

1966

Race Defamation and the First Amendment

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Race Defamation and the First Amendment, 34 Fordham L. Rev. 653 (1966).

Available at: <https://ir.lawnet.fordham.edu/flr/vol34/iss4/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

COMMENTS

RACE DEFAMATION AND THE FIRST AMENDMENT

[T]here is no reason that we should deprive a wise man of any advantage to his wisdom, while we seek to restrain from a fool that which being restrain'd will be no hindrance to his folly.¹

I. THE NATURE OF THE PROBLEM

The history of race defamation in the United States has fluctuated between dormancy and malignancy.² While the "hate barometer" at present does not indicate an atmosphere in which a minority would have to fear for its existence,³ public opinion is subject to mercurial change.⁴ Given the catalytic effect of modern mass communications⁵ on various segments of the population in times of racial anxiety,⁶ concern over the adequacy of our laws⁷ in curbing the potentially devastating results of class defamation is inevitable.⁸

II. CRIMINAL SANCTIONS AS A REMEDY

A. *The Common Law of Criminal Libel in England*

1. In General

Although there is authority for the proposition that there was a defamation law in England since Roman times,⁹ the statute *De Scandalis Magnatum*¹⁰ and

1. Milton, *Areopagitica*, in 4 *The Works of John Milton* 314 (1931).

2. See generally Myers, *History of Bigotry in the United States* (Christman rev. ed. 1960).

3. The General Counsel and National Director of the Anti-Defamation League of B'nai B'rith suggest that "gutter-level bigots" in the United States are "a concern only at the police precinct level . . ." Forster & Epstein, *Danger on the Right* at xviii (1964).

4. For an account of the chameleon-like change in American public opinion respecting Americans of Japanese ancestry in 1941-1942, see Bogardus, *The Making of Public Opinion* 212-16 (1951).

5. See generally Hovland, Lumsdaine & Sheffield, 3 *Experiments On Mass Communication* (1949).

6. The Harlem and Detroit riots of 1943, dealt with in Allport, *The Psychology of Rumor* 193-96 (1947), are paralleled by the summer riots of 1964 in Harlem (see *N.Y. Times*, July 19, 1964, p. 1, col. 4), Bedford-Stuyvesant (see *N.Y. Times*, July 21, 1964, p. 1, col. 7), and Rochester (see *N.Y. Times*, July 25, 1964, p. 1, col. 5). The simultaneous nature of these riots demonstrates the effect of the mass media on racial groups in time of racial strife.

7. See, e.g., Brown & Stern, *Group Defamation in the U.S.A.*, 13 *Clev.-Mar. L. Rev.* 7 (1964); Clark, *The Problem of Group Defamation*, 13 *Clev.-Mar. L. Rev.* 1 (1964).

8. See generally Belton, *The Control of Group Defamation: A Comparative Study of Law and Its Limitations* (pts. 1 & 2), 34 *Tul. L. Rev.* 299, 469 (1960); Beth, *Group Libel and Free Speech*, 39 *Minn. L. Rev.* 167 (1955); Kelly, *Criminal Libel and Free Speech*, 6 *Kan. L. Rev.* 295 (1958).

9. See Newell, *Slander and Libel* 19 (3d ed. 1914), citing Bracton, a writer in the reign of Henry III (1216-1272). There were no reported cases, however, until the reign of Edward III (1327-1377). Newell concludes that libel actions became common only after the advent of printing. *Ibid.* Furthermore, slander never became a popular action because men of the realm preferred to defend their own honor rather than turn to the courts. *Id.* at 19-20.

10. 3 *Edw. 1, c. 34* (1275).

subsequent re-enactments¹¹ were the earliest codifications of the law. Limited in scope, these statutes operated to curb political scandal and thereby prevent discord between the monarch and his subjects. It was not until the seventeenth century that, in *The Case De Libellis Famosis*,¹² libel of an ordinary subject was made a crime. The overwhelming majority of commentators finds the origin of criminal libel in this court's premise that the libel, by inciting the libeled person and his kin¹³ to revenge, leads to breach of the peace.¹⁴ The court, however, in rejecting truth as a defense to the crime, spoke also in terms of harm to the individual, noting that libel "robs a man of his good name, which ought to be more precious to him than his life . . . and therefore when the Offender is known, he ought to be severely punished."¹⁵ This dichotomy between harm to the person and harm to the public appeared in *The King v. Burdett*,¹⁶ which described libel as "the tendency to a breach of the peace produced . . . by writing,"¹⁷ yet reflected that it was as necessary to protect a man's reputation as it was to protect his property.¹⁸ Thus, the common-law history of criminal libel of an individual belies any attempt to categorize it as conceived solely to protect the public. Yet, it must be conceded that this was the *sine qua non* for the crime, whereas the protection of the person was merely an added justification for the punishment of the defendant.

2. As Applied to Classes

Whether or not one could libel a class of people¹⁹ with impunity was undetermined until the eighteenth century. Those in favor of extending the criminal sanctions of common-law libel to protect a class received a sharp setback in 1699

11. 2 Richard 2, stat. 1, c. 5 (1378); 12 Richard 2, c. 11 (1388). These statutes were a precursor of the sedition laws, 1 & 2 Phil. & M., c. 3 (1554), and 1 Eliz. 1, c. 6 (1558), which were administered by the notorious Star Chamber. See Hudon, *Freedom of Speech and Press in America* 9 (1963).

12. 5 Co. Rep. 125a, 77 Eng. Rep. 250 (K.B. 1609). From this point on, the discussion will center on libel, since the common law did not impose sanctions for slander. See Newell, *Slander and Libel* 1157-58 (3d ed. 1914). If the slander contained blasphemous or "grossly immoral" words, certain authorities contended that spoken words were indictable. Harris, *Criminal Law* 101 (12th ed. 1912); 4 Stephen, *Commentaries on the Laws of England* 134 (19th ed. 1928). From the absence of any case holding slander to be a crime, it is likely that these words were punished as "an offense of another description," e.g., breach of the peace. Newell, *op. cit. supra* at 1157.

13. Thus, even the libel of a dead person was a crime. *The Case De Libellis Famosis*, *supra* note 12; see Holt, *Libel* 246-47 (1st Am. ed. 1818); 4 Stephen, *op. cit. supra* note 12, at 136.

14. See, e.g., Button, *Libel and Slander* 17-18 (1935); Hickson & Carter-Ruck, *Libel and Slander* 196-202 (1953); 2 Starkie, *Slander and Libel* *213-15 (2d ed. 1830).

15. 5 Co. Rep. at 125b, 77 Eng. Rep. at 251.

16. 4 Barn. & Ald. 95, 106 Eng. Rep. 873 (K.B. 1820).

17. *Id.* at 95-96, 106 Eng. Rep. at 873.

18. *Id.* at 96, 106 Eng. Rep. at 874.

19. The word "class" is used to define a large unit of persons, thus encompassing racial and religious groups.

when King's Bench considered a writing entitled "The list of adventurers in the ladies invention, being a lottery, &c.,"²⁰ and declared:

Where a writing which inveighs against mankind in general, or against a particular order of men; as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel.²¹

The facts of the case, however, severely limit its precedent value. From Lord Raymond's less often cited but far more detailed report,²² it appears that the libel concerned completely unknown persons, and, hence, a jury could not say whether anyone was harmed. Therefore, when the court said that to be actionable the words must descend to individuals, it was not establishing any criteria for judging such descent when an individual's class is libeled. The decision is declaratory of common sense rather than of the common law of class libel.

In 1732, the common law could have been finally resolved when, in the case of *The King & Osborn*,²³ the defendant was tried for publishing a libel against Jews recently arrived from Portugal. Unfortunately, there are two conflicting unofficial versions of this case.²⁴ In Barnardiston's report, the court distinguished the prior case in that the libeled persons there were totally unascertainable, whereas, in the case before it, "the whole community of the Jews are [sic] struck at. And wherever that is the case . . . this Court ought to interpose."²⁵ Kelynge, on the other hand, reported that the court considered not libel, but breach of the peace as the foundation of the complaint for "tho' it is too general to make it fall within the Description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished."²⁶ The fact that there was an actual, rather than a constructive,²⁷ breach of the peace in this case²³ lends support to the Kelynge version. Nevertheless, eight years later, *Osborn* was cited for the proposition that, when a class is libeled, every member thereof is stained by the sweeping brush.²⁸ As this was the state of the law at the time of the

20. *Rex v. Orme & Nutt*, 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (K.B. 1699). (Italics omitted.)

21. *The King v. Alme & Nott*, 3 Salk. 224, 91 Eng. Rep. 790 (K.B. 1699). This case is a different reported version of *Rex v. Orme & Nutt*.

22. *Ibid.*

23. 2 Barnard. K.B. 138 (rule to show cause), 166 (rule absolute), 94 Eng. Rep. 406, 425 (K.B. 1732); Kel. W. 230, 25 Eng. Rep. 584 (K.B. 1732).

