1953


Thomas P. Lewis
University of Kentucky

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Recommended Citation
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Hitler proved before a world jury the potential power for the creation of evil bound up in deliberate, systematic defamation of a class of people. In his scheming rise to power, defamation ranked high as an effective political weapon. It is possible that facts like these led the Supreme Court in Beauharnais v. People of the State of Illinois\(^1\) to narrow further the range of protection from state interference with speech and the press guaranteed by the Fourteenth Amendment to the United States Constitution. By a five-to-four decision, the Court upheld as constitutional an Illinois statute which makes it a crime to publish defamatory matter directed at certain classes of citizens.\(^2\) The crime has been tagged "group libel". Because the case apparently represents the final emergence of an attitude toward freedom of speech which has been in evidence over the last several years, and because the case presents a reasonably good opportunity to determine the individual views of the present Justices on freedom of speech issues, a detailed analysis of the facts and opinions is warranted.

The statute under which the defendant Beauharnais was convicted provides: "It shall be unlawful for any person . . . to manufacture, sell . . . 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 . . . ."\(^3\) Beauharnais circulated a leaflet in the form of a petition to the mayor of Chicago, "to halt the further encroachment, harassment, and invasion of white people . . . by the Negro." Also contained in the leaflet was an appeal to whites to unite, exclaiming, "If persuasion . . . will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." The information under which Beauharnais was tried charged, in the terms of the statute, that he "did unlawfully . . . exhibit in

\(^1\) 343 U.S. 250 (1952).
\(^2\) The majority: Vinson, C. J., Frankfurter, Burton, Minton and Clark, J.J.; Dissenting: Black, Douglas, Reed and Jackson, J.J.
public places, lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of the Negro race and color and which exposes [sic] citizens of . . . the Negro race and color to contempt, derision or obloquy. . . ."

In the trial court, the judge simply instructed the jury that if they found the defendant had distributed the leaflet they were to return a verdict of guilty. On appeal, the Supreme Court of Illinois treated the crime as "criminal libel" and affirmed the conviction, holding that the lower court had treated it as such and had correctly disposed of the defense of truth published with good motives, as provided by the Illinois Constitution for all cases of libel, according to ordinary criminal libel precedents. 4

In the Supreme Court of the United States, Beauharnais challenged the statute as being a violation of the liberty of speech and the press guaranteed him by the due process clause of the Fourteenth Amendment. He contended also that the statute was unconstitutionally vague under the same clause. In determining the validity of these objections the Court, in an opinion delivered by Justice Frankfurter, drew an analogy between the Illinois crime and criminal libel directed at an individual. The latter existed at common-law, was thus a crime in the colonies, and presently exists either under common-law or by statute in all forty-eight states, the three territories and the District of Columbia. No doubt of the constitutionality of the crime exists. The Court then examined the definitions of criminal libel in the states having the crime by statute and found that, with minor variations, the definitions followed a pattern closely resembling the terms used in the Illinois group libel statute. 5

Interpreting the statute as nothing more than a criminal libel statute, the only difference being that the libel was directed at a huge group instead of at an individual, the Court concluded:

". . . if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to

4 People v. Beauharnais, 408 Ill. 512, 97 N.E. 2d 343 (1951).
5 Out of 23 jurisdictions having a statutorily defined crime of libel, the court found that eleven had the following general formula: "'A libel is a malicious defamation, expressed either by printing, or by signs or pictures . . . .tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or publish the natural defects of one who is alive and thereby to expose him to public hatred, contempt, ridicule, or financial injury.'" The remaining twelve jurisdictions had the following general version: "'A libel is a malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse . . . .'" Beauharnais v. People of the State of Illinois, 343 U.S. 250, 255 note 5 (1952).
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."

Relying further on the analogy to ordinary criminal libel, the Court found that the crime as defined was not so vague as to violate the Fourteenth Amendment, and that the procedure adopted in the Illinois courts was proper. By the same reasoning, the clear and present danger test was held to have no application.

Four major objections to the majority opinion were registered by the four dissenting Justices.

