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GROUP LIBEL

JOSEPH TANENHAUS

WHO CONTROLS THE UNITED STATES?

There are ten million Jews in this country and one hundred and thirty million non-Jews, and yet, the Jews, with their money, are in control.

They control the so-called "Federal Reserve Bank" and through it the rest of the National Banks. . . . All this discussion of Republican or Democrat is useless as long as Barney Baruch controls both. Don't waste any time on it, but face facts. It is not a choice of Republican or Democratic, it is Nationals versus Internationalists, Americans against America's destroyers, or to put it very plainly, Jew versus Gentile. . . .¹

This is a sample of group defamation. The disparagement of racial and religious groups not only hurts the groups as collectivities, and the individual members thereof, but adversely affects the stability and welfare of the community itself. Democracy thrives on the co-operation of dissimilar peoples and their differing talents and viewpoints; it cannot well succeed if distrust and hatred govern the thoughts and actions of its component elements. The Nazis developed into a "fine art" propaganda techniques for fomenting and exploiting existing group tensions. "Divide and Conquer" was the key to a policy which came all too close to success. None but the devil's advocate would deny the deleterious tendencies of group defamation.

Group defamation, nevertheless, is not the basic cause of prejudice and intergroup tensions. Whether the hate-monger will have any success in influencing other individuals depends to a large degree on the potential responsiveness of his audience. If persons are not even latently receptive of his propaganda, he has almost no chance of success. He can only be successful in spreading his rancor if the public feels economically, socially, politically, or religiously insecure, and as a result suffers from the psychological maladies of frustration and anxiety. It follows that the true solution to the problem of racial and religious hatred and prejudice is to remove the insecurity that makes bigotry possible and necessary.

Group defamation does, however, precipitate latent prejudice and exacerbate underlying tensions. Consequently what ought to be done about the dissemination of hate literature has been the subject of heated controversy for more than a decade. A number of proposals for legis-

¹ WOMEN'S VOICE, Jan. 29, 1948, p. 1, col. 1, p. 2, col. 2.

lative action has been offered. Some think that laws requiring the retraction of false and defamatory statements and the printing of rebuttals would be of value. The French *Droit de réponse* and the German *Berichtigung* offer models.² Others feel that anonymous literature is the main well of evil, and therefore favor laws prohibiting the circulation of printed matter that does not bear the names of those responsible for its publication and distribution.³ Others endorse statutes requiring the registration of all persons and organizations engaged in preparing, distributing, and financing propaganda, and providing for the disclosure of the information so gleaned.⁴ Federal statutes requiring the registration of various groups have been on the books for some time.⁵ But perhaps the most debated of all legislative proposals are group libel laws.⁶

"Group libel" is a rag-bag phrase used to include a wide range of critical comment that particular groups find objectionable. In broad terms, group libel laws may be said to be enactments whereby the publishers and disseminators of statements that tend to disparage racial and religious groups are rendered legally responsible for their actions. Legislation of this nature is by definition a restriction on the freedom of discussion. To curtail criticism, however virulent and ill-tempered, is a step so serious as to be taken only if investigation discloses that substantially more good than evil would result by so proceeding. The desirability of passing further group libel legislation can best be examined in the light of two

² CHAFFEE, *GOVERNMENT AND MASS COMMUNICATION* ch. 8; Riesman, *Democracy and Defamation*, 42 *COL. L. REV.* 727, 1085, 1282, 1109-1117 (1942). Cf. *FLA. STAT.* §§ 770.01-770.02. (1941).

³ Twelve major cities and the State of Florida have enacted such measures. BUFFALO, *CODE* c. 9, § 50; CLEVELAND *ORD.* 396-44; SAINT PAUL *ORD.* 443-D; GARY *ORD.* 2658; LOS ANGELES *CODE* § 28.08; KANSAS CITY (MO.) *REV. ORD.* § 19-25.1; MILWAUKEE *CODE* §§ 105-51 to 105-51.2; Denver *Ord.* 23, series of 1939; Minneapolis, approved Mar. 28, 1947; Elizabeth, approved Apr. 9, 1945; Philadelphia, approved Aug. 14, 1946; *FLA. STAT.* § 836.11 (1941).

⁴ See Smith, *Democratic Control of Propaganda Through Registration and Disclosure*, 6 *PUB. OP. Q.* 27, 707 (1942-43); Institute of Living Law, *Combating Totalitarian Propaganda*, 10 *U. OF CHI. L. REV.* 107 (1943); *Hearings before Committee on the Post Office and Post Roads on H.R. 2328 and H.J. Res. 49*, 78th Cong., 2d Sess. 100-109 (testimony of Mr. Morris Ernst).

⁵ See, e.g., 42 *STAT.* 163 (1921), 7 *U.S.C.* § 203 (1946) (stockyard dealers); 54 *STAT.* 673-6 (1940), 8 *U.S.C.* §§ 451-60 (1946) (aliens); 54 *STAT.* 1201-4 (1940), 18 *U.S.C.* §§ 14-17 (1946) (foreign agents); 52 *STAT.* 631-3 (1938), as amended, 22 *U.S.C.* § 611-21 (1946) (foreign propagandists); 53 *STAT.* 383 (1939), as amended, 26 *U.S.C.* § 3230 (1946) (narcotics dealers); 53 *STAT.* 393 (1939), 26 *U.S.C.* § 3261 (1946) (importers, manufacturers, and dealers in firearms).

⁶ For a bibliography on group libel see TANENHAUS, *THE PROTECTION OF RACIAL AND RELIGIOUS GROUPS THROUGH THE LAW OF DEFAMATION* (unpublished thesis in Cornell University Library, 1949).

other considerations: (1) the protection which the traditional law of defamation offers to groups; (2) an examination of existing and proposed group libel laws.

I

The law of libel offers both a civil and a criminal remedy for group defamation. A civil action can arise in two distinct ways. First, a suit can be brought by a member of the group defamed. In the early years of the seventeenth century one Lacy referred to the seventeen men against whom he was then engaged in a law suit as those "that helped to murder Henry Farrer."⁷ None of the men was named. The King's Bench, upholding a lower court judgment for Mr. Foxcraft, ruled that each one of the seventeen had as much cause for individual action as if each had actually been named. This is the first known instance in which an individual was allowed to maintain an action against the libeler of a group.

From a subsequent group of leading cases⁸ have evolved certain principles which may be categorically stated.

A. Defamation of a large group gives rise to no civil action on the part of an individual member of the group unless he can show special application of the defamatory matter to himself.

B. Defamation of a small group gives rise to civil action on the part of each individual member of the group,

1. if the defamatory language applies to each and every member as an individual and not solely to the group as a collectivity or

2. if the group is so small that the language of necessity applies to each and every member.

C. Defamation of a part of a group, whether large or small, gives rise to no civil action on the part of an individual member unless he is sufficiently identified to permit an action under A, or the part small enough to allow an action under B (2). On occasion courts have employed "class" to designate the larger collectivities falling into category A, and "group" to the smaller of category B.

Courts have held that actions could not be maintained by individuals when the "Stivers clan",⁹ "wine-joint" owners,¹⁰ insurance agents,¹¹ cor-

⁷ Foxcraft v. Lacy, HOBART 89a, 80 Eng. Rep. 239 (1613).

⁸ Sumner v. Buel, 12 Johns. 475 (N.Y. 1815); Ellis v. Kimball, 16 Pick. 132 (Mass. 1834); Ryckman v. Delavan, 25 Wend. 186 (N.Y. 1840); Le Fanu v. Malcomson, 1 H. C. L. 637, 9 Eng. Rep. 910 (1848); Eastwood v. Holmes, 1 F. & F. 347, 175 Eng. Rep. 758 (1858).

⁹ Louisville Times v. Stivers, 252 Ky. 843, 68 S.W.2d 411 (1934).

¹⁰ Comes v. Cruce, 85 Ark. 29, 107 S.W. 185 (1908).

¹¹ McGee v. Collins, 156 La. 291, 100 So. 430 (1924).

responsibility schools,¹² trading-stamp concerns,¹³ the officials of a labor union,¹⁴ and antique dealers¹⁵ were libeled. Plaintiffs were permitted to sustain actions when the "Fenstermaker family,"¹⁶ the members of a partnership,¹⁷ a staff of young doctors at a particular hospital,¹⁸ a court-martial,¹⁹ the occupants of a house,²⁰ a jury,²¹ a county commission,²² a board of town trustees,²³ an election board,²⁴ the administrative board of a university,²⁵ a group of coroner's physicians,²⁶ and a group of harness-makers in a fire department²⁷ were defamed. Actions by individuals were unsuccessful against publications alleging that most of the persons at a donation party were there for the liquor,²⁸ part of a named association consisted of a gang of blackmailers,²⁹ some members of a particular hose company had committed a theft,³⁰ one of a man's sons was a thief,³¹ and that several of a group of six witnesses would be in-

¹² *International Textbook Co. v. Leader Publishing Co.*, 189 Fed. 86 (6th Cir. 1910).

¹³ *Watson v. Detroit Journal Co.*, 143 Mich. 430, 107 N. W. 81 (1906).

¹⁴ *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 104 P.2d 860 (1940). (The court pointed out that the California Workers Alliance had 162 local chapters and hence at least 162 officers).

¹⁵ *Eastwood v. Holmes*, 1 F. & F. 347, 175 Eng. Rep. 758 (1858).

¹⁶ *Fenstermakers v. Tribune Publishing Co.*, 13 Utah 532, 45 Pac. 1097 (1896); *accord*, *Gidney v. Blake*, 11 Johns. 54 (N. Y. 1814) ("Your children are thieves and I can prove it."); *Maybee v. Fisk*, 42 Barb 326 (N. Y. 1864) ("Your sons stole my corn."). *But cf.* *Constitution Pub. Co. v. Leathers*, 48 Ga. App. 429, 172 S. E. 923 (1934) (An article naming five members of two families, and libeling them did not give the unnamed members grounds for action.).

¹⁷ *Tohin v. Alfred M. Best Co.*, 120 App. Div. 387, 105 N. Y. Supp. 294 (1st Dep't 1907). For numerous citations in accord see note, 97 A. L. R. 287.

¹⁸ *Bornman v. Star Co.*, 174 N. Y. 212, 66 N. E. 723 (1903) (12 doctors).

¹⁹ *Ellis v. Kimball*, 16 Pick. 132 (Mass. 1834).

²⁰ *McClellan v. New York Press Co.*, 64 Hun 639 (N. Y. 1892) (The charge that an apartment building was a house of ill-repute libeled each tenant). *But see* *Hyatt v. Lindner*, 133 La. 614, 63 So. 24 (1913) (The owner of an apartment house had no right of action against the charge that his building was a house of ill-fame even though he lived therein).

²¹ *Byers v. Martin*, 2 Colo. 605 (1875); *Smallwood v. York*, 163 Ky. 139, 173 S. W. 380 (1915); *Welch v. Tribune Pub. Co.*, 8 Mich. 661, 64 N. W. 562 (1890).

²² *Palmerlee v. Nottage*, 119 Minn. 136, 143 N. W. 260 (1913).

²³ *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290 (1901); *Children v. Shimm*, 168 Iowa 531, 150 N. W. 864 (1915).

²⁴ *Reilly v. Curtis*, 53 N. J. 677, 84 Atl. 199 (1912).

²⁵ *Lever v. Daily States Pub. Co.*, 123 La. 594, 48 So. 302 (1909).

²⁶ *Weston v. Commercial Advertiser Asso.*, 194 N. Y. 479, 77 N. E. 660 (1906).

²⁷ *Dwyer v. Fireman's Journal Co.*, 11 Daly 248 (N. Y. 1882) (three harnessmakers).

²⁸ *Smart v. Blanchard*, 42 N. Y. 137 (1860) (The hostess, who had been named, brought suit).

²⁹ *Hauptner v. White*, 81 App. Div. 153, 80 N. Y. Supp. 895 (1st Dep't 1903) (An officer of the association sued).

³⁰ *Giraud v. Beach*, 3 E. D. Smith 337 (N. Y. 1854).

³¹ *Harvey v. Coffin*, 5 Blacks 566 (Ind. 1841) (Action was brought by one of the sons).

dicted for perjury.³² The courts did, on the other hand, find that "subordinate engineers of a construction company or some of them,"³³ and "all radio editors save one"³⁴ were sufficiently narrow categories to permit suits.³⁵

Second, in certain instances a civil action can be brought in the name of the defamed group itself. Partnerships and corporations, while they have no moral personality and are incapable of experiencing humiliation and mental pain, have access to the courts on the grounds that disparagement of business integrity, operating methods, and credit standing tends to inflict pecuniary harm.³⁶ As in cases involving human beings, economic injury is presumed for many types of disparagement. In recent years, non-profit corporations have been able to sue successfully for defamation,³⁷ economic injury once again serving as legal justification for permitting recovery. Unincorporated associations are seldom able to sue for defamation because of the great procedural difficulties experienced by entities whose existence is not legally recognized. A New York State law, however, does permit actions in the name of unincorporated groups to be maintained by their presidents or treasurers.³⁸ In a recent case of significance, *Kirkwood v. Westchester Newspapers*, the New York Court of Appeals affirmed a judgment for a union local having some 17,000

³² *Kenelworth v. Journal Co.*, 17 Mo. App. 327, 93 S.W. 882 (1906).

