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Focus: Hate Speech Jurisprudence in the United States and Hungary

Hate Speech and the U.S. Constitution

Geoffrey R. Stone

One of the most difficult issues in working out a system of free expression arises out of the need to reconcile a society's often competing commitments to freedom of speech and individual dignity. This conflict is posed most poignantly in the context of libel, group defamation and hate speech. To what extent must a society, to be true to its commitment to free expression, tolerate speech that deliberately insults and degrades a group or individual on the basis of race, religion, gender or ethnic origin? On what theory does the right to free expression embrace the right to engage in individual or group defamation? On the other hand, to what extent may a society, in furtherance of its commitment to individual dignity, censor unpleasant racist or sexist or homophobic speech merely because it offends, or even deeply offends, particular groups or individuals? Can this possibly be a principled basis on which to censor ideas and opinions in a society committed to open public debate? For the past fifty years, the United States Supreme Court has wrestled with these questions. While at first the Supreme Court hinted at the possibility that some regulation of group defamation and hate speech would be constitutional, the Court has now quite firmly concluded that such regulation would most likely be unconstitutional.

The history of libel, group defamation and hate speech regulation in American constitutional law begins with the Supreme Court's 1942 decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in which the Court announced that some categories of speech are of only "low" First Amendment value and are thus accorded less than full constitutional protection:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise

any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The significance of this passage is that whereas the Supreme Court views laws restricting most forms of expression—for example, a law prohibiting the advocacy of communism—as presumptively unconstitutional and sustainable only on a showing that the restriction is necessary to prevent a clear and present danger of some very serious evil (a standard the Government almost never can meet), the Court views laws restricting "low" value speech as presumptively constitutional and will sustain such restrictions on a showing of mere "reasonableness."

Less than a decade after *Chaplinsky*, the Court confronted the issue of group defamation in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). *Beauharnais*, the president of the White Circle League, organized the distribution of a leaflet calling on the city council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." The leaflet called upon the "white people in Chicago to unite," and added that "If persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions [rapes], robberies, knives, guns and marijuana of the Negro surely will."

As a result of his participation in the distribution of this leaflet, *Beauharnais* was convicted under an Illinois statute declaring it unlawful for any person to distribute any publication which "portrays depravity, criminality, unchastity or lack

of virtue of a class of citizens, of any race, color, creed or religion" or subjects them "to contempt, derision, or obloquy."

In a five-to-four decision, the Supreme Court upheld the conviction. Relying on *Chaplinsky*, the Court explained that, because "libelous utterances [are not] within the area of constitutionally protected speech," it was irrelevant that Beauharnais' speech did not create a clear and present danger of any serious harm. It was enough, the Court said, that this was not a "purposeless restriction unrelated to the peace and well-being of the State." Pointing to the history of racial conflict in Illinois, the Court observed that "we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups." In response to Beauharnais' argument that he should at least have been permitted the defense of truth, the Court concluded that the State could constitutionally prohibit group defamation without regard to the truth or falsity of the statements if the defendant did not act "with good motives and for justifiable ends."

Although *Beauharnais* seemed a landmark decision that would significantly affect the Supreme Court's interpretation of the First Amendment for years to come, in fact it has never been cited approvingly by the Supreme Court and, for all practical purposes, has been *de facto* overruled. The beginning of the end for *Beauharnais* was *New York Times v. Sullivan*, 376 U.S. 254 (1964). Sullivan, an elected official in the city of Montgomery, Alabama, brought a civil libel action against the *New York Times* alleging that the *Times* had published several statements that inaccurately described his involvement in suppressing a demonstration by black students who were protesting racial segregation. Upon finding the statements to be false, the jury returned a verdict for Sullivan in the amount of \$500,000.

The Supreme Court reversed. At the outset, the Court confronted its own past statements in *Chaplinsky* and *Beauharnais* to the effect that libelous utterances are not "within the area of constitutionally protected speech." In rejecting these earlier statements, the Court declared that "libel can claim

no talismanic immunity from constitutional limitations" and "must be measured by standards that satisfy the First Amendment."

Turning to the task of articulating these standards, the Court observed in an oft-quoted passage that "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The essential difficulty, the Court explained, is that "erroneous statement is inevitable in free debate," and even false statements must therefore be "protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" Thus, the Alabama law of libel could not be "saved by its allowance of the defense of truth," for a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would lead to intolerable "self-censorship." Indeed, under such a rule, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court." Such a rule, the Court concluded, "dampens the vigor and limits the variety of public debate."

