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A PERFECT STORM: RACE, ETHNICITY, HATE SPEECH, LIBEL AND FIRST AMENDMENT JURISPRUDENCE

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Consider this hypothetical: A state legislature, hoping to protect minority groups from negative ethnic and racially motivated speech, passes a state statute that creates a cause of action for "group libel." Under this hypothetical statute, an individual could bring suit against any person who spreads or publicizes racist or xenophobic ideologies.

This Article explores the policy implications and validity of such a statute by focusing on the intersection of critical race theory, First Amendment free speech jurisprudence, and defamation law. This Article analyzes whether such a statute could survive a First Amendment freedom of speech challenge. It also explores the normative policy implications that may persuade a court in deciding whether hate speech utterances should constitute group libel in a manner consistent with the First Amendment. It then provides a roadmap for the legal arguments that would likely apply.

In addressing these arguments, the Article provides examples of statutory language that a state legislature could use to attempt to comport with First Amendment requirements and overcome an overbreadth challenge. Despite any such efforts, the application of First Amendment jurisprudence would still likely reveal various infirmities in such a statute that could result in it being struck down. The likelihood of such an outcome reveals, from a legal realism perspective, inherent flaws in our norms and doctrines that fail to adequately reflect the inequities of institutional racism and xenophobia as well as the harmful and insidious impact of hate speech.

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I. INTRODUCTION

Consider this hypothetical: A state legislature, hoping to protect minority groups from negative ethnic and racially motivated speech, passes a state statute that creates a cause of action for "group libel." Under this hypothetical law, an individual could bring suit against any person who spreads or publicizes racist or xenophobic ideologies.

This Article explores the policy implications and validity of such a law by focusing on the intersection of critical race theory,[1] First Amendment free

1. "Critical race theory" is a movement that has been described as:
[A] collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up but places them in a broader perspective that includes economics, history, setting, group and self-interest, and emotions and the unconscious. Unlike traditional civil rights discourse, which stresses incrementalism and step-by-step progress, critical

speech jurisprudence, and defamation law. This Article analyzes whether such a statute could survive a First Amendment freedom of speech challenge. It also explores the normative policy implications that may persuade a court in deciding whether hate speech utterances should constitute group libel in a manner consistent with the First Amendment. It then provides a roadmap for the legal arguments that would likely apply.

In addressing these arguments, the Article provides examples of statutory language that a state legislature could use to attempt to comport with First Amendment requirements and overcome an overbreadth challenge. Despite any such efforts, as discussed *infra*, the application of First Amendment jurisprudence would still likely reveal various infirmities in such a statute that could result in it being struck down. The likelihood of such an outcome reveals, from a legal realism perspective,[2] inherent flaws in our norms and doctrines that fail to adequately reflect the inequities of institutional racism and xenophobia as well as the harmful and insidious impact of hate speech.

A. Hate Speech in America

Throughout U.S. history, our society—predominantly white and American born—has used hate speech as a deadly weapon against ethnic and racial minorities, and this reality still exists today.[3] One particularly egregious example is the use of harmful racial propaganda against African Americans, which has created a legacy of racial inequality in the U.S.[4] This propaganda fueled the institution of slavery in the antebellum South, as well as state segregation statutes and lynching during the Reconstruction and post-Reconstruction periods; in modern times, such propaganda reinforces racial profiling by police officers and housing and employment discrimination.[5]

> race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.

RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION, 3 (3d ed. 2017).

2. *See, e.g.*, Calvin Trillin, *Harvard Law*, THE NEW YORKER: A REPORTER AT LARGE, Mar. 26, 1984, at 55 ("According to Legal Realism, cases are decided within the context of the society's cultural and economic and political values, and the law changes when the context changes-when, for instance, the society as a whole begins to worry a little more about protecting the tenant and a little less about protecting the landlord.").

3. *See generally* Evi Taylor et al., *The Historical Perspectives of Stereotypes on African-American Males*, 4 J. HUM. RTS. & SOC. WORK 213 (2019) (tracing the documented history of racism in the U.S. to pervasive modern inequalities throughout the realms of education, employment, and the justice system); EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3rd ed. 2017) (detailing how endemic racism, perpetuated by white supremacy rhetoric, resulted in extreme violence towards African Americans), https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-052421.pdf [https://perma.cc/5YLC-ALV7].

4. *See, e.g.*, EQUAL JUST. INITIATIVE, *supra* note 3, at 3, 53.

5. *See id.*, at 3, 9, 23–24; Taylor, *supra* note 8, at 213, 219.

Following 1877, during the post-Reconstruction Jim Crow Era and Civil Rights Movement, hate groups—such as the Ku Klux Klan—would often espouse inflammatory, hateful language and racist ideologies to incite violent mobs to lynch and murder African American victims.[6] Largely marginalized from modern mainstream discourse, hate groups increasingly use the Internet and social media to recruit new members and regain national influence, with hate-related websites increasing rapidly.[7] Disturbingly, the Southern Poverty Law Center has reported a recent trend of nation-wide resurgence in hate group activity, often emboldened by the divisive rhetoric perpetuated by former President Donald J. Trump and other high profile politicians and public figures.[8]

Law professor Jeremy Waldron argues that "hate speech undermines . . . the public good" of the assurance of security "by intimating discrimination and violence" and by "reawakening living nightmares" of what previous societies have been like.[9] It poses an "environmental threat to social peace, a sort of slow-acting poison," producing its effects over years.[10] From the perspective of members of the targeted groups, hate speech "sets out to make the establishment and upholding of their dignity" much harder.[11] As such, a prohibition against such hate speech helps to ensure the maintenance of social peace and civic order.[12]

To help attain this goal, states may want to consider enacting group libel statutes that provide members of targeted groups the ability to sue any person

6. *See, e.g.*, *id.* at 12–15, 27–39, 57–58.

7. *See* S. POVERTY L. CTR., THE YEAR IN HATE AND EXTREMISM 2019, at 6, 11, 21 (2020), https://www.splcenter.org/sites/default/files/yih_2020_final.pdf [https://perma.cc/FT8X-S25A] (highlighting a recent trend of nation-wide resurgence in hate group activity, often emboldened by the divisive rhetoric perpetuated by former President Donald J. Trump and other high profile politicians and public figures); *see also* Mark Mueller, *Hate Groups Spewing Venom on Net*, BOS. HERALD, Sept. 15, 1996, *reprinted in* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A MULTIRACIAL AMERICA 485–86 (2000). McNeil, *The Long History of Xenophobia in America*, TUFTSNOW (Sept. 24, 2020), https://now.tufts.edu/articles/long-history-xenophobia-america [https://perma.cc/9USV-7SYF]. Numerous other examples of hate speech and xenophobic oppression also exist and have existed throughout U.S. history against other marginalized groups of people, including, but not limited to, Native American, Latinx, Chinese, Japanese, Irish, Italian, Catholic, Muslim, and Jewish people, as well as women, LGBT, mentally ill, and disabled individuals. *See, e.g.*, Taylor McNeil, *The Long History of Xenophobia in America*, TUFTSNOW (Sept. 24, 2020), https://now.tufts.edu/articles/long-history-xenophobia-america [https://perma.cc/9USV-7SYF]; *COVID-19 Fueling Anti-Asian Racism and Xenophobia Worldwide*, HUM. RTS. WATCH (May 12, 2020, 3:19 PM), https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide [https://perma.cc/8RHQ-S4XV].

8. S. POVERTY L. CTR., *supra* note 7.

9. JEREMY WALDRON, THE HARM IN HATE SPEECH 4 (2012).

10. *Id*.

11. *Id*. at 5.

