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Group Defamation in the U. S. A.

James Jay Brown* and Carl L. Stern**

AN ALMOST FATALISTIC ATTITUDE of *laissez faire* seems to be the controlling influence on the development (or lack of development) of American group defamation law. As a result, many large groups of people, usually racial or religious minorities, cannot recover for even the vilest attacks on them. The reasons for this are said to be such exasperating ones as the vague limits of free speech, the difficulty of proving injury to a particular person in the group, the probability of multiple suits, and the inexactness of interests among the group members.¹ Even professional defamers are, today, insulated and protected by our laws from civil liability, as long as their words or actions remain "wholesale" defamation² and do not single out specific individuals or numerically small groups.

Public policy, that ancient legal justification for needed action, may be the only potent counter force to resolve this dilemma, today. In a very recent announcement, for example, insurance against civil liability for discrimination based on race, creed, color or national origin was barred in New York as being *against public policy*.³ If our courts and legislatures are supposed to mirror contemporary mores and developments of our society, how can it be that public policy so clearly is far ahead of them?

The problem of unrestricted wholesale libel or slander is illuminated when it is realized that "popular opinion is far more readily built up on rumors and impressions than on objectively observed facts."⁴

Each year hate publications find their way into at least half a million American homes, and well over 2 million persons read them. The original statements of these hate-sellers

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¹ Leflar, *Legal Remedies for Defamation*, 6 Ark. L. Rev. 423, 430 (1952).

² Note, *Marr v. Putnam*, 41 Calif. L. Rev. 144 (1953).

³ N. Y. State Ins. Dept. Ruling by Dept. Supt. N. G. Alford, Jr., reported in *New York Times*, p. 1 (Sept. 30, 1963).

⁴ Loewenstein, *Christians and Jews*, 126 (Internatl. Univ. Press, 1951).

are repeated in whispers and soon gain circulation. In this way the lies frequently become the "facts"—the initial source of which no one remembers, but everyone recognizes as "having heard somewhere before." As the creators of many public misconceptions, therefore, these propagandists cannot be dismissed as crackpots of no importance.⁵

No clearer example of this lie-fact complex can be found than in the bizarre history of the publication titled *Protocols of the Elders of Zion*. The Russian Secret Police, by changing the cast of characters and the contents, created this defamatory forgery out of another, pre-existing libel of a different group, in 1903.⁶ It was later picked up and spread by the Nazis, to create the illusion of a Judaeo-Masonic world plot. Not only did the lie spread among the world's masses, but it was accepted by such influential people as Houston Chamberlain and Henry Ford.⁷ Upon learning that the *Protocols* were forgeries, Ford retracted his published opinions and withdrew the publication that he had started because of this fabrication. But the damage that this vicious thing had caused was beyond measure.

Calculated falsehood and vilification, systematically manipulated in our pluralistic and mobile society, have in the past, and can again become a source of political power.⁸

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 of power. In recent times the use of this weapon has increased with the growth of mass communication. Defamation has become an integral part of the propaganda effort of many extremist groups.⁹

It is ironic, indeed, that in the United States, guardian and protector of individual rights and champion of justice, eighteen years after fighting a global war which was largely the result of group hatreds and defamations, there is no law to combat these same evils. Where are the laws for decent democratic conduct that World War II showed to be indispensable? Can it be that even our most astute legal minds believe prejudice and defama-

⁵ Forster and Epstein, *The Troublemakers*, 76 (Doubleday, 1956).

⁶ Rollin, *L'Apocalypse de Notre Temps* (Gallimard, Paris, 1936).

⁷ Loewenstein, *op. cit. supra* n. 4 at 59-60.

⁸ Riesman, *Democracy and Defamation: Control of Group Libel*, 42 *Columbia L. Rev.* 727, 728 (1942).

⁹ Comment, *Group Libel*, 41 *Calif. L. Rev.* 290, 295 (1953).

tion to be merely local problems—a normal though dangerous part of modern living? Were these the thoughts of the leaders of the European communities as *Mein Kampf* was being sent to a printer? Are these the thoughts of our best jurists as racists today defame and threaten fellow Americans because they are Negroes?

It is not an entirely hopeless picture, however. Right now an important case is before the Supreme Court on a writ of certiorari. *New York Times Co. v. Sullivan*¹⁰ presents the question whether published statements critical of the entire Montgomery, Alabama, police department were defamatory as to the unnamed police commissioner. Prior to this controversial case an unnamed member of such a small group clearly had no grounds for protection. Yet, the Alabama Supreme Court affirmed a half million dollar award for the commissioner, who claimed that the fund-raising newspaper advertisement was libelous *per se* and defamatory to him. If the high court can cut through to the central question, the legal anathema of unrestrained wholesale defamation may be corrected.

For the High Court, or any court, to begin analysis of this problem, certain terminology, long much misused, must be clarified. "Group" or "class," used interchangeably, are not the same things. Historically, real *class* libel, defaming an entire *people*, was not actionable. However, in practice, class has been held to mean all individuals possessing a common characteristic of residence,¹¹ occupation,¹² membership on a committee or board,¹³ race, or religion. Group has been held to mean such mass designations as the professional men or public officers within one certain city.¹⁴ Does this mean that all Jehovah's Witnesses living

¹⁰ *New York Times Co. v. Sullivan*, 273 Ala. 676, 144 S. 2d 25 (1962), case #39, Docket #606. Connected case, *Abernathy v. Sullivan* (Ala. Sup. Ct.) 144 S. 2d 25 (1962), case #40, Docket #609. The following have been granted the right to file *amicus curiae* briefs: Case #39: The Washington Post Co., The Tribune Co., and the American Civil Liberties Union; Case #40: The American Civil Liberties Union.

¹¹ *Cook v. Rief*, 20 Jones and S. 302 (N. Y. 1885); see, 34 Columbia L. Rev. 1322 (1934).

¹² *Comes v. Cruce*, 85 Ark. 79, 107 S. W. 185 (1908).

¹³ *Goldsborough v. Orsem & Johnson*, 103 Md. 671, 64 A. 36 (1906); *Wofford v. Meeks*, 129 Ala. 349, 30 S. 625 (1900); *Byers v. Martin*, 2 Colo. 605 (1875).

¹⁴ *Levert v. Daily States Publishing Co.*, 123 La. 594, 49 S. 206 (1909). For a later distinction between the terms see *Ewell v. Boutwell*, 138 Va. 402, 409, 121 S.E. 912, 914 (1924). See also, *Ryckman v. Delavan*, 25 Wend. 186,

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in the town of Solon, Ohio, for example, constitute a *group*, whereas all those living in Ohio form a *class*? Where the size of the group approaches that of the *class*, the definitional inconsistencies become obvious. Consequently, there is no sound, all-inclusive or controlling definition available to guide court thinking.¹⁵

In either type of action, the burden of going forward involves proof that the matter was communicated or published by the defendant, either intentionally or negligently, to someone other than the person defamed.¹⁶ The third party must have understood the defamatory meaning of the published matter,¹⁷ which if not apparent on its face is accomplished through the inducement and innuendo.¹⁸ These supply the allegations of fact which are extrinsic to the defamatory statement, and make it capable of being understood, or explain a second meaning.¹⁹ This allegation is difficult to prove when the group size approaches that of a class. Not only must it be established that the third party understood the libelous connotation, but it must be clearly proved, also, that he knew that the plaintiff was a member of the group,²⁰ and that the statement was directed at him.²¹

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202 (N. Y. 1840); *Weston v. Commercial Advertiser Assn.*, 184 N. Y. 479, 485, 77 N.E. 660, 661 (1906); *Fenstermaker v. Tribune Publishing Co.*, 12 Utah 439, 460, 43 P. 112, 114 (1895); *American Civil Liberties Union Inc., v. Kiely*, 40 F. 2d 451, 453 (C. C. A. 2d 1930).

¹⁵ See *People v. Eastman*, 188 N. Y. 478, 81 N.E. 459 (1907).

¹⁶ *Prosser, Torts*, 596, et seq. (2d. ed., 1955); 1 *Encyc. of Negligence*, c. 18 (1962).

