HOW AMERICAN CIVIL RIGHTS GROUPS DEFEATED HATE SPEECH LAWS

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Introduction

In the United States, as is widely known, "hate speech" is generally protected by the First Amendment. Hate speech is considered "free speech" unless it provokes imminent violence or constitutes a "true threat" or "fighting words." No other nation protects the right to express hate so vigorously. Hate speech laws exist in most other countries, where the principles of free speech are said to have no bearing on the expression of racial, ethnic, or religious hatred.[1]

Why are there no hate speech laws in America? There are many possible explanations. Some have suggested that the United States diverged from the rest of the world on hate speech regulation because of deeply ingrained national traits and tendencies, such as Americans' historic fear of government regulation and our individualistic culture.[2] In a book manuscript in progress, I argue that the course that America took on hate speech was not foreordained but was rather the result of contingency and circumstance. Hate speech laws existed in many jurisdictions before the 1950s, and there was a good deal of popular support for hate speech laws.

The reasons why hate speech laws ultimately failed to take root in America are complex. Timing was an important factor. The onset of McCarthyism in the 1950s undercut campaigns during the previous decade to advocate for hate speech laws. Efforts to enact hate speech laws arose during the period of the development of the modern First Amendment, between 1930 and 1960. Hate speech regulations clashed with emerging civil libertarian free speech principles, and free speech ultimately prevailed.

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[1] Adam Liptak, *Unlike Others, U.S. Defends Freedom to Offend in Speech*, N.Y. Times, June 12, 2008; *see generally* Erik Bleich, The Freedom to Be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism (2011).

[2] *See, e.g.*, Robert Post, *Hate Speech*, *in* Extreme Speech and Democracy 123, 137 (Ivan Hare & James Weinstein eds., 2009); *Interview with Robert Post*, *in* The Content and Context of Hate Speech: Rethinking Regulation and Responses 11, 18–36 (Michael Herz & Peter Molnar eds., 2012); Frederick Schauer, *The Exceptional First Amendment*, *in* American Exceptionalism and Human Rights 29, 42–49 (Michael Ignatieff ed., 2005); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 Yale L.J. 1151, 1164 (2004); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 Colum. L. Rev. 727, 730–31 (1942); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence*, *in* The Content and Context of Hate Speech: Rethinking Regulation and Responses, *supra*, at 242, 259, 267.

This essay focuses on another significant reason why hate speech laws may have failed to take root in America—the vigorous opposition of minority civil rights organizations to hate speech laws at the time when those laws had their greatest potential for adoption. Minority civil rights groups such as the National Association for the Advancement of Colored People (NAACP) and the American Jewish Committee opposed hate speech laws on the theory that such laws were ineffective in curtailing hate speech, and that any limitations on freedom of speech would hinder minorities' efforts to achieve racial and religious equality.

At a time when lynchings and cross-burnings were rampant, and when American fascist demagogues and neo-Nazis routinely terrorized minorities, the leaders of these civil rights groups thought hard about the hate speech problem. They concluded that the most effective way to reduce racial and religious hatred was to combat hate speech through counter-speech and education, rather than through legal restrictions on hate speech. The opposition of these civil rights groups to hate speech laws changed American law and public policy. Notably, their arguments influenced the Supreme Court in the 1960s, which created an expansive, civil libertarian free speech jurisprudence that was intended, in significant part, to protect the civil rights movement.

This essay tells the story of how and why American civil rights organizations opposed hate speech laws for much of the twentieth century. Civil rights groups like the NAACP could have sought laws banning hate speech, just as they fought for the desegregation of public facilities. Instead, eminent civil rights leaders—including Thurgood Marshall, W.E.B. Du Bois, and Louis Marshall, among others—rejected hate speech laws as incompatible with the pursuit of equality and civil rights.

This essay discusses significant episodes in the twentieth century when civil rights groups opposed hate speech laws, with important consequences for free speech law and public policy. Part I narrates the NAACP's campaign to have the film *The Birth of a Nation* censored, and how the failure of that campaign convinced the national NAACP of the ineffectiveness of legal regulations on hate speech. Part II describes Jewish civil rights organizations' rejection of hate speech laws in the 1920s and '30s, and how those groups developed methods to stop anti-semitic attacks through means other than legal restriction. Part III explores black and Jewish civil rights groups' opposition to proposed hate speech laws in the

1940s, and their creation of a "quarantine" or "silent treatment" policy as an alternative to legal suppression of hate speech. Part IV explains how the civil rights movement joined with the American Civil Liberties Union in the 1960s to defend the free speech of white supremacists, resulting in landmark First Amendment precedents. Part V details how and why some civil rights groups changed their positions on hate speech starting in the 1970s, a shift that was most visibly demonstrated in litigation surrounding neo-Nazi attempts to march in Skokie, Illinois. The conclusion emphasizes the wisdom of the civil rights groups' earlier stance opposing restrictions on hate speech.

I. *THE BIRTH OF A NATION*

The first American hate speech laws were passed during the opening two decades of the twentieth century. The purpose of those laws was to prevent race riots and other intergroup violence at a time of social diversification and unrest, when millions of European immigrants had settled in Northern cities, along with African Americans fleeing the South during the Great Migration. Many of the hate speech laws passed were adaptations of existing criminal libel laws, which punished defamation that led to breaches of the peace.[3] For example, in 1917, following race riots in East St. Louis, Illinois that left thirty-nine blacks and nine whites dead, the state made it a crime to portray "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" when the defamatory publication "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[4]

A significant catalyst to the passage of these hate speech laws was the notorious 1915 film *The Birth of a Nation*. The NAACP spearheaded a campaign to have the movie censored. Its involvement in that project ultimately turned the organization away from legal restrictions on hate speech.

A. "History Written with Lightning"

In 1913, an ambitious filmmaker from Kentucky named D.W. Griffith decided to make a movie based on the novel *The Clansman: A Historical Romance of the Ku Klux Klan*. The author of *The Clansman*, a Baptist preacher named Thomas Dixon,

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[3] On criminal libel, see Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1952*, 66 BROOK. L. REV. 71, 78–79 (2000).

[4] Joseph Tanenhaus, *Group Libel*, 35 CORNELL L. REV. 261, 279 (1950); Ellen C. Scott, *Black "Censor," White Liberties: Civil Rights and Illinois's 1917 Film Law*, 64 AM. Q. 219, 221–22 (2012).

sold the movie rights to Griffith. Griffith shared Dixon's view of Reconstruction as a "crime against the South." Griffith believed that Dixon's depictions of Klan members riding to the rescue of whites who were oppressed by a newly empowered black citizenry called out for dramatic cinematic portrayal.[5]

In 1915, Griffith released his film, *The Birth of a Nation*. At a time when the cinematic medium was less than ten years old, *The Birth of a Nation* was celebrated for its cutting-edge cinematography. It was "history [written] with lightning," said President Woodrow Wilson, who saw the movie when it was screened at the White House.[6] Griffith's film was a motion picture masterpiece, and it was also a vicious piece of hate speech. The film heroized the KKK and offered a distorted portrayal of Reconstruction as a time when blacks terrorized and victimized Southern whites. "Every resource of a magnificent new art has been employed with an undeniable attempt to picture Negroes in the worst possible light," the NAACP declared in its Annual Report.[7] As cinema scholar Andrew Sarris observed, the film was "regarded as outrageously racist at a time when racism was hardly a household word."[8]

The *Birth of a Nation* posed a serious dilemma for the NAACP, the leading black civil rights organization. In 1909, progressive whites and blacks had joined the noted sociologist and civil rights leader W.E.B. Du Bois to form the organization as an endeavor to advance equality and civil rights. The NAACP's main effort in its early years was lobbying for the passage of anti-lynching laws.[9]

Progressives in the early twentieth century were conflicted about freedom of speech.[10] The government had routinely suppressed information about liberal causes such as pacificism, integration, birth control, and labor rights. Through their

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[5] Dorian Lynskey, *"A Public Menace": How the Fight to Ban* The Birth of the Nation *Shaped the Nascent Civil Rights Movement*, SLATE (Mar. 31, 2015), https://perma.cc/H5DG-E4FD.

[6] Mark E. Benbow, *Birth of a Quotation: Woodrow Wilson and "Like Writing History with Lightning"*, 9 J. GILDED AGE & PROGRESSIVE ERA 509, 509–13 (2010).

[7] NAACP, COMPLETING THE WORK OF THE EMANCIPATOR: SIX YEARS OF STRUGGLE TOWARDS DEMOCRACY IN RACE RELATIONS 11 (1915).

[8] NICKIEANN FLEENER-MARZEC, D.W. GRIFFITH'S THE BIRTH OF A NATION: CONTROVERSY, SUPPRESSION, AND THE FIRST AMENDMENT AS IT APPLIES TO FILMIC EXPRESSION, 1915–1973, at 5 (master's thesis 1977), https://www.proquest.com/docview/302842993.

[9] *See* PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 19 (2009).

[10] *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 211–47 (1997).

opposition to this suppression, progressives developed a keen understanding of the importance of freedom of speech in a democratic society.[11] With *The Birth of a Nation*, they faced the dilemma of either suppressing freedom of expression or permitting a film that would likely intensify racism in a nation that was already pervaded with racist views.

NAACP leaders determined that there was no way to halt the exhibition of *The Birth of a Nation* other than calling for legal restrictions on the film.[12] In its resulting campaign against the movie, the NAACP pressured state and local governments to ban the film or to have its most objectionable scenes deleted. This campaign involved the NAACP in a costly battle when the organization had few resources.[13] The NAACP took up the effort only because it feared the devastating effects of the film. Progressive journalist Upton Sinclair called *The Birth of a Nation* "the most absolute terrifying and poisonous play that I have ever seen" and predicted that screenings in the South would provoke "a hundred thousand murders."[14] These fears were not unjustified. *The Birth of a Nation* triggered violence in many places it was shown. Race riots in Illinois were connected to *The Birth of a Nation*. Mobs and lynchings coincided with the film's exhibition.[15]

It was not entirely surprising that the NAACP would seek to invoke government censorship of film to combat *The Birth of a Nation*. Throughout the country, states and municipalities practiced film censorship. Progressives who otherwise supported a broad reading of freedom of speech advocated film censorship in the interest of discouraging the exhibition of films that promoted immorality, violence, or crime. Reformers feared that movies would corrupt children in particular. State and municipal censor boards routinely banned films that depicted sex or violence. Some censor boards required filmmakers to delete objectionable scenes as a condition for a film to be approved for release. In cities and states with censorship laws,

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[11] *Id.* at 217. On the American Civil Liberties Union as being comprised of progressives who supported civil libertarian views on free speech, see SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (2nd ed. 1999).

[12] MELVYN STOKES, D.W. GRIFFITH'S *THE BIRTH OF A NATION*: A HISTORY OF "THE MOST CONTROVERSIAL MOTION PICTURE OF ALL TIME" 133 (2007).

