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RACIAL AND ETHNIC GROUP DEFAMATION: A SPEECH-FRIENDLY PROPOSAL

MICHAEL J. POLELLE*

Abstract: In *AIDA v. Time Warner Entertainment Company*, currently before the Illinois Supreme Court, the American Italian Defense Association (AIDA) alleges that the television series “The Sopranos” portrays the criminal and psychopathically depraved character of the Mafia underworld as the dominant motif of Italian and Italian-American culture. The author, drawing upon his experience as co-counsel to AIDA, submits that the law should provide a remedy for racial and ethnic group defamation. It is paradoxical for the law to only allow a remedy for individual defamation. The current civil damage lawsuit for defamation is inapplicable because courts consistently deny damages for group defamation by refusing to recognize the individual harm caused by group defamation. Likewise, criminal defamation statutes are now found in fewer than half the states and rarely used by prosecutors. This Article proposes enacting a declaratory judgment statute at the state level to remedy group racial and ethnic defamation. This suggested remedy takes the form of model legislation in the Appendix to this Article.

I'm in the process of dealing with these Guido motherfuckers.

—Will Smith, in *ENEMY OF THE STATE* (Touchstone Pictures 1998)

INTRODUCTION

Freedom of speech and freedom from racial and ethnic discrimination are two fundamental values in American society that stem from both democratic governance and a population of increasingly

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diverse racial and ethnic groups. As the United States shifts symbolically from a melting pot to a mosaic, the necessity of respect for all racial and ethnic groups takes on increasing importance. Social harmony depends on peaceful co-existence and respect while at the same time, the spirit of open discussion and public debate remains an essential part of our constitutional heritage.

This Article proposes that the law should provide a remedy for racial and ethnic defamation because it is paradoxical for the law to allow a remedy for individual defamation but no effective remedy for group defamation. In *Only Words*, Professor MacKinnon attacks the distinction between a recovery for individual defamation but not for group defamation by pointing out that the distinction is in conflict with our equal-protection jurisprudence.¹ When a discriminatory act is involved, courts readily perceive that an invidiously discriminatory attack on a racial or ethnic group affects everyone within the group. In such cases, courts readily accept that the individual is only injured precisely because of his or her affiliation with a racial or ethnic group, unlike the group-defamation scenario.² To rigidly distinguish individual harm in such cases from group harm would be the equivalent of always considering crimes as isolated facts in a criminal law context and never as part of a group conspiracy despite any evidence to the contrary. An individual's social autonomy or subordination is inextricably linked to the mass stereotype of the individual's racial or ethnic group.

The suggested remedy for group racial and ethnic defamation, which takes the detailed form of model legislation in the Appendix to this Article, is a declaratory judgment procedure. This procedure avoids the constitutional and policy problems of monetary damages, injunctive relief, or criminal penalties. Furthermore, it reflects the reality that the Federal Communications Commission (FCC), applying a laissez-faire ethic, is increasingly unwilling to regulate the electronic media. The need for a remedy arises because classic counter-speech as a remedy is largely illusory in an age of multi-billion-dollar media megacorporations which are on the verge of becoming the media landlords of the marketplace of ideas.

¹ See generally CATHARINE A. MACKINNON, *ONLY WORDS* (1993).

² *Id.* at 51-52. MacKinnon also makes the point that "does any Black man doubt, upon encountering 'Nigger Die' at work, that it means him?" *Id.* at 52. Justice Frankfurter recognized that a legislature could rationally determine that individuals are socially affected for better or worse by the reputation of the racial group to which they belong. *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

I. AIDA v. TIME WARNER ENTERTAINMENT COMPANY

The genesis of this Article is the author's experience as co-counsel for the American Italian Defense Association (AIDA) in a civil action filed in the Chancery Division of the Circuit Court of Cook County, Illinois against Time Warner Entertainment Company, L.P., a subsidiary of AOL Time Warner Entertainment Company, for violation of Article I, Section 20 of the Illinois Constitution (entitled "Individual Dignity"). AIDA claimed that Time Warner's distribution through Home Box Office (HBO) of *The Sopranos*, a cable television miniseries, in whole or part violated this section of the Illinois Constitution. AIDA filed its lawsuit solely for a declaratory judgment, without any ancillary request for damages or injunctive relief.³

Article I, Section 20 of the state Bill of Rights provides: "To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned."⁴ The prototype for this constitutional provision was an Illinois criminal libel statute that had punished publication or portrayals of "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion." The United States Supreme Court in *Beauharnais v. Illinois* upheld the constitutionality of this statute in affirming a \$200 fine against Beauharnais for distributing leaflets which attributed criminal proclivities to African-Americans.⁵ Imputations of criminality are one of the most common

³ Complaint for Declaratory Judgment ¶ 1, AIDA v. Time Warner Entm't Co., No. 01CH05819 (Cir. Ct. Cook County Ill. filed Apr. 5, 2001).

⁴ ILL. CONST. art. 1, § 20. Victor Arrigo, the sponsor of Article I, Section 20, indicated his motivation for sponsorship in the legislative history:

As an American of Italian descent, I can speak with authority on this carcinoma of the soul that I became acquainted with at the age of twelve when I was stopped by a policeman on my way home from a public library branch with two books under my arm. The greeting was, "Hey, Wop, where did you swipe those books?" This was immediately followed by a kick in the backside and the parting remark, "Don't tell me you Dagos are now learning to read," when I showed him the library card and tried to prove my innocence of any wrongdoing in my possession of the books. The trauma of that experience and the feeling of degradation that followed has been a deeply engrained memory that has remained with me since.

SIXTH ILL. CONST. CONVENTION, VERBATIM TRANSCRIPTS, No. 65, at 1637-38 (1970), reprinted in RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, VERBATIM TRANSCRIPTS 1637-38 (John W. Lewis 1972).

⁵ 343 U.S. at 251-52, 266, 267.

categories of defamation.⁶ In addition to being defamatory, imputations of a criminal offense historically have been considered as slander *per se* because of their serious threat to reputation and, therefore, do not require proof of special damage.⁷

The AIDA complaint alleged that the Individual Dignity Clause of the Illinois Bill of Rights was violated in that one or more episodes of *The Sopranos* portrayed the criminal and psychopathically depraved character of the Mafia underworld as the dominant motif of Italian and Italian-American culture.⁸ AIDA's contention was that the Italian-American characters in *The Sopranos* were almost unanimously portrayed as lacking in civility, respectability, or virtue, or as condoning Mafia attitudes and misdeeds, even when they were not directly portrayed as Mafia members. More specifically, the complaint alleged that a particular episode of *The Sopranos* represented either expressly or by implication that criminality is "genetical" [sic] or in the blood of Italian-Americans.⁹ The filing of the lawsuit generated a controversial public debate about the merits of either *The Sopranos* or the lawsuit, and as a result, the author made a number of media appearances.

It must be emphasized that without the lawsuit, the author and representatives of AIDA, as this Article will show, would have had no effective access to the marketplace of ideas in daring to criticize a show as well-advertised as *The Sopranos* and a media enterprise as dominant as Time Warner Entertainment Company. AIDA, a not-for-profit corporation, had a membership just over one hundred persons at the time the lawsuit was filed. It was organized for charitable purposes and specifically for the education of the public regarding the social contributions of Italian immigrants and "the opposition by lawful means of all forms of negative stereotyping, and defamation of

⁶ BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 4.12, at 129-30 (2d ed. 1999).

⁷ See *RESTATEMENT (SECOND) OF TORTS* § 571 (1977). Claim of "alleged mob ties" was enough for defamation. *Bufalino v. Associated Press*, 692 F.2d 266, 269 (2d Cir. 1982); see also *Clemente v. Espinosa*, 749 F. Supp. 672, 677 (E.D. Pa. 1990). However, statement that plaintiff had "mob connections" and would "order a hit" on defendant does not impute that plaintiff in fact committed any crimes for slander *per se*, even though the words may be obviously defamatory. *Biondi v. Nassimos*, 692 A.2d 103, 107-08 (N.J. Super. Ct. App. Div. 1997) ("It is not uncommon for the mass media to report that an entertainer or other celebrity has 'mob ties' or 'mob connections.'"). In states equating libel *per se* to the slander *per se* categories, an imputation of a crime likewise does not require proof of special damage. See, e.g., *Bryson v. News America Publ'ns, Inc.*, 672 N.E. 2d 1207, 1214-15 (Ill. 1996); *Kevoorkian v. AMA*, 602 N.W.2d 233, 237 (Mich. Ct. App. 1999).

⁸ See Complaint ¶ 13, *AIDA* (No. 01CH05819).

⁹ See *id.* ¶ 13(d).

Italian Americans.”¹⁰ On the other hand, the defendant, Time Warner Entertainment Company, held consolidated assets of \$85 billion as of December 31, 2001. It is also a subsidiary of AOL Time Warner, the world’s largest provider of Internet services and the world’s leading media and entertainment company, with over \$208 billion in consolidated assets. Time Warner Entertainment Company’s cable network business involves chiefly its ownership and management of the HBO Division, the nation’s most widely distributed pay television service. HBO, together with its sister service, Cinemax, accounted for about 38.1 million subscribers as of December 31, 2001.¹¹

HBO is known for the exhibition of pay television original movies and especially for the television series known as *The Sopranos*. There is no doubt that *The Sopranos* has been both popular and widely acclaimed by a number of media critics.¹² But the passing popularity of racial or ethnic depiction says little or nothing about the stereotypical or defamatory nature of the depiction. *The Birth of a Nation*, for example, originally entitled *The Clansman*, was acclaimed as a cinematic masterpiece and its creator, D.W. Griffith, was seen as a visionary film artist when the film was released in 1915, even though the film depicted African-Americans as villains and the Ku Klux Klan as the South’s savior.¹³ Despite street protests and opposition by the NAACP due to the racist and stereotypical nature of this popular movie, the Directors Guild of America continued to bestow the “D.W. Griffith Award” upon twenty-eight directors for distinguished motion picture direction from 1953 until 1999, when the award was finally retired because of its unsavory connection to racial stereotyping.¹⁴

Without expressly deciding any First Amendment issue, the Chancery Division of the Circuit Court of Cook County granted the motion of Time Warner Entertainment Company to dismiss the com-

¹⁰ *Id.* ¶¶ 2, 4.

¹¹ AOL TIME WARNER INC., SEC FORM 10-K 17, F-27, F-110, at <http://www.sec.gov/Archives/edgar/data/1105705/000095013002001845/d10k405.htm>.

¹² *The Sopranos* has received four Emmy Awards, a George Foster Peabody Award, three Screen Actors Guild Awards, and three Golden Globe Awards. The show is the only television show to become part of the Museum of Modern Art’s permanent video collection. *The Washington Post* hailed the show as “one of the greatest pieces of auteurist television ever produced” and the *New York Times* called it “the greatest work of American popular culture in the past quarter century.” See Motion to Dismiss at 3, 4, AIDA v. Time Warner Entm’t Co., No. 01CH05819 (Cir. Ct. Cook County Ill. filed May 21, 2001).

¹³ DAVID M. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 6, 25–26 (3d ed. 1987).

¹⁴ David Robb, *Showcase: Directors Drop Griffith Award*, CHI. SUN-TIMES, Dec. 16, 1999, at 59.

plaint with prejudice. The court granted the motion both on the basis that AIDA lacked standing, even though the company never raised the issue, and on the more fundamental basis that the legislative history of Article I, Section 20 proved this section of the Illinois Bill of Rights was "purely hortatory" and merely a "constitutional sermon," without any legal meaning or effect.¹⁵ On June 28, 2002, the Illinois Appellate Court affirmed the dismissal of the complaint on the ground that AIDA lacked standing to assert the claim and on the ground that the Individual Dignity Clause of Article I, Section 20 was purely hortatory. The case is now before the Illinois Supreme Court on a petition for leave to appeal.¹⁶

II. THE GROUP HARM OF RACIAL AND ETHNIC STEREOTYPING

The following section summarizes the modern development of mass media by the Nazis as a tool of stereotypical indoctrination and social manipulation. Studies have indicated that the mass media does have an impact on the way ethnic and racial groups are perceived, even in democratic states. Because of the horrific effects of Nazi racist propaganda, both contemporary national and international laws have condemned and punished group defamation based on race and ethnicity. Aside from the significant exception of the United States, major democratic nations have seen no conflict between freedom of expression and a prohibition against speech that incites racial or ethnic hatred or that defames a racial or ethnic group. Like other immigrant groups, Italian Americans have been stereotyped and discriminated against. Contrary to fact, the Italian-American has become the criminal archetype of contemporary American society through the power of the mass media.

A. *A Brief History of Racial and Ethnic Stereotyping and Current Recognition of the Harm*

It is a cultural commonplace that Nazi Germany used the defamatory art of racial and ethnic stereotyping to make the imprisonment and death of Jews acceptable to public opinion. Generations of stereotyping existed, thus laying the groundwork even before Nazis arrived on the scene. Going back to the Middle Ages, the so-called

¹⁵ AIDA v. Time Warner Entm't Co., No. 01CH5819, slip op. at 4, 6 (Cir. Ct. Cook County Ill. Sept. 19, 2001).

¹⁶ AIDA v. Time Warner Entm't Co., 772 N.E.2d 953, 960 (Ill. App. Ct. 2002), *appeal denied* by 202 Ill. 2d 597 (Ill. 2002).

"blood libel" spread that gentile blood was necessary for the baking of Passover matzah. In the eighteenth and nineteenth centuries, anti-Semitic political groups in Europe used this defamatory myth to justify their prejudice against Jews.¹⁷ *The Protocols of the Elders of Zion* was a tract, probably concocted by the Czarist secret police, to circulate a fabricated account of a Jewish plot to take over the world. Since 1920 more than one hundred editions, reprints, and new versions of this ethnic attack have appeared in the English-speaking world. The Nazis admired Henry Ford for his endorsement of the views in this pamphlet, even though Ford later recanted under pressure of a libel lawsuit.¹⁸

Building on this history of group defamation, the Nazis used the new technology of film to dehumanize Jews in the cinemas of Germany. The best example of this genre of group vilification is a classic propaganda film cleverly crafted in a documentary style, which depicted Jews as a plague spreading across the world. The film drew an explicit parallel between rats and Jews, as the camera panned to a pack of swarming rats.¹⁹ Adolf Hitler provided the psychological insight for the effectiveness of group libel based on racial or ethnic origin by the concept of the "big lie."²⁰ In *Mein Kampf*, Hitler adopted the principle that a "big lie" is more effective than a petty lie, explaining that a nation's masses are more easily taken in by big lies because they find it difficult to believe that anyone would be impudent enough to fabricate on such a massive scale.²¹ Even when facts are

¹⁷ THE BLOOD LIBEL LEGEND: A CASEBOOK IN ANTI-SEMITIC FOLKLORE 233 (Alan Dundes ed., 1991). Even now the blood libel persists. The editor of a Saudi newspaper apologized for several articles that described Jews as "vampires who bake cookies with the blood of non-Jews" and a people admonished by the Torah to eat "pastries mixed with human blood." Donna Abu-Nasr, *Saudi Editor Retracts Anti-Semitic Articles*, CHI. TRIB., Mar. 21, 2002, § 1, at 10.

¹⁸ BENJAMIN W. SEGEL, A LIE AND A LIBEL: THE HISTORY OF THE PROTOCOLS OF THE ELDERS OF ZION 25-27 (Richard S. Levy ed. & trans., 1995).

¹⁹ See DER EWIGE JUDE [THE ETERNAL JEW] (UFA 1940). Another film depicted a grasping Jewish financier who is publicly executed. See JUD SUSS [SUSS THE JEW] (1940). A defamation-by-association film of Jews being deloused was titled, *Juden, Lause, Wanzen* [Jews, Lice, Bugs]. See JUDEN, LAUSE, WANZEN [JEWS, LICE, BUGS] (1941). The use of such propaganda extended to the Balkans, where a film portrayed a Jew who raped his servant and caused her death from an abortion and Jews who sold Croatian girls into Mideast slavery. See KAKO SE STVARAJU IZLOBE [HOW TO MAKE AN EXHIBITION] (Havatsk Slikopsis 1942).

²⁰ ADOLPH HITLER, MEIN KAMPF 231-32 (Ralph Mannheim trans., Houghton Mifflin 1999) (1925).

²¹ See *id.* at 231. Although Hitler projects use of the "big lie" onto the Jews, he clearly endorses it as a "sound principle." *Id.*

marshaled to counter the big lie, an aura of truth still lingers around the lie.²²

No reasonable person would suggest that the racial and ethnic malevolence shown by the Nazi media toward the Jews in the pursuit of political objectives exists in the United States. Even though an evil ideology does not motivate American media interests as it did in Nazi Germany, the American electronic media nonetheless exert a powerful influence on the perception of Americans. One advertising study of the psyche of the American public found that television holds "an absolutely central place in people's lives," with 68% of the national sample finding more pleasure and satisfaction in watching TV than in being with friends, helping others, taking vacations, or pursuing hobbies.²³ The study found television to be the prime method of unwinding in America, surpassing relaxation, vacations, music, or reading.²⁴ Ninety-nine percent of American homes are equipped with television; the average television is on for over seven hours per day.²⁵ The millions spent by advertisers attest to the belief that the media affects personal attitudes toward products and services. It is unlikely that the media have no similar effect on racial and ethnic perceptions.²⁶

Recognizing the harm of perpetuating these stereotypes, international law provides that racial or ethnic group defamation and com-

²² *Id.* at 231–32. The judicial distrust of group defamation is based on the assumption that the larger the group, the less likely a third person would rationally understand the defamation to refer to a particular person. But one court has noted that this psychological assumption, which isolates an individual from the group with which he or she is identified, has been challenged on the basis that when a third person thinks irrationally by harboring pre-existing prejudice against a group, the subsequent group defamation reinforces the prejudice, regardless of group size. *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 788 n.2 (N.Y. App. Div. 1981).

²³ D'ARCY MASIUS BENTON & BOWLES, INC., FEARS & FANTASIES OF THE AMERICAN CONSUMER: AN AMERICAN CONSUMER REPORT 34 (1986) (reporting the next highest category—being with friends—at 61%). The study was performed by mail, using the Consumer Panel of the advertising firm D'Arcy Masius Benton & Bowles, Inc. The panel consisted of 4,000 households, divided into four separate panels of 1000 households each, with each panel representative of U.S. households. *Id.* at 4.

²⁴ *Id.* at 35 (reporting the next highest category—just relaxing—at 60%). Watching television is the most popular way to spend an evening—three times more popular than spending time with friends—according to a more recent television survey. *Power in Your Hand*, *ECONOMIST*, Apr. 13, 2002, at 3.

