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The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws

Samantha Barbas
University at Buffalo School of Law

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Samantha Barbas*

It is well-known that there is no "hate speech" law in the United States. This has been criticized, especially given the existence of robust hate speech laws in other nations. The absence of hate speech laws in American law has been attributed to legal, cultural, and historical factors, including speech protective First Amendment jurisprudence and long-standing skepticism of group reputation as an interest worthy of legal protection.

This Article presents another reason for the absence of hate speech laws in America: the failure of a large-scale social movement in the 1940s to pass hate speech laws or "group libel" laws, as they were known. For over a decade, activists called for legislation that would impose civil liability and criminal punishment for speech that disparaged racial and religious groups. This movement was a response to the proliferation of anti-Semitic and fascist hate groups in the U.S. before and during the Second World War. Existing libel laws, which addressed the defamation of individuals, were inadequate to address the problem of group defamation. The movement to pass state and federal group libel laws produced a robust national dialogue on the problem of hate speech in the 1940s, but little in the way of actual law.

The "group libel law movement" rose and fell quickly, declining—ironically—just before the Supreme Court issued its 1952 decision in Beauharnais v. Illinois*, approving the constitutionality of an Illinois group libel law. By that time, the movement for group libel laws had dissipated, and many onetime proponents of such laws rejected them. The* Beauharnais *decision led to no new group libel laws, in part because there were few remaining advocates to promote them. Had the group libel law movement persisted, the United States might have taken a different approach to the regulation of hate speech.*

* Professor of Law, University at Buffalo School of Law.

INTRODUCTION 298
I. HATE SPEECH AND "GROUP LIBEL" LAWS BEFORE 1940 301
A. Early Attempts to Pass Hate Speech Laws 301
B. "Anti-Nazi" Laws 307
II. THE MOVEMENT FOR GROUP LIBEL LAWS, 1940–1949 312
A. Democracy and Defamation 314
B. The Lynch Bill of 1943 316
C. Postwar Efforts to Pass Group Libel Laws 319
D. The Indiana Group Libel Law 322
E. 'We Suggest Group Libel' 323
F. The Commission on Freedom of the Press 324
G. The President's Committee on Civil Rights 325
H. 1949 327
III. THE DECLINE OF THE MOVEMENT FOR GROUP LIBEL LAWS 328
A. Beauharnais v. Illinois 330
B. The Beauharnais Decision 331
C. The End of Group Libel 334
IV. CONCLUSION 337

INTRODUCTION

It is well-known that there is no "hate speech" law in the United States. This feature of American law sets the United States apart from other nations and has been much criticized. The absence of hate speech or group defamation laws in the United States has been attributed to a variety of legal, cultural, and historical factors, including a "free speech consciousness" in American culture, speech protective First Amendment jurisprudence, and Americans' tendency to regard reputation as an individual interest and to therefore see group reputation as unworthy of legal protection.[1]

This Article presents another reason for the absence of hate speech laws in America: the failure of a large-scale social movement in the 1940s to pass hate speech laws, or "group libel" laws, as they were then known.[2]

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1. *See generally* NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP (2018); ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE (2007). The title for this Article was inspired by: SAMUEL WALKER, ch. 5 *The Curious Rise and Fall of Group Libel in America, 1942–1952* in HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 77 (1994) [hereinafter WALKER, HATE SPEECH].

2. There is no single definition of "hate speech." WALKER, HATE SPEECH, *supra* note 1, at 8.

For over a decade, activists called for the passage of federal and state legislation that would impose civil and criminal liability for speech that disparaged racial and religious groups. This "group libel law movement" rose and fell quickly, declining—ironically—just before the Supreme Court issued its 1952 decision in *Beauharnais v. Illinois*, approving the constitutionality of an Illinois group libel law.[3] By the time of *Beauharnais*, the movement for group libel laws had dissipated, and many onetime proponents of such laws had come to reject them. The *Beauharnais* decision led to no new hate speech laws, in part because few advocates remained to promote them. Had the group libel law movement persisted, the United States might have taken a different approach to the regulation of hate speech.

The World War II-era movement for group libel laws was a response to the proliferation of fascist and anti-Semitic groups in the United States that relied on pamphlets, radio broadcasts, direct mail, and other modes of mass communication to convey their noxious views. Existing libel laws, which addressed the defamation of individuals, were inadequate to address the problem of group disparagement. The movement to pass state and federal group libel laws reached its peak between 1941 and 1947. It produced a robust national dialogue on the problem of hate speech, but relatively little in the way of actual law.

By 1950, supporters of group libel laws had abandoned their efforts. The notion of liability for group libel fell into such disfavor that legal scholar Harry Kalven Jr., writing in 1965, observed that "it is probable that among today's law students few have been called upon to think about group libel and that a fair number have never heard the term."'[4] After that, there were no significant calls for hate speech laws until the 1980s.[5] How can we explain the rise and fall of the World War II-era

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Generally, hate speech refers to any form of expression deemed offensive to any racial, religious, ethnic, or national group. *Id.* Historically, "hate speech" has been referred to by a variety of terms. *Id.* It was called "race hatred" in the 1920s, "group libel" in the 1930s and 40s, and in the 1980s was renamed hate speech. *See id.* at 7–8; *see also* JEREMY WALDRON, THE HARM IN HATE SPEECH 27 (2012) (defining "hate speech" as "publications which express profound disrespect, hatred, and vilification for the members of minority groups").

3. Beauharnais v. Illinois, 343 U.S. 250 (1952).

4. HARRY KALVEN JR., THE NEGRO AND THE FIRST AMENDMENT 7–8 (1965); *see* Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 283 (1974) ("Since the 1930s and 1940s, when fascist organizations were engaged in the systematic defamation of racial and religious groups, the interest in group libel statutes has declined markedly.").

5. *See* Arkes, *supra* note 4, at 284 (noting that group libel became disfavored after the 1940s); *see also* James Jay Brown & Carl L. Stern, *Group Defamation in the U.S.A.*, 13 CLEV.-MARSHALL L. REV. 7, 17–23 (1964), (providing a history of advocacy for group libel laws); *see also* John De J. Pemberton Jr., *Can the Law Provide a Remedy for Race Defamation in the United States*, 14 N.Y.L.F. 33 (1968) (advocating for group libel in 1968).

movement for hate speech laws? Why did enthusiasm for group libel laws wane, despite the U.S. Supreme Court's apparent approval of group libel laws in *Beauharnais v. Illinois*?[6]

The movement for group libel laws declined for several reasons, as this Article explains. One reason was that many onetime advocates of hate speech laws became convinced that such laws could exacerbate the problems they sought to cure. Laws prohibiting speech that incited racial or religious hatred could be used to censor the speech of minority groups, depriving them of free expression, a critical tool in the struggle for racial justice and equality. Prosecutions for group libel could backfire, generating further prejudice and providing hate groups a platform from which to broadcast their noxious views.

Another reason for the decline of the group libel law movement was an apparent reduction in hate groups after the Second World War, which made the passage of group libel laws seemingly less urgent. Government persecution of leftists during the postwar Red Scare made liberals who once supported group libel laws wary of official suppression of speech. Many former proponents of hate speech laws came to side with the American Civil Liberties Union, which argued that the best antidote to hate speech was not legal restriction but "more speech."[7]

This Article narrates the lost history of the first large-scale American movement for hate speech laws in the 1940s. Part I describes the antecedents of the movement—the efforts of civil rights groups before World War II to secure the passage of state and local group libel laws and the rise of organized opposition to such efforts. Part II explains the peak of the group libel law movement in the 1940s. As anti-Semitic and fascist propaganda proliferated in the U.S., the cause won the allegiance of well-known intellectuals and journalists as well as prominent union and civil rights leaders. The issue was debated vigorously in the national press and in other public forums. Pitting the values of equality and freedom of speech against each other, the group libel question polarized the liberal community and foreshadowed free speech conflicts of later generations. Part III explains the decline of the movement in the late 1940s and the unfavorable reaction among former supporters of group libel laws to the Supreme Court's *Beauharnais* decision. As Part IV explains, by the time

6. To date, only two scholars have addressed these questions. One suggested that the group libel movement was doomed to fail because of a free speech consciousness in American culture that was deeply ingrained even by the 1940s. *See generally* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Law, 1913–1952*, 66 BROOK. L. REV. 71 (2000). Another scholar suggested that the movement failed because it lacked an effective advocate, especially after World War II. *See* WALKER, HATE SPEECH, *supra* note 1, at 11, 15–16.

7. *See generally* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES A HISTORY OF THE ACLU (2d ed. 1999) [hereinafter WALKER, IN DEFENSE].

calls for hate speech laws resurfaced in the 1980s, the campaigns of the 1940s had disappeared from the collective memory. Debates over hate speech laws in the late twentieth and twenty-first centuries have transpired without recognition of this earlier episode in which Americans considered, debated, and largely rejected liability for group defamation.

I. HATE SPEECH AND "GROUP LIBEL" LAWS BEFORE 1940

A. Early Attempts to Pass Hate Speech Laws

The group libel law movement was borne of deficiencies and idiosyncrasies in the law of libel. Libel law, imported to the U.S. from the English common law, offers civil and criminal remedies for defamation. Prior to the Supreme Court's 1964 decision in *New York Times v. Sullivan*, state libel laws were strict and were not limited by the Constitution.[8] Under the common law of libel, the falsity of the defamatory statement was presumed; truth was a defense, but the truth had to be proven "completely and in all its particulars."[9] The essence of the harm of defamation was conceived as injury to individual reputation.[10] As such, the civil libel action was ineffective to address the defamation of groups.[11] Defamation of a large group could not be pursued as a civil action unless a member of the group could show that the defamatory statement applied to them as an individual.[12] It was said that the larger the group, "the greater the immunity afforded the defamer."[13]

Criminal libel laws in all the states permitted punishment of those who

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8. New York Times v. Sullivan, 376 U.S. 254 (1964).

9. Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian's View*, 74 AM. HIST. REV. 429, 437 (1968).

10. *See* Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595, 606 (1947); *see also* David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 730 (1942) (noting that defamation law protects against individual injury).

11. *See* Nathan D. Perlman & Morris Ploscowe, *False, Defamatory, Anti-Racial, and Anti-Religious Propaganda and Use of the Mails*, 4 L. GUILD REV. 13, 17 (1944) (noting that a civil action is only available for defamatory words that refer to an ascertainable person); Riesman, *supra* note 10, at 748 (limiting criminal libel prosecutions to libel for individuals); Joseph Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261, 266 (1949–1950) ("To date there has not been a single case holding a person civilly responsible for the defamation of a large collectivity."); *see also* Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda,* 61 YALE L.J. 252, 253 (1952) ("[D]efamers of sizable groups are immune if legally astute enough to avoid direct reference to an individual.").

12. *See* Tanenhaus, *supra* note 11, at 263 ("Defamation of a small group gives rise to civil action on the part of each individual member of the group . . . if the group is so small that the language of necessity applies to each and every member."); *see also* Note, *supra* note 11, at 253.

13. STAFF HOUSE COMM. ON JUDICIARY, 88TH CONG., 1ST SESS., REP. ON PROPOSED FED. GRP. LIBEL LEGIS. 3 (Comm. Print 1963).

issued defamatory statements that threatened to "breach the peace."[14] Theoretically, a criminal libel prosecution could be brought against a defamer of a group, yet criminal prosecutions for group defamation were rare, because most defamations of groups would not breach the peace. In most states, truth and proof of good motive were defenses to criminal libel actions, and some states had a privilege for "fair comment and criticism" of public matters.[15] Criminal libel laws were rarely invoked; by the twentieth century, the criminal libel action was disfavored because of its clash with emerging civil libertarian free speech ideals. By 1940, criminal libel was considered practically defunct in the United States.[16] Legal scholar David Riesman noted in 1942 that "the American scene exhibits singularly little reliance on the law of criminal libel."[17] One writer observed in 1950 that "to date there have been no successful actions, civil or criminal, for the libeling of a large racial or religious group."[18]

The inability of libel laws to reach group defamation led to efforts in the early twentieth century to secure the passage of "group libel" laws that imposed civil or criminal liability for statements that disparaged racial and religious groups. Some advocates of group libel laws sought to extend existing criminal libel laws to cover the defamation of groups; others sought the passage of separate "group libel" statutes. There were no First Amendment restrictions on group libel laws at the time. States had broad police powers to suppress speech with a "bad tendency" that would provoke violence or other social harm.[19] Social reformers of the

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14. John Kelly, *Criminal Libel and Free Speech*, 6 U. KAN. L. REV. 295, 302 (1958).

15. Recent Important Decisions, *Libel and Slander: Fair Comment and Criticism regarding Matters of Public Interest Source*, 27 MICH. L. REV. 942, 957–59 (1929).

16. *See* Tanenhaus, *supra* note 11, at 276 ("The traditional law of defamation is so ineffective in combating the group libeler that he can spread his hatred virtually without risk of legal action."); Note, *supra* note 10, at 600 ("[C]onvictions are difficult to get, and where obtained might provide a badge of martyrdom."); *see also* Riesman, *supra* note 10, at 730–31 (addressing why defamation and libel laws were ineffective in America); Kelly, *supra* note 14, at 330 ("The *Beauharnais* decision demonstrates the dangers of applying the concept of criminal libel to publications without consideration of the important relationship of the guaranty of the First Amendment to the doctrine of libel."); Pemberton, *supra* note 5, at 41 ("The number of reported cases allowing a criminal prosecution for group defamation . . . is not large."); James A. Scott, *Criminal Sanctions for Group Libel: Feasibility and Constitutionality*, 1 DUKE BAR J. 218, 223 (1951) ("[T]here have been few criminal prosecutions in the United States for group libel.").