24. Not until the publication of *English Law Reports* (1865 to date) did any report approach "official" status in England. See Price & Bitner, *Effective Legal Research* 279 (1953). Even so, these volumes are only "semi-official," the judges approving and revising the reports before they are published. *Id.* at 279 n.35.

25. 2 Barnard. K.B. at 166, 94 Eng. Rep. at 425.

26. Kel. W. at 230, 25 Eng. Rep. at 585.

27. A constructive breach of the peace would be found where words were spoken which would tend to breach the peace but did not actually lead to a disturbance. See, e.g., N.Y. Pen. Law § 722(1).

28. Defendant's words so aroused the community against the Jews that some rioted and injured the prosecutor, himself a Jew. Kel. W. at 231, 25 Eng. Rep. at 585.

29. *King v. Jenour*, 7 Mod. 400, 401, 87 Eng. Rep. 1318, 1319 (K.B. 1740).

creation of our Republic, it is not surprising that common-law authorities merged these holdings and found a common law of class libel based on a tendency to breach the peace.³⁰

Although a racial or religious group could fairly fit within the protected class under this definition, it is interesting to note that the English courts in the nineteenth century gave a more restrictive interpretation to their libel laws. In 1819, the Court of Chancery interpreted *Osborn* as a conviction for breach of the peace and expressly rejected the notion that this was a libel case.³¹ Barnardiston was vindicated three years later when one Williams, who libeled the clergy of the diocese of Durham, was convicted on the authority of *Osborn* "for a libel reflecting on a public body."³² In 1838, however, when a Roman Catholic nunnery was libeled, the court held that, whereas one may not with impunity attack a small group, "a person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism [sic], or even any sect of the Christian Religion [except for the established religion of the country which would be an attack on the country itself] . . ."³³ If the rule were, as this latter case seems to indicate, that a defendant could not focus his attack on a small group without implicitly attacking the individual members of the group,³⁴ the court must have intended to determine criminal liability in the same manner as it would determine civil liability, *i.e.*, by counting heads to ascertain personal injury.³⁵

This deviation from accepted common-law criminal libel principles cannot be justified by the fact that a class, rather than an individual, was the target of the defamer. It can scarcely be argued that the possibility of riot always increases as the defendant's barbs reflect on a narrower group to which the defamed person belongs. How could it be said, for example, that a member of the Jewish War Veterans would be angered by an attack on that organization but passive to an attack on all Jews? The court, therefore, in its presentation of the common-law rule, evidenced the fact that the common law was based on practice rather than on logic.³⁶

30. See, e.g., Bower, *Actionable Defamation* 426-27 (2d ed. 1923); Holt, *Libel* 246-47 (1st Am. ed. 1818); Odgers, *Libel and Slander* 456-57 (5th ed. 1911).

31. In the Matter of Bedford Charity, 2 Swans. 470, 532, 36 Eng. Rep. 696, 717 (Ch. 1819).

32. *Rex v. Williams*, 5 Barn. & Ald. 595, 597, 106 Eng. Rep. 1308 (K.B. 1822).

33. *Gathercole's Case*, 2 Lew. 237, 254, 168 Eng. Rep. 1140, 1145 (York Summer Ass. 1838).

34. *Ibid.*

35. See *Foxcroft v. Lacy*, Hob. 89a, 80 Eng. Rep. 239 (K.B. 1613); notes 50-58 *infra* and accompanying text.

36. It later became settled in England that, when a class was defamed, the common law dictated a prosecution for seditious libel or for conspiracy to effect a public mischief, and not for the spurious common-law crime of class libel. See *Opinion of the Counsel to the Crown* (unreported), noted in *People v. Edmondson*, 168 Misc. 142, 144, 4 N.Y.S.2d 257, 260 (Ct. Gen. Sess. 1938). This opinion was followed in *The King v. Leese & Whitehead*, Cent. Crim. Ct., Sept. 21, 1936, noted in *People v. Edmondson*, *supra* at 146, 4 N.Y.S.2d at 262. For a discussion of this case, see *N.Y. Times*, Sept. 22, 1936, p. 20, col. 6. In *Jordan v. Burgoyne*,

B. *The American Approach*

1. The States

a. *Common-law derivation*

Unhampered at the time by the limitations of the first amendment concerning freedom of the press,³⁷ the states were unanimous in the belief that, because of the ensuing danger to the community if passions were inflamed, the libel of an individual was not to be tolerated.³⁸ The ample common-law precedents surrounding individual criminal libel eased the task of the courts in dealing with such prosecutions. The law of class libel, however, presented innumerable difficulties. Plagued from the beginning by the confusion surrounding their English common-law antecedents, the early cases gravitated toward the Barnardiston version of *Osborn*. In 1815, although a New York court refused a civil remedy to a member of a libeled regiment, it added that "the offender, in such case, does not go without punishment. The law has provided a fit and proper remedy, by indictment; and the generality and extent of such libels make them more peculiarly public offenses."³⁹ This theory was affirmed in 1840 when, in another New York civil case,⁴⁰ the court stated in dictum that, because the words spoken, though of no particular application to an individual, tend to incite the passions

[1963] 2 Weekly L.R. 1045 (Q.B.), British Fascist leader Colin Jordan, who had been arrested for haranguing a crowd, was convicted for ordinary breach of the peace under the Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, § 5. Were one to engage in such conduct today, the prosecution would be under the Race Relations Act, 1965, 13 & 14 Eliz. 2, c. 73, § 6(1), which provides: "A person shall be guilty . . . if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins—(a) he publishes or distributes written matter which is threatening, abusive or insulting; or (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matters or words likely to stir up hatred . . ."

37. Madison would have had the first amendment apply to the states as well as to the federal government. The House originally adopted such a provision, but later joined the Senate in striking it from the final text. See *Hudon*, op. cit. supra note 11, at 6 & nn.32-35.

38. See *Beauharnais v. Illinois*, 343 U.S. 250, 254-55 & n.4 (1952). Until recently, there has not been a serious constitutional challenge to such decisions. Current developments indicate, however, that these rules of law may not be unassailable. See *Garrison v. Louisiana*, 379 U.S. 64 (1964). In *Garrison*, it was held that, absent actual malice, a public official could be attacked without fear of criminal penalty. *Id.* at 74-75. In *Rosenblatt v. Baer*, 36 Sup. Ct. 669 (1966), Mr. Justice Black formalized his previously personal attitude, see *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. Rev. 549, 557-58 (1962), that all libel laws are unconstitutional in light of the first and fourteenth amendments, *Rosenblatt v. Baer*, supra at 680-81 (separate opinion). Mr. Justice Douglas concurred in this view, noting that the question is whether "public issues" rather than public officials are involved. *Id.* at 677 (concurring opinion). This view has not, as yet, achieved general acceptance in the legal community. See 50 A.B.A.J. 786 (1964). Nevertheless, the criminal remedy has fallen into general disfavor among the states. *State v. Browne*, 86 N.J. Super. 217, 226-32, 206 A.2d 591, 596-99 (App. Div. 1965).

39. *Sumner v. Buel*, 12 Johns. R. 475, 478 (N.Y. Sup. Jud. Ct. 1815).

40. *Ryckman v. Delavan*, 25 Wend. 185 (N.Y. Ct. Err. 1840).

of a community, they are indictable as common-law libel.⁴¹ New Hampshire, in 1868, accepted the New York dictum as law in *Palmer v. City of Concord*.⁴² Palmer, a newspaper editor, had sued the municipality under a state statute⁴³ allowing indemnification against a municipality when property was damaged as a result of an unlawful riot. The statute precluded recovery if the destruction was caused by the plaintiff's illegal or improper conduct. The riot in Concord was touched off by the publication of an article in plaintiff's newspaper imputing cowardice to the Union forces in Virginia during the Civil War. The court denied recovery on the ground that the article would support an indictment under the common-law rule enunciated in the New York cases.⁴⁴ Although this doctrine was often used to convict libelers of relatively narrow groups,⁴⁵ so long as the gist of the crime remained the potential breach of the peace,⁴⁶ a conviction for the libel of an entire class was not precluded.

The possibility of such a conviction diminished in 1920 with the Texas Criminal Court's decision in *Drozda v. State*.⁴⁷ The court held that the purpose of criminal libel laws is to punish those who maliciously libel persons; therefore, "a government or other body politic . . . religious system, [or] race of people [is] . . . not subject to criminal libel."⁴⁸

In *People v. Edmondson*,⁴⁹ the only other decision on point, a New York court was asked to construe the New York criminal libel statute which proscribed the libel of "persons."⁵⁰ The court refused to construe the statute to include all members of the Jewish religion within the defined protection. The court rejected the notion that the common law dictated a contrary holding, finding that the Barnardiston version of *Osborn* was not a true reflection of the common law⁵¹ and that the American cases were either dicta or

41. *Id.* at 196 (dictum).

