



Look Who's (Not) Talking

THE REAL TRIUMPH OF HATE SPEECH REGULATION

Jon B. Gould

IN 2001, CONSERVATIVE ACTIVIST David Horowitz garnered national headlines when he crafted a highly controversial advertisement against reparations for slavery and sent the ad to a selection of newspapers at the most prestigious and liberal colleges across the country.¹ The ad drew a firestorm of protest at many schools, with several newspapers refusing to run the ad and others apologizing to their readers for having inflamed the campus community. Despite his protestations to the contrary – according to Horowitz “this kind of censorship ... should send chills up anybody’s spine”² – Horowitz appeared delighted in the papers having “taken the bait.” Known for his diatribes against liberal orthodoxy and political correctness, Horowitz used the controversy to jumpstart

his “Freedom Tour’ of campus lectures,”³ revealing, as he said, in “my 15 minutes of fame.”⁴

Conveniently, Horowitz never tried a comparison experiment, testing the willingness of student editors at mostly conservative schools to print a highly liberal issue ad. How, for example, might student editors at Liberty University have responded to an advertisement extolling the virtues of same-sex marriage? Given recent events, what about an ad in the Texas A&M or VMI papers criticizing the U.S. detention facility at Guantanamo as a “gulag”? It’s easy to throw around accusations of ideological censorship, but on a subject so central to the American experience as free speech, the issue deserves better than an antagonistic gadfly seeking to score political points.

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- 1 David Horowitz, *Colleges Targeted by Anti-Reparations Campaign*, Dec. 31, 2001 (visited June 23, 2005) www.frontpagemag.com/Articles/Printable.asp?ID=3723.
- 2 Lisa Petrillo, *Reparations ad creates firestorm for student editors. Issues of racism, free speech raised*, San Diego Union Tribune, Apr. 17, 2001, at B3.
- 3 Matt Rosenberg, *Horowitz’s journey into the jaws of controversy*, Seattle Times, May 16, 2001, at B7.
- 4 Petrillo, *supra* note 2.

In truth, the subject of speech restrictions – particularly the prohibition of offensive or political speech – had received considerable scholarly and popular attention long before Horowitz’s stunt. The topic seemed to reach a crescendo in the early 1990s, as many colleges and universities appeared to experiment with so-called “hate speech” policies that penalized students, faculty, or staff for speech that attacked others on the basis of race, ethnicity or similar such immutable characteristics.⁵ Over 450 editorials appeared in the popular press during this time concerning the evolution of hate speech codes, with several more books and academic articles published critiquing the merits of these measures.

As heated as the debate became about hate speech, its ardor was not simply a reaction to the college speech policies. On a deeper level, the contest reflected a growing recognition that even free speech norms were fluid. To be sure, the notion that law is socially constructed was hardly new at the time. The legal realists and critical race theorists had already argued that law bends to accommodate changed social relationships. But constitutional law, and particularly the First Amendment, are rarified areas in the law, engendering an almost mystical admiration that has adherents claiming that First Amendment jurisprudence must continue to mean the same thing. Perhaps the most famous advocate was Justice Black, who argued

that the First Amendment has a fixed meaning – Congress shall make *no* law abridging expression.⁶ Others have been more nimble in their argument, claiming that the values behind the First Amendment – including self-expression, truth seeking and self-government among others – require that its doctrine be unwavering.⁷

Yet this very argument shows the First Amendment’s meaning to be open to social construction. The fact that we present cultural and political rationales for the norm of free speech means that we determine its importance through social interactions. We use constitutional law to advance certain social values; in turn the meaning of these norms may change as our social, cultural or legal needs change. As Gerald Rosenberg has said, the “First Amendment is not a substantive force in itself, but instead a forum for substantive arguments about the cultural definitions of liberty” and its relation to equality.⁸

That free speech norms might be socially constructed, that their meanings might change as our social, cultural or legal needs change, is, understandably, a scary proposition to many of the First Amendment absolutists. As Stanley Fish explains,

People cling to First Amendment pieties because they do not wish to face what they correctly take to be the alternative. That alternative is *politics*, the realization that decisions about what

5 It is interesting that the college policies were dubbed “hate speech codes,” for few if any mentioned the term “hate speech,” nor does American law provide a ready definition. “Hate speech” is a creation of commentators and opponents of the speech policies, although the expression has become commonplace in everyday society. Indeed, some claim that hate speech cannot be defined, instead representing “a placeholder for contested meanings.” Amy Adler, *What’s Left? Hate Speech, Pornography, and the Problem of Artistic Expression*, 84 Cal. L. Rev. 1499–1572 (1996).