²⁵ WILLIAM F. BAKER & GEORGE DESSART, *DOWN THE TUBE: AN INSIDE ACCOUNT OF THE FAILURE OF AMERICAN TELEVISION*, at xiv (1998).

²⁶ See MICHAEL PARENTI, *INVENTING REALITY* 10–13 (1986) (contending that the news media distort public perceptions of race, class, and gender).

munications that foment racial hatred are not protected speech.²⁷ Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination considers group defamation a categorical exception to the right of free expression.²⁸ Furthermore, a number of nations have found laws restricting racial hatred and group defamation to be compatible with their democratic principles of government. By use of a criminal code amended in 1960, Germany makes it a criminal offense to insult a group of people or to maliciously cause the group to be vilified or defamed.²⁹ Since the 1970s, France has extensively applied laws, both civilly and criminally, prohibiting racial incitement, group libel, and racial injury.³⁰

Even nations that share the common law tradition with the United States, such as Great Britain, Canada, India, and Nigeria, prohibit defamatory speech affecting racial groups. Each nation typically requires a mens rea of one sort or another, probably because these regulations are found in the penal laws of each of the four common law nations.³¹ In *Regina v. Keegstra*, the Canadian Supreme Court upheld the validity of a statute that punished the defendant for disseminating hate propaganda.³² The defendant, Keegstra, had called Jews

²⁷ THOMAS DAVID JONES, *HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS* 38–40, 42 (1998) (“Group defamation is illegal conduct at international law, and it is punishable as a crime under the laws of the majority of nations in the world.”).

²⁸ *Id.* at 39. The United States is one of 165 signatories to the Convention. See generally UNITED NATIONS, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2002), at <http://www.unhchr.ch/report.pdf>.

²⁹ UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW AND RACIAL INCITEMENT IN SIX COUNTRIES 87 (Louis Greenspan & Cyril Levitt eds., 1993).

³⁰ *Id.* at 48–49. A 1990 reform makes it a criminal offense to deny the Nazi genocide of the Jews. *Id.* at 56. A federal court has held that the First Amendment bars enforcement in the United States of a French court order seeking to compel Yahoo! to either prevent its French subscribers from viewing Nazi memorabilia or pay a fine of \$13,000 per day. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1184–85, 1193 (N.D. Cal. 2001).

³¹ Thomas David Jones, *Human Rights: Freedom of Expression and Group Defamation Under British, Canadian, Indian, Nigerian and United States Law—A Comparative Analysis*, 18 SUFFOLK TRANSNAT’L L. REV. 427, 428–31 (1995).

³² [1990] S.C.R. 697, 713, 782 (Can.); see MACKINNON, *supra* note 1, at 99. (“We argued that group defamation is a verbal form inequality takes, that just as white supremacy promotes inequality on the basis of race, color, and sometimes ethnic or national origin, anti-Semitism promotes the inequality of Jews on the basis of religion and ethnicity.”). See generally Alan Borovoy et al., James McCormick Mitchell Lecture, Discussion on Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation (Nov. 4, 1998), in 37 BUFF. L. REV. 337 (1988/1989) (comparing Canadian and United States perspectives on group defamation).

“money-loving” and “child killers” and claimed that Jews fabricated the Holocaust.

These nations recognize from bitter historical experience, not fully shared by the United States, that defamatory racial and ethnic stereotypes harm people and can even lead to their destruction. Until recently, one might have assumed that the only harm to the stereotyped group came from the diminished respect that other groups in society had for the stereotyped group. A stereotype, such as that Gypsies are liars and thieves, can permeate a society and result in diminished cultural, political, and economic opportunities for the stereotyped group, which is then invidiously discriminated against by the social consequences of stereotypical discourse.

It is possible, however, that the most insidious harm caused by stereotypes is not the diminished respect of others who are taken in by the stereotype, but the internalized acceptance of the stereotype by the targeted victim. A study found that students taking academic tests perform worse if confronted with cultural stereotypes prior to the test.³³ This negative result occurred even when the tested group was not a racial or ethnic minority chronically targeted by social stereotypes.³⁴ Referred to by Professor Claude M. Steele, one of the authors of the study, as “stereotype threat,” this concept encompasses the extra pressure members of a stereotyped group feel in test situations, with the result that the group members, despite their individual abilities, tend to fulfill the stereotyped expectations of how their racial, ethnic, or gender group is expected to perform on such tests. To be affected by the stereotype the stereotyped person need not believe the stereotype nor even take it personally.³⁵

B. *The Italian-American Experience: Past Discrimination and Current Ethnic Stereotyping*

Like other ethnic groups from southern and eastern Europe, Italian-Americans have suffered discrimination because of a difference in culture and language. The Supreme Court specifically noted in *University of California Regents v. Bakke* that immigrants from southern, middle, and eastern Europe, including Italian-Americans, continued

³³ Joshua Aronson, et al. *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29, 36–37, 39 (1999).

³⁴ *Id.* at 39–40.

³⁵ Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 618 (1997).

to be shunned in the upper levels of corporate America because of their ethnic origins.³⁶ Another court has recognized that Italian-Americans in particular suffer from a history of “stereotyping, invidious ethnic humor and discrimination.”³⁷ This sometimes led to bigoted violence against Italian-Americans, such as the lynching of eleven Italians in New Orleans in 1891, which remains the largest single lynching in United States history.³⁸

World War II was also a traumatic experience for Italian-Americans. In the Wartime Violation of Italian-American Civil Liberties Act, Congress found that more than 600,000 Italian immigrants in the United States had been branded enemy aliens.³⁹ Government measures during the war required these Italian immigrants not only to carry identification cards but also to endure travel restrictions and seizure of their personal property.⁴⁰ More than 10,000 immigrants on the West Coast were forced to leave their homes and prohibited from entering coastal zones solely because of their ethnicity. Although not on the same massive scale as Japanese-Americans, thousands of Italians were arrested and hundreds interned in military camps similar to those that housed Japanese-Americans. The full extent of the civil rights violations remains unknown, and consequently, Congress has ordered the Attorney General to conduct a comprehensive review of the treatment of Italian-Americans by the United States government.⁴¹

Another example of discrimination against Italian-Americans was addressed when the chancellor of the City University of New York included Italian-Americans as an affirmative action group, because of

³⁶ 438 U.S. 265, 292 n.32 (1978).

³⁷ *United States v. Biaggi*, 673 F. Supp. 96, 101 (E.D.N.Y. 1987) (stating that Italian Americans constitute a “cognizable group” for *Batson* challenges), *aff’d*, 853 F.2d 89 (2d Cir. 1988).

³⁸ RICHARD GAMBINO, *VENDETTA: THE TRUE STORY OF THE LARGEST LYNCHING IN U.S. HISTORY*, at ix (2d ed, Guernica 2000).

³⁹ Pub. L. No. 106-451, § 2, 114 Stat. 1947 (2000). For further information, Stephen Fox provides a rare and excellent account of the wartime restrictions on Italian-Americans and on the effect of those restrictions. See STEPHEN FOX, *THE UNKNOWN INTERNMENT: AN ORAL HISTORY OF THE RELOCATION OF ITALIAN AMERICANS DURING WORLD WAR II*, at xv (1990) (noting that accounts of wartime relocation on the West Coast during World War II, which have focused completely on the Japanese, provide an incomplete story because they ignore the effects of relocation on Italians and Germans).

⁴⁰ Wartime Violation of Italian American Civil Liberties Act § 2.

⁴¹ See *id.* §§ 2, 3. The effect of World War II and the restrictive measures taken against Italian-Americans induced a sense of shame in Italian-Americans about their heritage. Lawrence Di Stasi, *How World War II Iced Italian American Culture*, in UNA STORIA SEGRETA: THE SECRET HISTORY OF ITALIAN AMERICAN EVACUATION AND INTERNMENT DURING WORLD WAR II, at 306 (Lawrence Di Stasi ed., 2001).

the widespread belief that the university discriminated against Italian-Americans.⁴² After the discovery of evidence that the university had discriminated against Italian-Americans, both on an individual and class basis, a judge later issued a preliminary injunction, which resulted in a settlement.⁴³ More broadly, judicial precedent indicates that Italian-Americans, like other Caucasians, can be considered a "race" for purposes of a civil rights action under 42 U.S.C. § 1981.⁴⁴

Nevertheless, the media emits a stream of discriminatory and stereotypical Italian-American roles. Given that violence, lust, and anti-social characters attract audiences, the temptation exists to find the stock "villain" who symbolizes these qualities and whose villainy will help attract and keep audiences. In the film *Enemy of the State*, the hero actor, Will Smith, psychologically links the disgusting Mafia characters with Italian-Americans by expressly referring to those "Guido motherfuckers."⁴⁵ This hardcore ethnic slur is addressed not to the criminal element, as would be appropriate, but to the Italian-American community, with the almost subliminal assumption the two concepts are substantially interchangeable. The raised consciousness of the film industry would most likely not permit a comparable slur of African-Americans, Hispanics, or perhaps any other racial or ethnic group.⁴⁶ Given that the celluloid image of the savage Native American

⁴² *Scelsa v. City Univ. of N.Y.*, 806 F. Supp. 1126, 1128 (S.D.N.Y. 1992).

⁴³ *Id.* at 1131.

⁴⁴ See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 611 (1987) (stating that encyclopedias in the nineteenth century defined race in terms of ethnic groups); see also *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 627 (1987) (holding that Jews can state a § 1982 claim of racial discrimination because, at the time the statute was passed, Jews were one of the groups considered to be a distinct race). Italian-Americans were specifically allowed to sue under 42 U.S.C. § 1981. *Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223, 230 (7th Cir. 1995); *DeSalle v. Key Bank of S. Me.*, 685 F. Supp. 282, 284–85 (D. Me. 1988). It appears that a § 1983 claim for violation of equal protection can also be raised by an Italian-American if the evidence is sufficient. See *Benigni v. City of Hemet*, 879 F.2d 473, 477–78 (9th Cir. 1988) (finding that plaintiff had only presented thin evidence of discrimination based on his Italian ancestry).

⁴⁵ *ENEMY OF THE STATE* (Touchstone Pictures 1998). "I have argued that the burden placed on the Italian immigrants was, in fact, an aspect of American racism, naturalizing (as based on a brute fact of race) the structural injustice of abridging basic human rights on grounds of dehumanizing stereotypes that arose from that abridgement." DAVID A. J. RICHARDS, *ITALIAN AMERICAN: THE RACIALIZING OF AN ETHNIC IDENTITY* 199 (1999).

⁴⁶ See, e.g., Celeste Garrett, *Toyota to Spend \$8 billion to Increase its Diversity*, CHI. TRIB., Aug. 10, 2001, § 3, at 2 (describing how Toyota pulled an offensive advertisement, showing a black man smiling with a gold front tooth highlighted with the shape of Toyota's RAV 4 sports utility vehicle). In a Title VII case, however, no valid claim existed, even though the Italian-American plaintiff produced affidavits that union managers had stated, "all the Italians were going to be fired" and "all the Italians were nothing but mobsters and gang-

or menacing African-American is no longer politically correct, it is understandable that a less politically cohesive group, such as Italian-Americans, should be nominated for the role of media villain. The forbidden attributes of violence, lust, and criminality projected onto the Mafia with a capital M becomes mythologized like the Noble Savage or Childlike Negro and becomes the archetype of the Criminal Italian. That fewer than 1% of Italian-Americans are involved in organized crime, according to the FBI's own statistics, is irrelevant to a media-massaged public perception because racial and ethnic generalizations have a far more powerful hold on public imagination than any fact.⁴⁷

One Italian-American academic finds a Faustian bargain made by earlier Italian-American immigrants who, unlike African-Americans and Jewish-Americans, withdrew from public discourse in exchange for being let alone. The early Italian-American immigrants developed a sheltered sense of identity that required a low profile, a shedding of cultural roots, and social passivity regarding racial and ethnic discrimination in the larger society.⁴⁸ The poverty of southern Italians who came in waves of immigration and the shame of Fascist Italy, at war with the United States, triggered an urgency to become more American than the Pilgrims and a highly developed defense mechanism of denial in the face of public stereotyping.⁴⁹ The author recalls a respected Italian-American judge with a name that ended in vowel who observed during a public lecture how hard it was to get elected with a name unlike the "American" name of an Irish-American candidate. The irony of this social conditioning is that the names of an-

sters." *Indurante v. Local 705, Int'l Bhd. of Teamsters*, 160 F.3d 364, 366 (7th Cir. 1998). In her dissent, Judge Rovner stated,

Indeed, I am aware of no case from this circuit suggesting that a remark akin to "We're going to fire all of the Blacks," or "We're not going to hire any women" would not amount to direct evidence of discrimination solely because it does not single out the plaintiff for individual mention.

Id. at 369 n.1 (Rovner, J., dissenting).

⁴⁷ Mafia membership peaked around five thousand in the 1960s. By 1999 it had dropped to about 1,150, with 750 members in New York. The national "commission" of mob bosses that resolved mob disputes has not met in twenty years. Rick Hampson, *Death of the Mob*, USA TODAY, July 28, 1999, at 1A. Even if all five thousand criminals in the heyday of organized crime were hypothetically all Italian-American, that would have constituted only .0025% of the estimated 20 million Italian-Americans in the United States. H.R. Con. Res. 141, 107th Cong. (2001) at 2, available at <http://thomas.loc.gov/cgi-bin/query/z?c107:H.CON.RES.141:>

⁴⁸ See RICHARDS, *supra* note 45, at 189–90, 193–95.

⁴⁹ See *id.* at 5–8; Di Stasi, *supra* note 41, at 306–09.

other immigrant ethnic group in a multicultural and multiethnic society are assumed to be "American" names while one's own name is not. Much as other Americans were surprised to find out that African-Americans were not really happy behind the blackface of another generation, it may also surprise some that Italian-Americans are increasingly unwillingly to fatalistically accept their ethnic profiling as gangsters.

In resisting what it felt to be the latest in a barrage of defamatory stereotyping of Italian-Americans exemplified by *The Sopranos*, AIDA and its members discovered that the media have a powerful role to play in the way racial and ethnic minorities view themselves and are viewed by others. The National Italian Foundation commissioned a survey by Zogby International to determine the impact of televised ethnic stereotyping on teenagers. When asked to identify the role a person of a particular ethnic or racial background would most likely play in a movie or on television 34.3% said Italian-Americans would be cast as crime bosses, the highest percentage of all ethnic stereotypes.⁵⁰ The more television these teenagers watched the more likely they were to cast Italian-Americans in the role of crime boss.⁵¹ The study concluded that: (1) teens learn the worst parts of their heritage from entertainment industry stereotyping; and (2) the perception that teens have of other racial, ethnic, or religious groups is shaped by entertainment industry stereotypes.⁵²

Although the results highlighted may be those affecting Italian-Americans, this is not to deny the stereotyping that occurs with other racial and ethnic groups. A respected consortium of medical professionals has concluded that, with the average American child watching television as much as twenty-eight hours a week, well over one thousand studies point overwhelmingly to a causal link between media violence and aggressive behavior in some children.⁵³ A more recent study

⁵⁰ ZOGBY INT'L, TEEN SURVEY: TESTING THE INFLUENCE OF MEDIA ON RACIAL STEREOTYPES 16 (2000).

⁵¹ *Id.* The criminal stereotype of Italian-Americans increases to 44.2% if the 9.9% of those who associate Italian-Americans with "gang members" is added to the "crime boss" category. *See id.* The report states, "[T]he National Italian American Federation is then, on the right track in trying to lobby for a better image of Italians through protests and in school curriculum, although such teachings need to involve families." *Id.* at 5.

⁵² *Id.* at 4-5.

⁵³ *See* AM. ACAD. OF PEDIATRICS ET AL., JOINT STATEMENT ON THE IMPACT OF ENTERTAINMENT VIOLENCE ON CHILDREN, CONGRESSIONAL PUBLIC HEALTH SUMMIT 11 2, 4 (July 26, 2000), at <http://www.aap.org/advocacy/releases/jstmtevc.htm>; *see also* Am. Amusement Mach. Assoc. v. Kendrick, 115 F. Supp. 2d 943, 987 Exhibit B (S.D. Ind. 2000).

found a noteworthy association between the time spent watching television and the likelihood of subsequent aggressive acts toward others, even when other possible causes were taken into account.⁵⁴ It is unlikely that television has any less of an exacerbating affect on racial stereotyping.

Media stereotyping of Italian-Americans and other racial and ethnic groups affects not only the next generation, but the current one. The Response Analysis Corporation studied the public image of Italian-Americans on behalf of the Commission for Social Justice of the Order of Sons of Italy in America. Among the negative characteristics, the most glaring was that 74% of the sample perceived Italian-Americans as involved with organized crime, far more than attributed criminal tendencies to other racial and ethnic groups.⁵⁵ This high percentage suggests a persistent and emphatic reinforcement of this negative stereotype by films, television, depictions, and other mass media treatments. Concerned that the media and, specifically, television shows like *The Sopranos* were unfairly damaging the collective reputation of 20 million Italian-Americans, the fifth largest ethnic group in the United States, Congressional Representative Marge Roukema has sponsored a concurrent resolution of Congress calling on the entertainment industry "to stop the negative and unfair stereotyping of Italian-Americans" and to undertake "an initiative to present Italian-Americans in a more balanced and positive manner."⁵⁶

Research by the Italic Studies Institute supports this suspected connection between the false public stereotype of generalized Italian-American criminality and the role of the film industry in perpetuating that myth. The Image Research Project of the Italic Studies Institute surveyed films produced in the United States during the years 1928

⁵⁴ Jefferey G. Johnson et al., *Television Viewing and Aggressive Behavior During Adolescence and Adulthood*, 295 SCI. 2468, 2468 (2002) (assessment over a seventeen-year period with a community sample of 707 individuals); see also Craig A. Anderson & Brad J. Bushman, *The Effects of Media Violence on Society*, 295 SCI. 2377, 2377 (2002) ("Despite the consensus among experts, lay people do not seem to be getting the message from the popular press that media violence contributes to a more violent society.").

⁵⁵ RESPONSE ANALYSIS CORP., AMERICANS OF ITALIAN DESCENT: A STUDY OF PUBLIC IMAGES, BELIEFS, AND MISPERCEPTIONS 5 (Jan. 1991). ("Notice that about three out of every four adults make the connection between Italian-Americans and organized crime. None of the other groups are associated with this item by more than about one out of four adults.").

