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Anthony W. Kraus
Miles & Stockbridge, P.C., akraus@milesstockbridge.com

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BEYOND THE FIRST AMENDMENT: WHAT THE EVOLUTION OF MARYLAND'S CONSTITUTIONAL FREE-SPEECH GUARANTEE SHOWS ABOUT ITS INTENDED BREADTH

By: Anthony W. Kraus[1]

Most Maryland lawyers are vaguely aware that Maryland's Declaration of Rights contains its own guarantee of free speech that is worded differently from the First Amendment of the United States Constitution. What the Declaration of Rights actually says about free speech, however, and what can be inferred from its distinctive phrasing and legislative history, are not matters that have received much particularized attention.[2] Decisions of Maryland's courts routinely state that Article 40 of the Declaration of Rights – the principal source of state free-speech rights – is construed in *pari materia* with the First Amendment, which, as a practical matter, has entirely eclipsed Article 40 in safeguarding communicative rights in Maryland.[3]

Article 40 contains two principal clauses and one subordinate clause, which differ significantly from the First Amendment's terse, single-clause prohibition against Congressional action infringing freedom of speech and related rights.[4] Most other states have adopted similar, more detailed formulations of free-speech protection than the simpler federal guarantee.[5] Displayed side by side for ease of comparison, the Maryland and federal provisions state, respectively, as follows:

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[1] Anthony W. Kraus is a principal of the firm of Miles & Stockbridge, P.C. His practice concentrates on litigation, principally in the area of labor and employment, but also involves First Amendment issues both in the work place and generally.
[2] *See, e.g.*, Nefedro v. Montgomery Cnty., 414 Md. 585, 593, 996 A.2d 850, 855 n.5 (2010) ("We need not consider Article 40 and the First Amendment separately. . .").
[3] Howard Cnty. Citizens for Open Gov't v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 623, 30 A.3d 245, 256 n.19 (2011) (Maryland courts have traditionally treated Article 40 as being in *pari materia* with the First Amendment to the United States Constitution.).
[4] *Compare* MD. CONST. Decl. of Rights art. 40, *with* U.S. CONST. amend. I.
[5] *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, DEFENSES § 5.02[2] at 5-6 (4th ed. 2006). American Bush v. City of S. Salt Lake, 140 P.3d 1235, 1247 (Utah 2006) (43 state constitutions with similar provisions as of 2000); *see also* Ex Parte Tucci, 859 S.W.2d 1, 38 (Tex. 1993) (Phillips, C.J., concurring) (collecting state constitutional provisions in the appendix thereto).

Article 40	First Amendment
• That the liberty of the press ought to be inviolably preserved; • that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, • being responsible for the abuse of that privilege.	• Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or • abridging the freedom of speech or of the press[.][6]

The traditional treatment of Article 40 as being in *pari materia* with the First Amendment does not conclusively settle the question of whether, in a proper case, the state provision might yet be found to confer different rights from those in the First Amendment. Many Maryland cases hedge their "in *pari materia*" characterizations of Article 40 with qualifications, noting that state and federal free-speech rights are viewed as equivalents "in general" or "ordinarily,"[7] but leaving open the implicit possibility that it may not always be so. In addition, some decisions have "emphasized that simply because a Maryland constitutional provision is in *pari materia* with a federal one . . . does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart."[8]

To date, the only discussion in a Maryland case about whether the language of Article 40 confers any different measure of rights than the First Amendment appears to be in the dissenting opinion of the Court of Appeals' 1997 decision in *Telnikoff v. Matusevitch*.[9] In *Telnikoff*, in response to a certified question, the court held that a judgment by an English court imposing liability for a defamatory letter published in the London Daily Telegraph was not entitled to comity and enforcement in Maryland's courts.[10] The *Telnikoff* majority concluded that the English judgment was contrary to Maryland public policy, which provides substantially greater safeguards than English law for freedom

[6] Both the Maryland and federal constitutions also contain similar provisions protecting two other types of communication: "speech and debate" in the legislature and the right to "petition government for grievances." Maryland's Declaration Rights further seeks to foster and facilitate the communicative process and the free exchange of ideas by exhorting the legislature in Article 43 to "encourage the diffusion of knowledge . . . [and] the promotion of literature [and] the arts." *See* MD. CONST. Decl. of Rights art. 43. *See also* U.S. CONST. amend. I.

[7] *See, e.g.*, Chase v. Town of Ocean City, 825 F. Supp. 2d 599, 613 n.14 (D. Md. 2011).

[8] The Pack Shack, Inc. v. Howard Cnty., 377 Md. 55, 64 (2003); *Howard Cnty. Citizens for Open Gov't*, 201 Md. App. 605, 623, 30 A.3d 245, 256 n.19.