6 *Barenblatt v. U.S.*, 360 U.S. 109, 140 (1958).

7 For more detailed discussion, consider Martin H. Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 Nw. U. L. Rev. 165–174 (1993); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 Cal. L. Rev. 1159–1200 (1982).

8 Gerald N. Rosenberg, *Protecting Fundamental Political Liberties: The Constitution in Context*. Paper presented at the Annual Meeting of the American Political Science Association (1988).

is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret – recharacterize or rewrite – principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech they want silenced.⁹

In many ways this prospect drove the college hate speech debate, for opponents seemed to respond as much to a perceived political movement that would be decided in the streets as they did to a narrow legal question that was the province of courts. Hate speech regulation became lumped together with “political correctness,” critics fearful that a cohort of liberal academicians was advancing a new legal and political agenda that would jump to civil society as a whole. There was certainly precedent for concern. Much of the anti-war protest in the 1960s originated on college campuses, and colleges and universities proved receptive venues for civil rights and women’s rights activism. Academic research can grab the attention of opinion leaders, raising some issues to the national agenda. Moreover, the ideas introduced in collegiate settings can influence succeeding generations of American leaders who become acquainted with these perspectives and proposals while at college. If, in fact, there were a new movement afoot on college campuses to restrain speech, it would be a fight for the public’s understanding and acceptance of free speech norms.

I do not doubt that the codes’ critics believed their rhetoric and the justness of their cause. But they were wrong, mistaken not only in the genesis of the speech codes but

also in the lasting influence of hate speech regulation. Part of the reason is that opponents have relied heavily on anecdotal reporting of the speech codes and hate speech regulation, leaving readers to wonder whether such authors as Dinesh D’Souza¹⁰ and Alan Kors and Harvey Silverglate¹¹ report typical cases or attention-getting aberrations. It is not just academic researchers who would question these works. Avern Cohn, the judge who overturned the University of Michigan’s speech code, has said of Kors and Silverglate’s book, “if one is confined to a single word to describe the text, the choice would fall somewhere among diatribe, jeremiad, philippic, and polemic.”¹² Why have the opponents of speech codes relied so prominently on anecdotal reports? Do they have a political message to sell, or are they largely political commentators and lawyers, activists who while well intentioned are largely untrained in (and may lack the patience for) empirical research? To be fair, this charge is hardly limited to the codes’ opponents, for others too have failed to understand the rise of speech policies. But the codes’ proponents were hardly as vocal as their antagonists, nor did they fear the lasting influence of such policies.

In a response to these dueling antagonists, I conducted an empirical study of the rise of contemporary hate speech regulation. Recently published in the book *Speak No Evil: The Triumph of Hate Speech Regulation*, the research finds that instrumental motives, not identity politics, explain the vast majority of college hate speech policies. Although multicultural theory may have primed the speech codes, the pivotal actors were top collegiate administrators acting on instrumental mo-

9 Stanley E. Fish, *There’s no such thing as free speech, and it’s a good thing too* (1994).

10 Dinesh D’Souza, *Illiberal Education: The Politics of Race and Sex on Campus* (1991).

11 Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America’s Campuses* (1998).

12 Avern Cohn, *Life on Campus Really Ain’t So Bad*, 98 Mich. L. Rev. 1549, 1551 (2000).

tives. In many cases, officials crafted speech codes as symbolic responses to racial incidents on campus, seeing the policies as a sop of sorts to assure campus constituencies that action had been taken against intolerance. Another set of schools engaged in normative isomorphism – an academic version of “keeping up with the Joneses” – crafting hate speech codes to remain within what top officials saw as the mainstream of higher education administration. At a final, much smaller group of schools, speech policies were developed by student services administrators who legitimately believed in the merits of the codes. These were probably the closest model to the traditional explanation offered by speech code opponents, although they are but a small percentage of the schools. Even more, the speech codes in these cases were proposed and adopted by administrators, not the student or faculty activists envisioned by the anti-PC crowd.

The research also provides an estimate of the number of hate speech codes on university books as of 1997, five years after the U.S. Supreme Court’s decision in *R.A.V. v. City of St. Paul* and up to eight years following a series of court cases in which courts from across the country had struck down college hate speech codes.¹³ Even in the face of contrary, persuasive judicial authority, the number of college speech policies had risen 30 percent, the greatest jump coming from among the most restrictive policies.