⁵⁶ H.R. Con. Res. 141, 107th Cong. (2001) at 1, available at <http://thomas.loc.gov/cgi-bin/query/z?c107:H.CON.RES.141:>

through 1999.⁵⁷ After four years of research, the project found a consistently negative portrayal of Italian-Americans and Italian culture in 74% of the films produced in that period.⁵⁸ Images of Italian-Americans as violent criminals predominated in 41% of the films surveyed, followed closely by 33% of the films in which those of Italian heritage are depicted as boors, buffoons, bigots, or socially undesirable. Ethnic images that were multifaceted, rather than stereotyped, or positive or heroic constituted only 26% of the films.⁵⁹ The influence of *The Godfather* (1972) was dramatic. Of all Italian mob films, only a quarter were produced before 1972, and three quarters after *The Godfather* opened the floodgates of copycat Mafia films.⁶⁰ The ability of the movie industry to fictionally shape public perceptions of an ethnic group is illustrated by a finding of the Institute that from 1928 through 1999, only 14% of Mafia movies were based on real characters or events. The remaining 86% were based on fictionalized characters or events.⁶¹

III. COUNTERSPEECH IN A MASS MEDIA MARKETPLACE OF IDEAS

Defamation occurs when a communication harms the reputation of another person so as to lower that person in the estimation of the community or as to deter other persons from associating or dealing with that person.⁶² One of the most persistent rationales for freedom of speech and press has been the marketplace-of-ideas metaphor invoked by Justice Oliver Wendell Holmes in the dissenting opinion of *Abrams v. United States*: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁶³

⁵⁷ See generally ITALIC STUD. INST., IMAGE RES. PROJECT, ITALIAN CULTURE ON FILM (1928–1999) (1999).

⁵⁸ *Id.* at statement of purpose.

⁵⁹ *Id.* at pie chart labeled “Individual Categories.”

⁶⁰ *Id.* at pie chart labeled “Influence of ‘The Godfather.’”

⁶¹ *Id.* at pie chart labeled “Mob Movies.” The increasing tendency of Hollywood to fictionalize characters and events and the rise of litigation claiming that these fictionalized movies distort history and damage reputations is discussed in Richard Willing, *Can Hollywood handle the truth?*, USA TODAY, Jan. 8, 2002, at 1A.

⁶² RESTATEMENT (SECOND) OF TORTS § 559 (1977); see *Murdock v. Penn.*, 319 U.S. 105, 115 (1943) (stating freedom of speech has a preferred position); *Chaplinsky v. N.H.*, 315 U.S. 568, 571–72 (1942) (stating that lewd, obscene, profane, libelous, insulting, or fighting words are not protected speech); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7 (4th ed. 1991).

⁶³ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (“‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”); LEE C. BOLLINGER, THE TOLERANT SOCIETY 18

AIDA's attempt to negotiate some kind of accommodation with Time Warner Entertainment Company, a corporation with consolidated assets of \$24.8 billion and part of an even larger AOL Time Warner, Inc. conglomerate, bordered on the ludicrous. With under two hundred members, AIDA had no bargaining power to insist on any disclaimers or clarifications related to the symbolic representation of Italian-Americans in *The Sopranos*. The opportunity of AIDA and similar citizens' groups to enrich public debate through counterspeech in the mass media marketplace is virtually nonexistent. The framers of the United States Constitution could not have foreseen the technological developments and economic barriers to market entry that ensure not only that freedom of the press belongs to those who can afford a modern printing press, but also that freedom of speech in the electronic media market belongs to those who can buy their own cable or television system.

In his now classic work, *The System of Freedom of Expression*, Professor Emerson observed even then that the most significant threat to freedom of expression was "the overpowering monopoly over the means of communication acquired by the mass media."⁶⁴ In 1967, he noted that out of 1547 cities with daily newspapers, only sixty-four cities had a competing daily newspaper, and three huge networks controlled what was seen on television.⁶⁵ With the exception of ABC, the other two major television networks of CBS and NBC were purchased by companies with little or no experience in television programming and whose executives were unaccustomed to doing business under the public-interest limitations of television programming.⁶⁶ More than just newspapers and television are at stake. Six companies now control the entirety of American mass media: General Electric, Viacom, Disney, Bertelsmann, Time Warner, and Rupert Murdoch's News Corporation.⁶⁷ Even before AOL's merger with Time Warner, the six had

(1986) ("[W]ithin the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech.").

⁶⁴ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 627 (Vintage Books 1971) (1970); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 390 (1974) (White, J., dissenting) ("The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home."). In a case of non-actionable group defamation, the Florida District Court of Appeal nonetheless criticized the commercial motivations of television news. See *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 805-06 (Fla. Dist. Ct. App. 1997).

⁶⁵ EMERSON, *supra* note 64, at 627-28.

⁶⁶ BAKER & DESSART, *supra* note 25, at 27, 138.

⁶⁷ BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY*, at x (6th ed. 2000).

more annual media revenues than the next twenty media firms combined. Now, with the historic merger of the world's largest Internet provider AOL and Time Warner, the resulting AOL Time Warner Inc. has become a corporation worth \$350 billion.⁶⁸

Time Warner Entertainment Company, L.P., the defendant in the AIDA lawsuit, persuaded the United States Court of Appeals to hasten the media consolidation of cable systems and television by striking down as arbitrary and capricious the FCC cable/broadcast cross-ownership rule in *Fox Television Stations, Inc. v. F.C.C.*⁶⁹ This rule prohibited a cable television system from carrying the signal of any television broadcast station if the cable system owned a broadcast station in the same local market.⁷⁰ The stage is now set for the consolidation of

⁶⁸ *Id.*

In 1983, 50 companies controlled more than half of the media in the United States. On paper at least, a mere 50 companies controlling most of American media would seem to be a cause for concern. But today, just 20 years later, the number has dropped to six. Six gigantic corporations control the vast majority of television, cable, radio, newspapers, magazines and the most popular Internet sites—and consequently, the majority of information, public discourse, and even artistic expression—in the United States. We have on our hands what one might very well call a “merger epidemic” in the media industry. And like any other epidemic, this is an unhealthy one.

*Hearing on Media Concentration: Before the Senate Committee on Commerce, Science & Transportation, 107th Cong. ¶ 4, 5 (2001) (statement of William Baker, President & CEO, Thirteen/WNET, New York), 2001 WL 808314 (citations omitted). Twenty years ago, thousands of family-operated stations dominated cable television. Yochi J. Dreazon et al., Why the Sudden Rise in the Urge to Merge and Form Oligopolies?, WALL ST. J., Feb. 25, 2002, at A1. On November 18, 2002, a deal made between Comcast and AT&T broadband left three companies in control of 65% of the cable market. Comcast Prospectus S-1, at <http://www.sec.gov/Archives/edgar/data/1166691/000104746903000769/a2100239z424b2.htm>. By comparison, what might happen in the United States if present trends continue is illustrated in Italy, where one company, Mediaset, controls about half of the television market. Tom Hundley, *Italian leader eyes media in Germany*, CHI. TRIB., Apr. 1, 2002, § 1, at 4.*

⁶⁹ 280 F.3d 1027, 1051 (D.C. Cir. 2002). See generally *AIDA v. Time Warner Entm't Co.*, 772 N.E.2d 953 (Ill. App. Ct. 2002).

⁷⁰ *Fox Television Stations, Inc.*, 280 F.3d at 1035 (additional rule prohibiting any entity from controlling TV stations if control resulted in an audience reach beyond 35% of the TV households in the United States remanded to FCC for further consideration). The former radio-television cross ownership rule generally prohibited joint ownership of a radio and television station in the same local market. The new rule permits more joint ownership of radio and television stations in the same market than the former “one-to-a-market” rule. *In re* Review of the Commission’s Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, Report & Order, 14 F.C.C.R. 12,903, 12,947 (1999). Meanwhile, the cross-ownership limitations on a newspaper owning a radio or television station remain in place for the time being. *In re* Amendment of Sections 73.34, 73.240, & 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcasting Stations, Second Report & Order,

cable and traditional broadcasting, which many originally saw as competitors in the marketplace of ideas. Additionally, a second stage is set for the future consolidation of television networks themselves. On April 19, 2001, the FCC announced that it had amended its dual network rule to permit any one of the four major television networks—ABC, CBS, Fox, and NBC—to own and control any emerging network, such as UPN and WB.⁷¹ A parallel drive toward consolidation is also occurring at the local station level. Effective November 16, 1999, the FCC revised its duopoly rule to permit any entity to own, operate, or control two television stations licensed in the same designated market area under certain conditions.⁷²

The FCC safeguards of the fairness doctrine, the political editorial rules, and the personal attack rule were designed to ensure that viewpoint diversity had some minimal respect in the monopolistic setting of the mass media. The Supreme Court in *Red Lion Broadcasting Company v. F.C.C.* upheld the right of the FCC to adopt by regulation the fairness doctrine and its derivative political editorial rules and personal attack rule.⁷³ The decision was based on the language and legislative history of the Federal Communications Act, which, since 1927, required broadcasters to operate in the “public interest.”⁷⁴ The fairness doctrine generally required broadcasters to devote a reasonable amount of time to the discussion of controversial issues by providing fair coverage of opposing positions. When a federal court of appeals stated that the fairness doctrine was not codified in the 1959 amendments to the Federal Communications Act, the FCC re-evaluated its fairness doctrine regulation and concluded that the doctrine contravened the First Amendment and disserved the public interest.⁷⁵

Docket No.18110, 50 F.C.C. 2d 1046, 1075 (1975). However, the FCC is considering the revision of even this limitation. See generally *In re Cross Ownership of Broadcast Stations and Newspapers*, 66 Fed. Reg. 50991 (proposed Oct. 5, 2001) (to be codified at 47 C.F.R. pt. 73).

⁷¹ Press Release, FCC, FCC Eliminates the Major Network/Emerging Network Merger Prohibition from Dual Network Rule, 2001 FCC LEXIS 2165, at *1 (Apr. 19, 2001).

⁷² *In re Kentuckiana Broad., Inc. & Independence Television Co.*, 16 F.C.C.R. 6974, 6974 n.1 (2001).

⁷³ See 395 U.S. 367, 380 (1969).

⁷⁴ *Id.*

⁷⁵ *Telecomm. Research & Action Ctr. v. F.C.C.*, 801 F.2d 501, 505 (D.C. Cir. 1986). Based on an extensive hearing, the FCC concluded that the fairness doctrine did not serve the public interest, but the agency did not definitively resolve the doctrine's constitutionality and continued to enforce the agency doctrine because of uncertainty as to whether the doctrine had been codified by federal statute. *In re Inquiry into Section 73.190 of the*

The derivative political editorial rules and political attack rules thereafter lived on borrowed time. The FCC abandoned the fairness doctrine in favor of a deregulated electronic media industry at a time when the industry was becoming increasingly centralized. The political editorial rules provided that when a broadcaster endorsed or opposed a legally qualified political candidate, the broadcaster had to notify the other candidates and give them a reasonable chance to respond.⁷⁶ The personal attack rule, of particular importance to those countering racial and group defamation, provided that if in the course of broadcasting a controversial issue an attack was made "upon the honesty, character, integrity or like personal qualities of an identified person or group," the broadcaster had to notify the person or group attacked no later than a week after the attack, provide a transcript of the attack or accurate summary if not available, and offer a reasonable opportunity to respond over the broadcaster's facility.⁷⁷

The personal attack rule provided extremely limited protection to groups alleging attacks based on race or ethnicity. Infrequent and insubstantial racial slurs were not enough to deny a television broadcast license.⁷⁸ Even where the Polish American Congress properly processed a substantial complaint, both on fairness and personal-attack grounds, through the FCC procedures, a federal appellate court found the personal attack rule unavailable to the Polish-American community, despite a series of "Polish jokes" told on the

Commission's Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C. 2d 145, 147, 155 (1985). In *Meredith Corp. v. F.C.C.*, the federal appellate court ordered the FCC to re-evaluate both the constitutional and public policy bases for the doctrine. 809 F.2d 863, 874 (D.C. Cir. 1987). In *Syracuse Peace Council against Television Station WTVH, Syracuse, NY*, the FCC found that the fairness doctrine chilled speech and disserved the public interest, even though the FCC admitted that broadcasting still had an allocational scarcity of more applicants for stations than spectrum space available. Memorandum Opinion & Order, 2 F.C.C.R. 5043, 5054-55 (1987). The federal appellate court upheld the repeal of the fairness doctrine as within the FCC's authority without reaching any constitutional issues. *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 655-56 (D.C. Cir. 1989).

⁷⁶ *Red Lion Broad. Co.*, 395 U.S. at 373-74. The political editorial rules were later codified in 47 C.F.R. § 73.1930 (1981).

⁷⁷ *Red Lion Broad. Co.*, 395 U.S. at 373-74. The personal attack rule was later codified in 47 C.F.R. § 73.1920 (1981).

⁷⁸ *Nat'l Ass'n for Better Broad. v. F.C.C.*, 591 F.2d 812, 820 (D.C. Cir. 1978). The allied fairness doctrine did not provide for monetary recovery based on group libel. *Provisional Gov't of the Republic of New Afrika v. ABC*, 609 F. Supp. 104, 108 (D.D.C. 1985). A fairness doctrine claim could not be raised in federal court until administrative remedies had been exhausted. *Mich. United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 903 (W.D. Mich. 1980) (group libel claim).

Dick Cavett show sponsored by the ABC network. The appellate court concluded that, since no controversial issue of public importance existed, neither the fairness doctrine nor its corollary, the personal attack rule, could be invoked.⁷⁹ A federal appellate court finally dismantled the personal attack rule by granting a mandamus against the FCC to compel repeal of both the personal attack rule and the political editorial rules. Instead of deciding the merits of the rules or whether they even violated the First Amendment, the court negated the rules for the simple reason that the FCC had unreasonably delayed its own decision for over two decades.⁸⁰ Without such rules, the Supreme Court has made it clear that no one has a constitutional or statutory right of access to a broadcast station and that the electronic media are not common carriers required to broadcast contrary views.⁸¹

IV. THE FAILURE OF CIVIL ACTIONS FOR GROUP DEFAMATION

Those who attempt to use the civil law of defamation to recover damages for group defamation based on race or ethnicity encounter an enormous doctrinal barrier. Generally, defamation of a large group is almost never actionable, either by the group itself or by any individual within the group.⁸² What constitutes a "large" group, as distinct from a "small" one, is uncertain.⁸³ The larger the group, the less

⁷⁹ *Polish Am. Cong. v. F.C.C.*, 520 F.2d 1248, 1256 (7th Cir. 1975). The Seventh Circuit has historically taken a dim view of the fairness principle. See *Radio Television News Dirs. Ass'n v. United States*, 400 F.2d 1002, 1020 (7th Cir. 1968) (prematurely concluding that the First Amendment precluded political editorial rules and the personal attack rule in a pre-*Red Lion* decision).

⁸⁰ *Radio-Television News Dirs. Ass'n v. F.C.C.*, 229 F.3d 269, 272 (D.C. Cir. 2000).

⁸¹ See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973).

⁸² See DAN B. DOBBS, *THE LAW OF TORTS* § 406 (2000). "Thus far, any civil remedy for such broadside defamation has been lacking." W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 111 (5th ed. 1984).

⁸³ *Alexis v. District of Columbia*, 77 F. Supp. 2d 35, 41 (D.D.C. 1999). One perceptive decision summarizes well the untidy "rules of thumb" that often divide "large" from "small":

In short, the cases surveyed from other federal and state jurisdictions do not establish a "bright line" above which a defamed group is "too big" for an unnamed individual member to sue for defamation. The cases do evince a consistent rule of thumb, however, that unnamed group members generally are not permitted to sue for group defamation if the group has more than 25 members; they will almost invariably not be permitted to sue if the group has more than 100 members.

likely it is that the individual plaintiff can establish that he or she was identified personally by the group defamation. One writer has flatly stated that a member of a political party, a race of people, or other large group that has been defamed will not be able to establish the individual identification necessary for personal defamation.⁸⁴ This leads to a legal paradox: the more expansive the defamation, the more likely it is that the defamer will totally escape any civil liability. The perverse lesson to the would-be defamer is to defame largely.⁸⁵

Possibly to mitigate the relativistic notions of "large" and "small," the *Restatement (Second) of Torts* arguably creates more confusion because it keeps the concepts of "large" and "small" groups, but does not require that this distinction be absolutely determinative. The *Restatement (Second) of Torts* § 564A provides:

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it, but only if,

(a) the group or class is so small that the matter can reasonably be understood to refer to the member, or

(b) the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member.⁸⁶

⁸⁴ WILLIAM E. FRANCOIS, *MASS MEDIA LAW AND REGULATION* 105 (5th ed. 1990) (offering criminal libel as a possible solution to the doctrinal barrier of group size).

⁸⁵ At least one court appears to have extended the notion of group libel to a product disparagement claim brought as a class action by 4,700 Washington state apple growers against the CBS television program *60 Minutes* for airing a program alleging that a growth chemical used on the apples was a carcinogen. *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 930-31, 936 (E.D. Wash. 1992) ("Blindly applying the concept [group defamation limitation] to all disparagement cases, however, would be tantamount to counseling potential disparagers [*sic*] that they are home free if only they succeed in wreaking damage on a sufficient number of manufacturers."). The expansive nature of group libel has also served to protect actors acting under color of state law in federal civil rights actions. For example, at least one court has used the group defamation concept to bar a lawsuit against defendants in a federal civil rights action under 42 U.S.C. § 1983. *See Sacco v. Pataki*, 114 F. Supp. 2d 264, 265, 271 (S.D.N.Y. 2000). Qualified privilege applied to civil rights lawsuits because pre-1997 group defamation precedents raised serious doubt as to whether an unnamed individual had a right to sue for group defamation, even if a listener could find out the group members' identities. *Alexis*, 77 F. Supp. 2d at 44, 46.

⁸⁶ *RESTATEMENT (SECOND) OF TORTS* § 564A (1977). A standard tort treatise seems to juggle the specificity of the statement with the size of the group: (1) defamation generally disparaging an entire group; (2) a more specific defamation about a "rather definite number of persons"; and (3) defamation involving only some members of a "relatively small group." *KEETON ET AL.*, *supra* note 82, § 111; *see also* *Action Auto Glass v. Auto Glass Spe-*

In commentary, the *Restatement (Second) of Torts* acknowledges the impossibility of setting a definite limit between a “large” and “small” class or group but then notes that cases permitting a plaintiff’s recovery involved “numbers of 25 or fewer.”⁸⁷ The result is a type of self-fulfilling prophecy because most authorities now rather rigidly agree the group must consist of twenty-five or fewer members in order for a member of the group to sue.⁸⁸ Sometimes the group is considered small, but it is not clear exactly how many members were in the small group.⁸⁹ Other times courts have tweaked the “small” group rule a bit by extending it to thirty members.⁹⁰ At the other extreme, a defamation action brought by more than one million American cattle farmers against television talk-show host Oprah Winfrey, exceeded the

cialists, No. 1:00-CV-756, 2001 WL 1699205, at *10 (W.D. Mich. Aug. 21, 2001) (issue of whether group defamation referred to plaintiff was left to jury).

