THE HARM IN HATE SPEECH

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I Approaching Hate Speech

I want to begin by explaining the position I am going to defend in this book, and I want to say something, too, about what has led me into this controversy. Let me start with the position and the concerns that underlie it.

Dignity and Assurance

A man out walking with his seven-year-old son and his ten-year-old daughter turns a corner on a city street in New Jersey and is confronted with a sign. It says: "Muslims and 9/11! Don't serve them, don't speak to them, and don't let them in." The daughter says, "What does it mean, papa?" Her father, who is a Muslim—the whole family is Muslim—doesn't know what to say. He hurries the children on, hoping they will not come across any more of the signs. Other days he has seen them on the streets: a large photograph of Muslim children with the slogan "They are all called Osama," and a poster on the outside wall of his mosque which reads "Jihad Central."

What is the point of these signs? We may describe them

loosely as "hate speech," putting them in the same category as racist graffiti, burning crosses, and earlier generations of signage that sought to drive Jews out of fashionable areas in Florida with postings like "Jews and Dogs Prohibited." Calling these signs hate speech makes it sound as though their primary function is expressive—a way in which one or another racist or Islamophobic element "lets off steam," as it were, venting the hatred that is boiling up inside. But it is more than that. The signs send a number of messages. They send a message to the members of the minority denounced in the posters and pamphlets:

> Don't be fooled into thinking you are welcome here. The society around you may seem hospitable and nondiscriminatory, but the truth is that you are not wanted, and you and your families will be shunned, excluded, beaten, and driven out, whenever we can get away with it. We may have to keep a low profile right now. But don't get too comfortable. Remember what has happened to you and your kind in the past. Be afraid.

And they send a message to others in the community, who are not members of the minority under attack:

> We know some of you agree that these people are not wanted here. We know that some of you feel that they are dirty (or dangerous or criminal or terrorist). Know now that you are not alone. Whatever the government says, there are enough of us around to make sure these people are not welcome. There are enough of us around to draw attention

> to what these people are really like. Talk to your neighbors, talk to your customers. And above all, don't let any more of them in.

That's the point of these signs—that's the point of hate speech—to send these messages, to make these messages part of the permanent visible fabric of society so that, for the father walking with his children in our example, there will be no knowing when they will be confronted by one of these signs, and the children will ask him, "Papa, what does it mean?"

Many of my colleagues who are not Muslim say that they detest these signs and others like them (the racist slogans, the anti-Semitic signage). But they say that people like us, who detest hate speech, should learn to live with it. Less often, and only under pressure, they will say that the father in our example (who is not a First Amendment scholar) and his children and others like them should also learn to live with these signs. But they say that uneasily. They are more often confident in their own liberal bravado, calling attention to their ability to bear the pain of this vicious invective: "I hate what you say but I will defend to the death your right to say it."

That is the most important thing, in their opinion. The signs that we have been talking about, the bigoted invective that defiles our public environment, should be no concern of the law, they say. People are perfectly within their rights, publishing stuff like this. There is nothing to be regulated here, nothing for the law to concern itself with, nothing that a good society should use its legislative apparatus to suppress or disown. The people who are targeted should just learn to live with it. That is, they should learn

to live their lives, conduct their business, and raise their children in the atmosphere that this sort of speech gives rise to.

I disagree. I think there is something socially and legally significant at stake. We can describe what is at stake in two ways. First, there is a sort of public good of inclusiveness that our society sponsors and that it is committed to. We are diverse in our ethnicity, our race, our appearance, and our religions. And we are embarked on a grand experiment of living and working together despite these sorts of differences. Each group must accept that the society is not *just* for them; but it *is* for them too, along with all of the others. And each person, each member of each group, should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination, or exclusion by others. When this assurance is conveyed effectively, it is hardly noticeable; it is something on which everyone can rely, like the cleanness of the air they breathe or the quality of the water they drink from a fountain. This sense of security in the space we all inhabit is a public good, and in a good society it is something that we all contribute to and help sustain in an instinctive and almost unnoticeable way.

Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be. It does this not only by intimating discrimination and violence, but by reawakening living nightmares of what this society was like—or what other societies have been like—in the past. In doing so, it creates something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and less natural for even the good-hearted members of the society to play their part in maintaining this public good.

The second way of describing what's at stake looks at it from the point of view of those who are meant to benefit from the assurance that is thrown in question by the hate speech. In a sense we are all supposed to benefit. But for the members of vulnerable minorities, minorities who in the recent past have been hated or despised by others within the society, the assurance offers a confirmation of their membership: they, too, are members of society in good standing; they have what it takes to interact on a straightforward basis with others around here, in public, on the streets, in the shops, in business, and to be treated—along with everyone else—as proper objects of society's protection and concern. This basic social standing, I call their *dignity.* A person's dignity is not just some Kantian aura. It is their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society. Their dignity is something they can rely on—in the best case implicitly and without fuss, as they live their lives, go about their business, and raise their families.

The publication of hate speech is calculated to undermine this. Its aim is to compromise the dignity of those at whom it is targeted, both in their own eyes and in the eyes of other members of society. And it sets out to make the establishment and upholding of their dignity—in the sense that I have described—much more difficult. It aims to besmirch the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing.

As the book goes on, we will look at a number of examples of this, of the way in which hate speech is both a calculated affront to the dignity of vulnerable members of society and a calculated

assault on the public good of inclusiveness. I offer a characterization of these concerns at this early stage in order to give readers a sense of what I think is at stake in the discussion of hate speech, a sense of what legislation limiting it or regulating it might be trying to safeguard. The case will be made in detail as the book goes on, and various objections confronted and answered.

The argument is not easy, and many readers will be inclined to dismiss it at the outset, because they just "know" that these sorts of publications must be protected as free speech and that we must defend to the death their authors' right to publish them. Most people in the United States assume that that's where the argument must end up, and they are puzzled (not to say disappointed) that I am starting off down this road. I think it is a road worth exploring, even if no one's mind is changed. It's always good to get clear about the best case that can be made for a position one opposes. However, for those who are puzzled about my involvement, let me begin with a little bit of intellectual biography.

A Tale of Two Book Reviews

In 2008, I published a short piece in the *New York Review of Books,* reviewing a book by Anthony Lewis on the topic of free speech.[1] Lewis is a distinguished author and journalist who has written a number of books on constitutional issues, including *Gideon's Trumpet* (1964), which was made into a TV movie starring Henry Fonda, and *Make No Law: The Sullivan Case and the First Amendment* (Random House, 1991).[2] Lewis's 2007 book, *Freedom for the Thought That We Hate,* is a fine essay on the history and future of First Amendment protections in the United

States. *The New York Review of Books* does not seem to mind if a person reviews something in which the reviewer has been criticized. In *Freedom for the Thought That We Hate,* Lewis said that "[o]ne of the arguments for allowing hateful speech is that it makes the rest of us aware of terrible beliefs"—the depth and intensity of racist beliefs, for example—"and strengthens our resolve to combat them."[3] He continued: "This argument was rudely countered by Jeremy Waldron, an Englishman who emigrated to teach law in the United States."[4] And he quoted a passage from a 2006 essay I wrote in the *London Review of Books,* discussing John Durham Peters's book *Courting the Abyss: Free Speech and the Liberal Tradition.*[5] In that review I said:

> [T]he costs of hate speech . . . are not spread evenly across the community that is supposed to tolerate them. The [racists] of the world may not harm the people who call for their toleration, but then few of *them* are depicted as animals in posters plastered around Leamington Spa [an English town]. We should speak to those who are depicted in this way, or those whose suffering or whose parents' suffering is mocked by [the Skokie neo-Nazis], before we conclude that tolerating this sort of speech builds character.[6]

Having quoted me, Lewis retorted that something like this view of mine had earlier "animated a movement, in the 1980s and 1990s, to ban hateful speech on university campuses." And he said that that movement had led to all sorts of "foolishness" and political correctness. "Even a sense of humor seemed endangered."[7]

With this provocation, I thought it appropriate to write a mildly critical review of Lewis's book in the *New York Review of Books*. I focused my critical comments on this issue of racist speech, expressing some misgivings about the arguments commonly used by Mr. Lewis and others in America to condemn what we call hate speech regulation. An expanded version of that review is included as Chapter 2 in the present volume.

Let me interrupt this tale with a word about definitions. By "hate speech regulation," I mean regulation of the sort that can be found in Canada, Denmark, Germany, New Zealand, and the United Kingdom, prohibiting public statements that incite "hatred against any identifiable group where such incitement is likely to lead to a breach of the peace" (Canada);[8] or statements "by which a group of people are threatened, derided or degraded because of their race, colour of skin, national or ethnic background" (Denmark);[9] or attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population" (Germany);[10] or "threatening, abusive, or insulting . . . words likely to excite hostility against or bring into contempt any group of persons . . . on the ground of the colour, race, or ethnic or national or ethnic origins of that group of persons" (New Zealand);[11] or the use of "threatening, abusive or insulting words or behaviour," when these are intended "to stir up racial hatred," or when "having regard to all the circumstances racial hatred is likely to be stirred up thereby" (United Kingdom).[12] As is evident, there are similarities and differences between these various instances of hate speech regulation. We shall discuss some of the details later. But all of them are concerned with the use of words which are deliberately abusive and/or insulting and/or threaten-

ing and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them. (Also, some of these laws, in an evenhanded spirit, threaten to punish insulting words directed at *any* racial group in the community even when the group is a dominant or majority group.)[13] Racial and ethnic groups are prime examples of the kinds of groups that are supposed to be protected by these laws, but more recently the protection has been extended to groups defined by religion as well.[14]