[13] Lynskey, *supra* note 5.

[14] *Id.*

[15] Letter from May Childs Nerney to Charles Russell (June 9, 1915) (NAACP Papers).

films could not be exhibited without the approval of the censor board.[16] In its 1915 decision in *Mutual Film v. Industrial Commission of Ohio*, the Supreme Court declared that film censorship was not prohibited by the First Amendment.[17]

Some NAACP leaders who opposed censorship in principle were uneasy about pushing for restrictions on *The Birth of a Nation*.[18] The NAACP's chairman, Joel Spingarn, was reluctant to advocate censorship of the film, reasoning that suppression of the film because it caused racial unrest could be used to censor the anti-slavery novel *Uncle Tom's Cabin*.[19] But other NAACP leaders believed that *The Birth of a Nation* was so dangerous that official suppression was justified. They also advocated censorship because blacks did not have equal access to mass communications to influence public opinion; they did not have resources to make movies of their own.[20] Du Bois described the "miserable dilemma" that the NAACP confronted. "We had to ask liberals to oppose freedom of art and expression and it was senseless for them to reply 'Use this art in your own defense,'" he explained.[21]

The ability of motion pictures to broadcast hateful ideas so provocatively led the NAACP to conclude that it had no choice but to endorse censorship. "If Negroes and their friends were free to answer in the same channels, by the same methods in which the attack is made, the path would be easy; but poverty, fashion, and color prejudice preclude this. . . . We have therefore sought vigorously through censorship to stop this slander of a whole race," proclaimed an editorial in the NAACP's publication *The Crisis*.[22] "A new art was used deliberately to slander and to vilify a race," Du Bois wrote. "There was no chance to reply. We neither had the

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[16] On the regime of film censorship that existed at the time, see Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665 (2012).

[17] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 233–34 (1915).

[18] NAACP leader Charles T. Hallinan had always fought "censorship of any kind," noted one Chicago journalist. Lynskey, *supra* note 5.

[19] M. ALISON KIBLER, CENSORING RACIAL RIDICULE: IRISH, JEWISH, AND AFRICAN AMERICAN STRUGGLES OVER RACE AND REPRESENTATION, 1890–1930, at 136 (2015)

[20] *Id.*

[21] Stephen Weinberger, The Birth of a Nation *and the Making of the NAACP*, 45 J. AM. STUD. 77, 87 (2011).

[22] NAACP, *supra* note 7, at 11.

money nor the influence. What were we to do? . . . We are aware . . . that it is dangerous to limit expression, and yet, without some limitations civilization could not endure."[23]

B. The Campaign Against The Birth of a Nation

The NAACP's campaign against *The Birth of a Nation* started in February 1915, when the film was slated to premiere in Los Angeles. A delegation of "five hundred of the most prominent white and colored people in the city" confronted the mayor at City Hall. The mayor explained that he lacked authority to stop the film, but he promised to have two scenes cut that depicted the rape of a white woman by a black soldier.[24] The NAACP petitioned the city council to ask the censorship board to rescind its approval of the film and to instruct the chief of police to prevent the film's showing.[25] When this failed, the NAACP sought a court injunction to prohibit the film's exhibition on the grounds that it would encourage violence. The court granted the injunction but limited it to a single afternoon matinee. On February 8, 1915, *The Birth of a Nation* played to its first audience at Clune's Theater, and it remained there for seven months.[26]

The NAACP then took its battle across the country, petitioning censor boards and meeting with governors, mayors, city council members, and civic groups. "We urge you to be watchful and to leave no stone unturned in an effort to suppress this picture," the national NAACP exhorted its local chapters. Local branches were advised to secure the support of "the local clergy . . ., civic organizations, [and] welfare societies" and to convince police commissioners, license commissioners, and mayors to suppress the film on the grounds that it would lead to violence.[27] The NAACP also recommended that branches commission "an able lawyer, preferably a white man upon whom you can depend absolutely" to examine existing ordinances to determine if one of them, such as a nuisance or breach of peace law, or a

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[23] *Id.*; FLEENER-MARZEC, *supra* note 8, at 8.

[24] Editorial, *The Clansman*, 10 CRISIS 33 (1915).

[25] Bob Wolfe, *California's Early Battle with "Birtherism": D. W. Griffith, the NAACP, and the Ku Klux Klan and the Courts*, 2021 CAL. SUP. CT. HIST. REV. 2, 4–5.

[26] *Id.* at 2, 5. *See also* Thomas R. Cripps, *The Reaction of the Negro to the Motion Picture Birth of a Nation*, 25 HISTORIAN 344, 344–62 (1963).

[27] Letter from May Childs Nerney to NAACP Local Branches (Apr. 7, 1915) (NAACP Papers).

film censorship law banning "incitement to violence," could be used against the film.[28]

If such a law existed, the local branches were to urge censorship boards and local police to apply it. If there was no law, the NAACP advised local chapters to seek legislation. Tacoma's NAACP chapter convinced the city to change an existing law to make it "unlawful for any person, firm or corporation to publicly show or exhibit . . . any (film or performance) . . . which portrays brutality, or which tends to incite race riot, or race hatred, or that shall represent or purport to represent any hanging, lynching, burning or placing in a position of ignominy of any human being, the same being incited by race hatred."[29] Similar ordinances were enacted in Houston, Oklahoma City, and Cincinnati. In Maryland, a film censorship law forbade the showing of "inflammatory scenes and titles calculated to stir up racial hatred."[30]

In several instances, sympathetic mayors, city councils, and governors agreed to ban the film. *The Birth of a Nation* was banned in a few cities and in Ohio and Kansas. [31] Typically, the movie was prohibited on the grounds that it was "unfit for decent people," "indecent," and "threatened public peace." But Griffith quickly appealed to courts for injunctions preventing interference with the film's showing. In New York, as a result of Griffith's appeals, the film was exhibited with only minimal cuts. The NAACP also lost its battle to halt the film in Boston, and by late spring, *The Birth of a Nation* had been seen by 100,000 viewers there. The attempt to suppress the movie had become a national news story, which drew even more people to the film.[32]

In early 1916, the NAACP's national headquarters summarized its efforts against *The Birth of a Nation*. It had petitioned officials throughout the country to ban the film or to refuse to license it. It had pressured censorship boards to cut the film and had sought film censorship and hate speech legislation.[33] It took part in

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[28] FLEENER-MARZEC, *supra* note 8, at 214.

[29] *Id.* at 330–31.

[30] KIBLER, *supra* note 19, at 138.

[31] Lynskey, *supra* note 5.

[32] Jack Schwartz, *The Fight to Ban 'Birth of a Nation'*, DAILY BEAST (Nov. 20, 2014), https://perma.cc/X2VN-DPEZ.

[33] STOKES, *supra* note 12, at 168.

hearings in police courts and before mayors, brought legal proceedings to ban the film, and even tried to have a movie produced that would counter the racist views in *The Birth of a Nation*.[34]

These efforts were mostly ineffective. The film was banned outright in only two states. In many cities, bans on the film were reversed by the courts as violations of freedom of speech. The NAACP had more success with having scenes cut from the movie. However, the cuts did not change the film's narrative and overall message.[35]

The NAACP's attempts to suppress *The Birth of a Nation* had backfired. The NAACP had lost credibility in progressive circles for its attacks on freedom of speech. Given its prior advocacy of free speech rights, it had opened itself up to the charge of hypocrisy. The *Birth of a Nation* controversy portrayed the NAACP as a censor while allowing Griffith to depict himself as a martyr for free speech.[36]

The campaign against *The Birth of a Nation* brought even more attention to the film. Hundreds of thousands went to screenings to see what was so controversial. Du Bois noted that the struggle had "probably succeeded in advertising [*The Birth of a Nation*] even beyond its admittedly notable merits"[37] and may have exacerbated the racial animus that the NAACP had tried to prevent.

And this spiking of racist fervor did indeed have devastating consequences, as predicted by NAACP activists at the time. According to some historians, the popularity of *The Birth of a Nation* spurred the resurgence of the Ku Klux Klan and its infliction of racial terrorism on black Americans. The KKK, which had originated in the post-Civil War South, had fallen dormant in the early twentieth century. *The Birth of a Nation* celebrated the Klan and led to its revival.[38] In the film, Griffith popularized the uniform of hoods and white sheets, originally depicted in *The*

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[34] NAACP, *supra* note 7, at 11, 16–22.

[35] STOKES, *supra* note 12, at 129–70.

[36] Weinberger, *supra* note 21, at 79. Griffith released an epic film called *Intolerance*, a defense of free speech and an attack on his critics. Griffith told the press that "intolerance"—including "intolerance" of his racist messages—was the "root of all censorship." DAVID WARK GRIFFITH, THE RISE AND FALL OF FREE SPEECH IN AMERICA 43–50 (1916).

[37] STOKES, *supra* note 12, at 169.

[38] A sharp spike in lynchings and race riots coincided with the exhibition of *The Birth of a Nation*. "Road show counties" where the film was shown continue to experience higher rates of hate crimes and hate groups a full century later. Desmond Ang, The Birth of a Nation*: Media and Racial Hate*, 113 AM. ECON. REV. 1424, 1424 (2023).

Clansman, that became the Klan's trademark.[39] All told, between its ineffective results, loss of credibility, and the increased attention brought to the film through the campaign against it, the energy devoted by the NAACP to banning *The Birth of a Nation* might have been more profitably directed towards efforts against segregation, disenfranchisement, and lynching.[40]

For these reasons, the campaign against *The Birth of a Nation* turned the national NAACP away from government suppression as a strategy for dealing with hate speech. When the NAACP protested remakes and exhibitions of the film in the 1940s and in the 1960s, it relied on strategies such as public demonstrations and pressuring theater owners not to show the film, rather than appealing to local officials or courts.[41] For much of the rest of the twentieth century, the NAACP and other civil rights groups would oppose government restrictions on hate speech. Instead, they advocated counter-speech as the most effective means of combating bigoted expression. By the end of 1915, DuBois was urging blacks to turn away from censorship as a means of combatting racist speech and to instead "use their many talents and leadership in putting before the world in picture, drama, poetry, music, and pageant their claims to the white man's tolerance and respect."[42]

II. HENRY FORD'S *DEARBORN INDEPENDENT*

Jewish civil rights organizations confronted a similar dilemma in the 1920s, when Henry Ford decided to publish a newspaper. In 1920, Ford began publishing *The Dearborn Independent*, a vicious publication specializing in antisemitic diatribes. *The Dearborn Independent* portrayed jazz as a dangerous "Jewish creation," accused Jews of corrupting baseball, and published parts of the conspiracy tract *The*

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[39] Allison Kinney, *How the Klan Got Its Hood*, NEW REPUBLIC (Jan. 8, 2016).