¹⁷ *Simpson v. Steen*, 127 F. Supp. 132, 137-138 (D. C. Utah 1954): "It is not sufficient that the plaintiff knows he was the subject of the article or that the defendant knew this when he was writing, but it must appear that third parties must have reasonably understood that the article was written of and concerning the plaintiff." *Prosser, Id.* at 579.

¹⁸ *Inducement*: the plaintiff must show facts creating the defamation which facts are not apparent on the face of the statement: *Kee v. Armstrong, Byrd & Co.*, 75 Okl. 84, 182 P. 494, 5 A. L. R. 1349 (1919); *Ten Broeck v. Journal Printing Co.*, 166 Minn. 173, 207 N.W. 497 (1926).

Innuendo: where the inducement is not clear, he must connect the facts to the defamation: *Pfeifly v. Henry*, 269 Pa. 533, 112 A. 768, 13 A. L. R. 1018 (1921); *Sharpe v. Larson*, 70 Minn. 209, 72 N.W. 961 (1897): e.g., "Burns is a member of the X-Y-Z Club." *Inducement*: The club was forcibly closed by the city. *Innuendo*: It was understood to have been engaging in illegal activities.

¹⁹ *Henn, Libel-by-Extrinsic-Fact*, 47 Cornell L. Q. 14, 19 (1961).

²⁰ *Ryckman v. Delavan, supra* n. 14; see generally: 33 *Am. Jur., Libel & Slander*, Sec. 240.

²¹ *Louisville Times v. Stivers*, 252 Ky. 843, 68 S. W. 2d 411 (1934); *Prosser, op. cit. supra* n. 16, at 583.

This crucial element, nearly impossible to prove,²² has been reiterated from earliest times,²³ to the detriment of the plaintiff. The courts have brought into existence, by their interpretations of this key element, the unchecked wholesale defamation of whole groups, or even worse, of whole classes. Finally, the plaintiff must prove that because of the defamation he suffered injury to his reputation.²⁴

The difficulties faced by the group defamation victim are obvious on paper and terrifying in reality. In merely defending his reputation, he is confronted by unprovable issues and, as will be pointed out, is bludgeoned in court by a history of "rational-reasonable" civil and criminal precedents. A brief outline of this paradox has been set out here, but the question still remains whether the civil-common law or our legislatures have an answer to this unbelievable legal quandary.

The Common Law

In its earliest beginnings suit for defamation was an action seeking recompense for shame brought upon the plaintiff.²⁵

²² "A publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff. In such a case the plaintiff must sustain the burden of pleading and proof, by way of 'colloquium,' that the defamatory meaning attached to him. If he fails to do so, he has not made out his case." Prosser, *op. cit. supra* n. 16, at 583. See Restatement of Torts, Sec. 564, Comment c; *Macaulay v. Bryan*, 339 P. 2d 377 (Nev. Sup. Ct. 1959); *Mick v. American Dental Association*, 49 N. J. Super. 262, 139 A. 2d 570 (1958).

Colloquium must be proved in order to preserve the complaint against demurrer: *Palmerlee v. Nottage*, 119 Minn. 351, 138 N. W. 312 (1912).

²³ Lord Campbell: "Where a class is described it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated." *LeFanu v. Malcolmson*, 1 H. L. C. 637, 668, 9 Eng. Rep. 910 (1848). Although this principle has been repeated *ad nauseam* and should be clearly understood by now, misunderstanding has crept into legal thinking. For example, it has been stated that if a publication does not defame any ascertainable person, it is not libel, but if one publishes material about a group, he assumes the risk of it being libelous to any member thereof. *Simpson v. Steen*, 127 F. Supp. 132 (D. C. Utah 1954).

²⁴ Prosser, *op. cit. supra* n. 16, at 574; 1 Encyc. of Negl. § 205 (1962).

²⁵ The action was found in historical records of 13th century middle ages courts. Donnelly, *History of Defamation*, 1949 Wis. L. Rev. 99, 100. The no-

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This law gradually developed²⁶ a pervasive doctrine in 1700 which formed the legal precedent for succeeding years. Today's libel law stems from this case of brittle age, and even more brittle logic—*King v. Alme & Nott*²⁷—where the court said:

Where a writing inveighs against mankind in general or against a particular order of men, as for instance men of the gown, this is not libel, but it must descend to particulars and individuals to make it libel.

The jurors set this defamation claim aside, not for sound legal reasons, but because none of them knew the plaintiffs, and consequently were unable to determine who had been defamed.²⁸ It is ironical that present legal inequities should be grounded upon the oft-quoted summary of an erroneous decision. In an odd twist of legal history, which has not had the pervasive influence of the above cited case, the very same court 32 years later permitted an unnamed member of a group of Portuguese Jews to recover for injury caused by circulated false rumors.²⁹

As an overall consequence of the *Alme & Nott* precedent, recovery today for defamation is dependent on the sheer size of the group. On the average, any number over twenty is too large.³⁰ Thus, a dozen Washington, D. C., parking lot owners could not get compensation for defamation.³¹ The court recog-

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tion of socially harmful libel dates back to 1275, when the English Parliament enacted *De Scandalis Magnatum* which was designed to suppress the Lollard rhymes ridiculing the rulers during the peasant revolts. Kelly, Criminal Libel and Free Speech, 6 Kan. L. Rev. 295, 300 (1958).

²⁶ In a collection of Ecclesiastical Court cases ranging from 1475 to 1610, 42 out of 700 involved defamation. Carr, History of Defamation, 18 Law Q. Rev. 255, 270 (1902), citing Archdeacon Hale's Precedents.

²⁷ *The King v. Alme & Nott*, 3 Salkeld 224, 91 Eng. Rep. 790 (1700); also found as *Rex v. Orme & Nutt*, Trin. 11 Will. 3, B. R. 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (1700).

²⁸ Note: Liability for Defamation of a Group, 34 Columbia L. Rev. 1322, 1332 (1934).

²⁹ *Rex v. Osborne*, 2 Barn K. B. 166 (1732). The court opined that defamatory writings which instigated street riots could not go unpunished.

³⁰ *Latimer v. Chicago Daily News, Inc.*, 330 Ill. App. 295, 71 N. E. 2d 553 (1947); *Fowler v. Curtis Pub. Co.*, 78 F. Supp. 303, 182 F. 2d 377 (App. D. C. 1950). Contra: 75 Jews of Quebec: *Ortenberg v. Plamondon*, 24 R. J. Q. 69, 385 (C. B. R. Quebec), 35 Can. L. T. 262, 267 (1914).

³¹ *Service Parking Corp. v. Washington Times Co.*, 67 App. D. C. 351, 92 F. 2d 502 (1937). Contra: Groups between 8 and 12 in size have recovered: *Gross v. Cantor*, 270 N. Y. 93, 200 N. E. 592 (1936); *Weston v. Commercial Advertiser Ass'n.*, 184 N. Y. 479, 77 N. E. 660 (1906); *Bornmann v. Star Co.*, 174 N. Y. 212, 66 N. E. 723 (1903).

nized this numerical block in *Marr v. Putnam*³² when it concluded that each member loses his right of protection against language directed at them when the group takes on significant size. A group as small as a state board of supervisors³³ was defenseless against damning derogatory statements about alleged state fund mismanagement, because of this outstanding principle. Conversely, and as an example of its inexact application, an unnamed member of a Texas posse recovered for application to his group of the designation of an "army of savages."³⁴ A court even denied recovery in a perjury accusation where the charge was directed against only three of seven unnamed witnesses.³⁵ Not even the limiting phrase "some of," applied to a group, receives uniform treatment in our law.³⁶

The law has not afforded relief to groups of persons bound by race or religion, on the principle that they are not recognizable units having legal powers to sue. They are formless and shifting segments of the population, incapable of defending themselves. Without group economic interests apart from those of its constituent members, such groups are viewed by such laws as having suffered no cognizable loss of public confidence.³⁷ These concepts, best described as "recognizable interest," illustrate the legal attempts to create principles which satisfy the logical conscience. Yet, how can anyone really believe that attacks upon "The Negroes" do not undermine the aggregate public confidence?

A clearly defined economic-property interest rationale developed in the early part of this century and, because of it, the courts refused to listen to defamation suits brought by non-

³² 196 Ore. 1, 246 P. 2d 509 (1952).

