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The Thought We Hate: A Survey of American Hate Speech Legislation

The legality of hate speech has been a topic debated by legal scholars for almost a century now in America, despite the large changes in socioeconomic circumstances and means of communications shifting drastically over that period of time. Currently, due to the First Amendment in the United States Constitution, hate speech is not an illegal form of expression. Due to specific circumstances someone engaging in hate speech can be found guilty of a crime if they are either threatening people or encouraging others to threaten people, but on its face hate speech is protected by the First Amendment. This was not always the case. In the early 20th century, a number of states passed laws banning "group libel", a concept that closely resembles what we would today call hate speech. In order to examine the legality of American hate speech, this paper presents the history of group libel laws and Supreme Court cases regarding topics closely related to hate speech, compares the legality of hate speech in European countries to the current state of American law, examines how the advent of the internet has changed how hate speech is propagated, and makes a case for why America should potentially adopt laws similar to those found elsewhere in the world. Since there is no formal legal definition of hate speech, this paper will be using the definition found on the United Nations' website: "offensive discourse targeting a group or an individual based on inherent characteristics (such as race, religion or gender) and that may threaten social peace." (United Nations)

The origin of legislation against hate speech in America can be found in the early 20th century, although these laws were categorized under a different name: group libel. These laws, passed by states, cropped up due to a variety of coinciding legal and cultural factors. In terms of legal factors, it was essentially impossible to sue on behalf of any group under civil libel laws in the 19th century. In order to win any libel case, the plaintiff had to prove that the any defaming language had a tangible effect on their finances – which was hard to prove in the case of language defaming a certain minority group instead of an individual. As for the cultural factors, the first two decades of the 20th century were marred by an intense antisemitic moral panic that led to widespread discrimination against people of Jewish descent. In response to both the rampant discrimination against Jewish people and a specific incident involving an affluent Jewish woman being turned away from a hotel on the basis of her ethnicity, Louis Marshall, a prominent Jewish lawyer in New York, in 1913 lobbied for a change to New York statute that would prohibit hotels from specifically advertising that they would refuse to accommodate people on the basis of their race. This law is interesting because it doesn't prohibit refusing any accommodation based on race, only the targeted advertising against certain groups. But by 1926, due to Marshall's lobbying, seven other states had passed similar laws with more broad restrictions on group libel. In this way, they exist as the first example of legislation in America outlawing any speech that exists to target a certain group. In "Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952", Evan P Schultz states:

> "This, then, was the fruit of the first campaign for group libel statutes. Such laws could be justified by one of two theories. They might stand for the proposition that assimilation should be accelerated in America by prohibiting hotels from treating Jews as members of

> a group. Alternately, the laws might indicate support for the right of Jews as a group to have the government protect their good name in the public realm." (Schultz 99)

The sentiment that attacks on specific groups of people due to their race, religion, or political affiliations acted as a threat to security and democracy was only strengthened by the rise of fascism in Europe and the events of World War II. It is a very simple task to draw connections between the virulent attacks on specific groups of people and the Nazi's rise to power in Germany. Enough so that law scholars in America began to argue for more protections against this kind of speech. David Riesman, a prominent American sociologist, argued in 1942 that group libel laws ought to be expanded as a reaction to current political climate, but he also commented on the fact that the American legal system's conception of both freedom of speech and libel made it a very hard task to implement. The American standard for libel, which can trace its origins back to England's standard for seditious libel, treats any verbal or written attack as something that can only affect an individual's reputation. This is why new legislation was required to protect groups against libelous speech. But this comes with the caveat that political speech, generally the kind of speech that specific groups would need protection against, has been given extra deference by the courts.

This tension between security and liberty in regard to group libel came to a boiling point in the mid-20th century in the Supreme Court case *Beauharnais v. Illinois.* Decided in 1952, *Beauharnais v. Illinois* involved a man who was fined for distributing leaflets protesting black people moving into white neighborhoods. He was fined because he was found to be in violation of Illinois's group libel law, specifically because he made it his goal to "portray depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion." In a close decision, 5-4, the Supreme Court upheld the Illinois Supreme Court's

decision to uphold Beauharnais's original conviction, essentially continuing a precedent set in *Chaplinsky v. New Hampshire* that libel and "fighting words" are not protected by the first amendment. Justice Felix Frankfurter in his majority opinion stated, "This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved." (Beauharnais v. Illinois 263*)* But in terms of what legislation against hate speech looks like in modern America, it is actually more enlightening to look at what Justice Hugo Black wrote in his dissent:

> "My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country, that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. I reject the holding that either state or nation can punish people for having their say in matters of public concern." (Beauharnais v. Illinois 270)

Beauharnais v. Illinois represents something of an anomaly in terms of the jurisprudence of the Supreme Court. In a technical sense, *Beauharnais v. Illinois*'s precedent still stands today, it was never overturned and was even cited in the 1982 case *Ferber v. New York*. But as America moved into the late 20th and early 21st centuries, the Supreme Court has made a variety of decisions that have chipped away at the precedent set in *Beauharnais v. Illinois* and the law looks more in line with what Justice Black hoped for in his dissent.

