

THE CONTENT AND CONTEXT OF HATE SPEECH

The contributors to this volume consider whether it is possible to establish carefully tailored policies for “hate speech” that are cognizant of the varying traditions, histories, and values of different countries. Throughout, there is a strong comparative emphasis, with examples, and authors, drawn from around the world. A recurrent question is whether or when different cultural and historical settings can justify different substantive rules without making cultural relativism an easy excuse for content-based restrictions that would gravely endanger freedom of expression.

Essays address the following questions, among others: Is “hate speech” in fact so dangerous and harmful, particularly to vulnerable minorities or communities, as to justify restricting freedom of speech? What harms and benefits accrue from laws that criminalize “hate speech” in particular contexts? Are there circumstances in which everyone would agree that “hate speech” should be criminally punished? Is incitement that leads to imminent danger a more reliable concept for defining restrictions than “hate speech”? Does the decision whether to restrict “hate speech” necessarily entail choosing between liberty and equality? What lessons can be learned from international law?

Michael Herz is the Arthur Kaplan Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University, where he also serves as Co-Director of the Floersheimer Center for Constitutional Democracy. Previously, he clerked for Justice Byron White of the U.S. Supreme Court and for Chief Judge Levin H. Campbell of the U.S. Court of Appeals for the First Circuit. His publications include *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (7th edition 2011, with Breyer, Stewart, Sunstein, and Vermeule), *A Guide to Judicial and Political Review of Federal Agencies* (2005, coedited with John F. Duffy), and articles on a variety of public law topics.

Peter Molnar is Senior Research Fellow and a founding researcher at the Center for Media and Communication Studies at Central European University, where he teaches courses on freedom of speech and access to information. Since 1994, he has taught at several other universities in Hungary including ELTE. He was a leading participant in Hungary’s transition to democracy at the end of the 1980s. He has served as a Member of Parliament (1990–1998), as a principal drafter of the 1996 media law and related laws, and as a member of the National Radio-Television Board’s Complaint Commission (2001–2010), and he has been an activist and legislative advisor. In 2006, he drafted the Budapest Declaration for the Freedom of the Internet, which was signed by many media scholars. In 2007, the staged version of his novel, *Searchers*, won awards for best alternative and best independent play in Hungary. He has been a visiting professor at several American universities, including the Graduate School of Journalism of the University of California at Berkeley and the Cardozo and Columbia Law Schools, and he has been a German Marshall Fellow, twice a Fulbright Fellow, and a Shorenstein Fellow at Harvard University. His publications include “A Failure in Limiting Restrictions on Freedom of Speech: The Case of the Audiovisual Media Services Directive,” in *Freedom of the Media* (Beata Klimkiewicz ed. 2010) and “Towards Better Law and Policy Against ‘Hate Speech’ – The ‘Clear and Present Danger’ Test in Hungary,” in *Extreme Speech and Democracy* (Ivan Hare and James Weinstein eds. 2009).

The Content and Context of Hate Speech

RETHINKING REGULATION AND RESPONSES

Edited by

MICHAEL HERZ

Benjamin N. Cardozo School of Law, Yeshiva University

PETER MOLNAR

Center for Media and Communication Studies, Central
European University



Cambridge University Press & Assessment
 978-0-521-19109-8 — The Content and Context of Hate Speech
 Edited by Michael Herz, Peter Molnar
 Frontmatter
[More Information](#)



Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
 103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9780521191098

© Cambridge University Press & Assessment 2012

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2012

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data

The content and context of hate speech : rethinking regulation and responses / [edited by] Michael Herz, Peter Molnar.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-19109-8 (hardback) – ISBN 978-0-521-13836-9 (paperback)

1. Hate speech. 2. Freedom of speech. I. Herz, Michael E. II. Molnar, Peter. III. Title.

K5210.C66 2011

345°.0256-dc22 2011018357

ISBN 978-0-521-19109-8 Hardback

ISBN 978-0-521-13836-9 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

| | |
|--|----------------|
| <i>Contributors</i> | <i>page</i> ix |
| <i>Foreword: Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)</i> Miklos Haraszti | xiii |
| <i>Foreword: Hate Speech and Common Sense</i> Adam Liptak | xix |
| <i>Acknowledgments</i> | xxiii |
| Introduction | 1 |
| PART I: OVERVIEWS | |
| 1 Interview with Robert Post | 11 |
| 2 Is There a Case for Banning Hate Speech? Bhikhu Parekh | 37 |
| 3 Hate Speech C. Edwin Baker | 57 |
| 4 Interview with Kenan Malik | 81 |
| 5 Hate Speech and the Demos Jamal Greene | 92 |
| 6 On American Hate Speech Law Floyd Abrams | 116 |