³³ *Hardy v. Williamson*, 86 Ga. 551, 12 S.E. 874 (1891). (The plaintiff alleged that the libel had been directed at him).

³⁴ *Gross v. Cantor*, 270 N.Y. 93, 200 N.E. 592 (1936) (The man excepted was satisfactorily identified by prior statements issued by the defendant. One of the group of editors brought suit).

³⁵ *Ortenberg v. Plamondon*, 24 Rap. Jur. 69, 35 C.L.T. 262 (Quebec 1914) is one well-known case which does not seem to fit in the suggested pigeon holes. In Quebec one Plamondon made a violently anti-Semitic speech in which he charged that all Jews were wont to commit heinous crimes, and advised his audience to take action against the potential menace. A few days later a Jewish storekeeper was assaulted and his store window smashed. In addition, the merchant alleged that his business was being boycotted as a result of the defendant's defamatory lecture. Carroll, J., in finding for Ortenberg, noted that there were but seventy-five Jewish families among Quebec's 80,000 persons. "This is not the case of a wrong against an entire class so large that the injury is lost in its numbers." Though *Ortenberg v. Plamondon* is frequently cited, its authoritativeness is so considerably diminished by the fact that it was decided in a civil law jurisdiction that it does not rank as an important exception to the general principles set forth. *But see Germain v. Ryan*, 53 Rap. Jur. 543 (Quebec 1918) (No action for defamation could lie for a slander of the French Canadian race).

³⁶ See Riesman, *op. cit. supra* note 2, at 756.

³⁷ *Finnish Temperance Society v. Publishing Co.*, 238 Mass. 345, 130 N.E. 845 (1921); *Society for the Suppression of Vice v. MacFadden Publications*, 260 N.Y. 167, 183 N.E. 284 (1932).

³⁸ N. Y. GEN. ASSOC. LAW § 12 (McKinney 1942). See VA. CODE § 6058 (Michie 1942).

members.³⁹ The libel charged that the officers had been misusing union funds. The court ruled:

The courts have no less a duty in this case than in a suit brought by a corporation or an individual, to protect good name, reputation and credit from slanderous or libelous attacks. . . . The history of the law of libel in this State as to partnerships and corporations has led us by successive steps to the rule that we now announce as to unincorporated associations. . . . *We now hold that it is equally applicable to unincorporated associations, also, and that such associations are to be regarded as entities to the extent necessary to permit suits for libel to be brought in their behalf, by their officers.*⁴⁰

As a subsequent decision has emphasized,⁴¹ the *Kirkwood* case does not regard the association as a legal entity for other than this special purpose. *Kirkwood v. Westchester Newspapers* is without question the most advanced position ever taken by an American court recognizing the right of groups to protect themselves from defamatory attack.

To date there has not been a single case holding a person civilly responsible for the defamation of a large collectivity. As the law now stands, the larger the group defamed, the smaller are the chances of successful civil action.

Since criminal libel is indictable at common law because it tends so to inflame men as to result in a breach of the peace, there is no rational basis for the exclusion of group defamers from liability to prosecution in common law jurisdictions.⁴² The consideration of major importance is not whether the defamed is likely to lose the respect of his fellow men and consequently suffer economic harm, but whether the safety and good order of the community may be jeopardized. Defamation of racial and religious groups certainly has this latter tendency. Nevertheless, prosecutions for group defamation, despite frequent endorsement through dicta, have been extremely unusual.⁴³

The first known attempt to prosecute the libeler of a group was made

³⁹ *Kirkman v. Westchester Newspapers*, 287 N. Y. 373, 39 N. E. 2d 919 (1942).

⁴⁰ *Kirkman v. Westchester Newspapers*, 287 N. Y. 373, 379, 39 N. E. 2d 919, 920 (emphasis added). *But see* *Meinhart v. Contrest*, 194 N. Y. Supp. 593 (1922) (The court held that the officer was acting as the representative of a number of natural persons and not of the association); *Rodier v. Fay*, 7 N. Y. S. 2d 744 (1938).

⁴¹ *Gillette v. Allen*, 269 App. Div. 441, 56 N. Y. S. 2d 307, 310 (4th Dep't 1945).

⁴² In most of the states statutes defining criminal libel no longer refer specifically to breaches of the peace. See note 67 *infra*.

⁴³ Prosecutions for the libeling of individuals could hardly be considered common. The *FOURTH DECENNIAL DIGEST*, covering the years from 1926-1936, lists but fifty-two instances of criminal prosecutions for libel. More recently there have been even fewer. The *GENERAL DIGEST* lists 2 for 1943, 0 for 1944, 2 for 1945, 2 for 1946, 0 for 1947, and 1 for 1948.

in London in 1700. The case, *King v. Alme and Nott*, is reported by both Salkeld and Lord Raymond.⁴⁴ The two reports differ in important respects. The Salkeld version reads in its entirety:

Indictment for a libel against several subjects, &c. to the jury unknown. Et per Curiam, Where a writing 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.

Here then stands the complete report, the greatest part of which consists of the famous phrase which has served as authority for the doctrine that no cause for action can lie unless a particular individual is specifically designated.

The somewhat more detailed report in the first volume of cases collected by Lord Raymond adds several illuminating facts. The defendants were indicted for a libel entitled "List of Adventures in the Ladies Invention, being a Lottery." The persons against whom the libel was directed could not be determined. The case was removed from Old Bailey to the King's Bench because the recorder felt himself libeled. The defendants were found guilty and moved in arrest of judgment. The Court of King's Bench then ruled that the original indictment had been insufficient since the persons libeled were unknown.

When both reports are considered it seems unreasonable to impute to the case more than the judgment that a libel must clearly affect someone. If no persons or definable groups are designated, there is no possibility of the peace being breached by hostile third parties or by wrathful souls seeking revenge. The curious reference to the recorder seems to suggest no more than that he found the libel so morally repelling as to feel that disseminators of such matter ought to be punished. Nothing appears in either report to suggest that an indictment must show that a particular person was libeled. The requirements are first that some indication of the application of the writing be made, and second that the application be to a group of such character that persons might be moved to disturb the peace. It is not likely that remarks disparaging judges will be taken seriously enough to cause unfortunate repercussions; directed against a religious or racial minority such remarks may be more harmful.

The leading case of *King v. Osborne* (1732) has traditionally been regarded as establishing the doctrine that group libel is an indictable

⁴⁴ 3 Salk. 224, 91 Eng. Rep. 790; 1 Ld. Rayd. 486, 91 Eng. Rep. 1224 (1700) (also called *King v. Orm(e) and Nutt*).

offense.⁴⁵ Versions of the case appear in the reports of Barnardiston, Swanston, and William Kelynge. Drawing upon all three, the facts seem to be these. A paper was published charging that the Jews who had recently arrived from Portugal and were then living near Broad Street, London,⁴⁶ had burned to death a Jewish woman and her bastard child which had been begot by a Christian. Such occurrences, it was added, were frequent. As a result mobs barbarously attacked and brutally beat Jews in various parts of the city; the peace was actually breached. Prosecutor Fazakerly, himself one of those assaulted,⁴⁷ sought an information for libel. According to Serjeant Barnardiston's report, the Court differentiated the case at bar from *King v. Alme and Nott* by pointing out that while in the former certain unknown ladies were defamed here "the whole community of Jews was struck at."

Swanston records that when the Chief Justice "objected that the generality of the reflection made it difficult to say who are the persons meant by the paper," the prosecutor answered, "that by the proper averments in the information, the persons reflected on might be easily discovered." The court in its decision ruled that though an information for criminal libel might be improper, such defamatory accusations necessarily "tend to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable and totally incredible," and deserve to be punished as misdemeanors. The information was granted, though its rationale is not clearly stated.

William Kelynge's report specifically denies that libel is the basis for the information. "This is not by way of Information for a Libel that is the Foundation of this Complaint, but for a Breach of the Peace, in inciting a Mob to the Distruction (sic) of a whole Set of People; and 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."⁴⁸

All three reports agree that the court felt some action had to be taken to deal with a defamatory writing having such dire consequences. They are further at one in reporting that the action ought to be a criminal

⁴⁵ 2 Barnardiston 138, 166; 94 Eng. Rep. 406, 425; 2 Swans. 502 n. 4. 36 Eng. Rep. 705, 717, W. Kel. 230, 25 Eng. Rep. 584 (1732).

⁴⁶ Swanston's Reports only.

⁴⁷ William Kelynge's Reports only.

⁴⁸ Mr. Eustace Fulton, former Director of Public Prosecutions in Great Britain, was of the opinion that the Kelynge report of *King v. Osborne* is the correct one. See *Opinion of Mr. Eustace Fulton Re the Imperial Fascist League*, (unprinted May 1, 1936); *People v. Edmondson*, 168 Misc. 142, 144, 4 N. Y. S. 2d 257, 260 (1938).

prosecution. The ground upon which to justify the granting of an information is the main point of controversy. While only the Barnardiston version of *King v. Osborne* considers libel to be the basis for the prosecution, this report was generally accepted by American courts as authoritative.⁴⁹

Dicta in three American civil suits were used to drive the wedge which widened the scope of the law. In *Sumner v. Buel*, an early New York case which involved the libeling of the officers of a regiment, the court seemed torn between two important but, under those circumstances, antithetical principles of jurisprudence.⁵⁰ If each member of the group were permitted to bring action, the defendant might be ruined by a number of costly suits; but, on the other hand, if he were for that reason immunized, he would not be subjected to retribution for a decided wrong. The Chief Justice seized the dilemma by the horns: "The offender, in such case, does not go without punishment. The law has provided a fit and proper remedy, by indictment. . . ." ⁵¹ In 1840, the New York case of *Ryckman v. Delavan*⁵² arose from the libel that the breweries on Albany hill "were supplied with water for malting from stagnant pools, gutters, and ditches." Chancellor Walworth, for the dissenters, thought that a class libel ought to be punished as a misdemeanor because, "although it has no particular personal application to the individual of the body or class libelled . . . it tends to excite the angry passions of the community, either in favor of or against the body or class in reference to the conduct of which the charge is made, or because it tends to impair the confidence of the people in their government or in the administration of its laws."⁵³

The third bit of obiter dictum appears in the strange New Hampshire

⁴⁹ Less than a decade later the King's Bench cited the Barnardiston version of the Osborne case with approval in *King v. Jenour*, 7 Mod. 400, 87 Eng. Rep. 1318 (1740). The defendant published an article charging a director of the East India Company with manipulating the price of green tea. An information was sought for a libel of the Company itself because it was asserted that a libel of an unnamed director was a libel of all the directors. Chief Justice Lee wrote, "Where a paper is printed, equally reflecting upon a certain number of people, it reflects upon all. . . . It has been the rule of this Court always to endeavor to prevent libels upon societies of men." (at page 401, 87 Eng. Rp. 1319). He added that no information could be granted if the persons defamed were unknown, but insisted that such a ruling was not inconsistent with the Osborne case because the information named certain persons affected. Of special interest is the absence of any mention of a tendency to breach the peace. Cf. *Rex v. Williams*, 5 B. & Ald. 595, 106 Eng. Rep. 1308 (1822). *But see* *Rex v. Gathercole*, 2 Lew. C. C. 237, 168 Eng. Rep. 1140 (1838).

⁵⁰ 12 Johns. 475 (N. Y. 1815).

⁵¹ *Id.* at 478.

⁵² 25 Wend. 186 (N. Y. 1840).

⁵³ *Id.* at 196.

case of *Palmer v. Concord* (1868).⁵⁴ The plaintiff, as publisher of a Concord newspaper, printed articles accusing the Union Army fighting in Virginia of cowardice and the mistreatment of civilians. As a result a mob consisting of soldiers from the 1st New Hampshire Volunteers and some civilians destroyed his equipment. Publisher Palmer sued the City of Concord for damages under chapter 1519, Laws of 1854, which made the city liable for injury to local property. To recover he had to prove that the articles did not constitute illegal or improper conduct, i.e. that they were not libelous. Leaning heavily on *Sumner v. Buel* and *Ryckman v. Delavan*, the court decided that the writings constituted a prima facie case of libel. It declared:

Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libellous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual; and a doubt has been suggested whether 'the fact of numbers defamed does not add to the enormity of the act'. . . . Cases may be supposed where publications, though of a defamatory nature, have such a wide and general application that in all probability a breach of the peace would not be caused thereby; but it does not seem to us that the present publication belongs to that class.⁵⁵

The court did not feel that the defamation of an army was too broad a publication to prevent a criminal indictment.

