

## **Dignity and Defamation: The Visibility of Hate**

**Lecture 1: Why call hate speech group libel?**

**Lecture 2: What does a well-ordered society look like?**

**Lecture 3: Libel and legitimacy.**

### **LECTURE 1: WHY CALL HATE SPEECH GROUP LIBEL?**

#### **1. How I came to this issue.**

A little more than a year ago, I published a short piece in the *New York Review of Books*, reviewing a book by Anthony Lewis called *Freedom for the Thought that we Hate*.<sup>1</sup> In the review, I expressed some misgivings about the arguments commonly used in America to condemn what we call hate speech legislation—legislation of the sort you will find in England, Canada, France, Denmark, Germany, New Zealand, and in some of the states of Australia, prohibiting statements “by which a group of people are threatened insulted or degraded on account of their race, color, national or ethnic origin,”<sup>2</sup> or prohibiting attempts to incite racial or religious hatred.<sup>3</sup> I ventured the suggestion that there was perhaps more to be said in favor of this legislation than Anthony Lewis had thought. But I didn’t make any very strong assertion. I said: “It is not clear to me the Europeans are mistaken when they say that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack.” I ended the piece quite moderately (I thought), saying

The case is ... not clear on either side. ...[*I said that*] the issue is not just *our* learning to tolerate thought that *we* hate—we the First Amendment lawyers, for example. The harm that expressions of racial hatred do ... is not harm ... to the white liberals who find the racist invective distasteful. Maybe we should admire some [ACLU] lawyer who says he hates what the racist says

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<sup>1</sup> Jeremy Waldron, *Free Speech & the Menace of Hysteria*, 55 NEW YORK REVIEW OF BOOKS (May 29, 2008) available at <http://www.nybooks.com/articles/21452>, reviewing ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE* (Basic Books, 2007).

<sup>2</sup> Language from Article 266b of Danish Penal Code.

<sup>3</sup> Cf. English statute.

but defends to the death his right to say it, but ... [t]he [real] question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials? Those are the concerns that need to be answered when we defend the use of the First Amendment to strike down laws prohibiting the publication of racial hatred.<sup>4</sup>

I thought that sounded all very measured and moderate. Until...

“YOU ARE A TOTALITARIAN ASSHOLE” screamed the subject-line of the first e-mail I received after the piece was published. “You are the type of human excrement that should be dealt with IF the laws that you propose ever become reality. We do not a strong state to support worthless little subsidized parasites like you...”<sup>5</sup> The e-mail left me a little bit bruised and so I decided that in these lectures—dedicated to the memory of Oliver Wendell Holmes, who himself at one time or another took both sides on most free speech issues—I would take the opportunity to explain myself.

## 2. Outline

My purpose is not to persuade you of the wisdom and legitimacy of hate speech laws—my in-box can’t take too many more of those hateful e-mails. Still less is it my aim to try and make a case for their constitutional acceptability in the United States. I’ll refer to the American debate from time to time, mostly suggesting ways in which it might be enriched by more thoughtful consideration of the rival positions.

Mostly, what I want to do is offer a characterization of such laws as we find them, in Europe and in the other advanced democracies of the world, and as we have found them, too, in America from time to time—because we must remember that opposition to these laws in this country is by no means monolithic or unanimous. Apart from the legal academy, which is divided on the matter, there is division among our lawmakers. There were state and municipal ordinances to be struck down in and in *RAV v St Paul*<sup>6</sup>, in *Virginia v Black*<sup>7</sup>, and in *Collin and the National Socialist Party v Smith, Village President of Skokie*<sup>8</sup> and there was a state

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<sup>4</sup> Jeremy Waldron, *Free Speech & the Menace of Hysteria*, 55 NEW YORK REVIEW OF BOOKS \_\_ (May 29, 2008) at <http://www.nybooks.com/articles/21452>

<sup>5</sup> E-mail from [Mike\\_Hardesty7@yahoo.com](mailto:Mike_Hardesty7@yahoo.com), July 13, 2008.

<sup>6</sup> *RAV. v. City of St. Paul*, 505 U.S. 377 (1992)

<sup>7</sup> *Virginia v. Black* 538 U.S. 343 (2003)

<sup>8</sup> *Collin v. Smith* 578 F.2d 1197 (1978).

law to be upheld in *Beauharnais v Illinois*.<sup>9</sup> Not everyone in America is happy with the constitutional untouchability of race leaflets in Chicago, Nazi banners in Skokie, and burning crosses in Virginia; not everyone thinks that state and municipal legislators must be compelled to stand back and let this material take possession of society. There has been an honorable impulse among some law-makers in America to deal with this problem; and what we need—before rushing to constitutional outrage in behalf of the First Amendment—is to understand that impulse.

Outside the United States, we know that legislation of this kind is common and widely accepted (though it is certainly not uncontroversial). For us, that gives rise to a question about what the European or Canadian or New Zealand legislators think they are doing with these laws. Why have most liberal democracies undertaken to prohibit these manifestations of hatred, these visible defamations of social groups, rather than permitting and tolerating them in the name of free speech? How do they characterize these prohibitions, and how do they position them in relation to concerns—to which they also subscribe—concerns about freedom of expression?

In my third lecture, I am going to focus on one very powerful American argument against legislation of this kind: an argument made by Ronald Dworkin and others about the effect that restrictions on free expression may have on the legitimacy of other laws that we want to be in position to enforce.<sup>10</sup> I think that case can be answered. Today and tomorrow, however, my argument will be less defensive in character. On Tuesday, I will argue that the issue is about what a good society looks like, and what people can draw from the visible aspect of a well-ordered society in the way of dignity, security, and assurance, as they live their lives and go about their business. I shall argue that this can be understood as the protection of certain sort of precious public good. And in today's lecture, I shall sketch some background for this, arguing that it may help to view hate speech laws as representing a collective commitment to uphold the fundamentals of people's reputation as ordinary citizens or members of society in good standing—vindicating, as I shall say, the rudiments of their *dignity* and social status.