[40] Weinberger, *supra* note 21, at 79.

[41] *See id.* at 78–79; FILMS AND PLAYS: BIRTH OF A NATION, 1940 (NAACP Papers).

[42] Weinberger, *supra* note 21, at 91.

Protocols of the Elders of Zion, which portrayed a paranoid vision of a Jewish international banking conspiracy.[43] *The Dearborn Independent* was not the first antisemitic newspaper to be published in the United States, but it did represent one of the most virulent attacks on Jews in American history up to that time.[44]

The nation's three major Jewish civil rights organizations—the American Jewish Committee, the Anti-Defamation League, and the American Jewish Congress—agreed that *The Dearborn Independent* had to be halted. Yet how to accomplish that was unclear. In most states, there were no hate speech or "group defamation" laws that could be used against Ford and his publication.

For a brief period in the early 1920s, the major Jewish civil rights organizations supported hate speech or group defamation laws. There were no First Amendment restrictions on such laws at the time. Under reigning First Amendment jurisprudence, states had broad police powers to suppress speech with a so-called "bad" or "pernicious tendency" to provoke violence, moral corruption, or other social harm.[45] Group defamation laws were advocated by the most prominent Jewish civil rights lawyer, Louis Marshall. But Marshall then reversed his position and opposed the use of law to combat antisemitism. Marshall would use extralegal measures to halt *The Dearborn Independent* and to force Ford to publicly apologize for his hate speech. Marshall's actions would start major Jewish civil rights organizations on a course of opposition to hate speech laws in the coming years.

A. Louis Marshall's Battle Against Hate Speech

Louis Marshall was a prominent New York lawyer of the early twentieth century who has had a lasting effect on history as a legal defender for civil rights.[46] With the exception of Louis Brandeis, Marshall was the most noted Jewish lawyer of his

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[43] Robert S. Rifkind, *Confronting Antisemitism in America: Louis Marshall and Henry Ford*, 94 AM. JEWISH HIST. 71, 72 (2008); *The Perilous Fight / America's World War II in Color / Anti-Semitism*, PBS, https://perma.cc/YT3W-W5CY (excerpting *Dearborn Independent* series).

[44] James Loeffer, *An Abandoned Weapon in the Fight Against Hate Speech*, ATLANTIC (June 17, 2019).

[45] Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 432–33.

[46] Mark A. Raider, *"Vigilantibus Non Dormientibus": The Judicial Activism of Louis Marshall*, 14 JEWISH SOC. STUD. 40 (2007).

generation.[47] From 1912 to 1929, Marshall served as president of the American Jewish Committee. The American Jewish Committee, the oldest Jewish civil rights organization in the United States, was founded in 1906 by wealthy American Jews of German descent.[48] In 1913, another Jewish civil rights organization, the Anti-Defamation League, was created.[49] The ADL's mission was "to stop, by appeals to reason and conscience and, if necessary, by appeals to law, the defamation of the Jewish people." Then in 1918, the American Jewish Committee's critics, including Rabbi Stephen S. Wise and Justice Louis Brandeis, formed the rival American Jewish Congress as a more populist organization that would appeal to a range of constituents regardless of their ethnic or national origins.[50]

Two years later, Henry Ford's *Dearborn Independent* published the first of a series of articles titled "The International Jew," which quoted liberally from *The Protocols of the Elders of Zion*. Marshall sent a letter to Ford describing the articles as "insidious and pernicious."[51] When Ford wrote back a snide letter calling Marshall a "Bolshevik orator," Marshall contacted his colleagues at the American Jewish Committee and notified them that he was contemplating a lawsuit. "It may be desirable," he said, "to bring an action against Ford and the Dearborn Independent for the purpose of forcing the hand of our enemies. It is better that this whole matter be brought out in the open rather than to allow this poison to circulate under the surface as it now does."[52]

Marshall urged Governor Nathan Miller of New York to support an amendment to the state's criminal libel law that would provide for punishment of malicious publications defaming a particular race or religion "as might tend to create

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[47] Victoria Saker Woeste, *Framing* Henry Ford's War*: Representation, Speech, and the New Civil Rights History*, 40 LAW & SOC. INQUIRY 1067, 1070, 1073 (2015).

[48] M. M. SILVER, LOUIS MARSHALL AND THE RISE OF JEWISH ETHNICITY IN AMERICA: A BIOGRAPHY, at xi (2013).

[49] LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA 74 (1995).

[50] VICTORIA SAKER WOESTE, HENRY FORD'S WAR ON JEWS AND THE LEGAL BATTLE AGAINST HATE SPEECH 71 (2012).

[51] *Fourteenth Annual Report of the American Jewish Committee*, 23 AM. JEWISH Y.B. 300, 316 (1921) (*quoted in* Rifkind, *supra* note 43, at 72).

[52] Letter from Louis Marshall to Julius Rosenwald (June 5, 1920), *in* 1 LOUIS MARSHALL: CHAMPION OF LIBERTY: SELECTED PAPERS AND ADDRESSES 330 (Charles Reznikoff ed., 1957) (quoted in Rifkind, *supra* note 43, at 73).

breaches of the peace" or "incite the ignorant to acts of aggression and brutality." He charged that Ford's campaign, with its "mendacity, violence, and indecency," was unparalleled in American history.[53]

The proposed group defamation law failed. Marshall then changed his mind and declared that he opposed attempts to use the law to quash antisemitism. Jews "of all people cannot afford to rest under the imputation that we are prepared to proceed with a policy of suppression," he said.[54] Preferring to rely on what he called the "sense of justice of the American people," he argued that such coercive actions would be regarded as an interference with freedom of speech and press and would only provide Ford with publicity.[55]

Marshall explained why lawsuits against Ford would not only be ineffective but dangerous. It would be impossible to bring into a single lawsuit all of the lies uttered by Ford. Moreover, a lawsuit would publicize the statements and, if the lawsuit failed, the failure would suggest to the public that Ford's statements were true. Marshall believed that legal proceedings would give hate speakers a platform from which to disseminate their views.[56]

Marshall had also thought deeply about the Constitution. He understood that state action can pose a threat to minorities unless it is restrained. Minority groups relied on freedom of expression to fight for their own civil rights. Marshall came to believe that silencing bigots through the law was not a substitute for what he described as the more enduring process of education against prejudice.[57] Marshall then announced that he opposed hate speech laws, which "would enable our enemies to shovel into the record all kinds of stupid and inane charges, which . . . would find credence on the part of those who either lack intelligence or who possess the fanaticism which constitutes favorable soil for antisemitic propaganda."[58]

Jewish civil rights leaders embraced Marshall's position that Ford's publication could best be stalled through means other than law, such as boycotts, gathering and

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[53] Letter from Louis Marshall to Rabbi Joseph Stolz (Jan. 12, 1906), *in* 1 LOUIS MARSHALL, *supra* note 52, at 21–22.

[54] MORTON ROSENSTOCK, LOUIS MARSHALL, DEFENDER OF JEWISH RIGHTS 167 (1965).

[55] *Id.* at 155.

[56] Rifkind, *supra* note 43, at 77–78.

[57] *Id.* at 79–81.

[58] *Id.* at 77; *see also* ROSENSTOCK, *supra* note 54, at 167–68.

publishing evidence to disprove Ford's allegations, and using ridicule to undermine Ford. The American Jewish Committee and other organizations arranged to have over two hundred prominent Americans, including President Wilson and ex-President Taft, sign a petition condemning *The Dearborn Independent*.[59]

B. Sapiro v. Ford

The Dearborn Independent finally met its demise when it published false accusations about a leading Jewish activist named Aaron Sapiro, who had become famous for organizing farmers' marketing cooperatives.[60] Entitled "Jewish Exploitation of Farmer Organization," *The Dearborn Independent*'s series of twenty articles, which ran for about a year in 1924, attacked Sapiro as the leader of a Jewish "plot" to exploit the farmers of America.[61] *The New York Times* described the accusations: "Mr. Sapiro was accused in the articles of being a cheat, a faker and a fraud, and there were animadversions against the Jewish people."[62]

In January of 1925, Sapiro sent a formal demand to Ford for the retraction of the articles.[63] When Ford refused, Sapiro filed a $1 million libel suit on behalf of "myself and my race." "What I seek is vindication in court both for myself and members of my race who have been libeled by Mr. Ford. If I win this case I believe that the people will be fair enough to see the lack of faith that has accompanied Ford's persecution of the Jews," he said.[64] One might imagine that given Marshall's stance against hate speech laws, he would have disapproved of Sapiro's attempts to bring a lawsuit for group defamation.[65]

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[59] ROSENSTOCK, *supra* note 54, at 155.

[60] *Id.* at 182; Grace H. Larsen & Henry E. Erdman, *Aaron Sapiro: Genius of Farm Co-Operative Promotion*, 49 MISS. VALLEY HIST. REV. 242, 267 (1962).

[61] *Sues Ford for $1,000,000: Aaron Sapiro Charges Libel in Dearborn Paper's Market Articles*, N.Y. TIMES, Apr. 23, 1925, at 6.

[62] *Ford Will Testify as Sapiro Witness; Six Women on Jury,* N.Y. TIMES, Mar. 16, 1927; Rohan Pavuluri, *Sapiro vs. Ford: The Mastermind of the Marshall Maneuver*, EXPOSÉ MAG., https://perma.cc/Z96D-HJ5E.

[63] Letter from Aaron Sapiro to Henry Ford et al., Demand for Retraction (Jan. 6, 1925), https://perma.cc/LM24-MTUD.

[64] *Sapiro Charges Libel*, *supra* note 61, at 6.

[65] Rifkind, *supra* note 43, at 77–78.

During the trial, a contested point was whether *The Dearborn Independent* had libeled Sapiro only as an individual, or whether all Jews had been libeled. In a pretrial ruling, the judge declared that Sapiro could not sue for group defamation, because Michigan had not passed a group defamation statute.

The lawsuit was tried after two years of preliminary proceedings. Sapiro hoped that Ford would be critically examined on the witness stand. But Ford got in an automobile accident and could not appear in court. The trial came to an end in April of 1927, when one of the jurors was interviewed by a reporter and the judge resultingly declared a mistrial.[66]

Realizing that a second trial would tarnish his reputation even further, Ford reached out to Marshall. Marshall thought that Sapiro would likely settle if Ford apologized. He convinced Ford to retract the charges in *The Dearborn Independent* and to issue an apology written by Marshall and signed by Ford. Ford claimed—falsely—that the subordinates who ran his newspaper betrayed him by publishing articles that did not accurately represent his views.[67]

Ford authorized a retraction of the statements against Sapiro: "I deem it to be my duty as an honorable man to make amends for the wrong done to the Jews as fellow-men and brothers, by asking their forgiveness for the harm that I have unintentionally committed, by retracting so far as lies within my power at the offensive charges laid at their door by these publications, and by giving them the unqualified assurance that henceforth they may look to me for friendship and goodwill."[68] The press and the public interpreted Ford's "apology" as a victory for Sapiro.[69]

Sapiro then announced his settlement with Ford, as Marshall had planned.[70] "Ford" wrote a letter of apology to Sapiro, which was published in *The New York Times*. Ford demurred that "it has . . . been found that inaccuracies of fact were present in the [*Dearborn Independent*'s] articles and that erroneous conclusions were drawn from these inaccuracies by the writer." In his next line, Ford admitted

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[66] *Id.*

[67] *Races: Apology to Jews*, TIME (July 18, 1927), https://perma.cc/C5PD-8V2H.