³³ *Noral v. Hearst Publications*, 40 Cal. App. 2d 348, 104 P. 2d 860, 863 (1940). In a case involving merely Detroit trading stamp concerns, not a large group, recovery was denied: *Watson v. Detroit Journal Co.*, 143 Mich. 430, 107 N. W. 81 (1906).

³⁴ *Chapa v. Abernathy*, 175 S. W. 166 (Tex. Civ. App. 1915).

³⁵ *Kenworthy v. Journal Co.*, 117 Mo. App. 327, 93 S. W. 882 (1906).

³⁶ *Kassowitz v. Sentinel Co.*, 226 Wis. 468, 277 N. W. 177 (1938); *Zanker v. Lackey*, 32 Del. 588, 128 A. 373 (1925); *Blaser v. Krattinger*, 99 Ore. 392, 195 P. 359 (1921). Contra: *Hardy v. Williamson*, 86 Ga. 551, 12 S. E. 874 (1891).

³⁷ *Lewis, Individual Member's Right to Recover for a Defamation Leveled at a Group*, 17 U. Miami L. Rev. 519 (1963); *Comment, Class Defamation—Scurrilous Matters in Mails*, 6 Villa. L. Rev. 525 (1961). See also: *Belton, The Control of Group Defamation: A Comparative Study of Law and its Limitations*, 34 Tulane L. Rev. 469, 470, 480 (1960); *Whittenberg, Individual Recovery for Defamation of a Group*, 15 Ohio St. L. J. 273 (1954); *Note, Developments in the Law of Defamation*, 69 Harv. L. Rev. 875, 898 (1956).

profit associations³⁸ or unions. Although following World War I the courts did begin to see a collective economic interest in the possible decrease in dues-paying union membership confronted by defamatory remarks,³⁹ this theory has deteriorated and has been replaced by thoughts of the loss of community prestige to both the union and its membership.⁴⁰ Does this new thought presage the dawn of an "enlightened equitable era"? Will it apply to groups in which no common economic interest exists?

Inconsistent theories and outmoded concepts plague the injured plaintiff, yet none is more outrageous than the legal labyrinth created out of the "ascertainable person" element.⁴¹ The libeler or hatemonger does not hurt merely one person, but a multitude of people. He usually intends to do this, and then evade liability, with court sanction, on the grounds that he did not mean that "all Catholics support a foreign power" but only "some of" them. But recovery in the "some of" cases also is denied. The total legal effect is one of utter unreasonableness of law.

Our jurists view such a statement as "all Catholics owe their allegiance to a foreign power" as unobjectionable, on the additional rationale that "reasonable" readers will know that it does not *mean* "all," and that *they* would not take it literally.⁴² This means that if the reader himself does not directly apply the statement to the victim,⁴³ the defamation remains legally harm-

³⁸ *Stone v. Textile Examiners & Shrinkers Employer's Ass'n.*, 137 App. Div. 655, 122 N. Y. Supp. 460 (1910).

³⁹ *Finnish Temperance Society v. Finnish Socialistic Publishing Co.*, 238 Mass. 345, 130 N. E. 845 (1921); *New York Society for Suppression of Vice v. McFadden Publications, Inc.*, 129 Misc. 408, 221 N. Y. Supp. 563 (Sup. Ct. 1927). *Contra*: *A. D. A. v. Meade*, 72 Pa. D. & C. 306 (Com. Pl. 1950), where a Pennsylvania chapter of A. D. A. had to allege a pecuniary loss when accused falsely of being communist infiltrated.

⁴⁰ "If the business and credit of the Union be destroyed, as well as it might be by defamatory statements which falsely charged corrupt and dishonest acts by the Union, each of its 17,000 members is affected equally by the possible loss of position and the loss of protection and benefits furnished by the Union." (*Italics added.*) *Kirkman v. Westchester Newspapers, Inc.*, 261 App. Div. 181, 24 N. Y. Supp. 2d 860, 863 (1941); *aff'd*. 287 N. Y. 373, 39 N. E. 2d 919 (1942).

⁴¹ *Ewell v. Boutwell*, 138 Va. 402, 121 S. E. 912 (1924).

⁴² *Salmond, Torts*, 405 (9th ed. 1936).

⁴³ *Julian v. American Business Consultants, Inc.*, 137 N. E. 2d 1 (N. Y. App. 1956). The fallacy in this reasoning was pointed out by Judge Field's dissent at page 16:

"As reason and decision make plain, a publisher may not brand his
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less. Moreover, our judges attribute other idealistic and benevolent attributes to our hypothetical reader, such as:

The most effective restraint upon the abuse of that freedom (of discussion and criticism in religious and public affairs) is in the *good taste* of the participants, or, if that fail, as it often does, in the knowledge that defamatory and abusive attacks are self-defeating." (*Italics added.*)⁴⁴

Going beyond the "reasonable man" test, the courts have viewed our hypothetical statement as *opinion* or *comment*⁴⁵—merely another innocuous contribution in the marketplace of ideas! A recent case of otherwise actionable libel of a labor union by a newspaper publisher was dismissed because

It is better for the public welfare that some occasional injury to an individual arising from a general censure . . . if his group go without remedy than that free public discussion of questions of public interest be checked.⁴⁶

It is clear that our common law of defamation has unfailingly followed a "sticks-and-stones" philosophy, and almost uniformly has thwarted honest attempts to silence the evil speaker. This dilemma was pointed out by Justice Jackson in *Kunz v. New York*:⁴⁷

Jews, many of whose families perished in the extermination furnaces of Dachau or Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have burned. Of course, people might pass this speaker by as a mental case, *and so*, they might file out of a theater in good order at the cry of fire. But in both cases there is a genuine likelihood that someone will get hurt.⁴⁸

As for the philosophy in particular:

We can at least eliminate as over optimistic the belief that statements which defame large groups are mere idle

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victim with suspicion and then avoid liability by attempting to foist upon the reader the burden and responsibility of ascertaining whether or not there is anything to the charge. . . Where the general tenor of the publication is such that it may be fairly read as casting a high degree of suspicion on every one of the persons listed, the mere suggestion that some of those named may not fall within the objectionable category cannot suffice, per se, to shield the defendant from liability."

⁴⁴ *People v. Edmonson*, 168 Misc. 142, 4 N. Y. Supp. 2d 257 (1938).

⁴⁵ *Post Publishing Co. v. Hallam*, 59 F. 530 (8th Cir. 1894).

⁴⁶ *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 104 P. 2d 880 (1940).

⁴⁷ The case involved a public speaker denouncing Jews as "Christ-killers who Hitler should have finished off." 340 U. S. 290, 95 L. Ed. 280, 71 Sup. Ct. 312 (1951).

⁴⁸ *Id.* at 330.

blathering and do no harm to the individuals. This belief is the adult variant of the child's "Sticks and stones can break my bones, but names can never hurt me"—a song never sung by any child who is not smarting under the hurt.⁴⁹

Criminal Law-Federal Legislation

To say that Capitol Hill is insensitive to the pressures of discrimination and defamation would be a naive misunderstanding of political reality. In spite of this, Congressional attempts to curb the evils of group defamation nurtured by our common law, present a picture of utter futility. Fruitlessly, bills to curb hate literature through group libel legislation have been introduced into every Congress since 1947, and before that in 1943.⁵⁰ Thirty-one attempts were made, and a few did get out of committee. The rest died there. Of those which reached a vote, the only ones to become law have made it an offense to intentionally put libelous, scurrilous, or defamatory matter on an envelope, an outside mail cover, or a post card,⁵¹ or to mail indecent articles

⁴⁹ Riesman, *Democracy and Defamation: Control of Group Libel*, 42 *Columbia L. Rev.* 727, 771 (1942).

⁵⁰ 1943, 78th Congress: Dickstein Resolution, H. J. Res. 49 (To declare certain papers, pamphlets, books, pictures, and writings nonmailable), received no action; H.R. 2328, received no action.

1947, 80th Congress: H.R. 2848 (To suppress the evil of anti-semitism and the hatred of any race because of race, creed, or color), received no action.

