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Group Libel and Criminal Libel

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GROUP LIBEL AND CRIMINAL LIBEL

INTRODUCTION

Freedom of expression is the lifeblood of a democratic society. Without the right of the individual to convey his thoughts to others in the market place of free ideas, all other freedoms would be nullified and become meaningless. This freedom is guaranteed from governmental interference by the First and Fourteenth Amendments to the United States Constitution, and by the various state constitutions. The freedoms of speech and press, however, are not absolute; not all speech is protected.¹ The area of non-protection includes defamatory matter. The scope of this article will be to examine the bounds of this non-protected area.

REMEDIES TO AN INDIVIDUAL, INDIVIDUALLY DEFAMED

It is well settled that an individual when defamed, by word of mouth or by the pen, has an action at law for damages. If the defamatory matter is written and malicious, the writer is also subject to criminal prosecution in most states, under criminal libel statutes.

CIVIL REMEDIES AVAILABLE TO A MEMBER OF A DEFAMED GROUP

Defamatory statements must be "of and concerning" the plaintiff.² A problem is thus presented when the imputation is directed at a group of persons rather than at an individual. The courts, generally, make a rather arbitrary classification—calling large collectivities "classes", and denying a civil action by any member of the class, and smaller collectivities "groups", and allowing recovery by individual members of the group.³ The rationale being that the basis for civil libel is damage to the plaintiff's reputation, and the damage becomes more highly conjectural as the size of the group increases.⁴ The courts denied recovery to an

1. See *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942).

2. Newell, *Slander and Libel* (4th Ed. 1924) sec. 539.

3. *People v. Eastman*, 188 N. Y. 478, 81 N. E. 459 (1907); *Elwell v. Boutwell*, 138 Va. 402, 409, 121 S. E. 912, 914, (1924). See further Riesman, *Democracy and Defamation: Control of Group Libel*, 42 Col. L. Rev. 727 (1942) and Tannenhaus, *Group Libel*, 35 Cornell L. Q. 261 (1950).

4. Prosser, *Law of Torts* 777 (1941).

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individual member when the collectivity defamed was "the Stivers clan,"⁵ "the wine joint owners,"⁶ "insurance agents,"⁷ "the officials of a named labor union,"⁸ "the officers of a military regiment,"⁹ and "members of a jury."¹⁰

The reasons for denying recovery have been a fear of multiplicity of suits for the same words against the same defendant,¹¹ the difficulty of determining damage, if any, to the individual member of the group,¹² and the desire to protect the freedoms of speech and press.¹³

"It is far better for the public welfare that some occasional consequential injury to an individual arising from general censure of his profession, his party, or his sect should go without remedy than that free discussion on the great question of politics, morals, or faith should go checked by the dread of embittered and boundless litigation."¹⁴

Recovery was allowed to an individual member when the collectivity defamed was—"the Fenstermaker family,"¹⁵ "the members of a named partnership,"¹⁶ "the staff of young doctors at a particular hospital,"¹⁷ and "an election board."¹⁸

If the defamatory words refer to only part of the group, or to one or several unspecified members, plaintiff can recover if he shows that he was the person, or one of the persons, against whom the imputation was leveled,¹⁹ or that the statement was understood by others to refer to him.²⁰

An action by the group itself was unheard of at Common Law. Today, in certain instances, a civil action can be brought in the name of the defamed group.

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5. *Louisville Times v. Stivers* 252 Ky. 943, 68 S. W. 2d 411 (1934).
 6. *Comes v. Cruce*, 85 Ark. 29, 107 S. W. 185 (1908).
 7. *McGee v. Collins*, 156 La. 291, 100 So. 430 (1924).
 8. *Noral v. Hearst Publications Inc.*, 40 Cal. App. 2d 348, 104 P. 2d 860 (1940).
 9. *Sumner v. Buel*, 12 Johns 475 (N. Y. 1815).
 10. *Smallwood v. York*. 163 Ky. 139, 173 S. W. 380 (1915).
 11. *Sumner v. Buel*, *supra*.
 12. *Ibid.*
 13. *Ryckman v. Delevan*, 25 Wend. 186 (N. Y. 1840).
 14. *Ryckman v. Delevan*, *supra* at 199.
 15. *Fenstermaker v. Tribune Publishing Co.*, 13 Utah 532, 45 Pac. 1097 (1896).
 16. *Tobin v. Alfred M. Best Co.*, 120 App. Div. 387, 105 N. Y. Supp. 294 (1st Dept. 1907).
 17. *Boruman v. Star Co.*, 174 N. Y. 212, 66 N. E. 723 (1903).
 18. *Reilly v. Curtis*, 53 N. J. 677, 84 Atl. 199 (1912).
 19. *Gross v. Cantor*, 270 N. Y. 93, 200 N. E. 592 (1903).
 20. *Kenworthy v. The Journal Co.*, 117 Mo. App. 327, 336-337, 93 S. W. 882, 885 (1906).

