (accessed 2 Apr. 2024).

¹³ Transcription from Bro’s remarks delivered at the *Economist’s* Open Future Festival, Chicago, 5 Oct. 2019.

2. Can these restrictions be written in sufficiently clear and precise language to avoid problems of undue vagueness and substantial overbreadth, which endanger much speech that is not harmful?
3. Do the restrictions' benefits, in terms of reducing the speech's harmful impact, outweigh their unintended costs, including: suppressing non-targeted, non-harmful speech; increasing attention to or sympathy for the targeted speech; and disproportionately silencing marginalized voices and views?
4. Are there no alternative measures, which are less speech-restrictive than the non-emergency speech restrictions, that would be as effective as these restrictions, or more so? For example, how effective is "counterspeech"—i.e., information and ideas that counter discriminatory stereotypes?

Logically, each of these questions should be answered affirmatively as a prerequisite for validating any hate speech restriction. We might well tolerate restrictions on our fundamental free speech rights in order to promote some important benefit, such as decreased discrimination. What is far less clear is whether we should tolerate such restrictions if they cannot promise such a benefit, or if the same benefit could be promoted through an alternative measure, which does not limit our free speech rights. Given this logical appeal, it is not surprising that this analysis is reflected not only in First Amendment law, but also in major United Nations proceedings on free speech, as well as the free speech law in many other countries.¹⁴

This Book's Answers to Some Salient Questions

This book can assist in answering some of the foregoing questions. It lays out the exact language of each country's hate speech restrictions, which can help in answering the second question above: whether such restrictions can be written in sufficiently clear, precise language to avoid problems of undue vagueness and substantial overbreadth. As for the remaining questions, much pertinent information is also provided by many contributors.

One noteworthy instance comes from George Karavokyris's chapter about Greece, discussing the landmark 2015 ruling by the first instance criminal court of Rethymno in Crete, arising from "the first time that an individual had been charged under anti-racism [hate speech] legislation introduced in Greece." The prosecutor had charged Heinz Richter, a German professor of Greek and Cypriot modern history at the University of Mannheim, with "denial of defamatory nature of the Nazi crimes committed against the Cretan people," in his 2011 book, *Operation Mercury: The Invasion of Crete*. In a number of countries, expression that questions certain widely accepted historical facts or interpretations surrounding the Holocaust and other atrocities has been outlawed as hate speech. In effect, such expression is deemed to be

¹⁴ See Nadine Strossen, "United Nations Free Speech Standards as the Global Benchmark for Online Platforms' Hate Speech Policies," 29 *Michigan State International Law Review* 307, 339–346 (2021).

hate speech against the pertinent minority groups, meaning that Holocaust denial is treated as illegal hate speech against Jews and other victims of the Nazis. Yet the inevitably contested nature of such matters was underscored by the Richter case. On the one hand, the University of Crete had decided to celebrate Richter's work by awarding him an honorary degree. On the other hand, his critics, including the prosecutor, found the book "offensive," since it "focused[ed] on the demythification of the resistance on the island during WWII."¹⁵

In a thoughtful opinion, the Greek court declared the law unconstitutional for violating free speech and academic freedom, providing negative answers to two of the key questions noted above: whether the restriction could be written with sufficient narrowness to avoid endangering valuable expression; and whether the restriction's costs outweighed its benefits. Concluding that the Greek law impermissibly "habilitates the parliamentary majority to act as a body of scientific knowledge on historical facts," the court's explication of the unintended adverse consequences of this approach is worth quoting:

[S]cientific bodies are not formed by the current parliamentary majorities and governments, but by researchers and academics... [T]he recognition that public authorities can... impose historical truths... and prohibit alternative interpretations of specific historical events inevitably leads many different groups to seek to use the power of law in order to protect their own versions from any dispute... [L]egislation that criminalises the denial of crimes against humanity can have pernicious unintended consequences for important freedoms. Although these laws are the result of collective disapproval of certain historical atrocities, they can lead down the slippery slope of threatening freedom of speech. Extreme caution is needed to control the irrational elements within the collective consciousness in a way that is compatible with the protection of important liberties such as academic freedom. Our collective search for meaning within our various communities should be open and allow for expressing interpretations of historical facts that might seem idiosyncratic or even offensive and disturbing to the collective narratives of a community in its search for self-understanding.¹⁶

This book also sheds light on two other questions that should be answered affirmatively to justify non-emergency hate speech restrictions. Several chapters question the efficacy of hate speech restrictions in redressing discriminatory attitudes, and point to the advantages of alternative counterspeech approaches. By way of illustration, I will briefly summarize the pertinent conclusions from three chapters.