⁸⁷ RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977).

⁸⁸ N.Y. Life Ins. Co. Agents’ Class Claimants Solicitation Litig., 92 F. Supp. 2d 564, 569 (E.D. La. 1997) (stating that “most authorities” require a group of twenty-five or fewer members); see *Gintert v. Howard Publ’ns, Inc.*, 565 F. Supp. 829, 833, 839–40 (N.D. Ind. 1983) (upholding ruling finding no cause of action for group defamation involving more than twenty-five persons); *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 805 (Fla. Dist. Ct. App. 1997) (holding that a defamatory reference to plaintiff is not possible if defamed group is over twenty-five persons); see also *Lins v. Evening News Ass’n*, 342 N.W.2d 573, 578 (Mich. Ct. App. 1983) (finding seven group members a small enough group). Sometimes, however, courts have found a group too large, even though it contained fewer than twenty-five persons. See, e.g., *Bujol v. Ward*, 778 So. 2d 1175, 1180 (La. Ct. App. 2001) (finding twenty-three members of a street crimes unit of forty-six persons who were allegedly defamed too large a group); *Coker v. Sundquist*, No. 01A01–9806-BC-00318, 1998 WL 736655, at *2–4 (Tenn. Ct. App. Oct. 23, 1998) (three named group members insufficient to state defamation claim as to one of the three who was adjudged libel-proof anyway because of his “Death Row” status). At least one court has found groups of persons under twenty-five too large when the group consists of public officials, for fear of violating the constitutional rule of *New York Times Co. v. Sullivan*, which prevents government from suing for defamation in the guise of a group of public officials who do the suing. See *Dean Jr. v. Town of Elkton*, No. CL00–1958, 2001 WL 184223, at *5 (Va. Cir. Ct. Feb. 21, 2001) (five to eight police officers of Elkton Police Department could not sue because of *New York Times*, even though the group was small). See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁹ See, e.g., *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 514 (S.C. 1998) (“family” considered a small group); *Hoffman v. Roberto*, 85 B.R. 406, 412 (W.D. Mich. 1987) (size of “relatively small group” was unclear). Sometimes the reverse occurs; a court considers a group too large without giving exact numbers. See *Price v. Viking Press, Inc.*, 625 F. Supp. 641, 645–46 (D. Minn. 1985) (even though as few as ten assigned special agents formed part of group, judicial notice was taken that the number of agents “exceeded the number typically assigned” to bar the lawsuit).

⁹⁰ *Alexis*, 77 F. Supp. 2d at 41 (“The courts traditionally have required quite a small group—no more than twenty or thirty members—before they will hold that defamation of the group should be deemed to have particular application to a group member who is not named in the defamatory remarks.”).

unusually generous 740-person line of demarcation between a "large" and "small" group set by the Texas courts.⁹¹ The only hope for a member of an obviously large group is to claim that he or she is a member of an identifiable small subset within the large group.⁹² In the classic case of *Neiman-Marcus v. Lait*, a group of 382 saleswomen was too large to permit any one of the saleswomen to sue, even though the entire class may have been defamed.⁹³

Ultimately though, the decisive factor under the *Restatement (Second) of Torts* is not the size of the group, but whether the group defamation reasonably implicates the individual plaintiff. Usually the very nature of a small group means that a defamatory statement as to all or fewer can reasonably apply to the plaintiff member, such as a defamatory statement that all but one person out of a group of twenty-five are thieves. This is not, however, always inevitable. For example, a defamatory statement that one out of a group of twenty-five has stolen an automobile may not sufficiently defame any particular member of the group under the *Restatement (Second) of Torts* test.⁹⁴ Conversely, it is possible for even a member of a so-called large group to sue in an unusual situation. The statement, "All lawyers are shysters," may be defamatory as to an individual lawyer if the words are published when the lawyer is the only lawyer present and the context indicates the speaker is making a personal reference to that lawyer.⁹⁵

⁹¹ *Tex. Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 860, 864 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000).

⁹² *See Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1228-29 (10th Cir. 1987) (class of 955 dog breeders was too large and was also not an identifiable small subset within the class of "dog breeding farms").

⁹³ 13 F.R.D. 311, 313, 315-16 (S.D.N.Y. 1952) However, fifteen salesmen out of twenty-five suing on their own behalf and on behalf of the others was a small enough group for a lawsuit, even though only "most" were referred to in a defamatory manner. The dispute revolved around 382 saleswoman who were accused of prostitution and "most" of the twenty-five salesmen whom defendant termed "fairies." Defendant apparently conceded that nine Neiman-Marcus models had a cause of action for his assertion that "some Neiman models are call girls." *Id.* at 313, 316 n.1; *see* MICHAEL F. MAYER, WHAT YOU SHOULD KNOW ABOUT LIBEL & SLANDER 104 (1968) (criticizing the ruling of *Neiman-Marcus v. Lait*).

⁹⁴ RESTATEMENT (SECOND) OF TORTS § 564A cmt. c (1977); *see* *Chapman v. Byrd*, 475 S.E.2d 734, 737 (N.C. Ct. App. 1996) (alleged defamation referring to "someone" in a group of nine insufficient). A member of a group has no claim for defamation aimed at some or less than all of the group if there is nothing to single out the plaintiff. *Evans v. Dolcefino*, 986 S.W.2d 69, 77 (Tex. Ct. App. 1999).

⁹⁵ RESTATEMENT (SECOND) OF TORTS, § 564A cmt. d (1977). If the plaintiff is not part of a "small" group under § 564A (a), then subsection (b) is to be used for a "large" group. *Bolanin v. Guam Publ'ns, Inc.*, 4 N. Mar. I. 176, 184 (N. Mar. I. 1994); *see* *Gintert v. Howard Publ'ns, Inc.*, 565 F. Supp. 829, 835 (N.D. Ind. 1983); *see also* Provisional Gov't of the Re-

This is small solace to a member of an ethnic or racial group, which by any definition is large. One can imagine, for instance, a situation in which an Albanian is the only known Albanian present and a speaker looks at the Albanian from a few feet away and says, "All Albanians are horse thieves." Even then, any recovery by the individual plaintiff Albanian is only for personal damage; it does nothing to protect the group reputation of all Albanians. Further, if the "all" is reduced to "some" or "most," even this rarefied hypothetical of linkage between the group and individual plaintiff most likely fails.⁹⁶ Although there may be a different legal result for an unnamed individual circumstantially harmed by the vilification of the group to which the individual belongs (who may not recover), as opposed to an unnamed but circumstantially identifiable individual who is defamed personally (who may recover), the question is ultimately one of circumstantial degree rather than bright-line rules. The problem is the same: do the circumstances reasonably identify the plaintiff as a target of the defamation?⁹⁷ The repeated use of the word "reasonably" in both subsections (a) and (b) of *Restatement (Second) § 564 A* is a verbal clue that "smallness" or "largeness" of a group is but a matter of circumstantial degree rather than the stuff from which black-letter rules are made.⁹⁸

public of New Afrika v. ABC, Inc., 609 F. Supp. 104, 108 (D.D.C. 1985) (actionability of a lawsuit depends on a defamatory statement reasonably applicable to the plaintiff).

⁹⁶ Conceivably, the defamation of racial slurs made toward an African-American worker in the workplace could become individualized actionable defamation through "group defamation" if the worker was the only member of the racial group present when the statement was made or if the words are reasonably understood to refer to the worker, but the worker lost the claim on other grounds. *L. & D of Or., Inc. v. Am. States Ins. Co.*, 14 P.3d 617, 620 (Or. Ct. App. 2000) (alleged defamatory statements included: "big, black and round like your d—k," "nigger work," "being asked what's long and hard on a black man and being told the answer was the 'second grade,'" and similar racist and derogatory jokes and comments).

⁹⁷ *Church of Scientology v. Flynn*, 744 F.2d 694, 697 n.5 (9th Cir. 1984). "This approach [of the *Restatement (Second) of Torts § 564A(b)* (1977)] is not analytically different from our conclusion that the group libel rule does not apply." *Id. Compare Gintert v. Howard Publ'n, Inc.*, 565 F. Supp. 829, 832–33, 837 (N.D. Ind. 1983) (prohibiting a member of a large defamed group from suing for that defamation under the Indiana non-group rule "unless he can show special application of the defamatory matter to himself"), with *RESTATEMENT (SECOND) OF TORTS § 564A(b)* (prohibiting the same thing unless "the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member"). Aside from semantic parsing, what is the practical difference?

⁹⁸ *RESTATEMENT (SECOND) OF TORTS § 564A(b)* (1977). In *Eyal v. Helen Broadcasting Corp.*, the owner of a corporation and the corporation itself, which operated a delicatessen in Brookline, Massachusetts, sued for a media defamation when the defendant reported that "the owner of a Brookline [d]elicatessen and seven other people [were] arrested in

A minority view, called the "intensity of suspicion" test, de-emphasizes the size of the group at least marginally more than the majority view of the *Restatement (Second)*.⁹⁹ This minority view emphasizes the extent to which a group defamation focuses on each individual member of the group, whether large or small. Oklahoma pioneered the "intensity of suspicion" test in *Fawcett Publications Inc. v. Morris*.¹⁰⁰ In *Fawcett*, a well-known plaintiff was an alternate fullback on the University of Oklahoma football team, which consisted of sixty or seventy persons. Without reference to any individual team member, the defendant published an article claiming that the entire Oklahoma football team took illegal drugs. Since the plaintiff was "well known and identified" with the group, the court found no reason why the size of the group alone should be conclusive.

The Oklahoma Supreme Court later held in *McCullough v. Cities Service Co.* that the "intensity of suspicion" test uses group size as only one factor to be considered along with others, such as the prominence of the group and the prominence of the individual within the

connection with an international cocaine ring." 583 N.E.2d 228, 229 (Mass. 1991). Because the reference was to only one unnamed delicatessen owner and not to a group, the Supreme Judicial Court of Massachusetts disagreed with the trial court's view that the owner's claim was one of group defamation. *Id.* at 230 n.6. Thus, the order dismissing the complaint was reversed. *Id.* at 223. Apparently it was unimportant how many delicatessens operated in Brookline or that other media outlets had referred to operation of the cocaine ring by an "Israeli Mafia." *See id.* at 229 n.5; *cf.* *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 936 n.5 (E.D. Wash. 1992). In *Auvil v. CBS 60 Minutes*, the court posed the following hypothetical: if pineapples instead of apples had been the subject of the derogatory statement, the public would suspect the producer as Dole Pineapple Co. because of its extensive market share. *Id.* Thus, Dole would be able to sue, despite the prohibition against group defamation. *See id.* Further, the court expressed uncertainty over this hypothetical outcome when the Washington apple growers would not be able to sue because of the group problem. *Id.*

⁹⁹ *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 223 n.4 (E.D. Ky. 1990) (The three factors of the "intensity of suspicion" test are definiteness and composition of the group, the prominence of the group, and the prominence of each individual member within the group.). The *Restatement (Second)* test has been referred to as the "so-called 'majority rule.'" *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 836 (Okla. 1984).

¹⁰⁰ *See* 377 P.2d 42, 48 (Okla. 1962). The Oklahoma Supreme Court distinguished early Anglo-American cases, which had confused group criminal defamation with civil cases. *See id.* at 51 (group size alone inconclusive of liability). The court cited a Canadian appellate precedent that allowed a Jewish plaintiff in Quebec, home to seventy-five Jewish families out of a city population of 80,000, to sue in defamation for the entire Jewish group, even though only the group was defamed and not the plaintiff individually. *Id.* at 51. This "intensity of suspicion" test has been called the "true" test in which group size is not controlling. *Brock v. Thompson*, 948 P.2d 279, 292 (Okla. 1997). *Accord* *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 147 (Okla. 1998).

group.¹⁰¹ Therefore, an alleged defamation of some 19,686 osteopaths in the United States failed the “intensity of suspicion” test as to a claim brought by one Doctor of Osteopathy among many.¹⁰² The Court explained that the action failed the “intensity of suspicion” test on the ground that impersonal reproach of an indeterminate class, such as 19,686 Doctors of Osteopathy, is not actionable because the larger the group libeled, the less likely a reader would take the libel to refer to a particular individual. Furthermore, the justices concluded that frank discussions of matters of public concern are protected by the First Amendment, and thus, incidental or occasional injury to a person resulting from defamation to a large group is offset by the public’s right to know.¹⁰³ This indicates that, although size alone is not controlling under the “intensity of suspicion” test, it can be the critical factor that leads to the same non-liability result as the majority view of the *Restatement (Second) of Torts*. The New York judiciary adopted this Oklahoma minority test in *Brady v. Ottaway Newspapers, Inc.*¹⁰⁴ While agreeing that group size is not controlling, the court added further balancing factors, including the definiteness of the group in composition and number and its degree of organization. The New York judiciary has acknowledged, however, that group variations are too great for an exclusive list of balancing factors.¹⁰⁵

In reality, the difference between the majority *Restatement (Second)* test and the minority “intensity of suspicions” test is simply a matter of degree. Neither test makes size controlling. Yet neither excludes size from consideration, even though the *Restatement (Second)* test appears to make the difference between “small” and “large” groups more significant. A New York court of review concluded that under the *Restatement (Second)* test, a member of a large group can only sue if there is a “special allusion to a particular member of the group or the circumstances surrounding publication give rise to the inference that there is a particular reference to a specific individual.”¹⁰⁶ The reference under the majority test is to the individual plaintiff under the

¹⁰¹ 676 P.2d 833, 837 (Okla. 1984).

¹⁰² *Id.*

¹⁰³ *Id.* at 836–37.

¹⁰⁴ 445 N.Y.S.2d 786, 793 (App. Div. 1981). Twenty-seven unindicted city police officers out of fifty-three in 1972 could sue for defamation of unindicted officers. *Id.* at 787, 794.

¹⁰⁵ *Id.* at 793. The plaintiff’s success in *Brady* occurred because of key factors regarding the group: it was limited to unindicted officers, was a highly visible group into which entry was limited, and was a locally prominent group easily identified by the public. *Houbigant, Inc.*, 182 B.R. 958, 975 (Bankr. S.D.N.Y. 1995).

¹⁰⁶ *Brady*, 445 N.Y.S.2d at 793.

guise of an attack on the group, and thus no need exists to ask whether the "intensity of suspicion" focuses on the individual plaintiff. Even though the minority view seems more favorable to plaintiffs, the difference is scant. The differences resemble mere quibbles about the relevant strength of circumstantial evidence needed to justify a reference to an individual plaintiff, as well as the importance of group size as one of those circumstantial factors.

The importance of policy in determining whether group defamation should be allowed is illustrated by *Auvil v. CBS 60 Minutes*, a class action for a product disparagement claim brought on behalf of 4700 Washington apple growers as the result of a *60 Minutes* program that implied that red apples across the United States were tainted with a carcinogen.¹⁰⁷ The federal court acknowledged that the group defamation doctrine, possibly applicable to the product disparagement case, was justified by two reasons: (1) dilution and (2) lack of plaintiff's identification. If a class is sufficiently large, no one person in the group suffers personal injury because the injury is diluted.

Even though this made sense in a defamation case, the court paradoxically concluded that, where "pecuniary interests" are at stake in a product disparagement case, no dilution exists.¹⁰⁸ Somehow the court saw intangible defamation harm as different from tangible product disparagement harm, even though a group of 4700 is large by any standard. As for the absence of a specifically identifiable plaintiff, the court theorized that when defamation of an entire large group occurs, the defamation cannot reasonably be taken to include each member of the group.¹⁰⁹ Yet, again the Washington court suggested the lack of a specifically identifiable plaintiff was more of a problem in the defamation of a large group rather than in a trade disparagement of a product, such as apples, involving a large group, such as Washington apple growers. The moral seems to be that when courts consider group defamation based on race or ethnicity at least as harmful as the Washington court considered the trade disparagement of red apples, the law of group defamation will likely change.

Neither the so-called majority *Restatement (Second)* test nor the "intensity of suspicion" minority test is useful to a plaintiff of a particular racial or ethnic group who sues on the basis of group defamation. The Prosser treatise acknowledges that even though group defama-

¹⁰⁷ See 800 F. Supp. 928, 930-31 (E.D. Wash. 1992).

¹⁰⁸ *Id.* at 935.

¹⁰⁹ *Id.* at 936.

tion has been a "fertile and dangerous weapon of attack" on racial, religious, and political minorities, so far a civil remedy for "broadside defamation" does not exist.¹¹⁰ A class action brought on behalf of over 600 million Muslims for defamation to recover damages for the showing of the film *Death of a Princess* was not actionable.¹¹¹ Even with the benefit of the presumably more liberal "intensity of suspicion" test, a Nigerian was not allowed to bring a defamation action against CBS for damages on his own behalf and on behalf of more than five hundred Nigerians engaged in international business with the United States.¹¹² Apparently only one federal case has intriguingly suggested in dictum that group defamation might exist in Illinois. This case, dealing with "Polish jokes" in the film *Flashdance*, stated that if the defamation could be said with certainty to include every member of the group, a cause of action would lie for group defamation because a stereotypical Polish-American who is the butt of "Polish jokes" may be said to represent every individual in the ethnic group.¹¹³

One treatise writer suggests that group defamation is disfavored because "much group abuse is meaningless invective."¹¹⁴ But obviously much non-group defamation is also meaningless invective that does not meet the definition of defamation.¹¹⁵ Neither proposition logically excludes, however, the harmful defamation of either a group or an individual where meaningless invective is not involved. The difficulty with a too facile dismissal of racial and ethnic group defamation is more than just the opportunity for demagogues to induce a population to adopt defamatory attitudes toward a disfavored or subordinate group, as the treatise writer himself concedes. Rather, the difficulty lies with the assumption that the marketplace-of-ideas metaphor functions in the mass media in the same way that it functions in the public square, where all citizens have equal access. Accordingly, the usual reasons given for not allowing a civil action for group defamation are questionable at best.