1949, 81st Congress: H.R. 2269 (To make unlawful the transportation or importation of false and defamatory statements designed to arouse inter-group conflict); H.R. 2270-73.

1952, 82nd Congress: H.R. 7717-19; H.R. 7723; H.R. 8033.

1953, 83rd Congress: H.R. 168; H.R. 3154; H.R. 10286.

1955, 84th Congress: H.R. 683; H.R. 5418; H.R. 7427; H.R. 10294; S. 446.

1957, 85th Congress: H.R. 883; H.R. 3662.

1959, 86th Congress: H.R. 1154; H.R. 1934; H.R. 3127.

1961, 87th Congress: H.R. 521; H.R. 610; H.R. 1034.

1963, 88th Congress: H.R. 535; H.R. 1104.

Source: Legislative Reference Service, Library of Congress; Proposed Federal Group Libel Legislation, House Judiciary Staff Report, 15-18 (Feb. 1963). Terminology of current proposal.

H.R. 535 indicates its scope. It is limited to amending title 18 of the criminal code declaring certain papers, etc., nonmailable.

"That . . . all 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 nonmailable matter, and shall not be conveyed in the mails, or delivered from any post office . . . and shall be withdrawn. . . ."

For a review of futile legislative attempts see Tanenhaus, *Group Libel*, 35 *Cornell L. Q.* 261 (1950).

⁵¹ 62 Stat. 782 (1948); 18 U. S. C. § 1718 (1958).

which tend to incite arson, murder, or assassination.⁵² These may have been political expedients, as they come nowhere near scratching the surface of the main problem, and appear to be battles against straw men.

Congress, in the past several sessions, has been unable to act quickly even on matters of immediate national urgency. It unhappily must be assumed that group defamation bills will remain bogged down in committee. The hope that the obviousness of the evil might evoke federal regulation has been further weakened by the effects of two advisory committee reports.⁵³ It was in the President's Committee on Civil Rights that this equitable gem was put forward:

We have considered and rejected proposals which have been made to us for censoring or prohibiting material which defames religious or racial minority groups. Our purpose is not to constrict anyone's freedom to speak; it is rather to enable the people to better judge the true motives of those who try to sway them. . . .⁵⁴

It would be fair to conclude from this that, at the national level, an individual's rights, and their equal protection under law, must bow to wholesale libel clothed in the glorious vestments of open discussion!

State Legislation

Some states have attempted to adopt some form of group libel law. Generally these have sought to control defamation of specific groups.⁵⁵ Such enactments have been tested by the courts, but in a 15 year period, starting in 1915, there were five major cases⁵⁶ which indicated no clear trend. In the *Alum-*

⁵² 62 Stat. 768 (1948); 18 U. S. C. § 1461 (1958).

⁵³ The President's Committee on Civil Rights, "To secure these rights," 57 (1947); Commission on the Freedom of the Press, 1 Chafee, Government and Mass Communication, 129 (1947).

⁵⁴ President's Committee, *id.* at 52.

⁵⁵ Indiana Stat. § 10-904-14 (Burns 1933), anti-racketeering aimed at Ku Klux Klan; New Mexico Stat. Ann. ss 41-2725-7 (1941), limited to attacks on religious and fraternal orders; W. Va. Code Ann. ss 6109 (1949), restricted to libelous pictures and theater performances; Conn. Rev. Stat. c. 417 ss 8376 (1949), applies only to group libel in advertisements; Nevada Comp. Laws ss 10110 (Hillyer 1929), broad and weak definition; Mass. Gen. Laws c. 272 ss 98 c (Supp. 1950); Ill. Rev. Stat. c. 38 ss. 471 (1951); N. J. Rev. Stat. Title 2 ss 157 B (1937).

⁵⁶ *People v. Turner*, 28 Cal. App. 766, 154 P. 34 (1915); *Crane v. State*, 14 Okla. Crim. 30, 166 P. 1110, 19 A. L. R. 1455 (1917); *People v. Gordon*, 63 Cal. App. 627, 219 P. 486 (1923); *People v. Speilman*, 318 Ill. 482, 489, 149

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*baugh*⁵⁷ decision, libel involving the purported oath of the Knights of Columbus, entitled "To Murder Protestants and Destroy American Government," was prosecuted successfully under the Georgia Penal Code.⁵⁸ Recovery by the plaintiff, a member of a group the size of a metropolitan religious fraternal order, is indeed extraordinary. Yet, membership in such a group is not nearly as clear to the public consciousness as membership in a group based upon skin color. If this defamation is deemed likely to stir up sufficient hatred, contempt and ridicule among those who know of the plaintiff's membership, to make necessary criminal prosecution, then defamation of a Negro, whose link with a group does not depend on special knowledge, certainly should be actionable.

State statutes generally have not weathered the legal onslaught. The courts find excuses for denying recovery in such questions as what is substantial danger to community welfare,⁵⁹ and in constitutional guarantees.⁶⁰ It seems that, regardless of the degree of awareness in our legislatures, our jurists are afraid to face and solve the group defamation problem.⁶¹ This is well

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N. E. 466 (1925); *Alumbaugh v. State*, 39 Ga. App. 559, 147 S.E. 714 (1929). The *Speilman* case dealt with a charge by a German language newspaper that 85% of the crime in St. Louis was caused by war veterans, and that membership in the American Legion consisted of "refuse, tramps, vagabonds and bums, as well as criminals." In upholding conviction for libel, the court said, "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 libel is punishable even though its application to individual members of a class or group cannot be proved."

⁵⁷ *Id.*

⁵⁸ Ga. Penal Code 1910 sec 340 (Now title 26 sec 2101, Gen. Code of 1933).

⁵⁹ *Tanenhaus, op. cit. supra* n. 50, at 278.

⁶⁰ *State v. Klapprott*, 127 N. J. L. 395, 22 A. 2d 877, 880 (1941) wherein the statute against public utterance of hatred, abuse, or violence against any racial or religious group was declared too vague and general to avoid fatal collision with constitutional guarantees. If left to a jury, the decision on such a matter would be too difficult:

These are abstractions. Is it possible to say when ill-will becomes hatred or when unworthy, scurrilous or false statements become abuse? As well try to point to a spot within a triangle which is equidistant from every point in the area enclosed as say when hatred takes the place of some lesser emotion. . . We do not think such phases of human reaction or emotion can be made a legitimate standard for a Penal Code.

⁶¹ One reason for their failure to come to grips with the problem is that where a defamation is issued about a large group the court is faced with not only the statement made, but also the motive behind it. To resolve such

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illustrated by one libel action that involved a *named* auto body shop.⁶² The court there could not comprehend that libel of the business was, in effect, a defamation of the owner-operator.

The only important decision to uphold a broad defamation statute was the famous *Beauharnais* case.⁶³ In it the United States Supreme Court promulgated a sweeping defense of individual rights by recognizing a clear case of class defamation. For the majority, Mr. Justice Frankfurter said

Long ago this court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs . . . It is not within our competence to confirm or deny claims of social scientists as to dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrogant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded to him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the afflicted individual may be inextricably involved.⁶⁴

The hope that this long awaited legal ruling stirred in the hearts of defamation victims was vain. The decision has produced no new similar legislation,⁶⁵ nor has it produced increased litigation.⁶⁶ In total effect, *Beauharnais* exists in a vacuum. The

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litigation the court is immediately faced with extreme subtleties of meaning and interpretation. It also must distinguish undesirable invective from socially valuable comments. Comment: Group Libel, 41 Calif. L. Rev. 290, 296, 298 (1953).

⁶² *Newspapers, Inc. v. Matthews*, 171 Tex. 284, 339 S.W. 2d 890 (1960). Contra: *Young v. New Mexico Broadcasting Co.*, 60 N.M. 475, 292 P. 2d 776 (1956).

⁶³ *Beauharnais v. Illinois*, 343 U. S. 250, 96 L. Ed. 919, 72 S. Ct. 725 (1952). The way was prepared for this decision by an earlier decision regarding the same statute: *Bevins v. Prindable, Sheriff* (D. C. E. D. Ill.) 39 F. Supp. 708 (1941) affd. 314 U. S. 573 (1941), which involved the conviction of 30 Jehovah's Witnesses for distributing material defamatory to the Roman Catholic Church.