17. Riesman, *supra* note 10, at 745.

18. Tanenhaus, *supra* note 11, at 276. *See* Note, *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 898 (1956) ("The law of defamation has afforded little relief to unorganized groups of individuals who constitute a 'class' because of a common characteristic, such as race, religion, or national origin.").

19. *See* Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 432–33 (2002) (noting that the bad tendency standard is premised on the

Progressive Era supported government regulation of speech on behalf of the public good, even if it undercut individual rights.[20]

The first efforts to pass group libel laws grew out of racial and religious conflict in Northern cities in the early twentieth century. A wave of immigration from southern and eastern Europe and the Great Migration of African Americans from the South led to the diversification of urban areas, subsequent racial strife, and civil rights activism by nascent civil rights groups such as the National Association for the Advancement of Colored People (NAACP). Black and Jewish civil rights organizations led efforts to ban or criminalize group libel. Efforts to pass group libel laws were also pursued by public officials seeking to prevent riots and other violent breaches of the peace in their communities.

New York passed one of the first group libel laws in 1913.[21] Louis Marshall, president of the American Jewish Committee (AJC), the oldest Jewish civil rights organization in the United States, founded in 1906,[22] called for a statute that would prohibit hotels from undertaking the then-common practice of printing advertisements stating that they discriminated based on race or religion. An existing New York law already prohibited discrimination in public accommodations.[23] In 1917, in response to activism by the AJC, Pennsylvania passed a law preventing the "publication and distribution of discriminating matter against any religious sect, creed, class, denomination or nationality . . . ."[24] By 1926, seven states had approved laws against discriminatory advertising.[25]

In 1915, the AJC, the Anti-Defamation League—founded in 1913 to

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principle that to preserve "peace and good order," states can punish speech that has a "pernicious tendency.").

20. M. ALISON KIBLER, CENSORING RACIAL RIDICULE: IRISH, JEWISH, AND AFRICAN AMERICAN STRUGGLES OVER RACE AND REPRESENTATION, 1890–1930 11 (2015). *See generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997) (examining free speech during the Progressive era).

21. *See* Schultz, *supra* note 6, at 916.

22. *Id.* at 91–92.

23. *See* KIBLER, *supra* note 20, at 118–19 ("New York [passed new civil rights laws in 1895, and has since] guaranteed all people equal access to 'inns, restaurants, hotels, eating houses, bathhouses, barber shops, theatres, music halls, public conveyances on land and water, and all other places of public accommodation or amusement'").

24. 352 PA. CODE (1917); *see* H.R. 255, 1971–72 Gen. Assemb., Reg. Sess. (Pa. 1971) ("§§ 2, 3 and 4, act of July 18, 1917 (No. 352), entitled 'An act to prevent the publication and distribution of discriminating matter against any religious sect, creed, class, denomination, or nationality, and to punish the same.'").

25. *See* KIBLER, *supra* note 20, at 121 ("[S]even states had passed laws against discriminatory advertising and access: Illinois, Colorado, Connecticut, New Hampshire, Pennsylvania, Maine, and New York.") (citing Schultz, *supra* note 6, at 99 n.153).

combat anti-Semitism and "the defamation of the Jewish people"[26]—and the NAACP led efforts to ban D.W. Griffith's notoriously racist film *The Birth of a Nation*. The AJC and the Anti-Defamation League had already supported censorship of film to eliminate "racial ridicule;" the NAACP feared that the exhibition of *The Birth of a Nation* would provoke violence.[27] The showing of the film spurred rioting and lynchings, and it led to the rise of the Ku Klux Klan as a terror organization in Northern cities. Municipalities and states enacted bans on *The Birth of a Nation* to forestall race riots;[28] some adopted broader provisions prohibiting the exhibition of films that provoked "race hatred."[29] In 1915, Pennsylvania announced that motion pictures "which hold up to ridicule any sect (religious or otherwise)" could not be exhibited.[30] In Maryland, a film censorship law forbade the showing of "inflammatory scenes and titles calculated to stir up racial hatred."[31]

During World War I, the mass migration of African American workers to Northern cities led to racially motivated rioting and violence. After over one hundred people were killed in race riots in East St. Louis in 1917, Illinois passed a law that prohibited the display of material that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion," when such display would expose "the citizens of any race, color, creed, or religion to contempt, derision, or obloquy which is productive of breach of the peace or riots."[32] Between 1915 and 1940, similar "race hatred" statutes were enacted in Houston, Oklahoma City, Cincinnati, and Denver.[33]

To prohibit marches and demonstrations by the virulently anti-Catholic Ku Klux Klan and violent backlashes against those demonstrations, several jurisdictions enacted "anti-Klan" statutes.[34] In 1923, Mayor

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26. Schultz, *supra* note 6, at 94. In the ADL's first annual report, published in 1915, the organization's president explained, "[t]he chief evil is not the discrimination but in the method by which that discrimination is made known." KIBLER, *supra* note 20, at 121.

27. *See* KIBLER, *supra* note 20, at 135–36 (addressing NAACP's stance on censoring *The Birth of a Nation*).

28. Although the NAACP had argued that the film encouraged lynching, the apparent motivation of much of the legislation was to prevent race riots. *See id.* at 142–45; Tanenhaus, *supra* note 11, at 279 (examining state laws censoring entertainment to prevent riots); see ROBERT ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950 (1980), for a discussion on the NAACP's fight against *The Birth of a Nation*.

29. Tanenhaus, *supra* note 11, at 284.

30. KIBLER, *supra* note 20, at 138.

31. *Id.*

32. Beauharnais v. Illinois, 343 U.S. 250, 251 (1952).

33. Tanenhaus, *supra* note 11, at 284–85.

34. The Klan had between three and six million members in Northern cities. WALKER, HATE SPEECH, *supra* note 1, at 21. Its popularity was largely due to its members' hatred of Catholicism. *Id.*

James Curley of Boston banned Klan marches and meetings to prevent riots and other disturbances of the peace.[35] Curley's edict was opposed by the American Civil Liberties Union (ACLU), which contended that if Curley "could stop the Klan, he could lawlessly stop others he disliked—the Communists, birth control advocates, and pacifists."[36] If censorship of the Klan prevailed on the theory that the organization fostered religious animosity, the same reasoning could warrant restrictions on Catholics and "representatives of some Protestant sects."[37] The best way to undermine the Klan, the ACLU insisted, was to permit it to disseminate its hateful views, which would lead to ostracism and "ridicule."[38]

Founded in 1920, the ACLU advocated freedom of speech irrespective of viewpoint, defended groups and individuals persecuted for their expression, and brought test cases challenging restrictive laws. The ACLU had been formed in response to government persecution of dissidents during World War I. The organization would become renowned for its defense of unpopular speakers including anarchists, Communists, and the Ku Klux Klan. The ACLU regarded the exercise of free expression not only as intrinsically valuable, but as a means for marginalized groups to attain social and political equality through the political process.[39] The ACLU started out as a grassroots organization but in the 1920s transformed into a professionalized national agency focusing on lobbying, litigation, and mass publicity on behalf of civil liberties and civil rights.[40]

In the 1920s, Henry Ford's anti-Semitic newspaper, *The Dearborn Independent*, had a circulation of over 600,000.[41] The AJC and the Anti-Defamation League sought amendments to state criminal libel laws as a way of halting the newspaper's circulation.[42] In 1921, the AJC urged the governor of New York to support a bill that would criminalize libels of any "race, religious denomination, sect or order" as might tend to "create breaches of the peace" or "incite the ignorant to acts of aggression and brutality."[43]

These efforts proved unsuccessful, and AJC president Louis Marshall reversed his position. Marshall announced that he opposed group libel

35. WALKER, IN DEFENSE, *supra* note 7, at 61.
36. Pamphlet, ACLU, *Shall We Defend Free Speech for Nazis in America?* 3 (Oct. 1934).
37. WALKER, IN DEFENSE, *supra* note 7, at 61.
38. *Id.*
39. *See generally id.* (discussing the ACLU's history of defending civil liberties in the U.S.).
40. *Id.* at 72–92 (highlighting the ACLU's first victories from 1925–1932).
41. WALKER, HATE SPEECH, *supra* note 1, at 19.
42. Schultz, *supra* note 6, at 104.
43. Robert S. Rifkind, *Confronting Antisemitism in America: Louis Marshall and Henry Ford*, 94 AM. JEWISH HIST. 71, 77 (2008).

legislation and litigation over anti-Semitic insults, which "would enable our enemies to shovel into the record all kinds of stupid and inane charges, which . . . would find credence on the part of those who either lack intelligence or who possess the fanaticism which constitutes favorable soil for anti-Semitic propaganda."[44] The AJC developed a policy of not pursuing litigation over anti-Semitic statements, believing that it would only keep the defamatory statements before the public. The AJC took the position that "persuasion and education" were more effective means of silencing bigots than criminal libel prosecutions.[45]

When sellers of *The Dearborn Independent* were mobbed and attacked, states and cities attempted to ban the paper's distribution.[46] Several of the proposed bans failed on free speech grounds.[47] Judges in Cleveland, Pittsburgh, and Detroit put a halt to efforts by city officials to stop distribution of the *Independent*, declaring it to be a prior restraint in violation of freedom of speech.[48]

These reactions to the proposed bans attest to increasingly favorable popular attitudes toward the ACLU's civil libertarian view of freedom of speech. By the end of the 1920s, in the words of historian Paul Murphy, there was "broadened popular acceptance for the socially valuable function of free discussion."[49] The political and social unrest of the Great Depression generated further tolerance for dissenting views. Following the tides of public opinion, the Supreme Court liberalized First Amendment law, adopting the "clear and present danger" standard

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44. *Id.*; *see also* MORTON ROSENSTOCK, LOUIS MARSHALL, DEFENDER OF JEWISH RIGHTS 167–68 (1965) ("[Marshall] argued cogently that coercive actions would be regarded as interference with freedom of speech and press, [and] would be ineffective "); Victoria Saker Woeste, *Insecure Equality: Louis Marshall, Henry Ford, and the Problem of Defamatory Antisemitism, 1920–1929*, 91 J. AM. HIST. 877 (2004) ("Marshall declined to exploit opportunities offered by law just when they might have benefited the greater cause he served."); MATTHEW SILVER, LOUIS MARSHALL AND THE RISE OF JEWISH ETHNICITY IN AMERICA: A BIOGRAPHY 309 (2013) (describing the influence of Louis Marshall's career through the 1920s on Jewish history and American ethnic history).

45. Rifkind, *supra* note 43, at 81. Efforts to bring a criminal libel case against Henry Ford in Michigan failed on grounds that the "concept of group libel with regard to racial, religious, or national groups was unsupported by the state's common law or statutes " William E. Forbath, *Henry Ford's War on Jews and the Legal Battle against Hate Speech by Victoria Saker Woeste*, 32 L. & HIST. REV. 726, 726 (2014). Despite the failure of the libel suit, the issue ultimately resolved with Ford issuing an apology and terminating the publication of the *Dearborn Independent*. *Id.* at 727.

46. WALKER, HATE SPEECH, *supra* note 1, at 20.

47. *Id.* ("[The] ACLU promptly went to Ford's defense..... argu[ing] that [b]anning Ford's paper could easily lead to the suppression of other ideas now regarded as moderate and legitimate.") (internal citations omitted).

48. Schultz, *supra* note 6, at 104.

49. PAUL MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 9 (1972).

expressed in earlier dissenting opinions by Justices Holmes and Brandeis[50] and initiating the practice of heightened scrutiny of restrictions on speech, on the theory that freedom of speech was the foundation of democratic society and the "matrix" of other freedoms.[51]

In the 1930s, the Supreme Court struck down restrictions on the speech of Communists, labor unions, and other dissidents under the clear and present danger standard.[52] Yet it deemed defamatory statements to be outside the scope of the First Amendment's protections, on the theory that defamation did not contribute to the expression of ideas and had no redeeming social value.[53] Until 1952, the Supreme Court offered no position on the First Amendment status of group libel laws.

B. "Anti-Nazi" Laws

The ascendance of the Nazi regime in Germany in the 1930s and the proliferation of Nazi groups in the U.S. led to calls to criminalize anti-Semitic defamation. In the 1930s, hundreds of Nazi groups formed in the U.S., with names like the Silver Shirts, Defenders of the Christian Faith, and the German American Bund, with over 25,000 members.[54] Many of these were aided directly by Hitler's government.[55] By 1939, there were 800 pro-fascist or pro-Nazi organizations in the United States.[56]

Anti-Semitic propaganda had been a major weapon in the Nazis' rise to power. In the U.S., Nazi groups disseminated anti-Semitic propaganda through pamphlets, circulars, and other material, often distributed through the U.S. mail.[57] This propaganda fueled rising anti-Semitism. The Depression had generated fears of Jewish influence in the nation's economy; America's financial woes were blamed on international bankers of Jewish descent.[58] Hostility against Jews, in the words of one historian, "pulsated in small towns and large cities, in fashionable social circles, and even on the floor of Congress."[59]

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50. *See generally* Abrams v. United States, 250 U.S. 616, 628 (1919); Whitney v. California, 274 U.S. 357 (1927).

51. Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled by* Benton v. Maryland, 395 U.S. 84 (1969)).

52. *See generally Herndon*, 301 U.S. 242; *Palko*, 302 U.S. 319.

53. *See* Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952) ("[Some words] by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

54. WALKER, HATE SPEECH, *supra* note 1, at 38–39.

55. *Id.*

56. Lawrence A. Harper, *Legislative Investigation of Un-American Activities Exhibit A: The Tenney Committee*, 39 CALIF. L. REV. 502, 515 (1951).

