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GROUP LIBEL

In *Beauharnais v. Illinois*¹ the United States Supreme Court, by a 5-4 decision,² upheld the constitutional validity of a state statute aimed at punishing the defamation of "a class of citizens of any race, color, creed or religion . . ."³ Thus, after years of debate on the wisdom, expediency and constitutional validity of this and other "group libel" statutes,⁴ and no less than ten previous decisions in the state courts,⁵ the issue has finally been decided by the nation's highest tribunal.

The facts of the case were simple and not disputed. Defendant, Beauharnais, was president of an organization called the White Circle League of America. On January 6, 1950, he passed out bundles of leaflets⁶ and gave instructions for their distribution the following day. The top part of these leaflets was a petition to the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods, and persons by the Negro." Below was a statement of the nature and purpose of the organization and a solicitation of members and monetary contributions. The most objectionable part of the publication was the following sentence: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, *surely will.*" The tenor of the whole leaflet was hostile towards Negroes, but not inflammatory.⁷

¹ 343 U.S. 250 (1952). See state court opinion, *People v. Beauharnais*, 408 Ill. 512, 97 N.E.2d 343 (1951), discussed in Note, 61 YALE L.J. 252 (1952).

² Justice Frankfurter wrote the majority opinion; Justices Black, Reed, Douglas and Jackson each wrote dissenting opinions.

³ ILL. REV. STAT. c.38, § 471 (1949). Though occasionally criticized, the name "group libel" has been accepted generally as connotative of the offense. Cf. Tanenhaus, *Group Libel*, 35 CORNELL L. Q. 261, 262 (1950).

⁴ See, e.g., the discussion of various statutes and ordinances, both existing and proposed, collected *id.* at 276-297; Riesman, *Group Libel*, 42 COL. L. REV. 727 (1942); Note, 47 COL. L. REV. 595 (1947).

Many courts have upheld group libel prosecutions under ordinary libel laws. When so applied, there would seem to be no reason for not treating these statutes the same as those specifically directed at the offense. Typical of the wording of such laws is CAL. PEN. CODE § 248: "A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural or alleged defects of one who is alive and thereby to expose him to public hatred, contempt, or ridicule."

⁵ *People v. Gordan*, 63 Cal. App. 627, 219 Pac. 486 (1923); *People v. Turner*, 28 Cal. App. 766, 154 Pac. 34 (1915); *Alumbaugh v. State*, 39 Ga. App. 559, 147 S.E. 714 (1929); *People v. Spielman*, 318 Ill. 482, 149 N.E. 466 (1925); *State v. Brady*, 44 Kan. 435, 24 Pac. 948 (1890); *State v. Cramer*, 193 Minn. 344, 258 N.W. 525 (1935); *People v. Edmondson*, 168 Misc. 142, 4 N.Y.S.2d 257 (1938); *Crane v. State*, 14 Okla. Cr. 30, 166 Pac. 1110 (1917); *Drozda v. State*, 86 Tex. Cr. R. 614, 218 S.W. 765 (1920); *Jones v. State*, 38 Tex. Cr. R. 364, 43 S.W. 78 (1897).

⁶ The entire leaflet is set forth in an Appendix to Justice Black's dissent, 343 U.S. at 276.

⁷ Compare the statement quoted above, as to power to arouse anger and instigate violence, with the following upon which convictions were based: "Such pimps . . . as this, men so low that they would willingly sell the virtue of their sister for a drink . . . greasy curs, foul-smelling scavengers . . ." *Jones v. State*, *supra* note 5 at 367, 43 S.W. at 79; or the falsely imputed oath, "[I will make relentless war] . . . against all heretics, Protestants and Masons

The trial court gave the jury only the issue of publication, rejecting a formal offer to prove truth and a requested instruction which would have required the jury to find a "clear and present danger" to convict.⁸ The jury found the defendant guilty and the court imposed the maximum penalty, a \$200 fine.

While there was only one opinion for the majority, that written by Justice Frankfurter, the four dissenters each found it necessary to write a separate opinion. The widely differing viewpoints these embody demonstrate the complexity and significance of the issues involved.⁹ The main conflict is between the desire to preserve and protect freedom of speech from encroachments by state action and the desire to protect both individuals and society from the evils of defamation.

