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Community, and the First Amendment. by Donald
Alexander Downs.

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ing, but fortunately the errors are minor ones that do not confuse Levy's line of argument.

NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT. By Donald Alexander Downs.¹ Notre Dame, Indiana: University of Notre Dame Press. 1985. Pp. xii, 227. \$20.00.

*John H. Garvey*²

There have only been two significant events in the life of the group libel doctrine: the 1952 decision in *Beauharnais v. Illinois* and the litigation arising out of the Nazis' attempt to march in Skokie, Illinois in 1977. We are now accustomed to think of *Beauharnais* as a derelict, cast off by the Supreme Court in *New York Times v. Sullivan*. This book argues that it would be unwise to abandon the concept of group libel, and that a properly limited rule against racial vilification would forbid expression such as the Nazi march.

The Nazis (thirty to fifty of them) wanted to march up and down for half an hour in front of the Skokie Village Hall on a Sunday afternoon, to protest an ordinance requiring demonstrators to carry insurance. They said they would carry signs with catchy slogans like "White Free Speech" and, more to the point, they would wear storm-trooper uniforms with swastika armbands. Most of Skokie's residents are Jewish, and many are survivors of persecution by Hitler's regime. The Nazis stirred things up in advance with some vile leaflets announcing their coming. Frank Collin, their leader, told Professor Downs that

I used it [the first amendment] at Skokie. I planned the reaction of the Jews. They [were] hysterical.

The Village sued in a state court to enjoin the march on the theory that it would cause distress to the Jewish population, incite religious hatred, and provoke violent retaliation. This ultimately failed.³ The Village also enacted three ordinances to provide more

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3. In the Cook County circuit court the Village got an injunction that forbade the Nazis to march in uniform, display the swastika, or distribute materials that would incite religious hatred. The Supreme Court ordered the state appellate courts either to allow an expedited appeal or to stay the injunction. *National Socialist Party v. Skokie*, 432 U.S. 43 (1977). The Illinois Appellate Court then modified the injunction to forbid only display of the swastika. *Village of Skokie v. National Socialist Party*, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977). After some more wrangling about a stay (see *National Socialist Party v. Skokie*,

permanent protection: (1) a permit system for public assemblies; (2) a criminal prohibition against dissemination of material which incites racial or religious hatred; and (3) a criminal prohibition against political demonstrations by people wearing military uniforms. The federal courts held all these invalid.⁴ In the end, though, the Nazis retreated and marched elsewhere.

I

Downs does not defend the Skokie ordinances, which he says forbade too much speech. But he argues that a more limited rule would be all right. In his view, racial vilification causes harms that outweigh the free speech benefits of such expression. Those harms occur, he argues, only when the vilification is "targeted" at an individual or a specific group (like the Jews in Skokie).

The best part of Downs's book is his collection and assessment of data devoted to the former of these two propositions: that the harms of racist expression outweigh the free speech benefits. To make that point Downs interviewed more than thirty of the participants in the controversy. These included members of the community of Jewish survivors, Skokie residents and political leaders, representatives of concerned groups in and outside the village (the Anti-Defamation League, the Jewish Federation in Chicago, the Northwest Suburban Synagogue Council, Skokie United Presbyterian Church, etc.), Nazi leader Frank Collin, and the American Civil Liberties Union officers and lawyers most involved in representing him.

What Downs draws from these interviews is a rather sensitive assessment of the effects of the conflict. Chief among the harms is the emotional trauma suffered by the survivors. Skokie's corporate counsel said:

I knew these people well, and never recalled any conversations about their experiences in the death camps. They were regular citizens before this. On this date, however, they were changed people: fanatical, irrational, frightened, angry. No one could possibly appeal to them with any reasonable argument. When we told them at noon that Collin had been served an injunction, many refused to be-

434 U.S. 1327 (Stevens, Circuit Justice 1977)), the Illinois Supreme Court held even that provision unconstitutional. *Village of Skokie v. National Socialist Party*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

A parallel state court action for similar relief was brought by a class of Nazi holocaust survivors. The circuit court gave the plaintiffs no relief, however, and the appeals produced no opinions. Certiorari was denied on the same day the Supreme Court disposed of the federal litigation. *Goldstein v. Collin*, 439 U.S. 910 (1978).

4. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *application for stay of mandate denied*, 436 U.S. 953 (1978), *cert. denied*, 439 U.S. 916 (1978).

lieve us. Many stayed until five o'clock, chanting loudly, etc. It would take a psychiatrist to understand the impact. There seemed to be different states of being: catatonia, frenzy, etc. They were possessed, some of them. It was as if they had repressed something for twenty years that was now loose. It was very disturbing.

In addition to the feeling of terror there was, particularly among the survivors of Hitler's Europe, a conviction that community protection had broken down and a sense of societal incivility. And in the background there was a very real threat that violence would occur if the march ever took place.

On the other hand the conflict produced significant benefits of the kind that free speech theorists typically envision. This was true even for the survivors themselves. There was nothing Collin and his pals could teach them about nazism, but Downs argues convincingly that for some of them the incident produced real self-development: a sense of mastery over the Nazi terror in their past, and a new willingness to participate in public life.

Other participants did learn new things about nazism and anti-Semitism, and for that matter about the pros and cons of freedom of speech. Moreover, the affair caused a political mobilization by the larger Jewish community that outlasted Collin's threat to march. According to Downs, "The local (Midwest) ADL, the National American Jewish Congress, and the National Jewish Community Relations Advisory Council . . . revised their established quarantine policies in favor of selective confrontations designed to support the community." Downs also speculates that the active resistance to the Skokie march will deter some other hatemongers.

Downs's proposal for balancing these harms and benefits is somewhat confusing. There are two reasons for this. The first is that he deals with too many principles; the second is that his methodology—what he's doing with these harms and benefits—is a little unclear.

First, as to principles. Professor Downs believes that we have gone overboard (not a lot, but a little) in protecting speech at the expense of other social values. He uses more than half a dozen pairs of principles drawn from various sources to make this point:

(1) "Republican virtue"/"community security." The former he uses to stress the positive aspects of free speech ("citizen participation in political matters" and so on); the latter the need for protection against assault and incivility.

(2) "Procedural justice"/"substantive justice." The former term is meant to describe aspects of current free speech doctrine such as the rule of content neutrality. (Downs likens this to the due process revolution in administrative law and criminal procedure.)

The latter term refers to a community interest in morality and civility.

(3) The "free speech principle"/the "harm principle." The former is Frederick Schauer's explanation of the scope and strength of the first amendment guarantee.⁵ The latter is a modified version of Kant's principle of ultimate ends in the *Foundations of the Metaphysics of Morals*. I will say more of this below.

(4) "Procedural equality"/"substantive equality." This contrast is not entirely clear, but it may describe the rights of speaker and victim, respectively, to equal dignity. A rule that treats all speakers equally without regard to the *content* of their speech (procedural equality), even if they use fighting words, violates the target's right to equal dignity (substantive equality).

(5) The principle of "analysis"/the principle of "synthesis." The former Downs likens to "the principle of libertarian individualism," which controls current free speech law; the latter "recognizes the individual as a social person."

(6) "Individualism"/"communitarianism." This seems to be a way of explaining the last pair.

(7) The "ethic of ultimate ends"/the "ethic of responsibility."⁶ The former term does not match up exactly with the first term in each of the other pairs, but the "ethic of responsibility" is another way of describing the need for community security, substantive justice, the harm principle, and so on. As Downs puts it: "The ethic of responsibility, which Weber contrasts with the puristic ethic of ultimate ends, is premised on the need to modify ideals and values in the face of their ethically relevant consequences in the real world."

A man I once worked for told me that the world is divided into two kinds of people—those who see everything as falling into two categories, and those who don't. If so, Downs is of the former sort.⁷ I am of the latter. I think the harm principle that Downs proposes is useful. But many of the other pairs he lines up are undeveloped, redundant, and shed only the dimmest light on the problem of racial vilification. One may find instances of "procedural justice" in modern administrative law and criminal procedure, but thinking

5. F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

6. See generally *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77-128 (H. Gerth & C. Mills ed. 1946).

7. He exhibits the same trait in describing the benefits that the Skokie conflict had for survivor-participants. These are described by means of the following pairs of principles: (i) "patients"/"agens" (Erik Erikson); (ii) "bare existence"/"independent self-consciousness" (Hegel); (iii) the "colonized"/the "full statute of a man" (Albert Memmi and Frantz Fanon); (iv) abolitionist policies/blacks standing up for their own rights (A.I. Melden).

about such instances does not help me see why the courts are in a muddle over *Beauharnais*. And Downs says better in his own words what Roberto Unger's principles of "analysis" and "synthesis" are supposed to tell me. The other problem with all these principles is that there are so many you don't take any of them seriously after a while, and that's too bad if one of them has something to say.

