

GENOCIDE AND THE NAZIS

THE CASE AGAINST GROUP LIBEL

CARL COHEN

In a recent article defending the right of the Nazis to march in Skokie, Ill. (*The Nation*, April 15), I undertook to show that the reasons commonly given for banning such demonstration, although plausible and tempting, cannot withstand examination. In the end, I argued, the right to speak freely, to march and demonstrate, applies even to Nazis in a heavily Jewish community.*

Responding to that essay, Doris Brin Walker, an attorney of Oakland, Calif. asked some very provocative questions. Here is her letter in full:

* The courts have agreed. An injunction originally forbidding the demonstration was quashed by the Illinois Supreme Court. A

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Most "free speech for Nazis" (and for the KKK, etc.) arguments fail to deal with a very basic point: the programs of these groups are based upon the libeling and degrading of colored peoples and of Jews and their goal is the physical extermination of those races and other groups whom they libel and degrade.

private suit against the Nazi march was ordered dismissed. Three ordinances adopted by the Village of Skokie, whose aim was to block the demonstration and to punish the publication of certain kinds of remark, were all held unconstitutional by the Federal District Court. On May 22, the 7th U.S. Circuit Court of Appeals upheld that ruling. The Nazis have the right to demonstrate, said the Circuit Court, even though they may "resort to hatred and vilification of fellow human beings." Appeal by Skokie to the U.S. Supreme Court has failed and the Nazis are now free to demonstrate in Skokie on the date they plan, June 25.

Carl Cohen's interesting and otherwise thoughtful article on Skokie, Illinois unfortunately slides over and around the questions raised by group libel and mass extermination, although in the same issue your editorial quotes a statement of Alvah Bessie which touches the point: "I am for free speech for everyone except those who would exterminate me. I have the right not to want to be exterminated, don't I?"

Does free speech include the right to espouse and encourage and thus to help bring about mass murder? Do Mr. Cohen and your editorial writer equate, within the free speech context, the political views of Communists with the views of those who would exterminate whole peoples because of attributes received at birth: race color, ancestral religion?

If we deny to the Nazis the right of advocacy of group inferiority, do we endanger the right of Communists to advocate socialist revolution? And if such danger does result (and I agree that today it does), should we accept that result, or begin to search out means of educating the people and the courts of the United States to distinguish between restrictions on political speech and restrictions on group libel and advocacy of mass murder of those libelled?

I hope that *The Nation*, and Mr. Cohen, will take another look, and will help to provide us with a more thorough analysis and exploration of these profoundly troubling questions.

Doris Brin Walker

What is that "very basic point" missed by those, like myself, who defend the right of all to speak? Is it that the Nazis would *libel* certain ethnic groups? Or is it that they aim to *exterminate* those groups? Two distinct arguments are conflated in Ms. Walker's letter. I will respond to both, answering explicitly the questions she asks.

Libel is a perennial problem for a society that prizes free speech. Between uninhibited debate and impermissible injury, where is the line to be drawn? This much will be generally agreed: the range of hurts held to justify recovery through libel action must be very narrowly restricted where citizens are expected to express their honest judgments frankly and forcefully. Critical speech must be protected, even when very painful, unless it can be shown that the attack has no bearing on the public business, and seeks the deliberate injury of private persons. But what is public business? And who are private persons? Hard questions, of course. The range of public concerns is vast and ever changing; the public role of citizen-participants is without precise boundary. In the broad arena of public argument dogmatism and error must be anticipated, prejudice and even nastiness tolerated. A continual intellectual free-for-all is what we expect in that arena—from which no claims or anxieties are barred, but to which candid entry is seriously hindered by fear of the charge of libel. (See "Libel, a

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Weapon for the Right" by Isidore Silver, *The Nation*, May 20.)