Barbara Herceg Paksic's chapter on Croatia concludes:

[T]he majority of citizens view the efforts to suppress [hate speech] as ineffective... Given the complexity of the social need to combat hate speech, the primary focus should not solely be on repressive solutions. Prevention, particularly through tailored education, is likely to be more impactful and effective.¹⁷

A similar recommendation is included in the chapter about the Czech Republic by Marek Fryšták, David Čep, and Katarína Kandová. Stressing the widespread prejudices against the Roma minority, which "can be easily turned into hateful motives

¹⁵ See this book, p. 276.

¹⁶ Ibid.

¹⁷ Ibid. at p. 144.

and thus into hate speech,” the chapter notes the importance of counterspeech in addressing these problematic underlying attitudes. Citing examples of constructive counterspeech that NGOs and public television spearheaded, the chapter concludes that “[s]uch activities... can shape public opinion in terms of acceptance of [the] Roma minority.” For example, regarding public television, the authors write: “The very popular Czech Television series MOST!... brought a fundamental turn in the view of the Roma in a certain part of society... Broadcast in 2019... this ethnic group was not shown in a negative light at all.”¹⁸

Another chapter that positively comments on a counterspeech, educational alternative to hate speech restrictions is the chapter about Finland, by Tarja Koskela and Riku Neuvonen. Referring to “[t]he most famous [hate speech] case in Finland,” which involved a magazine that was convicted for disseminating anti-immigrant conspiracy theories, they note the multiple academic studies that have critically examined this case. One of the cited studies supports “the need for more nuanced concepts” of discriminatory “fake news” about minority groups, and instead advocates “improv[ing] media literacy skills to help readers understand various motivations behind framing and reframing processes on different platforms and increasing the ability to understand the wider context.”¹⁹

To be sure, the above-cited passages hardly constitute conclusive evidence about the critical questions they address, yet they make significant contributions to a rigorous, evidence-based examination of the overarching issue that is of such great concern to all of us, worldwide: *Which* hate speech restrictions—as well as which counterspeech measures—will most effectively foster both free speech and equality rights?

New Milford, CT, USA
April 2024

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¹⁸ See this book, p. 164.

¹⁹ See this book, p. 182.

Acknowledgments

The reports gathered in this book are based on materials provided by Special National Rapporteurs commissioned by the International Academy of Comparative Law (IACL) from 2021 to 2023. They provide nothing more than a snapshot in time, but also nothing less. Hate speech is an old problem and shows no sign of disappearing. The problem is recognised internationally yet often has distinctly local dimensions reflected in the chapters.

It was an honour for me to have had the opportunity to present these themes in my capacity as General Rapporteur on the Criminalization of Hate Speech for the IACL General Congress in Asunción, Paraguay, from 23 to 28 October 2022. I owe an enormous debt of gratitude to Prof. Diego P. Fernández Arroyo for this kind invitation, and to Dr. Alexandre Senegacnik who first approached me with this invitation and constantly offered prompt and thoughtful guidance at every phase of the project. As everyone present in Asunción will have noticed, Dr. Senegacnik performed the Olympian task of overseeing this week-long, multi-event conference with unfailing collegiality. Of course, I must also express my great thanks to the entire organising and managing committee for the 2022 conference, which ran seamlessly at all stages, bringing together scholars and jurists from around the world, and I owe an equal debt of thanks for support provided by Dr. Senegacnik's successor Dr. Philippine Blajan, as well as IACL Secretary General Professor Gary Bell.

A personal thanks goes also to Judge Vivian López Núñez of the First Instance Civil Court in Paraguay and to Francisco Segura Riveiro, formerly of the Universidad de Concepción in Chile, for so generously hosting me in a city where my acquaintances were sparse. Many thanks also to the magnificent Prof. Aida Kemelmajer, former Justice of the Supreme Court of Mendoza, Argentina, who kindly chaired one of my sessions *à l'improviste*. A heartfelt thanks is due also to Uladzislau Belavusau of the Asser Institute in the Hague, who offered expert feedback on the question-

naire, which ensured that the Special Rapporteurs could use it as a tool for completing comprehensive responses. Ulad's colleague Frank Bakker of T.M.C. Asser Press also deserves special mention for the interest he has taken in the book, along with copy editors Nettie Dekker and Annika Mäkinen. Of course, and most importantly, I must thank all the authors who took the time to contribute to this volume.

London, UK

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