12. *See id*. at 8, 14, 46–47.

who spreads or publicizes overt racist or xenophobic ideologies.[13] Although questions may exist as to the necessity or wisdom of this approach, they can be rebutted. One might argue, for instance, that defamatory statements (as with fighting words or words that inflict intentional emotional distress) already fall under existing tort doctrine.[14] This begs the question of whether a hate-speech code is necessary. Typically, however, the common-law tort of libel has not been extended by courts to protect the reputation of large groups,[15] which leaves the door open for state legislative action. The act of codifying hate speech as libel may also provide the benefit of further deterring people from uttering it—i.e., people may be more discouraged from uttering hate speech if a legislature condemned it through a public pronouncement of law (especially because people might view the law as more legitimate if created by a democratically elected governmental body reflecting the will of the people). This focus on deterrence has support in the Supreme Court's free speech precedent. In *Beauharnais v. Illinois*, the Court held that the discouragement of hate speech was a legitimate state interest supporting the constitutionality of the state's enactment of a criminal hate speech group libel code.[16] Codifying hate speech as group libel would also meet the desirable goal of giving clear and fair notice to the public of what the law proscribes.[17]

A statutory approach would also further the goal of the states serving as "laboratories of democracy." The "state laboratories" principle was articulated by Justice Brandeis in *New State Ice Co. v. Liebmann*.[18] In his dissent, he described how "a single[,] courageous state may, if its citizens choose, serve as a laboratory[] and try novel social and economic experiments without risk to the rest of the country."[19] When any one or more of those experimental policies are successful, they are often expanded to the national

13. *E.g.*, James Loeffler, *An Abandoned Weapon in the Fight Against Hate Speech*, ATLANTIC (June 16, 2019), https://www.theatlantic.com/ideas/archive/2019/06/lost-history-jews-and-civil-rights/590929/ [https://perma.cc/P2DD-YHHM].

14. *Cf.* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 654, n.3 (2000) (citing a similar argument by Margalynne Armstrong regarding "group-oriented" housing discrimination); Margalynne J. Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 912 (1991) (arguing that "group-oriented relief can be granted in individual cases in a manner that can be reconciled with prevailing conceptions of statutory and constitutional civil rights" in the context of private fair housing litigation).

15. *See, e.g.*, Mikolinski v. Burt Reynolds Prod. Co., 409 N.E.2d 1324, 1324–1325 (Mass. App. Ct. 1980) (holding that individual plaintiff, who was of Polish descent, did not have a cause of action against defendants for alleged defamation of persons of Polish descent in movie).

16. 343 U.S. 250, 254–58, 261 (1952).

17. *Cf.* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253–54 (2012) (holding that the Due Process Clause of the Fifth Amendment precluded the FCC from punishing Fox for broadcasting "fleeting expletives" because its regulations did not give Fox "fair notice" that such conduct could subject it to punishment).

18. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

19. *Id.*

level by acts of Congress.[20] A similar federal expansion could occur if a state passes a civil race defamation statute that proves successful—and if not, the state has simply tried an "experiment" without imposing any risk to the rest of the country.

Regardless, such a statute—even one grounded in *civil* as opposed to *criminal* law—would almost certainly face stiff legal opposition, including in the form of constitutional challenges. Free speech advocates may argue that the Court should strike down such a law because it would have a chilling effect on content-based political speech and controversial viewpoints. As the argument goes, this could set the stage for the government to silence citizens who speak out against it—a slippery slope.[21] Put differently, any prohibition on hate speech could be susceptible to authoritarian abuse.

A prohibition on hate speech could also be used to backfire on minorities.[22] For instance, many forms of rap or other urban music and inspirational or political speeches speaking out against racism could effectively be silenced under a group libel law if a judge or jury were to perceive the statements as disparaging against whites or other races.[23]

Free speech absolutists may further argue that our society is built upon a marketplace of ideas, in which people, rather than the government, should

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20. For example, Massachusetts established a health care reform law in 2006 that became the model for the subsequent Affordable Care Act at the national level in 2010. *See* Patient Protection and Affordable Care Act Pub. L. No. 111-148, 124 Stat. 119 (2010). Various "concealed carry" state reciprocity agreements motivated a similar federal bill in 2017. *See* Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. (2017).

21. *See, e.g.*, 303 Creative LLC v. Elenis, 6 F.4th 1160, 1196 (10th Cir. 2021) (Tymkovich, C.J., dissenting) ("Stifling minority speech is the prototypical 'slippery slope' toward authoritarianism . . . ."). *Cf.* PEREA ET AL., *supra* note 7, at 3 (warning against making "slippery slope" arguments in the context of race and the law).

22. *See generally* Jacob Mchangama, *The Harm in Hate Speech Laws*, HOOVER INST. POL'Y REV. (Dec. 1, 2012), https://www.hoover.org/research/harm-hate-speech-laws [https://perma.cc/JB8G-PENM].

23. For example, there were calls for a black French rapper to be prosecuted under France's strict hate speech statute. James McAuley, *A black French rapper sang about hanging 'the whites.' He may now be prosecuted.*, THE WASHINGTON POST (Sep. 28, 2018), https://www.washingtonpost.com/world/europe/a-black-french-rapper-sang-about-hanging-the-whites-he-may-now-be-prosecuted/2018/09/27/93482f68-c24e-11e8-97a5-ab1e46bb3bc7_story.html [https://perma.cc/BR9M-X98Q]. Another instance is that Ice Cube received a lot of backlash in the 1990s for his song "Black Korea," which called for violence against Korean shop owners in retribution for the killing of a 15-year-old Black girl in LA. Inge Oosterhoff, Rapresenting: The Miscellaneous Meaning of Gangsta Rap in 1990s America (Dec. 19, 2014) (Master's Thesis, Leiden University), https://studenttheses.universiteitleiden.nl/access/item%3A2629719/view [https://perma.cc/N5L4-PRE6]. These examples of perception raise the question of whether a minority artist could possibly face liability for group libel under a hypothetical statute in the U.S. for releasing a racially controversial song. *But cf.* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE *passim* (2010) (arguing the contrary view that rap music is liberatory for all). *Cf.* André Douglas Pond Cummings, *A Furious Kinship: Critical Race Theory and the Hip Hop Nation*, 48 U. LOUISVILLE L. REV. 499, 499–500 (2010) (viewing certain critical race theorists as the scholarly equivalents of hip-hop artists).

decide what constitutes acceptable speech.[24] Under this familiar theory, the public acts to morally condemn racist speech, rendering government action unnecessary.[25] One illustrative example is the protest against the anti-Jewish Ku Klux Klan rally in Skokie, Illinois, which arguably rendered government intervention against hate speech unnecessary.[26]

These arguments, however, incorrectly presuppose that the public will *always* condemn hate speech. This assumption, in turn, relies on a false premise—that all racial groups enjoy equal opportunity to communicate their messages to the public. According to Professor Richard Delgado, the marketplace of ideas paradigm rests upon the incorrect premise that our society distributes social power and resources even-handedly to all groups.[27] In reality, however, many racial and ethnic minority groups often do not possess the financial means or social and political capital to influence public opinion against hate speech to the degree that their white counterparts do (i.e., the cards are stacked against most minorities).[28] Even when civil rights leaders, such as Rev. Jesse Jackson or Rev. Al Sharpton, speak out against racism and hate speech, they are often silenced and considered extremists by the media and society at-large.[29] Delgado explains that "communication is expensive, so the poor are often excluded; the dominant paradigm renders certain ideas unsayable or incomprehensible; and our system of ideas and images construes certain people to have little credibility in the eyes of listeners."[30] Thus, from a legal realism perspective, the marketplace of ideas theory ignores the reality of the status quo and the structural inequities of institutional racism.[31] Civil rights advocates may also argue that the impact of

24. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

25. *See id.*

26. Irving Louis Horowitz, *First Amendment Blues: On Downs, Nazis in Skokie*, 1986 AM. B. FOUND. RSCH. J. 535, 538 (1986).

27. Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171 (1994), *reprinted in* PEREA ET AL., *supra* note 11, at 1014–15.

28. *Id.* at 1015.

29. *Id.*

30. *Id*.

31. *Id*. at 1014–15. As stated by Charles R. Lawrence, III:

> Whenever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society—to pay the price for the societal benefit of creating more room for speech. And we assign this burden to them without seeking their advice or consent. This amounts to white domination, pure and simple. It is taxation without representation. We must be careful that the ease with which we strike the balance against the regulation of racist speech is in no way influenced by the consideration that it is others who will bear the cost. We must be certain that the individuals who pay the price are fairly represented in our deliberation, and that they are heard.

Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 39 DUKE L.J. 431, 472–73 (1990).

any "chilling effect" on people's free speech rights is overstated. A helpful example is Germany's criminal prohibition on the use of swastikas and other symbols of hate in response to the atrocities committed during the Holocaust.[32] Despite this prohibition, Germany's democratic system is "remarkably stable," which suggests that the prohibition has caused little to no undue "chilling effect" on the German people's general comfort or ability to otherwise express their beliefs.[33] Even assuming that, due to cultural and structural differences in the U.S., some "chilling effect" on freedom of expression occurs, some may argue it is necessary to prevent the "deep emotional scarring, and feelings of anxiety and fear that pervade every aspect of a [hate speech] victim's life."[34] Many victims of hate speech and propaganda have "experienced physiological and emotional symptoms ranging from rapid pulse rate and difficulty in breathing, to nightmares, post-traumatic stress disorder, psychosis and suicide."[35] Avoiding such severe harm on vulnerable people may justify some limited chilling effect on those that would otherwise desire to express feelings of toxic racism and hatred.

B. Background of Defamation Law in Tort

These competing policy arguments all come into play when deciding the legal issue of whether a group libel statute for racial or ethnic defamation, if enacted, would satisfy constitutional muster under the First Amendment's Free Speech Clause. Understanding these issues, however, requires some

32. The Federal Constitutional Court in Germany considers both the Communist Party and National Socialist Party to be unconstitutional because they threaten the democratic rule of law. *See* Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act] Aug. 11, 1993, Bundesgesetzblatt, Teil I [BGBL] at 1473, § 13, no. 2, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl193s1473.pdf%27]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl193s1473.pdf%27%5D__1634924490279 [https://perma.cc/6RFP-3RW2]. The German Criminal Code outlaws any use of symbols by such parties, providing for punishment by either imprisonment for not more than three years or a fine. *See* Strafgesetzbuch [StGB] [Penal Code], §§ 84–86a, http://www.gesetze-im-internet.de/englisch_stgb/index.html [https://perma.cc/LC28-E76R].

33. Anna Sauerbrey, Opinion, *How Germany Deals with Neo-Nazis*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/opinion/germany-neo-nazis-charlottesville.html [https://perma.cc/8JAS-B92S].

34. Lawrence, *supra* note 31, at 462.

35. Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 138–39 (1982) (noting that victims of racism may have feelings of humiliation, isolation, and self-hatred; engage in anti-social behaviors; and suffer from physical health problems such as hypertension); *cf.* Heinz Häfner, *Psychological Disturbances Following Prolonged Persecution*, 3 SOC. PSYCHIATRY 79, 79 (1968) (discussing psychological symptoms including headaches, dizziness, social withdrawal, chronic depression, and anxiety neurosis in survivors of extreme persecution).

familiarity with the intersection of the Free Speech Clause and the state common law of defamation.

The common law of defamation protects a person's reputation and good name against communications that are false and derogatory.[36] Defamation consists of two torts: libel and slander.[37] The main difference between the two is the form in which the defamation occurs. Libel consists of any defamation that can be seen, most typically in writing or pictures.[38] Slander consists of oral defamatory communications that can be heard.[39] The elements of libel and slander are nearly identical to one another. To prevail, a plaintiff must generally show "that a defendant has made (i) a public statement that is (ii) false and (iii) may diminish the plaintiff's reputation."[40]

This framework has been applied to group libel settings involving hate speech in *Beauharnais v. Illinois*.[41] Subsequent cases have called into question whether *Beauharnais* is still good law[42]—although none have expressly overruled *Beauharnais*.

C. General Framework for Protected and Unprotected Speech

Counterbalancing the need to protect a person's reputation is the need to protect freedom of speech. To meet this end, "[t]he Free Speech Clause of the First Amendment prohibits the government from 'abridging the freedom of speech'"—although it does not expressly "define what that freedom entails."[43] The Court has long construed this Clause to "protect against government regulation of certain core areas of 'protected' speech (including some forms of expressive conduct) while granting the government greater leeway to

36. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 24 n.5 (1998) (Stevens, J., dissenting) ("[V]indicating one's reputation is the main interest at stake in a defamation case . . . ."); *see also* Albright v. Oliver, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring) ("[T]he interests granted historical protection by the common law of torts [include] freedom from defamation . . . ."); David J. Acheson & Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, 47 SW. L. REV. 335, 335 (2018) ("The law of defamation is the principal legal mechanism in both the United States and England for protecting the interest in reputation.").

37. Yonathan A. Arbel & Murat Mungan, *The Case Against Expanding Defamation Law*, 71 ALA. L. REV. 453, 466 & n.75 (2019).

38. RESTATEMENT (SECOND) OF TORTS § 568(1) (AM. L. INST. 1977).

39. *Id.* § 568(2).

40. Arbel & Mungan, *supra* note 37, at 466; *see also* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

41. 343 U.S. 250, 251 (1952).

42. *See* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 672 (7th Cir. 2008); Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1200 (9th Cir. 1989).

43. VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1 (2019).

regulate other types of speech—including a handful of limited categories that the Court has deemed largely 'unprotected.'"[44]

Despite this framework for free speech, the Court's "current approach" is "not entirely categorical," which is consistent with legal theorists' more modern rejection of Classical formalism.[45] Nonetheless, "identifying the category of speech at issue," e.g., defamation, commercial speech, or obscenity, is an "important" (if not somewhat formulaic)[46] "step in determining what First Amendment standards, including what level of judicial scrutiny, a court might apply to the law" being challenged.[47] For instance, "[r]egulations of protected speech generally receive strict or intermediate scrutiny, which are high bars for the government to meet," whereas "the government typically has more leeway to regulate unprotected speech."[48] Thus, determining "the category of speech" remains a crticial step "in evaluating Congress's ability to legislate on a given subject."[49]

Generally speaking, "content-based restrictions on speech—laws that 'appl[y] to particular speech because of the topic discussed or the idea or message expressed'—are presumptively unconstitutional and subject to strict scrutiny."[50] At the safme time, the Court has "recognized limited categories of speech that the government may regulate because of their content, as long as it does so evenhandedly."[51] The Court has "identifie[d] these categories as . . . obscenity, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, child pornography," and, relevantly here, "defamation."[52] These categories' parameters "have changed over time, with many having been significantly narrowed by the Court."[53] Additionally, the Supreme Court under Chief Justice Roberts has been "disinclined to expand upon this list," and has relied on "theories of textualism and originalism" to decline to "recognize, for example, violent entertainment or depictions of animal cruelty as new categories of unprotected speech."[54]

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44. *Id.*

45. *Id.*; *see also* Allen R. Kamp, *Jurisprudence: A Beginner's Simple and Practical Guide to Advanced and Complex Legal Theory*, 2 THE CRIT: CRITICAL STUD. J. 62, 66 (2009) (noting that formalists view the law as "a science akin to geometry, in which basic axioms generation answers to specific problems," and believe that "all questions of law can be resolved by deduction, . . . without resort[ing] to policy").

46. Despite the formulaic nature of our free speech jurisprudence, the term "unprotected speech" does not mean that zero protection of that speech exists.

47. KILLION, *supra* note43, at 1.

48. *Id.*

49. *Id.*

50. *Id.*; Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

51. KILLION, *supra* note 43, at 1; R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

52. KILLION, *supra* note43, at 1.

53. *Id*.

54. *Id*.; Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 798–99 (2011); United States v. Stevens, 559 U.S. 460, 472 (2010).

Despite holding that defamatory statements enjoy less constitutional protection, "the Court has also recognized" that imposing "civil or criminal penalties for making [defamatory] . . . statements might [unduly] hamper free speech."[55] As such, as discussed below, "the First Amendment requires a party alleging defamation to demonstrate that the speaker acted with a certain level of intent," such as "in cases where the statement concerns a public official or figure[,] . . . or to prove certain injuries."[56]

II. ANALYSIS

As stated above, this Article offers examples of language that a state legislature may use in drafting a statute that classifies blatant hate speech as group libel while attempting to comport with First Amendment analysis to overcome an overbreadth challenge. The relevant jurisprudence, however, would likely reveal various infirmities in the statute. This analysis reveals various flaws in our norms and doctrines that improperly deemphasize the inequities of the status quo, the insidious impact of hate speech, and the realities of institutional racism and xenophobia.