42. 48 N.H. 211 (1868).

43. N.H. Laws of 1854, ch. 1519 (now N.H. Rev. Stat. Ann. § 31:53 (1955)).

44. 48 N.H. at 215.

45. E.g., *People v. Gordan*, 63 Cal. App. 627, 219 Pac. 486 (Dist. Ct. App. 1923) (fourth degree members of the Knights of Columbus); *People v. Turner*, 28 Cal. App. 766, 154 Pac. 34 (Dist. Ct. App. 1915) (same); *Alumbaugh v. State*, 39 Ga. App. 559, 147 S.E. 714 (1929) (same); *Crane v. State*, 14 Okla. Crim. 30, 166 Pac. 1110 (1917) (same); *People v. Spielman*, 318 Ill. 482, 149 N.E. 466 (1925) (American Legion); *State v. Hosmer*, 72 Ore. 57, 142 Pac. 581 (1914) (a convent); *Jones v. State*, 38 Tex. Crim. 364, 43 S.W. 78 (1897) (street car conductors).

46. *State v. Brady*, 44 Kan. 435, 437-38, 24 Pac. 948, 949 (1890).

47. 86 Tex. Crim. 614, 218 S.W. 765 (1920).

48. *Id.* at 617-18, 218 S.W. at 766.

49. 168 Misc. 142, 4 N.Y.S.2d 257 (Ct. Gen. Sess. 1938).

50. N.Y. Pen. Law § 1340 defines libel as "a malicious publication . . . which exposes any living person . . . to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation . . ." As this language is typical of many state libel statutes, *Beauharnais v. Illinois*, 343 U.S. 250, 255 n.5 (1952), the *Edmondson* reasoning would carry over to these jurisdictions.

51. 168 Misc. at 153-54, 4 N.Y.S.2d at 267-68.

applicable only to narrow groups.⁵² This case, as did *Drozda*, defined the gravamen of the crime as the harm to the individual,⁵³ which harm decreases as the size of the group increases. What slight injury is done must be suffered rather than have the honest commentator stifled.⁵⁴

While these cases appear correct in their finding that there is no common law of class libel,⁵⁵ they err in their reasons therefor. A correct interpretation is that, given our nation's historical regard for freedom of the press, it cannot be said that our common law imposes sanctions where the mother country's common law did not do so unequivocally. Furthermore, a court would not be on barren constitutional ground in maintaining that, even if there were a common law of class libel in England, the American Revolution destroyed it along with the rule of George III. Expressing our founding fathers' concern over the assault on freedom of expression under the stifling edicts of the mother country, James Madison stated:

Although I know whenever the great rights . . . freedom of the press, or liberty of conscience, come in question [in Parliament] . . . the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed.⁵⁶

Hence, Madison concluded that "the state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States."⁵⁷

The misinterpretation by many early American courts of the gist of common-law libel as harm to the individual as much as harm to the public has carried over to a majority of the states which wished to retain their criminal sanctions against individual libel even after, with the decline of the custom of dueling,⁵⁸ breaches of the peace occasioned by libel became rare. Thus, today, of the states which characterize the crime,⁵⁹ only five list libel with crimes tending to breach the peace,⁶⁰ while thirteen place it with offenses against the person or reputa-

52. *Id.* at 147-53, 4 N.Y.S.2d at 262-67.

53. *Id.* at 154, 4 N.Y.S.2d at 268.

54. The Edmondson court's decision could have been predicated on constitutional considerations, for a defendant could not have been expected to know, from the wording of the New York statute, that class libel was punishable. See *Jordan v. De George*, 341 U.S. 223, 230 (1951); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

55. See notes 19-36 *supra* and accompanying text.

56. 1 Cong. Deb. 453 (1834) [1789-1790].

57. 6 Writings of James Madison (1790-1802) 387 (Hunt ed. 1906). Jefferson was no less adamant, maintaining that "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." Letter to Colonel Edward Carrington, Jan. 16, 1787, in *The Life and Selected Writings of Thomas Jefferson* 411-12 (Koch & Peden ed. 1944). The most conservative position is that the Bill of Rights guaranteed only immunities inherited from the common law. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

58. See Tanenhaus, *Group Libel*, 35 Cornell L.Q. 261, 273 (1950).

59. Delaware, Kentucky, Maryland, Massachusetts, New Hampshire, Rhode Island, Vermont, and West Virginia punish the offense as a common-law crime. The other states have codified their prohibitions. See *Beauharnais v. Illinois*, 343 U.S. 255 n.5 (1952).

60. Colo. Rev. Stat. Ann. § 40-8-13 (1953); Pa. Stat. Ann. tit. 18, § 4413 (1963); S.C.

tion.⁶¹ Libel laws allowing convictions where there was no tendency to breach the peace are clearly in derogation of the common law. The duality of justification reappeared as the states attempted to enact specific provisions against class libel.⁶²

b. *Specific statutory enactment*

With the decline of the doctrine of common-law class libel, certain states sought to retain the existing criminal remedy, or to create one by enacting statutes aimed at the race defamer. Most are couched in terms of libel law as well as in terms of breach of the peace. If the former is the *raison d'être*, the statute is probably unconstitutional. If enacted to keep the peace, the statute is redundant in light of existing breach of the peace laws⁶³ and, hence, unnecessary.

The New Jersey statute has the distinction of being the only one thus far found unconstitutional by the state itself. The statute declared criminally liable:

Any person who shall, in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons . . . by reason of race, color, religion or manner of worship⁶⁴

When the German-American Bund violated this statute in 1941, the Supreme Court of New Jersey, in *State v. Klapprott*,⁶⁵ found the act violative of both the federal and state constitutional provisions of freedom of speech. In a sound opinion, the court noted that, since the statute was in derogation of the common law, it had to be construed strictly. Thus, judged according to its weaknesses rather than according to its strength,⁶⁶ the instant statute was too vague and indefinite, as well as destructive of personal liberties. As the court illustrated, a statement made in the privacy of one's home could be a criminal act if the household were made up of more than two members.⁶⁷ Teachers could not

Code Ann. § 16-161 (1962); Va. Code Ann. § 18.1-256 (1960); Wyo. Stat. Ann. § 6-117 (1957).

61. Alaska Stat. § 11.15.310 (Supp. 1965); Ga. Code Ann. § 26-2101 (1953); La. Rev. Stat. § 14:47 (1950); Mo. Rev. Stat. § 559.410 (1949); Neb. Rev. Stat. § 28-440 (1964); Nev. Rev. Stat. § 200.510 (1963); N.M. Stat. Ann. § 40A-11-1 (1953); N.C. Gen. Stat. § 14:47 (1953); Ohio Rev. Code Ann. § 2901.37 (Page Supp. 1965); Okla. Stat. tit. 21, § 771 (1961); Ore. Rev. Stat. § 163.410 (1963); Tex. Pen. Code Ann. art. 1269 (1953); Wis. Stat. § 942.01 (1961).

62. See notes 63-76, 88-100 *infra* and accompanying text. Since scurrilous literature has not been held to be inherently obscene, *People v. Eastman*, 188 N.Y. 478, 480, 81 N.E. 459, 460 (1907) (concurring opinion), the only criminal sanction against a race defamer would be a specific statute declaring such conduct illegal.

63. See, e.g., N.Y. Pen. Law § 722.

64. Laws of N.J. 1935, ch. 151, § 5.

65. 127 N.J.L. 395, 22 A.2d 877 (Sup. Ct. 1941).

66. The court was referring to a criminal class slander statute, but, as has been noted, see notes 19-36 *supra* and accompanying text, a class libel statute would be under the same handicap.