Three actual prosecutions for group libel were brought in American courts in the last decade of the nineteenth century.⁵⁶ In these cases the general principles laid down in the English decisions and the dicta of the early American cases were read into the law.

In 1907 Newton L. A. Eastman was indicted in New York State for selling a paper called "The Gospel Workers" which contained a disgusting anti-Catholic tirade.⁵⁷ When arraigned under an obscene literature statute, he successfully demurred in the lower court on the ground that the writing was not technically obscene. The New York State Court of Appeals sustained the demurrer. Chief Judge Cullen, concurring, said by way of dictum:

⁵⁴ 48 N.H. 211 (1868).

⁵⁵ *Id.* at 215 (emphasis added); see *Tracy v. Commonwealth*, 87 Ky. 518, 4 S.W. 822 (1888).

⁵⁶ *State v. Brady*, 44 Kan. 435, 24 Pac. 948 (1890) (six brothers); *State v. Hoskins*, 60 Minn. 168, 62 N.W. 270 (1895) (three banks); *Jones v. State*, 38 Tex. Crim. 364, 43 S.W. 78 (1897) (the street car conductors of the Galveston Railroad Company).

⁵⁷ *People v. Eastman*, 188 N.Y. 478, 81 N.E. 459 (1907).

The charges in the article being against a whole class, no single individual could maintain an action for libel against its author . . . but not so, however, as regards a criminal prosecution for libel. The foundation of the theory on which libel is made a crime is that by provoking passions of persons libeled, it excites them to violence and a breach of the peace. Therefore, a criminal prosecution can be sustained where no civil action would lie, as for instance in this very case, where the libel is against a class. . . .⁵⁸

These cases show that the courts' answers to the question: Who is expected to breach the peace? by no means concur—if, indeed, the question is considered at all. The one undeniable requirement is that the writing be patently defamatory of some individual, body, class, or group.

Within a few years a number of prosecutions for group libel was successfully undertaken. The four Knights of Columbus cases were an outcome of the wide dissemination of a vile and repulsive oath which anti-Catholics falsely alleged was taken by all fourth degree members of the brotherhood.⁵⁹ The pertinent facts in each of the cases are enough alike so that the four may be dealt with as a unit. Copies of the oath circulated by the defendants varied somewhat in details; all but one included the pledge to murder. None of the publications mentioned the names of individuals or local chapters. While in the *People v. Gordon* (1923) the prosecution proved in the trial court that the defendant had intended to harm one particular individual, the Appellate Court of California stated that the libel hurt all fourth degree Knights as well, and based its opinion on the grounds that a class had been libeled. One of the contentions set forth by the defendant in his appeal from the lower court conviction in *People v. Turner* (1915) was that the article was published during an election campaign, that it referred to candidates for office, and that not one of the prosecuting witnesses was a candidate. "Nevertheless, in terms and in effect, it refers to each and every member of the order of the degree named," said the California District Court of Appeals (1st District) in brushing the argument aside. "The inevitable conclusion to be drawn from the article is that every member of the order of the fourth degree had taken and subscribed to the public oath. . . ."⁶⁰ *Alumbaugh v. State* (1929) is technically not so authoritative as the others because the Solicitor-General of Georgia presented the case as a libel of the particular individuals named within the indictment, rather than as a libel of a

⁵⁸ *Id.* at 481, 81 N. E. at 460.

⁵⁹ *People v. Turner*, 28 Cal. App. 766, 154 Pac. 34 (1914); *Crane v. State*, 14 Okla. Crim. 30, 166 Pac. 1110 (1917); *People v. Gordon*, 63 Cal. App. 62, 219 Pac. 486 (1923); *Alumbaugh v. State*, 39 Ga. App. 599, 147 S. E. 714 (1929).

⁶⁰ *People v. Turner*, 28 Cal. App. 766, 771, 154 Pac. 34, 36 (1915).

class. The opinion of the Georgia Court of Appeals seems to lament the fact that the case had not been squarely presented by the prosecution, and gives no indication that its decision would have differed substantially from that of its three predecessors. With the relatively unimportant exceptions noted, the question of criminal responsibility for group defamation was faced and decided in the Knights of Columbus cases; the courts' opinions are not permeated with the doubts, qualifications, and dicta that weaken the authority of earlier cases.

Of similar import was the successful prosecution for a libel directed against the American Legion and its members.⁶¹ The Legion's incorporation was an irrelevant matter since the prosecution proceeded on the assumption that the whole membership had been defamed. Though the prosecuting witnesses alleged that they were personally affected, the court did not seem to consider their arguments as controlling. "The libel," said the court, "need not be on a particular person. It may be upon a family, class, corporation, or other body. . . . A libel upon a class or group has as great a tendency to provoke a breach of the peace or to disturb society as has a libel on an individual, and such a libel is punishable even though its application to individual members of the class or group cannot be proved."⁶²

This consideration of criminal cases⁶³ has disclosed a general if somewhat erratic trend. For the past two hundred years the law has, in practice at least, been gradually extended to afford protection to groups of ever-increasing size. Two modern cases which run counter to the trend are yet to be examined. First, in *Drozda v. State* (1920) the Texas Court of Criminal Appeals reversed on appeal the conviction of J. Drozda for publishing a defamatory statement in a Bohemian language newspaper.⁶⁴ The statement made disparaging remarks about "those people whom you call leaders." The court, after noting that the indictment was technically insufficient because it did not contain a substantially accurate translation into English of the article alleged to be defamatory, turned to the question of group libel.

The purpose of the libel law is to punish him who maliciously imputes to others in writing, etc., disgraceful conduct, bad character, crime, etc., and, unless there be that in the alleged libelous publication per se which would tend to indicate the person or persons

⁶¹ *People v. Spielman*, 318 Ill. 482, 149 N.E. 466 (1925).

⁶² *Id.* at 482, 149 N.E. at 469.

⁶³ See *State v. Cramer*, 193 Minn. 344, 258 N.W. 525 (1935) (libel of a voluntary relief organization); *State v. Hosmer*, 72 Ore. 87, 142 Pac. 581 (1914) (libel of a convent).

⁶⁴ 86 Tex. App. 614, 218 S.W. 765 (1920).

meant to be attacked, it is difficult for us to conceive how innuendo could impart to the language used the specific criminal intent necessary. . . . A man who scurrilously attacks the Smiths, Johnsons, Jones, or the Jews, Gentiles, or Syrians, Democrats, Republicans, Populists, or office holders in general, could not be successfully haled into court and convicted of libel of any particular person, unless there be something in such article which by fair interpretation thereof tended to bring into disrepute some particular person or persons.⁶⁵

Title 17 of the Penal Code of Texas justifies this interpretation. Yet the statutory definition of criminal libel in the states in which prosecutions for group libel have been upheld are hardly broader than that in the Texas code.⁶⁶ The development of the law over the past century seems to indicate that the more modern definitions of criminal libel were the result of efforts to extend rather than narrow the meaning of the common law. As dueling and armed revenge yielded to the law suit as the means of vindication, criminal libel ceased to result in breaches of the peace. In the attempt to preserve prosecution as a remedy, most states came to define the crime of libel in terms not much different from libel as a tort.⁶⁷ As a result the common law was broadened to permit prosecution for libel whether or not a tendency to cause a breach of the peace was present.

Breach of the peace, nevertheless, continued to be regarded by most courts as the gist of the action. The Drozda case, despite an earlier Texas decision to the contrary,⁶⁸ narrowed the common law by ruling

⁶⁵ *Id.* at 617, 218 S. W. at 766.

⁶⁶ OKLA. STAT. ANN. tit. 21 § 771 (1938); CAL. PEN. CODE c. 10, § 248 (Deering 1941); 26 GA. CODE ANN. 2101 (1933); ILL. STAT. tit. 38, § 402 (Hurd-Smith 1934).

⁶⁷ See, e.g., "Provoke to Wrath" was not dropped from the definition of criminal libel in Oklahoma until 1895 (OKLA. STAT. 1890, § 2156; OKLA. LAWS 1895, c. 33, § 1), and criminal libel was not classed as an "Offense Against the Person" until 1910 (Rev. Laws 1910, § 2380). In California criminal libel was grouped with "Offenses Against the Public Peace and Tranquillity" until 1871 (CAL. STAT. 1850, § 120; CAL. GEN. LAWS 1850-1864 (Hittell), § 1520); since 1871 libel has been classed as a "Crime Against the Person." (CAL. CODE 1874). Until 1910 the Penal Code of Georgia listed libel as "Offense Against the Public Peace and Tranquillity" (Pen. Code of 1817 in DIGEST OF THE LAWS OF THE STATE OF GEORGIA 364 (Prince 1822); PEN. CODE § 340 (Park 1914); now it is included with "Crimes Against the Person" (26 GA. CODE § 2101 (1933)). Criminal libel was listed as a "Crime Against the Public Peace and Tranquillity" in Illinois until all crimes were arranged alphabetically in 1874 (REV. STAT. 1845 § 172; REV. STAT. 1874). The laws of several states still exhibit vestiges of the days when criminal libels were apt to result in public disorders. See, e.g., IOWA CODE c. 737, § 737. 1 (1946) (provoke to wrath); KAN. GEN. STAT., c. 21, § 2401 (Corrick 1935) (provoke to wrath); ME. REV. STAT. c. 117, § 30 (1944); ALA. CODE tit. 14, § 347 (1940) (tend to provoke a breach of the peace); CONN. GEN. STAT. § 8518 (1949) (tend to provoke a breach of the peace).

⁶⁸ *Coulson v. State*, 16 Tex. App. 189 (1884). The court said, "There is a distinction between libel at common law and libel under our Penal Code. At common law libel was

that defamation is punishable as a crime *only* if particular individuals have been alluded to; libel could under no circumstances be considered as more than a crime against reputation.

Drozda v. State, in addition, implies a severe dichotomy between classes and particular individuals. The dichotomy may or may not exist. Whether some, all, or no members of a group may be hurt when the group is defamed depends upon the facts of the case. One grain of strychnine in a city reservoir would become sufficiently diluted so as to harm no one, whereas ten pounds might wipe out the entire population. It seems unlikely that libels upon mankind, or lawyers, persons who like chocolate ice cream or men over six feet tall could result in dire consequences; such is not the case with certain kinds of disparagement of Negroes, Japanese-Americans, Jews, and Catholics. It may do no harm to distribute throughout the South a handbill alleging that all thirteen million Negroes are Republicans. Naught but harm could result if the circulars charged they were Communists. Whether a publication libeling a group—whether or not it descends to particulars—is of such a nature as to justify prosecution as a crime is a matter that is best determined by the facts of each case. Clearly the *Drozda* decision is a departure from precedent.

The second case, *People v. Edmondson*,⁶⁹ was decided in 1938. Robert E. Edmondson was indicted on three counts for alleged libels against Frances Perkins, and Virginia C. Gildersleeve, and "all persons of the Jewish Religion." In dismissing the indictment Judge Wallace of the New York County Court of General Sessions presented two main lines of argument. The first was the contention that the New York State libel statute could not as a matter of law be extended to "apply to invective against a group so widespread and difficult to particularize or identify as all the members of a race or 'all persons of a religion.'"⁷⁰ Second, it was maintained that such an application, could it be made, would in the long run contravene the public welfare. The second line of argument will not be re-examined since it is our purpose to consider the Edmondson case from the standpoint of the history and theory of the law of defamation alone.

punishable solely on account of its tendency to provoke a breach of the peace. . . . Under our Penal Code, libel is punished on account of its tendency to injure the reputation of a person . . . and such being the case, if this intent is averred, the incitement is sufficient *without the additional* averment of the tendency and intent to create a breach of the peace. (at 197, emphasis added).

⁶⁹ *People v. Edmondson*, 168 Misc. 142, 4 N. Y. S. 2d 257 (1938).

⁷⁰ *Id.* at 143, 4 N. Y. S. 2d at 259.

On its face, the court declared, the New York State statute does not extend the protection of the law to groups.

The question now to be considered is whether or not the statute has been or should be extended by judicial construction so as to sustain indictment for invective directed against such larger groups, such as all the Jews, or all the Christians, or all the Democrats, or all the Republicans.

