Manifesto of a Tenured Radical

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In a famous 1925 poem called "Incident," Countee Cullen described in only two stanzas something of the power that hate speech can have over those who are its victims:

Now I was eight and very small,
    And he was no whit bigger,
And so I smiled, but he poked out
    His tongue, and called me "Nigger."

I saw the whole of Baltimore
    From May until December;
Of all the things that happened there
That's all that I remember.

It's not merely that the speaker here is a child, of course, but that he is attacked in a moment when he is offering friendship and thus likely to be especially vulnerable. He spent a full six months in the city, but that is the only event he recalls.

Hate speech has the power to effect lasting wounds; it can also channel and symbolize the much more pervasive and sometimes less easily isolatable structural forms of discrimination. And in some environments it may be especially potent. Hearing a racial epithet on Times Square in New York may not necessarily be especially wounding; one is after all more likely to be psychologically on guard in that setting. Hearing a racial epithet in a college dormitory might be another matter.

For many people a college campus is a place to insist on more humane and egalitarian behavior than one might expect in Bensonhurst. We cannot legislate a perfect world, we might argue, but we can regulate destructive and damaging speech in some specific social settings, and a college campus may be one such setting. Enforcing hate speech ordinances consistently in a large city might be impossible; enforcing them with some consistency on a college campus might be entirely possible. Changing the relatively self-contained campus setting could make a significant difference in the lives of the people who work there.

For these and other reasons a number of campuses in the 1990s have either passed or tried to pass regulations prohibiting hate speech and sanctioning penalties when it occurs. Many such regulations will be struck down by the courts, but some campuses will work to draft regulations more narrowly as a result. Thus we are likely to continue to see efforts to test the constitutionality of these ordinances in the courts.

I have opened my essay in this way because I want to argue the reverse case—that efforts to regulate hate speech are ultimately more dangerous than their benefits warrant—but I do not want to minimize the destructive effects hate speech can have. My position is obviously an awkward and impossible one where explicitly racist or sexist hate speech is at issue. A white male is not the most strategic spokesperson for First Amendment rights in this context. But racist hate speech in particular is the example we all must confront because it is so elaborately articulated to other forms of racism in America. And its history in our culture is so long and so deeply constitutive of our national identity. I want to lay out some of the problems with hate speech regulations, then, drawing on arguments that a number of other people have made in the last few years.

Perhaps the first point to make about hate speech is to clear the air about
some activities that are already either fully or partially prohibited under other laws, laws, moreover, where the penalties are generally more severe than those in hate speech regulations. It may be useful to work with some familiar examples:

1. A student enters another student’s college room in his or her absence and scrawls racist epithets across the walls. This act can involve breaking and entering and vandalism. It is covered by existing laws and regulations. Some instances might be prosecutable, and a college might well want to expel a student for this sort of behavior. We do not need to create hate speech regulations to punish perpetrators.

2. A group of white male fraternity members follows a black woman across campus at night making remarks that suggest a threat of physical or sexual assault. Once again, this kind of intimidation cannot be tolerated. Threats of bodily harm are not forms of protected speech. But we do not need new regulations to punish such acts.

3. A town or campus hate group burns a cross on the lawn of a black fraternity. Words are not involved, but the act is indeed communicative and certainly constitutes symbolic speech. Once again, existing laws against trespass or attempted arson may provide a sufficient basis for punishment.

Now I am not a lawyer and, even if I were, I doubt if I could claim expertise in state and municipal law across all the states in the country. So I am not offering to decide whether any given act is legal in a given locality. My point is rather that many serious actions that include hate speech are already sufficiently—and narrowly—regulated by existing law. Moreover, racist, sexist, or homophobic components to violations of existing law can justify both vigorous prosecution of such offenses and increased severity of sentencing for those found guilty. Vandalism at a church or synagogue can be punished more severely than vandalism at a bowling alley. The argument advanced by some—including some lawyers—that we are in danger from acts such as those I just described unless hate speech is regulated is often inaccurate.