[68] *Statement by Henry Ford*, 29 AM. JEWISH Y.B. 383, 387 (1927).

[69] *Mr. Ford Retracts*, 76 REV. REVS. 197–98 (1927); *Henry Ford's Apology to the Jews*, 146 OUTLOOK 372–74 (1927).

[70] *Ford and Sapiro Settle Libel Suit*, N.Y. TIMES, July 17, 1927, at 1, 15.

that "Mr. Sapiro may have been injured and reflections cast upon him unjustly" as a result.[71]

"*The Dearborn Independent*," Ford wrote, "will be conducted under such auspices that articles reflecting upon the Jews will never again appear in its columns." "The character of the charges and insinuations made against the Jews . . . justifies the righteous indignation entertained by Jews everywhere toward me because of the mental anguish occasioned by the unprovoked reflections made upon them," he continued. He concluded with a repudiation of hate speech: "It is wrong . . . to judge a people by a few individuals and I therefore join in condemning unreservedly all wholesale denunciations and attacks."[72]

Ford's apology was celebrated in the nation's press. In the words of the *Telegram*, "if one of the richest men in the world can't get away with an antisemitic movement in this country, no one else will have the nerve to try it."[73] When *The Dearborn Independent* was no longer able to serve its original purpose of disseminating hate speech, Ford stopped publishing the newspaper.[74]

In a dramatic way, through public pressure and counter-speech, Marshall had imposed a hate speech ban on the decade's most prominent antisemite. In the words of one scholar, "Ford could not speak out against Jews for the rest of his life if he wanted to maintain any credibility in Americans' eyes."[75]

C. Anti-Nazi Laws

During the 1930s, more than 800 fascist groups with names like Silver Shirts and Patriotic Sons of America gained a foothold in the United States, promising hope and prosperity to disaffected and impoverished Americans.[76] In New Jersey, groups affiliated with the Nazi Party such as the German American Bund con-

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[71] *Id.*; Editorial, *Sapiro Case Settled*, DEARBORN INDEP., July 30, 1927, at 11.

[72] *Ford Apologizes to Jews and Halts Magazine Attacks*, N.Y. HERALD TRIB., July 8, 1927.

[73] *The Ford "Retractor"*, LITERARY DIG., July 23, 1927, at 8 (quoting the *Telegram*).

[74] Pavuluri, *supra* note 62.

[75] *Id.*

[76] BRADLEY W. HART, HITLER'S AMERICAN FRIENDS: THE THIRD REICH'S SUPPORTERS IN THE UNITED STATES (2018); Leland V. Bell, *The Failure of Nazism in America: The German American Bund, 1936–1941*, 85 POL. SCI. Q. 585 (1970).

ducted military-style drills, distributed literature, and marched in the street chanting "Heil Hitler."[77] A few states passed hate speech laws, dubbed "anti-Nazi" laws, to quash the violence and mayhem that the Nazis seemed to provoke wherever they went. New Jersey's "anti-Nazi" law stated that any person who made speeches or circulated publications subjecting "any groups of persons . . . to prejudice, shame, hatred, ridicule, disgrace, contempt, or hostility by reason of race, color, religion, creed, or manner of worship" could be criminally punished.[78]

Several constituents of the American Jewish Committee approached the organization about whether anything could be done about the hate speech of the German American Bund and other Nazi groups. The organization appointed a Lawyers' Advisory Committee to investigate the question of whether "group defamation laws [can] provide a remedy for antisemitism." The Committee produced a position paper, "Laws Affecting Racial and Religious Propaganda," which reiterated its rejection of hate speech laws on the grounds that they would be used to hurt minorities.[79]

"Because of the[ir] necessarily vague language," hate speech or group defamation laws would not only curtail hate speakers, but also the free speech of minority groups, it asserted. The Lawyers' Advisory Committee also opposed libel prosecutions because juries were rarely comprised of members of minority groups, and an adverse verdict could give the impression that the defamation at issue in the case was true. Even a favorable verdict could backfire, as unfavorable stereotypes would be raised to the public's attention during legal proceedings.[80]

Prosecutions and trials would give fascists a platform from which to broadcast their views, the position paper continued. Before the Nazis rose to power in Weimar Germany, they had been prosecuted under criminal libel laws. Yet the Nazis used the proceedings for publicity. Under cross-examination in a libel case, Hitler had shouted: "I won't let myself be insulted any longer! They are trying to stage a bit of political propaganda! I won't answer these Jewish lawyers anymore!"[81]

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[77] WARREN GROVER, NAZIS IN NEWARK 90 (2003).

[78] Act of April 8, 1935, ch. 151(1)(c), 1935 N.J. Laws 372.

[79] American Jewish Committee, Laws Affecting Racial and Religious Propaganda (June 1935) (unpublished manuscript) (ACLU Papers).

[80] *Id.*

[81] *Hitler, Infuriated, Denies Foreign Aid: Declares on Stand that Nazis Will Not Accept Funds from Italy or Other Countries*, N.Y. TIMES, June 10, 1932, at 6. Hitler was fined for contempt of court

"Laws of this kind are appealing on their face, but we know from experience that they cannot be enforced," the Lawyers' Advisory Committee concluded. "Any attempt to enforce them does an immeasurable amount of harm."[82]

The American Jewish Committee and American Jewish Congress used these rationales to argue for the dismissal of criminal libel charges against Robert Edmondson, one of most prolific publishers of pro-Nazi material in the United States. Edmondson produced hundreds of pamphlets with titles such as *Invisible Government* and *Proof of a Jewish Conspiracy to Communize America and Rule the World.*

The American Jewish Committee and American Jewish Congress filed an amicus brief contending that the trial of Edmondson could be used as a "sounding board for malicious propaganda."[83] During the trial, Edmondson would likely call notorious antisemites as witnesses. If Edmondson were to be acquitted, that might be seen as proof of the truth of his allegations. Even if Edmondson were convicted, antisemites would cast him as a martyr to free speech.[84] Criminal libel or hate speech laws would undermine freedom of speech and thus "react against the very minorities sought to be protected," the brief stated.[85] The "true and effective reply to the propaganda of bigots" was not criminal prosecution, it concluded, but freedom of speech and "a campaign of education" against prejudice.[86]

Judge James Wallace dismissed the indictment. "It is wiser to bear with this sort of scandalmongering rather than to extend the criminal law so that in the future it might become an instrument of oppression," he concluded. "We must suffer the

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and disorderly conduct. *See* ZECHARIAH CHAFEE JR., GOVERNMENT AND MASS COMMUNICATIONS 122 (1947).

[82] NAOMI COHEN, NOT FREE TO DESIST: THE AMERICAN JEWISH COMMITTEE 1906–1966 (1972); American Jewish Committee, *supra* note 79.

[83] Statement, American Jewish Committee, Outcome of Criminal Prosecution of R.E. Edmondson, Antisemitic Pamphleteer (June 1938), https://perma.cc/Y3H6-8PMB; Dov Fisch, *The Libel Trial of Robert Edward Edmondson: 1936–1948*, 71 AM. JEWISH HIST. 79 (1981).

[84] Memorandum Submitted as Amicus Curiae on Behalf of the American Committee on Religious Rights and Minorities et al. at 4, People v. Edmondson, 4 N.Y.S.2d 257, 168 Misc. 141 (1938), https://perma.cc/33HV-PK94.

[85] *Id.* at 2.

[86] *Id.* at 5.

demagogues and the charlatans in order to make certain that we do not limit or restrain the honest commentator on public affairs."[87]

III. HATE SPEECH LAWS IN THE SECOND WORLD WAR

During the Second World War, the passage of hate speech laws took on new urgency as America was flooded with "hate literature" that seemingly interfered with the war effort. Native fascist groups and agents of Nazi Germany circulated pamphlets and periodicals with racist, antisemitic, and anti-Catholic invective, with titles like *America Preferred*, *The Cross and the Flag*, *The Defender*, *Patriotic Research Bulletin*, and *X-Ray*.[88] The purpose of this "hate literature" was to undermine the war effort by fomenting violence between racial and religious groups.[89]

"Hate propaganda" was said to be responsible for race riots in munitions plants that resulted in deaths and property damage running into the millions.[90] Commentators believed that, under the exigent circumstances of wartime, the nation had to take "drastic steps" to eliminate the "systematic defamation of racial and religious groups," including passing hate speech laws.[91]

Between 1940 and 1945, the United States engaged in a historic experiment with "race hate" legislation, as it was known at the time. States and cities across the country passed hate speech laws.[92] These laws did not yet conflict with the First Amendment. The Supreme Court had yet to fully embrace the "clear and present danger" test, and in *Chaplinsky v. New Hampshire* (1942), it had deemed "fighting words" to be unprotected speech.[93]

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[87] *Edmondson*, 4 N.Y.S.2d at 268.

[88] MARIANNE SANUA, LET US PROVE STRONG: THE AMERICAN JEWISH COMMITTEE, 1945–2006, at 40–41 (2007).

[89] *Declaring Certain Papers, Pamphlets, Books, Pictures, and Writings Nonmailable: Hearings on H.R. 2328 and H.J. Res. 49 Before a Subcomm. of the H. Comm. on the Post Office & Post Roads*, 78th Cong. 34 (1943) (statement of Max Perlow, Acting President, Jewish People's Committee).

[90] *Id.*

[91] Note, *Freedom of Speech and Group Libel Statutes*, 1 BILL RTS. REV. 221 (1941).

[92] *Declaring Certain Papers*, *supra* note 89, at 34.

[93] Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942).

None of these hate speech laws ultimately proved to be effective in eradicating "hate propaganda." There was no apparent reduction of racial or religious discrimination in jurisdictions with group defamation or hate speech laws.[94] The NAACP and the American Jewish Committee maintained their opposition to hate speech laws, recommending alternatives such as counter-speech and ignoring or "quarantining" hate speakers.