PART II: REFINEMENTS AND DISTINCTIONS

- | | | |
|------------------------------------|---|-----|
| 7 | Social Epistemology, Holocaust Denial, and the Post-Millian Calculus Frederick Schauer | 129 |
| 8 | Denying Experience: Holocaust Denial and the Free-Speech Theory of the State Julie C. Suk | 144 |
| 9 | What’s Wrong with Defamation of Religion? Kwame Anthony Appiah | 164 |
| 10 | Responding to “Hate Speech” with Art, Education, and the Imminent Danger Test Peter Molnar | 183 |
| 11 | Reconceptualizing Counterspeech in Hate-Speech Policy (with a Focus on Australia) Katharine Gelber | 198 |
| 12 | Hate Speech and Self-Restraint Arthur Jacobson and Bernhard Schlink | 217 |
| 13 | Hate Speech in Constitutional Jurisprudence: A Comparative Analysis Michel Rosenfeld | 242 |
| 14 | One Step Beyond Hate Speech: Post-Soviet Regulation of “Extremist” and “Terrorist” Speech in the Media Andrei Richter | 290 |
| 15 | Hate Speech and Comprehensive Forms of Life Alon Harel | 306 |
| PART III: EQUALITY AND FEAR | | |
| 16 | Hate Speech and Political Legitimacy Jeremy Waldron | 329 |
| 17 | Reply to Jeremy Waldron Ronald Dworkin | 341 |
| 18 | Waldron, Machiavelli, and Hate Speech Stephen Holmes | 345 |

| | | |
|----|--|-----|
| | <i>Contents</i> | vii |
| 19 | Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws Yared Legesse Mengistu | 352 |
| 20 | Interview with Nadine Strossen | 378 |
| 21 | Interview with Theodore Shaw | 399 |
| | PART IV: INTERNATIONAL LAW | |
| 22 | Does International Law Provide for Consistent Rules on Hate Speech? Toby Mendel | 417 |
| 23 | State-Sanctioned Incitement to Genocide: The Responsibility to Prevent Irwin Cotler | 430 |
| 24 | A Survey and Critical Analysis of Council of Europe Strategies for Countering “Hate Speech” Tarlach McGonagle | 456 |
| 25 | The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression Eduardo Bertoni and Julio Rivera Jr. | 499 |
| 26 | Orbiting Hate? Satellite Transponders and Free Expression Monroe E. Price | 514 |
| | <i>Index</i> | 539 |

Contributors

Floyd Abrams is a partner at the New York City law firm Cahill Gordon & Reindel LLP, where he specializes in free speech litigation.

Kwame Anthony Appiah is Laurance S. Rockefeller University Professor of Philosophy and the University Center for Human Values at Princeton University. In 2010 he was elected to a second term as president of the PEN American Center.

The late **C. Edwin Baker** was the Nicholas F. Gallicchio Professor of Law and Communication at the University of Pennsylvania Law School.

Eduardo Bertoni is Director of the Center for Studies on Freedom of Expression and Access to Information at the Palermo University School of Law in Buenos Aires. From 2002 to 2005 he served as Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights.

Irwin Cotler is a member of the Canadian Parliament and Professor of Law at McGill University. From 2003 to 2006, he was Minister of Justice and Attorney General of Canada.

Ronald Dworkin is Professor of Philosophy and Frank Henry Sommer Professor of Law at New York University.

Katharine Gelber is Associate Professor in Public Policy at the University of Queensland and the past president of the Australian Political Studies Association.

Jamal Greene is Associate Professor of Law at Columbia Law School.

Miklos Haraszti is an Adjunct Professor at Columbia University's School of International and Public Affairs. From 2004 to 2010 he served as Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe.

Alon Harel holds the Phillip P. Mizock & Estelle Mizock Chair in Administrative and Criminal Law at the Hebrew University of Jerusalem.