In this spirit there is no such thing as "group libel," a most unfortunate locution that should be discarded. Say what they will about the Jews—that they are pushy, or conspiratorial, or love watermelon—they cannot injure me, as private person, so as to justify redress through law. That is because the behavior and misbehavior of groups is, naturally and rightly, a matter of the highest public importance and a proper subject of public argument. The attitudes and practices of Jews and Catholics (taken as groups), of New Yorkers and Chicanos, of whites and blacks, are all matters we must be entirely free to argue about, to describe, analyze, and perhaps condemn. Group conduct and performance are commonly studied by social scientists, and the results of these studies are sometimes not agreeable to contemplate. Groups—national, religious, ethnic—perennially contend that judgments passed on them are malicious, defamatory, but appraising such judgments may become a critical piece of public business. In a polyglot society we cannot—repeat, cannot—threaten to punish angry speech about groups, even when allegedly defamatory, and expect to keep democracy healthy.

The Nazis say scurrilous things about colored peoples and Jews. We believe that the genetic inferiority they teach is profoundly mistaken and pernicious. Does that entitle us to suppress their demonstrations? Is it conceivable that, with respect to the behavior patterns of groups, and the reasons for these patterns, we are not yet in possession of the whole truth? If that is so we shall extend our understanding of such matters and correct mistakes of which we are now unaware only by opening all judgments about groups—about Jews, about Texans, about blacks—to the test of evidence and reason. There is no other rational course. If we believe an opinion vicious and absurd (German Nazis believed that all Jews had a peculiar natural odor offensive to Aryans, and therefore commonly disguised by perfume), we are free to exhibit its absurdity, to ridicule or condemn it, to ignore it. Of more moment, some very critical opinions about groups are by no means absurd but yet untrue; we need to expose errors, which we can do only by hearing them advanced and presenting refutation.

One attempt to justify the prohibition of Nazi demonstrations denies this flatly. Prof. Hadley Arkes (in the *National Review*, May 12) asks:

What unresolved issue in the marketplace of ideas may the Nazis help to settle for us? . . . Is there something in the perspective of the Nazis which has a plausible claim to truth? If we restrict the speech of the Nazis is it conceivable that we may shield ourselves from ideas that may turn out one day to be valid? . . . Might it be that the commitment to a democratic regime itself stands on premises that may be shown one day to be doubtful?

Rhetorical questions, all: Professor Arkes is convinced that he knows with absolute certainty that the answer to each is no. The wrongness of what he despises, he tells us, "arises from the concept of morals itself, and therefore no amount of discussion, now or in the future, could possibly have any effect upon its moral status." Many,

including Ms. Walker, who would outlaw "group defamation" are infected by the same conviction of infallibility.

The sweep and dogmatism of such claims is dangerous. Are we as wise as censors throughout the ages have believed themselves to be? Consider one of Professor Arkes's rhetorical questions. "Might it be that the commitment to a democratic regime itself stands on premises that may be shown one day to be doubtful?" The negative answer that he supposes to flow "from the concept of morals itself" is in fact mistaken. Democracy stands on premises that are indeed subject to doubt. Powerful arguments against them have been urged by philosophers and statesmen of great experience and depth. Most of us will agree in the end that those arguments are not sound, that democracy is morally justifiable. But if Arkes thinks that that matter is past discussing, he deludes himself. The ultimate justice of the democratic system can be defended only by meeting the arguments against it.

The Nazis, of course, are shallow, their arguments (insofar as they rely upon reason at all) ill-formed and ill-founded. Some of their claims and insinuations are an utter outrage. But there is also value for us in knowing this, in hearing their crudeness and superficiality, in allowing them to exhibit their inhumanity and seeing its failure to gain support. Professor Arkes asks: "Is it possible, for example, that a convincing case could yet be made for genocide if people were given a bit more time to develop the argument?" Of course not. But the easy condemnation of genocide (with which the Nazis are properly associated, but which they do not now explicitly propose) misapprehends the role of free speech in an open society. The error is twofold. On the one side lies the dogmatism that supposes it clearly known which political parties are morally unworthy of a hearing, and is ready to protect the rest of us from contamination. On the other side lies the failure to see that, even when moral condemnation of some party is substantively justifiable, the assurance of their free speech is a protection of our right to examine and expose their errors publicly.

Blacks and Jews, Georgia Crackers and Boston Irish need not fear defamatory attacks so long as they and others have the freedom and the willingness to respond. But if what may be safely said in public is restricted by law, the infection of bigotry is likely to fester. Nazis and others will not cease to spread ugly venom, but the antidote will be out of reach. Bigotry is most effectively dealt with in the fresh air of open argument.