There is no question today that states can constitutionally punish libels of individuals or small, easily defined groups. The Fourteenth Amendment has been held not to extend to such cases.¹⁰ The basic problem presented by this case, therefore, is whether group libel can be dealt with by the tests and standards of ordinary criminal libel. The majority opinion apparently recognized this issue as the crux of the case,¹¹ but assumed, rather than demonstrated, that there is no substantial difference between the two.¹² In deciding which of two conflicting, but vital public interests to prefer by its decision, the court seems to have passed over the most important issue without examination. It is to this problem that the present inquiry is directed.

. . . I will spare neither age, sex or condition, and that I will hang, burn, waste, boil, flay, strangle, and bury alive these infamous heretics; rip up the stomachs and wombs of their women, and crush their infants' heads against the walls . . ." *People v. Gordan*, *supra* note 5 at 631, 219 Pac. at 488.

⁸ Other possible issues such as the justification of the publication as "fair comment" or privileged were not urged by the defendant. For a discussion of these points, see CLARK AND MARSHALL, *LAW OF CRIMES*, § 434(h) (5th ed., Kearney, 1952).

⁹ Jackson agreed with the majority that libel of a group could be punished, but dissented because the defendant was denied the opportunity to prove truth and good motives. He also would require the application of the "clear and present danger" test. Reed argued that the statute was fatally vague. Black asserted that group libel was not akin to ordinary libel which is without constitutional protection. He contended that the mandate in favor of speech contained in the 1st and 14th amendments does not permit a "rule of reason" approach but absolutely forbids such laws as this. Douglas concurred with Reed and Black and also pointed out the difficulties and dangers involved in the application of group libel laws.

¹⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *cf. Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940); CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 149 (1941).

¹¹ "The precise question before us, then, is whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels—as criminal libel has been defined, limited and constitutionally recognized time out of mind—directed at designated collectivities and flagrantly disseminated." *Beauharnais v. Illinois*, *supra* note 1 at 258.

¹² "But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction, unrelated to the peace and well-being of the State." *Ibid.*

THE BACKGROUND OF GROUP LIBEL

Group libel was not unknown at common law. In the early English case of *King v. Osborne*,¹³ an information was sought against the defendant "for printing a libel reflecting upon the Portuguese Jews, that lately came over, in charging them with being guilty of burning a bastard child begotten by a Christian on the body of a Jewish woman." It appeared that several Jews had been attacked by a mob after the publication.¹⁴ The first impression of the trial judge was that the court could do nothing since no individual could show he had been singled out from the others. After granting a rule to show cause, the court concluded that since the publication implied the act was one Jews frequently did, the whole community of Jews was defamed. Therefore, the court allowed the action. The three reports of the case give differing versions of the nature of the crime, but Barnardiston's version clearly shows group libel.

In thus deciding, the court expressly refused to follow an earlier case, *Rex v. Orme and Nutt*,¹⁵ wherein judgment on a guilty verdict was stayed when the jury found the defendant guilty of libeling "several subjects, etc., to the jury, unknown." There are two reports of this case. One by Lord Raymond says that, since the jurors did not know who was libeled, they could not say the matter was false and scandalous or that anyone was defamed by it. The much shorter report by Salkeld says, "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."¹⁶

Early writers make it clear that *King v. Osborne* was accepted as representing the rule that group libel was punishable at common law.¹⁷ It was pointed out that the tendency to provoke a breach of the peace, which was given as the justification for punishing ordinary libels, was the same or greater in cases of group libel.¹⁸

¹³ There are three conflicting reports of this case: 2 Barn. K.B. 138, 166, 94 Eng. Rep. 406, 425, Kel. 230, 25 Eng. Rep. 584 (1732); the third is in note 4 of *In Re Bedford Charity*, 2 Swans. 470, 532, 36 Eng. Rep. 696, 717 (1819).

¹⁴ See Swanston report of *King v. Osborne*, *supra* note 13. The Kelynge report states that the Prosecutor, who was a Jew, had been assaulted by a mob which had been incensed by the publication. The Barnardiston report states merely that several Jews had been insulted.