Stephen Holmes is the Walter E. Meyer Professor of Law at New York University School of Law.

Arthur Jacobson is the Max Freund Professor of Litigation and Advocacy at the Benjamin N. Cardozo School of Law in New York City.

Adam Liptak is a columnist and the Supreme Court reporter for the *New York Times*. He was previously Senior Counsel in the *Times*'s legal department.

Kenan Malik is a writer, lecturer, filmmaker, and broadcaster living in London.

Tarlach McGonagle is Senior Researcher at the Institute for Information Law at the University of Amsterdam.

Toby Mendel is the founding Executive Director of the Centre for Law and Democracy in Canada. He was previously Senior Director for Law at ARTICLE 19.

Yared Legesse Mengistu, a former judge of the Federal High Court of Ethiopia, is Assistant Professor in the Graduate Program of the Law Faculty of Addis Ababa University.

Peter Molnar is a writer, activist, and former member of the Hungarian Parliament (1990–1998). He is Senior Research Fellow at the Center for Media and Communication Studies (CMCS) at Central European University in Budapest.

Bhikhu Parekh is a member of the British House of Lords and a former Professor of Political Philosophy at the University of Westminster and the University of Hull.

Robert Post is Dean and Sol and Lillian Goldman Professor of Law at Yale Law School.

Monroe E. Price is Director of the Center for Global Communication Studies at the Annenberg School for Communication at the University of Pennsylvania, Chair of CMCS, and the Joseph and Sadie Danciger Professor of Law and former dean at the Benjamin N. Cardozo School of Law in New York City.

Andrei Richter is Director of the Moscow Media Law and Policy Institute and Professor at the School of Journalism at Lomonosov Moscow State University.

Julio Rivera Jr. is Professor of Constitutional Law and Human Rights at Palermo University and at the San Andrés School of Law in Buenos Aires.

Michel Rosenfeld is the Justice Sydney L. Robins Professor of Human Rights and Director of the Program on Global and Comparative Constitutional Theory at the Benjamin N. Cardozo School of Law in New York City.

Contributors

xi

Frederick Schauer is the David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law.

Bernhard Schlink is Professor of Law at Humboldt University of Berlin, a novelist, and a former judge.

Theodore Shaw is Professor of Professional Practice in Law at Columbia Law School. His many years at the NAACP Legal Defense and Educational Fund, Inc., included service as director-counsel and president from 2004 to 2008.

Nadine Strossen is Professor of Law at New York Law School. From 1991 through 2008, she was president of the American Civil Liberties Union.

Julie C. Suk is Professor of Law at the Benjamin N. Cardozo School of Law in New York City.

Jeremy Waldron is University Professor at New York University School of Law and Chichele Professor of Social and Political Theory at All Souls College at Oxford University.

Foreword: Hate Speech and the Coming Death of the International Standard before It Was Born (Complaints of a Watchdog)

Miklos Haraszi

This collection of cutting-edge writing on hate speech is also a documentation of our day's passionate debate on democracies' free speech governance, a debate that not only reflects the change underway but also drives it forward. It is two changes in one, in fact. While concern over hate speech has grown from separate national anxieties into a global issue, the trend as to the preferred way of handling hate speech has gravitated toward restricting it by regulation rather than isolating it by more reasoned speech.

Both these approaches are defended in superbly crafted arguments in the present volume. The prize the authors want you to keep your eyes on are two very different "minimums." Proponents of keeping governments to a "minimal regulation" standard are powerfully rebutted by advocates of "extensive regulation" who believe, in Michel Rosenfeld's words, that "the state can no longer justify commitment to neutrality" and that it has a duty to "strive for maintenance of a minimum of mutual respect" and "secure a minimum of civility in the public arena."¹

This is enjoyable intellectual fencing, but it should not blind us to the surprising hazards that the dispute represents for the global advocacy arena, quite apart from the question of which approach is best suited to handle hate speech.

The "minimal regulation" approach could be formulated this way: "Actual instigations to actual hate crimes must be criminalized, but otherwise offensive speech should be handled by encouraging further dialogue – in the press, through media ethics bodies, or in civil courts." It is most fully developed and firmly entrenched in the United States, but it is also embraced by most international watchdog institutions as their own. It was certainly my guiding principle in my years as the media freedom representative of the Organization for Security and Co-operation in Europe.