That was the kind of legislation Anthony Lewis and I were talking about. He was mostly opposed to it, though he said he wasn't as sure now about this opposition as he once was.[15] In my review, I ventured the suggestion that there was perhaps more to be said in favor of this legislation than Lewis was indicating. I didn't make any very strong assertion. As I have said, Lewis's book was, on the whole, a thoughtful contribution to this debate and I wanted to review it in that spirit. I did say that it wasn't clear to me that the Europeans and the New Zealanders were mistaken in their conviction that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack. And I ended the piece quite reasonably (I thought), saying that "[t]he case is . . . not clear on either side," and repeating (more elaborately) the sentiments that had annoyed Mr. Lewis earlier:

> [T]he issue is not just *our* learning to tolerate thought that *we* hate—we the First Amendment lawyers, for example. The harm that expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized in pamphlets, billboards, talk radio, and blogs. It is not

> harm . . . to the white liberals who find the racist invective distasteful. Maybe we should admire some [ACLU] lawyer who says he hates what the racist says but defends to the death his right to say it, but . . . [t]he [real] question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials? Those are the concerns that need to be answered when we defend the use of the First Amendment to strike down laws prohibiting the publication of racial hatred.[16]

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

"YOU ARE A TOTALITARIAN ASSHOLE" screamed one of the emails I received after the piece was published. Other messages called me human garbage and a parasite on society. The emails left me a little bit bruised, and so when I was invited to deliver some lectures at Harvard—the 2009 Holmes Lectures, dedicated to the memory of Oliver Wendell Holmes, who himself at one time or another took both sides on most free-speech issues—I decided I would take the opportunity to explain myself. The three Holmes Lectures were delivered in Cambridge, Massachusetts, on October 5, 6, and 7 under the title "Dignity and Defamation,"[17] and were published in 2010 as an article in the *Harvard Law Review*.[18] The published lectures correspond (roughly) to Chapters 3, 4, and 7 of this book, though some ideas set out briefly in the third lecture are also developed in Chap-

ters 5 and 6. Chapter 8, which is more historical in character, was presented originally as an Amnesty International Lecture at Oxford in June 2010.

My Modest Intention

My purpose in putting all this in front of you is not to persuade you of the wisdom and legitimacy of hate speech laws. My in-box can't take too many more of those hateful emails. Still less is it my aim to make a case for the constitutional acceptability of these laws in the United States. I will refer to the American debate from time to time, mostly suggesting ways in which it might be enriched by more thoughtful consideration of the rival positions. But as things stand, I think it is unlikely that legislation of the kind I set out above will ever pass constitutional muster in America. That's alright: there are many different kinds of laws, regarded as enlightened in other parts of the world, that do not satisfy this test—gun control laws, for example. The point is not to condemn or reinterpret the U.S. constitutional provisions, but to consider whether American free-speech jurisprudence has really come to terms with the best that can be said for hate speech regulations. Often, in the American debate, the philosophical arguments about hate speech are knee-jerk, impulsive, and thoughtless. Like Mr. Lewis's title, they address the case for hate speech legislation as though it consisted of certain do-gooders' disliking speech of a certain kind (speech that expresses "thought that we hate") and trying to write their likes and dislikes into law. We can do better than that, I think; *I* will certainly try to do better.

The hope is that even if my readers end up continuing to support the current constitutional position in the United States, they will at least understand—rather than impatiently dismiss—the more thoughtful arguments that can be mustered in favor of these laws.

Mostly what I want to do in this book, then, is to offer a characterization of hate speech laws as we find them, in Europe and in the other advanced democracies of the world. I also want to characterize hate speech regulations as we have found them, too, in America from time to time—because we must remember that opposition to these laws in the United States is by no means unanimous or monolithic. Apart from the legal academy, which is definitely divided on the matter, there is division among our lawmakers. There were state, municipal, and village ordinances enacted and waiting to be struck down in *Virginia v. Black,*[19] in *R.A.V. v. City of St. Paul,*[20] and in *Collin and the National Socialist Party v. Smith (Village President of Skokie),*[21] and there was a state law enacted in Illinois, waiting to be upheld by the Supreme Court in *Beauharnais v. Illinois.*[22] Not everyone in America is happy with the constitutional untouchability of racist leaflets in Chicago, Nazi banners and uniforms in Skokie (Illinois), and the burning of crosses in Virginia; not everyone thinks that lawmakers must be compelled to stand back and let this material deface their society. There has been an honorable impulse among some legislators in America to deal with this problem; and what we need to do—before rushing to constitutional outrage on behalf of the First Amendment—is to understand that impulse.

Outside the United States, we know that legislation of this

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

One obvious point is that many countries see these laws not as violations of rights but as something which may be permitted or even required in a human-rights context. For one thing, their constitutions acknowledge that basic rights, including freedom of expression, are legitimately subject to restriction. The Canadian Charter and the South African Constitution say this of all the rights and freedoms set out in the Charter: they may be subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[23] Prohibitions on hate speech are seen as satisfying that provision. Moreover, there are the affirmative requirements of the International Covenant on Civil and Political Rights (ICCPR) to consider. It is sometimes said that these provisions prohibit hate speech. That's not quite right; what they do is obligate countries to pass legislation prohibiting it. Article 20(2) of the ICCPR requires that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[24] So does the International Convention on the

Elimination of All Forms of Racial Discrimination (ICERD).[25] No doubt, states vary in the extent to which they allow their national legislation to be guided by international human-rights law; but this aspect of the international human-rights consensus cannot be lightly dismissed.[26]

These prohibitions are not just a matter of obligation. Many advanced democracies willingly embrace the idea of restrictions on hate speech. Unless we understand how that embrace might be motivated—what deeper values of dignity, respect, equality, democracy, and social peace might be involved—we will not understand the thinking behind the international-law position.

Equally, it is important to have a sense of the best that can be said against these provisions, whether it is said in terms of constitutional rights or not. Again, the case against hate speech restrictions is not made simply by treating the free-speech icon as a monstrance. Hate speech is speech, no doubt; but not all forms of speech or expression are licit, even in America, and we need to understand why there might be a particular problem with restricting speech of this kind. My book is not an evenhanded survey of the arguments for and against. But I try to come to terms with and respond to what I think are the best arguments that can be made against the regulation of hate speech.

In Chapter 5, I shall respond to some arguments by the late C. Edwin Baker which assert that hate speech regulation (or almost any restriction on free speech) poses a threat to the ethical autonomy of the individual. Baker does not simply use "autonomy" as a slogan. He explains why it is a crucial part of a person's autonomy to be able to disclose her values to others, and he approaches the issue of hate speech through that lens. I engaged in

oral argument with Baker on this issue on a number of occasions, and I believe his argument deserves a published answer.

The same is true of another powerful argument against hate speech laws—one made by Ronald Dworkin. Like a number of free-speech advocates, Dworkin is interested in the effect that restrictions on free expression may have on the legitimacy of other laws that we want to be in a position to enforce.[27] He thinks that suppressing hate speech undermines the legitimacy of anti-discrimination laws by depriving people of the opportunity to oppose them. I have a great deal of respect for Professor Dworkin's work on this issue, as on many others. But I believe that in regard to hate speech, his legitimacy argument can be answered. I will consider this in Chapter 7.

In addition to these specific responses to Baker and Dworkin, I also devote some additional pages—in Chapter 5—to the distinction between offending people and attacking their dignity. I accept the point, which many critics make, that offense is not something the law should seek to protect people against. I have argued this elsewhere in connection with the furor that accompanied the publication of Salman Rushdie's novel *The Satanic Verses* in 1988.[28] But the case made in the present book is about dignity, not offense, and I try to explain the distinction between the two.

The chapters in the first half of the book are less defensive in character. As I have said, I want to develop an affirmative characterization of hate speech laws that shows them in a favorable light—a characterization that makes good and interesting sense of the evils that might be averted by such laws and the values and principles that might plausibly motivate them. The core of my argument—the best and most favorable account of hate speech

laws that I can give—is in the second half of Chapter 4, beginning with the section entitled "Assurance."

Talk of hate speech is never particularly pleasant: opponents as well as defenders of this legislation find such speech distasteful. But we need to go beyond the description of the speech itself as hateful to an understanding of the way it pollutes the social environment of a community and makes life much more difficult for many of those who live in it. In Chapter 4, I will argue that the issue is about what a good society looks like, and what people can draw from the visible aspect of a well-ordered society in the way of dignity, security, and assurance, as they live their lives and go about their business. I shall argue that this can be understood as the protection of a certain sort of precious public good: an open and welcoming atmosphere in which all have the opportunity to live their lives, raise their families, and practice their trades or vocations. In Chapter 3 I shall sketch some background for this, arguing that it may be helpful to view hate speech laws as representing a collective commitment to uphold the fundamentals of people's reputation as ordinary citizens or members of society in good standing—vindicating, as I shall say, the rudiments of their *dignity* and social status. These chapters, 3 and 4, are the affirmative core of the book.

The book ends with an essay of a different kind. Though there is a bit of history in Chapters 2, 3, and 4, my focus there is mainly on contemporary discussions. Chapter 8, however, takes us from twentieth-century and twenty-first-century debates about hate speech legislation into seventeenth- and eighteenth-century debates about religious toleration. I have long suspected that these debates were connected, but in the legal and philosophical litera-

ture they are often pursued as though they had nothing to do with each other. In this final chapter, I try to bring them together with a discussion of the way in which Enlightenment *philosophes,* from Locke to Voltaire, dealt with the question of expressions of religious hatred as threats to the character and viability of a tolerant society.

