Introduction

Michael Herz and Peter Molnar

As we write this introduction, in early 2011, our home countries, Hungary and the United States, are both preoccupied (convulsed would be too strong a term) with concerns over appropriate limits on public discourse. On January 8, 2011, several people were killed and Congresswoman Gabrielle Giffords severely wounded by a gunman who opened fire on a crowd in Tucson, Arizona. That state has been riven by debates over immigration policy, gun control, abortion, and other divisive issues that have been at least sharp and often hostile and abusive. The shooting produced a great deal of soul-searching and hand-wringing over whether the corrosive terms and rhetoric of the political debate had produced such violence. There were many calls to tone down the rhetoric. At a memorial service, President Obama urged: "[A]t a time when our discourse has become so sharply polarized, at a time when we are far too eager to lay the blame for all that ails the world at the feet of those who happen to think differently than we do, it's important for us to pause for a moment and make sure that we are talking with each other in a way that heals, not in a way that wounds."[1] Yet it is not at all clear that the rhetoric, abhorrent as it often is, in fact produced this particular act of violence, and the rhetoric itself grows out of deeply held beliefs and is very well received by those who view the world the same way, so fundamental change seems unlikely.[2]

[1] Barack Obama, Speech (Tucson, AZ, Jan. 12, 2011). Consciously or not, the President was echoing a seminal early scholarly contribution to the contemporary "hate speech" debate. *See* Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press 1993).

[2] One prominent conservative commentator decried the focus on violent political rhetoric in the wake of the Tucson shooting as a "hate speech inquisition." Michelle Malkin, "The Hate Speech Inquisition," *National Review Online* (Jan. 19, 2011), http://www.nationalreview.com/articles/257432/hate-speech-inquisition-michelle-malkin.

Meanwhile, in the last few years Hungary has seen significant increases in (public expressions of) anti-Semitism and anti-Roma prejudice.[3] For many, these trends became all the more worrisome with the 2010 election of a two-thirds majority right-wing government. Years before its election the governing party endorsed the use of a flag similar to the one used by the Nazi arrow cross party, which ruled Hungary at the end of World War II,[4] and an extreme right-wing opposition party is the third-strongest in Parliament. This troubling increase in visible racist sentiments coincides with the passage of highly restrictive media laws,[5] targeted in part at racist and other "hate" speech.[6] The members of the media board that will implement and enforce the new laws were all appointed by the governing supermajority, raising a threat that enforcement of these provisions will be arbitrary or skewed – for example, the limitations on racist expressions might be applied primarily, or disproportionately, *against* those who would attack racism. The constitutional treatment of "hate speech"[7] has been highly contested in Hungary,[8] and in classrooms, cafes, private homes, on the streets, and in the media Hungarians wrestle with how to handle this communication pollution in the current political-legal setting.

Our countries are not unusual. Hardly a day goes by without another report of a legal controversy somewhere in the world regarding the regulation of "hate speech." Communities beset by deep sectarian and racial divisions and conflicting worldviews – characteristics that seem, discouragingly, to define an ever greater number of human societies – are in a constant struggle to preserve and perhaps to balance values of free expression, equality, tolerance, diversity, and respect. The regulation of "hate speech" is arguably the most literal, concrete, and contested setting for this struggle.

Whether and how to restrict speech that denies (both in its substantive content and in its practical effects) equal dignity and liberty for all, speech that expresses and promotes hatred of particular groups, poses one of the most difficult challenges regarding free speech. Not surprisingly, responses to this challenge have not been uniform. In most of the world, "reasonable" regulation of "hate speech" is accepted

[3] *See, e.g.*, Erich Follath, "Europe's Capital of Anti-Semitism: Budapest Experiences a New Wave of Hate," *Der Spiegel* (Oct. 14, 2010), *available at* http://www.spiegel.de/international/europe/0,1518,722880,00.html.