The law surrounding libel began to change in 1964 with the decision in *New York Times Co. v. Sullivan*. A landmark case for many reasons, the precedent set by the majority opinion authored by Justice Brennan established the "actual malice" standard which changes the standard

for which circumstances can be considered criminal libel. It can only be criminal libel if a false statement was either made intentionally or without regard for the truth. This ruling only applies to statements made about public figures, but it represents a trend towards permitting speech rather than suppressing it – which is also a trend that continued in the 1969 case *Brandenburg v. Ohio.* This is another case that only obliquely affects legislation against hate speech and group libel, but it established a precedent that speech should only be restricted when it can cause "imminent lawless action." The context of *Brandenburg v. Ohio* is worth bringing up in the context of hate speech though. The defendant was a member of the Ku Klux Klan and was charged under Ohio's criminal syndicalism statute after appearing on television and advocating for violence against certain races. *R.A.V. v. City of St. Paul* is another Supreme Court case that reaffirmed the standard put in place after the *Brandenburg v. Ohio* decision that involved teenagers who set a cross on fire in the lawn of a black family. The case *Virginia v. Black* also deals with the constitutionality of an ordinance that considered cross-burning *prima facie* evidence of intent to intimidate a person or group. Despite each of these cases involving speech that would be categorized as racially motivated hate speech, symbolic or not, the Supreme Court decisions have unilaterally favored an expansion of free speech over protections against hate speech. The most recent Supreme Court decision related to the legality of hate speech was *Matal v. Tam* in 2017. This case involved a band unable to trademark their name due to it being a reclaimed racial slur. In a unanimous decision, the court struck down the portion of the law that prohibited any trademarks that were racially disparaging – but the opinion written by Justice Alito gives a clear look into the court's current thinking regarding the restriction of speech based on its categorization of hate speech by quoting Justice Oliver Wendell Holmes:

> "[this] idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." (Matal v. Tam)

According to the theory of the marketplace of ideas, an idea first introduced in the context of a Supreme Court decision by Oliver Wendell Holmes, the validity and truth of an idea will be revealed by whether or not the idea emergences from unrestricted public discourse as the broad consensus. As it stands, the law of the land in the United States prioritizes having less restrictions on speech to facilitate this ideal, even when that speech includes hate speech.

The comparison between the legislative approach of America and European countries towards hate speech is really interesting. Obviously, the sociopolitical circumstances of America and Western Europe are very different, but since American law has its origin in English law and both regions have a similar approach to allowing freedom of expression, its not too much of a stretch to compare both legislative approaches to hate speech. As already established, the American approach is to not restrict hate speech unless it can be proven that the hate speech will incite imminent violence. However, European laws tend to either restrict hate speech on its face or for reasons other than imminent violence. For example, the Finnish Constitution restricts any speech that would prevent an individual from participating in and influencing society, and the German Federal Constitutional limits any speech that would assault the dignity, incite hatred, or incite arbitrary measures against a segment of the population due to a group they happen to be a member of. Europe, and other countries whose laws make an effort to restrict hate speech, have enacted these laws to facilitate the democratic process. If a segment of the population feels unable to add to any discourse or participate in society due to hate speech, that society fails to be

a true democracy. Hate speech and disinformation have always paved the way to genocide. This is why the American tendency to protect speech in order to preserve an idealized version of the "marketplace of ideas" is flawed when it comes to matters such as hate speech or group libel. In circumstances when the public discourse is centered on whether or not a certain group of people deserve to have rights, it hardly seems fair to place the onus on that group to argue for their own existence. As international legal consultant Hadley Rose puts it:

> "[W]hat the free expression jurisprudence in the United States fails to acknowledge is the fact that some ideas and viewpoints harm the foundational principles of democracy. […] [T]he rest of the world has willingly confronted the complicated relationship between hate speech and the integrity of the public discourse, while the United States remains stubbornly behind." (Rose 314)

Of course, as we have entered the 21st century, the methods and forums used to communicate and propagate ideas has radically shifted.

The big new factor confounding this debate over the legality of hate speech has been the advent of the communication facilitated by the internet. As the internet allows users to communicate instantly with anyone who has a connection, legislating against internet hate speech has proven to be an increasingly difficult task anywhere in the world. This is due to the nature of the internet and the inherent characteristics of hate speech centralized on websites and forums. According to researcher Bharath Ganesh, hate speech on the internet has three distinctive characteristics: "its decentralized structure, its ability to quickly navigate and migrate across websites, and its use of coded language to flout law and regulation." (Ganesh 37) This raises a multitude of questions regarding regulation and jurisdiction. Up until this point in time, most web forums have been replaced by social media platforms that tend to regulate the content

posted on their sites based on their own standards, but this still raises a lot of issues. These corporations only have interest in protecting their capital; protecting the dignity and security of people of minority races, ethnicities, sexualities, and gender identities is only done when their protection just so happens to help them accrue profit. Compounding on this issue are the real-world consequences that can be attributed to the spread of online hate culture. A large number of hate crimes and violent attacks in recent years can be attributed to people radicalized by hateful rhetoric found online, and in some cases even being pushed by a website's algorithm. There is even a term for the type of public demonization using hate speech that leads to violent attacks: "stochastic terrorism." If a public figure constantly vilifies a certain group of people, statistically there is a greater chance of a violent attack occurring despite each individual attack being unpredictable. This is the type of environment fostered by allowing people with huge reach to engage in ideologically driven hate speech, and stochastic terrorism underscores the need for more focused regulation on hate speech, despite the likely difficulties it will involve in implementing them.

Given how easily hate speech and disinformation travel on the internet, it would be pertinent for the United States to reexamine how they deal with the First Amendment in regard to hate speech. Since the precedent set in *Beauharnais v. Illinois* has not been overturned, any legislation restricting hate speech passed in the 21st would have some hurdles to jump through but it would not be unprecedented and would generally benefit the public discourse in many ways by limiting speech that incites violence towards minority groups. As David Riesman said in 1942, "[P]olicy must be discriminating in judging what sorts of criticism […] further[s] the democratic cause and what sorts of defamatory falsehoods hinder it." (Riesman 731)

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