In 1952, an Illinois statute making it a crime to publish or exhibit material that portrays "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion" which exposes that class to "contempt, derision, or obloquy" was held constitutional by the U.S. Supreme Court, Justices Black, Douglas, Jackson and Reed dissenting. [*Beauharnais v. Illinois*, 343 US 250.] Under that statute a man was punished for distributing anti-Negro leaflets. Justice Black's powerful dissent bears reconsideration now:

[N]o 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. [p. 270.]

When (if ever) words may be punished because they injure, that could be—Justice Black emphasized—only if the injury were done to a specific individual, never because of an alleged injury to a group.

Freedom of petition, assembly, speech and press could be greatly abridged by a practice of meticulously scrutinizing every editorial, speech, sermon or other printed matter to extract two or three naughty words on which to hang charges of "group libel."

One of Skokie's new ordinances, (held unconstitutional by two successive federal courts) is modeled on that earlier statute, of which Justice Black said that it gave to libel "a more expansive scope and more respectable status than it was ever accorded even in the Star Chamber."

This [group libel] Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of "witches." [p. 274.]

It should also be remembered that those who, in the distant and recent past, burned books or people because of the opinions they expressed, usually did so with a conviction of moral righteousness no less confident than that of Ms. Walker or Professor Arkes.

Suppose group defamation were made a crime. Those accused of exposing classes of persons to hatred or derision would then be arraigned and tried in court for their alleged crimes. Juries and judges—and legislatures in framing statutes—would face questions of two kinds, neither of which admits of satisfactory answer.

First, *which* groups are to be protected against defamation? Whatever the categories chosen, the results must prove embarrassing. Shall groups of identifiable national origin be protected? Will it be a crime, then, to make nasty cracks about Swedes or Scots? Religions will surely be protected. How guarded must our comments be, then, about the Hare Krishna, the Moonies, the Holy Rollers? H.L. Mencken, I suppose, would have been obliged to defend himself regularly in court—or would have sheathed his tongue. Are citizens (or natives?) of geographic regions to be guarded from abuse? Down-easters and Brooklynites will get their revenge at last. Racial or cultural groups? May one be fined, then, if caught telling a story (in what company?) in which a Jew or an Irishman is the butt of humor? Laughter is often pervaded with derision; shall we inspect for sarcasm, note who smiles? Perhaps all classes distinguished by attributes received at birth are to be shielded. Then ardent feminists must be careful of what they say about men, and outspoken male chauvinist pigs can be locked up.

Second, *what* is defamatory? This is utterly impossible

to settle objectively. In a recent Supreme Court decision Justice Harlan observed that "one man's vulgarity is another man's lyric"—a remark appropriately repeated by the Illinois Supreme Court in striking down the original injunction against the Nazi demonstration. Certain terms—Bohunk, Canuck, Yid—are used contemptuously in some contexts, affectionately in others. May they be voiced only at the risk of criminal prosecution? Cultural, national and racial groups differ markedly in mores and styles of life. Shall we forbid by law any comparative observations publicly made? The performance of some ethnic groups is statistically inferior to the norm in one sphere or another: some show higher rates of alcoholism or divorce, some tend to do less well in schools, and so on. We need to know these patterns: some perturbing environmental factors are probably operative and need correction. It will be difficult to identify such problems if it is risky to discuss the symptoms openly. It will be even more difficult to ameliorate such problems if it becomes criminal to entertain or defend hypotheses about their causes that may well be deemed offensive by some. When a report of investigation into group behavior is made, who will say what is malicious and what is simply honest? For criminal conviction, must damage be shown? Of what sort, and to whom? If our Constitution did not already prohibit legislative entry into this utterly subjective sphere, our good sense should surely do so.

The problem is not that we cannot weave a legal net that will catch the ugly fish we despise. We can. But every such net will catch a myriad of fish we do not want. And the only way anyone could be sure not to be caught in such a net would be to keep silent. "Group libel" statutes oblige all to be very careful of what they say in public on controversial racial and religious questions, and even to guard what they say in private. Surely that is not the direction in which we want our society to go.