¹⁵ 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (1700); also reported as *King v. Alme & Nott*, 3 Salk. 224, 91 Eng. Rep. 790.

¹⁶ Thus, the actual extent of the holding is not certain, but Lord Raymond gives the title of the publication as "the List of Adventurers in the Ladies invention, being a Lottery &." It is possible that the action should have been one for obscenity.

King v. Osborne was followed a few years later in *King v. Jenour*, 7 Mod. 400, 87 Eng. Rep. 1318 (1740). In this case the defendant published an assertion that one director of the East India Co. was illegally trying to fix certain tea prices. The court treated this as a libel on the directors as a group. While noting that no information would be granted where the persons reflected on were entirely unknown, the court held that this case was controlled by the Barnardiston report on the Osborne case and granted an information; *cf.* *Gathercole's Case*, 2 Lewin 237, 168 Eng. Rep. 1140 (1838).

¹⁷ HOLT, *LAW OF LIBEL* 238 (2d ed. 1816); 2 STARKIE, *LAW OF SLANDER AND LIBEL* 213-215 (2d ed. 1830).

¹⁸ *Ibid.*

United States History and Experience

In dicta, three early American cases cited *King v. Osborne* as representing the rule that criminal actions for publishing a libel on a group were permissible.¹⁹ *State v. Brady*²⁰ is the earliest case which actually involved a conviction for a libelous publication not mentioning particular individuals. The court stated, "The law is elementary that a libel need not be on a particular person, but may be upon a family, or class of persons, if the tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace."²¹ In *Jones v. State*,²² where all the streetcar conductors in Galveston were defamed, the court said, "It therefore would be a violation of our statute to libel any sect, company, or class of men without naming any person in particular who may belong to said class."²³

There are four cases in which the Knights of Columbus were defamed by publications falsely imputing to them a shocking oath. In three of these the court sustained convictions²⁴ and in the fourth overruled a demurrer to the information.²⁵ In *People v. Spielman*,²⁶ the Illinois Supreme Court upheld a conviction obtained under the same statute involved in the *Beauharnais* case.²⁷ Here the defendant was indicted of a libel on (1) the membership of the American Legion and (2) certain named members of that organization. These individual members were not named in the publication nor referred to in any way except insofar as the Legion itself was mentioned. The court sustained the convictions, relying on the Barnardiston report of the *Osborne* case.²⁸

¹⁹ In *Sumner v. Buel*, 12 Johns. 475 (N.Y. 1815), an officer of a company of riflemen brought a civil action for a libel on the regiment. In holding that a civil action by a member of so large a group was not permitted, the court said the publication might be made an indictable offense. This case was cited with approval in *Ryckman v. Delavan*, 25 Wend. 186 (N.Y. 1840).

In *Palmer v. City of Concord*, 48 N.H. 211, 97 Am. Dec. 605 (1868), the plaintiff sued the city under a public liability statute for damages arising out of injury caused by a group of Union soldiers who wrecked his print shop. The statute provided that there would be no liability if the person injured had been guilty of illegal or improper conduct. The plaintiff had printed some articles defaming the Union Army. The court held that, although the soldiers could not have maintained a civil action against Palmer, he would have been liable for criminal prosecution for the publication of a libel. Consequently, his action failed.

²⁰ 44 Kan. 435, 24 Pac. 948 (1890).

²¹ *Id.* at 437, 24 Pac. at 949. The court apparently attached no weight to the fact that the group defamed was a family of six brothers, all of whose names were included in the information, but preferred to rest on the broader grounds stated above.

²² 38 Tex. Cr. R. 364, 43 S.W. 78 (1897).

²³ *Id.* at 367, 43 S.W. at 79.

²⁴ *People v. Gordan*, 63 Cal. App. 627, 219 Pac. 486 (1923); *People v. Turner*, 28 Cal. App. 766, 154 Pac. 34 (1915); and *Crane v. State*, 14 Okla. Cr. 30, 166 Pac. 1110 (1917).

²⁵ *Alumbaugh v. State*, 39 Ga. App. 559, 147 S.E. 714 (1929).

²⁶ 318 Ill. 482, 149 N.E. 466 (1925).