[9] Telnikoff v. Matusevitch, 347 Md. 561, 613, 702 A.2d 230, 257 (1997).

[10] *Id.* at 573, 702 A.2d at 236.

of speech and protection against defamation liability.[11] In his dissent, Judge Chasanow attributed the broad protections against defamation in Maryland cases as having been derived from the First Amendment, and argued that determining whether they precluded granting comity actually involved application of federal law, rather than posing a question of "state law" appropriate for the certification procedure.[12] Insofar as the majority "somehow" concluded that there was additional state-law protection against defamation arising independently from Article 40, Judge Chasanow complained they had failed to parse its actual language.[13] According to him, Article 40 and its final clause concerning 'being responsible for [] abuse' seemed "to indicate that the Drafters of the Declaration of Rights provided for *more* protection against libel or slander than the First Amendment," and therefore *less* protection of speech, contrary to the majority's assumption.[14] Since the majority opinion did not explicitly address either the relative scope of the two provisions or their differences in wording, the *Telnikoff* decision provided no real illumination on the issue but just some distant thunder.[15]

More recently, the question of the comparative scope of Article 40 and the First Amendment was raised peripherally in *Newell v. Runnels.*[16] There, the court considered wrongful discharge claims by former employees in a state's attorney's office, who allegedly had been terminated for exercising their free-speech rights.[17] While the plaintiffs asserted in their brief that Article 40 provided them greater free-speech protection than the First Amendment, they did not actively pursue or explain the point; and the Court, therefore, just repeated in a footnote, and without analysis, that the provisions were in *pari materia*.[18]

Because questions will continue to arise concerning the comparative reach of Article 40 and the First Amendment, and because of the importance of free-speech rights generally, it is useful and timely to begin considering, more fully than has occurred to date, whether or not they really provide equivalent rights and protections.

I. TEXTUAL DIFFERENCES

The starting point for analyzing the comparative scope of the two provisions is identifying the precise differences in their language. The texts of

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[11] *Id.* at 598, 702 A.2d at 248.
[12] *Id.* at 613-14, 702 A.2d at 256-57.
[13] *Id.* at 615, 702 A.2d at 257.
[14] *Id.* at 614, 702 A.2d at 257.
[15] *See generally id.* at 612-15, 702 A.2d at 255-57.
[16] Newell v. Runnels, 407 Md. 578, 967 A.2d 729 (2009).
[17] *Id.* at 590-91, 967 A.2d at 736.
[18] *See* Brief of Petitioners Jonathan G. Newell and State of Maryland at 33, Newell v. Runnels, No. 48 (Md. Ct. App. Aug. 29, 2008); *Newell*, 407 Md. at 602, 967 A.2d at 743 n.11.

Article 40 and the First Amendment differ in at least eight ways. The variations do not necessarily permit some general conclusion about which provision is more expansive, and it is possible that each could be viewed as broader in some respects and narrower in others. Article 40 arguably is more expansive than the First Amendment in that it:

- begins with a stand-alone command, provided in emphatic terms – that the liberty of the press ought to be *inviolably* preserved – whereas the First Amendment more blandly provides that Congress shall not abridge that freedom;[19]

- contains a sweeping positive endorsement of communicative rights – that *every* citizen ought to be allowed to *speak, write and publish* – whereas the First Amendment contains a back-handed prohibition against Congressional interference with freedom of speech and the press;[20]

- protects not simply "writing and speaking" but the potentially broader act of "publishing," which arguably could encompass other forms of expression including pictures, music and possibly other non-verbal art forms, as referred to in Article 43;[21]

- contains a broad right to communicate "sentiments on *all* subjects;"[22] and

- contains no express limited focus on a government actor, as the First Amendment does in regulating Congress and actions by it that infringe free speech.[23]

At the same time, Article 40 is arguably less expansive in that it:

- states in peculiarly abstract language that liberty of the press "ought" to be preserved without containing an unequivocal command not to infringe as does the First Amendment;[24]

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[19] *Compare* MD. CONST. Decl. of Rights art. 40, cl. 1, *with* U.S. CONST. amend. I. (emphasis added)
[20] *Compare* MD. CONST. Decl. of Rights art. 40, cl. 2, *with* U.S. CONST. amend. I. (emphasis added)
[21] *Id.*
[22] *Id.* (emphasis added)
[23] *Id.*
[24] *Compare* MD. CONST. Decl. of Rights art. 40, cl. 1, *with* U.S. CONST. amend. I.