57. WALKER, HATE SPEECH, *supra* note 1, at 38.

58. MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 155 (1992).

59. LEONARD DINNERSTEIN, ANTI-SEMITISM IN AMERICA 107 (1994).

With little opposition, in 1935 New Jersey passed an "anti-Nazi" law that criminalized any written or spoken statement "creating or tending to create prejudice, hostility, hatred, ridicule, disgrace or contempt of people . . . by reason of race, religion, or manner of worship."[60] Sellers of offending material could be held liable, as could those who made defamatory speeches or broadcast such material on the radio.[61] Owners and managers of buildings could be punished for permitting meetings where the law would be violated.[62] Truth was not permitted as a defense; it was a crime to publish any statement that promoted hostility against a group by reason of race or religion.[63] The law's purpose was to destroy the German American Bund, which had a strong membership in New Jersey; thousands attended the Bund's Camp Nordland, where they marched and saluted the Nazi flag.[64]

The nation's press opposed the New Jersey law, as they would henceforth oppose all group libel laws. Newspapers feared that they could be ensnared under the law's broad provisions against "promoting" "prejudice, hostility, [or] hatred." Opined one editorial, the restrictions in the bill could easily be interpreted as *prohibiting* attacks upon Nazis.[65] The ACLU described the law as "more sweeping in its threat to free speech than any measure ever passed in any state."[66] "[T]here is no general agreement on what constitutes race or religious prejudice. Once the bars are so let down, the field is open for all-comers to charge such prejudice against any propagandists,—Communists, Socialists, atheists,—even against Jews attacking the Nazis."[67] The best way to fight Nazi propaganda was not through suppression, it argued, but with "more speech."[68]

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60. WALKER, HATE SPEECH, *supra* note 1, at 55 (alteration in original).

61. *Id.* ("The specific provisions of the law imposed potentially sweeping restrictions on freedom of expression").

62. *See id.* ("[I]t was illegal for a property owner to rent out a place where hate propaganda was disseminated.").

63. Some characterized the law not as a "group libel" law, which extended criminal libel to defamation of groups, but a "race hate law." *Id.* at 55.

64. Camp Nordland was a resort facility in New Jersey operated by the German American Bund. Arlene Stein, *N.J.'s Forgotten History of Hate*, NJ.COM, (Jan. 25, 2021, 12:04 AM), https://www.nj.com/opinion/2021/01/njs-forgotten-history-of-hate-opinion.html [https://perma.cc/P2T4-A7YE]; *see also* WALKER, HATE SPEECH, *supra* note 1, at 38 (reporting that between 1933 and 1938, membership in New Jersey's Nazi sympathizer group, "Friends of New Germany," was estimated to be between 5,000 and 25,000 members—the ACLU estimates that membership could have even been as high as 60,000).

65. Editorial, *Jersey's Anti-Nazi Law*, COURIER-POST (Camden, N.J.), Apr. 11, 1935, at 8.

66. Martha Glaser, *The German-American Bund in New Jersey*, 92 N.J. HIST. 33, 36 (1974).

67. Pamphlet, ACLU, *supra* note 36, at 3.

68. *Id.* ("The best way to combat their propaganda is in the open where it can be fought by counter-

The major Jewish civil rights organizations took varied positions on the "anti-Nazi" law. The Anti-Defamation League and the American Jewish Congress supported group libel laws as a means of "bringing before the bar of justice one of the lowest type[s] of malefactors."[69] Founded in 1918, the progressive, activist American Jewish Congress represented a "populist counterbalance" to the relatively elite and conservative American Jewish Committee.[70] The American Jewish Committee maintained its policy against group libel legislation on tactical grounds. In 1935, its Lawyers' Advisory Committee opposed group libel prosecutions because of their potential to backfire. Such prosecutions "offer notoriety-seeking demagogues the very publicity upon which they thrive best," it noted.[71] When Jews in Germany attempted to seek legal recourse against the anti-Jewish propaganda of the Nazis, they found that "the prosecution of a defamer . . . added to the notoriety that he sought."[72] Nazis welcomed court trials because their publicity potential was so great that they outweighed any penalties. Moreover, attempts by Jewish groups to secure group libel legislation could be interpreted as an attempt to restrict freedom of the press and could thus alienate potential allies on the left, the Lawyers' Advisory Committee opined.[73] For these reasons, it advised, "it may be the part of wisdom to adopt other means of defending the civil rights of Jews," such as "a long-range program of education"

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propaganda, protest demonstrations, picketing ") The ACLU had opposed previous efforts to restrict Nazis' assembly and expression. In 1933, when the mayor of New York prohibited a Nazi group called The Friends of New Germany from participating in a public rally, ACLU lawyers defended the Nazis' right to demonstrate. SAMANTHA BARBAS, THE RISE AND FALL OF MORRIS ERNST, FREE SPEECH RENEGADE 144 (2021). The ACLU subsequently produced a position paper titled *Shall We Defend Free Speech for Nazis in America?*, which remains its position on hate speech. *See* David Cole, *Defending Speech We Hate*, ACLU (Feb. 2, 2022), https://www.aclu.org /news/civil-liberties/defending-speech-we-hate [https://perma.cc/M6MJ-25ZF]. "If the Union yielded to [] critics and condoned the denial of rights to Nazi propagandists, in what position would it be to champion the rights of others?" it asked. "Is it not clear that free speech as a practical tactic, not only as an abstract principle, demands defense of the rights of all who are attacked in order to obtain the rights of any?" Pamphlet, ACLU, *supra* note 36, at 2.

69. Schultz, *supra* note 6, at 111.

70. SCOTT AINSWORTH & BRIAN HARWARD, POLITICAL GROUPS, PARTIES, AND ORGANIZATIONS THAT SHAPED AMERICA: AN ENCYCLOPEDIA AND DOCUMENT COLLECTION 90 (2019) (internal quotations omitted).

71. Memorandum from American Jewish Congress on Laws Affecting Racial and Religious Propaganda, ACLU Papers, Vol. 765 (1935) (on file with author).

72. *Id. See generally* ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 122 (1947). For accounts of demonstrations staged in courtrooms by the Nazis, see *Hitler, Infuriated, Denies Foreign Aid: Declares on Stand that Nazis Will Not Accept Funds from Italy or Other Countries. Won't Answer Questions Fined for Contempt of Court and Insulting Defense Counsel in His Libel Suit against Journalist,* N.Y. TIMES, June 10, 1932, at 6 (describing Hitler's insolence in answering the court in a libel case against him, and the cheers of his admirers).

73. Memorandum from AJC, *supra* note 71.

against prejudice.[74]

In 1939, the ACLU drafted its formal position against group libel legislation. It announced that it opposed group libel laws because they "violate[] the constitutional right of freedom of speech, [which] would in practice strike at the freedom of many movements and stir up more conflict and prejudice than [they] would repress."[75] The ACLU's position on free speech was not absolute; the ACLU did not oppose liability for defamation of individuals but rejected the analogy of group libel with individual defamation, as individual defamation tended to implicate private matters, while discussion of "religious or racial subjects" typically involved public issues, matters of "matters of general policy."[76]

Not all members of the ACLU agreed with the organization's position against group libel legislation. In 1939, Roger Baldwin, head of the ACLU, commissioned Professor Jerome Michael of Columbia Law School, an expert on group libel, to draft a group libel law that did not conflict with the ACLU's view of free speech—a "race libel law that will work," as he put it.[77] Michael drafted a model state law that would extend existing criminal libel laws to cover group defamation, and a federal law that would ban the mailing of defamatory material.[78] Baldwin sought comments from an esteemed committee of lawyers and academics affiliated with the ACLU, including Socialist Party leader Norman Thomas and Thurgood Marshall, counsel for the NAACP.[79] When the committee failed to reach a consensus, Baldwin gave up attempts to craft a workable group libel law as a "hopeless task."[80]

In the 1930s, the rise of fascism in the U.S. and abroad encouraged Americans to embrace with renewed vigor values associated with American democracy and the Constitution. The ascent of Hitler, Mussolini, and Stalin led to a "revival of the determination to preserve

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74. *Id.*

75. Memorandum of Law & Policy from American Civil Liberties Union (ACLU) on Libels against Race and Religion, ACLU Papers, Vol. 2111 (Apr. 1939) (on file with author).

76. Osmond Fraenkel, *The Lynch Bill—A Different View*, 4 LAW. GUILD REV. 12, 13 (1944).

77. Letter from Roger Baldwin to Victor Yarros, ACLU Papers, Vol. 2734 (July 2, 1946) (on file with author); *see also* Letter from Roger Baldwin to Isaac Franck, ACLU Papers, Vol. 2308 (July 23, 1941) (on file with author).

78. *See* ACLU Memorandum on Proposed Group Libel Legislation by Professor Jerome Michael, ACLU Papers, Vol. 2186 (1940) (on file with author).

79. *See* Memorandum on Group Libel from Norman Thomas to ACLU, ACLU Papers, Vol. 2186 (on file with author) (Feb. 29, 1940); Memorandum on Group Libel Bills from Marland Gale to Lucille B. Milner, ACLU, ACLU Papers, Vol. 2186 (on file with author) (Feb. 29, 1940); Memorandum on Group Libel Bills from Thurgood Marshall to ACLU, ACLU Papers, Vol. 2186 (on file with author) (Mar. 7, 1940).

80. Letter from Roger Baldwin to Isaac Franck, *supra* note 77.

the 'American system,' of which the jealous safeguarding of individual rights is so vital a part," observed the *Bill of Rights Review*.[81] Liberals who had championed civil liberties began to fear that fascist movements in the U.S. could undermine democracy through anti-democratic propaganda. Seemingly opposing the values of free speech and equality, the group libel issue spurred a significant national debate.

In 1938, the popular magazine *Reader's Digest* published an article on what it described as the "vital" question of the legality of hate speech, titled "Should We Curtail Those Who Destroy Us?"[82] The magazine noted that "[r]ecent efforts of dictatorship countries to influence American affairs by means of propaganda and semimilitary organizations have aroused widespread alarm and resentment among both liberals and conservatives."[83] It asked, "[s]hould a democracy deny freedom of expression to any of its people, even to groups bent on destroying democracy?"[84] In the fictional debate between "Mr. Pro" and "Mr. Con" that was published, "Mr. Pro" argued that "the United States will not be clear of [] danger until civil liberties are withdrawn from any and all who deny their validity or preach the glories of foreign governments that suppress them."[85] "Mr. Con" asserted that "weapons forged against Nazis today are likely to be handy weapons against working classes tomorrow."[86]

As war engulfed Europe, anxieties arose in the U.S. around a "fifth column"[87] of purported Nazi spies and saboteurs who sought to foster social divisions through the dissemination of hate propaganda. Group libel laws had a new justification: preserving national security and curbing totalitarian propaganda in the face of impending war. Even those committed to the traditional civil libertarian position on free speech acknowledged that in times of peace and order, there might be little rationale for group libel laws, but "at a time of world unrest," group defamation created social discord and thus had the potential to undermine

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81. *A New Venture and Its Purposes*, 1 BILL RTS. REV. 3 (1940); *see* RAYMOND ARSENAULT, CRUCIBLE OF LIBERTY 47 (1st ed. 1991) ("In subtle but powerful ways the rise of totalitarianism, especially in Germany and the Soviet Union, heightened the consciousness of Americans about the uniqueness of their own form of constitutional democracy.").

82. *Should We Curtail Those Who Destroy Us?*, READER'S DIGEST, Apr. 1938, at 13.

83. *Id.*

84. *Id.*

85. *Id.* at 16.

86. *Id.*

87. Hirabayashi v. United States, 320 U.S. 81, 96 (1943). A fifth column is any group of people who undermine a larger group from within, usually in favor of an enemy group or nation. *See* E.D. HIRSCH, JR. ET AL., THE NEW DICTIONARY OF CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW 226–27 (3rd ed. 2002).

the nation's morale.[88]

The ACLU received a long-awaited opportunity to bring a test case challenging the New Jersey anti-Nazi law in 1940.[89] In one of the first prosecutions under the law, ten members of the German American Bund were charged with making anti-Semitic speeches.[90] The Supreme Court of New Jersey ruled the law unconstitutional under the First and Fourteenth Amendments to the federal Constitution and provisions of the New Jersey Constitution.[91] The remarks of the Nazis, while "revolting," did not constitute a clear and present "danger to the State," the court concluded.[92] It also found that the statute was void because such terms as "hatred," "abuse," and "hostility" were too vague and abstract.[93] On the eve of the Second World War, the New Jersey ruling in *State v. Klapprott* was the most important judicial statement on group libel laws, suggesting their potential unconstitutionality under the clear and present danger rule.[94]

II. THE MOVEMENT FOR GROUP LIBEL LAWS, 1940–1949

Anti-Semitic hate literature became a major national issue as the U.S. entered the Second World War. The nation was awash in "anti-Semitic propaganda and other defamatory attacks on symbolic individuals and groups."[95] Noted the *Bill of Rights Review* in 1941, "we are experiencing a wave of propaganda of various sorts."[96] It continued, "Nazi expression takes the form of racial persecution; others indulge in criticism of religious groups . . . overstepping the bounds of reasonable comment."[97] "A systematic avalanche of falsehoods has poured forth . . . concerning various groups, classes, and races," Harvard law professor Zechariah Chafee observed.[98]

One-third of Americans were said to receive fascist literature regularly

88. *Freedom of Speech and Group Libel Statutes*, 1 BILL RTS. REV. 221, 224 (1941).
89. State v. Klapprott, 22 A.2d 877 (N.J. Sup. Ct. 1941).
90. *Id.* at 879.
91. *Id.* at 882; Tanenhaus, *supra* note 11, at 280–81.
92. *Klapprott*, 22 A.2d at 882.
93. *Id*. at 881–82.
94. Riesman, *supra* note 10, at 732; WALKER, IN DEFENSE, *supra* note 7, at 58; *Race Hatred Law Held Violation of Right of Free Speech*, 2 BILL RTS. REV. 140, 140–42 (1941–42).
95. Zechariah Chafee, Government and Mass Communications 118 (1947), 118.
96. *Liability for Group Libel*, 1 BILL RTS. REV. 99, 99 (1941).
97. *Id.*
98. *See* CHAFEE, *supra* note 72, at 118 (finding that defamation was a major weapon the Nazi regime used in their published propaganda). Harry Kalven noted, "The war and the rise of fascism had made us suddenly sensitive to the evils of systematic defamation of minority groups, sensitive to the new and unexpected power of malevolent propaganda." KALVEN, *supra* note 4, at 7.

in the mail in the early 1940s.[99] Some came from domestic fascist groups, while other materials were imported from Germany.[100] Anonymous groups and individuals distributed "millions of antisemitic [sic] leaflets in war plants, airplane factories, post offices, police stations, and other public buildings."[101] These "bigoted harangues" were believed to be "camouflage for the dissemination of 'Fifth Column' propaganda."[102] Widespread racial violence, including race riots and the desecration of synagogues, were linked to "periodicals, pamphlets, [and] leaflets published throughout the country preaching race hatred and anti-Semitism."[103]

The dangers of hate propaganda to the nation's morale and security seemed clear and immediate, and many Americans demanded government action.[104] Even those who generally supported civil liberties felt that America had to take drastic steps to protect its democracy under conditions of a national emergency, the potential jeopardy to free speech notwithstanding.[105] Noted the American Jewish Congress, "We are told that in time, history, relying on a free market place of opinion, will vindicate the reputations of defamed minority groups. Such vindication will be bitter indeed if it comes after the groups—and the fabric of democracy—have been destroyed by their defamers."[106]

The 1940s saw a decade-long campaign for group libel laws led by the American Jewish Congress, labor organizations, Communist Party members, liberal academics, and public officials, including Solicitor General Francis Biddle, who in a 1940 address before the American Association of Law Schools advocated group libel laws.[107] Biddle doubted that group libel laws would face constitutional barriers if "the

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99. Riesman, *supra* note 10, at 727 n.6.