⁶⁴ *Beauharnais*, *id.*, at 930.

⁶⁵ Belton, *The Control of Group Defamation*, *op. cit. supra* n. 37, at 309.

⁶⁶ Note: *Developments in the Law of Defamation*, *op. cit. supra* n. 37, at 901.

only exception arose this year. *State of Louisiana v. Garrison*,⁶⁷ involved the criminal prosecution of a district attorney for use of the term "racketeer influences" in speaking of eight unnamed criminal district judges. The Court held that the term imputed fraud, deceit, or trickery, thereby constituting a personal attack upon their integrity and honesty, and exposed them to hate, contempt, and ridicule. This conviction may be a step forward from *Beauharnais*. However, the limited number of people involved (eight) raises grave doubt about any real progress. In addition, the Court by-passed any consideration of the element of ascertainability.

The "clear and present danger" doctrine,⁶⁸ permitting state preservation of public order, seemed to be well adapted to defamation law. Yet, the Supreme Court admitted that the doctrine defied decisive application, and quite possibly would be applicable only in clear cases of war or imminent invasion.⁶⁹ Even when faced by a Chicago riot initiated by a racist follower of Gerald L. K. Smith, in which bricks smashed through auditorium windows and blood was shed in the street, the Court still could find no "clear and present danger" sufficient to justify touching the right of "free speech."⁷⁰ As a direct consequence of this finding, our cities are unable to protect themselves from virtually certain violence threatened by speeches of George Lincoln Rockwell of the American Nazi Party.⁷¹

This view of state legislative efforts to curb group defamation is disheartening. Each new attempt has been met with another reason why nothing can be done. For example, it was said that the very lawsuit itself might prove damaging to the injured group.

. . . the publicity that would be given to the prosecution of such a suit might very readily serve to enkindle latent

⁶⁷ 244 La. 787, 154 S. 2d 400 (1963).

⁶⁸ *Schenck v. U. S.*, 249 U. S. 47, 63 L. Ed. 470, 39 S. Ct. 249 (1919).

⁶⁹ *Cantwell v. Conn.*, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900 (1940).

⁷⁰ *Terminiello v. Chicago*, 337 U. S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1948). For a discussion of the retirement of the doctrine see: Corwin, *Bowing Out: Clear and Present Danger*, 27 *Notre Dame Lawyer* 325 (1952).

⁷¹ "A community need not wait to be subverted by street riots and storm-troopers; but, also, it cannot, by its policemen or commissioners, suppress a speaker, in prior restraint, on the basis of news reports, hysteria, or inference that what he did yesterday he will do today." *Rockwell v. Morris*, 12 A. D. 2d 272, 211 N. Y. Supp. 2d 25, 35 (Sup. Ct. 1961). Compare *Rockwell v. D. C.*, 172 A. 2d 549 (D. C. 1961).

prejudices against the defamed group and in behalf of the defendant, and a series of suits prosecuted by the same class might easily lead to increased hostility against that class, since public opinion might rebel against singling out that class for protection. Furthermore, the mere possibility of an acquittal will serve as a deterrent to a group libel suit since an acquittal would appear to many to be an official vindication of the defendant's conduct. And even a conviction, if as infrequent as in the past might evoke public sympathy rather than contempt, so that hatemongers would become martyrs and their causes would become enhanced. Thus, a few cases of unwise convictions, a few martyrs, a few exaggerated headlines could more than cancel out the good intention of the law.⁷²

The implication is that the solution is to bury our heads in the sand.

The courts also have said that the importance of free speech outweighs any sort of reasonable restraint.⁷³ Yet, the First Amendment was never intended to grant immunity to every possible use of language.⁷⁴ This restricted concept has been the basis for banning obscenity because it might "encroach upon the limited area of more important interests."⁷⁵ If obscenity encroaches upon important interests, then certainly group defamation encroaches upon them too, with even more corrupting effects. Certainly at least one restraint should be read in this Amendment: The freedom should be tested at least in terms of conceivable social utility.⁷⁶

But the clear and present danger doctrine, as has been often pointed out,⁷⁷ not only provides no definite guide for judicial conduct, but is also exceedingly naive and archaic in its conception of the processes of opinion formation. It assumes amounts of rationality and orderliness in discussion which simply do not exist in the modern world—if indeed they ever did. Also, it completely ignores the rise of mass communication media, which give to vilifiers weapons never

⁷² Comment: Class Defamation—Scurrilous Matter in the Mail, 6 *Villa. L. Rev.* 525, 530 (1961).

⁷³ Note, Group Libel and Criminal Libel, 1 *Buffalo L. Rev.* 258, 262 (1952).

⁷⁴ *Frohwerk v. U. S.*, 249 U. S. 204, 206, 63 L. Ed. 561, 39 S. Ct. 249 (1919); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942), involving profane, libelous, and insulting words which by their very utterance inflict injury.

⁷⁵ *Roth v. U. S.*, 354 U. S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957).

⁷⁶ Leflar, *Legal Remedies for Defamation*, 6 *Ark. L. Rev.* 423, 453 (1952).

⁷⁷ Latham, *The Theory of the Judicial Concept of Freedom of Speech*, 52 *J. of Pol.* 637 (1950).

before possessed with which to carry on large scale, organized campaigns of defamation. It ignores the present urbanization of American society, which raises problems of the maintenances of public order and also produces a close contact between the social groups, which did not exist on such a scale in an agrarian society. Finally, it ignores the fact that in an industrial society, systematic vilification of social groups is one of the elements which leads to various economic discriminations which are a too prevalent feature of American life.⁷⁸

Very early in the history of the common law, reputation was singled out as an important individual right.

The security of his reputation or good name from the arts of detraction and slander are rights to which every man is entitled, by reason and natural justice; since without these, it is impossible to have the perfect enjoyment of any other advantage or right.⁷⁹

This vested interest in reputation and a fair name is the legal basis of the action for defamation.⁸⁰ As such, it dictated the direction of both the criminal and common law that have led to today's quandary.⁸¹

Personal humiliation from group slander is not uncommon. When a race, business, profession or nation is publicly slandered and when a member of the slandered group is present and known to others present to be a representative of the group, person humiliation is inevitable. *It is not actionable, however.*⁸² (Italics added.)

The law must overhaul its dusty concepts of individual rights and bring them abreast of social and scientific progress. Reputa-

⁷⁸ Beth, Group Libel and Free Speech, 39 Minn. L. Rev. 167, 174 (1955).

⁷⁹ Blackstone, Commentaries, 134 (Cooley, Am. Ed.). Reputation and good name appear in Wyckliffe's *De Civili Dominio*, and although highly idealistic in concept, it is a tacit recognition of its importance per se: "It is untrue then that men, when they speak falsely, blacken the fame of a consistently good man, for the fame is written in the book of life, and the good man is a 'mirror unspotted'."

⁸⁰ Harper, Torts, § 235 (1933); Black's Law Dictionary, 505 (4th ed. 1951).

⁸¹ Our criminal defamation law is the product of twin concepts. The initial criminal concept was to permit recovery for injury to the reputation of the individual: *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217 (1837); whereas the Common Law placed its primary emphasis upon the libel's tendency to provoke breaches of the peace: *King v. Griffin*, Sess. Cas. 74, 93 Eng. Rep. 75 (1732); *King v. Summers and Summers*, 1 Lev. 139, 83 Eng. Rep. 337 (1664); *State v. Haskins*, 109 Ia. 656, 80 N. W. 1062 (1899); *Commonwealth v. Syliakys*, 254 Mass. 424, 150 N. E. 190 (1926); *State v. Pierce*, 140 Ore. 1, 12 P. 2d 320 (1932).

The emphasis of one concept over the other can be seen in many state enactments which today provide for prosecution for offenses against the person (e.g., Calif., Okla., Ga.); Tanenhaus, *op. cit. supra* n. 50 at 273.

⁸² *Macauley v. Bryan*, 75 Nev. 278, 282, 339 P. 2d 377, 378-9 (1959).

tion involves the reactions of others to the comments of still others.⁸³ Contemporary concepts of the nature of a man's reputation are available and should be adopted by the courts.