Even if such statutes were in force, it should be remembered that the punitive machinery of the law could be brought into action only *after* the defamatory utterances had been made. Prior restraint is the archetype of state oppression. Even words so hurtful as to justify subsequent redress are entitled to a test in court. To suppress all *potential* libels we would have to cut out all our tongues, cap all our pens. Therefore, plainly, no so-called "group libel" statute could possibly serve to block a demonstration that Nazis or other fanatics were determined to hold.

Since punishment after the fact is the most such laws can threaten, and since the central question in the Skokie affair is whether the Nazis are to be permitted to demonstrate, it cannot be, as Ms. Walker suggests, that the potential for group libel is the "very basic point" missed by the defenders of the right to march. That is why arguments of this kind (as her letter illustrates) slide quickly from the nastiness of the *utterances* to the nastiness of the proposed *program*. What really troubles so many is not that the Nazis will *defame*, but that they would, if they could, *exterminate*.

"Does free speech include the right to espouse and

encourage and thus help to bring about mass murder?" Ms. Walker asks. Nazi blockers suppose the question rhetorical, its answer obviously negative. That is not so. The question raises very serious issues—but it is poorly framed, being both ambiguous and unhappily compound. Its confusion stems chiefly from the amalgamation of three fundamentally different kinds of action. Understanding their differences, and why differing verbs demand differing responses, is terribly important. Consider the three distinct questions:

(1) Have you the right to *espouse* mass murder? Yes, you do. The principles of free speech protect—and, we may proudly add, our Constitution protects—your right to espouse any opinions, any whatever. You may espouse even genocide—a fearful word used much too carelessly these days. The views you espouse are those you embrace as your cause—and you are free to attach yourself, privately or publicly, to any cause whatever, no matter how perverted, insane, or murderous others think it to be.

(2) Have you the right to *help bring about* mass murder? Certainly not. Acting as accessory to a murder, whether of one person or of many, is patently criminal. One who performs such acts ought to be quickly apprehended and firmly punished upon conviction.

(3) Have you the right to *encourage* mass murder? Here the act in question is simply not clear, and the ambiguity intensifies the confusion. If by "encourage" we mean to abet the actual crime, to conspire with those who proceed to do murder, to plan or direct their schemes or the like, the answer is clearly no. If by "encourage" we mean to advocate, to argue publicly in favor of mass murder, the answer depends upon the context in which that advocacy takes place. If presented seriously in a context in which some persons actually begin to execute what has been explicitly urged, the urging words may be said to become part of the actual crime. But if—as is the case in Skokie, surely—the context is one in which the advocacy of, say, the extermination of the Jews will be met with fury and contempt, no such felonies transpiring as the direct consequence of these words, the right to encourage in that sense is indeed protected.

The matter is muddled still further when Ms. Walker asks if one has the right "to encourage *and thus* help to bring about" mass murder. Conflating the verbs begs the central question. Would this advocacy help to bring its goals to pass? If Nazis in Skokie explicitly urge the killing of Jews, and if the murder of Jews follows directly from that urging, their speech may be properly criminal. The factual supposition is false, we know. More fundamentally mistaken is the supposition that, in every context, to advocate and encourage some course of action *is* to help bring it about.

"Logic-chopping!" One can hear the retort. But not so; these are not hairs being split. On the contrary, the difference between *espousing* and *bringing about* is the difference that makes rational self-government possible in a large community. To say that speech is free makes sense only so long as we are prepared to draw firm lines between words and the acts they are about. Only by making that distinction patiently and with restraint

can we consider all the courses of action open to us, hear all defenses and criticisms.

"I am for free speech for everyone except those who would exterminate me," exhibits with a classic non sequitur the failure to make this distinction. After all, "I have the right not to want to be exterminated, don't I?" Let us hope that thinking of this kind will not come to characterize the reasoning of judges or of citizens. It certainly does not follow from the fact that certain acts are criminal or beastly that persons who espouse a political program including those acts should lose their right to speak freely. Planning and engaging in mass murder is conduct essentially different from laudatory talk about it. Even healthy outrage does not justify the failure to make that fundamental distinction.