2 Anthony Lewis's *Freedom for the Thought That We Hate*

The United States, says Anthony Lewis, is the most outspoken society on earth: "Americans are freer to think what we will and say what we think than any other people" (ix).[1] They can do so without fear of official retaliation. If I had written, for example, in 2008 that George W. Bush was the worst president we had ever had, and that his vice president and former secretary of defense were war criminals, I would not have expected to be arrested for my impudence. That's just business as usual in America. "Today," says Lewis, "every president is the target of criticism and mockery. It is inconceivable that even the most caustic critic would be imprisoned for his or her words" (x).

It wasn't always so. In 1798 Colonel Matthew Lyon, a Republican member of Congress, sent a letter from Philadelphia to a newspaper called the *Vermont Journal* in which he conveyed to readers and constituents his low impression of President John Adams and the current administration:

> As to the executive, when I shall see the efforts of that power bent on the promotion of the comfort, the happiness, and

> accommodation of the people, that executive shall have my zealous and uniform support: but whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice; . . . when I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate.

Shortly before this letter was published, Congress had passed a Sedition Act making it an offense to bring the president or Congress into disrepute or "to excite against them . . . the hatred of the good people of the United States."[2] Colonel Lyon was arrested and indicted under this legislation for seditious libel. At his trial, he disputed the constitutionality of the Sedition Act—a plea that was peremptorily struck out by the judge (Supreme Court Justice Paterson, riding circuit as Supreme Court justices did in those days). In the early 1800s, the First Amendment was understood by some as admonitory rather than as a legally enforceable restraint upon state and federal lawmakers. Or if it was seen as mandatory, it was thought to prohibit only prior restraints on publication, not criminal proceedings for seditious libel after publication had taken place.

In a curious proceeding, Colonel Lyon then called on the judge himself to testify to the extravagance of President Adams's household, for truth was a defense against charges of seditious libel under the 1798 Act. The judge replied angrily that the fare was plainer at the president's dinner table than at the Rutland Tavern.

The jury convicted Lyon, and the judge sentenced him to four months' imprisonment, from which he could not be released until he had also paid a $1,000 fine.[3]

The marshal charged with Colonel Lyon's imprisonment was a man called Fitch, who seems to have nurtured a long-standing grudge against him. Fitch had Lyon thrown into a tiny, filthy cell reserved mostly for horse thieves and runaway slaves. When Lyon's supporters heard about the conditions of his imprisonment, they rioted and almost tore down the prison. In 1800, the *Vermont Gazette* published an article describing Marshal Fitch as "the oppressive hand of usurped power" and "a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims." This, too, enraged the (Federalist) authorities. The editor of the *Gazette,* Anthony Haswell, was likewise convicted of seditious libel; he was fined $200 and imprisoned for two months.[4]

Why did locking these critics up seem like an appropriate thing to do in the early years of the republic? I am sure no explanation would be complete if it did not mention the volatile combination of wounded vanity and—for the time being—legally unlimited authority. But it would also be a mistake to omit the point that political institutions are sometimes a lot more fragile than they look. This entity—the state—which to us appears so powerful and self-sufficient, depends crucially on the opinion of those over whom it rules, and it requires for its operation a modicum of deference and respect. (Think of the way we still enforce laws against direct contempt of court—against ridiculing judicial officers in their courtrooms.) Murmurings of discontent are one thing. But if expressions of contempt and denunciations of op-

pression and corruption by officials become standard features of the public landscape, then the government's authority is shaken and citizens may start to think they can refuse to cooperate with the authorities or to comply with their directives unless compelled to do so. There is a danger, in other words, that the state will be thrown back on its meager resources for sheer coercion, without any goodwill or voluntary support or any sense of obligation on the part of its citizens. No democratic government in this predicament can do much or last long.

To many people, federal authority seemed weak and precarious in 1798. Public agitation by Colonel Lyon's supporters led to a brief uprising in Vermont, and there was a threat of considerable political violence elsewhere. George Washington was denounced as a thief and a traitor; John Jay was burned in effigy; Alexander Hamilton was stoned in the streets of New York; our hero, Matthew Lyon, attacked a Connecticut Federalist with fire tongs when the fellow spat on him in the House of Representatives; and Republican militias armed and drilled openly, ready to stand against Federalist armies.[5] Over everything, like a specter, hung news of the Jacobin terror in France. It was by no means obvious in those years—though it seems obvious to us now—that the authorities could afford to ignore venomous attacks on the structures and officers of government, or leave the publication of such attacks uncontested in the hope that they would be adequately answered in due course in the free marketplace of ideas. That a government could survive the published vituperations of the governed seemed more like a reckless act of faith than like basic common sense.

That is the premise of making seditious libel an offense, but

the fact that such a law is open to abuse is equally obvious. Pomposity is a standard hazard of political life; and the pain experienced by a politician when his inflated self-esteem is publicly punctured is likely to be out of all proportion to any real danger posed to the viability of the state. Government cannot last long if most people believe it is a criminal kleptocracy; but accusations of malfeasance are standard fare in electoral politics—standard criticisms which politicians in power will go to any lengths to avoid. So a tool designed to protect government as such from public contempt is almost certain to be used for partisan political advantage. That's the dilemma.

It wasn't just political criticism that was punished in the early years of the republic. In 1823, a man was jailed for sixty days in Massachusetts for writing an essay in the *Boston Investigator* that denied the existence of God, affirmed the finality of death, and declared that "the whole story concerning [Jesus Christ] is as much a fable and a fiction as that of the god Prometheus."[6] At the time of the founding of the United States, William Blackstone's position—that "[b]lasphemy against the Almighty, . . . denying his being or providence, or uttering contumelious reproaches on our Saviour Christ . . . is punished, at common law by fine and imprisonment"[7]—was regarded as part of our heritage of common law, not just as a peculiarity of the English establishment. "Christianity," said a state court judge in 1824, "is and always has been a part of the common law of Pennsylvania." And that judge went on to suggest that Christianity could not do its work of holding society together if it was exposed to public denunciation. He added that prosecutions for blasphemous libel were perfectly compatible with freedom of conscience and free-

dom of worship, which the law of Pennsylvania also protected, since such prosecutions were directed not at belief but only at the most malicious and scurrilous public revilings of religion.[8]

How did we get from there to here? Anthony Lewis has taught law at Harvard and Columbia, but he does not fall into the lawyer's trap of ascribing the end of the offenses of seditious and blasphemous libel to the heroic actions of the judiciary. The Sedition Act did not last long; it was repealed in 1801. And its abuses were so clear to a subsequent generation that Congress in the 1840s passed bills to repay with interest the fines that Colonel Lyon and Anthony Haswell had incurred. But federal judges seemed perfectly happy to enforce it as long as it lasted. Its demise was the work of elected legislators. When something like seditious libel was revived in an Espionage Act passed in 1917 upon the entry of the United States into the First World War, once again the judges were by no means unenthusiastic. Oliver Wendell Holmes compared the publication of a leaflet denouncing conscription as slavery to a false shout of "Fire!" in a crowded theater, and the Supreme Court unanimously upheld a ten-year prison sentence for the author of the leaflet.[9] The premise was the same: the necessary tasks of government—in this case, military recruitment for war in Europe—could not be performed in an atmosphere polluted by public denunciation.

According to Lewis, it was not until 1931—in other words, 140 years after the passage of the First Amendment—that the Supreme Court began enforcing the constitutional guarantee of freedom of speech (Lewis, 39). It struck down a California law that had forbidden the display of a red flag "as a sign, symbol, or emblem of opposition to organized government."[10] Of course,

even before that year, there had been dissenting voices on the bench in favor of free speech and freedom of the press. Justice Holmes began the long process of reversing his preposterous equation—that criticizing the military was comparable to shouting "Fire!" in a crowded theater—as early as 1919, when he dissented from a Supreme Court decision upholding a twenty-year prison sentence imposed upon Jacob Abrams for throwing leaflets from a building in New York condemning President Woodrow Wilson's dispatch of troops to Russia to fight the Bolsheviks.[11] But there were dissenters in the legislature as well—legislators who opposed the Espionage Act or who spoke out against the Smith Act, passed in 1940 (and still on the books today), which was used in subsequent decades to punish advocates of Marxism-Leninism. If justices like Holmes and Louis Brandeis are now glorified for their dissents, it is because their opinions are cited by a more rights-conscious Court many decades later, not because free speech was safe in the hands of the judiciary at the time.

What do we believe now about free speech that most American judges and politicians did not believe in 1798 or 1823 or 1919? What do we now believe that has made the United States the safest country on earth in which to criticize political leaders or denounce societal shibboleths?

Prosecutions for attacks on Christianity faded away much more quickly than prosecutions for political speech. The logic of prosecuting atheists always sat uncomfortably with the American position on religion. Christian belief might appear vulnerable to public denunciations, and it might seem in need of the law's support—but it wasn't clear that this was support that the law was

entitled to give. The logic of blasphemous libel required courts to find ways of seeing the churches, or Christianity in general, as indispensable supports of government. By the middle of the nineteenth century, American courts found themselves unable to do this, and they struck out prosecutions for blasphemy not on free-speech but on anti-establishment grounds. Since Christianity could not be seen as part of the organized apparatus of social control, it would just have to fend for itself in the unruly marketplace of sacred and profane ideas.

So far as political speech is concerned, I suppose the crucial thing is that we now see the power of the state as much more of a threat to the individual than vice versa. In 1798, federal authority looked precarious; it was at the mercy of public opinion, and public opinion was looking well-nigh ungovernable. In the two centuries since then, we have learned that the state does not need our solicitude or legal protection against criticism. It is strong enough to shrug off our attacks, strong enough to dismiss our denunciations as not worth the effort of suppression. When Justice Holmes finally changed his mind on these matters in the 1919 case that I mentioned earlier, *Abrams v. United States,* he predicated his dissent on the derisory impotence of what he called the defendants' pronunciamentos. "Nobody," he said, "can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of government arms" (Lewis, 29). Whatever threat was posed by these "poor and puny anonymities" would be better countered not by the suppression of speech but by more speech—by what Holmes called "the free trade in ideas."