**The Interpretation of the Fourteenth Amendment**

Justices Black and Douglas disagreed with the majority's interpretation of the Fourteenth Amendment. Nowhere in the majority opinion is the First Amendment specifically mentioned as having any bearing on the decision. Herein lies the major difference between the majority and Justices Black and Douglas. In his dissent, Justice Black said:

> "Without distortion, this First Amendment could not possibly be read so as to hold that Congress has power to punish Beauharnais and others for petitioning Congress as they have here sought to petition the Chicago authorities. (citation omitted) And we have held in a number of prior cases that the Fourteenth Amendment makes the specific prohibitions of the First Amendment equally applicable to the states."

On the other hand, the majority opinion reads:

> "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. . . ."

The commands of the First Amendment in regard to speech and the press are not conclusive so far as state legislation regarding defamatory language is concerned. Thus the majority accepts what Justice Black terms the "reasonableness test." That is, if the state laws abridging speech or the press are found to have a "rational basis" they are sustained. Or in the words of the majority, the statute, making defamatory language the basis for punishment, must be sustained "unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State." Justice Douglas, though concurring with Justice Black, wrote a separate opinion in which he expressed the view that freedom of speech is guaranteed by the First

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7 Id. at 268.  
8 Id. at 258.
Amendment in absolute terms and therefore has a preferred position unlike, for example, the right of privacy guaranteed by the Fourth Amendment.

"Until recent years that had been the course and direction of constitutional law. Yet recently the Court in this and in other cases has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate 'within reasonable limits' the right of free speech. This to me is an ominous and alarming trend."

The present case, then, seems to settle firmly the principle that the Fourteenth Amendment protects speech and the press from state interference only so far as is necessary to preserve the "concept of ordered liberty", the test adopted for other guaranties arising from the due process clause. This is abandonment of the theory proposed by Justices Black and Douglas which was accepted by a majority of the Court as recently as 1944 and which would incorporate the First Amendment into the Fourteenth, making it applicable to the states.

With the acceptance of the "rational basis" test, the theory that speech occupies a "preferred status" must also be rejected. And whatever the weight previously given the elusive doctrine that the presumption of constitutionality does not apply to statutes restricting speech or the press, as it does to other statutes, that weight is no longer on the scale.

This aspect of the case is better settled than the five-to-four decision would indicate. Justice Jackson dissented on different grounds and expresses that the Fourteenth Amendment does not incorporate the First. The question of vagueness aside, Justice Reed agrees that the Constitution does not forbid the state to pass this type of statute. If he agrees with the other dissenting Justices, who

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Id. at 285.


See Thomas v. Collins, 323 U. S. 516, 529, 530 (1944). See also West Virginia State Board of Education v. Barnett, 319 U.S. 624, 639 (1942), where it was said, "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."


believe that Congress could not constitutionally pass such a law, he must concede that the Fourteenth Amendment does not incorporate the First. However, Justice Reed said in his opinion,

“This conviction must stand or fall upon a determination whether all the definitions of the acts proscribed by the statute and charged in the information may be banned under the principles of the First Amendment.”14 (Italics writer’s)

Just what the italicized words mean is unclear. They could mean that the specific commands of the First Amendment are the guide; more likely, they mean that the “principles of the First Amendment” are carried over as guides in determining what the word “liberty” of the Fourteenth Amendment demands.

**Vagueness**

The due process clause of the Fourteenth Amendment not only guarantees within limits certain substantive rights to citizens such as the right to speak freely or to contract for the acquisition of property,15 but it also guarantees that in the few instances when a citizen can be deprived of these rights, such deprivation will be constitutional only if it is carried out with certain procedural safeguards. One of these safeguards is that if a statutory crime is the basis of conviction, the crime must be so defined as to apprise reasonable men of what may be foreseen to be found illicit under the statute.16 Shading into substantive due process, this procedural requirement demands that the statute as relied upon for the conviction must not be so broad “as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech.”17

Justice Reed, dissenting in the present case, pointed out that Beauharnais’ conviction flowed from the information as a whole, the trial judge ruling as a matter of law that the defendant was guilty as charged. Thus each and every portion of the information must be constitutional for there is no way to determine under which portion the trial judge found Beauharnais guilty.18 Since the disjunctive was used in the information (“which publications portray depravity, criminality, unchastity, or lack of virtue”), the conviction might rest on portrayal of any one of these vices. “Our examination can begin and end with the inquiry as to what meaning lies in the act’s declaration,

14 Id. at 281.
15 West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).
as charged in the information, that it is unlawful to portray in a lithograph a lack of virtue of a class of citizens . . . which . . . exposes [them to] derision, or obloquy." Is such a definition so narrow that no writing which is fairly within the protection of the Fourteenth Amendment could serve as a basis for punishment? Does the definition of the crime sufficiently apprise reasonable men of what may be found to be illicit? Justice Reed answered both questions in the negative.