[4] On the use of this flag, see Peter Molnar, "Towards Better Law and Policy Against 'Hate Speech' – The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy* (Ivan Hare & James Weinstein eds., Oxford University Press 2009).

[5] *See* http://www.cmcs.ceu.hu/node/297/; http://hungarianwatch.wordpress.com/.

[6] The new media regulation extended the previous content-based ban on "hate speech" on radio and television programs to printed and online media content. *See* http://hungarianwatch.wordpress.com/2011/02/02/in-rare-interview-with-israeli-daily-orban-says-hungarys-new-media-law-is-good-for-the-jews-and-anti-semitism-exists-but-is-not-a-concern/.

[7] In light of the slippery and contestable nature of the term "hate speech," one of us is resolved never to use it without quotation marks. *See* Peter Molnar, "Responding to 'Hate Speech' with Art, Education, and the Imminent Danger Test," Chapter 10 herein, at n. 2. The other of us defers.

[8] *See generally* Molnar, *supra* note 4.

as both important and supportive of democratic values. (What counts as "reasonable" varies widely, however.) In contrast, our countries have opted for a quite different approach, providing constitutional protection to abhorrent speech. American courts have been consistently hostile to regulation of "hate speech," applying the First Amendment with vigor and insisting that the solution to the harms such speech causes is found not in suppression but in more speech countering the hateful messages. And since the early 1990s, postcommunist Hungary has been largely in the "the-more-speech-the-better" camp, notwithstanding the experience of the Hungarian Holocaust.[9]

If one accepts that there exists a category of unprotected degrading or abusive speech that justifies a governmental response of some sort, the next challenge is definitional. The general understanding is that the problematic speech must be directed at a group, or an individual on the basis of membership in a group, as opposed to being merely personal. (Telling an ex-lover "I hate you" might be an expression of hate, but it is not "hate speech.") But which groups count? All classes that are protected under other legal regimes (not that that is a fixed, agreed-on list)? Only minorities? Only those groups or those minorities that have been historically discriminated against or even persecuted? (Here a central disagreement in the affirmative action debate – is the problem racial classifications as such, or are racial classifications that disadvantage historically oppressed groups different from those that disadvantage the historical oppressors? – resurfaces.) If so, will majorities accept a law that protects only minorities, or only those groups or those minorities who have been historically discriminated against or even persecuted? If not, is a facially neutral law prone to uneven or abusive enforcement *against* minorities? Finally, at what point does condemnation, insult, or disdain cross the line to become a message of persecution, inhumanity, degradation, or whatever other term one uses to identify what is substantively beyond the pale? A particular problem is posed by coded speech: insults and attacks and maybe even calls to violence that on their face seem benign enough but stand in for blatantly hateful expressions and are understood to do so. Here again the immigration debate provides examples; many observers find that supposedly dispassionate policy statements about the threat from illegal immigration (in the United States especially by Hispanics, for example) is a sort of de facto "hate speech."[10] Reaching such speech, but only such speech, may be an

[9] Largely, but not entirely. One of the exceptions is that in 2010 Hungary criminalized holocaust denial, making it punishable by up to three years in prison.

[10] *See, e.g.*, Anti-Defamation League, *Immigrants Targeted: Extremist Rhetoric Moves into the Mainstream* (2008). The report states:

> The demonization of immigrants has led to an increased sense of fear in communities around the country and created a toxic environment in which hateful rhetoric targeting immigrants has become routine.
>
> Unlike the Ku Klux Klan and neo-Nazis, who make no attempt to hide their racism and bigotry, these anti-immigrant groups and coalitions often use more subtle language to demonize immigrants and foreigners. They are frequently quoted in the media, have been called to testify

impossible challenge for any regulatory regime, especially because it is at least likely that the more a country needs content-based regulation of "hate speech," the less chance it has for an evenhanded application of such restrictions.