### 3. Connotations of “Hate Speech”

The title of today's lecture is: Why call hate speech group libel? What we call a thing tells us something about our attitude towards it, how we see it as a problem, what our response to it might be, what difficulties our response to it might throw

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<sup>9</sup> *Beauharnais v Illinois* 343 U.S. 250 (1952)

<sup>10</sup> Dworkin, “Foreword” to Hare and Weinstein collection.

up. So it is with the phenomenon that we call in America “hate speech,” which can cover things as diverse as cross-burnings, racial epithets, bestial and other offensive depictions of vulnerable minorities in leaflets, posters, or on the internet, broad-brush ascriptions of criminality or dangerousness, calls to unite against the members of a hated group, genocidal radio-broadcasts in Rwanda in 1994, and Nazis marching in Skokie, Illinois, with swastikas and placards saying “Hitler should have finished the job.”

When we call these phenomena “hate speech”—as we do and as I will—we bring to the fore a number of connotations that are not entirely neutral. If we say we are interested in restrictions on hate *speech*, we convey the idea that state is proposing to interfere with the spoken words, with conversation,<sup>11</sup> and perhaps with vocabulary, with our use of epithets being controlled by political correctness (which is what we used to call “civility”). The spoken word can certainly be wounding. But the expressions of hatred that should concern us include those that are printed, published, pasted up, or posted, or in some other form become part of the visible environment in which our lives have to be lived. No doubt a speech can resonate long after the spoken word has died away—and I’ll say a little more tomorrow about the audible as proposed to the visible aspect of a society which permits hate speech—but to my mind it is the enduring presence of the published word that is particularly worrying.

The kind of speech we say we are interested in regulating is *hate* speech, and that word “hate” too can be distracting. It suggests we are interested in looking at and regulating the passions and emotions that lie behind a particular speech act. The word “hate” emphasizes the subjective attitudes of the person expressing the views or publishing the message in question. It sounds as though it locates the problem as an attitudinal one, and focuses on what motivates the speech in question. (It is like hate crimes, in this respect, and people may be excused for thinking that the controversy over hate crimes—over the use of mental elements like motivation as an aggravating factor in criminal law—is directly relevant to the controversy over racial expression.)<sup>12</sup> It suggests—I think misleadingly—that the task of legislation that restricts hate speech is to try to change people’s attitudes or control their thoughts.

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<sup>11</sup> In a follow up e-mail, Mike Hardesty told me that “some white guys in a British restaurant having a private conversation [who] made derogatory remarks about a particular Asian nationality ... were to be brought up before a Magistrate, which in New Labour England is par for the course.”-- Mike Hardesty [[mike\\_hardesty7@yahoo.com](mailto:mike_hardesty7@yahoo.com)] July 03, 2008, Subject: “Re: YOU ARE A TOTALITARIAN ASSHOLE.” (Cf. note 5 above.)

<sup>12</sup> Cite to hate crime literature. E.g. Heidi M. Hurd and Michael S. Moore, *Punishing Hatred and Prejudice*, 56 *STANFORD LAW REVIEW* (2004).

It can also bog us down in a futile attempt to define “hatred.” Hate is not an easy idea to define; Robert Post has a valiant stab at it in his essay in the new collection by James Weinstein and Ivan Hare, *Extreme Speech and Democracy*,<sup>13</sup> because he thinks the crucial issues are “When do ... otherwise appropriate emotions become so ‘extreme’ as to deserve legal suppression?” and “How do we ‘distinguish hatred from ordinary dislike or disagreement?’”<sup>14</sup> He thinks the defender of hate speech laws is required to take issue with Edmund Burke or James Fitzjames Stephen who say that hatred (e.g. hatred of tyrants or hatred of great crimes) is somehow healthy in society. I think all that is a distraction. It is perhaps worth noticing that if “hatred” is relevant at all, it is relevant (in many of the statutory formulations) as the purpose of the offending speech not the motivation of it (“advocacy of national, racial or religious hatred” in the ICCPR provision or speech intended or (in all the circumstances) likely to stir up hatred” in the British formulation.)<sup>15</sup>

The restrictions on hate speech that I am interested in, are not restrictions on thinking; they are restrictions on more tangible forms of message. The issue is publication and the harm done to individuals and groups through the disfiguring of our social environment by visible, public and semi-permanent announcements to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship.

#### **4. Use of the terms “group libel” or “group defamation”**

In many countries, a different term or set of terms is used by jurists: “group libel” or “group defamation.” Sometimes this is how the legislation describes itself; it is the terminology used, for example, in section 130 of Germany’s Penal Code. That section prohibits “attacks on human dignity by insulting, maliciously maligning, or *defaming* part of the population.” In other countries, “group libel” and “group defamation” are terms used in judicial doctrine and among the jurists and lawyers of the legal system in question to describe restrictions of the kind we would call hate speech restrictions. There is a specific French provision that prohibits defaming a group, but also some French jurists use the term “group defamation” or

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<sup>13</sup> Robert Post, *Hate Speech* in James Weinstein and Ivan Hare (eds.), *EXTREME SPEECH AND DEMOCRACY* (2009).

<sup>14</sup> *Ibid.*, 123 and 125..

<sup>15</sup> Public Order Act 1986 (as amended). “Section 18 (1)A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a)he intends thereby to stir up racial hatred, or (b)having regard to all the circumstances racial hatred is likely to be stirred up thereby.”

“racial defamation” to characterize all laws of this kind.<sup>16</sup> And it’s not just Europe. Some Canadian provinces (Manitoba, for example) have defamation statutes which punish “[t]he publication of a libel against a race, religious creed or sexual orientation.”<sup>17</sup>

Those of you who know these debates will know also that the term “group libel” used to be used in the United States, and was in fact deployed by the Supreme Court to characterize the law that was upheld in 1952 in *Beauharnais v Illinois*.<sup>18</sup> Remember, too, that the Jewish Anti-Defamation League took as its original mission “to stop, by appeals to reason and conscience, and if necessary by appeals to law, the defamation of the Jewish people.”<sup>19</sup> I suspect we might get a better understanding of hate speech laws and of why people of good will have favored them if we consider them under this heading. Nadine Strossen of the ACLU disagrees. She tells us that since 1952, “[t]he group defamation concept has been thoroughly discredited.”<sup>20</sup> I think that is too peremptory, born perhaps of a sense common among American constitutional advocates that hesitation or thoughtfulness will be treated as a sign of weakness. I will come back to the strange career of “group libel” in American constitutional discourse in a few moments.