Second, as to methodology. The principles that Downs lists reflect interests and values bearing on the formulation of a rule for dealing with the problem of group libel. But it is sometimes unclear how he is deploying these pieces en route to his final proposal. One approach he seems to suggest is to balance the harms and benefits from that class of speech, and come up with a general rule. This is what one expects after the long discussion of harms and benefits from the Nazis' proposed march in Skokie. The result of Professor Downs's balancing is a rule that favors the victim's interest. This is not surprising in light of the "teleological" theory of "communitarianism" that Downs endorses, or at least sees as a good to be achieved along with the good of "individualism."

Another approach Downs proposes is to resolve the conflict between speaker and target by resort to "the principle of direct harm" derived from Kant's principle of ultimate ends. Kant's principle, however, is not "teleological" but deontological: what ultimately counts is not a net balance of goods (like community security) but the categorical duty not to treat another person as a means. Thus:

[In the case of targeted racial vilification] the autonomy and self-government principles *do not apply* because of our application of the Kantian principle of ultimate ends of cases of direct harm. *Any* long-range benefit that might result from targeted racial vilification cannot justify its expression because of the direct harm which results. (Emphases in original).

[S]uch harms cannot be justified by the social utility of the speech *because then the targets would be treated as the means of large societal First Amendment ends*. (Emphases in original).

Downs would modify Kant's principle so that it comes into play only where the harm is "direct," i.e., intentionally caused to identifiable individuals. But that only limits the range of the principle, not its categorical force within the area where it applies. As the quotations above indicate, direct harm is not to be balanced against "societal first amendment" benefits.

This curious melange of balancing and categorical rules may seem somewhat familiar to students of the first amendment. It is a respectable imitation of the process of definitional balancing. The interesting thing about Downs's version is that he ends up in about

the same place as *Chaplinsky v. New Hampshire*, but by reasoning in the opposite direction. The usual approach is to begin with a broad free speech right ("All categories of expression are covered") and then lop off those categories such as fighting words that are too far from the center of first amendment purposes to justify the harm they cause. Downs, by contrast, begins with the right of the victim⁸ (always to be treated "as an end in himself, not merely as a means") and then lops off those "indirect" harms that are as a practical matter too far from the center of Kant's concerns to justify a restriction on free speech. In the end he too says that "insulting or 'fighting' words" can be forbidden.

II

Definitional balancing has one point in its favor that Downs's approach does not: the right to freedom of speech is explicitly protected by the Constitution; Kant's right to be treated as an end is not. Kant's right, as modified by Downs, is what we usually treat in first amendment computations as a "state interest"—the kind of thing that can be "legitimate," "important," "substantial," or even "compelling." What I like about Downs's backwards approach to group libel is that he feels around a part of the elephant that we don't usually address. We know much about categories of speech (commercial speech, libel, obscenity) and types of abridgement (content regulation, time, place, and manner restrictions) but, like Justice Blackmun,⁹ I'm not sure I can tell a legitimate from a compelling state interest. Professor Downs at least gives an example of each (indirect harm, direct harm), offers some distinguishing characteristics (direct harm is intentionally inflicted and intimidating), and proposes a justification for considering something compelling (Kant's principle, as modified).

Downs is right about Kant's principle, at least to this extent: I believe most of us would find it a sufficient reason for limiting a constitutionally protected liberty that one is maliciously using it to cause harm to a specific person. That is the reason why we tolerate restrictions on libel (even public figures can't be falsely and deliberately defamed), invasion of privacy, residential picketing, demonstrations on private property, and ambulance chasing. And our inability to point to specific people who are harmed is part of the trouble we have with obscenity, and so on. Group libel law traditionally has punished behavior that is more like obscenity or sedi-

8. More precisely, the duty of the speaker.

9. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring).

tious talk than libel: it has always been hard to say precisely who is hurt, and how. The danger, in other words, tends to be conjectural, long-term, and diffuse. Downs takes a step in the right direction by arguing that racial vilification should be forbidden only when it is “targeted” at “an individual or specified group” of limited size. By “targeted” he means either addressed to (“You are a _____”) or expressed about (“X is a _____”) a specific person or group.

