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THE STORY OF *BEAUHARNAIS V. ILLINOIS*

Samantha Barbas^{*}

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INTRODUCTION

What harms are caused by hate speech? How can we assess those harms? Does hate speech lead to violence? Do racial, ethnic, and religious groups have reputations that can be injured? Do the benefits of hate speech laws outweigh the harms that might be caused by restricting speech?

Americans grappled with these questions since the early twentieth century, which saw the first calls for “hate speech” laws.¹ Advocates of those laws championed them as essential to promoting social order, civility, and civil rights, while critics denounced them as vague, ineffective, and possibly unconstitutional. The passage of hate speech laws in states and municipalities during the World War II era did little to resolve the debate.²

The uncertain First Amendment status of hate speech laws loomed large in the late 1940s as the Supreme Court expanded protections for offensive speech in a series of landmark cases. The question of the constitutionality of hate speech laws finally came before the Court in 1952, in *Beauharnais v. Illinois*, involving the conviction of a white supremacist leader under an Illinois group defamation law. *Beauharnais* highlighted questions central to the hate speech law debate: Are hate speech laws valid prohibitions of insult and defamation, or are they unconstitutional restrictions on political speech? When can freedom of speech be limited in the interest of equality, civility, and dignity? The Supreme Court considered these issues against a contentious backdrop—the onset of the Cold War, the shadow of Nazi Germany, and violent race riots in the Midwest. In an opinion by Felix Frankfurter, a five-Justice majority upheld the Illinois statute, marking the first and only time that the Supreme Court validated a hate speech law.

Observers expected that *Beauharnais* would lead to the passage of hate speech or group libel laws nationwide, but that did not happen. There were few calls for

¹ There is no single definition of “hate speech.” SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 1, 8 (1994). 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 1970s and 80s was referred to more commonly as hate speech. *See id.* at 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”). *See also* Joseph Tanenhaus, *Group Libel*, 35 CORNELL L. Q 261, 266 (1949–50).

² Samantha Barbas, *The Rise and Fall of Group Libel*, LOY. L. REV. (forthcoming)

group libel laws after *Beauharnais*, and the movement to pass hate speech and group libel laws died out shortly afterward. Why the effort to pass hate speech laws *diminished* after a Supreme Court ruling approving their constitutionality is a mystery of First Amendment history. The answer lies in public opinion. By the 1950s, much of the public, as well as significant civil rights constituencies, opposed group libel laws, and no Supreme Court decision could change that fact. The *Beauharnais* ruling and its underlying principles fell into desuetude.³ The Supreme Court never overruled *Beauharnais* but effectively invalidated it in *New York Times v. Sullivan* (1964), *R.A.V. v. St. Paul* (1992), and other cases that declared hate speech, with limited exceptions, to be constitutionally protected expression.⁴

Beauharnais v. Illinois has been the subject of renewed interest in the twenty-first century as we confront a wave of hate speech online. Some have described *Beauharnais* as a lost opportunity.⁵ We might have been a more just, civilized, and unified nation, they argue, if the Court's lead had been followed and hate speech laws adopted. Others suggest that the public's rejection of *Beauharnais* represented a sound choice to favor free expression over limitations on expression. They contend that the choice made possible greater advances in civil rights than if the Supreme Court's decision had been embraced.⁶

³ See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 517–18; see also Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1997 (2018).

⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992); Geoffrey R. Stone, *Group Defamation*, 15 OCCASIONAL PAPERS FROM THE L. SCH., THE UNIV. OF CHI., 1, 1–2, 9–10 (1978).

⁵ RODNEY SMOLLA, *CONFESSIONS OF A FREE SPEECH LAWYER* 291 (2020); see also Waldron, *supra* note 1, at 62; Steven Ramirez, *Race in America 2021: A Time to Embrace Beauharnais v. Illinois?*, 52 LOY. U. CHI. L. J. 1001, 1003 (2021); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 729–31 (2000); James Loeffler, *An Abandoned Weapon in the Fight Against Hate Speech*, ATLANTIC (June 16, 2019).

⁶ See, e.g., Strossen, *supra* note 3, at 517–18; see also WALKER, *supra* note 1; Robert Post, *Racist Speech, Democracy, and the First Amendment*, 37 WM. & MARY L. REV. 267, 270–71 (1991).

I. BEAUHARNAIS AND THE WHITE CIRCLE LEAGUE

A. *Battles over Integration on Chicago's South Side*

The story of *Beauharnais v. Illinois* began on Chicago's South Side. In 1949, the area was a war zone, a site of chronic urban guerrilla warfare. The city's Black population had grown exponentially during the Second World War. As Black families began moving into areas adjacent to white communities, whites retaliated with arsons, bombings, and vigilante attacks. In 1949, one bombing or arson related to housing occurred every twenty days.⁷

One factor behind the surge in violence was the Supreme Court's 1948 decision invalidating restrictive covenants. For decades, white Chicagoans had relied on restrictive covenants to maintain segregated neighborhoods. In *Shelley v. Kraemer*, the Supreme Court ruled that judicial enforcement of restrictive covenants violated the equal protection clause of the Fourteenth Amendment.⁸

Shelley v. Kraemer was part of a national turn towards civil rights after the Second World War. The war had generated heightened awareness of racism and discrimination in America. In the wake of a global conflict that highlighted Nazi mistreatment of Jews, segregation seemed to be at odds with fundamental democratic values. The federal government was beginning to oppose segregation openly. In 1947, President Truman created a commission on civil rights to investigate and remedy racial inequality. The following year, Truman desegregated the Army. The rising economic status of African Americans and their migration to Northern cities led to further challenges to segregation. Organizations such as the NAACP redoubled their litigation efforts on behalf of civil rights.⁹

Of all the neighborhoods on Chicago's South Side, Park Manor was the most violent and resistant to integration. Racial tensions culminated in the infamous Roscoe Johnson incident of 1949. That summer, Johnson, a postal worker, and his wife Ethel moved into a two-flat property on St. Lawrence Street. Within hours, a mob of two thousand whites gathered around the building. Two men exploded a

⁷ ARNOLD HIRSCH, MAKING THE SECOND GHETTO, RACE AND HOUSING IN CHICAGO, 1940–1960, at 59 (1983); see also Raymond Mohl, *Race and Housing in the Postwar City: An Explosive History*, 94 J. ILL. STATE HIST. SOC'Y 8, 17–18 (2001).

⁸ *Shelley v. Kraemer*, 344 U.S. 1, 18 (1948).

⁹ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 123 (2004).

bomb on the front lawn. “We want fire! We want blood!,” the mob roared. Several men hurled flaming torches through the windows, hoping to burn down the house and drive the residents into the mob.¹⁰

Joseph Beauharnais watched the destruction of the Johnsons’ home that night. The “invasion” of Chicago’s white neighborhoods, he believed, was an intolerable violation of the “liberty to be and live as a white man.” That night, amidst the crowd and the blazing furniture, a terror organization was born. “I was out in Park Manor when the Johnsons moved in—and I realized that the white man must organize,” he recalled. Two days later, he founded the White Circle League of America.¹¹

B. The Leafletting Incident

Joseph Beauharnais was a fifty-three-year-old Chicagoan who ran a company, Beau Harnais, that manufactured fancy leather goods for upscale consumers. He was a vain and pretentious man. Beauharnais cloaked his tall, gaunt frame in expensive suits, often pinstriped in a patriotic red, white, and blue. He drove to meetings of real estate organizations and “white community associations” in an ostentatious Cadillac. With maudlin sentimentality, he claimed to be a descendant of Alexandre Beauharnais, one of the leaders of the French Revolution, from whom he purportedly inherited his sense of “racial pride.”¹² His peculiarities notwithstanding, Beauharnais was a dangerous man who harbored dreams of becoming one of the nation’s best-known “professional bigots.”