A person's standing in the community with his friends, neighbors—and prospective acquaintances—is of great value and he is entitled to have his relations with them unimpaired by defamatory harms. The regard of those around him more completely conditions his behavior than any other one factor, and it likewise adds more to his stature as a person than any other one factor. This interest has long been identified and valued as reputation, or less accurately, as character. It is an incident of group life and is found in all other group relations as in trade, family, profession, and political groups. It takes on the color of the particular group and is given different degrees of protection accordingly. The doctrines of slander and libel have in large part been developed about the protection of community relations.⁸⁴

The courts must realize that repeated lies by a defamer instill an unhealthy doubt about the reputation of those defamed, in the minds of their acquaintances, present or future.⁸⁵ It is indicative of a community's cultural, social and political quality to observe how an individual values his reputation, its place in the community scheme of values, and most particularly, the type of protective measures provided for it.⁸⁶

Measured by this standard, American society is little better than barbaric.⁸⁷

The Price of Our Legal Insanity

Can anyone ever forget the fantastically swift spread in popularity of the "hula-hoop" or rock-n-roll? The significance of these short-term national manias should not be overlooked.

The study of these contagious practices is of psychologic importance because our technical means of communi-

⁸³ Probert, *Defamation, A Camouflage of Psychic Interests, etc.*, 15 Vand. L. Rev. 1173, 1176-77 (1962).

Psychologically, "... 'he' does not end at his skin; 'he' is not to be most fully understood by talking about him as you see him. What 'he' is involves a product, so to speak, of him and others. 'He' is a function of his group identities and interrelations, as well as his internal make-up." *Id.* at 1179.

⁸⁴ Green, Malone, Pedrick and Rahl, *Injuries to Relations*, 332 (1959).

⁸⁵ Maslow, *Group Libel Reconsidered*, Congress Weekly (Jan. 23, 1948).

⁸⁶ "In making an appraisal of any society it is pertinent to ask what individuals are protected against what kinds of statements and by what legal mechanisms." Donnelly, *History of Defamation*, 1949 Wis. L. Rev. 99 (1949).

⁸⁷ Cultural lag—the malady; persistence of the remnants of feudal ideologies in the face of modern economic and technological progress—the causation. Loewenstein, *Christians and Jews*, 88 (Internatl. Univ. Press 1951).

cation—press, radio, and T.V.—have now increased their effect to the point where nearly everybody is within reach of an infectious source. The mind of man is never isolated anymore. His feelings, thinking, and creating are bound to mankind by a million ties of mutual influence.⁸⁸

More gruesome examples of such mental contagion are the recent rash of painted swastikas on synagogues, churches, and public buildings, public speeches defaming Negroes as a race, the pre-World War II spread of anti-semitism.⁸⁹ Such phenomena or anti-something mania are linked with group defamation, while group defamation and discrimination are inextricably connected with a bigger problem, prejudice,⁹⁰ which has been recognized as a mental infection and social mental disease.⁹¹ It is a problem of our times for which everyone has a theory, but no one an answer.

Racial prejudice is a powerful disruptive social force breeding violence and harming every community it touches; and its influence is becoming increasingly apparent in many parts of the world. There is every need therefore to understand its origins, to prevent its spread, and to control its manifestation.⁹²

⁸⁸ Meerloo, *Mental Infection and the Swastika*, 2 *Amer. Practitioner* 59A (April, 1960).

⁸⁹ Loewenstein, *op. cit. supra* n. 87 at 44. In the middle ages dance epidemics spread throughout Europe following the Plague and Black Death. Such manias have been attributed to some latent mental anxiety which incites human beings to look for a new emotional expression and exaltation. Meerloo, *op. cit. supra* n. 88.

⁹⁰ Maslow, *The Law and Race Relations*, 244 *The Annals* 75, 80 (Mar. 1946); Blake-Palmer, *Group Prejudice*, 2 *Med. J. of Australia* 813, 814 (Dec. 1, 1956): Prejudice is the mental state corresponding to the practice of discrimination; Bird, *a consideration of the Etiology of Prejudice*, 5 *J. Amer. Psychoanalytic Ass'n.*, 490, 506 (1957). See generally, Simpson & Yinger, *Racial & Cultural Minorities*, etc. (1953); Riesman, *Democracy and Defamation: Fair Game and Fair Comment I and II*, 42 *Columbia L. Rev.* 1085, 1282 (1942).

⁹¹ Adorno, Frenkel-Brunswik, et al., *The Authoritarian Personality*, 7 (1950); Loewenstein, *op. cit. supra* n. 87 at 19.

⁹² Comment: *Racial Prejudice*, 1 *Lancet* (London) 81 (Jan. 10, 1953), in which the need for more research is pointed out.

"The need for an understanding of the dynamics of prejudice has no equivalent in importance in the social sciences. In no other aspects of interpersonal and intergroup relationships is there a more urgent need for social sciences to 'get out and do something.'"

"Prejudice is not a new subject. Yet, we are ill adapted to cope with the problems of prejudice which have grown increasingly acute in the social evolutions of recent years." Lippitt & Radke, *New Trends in the Investigation of Prejudice*, *The Annals*, *op. cit. supra* n. 90 at 167.

Manipulation of prejudice in order to obtain power, of course, also is to be expected.

Mental infection through rumors and defiling habits can be used as an instrument of political aggression and seduction. It can be used to instill fear, to exhaust the thinking of a population that has lost its mental bearings.⁹³

In America, today, hot houses of prejudice are being built daily, deliberately to instigate group tensions:

. . . the way is always open to the clever manipulator to exploit the ready made block of votes which such a situation opportunely favors. There is thus a vested interest in preserving the life of differences which divide sections of the community into more easily managed groups.⁹⁴

The skeptic will scoff at the suggestion of this latent power, but he cannot deny that in this country group defamation flourishes, and as such, furthers anti-democratic ideas⁹⁵ by attacks upon defenseless minority groups.

Where a large number of people suffer from various forms of social mental diseases, whether victims or hatemongers, our communities' whole health and effectiveness is impaired.⁹⁶ In a study⁹⁷ of the American Negro, it was found that prejudices in the forms of discrimination and class distinctions created intra-psychic accommodations. Much of this marginal adaptation eventually harmed the community by precipitating derangements in family structure, in the individual's development potential, and in group cohesion. Each of these is a real loss, measurable in part by economic progress (or lack thereof) and by *per capita* income. Another measure is the crime rate, which in no small part is influenced by an individual's self-assessment of his place in a hostile society.⁹⁸

⁹³ Meerloo, *op. cit. supra* n. 88 at 60A. "Political movements can make use of the simple knowledge of the rules of mental infection to merge masses and audiences together and to make them do what the magician-dictator wants them to do." *Id.*

⁹⁴ Blake-Palmer, *op. cit. supra* n. 90 at 816.

⁹⁵ Donnelly, *The Law of Defamation: Proposals for Reform*, 33 Minn. L. Rev. 609 (1949).

⁹⁶ Kardiner & Ovesey, *The Mark of Oppression* 370 (1951) (harm to the victim); Loewenstein, *op. cit. supra* n. 87 at 18: "Efficiency is known to be impaired in people who are mentally sick. This is also true of the social mental diseases. People in the pathological group of anti-Semites are prevented by their obsession from seeking rational and permanent solutions to their social and economic problems."

⁹⁷ Kardiner & Ovesey, *id.* at 386. (Ed: there is a great need for similar studies into the effects of prejudice upon other victimized groups.)

⁹⁸ *Id.* at 304.

Certainly, a few rational men in legal history have recognized the evil and danger inherent in vicious attacks upon group reputation. But it has been only within the last forty years that the social sciences have disclosed the shocking scope of human injury inflicted by all forms of prejudice.^{98a} These studies will be reviewed, keeping in mind the interrelation of defamation-discrimination and prejudice. The latter, a form of mental sickness, is nurtured by the former, whether viewed by the victim or the aggressor.