There are contexts in which the line between speech and overt deed is very hard to draw. Problematic, for example, is the case of the unruly mob under the spell of a charismatic orator whose words are general and provocative, while their subsequent acts in his spirit are specific and destructive. Or consider cases in which the deed is physical (say, burning a draft card) but the clear point of it is to convey an ideological message publicly. In fairness, all will agree that the theoretical distinction between speech and action cannot by itself neatly resolve all borderline cases. Applying principles to difficult fact situations is the job of the courts. But the case of a public demonstration by American Nazis is nowhere close to the borderline. That their march and symbols now will later prove to be integral parts of clearly criminal acts of assault or murder in suburban Chicago is not a tenable claim. Seeing that, we must bite our lips and let them speak.

If we extend free speech protection to them, Ms. Walker asks, do we not "equate, within the free speech context, the political views of Communists with the political views of those who would eliminate whole peoples because of attributes received at birth?" Properly sensitive to a genuine danger, her mistaken response to it flows again from a failure to make a critical distinction. Assuring two different political parties the same right to speak is not for a moment to suppose that they have been equated, or are equals in anything more than that they are parties. We certainly do not equate their positions, any more than we equate the views of the Communist Party with those of the Republican Party by insisting upon their equal right to be heard. Indeed, we hear them partly in order to learn how and why they are not to be equated.

But "in the free speech context" we do of course give them equal protection. That is not a judgment of their worth, political or moral. It gives no legitimacy or support whatever to any of the programs advanced by either. Judgments of worth come after presentation, not before. Those who suggest that any degree of approval is conveyed by this protection are plainly mistaken in fact; more fundamentally they are mistaken in supposing that some person or group is authorized to screen all political parties in order to decide in advance which of them deserve the "approval" of public consideration.

That brings us to Ms. Walker's final plea: that we educate the people and the courts "to distinguish between restrictions on political speech and restrictions on group libel and the advocacy of mass murder." If that unhappy task be undertaken, who shall be the educators?

As a serious, factual report—not to deride Ms. Walker, whom I respect—I observe that the most successful recent instructor of country and courts along the lines she suggests was Sen. Joseph McCarthy. I refer not to his corrupt uses of power, or to his pernicious insinuations. The core of McCarthyism goes much deeper than those. Senator McCarthy operated in a rational framework, but one having a dreadful foundation. Much of his behavior was based consistently upon the premise that it was his job to protect decent folks from certain parties and persons whose objectives were so evil as to be unworthy of any hearing. McCarthy's conception of evil we may not share; but in his moral arrogance he really did seek to educate us and the courts to distinguish between acceptable views and those whose public defense is not tolerable.

He and his kind (there will always be those eager to offer such instruction) are not to be answered by showing that the views they hate are not so bad after all. They may be as bad as McCarthy thought the Communists, or we think the Nazis. But if we respond by insisting only that McCarthy was fighting the wrong demons we will be obliged to conclude that—once we have identified the right demons—McCarthyism as method is all right. If we would expose the fundamental corruption of McCarthyism we must insist that all political demons, *bad as they are*, retain the right to public speech. The task, most assuredly, is not to "educate" the courts or people to screen out bad ideas for obliteration, but to strengthen the determination of courts and citizens to distinguish freedom of thought from freedom of action, permitting no laws whatever to abridge the former.

If the Skokie ordinance making group defamation criminal is ultimately upheld, and if such statutes spread, we will have placed in the hands of the legislative branch the authority to regulate the right of free speech, and that, as Justice Douglas said in his dissent in *Beauharnais*, is an ominous and alarming trend. He wrote:

The free trade in ideas which the Framers of the Constitution visualized disappears. In its place there is substituted a new orthodoxy—an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality, or health of society. Free speech in the constitutional sense disappears. Limits are drawn—limits dictated by expediency, political opinion, prejudices or some other desideratum of legislative action. [p. 285.]

Minority groups which believe these statutes to be their victory will profit from a longer view; it is they—blacks and Jews—who will be the victims, sooner or later, of political orthodoxies enforced by law. That is a price far too high to pay in order to repress a few half-lunatic Nazis. □