²⁷ The only other conviction reported under this statute was obtained in *People v. Simcox*, 379 Ill. 347, 40 N.E.2d 525 (1942) (conviction reversed because the acts charged were not done in a public place as required by the statute).

²⁸ *Accord*, *State v. Cramer*, *supra* note 5. Here the defendants appealed from an order overruling a demurrer to the indictment. The indictment charged the publication of a libel on certain named members of a charitable association, but the publication set forth therein contained nothing to single out these persons. Held, membership in the class defamed was sufficient interest to be so named in the indictment. *Contra*, *Drozda v. State*, *supra* note 5.

Two cases which run contrary to this line of authority are *Drozda v. State*²⁹ and *People v. Edmondson*.³⁰ In the *Drozda* case, a prosecution for a libel on the leaders of a Bohemian national organization, the court first found the complaint defective. Then, as an alternative ground for dismissal, it said, "A government or other body politic, a corporation, religious system, race of people, or a political party, are not subject to criminal libel. Nor could a publication referring generally to any of these be made specific or libelous."³¹

In the *Edmondson* case, in considering an indictment for a libel on "All persons of the Jewish Religion," the court reviewed most of the authorities previously considered and came to the conclusion that, in its opinion "... 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."³² That this statement is questionable, to say the least, is apparent from the cases previously mentioned. The learned judge seems to have confused the fact that certain individuals were named in the indictments or informations in these cases with the fact that they were not named or referred to in the allegedly libelous publications. Since these prosecuting witnesses obtained standing, not because they were singled out, but merely because they were members of a group, it must be that it was the group which was libeled.³³ The argument that they were "impliedly" libeled as individuals is unsound, since they were involved only through membership in the group, which they held in common with a large and indefinite number of others.³⁴

It is apparent from a reading of the *Edmondson* case that the judge was concerned also with the free speech aspect of the problem. While his analysis of the precedents does not appear sound, it does seem that he recognized that the choice lay between ending "scandal-mongering" and protecting speech.³⁵ Without specifically relying on the Constitution, he chose to protect speech and in this regard, as will appear from the discussion below, the decision is to be approved.

²⁹ 86 Tex. Cr. R. 614, 218 S.W. 765 (1920).

³⁰ 168 Misc. 142, 4 N.Y.S.2d 257 (1938).

³¹ *Drozda v. State*, *supra* note 29 at 617, 218 S.W. at 766.

³² *People v. Edmondson*, *supra* note 30 at 144, 4 N.Y.S.2d at 260.

³³ *Cf.* Tanenhaus, *supra* note 3 at 276.

³⁴ While most of the cases do not indicate whether or not any individual must be named in the indictment or information, the court in *People v. Turner*, *supra* note 24 at 770, 154 Pac. at 36, stated, "It would seem that a mere statement of the published oath, coupled with an averment that it was false and malicious, would be sufficient to bring the publication within the terms of § 248 of the Penal Code [defining libel]". It seemed that here persons other than those named in the information as the prosecuting witnesses were intended to be defamed, but the court held that this fact was immaterial, since, in terms, the whole group was referred to.

³⁵ "As is so well pointed out in the briefs submitted by amicus curiae, it is wiser to bear with this sort of scandal-mongering rather than to extend the criminal law so that in the future it might become an instrument of oppression. We must suffer the demagogue and charlatan, in order to make certain that we do not limit or restrain the honest commentator on public affairs." *People v. Edmondson*, *supra* note 30 at 154, 4 N.Y.S.2d at 268.

The Basis of the Crime

To assess accurately the legal status of group libel, it is necessary to examine the basis of ordinary libel. The *civil action* for damages for defamation depends entirely upon the damage (real or legally presumed) to the individual,³⁶ although the existence of punitive damages may indicate a public policy to discourage the utterance of libelous matter.³⁷ The *crime* of libel, as it developed at common law, was based upon its supposed tendency to provoke the person libeled or his friends or relatives to a breach of the peace.³⁸ Some courts have added injury to the reputation of the individual as an alternative ground,³⁹ but generally the former has been cited without elaboration.⁴⁰ Thus the legal justification which is given to support ordinary criminal libel is twofold—protection of individual interests in reputation and protection of society from outbreaks of violence. To these, as possible bases for group libel laws, may be added an additional and probably more persuasive argument, which has not been used by the courts.