A. The NAACP's Continued Opposition to Hate Speech Laws

During the Second World War, thousands of Americans received "hate propaganda" in the mail. "Hate sheets" defaming racial, ethnic, and religious groups appeared unsolicited in millions of mailboxes around the country. Much of this "hate mail" was shipped from Nazi Germany and funneled through American organizations posing as legitimate academic and commercial organizations. This propaganda, ironically, drew on techniques that had been developed by American advertising and public relations firms.[95]

In 1943, New York Congressman Walter Lynch introduced a bill criminalizing the mailing of "antiracial and antireligious propaganda." Congress had already banned from the mail obscene matter, lottery tickets, and material used to promote frauds.[96] The Lynch bill would add to the definition of nonmailable matter all "writings of any kind containing any defamatory and false statements which tend to expose persons designated, identified, or characterized therein by race or religion . . . to hatred, contempt, ridicule, or obloquy, or tend to cause such persons to be shunned or avoided, or to be injured in their business or occupation."[97] The bill was described by its supporters in Congress as "the first realistic step to prevent the use of government institutions in order to destroy and undermine the government of the United States and the democratic way of life."[98]

The NAACP joined together with the American Civil Liberties Union to oppose the postal ban. The NAACP sent a representative to the hearings who testified

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[94] *Declaring Certain Papers*, *supra* note 89, at 139.

[95] HENRY HOKE, BLACK MAIL: THE INSIDE STORY OF THE CAMPAIGN TO DISRUPT AMERICA—HOW IT WAS PLANNED—HOW IT OPERATES—WHAT IT IS DOING (1944).

[96] *Groups Ask Mail Ban on Race Hate Matter: Urge House Committee*, N.Y. TIMES, Nov. 17, 1943, at 46.

[97] *Declaring Certain Papers*, *supra* note 89, at 1.

[98] *Id.* at 13 (statement of J. Nathan D. Perlman, Vice President, American Jewish Congress).

that "the means adopted to achieve this meritorious end will not lead to the results desired." "The [NAACP] has always believed in keeping open the channels of free expression. . . . [It] is apprehensive that enactment of the bill or resolution would lead to a stifling of free expression of grievances and would impair the constitutional right of petition and free speech and freedom of the press, and through the denial of these rights, lead to an aggravation of race and religious tensions, which may express themselves in violence and other forms of law violation," the NAACP representative noted.[99]

During the 1930s and '40s, leaders of the NAACP had continued to campaign against hate speech laws. In the 1930s, NAACP leader Walter White had denounced the New Jersey "anti-Nazi" law. "Although this bill is aimed at the Nazis, it can with equal facility be used against any other group. For example, a legitimate protest by Negroes" against segregation could be "interpreted as an attack on white people," he contended.[100] White noted how laws against "race hatred" had been used to suppress civil rights activists in the South. For example, in Memphis in 1940, editors of two black newspapers were ordered by the police commissioner to stop publishing articles calling for integration—articles that would "stir up feelings between the whites and the blacks"—lest they violate a municipal law against publishing inflammatory articles that would incite "race hatred."[101]

Thurgood Marshall, the NAACP's chief legal counsel from 1936 to 1961, spoke out against laws punishing hate speech or "race hatred." Marshall expressed his fear that those laws would be used "in connection with Negro issues." NAACP efforts against the poll tax, he believed, "might be interpreted as an act of discrimination against the white race."[102] "There is grave danger that these bills when enacted will serve to throttle . . . any [speaker] which seeks to champion the cause of minority groups. Usually the wording of these statutes and proposed bills is very indefinite in meaning and might be used to apply to almost any critical statement," Marshall

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[99] *Id.* at 110 (statement of Donald Jones, Assistant Field Secretary, NAACP).

[100] Letter from Walter White to Clement DeFreitas (July 5, 1935) (NAACP Papers, Part 12: Selected Branch Files, 1913–1939, New Jersey (Jan. 1, 1935–Dec. 1, 1935)).

[101] *Two Memphis Editors Warned Against Inciting Race Hatred*, RICHMOND TIMES-DISPATCH, Dec. 20, 1940, at 5.

[102] Minutes of ACLU Subcommittee (Feb. 21, 1940) (ACLU Papers, Volume 2186).

concluded.[103] In the 1940s, the national NAACP officially advised its branches to oppose all proposed hate speech laws.[104]

In 1952, the Supreme Court upheld the 1917 Illinois hate speech law in *Beauharnais v. Illinois*, describing hate speech or group defamation as a form of "low value" speech that could be banned without any constitutional difficulty.[105] *Beauharnais* involved a white supremacist leader named Joseph Beauharnais who was prosecuted for distributing leaflets reading, "The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and the 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."[106] Justices Black and Douglas dissented.[107] If racists could be forbidden from voicing their perspectives in Illinois under a hate speech law, Black opined, the same standard, speech "offensive to the community," could be used by a Southern state to outlaw civil rights activists from voicing their opinions.[108]

The NAACP and the African American press denounced the *Beauharnais* decision. "Leading Negro newspapers oppose the Supreme Court ruling on Joseph Beauharnais, white race-monger," noted a columnist in the *Pittsburgh Courier*, publishing under the headline "Negro Press Has a Stake in the Issue of Free Speech."[109] Thurgood Marshall filed an amicus brief along with the ACLU asking the Court to reconsider the decision. The NAACP shared the fears of Justices Black and Douglas that "a weapon has now been given to the enemies of minority groups." The Supreme Court declined to rehear the case.[110]

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[103] Letter from Edward R. Dudley to Alexander H. Pekelis (June 18, 1945) (NAACP Papers, Part 18: Special Subjects, 1940–1955, J–L (Jan. 1, 1943–Dec. 31, 1945)).

[104] *Id.*

[105] Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952).

[106] *Id.* at 276.

[107] *Id.* at 267.

[108] *Id.* at 273–75.

[109] J.A. Rogers, *Negro Press Has a Stake in the Issue of "Free Speech" and Beauharnais; Names Cannot Hurt Us*, PITTSBURGH COURIER, May 31, 1952, at 7.

[110] *See* Beauharnais v. Illinois, 343 U.S. 988 (1952) (petition for rehearing denied).

B. The "Quarantine" Policy

During the war, the American Jewish Committee maintained its policy against legal restrictions on hate speech. The organization continued to fear that hate speech laws could backfire by suppressing free speech and drawing attention to bigots. "To bring an anti-Semite into court . . . is simply to play into his hands. . . . [A] court trial only gives him a platform from which to reach millions instead of hundreds," it noted. The American Jewish Committee doubted whether a group defamation law could be drafted which could "have sufficient teeth" to attack group hatred but not restrict "bona fide discussion of public issues."[111]

These concerns led the American Jewish Committee to develop a novel tactic for dealing with hate speech that it dubbed the "silent treatment." The "silent treatment" was an alternative to hate speech laws that would diminish the impact of hate speakers while at the same time preserving freedom of speech.

The "silent treatment" called for the denial of publicity to the activities of "professional bigots." The idea was that demagogues thrived on publicity; they would wither away if no one paid them any attention. "The silent treatment is based upon the theory that it is better to treat a hate-filled vendor of racial and religious malice as an insignificant rat who does not deserve public attention, rather than as a powerful personage of great importance and prestige," observed Solomon Fineberg, the American Jewish Committee executive who developed the policy. "The one thing rabble-rousers cannot overcome is that which would close any show on Broadway—a complete lack of publicity in the general press."[112]

The "silent treatment" was publicized by the American Jewish Committee in 1943, in a booklet given to members titled "What to Do When the Rabble-Rouser Comes to Town":

> You've heard of the Rabble-Rouser—the guy who preaches hatred against racial and religious groups.
>
> He's old stuff—and he's POISON!
>
> The Rabble-Rouser may come to YOUR town.

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[111] Letter from Morris D. Waldman to Friends (June 1935) (American Jewish Committee Archives, Chronological Files, May–July 1935); Memorandum from Dr. Derenberg to Mr. Waldman, *in* ANALYSIS OF GROUP LIBEL IN GERMANY 4 (May 3, 1935) (American Jewish Committee Archives, Chronological Files, May–July 1935).

[112] S. Andhil Fineberg, *The Quiet Treatment*, N.J. JEWISH NEWS, Apr. 25, 1947, at 4, 11.

> What should you do about it?
>
> BE SCARED?
>
> That would make him happy!
>
> Make believe he doesn't exist?
>
> Certainly NOT!
>
> Scream in mighty protest till you're red in the face?
>
> NO!
>
> . . . The Rabble-Rouser wants publicity—plenty of it. Newspaper stories—good or bad—make him out a BIG SHOT!
>
> The Rabble-Rouser loves street fights—the noisier, the better. If his thugs run riot, that's sure-fire publicity . . .
>
> He thrives on crowds of suckers. When he gets publicity they think he has something on the ball.
>
> That's more publicity.
>
> What can YOU do about it?

The answer to the problem of the Rabble-Rouser was:

> NO MORE FREE PUBLICITY. If he wants to advertise, make him pay for it with his own dough. Expose him to the newspapers and leaders of public opinion. Make them realize the dangers of free publicity.[113]

The "silent treatment" was later recast as "quarantining" the influence of the "rabble rouser" to "as small a segment of the population as we possibly can." The "quarantine" policy was to be combined with public education, in a tactic known as "immunization"—"immunizing" the public against prejudice. "The way to fight the rabble-rousers is by fostering attitudes that reject and negate the purposes, techniques, and concepts of racial and religious hostility wherever and whenever," explained Fineberg.[114]

The "quarantine" policy was first used in 1946 against Gerald L.K. Smith. Smith led a right-wing organization called the Christian Nationalists.[115] In 1946, Smith

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[113] AM. JEWISH COMM., WHAT TO DO WHEN THE RABBLE-ROUSER COMES TO TOWN (1943), https://perma.cc/Y2RD-W7P6.

[114] *See* Solomon Andhil Fineberg, *Checkmate for Rabble Rousers*, 2 COMMENT. 220 (Sept. 1946).

[115] *Gerald L. K. Smith Dead; Anti-Communist Crusader*, N.Y. TIMES, Apr. 16, 1976, at 30; GLEN JEANSONNE, GERALD L. K. SMITH: MINISTER OF HATE (1988); David J. Leonard, *"The Little Fuehrer Invades Los Angeles": The Emergence of a Black-Jewish Coalition After World War II*, 92 AM. JEWISH HIST. 81 (2004).

was the lead speaker at a Cleveland convention of far-right groups. The American Jewish Committee convinced the local Jewish community to use the "silent treatment." As a result, Smith "didn't attract a corporal's guard to his Klan like orations and the collection plate didn't hold enough to pay expenses," observed *The Plain Dealer*. "We permitted [Smith] the freedom of speech guaranteed by the government [he reviles] but we decided that there was nothing in the Constitution compelling us to listen to [him] and to pay one damn bit of attention."[116] In places where Smith was "quarantined," attendance at his meetings dwindled.[117] For the next several decades, "quarantining" would remain the centerpiece of the American Jewish Committee's approach to hate speech.