¹ Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," Chapter 13 herein.

Yet it seems that the “minimalist” approach is losing out under a growing, punitive trend that is introducing new speech bans into national criminal codes. Most of them target “bad speech” specific to the country or to the worries of its ruling parties, the two being practically indistinguishable. In the wake of this legislative wave, “regulationist” thinking is on the rise in academia and also within all consensus-driven intergovernmental fora.

Treating society’s exposure to hate discourses by local anesthesia may be promoted with very different motives, both progressive and oppressive. In any case, however, it should be clear that pursuing this approach means abandoning the prominent role that the “minimalist” approach had played in globally establishing the standard of free speech – or indeed, free speech as a standard. That would be a profound transformation, going well beyond just swapping the “suspicious” stamp on governmental intrusion for “dedicated to the common good,” praise previously reserved for governmental self-restraint.

What is most at risk from this double-edged change may be the very existence of an international human rights standard for handling hate speech. Such a binding standard was virtually prescribed by that majestic free speech guarantee of the year 1948, Article 19 of the Universal Declaration of Human Rights (UDHR).² Now it seems it may disappear altogether before having been properly developed at all. The very notion of an international standard for limits on free expression becomes unnecessary – more than that: inappropriate – if the fragmentation into separate content-oriented, historically based, culturally defined, politics-shaped, country-specific approaches to speech restrictions becomes acceptable.

The painful reality is that we do not have a universally applicable agreement that could guide legitimate speech limitations. Article 19 of the UDHR gave an unreserved promise of a universal right to free speech; after twenty years of consensus labor, it has been balanced out by, among other concessions to state regulation, Article 20 of the International Covenant on Civil and Political Rights (ICCPR), which expressly prescribes legal restrictions on hateful incitement.³

As a matter of principle, and of logic, it has always been inescapable that any universal standard reconciling Article 19 with Article 20 would have to tend toward the minimal intrusion principle. If a universal standard allowed individual governments to define punishable hate speech or incitement as they pleased, it would be either not universal or not a free speech standard.

² Article 19 provides:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

³ Article 20(2) specifically states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Toby Mendel provides the blueprint of a reconciled standard.⁴ But the world has so far lacked a global institution equipped with autonomous authority, similar to that of the U.S. Supreme Court, and steered solely by the Declaration and the Covenant the way the Supreme Court is guided by the Constitution alone. Over time, such a body would surely come up with reconciled principles, just as the U.S. Supreme Court has in the last 100 years. In its absence, the consensus method characteristic of most international fora will in all probability be sufficient only to uphold – separately – the principles of both Article 19 and Article 20. Such a bifurcation can be seen in the case law of the European and the Inter-American Courts of Human Rights, which have simultaneously both blocked and enabled speech bans.

Nevertheless, looking back at my own intergovernmental work and that of the NGOs, *no* international advocacy would have been possible without a shared working assumption that the minimalist standard applies. My successor as media freedom representative also, I am sure, applies this test to speech bans. So do the Commissioner for Human Rights at the Council of Europe and the Special Rapporteurs for Freedom of Expression at the UN Human Rights Council, at the Organization of American States, and at the African Commission on Human and Peoples' Rights.⁵ It would also be difficult to find a global NGO that thinks otherwise.

This is not because they all shut their eyes to the outpouring of hate speech, or are dogmatic about restricting governments. Rather, the reason is that these particular offices are not what might be called “consensus-stricken.” Their mandate is to *independently* reconcile the right to free speech with the fight against hate speech (and the fight against misuse of hate speech prohibitions). So far, they have been quite free to define the tools used to fulfill their mandate.

I do not deny that diplomatic bargaining between local and global “values” can be fruitful; it may even open prison doors in some cases. But consistently rejecting manufactured, parochial constraints yields better results, even in practical terms. The international community may pay too high a price for too few concessions if it legitimizes local taboos and abandons insistence on every person's right to beliefs that are unpopular, even ugly, as long as they do not infringe on other people's rights. One may believe in gradual progress, but that will only come about if it remains clear for all players what is bargaining and what is the standard.

So there we stand, without an official universal standard, while another sobering bit of reality is the proliferation of new local hate speech laws that strive to protect citizens from their own rows.