This finding will likely find a receptive audience with such critics as Kors, Silverglate, and the Foundation for Individual Rights in Education (FIRE), who contend that colleges and universities are still “enforcing their own

politically correct worldview through censorship, double standards, and a judicial system without due process.”¹⁴ But if FIRE believes that its continued advocacy “will end ... the scandal of unconstitutional censorship at America’s public college and university campuses and ... will force private institutions to choose between liberty and tyranny,”¹⁵ it misconceives the prevalence of and support for hate speech regulation in civil society. Indeed, for all its focus on the precise number of existing college hate speech policies, FIRE risks missing the larger point that it is losing the war over hate speech regulation in general. Rather than being considered an unconstitutional pariah, hate speech restrictions are increasingly the norm among influential institutions of civil society, including higher education, the news media, and Internet service providers.

Speak No Evil provides polling data, content analysis, and examples of news coverage to argue that hate speech regulation has jumped the firebreak from academe to take root in civil society. But perhaps the most interesting evidence is found in a study conducted a year following the September 11th attacks. The research was designed to test the new media’s tolerance for controversial issue advocacy and was structured in a way David Horowitz might have followed had he truly been interested in seeing how a variety of media respond to controversial, indeed potentially offensive, paid messages.

A student researcher and I drew a sample of 113 top-circulating and well-respected newspapers in America and created three mock issue ads about the legacy of September 11th. One ad was neutral, suggesting the

13 *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Corry v. Stanford*, No. 740309 (Cal. Super. Ct. filed Feb. 27, 1995); *Doe v. Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *UWM Post v. Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Dambrot v. CMU*, 55 F.3d 1177 (6th Cir. 1995).

14 Kors and Silverglate, *supra* note 11, front flap.

15 *Id.*

The Legacy of September 11th

It has now been over a year since our country was viciously attacked on September 11th. On the one-year anniversary we properly mourned the dead and strengthened our resolve to bring those responsible to justice.

But September 11th's legacy should not end there. It must serve as a reminder of the importance and preciousness of American values – of freedom, liberty and equality.

On this Thanksgiving Day do something that makes you proud to be an American. Fly the flag, play a patriotic tune, visit your church, synagogue or mosque, cherish friends and family. Join us in showing the rest of the world that democracy and freedom endure. We memorialize September 11th best when we practice our values.

– The September 11th Memorial Alliance

legacy of September 11th must be a greater commitment to American ideals of equality and freedom; a second ad was highly liberal, arguing that American arrogance had brought on the attacks; and a third ad was ultra conservative, advocating that America tighten its immigration policy. In constructing ad text we consulted news professionals to ensure that the ads appeared credible and that their content reflected variation across the ideological spectrum.

We randomly assigned one ad to each paper and submitted the ads to the papers from fictitious public interest organizations inquiring about the possibility of publishing the messages. We timed the study to coincide with either Thanksgiving or Christmas of 2002, shortly after the first anniversary of the attacks, in hopes of heightening the salience and perceived offensiveness of the ads' text. Our hypotheses in conducting the study were two-fold. First, we expected that a newspaper's editorial philosophy – as reflected by its presidential endorsements in 1996 and 2000 – would affect its decision to

accept or reject an ad. That is, Democratic-leaning papers would be more likely to accept the liberal ad and reject the conservative ad, while Republican-leaning papers would be more likely to accept the conservative ad and reject the liberal ad. In addition, we predicted that papers generally would be more willing to run the neutral ad than the two ads at the extremes. Even if controversy spurs news coverage, we expected that newspapers would be reluctant to print divisive paid messages and potentially upset their readers.

The study was conducted in two waves. First, we sent the mock ads and inquiry letters to the papers asking about the possibility of running a quarter- or half-page ad using the text provided. After recording each paper's response (and declining any offers to publish the ads), we contacted the papers again under our actual academic identities to discuss the papers' processes and reasoning in reaching their publication decisions.

The results confirmed one of our hypotheses, the neutral ad having been accepted by every newspaper that received it. But there

An Open Letter to America – A Progressive Response To Terrorism

It has now been over a year since the terrorism of September 11th. We have voiced our anger and mourned the dead, but are we any closer to understanding the cause of the attacks? No.

Why did the attacks happen? Of course, there is no justification for terrorism, but one thing we must acknowledge is that America has sown the seeds for fanaticism.