A. Example of a Hypothetical Group Libel Statute Covering Hate Speech

Below is some hypothetical language that can be used in a group libel statute creating a cause of action for hate speech:

> Any person shall have a cause of action to sue for group libel if any person, or firm or corporation, manufactures, sells, or offers for sale, advertises or publishes, presents or exhibits in any public place or medium any website, television show, film, radio show, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, inferiority, or lack of virtue of a class of citizens, of any race or ethnic origin, which said publication or exhibition exposes the members of any race or ethnic origin to contempt, derision, or obloquy, provided that plaintiff is a member of such group defamed.

55. KILLION, *supra* note43, at 2.

56. *Id*. *See also* Gertz v. Robert Welch, 418 U.S. 323, 349 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

This language is adopted partially from the Illinois group libel statute cited in *Beauharnais*.[57] In that case, the Court upheld a conviction of a white supremacist for committing group libel against African Americans. The defendant allegedly violated a criminal statute by distributing anti-black leaflets advocating for housing segregation. The leaflets called for city politicians "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro."[58] They urged "one million self respecting white people in Chicago to unite."[59] They added that "[i]f 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."[60] Based on these statements, the jury convicted the white supremacist for violating the group libel code. The conviction was upheld by the Supreme Court.

Applying this decision, a plaintiff could potentially sue someone for civil damages for posting racist hate speech on social media or other internet or media outlets. In doing so, the plaintiff could argue that *Beauharnais* was a criminal case and that the present scenario involves civil litigation matters, so an even lesser threat of authoritarian abuse or "chilling effect"[61] on free speech would exist if civil damages were to be imposed here. This is because no threat of loss of life or liberty exists the way it would in a criminal proceeding, mitigating or reducing any such chilling effect. However, the plaintiff would still have many challenging legal hurdles to overcome under the First Amendment. As stated above, many subsequent cases have called into question whether *Beauharnais* is still good law—although none have explicitly overruled it.[62]

There appear to be two primary methods in which a litigant could challenge *Beauharnais* and, more importantly, any group libel statute covering hate speech. First, a defendant might raise the Free Speech Clause as a defense if a plaintiff brings a libel cause of action against him.

57. The statute cited in *Beauharnais* stated:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition 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.

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

58. *Id*. at 252.

59. *Id.*

60. *Id.*

61. *See e.g*., New York Times Co. v. Sullivan, 376 U.S. 254, 263 (1964) (emphasizing the need to prevent a chilling effect on free speech from government regulation).

62. *See* cases cited *supra* note 42.

Alternatively, a litigant need not wait until a plaintiff attempts to file suit in order to raise a challenge to the statute and its underlying caselaw; as a second option, one might go on the offensive and bring a constitutional challenge under the Declaratory Judgment Act without being sued.[63] In either scenario, assuming a justiciable case or controversy exists under Article III,[64] a court would need to decide whether the statute comports with First Amendment requirements.

B. The Statute Would Need to Require the Hate Speech to "Be Productive of a Breach of the Peace or Riots"

In deciding the statute's constitutionality under the First Amendment, the Court would need to resolve several questions. The first question is whether the present hypothetical scenario differs in any material way from the Court's reasoning and the legislative intent surrounding the criminal code in *Beauharnais*. The answer is "yes."

In *Beauharnais*, the state legislature explicitly intended for the code to prevent the occurrence or continuation of racial violence.[65] Recall that the defendant had violated a criminal statute by distributing anti-black leaflets characterizing black people as generally committing "aggressions," carrying "guns" and committing crimes including "rapes" and "robberies."[66] In upholding the defendant's conviction under the hate speech code, the Court applied rational basis review and found that the code was rationally related to meeting the state's legitimate interest in banning hate speech and preventing any resulting violence. The Court noted that the Illinois code expressly intended to prohibit hate speech that "[wa]s productive of breach of the peace or riots."[67] Taking into account the long-standing history of racial tensions in

63. *See* 28 U.S.C. § 2201. A Free Speech Clause challenge could take the form of an "overbreadth" challenge or an "as-applied" challenge. An "overbreadth" challenge is a form of a facial challenge that is applicable in First Amendment cases. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987); City of Houston v. Hill, 482 U.S. 451, 458–59 (1987). A statute regulating unprotected speech is considered overly broad if, in proscribing unprotected speech, it also proscribes protected speech. Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on its face, on the ground that it violates the First Amendment rights of others. *See, e.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482-83 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377, 411 (1992) (White, J., concurring). This would require the Court to strike down the statute in its entirety, instead of finding it unconstitutional in a narrower set of circumstances in which it applies (which would be the remedy for a successful "as-applied" constitutional challenge). *See, e.g.*, *Fox*, 492 U.S. at 482–83; *R.A.V.*, 505 U.S. at 411–14 (White, J., concurring).

64. *See* 28 U.S.C. § 2201 (requiring a "case of actual controversy" to exist); *see also infra* note 140 (describing issues of Article III standing that would arise).

65. *See Beauharnais*, 343 U.S. at 251.

66. *Id.* at 252

67. *Id.* at 271 (Black, J., dissenting).

Illinois,[68] the Court held that the state code was rationally related to the legitimate interest in banning disparaging hate speech and preventing violent racial incidents from occurring.

By contrast, the hypothetical group libel statute here exists to protect the collective reputation and dignity of racial and ethnic minorities but does not contain any language addressing violence. To be consistent with *Beauharnais*, therefore, a state legislature would likely need to draft the group libel statute to include language addressing the prevention of race riots. Below is an example of such statutory language:

> Any person shall have the right to sue for group libel if any person, or firm or corporation, manufactures, sells, or offers for sale, advertises or publishes, presents or exhibits in any public place or medium any website, television show, film, radio show, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, inferiority, or lack of virtue of a class of citizens, of any race or ethnic origin, which said publication or exhibition exposes the members of any race or ethnic origin to contempt, derision, or obloquy, *or which is productive of breach of the peace or riots,* provided that plaintiff is a member of such group defamed.

If a court were to hold a white supremacist group or individual liable under this statute, say, for creating an Aryan Nations website proclaiming that black men carrying guns are more likely to assault white women, which is a historically common racist stereotype,[69] such statutory liability may be consistent with the reasoning of *Beauharnais*. Here, the statute would classify the group libel statements as those that may enflame racial hatred and incite violence or lead to a "breach of the peace."[70]

Although lynching and riots are not as prevalent as they have been throughout earlier history, they can and often do still result from provocative

68. *Id.* at 259 ("From the murder of the abolitionist Love-joy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.").

69. *See, e.g.*, *Popular and Pervasive Stereotypes of African Americans*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/blog-post/popular-and-pervasive-stereotypes-african-americans [https://perma.cc/G8J4-VHYV].

70. *Beauharnais*, 343 U.S. at 251. Under this statutory language, a plaintiff would not need to prove that a riot actually occurred – he or she would merely need to prove that the offensive language at issue was of the type that could or may likely cause tempers to flare and riots to occur.

racist comments.[71] One only needs to look at recent events—such as the heated racial protests and demonstrations leading a woman's death in Charlottesville, Virginia, during August of 2017—to see that race still serves as an emotional issue today for many people, and that violent reactions may very well flare up from the use of blatantly offensive and inflammatory symbols and remarks of hatred.[72]

C. The Statute Would be Limited in Scope by the Requirement of "Imminent Unlawful Action"

Unfortunately for civil rights advocates, many hurdles still exist. As stated above, many experts believe that *Beauharnais* has little continuing vitality as precedent.[73] Although the case was never overruled, subsequent decisions, discussed below, have placed severe limitations on its scope.[74] This creates an uphill battle for civil rights attorneys arguing that the Court should uphold a group libel statute that covers hate speech.