The outstanding current studies usually have involved Negro or Jewish minorities. They have established that prejudice and segregation force middle-class Negroes to realize that even the able and ambitious are prevented from achieving any real degree of the success of which they are individually capable and deserving.⁹⁹ They build up feelings of bitter resentment, and must face continuing frustration in job discrimination.¹⁰⁰ It is even worse for lower-class Negroes, who face the actual inability to make a living.¹⁰¹

. . . No private virtue can compensate anyone to the extent of being able to counteract the impediments of self-realization. The Negro, being a member of our society, cannot invent new objectives for personal endeavor. The only objective we can think of that would not run afoul of the white man's discrimination would be *Yogism*. This type of adaptation happens not to be in vogue anywhere in Western Society;

. . . Being a member of a despised group would, by itself, be damaging to self-esteem, as it is with Jews, or any minority group. The greatest damage, however, is done by the impediments to opportunity.¹⁰²

Faced with constant frustrations to achievement, the Negro builds up anxiety, rage and hate, which he must prevent from

^{98a} Bogardus, *Immigration & Race Attitudes* (Heath, 1928); Freud, *Civilization and its Discontents* (London: Hogarth 1930): the manifestation of antagonism toward minority groups—the scapegoat theory of prejudice; Ichheiser, *Fear of Violence, etc.*, of *Sociometry* 376 (1944); Frenkel-Brunswick & Sanford, *Some Personality Factors in Anti-Semitism*, 20 *J. Psychol.* 271 (1945); Allport & Kramer, *Some Roots of Prejudice*, 22 *J. Psychol.* 9-39 (1946).

⁹⁹ Thompson, *The Formation of Social Attitudes*, 32 *Amer. J. Orthopsychiatry* 74, 76 (Jan. 1962).

¹⁰⁰ Adams, *Segregation-Integration: Patterns of Culture and Social adjustments*, 28 *Amer. J. Orthopsychiatry* 14, 18 (1958).

¹⁰¹ *Ibid.*

¹⁰² Kardiner & Ovesey, *op. cit. supra* n. 96 at 369.

initiating physical motor expression,¹⁰³ i.e., violent outbursts.¹⁰⁴ This forces him into defensive psychological adjustments which are unnatural, and into damaging mental postures, such as self-hatred and depression.¹⁰⁵ Some retreat into submissiveness and compliance, adopting the "Uncle Tom" attitude,¹⁰⁶ the role of one who retreats before a white and expresses humble gratitude for discarded clothing.

The effect of all these security operations is insidious and terribly damaging not only to the self-esteem but to the spontaneity, freedom of expression and creativity of the Negro. His productivity and generativity are usually seriously damaged, and by middle age despair has given way to resignation and apathy. Much of his life is role stereotyped, ritualistic, and minimally expressive of genuine feelings.¹⁰⁷

The Negro child in our discriminatory-defamatory society has been found to build up anxieties when his parents reflect the tensions of race relations.¹⁰⁸ He is soon burdened with an "inescapable inferiority feeling, a fixed ceiling to his aspiration level . . . and a sense of humiliation and resentment which can entail patterns of hatred against himself and his own group, as well as against the dominant white group."¹⁰⁹

The result of the continuous frustrations in childhood is to create a personality devoid of confidence in human relations, of an eternal vigilance and distrust of others. This is a purely defensive maneuver which purports to protect the individual against the repeatedly traumatic effects of disappointment and frustration. He must operate on the assumption that the world is hostile.¹¹⁰

All of these deep-seated, long-lasting injuries, inflicted by our society's failure to extend any group protection to rights of

¹⁰³ *Id.* at 304.

¹⁰⁴ Lief, *An Atypical Stereotype of the Negroes' Social Worlds*, 32 *Amer. J. Orthopsychiatry* 86, 87 (Jan. 1962).

¹⁰⁵ Kardiner & Ovesey, *op. cit. supra* n. 96 at 304-5: Low self-esteem has several forms of compensation within the victim (1) Apathy, (2) Hedonism, (3) Living for the moment, (4) Criminality.

¹⁰⁶ Lief, *op. cit. supra* n. 104.

¹⁰⁷ Lief, *op. cit. supra* n. 104 at 88.

¹⁰⁸ Adams, *op. cit. supra* n. 100 at 14.

¹⁰⁹ Bernard, *School Desegregation—Some Psychiatric Implications*, 21 *Psychiatry* 149, 151 (1958); it is Doctor Bernard's conclusion that racial prejudice has very bad consequential effects upon mental health. (Ed.: the contribution of wholesale group defamation cannot be denied.)

¹¹⁰ Kardiner & Ovesey, *op. cit. supra* n. 96 at 308.

reputation and name, are self-perpetuated, i.e., vicious circles.¹¹¹ As such, they are traumatic occurrences which produce symptoms of mental illness. Negro tensions of repressed aggression have produced migrainous headaches and hypertension.¹¹² Other observed forms of mental illness have been psychoneurotic or psychopathic behavior and psychosomatic disease.¹¹³ In the Jewish group, there is a comparatively high incidence of anxiety neuroses, schizophrenia, and manic-depression, attributed to frequent exposure to psychologically traumatic prejudicial experiences.¹¹⁴

If there were more studies into effects upon victims, the variety of substantial injuries would certainly be greater. It has been known for some time that psychic stimuli cause traumatic neuroses, miscarriage, and transient sickness.¹¹⁵ A psychological trauma can provoke or aggravate bronchial asthma, DeCosta's syndrome,¹¹⁶ angina pectoris, hypertension, rheumatoid arthritis, peptic ulcer, gastritis,¹¹⁷ diabetes mellitus, anorexia nervosa,¹¹⁸ and psoriasis.¹¹⁹

¹¹¹ "The heaviest adaptational load is carried by the lower-class Negroes... Here, not only the personal adaptation of each individual suffers, but an endless number of vicious circles are started that can never end anywhere because they are self-perpetuating." Kardiner & Ovesey, *op. cit. supra* n. 96 at 384-5; Middle and Upper Class Negroes: "... the obstructions to the accomplishments of white ideals leads to increase in aggression, anxiety, depression of self-esteem, and self-hatred. This compels him to push harder against the social barriers, to drive himself harder, and ends with more frustration and more self-hatred." *Id.* at 316.

Self-perpetuating conditions also were found regarding the Jewish minority: Loewenstein, *op. cit. supra* n. 87 at 78.

¹¹² Kardiner & Ovesey, *op. cit. supra* n. 96 at 305.

¹¹³ Adams, *op. cit. supra* n. 100 at 15.

¹¹⁴ Loewenstein, *op. cit. supra* n. 87 at 131.

¹¹⁵ Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193, 304 (1944).

¹¹⁶ Breathlessness accompanied by a sense of fatigue, pain over the heart, and heart palpitation.

¹¹⁷ Impairment of the power and function of digestion, and inflammation of the stomach.

¹¹⁸ A psycho-nervous condition in which the patient loses his appetite and systematically takes but little food, thereby becoming extremely emaciated.

¹¹⁹ Smith, *op. cit. supra* n. 115 at 217.

"Substantial numbers of persons about us certainly have subnormal resistance for one reason or another, whether this is due to transient sickness, pregnancy, chronic disease, infirmities of old age, or special susceptibility of the nervous system or psyche. Even if such persons comprise no more than 5-10% of the general populace, one may argue that the group is large enough to require a prudent actor to anticipate their presence and to avoid conduct which exposes subnormal persons to a substantial risk of injury." *Id.* at 255.

This human suffering is very real today! It exists because our laws have failed to take cognizance of who was *hit* by the defamation, rather than who was *aimed at*.¹²⁰

A Possible Solution

Existent in our present laws is a legal concept which recognizes mental injury. Its value for group defamation litigation is untested, but it contains the metal for forging a powerful weapon. The original concept of right to privacy, born in a law review article which discussed relief afforded in defamation cases,¹²¹ has developed, despite some opposition,¹²² into a well-established legal protection of individual freedom against severe emotional distress.

One, who, without privilege to do so, intentionally causes severe emotional distress to another, is liable for the emotional distress and the bodily harm resulting.¹²³

To this theory must be added the principle of foreseeability and its relation to negligent acts.¹²⁴ The result of such union is a concept which recognizes as a compensable injury the intentional or negligent infliction of mental suffering.

Case development of this actionable tort, identified as the "insult and outrage cases," in opposition to "fright and shock

¹²⁰ Note, *Arnott v. College of Physicians & Surgeons of Saskatchewan*, 33 Can. B. Rev. 221-2 (1955); Riesman, *Democracy & Defamation: Control of Group Libel*, 42 Columbia L. Rev. 727, 768 (1942).