As organized government came to seem less vulnerable, it also came to seem, itself, much more of a threat to the intellectual life of the country, to debate and deliberation among the citizenry and to the dignity and individuality of particular writers and dissenters. From this perspective, it is not the threat to social order that is alarming; it is the massive power that the government can deploy—that the government of this country has deployed in the past and the governments all over the world continue to deploy—to suppress dissent, deflect criticism, and resist exposure of its malfeasances. That is why the First Amendment has come to seem important. And to many people it has come to seem important as a counter-majoritarian device, because it is not just our rulers themselves who seek to suppress dissent. "It is, says Anthony Lewis, "a seeming characteristic of American society that it is periodically gripped by fear" (103)—panic about Jacobin terror in 1798, reactions against political radicalism and Bolshevism in 1919, hysteria about Communist infiltration in the 1940s and '50s, fear of radical Islam in more recent years. "[R]epeatedly, in times of fear and stress, men and women have been hunted, humiliated, punished for their words and beliefs" at the behest of a hysterical public (106). Those who call for these purges may think of themselves as patriots and as defenders of a free society; but their patriotism, in the words of one judge whom Lewis quotes,[12] is cruel and murderous. Like religious fanaticism, "it, too, furnishes its heresy hunters and its witch burners, and it, too, is a favorite mask for hypocrisy, assuming a virtue which it haveth not" (129–130).

Anthony Lewis is a defender of free speech, yet he is aware not only of the contingency of its development in the United States,

but of a number of outstanding areas in which First Amendment freedoms remain controversial. Invasions of privacy, campaign finance, protection of the integrity of jury trials, and the regulation of hardcore pornography are all touched on and illuminated by Lewis's "biography" of the First Amendment. In some of these areas, Lewis is open to the arguments put forward by those who advocate limits on freedom of the press. For example, he is inclined to accept Justice Stephen Breyer's suggestion that sometimes protecting people from press intrusion can promote free speech: statutory restrictions on making private conversations public "encourage conversations that otherwise might not take place" (76).[13] In other cases, however, as in the argument that hardcore pornography is demeaning to women, he is much more dismissive (138).

One of the most difficult areas of modern controversy concerns what is sometimes called "hate speech"—that is, publications which express profound disrespect, hatred, and vilification for the members of minority groups. In 1952, the Supreme Court upheld an Illinois law prohibiting the publication or exhibition of any writing or picture portraying the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion." The case was *Beauharnais v. Illinois,* and the Court refused an invitation on First Amendment grounds to overturn a fine of $200 imposed on the president of the White Circle League of America, who had distributed a leaflet on Chicago street corners urging people to "protect the white race from being mongrelized" and terrorized by the "rapes, robberies, guns, knives, and marijuana of the negro."[14]

Justice Felix Frankfurter, writing for the majority, described

this pamphlet as a "criminal libel," and he thought this put it beyond the protection of the First Amendment. "Libelous utterances," he said, "are not within the area of constitutionally protected speech." Anthony Lewis doubts that this argument would be accepted today (159). Its basis, he says, has been undermined by the 1964 Supreme Court decision in *New York Times v. Sullivan,* where the Court held that public figures cannot recover damages for libel unless they can prove that a false statement of fact was made maliciously or recklessly. In that case, the *Times* had published an advertisement proclaiming that racist Southern officials were using lawless tactics against the civil rights movement. A city commissioner in Montgomery, Alabama, had sued the newspaper—saying that the advertisement implicitly accused him of lawlessness—and he was awarded $500,000 damages by an Alabama court. The Supreme Court struck down the award on the ground that the robust discussion of public issues, to which the United States has "a profound national commitment," is bound to include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[15] The idea was that when they take on public responsibilities, state and federal officials have a duty to develop a thick skin and sufficient fortitude to shrug off public attacks.

Lewis is right that the Court no longer regards libel per se as an exception to the First Amendment. But it is not at all clear that the reasoning in *New York Times v. Sullivan* would protect the defendant in the *Beauharnais* case. The African Americans libeled collectively in the "obnoxious leaflet"[16] that was at issue in *Beauharnais* were not public officials who had taken on the burden of office. They were ordinary citizens who may have thought

they had a right to be protected from scattershot allegations of the most severe criminal misconduct—the "rapes, robberies, guns, knives, and marijuana of the negro." But Lewis is probably right that Joseph Beauharnais's conviction would not be upheld today. A 1969 decision of the Supreme Court,[17] reversing the conviction of an Ohio Ku Klux Klan leader, has held that hate speech, like seditious speech, is protected unless it is calculated to incite or likely to produce imminent lawless action.

Lewis notes that the United States differs from almost every other advanced democracy in the protection it currently gives to hate speech (157). The United Kingdom has long outlawed the publication of material calculated to stir up racial hatred. In Germany, it is a serious crime to display the swastika or other Nazi symbols. Holocaust denial is punished in many countries: the British author David Irving—a man who prides himself on having shaken more hands that shook the hand of Hitler than anyone else alive—was imprisoned until recently in Austria for this offense. New Zealand, Canada, France, and the Scandinavian countries—all use their laws to protect ethnic and racial groups from threatening, abusive, or insulting publications likely to excite hostility against them or bring them into public contempt. Moreover, these restrictions are not widely viewed as violations of individual rights; on the contrary, most countries have enacted them pursuant to their obligations under Article 20(2) of the International Covenant on Civil and Political Rights, which says that expressions of hatred likely to stir up violence, hostility, or discrimination *must* be prohibited by law.

Should the United States continue as an outlier in this regard? Our First Amendment faith is that the best response to a racist

pamphlet is more speech, not less speech. But Lewis says, at the end of his book, that he is not as certain about this answer as he used to be: "In an age where words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in [Justice] Brandeis's phrase, should be good ones" (166). I believe he would still oppose anything along the lines of the British legislation which makes expressions of racial or interreligious hatred unlawful even when there is no immediate prospect of violence. But it is worth considering whether the arguments that have supported First Amendment protection in other areas really do support it for this case.

I said earlier that prosecutions for seditious libel began to seem inappropriate when we realized that the government had become so powerful that it did not need the support of the law against the puny denunciations of the citizenry. Does that apply to vulnerable minorities? Is their status as equal citizens in the society now so well assured that they have no need of the law's protection against the vicious slur of racist denunciation? I said earlier that prosecutions for blasphemous libel came to seem inappropriate when we realized that, however vulnerable the Christian religion may be, it was not something that the law had any business trying to protect. Does that apply to racial minorities? Is their position in society—the respect they enjoy from fellow citizens—a matter of purely private belief, with which the law should have no concern? It is not clear to me that the Europeans are mistaken when they say that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack.

In general, prosecutions for speech that threatened the good order of society came to seem inappropriate when we realized that we need not be so panic-stricken as the Federalists were in 1798 about public demonstrations and disorder. But is that true of the system of mutual respect among the members of racial groups? Can we complacently assume that it, too, is immune from serious disturbance, so that we need not worry about the cumulative effect of racist attacks? I have my doubts. The state and its officials may be strong enough, thick-skinned enough, well-enough armed, or sufficiently insinuated already into every aspect of public life, to be able to shrug off public denunciations. But the position of minority groups as equal members of a multiracial, multiethnic, or religiously pluralistic society is not something that anyone can take for granted. It is a recent and fragile achievement in the United States, and the idea that law can be indifferent to published assaults upon this principle seems to me a quite unwarranted extrapolation from what we have found ourselves able to tolerate in the way of political and religious dissent. We sometimes say that the history of the United States is different in this regard from that of the European countries: their experience with the Holocaust necessarily flavors their attitude to hate speech, whereas Americans can afford to be more relaxed. But racial segregation, second-class citizenship, racist terrorism (lynchings, cross-burnings, fire-bombings of churches) are living memories in the United States—they are no less vivid than the memories of McCarthyism that haunt the defenders of the First Amendment—and those memories of racial terror are nightmarishly awakened each time one of these postings or pamphlets is put out into the public realm.

These hard questions are not intended to dispose of the matter. For the story of First Amendment freedom is not only that government came to seem so strong that it did not need the law's protection against criticism; the story of First Amendment freedom is that the government came to seem so strong that it constituted itself as a menace to individual freedom, and that is why it had to be restrained from interfering with free speech and freedom of the press. And I suppose the worry here is that a government equipped with hate speech codes would become a menace to free thought generally and that all sorts of vigorous dissenters from whatever social consensus the government was supporting would be, as Lewis puts it, "hunted, humiliated, punished for their words and beliefs" (106). Not only that, but as we saw earlier, campaigns against free speech tend to be motivated by public hysteria, and there is no telling what outbreaks of public hysteria would lead to if they had hate speech codes as one of the channels for their expression.

To me, it seems odd to concentrate only on *this* sort of manifestation of public hysteria, on the waves of majoritarian panic that could flow through the channels of the law, as opposed to other ways in which waves of public hysteria can threaten freedom in this society. Surely public hysteria is a danger to be recognized on *both* sides of this debate—both when it manifests itself in repressive laws and when it manifests itself in expressions of racial hatred. Why should we think that there needs to be protection only against the constraining laws and never against the racist expression?

Lewis's settled position, I think, is that we'd do better to swallow hard and tolerate "the thought that we hate" than open our-

selves to the dangers of state repression. I am not convinced. The case is certainly not clear on either side, and Lewis acknowledges that. But it is worth remembering a couple of final points.