## 5. Civil versus criminal libel

James Weinstein in the collection on *Extreme Speech* says that the idea of group libel is constructed by “analogy” with the tort of defamation;<sup>21</sup> this is an oversimplification. Though they are concerned with defamation, the statutes and regulations I am considering are more often part of the criminal law.

Libel and defamation may be best known today as torts, but in the past they have often been understood also as criminal offenses. Criminal libel laws came in

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<sup>16</sup> Article 29 of the Law on the Freedom of the Press of 29 July 1881 in France prohibits group as well as individual defamation. Pascal Mbongo classifies some French law under the heading of “penal suppression of abuse and defamation on grounds of race and religious belief.” (H&W 229-30).

<sup>17</sup> Section 19(1) of Manitoba’s Defamation Act prohibits “[t]he publication of a libel against a race, religious creed or sexual orientation, likely to expose persons belonging to the race, professing the religious creed, or having the sexual orientation to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people.”

<sup>18</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 253-4 (1952).

<sup>19</sup> Quoted in Sandra Colliver (ed.) *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* (Human Rights Centre, University of Essex, 1992), at 326.

<sup>20</sup> Nadine Strossen, *Balancing the Rights to Freedom of Expression and Equality*, in Sandra Colliver (ed.) *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* (Human Rights Centre, University of Essex, 1992), 295 at 302.

<sup>21</sup> H & W, 59.

various flavors. I suppose the best-known are the laws against *sedition* libel—of which, for us, the most notorious example is the Sedition Act, passed by Congress in 1798, making it a criminal offense to publish "false, scandalous, and malicious writing" bringing the president or Congress into disrepute or "to excite against them ...the hatred of the good people of the United States."<sup>22</sup> (This spectacularly ill-considered piece of legislation has given criminal libel a bad name in this country ever since.)

Or here's another flavor: *blasphemous* libel. William Blackstone observed that "[b]lasphemy against the Almighty, ... denying his being or providence, or uttering contumelious reproaches on our Saviour Christ ... is punished, at common law by fine and imprisonment, for Christianity is part of the laws of the land."<sup>23</sup> (Blasphemous libel was held to be a common law offense in the United Kingdom as late 1977, when a private prosecution was brought successfully by Mary Whitehouse against the publishers of *Gay News* for a poem that described necrophiliac acts performed upon the body of Jesus after his crucifixion.)<sup>24</sup> In 1823, a man was jailed for sixty days in Massachusetts for publishing an essay in the *Boston Investigator* that denied the existence of God, affirmed the finality of death, and declared that "the whole story concerning [Jesus Christ] is as much a fable and a fiction as that of the god Prometheus."<sup>25 26</sup>

There was also obscene libel—an offense which covered the publication of any obscene matter. Edmond Curl was found guilty in England in 1727 in respect of a book called "Venus in the Cloister," about lesbian love in a convent.<sup>27</sup> Obscene libel wasn't just restricted to books and pamphlets: in the 1826 case of *Rosenstein*, a man was convicted for offering for sale a snuff-box containing an indecent painting when you lifted the lid.<sup>28</sup>

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<sup>22</sup> July 14, 1798, ch. 74, 1 Stat. 596, sec. Sec. 2.

<sup>23</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. IV, Ch. 4 (1770).

<sup>24</sup> See <http://www.newstatesman.com/200602130044> (visited July 15, 2008). *Gay News* was fined 1,000 pounds and its publisher was given a nine months suspended prison sentence. When a challenge was brought under European Convention of Human Rights, the European Commission of Human Rights found that prohibitions on blasphemous libel could constitute a reasonable restriction on free speech. See *Gay News Ltd. and Lemon v. United Kingdom* (1983) 5 E.H.R.R. 123—before the European Commission of Human Rights, 7 May 1982.

<sup>25</sup> *Commonwealth v. Kneeland* 20 Pick. 206 (Mass. 1838).

<sup>26</sup> The Blackstone position on blasphemous libel was adopted explicitly by an American state court judge in 1824: "Christianity," he said, "general Christianity, is and always has been a part of the common law of Pennsylvania." *Updegraph v. Commonwealth* 1824 WL 2393 Pa. 1824.

<sup>27</sup> (1727) 2 Strange 788, 93 Eng. Rep. 849. See Colin Manchester, *A History of the Crime of Obscene Libel*, 12 J. LEGAL HISTORY 36 (1991) 36, at 38-40.

<sup>28</sup> 1826 C & P 414, See Manchester 44.

Notice that in these senses of libel, we are not really dealing with offenses that have a whole lot to do with defamation. Some of the prosecutions under the Sedition Act involved defamation of those in power.<sup>29</sup> But others involved general subversion of government. In *U.S. v. Crandell* (1836), an indictment was laid against Reuben Crandell, for publishing libels tending to excite sedition among the slaves.”<sup>30</sup> Sometimes, in its older uses, “libel” conveys the sense of untruths as in the title of one little book, listed in the NYU Law Library Catalogue: “*A libell of Spanish lies ... discoursing the ... the death of Sir Francis Drake.*”<sup>31</sup> But often the term just goes back to the neutral meaning of the Latin “*libellus*,” a little book. For much of its history “libel” could be used to refer to any old published pamphlet, without conveying any judgment about its content.<sup>32</sup>

When we do focus on defamation, what is consistently emphasized both in the law of torts and in the law of libel more generally, is the distinction between calumnies that are put about in *spoken* form, as *speech*, through gossip, rumor, or denunciation, and those that have the more enduring presence of something written or committed to paper, something published as a number of US civil codes put it, “by writing, printing, effigy, picture, or other fixed representation to the eye.”<sup>33</sup> “What gives the sting to the writing,” said a New York court in 1931, “is its permanence of form. The spoken word dissolves, but the written one abides and ‘perpetuates the scandal.’”<sup>34</sup>

I believe this is helpful for our inquiry, because when it comes to racist or religious defamation, this feature of libel may help us focus more clearly on the specific evil that legislation of this kind is directed against. It is not the immediate flare-up of insult and offense that “hate speech” connotes— a shouted slogan or a racist epithet. It is the fact that something said or thought becomes established as a

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<sup>29</sup> See *Lyon's Case*, Whart. St. Tr. 333, 15 F. Cas. 1183 (C.C.Vt. 1798) and *U.S. v. Haswell*, Whart. St. Tr. 684, 26 F. Cas. 218 (C.C.Vt. 1800).