An attorney advocating for free speech may argue that the group libel statute, as written above, conflicts with *Brandenburg v. Ohio*, especially to the extent that it covers hate speech on the Internet, because any resulting breach of the peace would need to be "imminent." In *Brandenburg*, the Court struck down a criminal code that prohibited people from advocating for unlawful action.[75] The lower court convicted a Klansman for violating the code because he, along with approximately twelve other hooded Klan members armed with guns, gathered to burn a cross and made general statements denouncing blacks and Jews. The speeches advocated for minority deportation and called for "revengeance" against the government for failing to uphold white supremacy.[76]

The Supreme Court reversed the lower court's conviction and invalidated the statute. The Court relied on the fact that the Klansman had not intended to incite *imminent* lawless action, and it reasoned that such imminent action was

71. *See, e.g.*, TIMOTHY J. HEAPHY ET AL., HUNTON & WILLIAMS LLP, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 1–7 (2017); *see also* VICE NEWS, *Charlottesville: Race and Terror - Vice News Tonight on HBO* (Aug. 14, 2017), https://video.vice.com/en_us/video/charlottesville-race-and-terror-vice-news-tonight-on-hbo/59921b1d2f8d32d808bddfbc.

72. *See, e.g.*, HEAPHY ET AL., *supra* note 71, at 1–7; *see also* VICE NEWS, *supra* note 71.

73. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1043–45 (4th ed. 2011); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 219 (1991); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 330–31 (1988). *But see* Ken Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 32–37 (1985); Delgado, *supra* note 35, at 175 n.250.

74. *See* cases cited *supra* note 42.

75. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

76. *Id*. at 446.

unlikely to occur.[77] The Court concluded that the statute, as applied, constituted an undue burden on political speech.[78]

A free speech attorney could argue that the current hypothetical group libel statute covering hate speech "which is productive of breach of the peace or riots"[79] is limited in scope by *Brandenburg*. *Beauharnais* required hate speech to create the *potential* for violence—not an *imminent* threat. As such, the holding of *Beauharnais* could be seen as in conflict with, or narrowed by, *Brandenburg* to require that a breach of peace or riots be "imminent."

To counter this argument, one might attempt to distinguish *Brandenburg* on the grounds that it involved a *criminal* code—as opposed to the present hypothetical scenario, which involves a *civil* statute.[80] As such, arguably a far lesser chilling effect on free speech exists here than it did in *Brandenburg*. Furthermore, in *Brandenburg*, the Court did not deal with the category of unprotected speech of libel but instead dealt with the wholly distinct category of *advocacy of unlawful action*.[81] One might argue that in emphasizing the *category* of speech to such a degree, one risks reliance on an overly rigid and formalistic approach to analyzing free speech jurisprudence. This overstates the case and misses the point. Defamatory statements carry their own unique set of concerns, such as the need to protect one's reputation from being tarnished. This same reputational concern applies with even greater force to defamatory racial and ethnic hate speech—due to the perpetuation of false negative stereotypes—which can lead to harmful consequences on minority groups collectively speaking, as well as on individuals who may experience discrimination and racial police profiling as a result of the proliferation of defamatory hate speech. By allowing hate speech to occur, society normalizes such beliefs, which emboldens people to commit harmful actions that are consistent with them.[82] Equity and legal realism principles therefore weigh in favor of the Court acknowledging these compelling circumstances and limiting the scope of *Brandenburg*. Despite these arguments, however, the reality remains that *Brandenburg* would make it very challenging in most scenarios for a group libel statute covering hate speech to pass constitutional muster.

77. *See id.* at 447–49.

78. *Id*. at 448–49.

79. Beauharnais v. Ill., 343 U.S. 250, 251 (1952) (quoting 38 ILL. COMP. STAT. 1949/471 (West 1949) (repealed 2012)).

80. *See, e.g.*, THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS 96 (1998).

81. *See id.* These arguments raise the basic question of where, if anywhere, group libel should fall in the Court's categorical analysis of unprotected speech.

82. *Cf. id.* at 151.

D. The Statute Must Require Certain Levels of Intent for Public Figures and Public Concerns

Even if the Court decides to distinguish or limit *Brandenburg*, however, it would still need to contend with additional cases in tension with a group libel statute covering hate speech. Many law review articles and circuit courts, for example, have interpreted the Court's decision in *New York Times v. Sullivan* to severely limit the scope of *Beauharnais*.[83]

In *Sullivan*, the Court struck down an Alabama tort statute that the state court applied in finding a defendant "libelous per se" upon a jury finding of a defendant publishing defamatory material concerning a plaintiff.[84] Several African American clergymen ran a full-page advertisement in *The New York Times*, accusing a police chief of intimidating black student-protestors with weapons, padlocking their dining hall, and expelling them.[85] The advertisement also implied the police assaulted Martin Luther King Jr., bombed his house, and falsely arrested him seven times.[86] Several of the statements were either false or misleading.[87]

Consequently, the police chief sued *The New York Times* for presumed injuries used by the false statements. The jury found the newspaper liable and awarded the police chief $500,000.[88] However, the Supreme Court reversed the lower court judgment, holding that a "public official" cannot prevail in a libel action concerning a "public issue" unless the plaintiff can prove that the defendant's speech was motivated by "actual malice."[89]

The Court held that "actual malice" exists when a defendant either knows that a defamatory statement is actually false, or acts with "reckless disregard" for its truth.[90] It reasoned that while there was evidence demonstrating that the *Times* had "published [its] . . . advertisement without checking its accuracy," the *Times* "relied upon [its] knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement" in deciding to publish the advertisement.[91] While the Court found this to constitute negligence, it held that this failed to prove the higher threshold of actual malice in order to collect any damages.[92] The Court reasoned that any less of

83. *See, eg.*, Kristen Grauer, *Group Libel: From Beauharnais to Sullivan*, 4 DARTMOUTH L.J. 21, 21–22 (2006).
84. New York Times Co. v. Sullivan, 376 U.S. 254, 263 (1964).
85. *Id.* at 256–57.
86. *Id.* at 257–58.
87. *Id*. at 263.
88. *Id*. at 256.
89. *Id*. at 279–80.
90. *Id*.
91. *Id*. at 287.
92. *Id*. at 287.

a standard would create a "chilling effect" of self-censorship for publications to criticize public officials on matters of public concern.[93]

Circuit court cases, such as *Collin v. Smith*[94] and *American Booksellers Ass'n v. Hudnut*,[95] have interpreted *Sullivan* as severely undermining *Beauharnias*. The majority in *American Booksellers* stated that "[i]n *Collin v. Smith* . . . we concluded that cases such as *New York Times v. Sullivan* had so washed away the foundations of *Beauharnais* that it could not be considered authoritative."[96] Many legal scholars, including John H. Garvey and Frederick Schauer, concur.[97]

The Supreme Court, of course, is not bound by such assertions. A civil rights attorney could argue that the holding of *Sullivan* should be narrowly construed to apply only in scenarios involving statements concerning *public figures* or *officials* regarding matters of *public concern*. The Court in *Sullivan* did not indicate that free speech protections in libel cases extended beyond this.[98]

A civil rights advocate may further argue that *Sullivan* does not apply to the hypothetical race defamation statute here because a public figure would not exist. Instead, a lawsuit contemplated under the group libel statute would involve a *private* individual. The plaintiff defamed in *Beauharnais* only had a cause of action because of the private *individuals* injured by the hate speech at issue in that case.[99] As such, *Sullivan* does not overrule *Beauharnais* because no "public figures" are at issue here.[100]

Even if the Court agrees with this analysis, however, *Gertz v. Welch* raises additional questions about the constitutional viability of a group libel statute covering hate speech. *Gertz* went beyond the public figure requirements in *Sullivan* by requiring plaintiffs to prove actual malice to collect "punitive damages" when suing for libel on matters of "public concern"—even when no public figure existed.[101] In such "public concern" scenarios, the Court also

93. *Id.* at 300–01 (Goldberg, J., concurring).

94. Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978), *noted in* Grauer, *supra* note 83, at 21 & n.8.

95. Am. Booksellers Ass'n, v. Hudnut, 771 F.2d 323, 332 n.3 (7th Cir. 1985), *noted in* Grauer, *supra* note 85, at 21–22, 21 n.9.

96. *Am. Booksellers, Ass'n*, 771 F.2d at 332 n.3.

97. Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 111 (1998); John H. Garvey, *Black and White Images*, 56 L. & CONTEMP. PROBS. 189, 189, 199 (1993).

98. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

99. *See* Beauharnais v. Illinois, 343 U.S. 250, 262–63 (1952).

