1992

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AMERICA'S FIRST "HATE SPEECH" REGULATION

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Americans have the endearing but frustrating tendency to view every development in public life as if it were happening for the first time. Each issue is a new thing under the sun. Now the issue of "hate speech"—speech that is designed to degrade or injure other people on the basis of their race, ethnic origin, sex, sexual orientation or other sensitive characteristic—is the hot new free speech question. The law reviews are filled with learned analyses. Task forces have been appointed. Colleges and universities are debating the question. Legislation has been introduced in Congress.

Yet to my knowledge, none of the scholarly analyses of the issue has attempted to draw on the American historical experience with this problem. "Hate speech" is one of the oldest public issues in America; the first law was enacted almost 350 years ago. The question traditionally has been framed in these terms: to what extent does a liberal society require social conditions of mutual respect and toleration, and to what extent may the force of law be employed to attain or preserve those conditions? Attention to historical experience may help us to appreciate both the roots of hate speech regulation and some of its pitfalls.

The first hate speech regulation in America was Maryland's Toleration Act of 1649.[1] Maryland had been founded a few years earlier by a Roman Catholic nobleman and friend of Charles I, Lord Baltimore. Lord Baltimore intended to make Maryland a haven for his fellow Catholics (who at that time were severely persecuted in the mother country) and to extend protection to other dissenters from the Church of England as well. The Toleration Act, which precedes by forty years the famous act of Parliament by that name, was enacted by the colonial legislature, superseding a similar

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1. Maryland Acts of Assembly, I, 244, quoted in Sanford H. Cobb, *The Rise of Religious Liberty in America* 376 (1902, reprinted Cooper Square, 1968) ("*Religious Liberty*").

proclamation by Lord Baltimore. As part of legislation establishing the "free exercise" of religion (the first appearance of those words in the laws of this continent), the Act imposed a fine of ten shillings on any person who called another "by such opprobrious terms as, Heretic, Schismatic, Idolator, Puritan, Independent, Presbyterian, Popish priest, Jesuit, Papist, Lutheran, Calvinist, Anabaptist, Brownist, Antinomian, Barrowist, Roundhead, and Separatist."[2] In the only recorded prosecution under the statute or the predecessor proclamation, a Catholic named William Lewis was fined for "interfering by opprobrious reproaches with two Protestants"[3]—an encouraging sign, since most colonial officials at the time were Catholics.

It may be objected that this statute deals with a subject—religion—far removed from today's concerns of race, sex, sexual orientation, and the like. But we must not commit the anachronism of dismissing religion as a private matter of little weight or consequence. Religion was central to the Maryland colonists' identity, and differences in religion were never far from their minds. Religious discord delivered Lord Baltimore's friend, Charles I, to the scaffold, and England to civil war. Moreover, the immediate problem addressed by the Maryland Toleration Act was not unlike that of today's hate speech regulations on campus. Words were used, then as now, to inflict injury, to humiliate, to ostracize, and to subordinate. Historian Sanford Cobb said of religious disputants in seventeenth century Massachusetts that they "made of their tongues weapons harder to bear than clubs."[4] The Maryland Toleration Act is thus an exceedingly close analogy to the regulation of hate speech on modern American campuses.

Unfortunately, we do not have much information about the implementation or effects of the Toleration Act. Following the downfall of the King, a Protestant faction seized power in the colony in 1652 and repealed the Toleration Act two years later, replacing it with a law explicitly denying protection to persons who "profess the exercise of the Popish Religion."[5] Oliver Cromwell forced the colonists to repeal the 1652 Act, thus reinstating the Toleration Act, but in the spirit of the day one would not expect faithful enforcement. Notwithstanding this lack of enforcement, however, three aspects of the Maryland experience seem significant today.

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2. Cobb, *Religious Liberty*, at 376 (cited in note 1).
3. Id. at 372.
4. Id. at 215.
5. Maryland Acts of Assembly, I, 340, quoted in Cobb, *Religious Liberty* at 379 (cited in note 1).

First, the framers of the Maryland statute obviously thought that outlawing hate speech ("opprobrious terms") was consistent with—not in opposition to—a regime of free speech and religion. Restrictions of this sort would advance free discourse and inquiry, because they would enable persons of all groups, including the most socially despised, to participate on equal terms. The Toleration Act did not view religious freedom as meaning only an absence of governmental coercion; it sought to regulate the private sphere to ensure social conditions of toleration.

The idea that governmental intervention in the realm of speech might promote the liberal society is utterly foreign to modern conceptions of freedom of speech, which are under challenge today mostly from a segment of the post-modern left. Conservatives and ACLU liberals alike share the conviction that the first amendment is a restraint on the power of government and that the social conditions of tolerance, like the social conditions of patriotism, virtue, or other ideals, must take care of themselves without the help of law. The great free speech controversies of the twentieth century have typically involved speakers—Jehovah's Witnesses, Nazis, or Communists—who were themselves intolerant of others.