IV. THE CIVIL RIGHTS MOVEMENT AND HATE SPEECH

During the 1950s and '60s, segregationists in the South attempted to destroy the civil rights movement by attacking its efforts to speak and to organize. Nonviolent protesters were arrested on charges that their activities had "incited unrest" or "breached the peace." Films and plays promoting integration were censored for "obscenity" or inciting "race hatred." The NAACP and other civil rights organizations recognized, more than ever, that the advance of civil rights depended on broad protections for freedom of speech. In the words of ACLU leader Ira Glasser, civil rights advocates "saw equality and free speech as mutually reinforcing, twin pillars of a singular value system."[118] In principle, there was no difference between defending civil rights demonstrators and white supremacists' free speech rights.

In the 1960s, the Supreme Court embraced this view of civil rights and civil liberties as mutually constitutive and intertwined. Partially to assist and protect the civil rights movement, the Court expanded the protections of the First Amendment. By the end of the 1960s, American law and culture afforded broader protections for the expression of ideas than any other nation in the world.[119] The civil

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[116] *The Silent Treatment*, PLAIN DEALER (*quoted in* Memorandum from John Slawson to S. Andhil Fineberg (Sept. 20, 1949) (American Jewish Committee Archives)).

[117] AMERICAN JEWISH COMMITTEE, ANTI-JEWISH PREJUDICE AND AGITATION IN THE UNITED STATES (Solomon Andhil Fineberg Papers, American Jewish Archives).

[118] Ira Glasser, *Introduction*, *in* SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 1, 2 (Henry Louis Gates Jr. et al. eds., 1994).

[119] Hate speech laws that had been enacted in previous decades were struck down by courts or allowed to lapse. *See, e.g.*, *"Anti-Hatred Law" Voided*, ANDERSON HERALD, Feb. 14, 1965, at 26.

rights movement contributed to First Amendment rulings that undermined, if not negated, the possibility of hate speech laws.

A. Freedom for the Thought That We Hate[120]

After *Brown v. Board of Education* was decided in 1954, Southern whites embarked on a massive effort to resist integration. This campaign of "massive resistance" involved suppressing the organizing activities of the civil rights movement.[121] As the NAACP explained in a 1960 position paper titled "The NAACP and the Bill of Rights," many "Negro orientated organizations" had been previously "too burdened with race issues to give much thought to the broad question of civil liberties." But "massive resistance" to the implementation of *Brown* had forced civil rights groups to recognize the importance of civil liberties—it forced a "marriage between civil rights and civil liberties," in the NAACP's words.[122]

In 1961, the NAACP joined the ACLU in defense of white supremacists' free speech rights. The National States' Rights Party (NSRP) was a political party that argued for "states' rights" against the advance of integration. The NSRP had been implicated in numerous acts of racist and antisemitic violence across the South.[123]

In 1960, two leaders of the NSRP, Robert Lyons and Edward Reed Fields, attempted to hold a membership drive in Fairfield, Alabama by distributing copies of its newsletter, *The Thunderbolt*. *The Thunderbolt* promoted Hitler's ideas and vaunted white supremacy.[124] Lyons and Fields also distributed handbills inviting local whites to "HEAR IMPORTANT SPEAKERS" at a meeting hall in downtown Fairfield.[125]

The town of Fairfield tried to halt the meeting. It said that the actions of the NSRP violated a local ordinance prohibiting the distribution of any "handbills, circulars, dodgers, or other advertising matter" and another holding a public meeting

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[120] *See* United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

[121] *See* NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[122] THE N.A.A.C.P. AND BILL OF RIGHTS 1–2 (NAACP Papers, Part 22: Legal Department Administrative Files, 1956–1965).

[123] *See* MICHAEL NEWTON, THE NATIONAL STATES RIGHTS PARTY: A HISTORY (2017).

[124] City of Cincinnati v. Black, 8 Ohio App. 2d 143, 145 (1966).

[125] Brief for the United States as Amicus Curiae at 2–3, Fields v. City of Fairfield, 375 U.S. 248 (1963) (No. 30).

without a permit. The mayor received from a local judge an *ex parte* injunction—one issued without a hearing—against Lyons and Fields on the grounds that holding the meeting and passing out the handbills violated the laws and was "calculated to create a disturbance, incite to riot, disturb the peace, and disrupt peace and good order in the City of Fairfield."[126]

On the day of the meeting, Lyons and Fields went to the town hall, told a crowd that the gathering had been moved to a nearby town, and passed out copies of *The Thunderbolt* which had no notice of the Fairfield meeting. That issue of *The Thunderbolt* asserted that the intention of civil rights activists was to "enslave white people" and "push the White South into the cesspool of complete integration." Lyons and Fields were held in contempt of court for giving out *The Thunderbolt*.[127] They faced five days in jail and a $50 fine. The state Supreme Court upheld the contempt of court conviction in June 1962.[128]

The ACLU and the NAACP took up the case as a test for freedom of speech. They appealed to the U.S. Supreme Court, arguing that both ordinances were unconstitutional abridgements of free speech. Moreover, by obtaining an *ex parte* injunction and punishing the racists for contempt, the city attempted to convert "otherwise unconstitutional and void statutes into ones which can successfully restrain and punish activities which would be protected in other situations described," read the ACLU's brief.[129] The brief cited several instances in recent years of "*ex parte* preliminary injunctions which had threatened to prevent talks and demonstrations against Negro civil rights demonstrations."[130] "If the court rules that temporary injunctions cannot be used to block free speech and association, one of the major obstacles to increased Negro and white opposition to discrimination and segregation will have been overcome," ACLU director John Pemberton noted.[131]

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[126] *Id.* at 3–4.

[127] *High Court Frees Segregationists*, N.Y. TIMES, Dec. 17, 1963, at 29.

[128] Fields v. City of Fairfield, 273 Ala. 588 (1962).

[129] Brief for Appellants at 32, Fields v. City of Fairfield, 375 U.S. 248 (1963) (No. 30).

[130] Press Release, ACLU, ACLU Tests Ex Parte Injunction That Curbs Free Speech and Association (Sept. 26, 1963) (American Civil Liberties Union Papers, MS Years of Expansion, 1950–1990: Series 3: Subject Files: Due Process of Law, 1938–1988, Box 980, Folder 7, Item 781).

[131] *Id.*

Jack Greenberg, Thurgood Marshall's successor as director of the NAACP Legal Defense Fund, filed an amicus brief on behalf of Fields and Lyons, even though the racists opposed the NAACP's participation in the case. "It goes without saying that the petitioner abhors the anti-Negro, antisemitic views and political program of Edward R. Fields and the National States' Rights Party. . . At the same time, petitioner is compelled to recognize that if this particular conviction against Fields is upheld, a precedent in the Alabama courts will be affirmed and substance will be given to similar proceedings in other courts directed against proponents of equality which will . . . seriously impede the movement for equal rights," the NAACP's brief noted.[132] "While petitioner believes that all lawful measures should be taken against illegal conduct by Fields and his party, it does not believe that the state may proceed in a way which denies First Amendment rights. Difficult as it may be to take the position in this case, petitioner believes that First Amendment rights must be vigorously guarded if the proponents of equality are to triumph," it continued.[133]

Black newspapers celebrated the NAACP's defense of the principle of freedom of speech, even if it meant defending white supremacists. In an editorial titled "All on the Same Side," the *Baltimore Afro-American* noted that the NAACP's involvement in the case was "enlightened self-interest—if segregationists could not legally distribute handbills, neither could the NAACP."[134] The *Chicago Defender* observed that "the right of speech, the right to petition, the right to dissent must be enjoyed even by those who disagree with us. That is the essence of democracy."[135]

The Supreme Court set aside the conviction of the NSRP leaders on the grounds that they did not violate the injunction when they handed out copies of *The Thunderbolt*. The ruling rested on the Supreme Court's 1960 decision involving Sam Thompson, an elderly black man who was convicted of disorderly conduct for "shuffling" in a café in Louisville. The Court in *Thompson v. City of Louisville* had held for the first time that conviction on absolutely no evidence denied an individual due process of law.[136] The *Thompson* precedent was used to decide in favor of

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[132] Motion for Leave to File Brief Amicus Curiae and Brief for the NAACP Legal Defense and Educational Fund as Amicus Curiae at 2, Fields v. City of Fairfield, 375 U.S. 248 (1963) (No. 30).

[133] *Id.*

[134] Editorial, *All on the Same Side*, AFRO-AMERICAN, Jan. 11, 1964, at 4.

[135] *Freedom of Speech*, CHI. DAILY DEF., Dec. 23, 1963, at 13.

[136] 362 U.S. 199 (1960).

white supremacists in *Fields v. City of Fairfield*, which would later be used to protect the civil rights movement. "That Mr. Fields and Mr. Lyons should benefit from a doctrine previously invoked by those on the other side of the racial struggle," noted *The New York Times*, "was only one of the ironies of their case."[137]

Throughout the country, the NSRP was prosecuted under various hate speech laws. The NSRP successfully challenged such ordinances, relying on *New York Times v. Sullivan*, the landmark 1964 decision which instituted First Amendment protections for speakers in libel law and proclaimed a "national commitment" to "uninhibited, robust, and wide-open discourse." The Supreme Court had issued the *Sullivan* ruling to protect civil rights leaders and their allies from weaponized libel lawsuits brought by Southern segregationists. Referencing *Sullivan*, an Ohio appeals court, striking down a hate speech law as unconstitutional, noted that "full and fair comment on social conditions and public affairs is the greatest possible safeguard to the freedom of all."[138]

B. Brandenburg v. Ohio

In another case that was filled with racial ironies, black and Jewish ACLU lawyers defended a KKK leader in a case that resulted in one of the most sweeping free speech rulings in American history. In *Brandenburg v. Ohio* (1969), the Supreme Court issued a fundamental revision of the "clear and present danger" test. *Brandenburg* practically invalidated the possibility of hate speech laws in America.

Clarence Brandenburg was a Second World War veteran who returned from combat paranoid and racist. After suffering a failed business and a bankruptcy, Brandenburg got involved with white supremacist organizations and was desperate to become a leader of the Klan. Brandenburg called a reporter for a Cincinnati television station, asking if he wanted an exclusive "scoop" about the KKK. He promised an exclusive news story about a Klan meeting if the station agreed not to reveal the meeting's location to authorities.[139]

Cameramen and reporters from a local station arrived at a farm in rural Hamilton County, Ohio. Twenty men in white robes gathered around, uttering racial

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[137] *High Court Frees Segregationists*, N.Y. TIMES, Dec. 17, 1963, at 29.

[138] Cincinnati v. Black, 8 Ohio App. 2d 143, 144–45 (1966).