¹¹⁰ KEETON ET AL., *supra* note 82, § 111.

¹¹¹ Khalid Abullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186, 186 (N.D. Cal. 1980).

¹¹² Anyanwu v. CBS, 887 F. Supp. 690, 691, 693 (S.D.N.Y. 1995).

¹¹³ Pawelek v. Paramount Studios Corp., 571 F. Supp. 1082, 1084, 1085 n.9 (N.D. Ill. 1983) (complaint dismissed on other grounds) (citing *Brewer v. Hearst Pub. Co.*, 185 F.2d 846, 848-49 (7th Cir. 1950); *McGuire v. Jankiewicz*, 290 N.E.2d 675, 676 (Ill. App. Ct. 1972)).

¹¹⁴ DOBBS, *supra* note 82, § 406, at 1137.

¹¹⁵ *Id.* § 403, at 1130 ("Beyond ridicule and name-calling, many assertions can cause harm to the plaintiff's reputation but are not defamatory.")

One concern is that any kind of group defamation action will set loose an unacceptable flood of litigation.¹¹⁶ The fear that lawsuits for defamation of a racial or ethnic group will open the floodgates of litigation is pure speculation. A North Dakota statute provides that if a defamation is uttered as to "an entire group or class of agricultural producers or products," a cause of action for damages, actual and exemplary, in addition to injunctive relief, arises in favor of each producer in the group and any association representing an agricultural producer, "regardless of the size of the group or class."¹¹⁷ No floodgate of litigation appears to have opened in North Dakota or in any other state with a similar law.¹¹⁸ The technique of class actions removes the fear that a large number of plaintiffs will automatically create insurmountable procedural difficulties.¹¹⁹

¹¹⁶ See *Mich. United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980). "Statements about a religious, ethnic, or political group could invite thousands of lawsuits from disgruntled members of these groups claiming that the portrayal was inaccurate and thus libelous." *Id.* In that case, an organization of hunters and several of its members, who belonged to a group of more than one million hunters, could not sue as a matter of law for defamation of Michigan hunters because, under the *Restatement (Second) of Torts* § 564A, the only way for a group member to sue is "if the circumstances surrounding publication give rise to the conclusion that the member was being focused on." *Id.* at 899.

¹¹⁷ N.D. CENT. CODE § 32-44-03 (1997). Undoubtedly, a two-year statute of limitation helps prevent a floodgate of litigation. See *id.* § 32-44-04. A similar Texas statute was found inapplicable in *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 862-63 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680, 687 (5th Cir. 2000) (Texas statute passed in 1995 on heels of Alar apple scare). These "veggie libel laws" allow all producers of a general food to sue if the food is wrongly said to be dangerous. DOBBS, *supra* note 82, § 406, at 1136-37.

¹¹⁸ Besides North Dakota, one authority has found some eleven states with statutes relating to agricultural food product disparagement. Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 404 n.13 (1995-1996). Some of these substantially expand the group of potential parties who can sue by defining "producer" to include the whole market chain from grower down to consumer. *Id.* at 413. No reported cases dealing specifically with these laws, however, are noted. See *id.* The author of this Article has found no cases decided under the North Dakota statute mentioned. See N.D. CENT. CODE § 32-44-03.

¹¹⁹ See, e.g., *Wilkinson v. Fed. Bureau of Investigation*, 99 F.R.D. 148, 156 (C.D. Cal. 1983) (finding that a class action against officers and agencies of the federal government was the "superior method" of litigating false stigmatization claims, which were "closely analogous" to group defamation claims). *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 317 (S.D.N.Y. 1952) (holding that a "spurious" class suit is appropriate where "there are common questions of law and fact affecting the several rights of members of the 'spurious' class and common relief is sought against the defendants"). If a defendant were to defame thousands of Irish-Americans in a city by picking likely Irish-American names out of a telephone book and personally defaming each person by reason of their Irish ancestry, the law has no concern about a floodgate of litigation because each plaintiff is named. Yet the same potential for mass litigation exists as though it were a group defamation case. The Supreme Court has indicated that group defamation is not an automatic defense to a civil

The law already permits group defamation actions in a covert fashion. Corporations, partnerships, and even unincorporated associations, as long as they have legal capacity to sue as an entity, may sue for defamation without regard to whether they are "large" or "small" in terms of capitalization or number of shareholders.¹²⁰ The reality is that the legal entity's officers, employees, and shareholders all benefit if the legal entity prevails in the lawsuit, even though they cannot directly sue for defamation to the legal entity.¹²¹ A not-for-profit corporation of African-Americans, having thousands of members in a state, can be defamed and can sue for that defamation, but if those same African-Americans are merely a large group, they cannot sue for group defamation, either as a group or as members of the group. It is curious, to say the least, that one corporation may sue for defamation to itself, though it has a huge number of employees and shareholders, but that a group of corporations, more than twenty-five and defamed as a corporate group, is not allowed to sue. The group of corporations is too large a group under the *Restatement (Second)* majority test even though the individual corporations may hypothetically be sole or family corporations with only a few shareholders underneath the corporate veils.

The problem with defamation suits based on race or ethnicity is not the common view that the defamation fails to cause generalized harm to the group or specifically to all persons within the group. The Supreme Court in *Beauharnais v. Illinois* acknowledged that prejudice based on race could affect the social prospects of all members within the group.¹²² Rather, the fundamental problem with these suits, and one not commonly noted, is that the larger the group, the more at-

defamation lawsuit brought by an individual plaintiff from the group. *Rosenblatt v. Baer*, 383 U.S. 75, 82 n.6 (1966).

¹²⁰ RESTATEMENT (SECOND) OF TORTS §§ 561, 562 (1977); see also *La Luna Enters. v. CBS Corp.*, 74 F. Supp. 2d 384, 387 (S.D.N.Y. 1999) (actionable claim by restaurant for "Russian mob" assertion); *McConathy v. Ungar*, 765 So. 2d 1214, 1218 (La. Ct. App. 2000) (actionable claim by corporation as a separate legal entity based on *Restatement (Second) of Torts* § 561). Libel of a partnership trade name is considered a libel of all the partners. *Poorbaugh v. Mullen*, 653 P.2d 511, 520 (N.M. Ct. App. 1982). Investors in an unincorporated business venture cannot directly sue, however, for defamation to the business venture. *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir. 1990).

¹²¹ See *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 935 (E.D. Wash. 1992). "It would matter not a whit whether all of the apple orchards in the state were owned by a single corporation or, as here, by thousands of 'ma and pa' operations. The injury would be the same." *Id.*

¹²² *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

tenuated the chain of causation linking the defamation to specific persons within the group.¹²³ Thus, there is an institutional inability of the law to parcel out the damages among members of the defamed group in any satisfactory manner. Even if a defamation proximately causes harm to a group, the law must still apportion the monetary damages among the plaintiffs according to some rational principle.¹²⁴

This apportionment problem is compounded by the fact that, absent proof of special damages, the typical general *per se* damages of defamation law are intangible concepts of reputation, honor, standing in the community, humiliation, and emotional suffering that are much harder to put in terms of dollars and cents, let alone apportion among members of the defamed group.¹²⁵ At least where a defendant falsely defames all apple growers in the United States by implying that they use a carcinogen on the red apples, an individual grower of red apples can show loss of profits or other monetary losses.¹²⁶ But how does one calculate, for example, the real but non-economic harm of a racial or ethnic community that is unable to elect members of its group to office because of a continuous defamatory barrage directed against the group?

There is no reason, moreover, to suppose that the monetarily compensable damage to members of a defamed group will be equal. A publication that "the Italian-American members of the Democratic party in State X are Mafia fellow travelers" could affect two Italian-Americans quite differently. For example, an Italian-American of Democratic persuasion in State X, who is fired because his employer read the publication and fired the employee in order to protect the company from Mafia fellow travelers, is more harshly affected by the publication than a Democratic Italian-American from State X who has lived abroad for ten years and plans to do so indefinitely. Furthermore, monetary compensation becomes totally unrealistic when a group, like any racial or ethnic group, is somewhat porous and not rigidly defined. Members of a racial or ethnic group may not be full-blooded members of the group or may not consider themselves psychologically members of the group, even if historically murky pedigrees could be ascertained with reasonable certainty. Conversely, indi-

¹²³ See *Auvil*, 800 F. Supp. at 935-36 (discussing the dilution problem).

¹²⁴ The determination of whether defendant's act has caused an injury precedes and is analytically different from the question of what damages should be compensated. LEON GREEN, *RATIONALE OF PROXIMATE CAUSE* 193 (Rothman Reprints, Inc. 1976) (1927).

¹²⁵ See generally DOBBS, *supra* note 82, § 422; KEETON ET AL., *supra* note 82, § 116A.

¹²⁶ *Auvil*, 800 F. Supp. at 930-31.

viduals who are not members of the racial or ethnic group by blood may consider themselves such by cultural choice. This would inject courts into the daunting task of determining whether a particular individual is properly aligned with a particular race or ethnic group for the purpose of receiving his or her apportioned damage.

Injunctive relief also does not provide a feasible alternative solution to the insoluble problem of apportioning damages among members of the defamed group. Injunctive relief cannot remedy past defamation, but only future harm. And even as to intended defamation not yet uttered, the traditional rule of equity, though questioned, has been that equity will almost uniformly reject injunctive relief against a libel that damages personal reputation.¹²⁷ Additionally, the judiciary in the United States has resoundingly rejected injunctive relief in defamation cases as a prior restraint on the First Amendment guarantees of free speech and a free press.¹²⁸ Although some sparse authority suggests an injunction might lie against further repetitions of a defamation once the plaintiff has secured a jury verdict,¹²⁹ it appears that there has been no case in which emergency conditions

¹²⁷ HENRY L. McCLINTOCK, *McCLINTOCK ON EQUITY* § 159, at 430 (2d ed. 1948) (Missouri judicial dicta suggesting injunctive relief against defamation if prior judgment at law is uncollectible); accord *DOBBS*, *supra* note 82, §§ 402, at 1124, § 422, at 1193–94. Ohio, Georgia, and Minnesota have been named as states no longer following the equitable maxim that equity will not enjoin a libel. *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991).

¹²⁸ *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (civil or criminal proceedings subsequent to defamation, rather than prior restraints, ordinarily preferred as more appropriate sanctions, even for calculated defamation because of First Amendment considerations). Accord *Near v. Minn. ex. rel. Olson*, 283 U.S. 697, 701–02, 722–23 (1931) (rejection of injunctive relief, even where defamation is a continuing nuisance and violates a criminal statute). “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). See *Near*, 283 U.S. at 701–02, 722–23 (striking down a statute that treated a “malicious, scandalous and defamatory newspaper or other periodical” as a public nuisance subject to injunction). “It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975) (presumption against prior restraints heavier and speech protection broader than judicial limitations set for criminal penalties affecting speech).

¹²⁹ See *Kramer v. Thompson*, 947 F.2d 666, 676 (3d Cir. 1991), *vacated by* 947 F.2d 935 (3d Cir. 1991) (four Missouri cases cited for dicta that injunctive relief is permissible to prevent further publication once prior jury verdict has been obtained). The Supreme Court has also warned that it has never held that all injunctions against the press would violate the First Amendment. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973) (“The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.”).

were ever found sufficient to justify injunctive relief against a threatened defamation not yet published.

In the final analysis, the traditional remedies of damages or injunctive relief for group defamation are totally unworkable from theoretical and practical standpoints. It would indeed be strange for a system of monetary compensation, which has been so strongly questioned when only an individual sues for non-group defamation, to be less defective when group defamation is at issue. And injunctive relief, which is effectively barred by the combined prohibitions of equity tradition and constitutional prior restraint doctrine in cases of individual non-group defamation, becomes no more tenable if group defamation is involved. In sum, civil law group defamation has remained a harm without a workable remedy.

V. CRIMINAL DEFAMATION STATUTES

Criminal defamation statutes avoid the intractable problem of allocating monetary recovery according to the harm caused each member of the group in a civil defamation action. By use of the criminal law, society punishes antisocial conduct without the necessity of compensating for harm to the victim. As AIDA discovered in its lawsuit, the Individual Dignity Clause of Article I, Section 20 of the Bill of Rights in the Illinois Constitution is based on a former Illinois criminal statute that made it unlawful to manufacture, publish, exhibit, or distribute in any public place any "lithograph, moving picture, play, drama or sketch" that portrayed "depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color, creed, or religion" and that exposed those citizens to "contempt, derision, or obloquy or which is productive of breach of the peace or riots."¹³⁰

The landmark case of *Beauharnais v. Illinois* upheld the constitutionality of this former Illinois statute in a 5-4 decision, when the statute was used to impose a \$200 criminal fine on Beauharnais, the president of the racist White Circle League, who had passed out bundles of leaflets to League members for distribution at Chicago's downtown street corners.¹³¹ The leaflets set forth a petition calling on city officials to halt the Negro invasion of white persons and their neighborhoods. The Supreme Court noted a key phrase in the leaflet, which asserted that the "rapes, robberies, knives, guns and marijuana

¹³⁰ ILL. REV. STAT. ch.38 § 471 (1949); DAVID R. MILLER, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS 17, 115 n.195 (4th ed. 1996).

¹³¹ 343 U.S. 250, 266-67 (1952).

of the negro" would surely unite the white race.¹³² No actual violence or bodily injury was charged or proved in relation to the distribution of the pamphlets.

In upholding the conviction, the Supreme Court rejected the argument that this criminal libel statute violated the First Amendment speech and press protections implicit in the Due Process Clause of the Fourteenth Amendment. The specific issue was whether a criminal libel statute could constitutionally be used to protect racial groups.¹³³ In answering affirmatively, Justice Frankfurter, writing for the Court, observed that, not only was libel a common law crime and punishable in the American colonies, but that, at the time of the *Beauharnais* decision, every American jurisdiction had a criminal libel statute.¹³⁴ His opinion also reasoned that, even though it was not completely clear to what degree these statutes extended beyond individual libel to criminal group libel, it would be "arrant dogmatism" for the Court to second-guess the Illinois legislature's policy determination that a person's job, educational opportunities, and other social benefits may depend as much on the reputation of the racial group to which the person accidentally belongs as on the person's own merits. Thus, speech punishable if directed at an individual also logically could be punishable if directed at the racial group with which a person is inextricably connected.¹³⁵

Following *Beauharnais*, however, the Seventh Circuit Court of Appeals in *Collin v. Smith* upheld the First Amendment right of neo-Nazis to march in Skokie, Illinois, a village with a large Jewish population, including several thousand Holocaust survivors.¹³⁶ The appellate court interpreted "the rationale" of *Beauharnais* to mean that the criminal libel statute in that case, which was substantially the same as the Skokie village ordinance, turned for its validity "quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder."¹³⁷ Because the village did not urge the possibility of a violent reaction to the neo-Nazi march, the group libel ordinance was

¹³² *Id.* at 251-52. "No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana." *Id.* at 257-58.

¹³³ *See id.* at 258, 266.

¹³⁴ *Id.* at 254-55.

¹³⁵ *Id.* at 263.

¹³⁶ 578 F.2d 1197, 1207 (7th Cir. 1978).

¹³⁷ *Id.* at 1204.

not strong enough to act as an exception to the First Amendment rights of the neo-Nazis.¹³⁸

This interpretation is questionable because it ignores aspects of the *Beauharnais* opinion that indicate criminal libel is punishable in itself, without the necessity of a violent reaction.¹³⁹ Furthermore, the *Collin* view runs counter to the well-researched case of *State v. Browne*, which established that, although early common law criminal libel cases depended on a concomitant breach of the peace, this was not true of later criminal libel law development.¹⁴⁰ Instead, the *Collin* court relied on the 1925 Illinois Supreme Court opinion of *People v. Spielman*, cited in *Beauharnais*, wherein the Illinois Supreme Court had actually interpreted a different Illinois criminal libel statute from the one involved in *Beauharnais*. Furthermore, when the Illinois Supreme Court in *Spielman* noted in passing that “[c]riminal liability for libels rests upon their tendency to provoke breaches of the peace,” it cited early common law cases and not the later development.¹⁴¹ In any

¹³⁸ See *id.* at 1204–05.

¹³⁹ See *Beauharnais*, 343 U.S. at 266. The *Beauharnais* majority rejected use of the clear-and-present danger test, which would be expected had a tendency toward violence been a constitutional necessity for the criminal libel statute. *Id.* The defendant was allowed to offer evidence on the truth of the charges, which would have been irrelevant if fear of social unrest had the dominant concern, just as it had been in the early days of common law libel. See *id.* at 253–54. Most importantly, the case went to the jury as a libel case, whether or not the words threatened violence or breach of the peace. *Id.* at 253. Even the text of the criminal libel statute under which the case was tried was worded in the disjunctive (“contempt, obloquy or derision or which is productive of breach of the peace or riots.”). ILL. REV. STAT. ch. 38 § 471 (1949). The *Beauharnais* majority cited *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), for the separate delineation of the categorical exceptions to the First Amendment: “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting words’—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 256.

¹⁴⁰ 206 A.2d 591, 595 (N.J. Super. Ct. App. Div. 1965). *Browne* states that:

While recognizing the common law breach-of-the-peace theory, the courts have not required a factual showing of violence; either actual or potential. In most modern criminal libel statutes that element is omitted, thereby indicating that such legislation is not solely designed to prevent violence. The trend is away from considering a threatened breach of the peace as a singular basis for criminal prosecution, and it has moved toward placing the emphasis upon the tendency of the publication to damage the individual regardless of its effect upon the public.

Id.

¹⁴¹ 149 N.E. 466, 469 (1925), cited in *Beauharnais*, 343 U.S. at 254 n.3, further cited without name in *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978) (limiting the *Beauharnais* holding to cases where the criminal libel has a strong tendency to provoke a violent reaction). “[S]uch a libel is punishable even though its application to individual members of the class or group cannot be proved.” *Id.*

event, the *Spielman* observation was more likely intended as a truism of general public policy than as an essential statutory or constitutional requirement, which would inject an element of uncertainty into every libel case. A “tendency” to provoke a breach of the peace is not the same as an indispensable element of a crime.

To make the constitutional validity of a criminal libel statute depend on the “heckler’s veto” leads to the unacceptable result that any group of rowdies can turn an otherwise unconstitutional application of a criminal defamation statute into a constitutional application for the protection of the group reputation, provided only that the group protests loudly and violently enough.¹⁴² Recent decisions have dismissed the yardstick of the “heckler’s veto” as the measure of a law’s constitutionality.¹⁴³ If the *Collin* view is ultimately correct, however, then the usefulness of criminal libel statutes is hobbled at the outset because of the difficulty in ascertaining how much clairvoyance of a violent reaction the First Amendment requires.