- appears to limit the right to speak, write and publish to "citizens" rather than to others who might seek to communicate within Maryland;[25] and

- contains an express acknowledgment that communicative freedom remains conditioned upon the speaker "being responsible for the abuse of that privilege.[26]"

The number and nature of these differences suggests that at least some variation in intent might have guided the respective formulations of Article 40 and the First Amendment. When Article 40 was drafted and enacted in its current form, the First Amendment had been in place for seventy-six years, and the textual divergences from it could not have arisen casually or without forethought.[27]

These facial differences occur in phrases, which like many constitutional provisions are skeletal and vague expressions of general principle that legislative history can sometimes help to clarify. Before assessing how these differences might affect consideration of particular free-speech issues, some reference to that legislative history is useful to see in general terms how such differences came about and what the historical record suggests about their meaning. Can those textual disparities really be dismissed as insignificant, as is assumed when finding the measures in *pari materia*, or do they point toward Article 40 being either more limited in its protection as suggested in the *Telnikoff* dissent or possibly conferring broader communicative rights?

II. LEGISLATIVE HISTORY

The evolution of Article 40 was not a simple matter. The provision that became Article 40 originated in the Declaration of Rights at the time of colonial independence in 1776, although it then was enumerated as Article 38 and was shorter.[28] As originally formulated, it consisted simply of current Article 40's first clause, stating, "That the liberty of the press ought to be inviolably preserved."[29] According to some historians and courts that have researched the tenor of those times, forceful language protective of the press

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[25] MD. CONST. Decl. of Rights art. 40, cl. 2.
[26] *Id.* at cl. 3.
[27] *See, e.g.*, Jacobs v. Major, 132 Wis. 2d 82, 90, 390 N.W.2d 86 (Wis. Ct. App. 1986), *aff'd in part, modified in part and rev'd in part*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987) ("The first amendment contains no similar provision [and w]e cannot conclude that the framers of the [state] Constitution included this language for no purpose at all.").
[28] MD. CONST. of 1776, Decl. of Rights art. 38.
[29] *Id.*

predictably found its way into the original states' constitutions as an outgrowth of the practice of vigorously criticizing local English officials in the colonial press. It was a tradition that some framers of state constitutions deemed worthy of safeguarding and perpetuating with respect to native government officials after independence.[30]

There is evidence, moreover, suggesting that Maryland's "liberty of the press" provision was motivated not just from the long-standing desire to prohibit any "prior restraint" of publication through the courts, but also because of specific concern about barring post-publication sanctions for some types of speech, such as prosecution for seditious libel, from which anti-Federalists especially sought protection.[31] In reviewing Maryland's public policy favoring free speech, the majority opinion in *Telnikoff* notes that during Maryland's 1788 convention to ratify the United States Constitution, a proposal was made to add Article 38's language to the federal Bill of Rights.[32] While the proposal was unsuccessful,

> [t]he drafting committee added an intriguing, if enigmatic, commentary: 'In prosecutions in the federal courts for libels, the constitutional preservation of this great and fundamental right may prove invaluable.' Whatever the draftsmen meant by this, it is clear that they did not share the view that a guarantee of freedom of the press would not affect seditious libel prosecutions.[33]

Some distinctive limitation on the kind of speech content that could be regulated, and on the post-publication penalty that could be imposed for it, thus appears to have been an anticipated effect of the Declaration of Rights' "liberty of the press" language among Maryland lawmakers at or around the time of its enactment.

As revolutionary passions waned in ensuing decades, states began enacting constitutional speech and press protections that were different in phrasing and tone.[34] At its Constitutional Convention of 1864, Maryland enacted Article 40 with its current language, both preserving the original "liberty of the press" clause and adding two new additional clauses: "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."[35] At various times, including

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[30] *See, e.g.*, Ex Parte Tucci, 859 S.W.2d at 20-21.

[31] David A. Anderson, *The Origins of the Press Clause,* 30 UCLA L. REV. 455, 470-72 (1983).

[32] *Telnikoff*, 347 Md. at 588, 702 A.2d at 243-44.

[33] *Id.* (*quoting* Anderson, *supra* note 31 at 472).

[34] *American Bush*, 140 P.3d at 1247; Ex Parte Tucci, 859 S.W.2d at 20-21.