100. *See* Grauer, *supra* 83, at 26.

101. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751 (1985) (confirming that *Gertz* directly applies to cases involving a public concern).

gave the plaintiffs the option to prove a defendant's "negligence" in order to obtain "provable damages."[102]

Gertz's applicability to matters of "public concern" places additional constraints on a state's ability to create a cause of action for group libel based on racist or xenophobic hate speech. Hate speech is clearly a "public concern." Furthermore, group libel is merely an *extension* of the individual libel addressed in *Gertz*. This is reinforced by Justice Frankfurter's statement in *Beauharnais*, which acknowledged this extension:

> [I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.[103]

Thus, *Gertz*'s limitations on a plaintiff's ability to collect damages apply to group libel settings.

In *Gertz*, the plaintiff brought an action against a newspaper for libel.[104] The plaintiff was a private individual. Because of this, the Court applied a less stringent test to allow for the collection of damages than it articulated in the public figure context in *Sullivan*.[105] According to the facts in *Gertz*, a policeman fatally shot a youth.[106] The state subsequently prosecuted and convicted the officer for murder.[107] Later, the youth's family hired an attorney (the soon-to-be plaintiff) to sue the officer. A right-wing newspaper, *American Opinion*, published an article that falsely accused the family's attorney of creating a left-wing Communist conspiracy to frame the officer.[108] In response, the attorney brought a libel suit against the publication.[109]

The Court held that this scenario involved a "public concern" but acknowledged that the family's attorney had not held himself out to be a "public figure"—which would have triggered the need for the attorney to prove actual malice in order to collect *any* damages. Instead, the Court merely required the plaintiff to prove actual malice if he wanted to collect *punitive* or *presumed* damages—or, alternatively, the plaintiff could prove negligence and collect any *actual*, or *provable*, damages.[110]

102. *Gertz*, 418 U.S. at 349–50.
103. *Beauharnais*, 343 U.S. at 258.
104. *Gertz*, 418 U.S. at 327.
105. *Id.* at 348.
106. *Id.* at 325.
107. *Id.*
108. *Id.* at 325–26.
109. *Id.* at 325–27.
110. *Id.* at 349–50.

The Court reasoned that protecting the reputations and privacy of private individuals outweighed the interest of maintaining the "marketplace of ideas."[111] It emphasized that a private individual does not voluntarily enter the marketplace of ideas or consensually assume the risk of public scrutiny as does a public figure.[112] Furthermore, private individuals do not have the same access to the media to defend their reputations as do public figures, which triggers fairness concerns.[113] In any event, the Court, swayed by the need to protect individual privacy and reputation, remanded the case and instructed the lower court to determine whether the newspaper's false report constituted actual malice or simply negligence, which would establish the type of damages the attorney could receive.[114]

In order to conform to the requirements of *Gertz*, therefore, the state legislature would have to draft the group libel statute covering hate speech with the following language:

> Any person shall have the right to sue for group libel if any other person, or firm or corporation, manufactures, sells, or offers for sale, advertises or publishes, presents or exhibits in any public place or medium any website, television show, film, radio show, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, inferiority, or lack of virtue of a class of citizens, of any race or ethnic origin, which said publication or exhibition exposes the citizens of any race or ethnic origin to contempt, derision, or obloquy, or which is productive of breach of the peace or riots, provided that plaintiff is a member of such group defamed *and can prove actual malice to collect punitive or presumed damages or prove negligence to collect actual damages*.

Applying this language, a plaintiff would face a difficult hurdle if he or she were to attempt to prove actual malice. A plaintiff could claim that the creator of an Aryan Nations or Ku Klux Klan website characterizing black men "as going around harassing and sexually assaulting white women" is acting with "reckless disregard for the truth," which, as the reader will recall, is one way to prove actual malice. The Court, however, in *St. Amant v. Thompson*, imposed a very high bar to show "reckless disregard for the

111. *Id.* at 339–46

112. *Id.* at 344.

113. One could argue that this disparity in media access is also exacerbated by the inequities in social, financial, and political capital inherent in our system of racial and ethnic biases and prejudices, as previously explained by Delgado, although the Court did not take such future policy implications into account (likely because they were not at issue in the specific case before it). Delgado, *supra* note 27, at 171; *see generally Gertz*, 418 U.S. 323.

114. *Id*.

truth."[115] It required a plaintiff to prove, by clear and convincing evidence, that a defendant entertained "serious doubts about the truth of his statements made."[116] This test is subjective and contemplates good faith: the plaintiff must prove the defendant's actual state of mind or raise compelling inferences about it. Both are extremely difficult tasks.

With that said, some jury members might experience shock from hearing such a blatantly racist statement described above. This shock, could, in turn, trigger their feelings of denial about anyone possibly being able to truly believe such blatantly offensive ideology. This, in turn, may conceivably cause some of them to rationalize that the defendant could *not* have genuinely believed such outrageous claims about minorities. Despite the harmful societal impacts of many white people psychologically denying the existence of racism against minorities,[117] this may, ironically, prove useful to a civil rights plaintiff under the subjective legal standard articulated in *St. Amant*. As stated above, the decision required a defendant to entertain "serious doubts about the truth of his statements."[118] Relying on *St. Amant*, a plaintiff may attempt to argue that if the defendant could *not* have reasonably believed his racist rhetoric to be true, but that he stated it nonetheless, then he must have "entertained serious doubts about the truth of his statements," helping the plaintiff to prevail.[119] Unfortunately, this argument would likely crumble in scenarios if a spokesperson of the hate groups were to be able to prove that he genuinely believed in the truth of his racist ideology.[120]

Alternatively, a plaintiff could argue that a defendant posting hate speech is acting with negligence. To meet this standard, a plaintiff would have to prove that a defendant failed to verify the truth of his statements.[121] A person stating that all black men carry guns and assault white women clearly constitutes a failure to verify the truth given the obvious lack of any credible evidence to support such a claim.

Many significant issues involving negligence, however, arise with damages. As stated above, a plaintiff asserting a negligence claim for libel can only collect *actual, provable* damages. One issue is whether, under this requirement, a group libel plaintiff would need to prove that the *overall minority group* targeted by the hate speech suffered injury from the speech. Arguably the answer is yes, because this would give meaning to the term

115. *See* St. Amant v. Thompson, 390 U.S. 727, 730–31 (1968).

116. *Id*. at 730–32.

117. *See, e.g.*, *American Denial*, PBS, https://www.pbs.org/independentlens/films/american-denial/ [https://perma.cc/6FYU-47QG] ("prob[ing] deep into the United States' racial psyche" and "expos[ing] some of the potential underlying causes of racial biases still rooted in America's systems and institutions today.").

118. *St. Amant,* 390 U.S. at 731.

119. *Id*.

120. *Id.*

121. New York Times Co. v. Sullivan, 376 U.S. 254, 287–88 (1964).

"group libel" as well as the requirement of having to "prove *actual* damages." However, a plaintiff may have a difficult time proving any concrete injuries—after all, how does one prove that an *entire race or ethnic group* suffered harm? One might ask whether any alternative legal approaches exist, consistent with the requirements of *Gertz*. The answer might be no. For example, if the courts were to make presumptions of generalized harm, as a matter of judicial notice of legislative facts, regarding the impact of hate speech, this would arguably negate the requirement of having to prove actual harm. In any event, these are all issues that would need to be resolved.

Furthermore, even if a plaintiff could establish the requisite harm as a matter of law, she would still need to prove a *causal link* between the harm and the hate speech.[122] It could be a very difficult task to prove that any individual utterance of hate speech contributed sufficiently to any injuries or disadvantage for minorities in society at large, to establish cause-in-fact or proximate cause, if the plaintiff is required to prove that an entire race or ethnic group suffered the harm.[123]

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122. "Causation in defamation consists generally of two separate and essential concepts: cause-in-fact (i.e., but for the negligently published falsehood the plaintiff would not have sustained the injury) and legal, or proximate, cause (i.e., the point at which legal responsibility attaches because the publication was a substantial factor in bringing about the plaintiff's injury)." Joseph v. Scranton Times L.P., 129 A.3d 404, 429 (2015).