I have carefully read the authorities on this subject, both in the United States and in England, and it is my opinion that such an indictment cannot be sustained under the laws of this state, and that no such indictment as one based upon defamatory matter directed against a group or community so large as 'all persons of the Jewish Religion' has ever been sustained in this or any other jurisdiction.⁷¹

The court thus made it clear that the New York criminal libel statute does not preclude an indictment for group defamation. If theory and precedent could justify prosecution for group libel, then the phraseology of the law need be no insurmountable impediment. The court did not feel, however, that precedent permitted an extension of the law to apply to the disparagement of so large a group as "all persons of the Jewish Religion."

The court first argued that a prosecution for group defamation cannot be successfully maintained in England.⁷² Be this as it may, it does not necessarily follow that the same situation prevails in the United States. In the States the law underwent considerable evolution, and the Barnardiston report of the *Osborne* case, wrong though it may be, came to be accepted as authoritative. After an examination of the case law, Judge Wallace declared:

I am of the opinion that the soundest rule that has been enunciated of the subject of group libel is this: That an indictment cannot be predicated upon defamatory writings assailing a class or group unless directly, or by implication, some individual is libeled.

As we read the indictments returned in cases in which groups were held to be libeled we note that the pleaders almost invariably

⁷¹ *Id.* at 144, 4 N. Y. S. 2d at 260.

⁷² In England group defamation can be prosecuted either as seditious libel or as a public mischief, but not as defamatory libel. See *King v. Leese and Whitehead* (1936), *London Times*, Sept. 22, 1936, p. 11, col. 4; *King v. Caunt* (1947), *N. Y. Times*, Nov. 18, 1947, p. 16, col. 6, *id.* Nov. 19, p. 12, col. 6, *id.* Nov. 20, p. 24, col. 4, *id.* p. 16, col. 2, *Newspaper World*, Oct. 18, 1947, p. 62, *id.* Nov. 22, 1947, p. 229. Also see WEBBER, MEMORANDUM ON THE LAW OF LIBEL AGAINST COMMUNITIES (unprinted 1934); Opinion of Mr. Eustace Fulton, *op. cit. supra* note 48; WEBBER, MEMORANDUM ON THE TRIAL OF ARNOLD (sic) SPENCE LEESE AND WALTER WHITEHEAD (unprinted 1936); WEBBER, OBSERVATIONS UPON THE CASE OF REX V. LEESE AND WHITEHEAD (unprinted 1936).

charged in the indictment that some individual is, directly or by implication, libeled.

They seem, consciously or unconsciously, to have reached the conclusion that there can be no criminal libel of group unless some individual is shown to have been affected by it. At all events, there is certainly nothing in the law of this State, nor in any of the cases cited, which justifies a finding that an indictment will lie, based on defamatory matter directed against so extensive and indefinable a group or class as "all persons of the Jewish Religion."⁷³

The court's justification for the great weight it attached to the naming of prosecuting witnesses in previous indictments is not persuasive. It does not seem likely that the Edmondson indictment would have been sustained if it had borne the names of a half dozen persons who claimed to have been affected. As was pointed out in *Drozda v. State*, the mere allegation that individuals were affected does not change the character of the libel. The court's stand in the *Edmondson* case in brief is this. Previous instances of group defamation have been successfully prosecuted because the libel affected particular individuals: the groups attacked were of small enough size and definite enough character to enable the libels to descend to particulars. Our reading of the cases has indicated that in theory the size of the group is immaterial. Although sustaining the indictments would have been a substantial extension of the law, such a projection would not have been unreasonable in the light of either precedent or theory.

In a sentence, to date there have been no successful actions, civil or criminal, for the libeling of a large racial or religious group. The traditional law of defamation is so ineffective in combating the group libeler that he can spread his hatred virtually without risk of legal action. Nor does there seem to be any indication that the courts will in the near future extend the law to offer protection to racial and religious groups.

II

The reluctance of the judiciary to extend the traditional law of defamation⁷⁴ has provoked considerable interest in group libel legislation. Since defamation is by nature a form of speech, however perverted, laws restricting group libel raise constitutional problems which, though knotty, are too well known to warrant more than cursory reference.

No member of the Supreme Court has ever maintained that freedom of speech is absolute. The late Mr. Justice Murphy, one of the staunchest

⁷³ *People v. Edmondson*, 168 Misc. 142, 154, 4 N. Y. S. 2d 257, 268 (1938).

⁷⁴ Riesman, *op. cit. supra* note 2, at 778; Note, 47 Col. L. Rev. 595, 599 (1947).

protectors of the freedoms of the First Amendment, spoke as follows in *Chaplinsky v. New Hampshire*:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These 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. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is outweighed by the social interest in order and morality.⁷⁵

Can utterances defamatory of groups be placed in the same category as the obscene, the libelous, and the "fighting word"? These latter seldom bear any relation to true discussion; attacks on groups almost invariably do.⁷⁶ The really dangerous disseminators of group hatred are those who use it as a means of furthering purposes that are social, political, or economic in character. It is difficult to draw a line between what is pure abuse completely devoid of opinion and ideas, and what is actually discussion, abusive, malignant, and perverted though it may be. "Buy Gentile" stickers assuredly have no valid relation to free speech, but most group libels do. The subtler the propaganda, the more the opprobrium represents rational argument, and consequently the more plausible and dangerous it is. It seems most unlikely that the Supreme Court could be convinced that group libels in general can be separated from discussion and expressions of opinion.

Yet utterances normally thought to be constitutionally protected may be restricted when the interests of the community in peace, order, and privacy are substantially impaired.⁷⁷ Even then speech may be abridged only if the resulting evils are serious and immediate,⁷⁸ and the legislation so narrowly drawn⁷⁹ and construed⁸⁰ as not to interfere with legitimate

⁷⁵ 315 U. S. 568, 571 (1942).

⁷⁶ FRAENKEL, *OUR CIVIL LIBERTIES* 18 (1944); Fraenkel, *The Lynch Bill—A Different View*, 4 *LAW. GUILD REV.* 12, 13 (1944).

⁷⁷ *E.g.*, *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949); *Saia v. New York*, 334 U. S. 558, 562; (1948) *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944); *Murdock v. Pennsylvania*, 319 U. S. 105, 109 (1943); *Cox v. New Hampshire*, 312 U. S. 569 (1941); *Cantwell v. Connecticut*, 310 U. S. 296, 303; *Schenck v. United States*, 249 U. S. 47 (1919).

⁷⁸ *E.g.*, *Thomas v. Collins*, 323 U. S. 516 (1944); *Taylor v. Mississippi*, 319 U. S. 583 (1943); *Herndon v. Lowry*, 310 U. S. 242 (1937). See Cushman, "*Clear and Present Danger*" in *Free Speech Cases in ESSAYS IN POLITICAL THEORY PRESENTED TO GEORGE H. SABINE* 311 (Konvitz & Murphy ed. 1948).

⁷⁹ *E.g.*, *Stromberg v. California*, 283 U. S. 359 (1931); *Lovell v. Griffin*, 303 U. S. 444 (1938); *Hague v. C.I.O.*, 307 U. S. 496 (1939); Note, *Statutory Prohibition of Group Defamation*, 47 *COL. L. REV.* 595, 606 (1947).

⁸⁰ The Supreme Court has on occasion upheld statutes which had been narrowed by

speech.⁸¹ The Supreme Court has recently ruled that a law may not be used to convict an individual even "if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of these grounds may not stand."⁸² If the Court is to find group libel laws justified, group defamation must be shown to be a very substantial danger to the welfare of the community. Moreover, group libel statutes, as other laws restricting the freedom of discussion, lose the presumption of constitutionality that has customarily been afforded to legislative enactments.⁸³ A clear listing of legislative findings and purposes may help focus the attention of the Supreme Court on the seriousness of a problem, and lead it to believe that the legislature was not acting hastily or unnecessarily;⁸⁴ nevertheless, such findings will not deter the Court from deciding the question of clear and present danger for itself.

Existing and proposed group libel statutes fall roughly into three categories: laws based upon the police power of the states, state statutes extending the scope of the traditional law of defamation, and proposals for national legislation based on the postal and commerce powers.

Section 2090 of the New York Penal Code is typical of the broad police power statute.

A person who wilfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health or which openly outrages public decency, for which no other punishment is expressly prescribed by this chapter, is guilty of a misdemeanor. . . .

Doubt whether these catch-all provisions warrant interference with the dissemination of hatred, coupled with even graver doubt concerning the constitutionality of such laws when applied to the written and spoken word, has prompted agitation for more narrowly drawn legislation.

West Virginia and Connecticut have had very limited statutes for

lower court interpretation. *E.g.*, *Cox v. New Hampshire*, 315 U. S. 568 (1942); *Fox v. Washington*, 236 U.S. 273 (1915); see *Winters v. New York*, 333 U.S. 507, 512, 517 (1948).

⁸¹ The Court has invalidated several statutes because they were not passed to meet a clear and present danger. *E.g.*, *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Carlson v. California*, 310 U. S. 106 (1940); *West Virginia School Board of Education v. Barnette*, 319 U. S. 624 (1943); *Cushman, op. cit. supra* note 78, at 320.

⁸² *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949).

⁸³ See, *e.g.*, *United States v. Caroline Products Co.*, 304 U. S. 144, 152 note 4 (1938); *Schneider v. State*, 308 U.S. 147, 161 (1939); *Bridges v. California*, 314 U.S. 252, 262 (1941); *Thomas v. Collins*, 323 U. S. 516, 530 (1944); *Kovacs v. Cooper*, 69 S. Ct. 448, 454 (1949). But see *Kovacs v. Cooper*, 69 S. Ct. 448, 455 (1949) (dissent).

⁸⁴ See *Cantwell v. Connecticut*, 310 U. S. 296, 307, 311 (1940); *Bridges v. California*, 314, 252, 260 (1941).

nearly three decades. The West Virginia measure applies only to pictures and theatrical performances, and makes it unlawful for any person

To advertise, exhibit, display or show any picture or theatrical act . . . in (any) place of public amusement . . . which shall in any manner injuriously reflect upon the proper and rightful progress, status, attainment, or endeavor of any race or class of citizens, calculating to result in arousing the prejudice, ire or feelings of one race or class of citizens against any other race or class of citizens.⁸⁵

The Connecticut law applies only to advertisements. No person shall by his advertisements, ridicule or hold up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class of persons . . .⁸⁶

Since advertisements of other than religious activities have never been thought to fall within the protection of the First and Fourteenth Amendments, and the censorship of entertainment has not yet been successfully challenged, the validity of the two statutes is hardly open to question. Neither law, it is equally clear, does more than touch the fringes of the problem of group defamation.

On its face the Illinois anti-hate law of 1917 is not much broader than the West Virginia and Connecticut statutes. It makes it unlawful for

any person . . . to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.⁸⁷

Although the language does not seem to refer to books and pamphlets the Illinois courts have regarded "sketch" as including general printed material.⁸⁸ The statute was apparently intended as authority for the censorship of motion pictures.⁸⁹ In 1941 and 1942, however, it became a weapon for harassment of the Jehovah's Witnesses, who were then conducting a phase of their perennial anti-clerical campaign in Illinois. The court noted in *Bevins v. Prindable*⁹⁰ that more than a score of cases involving

⁸⁵ WEST VA. CODE § 6109 (1943).

⁸⁶ CONN. REV. STAT. c. 417, § 8376 (1949).

⁸⁷ ILL. STAT., c. 38, § 471 (Hurd-Smith 1934).

⁸⁸ See, e.g., *People v. Simcox*, 379 Ill. 347, 40 N. E. 2d 525 (1942); *Bevins v. Prindable*, 39 F. Supp. 708 (1941), *aff'd*, 314 U. S. 573 (1941).

⁸⁹ See *Fox Film Corp. v. Collins*, 236 Ill. App. 281 (1925) and cases cited therein.

⁹⁰ 39 F. Supp. 708, 713 (E. D. Ill. 1941), *aff'd*, 314 U. S. 574 (1941).

infractions of the law by the Jehovah's Witnesses were then pending. It seems ironical that a law aimed at the protection of minorities should be used against a minority—offensive at times though it may be—that is very much more in need of protection than most.

Under the terms of the law as Illinois courts have construed it, a professor of sociology could be punished for showing literature defamatory of racial and religious groups to his graduate seminar. Although the statute was ruled valid on its face,⁹¹ it is unlikely in the light of recent Supreme Court decisions that such broad and indefinite language could sustain a conviction for most varieties of group defamation.