That aspiration had become increasingly challenging as the field of racial demagoguery became crowded after the war. In the early 1950s, Beauharnais was one of many “hatemongers” engaged in the “destructive and un-American work” of fostering racial hatred, observed the Anti-Defamation League in 1952.¹³ Groups such as the American Vigilantes and the Christian Defenders, and demagogues like Gerald L. K. Smith, leader of the Christian Nationalist Crusade, spewed racist, anti-

¹⁰ Mohl, *supra* note 7, at 17–18; see also Erika Pribanic & Jared Schroeder, *Breaking the White Circle: How the Press and Courts Quieted a Chicago Hate Group, 1949–1952*, 38 AM. JOURNALISM 416, 416–17 (2021); HIRSCH, *supra* note 7, at 58–59; Chris Ramsey, *Forgetting How to Hate: The Evolution of White Responses to Integration, 1946–1987*, at 55–56 (2017) (Ph. D. dissertation, Loyola University Chicago), <https://perma.cc/F24V-3W5E>.

¹¹ *Founder Admits Violence Aim of Chicago Klan Group*, DAILY WORKER, Dec. 14, 1949.

¹² ARNOLD FORSTER, TROUBLEMAKERS: AN ANTI-DEFAMATION LEAGUE REPORT 154 (1952).

¹³ *Id.* at 20.

Semitic, and anti-Catholic tirades to millions. A network of publications like *The Cross and the Flag* and the *Militant Truth* linked the nation's ills, including the proliferation of Communism, to sinister plots and conspiracies purportedly undertaken by African Americans, Jews, and Catholics. Over two million Americans subscribed to these "hate sheets," making many of the hatemongers wealthy men.¹⁴

Like his cohorts in the bigotry field, Beauharnais portrayed integration and civil rights as an unholy plot to undermine "white culture" and "white civilization." Beauharnais played to the racial and sexual fears of his followers by linking integration to "social intermingling" and "mongrelization," a term he used to describe intermarriage between Blacks and whites. "White dignity and culture is too fine, strong, eternal, and Godlike to be defiled by a dictatorial program fostered by government, education, or church organizations, to heap humiliation and insult upon the white race," he wrote to Truman's secretary of defense Louis Johnson, protesting the desegregation of the Army.¹⁵

Beauharnais' greatest concern was close to home—with the "housing situation" in Chicago. His "comprehensive solution" included a gubernatorial order forbidding African Americans from moving to Illinois, the denial of police protection for "Negroes moving into white neighborhoods," and a ban on Black employment "in any white man's business." He invited banks, mortgage firms, and community associations to contribute to what he described as the "first all-white organization which has come forward with a sound program to maintain segregation." After applying for and receiving an organizational charter from the state, he flooded Chicago neighborhoods with leaflets and the *White Circle News*, a twelve-page tabloid emblazoned with a logo of American and Confederate flags crossed in a symbolic union against attempts to "mongrelize" America.¹⁶

¹⁴ See RALPH ELLSWORTH & SARAH M. HARRIS, *THE AMERICAN RIGHT WING: A REPORT TO THE FUND FOR THE REPUBLIC* 3–4 (1960).

¹⁵ Letter from Joseph Beauharnais to Louis Johnson, U.S. Sec'y of Def. (June 24, 1949), <https://www.trumanlibrary.gov/library/research-files/joseph-beauharnais-harry-s-truman?documentid=NA&pagenumber=2>.

¹⁶ *Tolerance Fights Bigotry as the New Year Dawns*, CHICAGO DEFENDER, Jan. 7, 1950; see also RALPH LORD ROY, *APOSTLES OF DISCORD: A STUDY OF ORGANIZED BIGOTRY AND DISRUPTION ON THE FRINGES OF PROTESTANTISM* 118 (1953).

Beauharnais not only preached white supremacy but carried out a program of direct, at times militant action. He planned a legal bureau that would prepare segregationist legislation, a White Circle police force to patrol “hot” neighborhoods, and a “political department” to put members in strategic government posts. There would be White Circle magazines, newspapers, and a radio station. Beauharnais went as far as to run for mayor of Chicago as the write-in candidate of his “White American Party.” He envisioned thousands, tens of thousands, even millions of members.¹⁷

Beauharnais’ vision of a powerful mass movement fell astonishingly flat when only four hundred attended the first meeting of the White Circle League on December 17, 1949. Even fewer convened on January 6 on Chicago’s downtown Loop to solicit signatures for a petition calling on the Mayor of Chicago to declare an emergency and to “stop any further influx of Negroes into Chicago.” Passers-by signing the petition were given a leaflet:

PROTECT AND PRESERVE WHITE NEIGHBORHOODS!:

Whereas, the white population of the City of Chicago, particularly on the South Side of said city, are seething, nervous, and agitated because of the constant and continuous invasion, harassment, and encroachment by the Negroes upon them, their property, and neighborhoods Whereas, there have been disastrous incidents within the past year, all of which are fraught with grave consequences and great danger to the peace and security of the people

The leaflet went on to solicit “one million whites” to work “unceasingly to conserve the white man’s dignity and rights in America” and “to oppose the national campaign now on and supported by ‘Truman’s Infamous Civil Rights Program’ and many pro-Negro organizations to amalgamate the black and white races with the object of mongrelizing the white race!”

The White Circle League of America is the only articulate white voice in America being raised in protest against negro aggressions and infiltrations into all white neighborhoods. The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL.¹⁸

¹⁷ FORSTER, *supra* note 12, at 152.

¹⁸ *Beauharnais v. Illinois*, 343 U.S. 250, 252 (1952).

Clifford McFarland, a member of the Chicago branch of the American Civil Liberties Union, picked up a handful of discarded leaflets on the street and turned them over to city officials. Shortly after, the Anti-Defamation League reported the White Circle League to Governor Adlai Stevenson, claiming that its literature “read like a repeat of Hitler’s master race theory.” A judge proceeded to rescind the White Circle League’s charter, and a municipal court issued a warrant for Beauharnais’ arrest for the defamatory statements in the leaflet that accused African Americans of immorality and crime.¹⁹

Under Section 224a of the Illinois Criminal Code, it was a crime to publish or exhibit “any lithograph, moving picture, play, drama, or sketch” which “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens or any race, color, creed or religion” or “exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy,” when such publication would be “productive of breach of the peace or riots.” Any person, firm or corporation violating the section would be guilty of a misdemeanor, punishable by a fine of up to \$200.²⁰ This group libel or hate speech law originated in one of the bloodiest race riots in the state’s history.

C. *The Illinois Group Libel Law*

On May 28, 1917, hundreds of Black workers in East St. Louis, Illinois were beaten, shot, and hanged by white mobs. The riots were the result of labor and racial tensions, as tens of thousands of Black workers recently migrated to East St. Louis to take jobs in wartime defense plants. The violence lasted more than a week. It was followed by even deadlier attacks in July 1917 in which more than one hundred were killed.²¹

¹⁹ Transcript of Record at 1–2, *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (No. 118); see also *Chicagoans Move Against Hate Body*, ATLANTA DAILY WORLD, Jan. 13, 1950; *Expose White Circle Hate Gang: Warrant Out for Leader*, PITTSBURGH COURIER, Jan. 14, 1950; *Chicago Hate Leader to Face Jury*, ATLANTA DAILY WORLD, Feb. 2, 1950; *Hate Leader Charges Bias*, CHI. DEFENDER, Feb. 18, 1950; *Rights of Free Speech to Be Issue of Suit*, CHI. DAILY TRIB., May 30, 1950.

²⁰ *Beauharnais*, 343 U.S. at 25.

²¹ See ELLIOT RUDWICK, RACE RIOT AT EAST ST. LOUIS, JULY 2, 1917, at 41–57 (1964); see also ST. CLAIR DRAKE & HORACE CAYTON, BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY 8–18, 31–65 (1945); CHICAGO COMMISSION ON RACE RELATIONS, THE NEGRO IN CHICAGO: THE STUDY OF RACE RELATIONS AND A RACE RIOT 79–105 (2019); Allison Keyes, *The East St. Louis Riots Left Dozens Dead*, SMITHSONIAN (June 30, 2017), <https://perma.cc/B4RF-A2TA>.