Another definitional concern involves incitement. Preventing incitement is a central goal of "hate speech" regulations, and it provides a justification that rests on a larger, societal harm beyond solicitude for the target of the "hate speech." But incitement to what? Incitement to violence, assuming sufficient immediacy, is constitutionally unprotected and legally prohibited everywhere, and is the focus of the American-Hungarian principle that holds general content-based restrictions on "hate speech" unconstitutional. But if it is the threat of *violence* that justifies regulation, then the concern is no longer with "hate speech" per se. What about incitement to discrimination? Incitement to hatred? The first promotes acts that are (likely) themselves prohibited; the second promotes an attitude or belief system which can be maintained without engaging in prohibited acts.

Even if one concludes that the category of problematic speech can be identified, there arises a whole set of questions regarding the nature and scope of the governmental response. Most obviously, the response might take the form of legal liability (criminal? civil? administrative?). Arguably, however, art, education, and other affirmative measures, although usually off the main stage of the debate, are more effective than regulation and can enable communities – the targeted groups and the broader community as well – to engage in counterspeech to rebut, defuse, and prevent "hate speech," instead of relying on the state to silence hateful speakers.

Finally, the answers to these sorts of questions are unlikely to be uniform across all countries, times, and settings. Context matters. It is at least questionable whether it would be either possible or desirable to establish a standard global regulatory policy toward "hate speech." International law can be helpful in pushing for narrower restrictions on freedom of speech and thus reducing the risk of regulatory abuses, but one premise of almost every contribution to this collection is that there is no single means by which "hate speech" can and should be addressed. In the words of this book's title, both "content *and* context" count.

These challenges are longstanding. The settings have changed, in particular with the move online. But the issues are recurrent. The Internet has increased mutual engagement and understanding in meaningful ways, but it has also produced more polarized, aggressive, unrestrained, and often anonymous attacks on those groups the speaker disagrees with or dislikes. *Plus ça change*. Thus, while the Internet may have made "hate speech" more easily accessible, it has not made the issues surrounding it qualitatively different.

before Congress, and often hold meetings with lawmakers and other public figures. However, under the guise of warning people about the impact of illegal immigration, anti-immigrant advocates often invoke the same dehumanizing, racist stereotypes as hate groups.

Id. at 1.

The contributors to this volume address these issues from a range of perspectives, backgrounds, and starting points. Throughout, there is a strong comparative emphasis, with examples, and authors, drawn from around the world. Few of the authors are completely firm or absolutist in their positions, and none are deaf to competing claims.

The book consists of four parts. The chapters in Part I offer the broadest overviews. In the first of a set of interviews with Peter Molnar, Robert Post examines his concept of public discourse and the dangers of regulating it to fight "hate speech." Bhikhu Parekh and Ed Baker both are deeply convinced of their respective, and opposing, positions, but both carefully examine the counterarguments. Parekh offers a sweeping review of the reasons not to regulate "hate speech," finding that they are ultimately wanting. Baker also starts from first principles, puzzling out what kind of showing would justify the restriction of such speech and ultimately concluding that it has not been made. Kenan Malik, in another interview, also takes a strong speech-protective position, arguing in part that active social responses and vibrant dialogue can change prejudiced attitudes and their expression more effectively than can legal prohibitions. Jamal Greene explores the influence of public attitudes on the constitutional status of "hate speech," articulating the possibilities of a popular constitutionalism in which constitutional meaning is not solely the province of the courts. First Amendment lawyer Floyd Abrams defends the American approach, not necessarily for all places and all times, but certainly for America.