67. 127 N.J.L. at 402-03, 22 A.2d at 881.

lecture on the history of various races for fear that their remarks might breed "hatred," "abuse," and "hostility," if indeed such words could be defined.⁶⁸

Whether a statute can be drawn which meets all of the mandates of the Constitution is one of the critical questions in this field, which the present statutes leave unanswered. The Indiana legislation,⁶⁹ the farthest reaching of any thus far passed, proscribes both race libel and race slander. Enacted in 1947, the statute purports to protect the "economic welfare, health, peace, domestic tranquility, morals, property rights and interests"⁷⁰ of the people by outlawing "racketeering in hatred,"⁷¹ defined, *inter alia*, as:

person or persons acting with malice to create, advocate, spread, or disseminate hatred for or against any person, persons or group of persons, individually or collectively, by reason of race, color or religion which threatens to, tends to, or causes riot, disorder, interference with traffic upon the streets . . . destruction of property, breach of peace, violence, or denial of civil or constitutional rights.⁷²

In spite of the legislature's admonition that this statute should not "be construed to prohibit any right protected by the federal constitution or the constitution of the state of Indiana . . ."⁷³ it is doubtful that it could be considered constitutional under the sound principles of *Klapprott*.⁷⁴

The Massachusetts attempt at such legislation⁷⁵ is much more modest in its aims. The 1943 act forbids the publishing of "any false written or printed material with intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion . . ."⁷⁶ It is evident that the Massachusetts legislators were more concerned with the civil liberties problem posed by such a statute than were their Indiana brethren, for both malice and mendacity are requisite elements of the criminal act. Their concern, however, does not lessen the constitutional problems posed. At common law, truth was not a defense to libel. In fact, under the prevailing view,⁷⁷ the veracity of a statement aggravated the offense because it was considered more likely to lead

68. *Ibid.*

69. Ind. Ann. Stat. §§ 10-904 to -914 (1956).

70. Ind. Ann. Stat. § 10-904 (1956).

71. Ind. Ann. Stat. § 10-906 (1956).

72. Ind. Ann. Stat. § 10-905(B) (1956).

73. Ind. Ann. Stat. § 10-913 (1956).

74. Tanenhaus, *supra* note 58, at 282-83. Recently, a defendant was tried for a violation of the statute, and his motion to quash the indictment was granted. *State v. DeFields*, Cause No. 13437, Ind. Super. Ct., April 10, 1964. An Indiana grand jury refused to indict members of the Ku Klux Klan who were sending Klan literature through the mail. Letter From Winifred M. Hackett, Executive Secretary, Indiana Civil Liberties Union, to the *Fordham Law Review*, Feb. 22, 1966, on file in the *Fordham Law Review Office*. The *Indiana Civil Liberties Union* hopes to take a test case into the federal courts to present their argument that the statute is unconstitutional.

75. Mass. Gen. Laws Ann. ch. 272, § 98C (1956).

76. *Ibid.*

77. Blackstone, *Commentaries* 682-83 n.7 (4th ed. Chase 1923). This theory was carried over to the colonies and accepted as common law. *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804); Ray, *Truth: A Defense to Libel*, 16 *Minn. L. Rev.* 43, 46 (1931).

to a breach of the peace. Not until Lord Campbell's Act⁷⁸ in 1843 did truth, coupled with good motives, qualify as a defense. Most states adopted this statutory variant of the common law,⁷⁹ and some have even made it a matter of state constitutional law.⁸⁰ Were they not so inclined, however, the United States Supreme Court probably would not hold the statute unconstitutional on that ground alone, unless a public official were libeled, for only then is "the interest in private reputation . . . overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."⁸¹

It is the very defense of truth, ironically, which serves to render the statute ineffective and even potentially harmful to the group it is trying to protect.⁸² A theoretical case should demonstrate the illusory nature of the protection and the advisability of state legislatures having second thoughts about these statutes.

Suppose a neo-Nazi, proclaiming that all Jews are communists and murderers, was indicted under the state statute on the complaint of a member of the Jewish community. At the trial, the jury, no member of which would be a Jew because of the issue involved, would contain a cross section of the community, some of whom would be patently or latently bigoted. Only the former would be removed at the impanelling. Thus, the possibility exists that, regardless of defendant's statements, he might escape conviction, thereby lending the prestige of the court to his statement. Assuming that the jury were free from prejudice, there would remain the problem of disproving truth. How is truth to be determined? In terms of an individual, it is difficult. With respect to a class, it is nearly impossible. Granted that the race-baiter might make a statement which could be proven false, the educated bigot could easily weave a pattern of half-truths which could not be proven false beyond a reasonable doubt.⁸³

Adding to the problem is the fact that, by being brought to trial, the defendant is supplied a forum from which he can expound his views, complete with local and even national coverage by the mass media.⁸⁴ If acquitted, he could

78. 6 & 7 Vict. c. 96, § 6 (1843).

79. See, e.g., Alaska Stat. § 11.15.320 (1962); Ariz. Rev. Stat. Ann. § 13-353 (1956). See also statutes cited in *Garrison v. Louisiana*, 379 U.S. 64, 70 n.7 (1964). In some states, truth alone is a complete defense. See, e.g., Colo. Const. art. II, § 10; N.M. Const. art. II, § 17.

80. See, e.g., Cal. Const. art. 1 § 9; Fla. Const., Declaration of Rights § 13.

81. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). (Footnote omitted.)

82. Minnesota has recently joined the list of states attempting to provide relief in this area. Minn. Stat. § 609.765 (1964). This statute, like the Indiana statute, would prohibit all defamatory matter, defined as "anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation." Minn. Stat. § 609.765(1) (1964).

83. Nor would the requirement that good motives, as well as truth, be present to constitute a defense alleviate this problem. See note 109 *infra*.

84. When arrested in New York City recently on a disorderly conduct charge, George Lincoln Rockwell, self-proclaimed "führer" of the American Nazi Party, stated: "This arrest has given me more publicity than anything I could've done on my own. Contributions to the party depend on publicity." Krim, *Jewish Counsel for Nazi Berated*, N.Y. Herald Tribune, Feb. 11, 1966, p. 17, cols. 5, 7.

proclaim his struggle as a victory for truth. If the jury cannot reach a verdict, he gets a new trial with expanded "air time." Should he be convicted, chances are that he would receive a light fine.⁸⁵ If sent to jail, he would probably spend the time, while waiting for his conviction to be reversed on constitutional grounds, writing his memoirs, and emerge as a martyr to his followers. This situation is not unknown to history.⁸⁶ It is not surprising, therefore, that the majority of minority group representatives are not on record as favoring class libel legislation.⁸⁷

There have also been attempts to confine legislation in this area to income-producing hate mongering. Connecticut, for one, forbids holding up to ridicule or contempt by advertisement "any person or class of persons, on account of creed, religion, color, denomination, nationality or race"⁸⁸ West Virginia extends a similar ban to exhibits, displays, theatres, movies and other places of public amusement.⁸⁹ Although the constitutionality of these statutes has not as yet been tested, it must be noted that the protection of the first amendment is not lifted merely because income is being produced from the defendant's operation.⁹⁰ This statute, therefore, like its broader based counterparts, would be

85. With the exception of Indiana, Ind. Ann. Stat. § 10-906 (1956), the states which punish this conduct classify it as a misdemeanor, Ill. Rev. Stat. ch. 38, § 27-1(b) (1964); Mass. Gen. Laws Ann. ch. 272, § 98C (1956); Minn. Stat. § 609.765(2) (1964).

86. See Bullock, *Hitler—A Study in Tyranny* 109-10 (rev. ed. 1958).

87. The American Jewish Congress (Robison, Statement Submitted for the Consideration of the Commission on Individual Freedom and Jewish Security of the National Community Relations Advisory Council, Jan. 24, 1966), and the American Jewish Committee (Letter From Rhonda L. Goodkin, Director, Legal Division, American Jewish Committee, to the Fordham Law Review, Feb. 1, 1966, on file in the Fordham Law Review Office), are officially opposed to such laws. The National Association for the Advancement of Colored People sees no merit in such laws. Letter From Maria L. Marcus, Associate Counsel, NAACP, to the Fordham Law Review, Jan. 26, 1966, on file in the Fordham Law Review Office. The Congress of Racial Equality (Letter From Carl Rachlin, General Counsel, CORE, to the Fordham Law Review, Jan. 24, 1966, on file in the Fordham Law Review Office), and the National Urban League, Inc. (Letter From Arthur Q. Funn, Legal Counsel, National Urban League, Inc., to the Fordham Law Review, Jan. 24, 1966, on file in the Fordham Law Review Office), have taken no official position.

The Anti-Defamation League of the B'nai B'rith is not opposed in principle to a class libel statute, but has not found any of the existing laws or proposals satisfactory. National Civil Rights Committee of the ADL, Recommendation, adopted at the Convention of the National Committee of the ADL, New York City, Jan. 29 to Feb. 1, 1966. The Jewish War Veterans, U.S.A., support such legislation. Jewish War Veterans, U.S.A., Statement Submitted for the Consideration of the Commission of Individual Freedom and Jewish Security of the National Community Relations Advisory Council, Jan. 24, 1966.

Not infrequently, these groups act as *amicus curiae*, defending the right of the defamer to attack their race. See, e.g., *People v. Edmondson*, 168 Misc. 142-43, 4 N.Y.S.2d 257, 258-59 (Ct. Gen. Sess. 1938).