Certain groups have used libel and slander on a tremendous scale to achieve their ends, with varying degrees of success. All through history unpopular individuals and minority groups have been made the scapegoats of demagogues and other seekers after power. In recent times the use of this weapon has increased, with the growth of effective mass communication. Defamation has become an integral part of the propaganda effort of many extremist groups. It is the very essence of the "divide and conquer" technique.⁴¹ It has been suggested that if this danger is to be met with affirmative legislation, only defamation terms have adequate scope and meaning.⁴²

³⁶ PROSSER, TORTS 797 (1941); NEWELL, THE LAW OF SLANDER AND LIBEL 810 *et seq.* (1924).

³⁷ PROSSER, TORTS 11; NEWELL, *op. cit. supra* note 36, at 814 *et seq.*

³⁸ King v. Griffin, Sess. Cas. 74, 93 Eng. Rep. 75 (1732); King v. Summers and Summers, 1 Lev. 139, 83 Eng. Rep. 337 (1664). *Cf.* People v. Crespi, 115 Cal. 50, 46 Pac. 863 (1896); Commonwealth v. Clap, 4 Mass. Rep. 163 (1808); 2 STARKIE, *op. cit. supra* note 17, at 210.

³⁹ State v. Burnham, 9 N.H. 34, 31 Am. Dec. 217 (1837).

⁴⁰ See, e.g., State v. Hoskins, 109 Ia. 656, 80 N.W. 1062 (1899); Commonwealth v. Szliakys, 254 Mass. 424, 150 N.E. 190 (1926); State v. Pierce, 140 Ore. 1, 12 P.2d 320 (1932); State v. Levand, 37 Wyo. 372, 262 Pac. 24 (1927).

⁴¹ For a general treatment of this subject, see Loewenstein, *Legislative Control of Political Extremism in European Democracies II*, 38 COL. L. REV. 725, 741 (1938); see also Wilson, *Beauharnais v. Illinois: Bulwark or Breach?*, CURRENT ECONOMIC COMMENT, Nov., 1952, 59, 67 *et seq.*, for an analysis of the relationship existing between group libel and the maintenance of democracy in terms of the underlying psychological causes of group libel.

⁴² In his dissent to the *Beauharnais* decision, Reed urged that the statute under which the conviction had been obtained was fatally vague and uncertain, relying principally on *Winters v. New York*, 333 U.S. 507 (1948). This latter decision reversed a conviction resulting from the publication of matter principally devoted to "criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime." The holding was based on the fact that the statute was not drawn in terms clear on their face or rendered so by long and accepted usage or restrictive State interpretation.

While the Illinois statute involved in *Beauharnais* did contain some novel terms, one publishing group libel could be drawn up in accepted terms and, in fact, some statutes in the traditional terms themselves have been held to cover group libel cases. See note 4, *supra*.

THE NATURE OF GROUP LIBEL

With the factors just discussed providing the possible underlying policy justifications, let us examine more closely the nature of group libel. Consider the following two statements: "John Jones is a thief and user of marijuana" and "Negroes are thieves and users of marijuana." In prosecutions for criminal libel, no one would have much difficulty in finding both statements defamatory. But truth with good motives is ordinarily a defense.⁴³

Suppose the defendant in each case undertook to prove the truth of the statements. In the case of John Jones the issue would be a relatively simple question of fact. But what of the second case? Must it be shown that some Negroes, most Negroes, more Negroes than whites, or all Negroes fit within the class of thieves and addicts, to perfect the defense? The trial court in *Beauharnais* ruled that *no* evidence as to truth was admissible. On a technicality, this ruling was upheld in the Supreme Court,⁴⁴ so the question as to the role of truth has not been decided for future cases. If truth is not to be allowed as a defense, this in itself is a radical departure from the rules of ordinary libel;⁴⁵ if it is allowed, the trial may do more to expound and publish the defamer's views than did the original publication.⁴⁶

It may be argued, as Frankfurter's opinion perhaps suggests, that the defendant will be unable to prove the other ordinary requirement of good motives,⁴⁷ so the issue of truth will not arise. But motives are hard enough to ascertain in ordinary cases. When it is remembered that it is speech and the motives behind it with which we are concerned here, it is doubtful that this argument will provide much solace. What are the motives, for instance, behind the expression of a man's opinions on tax exemptions for parochial schools or on Freemasonry? At what point does the mere public expression of an honest, if bigoted, personal opinion ("I don't like cheap Jews") become punishable by the state?