100. *Dickstein Presses Anti-Nazi Measure: New York Representative Says Anti-Jewish Publication Is Being Sent Here*, N.Y. TIMES, July 24, 1935, at A5; *Anti-Semitism Held Furthered By Mail: Dickstein Finds Use as Weapon by Fifth Columnists*, N.Y. TIMES, June 7, 1943 ("Anti-Semitism and racial discrimination . . . has become one of the greatest weapons of fifth columnists and the anti-war forces.").

101. DINNERSTEIN, *supra* note 59, at 137.

102. *Freedom of Speech and Group Libel Statutes*, 1 BILL RTS. REV. 221, 224 (1941); Perlman & Ploscowe, *supra* note 11, at 15.

103. *Declaring Certain Papers, Pamphlets, Books, Pictures, and Writings Unmailable: Hearings before the Comm. on the Post Office & Post Roads H.R.*, 78th Cong. (1st session) 34 (1943) [hereinafter *Declaring Certain Papers Unmailable*] (statement of Max Perlow, acting president of the Jewish People's Committee).

104. Tanenhaus, *supra* note 11, at 293.

105. *Id.* at 294–95.

106. Memorandum from Robert K. Carr, Exec. Sec'y, to Members of the President's Comm. on C.R. on Grp. Defamation & C.R. (June 5, 1947) (on file with author) (internal quotations omitted).

107. Francis Biddle, *Symposium on Civil Liberties*, 9 AM. L. SCH. REV. 889, 894 (1941) ("I cannot see dangers if the phraseology were carefully drawn.").

phraseology were carefully drawn."[108] The wisdom and constitutionality of liability for group libel was regarded as one of the most important free speech questions of the 1940s. There was "no serious difference of opinion about the social undesirability of [group] defamation," observed a student writing in the *Columbia Law Review*, but serious doubts about whether "the problem [can] be solved by the use of state power."[109]

A. Democracy and Defamation

In 1942, the group libel law movement received significant academic backing with a series of law review articles in the *Columbia Law Review* titled "Democracy and Defamation" by David Riesman.[110] Riesman was a graduate of Harvard Law School who hailed from a prosperous German Jewish family, had clerked for Louis Brandeis, and was a law professor at the University at Buffalo. Riesman would later gain international fame for his 1950 sociological work, *The Lonely Crowd*, a critical study of postwar consumer society.[111] Riesman's articles were the first scholarly commentary on group libel laws, and they would be regarded for decades as the most comprehensive exposition of the subject, regularly cited by courts and commentators, including the U.S. Supreme Court in *Beauharnais v. Illinois*.[112]

Riesman's articles offered a legal and sociological analysis of group defamation in the United States and Europe. Riesman observed how defamation had been a major weapon in the Nazis' rise to power, and how fascist movements in Germany and France "sought to undermine democracy by exploiting its commitment to tolerance and free speech . . . ."[113] Fascists in Europe had used anti-Semitic defamation to incite group hatred, to "systematic[ally] manipulat[e] public opinion by the use of calculated falsehood and vilification."[114] "In the fascist tactic," Riesman noted, "defamation becomes a form of verbal sadism, to be used in the early stages of the conflict, before other forms of sadism are safe."[115]

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108. Felix S. Cohen & Edith Lowenstein, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 ILL. L. REV. 193, 206 (1942).

109. Note, *supra* note 10, at 597.

110. *See generally* Riesman, *supra* note 10.

111. *See, e.g.*, Daniel Horowitz, *David Riesman: From Law to Social Criticism*, 58 BUFF. L. REV. 1005, 1005–06 (2010) (emerging as one of the most famous and influential sociologists of his generation).

112. Beauharnais v. Illinois, 343 U.S. 250, 258 n.9, 261 n.16 (1952).

113. WALKER, HATE SPEECH, *supra* note 1, at 79.

114. Riesman, *supra* note 10, at 728.

115. David Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085, 1088 (1942).

In democratic nations, the primary threat of fascism did not spring from the state, but from private groups in the community, Riesman believed. "In this state of affairs, it is no longer tenable to continue a negative policy of protection *from* the state; such a policy, in concrete situations, plays directly into the hands of the groups whom supporters of democracy need most to fear."[116] Riesman built on the work of political scientist Karl Loewenstein, who had published a series of influential articles describing how European democracies had responded to totalitarian movements.[117] Loewenstein found that in nations with deference to civil libertarian concerns, the fascists had triumphed. He believed that Americans must replace their "democratic fundamentalism" with "authoritarian democracy" to avoid a similar fate.[118] Loewenstein recommended group libel laws and legislation protecting the armed services from "subversive propaganda."[119]

Riesman attributed the failure of the United States to create "a vigorous public policy for the handling of group libels" to the "American heritage of middle-class individualistic liberalism," which undervalued the importance of group reputation to the identity and dignity of individuals.[120] Libels directed at groups, Riesman speculated, defamed members of that group no less than personal libels.[121] Riesman called for vigorous group libel legislation, though he acknowledged possible constitutional obstacles, and that group libel statutes alone would not "raise the democratic boots out of the fascist quicksand."[122] Riesman suggested, in addition to modifications of libel law, "administrative control of propaganda," "efforts toward governmental education and counter-propaganda," and "private efforts to eliminate poisons from the stream of communications."[123]

Riesman's views of the harms of group defamation corresponded with those of the American Jewish Congress. In 1945, the American Jewish Congress established a Commission on Law and Social Action (CLSA)

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116. Riesman, *supra* note 10, at 780 (emphasis in original).

117. Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies I*, 38 COLUM. L. REV. 591, 608 (1938).

118. Richard W. Steele, *Fear of the Mob and Faith in Government Free Speech Discourse, 1919–1941*, 38 AM. J. LEGAL HIST. 55, 74 (1994).

119. Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies II*, 38 COLUM. L. REV. 725, 767 (1938); *see also* WALKER, HATE SPEECH, *supra* note 1, at 49 ("The most comprehensive and effective measures were those proscribing subversive movements altogether.") (internal citations omitted).

120. Riesman, *supra* note 10, at 734.

121. *Id.* at 731.

122. Horowitz, *supra* note 111, at 1028.

123. David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1318 (1942) (internal quotations omitted).

to advocate on behalf of civil rights causes.[124] Led by activist lawyers formerly employed by New Deal agencies, the CLSA became one of the foremost organizations in the legal fight against racial and religious discrimination in the 1940s.[125] Its strategy was considered by some to be shocking compared to the more passive tactic of "[e]ducation against prejudice" used by the American Jewish Committee.[126]

The CLSA was committed to a pluralistic vision of democracy which recognized group rights as a civil liberty, and it made group libel laws one of the centerpieces of its efforts to eliminate racial and religious bigotry.[127] It rejected the notion that "false and misleading propaganda can best be fought with measured statements of the truth."[128] Its approach to combating anti-Semitic propaganda was to call for "legal weapons to prevent it from ever being written or spoken."[129]

B. The Lynch Bill of 1943

Hate propaganda was distributed more widely through the U.S. postal service than any other medium, it was believed. The influence of such propaganda, "intended to impair the morale of our armed forces, lower production, breed hatred, and cause confusion, disunity, and dissension, . . . has been felt in the armed forces, in war production centers and in every community."[130] The American Jewish Congress campaigned for federal laws banning hate speech in the mail. Acting under its constitutional authority to control mail, Congress had excluded from the mails obscene matter, lottery tickets, and material used to promote frauds.[131] The ACLU contested this "post office censorship," declaring that the Postmaster General's ability to stop material that he had the sole discretion to declare obscene or fraudulent constituted unconstitutional discretion over speech in violation of the First Amendment.[132]

In 1943, Representative Walter Lynch of New York proposed a bill declaring nonmailable all materials "which tend to expose persons designated, identified, or characterized therein by race or religion . . . to hatred, contempt, ridicule, or obloquy, or tend to cause such persons to

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124. STUART G. SVONKIN, JEWS AGAINST PREJUDICE: AMERICAN JEWS AND THE INTERGROUP RELATIONS MOVEMENT FROM WORLD WAR TO COLD WAR 215 (1995).
125. *Id.* at 220.
126. *Id*. at 223.
127. *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 Yale L.J. 574, 592–94 (1949).
128. *Id.* at 592.
129. *Id.*
130. *Declaring Certain Papers Unmailable*, *supra* note 103, at 34.
131. *Id*. at 18.
132. *See generally* ACLU, NO MORE POST OFFICE CENSORSHIP (1944).

be shunned or avoided, or to be injured in their business or occupation."[133] Such material would be withdrawn from the mails "under such regulations as the Postmaster General may prescribe."[134] The Lynch Bill was not the first proposal for a federal law banning hate propaganda in the mail. In 1935, Representative Samuel Dickstein of New York had unsuccessfully proposed such a ban as part of his special investigation of Nazi activities in the United States.[135] Dickstein alleged that hundreds of tons of anti-Semitic mail from Nazi Germany were being shipped to America.[136] Under Dickstein's proposal, material "designed or adapted or intended to cause racial or religious hatred or bigotry or intolerance" would be declared nonmailable.[137]

The Lynch Bill became the focal point of national attention in the spring of 1944, as opposing parties brought prominent witnesses to testify for and against the bill. Witnesses included leftist labor unions affiliated with the Congress of Industrial Organization (CIO) and Black civil rights and labor organizations.[138] The Communist Party newspaper, *The Daily Worker,* vigorously endorsed the Lynch Bill.[139] CIO leaders described group libel as a "trade-union problem" since many of its members were

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133. Lynch Bill, H.R. 2328, 78th Cong. (1943) (reintroduced as H.R. 2328, 79th Cong. § 2).

134. The Lynch Bill saddled the Postmaster General with the responsibility for banning nonmailable publications. *Id.* at 1. The Postmaster General opposed the bill as being too difficult to enforce.

> The enforcement would impose upon the Department the undesirable task of deciding controversies between those seeking to discuss freely, racial, and religious issues and those who might consider certain of such discussions in violation of this law In such enforcement much time and effort would be required by the Department in determining the truth or falsity of statements made in writings upon such subjects sent through the mails.

Declaring Certain Papers Unmailable, supra note 103, at 56 (statement of Vincent M. Miles, Solic., Post Off. Dep't).

135. *See* WALKER, HATE SPEECH, *supra* note 1, at 60 (describing the ways in which "Dickstein lost more than he won").

136. *Declaring Certain Papers Unmailable*, *supra* note 103, at 10; *see also NAZI PROPAGANDA MAILED TO JERSEY: Flood of Circulars from Berlin Causes the Postoffice and the FBI to Investigate BRITAIN TARGET OF ATTACK Charged with Sending Mines Filled with Mustard Gas to Poles to Combat Invaders,* N.Y. TIMES (Nov. 7, 1939) https://www.nytimes.com/1939/11/07/archives/nazi-propaganda-mailed-to-jersey-flood-of-circulars-from-berlin.html [https://perma.cc/U9FF-X8MN].

137. *Declaring Certain Papers Unmailable*, *supra* note 103, at 2.

138. *Declaring Certain Papers Unmailable*, *supra* note 103, index at III. This included the Negro Victory Committee and the National Negro Congress. *Id.* The *California Eagle*, a Black newspaper in Los Angeles, editorialized:

> It would be impossible for the Negro haters to do their insidious work, utilizing the U.S. mails for their purposes We Negro people, in unison with all people in this country, must do all in our power to see to it that the Lynch Bill becomes the law of the land.

The Lynch Bill Must be Passed—It Depends on You, CALIF. EAGLE, May 11, 1944, at 7.