[35] MD. CONST. of 1864, Decl. of Rights art. 40. The final clause was amended three years later in 1867 to provide "being responsible for the abuse of that privilege." MD. CONST. of 1867, Decl. of Rights art. 40.

before and after Maryland added these phrases, approximately forty other states adopted similar language.[36]

III. COMPARISON WITH THE PENNSYLVANIA EXPERIENCE

Pennsylvania had been the first state to create and enact virtually this same two-clause formulation, broadly allowing "speech on any subject" while imposing "responsib[ility] for abuse," many decades before its eventual adoption in Maryland.[37] It appears that this two-clause 'qualified allowance' formulation may originally have been derived from Blackstone's *Commentaries on the Law of England*, which in somewhat similar terms stated:

> Every freeman had an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[38]

Blackstone sought to avert any prior restraint of the press, which he viewed as an abomination, but was not concerned with the scope of post-publication sanctions, which he generally believed should be available.[39] According to Blackstone, liberty of the press was properly advanced through immunity from "previous restraints upon publications, and not in freedom from censure for criminal matter when published."[40]

When initially fashioning and implementing the two-clause 'any subject/but no abuse' formulation in 1790, Pennsylvania simultaneously excised a broad, blunt exhortation from its 1776 constitution, providing that the "press ought not be restrained," which had been analogous to Maryland's "inviolably preserved" clause.[41] Pennsylvania retained a more cryptic and qualified endorsement of press rights, contained in its original 1776 constitution, which referred to "the printing-press being free to any person who undertakes to examine the proceedings of the legislature and any branch of government," and which apparently sought to assure open access to multiple viewpoints in such press coverage.[42] To this obscure "printing press" language

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[36] *See supra* note 5.

[37] State v. Ciancanelli, 339 Or. 282, 308 (2005); Ex Parte Tucci, 859 S.W.2d at 19-21.

[38] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 152 (4th ed. 1765-1769).

[39] *Id.* at 152.

[40] *Id.* at 151-52.

[41] *Compare* PA. CONST. of 1790, art. IX, § 7, *and* PA. CONST. 1776, Decl. of Rights XII *with* MD. CONST. of 1864, Decl. of Rights art. 40.

[42] Anderson, *supra* note 31 at 465-66.

was appended an endorsement of "free communication of thoughts and opinions [as] . . . an invaluable right" along with the two-clause 'any subject/but no abuse' formulation apparently derived from Blackstone.[43] Pennsylvania and several other states that eventually adopted this two-clause formulation also added provisions immediately following it, which expressly acknowledged the practice of prosecuting criminal libel and commented on how it should be conducted:

> In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.[44]

Pennsylvania's 1790 constitution also effectively fortified the new 'no abuse' qualification with an earlier reference about the right to protect and preserve one's *reputation*: "All men . . . have certain inherent and indefeasible rights, among which are those of . . . possessing and protecting property *and reputation* . . . ."[45]

Consistent with this legislative history, the Supreme Court of Pennsylvania eventually construed the two-clause 'any subject/but no abuse' formulation from 1790 as having had the limited intent of enacting a ban on prior restraints, as Blackstone had proposed.[46] Some other state courts have adopted similar interpretations.[47]

In contrast, Maryland's adoption of the two-clause 'any subject/but no abuse' formulation in 1864, seventy-four years after its initial emergence in Pennsylvania, proceeded somewhat differently. In the creation of Article 40, its emphatic language providing for "inviolable" preservation of liberty of the

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[43] *See* William Goldman Theaters, Inc. v. Dana, 405 Pa. 83, 89-90 (1961), *cert. denied*, 368 U.S. 897 (1961); Ex Parte Tucci, 859 S.W.2d at 19-20.

[44] PA. CONST. of 1790, art. IX, § 7. *See, e.g.*, ALA. CONST. art. I, §§ 4, 12; ARK. CONST. art. II, § 6; COLO. CONST. art. II, § 10; CONN. CONST. art. I, §§ 4, 5; DEL. CONST. art. I, § 5; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, ¶s 5-6; ILL. CONST. art. I, § 4; IND. CONST. art. I, §§ 9-10; IOWA CONST. art. I, § 7; KAN. CONST. Bill of Rights § 11; KY. CONST. Bill of Rights §§ 8-9; ME. CONST. art. I, § 4; MICH. CONST. art. I, §§ 5, 19; MO. CONST. art. I, § 8; MT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; N.Y. CONST. art. I, § 8; N.D. CONST. art 1, § 4; S.C. CONST. art. I, § 16; TEX. CONST. art. I, § 8; W. VA. CONST. art. III, § 7-8. *See also* excerpts in appendix to Ex Parte Tucci, 859 S.W.2d at 38.

[45] PA. CONST. of 1790, art. IX § 1. (emphasis added)

[46] *William Goldman Theaters*, 405 Pa. at 87.