123. *See Scranton Times*, 129 A.3d at 429. It is well-known, after all, that other societal factors, such as the mainstream media's perpetuation of negative racial and ethnic stereotypes, also contribute to harming minorities. Specifically, studies show that the media negatively portrays minorities to the public, which serves to perpetuate our system of institutional racism. For example, empirical reports establish that television news programs generally report African Americans as committing more violent crimes than actual crime statistics indicate, as compared to how such programs report whites. According to the statistical data, "blacks were 22% more likely to be shown on local TV news in Los Angeles committing violent crime than nonviolent crime, while according to police statistics, blacks were equally likely to be arrested for violent crime and nonviolent crime." LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS, BUILDING BLOCKS FOR YOUTH 15 (2001), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/off_babalan.pdf [https://perma.cc/457Y-QX8V]; White people, on the other hand, experience a far more favorable portrayal: "31% [are] more likely to be depicted committing a nonviolent crime than a violent crime, whereas Whites were in fact only 7% more likely to be arrested for a nonviolent crime than a violent crime. *Id*. Other studies indicate congruent results. Professor Robert Entman documents that African Americans are "most likely to be seen in television news stories in the role of criminal … [or] … victim," and that "[b]lacks are more frequently reported in connection with violence." Robert M. Entman, *Modern Racism and the Images of Blacks in Local Television News*, *in* 7 CRITICAL STUD. MASS COMMC'N 332, 332–45 (1990); Robert M. Entman, *Blacks in the News: Television, Modern Racism, and Cultural Change*, JOURNALISM Q. 69, 341–361 (1992); Robert M. Entman, *African Americans According to TV News*, *in* THE MEDIA IN BLACK AND WHITE 29, 30–31 (Everette E. Dennis & Edward C. Pease eds., Transaction Publishers) (1994). Furthermore, Romer and Jamieson "examined more than 3,000 stories from 14 weeks of local TV news in Philadelphia." Daniel Romer et al., *The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or Realistic Group Conflict?*, *in* 25 COMMC'N RSCH. 286, 292–93, 295 (1998). They found that African Americans were "overrepresented in crime stories and more likely to be shown as perpetrators in violent and nonviolent crime." *Id*. These misrepresentations of crime

These issues of damages and causation raised by *Gertz* had not been antipicated by the Court in *Beauharnais*. Thus, *Gertz* implicitly overrules *Beauharnais* because the two cases conflict in practice—as it is well-settled that the courts will decline to uphold a decision that proves to be unworkable.[124] If the Court overrules *Beauharnais*, it would have to strike down any hypothetical group libel statute, as it would have no constitutional support without *Beauharnais*.

E. Plaintiffs Would Need to Argue that the Secondary Effects of Preventing Riots and Violence Justify the Statute

Even assuming that the Court upholds a negligence or actual malice theory, a defendant may argue that the Court should overrule *Beauharnais* (and therefore strike down the statute) because *Beauharnais* conflicts with *R.A.V. v. City of St. Paul*, in which the Court disallowed content-based restrictions of unprotected speech.[125]

In *R.A.V.*, the Court invalidated a state criminal "fighting words" statute because it imposed a content-based restriction concerning race on speech. The defendant, a teenager, burned a cross in a black family's yard. The state of Minnesota prosecuted him for violating a criminal ordinance prohibiting cross burning as disorderly conduct when a defendant "knows or has reasonable grounds to know [that such cross burning] arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."[126] The defendant moved to dismiss, contending that the ordinance on its face was content-based, and the trial court granted the motion. On appeal, the Minnesota Supreme Court reversed the dismissal. The Supreme Court, however, reversed the state supreme court and struck down the statute.

In doing so, the majority opinion, written by Justice Scalia, held that "government may not regulate [any form of unprotected speech] . . . based on

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statistics reinforce stereotypes that African Americans are criminals. Such stereotypes are harmful as they implicitly and psychologically serve to justify a system that exploits and oppresses minorities. According to Walter Lippman, individuals become affected by the "pictures inside [their] heads," many of which he argues to be delivered by the news media. WALTER LIPPMANN, PUBLIC OPINION xviii, xix (Transaction Publishers 1991) (1922). "Our decisions about how to behave and how to construct our society have to be based on those pictures, Lippmann believed, because the world was too vast to experience personally." LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 4 (2001), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/off_balance.pdf [https://perma.cc/9YS4-BX5S]. This can influence how people view and treat minorities.

124. Montejo v. Louisiana, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion).

125. *See generally* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

126. *Id*. at 380.

hostility—or favoritism—towards the underlying message expressed."[127] According to the Court, the criminal ordinance in question only banned *certain forms* of fighting words based on *race* and *gender*, but not other forms—such as words based on *political affiliation.*[128] The Court ruled that this was an unconstitutional content-based restriction on speech.[129]

Free speech advocates could argue that the Court should apply *R.A.V.* to the hypothetical statute and strike it down because it is also a content-based restriction, prohibiting group libel based only on *race* and *ethnic origin*. To avoid this outcome, the state legislature may attempt to redraft the statute to prohibit *all* forms of group libel. However, one could also argue that the statute comports with *R.A.V.* because it falls under an exception to the general rule, articulated by Justice Scalia in his majority opinion.

The majority held that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech" exists when "the subclass happens to be associated with particular *secondary effects* of the speech, so that the regulation is *justified* without reference to the content of the . . . speech."[130] Furthermore, in *City of Renton v. Playtime Theatres, Inc*., the court held that such secondary effects do not have to constitute illegal action—the loss of quality of life is sufficient.[131]

Civil rights attorneys could take advantage of this exception. They could argue that racial violence could result from exposure to the hate speech, which is a "secondary effect" of the speech. This reality should justify the Court in upholding a content-based statute covering the hate speech based on race and ethnic origin. After all, if the Court is willing to allow states to prevent the occurrence of "secondary effects" that could decrease the quality of life for its citizens, then it should uphold a statute intended to prevent violence.[132]

127. *Id*. at 386.

128. *Id*. at 391.

129. Id. at 395–96.

130. *Id*. at 388 (emphasis added).

131. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

132. One could also argue that the constitutionality of a group libel statute covering hate speech is supported by *Brown v. Board of Education*. Lawrence argues that *Brown v. Board of Education* was really a hate-speech prohibition case, and not one about official conduct, i.e., segregated pupil assignment. Lawrence, *supra* note 31, at 439–40. According to Lawrence, the key to understanding *Brown* is the Court's implicit characterization of the practice of segregation as "speech." *Brown* reasoned that segregated schools were unconstitutional primarily because of the *message* segregation conveys: the message that Black children are an untouchable caste, unfit to be educated with white children. Lawrence argues that the Court emphasized how the messages from whites to blacks (stating that blacks are regarded as inferior, lazy, stupid, unworthy, etc.) are deeply damaging, and that one should not simply shrug them off. *Id*. Lawrence argues that his analysis does not ignore the distinction between speech and conduct when it comes to segregation, but rather it reflects the fact that speech and conduct are inextricably linked. His analysis asks whether there is a purpose for outlawing segregation that is unrelated to its message, and it concludes the answer is "no." *Id.* at 439, 471. He points out that "[i]f, for example, John W. Davis, counsel for the Board of Education of Topeka,

The validity of designating hate speech as something that is likely to create the "secondary effect" of violence to fall within Scalia's exception in *Renton* is reinforced by Professor Waldron's opinion that "hate speech undermines . . . the public good" of the assurance of security "by intimating discrimination and violence."[133] One only needs to look the heated racial demonstrations leading a woman's death in Charlottesville, Virginia, to see an example of the impact on quality of life that hate speech can cause.[134] Thus, a group libel statute against such hate speech would help to ensure the maintenance of social peace and civic order. It should therefore fall within the scope of *Renton*, despite being a "content-based" restriction.[135]

F. The Plaintiffs Could Attempt to Argue that the Statute Meets Strict Scrutiny

Even if the Court were to conclude that the statute imposes an undue burden on free speech, anti-racist advocates could attempt to make the challenging argument that the statute meets strict scrutiny. In order to do so, they would need to persuade the Court that the state has a "compelling interest" in preventing hate speech.[136] Professor Thomas David Jones argues that this is true. He contends that race "defamation is a form of racial discrimination and foments social discord among racial groups in an ethnically plural society."[137] He claims that a "no less restrictive alternative is available to control group defamation."[138] It would be difficult for one to credibly deny that preventing social discord is a compelling state interest.