88. Conn. Gen. Stat. Rev. § 53-37 (1958).

89. W. Va. Code Ann. § 6109 (1961).

90. *Breard v. Alexandria*, 341 U.S. 622, 641-42 (1951); *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

judged by the standards enunciated by the United States Supreme Court in its only class libel decision, *Beauharnais v. Illinois*.⁹¹

The 1917 Illinois statute which gave rise to the prosecution in this case was also the first attempt at class libel legislation. In wording, it was not unlike the West Virginia statute:

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 . . . to contempt, derision, or obloquy or which is productive of breach of the peace or riots⁹²

The Illinois courts, however, extended the coverage of the statute to literature of any type.⁹³ When, in 1941, the statute was used to prosecute members of the Jehovah's Witnesses, the federal district court refused to grant the sect an injunction against the state's action because it was not "clearly apparent that the statute in question is unconstitutional."⁹⁴

Constitutionality was still in issue in 1950 when *Beauharnais*, the president of the "White Circle League of America," distributed literature in public warning of the menace presented by the Negroes in Chicago. The pamphlets called for the white people of Chicago to petition the mayor and city council to aid in preserving and protecting the rights of white citizens. The high court of Illinois sustained *Beauharnais'* conviction under the class defamation statute.⁹⁵ The court noted that defendant's writings represented "fighting words"⁹⁶ which are not protected by the Constitution,⁹⁷ but predicated the conviction on the libelous aspects of *Beauharnais'* literature.⁹⁸ Basing his defense on libel, the gist of the complaint, *Beauharnais* offered to present evidence to support the veracity of his allegations (*e.g.*, high crime rates among Negroes), for, in Illinois, truth accompanied by good motives is a defense to libel.⁹⁹ The trial court rejected this attempt, and the appellate court affirmed on the ground that "such proof would be directed only as to a portion of the offense charged and could not in any manner be classed as published for good motives and for justifiable ends."¹⁰⁰

91. 343 U.S. 250 (1952); see notes 101-18 *infra* and accompanying text. Florida, Fla. Stat. § 836.11 (1961), and Pennsylvania, Pa. Stat. Ann. tit. 18, § 4414 (1963), proscribe the anonymous publication of scurrilous literature. These statutes would, of course, be no deterrent to the publicity-seeking racist.

92. Laws of Ill. 1917, at 363 (now Ill. Rev. Stat. ch. 38, § 27-1 (1965)).

93. *People v. Simcox*, 379 Ill. 347, 350, 40 N.E.2d 525, 526 (1942) (dictum).

94. *Bevins v. Prindable*, 39 F. Supp. 708, 712 (E.D. Ill.), *aff'd per curiam*, 314 U.S. 573 (1941).

95. *People v. Beauharnais*, 408 Ill. 512, 97 N.E.2d 343 (1951), *aff'd*, 343 U.S. 250 (1952).

96. 408 Ill. at 517, 97 N.E.2d at 346.

97. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

98. 408 Ill. at 517-18, 97 N.E.2d at 346-47.

99. Ill. Rev. Stat. ch. 38, § 27-2 (1964).

100. 408 Ill. at 518, 97 N.E.2d at 347. The court cited the *Bevins* decision as authority

The United States Supreme Court affirmed in a five-to-four decision.¹⁰¹ Mr. Justice Frankfurter, delivering the opinion of the Court, classified the statute as a libel law.¹⁰² He found common-law precedent¹⁰³ for such a statute, based on the tendency of the criminal words to lead to breaches of the peace.¹⁰⁴ The Justice noted that, since the racial climate in Chicago had been potentially explosive ever since the statute came into being, the state had the right and even responsibility to protect its citizens from the harm which could ensue from the distribution of such literature.¹⁰⁵ The construction of the statute by the Illinois court was found to be such that it cured any objectionable vagueness in the statute itself.¹⁰⁶ Mr. Justice Frankfurter refused to consider the traditional defenses to libel, *e.g.*, privilege and fair comment,¹⁰⁷ because they were not before the Court.¹⁰⁸ Illinois' rejection of the defendant's attempt to show truth, on the ground that it was not accompanied by proof of good motive,¹⁰⁹ was accepted as good law.¹¹⁰ The contents of the leaflet, therefore, were found to be libelous, beyond the protection of the first amendment, and punishable without the establishment of a "clear and present danger."¹¹¹

that the United States Supreme Court found the statute constitutional. *Id.* at 517, 97 N.E.2d at 346. This is not the case. See note 94 *supra* and accompanying text.

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

102. *Id.* at 253-54.

103. Thus, this case can be distinguished from *State v. Klapprott*, 127 N.J.L. 395, 22 A.2d 877 (Sup. Ct. 1941). See notes 65-68 *supra* and accompanying text.

104. 343 U.S. at 254.

105. *Id.* at 258-62.

106. *Id.* at 253. The rule is that statutes may be construed to eliminate constitutional objections, and state statutes are presumed to be construed constitutionally by the state courts. *Fox v. Washington*, 236 U.S. 273, 277 (1915).

107. See Prosser, *Torts* §§ 109-10 (3d ed. 1964).

108. 343 U.S. at 266 n.22.

109. Defendant was, in fact, questioned by his attorney about his motives, but an objection to this line of questioning was sustained. *Beauharnais* neither made an offer of proof, nor raised the question on appeal to the state appellate court. *Ibid.*

Although he found the statute constitutional, Mr. Justice Jackson dissented because the application of the statute did not sufficiently protect defendant's rights. *Id.* at 287. Since *Beauharnais* was denied the opportunity to prove the truth of his statements, "how could he show that he spoke truth for good ends?" *Id.* at 300. Furthermore, Mr. Justice Jackson stated that the privilege doctrine should be considered, especially since the defendant was petitioning for a redress of grievances. *Id.* at 301. Finally, he stated that the "clear and present danger doctrine," see text accompanying notes 163-90 *infra*, was applicable to this situation, for the danger induced by the libel is an element of the crime. 343 U.S. at 303-04.

The case serves to demonstrate that state limitations on the power to prosecute, *e.g.*, the requirement of "malice" or "bad motives," are meaningless. If actual malice is required, the well-meaning bigot is free to defame whomever he pleases. If only implied malice is requisite, the defamatory statement must be judged, as must the defamer's motives, by the standards of the community. The questions of malice and motive, therefore, would merge into the question of guilt and, hence, are not significant standards.

110. *Id.* at 265-66.

111. *Id.* at 266; see *Schenck v. United States*, 249 U.S. 47, 51-52 (1919); text accompanying notes 166 & 167 *infra*.

Mr. Justice Reed, with whom Mr. Justice Douglas joined in dissenting, argued that the statute itself was so broad that it permitted the stifling of protected liberties within its scope.¹¹² Neither the construction of this statute by the state courts nor the mere definition of the statute as a "libel law" rendered inapplicable the rule of *Winters v. New York*,¹¹³ which would hold unconstitutional any statute imposing criminal sanctions on protected speech.¹¹⁴

In stronger language, Mr. Justice Black, with whom Mr. Justice Douglas also joined in dissenting, described the statute as a return to the Star Chamber.¹¹⁵ The Justice rejected the notion that a statute confining freedom of the press could be found constitutional merely because it had a rational basis, and characterized this expansion of criminal libel law, from words directed at an individual to words directed at a group, as a degradation of the first amendment.¹¹⁶ In the Justice's view, the constant liberties secured by the first amendment would be endangered if left to the mercy of the majority of the Court on a case-by-case approach.¹¹⁷ Mr. Justice Douglas, in a separate dissent, predicted that state experimentation in the field of civil liberties would serve as "a warning to every minority that when the Constitution guarantees free speech it does not mean what it says."¹¹⁸

The *Beauharnais* decision still stands, but, in light of the composition of the present Court, and the limitations it has already placed on the right of the state to legislate against libel,¹¹⁹ any reliance on the holding would have to be

112. 343 U.S. at 281-84 (dissenting opinion).

113. 333 U.S. 507 (1948). See 343 U.S. at 280-84 (dissenting opinion).

114. 333 U.S. at 509. See *United States v. Petrillo*, 332 U.S. 1 (1947); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Herndon v. Lowry*, 301 U.S. 242 (1937). Furthermore, the statute was not sufficiently definite for the Court to fix its construction as constitutional. 343 U.S. at 281-282 (dissenting opinion); cf. *Screws v. United States*, 325 U.S. 91 (1945).

115. 343 U.S. at 273 (dissenting opinion).

116. *Id.* at 269 (dissenting opinion).

117. *Id.* at 274-75 (dissenting opinion). Where the wall of protection offered by the first amendment is breached, other liberties may fall. The *Beauharnais* holding, for example, has been used to support the suppression of literature, *Planned Parenthood Comm., Inc. v. Maricopa County*, 92 Ariz. 231, 375 P.2d 719 (1962); *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 916-17, 383 P.2d 152, 162, 31 Cal. Rptr. 800, 810, cert. denied, 375 U.S. 957 (1963), to take away the license of a bar featuring "obscene entertainment," *Tahiti Bar, Inc.*, 186 Pa. Super. 214, 142 A.2d 491 (1958), *aff'd*, 395 Pa. 355, 150 A.2d 112 (1959), appeal dismissed per curiam sub nom. *Tahiti Bar, Inc. v. Pennsylvania Liquor Control Bd.*, 361 U.S. 85 (1959), and in support of loyalty oath requirements, *Elfbrandt v. Russell*, 94 Ariz. 1, 10, 381 P.2d 554, 558-59 (1963), vacated, 378 U.S. 127, orig. judgment reinstated, 97 Ariz. 140, 397 P.2d 944 (1964), *rev'd*, 34 U.S.L. Week 4347 (U.S. April 19, 1966).