Criminal defamation statutes are faced with a dilemma. If they are not designed to protect against a violent reaction to the defamation uttered, they may be struck down as a violation of the First Amendment by those courts that follow the *Collin* approach of limiting the defamation exception to the First Amendment, with the overlay of a historically separate “fighting words” exception. On the other hand, if a criminal defamation statute explicitly incorporates protection against public disorder or breaches of the peace, it runs the high risk of violating the First Amendment by an unconstitutionally vague standard as to what constitutes public disorder, breach of the peace, or similar generic crime. In *Ashton v. Kentucky*, the Supreme Court struck down a Kentucky criminal libel statute that prohibited “any writing calculated to create disturbances of the peace” because the

¹⁴² The “heckler’s veto” concept in First Amendment jurisprudence is the ability of an audience hostile to the speaker’s message to stop the speech, either by violence or threat of violence against the speaker. The Supreme Court has severely limited, if not entirely abolished, the “heckler’s veto” over unwanted speech. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 183–84 (1986).

¹⁴³ See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (finding it improper to base administrative costs for demonstrations on the degree of hostile listeners’ reaction to the demonstration); accord *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949) (speech protected by First Amendment even if causing unrest, social dissatisfaction, anger, or public dispute); *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 701 (7th Cir. 1998) (finding it improper to waive administrative fees for established politicians and parties, because such a policy would be a form of the “heckler’s veto”); *Collins v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972) (clearly improper to consider possibility of a hostile audience as a factor in denying permit for a public demonstration).

statute vaguely required a defendant to calculate the emotional reactions of an audience to which the libel was addressed.¹⁴⁴ To follow the *Collin* approach is likely to place criminal defamation statute in a no-win position where it will either be struck down because it was not designed to protect public tranquility or because it was so designed but is inherently vague in its design.

Aside from the cloud cast by the view that a criminal defamation exception to the First Amendment can only be justified if combined with another historically separate "fighting words" exception, traditional criminal defamation statutes must also meet the constitutional requirement of "actual malice" established in *New York Times Co. v. Sullivan*.¹⁴⁵ "Actual malice" denotes knowledge of the defamatory falsity or reckless disregard for whether the statement was true or false.¹⁴⁶ In such cases, the truth of the defamatory words is absolutely protected under the First Amendment without any qualifications, such as those requiring the uttering of truth for good motives and justifiable ends.¹⁴⁷ Thus, even a criminal libel statute that simply refers to a defendant's "malicious intent" is both overbroad because it permits the prosecution of speech protected by *New York Times* actual malice and inherently vague because it creates a potential confusion between common law "malice" and *New York Times* "actual malice" definition.¹⁴⁸

¹⁴⁴ 384 U.S. 195, 200 (1966) "This kind of criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.'" ZECHARIAH CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 151 (1954), cited in *id.*; accord *Williams v. State*, 295 S.E.2d 305, 306 (Ga. 1982) (libel limited to that which "tends to provoke breach of the peace" unconstitutionally vague); *Boydston v. State*, 249 So. 2d 411, 413-14 (Miss. 1971) (statute punishing publication of a "libel" without statutory definition and no case precedent since 1910 unconstitutionally vague). But see *People v. Henrich*, 470 N.E.2d 966, 970 (Ill. 1984), appeal dismissed for want of jurisdiction, 471 U.S. 1011 (1985) (holding a communication "which tends to provoke a breach of the peace" constitutional because legislative history showed phrase limited to "fighting words").

¹⁴⁵ See generally 376 U.S. 254 (1964).

¹⁴⁶ *Id.* at 279-80; accord *Fitts v. Kolb*, 779 F. Supp. 1502, 1514 (D.S.C. 1991); *Ivy v. State*, 821 So. 2d 937, 946 (Ala. 2001); *Weston v. State*, 528 S.W.2d 412, 415 (Ark. 1975); *Eberle v. Mun. Court for Los Angeles Judicial Dist.*, 127 Cal. Rptr. 594, 597-98 (Cal. Ct. App. 1976); *State v. Browne*, 206 A.2d 591, 598 (N.J. Super. Ct. App. Div. 1965); *Madison v. Yunker*, 589 P.2d 126, 131 (Mont. 1978); see *Garrison v. Louisiana*, 379 U.S. 64, 77-78 (1964); see also *Moity v. Louisiana*, 379 U.S. 201, 209 (1964). Sometimes a court will save a criminal defamation statute by construing it to incorporate *New York Times* actual malice. See *Phelps v. Hamilton*, 59 F.3d 1058, 1070-71 (10th Cir. 1995), rev'g 828 F. Supp. 831 (D. Kan. 1993); *People v. Ryan*, 806 P.2d 935, 938-39, 940 (Colo. 1991).

¹⁴⁷ See *State v. Helfrich*, 922 P.2d 1159, 1161 (Mont. 1996) (citing precedent indicating that the "vast majority" of courts refuse to judicially narrow qualified-truth statutory defenses to save them from constitutional invalidity).

¹⁴⁸ *Fitts*, 779 F. Supp. at 1515-16.

Several cases have gone beyond the *New York Times* "actual malice" limitation, however, to find group defamation of public officials absolutely protected by the First Amendment.¹⁴⁹ Because impersonal criticism of government in general is often intermeshed with group defamation of public officials, some group defamation of public officials is absolutely protected by the First Amendment. To allow the group defamation action under such circumstances would open "a back door to official censorship."¹⁵⁰ Even if a group defamation of public officials can be disentangled from a protected criticism of government in general, such public officials, as well as all public figures who are the victims of a defamatory attack must at least still establish "actual malice" for liability.

Some authority stops here and refuses to hold that a criminal defamation statute invoked to punish the defamation of private persons, who are neither public officials nor public figures, must also require proof of *New York Times* actual malice.¹⁵¹ Under this view, a truthful statement, if uttered without good motives or justifiable ends, can still amount to criminal defamation as long as it involves the defamation of a private person who is neither a public official nor a public figure.¹⁵² Other authority has taken a bolder path, however, beyond the clear holdings of Supreme Court precedent, by deciding that the First Amendment prohibits a conviction of criminal libel for defamation uttered in public without *New York Times* actual malice on a matter of public concern, even if the victim is a private person.¹⁵³ This more expansive view is based on the premise that, because *Gertz v. Robert Welch, Inc.* precludes private plaintiffs who are involved in a matter of public concern from recovering punitive damages without

¹⁴⁹ See *Dean v. Town of Elkton*, No. 11958, 2001 WL 184223, at *5 (Va. Cir. Ct. Feb. 21, 2001). "It would appear after this holding in *New York Times v. Sullivan* that the 'small group theory' cannot be constitutionally utilized to prove the 'of and concerning' element of a defamation action if the defamatory statement is directed at a government or governmental agency, no matter what its size." *Id.*; see also *Andrews v. Stallings*, 892 P.2d 611, 617 (N.M. Ct. App. 1995), citing *Saenz v. Morris*, 746 P.2d 159, 163 (N.M. Ct. App. 1987) (holding that impersonal criticism of government is not libel of government official).

¹⁵⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-12, at 863 (2d ed. 1988).

¹⁵¹ See *Ryan*, 806 P.2d at 940-41; *People v. Heinrich*, 470 N.E.2d 966, 972 (Ill. 1984).

¹⁵² See *Heinrich*, 470 N.E.2d at 972.

¹⁵³ See *State v. Powell*, 839 P.2d 139, 145 (N.M. Ct. App. 1992). Some of the authorities supporting this view are pre-*Gertz* cases, which cite the earlier view of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 42-43 (1971), that the First Amendment requires proof of *New York Times* actual malice on all public issues and events of general interest, regardless of the plaintiff's status. See, e.g., *Commonwealth v. Armao*, 286 A.2d 626, 629-30 (Pa. 1972).

proof of *New York Times* actual malice, analogous reasoning should apply to private-person victims of a criminal defamation, because between punitive damages and criminal fines, both chill First Amendment rights.¹⁵⁴ Since *Garrison*, the Supreme Court has declined to resolve this split.¹⁵⁵

Constitutionally under attack at the fringes, criminal libel statutes are also under attack as broadly unconstitutional due to the void-for-vagueness doctrine. Application of the doctrine, especially potent in matters involving criminal statutes and the First Amendment, strongly suggests that the common law and statutory definitions of defamation are incapable of reasonably informing citizens of what is prohibited and encourage arbitrary enforcement of the law. In *Tollett v. United States*, a federal appellate court struck down as unconstitutional a federal statute that punished the mailing of any "libelous, scurrilous, defamatory, and threatening" matter on the outside of envelopes or on postcards.¹⁵⁶ Aside from a barrage of criticisms directed to a lack of clarity in the statute concerning its application to private libel, the truth defense, the role of "malice," the role of fault, and whether and to what extent a "breach of the peace" was required, the appellate court observed that the "Act [did] not in any way attempt an objective definition of 'libelous' and 'defamatory.'"¹⁵⁷ The appellate court in *Tollett* cited approvingly *Ashton* for Justice Douglas' broad dictum that the English common law of criminal libel was inconsistent with constitutional principles and too indefinite and uncertain for enforcement as a criminal offense.¹⁵⁸ In addition, the court in *Tollett* found the governmental interests supporting the statute insufficient, including the argument that criminal libel laws usefully supplement civil libel laws

¹⁵⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Presumably, these courts would not constitutionally extend *New York Times* actual malice to private persons not involved in a matter of public concern because in a civil defamation context the Supreme Court has refused to hold that the First Amendment requires such a purely private plaintiff to prove *New York Times* actual malice in order to recover punitive damages. See generally *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

¹⁵⁵ 379 U.S. at 72 n.8 (stating, "We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels.").

¹⁵⁶ 485 F.2d 1087, 1096 (8th Cir. 1973). The court concluded that, unlike in other contexts, it was merging the concepts of vagueness and overbreadth in striking down the statute because the statute dealt with a First Amendment activity. *Id.* at 1096 n.22.

¹⁵⁷ *Id.* at 1097.

¹⁵⁸ *Id.* at 1097, citing *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966).

by protecting the dignity of the individual.¹⁵⁹ Another court, which reached the same result, found that, although this federal criminal statute might rationally deter potential defamers who would not be frightened of a civil law judgment, this reasoning still did not satisfy the compelling governmental interest required by the First Amendment.¹⁶⁰

The Alaska Supreme Court has reached much the same conclusion. Alaska had a misdemeanor criminal defamation statute that punished the willful publication of "defamatory or scandalous matter" concerning another with "intent to defame." In *Gottschalk v. State*, the statute was applied against a citizen who had accused a state trooper of having taken money from the citizen's vehicle.¹⁶¹ The Supreme Court in *Gottschalk*, besides reversing the prosecution on narrower grounds, took the broader position found in *Ashton* and *Tollett* that the concept of defamation was inherently vague. After noting that the statute did not define what was "defamatory" or "scandalous," the Supreme Court turned to the common law definition, which it also found lacking in sufficient precision.¹⁶² The Supreme Court was influenced by Dean Leflar's study, in which Leflar found that nearly half of all criminal defamation cases brought between 1920 and 1955 were basically political in that they were filed against unsuccessful political candidates, the candidate's supporters, or against private citizens who had offended those who were politically powerful.¹⁶³

Even though the Supreme Court has never overruled *Beauharnais*, the continued validity of that case remains in considerable doubt because of basic changes in the law of defamation relating to freedom of expression.¹⁶⁴ The Court of Appeals for the Seventh Circuit has

¹⁵⁹ *Tollett*, 485 F.2d at 1095-96.

¹⁶⁰ *United States v. Handler*, 383 F. Supp. 1267, 1278 (D. Md. 1974).

¹⁶¹ 575 P.2d 289, 289-90 (Alaska 1978).

¹⁶² *Id.* at 292. The court stated:

What is defamatory or scandalous is not defined in AS11.15.310; therefore, the common law definition must be relied on. At common law, any statement which would tend to disgrace or degrade another, to hold him up to public hatred, contempt or ridicule, or to cause him to be shunned or avoided was considered defamatory. In our view this falls far short of the reasonable precision necessary to define criminal conduct.

Id.

¹⁶³ *Id.* at 294. The Alaska Supreme Court left open the possibility that a narrowly drawn statute with more precise definitions related to breach of the peace might be upheld. *Id.* at 295.

¹⁶⁴ See *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989).

concluded that *Beauharnais* is no longer good law.¹⁶⁵ A number of other cases have also questioned the current validity of *Beauharnais*.¹⁶⁶ Yet the United States Supreme Court has in at least two cases assumed the continued vitality of *Beauharnais*.¹⁶⁷

Whatever the remaining constitutional validity of *Beauharnais*, a more fundamental reason remains for the inefficacy of criminal defamation law as a remedy for group defamation based on race or ethnicity. Since *Beauharnais*, the trend of legislation and public policy has moved decisively against the continuation of criminal defamation statutes. The *Beauharnais* opinion noted that, at the time of that decision, every one of the then forty-eight states, the District of Columbia, Alaska, Hawaii, and Puerto Rico punished criminal libels of individuals.¹⁶⁸ Furthermore, some of these statutes were even used to punish group libel.¹⁶⁹ To the extent *Beauharnais* relied on this unbroken pattern of support for criminal libel laws, the reliance as constitutional authority has been gravely undermined by subsequent events. At the time of this Article, the author could only find nineteen states that still had some form of criminal libel or criminal defamation, either by statute or common law.¹⁷⁰ Nevada was not included because, even

¹⁶⁵ *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (“*In Collin v. Smith*, [we] concluded that cases such as *New York Times v. Sullivan* had so washed away the foundation of *Beauharnais* that it could not be considered authoritative.”) (citation omitted). *Accord Dworkin*, 867 F.2d at 1200 (“We agree with the Seventh Circuit that the permissibility of group libel claims is highly questionable at best.”).

¹⁶⁶ *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 n.7 (6th Cir. 1981) (citing cases questioning *Beauharnais*).

¹⁶⁷ *See New York v. Ferber*, 458 U.S. 747, 763 (1982) (“Leaving aside the special considerations when public officials are the target, *New York Times Co. v. Sullivan*, a libelous publication is not protected by the Constitution. *Beauharnais v. Illinois*” (citations omitted)). In *R.A.V. v. City of St. Paul*, the Court cited *Beauharnais* as an example of a traditional limitation on freedom of speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (“We have recognized that ‘freedom of speech’ referred to by the First Amendment does not include a freedom to disregard these traditional limitations.”).

¹⁶⁸ *Beauharnais*, 343 U.S. at 255. Eight states punished criminal libel by common law; twelve made statutory “libel” a crime without defining the term. The remaining jurisdictions used the common law definition in their statutes. *Id.* at 255 n.5. Even as late as *Tollett v. United States*, which struck down a federal libel statute as unconstitutionally vague, the federal appellate court conceded that most states had some type of criminal libel statute. 485 F.2d 1087, 1088, 1094 (8th Cir. 1973).

¹⁶⁹ *See Beauharnais*, 343 U.S. at 258.

¹⁷⁰ (1) COLO. REV. STAT. § 18-13-105 (2002). This statute survived constitutional challenge in *People v. Ryan*, 806 P.2d 935, 941 (Colo. 1991); (2) FLA. STAT. ch. 836.01 (2002); (3) GA. CODE ANN. § 16-11-39 (1999). In *State v. Linakis*, the statute’s applicability was limited to defamatory remarks with the direct tendency to cause acts of violence by the person to whom defamation is addressed. 425 S.E.2d 665, 670 (Ga. Ct. App. 1992); (4) IDAHO CODE §§ 18-4801 to -4809 (1997); (5) KAN. STAT. ANN. § 21-2004 (1995). This

though it has a criminal libel statute, no one has ever been prosecuted under the statute, and in an unpublished order, the United States District Court approved an agreement by the parties that the Nevada statute was unconstitutional.¹⁷¹ Of those nineteen states, Kentucky's statute is limited to defamation actions brought by judges against those who defame the judiciary in the course of its duties.¹⁷² Moreover, several of those nineteen states have statutes or common law that have been invoked minimally or sometimes not at all since the nineteenth or early twentieth centuries.¹⁷³ Others have only limited criminal defamation statutes targeted to specialized problems without general application.¹⁷⁴ The irony is that Illinois has repealed not only the group criminal libel statute upheld by the Supreme Court in *Beauharnais* but also a general criminal defamation statute.¹⁷⁵

statute survived constitutional challenge in *Phelps v. Hamilton*, 59 F.3d 1058, 1061 (10th Cir. 1996); (6) KY. REV. STAT. ANN. § 432.280 (1999) (limiting criminal defamation to libel or slander of a judge); (7) MASS. GEN. LAWS ch. 272, § 98C (2000); (8) MICH. COMP. LAWS §§ 750.97, 750.389 (West 2002) (regarding false statements about financial condition of certain financial institutions; § 750.370 (regarding attribution of crime, infamous or degrading act, or unchastity of a female); (9) MINN. STAT. §§ 609.77, 609.765 (2002); (10) MONT. CODE ANN. § 45-8-212 (2001); (11) N.H. REV. STAT. ANN. § 644:11 (1996); (12) N.C. GEN. STAT. § 14-47 (2002); (13) N.D. CENT. CODE § 12.1-15-01 (1997); (14) OKLA. STAT. tit. 21, §§ 777-781 (2003); (15) TENN. CODE ANN. § 40-13-214 (1997) (apparently basing indictment for criminal libel on common law criminal libel); (16) UTAH CODE ANN. § 76-9-404 (1999); (17) WASH. REV. CODE §§ 9.58.010 to -.020 (2003); (18) *State v. Clifford*, 52 S.E. 864 (W. Va. 1906) (reviewing apparent common law criminal defamation cause of action); (19) WIS. STAT. § 942.01 (2001-2002).

¹⁷¹ See NEV. REV. STAT. 200.510 (West 2002); LIBEL DEF. RES. CTR., INC. (LDRC) 50-STATE SURVEY 2001-2002: CURRENT DEVELOPMENTS IN MEDIA LIBEL LAW, at Nevada, § I (LDRC ed., 2001).

¹⁷² KY. REV. STAT. ANN. § 432.280 (1999).

¹⁷³ Oklahoma has had only one reported case since 1931. *Pegg v. State*, 659 P.2d 370, 372-73 (Okla. Crim. App. 1983) (affirming conviction under "false rumor" statute for accusing a person of being a prostitute). Tennessee's last case seems to be *Melton v. State*, 22 Tenn. (3 Hum.) 389 (1842). West Virginia's last common law case appears to be *State v. Clifford*, 52 S.E. 981 (W. Va. 1906).