First, the issue is not the *thought* that we hate, as though defenders of hate speech laws wanted to get inside people's minds. The issue is publication and the harm done to individuals and groups through the disfiguring of our social environment by visible, public, and semipermanent announcements to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship. The old idea of group *libel*—as opposed to hateful thoughts or hateful conversation—makes this clear, and it is no accident that a number of European countries still use that term.

Second, the issue is not just *our* learning to tolerate thought that *we* hate—we the First Amendment lawyers, for example. The harm that expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized in the racist pamphlets and billboards. It is not harm—if I can put it bluntly—to the white liberals who find the racist invective distasteful. Maybe we should admire some lawyer who says he hates what the racist says but defends to the death his right to say it, yet this sort of intellectual resilience is not what's at issue. The question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials? Those are the concerns that need to be answered when we defend the use of the First Amendment to strike down laws prohibiting the publication of racial hatred.

3 Why Call Hate Speech Group Libel?

Connotations of "Hate Speech"

What we call a thing tells us something about our attitude toward it, why we see it as a problem, what our response to it might be, what difficulties our response might cause, and so on. So it is with the phenomenon that we in America call "hate speech," a term that can cover things as diverse as Islamophobic blogs, cross-burnings, racial epithets, bestial depictions of members of racial minorities, genocidal radio broadcasts in Rwanda in 1994, and swastika-blazoned Nazis marching in Skokie, Illinois, with placards saying "Hitler should have finished the job." When we call these phenomena "hate speech," we bring to the fore a number of connotations that are not entirely neutral.

First, the term "hate." The kind of speech whose regulation interests us is called "*hate* speech," and that word "hate" can be distracting. It suggests that we are interested in correcting the passions and emotions that lie behind a particular speech act. For most of us, the word highlights the subjective attitudes of the person expressing the views, or the person disseminating or pub-

lishing the message in question. It seems to characterize the problem as an attitudinal one, suggesting, I think misleadingly, that the aim of legislation restricting hate speech is to punish people's attitudes or control their thoughts. The idea of "hate speech" feels, in this regard, like the idea of "hate crimes"—offenses that are aggravated, in the eyes of the law, by evidence of a certain motivation.

In that connection, people may be excused for thinking that the controversy over the use of psychological elements like racist motivation as an aggravating factor in criminal law is also relevant to the controversy over racist expression.[1] In fact, though the two ideas—hate speech and hate crimes—do have a distant connection, they really raise quite different issues in our thinking about law. The idea of hate crimes is an idea that definitely does focus on motivation: it treats the harboring of certain motivations in regard to unlawful acts like assault or murder as a distinct element of crime or as an aggravating factor. But in most hate speech legislation, hatred is relevant not as the motivation of certain actions, but as a possible *effect* of certain forms of speech. Many statutory definitions of what we call hate speech make the element of "hatred" relevant as an aim or purpose, something that people are trying to bring about or incite. For example, the Canadian formulation that I mentioned in Chapter 1 refers to the actions of a person "who, by communicating statements in any public place, *incites* hatred against any identifiable group."[2] Or it is a matter of foreseeable effect, whether intended or not: the British formulation refers to speech that, in all the circumstances, is "*likely to stir up* hatred."[3]

Even once this distinction has been grasped, the phrase "hate

speech" can also bog us down in a futile attempt to define "hatred." It is certainly not an easy idea to define. Robert Post takes a valiant stab at it in his essay in the collection *Extreme Speech and Democracy,* treating hatred as an extreme form of dislike. He identifies two crucial issues: "When do . . . otherwise appropriate emotions become so 'extreme' as to deserve legal suppression?"—notice how this still assumes we are aiming to suppress hate rather than punish the incitement of it—and "How do we distinguish hatred from ordinary dislike or disagreement?"[4] Post says these questions involve profound conceptual difficulty (though he does not tell us exactly what the profundity consists in). I guess whatever difficulty there is here is going to arise whether hatred is regarded as a crucial motivation in the hate speech offense or as its crucial purpose or effect. But by giving the impression that the laws in question are trying to "forbid expressions of 'extreme' intolerance or 'extreme' dislike," Post exaggerates the seriousness (for instance, the possible unfairness) of our having to draw an *arbitrary* line between hatred and ordinary dislike.

Also, Post's discussion conveys a misleading impression that it is *hatred as such* which the law is trying to target—that the law regards hating (in whatever context) as "a bad thing." He thinks, therefore, that the defender of hate speech laws is required to take issue with Edmund Burke (who advocated hatred of tyrants), James Fitzjames Stephen (who advocated hatred of great crimes), and Lord Patrick Devlin (who advocated hatred of immorality).[5] According to Post's account, the defenders of hate speech regulation think hatred is always unhealthy, whereas Burke, Stephen, and Devlin denied that. But this is a distortion.

Advocates of hate speech legislation do not infer the wrongness of stirring up hatred against vulnerable minorities from the badness of hatred in general. That's not what they are interested in. They are concerned about the predicament of vulnerable people who are subject to hatred directed at their race, ethnicity, or religion; apart from that predicament, advocates of hate speech legislation may have little or no interest in the topic of hatred as such.

Second, the term "speech." If we say we are interested in restrictions on hate *speech,* we convey the idea that the state is proposing to interfere with the spoken word, with conversation,[6] and perhaps with vocabulary (interference that will result in our use of epithets being controlled by political correctness). We make it sound as though we are treating *what people say out loud* as a problem that calls for legislation—words that are blurted out, as Justice Robert H. Jackson once put it, "when the spirits are high and the flagons are low."[7] I think this creates a misleading impression. Speech, in the sense of the spoken word, can certainly be wounding.[8] But the sort of attacks on vulnerable minorities that elicit attempts to regulate and suppress "hate speech" include attacks that are printed, published, pasted up, or posted on the Internet —expressions that become a permanent or semipermanent part of the visible environment in which our lives, and the lives of members of vulnerable minorities, have to be lived. No doubt a speech can resonate long after the spoken word has died away—and I will say a little more in Chapter 4 about the audible as opposed to the visible aspect of a society which permits hate speech. But to my mind, it is the enduring presence of the published

word or the posted image that is particularly worrying in this connection; and this is where the debate about "hate speech" regulation should be focused.

I don't want this shift away from "speech" to be understood as a maneuver in First Amendment jurisprudence. The U.S. Constitution protects freedom of speech as well as freedom of the press, and the former protection has been interpreted generously enough that the word "speech" will certainly cover the phenomena that I want to focus on. First Amendment scholars do debate an alleged difference between speech and action; I will touch on that in Chapter 5 and there take the position, which I think is unassailable, that calling something speech is perfectly compatible with also calling it an action that may be harmful in itself or that may have harmful consequences. In Catharine MacKinnon's blunt formulation, "Speech acts."[9] But that important point is not what I am trying to get at here, in my reservations about the term "hate speech." All I want to do is shift the focus somewhat from (for example) shouted epithets to more enduring artifacts of racist expression.

I said in Chapter 1 that all this began with my reviewing a book by Anthony Lewis (the review reproduced in Chapter 2). Lewis called the book that I reviewed *Freedom for the Thought That We Hate,* and this, too, is misleading in its suggestion that what is at stake is some sort of thought control, as though defenders of hate speech laws wanted to get inside people's minds: we want to restrict "thought"; he wants to emancipate it. That's moving in the wrong direction from the idea of speech control, back toward the idea of attitude control; whereas what we should really be talking about restricting are the *products* of people's at-

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

Notice also the double reference to hate in Lewis's title. The thought in question is assumed to be full of hatred—i.e., it embodies or it is motivated by or it is intended to stir up hatred against minorities. And it is also assumed to be *hated* thought: liberals hate it; they don't like the thought of people who hate minorities in this way. So Lewis's premise is that we all hate thought that is imbued with hatred, but his argument is that we should not allow our hatred of hate-filled thought to justify restrictions on people's liberty. These convolutions quickly multiply and, though I will keep on using it for familiarity, I sometimes think it would be better if we dropped the phrase "hate speech" altogether.

Group Defamation

In many countries, a different term or set of terms is used by jurists: instead of "hate speech," they talk about "group libel" or "group defamation." Sometimes this is how legislation describes itself; it is the terminology used, for example, in section 130 of Germany's Penal Code. That section prohibits "attacks on human

dignity by insulting, maliciously maligning, or defaming part of the population." Article 266 of the Danish Criminal Code forbids public defamation aimed at a group of persons because of their race, color, national or ethnic origin, religion, or sexual inclination. Section 251 of Norway's General Penal Code authorizes "the public authorities [to] prosecute a defamatory statement that is directed against an indefinite group or a large number of persons if it is so required in the public interest." In other European countries, "group libel" and "group defamation" are terms used in judicial doctrine, and among the jurists and lawyers of the legal system in question, to describe restrictions of the kind we would call hate speech restrictions. There is a specific French provision that prohibits defaming a group: Article 29 of the Law on the Freedom of the Press passed July 29, 1881, prohibits group as well as individual defamation. But some French jurists use the term "group defamation" or "racial defamation" to characterize all laws of this kind.[10] And such terminology extends beyond Europe. In Canada, Manitoba has a defamation statute which punishes "[t]he publication of a libel against a race, religious creed or sexual orientation."[11]

The term "group libel" used to be common in the United States as well. In the 1950s, American scholars would frequently observe that "group libel" or "group defamation" was the appropriate heading under which to describe the debate about the constitutionality and the desirability of legislation of this sort.[12] "Just a little more than a decade ago," wrote Harry Kalven in 1964, "we were all concerned with devising legal controls for the libeling of groups."[13] The idea of group libel was alluded to by the U.S. Supreme Court in characterizing the state law that it upheld in 1952

in *Beauharnais v. Illinois*.[14] (I shall say much more about that case later in this chapter.) Five years before *Beauharnais,* some scholars at Columbia had tried to crystallize debate by publishing a model group libel statute in the *Columbia Law Review*.[15] And it is worth remembering that—as its name suggests—the Jewish Anti-Defamation League took as its original mission "to stop, by appeals to reason and conscience, and if necessary by appeals to law, the *defamation* of the Jewish people."[16]

It is worth dwelling on these points of terminology, for I suspect we might get a better understanding of hate speech laws and of why people of good will have favored them if we consider them under this heading. Nadine Strossen of the American Civil Liberties Union disagrees: she tells us that since 1952 "[t]he group defamation concept has been thoroughly discredited."[17] I think that is too hasty. Certainly, group defamation is a complex and difficult idea, but the complications slow us down in a salutary way. They help to correct some of the simplicities fostered by the term "hate speech"; and an awareness of the difficulties, both conceptual and forensic, may make us more thoughtful on this issue, more open to new ways of thinking it through (whether or not we want to end up ultimately on the side that Strossen advocates). I hope people on all sides of the dispute will have some patience with this; it may be productive.[18]

Varieties of Libel

When we think about group libel, it is tempting to see it as an extension of individual defamation: we start with the idea of defaming a person, and with liability in tort law for libel and slan-

der, and then we extend this to encompass liability for attacks on the reputation of a group.[19] But this is an oversimplification. Libel may be best-known today as a tort, but in the past it has often been understood also as a criminal offense. I think we should consider first the history of criminal libel.