[47] *See, e.g.*, *American Bush*, 140 P.3d at 1248; State v. Jackson, 356 P.2d 495, 500 (Or. 1960); Dailey v. Superior Court, 44 P. 458, 459-60 (Cal. 1896).

press was retained *in toto* in its original Revolution-era form, rather than being excised as Pennsylvania had done with the analogously emphatic language contained in its original constitution.[48] Equally important, in adding the new language about "being responsible for abuse," Article 40 remained pointedly vague about what "responsib[ility]" was contemplated.[49] Article 40 did not include any subsequent references acknowledging libel laws or stating how prosecution for libel should be conducted, as had been added in Pennsylvania's Constitution and had become commonplace elsewhere.[50] Nor was language included in Article 40 or elsewhere in Maryland's Declaration of Rights about redress for damage to reputation, as was included the Pennsylvania Constitution.[51] While state constitutions with such provisions can be viewed as "constitutionalizing" the law of defamation by specifically alluding to it, the "being responsible" language in amended Article 40 appears to have been left intentionally less specific and vague.

Moreover, during the Maryland Convention's debates in 1864, the framers of the new two-clause formulation resisted being specific about what "abuse" was referred to in Article 40.[52] A proposed amendment stating that "freedom of the press shall be inviolably preserved *except when used for treasonable purposes*" (an unsurprising suggestion during the Civil War) was rejected.[53] In speaking for the majority in support of the traditional, unqualified "inviolable liberty of the press" language, Delegate Archibald Stirling, Jr. stated, "This article is intended . . . to assert a general principle . . . . If this broad exception is made to the rule, then the question is—who is to decide what are treasonable purposes?"[54] The general principle of liberty of the press was preserved without the stated exception, and no example or description of possible "abuse" was ever inserted.[55]

While not an exhaustive review of the origins of Article 40, this history provides suggestive context for determining how Article 40's provisions might most sensibly be construed. By retaining the broad statement of the "inviolab[ility]" of the liberty of the press, carried forward since the Revolutionary War, Article 40 as amended still emphasized and preserved special concern for freedom of the press. Although its "ought to be preserved" language sounds theoretical and oblique to modern ears, it was consistent with the early American mindset to phrase constitutional provisions in terms of

[48] *Compare* MD. CONST. Decl. of Rights art. 38 (repealed 1977), *and* MD. CONST. Decl. of Rights art. 40, *with* PA. CONST. art. I, § 7.
[49] *Compare* MD. CONST. Decl. of Rights art. 40 *with* PA. CONST. art. I, § 7.
[50] *Id.*
[51] *Id.*
[52] RICHARD P. BAYLY, THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 387 (1864).
[53] *Id.*
[54] *Id.*
[55] *See generally* MD. CONST. Decl. of Rights art. 40.

general hortatory principles.[56] Interpreting this phrasing as not detracting from the force of Article 40's protection of a free press seems especially warranted because of its additional, insistent "inviolably preserved" language. Moreover, if the intent of amending Article 40 in 1864 simply had been to adopt Blackstone's objective of reining in prior restraint of the press, it is difficult to explain why the initial resounding "liberty of the press" provision, that appeared to have been understood as intended to curtail post-publication prosecution for libel, was retained as the introduction of Article 40, rather than being discarded as occurred with the comparable language in Pennsylvania or by being in any way qualified or moderated.[57]

Indeed, the apparent intent of this language to confer special protection for freedom of the press was acknowledged by Judge Chasanow in his *Telnikoff* dissent: "Article 40 . . . establishes a clear difference between the 'liberty of the press,' which is inviolably preserved, and the right of every citizen to speak, write and publish, which leaves the individual responsible for abuse of the privilege."[58] This distinction was important since his dissenting opinion depicted the libelous letter as being private in nature, and only incidentally picked up in the press:

> Although the letter was published by a newspaper as a letter for the editor . . . the libel was in the letter prepared and dispatched by a private person. The letter was libelous regardless of whether the newspaper chose to reprint it. Freedom of the press is not implicated.[59]

Furthermore, later construction of Article 40 by the Court of Appeals has implicitly interpreted not only the original "liberty of the press" language, but also the appended two-clause 'any subject/but no abuse' formulation, as conferring free-speech protection beyond simply enacting Blackstone's condemnation of prior restraints. The court has construed Article 40, consistent with the First Amendment, to prohibit imposition of post-publication penalties on speech not in any way involving the press or prior restraint of it. Thus, for example, in *Nefedro v. Montgomery County*, the court invalidated a county ordinance that imposed penalties for fortune telling.[60] It is only the language in the second clause of Article 40, concerning "every citizen's right to speak, write and publish," that can have this protective effect,

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[56] *See* Adam Rick, *First Amendment, Second Fiddle: Free Speech in New Hampshire's Constitution*, 7 PIERCE L. REV. 373, 381 (2009). *See also, e.g.*, MASS. CONST. Decl. of Rights art. XVI, pt. 1; N.C. CONST. Decl. of Rights art. I, § 14; N.H. CONST. art. I, § 22; PA. CONST. Decl. of Rights art. I, § 7; TENN. CONST. Decl. of Rights art. I, § 19; VT. CONST. ch. I, art. 13.