¹⁷⁴ Georgia limits application to threat of direct violence by the subject of the defamation, GA. CODE ANN. § 16-11-39 (1999); Kentucky, to defamation of a judge, KY. REV. STAT. ANN. § 432.280 (1999); and Michigan, to various isolated kinds of criminal libel situations, MICH. COMP. LAWS §§ 750.97, 750.370, 750.389 (West 2002). See generally *Ashton v. Kentucky*, 384 U.S. 195 (1996) (striking down Kentucky's general criminal libel statute on vagueness grounds).

¹⁷⁵ The statute upheld in *Beauharnais*, ILL. REV. STAT. ch.38 § 471 (1949), was repealed on January 1, 1962. The separate general criminal defamation statute, 720 ILL. COMP. STAT. 5/27-1 (1993), was repealed July 1, 1986. The general criminal defamation statute had been interpreted to provide sanctions against group defamation as well as individual defamation. *Id.*

In addition, what the majority in *Beauharnais* failed to note was the infrequency with which these laws were invoked, even around the time of the *Beauharnais* decision. Professor Robert A. Leflar conducted a study of 110 reported criminal defamation cases between years 1920 and 1955 in which he found a declining number of cases in each ten-year period. Leflar found fifty-eight cases reported in the ten-year period of 1920–1929, thirty-four in the twelve-year period of 1930–1941, and only eighteen in the fourteen years from 1942 through 1955. Nearly half of all cases were political in the sense that they involved public officials or candidates for public office. Only 10 of the 110 involved group libel, typically involving attacks on religious or racial groups, such as Jews, African-Americans, or Catholics.¹⁷⁶

In updating Leflar's study from 1956 through 2001, the author of this Article found the declining trajectory of prosecutions for criminal defamation even more remarkable. The author found sixteen reported cases of criminal defamation from 1956 through 1966, fourteen cases from 1966 through 1976, a sharp fall-off to five cases from 1976 through 1986, just one case from 1986 through 1996, and then only two cases from 1996 through 2001. Of the total number of thirty-eight cases reported in the Decennial Digests during this period, only one involved racial group libel and twenty—almost two-thirds—were political in the sense of involving alleged defamatory attacks on political candidates or public officials, such as judges, district attorneys, an attorney general, a police chief, a sheriff, a presidential candidate, and both a senator and a town.¹⁷⁷ A hypothesis for this decline since Leflar's study is that prosecutors have heeded the cumulative impact of *Garrison* in 1964, *Ashton* in 1966, and *Gertz* in 1974 by not bringing defamation actions. It is unlikely that public discourse has become more courteous and less defamatory in this period.

¹⁷⁶ Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 985 (1956). *Gottschalk v. State*, 575 P.2d 289, 294–95 (Ala. 1978) relied substantially on the article's findings in striking down Alaska's criminal libel statute. *Id.*

¹⁷⁷ See Libel & Slander, 2001 ELEVENTH DECENNIAL DIGEST PART I §§ 141–62, at 838; Libel & Slander, 1998 TENTH DECENNIAL DIGEST PART II §§ 141–162, at 291–92; Libel & Slander, 1992 TENTH DECENNIAL DIGEST PART I §§ 141–162, at 1078–79; Libel & Slander, 1988 NINTH DECENNIAL DIGEST PART II §§ 141–162, at 1539–40; Libel & Slander, 1983 NINTH DECENNIAL DIGEST PART I §§ 141–162, at 1645; Libel & Slander, 1978 EIGHTH DECENNIAL DIGEST §§ 141–162, at 1680–82; Libel & Slander, 1968 SEVENTH DECENNIAL DIGEST §§ 141–162, at 709–12. Like Professor Leflar, the author based his research on West's Decennial Digests. The author used the keynote system by researching under Libel and Slander, Criminal Responsibility, §§ 141–162. Like Leflar, the author eliminated duplicate citations to the same case and went further by eliminating civil cases and Wisconsin criminal slander of title cases, which had been misclassified as criminal defamation cases.

The Supreme Court has probably doomed criminal defamation law, not by a sudden-death thrust of inherent unconstitutionality, but rather by the ultimately mortal wounds of *New York Times* actual malice and the void-for-vagueness doctrine. At some point, the Supreme Court may constitutionally snuff out criminal defamation altogether by invoking the coup-de-grace of reverse-*Beauharnais* reasoning—namely that, because so few states have criminal defamation laws and because few are effective in those states that do have them, no compelling state interest justifies the consequent prohibition on freedom of expression. This is particularly true inasmuch as approximately two-thirds of the cases decided between 1956 and the present involve political officials or political candidates who tried to invoke criminal libel law against their opponents. This borders on the criminalization of criticism directed toward government. Ever since *Sullivan* denounced the Alien and Sedition Acts of 1798, which had punished defamation against the federal government and federal officials, this confusion between government and individual officeholders has been considered an unconstitutional abridgement of the First Amendment.¹⁷⁸

Criminal libel law, therefore, is a useless and increasingly unconstitutional remedy for the redress of racial or ethnic group defamation. The author has found only one case since 1956 that applied a criminal libel statute to protect racial and ethnic groups against scurrilous defamation.¹⁷⁹ Criminal defamation is not recognized in the Model Penal Code or by a leading criminal law treatise.¹⁸⁰ Even though racial and ethnic defamation affect the public weal and not

¹⁷⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."). *New York Times* cited *City of Chicago v. Tribune Co.*, in which the Illinois Supreme Court concluded free expression prevented a city, as a governmental entity, from suing its citizens for defamation. 139 N.E. 86, 90 (Ill. 1923); see also *supra* notes 122, 124. Professor Leflar noted that public figures, such as Hollywood movie stars, as well as government officials, are apt to use their influence to initiate criminal defamation charges. See Leflar, *supra* note 176, at 985. See generally *Eberle v. Mun. Court*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976), in which the state unsuccessfully brought criminal libel charges against defendants for publishing negative comments about actress Angie Dickinson.

¹⁷⁹ See generally *City of Chicago v. Lambert*, 197 N.E.2d 448 (Ill. App. Ct. 1964) (affirming conviction for distribution of leaflets attributing to African-Americans and Jews criminal tendencies, unchastity, and degrading sexual inclinations).

¹⁸⁰ See generally MODEL PENAL CODE (1985); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW (2d ed. 1986). Another criminal law treatise writer suggests libel should be left to the civil law. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 492 (3d ed. 1982).

merely individual interests, the criminal law of libel is no longer effective to redress that group wrong.

VI. DECLARATORY RELIEF: A SOLUTION

There is substantial support for declaratory relief as a general solution to the haphazard First Amendment dangers of a traditional defamation action for monetary relief. Generally, a declaratory judgment is a traditional remedy that provides an authoritative declaration of rights disputed by the parties in cases of actual controversy.¹⁸¹ Any such declaration has the full force of law and the effect of a final judgment by itself, whether or not a further remedy is sought. The *Restatement (Second) of Torts* discusses a number of advantages that a declaratory judgment action has over a traditional damages action for defamation.¹⁸² Former Supreme Court Justice White expressed the view that declaratory relief, with damages banned or curtailed, might better serve both First Amendment interests and a plaintiff's interest in reputation than an action for damages as limited by the Supreme Court in *Gertz v. Robert Welch, Inc.*¹⁸³ In *Gertz*, the Supreme Court held that the First Amendment precluded the imposition of defamation liability without fault where the defamation defendant is a private individual.¹⁸⁴ Then U.S. Representative Charles Schumer proposed to the 99th Congress a bill that would have protected "the constitutional right to freedom of speech by establishing a new cause of action for defamation," in which a public official or public figure who was the subject of a publication or broadcast by print or electronic media may sue for a declaratory judgment that such publication was false and defamatory. Proof of defendant's state of mind was not required, but, on the other hand, no damages were awardable under this action.¹⁸⁵

¹⁸¹ 28 U.S.C. § 2201 (2000); DAN B. DOBBS, *LAW OF REMEDIES* § 2.1(2), at 53 (2d. ed. 1993).

¹⁸² *RESTATEMENT (SECOND) OF TORTS* § 623 (1977). Declaratory judgment provides a judicial vindication of reputation while avoiding the problems of converting harm to reputation into money damages, of the frequent unavailability of any damage remedy, and of the chilling speech effect of substantial damages. *Id.* at 327-28.

¹⁸³ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring) ("At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 393 (1974) (White, J., dissenting) ("I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages he should be able to prevail and have a judgment that the publication is false.")

¹⁸⁴ *See Gertz*, 418 U.S. at 347, 349-50.

The Libel Reform Project of the Annenberg Washington Program also recommended a declaratory judgment action for any defamation lawsuit as an alternative option to a lawsuit for damages. Under this declaratory approach the defendant's state of mind was also not an element of proof.¹⁸⁶

Furthermore, the constitutional concern of the Supreme Court regarding civil defamation involves the chilling effect of monetary damages on the First Amendment rights of freedom of speech and press.¹⁸⁷ The holdings of *New York Times* and *Gertz*, which used First Amendment concerns to delimit the traditional law of defamation, were related to a traditional action for damages. Declaratory relief, however, does not require an ancillary request for damages or injunctive relief, even though oftentimes one of these two alternative remedies is also requested.¹⁸⁸ Unlike other judgments, a judgment of declaratory relief is not coercive and does not compel the parties against whom it is entered to take or refrain from taking any action. Except for this difference, no other exists between a declaratory judgment and any other kind of judgment.¹⁸⁹ Yet, a declaratory judgment differs from an advisory opinion in that it is a binding determination on the merits and, by reason of *res judicata*, may preclude re-litigation of the same issue.¹⁹⁰

¹⁸⁶ H.R. 2846, 99th Cong. (1985). The avoidance of the *New York Times* actual malice standard makes a plaintiff's case much easier. The empirical evidence indicates that the *New York Times* standard has reduced a plaintiff's likelihood of success in a libel case by as much as 60%. LARRY J. SABATO, *FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS* 70 (1991).

¹⁸⁶ LIBEL REFORM PROJECT OF THE ANNEBERG WASH. PROGRAM, *PROPOSAL FOR THE REFORM OF LIBEL LAW* § 4, at 16 (1988). North Dakota has adopted the Uniform Correction or Clarification of Defamation Act, which provides that a defendant who makes a timely and sufficient correction or clarification can only be sued for provable economic loss, mitigated by the correction or clarification. N.D. CENT. CODE § 32-43-05 (1996).

¹⁸⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."). The threat of imprisonment under a criminal libel statute is remote. In fact, in *New York Times*, Justice Brennan thought that a civil defamation action potentially chilled the First Amendment even more than a criminal defamation action because of the greater procedural and constitutional safeguards built into the criminal law. *Id.* at 277; see also *Gertz*, 418 U.S. at 349 (noting the uncontrolled discretion of juries in awarding damages, both compensatory and punitive).

¹⁸⁸ DOBBS, *supra* note 82, § 1.1, at 7.

¹⁸⁹ 2 WALTER H. ANDERSON, *ACTIONS FOR DECLARATORY JUDGMENTS* §457, at 1070 (2d ed. 1951).

¹⁹⁰ See EDWARD D. RE & JOSEPH R. RE, *REMEDIES: CASES AND MATERIALS* 347 (5th ed. 2000).

It is probable that the quagmire of *New York Times* actual malice would not be a constitutional requirement of a declaratory action brought to determine whether a communication was defamatory at law. An action for declaratory judgment is also better than an alternative variation that would unconstitutionally force a media defendant to publish a correction or retraction in its own medium of communication.¹⁹¹ Because of First Amendment concerns, the FCC and the judiciary have changed course and no longer force an electronic media defendant to open up a station to outsiders under the fairness doctrine, the political attack rule, or the political editorial rules.¹⁹² A declaratory action, on the contrary, does not hypothetically trench on the First Amendment by forcing a media defendant to publish state-dictated content in its media communications or to spend its own finances to publish a state-dictated retraction.

A declaratory remedy for racial and ethnic group defamation is also attractive because it circumvents the First Amendment objection that criminal libel statutes are unconstitutional because they are facially vague and overbroad.¹⁹³ The juxtaposition of the First Amendment and the criminal law raises vagueness and overbreadth challenges to their maximum effectiveness.¹⁹⁴ Because a declaratory

¹⁹¹ A state violates the First Amendment by requiring a newspaper to provide a "right of reply" by a political candidate who was attacked by the newspaper. *See generally* *Miami Herald Publ'n. Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that an intrusion into editorial judgment and control over size and content of the newspaper violates the First Amendment). The Supreme Court has not expressly extended the *Tornillo* doctrine to the electronic media and, in fact, distinguished newspapers from cable television in *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 656 (1994).

¹⁹² *See generally*, *supra* notes 68–75 and accompanying text. The FCC cited *Tornillo*, 418 U.S. at 241, in explaining why its fairness doctrine should be abandoned as to broadcasters. *In re* Inquiry into Section 73.190 of the Commission's Rules and Regulations Concerning General Fairness Doctrine Objections of Broadcast Licensees, Report, 102 F.C.C.2d 145, 151–52 (1985) (stating that the *Tornillo* "right of reply" statute is less speech-inhibiting than the fairness doctrine); *In re* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 2 F.C.C.R. 5272, 5283, 5300 n.87, 5301 n.92 (1987) (arguing that increased public access would inject government into day-to-day operations and erode editorial discretion).

¹⁹³ Laws that inhibit the First Amendment can be facially attacked by the vagueness doctrine. *City of Chicago v. Morales*, 527 U.S. 41, 55–56 (1999); *accord* *Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.").

¹⁹⁴ When a criminal law implicates the First Amendment, the law must be so clear that persons of ordinary intelligence have a reasonable opportunity to know what is prohibited. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000). The other peculiar criminal law concern is that a vague law impermissibly delegates basic policy to police

judgment action is not a criminal action, however, the vagueness objection is less stringent.¹⁹⁵ It would be startling for the Supreme Court to now declare over two hundred years of civil defamation law, which has permitted damages, to be unconstitutionally vague, particularly when only a declaratory remedy is sought without damages or injunctive relief.

A declaratory remedy for racial and ethnic group libel may be more seriously attacked as improperly chilling freedom of speech and the press, such as when government uses a declaratory judgment to brand a communication defamatory. The paradox of such a position, however, is that it would ban a declaratory judgment without damages under the First Amendment, even though the Supreme Court has generally refused to invoke the First Amendment to limit civil defamation lawsuits for damages, aside from the *Sullivan* and *Gertz* doctrines. The Supreme Court has instead indicated that a governmental right to speak does not necessarily violate the First Amendment rights of those affected by government speech.

In *Meese v. Keene*, the Supreme Court upheld the statutory authority of the federal government to label three Canadian films "political propaganda" without violating the First Amendment rights of a California senator who wanted to show the films.¹⁹⁶ The Court noted that Congress did not by means of the statute prohibit, edit, or restrain the distribution or exhibition of the films and left the senator free to critically comment on the federal government's action. Conversely, the district court's injunction against the government's speech narrowed the marketplace of ideas by eliminating the government's views.¹⁹⁷ In *Pestrak v. Ohio Elections Commission*, a federal appellate

officers, judges, and juries for resolution on a subjective basis, with the consequent dangers of arbitrary and discriminatory law enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). Vagueness and overbreadth attacks in a First Amendment setting more drastically invalidate on a facial basis, while if done on a Due Process basis, they usually invalidate only on an as-applied basis to a specific defendant. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1299 (14th ed. 2001).

¹⁹⁵ *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498–99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

¹⁹⁶ 481 U.S. 465, 485 (1987); *accord* *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986) ("We know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content."). Every time a court allows a civil defamation judgment for damages against a defendant, government is being "critical" of the defendant's defamatory speech. *See also* *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1324–25 (S.D. Ala. 2000) (upholding "political committee" statutory label imposed on plaintiffs by government).

¹⁹⁷ *Keene*, 481 U.S. at 480–82.

court upheld an Ohio statute insofar as it allowed a state commission to declare the truth or falsity of statements made by candidates during an election.¹⁹⁸ The Sixth Circuit Court of Appeals observed that the "truth-declaring" function of the commission was comparable to other activities carried on by government, such as federal officials declaring the truth or falsity of inflation statistics and the unemployment rate or U.S. Representatives declaring the truth or falsity of information in the course of discussing public policy alternatives.¹⁹⁹

Ever since *Milkovich v. Lorain Journal Company*, the Supreme Court has clearly expressed that opinions, as well as factual assertions, can be grounds for defamatory harm without any violation of the First Amendment.²⁰⁰ The only opinions that are protected are those that constitute "rhetorical hyperbole" or "imaginative expression" or that are based on a complete set of disclosed and true facts so that a reader or listener has sufficient information to independently evaluate the credibility of the defendant's opinion inferred from the facts.²⁰¹ Opinions that imply false statements of fact without stating them or that are based on incompletely disclosed facts, however, may still be actionable without violating the First Amendment.²⁰² Aside from the fact that they involved claims for damages and not declaratory relief, earlier defamation cases, which suggest that a civil action for group libel might automatically violate the First Amendment, are even more broadly undercut by the *Milkovich* decision, so as to permit some actions for defamatory opinions.²⁰³

¹⁹⁸ 926 F.2d 573, 579-80 (6th Cir. 1991).

¹⁹⁹ *Id.* at 579.

²⁰⁰ 497 U.S. 1, 21 (1990).

²⁰¹ *Id.* at 17.

²⁰² *Id.* at 18-19.