¹²¹ Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) "... modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." *Id.* at 196.

¹²² "Liability still cannot be extended to every trifling indignity . . . the plaintiff . . . must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." Prosser, *Intentional Infliction of Mental Suffering: a New Tort*, 37 Mich. L. Rev. 874, 887 (1939).

"No pressing social need requires that every abusive outburst be converted into a Tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1053 (1936).

¹²³ Restatement of Torts (1948) Supp. §§ 46, 616, comment, expresses the trend toward more protection in this field. Peace of mind is an interest of sufficient importance to receive protection against intentional invasions: *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N. E. 2d 157 (1961).

¹²⁴ *In re Arbitration between Polemis, et al. and Furness, Withy & Co., Ltd.*, 3 K. B. 560 (Ct. of App. 1921); *Palsgraf v. L. I. R.R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928).

cases,¹²⁵ began with extreme cases of murder.¹²⁶ It now encompasses more reasonable and common examples of infliction of mental suffering, such as a creditor's continuous stream of threatening letters,¹²⁷ and an illicit solicitation of sexual intercourse.¹²⁸

*Halio v. Lurie*¹²⁹ illustrates recovery of damages for conduct which went beyond all reasonable bounds of decency, thereby causing the victim mental anguish. The injury occurred when the defendant received and read, in front of her family, plaintiff's taunting and ridiculing letter. She suffered public shame and disgrace, and damage to her reputation, for which the New York Court found a valid cause of action, i.e., the intentional infliction of mental distress without physical impact.

Where, in *Schuman v. Schlein*,¹³⁰ a landlord inflicted mental distress through a series of acts designed solely to cause a sick couple to move out, a counterclaim to this effect stated a good cause of action. The court reiterated the concept that freedom from mental disturbance was a recognized and protected interest in New York State.¹³¹

A family of Puerto Ricans,¹³² who had contracted to buy a home, were threatened and frightened so as to cause them emotional shock, humiliation, sickness, and nervousness. The court declared such threats, uttered only to the vendor and by him communicated to the family, to be vicious and illegal.

Deliberate and malevolent conduct, albeit confined to words, is at least as serious a matter, requiring the protection of the law to even a greater degree.¹³³

¹²⁵ Lambert, Tort Liability for Psychic Injury, 41 B. U. L. Rev. 584 (1961). See generally, Note, 25 NACCA L. J. 116 (May 1960).

¹²⁶ Knierim v. Izzo, *supra* n. 123; Mahnke v. Moore, 197 Md. 61, 77 A. 2d 923 (1951), where a child was forced to watch the murder of her mother and suicide of her father.

¹²⁷ Barnett v. Collection Serv. Co., 242 N. W. 25 (Iowa 1932).

¹²⁸ Samms v. Eccles, 358 P. 2d 344 (Utah 1961); Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S. E. 2d 203 (1948).

¹²⁹ 15 A. D. 2d 62, 222 N. Y. Supp. 2d 759 (1961). The court found support for its decision in *Mitran v. Williamson*, 21 Misc. 2d 106, 197 N. Y. Supp. 2d 689 (1960), which concerned mental distress inflicted by receipt of salacious mail.

¹³⁰ 35 Misc. 2d 581, 231 N. Y. Supp. 2d 548 (Part I) (1962); the landlord called the tenant at extreme evening hours, threatened suit unless the victim consented to a rent increase, and installed his son and daughter-in-law on the floor above in order to create disturbing sounds late at night.

¹³¹ Cited in *Ferrara v. Galluchio*, 5 N. Y. 2d 16, 21, 176 N. Y. Supp. 2d 996, 999, 152 N. E. 2d 249, 252, 71 A. L. R. 2d 331 (1958).

¹³² Ruiz v. Bertolotti, 37 Misc. 2d 1067, 236 N. Y. Supp. 2d 854 (1962).

¹³³ *Id.* at 1069; *Scheman v. Schlein*, *supra* n. 130.

Again, the infliction of mental suffering was a recognized compensable tort.

This principle of law is being accepted elsewhere, *i.e.*, Florida¹³⁴ and Hawaii.¹³⁵ In Georgia,¹³⁶ an eleven year old girl recovered for mental suffering and shock when threatened by a collection agent. And in Iowa,¹³⁷ a court decreed that the "intent" did not have to be specifically directed at the victim if the act was intentional and the actor could reasonably have expected emotional distress to result.

The Iowa concepts of intent and foreseeability, together with the general action for infliction of mental suffering, should be molded and modified into an action designed to protect group defamation victims. It would change the legal viewpoint from "who was aimed at" to "who was *hit*"—the position which should have been adopted long ago for such cases. In light of the medical evidence about emotional distress, and realizing that nowhere else is there legal redress for such suffering, this cause of action is a virtual necessity. Its many advantages for meeting group defamation should be quickly realized.

Ascertainability no longer need vex the injured plaintiff when the law looks at *who was hit* by group defamatory utterances. The courts' "numbers game" would be finished, if the victim could establish his membership in the group and resulting injury.

Freedom of speech, clearly, is not the issue. And the oft-cited fear of a multiplicity of suits, the classic argument utilized against nearly every legal advance, would resolve itself into the problem of adequate proof.¹³⁸ Additionally, the proper case development of such a theory would place the liability for vicious anti-democratic outbursts where it rightfully belongs, on the heads of the hatemongers. Proof of damages could be handled by questioning the victim directly, about the effects of being subjected to hatred and ridicule, as was done in *State of La. v. Garrison*.¹³⁹

¹³⁴ *Slocum v. Food Fair Stores of Fla., Inc.*, 100 S. 2d 396 (Fla. 1958).

¹³⁵ *Fraser v. Morrison*, 39 Hawaii 370 (1952), wherein the court enumerated three elements constituting an action for the intentional infliction of mental suffering: (1) The act must be intentional, (2) unreasonable, and (3) the actor should recognize it as likely to result in illness.

¹³⁶ *Delta Finance Co. v. Ganakas*, 93 Ga. App. 297, 91 S. E. 2d 383 (1956).

¹³⁷ *Amos v. Prom, Inc.*, 115 F. Supp. 127 (D. C. Iowa 1953).

¹³⁸ *Halio v. Lurie*, *supra* n. 129 at 763.

¹³⁹ 154 S. 2d 400 (La. 1963).

. . . Regarding medical evidence . . . for the purpose of pleading, an allegation of the infliction of severe mental distress is sufficient. If there is a failure of proof of this allegation at the trial the cause will be defeated. The capability of the medical profession in the psychiatric field to determine if severe mental distress has been inflicted is today recognized. No longer are claims based upon such testimony deemed "fictitious and speculative."¹⁴⁰

Conclusion

The assassination of President Kennedy has made startlingly clear the urgency of the need for better law to check the bigots and hate and fear peddlers. It is hardly to be doubted that his assassin was "educated" to brutal hatred. The bigots and hate and fear mongers, whether of the communist, fascist, or whatever category, must be restrained by sound law. Otherwise they may destroy our society, and, quite possibly, the world.

The present condition of America's law of group defamation, and its evil consequences, constitute dangers to every civilized man. Regardless of how the Supreme Court disposes of the three cases now before it,¹⁴¹ all containing the crucial group defamation issue, there must be a new and sound legal answer to the question of how an unnamed member of a large group can be legally protected against group defamation, though no law ever can fully compensate for the suffering it has caused.

¹⁴⁰ *Scheman v. Schlein*, *supra* n. 130 at 552; *Battalla v. State*, 10 N. Y. 2d 237, 219 N. Y. Supp. 2d 34, 176 N. E. 2d 729 (1961).

¹⁴¹ *Fawcett Publications, Inc. v. Morris*, 377 P. 2d 42 (Okla. 1962), docket #741, defamation of a football team; *New York Times Co. v. Sullivan*, 273 Ala. 676, 144 S. 2d 25 (1962), docket #606, case #39, defamation of a police force; *Abernathy v. Sullivan*, 144 S. 2d 25 (Ala. 1962), docket #609, case #39, same as *New York Times*.