The riots were linked to hate speech. In the months leading up to the attack, real estate associations and community organizations circulated racist literature, and a prominent lawyer gave inflammatory speeches to unemployed white workers.²² The notorious D.W. Griffith film *The Birth of a Nation*, which heroized Klan lynching, had recently been shown.²³ With the film in mind, Robert Jackson, one of two Black men in the Illinois legislature, drafted a law criminalizing material that defamed individuals based on their “race, color, creed or religion.” Jackson envisioned the law as protecting African Americans’ reputational rights, but the legislature’s stated intent was to forestall race riots.²⁴ Section 224a passed the House of the General Assembly just days after the May 28 riot.²⁵

The law was rarely invoked. By the time of Beauharnais’ arrest in 1950, Section 224a had been used only a few times, and none of the cases dealt with race. Reported court cases arising from Section 224a involved a violent film, an accusation that a person was a Communist, and the proselytizing efforts of the Jehovah’s Witnesses, a reviled religious group.²⁶

In 1940, when Jehovah’s Witnesses distributed leaflets denouncing the Roman Catholic Church as “a snare and a racket,” citizens pressured local sheriffs to arrest them under the group libel law. The Witnesses sought to enjoin the officials from interfering with their free speech rights, but the conviction was upheld.²⁷ A law that was aimed at the protection of minorities had been used against an unpopular minority. The law was worded so broadly that a professor of sociology could be punished for assigning literature critical of religious groups to his graduate seminar.

²² Report of the Special Committee Authorized by Congress to Investigate the East St. Louis Riots, H.R. Doc. No. 1231, 65th Cong., 2d Sess.; see also *Beauharnais*, 343 U.S. at 261 & n.14; *THE NEGRO IN CHICAGO*, *supra* note 21, at 75.

²³ See Paul J. Polgar, *Fighting Lightning with Fire: Black Boston’s Battle Against Birth of a Nation*, 10 MASS. HIST. REV. 84, 86 (2008) (discussing riots caused by *Birth of a Nation*); see also Ellen C. Scott, *Black “Censor,” White Liberties: Civil Rights and Illinois’s 1917 Film Law*, 64 AM. Q. 219, 229 (2012).

²⁴ Scott, *supra* note 23, at 227–28.

²⁵ *Beauharnais*, 343 U.S. at 259–60.

²⁶ Scott, *supra* note 23, at 246 n.92.

²⁷ *Bevins v. Prindable*, 39 F. Supp. 708, 713 (E.D. Ill. 1941).

D. *The White Circle League in Court*

Maximilian St. George represented Beauharnais and the White Circle League in Chicago Municipal Court. An elderly Chicago lawyer with a long history of representing right-wing demagogues, St. George was no stranger to First Amendment defenses.²⁸ St. George claimed that in circulating the leaflet and petition, Beauharnais was merely exercising his constitutional right to petition the government for redress of grievances. “This is a white man’s world, you can’t make a man take something he doesn’t like! Beauharnais didn’t like the condition of things in Chicago. He thought he had a remedy. His actions were within his constitutional rights,” he said.²⁹

The state’s attorney, Albert Zemel, denounced Beauharnais as a “wicked, lying racketeer” and described the leaflet as inexcusable and condemnable defamation. He presented several Black witnesses, including a renowned surgeon and a captain of the police force, who testified that their dignity and reputations had been injured by Beauharnais’ racist tirades.³⁰ The judge sent the case to the jury without any mention of the First Amendment. Jurors found Beauharnais guilty and imposed on him the maximum fine of \$200. On appeal, the Illinois Supreme Court rejected the First Amendment arguments, concluding that the “libelous and inflammatory” words constituted “fighting words” and a “clear and present danger” and were outside the protections of the First Amendment.³¹

Riots in Cicero, Illinois six months later seemingly confirmed the threat that Beauharnais and the White Circle League posed to public safety and order. A Black bus driver named Harvey Clark and his wife had rented an apartment in an all-white community in the Chicago suburb. A mob of 3500 stormed the apartment, hurled the family’s belongings out a third-floor window, and firebombed the building. The riots lasted three days. It took 600 police officers, National Guardsmen, and sheriff’s deputies to quash the violence. The first televised riot in history, Cicero

²⁸ See MAXIMILIAN ST. GEORGE & LAWRENCE DENNIS, *A TRIAL ON TRIAL: THE GREAT SEDITION TRIAL OF 1944*, at 6–15 (1946).

²⁹ *Hate Group Head Fined*, *AFRO-AMERICAN*, May 13, 1950.

³⁰ *PITTSBURGH COURIER*, May 13, 1950.

³¹ *People v. Beauharnais*, 97 N.E.2d 343, 345, 347 (Ill. 1951); *Negroes’ Defamer Loses*, *N.Y. TIMES*, Jan. 19, 1951, at 25.

attracted worldwide attention and became a symbol of enduring racism in America, even in the North.³²

Even though the White Circle League's charter had been revoked, Beauharnais handed out pamphlets, solicited memberships, and led tributes to the "brave youths of Cicero." The mob chanted "Go, Go, Keep Cicero White," a phrase that had been taken directly from White Circle League pamphlets.³³

E. The American Civil Liberties Union

Beauharnais called the American Civil Liberties Union. Though the ACLU defended "freedom for the thought that we hate," it did not rush to Beauharnais' aid. Beauharnais had no love for the ACLU, having denounced the organization as "subversive" and communist.³⁴ It wasn't just Beauharnais' attacks that gave the ACLU pause. The ACLU's defense of hate speech had provoked serious divisions within the organization.

The ACLU had a long commitment to civil rights, having allied with the NAACP and other civil rights organizations on anti-lynching, voting rights, and desegregation campaigns.³⁵ For many ACLU members, freedom of speech was not absolute; a line had to be drawn somewhere, and they drew it at hate speech. In 1933, hundreds quit the organization when it defended the right of Nazi groups to march in New York.³⁶ An even greater number resigned when the ACLU represented an anti-Semitic preacher, Father Terminiello, in 1949.³⁷ Yet for others, including many of the ACLU's prominent leaders, freedom of speech demanded the defense of all viewpoints, no matter how hateful. The same laws that were used to

³² ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 373–75 (2011).

³³ *Id.*

³⁴ Leaflet contained in White Circle League of America FBI File (1964).

³⁵ SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 60, 68, 89 (1990).

³⁶ SAMANTHA BARBAS, *THE RISE AND FALL OF MORRIS ERNST: FREE SPEECH RENEGADE* 144 (2021).

³⁷ Leon Despres, ACLU staff counsel to Herbert Monte Levy, ACLU staff counsel (Jan. 30, 1951) (ACLU Papers, Box 1230).

cancel fascists and racists, they pointed out, could be wielded against movements on the left, such as movements for labor and civil rights.³⁸

In 1940, the ACLU defended the German American Bund, a Nazi group which had been prosecuted under a New Jersey law criminalizing any statement which “incites, counsels, promotes, or advocates hatred, violence, or hostility against any groups of persons . . . by reason of race, religion, or manner of worship.” The state’s Supreme Court struck down the law in *State v. Klapprott*, concluding that its terms “hatred” and “hostility” were too vague, rendering it a threat to free speech.³⁹ After this decision, ACLU leaders were certain that the U.S. Supreme Court would strike down group libel laws if it were presented with a suitable case.

ACLU leaders were eager to take Beauharnais’ case to the Supreme Court but concerned that representing Beauharnais would create divisions in the organization. “Beauharnais is a miserable race baiter, and the question of his defense tears [us] in very much the same way . . . as the earlier question of defending Terminiello,” wrote lawyer Leon Despres to ACLU staff counsel Herbert Monte Levy.⁴⁰ Executive Director Patrick Murphy Malin was therefore surprised when a majority of the Executive Committee eventually agreed with him that the “only legitimate non-partisan civil liberties position required our entrance.”⁴¹ One of the ACLU’s top litigators, Al Albert, agreed to argue the case. The *Pittsburgh Courier*, a leading Black newspaper, noted the “paradox . . . that a most liberal organization has sent one of its ablest lawyers to defend [a] hate advocate.”⁴²

F. The NAACP

The group libel issue had also divided the NAACP, the nation’s leading civil rights organization. Even though the NAACP led campaigns to suppress *Birth of a Nation* in 1915, by the 1930s it had reversed its position on censorship and group

³⁸ BARBAS, *supra* note 36, at 145.