But it isn’t enough, according to Downs’s argument, that speech be targeted at a specific person or group. The modified Kantian principle also requires that the speech cause harm of a “substantial” nature. In order for the principle to serve a useful role in first amendment analysis, there must be general agreement about what it means to “cause” harm and about what harms are “substantial.” Although the book contends that racial vilification always causes the requisite harm, I am not convinced.

There are perhaps four kinds of harm that group libel can cause. The first is provocation to violence, by the target group (as in *Chaplinsky*) or a sympathetic audience (as in *Beauharnais* and *Brandenburg*). Lawyers nowadays usually feel that this is the only harm that justifies control of racial slurs, whether directed at groups (*Beauharnais*) or individuals (*Chaplinsky*). But in most cases of group libel, physical violence doesn’t occur. Given our constitutional bias in favor of free speech, the bare possibility of violence does not support a flat rule against racial vilification. Instead it supports something like a clear and present danger rule, which requires an appraisal of the danger in each case. That is in fact the current constitutional rule for cases in which the government tries to justify suppression of speech on this ground.

An additional causation problem afflicts many “provocation to violence” cases. Assume, for example, that the march had occurred in Skokie and had provoked residents to violence. The problem is that the Nazis gave warning of when they would come and what they would say. The targets’ decision to attend would therefore have been voluntary. It would also have been understandable; but if they reacted violently it would be hard to say that they were not responsible for their own actions.

The targets’ emotional distress is a second kind of harm that may be caused by group libel. Downs argues that the Nazis’ proposed march inflicted a special kind of mental torment on holocaust survivors in Skokie, and that this harm surpasses the lower bound he sets for the Kantian principle. I agree, but I don’t think Downs will convince people who don’t. We lack a universally accepted rule for identifying compelling harms (as we have the Constitution for

identifying some fundamental and not-so-fundamental liberties). Professor Downs uses two methods to remedy this deficiency. One is simple intuition—he presents hypothetical examples of harms above and below the line, and assumes that the reader's moral sense will sort them in the same way. An obvious problem with this method is that not everyone has the same intuition. Franklyn Haiman, for one, would disagree with all of Downs's hypotheticals.¹⁰ The second method is the common law of torts, which is a kind of social statement that certain harms are compensable and other are not. Downs points to the tort of intentional infliction of emotional distress as communal recognition of the fact that this kind of harm justifies control of behavior. Unfortunately, the common law does not tell us how emotional distress registers on the relevant scale. A mere "legitimate" interest in compensating harm suffices to justify most tort causes of action. For first amendment purposes, by contrast, we need to know whether the interest in preventing emotional distress is "substantial" or "compelling."

There is another problem with justifying a flat rule against racial vilification by reference to the targets' extreme emotional distress. It will be a rare case where each member of a large group—or even an individual, unless he is specially vulnerable—suffers that kind of harm. What made the Nazis' Skokie march a hard case was not that it would traumatize Jews generally, nor even Jews in Skokie, but Jewish survivors of the holocaust. The only harm that necessarily occurs in the ordinary case is of a different type.

A third type of harm might be called "offense": irritation, disgust, embarrassment, and the like. This might be one way of characterizing the harm suffered by native-born Jews (and maybe also by non-Jews) in Skokie, and generally by those to whom racial epithets are addressed. There is no bright line separating "offense" from "emotional distress," but the mental state is sometimes quite different and deserves separate treatment.¹¹

My intuition and the law of torts tell me that Downs should be able with impunity to dismiss my review by saying, "It figures;

10. See F. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 95, 97, 146 (1981). Downs suggests, for example, that it would cause harm above the line to circulate leaflets saying, "Jew Greed Pockets Another Commission: Kike Keefe Cashes in on Families' Homes." Cf. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Haiman disagrees ("crafty jews," "Kosher Coon"). Downs says it would cause harm above the line for a group of twenty demonstrators to stand outside the home of a black family "'chanting in a low tone, . . . mak[ing] almost no sound at all.'" Haiman says that "[i]f they are there for an hour or so, it would be just as easy for residents of the home to avoid looking out the window or to pull their shades." Haiman also argues against restriction of speech in the Skokie case.