Part II turns to a set of more specific concerns. Frederick Schauer takes on John Stuart Mill, analyzing, in depth and detail, the (in)applicability in this setting of Mill's argument that suppression on the basis of falsity is always a mistake because what we think is false may prove to be true. Julie Suk's chapter offers an account of the criminalization of Holocaust denial in France, drawing our attention to the possibility that, contrary to the premises of American free speech jurisprudence, the direct regulation of public debate can be a mechanism to promote national solidarity and state legitimacy. Anthony Appiah dissects and rejects the arguments for legal prohibitions on or remedies for defamation of religion, an idea that has at times made real headway within the United Nations and elsewhere. Peter Molnar proposes that art and other forms of education (in the broadest sense possible) combined with a more workable concept of incitement to imminent danger, is the best response to expressions of hatred. Katharine Gelber takes on the question of counterspeech; she values such speech, but is skeptical that counterspeech, let alone effective counterspeech, will arise spontaneously, arguing instead that the state has a role in encouraging, nurturing, and facilitating private responses. Arthur Jacobson and Bernhard Schlink offer an illuminating corrective to the received wisdom about the American constitutional protection of "hate speech," describing three ways in which such speech is in fact meaningfully regulated in the United States. Michel Rosenfeld provides a comparative study of the constitutional treatment of "hate speech" in several western democracies. Andrei Richter reports on the use and abuse of laws

against extremism and terrorism in the biggest postcommunist country, Russia, and other post-Soviet republics. Alon Harel, unusually for these debates, focuses not on the speech itself or its harmful effects, but rather on its meaning *to the speaker*, venturing the argument that "deeply rooted" "hate speech" merits protection that more casual, transient, or thoughtless speech does not.

One of the central conceptual, jurisprudential, and practical challenges posed by the question of regulating "hate speech" is the (perceived) clash between free speech values and equality values. It is common to see this as precisely the setting where those concerns intersect and conflict. For many, to prohibit "hate speech" is to privilege equality over liberty; to protect it is to privilege liberty over equality. The chapters in Part III address this concern. The chapters by Jeremy Waldron, Ronald Dworkin, and Stephen Holmes form a trio. Waldron is sympathetic to certain speech restrictions, finding liberty concerns often quite dilute and equality concerns compelling; in particular, he is dubious about Dworkin's (and to some extent Post's) claim that governmental action in a democracy is legitimate only if the process that preceded it was open to participation by all. Dworkin defends his position, and Holmes offers further comments on both Waldron's and Dworkin's arguments. Yared Mengistu is particularly sensitive to the liberty/equality conflict; drawing mostly on the experience of his native Ethiopia, he argues that equality concerns require controlling "hate speech" directed at oppressed minorities, but that speech in the other direction should be protected. This part concludes with interviews with two of the most celebrated civil liberties advocates in the United States. Nadine Strossen (former president of the American Civil Liberties Union [ACLU]) offers a full-throated and unapologetic defense of robust constitutional protection for "hate speech," denying that this position undermines or sets back the cause of equality. Theodore Shaw (former director-counsel and president of the NAACP Legal Defense and Educational Fund, Inc.) takes a less firm position, although he also is wary of regulating speech, in part because of a fear that such regulations would be used to silence rather than to protect vulnerable minorities – in other words, that in practice, restrictions of liberty will prove harmful to the goal of equality.

The last section of the book turns to questions of international law, which increasingly has taken on the issue of regulating "hate speech." Toby Mendel reviews the relevant international law, arguing that it provides a coherent and useful set of principles that can be applied domestically. Irwin Cotler's chapter concerns what may be the most gruesome and abhorrent form of "hate speech": incitement to genocide. Tarlach McGonagle focuses on the Council of Europe, providing a sweeping review of the many different legal instruments and fora in which the Council has grappled with this issue. Eduardo Bertoni and Julio Rivera Jr. report on the American Convention on Human Rights, an international agreement with its own particular approach. This part concludes with Monroe Price's study of the somewhat anarchic

way in which states have sought to control content, including "hate speech," that is broadcast internationally via satellite.

These chapters are wide-ranging in subject matter. They share open-mindedness, seriousness of purpose, engagement with competing views, and respectful disagreement. By both substance and example, then, they offer some hope of progress on these intractable and profoundly important questions.

Elsewhere we gratefully acknowledge the many people and institutions that have provided such wonderful support for this volume.[11] Allow us here simply to thank the authors for their extraordinarily thoughtful, learned, and serious contributions.