<sup>30</sup> 4 Cranch C.C. 683, 25 F.Cas. 684 C.C.D.C. 1836. March Term 1836

<sup>31</sup> 1596, from Julius Catalog, search under libel, # 32.

<sup>32</sup> Wycliffe's New Testament, from the end of the fourteenth century, translated Matthew 5: 31 as “Forsooth it is said, Whoever shall leave his wife, give he to her a libel, that is, a little book of forsaking.”

<sup>33</sup> California Civil Code, §45, quoted by PHILIP WITTENBERG, *DANGEROUS WORDS: A GUIDE TO THE LAW OF LIBEL* (Columbia University Press, New York, 1947), p. 7. The phrase seems to come originally from OGDERS ON LIBEL: see *Staub v. Van Benthuysen*, 36 La. Ann. 467, 1884 WL 7852, La., 1884: “A libel is any publication whether in writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Odgers on Libel and Slander, 7, 20.”

<sup>34</sup> *Ostrowe v. Lee*, 256 N.Y. 36, 39, 175 N.E. 505, 506 (1931), quoting from *Harman v. Delany*, Fitz-G. 253, 94 Eng. Rep. 743 (1729) “words published in writing are actionable, which would not be so from a bare speaking of the same words, because a libel disperses and perpetuates the scandal...”

visible or tangible feature of the environment—part of what you can see and touch in real space (or in virtual space) as you look around you—that attracts the attention of the criminal law.<sup>35</sup>

Even apart from seditious libel, many countries had until recently laws of criminal libel touching ordinary individuals. Until 1993, the New Zealand Crimes Act specified a year's imprisonment as the penalty for any "matter published, without lawful justification or excuse . . . designed to insult *any* person or likely to injure his reputation by exposing him to hatred, contempt, or ridicule."<sup>36</sup> Why, you may ask, would the criminal law concern itself with libel at all, in the specific sense of defamation, when there was no public issue of sedition or obscenity or blasphemy? Why not leave it to private law?

One possibility is that certain forms of defamation might be seen as an attack on public order as such. It was a matter of keeping the peace, avoiding brawls and so on, in the area where egregious libel might flow over into fighting words.

But we should bear in mind that preventing fighting or violence from breaking out—that very narrow sense of *keeping the peace*—is only one dimension of public order. Public order might also comprise society's interest in maintaining among us a proper sense of one another's social or legal status. In an aristocratic society, this meant securing the standing of great men or high officials—with laws of *scandalum magnatum*, to protect nobles and great men from scandalous imputations on their breeding, their status, their honor, or their office. But when we abolished titles of nobility, we didn't necessarily abolish that sort of concern for status. A democratic republic might equally be concerned with upholding and vindicate important aspects of legal and social status—only now it would be the dignity of even its non-officials as citizens—and with protecting that status (as a matter of public order) from being undermined by various forms of obloquy.

And just to anticipate: *that* is what I think is the concern of laws regarding group defamation. They are set up to vindicate public order, not just by preempting violence, but by upholding against attack a shared, public sense of the basic elements of each person's status, dignity, and reputation as a citizen or member of society—particularly against attacks predicated upon the characteristics of a some particular social group.

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<sup>35</sup> In the case of *Curl*, which I mentioned earlier (the 1727 case concerning the libel, *Venus in the Cloisters*) this was crucial to an understanding of why this obscenity was a matter for the temporal courts rather than for a spiritual tribunal set up by a bishop. "The Spiritual Courts punish only personal spiritual defamation by words; if it is reduced to writing, it is a temporal offence. . . . This is surely worse," said Reynolds J., "than *Sir Charles Sedley's case*, who only exposed himself to the people then present, who might choose whether they would look upon him or not; whereas this book goes all over the kingdom." (*Curl*, 850-1).

<sup>36</sup> Crimes Act, section \_\_, repealed by section 56(2) of the Defamation Act.

It's a matter, as I said, of protecting the basics of each person's reputation. I can best illustrate what I mean by the "basics of reputation" by mentioning that often the group libels that we are trying to prohibit involve attempts to bestialize a group of citizens—presenting them as animals—or to associate all of them, all of the members of a racial or religious group, with some form of terrible criminality that, if sustained on a broad front, would make it seem inappropriate to continue according the elementary status of citizenship to the members of the group in question. The criminal law, we may say, protects the basics of social standing; beyond that it is matter of people pursuing private actions in civil law to protect the further details of personal reputation against slurs or attacks of various sorts.

### **6. *Beauharnais v Illinois* (1952)**

Earlier I mentioned that the characterization of hate speech as group libel is not unknown in the United States. In 1952, what we would call a hate speech law (dating from 1917) was described and upheld by the Supreme Court as a law of criminal libel. And in the 1950's American scholars would commonly observe that "group libel" or "group defamation" is the appropriate heading under which to describe the debate about the constitutionality and the desirability of legislation of this sort.<sup>37</sup>

The 1952 case involved an Illinois statute prohibiting the publication or exhibition of any writing or picture portraying the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion."<sup>38</sup> The case was *Beauharnais v. Illinois*, and the Supreme Court refused an invitation on First Amendment grounds to overturn a fine of \$200 imposed on Joseph Beauharnais, the President, Founder, and Director of something called the White Circle League of America, who had distributed a leaflet on Chicago street corners urging people to protect the white race from being "mongrelized" and terrorized by the "rapes, robberies, guns, knives, and marijuana of the negro."

The leaflet, which can be viewed on-line,<sup>39</sup> had as its headline: "Preserve and Protect White Neighborhoods! From the Constant and Continuous Invasion,

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<sup>37</sup> See e.g. Joseph Tanenhaus, *Group Libel*, 35 CORNELL LAW QUARTERLY 261 (1950), p. 261.

