and calling for action to keep African Americans out of white neighborhoods. Justice Frankfurter for the Court sustained the statute along the following reasoning. Libel of an individual, he established, was a common-law crime and was now made criminal by statute in every state in the Union. These laws raise no constitutional difficulty because libel is within that class of speech that is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, then no good reason appears to deny a state the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State." [1210] The Justice then reviewed the history of racial strife in Illinois to conclude that the legislature could reasonably have feared substantial evils from unrestrained racial utterances. Nor did the Constitution require the state to accept a defense of truth, because historically a defendant had to show not only truth but publication with good motives and for justifiable ends.[1211] "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'" [1212]

Beauharnais has little continuing vitality as precedent. Its holding, premised in part on the categorical exclusion of defamatory statements from First Amendment protection, has been substantially undercut by subsequent developments, not the least of which are the Court's subjection of defamation law to First Amendment challenge and its ringing endorsement of "uninhibited, robust, and wide-open" debate on public issues in *New York Times Co. v. Sullivan*.[1213] In *R.A.V. v. City of St. Paul*, the Court, in an opinion by Justice Scalia, explained and qualified the categorical exclusions for defamation, obscenity, and fighting words. These categories of speech are not "entirely invisible to the Constitution," even though they "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*." [1214] Content discrimination unrelated to that "distinctively proscribable content," how-

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[1210] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

[1211] 343 U.S. at 265–66.

[1212] 343 U.S. at 266.

[1213] 376 U.S. 254 (1964). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) (ordinances prohibiting distribution of materials containing racial slurs are unconstitutional), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953 (1978), *cert. denied*, 439 U.S. 916 (1978) (Justices Blackmun and Rehnquist dissenting on the basis that Court should review case that is in "some tension" with *Beauharnais*). *But see* New York v. Ferber, 458 U.S. 747, 763 (1982) (obliquely citing *Beauharnais* with approval).

[1214] 505 U.S. 377, 383 (1992) (emphasis in original).