In the West, pursuit of a benign utopia of an offense-free society takes its toll on freedom of expression. And when the model of ad hoc speech limitations is copied in new democracies, and even more so in new autocracies, it often becomes the

⁴ Toby Mendel, “Does International Law Provide for Consistent Rules on Hate Speech?,” Chapter 22 herein.

⁵ See Annual Joint Declarations of the UN, OAS, OSCE, and ACHPR mechanisms on freedom of expression, available at <http://www.article19.org/publications/law/igo-materials.html>.

old “utopia” of an offense-free state, a specter of the dictatorial past believed to have been buried.

Of course, there are understandable motives pressing for this shift. One is the unquestionable abundance of poisonous hate speech, the sheer amount of which is compounded by increasingly easy access to it. The deepest cause for regulatory nervousness is probably that territorial jurisdiction over media content has evaporated. Thanks to the Internet and other global platforms, “organized” hate speech can now be delivered right at home, anonymously, without being restrained by distance, rules, or culture. (I wonder how the proponents of “extensive regulation” actually imagine curbing hate speech online. Can they avoid the only known “solution” to controlling the Internet – already realized by China or Iran – which is the carving up of the global network into nationally controlled intranets?)

Another explanation for the new regulatory zeal would focus on global crises: the Rushdie fatwa; the cartoon clashes; the post-9/11 security scare. Further, any cause or excuse that helps to avoid a rigorous, American-style enforcement of state neutrality is, unsurprisingly, welcomed by emerging new powers eager to keep their domestic public space as much under control as their economic might. Finally, not even Western Europe is still keen on the hard Voltaireian standard; it buzzes with well-meaning impromptu speech bans meant to help fight social battles.

I tend to agree with Bhikhu Parekh, whose eloquent *plaidoyer* for “regulationism” distinguishes between the West and the rest: today only the West can “afford to assign law a relatively limited role,” whereas “making law a major instrument” is a necessity in the developing world.⁶ Parekh bases this conclusion on nations’ present political and cultural capabilities. But my agreement with his partition rests on a different criterion, namely the two regions’ political and cultural relationship to *free* speech, not to bad speech or to the rule of law. I believe that the dispute over hate speech regulation is a real one only in countries where, as in most western nations, the level of freedom of expression would be left basically intact regardless of whether the debate favored a more “minimalist” or a more “regulationist” model. However, in countries where free speech itself is in trouble, and public speech gets overregulated quite apart from the hate speech conundrum, the “dispute” is hollow or even mere play-acting, its outcome preordained, because any step toward the “regulationist” model ends up by further – or again – curbing legitimate speech.

What I would add to the intra-western debate is exactly the notion of responsibility – solidarity if you wish – toward the possible global consequences.

The nascent standard was punctured early on in the noblest possible way, with a dozen or so European countries criminalizing Holocaust denial. Who could morally oppose these nations’ efforts to honestly confront their own past? However, these morally appealing laws had features that served as a model for groups seeking to have their dignity guaranteed by a governmental ban on speech that offends them,

⁶ Bhikhu Parekh, “Is There a Case for Banning Hate Speech?,” Chapter 2 herein.

and also for governments seeking to assume the role of the judge over admissible speech. The Holocaust denial bans were content-based, instead of situation-based. From an ocean of nasty lies filling the public space every day, they picked out certain symbolically potent fallacies. They punished the hidden intent of the speaker. They abandoned what had been a primary value, peace of society – public order, rule of law, non-violence – in favor of the peace of soul of those who had experienced, and those who respected, the historical truth. Protection of a free public space gave way to protection of a hate-speech-free public space.

And so began the slide down the slippery slope. As usual, in the long run it was not the moral necessity of such activism that proved contagious; it was its arbitrariness.

Consider just a few examples of how the relativistic innovations have been mimicked and misused in other settings, in order simply to return to government oversight of the public space under the banner of a contemporary, noble cause.

“Defamation of religions,” analyzed by Kwame Anthony Appiah,⁷ is promoted internationally as a modern human right to dignity. But wherever it is invoked, it just reinvents the world’s oldest hate speech provision, the prohibition of blasphemy.