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Partnerships and corporations, though incapable of experiencing mental pain from the imputations, have been allowed access to the courts on the grounds that the disparagement of business integrity and credit tends to inflict pecuniary harm.²¹ Massachusetts and New York have even allowed libel suits by non-profit corporations.²² One case allowed a suit in the name of an unincorporated association.²³

CRIMINAL LIBEL

The criminal law of defamation generally applies only to libel.²⁴ Libel was a criminal offense at Common Law.²⁵ Most states now have criminal libel statutes, typical of which is the New York statute which declares that—

“A malicious publication by writing, printing, picture . . . otherwise than by mere speech, which exposes any living person . . . to hatred, contempt, ridicule or obloquy, or which causes . . . any person to be shunned or avoided, or which has the tendency to injure any person, corporation, or association of persons, in his or their business or occupation, is a libel.”²⁶

While civil libel is based upon injury to reputation, the purpose of criminal libel is to protect society against a breach of the peace.²⁷ The one libeled may resort to physical action,²⁸ or indeed third parties may be incited to resort to violence against the party libeled.²⁹ The prosecution for the libel of an individual is not a denial of freedom of speech and press.³⁰

21. *Bergstrom v. Ridgway-Thayer Co.*, 53 Misc. 95, 103 N. Y. Supp 1093 (Sup. Ct. 1907), *aff'd.* 119 App. Div. 89, 105 N. Y. Supp. 1107 (1st Dept. 1907). See Tannenhaus, *supra*, n. 3 at 265; *Contra: Potter v. State*, 86 Tex. Cr. 380, 216 S. W. 886 (1919).

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

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

24. See 2 Wharton, Criminal Law (12th Ed. 1932) sec. 1939.

25. *Comm. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212 (1821).

26. New York Penal Law, sec. 1340.

27. Miller, Criminal Law, 492-493 (1934).

28. See Veeder, *History and Theory of the Law of Defamation*, 3 Col. L. Rev. 546, 548, 559 (1903).

29. *King v. Osborn*, 2 Barn. K. B. 138 (1732).

30. *People v. Doss*, 318 Ill. App. 387, 48 N. E. 2d 213, *aff'd.* 384 Ill. 400, 51 N. E. 2d 517, *cert. denied Doss v. People of the State of Illinois*, 321 U. S. 789 (1943).

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In order to establish a criminal libel a malicious intent must be shown.³¹ Legal malice here, is not malice in its popular sense viz., hatred and ill will to the party libeled, but rather connotes an act done wilfully, unlawfully, and in violation of the just rights of another.³²

At common law, and by most statutes today, truth is not an absolute defense to a criminal libel prosecution.³³ Truth when published with good motives, and for justifiable ends, i. e., without malice, is a sufficient defense.³⁴ In some states truth alone is a sufficient defense.³⁵ The burden is on the accused to show truth and freedom from malice,³⁶ or that the communication is privileged.³⁷ In most states the jury is the sole judge of the law as well as the facts in a criminal libel prosecution.³⁸

There is a conflict of authority whether a libel of a group is subject to prosecution under the *ordinary* criminal libel statute. It was said in an early English case that—

“where a writing which inveighs against mankind in general, or against a particular order of man as for instance, men of gown, this is no libel but it must descend to particulars and individuals to make it a libel.”³⁹

In subsequent cases convictions were obtained where the groups libeled were “the Jews on Broad Street,”⁴⁰ the Knights of Columbus,⁴¹ and the American Legion.⁴² Prosecutions were dismissed where the publications attacked “Bohemians,”⁴³ and “the Jews,”⁴⁴ largely on the grounds that the group was too large or vague.

31. *People v. Hebbard*, 96 Misc. 617, 637, 162 N. Y. Supp. 80, 93 (Sup. Ct. 1916).

32. *Comm. v. York*, 50 Mass. 93, 43 Am. Dec. 373 (1845).

33. *People v. Croswell*, 3 Johns Cas. (N. Y.) 337, 395 (1804). *Comm. v. Clap*, *supra*, n. 25; *Sachs v. Government of the Canal Zone*, 176 F 2d 292 (5 cir. 1949), *cert. denied* 338 U. S. 858 (1949).