11. See J. FEINBERG, *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY* 69-109 (1980); Vandevveer, *Coercive Restraint of Offensive Actions*, 8 *PHIL. & PUB. AFFAIRS* 175 (1979).

Garvey's a dumb mick." But Downs treats this as he does the deliberate infliction of emotional distress. His rule would allow me to sue for damages (or perhaps initiate criminal proceedings) because that comment (1) . . . explicitly demeans . . . through reference to . . . ethnicity . . . and (2) such expression and harm are intended by the speaker . . . and (3) such expression is directed at an individual . . . in such a way as to single out an individual . . . as the definite target of the expression.

It would be nice if people didn't say such things. And when offense comparable in degree results from conduct not protected by the first amendment (when you let your dog defecate on my front porch) we have no hesitation about controlling it. But where the harm principle collides with the free speech principle, I think the lower bound must be somewhat higher.

Some racial slurs degrade the target group in the mind of the audience. This fourth type of harm is one the phrase "group *libel*" usually suggests: an injury to reputation.¹² But what nearly all these cases are really about is a shade different. It is the closely related harm from racial vilification that is neither true nor false ("kike," "nigger," swastikas, burning crosses) but that promotes hatred or contempt. The idea is that members of the abused group will eventually suffer a loss of status, political power, job opportunities, and so on, when others come to view them as the speaker (and other speakers) have characterized them.

If all this happens, I suppose this kind of harm is serious enough to justify control. The difficulty is in figuring out when any particular group libel has had such an effect. The harm is cumulative, and the addition to societal prejudice made by a single libel is likely to be negligible. Moreover, the harm is long-term rather than immediate, and it is possible that more speech may nullify it. (What A says to B may be overcome by what A later says, or by what C says; or B may forget it.) In the third place, the harm of societal prejudice—assuming that it occurs in measurable increments and is not nullified by rebuttal or other events—is spread over all the members of the group. Whether it is thereby diffused (like a pollutant discharged into the air) or multiplied (like a flu virus) may be debated. I incline to the latter view, but with this reservation: it would be impossible to identify the specific individuals ultimately harmed by the increment of prejudice that the libel causes. Thus even if speech is "targeted" at a particular person, one must conclude that this kind of harm is not "direct" enough to count in Downs's system.

12. See *Beauharnais v. Illinois*, 343 U.S. 250, 257-58 (1952).

The reservations I have about Downs's methods and conclusions, though they are serious, do not negate the book's usefulness as a realistic study of the first amendment in action. The Skokie case is a hard problem, and as Judge Sprecher said, "[E]ach court dealing with [the case has felt] the need to apologize for its result." Downs may not change the results, but he helps us understand the need for apologies.

A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS. By Carl Wellman.¹ Totowa, New Jersey: Rowman & Allanheld. 1985. Pp. 225. \$34.95.

*Ernest van den Haag*²

Rights are incessantly being manufactured in the U.S. (and on a global scale by the U.N.) with little thought being given to the nature and usefulness of the product, or the legitimacy of the manufacture. So I looked forward to Professor Carl Wellman's *A Theory of Rights*, thinking that he would scrutinize the process of production. I was disappointed.

Professor Wellman goes back to Hohfeld's distinction among rights, claims, privileges, powers, and immunities, not to speak of the correlative duties—commenting on it, clarifying it here and there and, perhaps, sharpening it. Herein lies his claim of originality, too often reiterated. Although I do not think that Wellman's revisions (some acknowledging the influence of H.L.A. Hart) are world-shaking, his work might have been useful, were it not for his irritatingly repetitive style and a pedantic habit of making distinctions ad infinitum, some without a difference, others conceivably of some use, most unneeded. Sometimes Wellman's writing borders on self-parody: "The core of this right, as I conceive it, is the moral liberty of the pregnant woman to obtain an abortion. For the sake of brevity, I shall use the word 'woman' somewhat loosely to refer to any woman or girl of child-bearing age." Must we be told that the liberty to obtain an abortion pertains to a "pregnant" woman (have others been applying?) only if she is "of child-bearing age" (ditto) or that "woman" may "loosely" refer to "any woman or girl"? Unfortunately this passage is no exception. Although

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