³⁹ *State v. Klapprott*, 22 A.2d 877, 882–83 (N.J. 1941).

⁴⁰ *Id.*

⁴¹ Letter from Patrick Murphy Malin, Exec. Dir., to Walter White, Exec. Sec’y of the NAACP (July 27, 1951) (ACLU Papers, Box 1230).

⁴² PITTSBURGH COURIER, Jan. 19, 1952.

defamation. Several NAACP leaders, including Thurgood Marshall, head of the Legal Defense Fund, feared that group libel laws could be wielded against civil rights groups speaking out against segregation and racial injustice.⁴³

Marshall and others on the NAACP were sensitive to the harms caused by group libel but were uncertain whether legal restraints were effective. Prejudices ran deep, and restrictions on expression would not necessarily strike at their root. Trials of hatemongers could provide a platform for their noxious views, and acquittals could appear to validate the truthfulness of their accusations. A conviction might make the defendant a martyr who could then accuse the prosecution of violating civil liberties. As such, the NAACP pursued other methods of curtailing stereotypes and group defamation, including boycotts, pressuring publishers to eliminate offensive material, and public education and counter-speech.⁴⁴

Yet some prominent NAACP figures, including Walter White, head of the NAACP, supported the use of group libel laws against flagrant white supremacists like Beauharnais. Upon hearing that the ACLU was representing Beauharnais, White wrote to Malin that he was “frankly puzzled” by the decision. “Here is a proven case of a man and an organization which fomented hatred which has found expression in rioting and other denial of constitutional rights to Negroes in the rioting at Cicero Does the ACLU contend that a man has a right to violate the law and to encourage others to do so in defiance and negation of the guarantees of the federal and state constitution?”⁴⁵

Replied Malin, “as you know, we all along contended that such a group libel law is unwise. We suggest now that there is evidence of its ineffectiveness.” Beauharnais had been prosecuted and convicted, and his organization dissolved, yet the worst rioting since East St. Louis had taken place in Cicero.

⁴³ See Letter from Walter White, Exec. Sec’y of the NAACP, to Clement DeFreitas, head of the Plainfield Chapter of the NAACP (July 5, 1935) (NAACP Papers).

⁴⁴ See Cheryl Greenberg, *Civil Rights, Free Speech, and Group Libel*, in *MINORITY RELATIONS: INTERGROUP CONFLICT AND COOPERATION* 65–101 (Greg Robinson & Robert Chang, eds. 2016). There is extensive material on the NAACP’s strategy of dealing with stereotypes in mass media and textbooks contained in the NAACP Papers, Manuscripts and Archives Division, Library of Congress.

⁴⁵ Letter from Walter White, Exec. Sec’y of the NAACP, to Patrick Murphy Malin, Exec. Dir. (July 16, 1951) (ACLU Papers, Box 1230).

He continued: “We have always known that [hate speech] may cause great harm even to interests which we hold dear, such as equality for Negroes, but in the forced choice between risks, we have always contended that the interests of American democracy—including the interests of Negroes and other minority groups—are on balance much better served by helping that . . . kind of speech [be] free.”⁴⁶

Some on the NAACP remained unconvinced by the ACLU’s position. Responding to the ACLU’s argument that Beauharnais did not pose a clear and present danger to public safety, they pointed out that “3,432 Negroes have been lynched by such . . . organizations as the White Circle League and the Ku Klux Klan.”⁴⁷

II. THE FIRST AMENDMENT AND HATE SPEECH

A. *Constitutional Questions*

The ACLU pursued its defense of Beauharnais and the White Circle League with little First Amendment law on the books. First Amendment jurisprudence was a relatively recent creation, largely the product of Supreme Court decisions of the previous two decades. The central principle of modern First Amendment law that emerged in this period was that freedom of speech is the foundation of participatory democracy—“the indispensable condition of nearly every form of freedom,” as the Supreme Court wrote in 1937—and as such, must be treated with particular care. Laws that restricted speech on public affairs or “matters of public discussion” lost the presumption of constitutionality that was customarily afforded to legislative enactments and were reviewed by the courts with heightened scrutiny.⁴⁸

The “clear and present danger” test was used by the Court to review restrictions on political expression. Under the test, speech could not be prohibited unless it presented a clear and present danger of an imminent harm that the state had a right to prevent. The test balanced the government’s interest in order and self-preservation against freedom of expression, with a thumb on the scale for speech. Short of a clear

⁴⁶ Letter from Malin to White, *supra* note 41.

⁴⁷ *High Court Faces Difficult Decision*, PITTSBURGH COURIER, Jan. 19, 1952.

⁴⁸ G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299, 301 (1996); *see also* Palko v. Connecticut, 302 U.S. 319, 327 (1937).

and present danger, noxious views should compete for public acceptance in the “marketplace of ideas” rather than be subject to government censorship.⁴⁹

Not all speech was subject to the clear and present danger test. Under the theory of the First Amendment announced in *Chaplinsky v. New Hampshire* (1942), later described as a “two level” theory, speech that was of “slight social value as a step to truth” was unprotected by the First Amendment.⁵⁰ There were some kinds of speech that were so dangerous that they could be limited in the name of social order. Whenever speech failed to contribute to the expression of ideas or to possess any “social value,” wrote Justice Frank Murphy, the right to utter that speech can be limited by government in the “social interest in order and morality.” *Chaplinsky* stated that categories of unprotected, “low-value” speech included defamation of individuals, obscenity, “profane” words, and “fighting words,” defined as speech that by its “very utterance inflict[ed] injury” or that tended to “incite an immediate breach of the peace.”⁵¹

The constitutional questions posed by group libel laws were twofold. Was group libel protected speech under the “two level” theory, or did it fall into the categories of worthless speech? If group libel did contribute to the “expression of ideas,” did any given instance of it present a clear and present danger of a harm that the government had the right to prevent? More broadly, could noxious ideas be dispelled in the marketplace of ideas? Was freedom of speech more valuable in every instance than dignity and equality?

“Fighting words” arguably had little social value. Similarly, defamatory statements about individuals, particularly private citizens, could be said to contribute little to the discussion of public affairs. But speech that criticized social groups was not always worthless. Groups belittled each other regularly in the course of everyday political debate. (The ACLU used the example of non-Zionist Jews criticizing Zionist Jews, or Catholics criticizing Protestants.) Were such attacks fighting words? Were they devoid of opinion and ideas? What was sheer abuse, and what was political debate, however abusive?

⁴⁹ White, *supra* note 48, at 324–30; see also Chester James Antieau, *Clear and Present Danger, Its Meaning and Significance*, 25 NOTRE DAME L. REV. 603, 603–44 (1950).

⁵⁰ Harry Kalven Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 8–10.

⁵¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

The Supreme Court had dealt with similar issues in two cases during the previous decade. In *Cantwell v. Connecticut* (1940) and *Terminiello v. Chicago* (1949), the Court protected virulent attacks on Catholics and Jews.⁵² *Terminiello* involved a defrocked priest, Arthur Terminiello, known as the “Father Coughlin of the South.” During a rant before eight hundred sympathizers in a Chicago auditorium just after the end of the war, Terminiello denounced Jews and claimed that they wanted to inject non-Jews with syphilis and other diseases. A crowd gathered outside the auditorium, shouting “Fascists! Hitlers!” Terminiello was convicted under a Chicago breach of the peace ordinance that condemned speech that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”⁵³

Terminiello came to the Supreme Court during a period when several of the Justices believed that freedom of speech was in a “preferred position” over other constitutional rights.⁵⁴ In a majority opinion by William Douglas, one of the advocates of the “preferred position” theory, the Court reversed Terminiello’s conviction. His speech did not pose a clear and present danger; it merely invited “disagreement,” “dispute,” and “conditions of unrest,” Douglas wrote. Free speech “may indeed best serve its high purpose when it . . . creates dissatisfaction with conditions as they are, or even stirs people to anger,” he explained.⁵⁵

On the other hand, Robert Jackson, who had just returned from serving as prosecutor in the Nuremburg war trials and knew the destructive capabilities of group defamation, feared that the Court had gone too far and had falsely equated civil liberties with the removal of all restraints. “The choice is not between order and liberty. It is between liberty with order and anarchy without either,” he wrote. If the Court did not “temper its doctrinaire logic with a little practical wisdom,” it would convert the Bill of Rights into a “suicide pact.”⁵⁶

Douglas’s opinion in *Terminiello* received wide notice as proof of the high level of tolerance in America. Yet it wasn’t long before majorities on the Court, following

⁵² *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940); *Terminiello v. City of Chicago*, 337 U.S. 1, 6 (1949).