The post-modern left challenge to the prevailing conception of freedom of speech, of which hate speech regulation is the most conspicuous element, may seem newfangled and paradoxical. How can the principle of freedom of speech empower the *authorities* to restrict the speech of private persons, however hateful that speech may be? Surely such restrictions must be defended on the basis of some goal (perhaps racial equality) *other than* promoting free discourse and inquiry, and must be subjected to a healthy dose of liberal skepticism.

It is helpful to realize that the post-modern left challenge to free speech doctrine is not a new position. The hate speech regulators stand in the honorable shoes of Lord Baltimore and the Maryland colonists, who believed that private intolerance, through the use of hurtful epithets, is a significant obstacle to achievement of a society in which persons of all faiths (today we would say all races, sexes, sexual orientations, and the like) can live together peaceably and equally. In a world in which Catholics, for example, are both seriously outnumbered and socially subordinated, a jurisdiction that wants to offer Catholics a hospitable place in which to live must be concerned with the danger that private intolerance will make that objective unattainable. By the same token, if the desired end is a community of inquiry in which all viewpoints and perspectives can be shared, is it unreasonable for university administrators to think

that an interventionist policy is necessary to ensure that some portions of the student body are not silenced and excluded from the discourse?

Second, the framers of the Toleration Act of 1649 had a difficult drafting problem. They were caught between the dangers of vagueness on the one hand and underinclusiveness on the other. How could they define "hate speech" so that they could outlaw it? The problem was particularly difficult because part of the religious exercise they were protecting was the ability to proclaim the faith, which often entails an explanation ("exhortation" might be a better word) of why other religions are false. How could the colonial authorities tell when legitimate discourse ends and "opprobrious terms" begin?

The Maryland drafters did not do a very good job. If their list is taken to be exclusive, there are a number of opprobrious epithets they left out: Socinian, ranter, pagan, Christ-killer, fanatic, hireling, and many more. If the list is taken only to be illustrative, it doesn't solve the vagueness problem. If a Protestant maliciously mocks the Latin of the mass by calling it "hocus-pocus,"[6] is that covered? If a Unitarian sneers at the credulity of those who believe in a virgin birth, is that covered? Conversely, some of the terms in the Maryland Act seem rather innocent. "Presbyterian," for example, is not an obvious example of an opprobrious epithet. And any of the terms, in a certain context, might be perfectly legitimate. That is the problem with legislation by list. If, however, the Maryland legislators had used another approach instead of listing forbidden epithets, they would have had a different set of problems. They might have based the law on the actual intent of the speaker to ostracize or subordinate members of a different faith, which makes it virtually unenforceable. Only the speaker knows his own intent. Or they might have based it on the effect on the hearer, which makes it vaguer than ever, and makes speech vulnerable to the reactions of the most sensitive among us.

Modern campus administrators face much the same problem. Like the Maryland legislators, they, too, could publish a list of forbidden epithets, the modern equivalents of "heretic," "schismatic," "papist," or "roundhead." We can all imagine the contents of the list. But no university has opted for that approach, perhaps for reasons of good manners. Instead they opt for vagueness. The University of Michigan interim code—the one instituted *after* the first effort was held unconstitutional by a federal court—forbids "verbal

6. The expression "hocus-pocus" is a corruption of the Latin hoc est corpus, "this is my body," the eucharistic formula.

slurs, invectives or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation," etc., made with the "purpose of injuring the person to whom the words or actions are directed," but excluding statements made as a part of a "discussion or exchange of an idea, ideology, or philosophy."[7] Try to figure out when that will apply.

Given the difficulties of drafting intelligible standards, it should come as no surprise that the enforcement of hate speech codes has been clumsy and unpredictable. Under the original Michigan code, for example, a graduate student was haled before a disciplinary board to account for his statement in a social work class that he believed homosexuality to be a disease and that he intended to develop a counseling program to help patients to overcome it.[8] Another student was "counseled" and required to apologize for commenting in class that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."[9] At the same time, some of the more egregious incidents of racism on campus would apparently fall outside most hate speech codes because they are directed at a general audience rather than at a particular person whom they seek to injure.