In 1935 New Jersey passed the Rafferty Act, or "Anti-Nazi Law", in an attempt to throttle the German-American Bund.⁹² The law placed restrictions on the making of speeches, the possession, publication, and dissemination of literature, the use of auditoriums, the wearing of uniforms, and the display of flags. It read in part:

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 residing or being in this state by reason of race, color, religion, or manner of worship, shall be guilty of a misdemeanor.⁹³

Though directed against a particular abuse, the statute was very broad in scope. Chief Justice Brogan of the Supreme Court of New Jersey, in voiding the law,⁹⁴ offered four main arguments against it. He first contended that the statute made oral expression a crime, and in so doing ran contrary to the course of the common law. Second, a penal statute of such a nature loses, in effect, its presumption of constitutionality and must be judged "according to its weakness rather than its strength." The statute was, moreover, so vague and indefinite as to leave unsettled in the minds of citizens precisely what conduct was illegal. "That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond a reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what was said? Nothing in our criminal law can be invoked to justify so wide a discretion."⁹⁵ Third, the statute was so broad as to jeopardize constitutional rights.

⁹¹ *Id.* at 713.

⁹² N. J. STAT. ANN. tit. 2, c. 157 B §§ 1-8 (1937).

⁹³ *Id.* c. 2, § 157 B-5.

⁹⁴ *State v. Klapprott*, 127 N. J. L. 395, 22 A. 2d 877 (1941).

⁹⁵ *State v. Klapprott*, 122 N. J. L. 395, 402, 22 A. 2d 877, 881. These sentences were quoted with approval in *Winters v. New York*, 333 U. S. 507, 517 (1948).

Fathers instructing their children in a neighbor's religion and teachers of philosophy in the schools could be caught in its web. Finally, the remarks of the defendant did not constitute a clear and present danger.

As long as the irrationalism in the law of libel and slander upon which Judge Brogan's first contention was based remains in the vast majority of jurisdictions,⁹⁶ his position will probably be regarded as correct. The second and third points were well taken. Laws that abridge the freedoms of the First Amendment have clearly lost the presumption of constitutionality normally afforded to legislative enactments,⁹⁷ and the relative certainty in the terms associated with the law of defamation is one of the strong reasons why group libel statutes patterned after the traditional law are most favored. Whether hate propaganda in general constitutes a clear and present danger that society has a right to prevent is a question over which honest men can dispute; whether a particular piece does, poses an even more difficult question. Actually only the section of the law dealing with oral defamation was judged unconstitutional, though all but the first of Judge Brogan's objections would apply to the other sections as well. The statute has not been applied since.⁹⁸

The most recent state enactment based upon the police power is a law passed by the legislature of Indiana in 1947.⁹⁹ Aimed at the Ku Klux Klan, this unusual bit of legislation represents a somewhat crude attempt to avoid the stumbling blocks of unconstitutionality that have in recent years overturned so many laws affecting speech. Its provisions are essentially as follows:

Sec. 10-904. It is the policy of the state to protect the welfare and rights of its citizens by preventing "racketeering in hatred."

Sec. 10-905 A. "It shall be unlawful . . . to conspire . . . for the purpose of advocating . . . or disseminating malicious hatred by reason of race, color, or religion . . . for or against any person, persons, or group of persons, individually or collectively. . . ."

B. "It shall be unlawful for any person or persons acting with malice . . . to advocate . . . or disseminate hatred for or against a person, persons, or group of persons, individually or collectively, by reason of race, color, or religion which threatens to, tends to, or causes riot . . . interference with traffic upon the streets . . . or denial of civil or constitutional rights."

⁹⁶ In a few states slander is punishable as a crime. *See, e.g.*, ARK. STAT. § 41-2405 (1947); CAL. PEN. CODE § 258 (Deering 1941); IND. STAT. 10-3202 (Burns 1933); LA. CODE CRIM. PROC. 740-47 (1942); MICH. STAT. § 28.602 (Henderson 1935); TEX. CRIM. STAT. tit. 16, c. 2, § 1293 (Vernon 1925) (unchastity); WIS. STAT. 348.41 (1945).

⁹⁷ See note 86, *supra*.

⁹⁸ A similar bill was introduced in the New York State Senate in January of 1947. No. 603, Ind. 588.

⁹⁹ IND. STAT. § 10-904-914 (Burns 1933).

Sec. 10-906. Violators "shall be deemed guilty of racketeering in hatred" and liable to a maximum penalty of disfranchisement for ten years, \$10,000 fine, and two years in jail.

Sec. 10-907. This section provides the equitable remedy discussed below.¹⁰⁰

Sec. 10-908. Corporations cannot be chartered, nor foreign corporations allowed to do business in the state, for the purpose of violating 10-905.

Sec. 10-909. Domestic corporations acting in violation of section 10-905 shall forfeit their charters.

Sec. 10-912. "The term 'hatred' as used in this act shall mean and include malevolent ill-will, animosity, odium. . . ."

Sec. 10-913. "No provision of any section of this act shall be construed to prohibit any right protected by the federal constitution . . . including, but not limited to rights of freedom of speech, freedom of the press, and freedom of religion."

The Indiana statute makes two acts illegal: conspiracies for the purpose of disseminating hatred, and the dissemination of hatred tending to cause acts which the state has a right to prevent. Moreover, hatred is specifically defined as involving actual malice. Section 10-913 makes the further qualification that the statute is not to be construed in such a way as to interfere with constitutional rights. To consider these matters in reverse order, the last provision may be dismissed as a simple legislative declaration of good intentions. The constitutionality of a statute depends far less on legislative declaration of intent than on the import of the provisions themselves.

The restricted definition of the word "hatred" is of some consequence. No provision, it is important to note, is made for truth as a justification. In prosecutions for libel in most states truth is admissible as a defense if publication was undertaken with good motives and for justifiable ends. Actual malice, while it does not necessarily destroy truth as a defense, has a strong tendency to do so. If the prime motivation of the defamer was actual malice, the defense of truth is usually of little value. Under the Indiana law absence of ill-will is, by implication, the only defense. Though ill-will may not have been the dominant motivation, the disseminator is still subject to punishment.

The Indiana law is sadly deficient in affording adequate protection for freedom of speech. The most serious objection to the clause outlawing the spread of hatred tending to cause acts which the state has a right to prevent (10-905B) is the inclusion among such acts of the "denial of civil or constitutional rights." This term seems too vague for a criminal

¹⁰⁰ See *infra*, p. 290.

statute affecting speech. The validity of a conviction under the conspiracy provision (10-905A) would depend on whether the conspiracy prosecuted was in furtherance of an unlawful undertaking. It does not seem likely that the courts would tolerate the conviction of combinations to accomplish lawful ends by constitutionally-protected means. Under section 10-905A a group of serious students could technically be prosecuted for collecting and analyzing hate-literature. While there is little likelihood that the statute would be used for such a purpose,¹⁰¹ it must be remembered that the Court, when considering the validity of laws that affect the basic freedoms, keeps a sharp watch for looseness in phraseology that might give rise to misuse. A more careful wording of section 10-905A could remedy this defect. It is quite obvious, nonetheless, that the object of the Indiana act is to stop the organized hate-monger rather than the occasional psychopathological crack-pot or misguided citizen.

Of the five statutes only the New Jersey and Indiana enactments were passed with the problem of present-day group defamation in mind. The New Jersey law was an early experiment and ran afoul of the Constitution as it came to be interpreted in the years after 1939. There was little indication in 1935 that it could not withstand the severest of constitutional tests. Though the Indiana law remains as yet unchallenged, constitutional difficulties are to be expected. The West Virginia and Connecticut laws are too limited in scope to be of any real help in combating group defamation, and the Illinois statute is too broad to enable convictions for most kinds of racial and religious disparagement to stand.

Virtually every city and town has been delegated authority to pass ordinances for the protection of its residents. Section 16-601 of the Portland, Oregon Police Code is typical.

It shall be unlawful for any person to commit any violent, riotous or disorderly act, or to use any profane, abusive or obscene language in any street, house, or place whereby the peace and quiet of the city is or may be disturbed, or to commit any indecent or immoral act or practice.¹⁰²

The scope of such a broad prohibition stops only with the imagination. The courts, however, for constitutional reasons, are not apt to permit the word "abusive" to be used to cover most types of hate propaganda unless the danger of disorder is clear and present. A few cities do have

¹⁰¹ The law seems to have been invoked on but one occasion. Mr. Joel Eddy was charged with violating the law by his actions during the student strike protesting the admission of Negroes to Emerson High School in Gary, Indiana. (N. Y. Times, Sept. 7, 1947, p. 14, col. 4). There is no record of prosecution.

¹⁰² PORTLAND (ORE.) POLICE CODE, § 16-601.

ordinances more or less directed at the spread of racial and religious bigotry.

The City of Sacramento passed an ordinance in 1922 that resembles the West Virginia theatrical statute.

It shall be unlawful for any person . . . to conduct any moving picture . . . or show which tends to engender race hatred or hold up to ridicule or ostracism any race or class of people, or appeals to race prejudices. . . .¹⁰³

The Portland entertainment ordinance varies somewhat. Entertainment has to be approved before exhibition, and a show and its advertising must not tend "to ferment religious, political, racial or social hatred or antagonism. . . ." ¹⁰⁴ The Omaha Municipal code, like that of Sacramento and of Portland, deals with entertainment although with more adjectives. Incitement to race hatred alone is forbidden; no protection is given to religious groups.¹⁰⁵ While the Sacramento, Portland, and Omaha ordinances offer no constitutional problem because they deal with entertainment, their value in dealing with racial and religious defamation is negligible.

Oklahoma City passed an ordinance in 1940 that is reminiscent of the old common law crime of blasphemous libel.

Ridiculing Religion. It shall be unlawful and an offense for any person . . . to wantonly utter (or) publish . . . any words or language casting contumelious reproach or profane ridicule on God, Jesus Christ, the Holy Ghost, the Holy Scripture, or the Christian or any other religion calculated, or where the natural consequence is, to cause a breach of the peace or an assault.¹⁰⁶

The ordinance could not be constitutionally applied to most racial and religious defamation, and may well be bad in other respects.

The City of Houston has a provision somewhat more pertinent. The use of city property, including the famed Sam Houston Coliseum, other buildings, and municipal parks, is denied for

Lectures, speeches, debates, and otherwise (that) in the opinion of the manager (or superintendent of parks) . . . will tend to engender religious or racial antagonism.¹⁰⁷

This delegation of discretion to administrative officers is censorship in its

¹⁰³ SACRAMENTO ORD., 67, 4th Series, 1921-23.

¹⁰⁴ PORTLAND (ORE.) LICENSE AND BUSINESS, § 20-706-7.

¹⁰⁵ OMAHA CODE, Ord. 14924, art. 12-68.1.

¹⁰⁶ OKLAHOMA CITY REV. ORD., 5228 (1944 Supplement), 8-13 C. Emphasis added.

¹⁰⁷ Houston Code, c. 32, art. 5, § 1387 (1942).

baldest form, and as a result the ordinance is probably unconstitutional on its face.¹⁰⁸

Denver and Cincinnati have ordinances which are squarely in point. The former prohibits the distribution of

any circular, pamphlet, card or dodger, whether anonymous or not, which incites, counsels, promotes or advocates hatred, violence or hostility against any person or group of persons residing or being in the City and County of Denver by reason of race, color, religion or manner of worship.¹⁰⁹

The Cincinnati regulation makes it an offense to

offer for sale or sell or give away any pamphlet or paper which contains an article or articles subjecting to ridicule or contempt any class or group of citizens on account of its or their race or religious belief, or which in any manner tends to promote racial hatred or religious bigotry. . . .¹¹⁰

The Denver and Cincinnati ordinances allow no defenses whatsoever and are so loosely drawn as to proscribe legitimate speech.

The only other large city having a "race-hate" ordinance is Chicago. After rescinding one measure because of its doubtful constitutionality,¹¹¹ the Chicago City Council approved a narrowly-drawn law.

It is unlawful to create a clear and present danger of a riot or assault, battery, or other unlawful trespass against any person or group of persons because of his or their race, religion, color, national origin, or ancestry, or to create a clear and present danger of arson, vandalism, defacement, or other unlawful trespass against property because of the race, religion, color, national origin, or ancestry of the owner, possessor, authorized user or users of said property, or, in the case of a cemetery, of the decedent buried therein.¹¹²

This ordinance is clearly constitutional. The real problem is whether so narrow a law can be of any appreciable value in combating group defamation.

Statutes extending the law of defamation have a *prima facie* advantage over other possible legislative attempts to control the disparagement of racial and religious groups. This advantage stems from the fact that the

¹⁰⁸ See, e.g., *Lovell v. Griffin*, 303 U. S. 444 (1938); *Saia v. New York*, 334 U. S. 558 (1948).

¹⁰⁹ DENVER ORD. 23, series of 1939.

¹¹⁰ CINCINNATI CODE, § 901-53 (1945).