²⁰³ Khalid Abdullah Tariq al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186, 187 (N.D. Cal. 1980) ("If the court were to permit an action to lie for the defamation of such a multitudinous group we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import."); accord *Brady v. Ottawa Newspapers, Inc.* 445 N.Y.S.2d 786, 789 (App. Div. 1981) ("Thus the incidental and occasional injury to the individual resulting from the defamation of large groups is balanced against the public's right to know."). *Fanning* involved a claim for \$20 billion on behalf of 600 million Muslims, a remedy far more likely to chill First Amendment rights than simple declaratory relief. *Fanning*, 506 F. Supp. at 186-87. Although *Milkovich* requires that, even for a defamatory opinion a public figure must still prove *New York Times* "actual malice" and that a private figure of public concern must prove some level of fault, unincorporated racial and ethnic groups who are usually the gratuitous victims of group defamation simply cannot reasonably be deemed "public figures," let alone a "private figure," even if such cases are not distinguishable on the more basic ground that these

A declaratory action for defamation is squarely within a traditional exception to the First Amendment. Such a declaratory action would not affect lawful speech but only defamation—a historically recognized exception to the First Amendment. More importantly, the action would not prohibit a defendant's speech, regardless of whether the speech is considered protected under the Constitution.²⁰⁴ Finally, a declaratory judgment action could be drafted to avoid the viewpoint discrimination found in the Indianapolis ordinance.²⁰⁵ A declaratory approach also effectively circumvents the problematic premises of critical race theory that either prohibits racist and bigoted insults as a new exception to the First Amendment or provides monetary damages for a new tort of racial insult.²⁰⁶

In the author's role as AIDA co-counsel, one tactical advantage of a declaratory judgment action became apparent. By not requesting monetary or injunctive relief, a plaintiff assumes the high ground of principle over suspected mercenary or censorious motives. With a pure declaratory judgment action, the plaintiff is simply trying to correct the defamatory stereotyping of the racial or ethnic group in the public mind. The judiciary has shown some recognition of the fact that words and images, unless rebutted, can condition a society to accept falsity as truth.²⁰⁷ Thus far, the most comprehensive study done on the subject of defamation law has found that some plaintiffs see themselves as "winners" by the very act of suing for defamation, even though they have little chance of obtaining damages in a traditional defamation suit.²⁰⁸ Since groups like AIDA are often more concerned about public vindication, they are most likely to use a declaratory

requirements were designed for defamation cases seeking damages. *Milkovich*, 497 U.S. at 9.

²⁰⁴ *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985) (striking down an Indianapolis ordinance for impermissibly prohibiting protected "pornographic" speech that went beyond the "obscenity" exception to the First Amendment because "[t]he definition of 'pornography' is unconstitutional.>").

²⁰⁵ *See id.* at 331, 332. The Court in *Hudnut* stated, "We come, finally, to the argument that pornography is 'low value' speech, that it is enough like obscenity that Indianapolis may prohibit it." *Id.* at 331. The Court also noted that "the Indianapolis ordinance, unlike our hypothetical statute, is not neutral with respect to viewpoint." *Id.* at 332.

²⁰⁶ *See generally* MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

²⁰⁷ *Hudnut*, 771 F.2d at 329 ("Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.>").

²⁰⁸ RANDALL P. BEZANSON, ET AL. *LIBEL LAW AND THE PRESS* 78 (1987); *see* DONALD M. GILLMOR, *POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW* 11 (1992).

remedy, particularly since alternative methods of relief are basically illusory.

Beyond vindication, a declaratory judgment of defamation could be used by the racial or ethnic group to counter the social forces that feed the defamation. Such declaratory judgments, for example, could be used at shareholders' meetings to prevent corporate assets from being wasted on defamatory activity. Or they could conceivably be used as evidence that a broadcaster has not served the public interest when that broadcaster seeks a license renewal. There is even some dicta for the view that once a jury has found defamation after a full trial, the doctrine of prior restraint does not prevent a court of equity from enjoining repetitions of the same or similar defamation.²⁰⁹ In sum, the declaratory judgment could have practical consequences beyond the moral implications of community judgment.

Furthermore, a declaratory action could still significantly deter racial or group defamation, even though it lacks the teeth of money damages, injunctive relief, or criminal penalties. Deterrence has never been the sole justification of criminal law. In fact, it has always been highly questionable as to what extent the death penalty deters murder or to what extent the criminal law itself deters crimes of passion, economic necessity, or crimes resulting from sociopathic behavior. The determination of how any legal norm prevents antisocial conduct from occurring eludes scientific certainty. But the utilitarian reality is that a declaratory judgment mechanism, like the criminal law, would publicly affirm a minimal standard of communal civility – a civic ritual of cohesion indispensable to any society, no matter how great or little the deterrent effect of the standard.

CONCLUSION

In summary, the major nations of the world have recognized that racial and ethnic defamation is a harm that requires some form of remedy, just as individual defamation is remedied. Unlike these nations, however, the United States has historically accorded freedom of speech and press greater weight in balancing the harm to be remedied against the infringement on free expression caused by the legal remedy. Aside from any constitutional issues, the current civil damage lawsuit for defamation is inapplicable because courts have consistently denied damages for group defamation by simply refusing to recognize

²⁰⁹ See, *supra* note 126 and accompanying text.

the individual harm caused by group defamation. Even if courts did recognize the harm and award damages, the perplexing problems of apportioning class damages among a racial or ethnic group would lead to arbitrariness and unworkable complexity. Likewise, criminal defamation statutes, whatever constitutional validity *Beauharnais* may still have, are now found in fewer than half of the states in the United States. Even in states that have criminal defamation statutes, prosecutors have rarely brought actions within the last thirty years. When actions have been brought, the alleged victims are usually public officials or public figures, rather than powerless private citizens who most need the protection of such statutes.

The solution is to enact a declaratory judgment statute at the state level to remedy the specific problem of group defamation based on race or ethnicity. The declaratory theory would provide some remedy where at present none realistically exists because of constitutional and policy concerns. Such a statute should be carefully crafted to avoid any possible collision with the First Amendment and to remedy the most serious wrongs perpetrated by the mass media. The floodgate must not be opened so that every trivial charge of backyard group defamation streams into the courts. Rather, the statute should focus on the most harmful kind of group defamation. Further, the action should be controlled by a state official in such a way as to avoid any clouded issues of standing in order to bring the declaratory lawsuit.

The proposal and commentary found in the Appendix are intended to show how a draft of a model statute incorporating these principles might look. The proposed statute is a composite of various earlier suggestions combined with the thoughts of the author, whose major goal was to provide a durable statute that would focus on the most serious kind of defamation and that would not be open to frivolous misuse. Of course, the statute could be otherwise expanded or modified in the light of experience. If the declaratory action works well in the limited area of group defamation based on race and ethnicity, it could then be expanded to cover other classes, such as gender or even individual defamation cases, as respected authorities have already suggested. Declaratory relief provides a way for the United States to join the major nations of the world in asserting communitarian values of minimal decency without abridging its robust heritage of free expression and thought.

APPENDIX

"RACIAL AND ETHNIC GROUP DEFAMATION ACT"

PREAMBLE

The purpose of this Act is to provide a remedy for a certain kind of defamation of unincorporated racial or ethnic groups and the derivative defamation of natural persons within such defamed groups. The Act is not intended to replace or modify the civil or criminal law relating to the direct defamation of specific and identifiable persons, whether natural or artificial, who claim to have been defamed in their individual capacity rather than by membership in a racial or ethnic group. The Act is to be construed in such a way as to avoid wherever possible any conflict with the freedom of speech and press guaranteed by either the First Amendment of the United States Constitution or the constitution of this state.

SECTION 1: SCOPE OF COVERAGE

This Act provides an action and remedy for group defamation only insofar as an identifiable racial or ethnic group is the subject of the defamation and for no other groups.

Comment: Because the Act is novel, the goal is to concentrate on race and ethnicity, which have a special importance because of social tensions created by an increasingly multicultural society. Once the Act takes hold it could be extended to other groups in need of protection from other forms of defamation, such as defamation based on gender.

SECTION 2: ACTIONABLE DEFAMATION

(A) Only defamation, as defined under the law of this jurisdiction, which attributes or imputes criminality to any race or ethnic group by virtue of or by reason of the race or ethnicity of the group is actionable under this Act.

Comment: False attribution of criminal conduct is such a serious form of defamation under traditional law that it has been considered defamation in itself without the need to allege or prove special damages. In addition, this subclass of defamation has a precise meaning because criminal conduct is defined by the criminal laws of the juris-

diction in which this Act takes effect and by centuries-old precedent refining the meaning of this subclass. It is arguably undesirable, both for possible constitutional and practical reasons, to extend a cause of action to language substantially more vague in content, such as "depravity" or "lack of virtue," as set out, for example, in Art. I §20 of the Illinois Constitution (Individual Dignity Clause). Given that the void-for-vagueness doctrine generally has been used only in criminal cases or in First Amendment cases involving prohibition or limitation of speech, however, a jurisdiction might plausibly extend coverage to other defamatory statements besides criminal conduct.

(B) Statements of fact that constitute defamation under Section 2 (A) of this Act are automatically actionable.

(C) Statements of opinion, as defined by the law of this jurisdiction or federal constitutional law, may only constitute defamation under Section 2 (A) if they are based either expressly or implicitly on false facts. If they are so based on false facts, defamation may exist under this Act even though consideration of the opinion in conjunction with such facts is necessary to construe a defamatory meaning. If they are expressly or implicitly based on true facts, defamation does not exist under the Act, whether or not the facts are reasonably sufficient to support the opinion.

(D) Rhetorical hyperbole or pure invective, whether classified as fact or opinion, is not actionable.

(E) Defamation of an individual based on race or ethnicity shall not be considered group defamation unless the number of individuals defamed is reasonably sufficient to infer an express or implied defamation of the entire race or ethnic group or unless the individual defamation, whether based on a real or fictionalized individual, is reasonably construed as a symbolic defamation of the entire race or ethnic group.

Comments: Subsections 2(B), (C), and (D) are based on the constitutional demarcation between actionable defamatory opinions and non-actionable defamatory opinions set out by the Supreme Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The distinction should remain because it existed at common law even apart from later First Amendment doctrine. See also Hustler Magazine v. Falwell, 485 U.S. 46 (1988). Subsection 2(C) would protect researchers, such as Dr. William Shockley, if their controversial or even loathsome conclusions or opinions are based on true facts. As long as a third-party reader or listener can evaluate the reasonableness of the

conclusion or opinion based on the disclosed true facts, the marketplace of ideas needs no state intervention. Subsection (E) is designed to protect against disingenuous attempts to disguise group defamation as individual defamation, such as the symbolic use of "The Wandering Jew" to represent all Jews. Yet, most individual defamation will not amount to group defamation, such as the accusation that a particular Italian-American is a "Mafia hitman."

SECTION 3: PROPER PLAINTIFFS

(A) The Attorney General of this State is authorized to bring an action under this Act.

(B) The only other party, or parties, authorized to bring an action under this Act is a proper representative, or representatives, expressly selected from the aggrieved racial or ethnic group by the Attorney General in his or her sole discretion and only if the Attorney General expressly relinquishes his or her primary authority to bring an action.

(C) Any representative or representatives selected by the Attorney General pursuant to Section 3 (B) shall have the same standing to bring an action under this Act as would the Attorney General.

Comment: This is based in part on a Massachusetts criminal libel statute, which provides that statutory actions for libel based on "race, color or religion" are instituted "only by the attorney general or by the district attorney for the district in which the alleged libel was published." M.G.L.A. 272 § 98 C. Since the reforms of 1990, French law permits certain associations in existence for five years and organized to defend the Resistance and concentration camp inmates to initiate criminal proceedings involving war crimes, crimes against humanity, criminal collaboration, and legal proceedings brought against those who deny the Nazi Holocaust against Jews. UNDER THE SHADOW OF WEIMAR 47 (Louis Greenspan & Cyril Levitt eds., 1993). This Act attempts to combine both approaches by allowing the Attorney General to control the action so as to prevent frivolous or borderline claims but also to allow representatives of the affected racial or ethnic group, who would be the most motivated, to bring the action. Political realities might also lead an Attorney General to turn the action over to designated racial or ethnic representatives.

SECTION 4: SOLE REMEDY

(A) The sole and appropriate remedy under this Act shall be an action for declaratory judgment, whether or not such a remedy would be appropriate under any other law of this state, and no other relief, including monetary damages, temporary restraining orders, or injunctions either permanent or temporary, shall be awarded.

(B) Either party shall have the right to a jury, and if such right is invoked, the judge shall enter a declaratory judgment in accordance with the jury verdict.

(C) This Act does not abolish or restrict any remedies that might otherwise exist under the common law or statutory law of this state.

Comment: The Restatement (Second) of Torts § 623, the Libel Reform Project of the Annenberg Washington Program, H.R. 2846, 99th Congress (1985), and other reforms in the 1980s offered a declaratory approach as an alternative to money damages in a civil defamation action, even though they were not concerned with group defamation. As for Subsection 4 (B), the predominant view is that declaratory actions historically preceded equitable actions and are largely governed by statutes in modern times. 1 Walter H. Anderson, Actions for Declaratory Judgments, § 1, at 1 ("older than the equitable system of jurisprudence"). Thus, no tradition would suggest that a jury not be available. Indeed, the community sense of what constitutes a discrediting statement to reputation, whether individual or group, is particularly suitable for jury resolution. Defamation is one of a few tort actions where England still normally permits juries. 37 Halsbury's Laws of England para. 1075 (4th ed. Reissue, Butterworth Lexis Nexis 2001)(juries permitted to hear claims of fraud, defamation, malicious prosecution, and false imprisonment). In case of a bench trial, the judge would, of course, need to find defamation before issuing a declaratory judgment.

SECTION 5: TRUTH

Substantial truth shall constitute a complete defense to any alleged defamation under this Act, but the burden of proving the truth of the alleged defamation shall be borne by the defendant.

Comment: Public officials and public figures who sue for defamation must allege and prove the falsity of the statement. Even private plaintiffs who are a subject of public concern must prove falsity. Philadelphia Newspapers v. Hepps, 476 U.S. 767 (1986). Whether

or how the Supreme Court would classify a racial or ethnic group within these categories of plaintiffs is not completely clear. But this constitutional mandate requiring such plaintiffs to prove falsity rather than a defendant to prove truth as an affirmative defense arose only in the context of a defamation action for money damages with a potential chilling of First Amendment rights. Section 5 represents the traditional common law unaffected by First Amendment considerations.

SECTION 6: STATE OF MIND

The defendant's state of mind at the time of uttering any defamation under this Act, whether it be with knowledge or reckless disregard of a defamatory statement's falsity or negligence in failing to use reasonable care before uttering any defamation or any other state of mind, is irrelevant under this Act and shall constitute neither an element of a claim nor of a defense.

Comment: New York Times "actual malice" has spawned extensive litigation. Since this constitutional rule has only been applied to defamation lawsuits seeking damages, the disadvantages of the rule can be avoided. For example, editors will no longer be forced to reveal their internal thought process in depositions seeking to establish "actual malice" and to that extent will enjoy greater freedom of thought and expression. Herbert v. Lando, 441 U.S. 153 (1979) (money damages).

SECTION 7: CLASSIFICATION OF DEFAMATION

The common law categories of defamation *per se* or defamation *per quod* are abolished insofar as this Act is concerned, and only the general meaning of defamation under the common law is to be used.

Comment: The sometimes bizarre and historically hoary distinctions between defamation per se and defamation per quod, which have generated much criticism, would be bypassed. Like the bypassing of New York Times "actual malice," this will expedite the trial of a defamation action under this model statute. The distinctions should still be kept in the typical defamation action involving individuals.

SECTION 8: PRIVILEGES

Any privileges, be they absolute or conditional, that exist under the common or statutory law of this state remain as defenses under this Act, except that any defense based on the common law of fair comment is subject to Section 2 (C) of this Act.

Comment: Because money damages are not involved under this Act, it might be argued that the privileges should not apply. However, the privileges typically represent social interests that are considered to offset what otherwise would be a defamatory statement. It would seem that these social interests should still be paramount, even where only a declaratory judgment is requested. The privilege of fair comment has been virtually swallowed up by New York Times v. Sullivan, 376 U.S. 254 (1964), Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and their numerous offspring. But given that New York Times and Gertz do not apply under this Act, the qualified privilege of fair comment may spring back into use. Its use, however, is modified in Section 2 (C) as required by Lorain Journal Co. v. Milkovich, 497 U.S. 1 (1990) in its constitutional parsing of actionable and non-actionable opinions.

SECTION 9: DEMAND FOR RETRACTION, CORRECTION, OR RIGHT OF REPLY

(A) No action for defamation shall be commenced against any defendant unless the complaint alleges that a timely demand for a full and fair retraction or a timely demand for a correction or a timely demand for a full and fair opportunity to reply on behalf of the affected racial or ethnic group was reasonably made and either refused or ignored.

(B) If a defendant agrees to provide an opportunity to reply to the alleged defamation, as provided in Section 9 (A), this agreement shall include the right of access to and use of the defendant's facilities that were originally used to communicate the alleged defamation to the end that the reply may as far as possible reach the same audience that heard the alleged defamation, unless the Attorney General or the representatives designated by the Attorney General waive this right of access and use.

(C) It is an absolute defense that a defendant has reasonably offered a full and fair opportunity to reply under Section 9(A) when an opportunity to reply has been demanded or has reasonably offered or

made the demanded correction or a mutually agreed correction when a correction has been demanded.

(D) It is an absolute defense that a defendant has offered or made a full and fair retraction, whether the Plaintiff has demanded either a retraction, a correction, or an opportunity to reply.

Comment: This section is based on the Uniform Correction Or Clarification Of Defamation Act and the North Dakota version of that Act. N.D. Cent.Code §32-43-05 (1995). By counteracting any harm by the devices of retraction or correction, litigation can be reduced. The right of reply and use of a media defendant's facilities avoids the constitutional limitations of Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) because the right to reply would remain the choice of the media defendant. This avoids the prohibited forced intrusion into editorial judgment and editorial control over media publications. See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

SECTION 10: LEGAL ENTITIES

(1) Corporations, partnerships, and all legal entities other than natural persons, whether for profit or not-for-profit, shall not be deemed a racial or ethnic group, even though the protection of such groups may be within their corporate purpose

(2) Such corporations, partnerships, and all other artificial persons at law retain whatever rights they have under the common or statutory law of this state to sue for defamation of the corporate person, and they may be designated as a representative of an affected racial or ethnic group at the sole discretion of the Attorney General.

Comment: This avoids the claim that the Act will protect a single legal entity organized for racial or ethnic purposes on the ground that, though legally it is one artificial person, it actually represents a racial or ethnic group, such as Operation Push or the Polish National Alliance. The Act should protect living individuals from the indignity and insult of racial or ethnic defamation, whether or not they are organized into a legal entity.

SECTION 11: STATUTE OF LIMITATIONS

Any cause of action brought under this Act shall be brought within one year after the cause of action accrues.

Comment: A one-year limitation is common for defamation actions. The short period is further protection against less meritorious claims or evidence impaired by the passage of time. A "discovery rule," which would extend the time for filing to a period within one year after knowledge of the defamation or after knowledge should reasonably have been acquired, has been omitted. It is most unlikely that a racial or ethnic defamation of any significance would escape the attention of the Attorney General, given the numerous interested members of a racial or ethnic group who would immediately report the defamation to the Attorney General. In any case, the discovery rule generally has been confined to medical malpractice cases.