It is certainly possible that the specificity of hate speech regulations gives them a more focused deterrence value. On the other hand, a stiff penalty for attempted arson for a cross burner has obvious deterrence potential as well. The one benefit one does lose is the educational benefit gained from debating hate speech ordinances or regulations. Awareness of the problem increases significantly when the issue is given wide discussion. Carefully chosen prosecutions
under existing law could supply some—but certainly not all—of the same educational effect.

On the other hand, existing law will not prevent or punish the incident Countee Cullen describes, even if the perpetrator is older than eight. Cullen, of course, partly deals with it himself—by writing and publishing the poem. He thus employs the long-standing civil libertarian remedy for bad speech—more speech. Colleges are obviously uniquely empowered to adopt Cullen’s remedy, not only by offering alternative speech but also by calling for more speech from racists on campus. As Leon Botstein argued recently, colleges have something to gain by urging people to express such views and then to debate them vigorously.³

That would have been my solution to the incident at Brown University in 1990—when a loutish, drunken student yelled racist and homophobic epithets at 2 A.M. I would not, however, insist on handling such students gently. If this clown persisted, I would not give him a moment’s peace. I would encourage people to discuss and criticize his behavior in every class he attended. At the cafeteria, on the quad, I would encourage people to come up to him and let him know what effect he was having on people. Though I would not expel him for that one incident alone, neither did Brown; he was already on probation for earlier behavior. On the other hand, I certainly would not pretend, as Brown did, that he was expelled for conduct rather than speech, a distinction that Nan Hunter has shown to be impossible to maintain.⁴

There is some real value in involving people in more diverse and widespread efforts to challenge and eliminate hate speech. Adopting a regulation as a sufficient solution may seem satisfying, but it may also block recognition of how pervasive racism is in the culture. Other forms of discrimination require legal remedies. Hate speech may be more persuasively curtailed by more varied forms of social pressure. Once again, of course, there is a counterargument that such regulations do not claim to alter people’s attitudes; they merely seek to alter behavior and eliminate its destructive effects. Even the effort to curtail these specific behaviors, however, might benefit from broad, continuing, and complex community involvement. Except for a long-term reporting and policing function, the only broad community involvement in hate speech ordinances comes in the initial period when the ordinance is being debated.

Yet the prospect of a campus environment free of racist speech is immensely appealing. Those who argue against hate speech regulations need to acknowledge that such regulations might well accomplish considerable good. The possibility that a strong university or municipal policy on hate speech could substantially reduce occurrences of hate speech in a town or on a campus offers a powerful inducement to support such policies. I share that desire and thus make a case against formal regulation only with difficulty.
In order to legislate all instances of the behavior Cullen describes—and to cover all such aggressions against women and minorities and various religious and ethnic groups and people of differing sexual orientations—it is necessary to write broad, vague regulations that make substantial inroads against our constitutional guarantees of free speech. In the end, as in the broad antipornography legislation championed by Catharine MacKinnon and others, the evidence often becomes the effects testified to by victims of hate speech. It is not impossible that someone could claim to be deeply hurt by hearing me read Cullen’s poem. And thus the text of a black poet speaking out against racism could be silenced as well. Again, I am not denying that I would rather have a campus free of racist epithets. I would. But I am not willing to stifle freedom of speech to achieve that end.

The effort to regulate hate speech has also helped support a related movement to regulate and, when advocates deem appropriate, penalize much less overtly offensive speech in the classroom. Here the challenge is to identify what speech constitutes a “hostile environment” detrimental to students’ ability to learn. The American Association of University Professors recognizes that more, rather than less, freedom may be required in a classroom if its intellectual mission is to be realized—sometimes students need to be scandalized and offended, to be exposed to speech that is outrageous—but people concerned about students’ feelings are sometimes inclined to argue the reverse, that a class is a captive audience that requires special protection. Particularly chilling is the tendency of some on campus, heavily influenced by MacKinnon, to consider the testimony of any student who feels offended to be decisive. Thus even if no one else in the class found it a hostile environment the student who did is definitive; that student’s experience needs to be honored, even to the extent of punishing the offending faculty member. The result can be a grotesque mix of witch-hunt and kangaroo court that promotes an atmosphere of fear on campus and denies pedagogy its critical edge. All these restrictive practices, moreover, serve not only to undermine intellectual challenges on campus but also to train students to be intolerant of others’ speech after they graduate.