Why America? Some say the terrorists hate our democracy and freedom. Maybe so, but what about Canada? Canada is a modern democracy, and no one hates the Canadians. The terrorists didn't target Canada. They didn't attack Sweden or Japan, they came after the United States.

Why?

For years America has been the light of the world, but lately we have lost our way. We have become arrogant and heavy-handed. We are addicted to oil, to corporate profits, to defense contractors. Our foreign policy is irresponsible. We threaten to march through other countries – to shed American blood – in search of more oil. We embrace the United Nations when it is convenient and flout human rights when it is expedient. Most of all, we back tyrants abroad and sell arms to oppressors. No wonder they hate us in the Middle East.

Americans can stop this madness. What can we do? Protest. Boycott. Make your voices heard.

- ◊ *Insist that the U.S. follow United Nations mandates.*
- ◊ *Refuse to deal with corporations that mortgage American lives for their profits.*
- ◊ *Demand accountability from your tax dollars – no money for despots.*
- ◊ *Junk your SUV, conserve fuel, and weaken our dependence on foreign oil.*

If we do not stem this dangerous political tide now, America is in real danger. To protect our country we need to change U.S. policy now.

Join us in a new campaign, a progressive movement for security. This holiday season write a check. Send it to a progressive group that is fighting for equality and justice. Tell them it's in memory of September 11th, a symbol of your commitment to prevent future terror.

The first step toward true recovery is recognizing America's complicity in feeding the anger. Together we can change U.S. policy and make us all safer.

– The Partnership for Responsible Policy

Getting Smart on Immigration

It has now been a year since the attacks of September 11th. The President has led a war against Al Qaeda. Congress has passed laws to root out terrorists. These are all admirable.

The problem is that they do not go far enough. Call it political correctness, but no one is willing to point the finger where it ought to go. American citizens did not carry out the September 11th attacks. Foreign terrorists did. They were not your neighbors. They were visitors or would-be immigrants.

The answer ought to be obvious. If we want to make America safer we need to make our borders more secure by tightening the rules for immigration. We now know that many of the September 11th terrorists used loop holes in the immigration laws to stay in the U.S. and plan their attacks. Some used student visas to attend flight schools; others received multiple tourist visas to remain in the U.S. That just gives terrorists time on our shores to coordinate their plans.

We need to crack down on the revolving visa system and make it harder for foreigners to immigrate to the U.S. Up to now the INS has treated visa applicants relatively equal. That has to stop. The Swedes and Thais are not trying to attack us. All of the terrorists came from the Middle East. It is time to limit visitors from these countries and to ensure that the Government is screening applicants very carefully from that part of the world.

Is this putting up a brick wall around America? Perhaps. But what is more dangerous, would-be terrorists roaming inside the U.S. or stuck outside? You be the judge. Join us in an effort to enact smart immigration laws. Protect America by keeping dangerous foreigners where they belong: out of the U.S.

– The Partnership to Protect America

was no relationship between a paper's editorial ideology and its willingness to accept either the liberal or conservative ad. As a group, newspapers were more willing to print the liberal ad (89% of papers that received it) than the conservative ad (69% of papers that received it), but surprisingly the rates of acceptance were similar when papers responded to the ads' ideological message. Put a different way, when newspaper staff reacted to the premise or overall point of the extremist ads, the rates of rejection were similar for the liberal and conservative issue ads. Rates differed, though, when executives keyed to the style of presentation. In particular, several staff pointed to language in the conservative ad that they claimed was analogous to hate speech. Consider the text of that mock ad (on page 373, above), which advocated curbs on immigration.

According to the papers, the offending language came in the third line of the fourth paragraph: "The Swedes and Thais are not trying to attack us. All of the terrorists came from the Middle East." How was this hate speech, we asked? Because the language seemed to "disparage a group on the basis of its religion or ethnicity," papers replied. But the text did not mention Islam or Arabs, we countered. "Maybe, but it's implied," an ad executive said. Explained another quite adamantly, "I will not publish this. It's offensive, incendiary, and it picks on people's religion." Almost all of the ad executives described their decisions as an "editorial judgment." Said the advertising director of a paper in the Northwest, "Although this may not be news, where we offer greater latitude to quote newsmakers, we want to encourage open debate in our paper. ... It's good for the community and good for sales. ... But free speech doesn't mean singling someone out because of his race."