Another popular hate speech provision punishes the questioning of a nation’s official historical narrative. While Turkey has prosecuted writers for calling the massacre of Armenians in 1915 genocide, Switzerland in 2007 convicted a Turkish politician of incitement to hatred for calling the genocide claim an “international lie.”⁸ Attempts in Ukraine to criminalize denial of Holodomor, that is, the questioning of the genocidal character of the Soviet-induced famine of the 1930s, neatly pairs up with the push in Russia for criminalization of denial of the role played by the Soviet Union in World War II. One could list similar Baltic, Slovakian, Irish, and other “incitement of hatred of the historical truth”-type initiatives.

As Andrei Richter recounts, punishment of “extremism” is in fashion in the post-Soviet countries.⁹ Legislators bundle the defamation of religions provisions with otherwise legitimate incitement laws, adding also the ban of “offensive criticism” of government. There is an echo here of the West’s “promotion of terrorism” provisions, which is helpful in defusing possible criticism. But while western legislation was criticized domestically as being possibly conducive to illegitimate prosecution of political thought, the post-Soviet extremism packages are actually created for that purpose.

The original draft of Slovakia’s infamous 2008 press law prohibited incitement to hatred on a *Guinness Book of World Records*-worthy *eighteen* different grounds, including hatred of a political conviction, punishable by the Ministry of Culture. I was successful in advocating the abandonment of this extreme proposal. Nonetheless,

⁷ Kwame Anthony Appiah, “What’s Wrong with Defamation of Religion?,” Chapter 9 herein.

⁸ See “Swiss Court Convicts Turkish Politician of Genocide Denial,” *N.Y. Times*, March 9, 2007.

⁹ Andrei Richter, “One Step Beyond Hate Speech: Post-Soviet Regulation of ‘Extremist’ and ‘Terrorist’ Speech in the Media,” Chapter 14 herein.

the enacted version of the extremism law included significantly enhanced state powers.¹⁰

My own country, Hungary, in its December 2010 media law, established a new method of punishing hate speech outside the criminal justice system. Just like Slovakia, Hungary has empowered an authority wholly controlled by the ruling party to punish all kinds of offending expression, notwithstanding the fact that these categories of speech had been held protected by the Constitutional Court in an earlier review of the Criminal Code.

This valuable collection not only contains current reports on the state of play in hate speech regulation. It also illustrates the state of the disintegration of the international standard and highlights the danger that disintegration poses for freedom of speech.

As new speech bans pour out of the national law pipelines, the international watchdog may wield only a rubber stamp. “Go in peace to prison, your country has a specific law banning just what you have uttered,” could become a standard reply to complaints.

I am sure no proponents of the “extensive regulation school” wish to reach that point. In addition, my instinct is that the freefall of the international standard will do nothing to make the fight against hate speech more effective or successful.

But the impasse over the international standard is only one of the many lively issues touched upon by this thoughtful collection from Herz and Molnar. From it, all protagonists in the free speech saga will learn a lot about themselves, and will learn that the saga continues. Journalists who hate holding back their opinions; politicians who hate journalists for having opinions; extremists who love hating; scholars and students who love the issue of hate for being so illustrative of the dilemmas of regulating speech; and my lot, the free speech defenders – all will find splendid reading and a very usable book in their hands.

¹⁰ Relevant materials, including my letters and press releases and a report on the draft law by Article 19, can be found on the OSCE Web site, osce.org/fom.

Foreword: Hate Speech and Common Sense

Adam Liptak

Not long after the U.S. Supreme Court decided, by an 8–1 vote, that hateful speech from protestors at military funerals is protected by the First Amendment,¹ the father of the fallen Marine who had brought the case ventured an opinion of his own.

“My first thought,” said Albert Snyder, “was that eight justices didn’t have the common sense that God gave a goat.”

There is, as Jeremy Waldron notes in his characteristically incisive contribution to this impressively varied and immensely valuable collection of chapters and interviews, a “weird artificiality” about how we think about hate speech.²

All Mr. Snyder had wanted to do was bury his son, Lance Cpl. Matthew A. Snyder, in peace and with dignity. What he endured instead was a protest from a small church that believes God is punishing the United States for its tolerance of homosexuality. Members of the church make this point by appearing at funerals and other public settings with signs bearing messages like “Thank God for Dead Soldiers” and “God Hates Fags.”