Criminal libel laws have come in various flavors over the years. The best-known are laws against seditious libel—of which, for Americans, the most notorious example is the Sedition Act, passed by Congress in 1798. The Sedition Act made it a criminal offense to publish "false, scandalous, and malicious writing" bringing the president or Congress into disrepute or "to excite against them . . . the hatred of the good people of the United States."[20] (In the previous chapter, I discussed some of the prosecutions that occurred under the Sedition Act.) This spectacularly ill-considered piece of legislation has given criminal libel a bad name in the United States ever since.[21] It is worth noting, however, that at the time of its initial enactment and enforcement, the courts summarily refused to strike it down.[22] This is partly because, in the early 1800s, free-speech clauses were understood sometimes as admonitory rather than as legally enforceable restraints upon state and federal lawmakers; or if they *were* seen as mandatory, they were thought to prohibit only prior restraints on publication, not criminal proceedings for seditious libel after publication had taken place.

Or consider *blasphemous* libel. William Blackstone observed that "blasphemy against the Almighty, . . . denying his being or providence, or uttering contumelious reproaches on our Saviour Christ, . . . is punished, at common law by fine and imprisonment, for Christianity is part of the laws of the land."[23] For many years,

this doctrine was accepted in the United States, notwithstanding the constitutional commitment to religious freedom. In 1823, a man was jailed for sixty days in Massachusetts for publishing an essay in the *Boston Investigator* that denied the existence of God, affirmed the finality of death, and declared that "the whole story concerning [Jesus Christ] is as much a fable and a fiction as that of the god Prometheus."[24] The Blackstone position on blasphemous libel was adopted explicitly by an American state court judge in 1824: "Christianity," he said, "general Christianity, is and always has been a part of the common law of Pennsylvania."[25] The judge said that prosecutions for blasphemous libel were compatible with freedom of conscience and freedom of worship, which the law of Pennsylvania also protected, since the prosecutions were directed not at belief but only at the most malicious and scurrilous revilings of religion.

There was also something called obscene libel—an offense which covered the publication of any pornographic material. In 1727, in England, Edmond Curl was found guilty as the author of a book called *Venus in the Cloister,* about lesbian love in a convent.[26] Obscene libel wasn't just restricted to books and pamphlets: in the 1826 case of *R. v. Rosenstein,* a man was convicted for offering for sale a snuffbox displaying an indecent painting when you lifted the lid.[27]

Notice that in these various senses of "libel," we are not really dealing with offenses that have a whole lot to do with defamation. Some of the prosecutions under the Sedition Act did involve defamation of those in power.[28] But others involved general subversion of government. In *U.S. v. Crandell* (1836), an indictment was laid against Reuben Crandell for publishing "libels

tending to excite sedition among the slaves."[29] Sometimes, in these older uses, "libel" conveys the sense of "untruths," as in the title of one little book listed in the NYU Law Library Catalogue: *"A Libell of Spanish Lies . . . discoursing the . . . the death of Sir Francis Drake."*[30] But often the term just goes back to the neutral meaning of the Latin word *libellus,* meaning a little book. For much of its history, "libel" could be used to refer to any old published pamphlet, without conveying a judgment about its content. We mostly think of libel as a species of defamation; and those with a smattering of law know that libel is distinguished from slander by being written rather than just spoken. But in its original meaning, a "libel" could be any published declaration by an individual, printed in a pamphlet or nailed up on a church door. Inasmuch as it had a technical legal meaning, the term referred to the statement of claim commencing a lawsuit. But it could be any declaration purporting to have legal effect. John Wycliffe's *New Testament,* from the end of the fourteenth century, translated Matthew 5:31 as "Forsooth it is said, Whoever shall leave his wife, give he to her a libel, that is, a little book of forsaking." Libels often had an accusatory character, which I guess is the source of the association with defamation. One started a lawsuit or pasted a declaration up on a tree in the public square when one wanted to take someone or something to task. But the term's negative connotations went well beyond defamation: there could also be seditious libels, blasphemous libels, obscene libels, and libels (most notably blood libels) making accusations against whole groups in the community.

When we do focus on defamation, what is consistently emphasized, both in the law of torts and in the law of libel more generally, is the distinction between calumnies that are put about

in *spoken* form—i.e., as speech, through gossip, rumor, or denunciation—and those that have the more enduring presence of something written or committed to paper, something published, as a number of U.S. civil codes put it, "by writing, printing, effigy, picture, or other fixed representation to the eye."[31] Defamation disseminated as speech is slander; defamation committed to paper is libel. The thought is that libel is much the more serious of the two, because the imputations it embodies take a more permanent form. "What gives the sting to the writing," said a New York court in 1931, "is its permanence of form. The spoken word dissolves, but the written one abides and perpetuates the scandal."[32]

I believe this is important for our inquiry. When it comes to racist or religious attacks, this issue—what we might think of as the half-life of defamation—may help us to understand the specific evil that the legislation we're considering is directed against. It is not the immediate flare-up of insult and offense that "hate speech" connotes—a shouted slogan or a racist epithet used in the heat of the moment. (Some campus hate speech codes may be directed at this, and also some workplace codes, but it is not usually the primary concern of what we call "hate speech legislation.") It is the fact that something expressed becomes established as a visible or tangible feature of the environment—part of what people can see and touch in real space (or in virtual space) as they look around them: this is what attracts the attention of the criminal law.[33]

Criminal Libel and Disorder

Until recently, many countries had laws relating to criminal defamation that was aimed at ordinary individuals. Until 1993, the

New Zealand Crimes Act specified a year's imprisonment as the penalty for any "matter published, without lawful justification or excuse . . . designed to insult any person or likely to injure his reputation by exposing him to hatred, contempt, or ridicule."[34]

Why, you may ask, would the criminal law concern itself with libel at all, in the specific sense of defamation, when there was no public issue of sedition or obscenity or blasphemy? Why not leave it to private law?

One possibility is that certain forms of defamation might be seen as an attack on public order. It is a matter of keeping the peace, avoiding brawls and so on, because egregious libel might flow over into fighting words. No doubt this is important. But we should bear in mind also that preventing fighting from breaking out—that very narrow sense of *keeping the peace*—is only one dimension of public order. Public order might also comprise society's interest in maintaining among us a proper sense of one another's social or legal status. In aristocratic societies, this meant securing the standing of great men or high officials—with laws of *scandalum magnatum* set up to protect nobles and great men from scandalous imputations on their breeding, their status, their honor, or their office.[35] I know the United States abolished titles of nobility in 1787, but maybe we should not regard Americans as having abandoned all concern for status. Think of it this way. Just as an aristocratic society might be concerned with the status of nobles, a democratic republic might be concerned with upholding and vindicating the elementary dignity of even its nonofficials as citizens—and with protecting that status (as a matter of public order) from being undermined by various forms of obloquy. Immanuel Kant observed that, in a republic, even the lowli-

est person may have the dignity of citizenship, and we should not expect this to be affected by our ban on titles of nobility.[36]

And just to anticipate: *that* is what I think laws regarding group defamation are concerned with. They are set up to vindicate public order, not just by preempting violence, but by upholding against attack a shared sense of the basic elements of each person's status, dignity, and reputation as a citizen or member of society in good standing—particularly against attacks predicated upon the characteristics of some particular social group. I am going to argue that group-libel laws aim at protecting the basics of each person's reputation against attempts (for example) to target all the members of a vulnerable racial or religious group with some imputation of terrible criminality—an imputation which, if sustained on a broad front, would make it seem inappropriate to continue according the elementary but important status of citizenship to the members of the group in question.

Beauharnais v. Illinois (1952)

Earlier I commented that the characterization of hate speech as group libel is not unknown in the United States. In 1952, what we would now call a hate speech law (an Illinois ordinance dating from 1917) was upheld by the Supreme Court of the United States as a law of criminal libel. What was in question was an Illinois statute prohibiting the publication or exhibition of any writing or picture portraying the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion."[37] The case was *Beauharnais v. Illinois*,[38] and the Supreme Court refused an invitation on First Amendment grounds

to overturn a fine of $200 imposed on Joseph Beauharnais, the president, founder, and director of something called the White Circle League of America, who had distributed a leaflet on Chicago street corners urging people to protect the white race from being "mongrelized" and terrorized by the "rapes, robberies, guns, knives, and marijuana of the negro."