It is remarkable that papers would reject

this ad as hate speech, but follow-up interviews with advertising executives discovered that roughly *half* of the participating papers have some policy, whether written or informally understood, that prohibits ads with hate speech. How do papers define hate speech? There was some variation, and not everyone used the exact term "hate speech," but the collective focused on "offensive" or "derogatory" language directed at a person or group because of its race, gender, ethnicity, or religion. Some newspapers were incredibly precise. An official of a major national paper said definitively that he would not print "hate speech." When asked to define the term, he answered, "gratuitously offensive on race, ethnicity, religion, gender, and possibly sexual orientation." Interestingly, his paper was willing to publish the mock ad, since he believed that the text had not reached this threshold. But there are many more situations in which his paper – and papers like this well-respected national journal – would prohibit public dissemination of hate speech. Papers were not rejecting the ad because it was profane, obscene, or controversial; they took issue with its perceived attack against a minority group's immutable characteristics. Indeed, their reasoning seemed almost synonymous with the purported theory of college hate speech codes – that speech which attacks people on the basis of their minority characteristics serves no useful function and only acts to inflict unnecessary pain.

There will undoubtedly be those who see the papers' decisions to reject the conservative ad and their hate speech policies as an ideological or even partisan bias by the mainstream media to constrain conservative messages. However, this wrongly construes the utterance of hate speech as limited to conservatives and the regulation of the same as the province of liberals. Consider, again, that "hate speech" is usually defined as a verbal at-

tack against a person's original or immutable characteristics. Although we may generally think of race and ethnicity in these categories, religion also falls within its bounds. Certainly, many conservative Christians would say so, who more and more are complaining that they are under attack. Perhaps Christian conservatives sense a disconnect between political rhetoric and changing social customs, but both partisan and scholarly sources have described a conservative Christian movement that increasingly sees itself as a victim of scorn, derision, and verbal attacks from secular Americans.¹⁶ Not surprisingly, this "cult of victimhood"¹⁷ lends itself to calls for restrictions against "anti-Christian bias, bigotry, [and] intolerance."¹⁸

Nor are evangelicals the only conservatives calling for protection against verbal "discrimination."¹⁹ Those pushing a so-called "academic bill of rights" would provide a "judicial remedy, guaranteed safety, and representation" for conservatives on college campuses.²⁰ Much like the speech code "movement" that conservatives derided over a decade ago, present-day regulation comes from groups that perceive themselves as under attack and that seek protection from offensive or wrong-minded speech. In one respect the table turning has been remarkable, with liberal critics now accusing social conservatives of flip-flopping. "After years of decrying the 'political correctness police,'" says one observer, "thin-skinned conservatives have joined in; they want their own ideological wardens

to enforce intellectual conformity."²¹ But on a different level, the changing and expanding constituencies for speech restrictions add further support to Fish's claim that the "realm of expression" is governed as much by social and political forces as it is by "principle or firm doctrine."²² As groups come to assess their social position and political power differently, as they worry about threats to their "membership rights" in society, they may also value particular speech differently.

In the end, my point is not to take sides in the debate over hate speech regulation. Actually, I'm fairly agnostic on the question, sympathetic to the motives behind hate speech prohibitions but convinced that most such regulation has been overbroad. Rather, my interest is in the socio-legal advancement of the practice and the increasing acceptance of a doctrine that would seem to conflict with formal jurisprudence. The courts may have spoken out against hate speech regulation, restricting efforts to punish racial, ethnic, and now religious hate speech, but a countervailing norm seems to be growing, replicating itself in the institutional activity of civil society, and in the process influencing public attitudes about the scope of constitutional norms and free speech rights. What may have begun as an instrumental, intra-academic exercise has not been dispatched by its critics. As we move further into a new century, the norm of hate speech regulation not only lives, it also prospers. *JB*

16 Best of the Blogs, Mar. 23, 2005 (June 23, 2005) www.bestoftheblogs.com/2005_03_24_bestof.html; Russell Jacoby, *The New PC: Crybaby Conservatives*, *The Nation*, Apr. 4, 2005, 11–15; Thomas Linneman, *Weathering Change: Gays and Lesbians, Christian Conservatives, and Everyday Hostilities* (2003).

17 *National Review*, Patterns of Fact, Sept. 17, 1999 (visited June 23, 2005) www.nationalreview.com/daily/nr092099.html.

18 National Alliance Against Christian Discrimination (visited June 23, 2005) www.naacd.com.

19 withCHRIST.org, *The Culture Wars* (visited June 23, 2005) withchrist.org/disc.htm.

20 Jacoby, *supra* note 16.

21 *Id.*

22 Fish, *supra* note 9.