139. *See, e.g.*, Abraham Chapman, *ACLU Clique Aids Race-Haters in its Fight to Beat Lynch Bill*, DAILY WORKER, Mar. 4, 1944, at 3.

ethnic minorities. Representatives of the American Federation of Labor noted that campaigns of racial and religious propaganda had "victimized" unions for years.[140] Arguments invoked wartime exigencies: "to win this war of survival, the utmost unity is essential. To achieve maximum production of war materials to help safeguard the lives of our armed forces . . . the utmost unity is needed on the home front."[141] Damon Runyon, one of the nation's most popular journalists, promoted a postal ban on hate speech in his column, describing it as a good way of getting at "conscienceless persons who seem to make a regular business of creating and spreading . . . hatred "[142]

An array of prominent witnesses testified to the bill.[143] A representative of the NAACP testified that the organization disapproved of all group libel laws on the theory that they would "impair the constitutional right of petition and free speech and the freedom of the press. . . [T]hrough the denial of these basic rights, [group libel laws would] lead to an aggravation of race and religious tensions, which may express themselves in violence and other forms of law violations."[144] The Lynch Bill ultimately died in committee.

Several states proposed group libel laws during the war. A bill introduced in the New York legislature made it a misdemeanor to publish any false written or printed material promoting "hatred of any group because of race, color, or creed."[145] It was promoted as a "win-the-war" effort to "help paralyze enemy-inspired attempts to stir up discord and disruption of the home front."[146] A 1945 Florida statute forbade anonymous literature exposing "any religious group to hatred, contempt, ridicule or obloquy."[147] In 1943, on the urging of the American Jewish Congress, Massachusetts amended its criminal libel law to cover

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140. *DEMAND MAIL CURB ON RACIAL LIBELS: Spokesmen of Minorities and Trade Unions Urge House Group to Back Measure***,** N.Y. TIMES 16 (Nov. 19, 1943), https://www.nytimes.com/1943/11/19/archives/demand-mail-curb-on-racial-libels-spokesmen-of-minorities-and-trade.html [https://perma.cc/SZ9T-LK8Q].

141. *Declaring Certain Papers Unmailable, supra* note 103, at 53 (statement of Abraham Welanko, Int'l Workers' Ord., Newark, N.J.).

142. Damon Runyon, *The Brighter Side*, PITTSBURGH SUN TELEGRAPH, Dec, 16, 1943, at 18.

143. *Declaring Certain Papers Unmailable*, *supra* note 103, at II–III (listing witnesses and recounting testimony during Committee on the Post Office and Post Roads on Nov. 15–16, 1943).

144. *Declaring Certain Papers, Pamphlets, Books, Pictures, and Writings Unmailable: Hearings Before the Comm. on the Post Office & Post Roads H.R.,* 78th Cong. (2d session) 110 (1944) (statement of Donald Jones, NAACP Chairman).

145. *Bill Would Punish Race-Hate Writers*, N.Y. TIMES, Jan. 13, 1944.

146. *NY Legislature Gets Race Anti-Bias Measures: Four Bills Would Outlaw All Forms of Discrimination*, NEW J. & GUIDE, Jan. 29, 1944, at A16.

147. FLA. STAT. XLVI § 836.11 (1945).

speeches inciting religious and racial hatred.[148] The statute was enacted at a time of virulent race riots in Boston. Like most of the group libel laws, it was unenforced. The law lapsed into desuetude and was regarded generally as a failure. The ACLU observed that there was no dearth of anti-Semitic defamation in Massachusetts, and even after the law's passage, perhaps more anti-Semitic literature circulated per capita in Boston than anywhere else in the country.[149]

C. Postwar Efforts to Pass Group Libel Laws

The end of the war led to the end of many of the circumstances that brought about the group libel law campaign. After World War II, there was a decline in the number of domestic fascist groups, as well as reported declines in overt anti-Semitism.[150] Efforts to pass group libel laws continued nevertheless, buoyed by a new national commitment to civil rights. Military service had brought many Americans into contact with racial, ethnic, and religious minorities, and this contact had increased tolerance for diversity. Members of racial and religious minorities who had fought in the war demanded recognition for their service in the form of full social equality for themselves and their children.[151] The nation's leaders were exhorted to implement the democratic ideals for which the country had fought.[152]

The period between 1945 and 1950 saw the passage of more antidiscrimination laws than at any point in U.S. history.[153] The federal government under President Harry Truman expressed its resolve to eradicate racial discrimination; Truman ended segregation in the armed

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148. WALKER, HATE SPEECH, *supra* note 1, at 82–83; MASS. GEN. LAWS c. 272, § 98c (1943). Under the Massachusetts statute,

> Whoever publishes any false written or printed material with intent to maliciously promote hatred of any group of persons in the Commonwealth because of race, color or religion shall be guilty of libel and shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. The defendant may prove in defense that the publication was privileged or was not malicious. Prosecutions under this section shall be instituted only by the attorney general or by the district attorney for the district in which the alleged libel was published.

For comment, *see* Note, 28 MASS. L. Q. 104 (1943) (describing the unique nature of the act and the history of its enactment).

149. Perlman & Ploscowe, *supra* note 11, at 13–14; Tanenhaus, *supra* note 11, at 286.

150. *Survey Finds Drop in Anti-Semitism: B'nai B'rith Unit Says People Are Increasingly Aware of Peril in Race Bias*, N.Y. TIMES 29 (May 7, 1947), https://www.nytimes.com/1947/05/07/archives/survey-finds-drop-in-antisemitism-bnai-brith-unit-says-people-are.html [https://perma.cc/7HH3-T68Q]; *See* CHAFEE, *supra* note 72, at 118 ("Doubtless, the defeat of fascism in the war has rendered these evils less acute than when the New Jersey statute was enacted in 1939.....").

151. *See* DINNERSTEIN, *supra* note 59, at 151–52

152. *See id.* (describing the anti-racist attitudes that came to America after the end of World War II).

153. Isaiah M. Minkoff, *Inter-Group Relations*, 49 AM. JEWISH Y.B. 188, 197 (1947–1948).

forces and proposed a civil rights bill.[154] The year 1947 saw an outpouring of articles, editorials, and films on the problem of discrimination. *Gentleman's Agreement*, a novel about anti-Semitism, was a bestselling book that was turned into an acclaimed motion picture.[155] Educational groups and labor organizations initiated programs to end discrimination and intolerance.[156]

The argument for group libel laws as a wartime security measure was no longer valid. Calls for hate speech laws were framed increasingly in terms of equality and civil rights.[157] Advocates of group libel laws endorsed them as a means of curbing bigotry and discrimination, on the theory that prejudicial attitudes were created and reinforced through prejudicial speech.[158] Anthropologist Ashley Montagu, author of several popular books on racism as a social problem, argued in the journal *Psychiatry* in 1946 that legislation against the utterance of prejudice would reduce discriminatory acts and that group libel laws "will do more for the improvement of group relations than any other practical measures of which I can think."[159]

Proponents of group libel laws also began framing their arguments in terms of freedom of speech. They could not avoid the obvious conflict with recent Supreme Court First Amendment rulings and sought to address such objections head-on. During the 1940s, the Supreme Court declared freedom of speech to be in a "preferred place" in the scheme of constitutional liberties because of its intimate connection to participatory

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154. *See* Exec. Order No. 9981 (banning segregation in the Armed Forces); MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 26 (2011).

155. *See* DINNERSTEIN, *supra* note 59, at 151–52. *See* N. Y. Times, Mar. 13, 1947, at 25 col. 7; *id.*, Nov. *5,* 1946, at 20 col. *3*; *id.*, Nov. 4, 1946, at 24 col. 7; *id.*, Aug. 1, 1946, at 10 col. 2; *Saturday Review of Literature*, Feb. 1, 1947, at 20 *and* response Mar. 15, 1948; *including* response by Learned Hand.

156. *See* DINNERSTEIN, *supra* note 59, at 153 (noting how several groups wanted to spread tolerance and antiracism).

157. *See* the following arguments of the Commission on Law & Societal Action (CLSA) in THE WORK OF CLSA: A BIBLIOGRAPHY OF REPRESENTATIVE PUBLICATIONS OF THE COMM. OF LAW & SOCIAL ACTION (American Jewish Congress, 1945–1957); Leo Pfeffer, *How Free Should Speech Be?*, CONG. WKLY. (Dec. 7, 1945) (calling for laws against group libel); CISA, MODEL RACE HATRED ORDINANCE FOR MUNICIPALITIES, (Nov. 26, 1947) (listing proposals for group libel ordinances); CISA, MODEL STATE GROUP LIBEL BILL, (Mar. 2, 1949) (outlining a model state bill criminalizing group libel); Phil Baum, *The Bounds of Free Speech,* CONG. WKLY. (Feb. 4, 1952) (discussing the Beauharnais case in which a white supremacist was convicted under the Illinois group libel law).

158. Studies on the psychology of anti-Semitism demonstrated that individuals who heard anti-Semitic remarks were more likely than others to harbor prejudice. Bruce Bliven, *What is Anti-Semitism?*, NEW REPUBLIC, Dec. 22, 1947, at 16–18.

159. M. F. Ashley Montagu, *Racism and Social Action*, 9 PSYCHIATRY 143, 147 (1946).

democracy,[160] and it invalidated loosely drawn statutes that restricted speech on "matters of public concern" short of a clear and present danger.[161] The Court invoked comparisons between America's toleration of diverse viewpoints and the control of thought and expression under totalitarian regimes.[162] Forced speech and thought were said to be hallmarks of dictatorship, and freedom of conscience, freedom of thought, and freedom to communicate were described as weapons against tyrannical government.[163]

Foreshadowing arguments that would be made decades later, advocates of group libel laws claimed that group libel laws promoted rather than impaired freedom of expression. Positive state action to limit group defamation was necessary to secure the freedom of discussion that the Supreme Court had declared to be the central purpose of the First Amendment, they asserted.[164] Freedom of speech "must be guarded jealously, not only from governmental interference but from private restraint and obstruction as well."[165] Insofar as group libel laws helped to preserve harmonious relations among social groups, they facilitated orderly public conversations. With its barrage of lies, hate speech made no contribution to the "marketplace of ideas."[166]

1947 marked the high point of the group libel law movement. Eradicating discrimination had become an issue of national priority, and Americans placed increasing faith in the ability of the state to police intergroup relations. Proponents of group libel laws noted the irony of the absence of group defamation laws in the United States after having fought a global war that resulted from group defamations.[167]

However, 1947 also marked the beginning of a decline in efforts to pass hate speech laws and in the popularity of group libel laws. Curbs on

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160. Thomas v. Collins, 323 U.S. 516, 529–30 (1945); *see* also DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT 271 (1992).

161. *See* Thornhill v. Alabama, 310 U.S. 88, 105 (194); Winters v. New York, 333 U.S. 507, 518–20 (1948) (holding that the statute was invalid for prohibiting publication of "criminal news and stories of bloodshed, lust or crime."); *Thomas*, 323 U.S. at 530–36 (holding a state statute requiring registration of labor organizers invalid as applied); Taylor v. Mississippi, 319 U.S. 583, 588–90 (1943) (reversing convictions under a state statute because the communications in question were "beliefs and opinions"); Bridges v. California, 314 U.S. 252, 270–78 (1941) (reversing convictions for contempt of court).

162. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 (1943) (stating that balancing unity and diversity has always been a struggle for the country); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (stating democracy and freedom of expression has limited whom the state may punish for hateful speech).

163. *Barnette*, 319 U.S. at 640–42 (1943).

164. Note, *supra* note 10, at 604.

165. *Id.* at 609.

166. *Private Attorneys-General*, *supra* note 127, at 592–94.

167. Brown & Stern, *supra* note 5, at 8–9.

group defamation were no longer perceived to be as urgent as they had once been, and the national experience with group libel laws had not been fruitful. Doubts increased as to whether such laws could be framed in a way that did not sweep broadly across constitutionally protected speech.

D. The Indiana Group Libel Law

The most significant group libel law of the postwar period was an Indiana law that prohibited the new crime of "racketeering in hatred," defined as "disseminating hatred by reason of race, color or religion."[168] The so-called "anti-hate" bill was an attempt to stop the Ku Klux Klan, which surged in the state in 1946.[169] No other enactment of the 1947 session of the Indiana General Assembly was met with stronger public and legislative support. [170] The law had been drafted awkwardly to avoid constitutional difficulties. Section 10 stated that "no provision of any section of this act shall be construed to prohibit any right protected by the federal Constitution or the Constitution of the State of Indiana, including but not limited to rights of freedom of speech, freedom of the press and freedom of religion."[171]

The ACLU opposed the law as being "so loosely drawn as to endanger freedom of speech and press generally."[172] ACLU co-general counsel Morris Ernst described the Indiana law as "frightening" and "unconstitutional."[173] Group libel law advocates recognized that such vague laws could be constitutionally problematic, yet they also recognized the potential ineffectiveness of more narrowly drawn provisions.[174] Believing that "[a] carefully drafted statute which describe[d] the offense precisely" would "not run afoul of the Constitution," proponents of group libel laws set out to draft clearer legislation with greater attention to the protection of legitimate

168. IND. CODE § 10-904, 905(A) (1947) ("It shall be unlawful . . . to . . . conspire . . . for the purpose of . . . advocating . . . or disseminating malicious hatred by reason of race, color, or religion . . . for or against any person, persons, or group of persons, individually or collectively..... ").

169. Tony Cook, *Indiana Once Had a Hate Crimes Law, But It Quietly Disappeared*, INDIANAPOLIS STAR (Nov. 29, 2017, 6:00 AM), https://www.indystar.com/story/news/politics/2017/11/28/indiana-once-had-hate-crimes-law-but-quietly-disappeared/626926001/ [https://perma.cc/U6MT-J2JU].

170. Lloyd C. Wampler, *The "Anti-Hate" Act*, 22 IND. L.J. 295, 295 (1947).

171. Indiana v. Levitt, 246 Ind. 275, 288–92, 203 N.E.2d 821, 828–30 (1965) (Jackson, J., dissenting).

172. *See* Letter from Arthur Garfield Hays to Hon. Ralph F. Gates (Feb. 17, 1947) (urging the legislature to consider opposing the bill).