[57] *See supra* note 48.

[58] *Telnikoff*, 347 Md. at 614, 702 A.2d at 256-57.

[59] *Id.* at 615, 702 A.2d at 257.

[60] Nefedro v. Montgomery Cnty, 414 Md. 585, 996 A.2d 850 (2010).

since liberty of the press is not involved; and the invalidated penalty was a post-publication sanction rather than a prior restraint.[61]

The legislative history also suggests that the "being responsible" language in Article 40 was not intended to reduce that Article's protection of speech, in the press or otherwise, below the level provided by the First Amendment, contrary to the dissent's suggestion in *Telnikoff*.[62] As explained above, the "being responsible" language at most provided an intentionally vague acknowledgement that "writing, speaking or publishing sentiments" was not constitutionally immune from any and all sanction, but at the same time avoided expressly constitutionalizing any particular type of sanction.[63] While the First Amendment does not contain similar "being responsible" language as a qualification to its protections, it has been understood from its inception to preserve at least some sanctions for abusive speech.[64] Because the "being responsible" language in Article 40 thus appears intended to codify no more than a similar, vague recognition of such sanctions that has always been implicit in the First Amendment, it arguably should not be construed as providing more restricted protection of free speech than the First Amendment.

In sum, the historical record supplies at least some indication that Article 40's "liberty of the press" language was originally desired by Maryland lawmakers as a possible addition to the federal constitution for curbing seditious libel prosecutions, and to that extent, may have been seen as possibly broader than the First Amendment as contemporaneously adopted and understood.[65] More importantly, Maryland's later adoption of the two-clause 'any subject/but no abuse' formulation in Article 40 was done in a distinctive manner, suggesting it was not intended simply to prohibit prior restraints, as comparable language has been construed to do in some other state constitutions.[66] In addition, there is no indication that the "being responsible for abuse" clause was intended to make rights conferred under Article 40 less extensive than those now viewed as granted by the First Amendment, or to indicate any specific constitutional limitation on such rights, unlike in some other states.[67] On the whole, the legislative history appears to militate in favor of construing the terms of Article 40 as providing greater rights than the First Amendment and, equally importantly, *not* to militate against such a construction in ways suggested by the different manner in which similar language was adopted in some other states.

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[61] *Id.* at 590-91, 996 A.2d at 853 (quoting Montgomery County Code, § 32-7 (1999)).

[62] *Telnikoff*, 347 Md. at 614, 702 A.2d at 867.

[63] *See supra* notes 49-51.

[64] *See*, *e.g.*, Herbert v. Lando, 441 U.S. 153, 158 (1979) ("Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability.").

[65] *See supra* Part II, pp. 87-89.

[66] *See supra* Part III, pp. 90-92.

[67] *See supra* Part III, pp. 92-93.

IV. ACTIONS OF OTHER STATE COURTS AND IMPLICATIONS OF BROADER PROTECTION

Construing Article 40 in this manner is further supported by judicial decisions in other states that have interpreted similar language as providing protections greater than those of the First Amendment. In fact, there are several different settings in which courts in other states have concluded that provisions similar to Article 40, in whole or in part, supply broader free-speech protection than is accorded under the First Amendment. These cases have considered how such language bears upon a variety of free-speech questions, including *what* speech is subject to regulation or can result in liability, *when* regulation properly can occur by prior restraint or otherwise, and *who* properly can be enjoined from interfering with free speech.[68] Those courts have found the "being responsible" language of the two-clause formulation is compatible with, and does not preclude, recognizing broader rights than are conferred by the First Amendment.

A. PROTECTION OF OPINION

One important way speech has been protected more expansively under state constitutions than under the First Amendment has been in safeguarding expression of opinion. Broad First Amendment protection for statements of opinion had been widely presumed to exist up through the 1980s.[69] A complicated, context-sensitive approach had been developed for differentiating opinion from fact, articulated most prominently in the concurring opinions of Judges Kenneth Starr and Robert Bork in *Ollman v. Evans*.[70] The approaches of those two conservative jurists were overturned for not being conservative enough in the Supreme Court's highly controversial decision in *Milkovich v. Loraine Journal Co.*,[71] which limited the considerations used for determining whether a statement is factual or is entitled to constitutional protection as opinion.[72]

Widespread dissatisfaction with *Milkovich* promptly led to various approaches by lower courts to dilute or avert its impact and effectively to reimport some or all of the more nuanced approach of *Ollman*.[73] One way of achieving this result, first utilized by the New York Court of Appeals, was to