The majority of the Court relied upon the long-acquiesced-in usage of such broad terms in ordinary criminal libel statutes and upon the Illinois courts' construction as fixing their meaning. Justice Reed answers:

"To say that the mere presence of the word 'virtue' in the individual libel statute makes its meaning clear in the group libel statute is a non-sequitur. No case is cited which defines and limits the meaning of these words."

As to the "clarifying construction and fixed usage" which the Illinois court put on the terms of the statute, there was simply the analogy to criminal libel. The majority pointed out that the Illinois high court characterized the words prohibited by the statute as those "liable to cause violence and disorder." As far as can be determined from the opinion, however, no finding was made or necessary to be made that the words of the defendant had this tendency. Justice Reed said that the characterization of the Illinois court did not limit the prohibition of the statute, but merely described the lithograph published by Beauharnais.

"Derision" is as loose a term as "virtue". A limited search failed to disclose one case in which "virtue" as relates to libel was defined; nor was a case found defining "derision" in the context of libel. The phrase "derisive words", which defined prohibited speech in a New Hampshire statute, was held not to be too vague, but because it came within the purview of the statute only when the plain tendency of "derisive words" was to excite the addressee to a breach of the peace.

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20 Id. at 282.
21 On this score, Justice Frankfurter said: "We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography." In Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952), decided one month later than the Beauharnais case, Justice Frankfurter, concurring, traced the meaning of the word "sacrilegious" for 11 pages, though its meaning, whether too broad or not, had been fixed by the New York Court of Appeals in applying the statute challenged there.
A New Jersey statute, similar to the Illinois statute at least in its desired object, made it unlawful to "make . . . any speech . . . which . . . incites . . . hatred, abuse, violence, or hostility against any group . . . of persons . . . by reason of race, color, religion or manner of worship. . . ." This statute was never before the Supreme Court, for the state appellate court held it to be unconstitutional under the federal and state constitutions. Among others, one reason for the holding was that the words "hatred", "abuse", and "hostility" were abstract and indefinite in meaning. Concededly the terms are vague, but it is submitted that they are no more so than the terms "virtue" and "derision".

The Clear and Present Danger Test

A third objection registered in dissent concerned the majority's failure to apply the clear and present danger test. Quoting an earlier case, the majority characterized libel as being one of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." The Court elaborated:

"These [classes of speech] 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 an exposition of ideas. . . ."

In short, the Court defined libel as not being "speech" within the protection of the Fourteenth Amendment, comparing it to obscenity. Not being within the area of protection, the Court rationalized, it was unnecessary to consider the clear and present danger test.

Justice Black believed the statute unconstitutional by its terms and thus did not reach a consideration of the clear and present danger test. But he believed the quotation of the dicta from Chaplinsky v. New Hampshire upon which the Court relied was misplaced. The dicta in the Chaplinsky case was written concerning a defendant convicted for calling a man vile names face-to-face on a public street in violation of a statute. According to Justice Black, "We pointed out in that context that the use of such 'fighting words' was not an essential part of exposition of ideas." Ordinarily, face-to-face name-calling on a pub-

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26 Id. at 256, 257.
27 Id. at 272, 273.
lie street is not related to the expression of ideas. On the other hand, the same is not necessarily true when one portrays a lack of virtue in a class of citizens subjecting those citizens to derision. In *Cantwell v. Connecticut*, the following observation was made:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."²⁸

Group libels, at least the dangerous type, are not indulged in merely for the sake of insulting the group; their purpose is to obtain a reaction from another class of citizens. The very fact that ideas are thus transmitted to and implanted in the minds of many persons is what makes this type of defamation a dangerous social and political weapon. The lesser shades of group libel—the border line cases—are just as closely related to, and often the means of, persuasion. Being thus related, such speech would seem to be within the protection of the Fourteenth Amendment subject, of course, to having this protection withdrawn if the speech presented a clear and present danger of creating some substantive evil which the state has the right to prevent.²⁹

One of the express grounds for Justice Jackson's dissent was the majority's refusal to apply the clear and present danger test. Referring to the test he said:

"The test applies and has meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime but to which such tendency is sought to be attributed by construction or by implication from external circumstances."