With these considerations in mind, the Court held that public officials may not recover damages for defamatory falsehood relating to their official conduct unless they can prove "that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not."

New York Times revolutionized the law of libel and, at the same time, undermined the principles underlying *Beauharnais*. The decision in *Beauharnais* had been based on the premise that defamatory utterances are "unprotected" by the First Amendment, whether or not they are false. *New York Times* emphatically and unequivocally rejected that premise. As a result, in the thirty years since *New York Times*, it has come to be accepted in American constitutional law that the Illinois statute upheld in *Beauharnais* would no longer be held constitutional, and that such actions for group defamation are incompatible with the First Amendment because they suppress ideas, opinions and assertions

that may offend; but these do not create a clear and present danger of serious harm.

The extent to which *Beauharnais* has been discredited was made clear in the 1977 Skokie controversy. In 1977, Skokie, a northern Chicago suburb, had a population of about 70,000 persons, 40,000 of whom were Jewish. Approximately 5,000 of the Jewish residents were survivors of Nazi concentration camps during World War II. Frank Collin, leader of the National Socialist Party of America, informed Skokie officials that the party intended to hold a march through Skokie. Collin explained that the demonstration would consist of thirty to fifty individuals marching in single file wearing uniforms reminiscent of those worn by the Nazi Party in Germany under Hitler and that they would wear swastika armbands. The marchers would also carry banners containing a swastika and signs bearing such messages as "Free Speech for Whites."

Skokie officials filed suit seeking to enjoin the marchers from wearing their uniforms, displaying the swastika, or distributing any materials that would "incite or promote hatred against persons of Jewish faith or ancestry." The complaint alleged that the march, as planned, was a "deliberate and willful attempt to exacerbate the sensitivities of the Jewish population in Skokie and to incite racial and religious hatred" and that the display of the swastika in Skokie "constitutes a symbolic assault against large numbers of the residents of Skokie and an incitation to violence and retaliation."

The Illinois Supreme Court held that the proposed demonstration was protected expression and that an injunction against the march would violate the First Amendment. The Supreme Court of the United States declined even to review the issue. (Eventually, Collin agreed to move the demonstration from Skokie to downtown Chicago. In 1978, he held an hour-long rally at which 400 riot-helmeted policemen protected the twenty-five Nazi demonstrators from several thousand counter-protesters. There were seventy-two arrests and some rock and bottle throwing but no serious violence.)

The Supreme Court returned to the hate speech issue fifteen years later in *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992). After burning a cross on a black

family's lawn, the petitioner, a teenager, was charged under the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, which prohibited the display of a burning cross, a swastika, or other symbol which one knows or has reason to know "arouses anger, alarm or resentment in others" on the basis of race, color, creed, religion or gender. The Minnesota Supreme Court interpreted the ordinance as prohibiting only constitutionally unprotected "fighting words."

In *Chaplinsky*, the Court had listed "fighting words" among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Indeed, in *Chaplinsky* itself the Court had upheld the conviction of an individual for calling a police officer a "damned racketeer" and a "damned Fascist." The Court explained that "fighting words" – personal epithets hurled face-to-face at another individual which are likely to cause the average addressee to fight – are "unprotected" by the First Amendment because they "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

In the half-century between *Chaplinsky* and *R.A.V.*, the Court had consistently narrowed the scope of the fighting words doctrine and, indeed, had not upheld a single fighting words conviction. Nonetheless, the Court never directly called into question the continued vitality of the doctrine itself. Thus, given that the state courts in *R.A.V.* already had interpreted the ordinance as limited to fighting words, there would not seem to be any serious question about the constitutionality of the ordinance. (Note: The question whether the burning of the cross actually constituted "fighting words" was not considered by the Court because the defendant had not yet been tried.)

Nonetheless, the Supreme Court invalidated the St. Paul ordinance, holding that the ordinance was invalid even if it was limited only to fighting words. This was so, the Court explained, because the ordinance was selective among fighting words

—it prohibited only some fighting words (those related to race, for example), but not all fighting words (those related to political affiliation). The Court began by noting that the “First Amendment generally prevents government from proscribing speech because of disapproval of the ideas expressed.” Regulations of speech because of its content “are presumptively invalid.” And this is true, the Court reasoned, even within a category of otherwise unprotected expression. Thus, although “the government may proscribe libel, it may not make the further content discrimination of proscribing only libel critical of the government.” In *R.A.V.*, the ordinance restricted only those fighting words that “insult, or provoke violence ‘on the basis of race, color, creed, religion or gender.’” This, the Court concluded, is impermissible:

“Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specific disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”

Finally, the Court rejected the claim that the “discrimination” in the ordinance was justified because it was necessary to further the city’s compelling interest in helping “to ensure the basic human rights of members of groups that have historically been subjected to discrimination.” The Court explained that the content limitation was not “necessary” to achieve the city’s interest because the city could have achieved its ends without the content limitation by banning all fighting words. Thus, “the only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases singled out. That is precisely what the First Amendment forbids.”