173. Letter from Morris Ernst to Will Maslow (Feb. 10, 1947).

174. CHAFEE, *supra* note 72, at 125–26 (commenting upon vagueness as an inherent characteristic of group libel legislation).

criticism.[175]

Spurred by widespread condemnation of the Indiana group libel law, the *Columbia Law Review* in 1947 published a "model group libel statute" that gained national attention.[176] The model law strove to avoid constitutional difficulties by providing that a statement must be false as well as defamatory.[177] It also attempted to provide a more precise definition of proscribed conduct.[178] The law made criminal "any offensive, abusive, insulting or derogatory words except when used in the course of and as a part of an exposition primarily directed to the advocacy of ideas on matters of public concern."[179] The phrasing was still broad, highlighting, in the words of one commentator, "the necessarily vague language of a group libel statute [which] makes it a legal blunderbuss, likely to hit wide of the mark."[180] The "model law" failed to assuage critics and contributed to growing pessimism toward group libel laws.

E. 'We Suggest Group Libel'

Group libel laws attracted further criticism after editor Norman Cousins of the *Saturday Review of Literature*, a well-known liberal intellectual magazine, published an influential article in 1947 that was sent to Senators and Congresspeople from New York, to "solicit [their] opinion on a suggestion we respectfully offer in connection with an awkward but serious problem concerning freedom of speech."

> What are we to do about those who use our freedoms as battering rams against freedom? What are we to do about the . . . the KuKluxers . . . and all the other hate specialists . . . ?.....There is an approach to the problem. It is by no means a solution ..... but it may at least be one way of getting at certain aspects of the problem..... We suggest group libel ..... Group libel may not represent direct surgery, but it can have some antiseptic value. It may cause the totalitarian to think not twice but twenty times before leaping to irresponsible attack. .....It is one of the sacred privileges of this country that any person can make a fool of himself in public ..... But the condition that goes along with that right is that there be no immunity if someone is hurt. By all means, let us guarantee free speech to the anti-free speechers. But let us at least establish, along with the right to attack, the right to defend.[181]

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175. Will Maslow, *The Law and Race Relations*, 224 ANNALS AM. ACAD. POL. & SOC. SCI. 75, 81 (1946).

176. *See* Note, *supra* note 10, at 609–12 (providing model language for a libel prohibition statute).

177. *Id*. at 604.

178. *Id.* at 609–10.

179. *Id.* at 612.

180. Note, *supra* note 11, at 260.

181. *Group Libel*, SATURDAY R. OF LIT., Feb. 1, 1947, at 20.

The proposal struck a chord with the magazine's readers. The *Saturday Review* received more than 200 letters in reply, both from the rank and file of its readership and from some of the leading public figures of the day.[182] The most influential response was from federal appeals court judge and noted civil libertarian, Learned Hand.[183] Hand offered a list of objections to group libel laws. If group libel were to take the form of a civil action, the damage suffered by each member of a minority group would be impossible to prove, he argued.[184] In a criminal action, a prosecutor would have to "go back far into history" to prove that the propaganda was untrue.[185] Hand insisted that the problem of prejudice was principally educational, not legal. "There is no remedy for the evil, but the slow advance of the spirit of tolerance; and I believe that the suppression of intolerance always tends to make it more bitter."[186] The press celebrated Hand's forceful rebuke of group defamation laws. Noted the *Charlotte News*, "the rebuttal to [the] editorial, eloquent as it was and coming from the sources that it did, will probably bury the theory of group libel."[187]

F. The Commission on Freedom of the Press

Two other prominent rebuttals of group libel laws in 1947 did, to some extent, "bury the theory of group libel."[188] One was issued by the Hutchins Commission on Freedom of the Press, a commission of academics, lawyers, and journalists, funded by *Time, Inc.* publisher Henry Luce, to investigate the "freedom of and responsibility of the press."[189] The impetus for the commission's creation was criticism of concentrated ownership in the media industries, which was said to distort the marketplace of ideas by limiting the expression of diverse points of view.[190] After meeting for three years, the commission produced several reports, including a report on the "law of mass communications" authored by Zechariah Chafee, eminent First Amendment scholar from Harvard.[191]

Echoing the arguments of Learned Hand, Chafee opposed group libel

182. *See generally Group Libel*, SATURDAY R. OF LIT., Mar. 15, 1947.
183. *Id.* at 23–24.
184. *Id.*
185. *Id.*
186. *Id.*
187. Editorial, *The Theory of Group Libel*, CHARLOTTE NEWS, Mar. 19, 1947.
188. *Id.*
189. Victor Pickard, America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform 144 (2015).
190. *See id.* at 199 (discussing the monopolistic practices of communication industries over time); STEPHEN BATES, AN ARISTOCRACY OF CRITICS: LUCE, HUTCHINS, NIEBUHR, AND THE COMMITTEE THAT REDEFINED FREEDOM OF THE PRESS 167 (2020).
191. *See generally* CHAFEE**,** *supra* note 72.

legislation. He acknowledged the interest in group libel laws, noting that "[s]ince the existing law of criminal and civil libel is plainly unable to cure the undoubted evils of group vilification, it is natural that some influential people should favor new legislation specifically directed against these evils."[192] Group libel laws were an "obvious remedy, but . . . not on that account necessarily the best remedy. It may even be a bad remedy, which will do much more harm than good."[193]

Insofar as they hindered "open discussion," group libel laws were "probably unconstitutional," Chafee opined, "[M]atters which ought to be debated and discussed may be kept under cover by a group libel law. . . . [T]hey will lead to constant and difficult litigation. Such statutes are necessarily vague."[194] Like Learned Hand, Chafee advocated extra-legal methods such as "continuous efforts in the schools" to teach tolerance, and open discussions of prejudice in the press.[195] "Group vilification," he speculated, is a "symptom of evils which group libel laws cannot reach."[196] He believed that the problem called for "intricate social regulation," rather than criminal prosecutions.[197] "The remedy for bad discussion is not punishment but plenty of good discussion."[198]

G. The President's Committee on Civil Rights

Another rebuke of group libel laws that year came from President Truman's Committee on Civil Rights (CCR). Comprised of noted liberal lawyers and civil rights activists, the CCR was tasked with submitting recommendations for government action to determine means of "strengthen[ing] and improv[ing]" civil rights in the United States.[199] In 1947, the CCR heard testimony from the American Jewish Congress, the American Jewish Committee, the Anti-Defamation League, the ACLU, and other groups on the viability of group libel laws as a civil rights measure.

The American Jewish Congress, which submitted to the CCR a broad group libel law proposal, maintained its position that group defamation imperiled "democracy itself."[200] It stated that,

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192. *Id.* at 122.
193. *Id.*
194. *Id.* 122, 123, 125.
195. *Id.* at 129.
196. CHAFEE**,** *supra* note 72, at 127.
197. *Id.*
198. *Id.* at 130.
199. In December 1947, the CCR produced a 178-page report entitled, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947).
200. Will Maslow & Joseph B. Robison, *Civil Rights, A Program for the President's Committee*, 7 LAW. GUILD REV. 112, 119 (1947).

> We learned from bitter experience in Germany that fascist groups begin their assault upon democracy by exploiting latent prejudices against the Jews and other minorities. Democrats in Europe wrung their hands while political extremists made a mockery of free speech. We can no longer solve these problems by a hackneyed repetition of the clear and present danger rule. When the danger becomes so clear and present that the courts see it, it will be too late for governmental measures.[201]

The Anti-Defamation League had reversed its position on group libel laws. It was yet to be persuaded that "an effective statute can be drawn which copes with the evil of group libel without . . . so threatening freedom of bona fide discussion of public questions as to react to the prejudice of the very minority groups which the statute is supposedly designed to protect."[202] The American Jewish Committee continued to oppose group libel laws as "psychologically [and] legally unsound."[203] Because "the welfare of Jews is closely identified with the preservation of constitutional liberties of all Americans," it approached with caution any "suggestion for legislation that might have a tendency to restrict these liberties."[204]

The President's Committee on Civil Rights rejected the group libel proposals. The argument for anti-defamation laws was "compelling," it noted, "but the record of restrictive punitive action presents little basis for confidence in its success, aside from questions of its moral appropriateness."[205] Moreover, "[t]he hierarchy of civil rights on which they are based places the defamed group first . . . [over] freedom of expression."[206] It recommended a right of reply as an alternative to group libel, requiring any publication that issued a defamatory statement to permit the defamed party to publish a rebuttal.[207] The CCR also proposed requiring any party seeking to use the U.S. mail to disclose their identity and the source of the funds with which they published the material.[208] Many hate publications were issued anonymously, and it was believed that forced exposure of authors' identities would deter those publications and enable audiences to better appraise the value of the material.[209] The

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201. *Id.*
202. Schultz, *supra* note 6, at 130.
203. *Minutes from Confidential Bus. Meeting of President's Comm. on C.R.* (May 1, 9147 through May 15, 1947), at 282 (on file with Harry S. Truman Library).
204. *Id.*
205. Memorandum from Robert K. Carr to Members of the President's Comm. on C.R., *Group Defamation and Civil Rights*, 18 (June 5, 1947).
206. *Id.*
207. *Id.* at 21–22.
208. TO SECURE THESE RIGHTS, *supra* note 199, at 164.
209. *Id.*

CCR endorsed the conclusions of the Hutchins Commission that the solution to group defamation was counter-speech.[210]

H. 1949

In 1949, the number of identified hate groups in the U.S. declined from 130 in 1946 to sixty-six.[211] According to historian Leonard Dinnerstein, anti-Semitism had become "a less socially acceptable aspect of American life."[212] The postwar period was one of social and economic prosperity and more Americans concentrated on those opportunities "rather than on the alleged culpabilities of the minorities in their midst," according to Dinnerstein.[213]

Four proposed federal group libel bills, drafted by the American Jewish Congress's Commission on Law and Social Action (CLSA) and introduced to Congress by representatives from New York that year, failed to win support.[214] All four bills were aimed at "outlawing group libel."[215] The CLSA carried out a vigorous lobbying campaign for the Javits-Klein bill. It argued that consistent convictions under "group libel" laws would drain the resources of hate organizations, discouraging future activity.[216] Group libel statutes could "favorably influence the behavior of individuals by deterring those tempted to indulge in hate activities and reinforcing the reluctance of others to participate."[217] Drawing on strands of contemporary psychology, it noted irreparable harms caused by group defamation: "[R]acial defamation is like a slow cumulative poison, the effects of which may not be visible for years, nor does it take into account the fact that racial defamation can not [sic] be overcome merely by counter-propaganda."[218]

The major Jewish civil rights organizations convened a symposium to discuss the proposals, noting that "[t]he debate over group libel

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210. Carr, *supra* note 205, at 21.

211. Note, *supra* note 11, at 253 n.4; *see also Group Defamation*, 1949 CIV. RTS. U.S. 62 (1949) ("Organized hate-mongers remained few and weak and there was little indication, barring serious economic depression or political upheaval, that they would grow in strength or influence.").

212. DINNERSTEIN, *supra* note 59, at 150.

213. *Id.* at 151. According to historian Leonard Dinnerstein, the decrease in anti-Semitic activity was attributed to "the fact that there is economic prosperity and no national or international problems which are sharply and deeply dividing Americans." *Id.* at 162.

214. Phil Baum, *Good and Bad Libel Bills*, CONG. WKLY., Sept. 19, 1949.

215. Nat'l Cmty. Rels. Advisory Council, *Federal Group Libel Legislation: Should Jews and Jewish Organizations Support or Oppose?*, NCRAC LEGIS. INFO. BULL., June 10, 1949, at 3 [hereinafter *Federal Group Libel Legislation*] (summarizing the position of the American Jewish Congress).

216. Note, *supra* note 11, at 254.

217. *Id.* at 255.

218. *Federal Group Libel Legislation*, *supra* note 215, at 3.

legislation [has been] lifted out of the realm of theory and projected into the arena of legislative action."[219] The Anti-Defamation League, American Jewish Committee, and Jewish Labor Committee criticized the proposed measures as poorly conceived and constitutionally dubious.[220] The American Jewish Committee noted, "[a]fter years of experience[,] there is now general agreement . . . that the best way to handle the Gerald L.K. Smiths"—referring to the notorious anti-Semitic demagogue—"is with [the] 'silent treatment.'"[221] The "silent treatment," or "quarantine" strategy, called for the complete denial of publicity to the activities of "professional bigots," on the theory that public protest and group libel prosecutions made martyrs out of villains and gave demagogues a broader stage from which to speak.[222] None of the bills were reported out of committee, and their failure marked the effective end of the group libel law campaign.[223]

III. THE DECLINE OF THE MOVEMENT FOR GROUP LIBEL LAWS

By 1950, large-scale efforts to pass group libel or hate speech legislation had all but halted. Seven states (California, Connecticut, Illinois, Indiana, Massachusetts, Nevada, and West Virginia) and a handful of large cities (Cincinnati, Chicago, Sacramento, Denver, Houston, Oklahoma City, Omaha, and Portland, Oregon) had statutes and ordinances applicable to some types of group defamation.[224] Many were thought to be of questionable constitutionality and the laws "all but withered on the vine from lack of enforcement."[225] The CLSA of the American Jewish Congress remained the sole advocate of group libel laws, but group libel disappeared even from its agenda in the early 1950s.

One reason was the Red Scare. After the Second World War, the nation was engulfed in an anti-Communist panic. Fear of domestic communism, espionage, and "subversion" led to a wave of ideological persecution. Loyalty oaths, group registration requirements, and congressional investigations were used to crack down on suspected Communists, who were discharged from public and private employment and ostracized from their communities. The notorious red-baiting

219. *Id.* at 1.
220. *Id.* at 7.
221. *Id.* at 4.
222. SVONKIN, *supra* note 124, at 142–43; *see also* WALKER, HATE SPEECH, *supra* note 1, at 77–100 (addressing the "quarantine" idea and the history of group libel law during and after World War II).
223. *Group Defamation*, *supra* note 211, at 66.
224. Joseph Tanenhaus, *Group Libel and Free Speech*, 13 PHYLON 215, 215 (1952).
225. *Id.*; *see also* Note, *supra* note 11, at 255 (describing criminal statutes in various states that allow prosecution for group libel).