"Not the least of the virtues of this formula in such tendency cases is that it compels the prosecution to make up its mind what particular evil it sought or is seeking to prevent. It must relate its interference with speech or press to some identifiable evil to be prevented."³⁰

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²⁸ 310 U.S. 296, 310 (1940).
³⁰ Beauharnais v. People of State of Illinois, 343 U.S. 250, 303 (1952). Since its birth in Schenck v. United States, 249 U.S. 47 (1918), the clear and present danger test has been modified so that there are now at least four different situations involving some degree of restrictions of speech in which the test will apply differently, if at all.

(1) If a statute proscribes defined, specific utterances, for example, advocacy of the forceful overthrow of the government, the clear and present danger test is satisfied by an inquiry, whether the "'gravity of the evil, discounted by
The traditional justification for making a punishable offense of libel is its tendency to create a breach of the peace.\textsuperscript{31} Because of this "traditional" tendency, the Court holds that it is unnecessary that the clear and present danger test be satisfied. Yet, a conviction resting on violation of a statute making it unlawful to incite a breach of the peace would probably be sustained only upon a showing that the defendant's speech or publication presented a clear and present danger of creating a breach of the peace.\textsuperscript{32}

It has been suggested that protection of reputation is another reason for punishing libel.\textsuperscript{33} This is perhaps more cogent justification for conviction for group libel than is the libel's tendency to create a breach of the peace. To the extent that libel does lower the standing of the members of the libeled group in the confidence and respect of the public, the majority's rationalization is more understandable. The harm sought to be prevented occurs by the very fact of publication. Like obscenity, libel has done its damage as soon as it reaches the minds of an audience, if libel \textit{does} cause the loss of public respect and confidence. But harm to reputation, to public standing, is speculative. Seemingly innocuous publications could conceivably cause harm to the community standing of a class of citizens. It would therefore be some protection for future defendants under this statute to apply Jackson's test as a "rule of reason", at least to the extent of making the prosecution relate the "libelous" matter to some evil with factual evidence.\textsuperscript{34}

\textsuperscript{31} Its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Dennis v. United States, 341 U. S. 494, 510 (1951).

\textsuperscript{32} (2) If the offense is defined in non-speech terms, or if a conviction is based on speech which does not directly advocate a crime, but which has that tendency attributed to it, the test will apply as a "rule of reason". The speech would have to be shown to have created a clear and present danger of the crime sought to be prevented. Dennis v. United States, 341 U. S. 494, 505, 568 (1951); Cantwell v. State of Connecticut, 310 U. S. 296 (1940).

\textsuperscript{33} (3) If speech is not proscribed, but the time, place or mode of delivering the speech is regulated, the clear and present danger test does not apply. Breard v. Alexandria, La., 341 U. S. 622 (1951); Cox v. New Hampshire, 312 U. S. 569 (1941).

\textsuperscript{34} (4) If the speech upon which conviction is based is such that no exposition of ideas is accomplished by it and the harm sought to be prevented is caused by its very utterance, for example, obscenity, the test has no application. Chaplinsky v. State of New Hampshire, 315 U. S. 568 (1942); Beauharnais v. People of State of Illinois, 343 U. S. 250 (1952). The majority of the Court place libel in category four. Justice Jackson classifies it as falling within category two.


\textsuperscript{32} Cantwell v. Connecticut, 310 U. S. 296 (1940).

\textsuperscript{33} See the formula which twelve states adopted by statute \textit{supra} note 5; Note, 52 \textit{Col. L. R.} 521 (1952).