118. 343 U.S. at 287 (dissenting opinion). Mr. Justice Douglas has not tempered his beliefs as to the unconstitutionality of *Beauharnais*, and has asked that it be overruled as a "misfit in our constitutional system." *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring).

119. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964), where the Court unanimously overturned a state conviction for libel of certain members of the Louisiana judiciary. The principle earlier adopted in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that

severely qualified. Given the fact that class libel laws are of slight efficacy and of doubtful constitutionality,¹²⁰ they should be repealed by the legislatures in the states where they do exist,¹²¹ for their very existence is a burden on legitimate social commentators.¹²²

2. The Federal Government

Present federal legislation provides only limited protection to minority groups.¹²³ One statute imposes criminal sanctions on the mailing of "obscene, lewd, lascivious, indecent, filthy or vile . . . matter."¹²⁴ "Indecent" is defined as of a character tending to incite to arson, murder or assassination.¹²⁵ Although this statute would not bar insulting literature, such as that published in *Beauharnais*, it might serve to prevent the mails from being used to urge violence against minority groups.

absent calculated falsehood one may with impunity fall short of the truth in criticizing a public official, was extended to criminal actions. Mr. Justice Brennan, writing for the Garrison Court, noted that criminal libel law is a declining doctrine and one which was not placed in the Model Code of the American Law Institute, 379 U.S. at 69-70, which recommended such laws only where designed to curb words "especially likely to lead to public disorders," Model Penal Code § 250.7, comment 2, at 45 (Tent. Draft No. 13, 1961). Justices Black and Douglas would have extended the holding to allow even malicious defamation of public officials, in order to obliterate every remnant of the law of sedition. This privilege doctrine could be extended to cover "public classes," e.g., Jews and Catholics, and thus negate any *Beauharnais*-type conviction. See note 153 *infra* and accompanying text.

120. See 1 Chafee, *Government and Mass Communications* 116-30 (1947). Perhaps fearing the strength of the protection offered by the *Beauharnais* case, the Illinois Legislature has since changed its statute to read: "A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace." Ill. Rev. Stat. ch. 38, § 27-1(a) (1965). The comments to the statute admit that the old criminal libel law failed in its attempt to mitigate the harm done to the individual. By phrasing the crime in terms of breach of the peace, the legislature was able to forbid class slander as well as class libel by fitting both under the Chaplinsky "fighting words" doctrine. See notes 179-83 *infra* and accompanying text. The statute was used to convict "White Youth Corps" demonstrators in Chicago in 1964. Defendants were found to have violated both the class libel and breach of the peace statutes. *City of Chicago v. Lambert*, 47 Ill. App. 2d 151, 197 N.E.2d 443 (1964). It is difficult to see why the latter statute would not suffice in every such instance.

121. Unfortunately, new bills are perennially being brought up for consideration in state legislatures. See, e.g., Sen. Intro. No. 1056, Pr. No. 1056, Ass. Intro. No. 2504, Pr. No. 2510, N.Y. State Leg. 188th Sess. (1965); Sen. Intro. No. 1573, Pr. No. 1600, Ass. Intro. No. 2311, Pr. No. 2326, N.Y. State Leg. 188th Sess. (1965); Sen. Intro. No. 1038, Pr. No. 1038, N.Y. State Leg. 188th Sess. (1965); Sen. Intro. No. 1738, Pr. No. 1766, N.Y. State Leg. 188th Sess. (1965); Ass. Intro. No. 257, Pr. No. 257, N.Y. State Leg. 189th Sess. (1966); Ass. Intro. No. 983, Pr. No. 983, N.Y. State Leg. 189th Sess. (1966).

122. Cf. *Poe v. Ullman*, 367 U.S. 497, 513-15 (1961) (Douglas, J., dissenting).

123. See generally Staff of House Comm. on the Judiciary, 83rd Cong., 1st Sess., Report on Proposed Federal Group Libel Legislation (Comm. Print 1963).

124. 18 U.S.C. § 1461 (1964).

125. *Ibid.*

Another statute proscribes the mailing by postal card or on the outside of an envelope of "any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another . . ."¹²⁶ The words of the statute, unfortunately, reflect no positive congressional intent to extend the ban to encompass attacks on classes. The ambiguity of the statute is reflected in the illogical development of the case law. In 1910, the Eighth Circuit held that a prosecution under the statute does not proceed as one for libel.¹²⁷ The Ninth Circuit, in a nebulous opinion, later added that the statute is penal in nature and must be strictly construed.¹²⁸ Meanwhile, the Second Circuit, treating the statute as libel legislation, declined to apply it to the defamation of a group, since such conduct was not criminal at common law.¹²⁹ A recent decision in the Tenth Circuit,¹³⁰ however, held that, since the statute was cast in the disjunctive, it was meant to regulate the mails in addition to combatting libel. Under this rationale, the writer could be prohibited from using the mail under the regulatory power without falling under the strict libel rules. Hopefully, this decision will be extended to cover class libel, thereby releasing the postal employee from the role of captive audience and knowing disseminator of vile material.

Of the proposed federal mailing remedies aimed directly at the class defamer,¹³¹ the most thoughtful was the 1949 proposal of Representatives Javits,¹³² Klein,¹³³ Dawson,¹³⁴ Keating¹³⁵ and Keogh.¹³⁶ The bills contained multiple safeguards for the civil liberties of the sender, requiring for conviction proof of an "intent to create ill will against a racial or religious group," as well as a knowingly false statement.¹³⁷ The very protections offered, however, would have rendered the statute proposed as ineffective as the state statutes.¹³⁸ Thus, the bill's ultimate demise is hardly a matter of concern to the minority groups.¹³⁹

126. 18 U.S.C. § 1718 (1964).

127. *Warren v. United States*, 183 Fed. 718 (8th Cir. 1910).

128. *McKnight v. United States*, 78 F.2d 931 (9th Cir. 1935).

129. *American Civil Liberties Union, Inc. v. Kiely*, 40 F.2d 451 (2d Cir. 1930).

130. *McCrossen v. United States*, 339 F.2d 810 (10th Cir. 1965).

131. See H.R. 7434, 82d Cong., 2d Sess. (1952); H.R. 8033, 82d Cong., 2d Sess. (1952); *Tanenhaus, Group Libel*, 35 Cornell L.Q. 261, 293-97 (1950).

132. H.R. 2269, 81st Cong., 1st Sess. (1949).

133. H.R. 2270, 81st Cong., 1st Sess. (1949).

134. H.R. 2271, 81st Cong., 1st Sess. (1949).

135. H.R. 2272, 81st Cong., 1st Sess. (1949).

136. H.R. 2273, 81st Cong., 1st Sess. (1949).

137. E.g., H.R. 2269, 81st Cong., 1st Sess. 3 (1949).

138. See notes 82-87 *supra* and accompanying text.

139. The United States House of Representatives has recently passed legislation, H.R. 980, 89th Cong., 1st Sess. (1965), which would allow a person to return, to the Postmaster General, material which, in his opinion, is obscene, and to request the Postmaster General to notify the sender not to mail such items to him. The Attorney General, upon request of the Postmaster General, may seek a federal district court order demanding compliance, the violation of which could be punished by the court as contempt. It is conceivable that certain

III. THE CIVIL REMEDY

A. *Injunction Against Abuse*

Following the example of the State of Indiana,¹⁴⁰ the use of injunctions could be proposed as a potential remedy against the race-baiter. The Province of Manitoba is the only other common-law jurisdiction to afford similar relief. The latter jurisdiction's statute¹⁴¹ allows any member of a racial, religious, or national group to obtain an injunction against the publication of scurrilous literature directed against his group. Aside from the fact that this remedy would present innumerable procedural difficulties in determining who is the representative Negro, Catholic, or Italo-Canadian, the statute, like its Indiana counterpart, would clearly be unconstitutional in the United States under the doctrine of *Near v. Minnesota ex rel. Olson*.¹⁴²

In 1931, *Near* was enjoined from publishing libelous matter directed at certain individuals and Jews in general, under the appropriate Minnesota statute.¹⁴³ The United States Supreme Court, exercising its newly declared power under the due process clause of the fourteenth amendment,¹⁴⁴ found that the statute violated the first amendment. To hold otherwise, Mr. Chief Justice Hughes declared, would be a long stride toward complete censorship.¹⁴⁵ The Court was unquestionably justified in striking down a statute which would have forced a publisher to convince a judge, prior to publication, that his material was worthy of being disseminated.¹⁴⁶ Even in the restrictive atmosphere of eighteenth century England, "every freeman [had] . . . an undoubted right to lay what sentiments he [pleased] . . . before the public: [for] to forbid this [was] . . . to destroy the freedom of the press . . ." ¹⁴⁷ It cannot be seriously contended that the founding fathers envisioned fewer rights under the Constitution.

racist literature could fall into this category. See generally H.R. Rep. No. 219, 89th Cong., 1st Sess. (1965); Sigler, *Freedom of the Mails: A Developing Right*, 54 *Geo. L.J.* 30 (1965).