¹¹¹ See memorandum prepared by Byron S. Miller and Gilbert Gordon for the Commission on Law and Social Action of the American Jewish Congress (mimeographed, no date).

¹¹² CHICAGO CODE, c. 193-1.1.

law of defamation is so deeply rooted in Anglo-American legal tradition. In the course of many centuries of development under greatly varying conditions, hundreds of the innumerable and unforeseeable problems that must plague any new branch of the law have been faced and solved by the finest of legal minds. Confused, outdated, illogical the law may seem; yet it retains a measure of the certainty and predictability so essential to a democratic jurisprudence. Lawyers and judges are largely aware of what the law of defamation can be made to do, and what it cannot. America's unfortunate experience during the period of the First War is still a vivid and frightening reminder of what may happen when legislation affecting the written and spoken word is enacted without precedent for guide.¹¹³

The law of defamation may be extended by criminal or civil statutes. Criminal statutes which might be construed as extending the traditional law are on the books of four states. Of these Massachusetts alone passed a law with the purpose of controlling the dissemination of racial and religious hatred.¹¹⁴ Upon petition of the American Jewish Congress,¹¹⁵ the statute was enacted in April of 1943, at a time when hate literature was rife throughout the United States, and race riots and the desecration of religious property in the Boston area were causing considerable concern. The law provides that anyone publishing "any false, written or printed material with the intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion shall be guilty of libel. . . ."¹¹⁶ Significantly enough, whereas in a prosecution for the criminal libel of an individual, truth is no justification if actual malice is proved, in the case of a group libel even the *absence of truth* creates no liability unless actual malice is proved.¹¹⁷ Thus the defendant may maintain in defense either that the publication is privileged or that it is not malicious. There has not been a successful prosecution under the act in the six years since it was passed.¹¹⁸

Criminal libel is so broadly defined in the Nevada code that prosecution for the disparagement of a racial or religious group might well be possible. "A libel is a malicious defamation . . . tending . . . to impeach . . . the

113 CHAFFEE, *FREE SPEECH IN THE UNITED STATES passim* (1941).

114 Note, 28 MASS. L. Q. 104 (1943).

115 Perlman & Ploscowe, *False, Defamatory, and Anti-Democratic Propaganda*, 4 LAW. GUILD REV. 13 (1944).

116 Mass. Laws, c. 272, § 98c (1943).

117 *Id.*, c. 278, § 98. Even this is more generous than the law in most jurisdictions which assumes malice.

118 For reference to an unsuccessful prosecution undertaken some eight months after the law was passed, see Konvitz, editorial in *THE RECONSTRUCTIONIST*, Jan. 21, 1944, p. 6.

reputation . . . of a living person, or persons, or community of persons, or association of persons. . . ."¹¹⁹ Truth is a defense only if used with good motives and for justifiable ends, and the possible penalty of five thousand dollars and five years in prison is extremely severe. No prosecution for group defamation has ever been attempted under the Nevada law.¹²⁰

The New Mexico Statutes class as criminal libel any publication which "conveys the idea" that a "fraternal or religious order or society" has committed a penal offense or been guilty of a disgraceful act or omission with the intent to injure the order or society.¹²¹ Though the law was passed in 1915, its scope with regard to large groups appears never to have been adjudicated. Article 2, section 17 of the state constitution establishes truth as a complete defense in all prosecutions for libel if publication was undertaken with good motives and for justifiable ends. Furthermore section 41-2719 of the Statutes qualifies the import of sections 41-2725-7 by providing that publications respecting the merits or doctrines of a religion are not libelous.

The Penal Code of California defines slander as

malicious defamation orally uttered . . . by radio . . . or other means . . . tending to blacken the memory of one who is dead, or to impeach the . . . reputation . . . of one who is living, or of any educational, literary, social, fraternal, benevolent or religious corporation, association, or organization. . . .¹²²

Special mention is made that privileged communication is not slander. Moreover, if the statements were made with good motives and for justifiable ends, truth is a complete defense.¹²³ It is of interest to note that California's criminal libel law refers to none other than the individual, though two successful prosecutions for group libel have been maintained under its provisions.¹²⁴

Four things stand out in a comparison of the Massachusetts, Nevada, New Mexico, and California laws. First, only the Massachusetts law clearly covers large racial and religious groups. Second, the Massachusetts law most adequately protects freedom of discussion by admitting truth without qualification as a complete defense. Third, the California law alone applies to oral defamation, and last, there is no record of successful prosecutions under any of these laws.

¹¹⁹ NEV. LAWS § 10110 (Hillyer 1929).

¹²⁰ Mr. W. T. Mathews, Special Assistant Attorney General (private communication).

¹²¹ N. MEX. STAT. § 41-2725-41-2727 (1941).

¹²² CAL. PEN. CODE, c. 11, § 258 (Deering 1941). Sections 8271-8272 of the CALIFORNIA EDUCATIONS CODE (Deering 1943) forbid teachers and textbooks from reflecting upon citizens because of their race, color, or creed.

¹²³ CAL. PEN. CODE, c. 11, § 260 (Deering 1941).

¹²⁴ See *supra*, p. 271ff.

A model for an improved state statute was included in the memorandum submitted to the President's Committee on Civil Rights by the Anti-Defamation League of B'nai B'rith.¹²⁵ The model bill defines libel as

a publication by writing, printing, picture, effigy, or other representations, or by any form, or wireless or radio broadcasting, which tends to expose to hatred, contempt, ridicule, obloquy or pecuniary injury, any persons, characterized or identified therein by race, religion, color, national origin, or ancestry, and whether or not individually identified, who, or some of whom, reside in this state.

This careful phraseology eliminates many of the loopholes in the other measures that could be exploited by a shrewd defense. Under the Massachusetts statute, for example, a defendant could plead that the Jews are neither race nor religion, that his hatred for Negroes results not from their color but from their inferior ability, or that his objection to the Japanese lies not in their racial characteristics but in their questionable loyalty to the United States.

The model bill is at one with the Massachusetts law in liberalizing the rule used in the majority of jurisdictions by making truth a complete defense regardless of motive. It goes a step further by specifically exempting from liability matter "honestly believed . . . upon reasonable grounds, to be true," even though maliciously published. This is more solicitous of freedom of discussion than even the "Kansas rule" which only permits honest misstatements of fact concerning *public officers* if *not* maliciously made.

By defining malice as "actuated . . . in whole or in part by ill-will towards the persons or group of persons referred to . . . or any of them", the usual presumption that malice is caused by the very fact of publication is counteracted, and recklessness is rendered incapable of causing criminal responsibility. The Massachusetts law, as was noted, appears to justify a similar interpretation of "malice." Explicit definition of the term as in the model bill would, however, preclude other possible interpretations.

Section 4 of the model bill states that "any person who knowingly sells, distributes, or circulates a group libel originally published by some other person shall be deemed to have published such group libel." In most states a knowledge of the contents on the part of newspaper and book publishers is presumed. The model statute makes no such presumption. Lastly, the model, in keeping with the general rule which does not regard

¹²⁵ The A.D.L. does not strongly favor the enactment of group libel laws, and offered this draft to the Committee without endorsement. The President's Committee on Civil Rights opposed group libel legislation. See *TO SECURE THESE RIGHTS* 52.

defamatory speech as criminal, does not attempt to cover oral defamation though it does define radio defamation as libel.

The model bill is an improvement over the Massachusetts statute because it is more carefully drafted and because greater pains are taken to see that freedom of discussion will not be jeopardized. If there are serious constitutional objections to any of these criminal statutes extending the law of defamation, they are not readily apparent. Convictions, of course, might be reversed because of invalid applications of the laws, but there is little reason to believe that the courts would void statutes so closely paralleling the traditional law.

The civil remedy is not so easily extended to create liability for group defamation because the purpose of civil relief has long been to permit the individual to seek financial reparation for injury to his reputation. Let us suppose with Professor Chafee¹²⁶ that "a newspaper makes some unwarranted charge against 'Harlem Negroes' generally. If a court were to let Mr. Adams of Harlem maintain a libel action against a newspaper, it would have to grant a similar privilege to Mr. Johnson and Mr. Washington and every other colored inhabitant of Harlem." If Mr. Adams were to win his suit, a tremendous flood of litigation would be sure to follow as droves leaped on the "strike it rich" bandwagon. The newspaper would be plagued to death by the multiplicity of actions resulting from the single libel, and the courts, overburdened as they inevitably are, might become helplessly bogged down in the litigious morass.¹²⁷ The question of appropriate damages, a most difficult problem of intangible nature in even an ordinary libel suit, approaches the nigh-impossible when the effect of an attack on the Negro population of Harlem must be resolved into the economic injury suffered by a particular Mr. Adams. Let us suppose, further, that a statement is of a highly controversial nature but not clearly unwarranted. The series of articles about the Catholic Church written by Mr. Paul Blanshard and recently appearing

¹²⁶ 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATION 119 (1947).

¹²⁷ While the courts' perennial fears of the overburdening effect of new legislation are not always to be seriously acknowledged (Riesman, *op. cit. supra* note 2, at 722; Note 47 COL. L. REV. 595, 600 (1947)) because the cry of wolf has too often turned out to have little justification, they cannot be completely discounted. Suits for defamation became so plentiful in Coke's time (Sir Herbert Crofts v. Brown, 3 Bul. 167, 81 Eng. Rep. 141 1616)—probably a result of the decision of the Star Chamber to consider non-political actions for libel—that a rule of strict construction had to be adopted to discourage litigation. As a result, the law of defamation was forced down one of the strange byways which dot its history. One Astrigg, for example, was acquitted in an action for slander because his charge that "Sir Thomas Holt struck his cook on the head with a cleaver and cleaved his head; the one part lay on one shoulder and the other on the other" did not contain the allegation that Sir Thomas had killed the cook and therefore did not imply that he was guilty of homicide (cited in 8 HOLDSWORTH, THE HISTORY OF ENGLISH LAW 360 (2d ed. 1937)).

in the *Nation* is a case in point.¹²⁸ An individual who maintains an action for personal defamation risks little likelihood of visiting any but himself with disaster. But should some sensitive though well-meaning Catholic—one quite unacquainted with, or indifferent to, the dangers and pitfalls that honeycomb the law—be allowed to jeopardize the welfare and interests of millions of other Catholics by dragging into the courtroom an issue that belongs in the market place of open discussion?¹²⁹

These are some of the more obvious difficulties that face any effort to broaden the definition of civil defamation without making significant alterations in the law. Yet the several distinct advantages of the civil over the criminal law are so important that serious attention has been given to ways of eliminating these drawbacks. The advantages are four in number. The civil law has traditionally covered the spoken as well as the written word; the more limited role of the jury in civil suits makes them far easier to win without an increase in the danger to discussion; the government plays no part in the action; use of the equitable remedy, the injunction, is at least a possibility.

Reference has already been made to the Indiana "anti-racketeering" law.¹³⁰ One section of the law provides for enjoining the dissemination of hatred against persons or groups by reason of race, color, or religion. This section is the only piece of legislation now on the statute books which offers a civil remedy for group defamation. Even in this instance, however, the injunction may not be sought by a private individual; all actions must be brought either by a prosecuting attorney, or the Attorney General of the State.¹³¹ Deeds enjoined include "acting with malice" to "advocate hatred" which "tends" to cause "a riot or the denial of civil or constitutional rights," and associating with any other person for the purpose of "spreading malicious hatred." Both of these actions are made criminal by the same statute which provides for enjoining them. Under these provisions a Dixiecrat could be denied the right to speak in Indiana, supporters of Gerald L. K. Smith prevented from entering a hall in which he was to hold a rally, or the Jehovah's Witnesses forced from the streets. Such prior restraint is as indefensible as it is unconstitutional. The opinion of a judge sitting alone in equity that a lecturer might advo-

¹²⁸ 165 *NATION* 466-9, 496-9, 525-8; 166 *NATION* 390-3, 416-17, 432-4, 459-64, 499-502, 521-4, 574-6, 601 ff, 630-2.

¹²⁹ See *infra* p. 58 ff.

¹³⁰ *IND. STAT.* § 10-907. See *supra* p. 281 ff.

¹³¹ The Minnesota statute invalidated in *Near v. Minnesota*, 283 U. S. 689 (1931) permitted a private citizen to seek an injunction if no action was taken by the Attorney General or the County Attorneys. The Manitoba, Canada, Libel Act of 1934 permits any member of the libeled group to seek an injunction (*MANITOBA REV. STAT.*, c. 119, § 14 (1940).

cate hatred and therefore may not speak is a form of censorship abhorrent to democratic government.