\textsuperscript{34} Reisman, \textit{Democracy and Defamation: Fair Game and Fair Comment} II, 42 \textit{Col. L. R.} 1988, 1307 (1942), suggests the use of public opinion analysts to determine the effect of group libel.
Issues for the Jury

Justice Jackson agreed with the majority in their interpretation of the Fourteenth Amendment, that is, that the due process clause protects speech from state interference only to the extent necessary to preserve the "concept of ordered liberty." The preservation of the "concept of ordered liberty," however, commands more from Jackson's viewpoint than the majority granted. In order to make the statute constitutional, Jackson believes it would have to be applied with more adequate procedural safeguards, among which he would list trial by jury not only on the issue of publication, but also on the question whether the matter charged is libelous. England has had jury trial on issues of law and fact in libel prosecutions since the passage of Fox's Libel Act in 1792.35 Twenty-nine of the American States have provisions for broad jury powers in trials for criminal libel.36 Twenty-four of these states provide for jury trial of law and fact in their constitutions, substantially, adopting the provision of the New York Constitution37 which was inserted as a result of the leading American case on the subject, People v. CrosweU.38 This provision in the New York Constitution represents, according to Jackson, "the common sense of American criminal libel law."

The defense of truth, justification of the utterance as "fair comment", and the privilege of redressing grievances were also dealt with in Jackson's dissent. The majority opinion did not hold these defenses unavailable. It held that the defendant failed in the defense of truth, because for it to prevail, good motives must also be shown. As to the defenses of fair comment and privilege, the Court simply held that since the defendant failed to proffer evidence regarding them or to raise the defenses by motion, the issue, whether the statute is constitutional if these defenses were denied, was not before the Court. Thus

35 32 Geo. III c. 60.
36 For a collection of these states and the relevant codes, statutes and constitutions, see Note 52 Col. L. R. 521, 523 note 20 (1952). Kentucky is among these with the provision, "... and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases," Ky. Const. sec. 9 (1891). However, the only case found which interprets this section allowed the judge to determine whether the matter charged was libelous, even though it was admitted that the section was copied after Fox's Libel Act. Walston v. Commonwealth, 32 Ky. L. Rpt. 535, 106 S.W. 224 (1907).
38 3 Johns Cas. 337, 413 (N. Y. 1804). In this case, CrosweU was indicted for libeling Thomas Jefferson. The trial judge pronounced CrosweU's statements libelous as a matter of law, leaving to the jury only the issue of publication, as the court did in the Beauharnais case. Pending an appeal by CrosweU, the public response to the trial was such that the New York legislature quickly enacted a statute providing that the question whether the matter charged was libelous should be decided by the jury. "In consequence of this declaratory statute," the New York high court unanimously awarded a new trial.
little is settled by the case in regard to defenses to the action. Presumably, if the analogy to ordinary libel is to be carried to its logical conclusion, any defenses which are available under the existing ordinary criminal libel law will have to be made available to a defendant being prosecuted for the commission of group libel. Generally, defenses which will probably apply to group libel are: (1) Truth, which must ordinarily be as broad as the imputation of the libel, and in some states is only a defense when published with good motives;\textsuperscript{39} (2) Privilege, that is, that the publication was made "to protect or advance a legitimate and important interest of the publisher", or of a third person;\textsuperscript{40} (3) fair comment, which is actually a type of "privilege". This defense is defined as the right to make fair criticism of matters of public concern in the form of expression of opinion, which criticism represents the critic's honest opinion.\textsuperscript{41}

Some Non-Constitutional Arguments Against the Statute

Justice Frankfurter recently wrote, "Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value."\textsuperscript{42} Taking that suggestion, it will perhaps be worthwhile briefly to consider the wisdom of the statute under which one could conceivably be convicted if he (1) portrays what a judge considers a lack of virtue (2) of a class of citizens because of race, color, creed or religion, (3) so that the citizens are subjected to derision, (4) whether or not the portrayal is shown to have a tendency to cause a breach of the peace, or to lower the community standing of the citizens.