34. *People v. Spielman*, 318 Ill. 482, 149 N. E. 466, 9 (1925); See N. Y. State Constitution. Art I sec. 8.

35. *Leighton v. People*, 90 Col. 106, 6P 2d 929 (1931); *Morris v. State*, 109 Ark. 530, 160 S. W. 387 (1913).

36. *Sachs v. Gov't of the Canal Zone*, *supra*, n. 33.

37. *State v. Gardner*, 151 Atl. 349, 112 Conn. 121 (1930).

38. N. Y. State Constitution, Art. I, sec. 8. *People v. Sherlock*, 166 N. Y. 180, 183, 59 N. E. 830 (1901).

39. *Rex v. Alme and Nott*, 3 Salk 224, 91 Eng. Rep. 790, 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (1700).

40. *Rex v. Osborne*, 2 Barnardiston 138 (1732).

41. *People v. Gordon*, 63 Cal. App. 62, 219 Pac. 486 (1923).

42. *People v. Spielman*, *supra*, n. 34.

43. *Drozda v. State*, 86 Tex. Cr. 614, 218 S. W. 765 (1920).

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

GROUP LIBEL STATUTES

The reluctance of the courts to allow a civil or criminal action to lie against one who libeled a large racial or religious group has led to considerable agitation for group libel legislation. Some states have enacted such statutes of which the Illinois statute is an example.

"It shall be unlawful for any person, firm, or corporation to manufacture, sell . . . present, publish or exhibit . . . 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."⁴⁵

Two important questions arise in connection with group libel legislation. One is philosophical, namely, are group libel statutes advisable. The other is legal, namely, are group libel statutes Constitutional.

THE ADVISABILITY OF GROUP LIBEL LEGISLATION

Those favoring group libel laws contend that group defamation contributes nothing to the exposition of ideas, and is of no social value.⁴⁶ They also claim that false and defamatory propaganda against racial and religious groups harms each member of the group. In Germany, anti-Jewish propaganda eventually resulted in their ostracism from the community, their enslavement, and their murder. It is further argued that criminal libel is predicated on the tendency toward a breach of the peace, and it is more likely that there will be a breach of the peace when a large racial or religious group is defamed.

"Prejudice and hate can't be legislated out of existence, but activities motivated by prejudice, and hate can be outlawed. When that is done, the condemnation will attach also to the prejudice and hate that prompted them."⁴⁷

Those opposing group libel laws contend that such a law, no matter how carefully drafted, would tend to discourage discussion and criticism. It is difficult

45. Ill. Rev. Stat, 1949, Chap. 38 p. 471.

46. See Chafee, *Free Speech in the United States*, 150 (1941), where Professor Chafee, although not discussing group libel, expresses the view that profanity and indecent talk and pictures are not protected by the First Amendment because they lack social value.

47. By Att'y Eli Louis Cooper in 92 Cong. Rec. A3679,3680 (1946).

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to draw the line between legitimate expression of opinions, and those views which tend to create hatred because of opinions on race or religion.⁴⁸ Also if improperly applied the law might be used as a sword against the very groups for which the law was designed to be a shield.

The publicity caused by a prosecution, furthermore, might be far greater than that afforded the actual propaganda; and a hate monger if convicted would be a martyr, if acquitted it would appear to the lay public that his writings met with judicial approval.⁴⁹

It was said in the *Edmondson* case that —

“We must suffer the demagogue and the charlatan in order to make certain that we do not limit or restrain the honest commentator on public affairs.”⁵⁰

It is interesting to note that several civil liberties groups such as the American Civil Liberties Union and the American Jewish Congress appeared as amici for the defendant in the *Edmondson* case.

FREEDOMS OF SPEECH AND PRESS—CLEAR AND PRESENT DANGER

It was the belief of Blackstone that freedom of the press included only freedom from prior restraint.

“The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he published what is improper, mischievous, or illegal, he must take the consequences of his temerity.”⁵¹

In the United States the First and Fourteenth Amendments⁵² protect the press not only from prior restraints,⁵³ but also from subsequent restrictions on publication,⁵⁴ and from discriminatory taxation.⁵⁵ The freedoms of speech and

48. Fraenkel, *Our Civil Liberties*, 19 (1944).

49. See Tannenhaus, *Group Libel*, *supra*, n. 3 at 301.

50. *People v. Edmondson*, *supra*, n. 44 at 154, 268.

51. 4 Bl. Com. 151, 152.

52. U. S. Const., Amend I, Amend. XIV.

53. *Near v. Minnesota*, 283 U. S. 697 (1931).