⁵³ *Terminiello*, 337 U.S. at 7.

⁵⁴ DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 271 (1992).

⁵⁵ *Terminiello*, 337 U.S. at 7.

⁵⁶ *Id.* at 37 (Jackson, J., dissenting).

the tides of public opinion during the Red Scare, changed course in the name of national self-defense against “subversives” and communists. Just two years later, a majority of the Court upheld a similar breach of peace conviction in *Feiner v. New York*. When *Feiner* delivered a racially provocative speech on a street corner, urging African Americans to rise up in arms and fight for civil rights, several took offense and threatened violence. Police made no attempt to control the crowd and instead arrested *Feiner*. In affirming his conviction, the Court noted that “when speech posed a clear and present danger of riot, disorder, or interference with traffic . . . the power to punish is obvious.”⁵⁷

Beauharnais v. Illinois had far-reaching implications. A Supreme Court decision on group libel laws could shift First Amendment jurisprudence at a time when that area of law was in flux. It had the potential to shape race relations in America in a moment of transition. The decision would address the longstanding question of whether speech can be restricted out of a regard for equality and civility. It could affect racial tolerance in America and the contours of public discourse for years to come. In November 1951, the Supreme Court heard the case.⁵⁸

B. Arguments

In its brief to the Supreme Court in *Beauharnais v. Illinois*, the ACLU made arguments about group libel laws that it had made for more than thirty years. The Illinois law punishing portrayals of “depravity, criminality, unchastity, or lack of virtue of a class of citizens or any race, color, creed or religion” was too unclear to apprise the average citizen of any offense they might commit and should be struck down on that basis alone, the ACLU argued.⁵⁹ In previous decisions, the Court had deemed vague statutes limiting speech to be unconstitutional.⁶⁰

The ACLU also made an argument based on “overbreadth.” The Illinois law was worded so broadly that the works of Shakespeare and other literary classics would be subject to prosecution. Unlike defamation of individuals, group defama-

⁵⁷ *Feiner v. New York*, 340 U.S. 315, 320 (1951).

⁵⁸ Memorandum from Harold Burton, Assoc. Just. of the Sup. Ct. of the U.S. (October Term 1951) (Library of Congress Manuscripts and Archives Division Box 86) (noting that six justices voted to hear the case).

⁵⁹ Reply Br., *Beauharnais v. Illinois*, at 9.

⁶⁰ *Winters v. New York*, 333 U.S. 507, 518–20 (1948).

tion often involved the expression of ideas protected by the First Amendment, according to the ACLU. To say that defamatory comments about ethnic or racial groups had no societal value whatsoever would be to “permit judicial censorship of the worst sort.”⁶¹

The “fighting words” doctrine did not apply, as the publication of literature was not a face-to-face situation, nor were epithets or personal attacks involved, according to the ACLU. There was no evidence that the leafletting incident created a danger of riots or public disorder. There was something “almost ludicrous” in the “spectacle of the full majesty of the law swooping down on the bigot Beauharnais to punish him for his absurd utterances,” the ACLU concluded. “But whatever the wisdom of such punishment, it is freedom that is at stake.”⁶²

The state’s attorney argued that the words in the leaflet were fighting words, intended to “inflict injury” and “incite an immediate breach of the peace.” The inflammatory words in the leaflet created a clear and present danger of unrest, as the state’s history of racial violence indicated tragically. Every race riot “had its incitement in speech.” The words might “directly call for lynching,” or they could consist of “deliberately calculated appeals to race hatred. But it is by calumny of race that riots are started,” he insisted.⁶³

III. *BEAUHARNAIS V. ILLINOIS*

A. *The Beauharnais Opinion*

In October 1952, after years of public and judicial debate on the wisdom and constitutional validity of group libel laws, the Supreme Court finally addressed the issue in *Beauharnais v. Illinois*. A majority upheld the Illinois group libel law and Beauharnais’ conviction under it. *Beauharnais* resulted in five separate opinions, underscoring the sharp disagreement on the Court on the scope of the First Amendment as well as disputes over the injuries caused by group defamation.

Felix Frankfurter wrote the opinion for the five-justice majority. A former Harvard Law School professor appointed by President Roosevelt in 1938, Frankfurter was known for his acerbic, domineering personality, his lengthy, didactic opinions,

⁶¹ Reply Br., *Beauharnais v. Illinois*, at 3.

⁶² *Id.* at 12–13.

⁶³ Br. for Resp., *Beauharnais v. Illinois*, at 7.

and his conflicted relationship with his fellow justices. Written in bold and intemperate tones, the opinion reflected Frankfurter's conservative philosophy of the First Amendment, his preference for social order and restraint over an unbounded marketplace of ideas. It also reflected his feuds with his civil libertarian colleagues, especially Hugo Black, who believed in the "preferred position" theory. During these years, Black was in the process of becoming an "absolutist" who believed that the First Amendment's command was literal and that "no law" should abridge freedom of speech and press.⁶⁴

Despite his avowedly liberal credentials—Frankfurter was a founder of the ACLU, had been involved in a variety of progressive causes, and advised Roosevelt on New Deal policy—Frankfurter did not believe that freedom of speech held a "preferred position" in the hierarchy of constitutional values. To Frankfurter, freedom of speech must be balanced against the needs of a democratic society. The essence of democracy was society's ability to achieve common goals and aspirations. If speech threatened social order and cohesion, it must be limited lest democracy become impossible.⁶⁵ Frankfurter believed that courts must not second-guess the determinations of the legislature, even if it involved limitations on expression.⁶⁶

The issues in *Beauharnais* were also personal for Frankfurter. A Jewish immigrant from Austria who spent a significant part of his boyhood on New York's lower East Side, Frankfurter knew from his own experiences with anti-Semitism how a person can suffer because of their racial or religious heritage. Although Frankfurter abandoned formal Judaism as a young man, he strongly identified with

⁶⁴ MARK SILVERSTEIN, *CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING* 176–89 (1st ed. 1984).

⁶⁵ See HELEN THOMAS, *FELIX FRANKFURTER, SCHOLAR ON THE BENCH* 74–84 (1960) (explaining that the position reflected the progressive political tradition that had shaped Frankfurter's worldview as a young man).

⁶⁶ *Dennis v. United States*, 341 U.S. 494, 541 (1951) (Frankfurter, J., concurring in the judgment) ("Even when free speech is involved we attach great significance to the determination of the legislature.").

Jews as a people. Frankfurter had been one of the founding members of the American Jewish Congress, an organization that campaigned for group libel laws in the 1940s.⁶⁷

B. Group Libel

Understanding Frankfurter's *Beauharnais* opinion requires us to understand something about the complex rules and terminology surrounding the concept of libel.