<sup>38</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Convicted under section 224a of Division 1 of the Illinois Criminal Code, Ill.Rev.Stat.1949, c. 38, s 471: "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."

<sup>39</sup> The racist leaflet at the center of that case can be viewed at <http://1stam.umn.edu/archive/primary/Beauharnais.pdf> (visited January 17, 2008).

Encroachment and Harassment of the Negroes.” It said: “We are not against the negro; we are for the white people and the white people are entitled to protection” But, it went on, “The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions ... rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL.”<sup>40</sup> The leaflet complained that “[t]he Negro has many national organizations working to push him into the midst of the white people on many fronts. The white race does not have a single organization to work on a NATIONAL SCALE to make its wishes articulate and to assert its natural rights to self-preservation. THE WHITE CIRCLE LEAGUE OF AMERICA proposes to do the job.” The leaflet provided a tear-off application form, which if submitted with a dollar, would enable the sender to become a member of the White Circle League of America (provided he promised to try and secure then other members as well).

On March 6, 1950, Beauharnais was charged under the Illinois statute. He was convicted by a jury and fined the sum of \$200. It was upheld on appeal in Illinois and upheld too by the US Supreme Court 5-4.

From today’s perspective, it seems remarkable that the Supreme Court did not intervene in order to vindicate free speech in the form of this pamphlet. There were powerful dissents—“ This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights”—but they did not persuade the majority. The dissenters noted that the pamphlet did not threaten violence, nor did it seem particularly likely that it would incite disorder. But the majority observed that it is enough that it was just hateful and defamatory: “Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.”<sup>41</sup>

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<sup>40</sup> Ellipsis and capitalization in the original.

<sup>41</sup> Nadine Strossen says that before we get too enthusiastic about the ordinance upheld in Beauharnais, we should remember that prior to its use against this white supremacist group, it was a weapon for the harassment of Jehovah’s Witnesses, “a minority,” as she says, “very much more in need of protection than most.” Strossen in Colliver, 303 (quoting Tanenhaus at 279-80). In fact, the Jehovah’s Witnesses were prosecuted for what a federal court described as “bitter and virulent attacks upon the Roman Catholic Church” and “accusations which in substance and effect were charges of treasonable disloyalty.” (See *Bevins v. Prindable*, 39 F.Supp. 708, at 710, E.D.Ill., June 17, 1941.)

The point about *Beauharnais* that I find most interesting is the terminology that the Supreme Court of Illinois used,<sup>42</sup> and that Justice Frankfurter endorsed, to describe the statute as “a form of criminal libel law.”<sup>43</sup> If the pamphlet could be described as a “criminal libel,” Frankfurter thought it would be beyond the protection of the First Amendment. “Libelous utterances,” he said, “are not within the area of constitutionally protected speech.” Three of the four dissenters in *Beauharnais* acknowledged this point.<sup>44</sup> Only Justice Black disputed this premise outright, and for him the problem was the “group” aspect of group libel:

[A]s ‘constitutionally recognized’ [criminal libel] has provided for punishment of false, malicious, scurrilous charges against individuals, not against huge groups. This limited scope of the law of criminal libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds.<sup>45</sup>

### 7. Can a group be libeled?

I think this was a mistake. And if you’ll indulge me for a moment, I want to consider Justice Black’s argument in detail, before addressing a different criticism that could be made after 1964, —namely, that the decision in *New York Times v. Sullivan* has removed (or—for our European brothers and sisters—indicated a good reason for removing) the whole category of libel from the list of exceptions to First Amendment protection.

“[A]s ‘constitutionally recognized,’” said Justice Black, “criminal libel provides for the “punishment of false, malicious, scurrilous charges against individuals, not against huge groups.” But neglects the difference between the concern for personalized reputation in civil cases and a concern for the fundamentals of anyone’s reputation or civic dignity as a member of society in good standing. Unlike civil libel, criminal libel has traditionally been concerned, not with the intricate detail of each person’s reputation and its movement up or down the scale of social estimation, but with its foundation. No doubt the

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<sup>42</sup> *People v. Beauharnais* 408 Ill. 512, 97 N.E.2d 343 Ill. 1951 at 517-8. “The libelous and inflammatory language used in said exhibit A was designed to breed hatred against the Negro race and is not of such character as entitles defendant to the protection of freedom of speech guaranteed by the State and Federal constitutions.”-

<sup>43</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 253-4 (1952).

<sup>44</sup> Justice Reed in his dissent assumed “the constitutional power of a state to pass group libel laws to protect the public peace.” His objection was based on the vagueness of the terms of the ordinance. Justice Jackson noted that “[m]ore than forty State Constitutions, while extending broad protections to speech and press, reserve a responsibility for their abuse and implicitly or explicitly recognize validity of criminal libel laws.” *Ibid.*, 292.

<sup>45</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952).

foundation of a person's dignity might be attacked in various different ways, varying from case to case, but the elementary aspects of civic dignity that are protected are the same in every case.

Indeed, it has sometimes been argued that the civil law of libel and the criminal law of libel work together, to cover the field as it were. In the case of a civil action for libel, there must be a defamation of a particular person, or of a group so confined that the allegation descends as it were to particulars. But—so the argument goes—this does not mean that the law is unconcerned with defamation on a broader front; only the problem now becomes the concern of the criminal law rather than the civil law.

Certainly that's what you would conclude from a public order perspective.<sup>46</sup> In *Palmer v Concord*, an 1868 case concerning accusations of cowardice made against a company of soldiers who had been engaged in the Civil War, a New Hampshire court said this

As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. ... *Indictments* for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libellous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual."<sup>47</sup>

It is possible that a court might proceed more directly in a case like this, simply under the heading of public order. This is what happened (according to some reports in the English case of *Osborne* (1732). Osborne was charged

for publishing a Paper intituled, A true and surprizing Relation of a Murder and Cruelty that was committed by the Jews lately arrived from *Portugal*; shewing how they burnt a Woman and a new born Infant the latter End of *February*, because the Infant was begotten by a Christian. ... It was objected, that ... the Charge was so general that no particular Persons could pretend to be injured by it.