54. *Bridges v. California*, 314 U. S. 252 (1941), *Pennekamp v. Florida*, 328 U. S. 331 (1946).

55. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

press are not absolute—"the lewd and obscene, the profane, the libelous, and the insulting or fighting words" are not entitled to protection.⁵⁶

If a legislative body in the exercise of its police power desires to require or restrict certain types of conduct or speech, and such legislation thereby places some restraints on free speech or press, in order for that legislation to be upheld as Constitutional there must be a clear and present danger of some substantive evil.⁵⁷ In that event the right to express one's ideas is subordinated to the general welfare of the community.

"Freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil which rises far above public inconvenience, annoyance, or unrest."⁵⁸

In *Gitlow v. New York*⁵⁹ it was held that the clear and present danger test did not have to be satisfied where the legislature, instead of forbidding certain types of conduct, forbids a certain type of speech as harmful and unlawful,⁶⁰ but this is probably not the rule today. *Dennis v. United States*⁶¹ leads one to believe that the clear and present danger test must be satisfied whether the legislative restriction relates to conduct or speech.⁶² The clear and present danger test, as formulated in the *Dennis* case, is less restrictive than its previous formulations. The greater the danger, the less clear and imminent need be the danger before it may be thwarted.

Group libel legislation places a prohibition on certain types of speech, and a law not requiring a clear and present danger of substantive evil before there is an arrest probably would be unconstitutional. The court, however, would leave certain discretion as to a determination of the magnitude of the danger

56. *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942).

57. *Schenck v. United States*, 249 U. S. 47, 52 (1919).

58. *Terminiello v. City of Chicago*, 337 U. S. 1, 4 (1949); See Frankfurter, J. concurring in *Niemotko v. Maryland* 340 U. S. 268, 273-289 (1951) for an analysis of various legislative restrictions, and their treatment by the Supreme Court.

59. 268 U. S. 652 (1925) where a conviction under a state criminal anarchism statute was affirmed: The New York Penal Law sec. 160, 161 prohibits overthrow of the government by force. Cf. *Whitney v. California*, 274 U. S. 357 (1927) where a conviction under a state criminal syndicalism statute was affirmed.

60. The Constitutional test in this type of case was said to be whether the legislature could have reasonably concluded that such language created, in itself, a sufficient danger of substantive evil.

61. 341 U. S. 494 (1951).

62. But see Justice Frankfurter's concurring opinion at 540 where it was expressed that in cases involving First Amendment freedoms, as in non-civil liberties cases [see *United States v. Carolene Products Co.* 304 U. S. 144 (1938)], great discretion must be given to legislative judgments as to how best to reconcile competing interests.

and the social desirability of its restriction to the legislature. The danger would have to be of some serious substantive evil such as an imminent threat of a riot, rather than mere hurt feelings on the part of the libeled group.

If it is found that group libel, like the libel of an individual, is per se not subject to First Amendment protection then the clear and present danger test would not have to be met. In *Terminiello v. City of Chicago*⁶³ the court included "the libelous" in the area of non-protected speech. Also in *Cantwell v. Connecticut*⁶⁴ it was said that—

"Resorts to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

GROUP LIBEL LEGISLATION—VAGUENESS

The due process clauses of the Fifth and Fourteenth Amendments require that criminal laws be free from vagueness and uncertainty. The law must appraise the reasonable person of the type of conduct which is prohibited.⁶⁵ The statute must furnish a sufficiently ascertainable standard of guilt.⁶⁶ In *Lanzetta v. New Jersey*,⁶⁷ a New Jersey "gangster" statute was declared repugnant to the Fourteenth Amendment due to its vagueness and uncertainty. In *Fox v. Washington*,⁶⁸ a statute making it a crime to print . . . etc. matter advocating or encouraging the commission of any crime or breach of the peace was held not too vague after the state court had placed a restrictive interpretation on the statute.

A criminal group libel law would also have to be free from vagueness and uncertainty. In *State v. Klapprott*,⁶⁹ a New Jersey "race hatred" statute making it a misdemeanor to make statements inciting, promoting or advocating hatred, abuse, violence or hostility against any group of persons because of race, color, religion, or manner of worship was declared unconstitutional. The court said that the words "hatred, hostility, and abuse" were too broad, abstract, and indefinite.⁷⁰ A statute which would make "any libel of a group" a crime would

63. *Supra*, n. 58 at 4.

64. 310 U. S. 296, 309-310 (1940).

65. *Winters v. New York*, 333 U. S. 507 (1948).

66. *Herndon v. Lowry*, 301 U. S. 242 (1937).