It is readily apparent that, while prosecutions of libels on individuals present factual questions in general similar to those in ordinary criminal actions, those for group libel will often involve extreme subtleties of meaning and interpretation. Sanctions may be applied to statements which accu-

⁴³ Frankfurter conceded that truth, at least when published with good motives, was a defense to a prosecution for libel. Jackson, in his dissent to the *Beauharnais* decision, at 295 *et seq.*, gives a good summary of the historical growth of the role of truth as a defense in libel cases. Stemming from the case of *People v. Crowell*, 3 Johns. Cas. 337 (N.Y. 1804), which prompted the New York legislature to permit it as a defense, truth (often only when coupled with good motives) is now recognized as a defense to a prosecution for libel in the great majority of the States. In several footnotes to his opinion, Jackson cites the state constitutional provisions which embody this principle.

⁴⁴ *Beauharnais* offered evidence tending to show truth and good motives which was rejected. In addition, he made a formal offer to prove truth, but none as to his good motives. The majority held he had failed "to satisfy the entire requirement which Illinois could exact."

⁴⁵ See note 43 *supra*.

⁴⁶ For a discussion of this and other arguments against group libel laws, see 1 CHAFFE, *GOVERNMENT AND MASS COMMUNICATION* 122 (1947).

⁴⁷ *Castle v. Honston*, 19 Kan. 417, 27 Am. Rep. 127 (1877); *Commonwealth v. Bonner*, 9 Metc. 410 (Mass. 1845).

rately reflect common public opinion. The possibility is unusually strong in this type of case that jurors will be swayed by their own beliefs and prejudices, for or against the defendant.⁴⁸ Perhaps none of these factors is an insurmountable barrier to group libel legislation, but together they indicate the sharp differences between group and ordinary libel and point to some of the many problems which cast doubt on the wisdom of such enactments.

But there is still a more important difference between ordinary libel and group libel. Compare these two statements: "The members of the Knights of Columbus take an oath to kill Protestants and overthrow the government whenever the Pope so orders" and "The Knights of Columbus is a secret organization opposed to truth, religion and morality and promotive of factionalism which threatens our society; it should be outlawed." Both statements are defamatory and would seem to be punishable by any standards that appear in the *Beauharnais* decision. But the two statements clearly differ. The first is an assertion of fact which may be proved, one way or the other. The second contains the uncertainty as to fact and motive which was seen above to be very difficult to resolve. But even more significant, the second contains a proposal for public action, addressed to society at large. It asserts that certain evils exist and recommends a remedy. This is not ordinary defamation. The intent of the speaker, at least apparently, is directed beyond the group involved and at what he conceives to be a problem of some social significance. The fact that the sentiments expressed may be sham or pretense, designed to obtain immunity for a defamatory publication cannot be presumed unless all public speech is to be made to bear the burden of demonstrating its particular justification.

The majority opinion in the instant case rests its position on the following statement by Justice Murphy in *Chaplinsky v. New Hampshire*:⁴⁹

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 clearly outweighed by the social interest in good order and morality.

It would seem that the majority opinion adopts a literal interpretation of the term "libelous" without adequately considering the qualification in the next sentence, namely, that the speech referred to is "no essential part of any expression of ideas" and "of such slight social value as a step to

⁴⁸ Either result would be equally bad. If the jury is swayed in behalf of the defendant, it would be tantamount to an official sanction of the defamation; if it is swayed against him, his freedom of speech will be lost.

⁴⁹ *Supra* note 10 at 571.

truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in good order and morality."

This is the crux of the problem. Can it be said that group libel, as a class of speech, falls clearly outside that speech which in Justice Murphy's terms "is of . . . social value" so that any protection afforded by the First or Fourteenth Amendment is lost? Can we afford to deal so summarily with speech which may be directed at educating or influencing the public mind on matters of general public concern? In so far as an utterance is pure invective or obscenity, there is no constitutional problem; but when speech takes on the character of "public speech" or "socially valuable" speech, the Constitution requires that its protection be afforded.