A novel attempt to draft a workable civil statute was presented in the June 1947 issue of the *Columbia Law Review*.¹³² Its provisions include the following:

- (a) "No person shall utter in a public place any *false and*¹³³ defamatory statement of fact concerning a racial, religious or national group."
- (b) Any person violating this interdict shall be ordered to make a suitable retraction.
- (c) Violators may be ordered to refrain from repeating the defamatory matter or its *substantial equivalent*.¹³³
- (d) Violators may be ordered to post a bond for a reasonable period conditioned upon not violating (a) again.
- (e) No damages are to be awarded to the plaintiff.
- (f) An action once commenced "may be discontinued only with the court's permission."
- (g) Upon the insistence of the defendant a \$300 bond must be submitted by the plaintiff to guarantee costs if his action should be unsuccessful.
- (h) "Any judgments upon the merits rendered in an action authorized . . . shall constitute a defense in any subsequent suit . . . based on the same utterance."

Strike suits would be completely eliminated by (e) since the plaintiff could gain nothing in the way of pecuniary remuneration. (d), the bond to refrain from further violation, would act as a deterrent in place of the damages that the defendant would normally have to pay to a victorious plaintiff. Overly sensitive persons, furthermore, would be rendered a bit more hesitant to entertain proceedings by the necessity for posting a plaintiff's bond (g), and (f), the inability to discontinue an action without the permission of the court. These last two provisions, (g) and (f), would also tend to prevent a large number of suits undertaken with the sole intention of harassing an individual objectionable to a particular group of citizens. Although truth alone, and not a reasonable or honest belief in the truth, is a defense, it is argued¹³⁴ that the honest but misguided individual is faced with no hardship because he would most probably be forced to do no more than retract (b), the only mandatory remedy in the draft.

It seems quite possible, on the other hand, that freedom of discussion

¹³² Note 47 *COL. L. REV.* 595, 609 (1947). The draft also contains criminal provisions which are not discussed.

¹³³ Emphasis added.

¹³⁴ Note 47 *COL. L. REV.* 595, 608 (1947).

might suffer because being hauled off to court to make a retraction, even though no damages may have to be paid to the plaintiff, requires considerable expense and entails a degree of ignominy. In addition, the threat of having to post a bond on a subsequent occasion, if careless, is hardly conducive to the frank discussion of highly controversial issues affecting racial and religious groups. It seems unlikely, moreover, that an overly-sensitive person, or a crank, who feels so personally offended that he is willing to go to the expense of engaging counsel and undertaking an action is going to be persuaded to change his mind by the necessity of posting \$300 to cover the costs if he loses, or by the stipulation that he cannot drop the suit without permission.¹³⁵

Though the general rule in the United States is that an injunction cannot issue to restrain a libel unless the libel is an incident to a tort, the constitutionality of legislation authorizing the enjoining of libels has never been squarely faced by the Supreme Court. In *Near v. Minnesota*,¹³⁶ the case most nearly in point, the Court invalidated a statute which permitted an injunction preventing the enjoined from publishing anything at all until he had convinced the issuing judge that he would print nothing improper. To prevent a person from publishing his views because a judge feels that they may not be proper is giving to the judiciary more discretion than becomes mortal man. *Near v. Minnesota* does not, however, completely close the door to the use of the injunction in combating the hate-monger. Statutes permitting the enjoinder of known and unquestioned falsehoods would, perhaps, meet the constitutional test. The "Knights of Columbus Oaths"¹³⁷ and "The Protocols of the Learned Elders of Zion"¹³⁸ are good examples. These and similar tracts are not only still being disseminated in large number, but are frequently quoted in many of the propaganda sheets now widely circulated throughout the country. The courts, if statutes so provided, could be empowered to enjoin the publishers and distributors of such materials from their further use without raising substantial constitutional questions. If those pub-

¹³⁵ Litigation brought by cranks and overly-sensitive persons could be prevented by restricting the initiation of actions to organizations authorized by the courts to act on behalf of the groups defamed. An authorized organization would not completely do away with the danger of having a section of a group not necessarily representative of it as a whole act for the interests of the entire group, but it would lessen substantially the danger of ill-advised litigation. However, an additional problem would then be raised by the fact that there is no group in the United States which can be said to speak for the entire Negro or Jewish population.

¹³⁶ *Near v. Minnesota*, 283 U. S. 689 (1931).

¹³⁷ See *supra* p. 271 ff.

¹³⁸ See CURTIS, AN APPRAISAL OF THE PROTOCOLS OF ZION (1942); STRONG, ORGANIZED ANTI-SEMITISM IN AMERICA 149 (1941).

lishers and distributors should seek to evade the order by altering or paraphrasing the enjoined matter, as they no doubt would, more sobering constitutional difficulties would crop up. Whether an injunction against further dissemination of matters decidedly false could carry the words "or material substantially equivalent" and stand up constitutionally is not an easy question. The answer in large part would depend upon the facts of the particular case.

Exactly how much "proof" of falsity would be necessary is another difficult question. It is highly unlikely that the Court would accept the decision of twelve ordinary citizens sitting as a jury on the truth or falsity of an allegation as a definitive determination of the truth. Then, too, there is the temporal consideration. What was false yesterday may be true today, or become true tomorrow. Truth is a relative concept when removed from the world of mathematics and science, and perhaps even there. Not all Negroes are morons, nor all Jews Communists, but there are some in each group who are. Is it false to denounce the Jews by saying "some," or "many," or "a good many," or "quite a few," or a "large number," or a "goodly number," or "an astounding proportion," or "a surprising part," are "wealthy," or "queer," or "sly," or "foreign looking," or "draft-dodgers," or "black-marketeers," or "Communists," or "bankers"? A statement may be partially true, reasonably true, substantially true, or just contain an element of truth without being either "true" or "false." What other than forgeries like the "oath" and the "protocols" could be enjoined—if indeed they could—is a question to which only the courts can give satisfactory answer when faced with concrete cases. There is no basis for even a measured guess. Yet the Columbia draft is the only suggestion for a civil law I have seen which is worthy of consideration.

A number of group libel bills have been introduced in Congress in recent years. The use of the United States mails for propaganda purposes by the Nazi Government of Germany and its American apologists early prompted Representative (now Judge) Samuel Dickstein to seek legislation barring pro-Axis literature from the mails.¹³⁹ Not until the 1st Session of the 78th Congress, however, was great attention attracted to national group libel legislation as a method of suppressing the anti-democratic canards that were swamping the country. By the fall of 1942 the apparent success of pro-Axis propaganda in exacerbating inter-group tensions had reached alarming proportions. Popular demand for some form of governmental action was becoming clearly audible. In Novem-

¹³⁹ See H. J. RES. 363, 74th Cong., 1st Sess. (1935); H. J. RES. 519, 75th Cong., 2d Sess. (1937); H. J. RES. 228, 76th Cong., 1st Sess. (1939); H. J. RES. 604, 76th Cong., 3d Sess. (1940); H. J. RES. 65, 77th Cong., 1st Sess. (1941).

ber of 1943, the first set of committee hearings¹⁴⁰ was held on the Lynch Bill¹⁴¹ and the Dickstein Resolution.¹⁴²

The Lynch Bill proposed to amend Title 18 of the United States Code.

(A)ll papers, pamphlets, magazines, periodicals, books, pictures, and writings of any kind, containing any defamatory and false statements which tend to expose persons designated, identified, or characterized therein by race or religion, any of whom reside in the United States, to hatred, contempt, ridicule, or obloquy, or tend to cause such persons to be shunned or avoided, or to be injured in their business or occupation, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails or delivered from any post office or by any letter carrier and shall be withdrawn from the mails under such regulations as the Postmaster General may prescribe. . . .

The less carefully drafted Dickstein Resolution would have made it a crime to mail writings

designed or adapted or intended to cause racial or religious hatred or bigotry or intolerance, or to, directly or indirectly, incite to racial or religious hatred or bigotry or intolerance are hereby declared nonmailable matter and shall not be transmitted through the mails nor delivered from any post office or by any letter carrier.

Its terminology was not that of the law of defamation, and no provision was made for truth as a defense. Both measures not only provided heavy criminal penalties for violation of the interdiction, but saddled the Postmaster General with the responsibility for banning from the mails such publications as were declared nonmailable. The Postmaster General himself was quick to admit that such power of prior censorship, aside from its questionable constitutionality, was a task to daunt an administrative Hercules.¹⁴³ Late in January of 1944, the Weiss sub-committee, after amending the Lynch Bill by substantially reducing the penalties for violation, reported it with approval to the Committee on Post Offices and Post Roads.¹⁴⁴ The full committee held three more days of hearings in February and March of 1944.

The list of those who endorsed the Lynch Bill is indeed impressive.¹⁴⁵ The country was engaged in a total war, the outcome of which was far from certain. Many felt that democracy had to take drastic steps to

¹⁴⁰ *Hearings before Committee on the Post Office and Post Roads on H.R. 2328 and H. J. Res. 49, 78th Cong., 2d Sess. (1943-1944).*

¹⁴¹ H.R. 2328, 78th Cong., 2d Sess. (1943).

¹⁴² H. J. Res. 49, 78th Cong., 2d Sess. (1943).

¹⁴³ *Hearings, op. cit. supra* note 142, at 2.

¹⁴⁴ N. Y. Times, Jan. 28, 1944, p. 5, col. 6.

¹⁴⁵ *Hearings, op. cit. supra* note 142, *passim*.

defend itself on the home front, the potential jeopardy to discussion and criticism notwithstanding. The danger seemed clear and immediate. As D-day approached and the likelihood of victory increased, the flood of propaganda slowed. The Lynch Bill died in committee—fortified with hindsight one is tempted to add that wiser counsel had prevailed.

The end of the war brought a revival of propaganda harmful to minority groups although on a far smaller scale than in the years before Pearl Harbor.¹⁴⁶ The dependence of the propagandist upon the mails and the vehicles of commerce as channels for his literature, coupled with the abject failure of state and local attempts to deal with disseminators of group defamation, has led to renewed activity on the part of those who favor national group libel legislation.

In March of 1947, Congressman Buckley of New York introduced a bill sponsored by the American Jewish Labor Council.¹⁴⁷ The measure outlaws the importation, mailing and shipment, receipt, and distribution of any written or printed material—

Which exposes the Jews or any other group as a nation, people, or any substantial portion of them, to hatred, contempt, ridicule, or obloquy, or which causes or tends to cause them to be shunned or avoided, or which has a tendency to injure them in their occupations, employments, or other economic activities or exposes any race because of race, creed, or color to hatred, contempt, ridicule, or obloquy, or which causes or tends to cause the members of such race or religion to be shunned or avoided, or which has a tendency to injure the members of such race or religion in their occupation, employment, or other economic activities.

While using the terms of the law of defamation, and giving no discretion to an administrative officer as did the Lynch bill, the Buckley bill contains a number of glaring defects. The bill is so poorly drafted that it is highly ambiguous and obscure. The phrase "Jews or any other group as a nation, people, or any substantial portion of them," defies logical interpretation. It might well mean any substantial part of any group; if so the C.I.O., the N.A.M., the Ku Klux Klan, the Communist Party, and every other organization would be protected as fully as racial and religious groups. The phrase "exposes any race because of race, creed, or color to hatred" is hardly more than verbal nonsense. No defenses whatsoever are permitted under the provisions of the bill. A person could be punished for distributing defamatory statements no matter how

¹⁴⁶ Compare STRONG, *op. cit. supra* note 138 *passim*, with ANTI-DEFAMATION LEAGUE, *A Survey of the Anti-Semitic Scene in 1946* (1947), and ANTI-DEFAMATION LEAGUE, *ANTI-SEMITISM IN THE UNITED STATES IN 1947* (1948).

¹⁴⁷ H.R. 2848, 80th Cong., 1st Sess. (1947).

true. Nor could the lack of ill-will and the absence of malice be pleaded in justification. Those who send the material through the mails and channels of commerce with the intent to discredit racial and religious groups are not alone subject to prosecution. Librarians, teachers, ministers, sociologists and students of propaganda and social criticism who "take or receive from the mails . . . with intent to . . . exhibit . . . or . . . read to others" material proscribed would be as guilty as the professional hate-monger. For such reasons as these, the wide-spread opposition to the bill included the American Jewish Congress, an organization which is the leading proponent of group libel legislation.¹⁴⁸ The Buckley bill died in committee only to be reintroduced without change by Congressman Davenport of Pennsylvania on March 29, 1949.¹⁴⁹

The following day Representative Barrett of Pennsylvania dropped H.R. 3908 into the hopper.¹⁵⁰ Mr. Barrett's proposal differs from the Buckley and Davenport bills in but a few minor details. By replacing the words "any other group" with "Negroes", and by excising several clauses including "race because of race, creed, or color", H.R. 3908 somewhat tightened the phraseology of the mother bill at the expense of the Catholics, Japanese-Americans, and other minorities. Heredity has left the other imperfections as common property.