The leaflet had as its headline: "Preserve and Protect White Neighborhoods! From the Constant and Continuous Invasion, Encroachment and Harassment of the Negroes." It said: "We are not against the negro; we are for the white people and the white people are entitled to protection." It went on: "The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL." It alternated between a self-pitying and a triumphalist tone. On the one hand, it declared that "THEY CANNOT WIN! IT WILL BE EASIER TO REVERSE THE CURRENT OF THE ATLANTIC OCEAN THAN TO DEGRADE THE WHITE RACE AND ITS NATURAL LAWS BY FORCED MONGRELIZATION." But on the other hand, it complained, in tones of pathos designed to awaken the voice of the white race, that "[t]he Negro has many national organizations working to push him into the midst of the white people on many fronts. The white race does not have a single organization to work on a NATIONAL SCALE to make its wishes articulate and to assert its natural rights to self-preservation. THE WHITE CIRCLE LEAGUE OF AMERICA proposes to do the job."[39] The leaflet provided a tear-off ap-

plication form, which, if submitted with a dollar, would enable the sender to become a member of the White Circle League of America (provided he or she promised to try and secure ten other members as well).

On March 6, 1950, Joseph Beauharnais was indicted on charges "that . . . on January 7, 1950, at the City of Chicago, [he] did unlawfully publish, present and exhibit in public places, lithographs, which publications portrayed depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposed citizens of Illinois of the Negro race and color to contempt, derision, or obloquy." He was convicted by a jury and fined the sum of $200. His conviction was upheld on appeal in Illinois,[40] and upheld, too, by the Supreme Court of the United States by a majority of five to four.

From today's perspective, it is remarkable that the Supreme Court did not intervene to vindicate free speech in the form of this leaflet.[41] There were powerful dissents—"This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights," said one of the justices[42]—but they did not persuade the majority. The dissenting justices noted that the leaflet did not threaten violence, nor did it seem particularly likely that it would incite disorder. But the majority observed that it was enough that the leaflet was just hateful and defamatory: "Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community." Jus-

tice William O. Douglas, even in dissent, noted that the Nazis were an example of "how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy."[43] He said that, in principle, he "would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense." The decision and these statements indicate an openness in First Amendment jurisprudence that has not often been seen since.[44]

Nadine Strossen, of the American Civil Liberties Union, says that before we get too enthusiastic about the ordinance upheld in *Beauharnais,* we should remember that prior to its use against this white supremacist group, it was a weapon for the harassment of Jehovah's Witnesses, "a minority," as she says, "very much more in need of protection than most."[45] In fact, the Jehovah's Witnesses were prosecuted for what a federal court described as "bitter and virulent attacks upon the Roman Catholic Church" and "accusations which in substance and effect were charges of treasonable disloyalty."[46] In terms of the values attributed to the state by the Supreme Court justices, the prosecution was warranted. The fact that contempt, derision, and obloquy are directed at minority group X by members of another minority group, Y, does not mean we should not be concerned about the defamation of X. Defamation by a minority against a minority may constitute the same sort of obstacle to "free, ordered life in a metropolitan, polyglot community" as defamation by members of the dominant majority against a minority group.

The point about *Beauharnais* that I find most interesting is the terminology that the Supreme Court of Illinois used,[47] terminol-

ogy that Justice Frankfurter endorsed when describing the statute as "a form of criminal libel law." Said Justice Frankfurter:

> No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana. . . . There is even authority . . . that such utterances were also crimes at common law. . . . [I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.[48]

If the pamphlet could be described as a "criminal libel," Frankfurter thought that it would be beyond the protection of the First Amendment. "Libelous utterances," he said, "are not within the area of constitutionally protected speech."

Three of the four dissenters in *Beauharnais* acknowledged this point. Justice Stanley Reed, in his dissent, assumed "the constitutional power of a state to pass group libel laws to protect the public peace." His objection to the decision was based on the vagueness of the terms of the ordinance. Justice Robert Jackson noted that "[m]ore than forty State Constitutions, while extending broad protections to speech and press, reserve a responsibility for their abuse and implicitly or explicitly recognize validity of criminal libel laws."[49] Only Justice Hugo Black disputed this premise outright, and for him the problem was precisely the *group* aspect of group libel: "[A]s 'constitutionally recognized,' [criminal

libel] has provided for punishment of false, malicious, scurrilous charges against individuals, not against huge groups. This limited scope of the law of criminal libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds."[50]

I think this was a mistake. And I would like now to consider and criticize Justice Black's argument in detail, before addressing a different criticism that could be made after 1964—namely, that the decision in *New York Times v. Sullivan* has removed (or—for non-American readers—indicated a good reason for removing) the whole category of libel from the list of exceptions to the protection of free speech.

Individuals and Groups

Justice Black claimed that criminal libel provides for the "punishment of false, malicious, scurrilous charges against individuals, not against huge groups." But in fact the law has traditionally pursued two complementary concerns in this domain. On the one hand, there is the concern for personalized reputation in civil cases. On the other hand, there is a concern for the fundamentals of *anyone*'s reputation or civic dignity as a member of society in good standing. The latter has been the concern of the law of criminal libel. Unlike civil libel, criminal libel has traditionally been interested not in protecting the intricate detail of each individual's personalized reputation and that person's particular position in the scale of social estimation, but in protecting the foundation of each person's reputation. No doubt the foundation of

a person's dignity might be attacked in different ways that vary from case to case. But the elementary aspects of civic dignity that are protected are the same in every case. People are assumed to be basically honest and law-abiding; it is assumed that their basic attributes—for example, that they are men rather than women, black rather than white, Jewish rather than Christian—do not in and of themselves dispose them to endemic criminality or anti-social character. In these ways, the civil law of libel and the criminal law of libel may be thought to work together—to cover the field, as it were. In the case of a civil action for libel, there must be a defamation of a particular person, or of a group so confined that the allegation descends to particulars. But—so the argument goes—this does not mean that the law is unconcerned with defamation on a broader front; it means only that that problem now becomes the concern of the criminal law rather than the civil law. And when we are dealing with the broad foundations of each person's reputation, rather than its particularity, the law might seek to deal with this by protecting large numbers of people, thought of as a group, against attacks on the fundamental reputation of all persons of that kind. When this is the law's interest, there is little point to insisting—as Justice Black thinks we should—upon focusing on the impact on individuals considered one by one. We should deal with the insult or libel at the level at which it is aimed and at the level at which damage to reputation is sustained.

Indeed, it is possible that a court might proceed more directly in a case like this, simply under the heading of public order. This is what happened (according to some reports) in the English case of *Osborne* (1732), a case I will discuss in more detail in the final

chapter of this book. Mr. Osborne was charged with publishing a blood libel against Jews in London.[51] There was an objection at his trial that the allegation he had made "was so general that no particular Persons could pretend to be injured by it." But the court responded: "This is not by way of Information for a Libel that is the Foundation of this Complaint, but for a Breach of the Peace, in inciting a Mob to the Distruction of a whole Set of People; and tho' it is too general to make it fall within the Description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished."[52]

Now, case reports were not well organized or entirely consistent in the eighteenth century. Other reports of the same case say that it *was* decided as a matter of criminal libel, but they agree that the public-order dimension was key to that characterization.[53] Either way, it seems to me a viable or at least arguable position. As a matter of public order, assaults on the reputation of a group cannot be neglected. As Joseph Tanenhaus put it, "Since criminal libel is indictable at common law because it tends so to inflame men as to result in a breach of the peace, there is no rational basis for the exclusion of group defamers from liability to prosecution in common law jurisdictions."[54]

We find the same approach taken in an American decision from 1868. In *Palmer v. Concord,* accusations of cowardice were made against a company of soldiers who had been engaged in the Civil War. The New Hampshire court that heard the case said this:

> As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier

> could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. . . . *Indictments* for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libellous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual.[55]

The court added that the number of people defamed might well add to the enormity of the libel. It cited the 1815 New York State case of *Sumner v. Buel,* where a majority held that a civil action could not be maintained by an officer of a regiment for a publication reflecting on the officers generally, unless there was an averment of special damage; in that case, Chief Justice Smith Thompson insisted that "the offender, in such case, does not go without punishment." He said: "The law has provided a fit and proper remedy, by indictment; and the generality and extent of such libels make them more peculiarly public offences."[56]

Unfortunately, Justice Black's dissent in *Beauharnais* takes all this in exactly the wrong direction, with its perverse implication that the larger the number of people defamed, the less likely it is that the leaflet can be subject to any sort of regulation, because large-scale defamations enjoy constitutional protection in a way that the defamation of a single person or a small number of persons would not.

Someone might venture a separate contention that no real harm or injury is done in large-group defamation. Maybe defa-

mation mostly loses its force when it is applied to groups: "the injury is lost in the numbers." But this is precisely *not* the case when a vicious slur is made against all the members of a group with reference to some ascriptive group characteristic. Perhaps if the defendant says "*Some* of the members of group X are guilty of criminality," with the implication that it may be an unknown dozen among millions, then the injury to the dignity and reputation of members of X generally is "lost in the numbers." And the disorder that such a diluted insult is likely to occasion may, by the same token, be slight or nonexistent. But that is not what happens when the libel is associated ascriptively with group membership as such—as it was in the Illinois leaflet. There, it does seem reasonable to say both that the group libel reflects seriously on all members of the group and, as the Illinois court observed, that "[a]ny ordinary person could only conclude from the libelous character of the language that a clash and riots would eventually result between the members of the White Circle League of America and the Negro race."[57]

Assaulting Group Reputation

How does one libel a group? What aspects of group reputation are we trying to protect with laws against racial or religious defamation? The first thing to note is that it is not the group as such that we are ultimately concerned about—as one might be concerned about a community, a nation, or a culture. The concern, in the end, is individualistic. But as I have already said, group-defamation laws will not concern themselves with the particularized reputations of individuals. They will look instead to the ba-

sics of social standing and to the association that is made—in the hate speech, in the libel, in the defamatory pamphlet, poster, or blog—between the denigration of that basic standing and some characteristic associated more or less ascriptively with all members of the group.