The practical problem in attempting to punish group libel, of course, arises when, as will often be the case, the two elements are intertwined, as in the second Knights of Columbus' example above and in the facts of the *Beauharnais* case itself.⁵⁰ Some constitutional test must be evolved to separate that which must be protected from that which is punishable. The traditional "clear and present danger" test is of little value. Defamation is such that the bulk of the evil, if any, is created as soon as the words reach their hearer or reader—they have effect when published or not at all. On the other hand, speech which advocates or tends to encourage crime or violence usually has some definite and often considerable time lag between its utterance and the specific act. The "clear and present danger" test was created and has meaning principally in judging speech according to its tendency to bring about such evils.⁵¹ It contains a definite temporal connotation. It has little significance when the chief basis of attacking an utterance is something other than its tendency to bring about some evil. Therefore, it becomes necessary to try to formulate some more meaningful test to apply to this situation.

A Possible Test for Group Libel Cases

It must be remembered that constitutional tests are, after all, only words and concepts and not like the chemists' litmus nor the physicists' delicate balance. If we must fall back on generalities and the ability of judges, guided by reason, to apply them, it is because it is not a precise and tangible field in which we operate. Perhaps the answer to the problem is that hinted at in the statement of Justice Murphy in the *Chaplinsky* case, quoted above. Since the conflict is between two socially desirable values, the only solution possible would appear to be a balancing of the public interests involved on each side, in each case. The idea and discussion of public interest content on one side (for thus is truth reached in a democracy) must be weighed against the social interests of good order, integrity of reputation and stability on the other. Because our traditions

⁵⁰ *Beauharnais* was apparently making a legitimate appeal for popular support to influence legislative action by the city council. It is submitted that democracy is reasonably safe as long as such extremists continue to use the democratic processes.

⁵¹ *Schenck v. United States*, 249 U.S. 47 (1919); *cf.* Jackson, concurring in *Dennis v. United States*, 341 U.S. 494, 568 (1950).

declare freedom of speech to be the prime bulwark of democracy, and history has borne out this declaration, there must be placed in the balance, on the side of the speech, a presumption of validity, which will require a clear showing to upset. To the argument that the constitutional protection of free speech would prohibit such an infringement as this, even with the favorable presumption accorded it, the fact that neither the First nor the Fourteenth Amendment has *ever* been treated as an absolute bar to governmental action should be sufficient.⁵² Even freedom of speech can and must give way when other valid interests of sufficient public significance so demand.

But this test, or any other which may finally be adopted, is only the constitutional norm by which two conflicting policies must be vindicated should they clash. It does not in any sense present an argument *for* group libel laws. Rather, the fact that such legislation would entail another inroad into our most vital freedom is itself enough to raise serious doubts as to its desirability. When coupled with the extreme difficulties of interpretation and application, the argument against the desirability of such laws seems, to this writer, well-nigh irresistible.⁵³

CONCLUSION

The decision in *Beauharnais v. Illinois* would thus appear to be an unfortunate one. Though the majority is probably correct in its view that group libel actions are not prohibited by the Constitution, it utterly failed to note the vast difference between the rules of ordinary libel which it applied and those which would be necessary adequately to safeguard socially valuable speech which might fall within the classification of group libel. It is sincerely to be hoped, should the question ever rise again, that the Court will examine more closely the elements involved.

But even more, it is to be hoped that legislative bodies will think twice before enacting group libel legislation, and then decide against it. There are real and substantial benefits to be gained, it is true, from the prevention of such defamation, but the extreme difficulty of effective application and the risks encountered thereby are not justified by the benefit. In the long run, it seems better to rely on the positive action of free discussion and the good sense of the people to preserve and expand our democratic concepts of brotherhood and tolerance.

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⁵² *Schenck v. United States*, *supra* note 51; *Gitlow v. New York*, 268 U.S. 652 (1925).

⁵³ For further references on the subject of group libel, see material cited in the excellent bibliographical note in EMERSON AND HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1170 (1952).

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