Only a pressing need for this legislation can justify such a statute. If the need exists, the legislation, to be wise, should meet this need with a minimum of risk that the free exchange of ideas will be unduly checked. What protection does a huge group have in the absence of a group libel statute? The civil action and criminal prosecution for libel exist mainly for the protection of the individual, but certain groups have been extended some protection. Civil actions have been allowed when the plaintiff is a member of a large group if he can show special application of the libel to himself. This remedy is available if the group libeler makes the mistake of attacking a group by libeling its leader.\textsuperscript{43} Or if the group is so small that a libel directed at it

\textsuperscript{40} Id. at 821.
\textsuperscript{41} Id. at 841-844.
\textsuperscript{42} Dennis v. United States, 341 U. S. 494, 555 (1951).
\textsuperscript{43} On this subject generally, see Tanenhaus, \textit{Group Libel}, 35 \textit{Cornell L. Q.} 261 (1950)
amounts to a libel of each member, each has a civil action. For example, actions have been allowed when the members of a partnership, a house, an election board, and a state board of medical examiners were defamed. Actions were held not maintainable by individuals when the “wine-joint” owners, proprietors of correspondence schools, the Stivers Clan, and the drivers of a taxicab company were libeled. Some groups can maintain an action for libel in their own name. A corporation can sue for libel to protect its commercial reputation. But marking the outer limits of suits for libel in this field is a New York case allowing an unincorporated association (a trade union) to sue through its president. Aside from trade unions, unincorporated associations, which approach more closely the type of groups at which libels are directed for political reasons, have made few attempts to maintain suit for libel, indicating the existence of procedural difficulties.

Criminal prosecutions have been maintained for libels directed at broader groups than those whose members could sue in a civil action. Convictions have been maintained, inter alia, for libels of the fourth degree of the Knights of Columbus, and the American Legion. People v. Edmondson is probably typical, however, of the result to be expected when an attempt is made to stretch ordinary criminal libel statutes to protect large racial or religious groups. Edmondson was indicted for publishing libels against “all persons of the Jewish Religion.” In dismissing the indictment, the judge said:

“I have carefully read the authorities on this subject, both in this country and in England, and it is my opinion that such an indictment cannot be sustained under the laws of this state, and that

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46 Smallwood v. York, 163 Ky. 139, 173 S.W. 380 (1915).
48 Fullerton v. Thompson, 123 Minn. 136, 143 N.W. 260 (1913).
49 Comes v. Cruce, 85 Ark. 29, 107 S.W. 185 (1908).
53 Pullman Standard Car Mfg. Co. v. Local Union No. 2928 of United Steelworkers of America, et al., 152 F. 2d 493 (7th Cir. 1945).
55 Reisman, Democracy and Defamation: Control of Group Libel, 42 Col. L. Rev. 727, 761 (1942).
57 People v. Spielman, 818 Ill. 482, 149 N.E. 466 (1925).
58 168 Misc. 142, 4 N. Y. S. 2d 257 (1938).
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."

Thus the Illinois statute presented in the *Beauharnais* case is not merely added protection; it is all the protection of the law large groups can presently call upon.

Does the statute afford real protection, worth the supression of free expression necessitated by it? In regard to this question it is interesting to compare the *Beauharnais* case with another case decided during the same term of court. In *Joseph Burstyn, Inc. v. Wilson*,\(^6\) it was decided that a statute allowing a board of censors to ban moving pictures deemed to be "sacriligious" imposed an unconstitutional restraint on a free press. The Court believed that, "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures."\(^7\) Concededly, the *Beauharnais* case on its facts did not involve any religious issues. But the statute includes religion with race, creed, or color in enumerating the groups to be protected, and repeatedly throughout the opinion of the Court, Justice Frankfurter wrote in terms of "racial and religious groups" indicating that the Court would not be hostile to a conviction for a libel directed at a large religious group. Where does one draw the line between sacrilegious utterances, and libel of a religious group subjecting that group to derision? Apparently the difference lies between abusing the religion and abusing the members of a given sect. But can it be said that a vituperative attack of a religion leaves its members unharmed socially or tends any less to create a breach of the peace? At least in the field of religion, a large range of possibly injurious publications must be left unfettered by the statute if the *Burstyn* case is to be upheld.

The same might be said of the remaining terms of the rubric, race, color or creed. Suppose an untruthful and unjustifiable attack is directed at the Negro race, or at the Jewish people. By the words of the statute the publication, to be punishable, must portray "depravity, criminality, unchastity, or lack of virtue" of a class of citizens. Is the statement, all Negroes should be lynched, within the statute? Or consider the sample of group defamation which Professor Tanenhaus sets out in his article on the subject:

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\(^6\) People v. Edmondson, 168 Misc. 142, 144, 4 N. Y. S. 2d 257, 260 (1938).
\(^7\) 343 U. S. 495 (1952).
\(^8\) *Id.* at 505.
"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 the choice of Republican or Democrat, it is Nationals versus Internationalists, Americans against America's destroyers, or to put it very plainly, Jews versus Gentile. . . ."  