67. 306 U. S. 451 (1939).

68. 236 U. S. 273 (1915).

69. 127 N. J. L. 395, 22A 2d 877 (1941).

70. *ibid.* at 402; at 881.

probably meet the vagueness test in that there is a Common Law idea of what is a libel.⁷¹

PEOPLE v. BEAUHARNAIS

The Constitutionality of the Illinois Group Libel statute⁷² now rests in the hands of the United States Supreme Court. Joseph Beauharnais, the President of the White Circle League of America,⁷³ was charged and convicted of publishing lithographs which portrayed depravity, criminality, unchastity, and lack of virtue in the Negro race which exposed Negroes to contempt, derision, and obloquy. The Illinois Supreme Court called the defendant's writings "fighting words"⁷⁴ liable to cause violence and disorder between the races, and affirmed the conviction. (Fighting words, those calculated to cause a breach of the peace, are not entitled to free speech and press protection.⁷⁵) The Supreme Court granted certiorari,⁷⁶ and has heard the oral arguments.⁷⁷

The State of Illinois in support of the statute contends that writings like those of the defendant tend to cause discrimination in public places due to color, (a substantive evil in Illinois⁷⁸) and bring about riots and other breaches of the peace. The Springfield riots of 1908, and the recent Cicero riots were pointed to, in order to show that the Illinois legislature could reasonably have found that group libel was a very substantial danger to the community in that it could eventually bring about such riots. The ends to be attained being desirable, it should only be the court's function to determine if the means designed to attain the ends are reasonable. They further contended that the statute adequately informed the public of that which was made criminal.

The American Civil Liberties Union appeared as counsel for Beauharnais. They expressed their abhorrence of the views expressed in the defendant's publication, and made it clear that the Union was fighting only for the defendant's right to publish his views. The A. C. L. U. contended that the statute did not meet the clear and present danger test, and was, therefore, unconstitutional. They claimed that the defendant was convicted under that part of the statute which

71. *White v. Nicholls*, 44 U. S. 266 (1845). Cf. *Winters v. New York*, *supra*, n. 65 where there was no Common Law idea of "lewd and lascivious matter."

72. Ill. Rev. Stats. *supra*, n. 45.

73. A corporation that lost its corporate charter in a quo warranto proceedings. The Illinois court holding that the Constitutional guarantee of free speech doesn't authorize violation of a corporate charter. 408 Ill. 564, 97 N. E. 2d 811 (1951).

74. *People v. Beauharnais*, 408 Ill. 512 97 N. E. 2d 343,6 (1951).

75. *Chaplinsky v. New Hampshire*, *supra*, n. 56.

76. 72 S. Ct. 39 (1951).

77. 20 U. S. L. Week, 3141.

78. Ill. Rev. Stats. 1951, chap. 38, pp 1342-1343.

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made it a crime to portray depravity, etc., in a race and thereby subject that race to contempt, derision and obloquy *not* that part of the statute which makes the same writings criminal if they are productive of breach of the peace or riots.⁷⁹ The A. C. L. U. also contended that the statute was vague, that it could be applied to writings attacking the Chinese Communists as liars, pagans, and ungodly, or to the writings of a professor making a race study, etc.

CONCLUSION

The particular Group Libel statute now being scrutinized by the Supreme Court might fall due to its general vagueness and indefiniteness. It might also fall due to the fact that part of the statute makes it a crime to publish certain types of writings even when those writings are not calculated to create a clear and present danger of a breach of the peace. That would not necessarily mean that a constitutional law could not be drafted. A law free from vagueness, which makes it a crime to libel a racial or religious group when such a libel would tend to create a breach of the peace could probably be sustained. Logically if the libel of an individual does not come within the protection of free speech and press, the libellant should not be able to escape punishment by multiplying the number of persons vilified and by identifying them by a collective term.

It is one thing to say that a Group Libel statute valid in law could be drafted, and another thing to determine if such a law should be drafted. The latter determination is a matter of personal judgment. The right of a group to be free from virulent attacks based only on the color of their skin or the way they pray to God, and the right of the individual to express his views unafraid of criminal prosecution, whether his views be popular or unpopular, both rank high on our social scale. When an issue is between a right and a wrong, it presents no dilemma. "The dilemma is because the conflict is between two rights, each in its own way important."⁸⁰

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79. See n. 45, supra. Note the *or* in the statute (*or* which is productive of breach of the peace or riots.)

80. Robert H. Jackson, *Wartime Security and Liberty Under Law*, I Bflo. L. Rev. 103, 117 (1951).