[139] Jacob Hillesheim, 'Sanctuary of Belief and Conscience': The US Supreme Court, Freedom of Speech, and *Brandenburg v. Ohio* 56–63 (2018) (M.A. thesis, University of Nebraska at Kearney).

epithets and violent language. Brandenburg addressed the Klan members while a cross blazed in the background:

> We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.[140]

Brandenburg's remarks were aired on television. Ohio authorities charged Brandenburg with criminal syndicalism. Ohio's criminal syndicalism statute, which was similar to criminal syndicalism laws in most states, criminalized speech advocating "sabotage, violence, or . . . terrorism . . . as a means of accomplishing . . . political reform." In *Whitney v. California* (1927), the Supreme Court had upheld a criminal syndicalism statute against a First Amendment challenge.[141] In the 1960s, several states had revived their criminal syndicalism laws and were using them against the KKK and civil rights activists.[142]

In 1966, Brandenburg was convicted under Ohio's criminal syndicalism law, sentenced to prison, and fined. Because he needed free legal counsel if he were to continue his appeals, he agreed to be represented by the ACLU even though he despised its civil rights advocacy.[143]

The prosecutor argued that Brandenburg had made remarks advocating violence, which presented a "clear and present danger." Brandenburg appealed; the Ohio Court of Appeals upheld the conviction, which was then also upheld by the Ohio Supreme Court. Brandenburg then appealed to the U.S. Supreme Court.[144]

Brandenburg was represented by Allen Brown of the Cincinnati ACLU, whom colleagues described as an "absolute mensch, a Jewish saint."[145] The other ACLU lawyer representing Brandenburg was Eleanor Holmes, later known as Eleanor Holmes Norton. Holmes had graduated from Yale Law School in 1964 and was one of only two black women at the law school. After Yale, she became an organizer for the civil rights group Student Nonviolent Coordinating Committee and traveled to Mississippi for Freedom Summer, a voter registration campaign, in 1964. In 1965,

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[140] Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

[141] Whitney v. California, 274 U.S. 357, 371 (1927).

[142] *20 Negroes in Jail*, N.Y. TIMES, Sept. 25, 1964, at 26.

[143] Steve Kissing, *Brandenburg v. Ohio*, CINCINNATI MAG., Aug. 2001, at 14, 15.

[144] *Id.* at 15.

[145] Hillesheim, *supra* note 138, at 89.

she became the assistant legal director of the ACLU, specializing in free speech cases.[146]

Holmes led the ACLU's efforts on the *Brandenburg* case. "I loved the idea of looking a racist in the face . . . and saying, 'I am your lawyer, sir, what are you going to do about that?'" she recalled. She found herself forced to explain why her defense of racists' right to express their views did not conflict with her "black militant philosophy." "Actually," she said, "the right-wing cases are real plums. When I defend a left winger's right to dissent, I am not saying very much to the increasingly larger body of people in this country committed to repression of extreme ideas. But when I'm defending a racist's rights, the object lesson is dramatically clear."[147]

All the Justices agreed that the conviction should be reversed under the clear and present danger test. Chief Justice Earl Warren assigned the opinion to Justice Abe Fortas. In the first draft of the *Brandenburg* opinion, Fortas wrote that the Ohio criminal syndicalism statute failed the clear and present danger test because it punished mere advocacy of violent acts. Shortly after Fortas wrote the draft, he resigned from the Court. The opinion was redrafted by Justice William Brennan. In his draft opinion, Fortas had invoked the clear and present danger test but strengthened it by requiring advocacy "directed to inciting or producing imminent lawless action."[148] Brennan's redraft added a requirement that such advocacy must be "*likely* to incite or produce such action."[149] This "imminent lawless action" test gave greater protection to "subversive speech" than existed anywhere else in the world.

Brandenburg was grateful for the black and Jewish lawyers who defended him—so grateful that "I guess he forgot his racism for a moment," Holmes recalled. She later commented, "I certainly disagreed with everything he said. He called African Americans all kinds of pejorative names, terrible things. But for me, it was an easy case. It's just the kind of case that you should look at to test whether you are for free speech or not."[150]

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[146] Kissing, *supra* note 143, at 15.

[147] Hillesheim, *supra* note 139, at 89.

[148] Bernard Schwartz, *Justice Brennan and the Brandenburg Decision—A Lawgiver in Action*, 79 JUDICATURE 24, 27 (1995).

[149] Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

[150] Michael S. Rosenwald, *The Landmark Klan Free-Speech Case Behind Trump's Impeachment Defense*, WASH. POST, Feb. 12, 2021.

Brandenburg would later be used to protect civil rights activists in *NAACP v. Claiborne Hardware* (1982). In March of 1966, after white officials failed to acknowledge their demands for integration, the NAACP led a protest against white merchants in Port Gibson, Mississippi. Charles Evers, Field Secretary for the Mississippi NAACP, called for a total boycott of all white-owned businesses in Claiborne County. "If we catch any of you going into any of them racist stores, we're gonna break your damn neck," he shouted to a crowd. Violence occurred several weeks after the speech. The merchants sued for economic losses.[151]

Evers' words, however emphatic, "did not transcend the bounds of protected speech set forth in *Brandenburg*," wrote Justice John Paul Stevens. There was no evidence that Evers authorized or directly threatened acts of violence. Stevens acknowledged that Evers spoke with passion. "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." Stevens concluded that "to rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'"[152]

V. Reversal and Retrenchment

A. The J.B. Stoner Incident

After sixty years of opposing hate speech laws, several significant civil rights organizations, including the NAACP and ADL, reversed their positions and advocated legal restrictions on hate speech in the 1970s. It is not entirely clear why this shift took place. With civil rights victories behind them, those organizations may have felt less willing to tolerate slurs and stereotypes. Overt expressions of racism and bigotry had become unacceptable in society generally.[153] After achieving a

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[151] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982). In other decisions protecting the free speech rights of civil rights activists, Likewise, other important decisions protecting the free speech rights of civil rights activists—*NAACP v. Button*, 371 U.S. 415, 444–45 (1963), *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and *Cox v. Louisiana*, 379 U.S. 536, 552 (1965)—relied on *Terminiello v. Chicago*, 337 U.S. 1 (1949), which had protected an antisemitic speaker.

[152] *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 928.

[153] In the words of communication scholar Haig Bosmajian, writing in 1978, as "minorities have become increasingly aware that the racial and sexual labels, definitions, and stereotypes that have been inflicted upon them have been used as instruments of power and control, there have been

number of successes in the previous decade, civil rights groups may have worried less about the consequences of silencing their opponents, or may have no longer feared that the government would use hate speech laws against them.[154]

An important moment in this new direction was the protest of the NAACP and the ADL in 1972 against the television campaign ads of Jesse Benjamin ("J.B.") Stoner, the white supremacist founder of the National States' Rights Party. J.B. Stoner was known as the "Southern Fuehrer." He began his inauspicious, racist career when he chartered a chapter of the Ku Klux Klan in Chattanooga at the age of eighteen.[155] Stoner's racist and antisemitic rants gained popularity after *Brown v. Board of Education*, when he became the voice of white segregationist rage. Stoner was responsible for a string of bombings of Jewish temples, black churches, and recently-integrated schools in the South. In 1972, Stoner ran for the Senate in Georgia, pledging that he would call for the repeal of civil rights legislation and "stop race mixing insanity" by cutting off federal funds for school desegregation efforts.[156]

"I am J.B. Stoner. I am the only candidate for United States Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrel's civil rights law. . . . Vote white. This time vote your convictions by voting white racist J.B. Stoner into the run-off election for United States Senator," he said, dressed in a black suit and bow tie, with a Confederate flag in his breast pocket. Several racist epithets were intermingled in this tirade.[157] Within minutes of the initial

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greater efforts to minimize the use of racial and ethnic epithets and the portrayal of degrading pictures which are viewed by the offended groups as insulting, malicious, provocative, and defamatory." Haig A. Bosmajian, *Freedom of Speech and the Language of Oppression*, 42 W.J. SPEECH COMMC'N 209, 209–10 (1978).

[154] Clive Webb, *Freedom for All? Blacks, Jews, and the Political Censorship of White Racists in the Civil Rights Era*, 94 AM. JEWISH HIST. 267, 286 (Dec. 2008).

[155] *Id.* at 267.

[156] *Id.* at 268.

[157] Congressional Archives Carl Albert Center, *J.B. Stoner Campaign Ad (1972)*, YOUTUBE (2021), https://youtu.be/4SokWrDWpyA?feature=shared.

broadcasts, the phone rang off the hook at Atlanta television stations. Residents sent an avalanche of letters to the FCC.[158]

After consulting with the NAACP and the ADL, Atlanta mayor Sam Massell issued an executive order that no television station run Stoner's commercial, lest the city be overtaken by rioting.[159] The television stations, on the advice of their lawyers, resisted Massell's order because they did not want to risk violating Section 315 of the Federal Communications Act of 1934, which provides that when a broadcast station allows any "legally qualified candidate" to use its facilities, it must provide "equal opportunities" to all other legally qualified candidates for the same office. Once a candidate purchases time, the candidate can say whatever they want, so long as they do not advocate violence.[160]

The NAACP and the ADL filed a petition asking the FCC to inform local stations that they would not violate Section 315 if they failed to run Stoner's ad. According to the petition, the stations should refuse the ad because it was inflammatory and inciting.[161] Notably, the petition also made an argument based on psychological harm. It included the expert testimony of a pediatrician at Georgia Medical College who opined that exposure to such epithets would prove "detrimental to the normal psychological development of children."[162]

The FCC upheld Stoner's right to run his ads. The FCC Commissioners declared that the petitioners failed to offer evidence that Stoner's ad would produce imminent lawlessness, and that advance censorship "bears heavy pressure against its own constitutional validity." "If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial," the board concluded. "Accordingly, your request is DENIED."[163] Stoner

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[158] Michael D. Murray, *J.B. Stoner and Free Speech: How Free is "Free"?*, 38 W.J. COMMC'N 18, 18–19 (1974).

[159] *Atlanta Mayor Hits Racist Ads of Candidate*, CHI. TRIB., Aug. 3, 1972, at A6.

[160] *In re* Complaint by Atlanta NAACP Concerning Section 315 Pol. Broad. by J.B. Stoner, 36 F.C.C.2d 635, 638 (1972).

[161] Memorandum from the Anti-Defamation League (Aug. 9, 1972) (Oscar Cohen Papers, American Jewish Archives); Letter from Atlanta NAACP to William Ray (Aug. 2, 1972) (Oscar Cohen Papers, American Jewish Archives).

[162] Webb, *supra* note 154, at 290.