Outside the classroom, on the other hand, it is clear that political life and public debate require some expressions of anger and perhaps something like hate. When I was part of a small group of college students thirty years ago who interrupted a Lyndon Johnson speech by chanting “LBJ LBJ, how many kids did you kill today?” I think I was partly engaged in hate speech. If I call David Duke racist and Pat Buchanan homophobic and Dan Quayle dumb as a brick I may, I suppose, hurt their feelings. Some audiences would take some versions of these remarks as fighting words. But I want the freedom to speak them anyway.

I use these examples because many Americans are likely to assume the
freedom to criticize public figures could never be imperiled. But those are freedoms we are always in danger of losing. Let us not forget that people largely lost those freedoms in the decade and a half that followed the Second World War. That was a period when subversive public speech—like support for civil rights or support for democratic governments—was often punished by termination of employment. And criticism of public figures on those grounds was considered actionable in loyalty boards throughout the country.

In a country with little sense of history and even less sense of how current actions may impact our future, it is very easy to take advantage of immediate political opportunities and put hate speech regulations in place in those municipalities or college campuses where sentiment seems to favor them. It is also tempting for victims of oppression to employ identity politics to demonize advocates of free speech and stifle debate on such issues. That could easily have happened at the University of Illinois conference where I presented an earlier version of this essay. I was, as it happened, the only speaker who spoke out against hate speech regulation; a number of the other speakers supported such regulations either in their formal papers or in comments during discussion. But everyone was cordial, and there was no effort to block debate. I agreed to speak in part in order to empower and create a credible space for audience members who reject both racism and speech regulation. I was not happy to be the only speaker taking that position, but I was not terrified either; at least for faculty members, there seems to me to be no excuse other than excessive personal cowardice to claim it is impossible to speak out against hate speech regulation at events dominated by Left-oriented audiences. Some students and faculty nonetheless confided to me afterwards that they were still unwilling to speak publicly against hate speech regulations at a Left conference on race in America. That suggests that psychological restraints against taking politically incorrect positions are strong enough that we need to work harder at encouraging debate on difficult issues like this. At the very least one may point out that an atmosphere of political correctness that demonizes those on the Left who support free speech heralds the very dangers inherent in the future cultural work these regulations may do. In punishing racist speech in Minneapolis or Madison we give the radical Right the tools they can and will use to punish progressive speech everywhere else. Can and will. I emphasize that this is hardly a matter of speculation. For many of us, the Federal judiciary can now be counted on to suppress civil liberties for the rest of our lives. The press for years has been successfully terrorized and manipulated by the Right. If some of us on the Left now collaborate in the destruction of our basic and vulnerable freedoms we will pay a price in the end more terrible than the speaker does in Cullen’s poem.
And we will end with a culture that continues to be deeply and institutionally racist. We will have accomplished nothing but our own destruction.

Why, in the light of this terrible risk, was a coalition of civil rights groups and unions—from the NAACP to the Anti-Defamation League of B’nai B’rith—willing to support a law so sweeping in its dangers as St. Paul City Ordinance 292.02, which criminalized any public speech or symbolism “which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender”? This wording on its own would have made a powerful repressive weapon available to reactionary forces. If it had been judged constitutional, it would have given license to restrictions on speech offensive to any group on any grounds. The only test would then have been the test of a group’s political power. If you could get such a law passed, it would then have a good chance to be constitutional. Can it be that civil rights groups were so benighted as to be unaware that they are hardly the ones likely to be most able to employ legal weapons against speech in the decade to come? Unfortunately, some may be deluded about their relative influence in American culture. Others may have been assuming they would lose the Minnesota case and other similar cases and thus assuming the real function of such debates is educational. It is more likely, moreover, that many progressive groups, feeling cut out of the action for more than a decade of Reagan-Bush power, simply found it irresistible to go for this opportunity when they saw it. It is one of the few places where some seeming progress could be made by concentrating on local legislation. My argument is that hate speech regulation is exactly that—seeming progress—that will be turned against us and set the progressive agenda back decades. I urge people to think seriously about the past and the future and about the overall price that will be paid if future laws of this sort are found constitutional. On 22 June 1992, the Supreme Court found the Minnesota law unconstitutional. But the issue is not likely be permanently settled. Proponents of hate speech regulation will no doubt try again. Other laws will follow.