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[68] *See* discussion *infra* Part IV, pp. 94-97.
[69] *See, e.g.*, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).
[70] *Id.* at 971, 993.
[71] Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
[72] *Id.* at 17-18.
[73] *See, e.g.*, Kathryn Sowle, *A Matter of Opinion, Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 512 (1994) and cases discussed therein.

preserve traditional constitutional protection for opinion under state law, irrespective of federal law.[74] In the case of *Immuno AG. v. Moor-Jankowski*, based on language similar to the two-clause formulation in Article 40, the court essentially reinstated, under the state's constitution, broader pre-*Milkovich* tests for distinguishing opinion from fact.[75] The court stressed that in its free-speech protections, New York "made a deliberate choice not to follow the language of the First Amendment," preferring rather "to set forth our basic democratic ideal of liberty of the press in strong affirmative terms." Another key factor was that New York had served as the "cultural center for the Nation and has a long tradition of providing a hospitable climate for the free exchange of ideas."[76] Other states have followed New York's lead.[77]

Article 40 provides a basis for reaching the same conclusion under Maryland law, at least with respect to opinions published in the press rather than communicated privately. Article 40 contains not only language similar to New York's constitution about every citizen having the right to "speak, write and publish on all subjects," but further possesses its own highly emphatic language, retained since the Revolutionary War, assuring inviolability of freedom of the press.[78] In so doing, it too sets forth "a democratic ideal of liberty of the press in strong affirmative terms," arguably even more strongly than in New York. While Maryland may not be as significant a cultural center as New York, its Declaration of Rights clearly aspires for it to become one through the command that the legislature "encourage the diffusion of knowledge" and promote "literature and the arts."[79] Keeping channels of communication free from undue restriction would assist in achieving that aim, further justifying constitutional protection of opinion in Maryland.

B. PROTECTION AGAINST PRIOR RESTRAINT

Some states also have determined that the language in their state constitutions provides broader protection against government-imposed prior restraint on speech than the First Amendment. Applying language virtually identical to the 'speech on all subjects' assurances of Article 40, the Arizona

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[74] Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 261 (1991).
[75] *Id.* at 250, 252-55.
[76] *Id.*
[77] *See, e.g.*, Beattie v. Fleet Nat'l Bank, 746 A.2d 717, 724-25 (R.I. 2000) (finding protection under the Rhode Island Constitution broader than *Milkovich* may allow under First Amendment); Vail v. The Plain Dealer Publishing Co., 72 Ohio St.3d 279, 282 (1995) (rejecting *Milkovich* and applying *Ollman* tests under the Ohio constitution); Wampler v. Higgins, 93 Ohio St.3d 111, 121 (2001) (extending the same protection for opinion to private communications outside the press).
[78] *Compare* N.Y. CONST. art. I, § 8, *with* MD. CONST. Decl. of Rights art. 40, cl. 1 & 2.
[79] *See* MD. CONST. Decl. of Rights art. 43.

Supreme Court struck down a mandate of the state utility commission, which ordered a telephone company temporarily to block access to an information provider service and formulate a plan for addressing pre-subscription issues with consumers about the service before providing access to it.[80] A similar provision was applied by the Supreme Court of Washington to void a contempt citation issued to a news reporter for publishing, contrary to a court's instructions, tape-recorded conversations of a defendant being tried for solicitation of murder.[81] The court held that the "speak, write and publish on all subjects" language "seems to rule out prior restraints under *any* circumstances, leaving the state with only post-publication sanctions."[82] Even when the two-clause 'all subjects/but no abuse' formulation has been interpreted conservatively just to implement Blackstone's disapproval of prior restraints, its language has been construed to do so more expansively than the First Amendment.[83] Broad protection against prior restraints may even be more strongly compelled under Article 40, in light of its language concerning *both* the inviolability of the liberty of the press *and* the right of every citizen to "speak, write and publish."[84]

C. PROTECTION AGAINST INFRINGEMENT OF SPEECH BY PRIVATE PARTIES

When property owners whose premises have assumed the character of a public forum have sought to constrain communicative rights of visitors to such sites, some state constitutions have been found to reach such practices and prohibit such speech restriction, even without involvement of a state actor imposing the restraint.[85] These decisions have relied on "speak, write and publish" clauses like those in Article 40 and the absence of any express state actor requirement, in contrast to the First Amendment's exclusive focus on avoiding impairment of free speech by Congress.[86] The text of Article 40 might similarly support such an extension of rights against private parties.[87]