140. Ind. Ann. Stat. § 10-907 (1956).

141. Man. Rev. Stat. c. 60, § 20 (1954).

142. 283 U.S. 697 (1931).

143. Minn. Laws 1925, ch. 285, §§ 1-3.

144. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); accord, *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Whitney v. California*, 274 U.S. 357 (1927).

145. 283 U.S. at 721.

146. The prohibition against prior restraint would prevent a state body from refusing to grant a license to speak in a public park unless the statute giving it this power were narrowly drawn and contained adequate standards. *Niemotko v. Maryland*, 340 U.S. 263, 271 (1951) (Jehovah's Witnesses invalidly denied a license). New York has extended this rule to cover the American Nazi Party, which could not be denied access to a park merely on the basis of its bad reputation in other jurisdictions. *Rockwell v. Morris*, 12 App. Div. 2d 272, 211 N.Y.S.2d 25 (1st Dep't), aff'd, 10 N.Y.2d 721, 176 N.E.2d 836, 219 N.Y.S.2d 263, cert. denied, 368 U.S. 913 (1961).

147. 4 Blackstone, Commentaries *152. If, however, the publication were "improper, mischievous, or illegal, he must take the consequence of his own temerity." *Ibid.*

B. *Damages*

It is unlikely that the traditional civil remedy of damages will ever become available to members of a defamed class. Although a cause of action for defamation will lie in favor of two or more persons,¹⁴⁸ it is well settled that, where a group or class has been defamed, a member thereof must show individual application to himself in order to recover.¹⁴⁹ Because this individual application cannot be readily demonstrated where the group is large, in this instance neither the members nor the group as a whole will recover.¹⁵⁰ This common-law rule¹⁵¹ is, despite an occasional deviation from the norm,¹⁵² mechanically applied. The counting of heads to determine injury is founded in both logic and expediency. It is generally considered that "language which would be read seriously if written as to an individual might not be capable of serious application to each member of a large group; [for] that which is general may become vague; [and] that which is specific may become ridiculously extravagant."¹⁵³ It has been suggested that the problem of harassing the defendant with multiple suits could be alleviated by the use of a class action.¹⁵⁴ It is doubtful, however, that anyone could be designated as an adequate representative of a race.

Until 1962, the mechanical process had narrowed recovery to a group of twenty-five.¹⁵⁵ In that year, a member of a football team consisting of sixty or seventy players recovered upon the somewhat startling observation of an Oklahoma court that the controlling factor should be the intensity of the suspicion cast on the plaintiff, rather than the size of the group.¹⁵⁶ Even if this reasoning

148. See, e.g., *Chapa v. Abernethy*, 175 S.W. 166 (Tex. Civ. App. 1915) (members of a posse).

149. Prosser, *Torts* § 106, at 767-69 (3d ed. 1964).

150. *Ibid.*

151. See *Foxcroft v. Lacy*, Hob. 89a, 80 Eng. Rep. 239 (C.P. 1613).

152. In the Quebec Province case of *Ortenberg v. Plamondon*, 35 Can. L.T. 262 (Que. Ct. App. 1914), two Jewish merchants were allowed to recover damages against a defendant who libeled all the Jews in Quebec. The Jewish population of Quebec consisted of 75 families. The court, while adhering to the principle that, "if the collectivity is numerous there is no right of action, because the injury in that case is not deemed to indicate any one person" and, hence, a Jew could not recover for a libel against all Jews, *id.* at 266, allowed recovery, because whether individual application could be found was "a question of fact left to the discretion and wisdom of the Courts," *ibid.* This case has not been followed in the United States, where it has been distinguished on the ground that Quebec is a civil law jurisdiction. *Louisville Times v. Stivers*, 252 Ky. 843, 847, 68 S.W.2d 411, 412 (1934). Nor was the holding extended in Quebec itself, when all French-Canadians were slandered. *Germain v. Ryan*, 53 Que. Super. 543 (1918).

153. *Golson v. Hearst Corp.*, 128 F. Supp. 110, 112 (S.D.N.Y. 1954).

154. See, e.g., *N.Y. Civ. Prac. Law* § 1005.

155. *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

156. *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962), appeal dismissed *per curiam* and cert. denied, 376 U.S. 513 (1964). This decision has been criticized on the basis that the "numbers" test, while not a perfect standard, was at least workable. 35 U. Colo. L. Rev. 616 (1963).

were generally accepted, only a defamation of a particular segment of a minority group would be actionable. The possibility of recovery would, however, be limited by the privilege of fair comment on matters of community concern,¹⁵⁷ whether the words were taken as opinion¹⁵⁸ or, under the more recent law, as fact,¹⁵⁹ for the larger the group defamed, the more the statement becomes a matter of public domain.

IV. CLEAR AND PRESENT DANGER AND FIGHTING WORDS

It is evident that, at present, the law offers members of minority groups little protection from insult. It is also clear that the evil resulting therefrom is far outweighed by the fact that the civil liberties of all citizens are strengthened when the bigot is not silenced. The minority group representatives, for the most part, recognize this. What, however, would be the situation, where it was not merely the pride of the class which was endangered but, rather, existence itself?

As Mr. Justice Douglas noted in *Beauharnais*, a conspiracy aimed at destroying a race is not protected by the first amendment. This is something more than free speech; it is "free speech plus."¹⁶⁰ For the state to curb free speech, however, there must be more than a mere likelihood of danger.¹⁶¹ Mr. Justice Douglas observed that "the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster."¹⁶²

The clear and present danger doctrine came into being in 1917, when Congress made its first encroachment upon freedom of speech and press since the Alien¹⁶³ and Sedition¹⁶⁴ Acts of the eighteenth century. The Espionage Act of June 15, 1917,¹⁶⁵ made it illegal to attempt to cause insubordination in the armed forces or to obstruct their recruiting effort. In *Schenck v. United States*,¹⁶⁶ the United States Supreme Court upheld the constitutionality of the act. Mr. Justice Holmes, speaking for a unanimous Court, stated that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹⁶⁷ It soon appeared that these words were an illustration rather than a statement of constitutional law. One week later, Mr. Justice Holmes, again speaking for the Court, upheld the conviction of two other violators of the act, without using the clear and

157. Prosser, Torts § 110, at §12-16 (3d ed. 1964).

158. *Potts v. Dies*, 132 F.2d 734 (D.C. Cir. 1942), cert. denied, 319 U.S. 762 (1943).

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

160. *Beauharnais v. Illinois*, 343 U.S. 250, 284 (1952) (Douglas, J., dissenting).

161. *Id.* at 284-85 (Douglas, J., dissenting).

162. *Id.* at 285 (Douglas, J., dissenting).

163. Chs. 58, 66, 1 Stat. 570, 577 (1798).

164. Ch. 74, 1 Stat. 596 (1798).

165. Ch. 30, § 3, 40 Stat. 219.

166. 249 U.S. 47 (1919).

167. *Id.* at 52.

present danger test.¹⁶⁸ Even though Justice Holmes later stated that clear and present danger was to be a rule of law rather than empty verbiage,¹⁶⁹ the Court, with the solitary exception of Justice Brandeis,¹⁷⁰ continued to ignore the rule in the first decade after its creation.¹⁷¹ This general disfavor with clear and present danger continued through the 1930's. When the Court did strike down a statute as violative of the first amendment, it used theories of vagueness,¹⁷² prior restraint,¹⁷³ or unreasonable restriction,¹⁷⁴ but not the Holmes standard.

The 1940's marked the re-emergence of clear and present danger. In voiding an Alabama statute which made picketing illegal, the Court held that "abridgment of the liberty of . . . discussion [of matters of public interest] can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."¹⁷⁵ One month later, in *Cantwell v. Connecticut*,¹⁷⁶ the Court extended the doctrine to cover public disturbances of a non-union nature. In *Cantwell*, members of the Jehovah's Witnesses who were passing out anti-Catholic literature and playing phonograph records on the same theme in public were arrested for breach of the peace. The Court held that the defendants' conduct was not punishable in the absence of a "clear and present danger to a substantial interest of the state . . ."¹⁷⁷ Throughout this decade, the first amendment came to have a "preferred position"¹⁷⁸ which apparently could be defeated only by the presence of a clear and present danger.

There were, however, certain words which were beyond the protection of the first amendment and which did not have to meet the Holmes test. As delineated

168. *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

169. *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

170. See, e.g., *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Brandeis, J., joining Holmes, J., dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting); *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting); *Schafer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919), (Brandeis, J., joining Holmes, J., dissenting).