But the court responded:

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<sup>46</sup> Joseph Tanenhaus, *Group Libel*, 35 CORNELL L. Q. 261 (1949-1950), at 266: "Since criminal libel is indictable at common law because it tends so to inflame men as to result in a breach of the peace, there is no rational basis for the exclusion of group defamers from liability to prosecution in common law jurisdictions"

<sup>47</sup> *Palmer v Concord* 48 N.H. 211 (1868).

This is not by way of Information for a Libel that is the Foundation of this Complaint, but for a Breach of the Peace, in inciting a Mob to the Destruction of a whole Set of People; and tho' it is too general to make it fall within the Description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished.<sup>48</sup>

That seems to me a viable or at least arguable position. But Justice Black's dissent in *Beauharnais* takes that in exactly the wrong direction, with its perverse implication that the very large *number* of people defamed in the White Circle League's leaflet meant that the leaflet must have constitutional protection in a way that the defamation of one person does not.

### **8. Ways of assaulting group reputation**

How does one libel a group? What aspects of group reputation are we trying to protect with laws against racial or religion defamation? The first thing to note is that it is not the group as such that we are ultimately concerned about—as one might be concerned about a community, a nation or a culture. The concern in the end is individualistic. But, as I have already said, group defamation laws will not concern themselves with particularized reputation. They will look instead to the basics of social standing and to the association that is made—in the hate speech, in the libel, in the defamatory pamphlet or poster—between the denigration of that basic standing and some characteristic associated more or less ascriptively with the group.

So, first of all, that association might take the form of a factual claim. That was important in *Beauharnais*, with its imputation that guns, crime and marijuana were somehow typical of “the negro.” Or in a claim that all Muslims are terrorists. Or consider the statements complained of in the landmark Canadian case of *R. v. Keegstra*: James Keegstra was a high school teacher in Eckville, Alberta, who taught his classes that Jewish people seek to destroy Christianity and that they “created the Holocaust to gain sympathy.”<sup>49</sup>

Secondly, group libel often involves a characterization that denigrates people—a characterization that probably falls on the “opinion” rather than “fact” side of the distinction sometimes made in US constitutional law. The example I gave earlier will serve: depictions of members of minority groups as insects or animals. I remember seeing a racist agitator sentenced to a short prison term in

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<sup>48</sup> *R. v. Osborne*: W. Kel. 230, 25 Eng. Rep. 584 (1732). But see also the report of the same case in *R. v Osborn* 2 Barnardiston 138 & 166 (94 Eng. Repo. 406 & 425) for an acceptance of this as group libel. Also ambiguous report in 2 Swans 502.

<sup>49</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697

England in the late 1970s for festooning the streets of Leamington Spa with posters depicting Britons of African ancestry as apes. After his conviction by the jury, he was sentenced by a crusty old English judge, who (one might have imagined) would have little sympathy with this newfangled hate speech legislation. But the judge gave the defendant a stern lecture to the effect that we cannot run a multiracial society under modern conditions if people are free to denigrate their fellow citizens in bestial terms. There was some shouting from the gallery as the defendant was taken away. The case made a deep impression on me.<sup>50</sup>

Thirdly, there are libels that go even beyond opinion but which denigrate by embodying slogans or instructions which implicitly degrade those to whom they are addressed. A group and its members can be libeled by signage, associating group membership with prohibition or exclusion. “No blacks allowed.” Ontario's Racial Discrimination Act prohibited the publication or display of “any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.” And that is quite apart from the prohibition on discrimination itself. Or consider that in the early days of Anti-Defamation League in the United States, one of the aims of the League was to put a stop to the poisoning of the social environment by published declarations of racial and religious hostility. When the ADL campaigned for legislation against stores and hotels denying their business to Jews, it was not just the discrimination they wanted to counter, it was the *signage*—“Christians only.” What concerned the ADL was the danger that anti-semitic signage would become a permanent feature of the landscape and that Jews would have to make their lives in a community whose public aspect was disfigured in this way.<sup>51</sup>

Singly or together these reputational attacks amount to assaults upon the *dignity* of the persons affected—“dignity,” in the sense of their basic social standing, the basis of their recognition as social equals and as bearers of human rights and constitutional entitlements. Dignity is a complex idea and there is no time to go into it here: I spoke about it at length in the Tanner Lectures I gave in Berkeley in April on the subject “Dignity, Rank and Rights,” and they will be published as a book sometime next year. But let me say just this: dignity, in the sense I am using it, is not just a philosophical conception of immeasurable worth in (say) the Kantian sense of *würde*.<sup>52</sup> It is a matter of status—one’s status as

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<sup>50</sup> [LRB July 20, 2006)

<sup>51</sup> See Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913-1952*, 66 BROOKLYN LAW REVIEW 71 (2000-2001), at 96.

<sup>52</sup> Cite to KANT, GROUNDWORK and to Steven Heyman’s use of this idea.

member of society in good standing—and it generates demands for recognition and treatment that accords with that status. Philosophically we may say that dignity is inherent in the human person—and so it is. But as a social and legal status it has to be upheld and maintained by society and the law, and this—as I shall argue tomorrow—is something in which we are all required to pay a part. At the very least, we are required in our public dealings with one another not to act in a way that undermines one another’s dignity—and that is the obligation that is being enforced when we enact and administer laws against group libel.

### **9. Group dignity**

We are talking about group dignity, but our point of reference is the individual members of the group.<sup>53</sup> It is not the dignity of the group as such, or of the culture or social structure that holds the group together. (We might postpone to another occasion talk of dignity of nations or of communities or of peoples: I am not wanting to rule this out; only to show that it is not this that is engaged when we talk about group libel.)<sup>54</sup> Members may belong ascriptively to a group by virtue of some shared characteristics: race, ethnicity, religion, gender, sexuality, and national origin. And that may be something of which the members of the group are proud or to which they are indifferent. In relation to their membership, protection against group libel is mainly a negative idea. The South African Constitutional Court expressed this important negative idea in the following way in *President of the Republic v Hugo*: the court said, “[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.” I don’t mean that group membership is in and of itself a liability. But group defamation sets out to make it a liability by denigrating group-defining characteristics or associating them with bigoted factual claims that are fundamentally defamatory. A prohibition on group defamation, then, is a way of blocking that enterprise.