But what about the conduct of the Right in the debate over hate speech regulations? Here I would like to deploy a little strategic paranoia. One of the things that worries me about the debate over hate speech is that the Right is playing as if it wants to lose the first round. They are treating what should be a major political battle as if it were merely a cultural struggle for our hearts and minds. In other words, in a serious political struggle you do not use cultural spokespeople—a bombastic, hyperbolic figure like William Bennett and a half-senile patrician like William Buckley—as your shock troops. These people are fine if what you want to do is keep the Left exercised but not if you want to
send a strong political message to the Supreme Court. I am not suggesting that everyone on the Right has thought this issue through thoroughly enough to realize that they have much to gain by losing a case like this, though some may have. We can, however, be certain that if some college or municipality wins a similar case in the future—using a more narrowly drawn regulation or law—the Right will realize how to turn its supposed failure into a major victory.

I am not, I should emphasize, against legislative and regulative remedies. Mandated affirmative action, for example, has been and continues to be immensely helpful and necessary in college hiring. I continue to be in favor of forced desegregation in schooling. I would like to see universal health care mandated by law, and I would like to see the tax laws redistribute income more fully. I am merely against restricting and punishing speech. The solution to bad speech remains more speech, including speech that is politically incorrect. Of course this is a “solution” without guarantees; it is merely a practice, a means of making acts of witness and sustaining continuing struggle. That, I believe, is the best we can do. There are many rights and opportunities we can guarantee by law, but we cannot guarantee either ideal speech situations or social environments free of painful and destructive utterances. The effort to suture social life so that it excludes all unacceptable speech will always be frustrated. If that frustration is met by increasingly severe or more widely applied penalties it risks ending in tyranny.

After I presented this essay at the University of Illinois one of the other speakers—also a white male—came up to me to say that he wished people on the Left who held views like mine would remain silent. When I asked why he made two arguments: first, that at the present time alliances with minority members who favor hate speech regulation are more important than putting our own views forward; second, that the First Amendment has never been honored by the country in any case. All I can do in response is to repeat the arguments I made in the original paper.

Alliances based on suppressing our beliefs have increasingly less chance of succeeding. With the country’s steadily more diverse range of minority, ethnic, and gender interests and disenfranchisements already in considerable competition with one another, alliances need to be based on careful and difficult negotiations over our similarities and differences. Less honest alliances can only work in moments of desperate crisis. Trying to enforce a single politically correct position on hate speech regulation will only fragment a Left that might reach effective consensus on other pressing political issues. I take Richard Perry and Patricia Williams’s essay “Freedom of Hate Speech” to be moving, therefore, in the wrong direction, since they assume that anyone interested in multiculturalism will certainly be in favor of hate speech regulation. I am thereby left with
no subject position in their politics, since I do multicultural research but am against hate speech ordinances. Perry and Williams also thereby reinforce the Right’s image of the Left as monolithic, another cultural contribution that is less than beneficial.

Being against hate speech regulations does not, however, mean ignoring the often dismal record of the First Amendment’s enforcement. Neither under slavery nor in the hundred years after its abolition did African Americans feel they had meaningful freedom of speech. No one who stood publicly against the First World War in America is likely to have felt sheltered by the First Amendment. Neither the Japanese Americans sent to prison camps during the Second World War nor the thousands of people who lost their jobs during the McCarthy era felt protected by the Bill of Rights. And any claim that Native Americans have been consistent beneficiaries of constitutional rights would be laughable. One could go on, looking at speech restrictions in institutions like public schools and industries. The only question is whether it would have been significantly worse without the Bill of Rights and subsequent amendments. I believe it would have been much worse indeed.