Libel is defamation through the written word. Under American law, there were two types of libel. In most states, libel was a cause of action under both civil and criminal law. Under the criminal law of libel, defamation of an individual could be punished with fines and imprisonment. The idea was that the state had a right to use criminal law to protect individual reputation, as well as to protect the public from violent "breaches of the peace" that might result from defamatory statements. Most states that had group libel laws treated them as extensions of criminal libel law.⁶⁸ Under the civil action for libel, an individual whose reputation had been harmed by defamation—statements accusing them of immorality or crime, for example—could sue the defamer for monetary damages. The harm remedied by the civil action was injury to individual reputation; there was no civil action for the libel of groups.⁶⁹

There were many why reasons civil actions for group libel were disfavored. One was the assumption that injuries caused by the defamation of groups were too diffuse and intangible to be remedied by law. If a religious group were defamed, was every member of the group harmed? How could that injury be measured? Allowing a large group to sue for defamation could encourage massive lawsuits overwhelming the legal system. Another reason for prohibiting actions for group libel was the belief that commentaries on large groups were more likely to involve disputes that were public and political in nature, compared to individual defamation. Observed First Amendment scholar Zechariah Chafee, because almost everyone could claim

⁶⁷ Loeffler, *supra* note 5; see also Andrew Porwancher & Taylor Jipp, *From Jew to Judge*, TABLET (Nov. 15, 2022), <https://perma.cc/JH6U-SN4X>; LIVA BAKER, FELIX FRANKFURTER 17–19 (1969); THOMAS, *supra* note 65, at 77–78.

⁶⁸ *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521, 522–26 (1952); see also Edward E. Kallgren, *Group Libel*, 41 CALIF. L. REV. 290, 292–96 (1953).

⁶⁹ Kallgren, *supra* note 68, at 292–96.

affiliation in a group, actions for group libel could stifle a good deal of political commentary—“the wider the protection, the narrower becomes the field for unimpeded discussion of public affairs,” he wrote.⁷⁰ Finally, there was no consensus in American legal or social tradition as to whether racial, religious, or ethnic groups had reputations that could be injured.

Frankfurter described two types of harm that were addressed by the Illinois group libel law. One was “breach of the peace.” Frankfurter assumed that group libel laws were a proper extension of ordinary criminal libel laws. The state had a well-established right to protect itself against riots and violence.⁷¹

This was critical given the state’s history of racial violence, from the murder of the abolitionist Elijah Lovejoy in 1857 to the East St. Louis riots to the Cicero riots, Frankfurter wrote. Many of these incidents had been triggered by group defamation. Given this tragic history, with its “frequent obligato of extreme racial and religious propaganda,” the Court should not prevent the legislature from taking steps it deemed necessary to remedy the problem. “It may be argued, and weightily, that this legislation will not help matters . . . yet only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color, or religion,” Frankfurter explained. “This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State’s power.”⁷²

C. The Importance of Group Reputation

Frankfurter then made a more interesting and important argument, which was that society had an interest in protecting the reputation of groups. He imputed this intent to the Illinois legislature, although that was not actually the case, as we have seen. Frankfurter’s position in favor of group rights was novel, given the nation’s long tradition of individualism and its rejection of the concept of group identity and group reputation. American law was historically rooted in relationships between the individual and the state; American jurisprudence had been largely devoid

⁷⁰ ZECHARIAH CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 125 (1947).

⁷¹ *Beauharnais*, 343 U.S. at 259.

⁷² *Id.*

of discussion of the claims and identities of groups.⁷³ There were two reasons why the law should protect group reputation, according to Frankfurter. One was that the protection of group reputation was critical to the protection of individuals—to a person’s social standing, identity, and sense of self.

Frankfurter observed that an individual’s reputation was determined to a significant extent by his or her group affiliations. One’s status and fate in the world were just as dependent on his or her own actions as the reputations of the groups to which he or she belonged. As such, defamation of a group violated the integrity of the individual by attributing to a person the characteristics of their group affiliations, regardless of their own attributes. This contradicted the American ideal of the independent individual capable of transcending their backgrounds and defining themselves.

“It would be arrant dogmatism . . . for us to deny that . . . a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits,” Frankfurter wrote. If a libelous statement could be the object of sanctions when directed at an individual, the state should not be denied the right to punish the same statement when it was directed at a group. “We are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved,” Frankfurter explained.⁷⁴

Frankfurter went further and suggested another basis for protecting group reputation—that social groups had reputations in their own right that were valuable and worthy of protection. Society’s interest in protecting the dignity and reputation of groups, particularly minority groups, was so fundamental to the pursuit of democracy that it justified restraints on expression, according to Frankfurter.

⁷³ On the concept of group rights, see AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 73–75 (1995); see also David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 731 (1942); HADLEY ARKES, *THE PHILOSOPHER IN THE CITY* 24–53 (1981); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 185 (1st ed. 1995); Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1952*, 66 BROOK. L. REV. 71, 71–145 (2017).

⁷⁴ *Beauharnais*, 343 U.S. at 263.

Group defamation legitimized social inequalities. By damning the members of a minority group with distorted characteristics, group defamation undercut the recognition of the group's right to stand on the same footing as other members of society. Unlike members of political parties and other voluntary associations, who assumed the risk of criticism to some extent, members of ethnic and racial groups were unable to avoid their status and therefore deserved legal protection. With its specific prohibition of racial and religious defamation, the Illinois law was narrowly tailored to this offense, Frankfurter wrote.⁷⁵

Though *Beauharnais* was about anti-Black violence in Illinois, Frankfurter clearly had in mind the use of group libel against Jews in Germany as he wrote the opinion. Frankfurter drew heavily on the work of David Riesman, a law professor and former law clerk for Justice Louis Brandeis who had authored the first scholarly articles on group libel laws in 1942. In an influential three-part series published in the *Columbia Law Review*, Riesman described how the systematic defamation of Jews had been a major weapon in the Nazis' rise to power. "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."⁷⁶

In democratic societies, Riesman had argued, the greatest threat to democracy came not from the state, but from private groups in the community. In Germany and France, fascist movements had exploited democratic commitments to free speech, using civil liberties to undermine democracy. "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," he wrote.⁷⁷

Riesman built on the work of political scientist Karl Loewenstein, who had published a series of articles in the 1930s, also cited by Frankfurter, describing how in European nations with deference to civil liberties, the fascists had triumphed. He believed that Americans must replace their "democratic fundamentalism" with

⁷⁵ *Id.*

⁷⁶ Riesman, *supra* note 73, at 1088.

⁷⁷ *Id.* at 731.

“authoritarian democracy” to avoid a similar fate.⁷⁸ With a nod to Riesman and Loewenstein, Frankfurter wrote that law must “be an instrument of democracy.”⁷⁹

Referring to the “the tragic experience of the last three decades,” Frankfurter described the Illinois law as extending the law of libel “to a group to protect its rights against those who would like to liquidate the group.”⁸⁰ During a meeting of the justices to discuss the case, Frankfurter referenced the British Public Order Act of 1936. The law had been passed in response to verbal attacks on the Jewish community by Oswald Mosley and members of the British Union of Fascists. The Act gave the Home Secretary the power to ban marches and made it an offense to wear political uniforms and to use threatening and abusive words. Violence ebbed after the passage of the act.⁸¹ This reference ultimately did not make it into the final version of the opinion.

Modern campaigns of group defamation were not “idle” political commentary or the “daily grist of vituperative political debate,” as Hugo Black implied in his dissent. Defamation of racial and religious minorities justified their dehumanization and even their destruction, as the example of Nazi Germany made clear. While “purposeful attacks” on racial groups were nothing new in history, the advent of mass communications made those attacks infinitely more dangerous. Mass media made possible large-scale campaigns of “falsehood and vilification”—“avalanche[s] of falsehoods . . . circulated concerning the various groups, classes and races which make up the countries of the western world,” Frankfurter explained.⁸²

From this meditation on the harms caused by group defamation, Frankfurter turned back to the hard ground of legal doctrine. Under *Chaplinsky*, libel of individuals was among the classes of speech that could be punished without constitutional difficulty. Therefore, Frankfurter reasoned, group libel was also outside the scope of constitutional protections. Frankfurter mentioned freedom of speech only

⁷⁸ Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 COLUM. L. REV. 591, 591 (1938); see also Richard W. Steele, *Fear of the Mob and Faith in Government: Free Speech Discourse, 1919–1941*, 38 AM. J. LEGAL HIST. 55, 74 (1994).

⁷⁹ Memorandum from Robert Jackson (undated) (Library of Congress, Manuscripts and Archives Divisions, Box 173).