[11] *See* "Acknowledgements," *supra*.

PART I

Overviews

1

Interview with Robert Post

Peter Molnar: When I first came to the United States, a friend told me that the supposedly strong protection of freedom of speech in this country is simply a myth. Would you agree?

Robert Post: I suppose it would depend upon what one means by "myth." In certain communicative contexts – like the Internet, newspapers, magazines, or movies – constitutional protections for speech are quite robust. But in many other settings there is far less, if any, constitutional protection. So can we conclude that the reputation of a strong First Amendment is merely a myth?

PM: More narrowly, then: It is often stated that in the United States "hate speech"[1] is constitutionally immune from regulation. Is this correct?

RP: In many settings speech that is demeaning or degrading to particular minorities or genders or sexual orientations is regulated in the U.S. with few, if any, constitutional impediments. In private settings, for example, where there is no state action, constitutional restrictions do not apply. In such private settings hate speech can be regulated without constitutional constraint. There are also many public settings in which hate speech can be and is suppressed regularly and effectively. These tend to be settings in which the regulation of hate speech does not compromise public discourse.

PM: For example?

RP: In courtrooms, for example. Attorneys and judges will be penalized for hateful expression. So will teachers and students in public elementary and high schools,

[1] Peter Molnar explains why he places "hate speech" in quotation marks in "Responding to 'Hate Speech' with Art, Education, and the Imminent Danger Test," Chapter 10 herein, at n. 2.

This interview was conducted in New York City on October 29, 2009. Dean Post subsequently revised and expanded his remarks. Eds.

and even, in some contexts, in public universities. Prisoners, guards, and administrators will be regulated for hate speech in prisons, as will government employees in bureaucracies. There are lots and lots of settings in which in the United States government regulates or prohibits hate speech and First Amendment issues are not thought to arise.

This is an area in which conceptual precision is essential. First Amendment protections attach to speech acts, not to speech per se. The identity of a speech act is in part determined by its context. The same vile words, epithets, and concepts can therefore in different contexts be constitutionally conceptualized as entirely different kinds of speech acts and in consequence receive entirely different degrees of constitutional protection.

Speech acts that comprise "public discourse" – speech acts that we recognize as appropriate ways to influence the formation of public opinion – receive what we ordinarily conceive as the full measure of First Amendment protection. Hate speech that is part of public discourse will receive the same protection that public discourse generally receives. Hate speech that is not part of public discourse will not receive this kind of protection. So, for example, hateful words addressed by one employee to another in the context of employment within the Social Security Administration will receive only the minimal forms of constitutional protection that we accord to speech expressed by employees in the context of government employment about matters of private concern.

Because First Amendment protections depend on how a speech act is classified, and because "hate speech" is not in the United States itself recognized as a distinct constitutional category of speech act, it is never clear what circumstances people have in mind when they speak of the regulation of hate speech in the United States. Typically the claim that hate speech is constitutionally immune from regulation imagines hateful communications within public discourse, like expression in newspapers. Such speech does indeed tend to be protected from regulation. But because speech uttered in the workplace is not typically classified as public discourse, hate speech expressed in such a context is routinely suppressed.

PM: So how do we distinguish between those parts of the public sphere that comprise public discourse as you define it and those that do not?

RP: The concept of the "public sphere" is a sociological one. It refers to a sociological formation created by the circulation of texts. It typically comes into being when persons seek access to common facts and common information, and typically for some common purpose. There is a large and complicated literature, and much disagreement, on what the public sphere entails.[2] When I use the term "public

[2] *See, e.g.*, Jürgen Habermas, "The Public Sphere: An Encyclopedia Article," in *Media and Cultural Studies: Key Works* 102 (Meenakshi Gig Durham & Douglas M. Kellner eds., Wiley-Blackwell 2001); Nancy Fraser, "Rethinking the Public Sphere," 25/26 *Social Text* 56 (1990).