Senator Joseph McCarthy rose to power in 1950. Many who were implicated in the anti-Communist witch hunt were not actual or former members of the Communist Party, but liberals who had been associated with leftist causes during the New Deal.[226]

This persecution of the left led to a shift in attitudes toward group libel laws. It became increasingly difficult for liberals to side with government restrictions on expression. Liberals began to lose faith in the ability of the state to regulate discourse. There were other tactical reasons to abandon advocacy of group libel laws. The Communist Party of the U.S.A. and its publication, *The Daily Worker*, had advocated group defamation laws in the 1940s, and many on the left sought to avoid guilt by association.[227]

A testament to changing views on group libel laws was David Riesman's reversal on the issue. In *Commentary*, a magazine sponsored by the American Jewish Committee, Riesman wrote in 1951 that he had come to believe that the self-interest of Jews and other persecuted groups lay not in the suppression of speech but rather protecting freedom of expression.[228] "In the present context of American society," he noted, "freedom of expression is one of the greatest safeguards for Jews and all other minorities subject to prejudice."[229] "[T]hreats to freedom of expression," he believed, "were equally serious" whether they came from such right-wing groups as the American Legion and the Legion of Decency, or from groups on the left such as the Commission for Law and Social Action.[230] Thus, by the time the Supreme Court finally got around to addressing the group libel issue in *Beauharnais v. Illinois*, few advocates of group libel laws remained. In the words of one commentator, the group libel debate had "largely burned itself out."[231]

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226. *See generally* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998).

227. *See* SVONKIN, *supra* note 124, at 323–24, 378 ("[The] ADL and the AJ Congress mounted educational campaigns . . . designed to highlight the danger which guilt by association posed to Jews ").

228. David Riesman, *The Militant Fight against Anti-Semitism*, COMMENTARY, (Jan. 1951), https://www.commentary.org/articles/david-riesman/the-militant-fight-against-anti-semitismeducation-and-democratic-discussion-is-the-better-way/ [https://perma.cc/5CKA-AS2G].

229. *Id.*

230. WALKER, HATE SPEECH, *supra* note 1, at 99; *see also* Riesman, *supra* note 228 (warning that freedom of expression should be protected against both the government and against private groups).

231. Tanenhaus, *supra* note 210, at 215. Another commentator has argued that the group libel movement waned when Jewish civil rights organizations, the major force advocating group libel laws, abandoned their commitment to the notion of a group reputation and "group identity." *See* Schultz, *supra* note 6, at 73–74 ("American Jews supported group libel statutes at the same time that they most strongly identified themselves as a cohesive, even separate, group within American

A. Beauharnais v. Illinois

In 1952, after years of public debate on the wisdom and constitutional validity of group libel laws, the Supreme Court finally addressed group libel in *Beauharnais v. Illinois*. *Beauharnais* did not involve a response to modern fascism, but instead the Illinois group libel law that had been enacted in 1917.[232] The state had invoked the law after the Second World War due to a surge of race riots in Chicago. Chicago's Black population had doubled in the previous ten years due to wartime employment opportunities, but housing did not keep pace with demand.[233] White residents resisted housing integration with every means available, including outright violence.[234]

Joseph Beauharnais, president of a white supremacist group called the White Circle League, was convicted of violating the anti-hate law.[235] Beauharnais distributed copies of a leaflet calling upon the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro."[236] The case was tried before a jury which found Beauharnais guilty and fined him the maximum sum of $200.[237] On appeal, he challenged the statute's constitutional validity. The Supreme Court of Illinois rejected the claim that the statute was too vague and held that Beauharnais's acts created a clear and present danger which justified abridging his right to free expression.[238]

Beauharnais appealed to the U.S. Supreme Court with the assistance of the ACLU. ACLU leaders had long hoped for an opportunity to test the constitutionality of the Illinois group libel law.[239] In its *Beauharnais* brief, the ACLU deployed arguments about group libel that it had made

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society. Conversely, American Jews generally refused to support group libel statutes after they began to see themselves in more individualistic terms.").

232. Beauharnais v. Illinois, 343 U.S. 250, 251–52 (1952).

233. Erika J. Pribanic-Smith & Jared Schroeder, *Breaking the White Circle: How the Press and Courts Quieted a Chicago Hate Group, 1949–1952*, 38 AM. JOURNALISM 416, 419 (2021).

234. *Id.*

235. *Beauharnais*, 343 U.S. at 251.

236. Joseph Beauharnais, *Preserve and Protect White Neighborhoods! From the Constant and Continuous Invasion, Harassment, and Encroachment by the Negros* (1950). "Wanted," the leaflet continued,

> [o]ne million self respecting white people in Chicago to unite..... If persuasion and the need to prevent the white race from becoming mongrelised by the Negro will not unite us, then the aggressions.....rapes, robberies, knives, guns and marijuana of the Negro, surely will.

237. People v. Beauharnais, 408 Ill. 512, 515, 97 N.E.2d 343, 345 (1951).

238. *Id.*

239. *See* Letter from Leon Despres to Herbert Monte Levy (Jan. 19, 1951) ("As you know, the Chicago Executive Board was firmly of the belief that [Beauharnais] was an appropriate case for intervention.").

for nearly thirty years. The brief challenged the Illinois group libel statute as "fail[ing] to set a reasonable standard by which a citizen may be apprised of any offense" and denied that there was a clear and present danger.[240] Commenting on group libel laws broadly, it noted that "[m]any states in attempting to suppress racial and religious antagonism have enacted similar statutes. They are all aimed at expressions of opinion."[241] Under the provisions of the Illinois law, portrayals of "[t]he New and the Old Testament, the works of Shakespeare and many of the classics must also be the subject of prosecution . . . ."[242] It rejected the analogy of group libel to individual libel on the theory that group libel laws could be used to punish nondefamatory commentary on social issues. [243]

B. The Beauharnais *Decision*

On April 28, 1952, the Supreme Court decided *Beauharnais v. Illinois* in favor of the state.[244] Five separate opinions reflected the divergent stances on the Court on First Amendment and group libel laws. The majority opinion was written by Justice Frankfurter. A Jewish immigrant who spent a significant part of his boyhood on New York's lower East Side, Frankfurter had been one of the founding members of the American Jewish Congress.[245]

Frankfurter, known for his approach of judicial restraint, accepted the state's prerogative to punish group libel and the Illinois courts' construction of the statute as a form of "criminal libel."[246] In the *Beauharnais* opinion, Frankfurter traced the long history of criminal libel in the United States.[247] He then turned to *Chaplinsky v. New Hampshire*, which deemed "fighting words," i.e., "[words] which by their utterance inflict injury or tend to incite an immediate breach of the peace," to be an

240. Appellant's Brief at 14, 21, Beauharnais v. Illinois, 343 U.S. 250 (1952) (No. 118), 1951 WL 82008.

241. *Id.* at 1.

242. *Id.* at 17.

243. *Id.* at 18–19.

244. *See Beauharnais*, 343 U.S. at 266 ("We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack.").

245. *Religion: Jews v. Jews*, TIME, June 20, 1938, at 24; *see also* AM. JEWISH CONG., *About Us*, https://ajcongress.org/about/ [https://perma.cc/D4ZL-LAMS] (last visited Aug. 25, 2022).

246. *See Beauharnais*, 343 U.S. at 253–54 (noting that the Illinois Supreme Court treated the statute as a form of criminal libel law, which was accepted by the defendant and trial court).

247. *See id.* at 254–57 (tracing the origins of criminal libel to common law libel, which was adopted in every state when libels were directed at individuals and noting that proscriptions on libel had never raised constitutional issues); *see also id.* at 259–61 (tracing racial tensions in Illinois and the legislature's justification in seeking ways to curb defamation of religious and ethnic groups).

unprotected category of speech.[248] Frankfurter reasoned that if a libelous statement "directed at an individual" could be the object of criminal sanctions, then the state could not be denied the right to punish "the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the state."[249]

Frankfurter's opinion noted the history of racial violence in Illinois, writing:

> In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.[250]

The dangers of hate groups and demagogues—those who in "the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties"—was "familiar to all," and within the limits of what "the states appropriately may punish."[251]

While the Illinois law limited speech, it did so for good reasons and "[was], consequently, constitutional."[252] Frankfurter explained that the history of racial tensions in Illinois gave its legislature ample grounds for concluding that group defamation should be outlawed. He opined that group libel legislation might not actually alleviate intergroup frictions, but the judiciary ought not lightly to deny states use of the "trial-and-error" method in dealing with "obstinate social issues."[253] Frankfurter went on to write:

> We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack. But it bears repeating—although it should not—that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.[254]

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248. *See id.* at 257 (noting that criminal liability for "[r]esort to epithets or personal abuse" was viewed as constitutional in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), which first established the "fighting words" doctrine) (internal quotations omitted).

249. *Beauharnais*, 343 U.S. at 258.

250. *Id.* at 261.

251. *Id.*

252. Tanenhaus, *Group Libel and Free Speech*, *supra* note 224, at 216.

253. *Beauharnais*, 343 U.S. at 262.

254. *Id.* at 266–67.

Four justices dissented. Justice Robert Jackson did so primarily on procedural grounds.[255] William Douglas and Hugo Black, in strong dissents, objected to group libel laws in their entirety.[256] Black and Douglas, known for their absolutist approach to free speech, believed that the Court drastically weakened constitutional protections of freedom of speech by ignoring the clear and present danger test and turning over to the states the power to limit speech in "reasonable" ways.[257] Black thought that the majority opinion degraded First Amendment freedoms to a "rational basis" level and characterized the Illinois law as a form of censorship.[258] Black believed that group libel laws could be used by dominant political, economic, and social groups to quash criticism.[259] In Black's view, Frankfurter's analogy between group libel and individual libel was misguided because there was an element of group libel that was not involved in individual libel; namely, the discussion of "matters of public concern."[260]

Beauharnais is almost universally regarded to have been wrongly decided, though it is still technically good law. Law review commentary on the decision was virtually unanimous in its criticism of the majority's equation of individual and group libel.[261] The Court should have used the clear and present danger test, and it was apparent that the state had not met the burden of showing an imminent danger. Since *Beauharnais,* the Supreme Court has not in a single instance relied upon *Beauharnais*

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255. *See generally id.* at 287–305 (Jackson, J., dissenting).

256. *See generally id.* at 267–76 (Black, J., dissenting); *see also generally id.* at 284–87 (Douglas, J., dissenting).

257. *See Beauharnais*, 343 U.S. at 275 (Black, J., dissenting) ("I think the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.' Whatever the danger, if any, in public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech."); *see also id.* at 284–85 ("My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.").

258. *See id.* at 269 (Black, J., dissenting) ("Today's case degrades First Amendment freedoms to the 'rational basis' level."); *see also id.* at 271 (Black, J., dissenting) ("This statute imposes state censorship over [different forms of public speech].").

259. *See id.* at 273 (Black, J., dissenting) ("In other words, in arguing for or against the enactment of laws that may differently affect huge groups, it is now very dangerous indeed to say something critical of one of the groups."); *see also id.* at 274 (Black, J., dissenting) ("History indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'").

260. *Beauharnais*, 343 U.S. at 270 (Black, J., dissenting).

261. *See, e.g.*, Loren P. Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955) (analyzing problems posed by group libel laws); *see also* Edward E. Kallgren, *Group Libel*, 41 CALIF. L. REV. 290 (1953) (arguing that *Beauharnais* was an "unfortunate [decision]"); *see also* Note, *supra* note 11 (discussing attempts to enact group libel laws); *see also* Note, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521 (1952) (considering application of First Amendment to group libel laws).

as controlling precedent.[262] In *New York Times v. Sullivan* (1964), the Court rejected the underlying premise of *Beauharnais* that libel was outside the realm of constitutionally protected speech.[263]

C. The End of Group Libel

Beauharnais was not the beginning of a new era in the history of group libel laws, but rather the end of the story. By the time of the *Beauharnais* decision, enthusiasm for group libel laws had all but died out.[264] Group libel had vanished as a recommended "remedy for prejudice and discrimination,"[265] observed one historian, noting that "[p]aradoxically, [group libel advocates] rejected the concept at precisely this moment of seeming triumph."[266] Noted law professor Harry Kalven Jr., "[i]ronically, once the victory was won, the momentum for such legal measures seemed to dissipate "[267]

Many civil rights advocates were convinced that freedom of speech was a more effective means of protecting minority rights than prohibitions on group defamation. Noted the newspaper the *Baltimore Afro-American*, writing on *Beauharnais*,

> The AFRO has consistently fought bigotry and intolerance in all of its forms, but such a battle can be fought only in an atmosphere in which freedom of speech is not restricted or confined. We seek for those with whom we disagree the same rights and privileges we demand for ourselves In this framework, an NAACP protest against a lynching in the deep South or agitation for fair employment practice legislation . . . could be summarily jailed.[268]

Thurgood Marshall, then-head of the NAACP Legal Defense and Educational Fund, opposed the *Beauharnais* decision and filed a brief with the ACLU asking for reconsideration of the decision.[269] Marshall shared the fears of Justices Black and Douglas that *Beauharnais* could be wielded by enemies of minority groups as a form of censorship.[270]

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262. Geoffrey R. Stone, *Group Defamation*, 15 OCCASIONAL PAPERS L. SCH. U. CHI. 1, 9 (1978).
263. *Id.* at 11.
264. *See* WALKER, HATE SPEECH, *supra* note 1, at 98 ("[E]ven the leading supporters of group libel legislation were losing interest in [group libel] by the time of the *Beauharnais* decision.").
265. *Id.* at 100.
266. *Id.* at 98.
267. KALVEN, *supra* note 4, at 7.
268. *Right to Disagree*, BALT. AFRO-AM., May 10, 1952.
269. *See* Schultz, *supra* note 6, at 143, n.411 (highlighting the NAACP's evolving stance on group libel laws).
270. Beauharnais v. Illinois, 343 U.S. 350 (1952) (petition for rehearing denied), *reh'g denied by* 343 U.S. 988 (1952); *see Ask Rehearing of Verdict on Race Slander,* CHI. DEF. (NAT'L ED.) (1921–67), May 24, 1952 ("Counsel for the petition share the fears of Mr. Justice Black and Mr. Justice Douglas that a weapon has now been given to enemies of minority groups ").