⁸⁰ *Beauharnais*, 343 U.S. at 258; see also Jackson Memorandum, *supra* note 79.

⁸¹ *How Britain Banned Mosley’s Black Shirts*, N.Y. TIMES, June 27, 1995.

⁸² *Beauharnais*, 343 U.S. at 306 n.16.

in passing in that discussion and referred to no First Amendment case law. In his view, there was no relationship between group libel laws and the First Amendment.

D. Dissenting Opinions

Frankfurter's analysis provoked vigorous dissents from Justices Stanley Reed, Hugo Black, William Douglas, and Robert Jackson. "Seldom," observed a writer in the *Los Angeles Times*, "have the justices of the United States Supreme Court got so excited, or at least showed such pronounced differences of opinion."⁸³

Jackson and Reed supported group libel laws in principle but insisted that the Illinois law lacked essential safeguards for free expression. To Reed, phrases like "virtue" and "derision" were too vague to inform anyone whether they would be prosecuted, and the law would inhibit protected speech.⁸⁴ In language reminiscent of his dissent in *Terminiello*, Jackson remarked that group libel laws represented a "commendable desire to reduce sinister abuses of our freedoms of expression—abuses which . . . can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities."⁸⁵ Yet it was important that fundamental liberties not be suppressed in the fight against hate. Among the safeguards *Beauharnais* had not been given were the clear and present danger test and the right to argue that his speech was protected as a petition to the government. The absence of these protections made the majority's ruling a threat to all speakers. "No group interested in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow," he warned.⁸⁶

William Douglas, acknowledging how Hitler and the Nazis "showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt," recognized the dangers of group defamation. Nevertheless, he characterized the comments as protected political expression, however injurious they may have been. Douglas condemned Frankfurter for replacing the constitutional right of free speech with "a new orthodoxy that changes with the whims of the age or the day." The majority's "flexible" interpretation of the First Amendment rendered it meaningless for those groups that needed its protections the most. The majority's decision "is a warning to every minority that when the Constitution guarantees free

⁸³ E.C. Krauss, *When the Justices Dissent*, L.A. TIMES, June 5, 1952.

⁸⁴ *Beauharnais*, 343 U.S. at 281.

⁸⁵ *Id.* at 304.

⁸⁶ *Id.*

speech it does not mean what it says,” Douglas wrote. “Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive covenants. Tomorrow a negro will be hailed before a court for denouncing lynch law in heated terms.”⁸⁷

Not surprisingly, Hugo Black issued the most vigorous dissent. Black denounced Frankfurter for ignoring the clear and present danger test and turning over to the states the power to limit speech in “reasonable” ways. The majority’s practice of “meticulously scrutinizing every editorial, speech, sermon or other printed matter to extract two or three naughty words on which to hang charges of ‘group libel’” would obliterate freedom of speech, he predicted.⁸⁸

Of all the dissenters, Black was least sympathetic towards group libel laws. Discounting the ugly facts of *Beauharnais* and other instances of racial violence in the state, he described group defamations as mere slights and insults that must be suffered as the price of living in a free society. Black balked at Frankfurter’s construction of the statute as a “group libel” law; to him, it was blatant political censorship. Black rejected Frankfurter’s analogy between individual and group libel as a coy sleight of hand that he used to justify encroachments on political speech. Untethered from individual harms, the charge of group libel became so vague that it was nothing more than arbitrary justification for cutting off speech that criticized groups, he contended.

“Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment,” he wrote. “Unless I misread history the majority is giving libel a more expansive scope and more respectable status than it was ever accorded even in the Star Chamber. For here it is held to be punishable to give publicity to any picture, moving picture, play, drama or sketch, or any printed matter which a judge may find unduly offensive to any race, color, creed, or religion. 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.”⁸⁹

Black warned of the “boomerang” effect of the Court’s ruling:

⁸⁷ *Id.* at 286–87.

⁸⁸ *Id.* at 273.

⁸⁹ *Id.*

Today Beauharnais is punished for publicly expressing strong views in favor of segregation. Ironically enough, Beauharnais, convicted of crime in Chicago, would probably be given a hero's reception in many other localities, if not in some parts of Chicago itself. Moreover, the same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and nonsegregation. What Beauharnais said in his leaflet is mild compared with usual arguments on both sides of racial controversies.

If racists could be forbidden from speaking in Illinois, the same standard, speech "offensive to the community," could be used by a Southern state to outlaw civil rights activists, he wrote. Foreshadowing the Court's decision in *New York Times v. Sullivan* (1964), Black advised those that might hail the *Beauharnais* decision as a victory for minority groups to "consider the possible relevancy of this ancient remark, 'another such victory and I am undone.'"⁹⁰

IV. THE AFTERMATH OF *BEAUHARNAIS*

A. *Criticism of the Decision*

The Supreme Court's long-awaited pronouncement on group libel laws was reported on front pages throughout the country. Pundits predicted that the decision would be the subject of "wide controversy likely to be fanned when the various and diverse dissenting opinions are examined."⁹¹ Yet that controversy failed to materialize. Few praised Frankfurter's opinion. Criticism of *Beauharnais* came from all quarters. Public sentiment was overwhelmingly with the dissenters, especially justices Black and Douglas.

Lawyers and law professors criticized Frankfurter for improperly equating individual libel and group libel and failing to use the clear and present danger test.⁹² Newspaper editors, historically supportive of free speech in their own self-interest, decried *Beauharnais* as "censorship" and yet another decision in which the Court seemingly denied the meaning of the First Amendment. As the *Washington Post* noted, "The court's decision . . . raises a disturbing question as to where such censorship will end." "To call something 'a dirty Irish trick' could be actionable," ob-

⁹⁰ *Id.* at 275.

⁹¹ Krauss, *supra* note 83.

⁹² See e.g., Kallgren, *supra* note 68, at 298–99; see also Harold D. Jones Jr., *State Regulation of the Hatemonger*, 1 J. PUB. L. 519, 519 (1952); Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 YALE L. J. 252, 255–56 (1952).

served the *Chicago Tribune*. Under the majority's interpretation, opined the *Providence Bulletin*, Western movies showing attacks by Indians would be canceled, and the *Merchant of Venice* would be barred.⁹³

Some of the strongest denunciations of *Beauharnais* came from the African American press. Editors of Black newspapers wrote extensively on the decision, with most reflecting the NAACP's position on group libel. A columnist publishing under the headline "Negro Press has a Stake in the Issue of Free Speech" noted that he was "happy to see . . . leading Negro newspapers oppose the Supreme Court ruling on Joseph Beauharnais, white race-monger."⁹⁴ The *Baltimore Afro-American* agreed with the dissenters that the battle against bigotry could "only be fought in an atmosphere in which freedom of speech is not restricted or confined." Under the theory of the majority in *Beauharnais*, "an NAACP protest against a lynching in the deep South or agitation for fair employment practice legislation could be summarily jailed."⁹⁵

The *Pittsburgh Courier* was no doubt thinking of segregationist attacks on civil rights activists when it observed that "one shudders to think what may happen if a large number of states not politically controlled by friends of the colored people should pass laws similar to the Illinois measure and turn it against this . . . minority."

All that glitters is not gold, and a tactical partisan victory can sometimes become a disastrous strategic defeat. For this reason violations of the basic principles upon which the Republic has prospered should not be tolerated or endorsed just because a partisan advantage is gained thereby for some particular interest or group. Today it is the steel industry or Joseph Beauharnais that is hit and hurt, tomorrow . . . it may be the corner grocer, the eighty-acre farmer, the neighborhood pastor, the NAACP, or this newspaper.⁹⁶

Thurgood Marshall, chief of the NAACP Legal Defense Fund, who had just argued *Brown v. Board of Education* before the Supreme Court, filed a petition with the ACLU asking the Court to reconsider its decision in *Beauharnais*. Marshall

⁹³ *The Press: The Right to Libel*, TIME (May 12, 1952), <https://perma.cc/775N-4L8K>. See also *Group Libel Law Curbs Free Speech*, STAR TRIBUNE, May 9, 1952.