“Since when did any of our military die so that a group of people could target their families and harass them?” Mr. Snyder asked me not long before the Supreme Court heard his case. He had won an \$11 million jury verdict against the Westboro Baptist Church of Topeka, Kansas, saying the church had caused him emotional distress, but an appeals court reversed, invoking the First Amendment.

In March 2011, the Supreme Court agreed. Its decision confirmed a theme that runs through many of the chapters collected here: The United States’ commitment to the protection of hate speech is distinctive, deep, and authentic – and also perhaps reflexive, formal, and unthinking.

Chief Justice John G. Roberts Jr.’s majority opinion in the case, *Snyder v. Phelps*, was not inattentive to the pain the protests had caused. “The record makes clear that

¹ *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

² Jeremy Waldron, “Hate Speech and Political Legitimacy,” Chapter 16 herein.

the applicable legal term – ‘emotional distress’ – fails to capture fully the anguish Westboro’s choice added to Mr. Snyder’s already incalculable grief,” the chief justice wrote.³ But the court responded to that pain with what was, depending on your point of view, ringing rhetoric from the First Amendment canon or an unthinking and formulaic set of platitudes.

“Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment,” Chief Justice Roberts wrote. “Such speech cannot be restricted simply because it is upsetting or arouses contempt.”⁴

That form of analysis was anticipated by the fascinating interview that kicks off this volume, one in which Michael Herz and Peter Molnar have collected illuminating perspectives from the leading scholars and practitioners in this area.

In the United States, Robert Post told Professor Molnar in 2009, “Hate speech that is part of public discourse will receive the same protection that public discourse generally receives.”⁵

A little later in the interview, Dean Post acknowledged, however, that even American courts reserve some doctrinal running room in this area. “Often hard cases within public discourse are handled by courts classifying speech as outside public discourse,” he said.

Did the speech at issue in the *Snyder* case include contributions to public discourse? Chief Justice Roberts took a broad view:

The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” While these messages may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import.⁶

But did the speech *solely* involve public discourse? This is the point on which the *Snyder* decision is most vulnerable, at least under conventional American legal reasoning.

Aspects of the church’s messages, notably including an Internet screed that the Supreme Court refused to consider on technical grounds, did seem to target the Snyder family directly and without making an obvious contribution to public discourse even as generously defined by the court.

³ *Snyder*, 131 S. Ct. at 1217–18.

⁴ *Id.* at 1219.

⁵ “Interview with Robert Post,” Chapter 1 herein.

⁶ *Snyder*, 131 S. Ct. at 1216–17.

Chief Justice Roberts dismissed the concern in the circumstances:

We are not concerned in this case that Westboro’s speech on public matters was in any way contrived to insulate speech on a private matter from liability. . . . There was no preexisting relationship or conflict between Westboro and Snyder that might suggest Westboro’s speech on public matters was intended to mask an attack on Snyder over a private matter.⁷

The negative pregnant in the passage is an acknowledgment of Dean Post’s point about the fluid definition of public discourse.

In the wake of the *Snyder* decision, which does seem to put the United States at one extreme in the international spectrum in its commitment to protecting hate speech, it is particularly interesting to hear the voices in this volume cautioning against making too much of the claim of American exceptionalism in this area.

It is a particular privilege to hear some final reflections on this point from the late C. Edwin Baker, who first of all reminds us of just how much hate speech in the United States is unprotected against regulation by nongovernmental actors in, for instance, workplaces and schools.⁸

“Interestingly,” he goes on, “putting aside official legal doctrine, some political scientists have concluded that in practice as opposed to rhetoric the United States is not exceptional in the way typically suggested.” He reminds us, too, of “the historically *inadequate* protection of speech freedom in the United States.”

But in the area of hate speech, at least, the weight of the evidence seems to me to support the claim of exceptionalism. Consider, for instance, Michel Rosenfeld’s reflections on the Canadian experience. Although the Canadian Supreme Court is attentive to the views of the U.S. Supreme Court, Professor Rosenfeld writes, it has expressly declined to follow them in protecting hate speech.⁹

I looked into the contrasting American and Canadian approaches to hate speech in 2008 in the context of proceedings before the British Columbia Human Rights Tribunal over whether a news magazine had violated Canadian law by publishing an article arguing, in biting tones, that the rise of Islam threatened western values.¹⁰ In the process, I had occasion to interview some of the lawyers involved.