Is that statement punishable under the statute? It probably is not and shrewd defamers could take advantage of that fact. Paradoxically, the better a statute is from the standpoint of protection the more dangerous it is to the free exchange of ideas, and consequently, the less likely it is to withstand the test of constitutionality.

Other factors give rise to doubts as to the wisdom of a statute attempting to control group libel. For example, truth is a defense to prosecution under the Illinois statute but truth is not defined. Beauharnais would have no trouble proving that some negroes did rob, rape, carry guns and knives, and smoke marijuana. He could show the same facts if it were the white race involved, or the Catholic, Jewish or Protestant religion. Such proof does not justify the imputation of these crimes to the whole race, but the problem of what is truth could be troublesome in a less extreme situation. All the issues become less clear in a group libel case than in a case of individual libel.  

In attempting to prove the truth, a defendant could bring hate literature into the courtroom by the carload. The courtroom would be turned into a sounding board for his views. And at least in a jurisdiction that allows reasonable and honest belief in the truth of the matter charged, the defendant would not have too much difficulty convincing a jury of this reasonable belief. The very seriousness of group defamation results from the fact that so much of it is apparently believed. If it is not believed, group libel statutes are unnecessary.  

Another problem under group libel statutes is the difficulty of obtaining convictions where clearly warranted. If the definition of the crime is sufficiently narrow to be constitutional, acquittals will result in many cases. If the defendant had been left free to peddle his false ideas, the ideas might have withered in the market place from lack of buyers. But if he is tried and acquitted, his ideas are impressed into the minds of many with the stamp of truth of the courtroom.  


TANENHAUS, GROUP LIBEL, op. cit. supra note 62 at 299.

Id. at 301.
Whether he is convicted or not, the issues are brought more vividly before the public and the town becomes divided pro and con.

Another real objection is that prosecutions for group libels may depend largely on the affiliations of the district attorney and his staff or their susceptibility to political pressures of strong minority groups. If prosecutions are brought, whatever the result, the effect will probably be unsatisfactory. If the defendant wins, his position is merely strengthened and he becomes more arrogant. His followers are encouraged. If the defendant loses, the sentence will be short or the fine light. He becomes a martyr and his followers become more contemptible of democratic processes.66

Because of these factors and others, The Commission on the Freedom of the Press, whose seventeen members are unaffiliated with the press, radio, and motion picture industries, are unanimously opposed to the enactment of group libel statutes.67 On the other hand, the American Jewish Congress, an organization which represents a group which has felt the sting of unjustified and untruthful attacks, is one of the leading proponents of such legislation.68 Experiment under the Illinois statute may prove whether the fears of this type of legislation are well-founded, or whether such legislation can be of real value. But the rise of the Nazis in the face of more stringent legislation than America has ever seen, with the legislation often working to the advantage of those whom it sought to restrain, creates a presumption against the effectiveness of group libel laws.69

THOMAS P. LEWIS

THE EFFECT OF THE NATIONAL BANKRUPTCY ACT ON KENTUCKY'S GENERAL ASSIGNMENT LAW

It has long been held that state laws on insolvency are suspended while the national Bankruptcy Act remains in effect.1 Courts have disagreed, however, as to exactly what constitutes an insolvency law. Virtually all courts agree that a statute which merely regulates the

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66 CHAFFEE, op cit. supra note 63 at 127.
67 CHAFFEE, op cit. supra note 63 at 129.
68 TANENHAUS, op cit. supra note 62 at 296.
69 See Reisman, Democracy and Defamation: Fair Game and Fair Comment I, 42 COL. L. R. 1085, 1092-1110 (1942).

1 In re Macon Sash, Door and Lumber Co., 112 F 323 (D. C., D. Ga., 1901), rev'd on other grounds; In re John A. Ethridge Furniture Co., 92 F. 329 (D. C., D. Ky., 1899); (Proceedings under such state insolvency laws, as such, are now void whether proceedings in Bankruptcy follow or not.)