Third, the selectivity reflected in the Maryland statute is not random. Several epithets referring to Catholics are listed, because they were precisely the protected class whom the colonial authorities had in mind. There are no epithets pertaining to Jews. There are no epithets pertaining to atheists. There are no epithets pertaining to pagans, Muslims, or other assorted heathen—even though the vast majority of the inhabitants of Maryland in 1649 adhered to religions the legislators would have considered heathen. By interesting contrast, the 1669 Fundamental Constitutions of the Colony of Carolina, drafted in part by John Locke, which was in other respects less liberal in its protection of religious freedom, explicitly extended its protection to "Jews, heathens, and other dissenters from the purity of Christian religion."[10]

It was no accident that the Maryland legislature outlawed some epithets and not others. Maryland was designed as a haven

7. University of Michigan Interim Policy on Discrimination and Discriminatory Conduct By Students in the University Environment, at 5.

8. The incident is recounted in *Doe v. University of Michigan*, 721 F. Supp. 852, 865 (E.D. Mich. 1989).

9. 721 F. Supp. at 866.

10. Fundamental Constitutions of Carolina § 107 (1669), reprinted in Mattie Erma Edwards Parker, ed., *North Carolina Charters and Constitutions, 1578-1698* 132, 149 (Carolina Charter Tercentenary Comm'n, 1963).

for religious dissenters, but religious dissenters of a particular kind. Others were not welcome.

We see that same phenomenon in modern hate speech rules, which forbid hate speech directed against certain groups but not against others. You can, for example, call a fellow student a "racist, fascist homophobe," or a "pimply nerd," or a "damn Yankee," with impunity on any campus in America. Epithets like these serve no less to cut off debate, to humiliate, to ostracize, and to exclude; but they are not covered. Modern hate speech rules are intended to protect groups, but only groups of a certain kind. The opinions of significant subgroups of Americans on issues such as race and sexuality are not welcome on most American campuses. And these voices are not often heard. Who wants to be hissed in class?

There is a distinction, one might respond: the Maryland statute leaves out groups that are disfavored by the hegemonic authorities, while the hate speech regulations protect the oppressed and vulnerable in society. With all respect, this reflects a distorted picture of power relations in modern American academia. Most modern colleges and universities are passionately—one might even say religiously—committed to a particular view of race, gender, and sexual orientation. It is not merely a coincidence that the speech protected by the hate speech regulations is speech that is broadly consistent with the reigning orthodoxy, while the speech that is prohibited is contrary to it. Of course, some universities are exceptions; but the exceptional institutions typically have not enacted speech codes.

The University of Michigan rules could just as easily have prohibited "verbal slurs, invective or epithets directed at an individual," with the same requirements of intention to injure and the same exception for words used in course of the discussion or exchange of ideas—*without confining the forbidden epithets to those based on race, ethnicity, sex, sexual orientation, or the like.* Nothing would be lost by dropping the limitations. But I am aware of no college or university that has adopted a hate speech regulation without the list of protected classes. That they do not do so is an indication that their framers are less concerned with hate speech in general than with protecting their own ideological position—just as the particular range of religious faiths protected by the Maryland legislators was an indication of their ideological position.

College administrators sometimes defend selective protection on the ground that racial, sexual, and other invective of the prohibited sort is more wounding than other types of opprobrious language. But how can we know? As an empirical matter I suspect

that various forms of personal insult ("pimply nerd") are, if anything, more humiliating—more humiliating precisely because there will be no group to rally round in protest and indignation. Indeed, the very fact that racist, sexist, and homophobic speech is so widely condemned on campus suggests that its victims are not without social support. But even if college administrators could demonstrate that the prohibited forms of invective are *more* harmful, this would not mean that other insults, which are also hurtful, should be excluded from protection. Why not prohibit all insults that have the purpose and effect of silencing, subordinating, or excluding a fellow member of the university community, without drawing dubious distinctions on the basis of content?

It is one thing for the authorities to promote civility in discourse. It is quite another thing to promote civility only selectively—to apply a double standard depending on whether the incivility accords with or opposes the ideological position of the authorities. In this context, the content distinctions are suspiciously congruent with the ideological position of the university. Hate speech regulation can be seen as an effort to disarm one particularly unappealing segment of the university's opponents without disarming any of its ideological allies.

An examination of the Maryland Toleration Act of 1649 thus suggests that we should not accept too quickly the common position of conservatives and ACLU liberals that hate speech regulation is, in principle, contrary to the requirements of a free society. Our early history shows that lawmakers no less committed to a free society than most of us came to the conclusion that a free, equal, and tolerant society must protect its principles from the forces of intolerance, even when they manifest themselves in speech. But even if we become more sympathetic, in principle, to the concept of hate speech regulation, we should also be aware that there are grave, and perhaps insuperable, difficulties in drafting regulations that are broad enough without being vague. We must be ever conscious of the possibility that, in the guise of regulations for the preservation of toleration, the authorities will use their power over speech to advance their own ideological causes at the expense of dissenters.