“Canadians do not have a cast-iron stomach for offensive speech,” one of them, Jason Gratl, said. “We don’t subscribe to a marketplace of ideas. Americans as a whole are more tough-minded and more prepared for verbal combat.”

Mr. Gratl, you may be surprised to learn, was a lawyer with the British Columbia Civil Liberties Association.

⁷ *Id.* at 1217.

⁸ C. Edwin Baker, “Hate Speech,” Chapter 3 herein.

⁹ Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,” Chapter 13 herein.

¹⁰ See Adam Liptak, “Freedom to Offend,” *N.Y. Times*, June 12, 2008, at A1.

I suspect Professor Waldron would have some sympathy for Mr. Gratl’s measured defense of offensive speech. That is because Professor Waldron, like the other contributors to this splendid volume, eschews the reflexive in favor of the reflective.

“There are a number of arguments in the literature that link the protection of free expression to the flourishing of self-government in a democracy,” Professor Waldron writes. “Some say little more than that, though they say it sonorously and at great length.”

That amusing accusation does not hold here, which is a tribute to the editors, although it might have some purchase in the *Snyder* case. Mr. Snyder would certainly think so.

Acknowledgments

It is a pleasure to acknowledge the wonderful assistance and support that we have enjoyed during the long process of producing this volume.

Appropriately for a project about speech, this book began with a conversation. The conversation was between Monroe Price and Miklos Haraszti. Miklos had become the Representative for Freedom of Expression of the Organization for Security and Co-operation in Europe (OSCE), in which capacity he was confronted by wildly divergent approaches to “hate speech,” such as that taken by the European Convention on Human Rights on the one hand and the First Amendment to the U.S. Constitution on the other. Monroe, who sees all problems as opportunities, suggested we take on a comparative examination of “hate speech” regulation. Monroe continued to offer support and helpful ideas throughout the project. The result was two conferences, one hosted by the Cardozo School of Law in New York City and the other by the Center for Media and Communication Studies (CMCS) at Central European University in Budapest. The bulk of this book consists of papers from those conferences. We are grateful to Monroe and Miklos and are pleased both are represented within these pages.

We received institutional support for the conferences, as well as a colloquium and conference at Cardozo in spring 2010, from several sources. The Floersheimer Center for Constitutional Democracy at the Cardozo School of Law was indispensable. It is a source of deep regret that Stephen Floersheimer did not live to see this volume in print, but we are deeply indebted to him and the Center for making it possible. The Center for Media and Communication Studies (CMCS) at Central European University was essential to the book’s existence. In addition, the Open Society Justice Initiative and the Organization for Security and Cooperation in Europe provided generous support for the Budapest conference.

All of the authors have our heartfelt thanks, but among them Robert Post stands out. Despite overwhelming professional obligations, Robert has shown unflagging enthusiasm for and support of this project and, among other contributions, was

generous enough to give the keynote speech at both the original Budapest conference and the May 2010 conference at Cardozo.

Sandra Coliver of the Open Society Justice Initiative (the editor of an enormously valuable book, *Striking a Balance*, about the subject of this volume) was a constant source of generous guidance, advice, and hospitality throughout this project.

Thanks also to David Rudenstine, who was hugely helpful both as Cardozo dean and as conference and workshop participant.

Several of the chapters herein were further honed through presentation at a spring 2009 colloquium co-sponsored (with CMCS) by the Center for Law and Culture at the Columbia Law School convened by Peter Molnar and Kendall Thomas. We are grateful for Columbia's support.

John Berger of Cambridge University Press is a model editor, combining patience and flexibility with high standards and a clear vision of what a book can and should be.

Two anonymous reviewers consulted by Cambridge University Press provided very helpful comments on several chapters.

Zelma Rios, Program Director of the Floersheimer Center, went above and beyond, as she so often does, in reading and providing invaluable comments on the entire manuscript.

Between the four of them, Cardozo students Jocqueline Cheever, Todd Grabowsky, Brooke Menschel, and Marissa Rothstein proofread and cite-checked the entire manuscript. They did a superb job.

Finally, we would like to thank the many friends, not identified here, who helped in ways large and small and, most of all, our families for inspiration and support.

Michael Herz
New York City

Peter Molnar
Budapest & New York City