Critical legal studies has helped remind us that the law is subject to continual reinterpretation, that its enforcement is often a matter of social struggle and political expediency, that the meaning of a sentence in the Constitution is always open to change. That is not to say, however, that principles like those articulated in the Constitution are valueless. The First and other amendments to the Constitution are weapons to be used in the constant struggle to maintain a degree of freedom in public speech. Without those discursive resources to appeal to, the country would have been even more repressive than it has been.

Stanley Fish has spoken out in favor of hate speech regulation and buttressed his argument by claiming that there never has been and never will be any such thing as free speech. On the latter point, Fish is quite correct, though his model of communally arrived at consensual limits to what it is possible and reasonable to say is an excessively rational one. At least since Freud and Marx we have known that we cannot actually speak freely. Indeed, there are more powerful psychological and political constraints on speech than we are capable of realizing; most of what constrains our speech remains invisible to us. But within the boundaries we can recognize there are both degrees and instances of different kinds of freedom and repression; those are differences worth struggling over.

Fish concludes that, since it is all a matter of social competition, ideals like those embodied in the First Amendment have no value. This is typical of the kinds of errors critics make who were schooled in the apolitical atmosphere of American literary theory in the 1970s. Deciding that it is all a matter of politics throws Fish into a model of politics that is as hopelessly abstract and nonmaterial
as textuality would have been a decade earlier. The point is that ideals and appeals to idealization are important components of political struggle—both for the Left and the Right. Appeals to the First Amendment are a significant part of Left political strategy. Pushed further, Fish's argument would lead to declaring the entire Constitution irrelevant. Does he really think he would be as free as he is to speak his views without it? This is not something that can be decided wholly in the abstract—by comparing arguments—as Fish believes it is. The issue requires careful study of both national and local material practices throughout American history.

If, as Fish claims, there is no such thing as free speech, it follows there is no such thing as freedom. Once again, all the modern philosophies of determination tell us history and culture radically constrain us and limit our freedom. We have choices to make, but we do not get to choose what range of choices is available to us. Despite this, freedom is not an empty term. Its relative degrees of realization make the difference between a life that is tolerable and one that is not. A freed slave may soon realize he or she is neither economically nor socially free, and that exercising speech rights has consequences, but that does not mean a former slave would prefer a return to slavery. The freedom of speech one does not have in the gulag differs from the freedom of speech one lacks in a university. One might imagine that this would be self-evident, but not apparently to a certain kind of dematerialized theorizing.

Of course a public confidence in "freedom" or "free speech" can be unjustified or self-deceiving, as it often has been in the United States. We can persuade ourselves that our speech is much freer than it is. But the solution is not to abandon the concept and opt instead for a social competition for the power to constrain and coerce. Consent to a national ideal of free speech helps preserve a greater degree of tolerance for speech. It also helps shape increased legal protection for speech. When a three-judge Federal panel declared portions of a law to restrict and penalize speech on the Internet unconstitutional in June of 1996, they invoked First Amendment speech rights. One judge referred to our constitutionally guaranteed "unfettered speech"; another acknowledged "our cherished freedom of speech does not cover as broad a spectrum as one may have gleaned from a simple reading of the Amendment." But all felt the issue had to be decided in dialogue with both legal precedent and the consensual idealization of free speech in the public sphere. Of course the consent has to be won anew at every turn of history. But the concept of free speech is a powerful tool nonetheless. Abandoning it or mocking it would make life worse, not better.

It is thus a considerable error for people on the Left to abandon the struggle to win support for their interpretations of constitutional law. It is also an error to cede popular interpretation of the First Amendment and other elements of
the Constitution to the Right. The Right, of course, likes to treat the First Amendment as an untarnished ideal impeccably honored throughout our history; under pressure, a few will concede past errors but insist free speech is guaranteed now. Their aim is simple enough—to deflect attention from the real and continuing struggles over political freedom and material inequities. But there is no reason to credit the bombastic and disingenuous rhetoric that reactionary journalists, politicians, and members of the judiciary use to surround and muffle the First Amendment. The Left can foreground historical reality while still appealing to values that may be read into democratic ideals. Appealing to political reality does not mean abandoning the role of idealization in social life. Again, the proper tactic is more speech, not silence.