171. See, e.g., *Whitney v. California*, 274 U.S. 357, 371 (1927); *Gitlow v. New York*, 268 U.S. 652, 667 (1925); *Schafer v. United States*, 251 U.S. 466 (1920); *Abrams v. United States*, 250 U.S. 616 (1919).

172. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Stromberg v. California*, 283 U.S. 359 (1931).

173. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

174. *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).

175. *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940). (Footnote omitted.)

176. 310 U.S. 296 (1940).

177. *Id.* at 311.

178. See, e.g., *Saia v. New York*, 334 U.S. 558, 561 (1948); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Follett v. Town of McCormick*, 321 U.S. 573, 575 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). See generally Berns, *Freedom, Virtue & the First Amendment* (1957).

in *Chaplinsky v. New Hampshire*,¹⁷⁹ these words "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁸⁰ Because these words are not in a "preferred position," the state may weigh them against "the social interest in order and morality" and punish the utterance if it is construed as of "slight social value."¹⁸¹ Chaplinsky, who had denounced all religion as a "racket" and the complainant as a "God damned racketeer" and fascist, was prosecuted under a state statute¹⁸² which forbade offensive remarks to a person lawfully in a public place. The complaint encompassed only the remark relating to the complainant and, under the words of the state statute, it could be argued that only a statement of that nature was punishable. From the holding of the Court, however, it is clear that a state could punish fighting words without the use of a colloquium if the words, as spoken, could cause an ordinary man to breach the peace if the words were addressed to him. A state statute designed to protect against breach of the peace would be held constitutional if construed by the state court to disallow only the most scurrilous words which are of "no essential part of any exposition of ideas."¹⁸³

The importance of the interpretation of breach of the peace statutes in state courts upon the constitutionality of the punishment was reiterated seven years later in *Terminiello v. Chicago*.¹⁸⁴ Defendant, a renegade priest addressing the Christian Veterans of America in Chicago on the alleged "atheistic Jew communist" menace, attracted a crowd of one thousand protesters who surrounded the auditorium where he was to speak. Terminiello was arrested for violating a local ordinance which provided:

All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct . . .¹⁸⁵

The trial court charged that

"breach of the peace" consists of any "misbehavior which violates the public peace and decorum"; and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."¹⁸⁶

179. 315 U.S. 568 (1942).

180. *Id.* at 572. (Footnote omitted.)

181. *Ibid.*

182. N.H. Laws of 1885 ch. 378, § 2.

183. 315 U.S. at 572. The Supreme Court recently affirmed this position in *Garrison v. Louisiana*, 379 U.S. 64 (1964), wherein Mr. Justice Brennan proclaimed: "[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Id.* at 75. The "fighting words" doctrine was used recently to sustain the disorderly conduct conviction of the leader of the American Nazi Party. *Rockwell v. District of Columbia*, 172 A.2d 549, 551 (Munic. Ct. App. D.C. 1961).

184. 337 U.S. 1 (1949).

185. Chicago, Ill., Municipal Code § 193-1 (1939).

186. 337 U.S. at 3.

Mr. Justice Douglas, writing for a five-to-four majority, held that the very purpose of free speech is to invite dispute and that words such as those spoken by the defendant could not be punished "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."¹⁸⁷

Terminiello marked the apex of the clear and present danger test, for the minority Justices in that case achieved majority in the 1950's and, led by Mr. Justice Frankfurter, rose to cripple its effect. As in *Beauharnais*, the Court turned to a "balancing of interests" between free speech and press on the one side, and public convenience on the other.¹⁸⁸ Thus, Mr. Justice Frankfurter was not adverse to the idea of allowing the states to resolve their balancing problem by a process of trial and error.¹⁸⁹

The clear and present danger doctrine, however, may once again be reincarnated, depending on the philosophy of the justices currently sitting.¹⁹⁰ It is clear that, if the doctrine were to be applied in the area of race defamation, the safety of the class as well as the civil liberties of the general public would be protected.

V. THE WORLD VIEW

Because of constitutional prohibitions, the United States has remained aloof from attempts to outlaw race defamation sponsored by the United Nations.¹⁹¹ Thus, in 1963, when the call went out to all member states to "take immediate and positive measures, including legislative and other measures, to prosecute and/or outlaw organizations which promote or incite to racial discrimination or incite to or use violence for the purposes of discrimination based on race, color

187. *Id.* at 4.

188. See *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957) (picketing); *Dennis v. United States*, 341 U.S. 494 (1951) (subversion); *American Communication Ass'n v. Douds*, 339 U.S. 382 (1950) (loyalty oaths).

189. *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952). Mr. Justice Black termed this idea of state experimentation in the muzzling of freedom of the press a "startling and frightening doctrine in a country dedicated to self-government by its people." *Id.* at 270 (dissenting opinion).

190. See *Hudon*, *Freedom of Speech and Press in America* 166 (1963). The doctrine's hibernation has been disturbed occasionally in recent years. In *Wood v. Georgia*, 370 U.S. 375 (1962), the Court discussed the doctrine in reversing a criminal contempt conviction. *Id.* at 384-85. In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court, while holding that clear and present danger did not apply to a statute prohibiting the picketing of courthouses, carefully distinguished this situation from contempt cases. *Id.* at 563-64, 566.

191. Thus, when the original draft of the Genocide Convention made "cultural genocide" a crime, the United States was instrumental in changing the text to forbid only actual biological and physical genocide. U.N. Doc. No. E/623/11-19 (1948); see Comment, *Genocide: A Commentary on the Convention*, 58 *Yale L.J.* 1142, 1145 (1949). Furthermore, even though Article III of the Convention makes it a crime to cause mental, as well as bodily harm to the group, under Article IV the contracting parties agree to enforce the Convention only when permissible under their respective constitutions. Hence the first amendment would control any attempt at compliance on the part of the United States. See generally *id.* at 1142.

or ethnic origin,"¹⁹² Ambassador Stevenson objected that such a measure "calls for an invasion by the Government of the right of free speech, a right which the Government is obliged to defend."¹⁹³

In contrast, over a score of nations, cutting across the political spectrum, have national legislation aimed at proscribing the spread of racial hatred.¹⁹⁴ Though the United States now represents the minority view, undue reliance on any specific enactment cannot be justified. In the turmoil during the German Weimar Republic, similar statutes were used to punish socialist and communist defamers while their National Socialist counterparts were set free or let off with a light fine after having used their trial for propaganda purposes.¹⁹⁵ Later, when the Nazis came into power, the same statutes were used as an effective weapon against criticism, the very result civil libertarians fear most.¹⁹⁶

VI. CONCLUSION

It is suggested that the minority groups will not be protected if the race-baiter is driven underground. In fact, the airing of these obnoxious words should serve to aid the group rather than to harm it, both by solidifying its ethos in the midst of external attack¹⁹⁷ and by rallying the vast majority of the majority to its side. Legislators should recognize this, in accord with the enlightened leaders of the groups, and refrain from class libel legislation, rather than pandering to the fears, understandable as they may be, of their minority constituents. As Mr. Justice Brandeis stated, "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women."¹⁹⁸ Where the danger to the group or to the entire community is clear and present, the state can, and should, step in to offer its protective mantle. Absent this, the miniscule protection which might be forthcoming is far outweighed by the ensuing danger to constitutional liberties.

192. Declaration on the Elimination of All Forms of Racial Discrimination, art. 9, § 2 (1963), in Lerner, *The Crime of Incitement to Group Hatred* 12 (1965).

193. U.N. Gen. Ass. Off. Rec. 18th Sess., Plenary 10 (A/PV. 1261) (1963).

194. See generally Lerner, *The Crime of Incitement to Group Hatred* 43-75 (1965).

195. Though there were no specific class libel statutes in the Republic, Riesman, *Democracy and Defamation: Control of Group Libel*, 42 *Colum. L. Rev.* 727, 729 (1942), the Nazis violated individual criminal libel law when they attacked a collectivity by deriding a member thereof, e.g., Baron Rothschild standing for the Jews, *id.* at 728-29. Had there been class libel statutes, this process would merely have been compounded. Riesman concludes that, "had the public and judicial attitude toward libel in Germany been as tolerant as it is in the United States, the courtroom triumphs of the Nazis and other reactionaries would have seemed less impressive, and might even never have occurred." Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 *Colum. L. Rev.* 1035, 1104 (1942).

196. *Id.* at 1102-03. West Germany now has perhaps the most severe group libel law in the world. See 6th *Strafrechtsänderungsgesetz*, June 30, 1960 (*Bundesgesetzblatt*, pt. I, 478). See generally Zuleeg, *Group Defamation in West Germany*, 13 *Clev.-Mar. L. Rev.* 52 (1964).

197. See Bierstedt, *The Social Order* 438 (1957).

198. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).