[163] *In re Complaint by Atlanta NAACP*, 36 F.C.C.2d at 638.

celebrated the ruling as a "victory for freedom of speech."[164] The NAACP and the ADL threatened to go to federal court to stop Stoner's ads.[165]

B. Restriction Ascendant

The Stoner incident fueled renewed interest by civil rights groups in legal restrictions on hate speech, epithets, and slurs. In the 1970s, minority civil rights organizations, many of them newly formed, began exercising what some called "private censorship" by pressuring television stations and advertisers to eliminate stereotypical depictions from broadcasts.[166] The Italian American Civil Rights League, contending that all Italians were stigmatized by the terms "mafia" and "Cosa Nostra," succeeded in having those words removed from the 1972 film *The Godfather* and a television series on the FBI that was broadcast on the ABC network.[167]

Likewise, in 1970, the Mexican American Anti-Defamation Committee initiated a campaign against Frito Bandito, a cartoon depicting a sombrero-wearing bandit who stole Fritos and spoke in an exaggerated accent. The caricature was used by the Frito Lay company to advertise its Fritos corn chips on television; the campaign ended when California television stations refused to run the commercials and Frito Lay ordered a halt to them.[168] The Committee planned to initiate a lawsuit in federal district court against the executive director of Frito Lay, its advertising agency, and the television networks that sought "$10-million to finance programs plus $100 punitive damages for each person of Spanish-speaking ancestry in the United States."[169] The argument was that the depiction of Frito Bandito "leaves the impression Mexican-Americans . . . are lazy, thieving people," and that it was "group defamation" and created emotional distress.[170]

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[164] *Racist's Right to Speak Upheld*, BOSTON GLOBE, Aug. 4, 1972, at 8. *See also* LaVonda N. Reed-Huff, *Offensive Political Speech from the 1970s to 2008: A Broadcaster's Moral Choice*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241, 259–61 (2008) (describing the Stoner political ad and associated FCC response).

[165] Tom Linthicum & Bob Hurt, *Stoner Ads Upheld, Charges Loom*, ATLANTA CONST., Aug. 4, 1972, at 1A.

[166] Bosmajian, *supra* note 153, at 209–10.

[167] *Closing the Eyes Helps Not at All*, CENT. N.J. HOME NEWS, Mar. 29, 1971, at 18.

[168] Cathy Cooper, *Adios to Frito's Bandito*, FRESNO BEE, Mar. 15, 1970, at 3-C.

[169] *Damage Suit Scores 'Frito Bandito' Ads*, N.Y. TIMES, Jan 1, 1971, at 31.

[170] *Id.*; *Frito Bandito Causing Lawsuit*, STAR GAZETTE, Jan. 2, 1971, at 10. *See also* STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 210–11 (2003).

The culmination of this renewed interest in restrictions on hate speech in the 1970s was the "Nazi-Skokie" incident. In 1977, a small group of uniformed Nazis attempted to march into a Chicago suburb that was populated by Holocaust survivors. The Village of Skokie passed three new ordinances to stop the Nazis. One ordinance made unlawful the public display of symbols offensive to the community and parades by political organizations in military style uniforms.[171] Another ordinance banned the distribution of materials that "promoted or incited hatred against persons because of their race, religion or national origin," on penalty of fine or imprisonment.[172] The ACLU challenged the laws as violations of free speech.

The Holocaust survivors tried to stop the Nazis with the assistance of the ADL. The ADL recanted its earlier position on "quarantining" and contended that the normal tenets of freedom of expression did not apply under the extreme circumstances of the case. ADL lawyers came up with a novel approach that involved filing a class-action lawsuit on behalf of the Holocaust victims living in Skokie.[173]

The ADL lawyers sought to ban the Nazis from marching in Skokie while wearing or displaying Nazi insignia. The rationale for banning such demonstrations was that they would cause the survivors "severe and extreme emotional distress."[174] The theory of the case, resting on emotional or psychological harm, was novel. American law had historically been skeptical about the recovery of damage awards for injury to one's emotions or feelings in the absence of physical injury. However, several states, influenced by social science studies that documented physical harms that can be caused by emotional distress, had begun to recognize a new cause of action for intentional infliction of emotional distress.[175]

The basis of the so-called "survivors' suit" was a sixty-page brief based on studies documenting the emotional and physical harms that were said to be caused by

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[171] Application for Stay of Injunction Prohibiting Public Speech & Assembly in the Village of Skokie, Illinois at 8a–16a, 19a, Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (No. 76-1786).

[172] *Id.* at 17a–18a.

[173] Complaint, Goldstein v. Collin, No. 77 Ch. 4367 (Ill. Cir. Ct. June 27, 1977), https://perma.cc/99ZP-RQ9F.

[174] *Id.*

[175] *See* James Jay Brown & Carl L. Stern, *Group Defamation in the U.S.A.*, 13 CLEV.-MARSHALL L. REV. 7, 29–32 (1964).

hate speech. The survivors commissioned psychologists to document "severe emotional distress" experienced by the survivors that would be exacerbated upon seeing the Nazis in their community. They were prone to an "overwhelming sense of anxiety" and "feelings of terror, shame, or guilt," said experts.[176] This represented an important empirical claim about the harms caused by hate speech. The "survivors' suit" impacted the way that the courts, the press, and the public viewed the Skokie case, and the harms of hate speech more generally. After the survivors' case, the focus of legal restrictions on hate speech was no longer preventing violent breaches of the peace. More often, the purpose of hate speech laws was described as preventing the psychological and emotional harms that are caused by hate speech.[177]

The survivors' suit was dismissed, and the three ordinances were struck down as violations of the First Amendment. Noting "the very grave danger posed by public dissemination of doctrines of racial and religious hatred," Judge Bernard Decker of the United States District Court for the Northern District of Illinois maintained the rule first delivered by Oliver Wendell Holmes: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[178] The ability of American society to "tolerate the advocacy even of hateful doctrines such as Nazism was the best protection we have against the establishment of any Nazi-type regime in this country," Decker wrote.[179]

The courts in the Skokie cases reaffirmed that hate speech is, for all intents and purposes, protected by the First Amendment. Yet free speech for Nazis did not fare as well in the court of public opinion. Gallup polls indicated that while a majority

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[176] Affidavit of Lawrence Zelic Freedman at 2, Goldstein v. Collin, No. 77 Ch. 4367 (Ill. Cir. Ct. June 27, 1977), https://perma.cc/RK8L-CAR3. *See also* William G. Niederland, *The Problem of the Survivor: The Psychiatric Evaluation of Emotional Disorders in Survivors of Nazi Persecution*, 10 J. HILLSIDE HOSP. 233 (1961), *reprinted in* MASSIVE PSYCHIC TRAUMA 8 (Henry Krystal ed., 1968).

[177] *See, e.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

[178] United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

[179] Collin v. Smith, 447 F. Supp. 676, 702 (N.D. Ill. 1978).

of Americans supported free speech in the abstract, 72% believed that Nazis should not be permitted to march in Skokie.[180]

By the 1980s, in part because of the Nazi-Skokie episode, many Americans had come to question whether freedom of speech was compatible with equality and whether there were times when democracy demands less, rather than more, expression. In the 1980s and 1990s, "speech codes" banning hate speech were adopted in over 350 universities across the country.[181] Prominent minority scholars, including Richard Delgado and Mari Matsuda, made passionate arguments for hate speech laws. Building their arguments off of claims that had been made by the Holocaust survivors in Skokie, they contended that First Amendment law had been insensitive to the experiences of the victims of hate speech. Civil libertarians had always objected to using people's feelings as a benchmark for defining limitations on speech. Yet this detached and impersonal approach blinded lawmakers to the effects of hate speech, Matsuda and Delgado argued.[182]

While Delgado relied on social science studies to document the effects of hate speech, Matsuda looked to the personal stories of minorities, or "outsiders," which revealed the psychological pain and dehumanization that is inflicted by hate speech. Matsuda believed that these personal accounts of the harms of hate speech would compel courts to reckon with the human consequences of hate speech, rather than hide behind such technical First Amendment doctrines as "clear and present danger" and "imminent lawless action."[183] By the 1980s, many civil rights advocates and organizations had begun to embrace a full-throated advocacy of hate speech laws that would not have been contemplated even twenty years earlier.[184]

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[180] ROPER ORG., ROPER REPORTS 78-4, Question 44 (1978), DOI: 10.25940/ROPER-31097340 (survey question).

[181] Sanne Steinstra, *Editor's Note: Hate Speech Policies*, 74 LEWIS & CLARK PIONEER LOG, Oct. 23, 2009, at 3.

[182] *See* Delgado, *supra* note 177; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2378 (1989).

[183] Matsuda, *supra* note 182, at 2378. *See also* Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741 (1993).

[184] Notably, the NAACP and the ADL filed amicus briefs defending a law against cross-burning in the 1992 Supreme Court case *R.A.V. v. City of St. Paul*. *See* Brief Amicus Curiae of the Anti-Defamation League of B'nai B'rith in Support of Respondent, R.A.V. v. City of St. Paul, 505 U.S. 377

Conclusion

For much of the twentieth century, civil rights groups were the most vocal and vehement opponents of hate speech laws. Organizations such as the NAACP and the American Jewish Committee recognized that restrictions on hate speech can open the door to restrictions on any speech that government or society deems to be unpopular, including the speech of advocates of racial and social equality.

That insight has been proven to be accurate time and time again. Today, in many countries that have hate speech laws, leftist groups and racial and religious minorities are vigorously prosecuted under those laws.[185] There is no evidence that hate speech laws were effective when they existed in the United States, nor have they been proven to be effective elsewhere in the world.[186]

American civil rights advocates recognized how the vagueness of the concept of "hatred" invites self-censorship. If people can't be sure what might be deemed "hate speech," or what constitutes "hatred or contempt," they will have no choice but to silence themselves. As historical incidents such as the D.W. Griffith controversy illustrate, censorship often turns hate speakers into free speech martyrs. It may encourage them to seek bolder and more harmful means of publicizing their messages, including potentially engaging in violent acts.

In the United States, counterspeech and public education have proven to be effective methods of countering hate speech. Social norms generally proscribe racial slurs and the swastika. Education has led to tremendous advances in racial and religious tolerance in the past fifty years. Hate groups like George Lincoln Rockwell's American Nazi Party, and the neo-Nazi marchers in Charlottesville in 2017, undermine themselves by exposing their horrendous nature to the world, bringing on the condemnation they deserve.

Banning hateful ideas and words seems like an easy solution to a pernicious and complex problem. Yet as civil rights organizations understood early on, punishment of hate speech worsens the problems it was intended to ameliorate. It cannot

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(1991) (No. 90-7675); Ronald K.L. Collins & Sam Chaltain, We Must Not Be Afraid to Be Free: Stories of Free Expression in America 185 (2011).

[185] Glenn Greenwald, *In Europe, Hate Speech Laws Are Often Used to Suppress and Punish Left-Wing Viewpoints*, Intercept (Aug. 29, 2017), https://perma.cc/4UPT-48WW.

[186] *See* Nadine Strossen, Hate: Why We Should Resist It with Free Speech, Not Censorship (2018).

replace the more meaningful work of addressing the underlying social and cultural problems that are the roots of prejudice and hatred.