### **10. The emphasis on dignity rather than offense**

This brings me to an important distinction, one of several that I am going to develop in this lectures and which need to be developed if the position explained here is to be defensible. There is a big difference between protecting individuals

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<sup>53</sup> In the last analysis, the dignity we are talking about is and remains an individualist idea. See Michael Ignatieff indicated, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Princeton University Press, 2001), p. 166.

<sup>54</sup> See Waldron, *The Dignity of Groups*, *ACTA JURIDICA* (Cape Town 2008), available also at <http://ssrn.com/abstract=1287174>

from *defamation* (based on some denigration of group characteristics), and protecting them from *offense*, even when the offense goes to the heart of what they regard as the identity of their group. The group of all Muslims in society, the group of all followers of Islam, is a group of people committed to the one God, to his Prophet, Mohammed, and to the holy writings of the Koran. They—the individual Muslims—are entitled to protection against defamation, including defamation *as Muslims*. But that doesn't mean that the Prophet is to be protected against defamation or the creedal beliefs of the group. The civic dignity of the members of a group stands separately from the status of their beliefs, however offensive an attack upon the Prophet or even upon the Koran may seem. (I don't mean to deny how distressing an attack on (say) the Koran might be; and the infliction of that distress might be wrong and unlawful in other contexts and for other reasons; for example, its exploitation by American agents at Guantanamo Bay who rip up Korans or flush them down the toilet as a way of “softening detainees up” for interrogation. I have written about that abusive practice elsewhere.)<sup>55</sup> But the specific concern about group libel does not encompass these things. And it does not include protection of the religion itself or its founders.

In general a dignitarian rationale for laws against group defamation differs from an approach based on the *offense* that may be taken by the members of a group against some criticism or attack. If time permitted, I would want to rehearse arguments I made a long time ago, in relation to the work of John Stuart Mill and in relation to the Salman Rushdie affair (*The Satanic Verses*) that being disturbed by a shocking attack on one's views, even one's deepest and most cherished religious conviction, is not something people have an interest in being protected against.<sup>56</sup> For our purposes here this evening, however, let me just say this: it is an advantage of the “group libel” formulation that it conveys this distinction. Libel and defamation generally are never organized to protect people from being offended, disturbed, or upset in themselves: they are organized to protect the dignity of the persons themselves not to impose an aura of untouchability around their convictions.

I don't deny that the distinction is a delicate one. And I don't mean to convey indifference to the subjective or felt aspect of assaults on dignity. Civic dignity is not just decoration; it is sustained and upheld for a purpose. It will be an important part of my argument in tomorrow's lecture that the social upholding of

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<sup>55</sup> See Waldron, *What Can Christian Teaching Add to the Debate about Torture?* 63 THEOLOGY TODAY 330 (2006) at 341.

<sup>56</sup> See Waldron, *Mill and the Value of Moral Distress*, 35 POLITICAL STUDIES 410 (1987), 410 and *Religion and the Imagination in a Global Community: A Discussion of the Salman Rushdie Affair*, TIMES LITERARY SUPPLEMENT (March 10-16, 1989), pp. 248 and 260 (both reprinted in my collection LIBERAL RIGHTS).

individual dignity furnishes the basis of a general assurance of decent treatment and respect as people live their lives and go about their business in public. And an assault on this is bound to be experienced as wounding and distressing; and unless we understand that distress we don't understand what is wrong with group defamation and why it is appropriate to prohibit it by law.

Not only that, but in anyone's reaction to any particular incident of hate speech, there are going to be a plethora of factors all mixed up. The phenomenology of this sort of assault is complex and tangled. It is not easy to differentiate the offense from the insult or the immediate wounding of an epithet from the perception of a threat or the outrage and from the humiliation, the anger from the shame of having to explain to one's children what is going on.<sup>57</sup> The reactions are all mixed up and it will often seem that the law, in responding to one set of phenomena, is also responding to others. I think this is likely to be true of hate speech also. Of course, when a racial group is hatefully denigrated, there will be a complex of elements in the viewer's response—and I don't mean the response of the white liberal, but the response of members of the community at which denigration is targeted. There will be fear, hurt, vehement disapproval to the point of outrage, humiliation, shame, anger, offense, and so on. And it will be hard to disentangle these from one another; often there will be no point in doing so.

But it is important in this context to try. In American discussions of hate speech, it is often assumed that hate speech laws are an attempt to protect people from offense, or from the immediate wounding effect of vicious slurs and epithets. I have no doubt that the wounding effect of slurs and epithets is considerable. Charles Lawrence has done a tremendous amount to convey the trauma that such wounding words—assaultive hate speech—might cause, and I can imagine an honorable legislative attempt to protect people from this and to prohibit the infliction of this harm.<sup>58</sup> But that project is different from the dignity and reputation rationale that I am considering here.

### **10. *Beauharnais* and libel in light of *NY Times v Sullivan* (1964)**

It is time to return to *Beauharnais*. It is remarkable that in the half century since it was decided, *Beauharnais v Illinois* has never explicitly been overturned by the Court. In one or two cases, lower courts have expressed doubts about the

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<sup>57</sup> See JW, Mill and the Value of Moral Distress, *op. cit.*

<sup>58</sup> See, e.g., Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990), at 452-6.

precedent,<sup>59</sup> and among First Amendment scholars there is some considerable doubt whether the Supreme Court would nowadays accept the idea of group libel as an exception to First Amendment protection. Many jurists—better informed than I am in the ways of the justices—say they probably would not.<sup>60</sup>

Some attribute faulty reasoning to the Justices in making this prediction. (That of course doesn't mean the prediction is false as a prediction.) Anthony Lewis says that the basis of *Beauharnais* has been undermined by the 1964 Supreme Court decision in *New York Times v. Sullivan*, where the Court held that public figures cannot recover damages for libel unless they can prove that a false statement of fact was made maliciously or recklessly.<sup>61</sup> The Court argued that the sort of robust discussion of public issues, to which the United States has “a profound national commitment,” is bound to include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>62</sup> The idea was that when they take on public responsibilities, state and federal officials have a duty to develop a thick skin and sufficient fortitude to shrug off public attacks.