The distance traversed from *Beauharnais* to *R.A.V.* is considerable indeed. After *R.A.V.*, it would seem that no direct regulation of speech, even of

otherwise unprotected speech, that is drawn explicitly to protect particular groups against offensive or hurtful expression will pass constitutional muster. And this is so because, as the Court has often said, apart from the existence of certain categories of “low” value expression, there is an “equality of status in the field of ideas” and, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

In *Wisconsin v. Mitchell*, 113 S.Ct.—(1993), the Court’s most recent foray into this area, the Court upheld a Wisconsin hate-crime penalty enhancement statute. In 1989, a group of black men, including Mitchell, were discussing a scene from the motion picture “Mississippi Burning,” in which a white man beat a young black boy who was praying. At that point, a young white boy walked by and Mitchell said, “There goes a white boy; go get him.” The group then ran towards the boy and beat him severely. Mitchell was convicted of aggravated battery, an offense which ordinarily carries a maximum sentence of two years’ imprisonment. But because the jury found that Mitchell had intentionally selected his victim because of the boy’s race, the maximum penalty for Mitchell’s offense was increased to seven years under a state statute providing for penalty enhancement whenever the defendant “intentionally selects the person against whom the crime is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”

The Court unanimously rejected the argument that this statute violated the First Amendment because it “enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason.” The Court explained that “a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.” Thus, this case is different from *R.A.V.* because “the ordinance struck down in *R.A.V.* was explicitly directed at expression,” whereas “the statute in this case is aimed at conduct

unprotected by the First Amendment.” Moreover, although reaffirming that a state may not punish an individual more severely because he has unpopular or even odious beliefs, the Court nonetheless concluded that this statute involved enhanced punishment for motive, which is commonplace in the law, rather than for abstract belief.

The current state of the law, then, would seem to permit penalty enhancement for non-speech crimes when the defendant acts for impermissible, hate-based motives, but to prohibit punishment for speech (including symbolic speech, like wearing a swastika or burning a cross) because it offends or otherwise harms particular groups or individuals on the basis of such factors as race, religion, gender or ethnicity.

The Court has thus subsumed hate-speech and group defamation legislation within its more general assumption that most forms of content-based restrictions of speech are presumptively unconstitutional. The underlying rationale of this approach is that government cannot be trusted to make judgments about which ideas can and cannot legitimately be aired in public debate.

Moreover, to guard against the risk that government might effectuate its preferences for some ideas over others merely by claiming that it is restricting speech because it is harmful, the Court has held that government may not regulate expression because of its content except in the most extraordinary of circumstances.

Thus, just as the government cannot constitutionally restrict advocacy of communism, agitation against an on-going war, burning of the American flag, or the expression of ideas that deeply offend others, so too is it foreclosed from restricting speech that insults or degrades particular racial, religious, ethnic or gender groups. The point is not that such expression is harmless. It is, rather, that there are better ways to address the harm than by giving government the power to decide which ideas and opinions the citizens of a free and self-governing nation may and may not express.

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Hate Speech for Hostile Hungarians

Andras Sajo

Dean Stone reviews the past fifty years of the U.S. Supreme Court's struggle to work out a system of free expression that reconciles "a society's often competing commitments to freedom of speech and individual dignity." The emerging democracies of Eastern Europe have had only three or four years to devise their own solutions to this same problem. Legal rules chosen in haste, however, may have a lasting social impact. This article reviews the hate speech/free speech debate in postcommunist Hungary, in the light of U.S. standards (which, as it happens, played a major role in the Hungarian

Court's deliberations).

Unrestrained speech, on the one hand, given the social and political conflicts racking Hungarian society during the transition period, may endanger social stability. Restricted speech, on the other hand, may immobilize nascent civil society, limit fundamental freedoms, and stifle the lively criticism of government so essential to democracy. The present-day legal system in Hungary seems to be torn between these two irreconcilable positions. The constitution as amended in 1989 guarantees freedom of thought and religion and the right of