⁹⁴ *Negro Press Has a Stake in the Issue of 'Free Speech' and Beauharnais*, PITTSBURGH COURIER, May 31, 1952.

⁹⁵ *Right to Disagree*, BALTIMORE AFRO-AMERICAN, May 10, 1952.

⁹⁶ *Latest Supreme Court Decision*, PITTSBURGH COURIER, May 10, 1952.

shared the fears of Justices Black and Douglas that “a weapon has now been given to the enemies of minority groups.” The Supreme Court declined to rehear the case.⁹⁷

B. The Demise of Group Libel

Commentators predicted that the Supreme Court’s approval of Illinois’ group libel law would lead to the passage of similar laws.⁹⁸ The *Beauharnais* decision, one scholar opined, would “inject life-giving serum into the laws and rekindle the debate,” and lead to “heavy pressures to have existing laws zealously enforced, and new ones enacted.”⁹⁹

Yet this never came to pass. *Beauharnais* generated no further calls for group libel laws nor increased litigation.¹⁰⁰ The reason why *Beauharnais v. Illinois* did not yield an American regime of group libel or hate speech laws was that much of the public by 1952 had become skeptical of those laws. The concept was no longer regarded with the plausibility and esteem that it had held just a decade earlier.¹⁰¹

One reason for the declining popularity of group libel laws was their apparent ineffectiveness. By 1952, eight states, including New Jersey, Illinois, Indiana, and Massachusetts, had group libel laws on the books. Yet there was apparently no less discrimination or violence in those states than in states without group libel laws.¹⁰²

⁹⁷ See *Beauharnais v. Illinois*, 343 U.S. 988 (1952).

⁹⁸ *The Beauharnais Conviction*, CHICAGO DEFENDER, May 10, 1952; see also *Other Editors Say*, AFRO AMERICAN, May 31, 1952.

⁹⁹ Tanenhaus, *supra* note 1, at 215, 217; see also Loren Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167, 167 (1995) (stating “it is likely that this judicial acceptance will signal the adoption of similar laws by other states”).

¹⁰⁰ See Walker, *supra* note 1, at 77–100.

¹⁰¹ HARRY KALVEN JR., *THE NEGRO AND THE FIRST AMENDMENT* 7–8 (1965) (stating that, “[i]ronically, once the victory was won, the momentum for such legal measures seemed to dissipate”); see also Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 283 (1974) (explaining that, “[s]ince 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”).

¹⁰² Tanenhaus, *supra* note 1, at 286; see also *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, *supra* note 92, at 255–56.

A 1952 *Yale Law Journal* article on the subject was aptly titled *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*.¹⁰³

Another reason for the unpopularity of group libel laws was a relatively robust sentiment in favor of free expression in the culture of the time. The nation's experience fighting totalitarianism during the war had heightened popular consciousness of the importance of civil liberties to democracy. The Supreme Court's war-time First Amendment decisions, linking arbitrary state suppression of speech to fascist regimes, were influential and widely praised.¹⁰⁴ Government censorship of film, literature, and other media were in steep decline by the late 1940s. Government noninterference with speech had become synonymous in the popular imagination with democracy and the American way of life.¹⁰⁵

While the postwar Red Scare may have diminished tolerance for free speech among some sectors of the populace, at the same time, McCarthyism galvanized the commitments of many liberals to free expression. Many of those who had been caught in the snares of the anti-Communist witch-hunts had not been involved with the Communist Party, but with leftist causes such as civil rights. In this atmosphere of persecution, it became increasingly difficult for those on the left to side with government restrictions on expression. In particular, liberal Jewish intellectuals who had once been supporters of group libel laws became wary of Red-baiting and government witch hunts, with their anti-Semitic overtones.¹⁰⁶ Liberals began to lose faith in the ability of the state to regulate discourse. They had come to believe that "conformity of thought and the stifling of criticism" would be a "heavy price

¹⁰³ *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, *supra* note 92, at 252–63.

¹⁰⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–42 (1943); *see also* *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); *Group Libel*, *SATURDAY REV. LITERATURE* (Mar. 15, 1947) (describing postwar criticisms of group libel laws as inconsistent with freedom of speech); CHAFEE, *supra* note 70, at 125.

¹⁰⁵ *See* Samuel Walker, *The Growth of Civil Liberties, 1900–1945*, in *CRUCIBLE OF LIBERTY* 36–51 (Raymond Arsenault ed., 1991); *see also* PAUL BOYER, *PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE* 273 (2002); Samantha Barbas, *The Esquire Case: A Lost Free Speech Landmark*, 27 *WM. & MARY BILL RTS. J.* 287 (2018).

¹⁰⁶ STUART SVONKIN, *The Adoption of Liberal Anticommunism*, in *JEWES AGAINST PREJUDICE: AMERICAN JEWS AND THE INTERGROUP RELATIONS MOVEMENT FROM WORLD WAR TO COLD WAR* 79 (1995).

to pay for questionable reduction in intergroup tensions,” in the words of one scholar writing in 1952.¹⁰⁷

A testament to the left’s changing views on group libel laws was David Riesman’s reversal on the issue. Riesman had been one of the most influential advocates of group libel laws in the 1940s. Yet in 1951 he opined in *Commentary*, a magazine sponsored by the American Jewish Committee, that freedom of expression “in the present context of American society . . . is one of the greatest safeguards for Jews and all other minorities subject to prejudice.” “[T]hreats to freedom of expression,” he wrote, “were equally serious” whether they came from right-wing groups such as the American Legion, or from groups on the left such as the “Commission for Law and Social Action,” which had advocated for group libel laws.¹⁰⁸

There were also other tactical reasons for liberals to abandon their support of group libel laws. The Communist Party of the U.S.A. and its publication *The Daily Worker* had been a vigorous advocate of group defamation laws in the 1940s, and many liberals sought to avoid guilt by association.¹⁰⁹

Beauharnais arose at a moment when civil rights groups were becoming especially conscious of the relationship between freedom of speech and civil rights. As civil rights activism in the South increased in the 1950s, groups such as the NAACP found themselves frequently ensnared by vague laws prohibiting “breaches of the peace” or expression that caused “unrest” or “disorder.” Such laws were wielded fiercely by segregationists to suppress and silence civil rights activists. The NAACP made the defense of free expression a critical part of its legal agenda, resulting in First Amendment litigation and landmark Supreme Court decisions such as *NAACP v. Alabama* (1958) that not only advanced the civil rights movement but expanded rights of free expression more generally.¹¹⁰ Civil rights advocates focused their efforts on securing antidiscrimination measures in housing, employment, and education, rather than laws against group libel.

¹⁰⁷ Joseph Tanenhaus, *Group Libel and Free Speech*, 13 *PHYLON* 215, 215 (1952).

¹⁰⁸ David Riesman, *The Militant Fight Against Anti-Semitism: Education and Democratic Discussion Is the Better Way*, 12 *COMMENTARY* 11, 15–19 (1951).

¹⁰⁹ Stuart Svonkin, *Jews Against Prejudice: American Jews and the Intergroup Relations Movement from World War to Cold War* (1995) (Ph.D. dissertation, Columbia University).

¹¹⁰ *NAACP v. Alabama*, 357 U.S. 449, 466 (1958).

As such, the Supreme Court's decision in *Beauharnais v. Illinois* was not the beginning of a new era in the history of group libel laws, but the end of the story, at least for the next three decades. By 1952, the movement to pass group libel laws had, in the words of one commentator, "burned itself out."¹¹¹ The dissents of Black and Douglas carried the day, both in courts of law and in the court of public opinion. Frankfurter's conception of group libel disappeared into the ether and would never again be relied on in a decision of the Supreme Court. His vision of the harms of group defamation and its relationship to free expression, however, would eventually resurface in the late twentieth century, when academics and civil rights advocates took up calls for group libel laws, now designated as "hate speech" laws.

¹¹¹ Tanenhaus, *supra* note 107, at 215; *see also* KALVEN, *supra* note 101, at 7 (explaining that by 1965, the debate over group libel laws had all but "disappeared from view. . . . The story is not a long one and seems to have come to a tranquil ending.")