Anthony Lewis is right that the Court no longer regards libel *per se* as an exception to the First Amendment. But it is not at all clear why the reasoning in *New York Times v. Sullivan* should protect the defendant in the *Beauharnais* case. The African-Americans libeled collectively in *Beauharnais*' “obnoxious leaflet”<sup>63</sup> were not public officials who had taken on the burden of office. They were ordinary citizens who may have thought that they had a right to be protected from scattershot allegations of the most severe criminal misconduct—the “rapes, robberies, guns, knives, and marijuana of the negro.”

Still, as an empirical matter, the naysayers are probably right that Joseph *Beauharnais*' conviction would not be upheld today. Lewis's fallacious reasoning is common, and if constitutional scholars are taken in by it, there is no reason to suppose the present justices are immune. But my argument tonight is not about the

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<sup>59</sup> See, e.g., *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989) and *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978), *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring); *United States v. Handler*, 383 F.Supp. 1267, 1277-78 (D.Md.1974). But see also the interesting and not unfavorable comments about the *Beauharnais* precedent in *Smith v. Collin* 439 US 916 (1978), at 919 (Blackmun J., dissenting from denial of certiorari).

<sup>60</sup> Professor Tribe has observed that “subsequent cases seem to have sapped *Beauharnais* of much of its force.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988) at 926-27.

<sup>61</sup> LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE*, p. 159

<sup>62</sup> *New York Times Co. v. Sullivan* 376 U.S. 254, at 270 (1964).

<sup>63</sup> Justice Jackson's term in his dissenting opinion in *Beauharnais v. Illinois*, at p. 287.

strategic desirability of using the group libel idea in the US,<sup>64</sup> but about what might be involved as a matter of principle in thinking that group defamation is a problem, and what insight may be available from this characterization for those willing to take the risk of appearing thoughtful in these matters.

### 11. NYRB argument

The difference in principle between *Beauharnais* and *New York Times v Sullivan* reminds us of the vulnerable position of the beneficiaries of hate speech laws and of the importance of not neglecting society's obligation to them. In that *New York Review of Books* piece, I asked, at the end of my review, what is it that we believe now that we didn't believe in the days when we had laws against blasphemous libel and seditious libel. And how much (*if anything*) of that change of belief on that topic in fact carries through to also disqualify laws protecting the reputation of groups, laws of the kind I have been discussing in these lectures?

We know that prosecutions for attacks on Christianity faded away much more quickly than prosecutions for political speech. The logic of prosecuting atheists always sat uncomfortably with the American position on religion. Christian belief might appear vulnerable to public denunciations; it might seem in need of the law's support; but it wasn't clear that this was support that the law was constitutionally entitled to give. The logic of blasphemous libel required courts to find ways of seeing the churches or Christianity in general as indispensable supports of government. By the middle of the nineteenth century, American courts found themselves unable to do this, and they struck down prosecutions for blasphemy not on free speech but on anti-establishment grounds. Since Christianity could no longer be seen as part of the organized apparatus of social control, then vulnerable or not, it would just have to fend for itself in the unruly marketplace of sacred and profane ideas.

So far as political speech is concerned, there is a different story to be told. In 1798, federal authority looked precarious; it was at the mercy of public opinion and public opinion was looking well-nigh ungovernable. Public agitation led to political violence and brief uprisings in some of the states. George Washington was denounced as a thief and a traitor; John Jay was burned in effigy; Alexander Hamilton was stoned in the streets of New York; a Connecticut Federalist was attacked with fire tongs in the House of Representatives; and Republican militias armed and drilled openly, ready to stand against Federalist armies. Over everything, like a specter, hung fears of the Jacobin terror in France. It was by no

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<sup>64</sup> See the excellent discussion in SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* (University of Nebraska Press, 1994), esp. Ch. 5.

means obvious in those years—though it seems obvious to us—that the authorities could afford to ignore venomous attacks on the structures and officers of government, or leave their publications unmolested in the hope that they would be adequately answered in due course in the free marketplace of ideas. That government could survive the published vituperations of the governed seemed more like a reckless act of faith than basic common sense.

However, in the two centuries since then we have learned that the state does not need our solicitude or legal protection against criticism. It is strong enough to shrug off our attacks, strong enough to dismiss our denunciations as not worth the effort of suppression (though strong enough to make the effort if it wants). When the jurist for whom these lectures are named began supporting free speech ideas in 1919, he predicated his position on the derisory impotence of what he called the defendants' *pronunciamentos* and on a greater confidence in the state's ability to resist their destructive effect. "Nobody," he said, "can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of government arms."<sup>65</sup>

So what about group defamation? Prosecutions for seditious libel began to seem inappropriate when we realized that the government had become so powerful that it did not need the support of the law against the puny denunciations of the citizenry. Does that apply to vulnerable minorities? Is their status as equal citizens in the society now so well assured that they have no need of the law's protection against the vicious slurs of racist denunciation? Prosecutions for blasphemous libel began to seem inappropriate when religion came to be regarded as a private matter. Is that true of the status of embattled minorities? Is their position in society—the respect they receive from fellow citizens—a matter of purely private belief, with which the law should have no concern? It is not clear to me that the Europeans are mistaken when they say that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack.

The state and its officials may be strong enough, thick-skinned enough, well-enough armed, or sufficiently insinuated already into every aspect of public life to be able to shrug off public denunciations. And those denunciations may help reveal, and remedy, abuses of power. But the position of minority groups as equal members of a multiracial, multiethnic, or religiously pluralistic society is not something that anyone can take for granted. It is a recent and fragile achievement in the United States and the idea that law can be indifferent to published assaults

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<sup>65</sup> *Abrams v United States* 250 U.S. 616 (1919).

upon this principle seems to me a quite unwarranted extrapolation from what we have found ourselves able to tolerate in the way of political and religious dissent.