Commentators predicted that *Beauharnais* would lead to the passage of group libel laws. Opined constitutional scholar Loren P. Beth, "[i]t is likely that this judicial acceptance will signal the adoption of similar laws by other states, perhaps even the Federal Government."[271] One scholar who had written extensively on group libel predicted that *Beauharnais* "may well inject life-giving serum into the [group libel laws] and rekindle the debate. . . . The Illinois libel case will no doubt occasion heavy pressures to have existing laws zealously enforced and new ones enacted."[272]

Yet few efforts to secure group libel laws took place after *Beauharnais*, and none were successful. Shortly after the decision, four New York Congressmen announced their intent to introduce a group libel bill, hoping to draw interest from the Supreme Court decision the previous week, but this went nowhere.[273] *Beauharnais* did not result in a "flurry of similar enactments."[274] Noted two law review commentators, "[t]he hope that this long awaited legal ruling stirred in the hearts of defamation victims was vain. The decision has produced no new similar legislation, nor has it produced increased litigation. In total effect, *Beauharnais* exists in a vacuum."[275] Civil rights groups in the 1950s avoided proposals for group libel, believing that greater success came through constitutional litigation on behalf of individual rights.[276]

A testament to the widespread disapproval of group libel laws occurred in 1958, when the American Jewish Congress issued a statement rejecting group libel legislation. Anti-Semitic literature was believed to have triggered a surge of bombings of Jewish temples in the South.[277] Responding to the violence, the American Jewish Congress opined that "[a] statute seeking to prohibit group defamation would at best control the symptoms but would not reach the disease. It would create the impression that effective measures had been adopted to meet the basic

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271. *See* Beth, *supra* note 261, at 167.

272. Tanenhaus, *supra* note 224, at 215, 217.

273. *See Bill in Congress Would Outlaw Libeling of Religious Groups*, JEWISH EXPONENT (Phila.), May 9, 1952, at 40 (introducing a bill making it unlawful to libel racial or religious groups "through shipment or mailing of defamatory material" across interstate lines).

274. Peter J. Belton, *Control of Group Defamation: A Comparative Study of Law and Its Limitations*, 34 TUL. L. REV. 299, 309 (1959–60).

275. Brown & Stern, *supra* note 5, at 19.

276. *See* WALKER, HATE SPEECH, *supra* note 1, at 103–04 (arguing that civil rights groups chose not to restrict hate speech because they believed that greater success came through individual litigation seeking vindication of constitutional rights).

277. *See* Anthony Lewis, *'Hate Literature' Hard to Stop: Officials Seek Ways to Curb Its Flow*, N.Y. TIMES, Oct. 26, 1958 (noting the relationship between hate publications and racial violence).

problem, whereas the basic problem had been avoided."[278]

The American Jewish Congress also opposed postal bans on "publications libeling racial or religious groups."[279]

> Implicit in any proposal to empower the postal officials to bar hate literature from the mails is a distrust in the capacity of the American people to distinguish between truth and falsity and to evaluate the true worth of such literature. The singular lack of success experienced by hate sheets in the United States is evidence . . . that this distrust in the good sense of the American people is unfounded.[280]

The American Jewish Congress proposed, in the alternative, federal legislation aimed at bombings of religious facilities, enforcement of existing laws against violence, and "[a]wakening the [c]onscience of the [p]eople."[281]

The organization effectively adopted the arguments of the ACLU. Two years later, in 1960, it adopted a resolution at its biennial conference repudiating group libel legislation.[282]

That year, when Department of Justice and Post Office officials met to consider the problem of hate propaganda sent through the U.S. mail, they decided that any legal action would face "statutory and constitutional obstacles."[283] The Department of Justice issued a statement that publications advocating racial and religious hatred and discrimination "generally fall within the protection of the First Amendment . . . ."[284] In 1961, Illinois repealed the 1917 group libel law.[285] Two years later, a staff report by the House Committee on the Judiciary denounced a proposed group libel law, noting that "the crucial problem confronting a democracy is not one of banning opinion and expression, however hateful, abusive, or false, but rather one of encouraging the widest circulation and confrontation of all views."[286] "Through such confrontation, challenge, and counterchallenge of ideas, not through the repression of speech, can a democracy survive and flourish," it

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278. AM. JEWISH CONG., BOMBINGS AND HATE SHEETS: A PROGRAM TO COMBAT LAWLESSNESS 9 (1958).

279. *Id.* at 10.

280. *Id.* at 12.

281. *Id.* at 5, 19, 22.

282. *See* WALKER, HATE SPEECH, *supra* note 1, at 100 ("In 1960 the American Jewish Congress adopted a resolution at its biennial conference officially repudiating group libel legislation as a remedy for prejudice and discrimination.").

283. Lewis, *supra* note 277.

284. *Free Press Cited in Bias Complaint: Justice Department Notes First Amendment Covers 'Hate' Literature*, N.Y. TIMES (Jan. 17, 1960) (internal quotations omitted).

285. *See* WALKER, HATE SPEECH, *supra* note 1, at 77, 100 (noting the repeal).

286. STAFF OF HOUSE COMM. ON JUDICIARY, 88TH CONG., 1ST SESS., REP. ON PROPOSED FED. GRP. LIBEL LEGIS. 23 (Comm. Print 1963).

asserted.[287] "Congressional attempts to curb the evils of group defamation nurtured by our common law present a picture of utter futility."[288] By then, the group libel law debate had seemingly run its course.

IV. CONCLUSION

By 1965, the debate over group libel laws had all but "disappeared from view," Harry Kalven Jr. noted.[289] "The story is not a long one and seems to have come to a tranquil ending," he wrote.[290] Proposals for group libel laws were almost entirely absent from public and legal discourse in the 1960s. At the peak of social unrest in 1968, the *New York Law Forum* noted that "the problem of group defamation may nevertheless soon come to be seen with an urgency not heretofore attached to it [because] the American nation is rapidly moving into the status of two societies. In the process race defamation—from both sides of the black-white division—is becoming more prevalent."[291] It anticipated "what well may become an accelerating demand for legal remedies for race defamation."[292]

That "accelerating demand" did not come to pass for more than a decade, however. In the 1960s, the Supreme Court expanded free speech protections under the First Amendment, and public opinion favored expressive freedoms, amid civil rights and countercultural protest movements. Almost no scholarly articles were published on group libel in the 1960s. One obscure 1964 article from the *Cleveland Marshall Law Review* presaged the discussion of hate speech laws that would take place two decades later. The authors pointed to the increasing judicial acceptance of tort remedies for emotional distress and suggested their potential applicability to injuries caused by group defamation or hate speech: "Existent in our present laws is a legal concept which recognizes mental injury. Its value for group defamation litigation is untested, but it contains the metal for forging a powerful weapon."[293] The authors proposed a tort action in which victims of hate speech could receive damages for emotional distress, noting that hate speech could produce a range of emotional, psychological, and physical harms.[294]

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287. *Id.*
288. Brown & Stern, *supra* note 5, at 16.
289. KALVEN, *supra* note 4, at 7.
290. *Id.* at 8.
291. Pemberton, *supra* note 5, at 33. Pemberton served as executive director of the American Civil Liberties Union.
292. *Id.*
293. Brown & Stern, *supra* note 5, at 29.
294. *See id.* at 29 (discussing the tort of intentional infliction of emotional distress).

In 1974, political scientist Hadley Arkes noted in an article in the *Supreme Court Review* that:

> Since the 1930s and 1940s, when fascist organizations were engaged in the systematic defamation of racial and religious groups, the interest in group libel statutes has declined markedly..... Indeed, the concept of group libel itself seems to have fallen into disfavor among legal scholars. To put it mildly, it is not treated any longer with the same plausibility or even esteem that it held in the 1940s.[295]

That changed in the 1980s with the revival of calls for group defamation laws, framed as "hate speech" laws.

Advocates of hate speech laws suggested that the expansion of First Amendment protections in the 1960s and '70s and more permissive social attitudes toward free expression had not remedied social inequalities but may have exacerbated them. Starting in the late 1970s, activists called for civil and criminal actions against pornographers on the theory that pornography was not constitutionally protected speech and that criminal and civil penalties for pornography would reduce the incidence of sexual violence.[296] An increase in racist incidents on college campuses in the 1980s led universities to attempt to restrict racist expression through campus speech codes. In 1991, Professor Robert Post observed that "the past few years have witnessed an extraordinary spate of articles analyzing the constitutionality of restrictions on racist speech."[297] Never before in the previous fifty years had there been such strong cultural support for punishing offensive speech.

In contrast to the group libel debate of the 1940s, these discussions focused less on the social unrest caused by group defamation and more on the psychic and emotional harms that group defamation caused to individual members of minority groups. In a groundbreaking law review article in 1982, Professor Richard Delgado recognized the dignitary harms of racist speech and suggested a tort remedy for injuries caused by racist hate speech.[298] Popular and academic literature forwarded similar proposals, often referencing the decision in *Beauharnais v. Illinois* for the

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295. Arkes, *supra* note 4, at 283–84.

296. This resulted in the unexpected alliance of feminist activists with religious conservatives who opposed pornography. *See* Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose between Freedom of Speech and Equality?*, 46 CASE W. RSRV. L. REV. 449, 450–51 (1996) (noting how some feminist scholars attempted to distinguish pornography from constitutionally protected speech by labeling it as obscenity, as well as the alliance between liberal activists and political and religious conservatives).

297. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 267 (1991).

298. *See generally* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R. – C.L. L. REV. 133 (1982).

constitutional validity of such regulations.[299]

These calls for hate speech laws took place against the backdrop of notable federal court rulings declaring hate speech to be protected expression, including the 1977 *Skokie* case, in which the courts held demonstrations by neo-Nazis to be protected by the First Amendment,[300] and the Supreme Court's 1992 decision in *R.A.V. v. St. Paul*, declaring that a municipal hate speech law that banned "fighting words" based on race, religion, or gender amounted to a form of content or viewpoint discrimination.[301] Notably, none of these calls for hate speech laws referenced the earlier group libel debates. By the 1980s, the group defamation campaigns of the World War II-era had disappeared from the collective memory.

The twenty-first century has seen an increase in calls for restrictions on hate speech in response to the disturbing speech environment created by the internet. Our unhappy experience with the internet and social media has demonstrated that "more speech" and counter-speech may not be effective in eradicating prejudice and eliminating hate groups, as tragic incidents in Charlottesville, Buffalo, and elsewhere have shown.[302] These calls to revisit the American position on hate speech laws are timely and important. Those efforts should grapple with the history of hate speech law as illustrated in this Article.

The debate over legal restraints on group libel or hate speech dates back more than eighty years, as this Article has demonstrated. In the 1940s, at the height of racist and anti-Semitic prejudice and violence during the Second World War, thoughtful commentators studied proposals for group libel laws and deemed them practically ineffective as a remedy for hatred and discrimination. Group libel prosecutions could increase public attention given to bigots and provide a platform for hate

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299. *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 75 (1993) (noting that although *Beauharnais* upheld an Illinois group libel statute, it has fallen into disfavor).

300. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

301. R.A.V. v. St. Paul, 505 U.S. 377, 391–95 (1992).

302. *See* Jerome A. Barron, *Internet Access, Hate Speech and the First Amendment*, 18 FIRST AMEND. L. REV. 1, 2 (2020) (proposing that the connection between mass shooters in tragedies such as Charleston, Pittsburgh, and El Paso reveals the role that social media platforms play in hate speech, making it imperative to view the tragedies from the perspective of this connection with the internet); *see Charlottesville: White Supremacist Gets Life Sentence for Fatal Car Attack*, GUARDIAN (June 28, 2019), https://www.theguardian.com/us-news/2019/jun/28/charlottesville-james-fields-life-sentence-heather-heyer-car-attack [https://perma.cc/73XW-5W73] (discussing the Charlottesville killer's violent social media posts); *see generally* Jonah E. Bromwich, et al., *The Suspect Recorded Months' Worth of Preparation in an Online Chat Log*, N.Y. TIMES (May 16, 2022), https://www.nytimes.com/2022/05/16/nyregion/buffalo-shooting-suspect-discord-chat.html [https://perma.cc/7G54-BPP2].

groups to air their views. Group libel laws could be wielded against minority groups which required free expression to convey their messages to the public.

In the 1940s and '50s, legislators, civil rights advocates, and members of the general public considered and rejected a panoply of group libel proposals. McCarthyism and other ideological persecution of minorities during the Red Scare provided a stark reminder of how viewpoint-based restrictions could be used to quash the expression of unpopular groups. Leading civil rights groups, including the NAACP, rejected group libel laws, believing that civil rights could only be achieved through the protection of rights of individual expression. The historic advances of the civil rights movement were made possible by the Warren Court's protections for freedoms of speech, press, and assembly. By the 1960s, law and public opinion had reached a broad consensus that free expression and freedom of discussion were powerful and effective weapons in the battle against intolerance. Our ongoing discussions of the wisdom and efficacy of hate speech laws should consider these perspectives from the past.