Kansas, had been asked during oral argument[s] in *Brown* to state the Board's purpose in educating black and white children in separate schools, he would have been hard-pressed to answer in a way unrelated to the purpose of designating black children as inferior." *Id*. at 441. Given that "segregation's primary goal is to convey the message of white supremacy, then *Brown's* declaration that segregation is unconstitutional amounts to a *regulation of that message of white supremacy*." *Id*. (emphasis added). Based on this proper understanding of "*Brown* and its progeny[,]" the jurisprudence requires an end to the "systematic group defamation" *message* inherent in segregation. *Id*. Thus, "although the exclusion of black children from white schools and the denial of educational resources . . . can be characterized as *conduct*, these particular instances of conduct are concerned primarily with communicating the *idea* of white supremacy" – i.e., the speech and conduct elements cannot be separated. *Id*. (emphasis added). If anything, "the non-speech" or conduct "elements of segregation are simply *by-products* of the main message" or speech being communicated. *Id*.

133. WALDRON, *supra* note 9, at 4.

134. *See, e.g.*, HUNTON & WILLIAMS LLP, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 1–7 (2017); *see also* VICE NEWS, *Charlottesville: Race and Terror - Vice News Tonight on HBO* (Aug. 14, 2017), https://video.vice.com/en_us/video/charlottesville-race-and-terror-vice-news-tonight-on-hbo/59921b1d2f8d32d808bddfbc [https://perma.cc/664Y-JV78].

135. *See* WALDRON, *supra* note at 9, at 8, 14, 46–47.

136. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

137. JONES, *supra* note 80, at 151.

138. *Id*.

Thus, this could be an argument for advocates to use. In the (however unlikely) event that a court agrees to adopt this argument, a plaintiff could prevail.[139]

III. CONCLUSION

As this analysis illustrates, civil rights supporters would face a variety of difficult constitutional hurdles in arguing for the Court to uphold a group libel statute covering defamatory hate speech.[140] From a legal realism perspective,

139. The plaintiffs would also need to try and distinguish the Court's recent decision in *Matal v. Tam*. *See generally* Matal v. Tam, 137 S.Ct. 1744 (2017) (holding that legislation intended to prevent the offense of individuals and groups of people is unconstitutional under the First Amendment). In that case, a federal law had prohibited the registration of trademarks that "may disparage . . . or bring . . . into contempt[ ] or disrepute" any "persons, living or dead." 15 U.S.C. § 1052(a). Relying on this provision, the Patent and Trademark Office ("PTO") rejected a trademark application for The Slants, an Asian-American dance-rock band, because it found the mark may be disparaging to Asian Americans. In striking down the trademark statute, the Court held that the disparagement provision violated the Free Speech Clause as "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Matal*, 137 S.Ct. at 1751. This decision creates tension with any attempt by a state legislature to create a cause of action for any statement that displays "depravity, criminality, unchastity, inferiority, or lack of virtue of a class of citizens, of any race or ethnic origin, which said publication or exhibition exposes the citizens of any race or ethnic origin to contempt, derision, or obloquy." Beauharnais v. Ill., 343 U.S. 250, 251 (1952) (quoting 38 ILL. COMP. STAT. 1949/471 (West 1949) (repealed 2012)). At the same time, however, this scenario can arguably be distinguished from *Matal*. As Jeremy Waldron points out, "There is a big difference between protecting individuals from *defamation* (based on some denigration of group characteristics), and protecting them from *offense*, even when the offense goes to the heart of what they regard as the identity of their group." JEREMY WALDRON, DIGNITY AND DEFAMATION: THE VISIBILITY OF HATE 16-17 (2009) (emphasis added). The former scenario may provide a stronger case for a plaintiff, whereas the latter situation would likely conflict with *Matal*.

140. Another constitutional hurdle would be Article III standing. Under the modern test for standing, a plaintiff must show that she has suffered a concrete, actual and imminent "injury-in-fact" as a result of illegal conduct of a defendant. It is worth considering whether a plaintiff suing a defendant under a group libel statute for uttering hate speech may rely solely on the existence of any resulting emotional or psychological trauma to establish "injury-in-fact." The answer appears to be "no." In *Allen v. Wright*, the Court concluded that while a plaintiff could assert a claim of stigmatic injury based on being "personally subject to discriminatory treatment," if the plaintiff has alleged only an "abstract stigmatic injury," the claim is not judicially cognizable. *See* Allen v. Wright, 468 U.S. 737, 755–56, 757 n.22 (1984) (citing Heckler v. Matthews, 465 U.S. 728, 739–40 (1984)). As such, *Allen* renders it unlikely that a plaintiff suing under a group libel statute for hate speech may succeed in solely alleging emotional harm without also showing more concrete discriminatory conduct. It is worth noting, however, that the Court has *never altogether* "*precluded* the recognition of psychological harm as injury-in-fact." Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1558 (2016) (emphasis added). Other issues with standing exist as well. Suppose, for the sake of argument, that psychological harm is found sufficient to establish "injury-in-fact." Another intriguing question is whether courts should find allegations for standing by racial or ethnic minorities more cognizable over those of their white counterparts when alleging "injury" under a group libel statute covering hate speech. The standing doctrine requires a plaintiff to have a sufficient stake in the outcome of a case. *See* Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972). This ensures the necessary adverseness between parties to "sharpen[. . .] the presentation of

this reveals various flaws in our norms and doctrines, which improperly deemphasize the inequities of institutional racism and xenophobia as well as the insidious impact of hate speech.[141]

Arguments to the contrary are unpersuasive. For example, free speech advocates may contend that education without any legal requirements is more appropriate for combating hate speech, and that allowing citizens to sue for overt race defamation may create resentment and backlash against minorities. Professor Jones disagrees, however, and argues that education, without accountability from the law, will fail to remedy the problem of racism, and that the "educative power of the law" would serve to end racist attitudes because people, in conforming to statutes prohibiting overt hate speech, would eventually adopt beliefs consistent with their actions.[142] In other words, the power of education and the force of law are inextricably linked here.

Jones, in his book *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*, quotes the World Jewish Congress, asserting that "laws . . . have themselves the character and purpose of social enlightenment and often prove to be the most effective means of education."[143] By "condemning certain actions, laws not only hold out the threat of punishment to those who violate them, but set standards of decent human behavior, to which the citizen, in his social attitude, should conform."[144] Therefore, "our society has a responsibility to apply this educative influence of the law in countering and combating racist propaganda."[145]

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issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). According to law professor Charles R. Lawrence, III, "[n]ot everyone has known the experience of being victimized by racist, misogynist, and homophobic speech, nor do we share equally the burden of the societal harm it inflicts," and "[o]ften we are too quick . . . to [falsely] assure ourselves we have experienced the same injury." Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus,* DUKE L. J. 431, 459–62, 466–75, 482–83 (1990). If this view is adopted by judges, they must then decide whether it is appropriate as a normative matter to find that a white person, as opposed to a minority member, lacks "a sufficient stake in the outcome of a case" involving defamatory hate speech. Raj Shah, *An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the U.S. Supreme Court's Standing Jurisprudence*, 61 UCLA L. REV. 196, 200 (2013) (citing *Sierra Club*, 405 U.S. at 731–32). Does treating people differently on the basis of race and ethnicity create a troubling double-standard? *See, e.g.*, *id.* at 215 (discussing "disturbing" racial double standards in standing requirements).

141. The Supreme Court would, of course, almost certainly invalidate a group libel statute allowing plaintiffs to sue defendants who create pseudo-scientific racist literature or any media outlet that perpetuates the false and negative stereotypes of minorities. In such a scenario, the Court would almost certainly find that the statute violates the First Amendment. This suggests, however, that our constitutional jurisprudence does not reflect the reality of modern-day racism, which is often subtle and harder to prove than the more obvious statements of blatant hate speech.

142. JONES, *supra* note 80, at 152.

143. *Id*.

144. *Id*.

145. *Id*.