By far the best suggestion for a national group libel law was drafted by the American Jewish Congress and recently submitted in the form of identical bills by Representatives Javits,¹⁵¹ Klein,¹⁵² Dawson,¹⁵³ Keating,¹⁵⁴ and Keogh.¹⁵⁵ The bill makes it unlawful

for any person, with intent to create ill-will against a racial or religious group . . . to deposit or cause to be deposited in the United States mails for mailing and delivery . . . any publication or material which is printed, mimeographed, or otherwise reproduced in multiple form by mechanical process, containing any statement concerning any person, persons or groups of persons, designating, identifying, or characterizing him or them directly or indirectly by reference to his or their race or religion, which exposes or tends to expose him or them to hatred, contempt, or obloquy or causes or tends to cause him or them to be shunned or avoided or to be injured in his or their business or occupation: *Provided, however,* That no person

¹⁴⁸ N. Y. Times, Nov. 20, 1947, p. 6, col. 3.

¹⁴⁹ H.R. 3882, 81st Cong., 1st Sess. (1949).

¹⁵⁰ H.R. 3908, 81st Cong., 1st Sess. (1949).

¹⁵¹ H.R. 2269, 81st Cong., 1st Sess. (1949).

¹⁵² H.R. 2270, 81st Cong., 1st Sess. (1949).

¹⁵³ H.R. 2271, 81st Cong., 1st Sess. (1949).

¹⁵⁴ H.R. 2272, 81st Cong., 1st Sess. (1949).

¹⁵⁵ H.R. 2273, 81st Cong., 1st Sess. (1949).

shall be convicted under this section if such statement is true or was honestly believed by him, upon reasonable grounds, to be true. The burden of coming forth with evidence upon the issues of truth, honest belief, reasonableness of belief and lack of intent to create ill-will shall be upon the defendant, but the burden of proof beyond a reasonable doubt upon the entire case shall be upon the prosecution.

It is evident that the Javits-Klein proposal contains a number of commendable features. The terminology used is that of the law of defamation. Personal letters are excepted from liability. Wide protection is given to discussion and criticism by making truth or an honest and reasonable belief in the truth a complete defense. Since the absence of intent to create ill-will may be pleaded in justification, it seems that fair comment, and absolute and qualified privilege would be good defenses. Section 566 provides protection against misapplication of the projected law by making all prosecutions dependent upon the prior approval of the Attorney General. The penalty for violation is not excessive—"a fine of not more than \$1,000 or by imprisonment for not more than one year or by both."

This treatment of the extant and proposed group libel laws yields the following conclusions:

- 1) Generally speaking, the statutes extending the traditional law of defamation seem best able to meet the rigorous requirements of the First and Fourteenth Amendments of the Constitution as now interpreted by the Supreme Court.

- 2) Statutes extending the traditional law offer the most protection for discussion and opinion.

- 3) The best drafts of this kind of statute have not yet been enacted.

- 4) Police power statutes which are likely to meet the constitutional tests must be so narrowly drawn as to be virtually worthless as a weapon against the most dangerous kinds of racial and religious defamation.

- 5) Available information indicates that those laws now on the statute books are seldom utilized; consequently, little is known of their actual and potential value.

III

The American, it has frequently been observed, tends to believe that any problem can be solved by legislation. "There ought to be a law" is a stock solution to almost any situation from the inconvenience of the value of *pi* to the desirability of instilling patriotism. If a proposal be constitutional, the vast majority seldom questions the advisability of enacting it into law. But as constitutionality is not always the measure of wisdom, so the desirability of group libel legislation cannot be deter-

mined solely on the basis of what the Supreme Court will regard as compatible with the freedoms protected by the First and Fourteenth Amendments, important as that consideration may be. That group defamation is a serious evil needs no further demonstration. Nevertheless, the desirability of additional group libel legislation is hardly self-evident. In recent years several important committees have studied the problem of group defamation and have taken unequivocal stands against group libel legislation as a solution.¹⁵⁶

The desirability of rendering the defamers of racial and religious groups liable for their outpourings lies in the answers to these two questions: Could group libel legislation be at all effective in so obstructing the peddlers of hatred that tensions can be kept at a minimum? Would such legislation (assuming that it could be effective) result in more harm than good?

Paradoxically, the better the law, the less effective it can be. Laws which are so narrowly drawn and carefully drafted as to have much likelihood of meeting the severe constitutional tests would by their very nature offer gaping loopholes to all but the crudest group libelers. Both the B'nai B'rith model bill and the Javits-Klein proposals, by far the best suggestions that have been offered, permit the defendant three courses of action.

1. The defendant may prove that the statements are true.
2. The defendant may prove that, whether or not he can prove the statements true, he reasonably and honestly believes them to be true.
3. The defendant may prove that, whether or not he can prove the statements true, and whether or not he can prove that he reasonably believed them true, he did not act with the intent to create ill-will.

Assuming that the traditional law of defamation will be followed in so far as it is applicable, proof of the truth must be established to the satisfaction of a jury. The truth "must be as broad as the charge, and must be a justification of the entire charge,"¹⁵⁷ but "the truth of the defamatory statements need not be shown in meticulous detail. It will suffice to prove that they are true in substance."¹⁵⁸ The truth cannot be established by pointing to the source of the statement. If a person repeats

¹⁵⁶ The President's Committee on Civil Rights (To SECURE THESE RIGHTS 52 (1947)); Commission on the Freedom of the Press (2 CHAFEE, GOVERNMENT AND MASS COMMUNICATION 129 (1947)); Committee on the Law of Defamation, (REPORT OF THE COMMITTEE ON THE LAW OF DEFAMATION 11 (England 1948)).

¹⁵⁷ Rathkopf v. Walker, 73 N. Y. S. 2d 11, 117 (1947).

¹⁵⁸ Sanctuary v. Thackrey, 189 Misc. 724, 731, 72 N. Y. S. 2d 104, 111 (1947).

libelous or slanderous words, he must prove their truth in order to plead justification. A large amount of anti-Semitic propaganda, for example, is little more than a relish of such established forgeries as the "Protocols of the Learned Elders of Zion."¹⁵⁹ Those who circulated this material would have little chance of proving its truth.

Honest belief in the truth, upon reasonable grounds, offers the defendant a far better defense. Whether a person who swears under oath that he honestly believes a particular fact to be true is lying is a question for the psychiatrist rather than the juryman. What constitutes reasonable grounds for honest belief? Or rather, what would a particular jury consider reasonable grounds? The defendant in his effort to convince the jury that his grounds for belief were reasonable would be justified in introducing into evidence every piece of hate-literature he could find. The courtroom would in effect be turned into a public forum for his views. Considering the countless tons of defamatory literature available, it is hard to think of anything that a jury might not be convinced was reasonably and honestly believed, ritual murder and world conspiracies included. In fact is not this the heart of the matter? Group defamation is such a problem because so much of it is believed and accepted. If no one took the racist seriously, he could find no market for his bigotry and cause no concern.

The third defense, the absence of ill-will, offers protection to newspaper publishers, teachers, sociologists, librarians, and others who might circulate false and defamatory matters for non-malicious purposes. It seems likely that the customary absolute and qualified privileges would be regarded as falling within this defense.

The defendant's success in pleading any of these defenses, it has been emphasized, rests with the jury. Libel suits of all varieties are such risky undertakings because a jury's verdict cannot be forecast with confidence. Too often the issue boils down to the question of which side is lying, and which is telling the truth. In cases of defamation, suggested Joseph-Bartélemy, it is usually as safe to rely on a throw of the dice as on a jury's verdict.¹⁶⁰ While most would agree that this statement is overly strong, it carries an unquestionable element of truth. If a columnist attacks the Jews as "the worst blackmarketeers," the readers of the piece, depending upon a multitude of variable factors, such as their previous acquaintance with members of the group attacked, their particular regard and esteem for the writer, their general political affiliations, and their social attitudes, agree, disagree, view with scepticism, or remain

¹⁵⁹ STRONG, *op. cit.* *supra* note 138, at 149.

¹⁶⁰ THE GOVERNMENT OF FRANCE 176 (transl. 1924).

totally unimpressed. The charge is appraised in the market-place along with denials, reiterations, and counter-charges. A sufficiently heavy traffic in ideas, in a keen and open market, gives truth an excellent chance to win out in the long run.

Were the group defamed to go to court it would in effect be withdrawing the conflict from the market of discussion to a new battleground. Said Mr. Justice Frankfurter:

A trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of truth to get itself accepted in the competition of the market. . . .' A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and age-old traditions.¹⁶¹

Twelve members of the community are chosen to represent it by acting as evaluators of the truth. If these twelve are a true cross section of the community, their decisions will reflect that of the whole community. Sociologists estimate that some 50% of the American people are mildly anti-Semitic, and that 5-10% are violently so.¹⁶² No Jew, in a case such as the one suggested, could survive the defense's challenge when the jury was being selected. Weeding out all those with anti-Semitic tendencies would be a far more difficult, if not impossible, job. The average jury would contain one person with a pronounced anti-Semitic outlook, and several more who were somewhat bigoted. Juries, furthermore, are in a position to be swayed by the thunder and eloquence of counsel, the personal appearances of the litigants, or the attitude of the witnesses, judges, and spectators. One severe critic of the jury system put it this way:

The least that can be said is that trial by jury is a process of strategy, of matching wits, a battle of surprises and emotional struggles at best, and that in this sort of combat the point of merit is apt to be lost. . . .¹⁶³

The average jury in any case of difficulty is about as helpful as it would be in solving a problem in higher mathematics, in industrial finance, or in electrical engineering. . . .¹⁶⁴

Available information, in short, points to great obstacles to successful prosecution for group defamation.¹⁶⁵

¹⁶¹ *Bridges v. California*, 314 U. S. 252, 283 (1941) (dissenting).

¹⁶² MACIVER, *THE MORE PERFECT UNION* 150 (1948).

¹⁶³ GREEN, *JUDGE AND JURY* 402 (1930).

¹⁶⁴ *Id.* at 416.

¹⁶⁵ The two cases which come closest to indicating what can be expected in trials for group defamation are *King v. Leese* and *Whitehead* (1936) and *King v. Caunt* (1947). See note 75 *supra*.

In the market an actual decision need never be reached. The controversy may eventually die without the truth or falsity of the allegations having been determined as a matter of record. Not so in the courtroom; a formal verdict is rendered. Either the Jews are "the worst blackmarketeers" or they are not. The jury's decision is an authoritative stamp of the "truth."

Would group libel laws cause more harm than good? This is a question that defies an unequivocal answer. The possible ill-effects are numerous. Group libel legislation, no matter how carefully drafted, would tend to discourage discussion and criticism, the backbone of democratic government. If improperly applied, even the use of legitimate discussion and criticism might be prosecuted. The very groups which the legislation was passed to protect might be hurt. Hate-mongers if convicted would become martyrs, if acquitted would, in effect, have had their allegations justified. The publicity caused by prosecution might be far greater than that afforded the actual propaganda. The public might well resent the attempt of particular groups to use the law as a means of attaining special protection and privileges. Group libel laws could, in addition, hamstring the efforts of groups to discredit their attackers.

Group libel legislation might set a dangerous precedent that could in the future be used by various political, economic, and social groups to protect themselves from well-deserved criticism. It is difficult to keep a hole in a dike from being enlarged. Mr. Justice Brandeis wisely warned, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."¹⁶⁶

The dangers caused by group defamation are substantial and serious. But are they so substantial and so serious as to make it unsound policy to enact group libel laws? In the early years of World War II, when the nation was waging an up-hill fight for survival, it would have been far easier than it is today to give an affirmative answer. Anti-Semitic activity, for example, is at a substantially lower ebb than it was in 1940, and has shown little sign of increasing since 1946.¹⁶⁷

It may be argued that the potential evils of group libel legislation have been greatly exaggerated, and that group libel laws will prove far more effective than suggested herein. If the best available drafts were enacted into law in one or two states as an experiment, careful studies

¹⁶⁶ *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (dissenting).

¹⁶⁷ See note 148 *supra*.

could be made to determine first, whether group libel legislation can be effective, and second, whether the fears of those opposed to group libel laws are justified. If the experiment was narrowly confined and judiciously executed, it is difficult to see how much harm could be done. Much good, on the other hand, might be accomplished. The national level, however, is clearly no place for experimentation.

The dearth of necessary data does not permit a definite determination whether group libel legislation could be effective and desirable. Until such information is made available, the presumption must run against group libel legislation as a method of combating group defamation. Proposals for national legislation in particular are, I think, potentially too dangerous to warrant enactment.