So, first of all, that association might take the form of a factual claim. That was important in *Beauharnais,* with its imputation that guns, crime, and marijuana were somehow typical of "the negro." Putting about such factual imputations and getting them accepted at a general level can have a profound effect on all members of the group: "[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. This being so, 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."[58] We could say something similar about a claim that Muslims are terrorists: a general imputation of dangerousness has a direct impact on the standing and social relations of all members of the group

Second, group libel often involves a characterization that denigrates people—a characterization that probably falls on the "opinion" rather than "fact" side of the distinction sometimes made in U.S. constitutional law.[59] Consider the statements complained of in the landmark Canadian case of *R. v. Keegstra:* James Keegstra was a high school teacher in Eckville, Alberta, who taught his classes that Jewish people seek to destroy Christianity and that they "created the Holocaust to gain sympathy."[60] Here, the fac-

tual imputation is damaging specifically to social and cultural reputation, which can still isolate and stigmatize individuals. Catharine MacKinnon—whose organization, the Woman's Legal Education and Action Fund, intervened in the *Keegstra* case—put it this way: "We argued that group libel . . . promotes the disadvantage of unequal groups; . . . that stereotyping and stigmatization of historically disadvantaged groups through group hate propaganda shape their social image and reputation, which controls their access to opportunities more powerfully than their individual abilities ever do."[61]

Third, a group libel may go directly to the normative basis of equal standing, damning the members of the group with vicious characterizations that dehumanize their ascriptive characteristics and depict them as insects or animals. We believe that all humans, whatever their color or appearance, are equally persons, with the rights and dignity of humanity. But I remember seeing a racist agitator sentenced to a short prison term in England in the late 1970s, under the Race Relations Act, for festooning the streets of Leamington Spa with posters depicting Britons of African ancestry as apes. After his conviction by the jury, he was sentenced by a crusty old English judge, who (one might have imagined) would have little sympathy with this newfangled hate speech legislation. But the judge gave the defendant a stern lecture to the effect that we cannot run a multiracial society under modern conditions if people are free to denigrate their fellow citizens in bestial terms. There was some shouting from the gallery as the defendant was taken away. The case made a deep impression on me.[62]

Finally, there are libels that go even beyond opinion and moral

characterization, but that denigrate the members of a group by embodying slogans or instructions intended implicitly to degrade (or signal the degradation of) those to whom they are addressed. It might be something as crude as "Muslims Out!" Or a group and its members can be libeled by signage, associating group membership with prohibition or exclusion. "No Blacks Allowed." Ontario's Racial Discrimination Act prohibited the publication or display of "any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons." And that is quite apart from the prohibition on discrimination itself. Or consider that in the early days of the Jewish Anti-Defamation League (ADL) in the United States, one of the aims of the League was to put a stop to the poisoning of the social environment by published declarations of racial and religious hostility. When the ADL campaigned for legislation against stores and hotels that denied their business to Jews, it was not just the discrimination they wanted to counter—it was the *signage:* "Christians Only." What concerned the organization was the danger that anti-Semitic signage would become a permanent feature of the landscape and that Jews would have to live and work and raise their families in a community whose public aspect was disfigured in this way.[63]

Singly or together, these reputational attacks amount to assaults upon the *dignity* of the persons affected—"dignity," in the sense of their basic social standing, the basis of their recognition as social equals and as bearers of human rights and constitutional entitlements. Dignity is a complex idea, and there is much more

to say about it than I can say here: Chapters 4 and 5 will contain some further discussion.[64] For the moment, please note that dignity, in the sense in which I am using it, is not just a philosophical conception of immeasurable worth in (say) the Kantian sense of *würde*.[65] It is a matter of status—one's status as a member of society in good standing—and it generates demands for recognition and for treatment that accords with that status. Philosophically, we may say that dignity is inherent in the human person—and so it is. But as a social and legal status, it has to be established, upheld, maintained, and vindicated by society and the law, and this—as I shall argue in Chapter 4—is something in which we are all required to play a part. At the very least, we are required in our public dealings with one another to refrain from acting in a way that is calculated to undermine the dignity of other people. This is the obligation that is being enforced when we enact and administer laws against group libel.

In all of this, though we are talking about group dignity, our point of reference is the individual members of the group, not the dignity of the group as such or the dignity of the culture or social structure that holds the group together.[66] The ultimate concern is what happens to individuals when defamatory imputations are associated with shared characteristics such as race, ethnicity, religion, gender, sexuality, and national origin.[67] Ascription of the shared characteristic is what membership of the group amounts to—though once ascribed, the membership may be valued or not valued by the persons concerned; it may be a source of pride or something to which they, as individuals, prefer to remain indifferent. We might even say that protection against group libel (and thus protection of "group dignity" in the sense in which I

am using the term here) is mainly a negative idea. The South African Constitutional Court came close to this position in *President of the Republic v. Hugo,* when it said "the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect *regardless of their membership of particular groups.*"[68] But I certainly don't mean that group membership is, in and of itself, a liability. Group defamation sets out to *make* it a liability, by denigrating group-defining characteristics or associating them with bigoted factual claims that are fundamentally defamatory. A prohibition on group defamation, then, is a way of blocking that enterprise. Whether we want to go further and uphold the affirmative dignity of the group (as a group) would be quite another matter, and that is not the concern of hate speech legislation. Affirmatively, what hate speech legislation stands for is the dignity of equal citizenship (for all members of all groups), and it does what it can to put a stop to group defamation when group defamation (of the members of a particular group) threatens to undermine that status for a whole class of citizens.

Beauharnais versus *New York Times v. Sullivan*

It is time to return to the case of Joseph Beauharnais. In the sixty years since it was decided, *Beauharnais v. Illinois* has never explicitly been overturned by the Court. In one or two cases, lower courts have expressed misgivings about the precedent,[69] and among First Amendment scholars there is some considerable doubt as to whether the Supreme Court would nowadays accept the idea of group libel as an exception to First Amendment pro-

tection. Many jurists—better informed than I am in the ways of the justices—say they probably would not.[70]

Anthony Lewis says that the basis of *Beauharnais* has been undermined by the 1964 Supreme Court decision in *New York Times v. Sullivan,* where the Court held that public figures cannot recover damages for libel unless they can prove that a false statement of fact was made maliciously or recklessly.[71] The Supreme Court argued that the sort of robust discussion of public issues to which the United States has "a profound national commitment" is bound to include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[72] The idea was that when they take on public responsibilities, state and federal officials have a duty to develop a thick skin and sufficient fortitude to shrug off public attacks.

Anthony Lewis is right that the Court no longer regards libel per se as an exception to the First Amendment. But it is not at all clear why the reasoning in *New York Times v. Sullivan* should protect Joseph Beauharnais or anyone else in his position. The African Americans libeled as a group in Beauharnais' "obnoxious leaflet"[73] were not public officials who had taken on the burden of office. They were ordinary citizens who may have thought they had a right to be protected from scattershot allegations of the most severe criminal misconduct—the "rapes, robberies, guns, knives, and marijuana of the negro." Justice Arthur Goldberg said in his concurrence that it does not follow from the decision in *Sullivan* "that the Constitution protects defamatory statements directed against the private conduct of a . . . private citizen."[74] Allegations of rape, robbery, and drug use by "the negro" are exactly statements of this kind, and it seems to me obvious that laws pro-

hibiting defamation of this type are not affected by laws whose purpose is to protect public criticism of public officials.

Indeed, the court in *Beauharnais* itself indicated—and the court in *Sullivan* noted and approved of its making—just such a distinction between the defamation of private persons (individually or in large numbers) and the defamation of politicians and government officials. Justice Frankfurter said that protecting African Americans from group libel was quite different from protecting public figures. "Political parties," he said, "like public men, are, as it were, public property." He said there would be no difficulty blocking an extrapolation from the decisions he was making in *Beauharnais* to a decision that would interfere with political speech.[75] So there is a carelessness about the consensus of modern First Amendment jurists that *Sullivan* implicitly overturns *Beauharnais,* a carelessness that I suspect is really the product of nothing more scholarly than wishful thinking. To actually sustain an argument—as opposed to a hope—that *Sullivan* undermines *Beauharnais,* one would have to separate the Court's endorsement of the importance of robust public debate in *New York Times v. Sullivan* from the public-figure doctrine in which its conclusion was couched, arguing that if public debate is this important it must be protected even when the reputations of nonpublic figures (like ordinary African Americans living in Illinois) are at stake. Maybe that's what the Supreme Court now believes, but it certainly doesn't follow from the reasoning in *Sullivan.* Or—even less convincingly—one would have to argue that a group of citizens counts as a public figure even if the individual members of the group do not. And that just seems silly.

Still—who knows?—the naysayers are probably right to teach

their students that Joseph Beauharnais's conviction would not be upheld today. The reasoning I have been criticizing is common, and if constitutional scholars are taken in by it, there is no reason to suppose the present justices are immune. Judge Richard Posner is probably right when he said in 2008 that "though *Beauharnais* . . . has never been overruled, no one thinks that the First Amendment would today be interpreted to allow group defamation to be prohibited."[76] So we shouldn't rely too heavily on *Beauharnais.*[77] However, as I said in Chapter 1, my argument in this book is not about constitutional strategy, but about what might be involved as a matter of principle in thinking that group defamation is a problem, and what insights may be available from this characterization for those willing to take the risk of appearing thoughtful in these matters.