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[80] *See* Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n, 160 Ariz. 350, 358 (1989) (finding the order "in the nature of a prior restraint" and invalid under the broader protection of the Arizona constitution).
[81] State v. Coe, 101 Wash.2d 364, 374 (1984).
[82] *Id.* (court emphasis). *See also* Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992) (any prior restraint is presumptively unconstitutional under broader state standard).
[83] *William Goldman Theaters*, 405 Pa. at 87-88.
[84] MD. CONST. Decl. of Rights art. 40, cl. 2.
[85] *See* Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899 (1979), *aff'd*, 447 U.S. 74 (1980); State v. Schmid, 84 N.J. 535 (1981), *app. dism. sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982); Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991).
[86] *Robins*, 23 Cal. 3d at 908; *Schmid*, 84 N.J. at 560; *Bock*, 819 P.2d at 60-61.
[87] This conclusion has been vigorously advocated in Matthew S. Fuchs, *Free Exercise of Speech in Shopping Malls: Bases that Support Independent*

D. Greater Protection Against Prosecution for Obscenity

Some states also have found their state constitutional grants of free speech are more protective against censorship or prosecution for obscenity than the First Amendment. The Court of Appeals of New Mexico determined that its "speak, write and publish" provision confers broader protection than the First Amendment with respect to attempted content-based regulation of speech, principally with respect to obscenity.[88] The distinctive affirmative language in that provision permitting "publish[ing of] sentiments on any subject," not present in the First Amendment, was critical to the court in fashioning a more limited ability to censor only when obscenity was found "intolerable" instead of just not "acceptable" under community standards.[89]

These examples of cases in which state constitutional language similar to Article 40 has conferred broader protection than the First Amendment are not all-inclusive. Additional practices impairing free speech that have been invalidated based on such state law protections include, among other things, the assessment of punitive damages for defamation,[90] permitting regulation of "fighting words,"[91] and rigidly relying on whether government personnel have spoken in their roles as public employees or as private citizens for purposes of determining whether they can be disciplined for speech activities.[92]

CONCLUSION

It is true that not all courts in states having such constitutional provisions have agreed with these rulings or found such state constitutional language to compel more speech-protective outcomes than under the First Amendment.[93] Providing a comprehensive overview of the relevant cases would require far more discussion than is feasible in this article, but suffice it to say that the more

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Interpretation of Article 40 of the Maryland Declaration of Rights, 69 ALB. L. REV. 449 (2006).

[88] City of Farmington v. Fawcett, 114 N.M. 537, 545 (N.M. App.), *cert. denied,* 114 N.M. 532 (1992).

[89] *Id.*; *see also Ciancanelli*, 339 Or. at 322 (concluding that criminal prohibition of "public shows" involving "sexual conduct" was facially invalid under state constitutional provision protecting expression on any subject).

[90] Wheeler v. Green, 286 Or. 99 (1979).

[91] City of Eugene v. Lincoln, 183 Or. App. 36, 44 (2002).

[92] Matthews v. Dep't of Pub. Safety, No. HHDCV116019959S, 2013 WL 3306435, at *31 (Conn. Super. Ct. 2013).

[93] *See, e.g.*, *American Bush*, 140 P.3d at 1235 (finding nude dancing not subject to greater protection); Gilbert v. Flandreau Santee Sioux Tribe, 725 N.W.2d 249 (S.D. 2006) (public employees' protection for speech about "public concern" not subject to greater protection); Eastwood Mall, Inc. v. Slanco, 68 Ohio St. 3d 221 (1994) (freedom of expression on private mall property not subject to greater protection.).

common judicial response has been to apply First Amendment theory and limitations on such issues rather than a more expansive, independent state constitutional approach.[94] There is, of course, a strong practical incentive for judges to follow the lead of First Amendment precedent, which avoids complicating matters with local variations.[95]

The point here, however, is that there are several possible ways that free-speech protection under Article 40 *could* be found to be broader than under the First Amendment. This would require persuading Maryland courts to withhold their customary threshold invocation of "in *pari materia*," and squarely address the distinctive language and legislative history of Article 40.[96] Its divergences from the language of the First Amendment must mean *something*, or if not, at least warrant more painstaking consideration and explanation than has been provided so far about why such differences are inconsequential.[97] Only after such more fully considered review will Maryland's citizens obtain the assurance they deserve that free speech is being protected in the Free State to the full extent intended in its Declaration of Rights.

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[94] *Gilbert*, 725 N.W.2d at 257-58 (collecting illustrative cases and noting "[t]he majority of states with almost identical language have interpreted their state constitutional free speech provisions as coextensive with their federal counterparts.").

[95] *See generally In re Special Investigation No*. 228, 54 Md. App. 149, 176 n.26 (1983) (confessing that the court's earlier in *pari materia* reading of two laws had the practical attractions of being "quick" and "easy," but ultimately was based on a superficial analogy between them.).

[96] *See supra* notes 2, 7, and 8.

[97] *See supra* note 27.