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APPENDIX I

CHAPTER I

SEDITIOUS LIBEL AND RELATED OFFENCES IN ENGLAND, the UNITED STATES, and CANADA

by

Mark R. MacGuigan, Ph. D., J.S.D.

Associate Professor of Law, University of Toronto

GENERAL INTRODUCTION

“The wrong of defamation is sometimes a crime pure and simple, sometimes a tort pure and simple, and sometimes it can be treated either as a crime or a tort.....

“There is nothing anomalous in the fact...for it is obvious that defamatory writings or speeches may, according to their contents, either (i) affect the stability or the peace of the State, or the morals of its subject; or (ii) cause loss of reputation or pecuniary loss to an individual; or (iii) be both dangerous to the peace of the State and harmful to an individual.”¹

These words of Sir William Holdsworth draw attention both to the legal classification of defamatory imputations as crime or as tort and also to some of the policy considerations involved in the classification. In civil law, i.e., in the law of torts, the fundamental categorization of defamatory imputations by the common law is into libel and slander, distinguished by the medium through which the imputation is conveyed, a distinction which in Dean C. A. Wright's words is “as important as it is illogical;”² if it is conveyed by written or printed words or by picture or effigy it is classed as libel, but if it is conveyed by spoken words, or by looks, signs or gestures it is termed slander. Slander is taken much less seriously by the civil law than is libel, probably for the reason that greater mischief is thought to result from the more permanent kind of publication in libel; thus in the law of torts a libel is actionable without proof of damage to the person libelled, whereas, except in certain special cases (the most important of which is where the words reflect on a man in the way of his office, profession or trade) an action for slander will not lie unless damage can be proved.³

Slander as such has no place in the criminal law at all,⁴ though spoken words may come within the criminal law as being blasphemous, seditious, or obscene. Libel, on the other hand, exists in the criminal law in three forms: seditious libel, blasphemous libel,⁵ and defamatory libel.

Defamatory libel is the writing and publishing of defamatory words of any *private person*, or the exhibiting of any picture or effigy defamatory of him, and it was a misdemeanor at common law, punishable with fine and imprisonment. It is not a crime merely to speak defamatory words of a private person, since mere slander is not a criminal offence, but it is not even always a crime to write and publish defamatory words about a private person. On this latter point Odgers writes:

"Not every publication which would be held a libel in a civil case can be made the foundation of a criminal proceedings. Hawkins, in a passage cited apparently with approval by the Court in *R. v. Labouchere* (1884), 12 Q.B.D., at p. 322, 'puts the whole criminality of libels on private persons, as distinguished from the civil liability of those who publish them, on their tendency to disturb the public peace.' He says (1 Hawk. P.C., c.28, s. 3); 'The Court will not grant this extraordinary remedy (a criminal information), nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community.'

"In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual. A criminal prosecution ought not to be instituted unless the offence be such as can be reasonably construed as calculated to disturb the peace of the community. In such a case the public prosecutor has to protect the community in the person of an individual. But private character should be vindicated in an action for libel, and an indictment for libel is only justified when it affects the public, as an attempt to disturb the public peace' (per Lord Coleridge, L. C. J., in *Wood v. Cox* (1888), 4 T. L. R., at p. 654).⁶"

The offence of defamatory libel is now covered by ss. 250 and 251 of the Canadian Criminal Code.⁷

This paper is, however, concerned with seditious rather than defamatory libel and so is focused on sections 60-62 of the Canadian Criminal Code and cognate rules in England and the United States. These sections of the Canadian Criminal Code are as follows:

60. (1) "Seditious words". Seditious words are words that express a seditious intention.
- (2) "Seditious libel". A seditious libel is a libel that expresses a seditious intention.
- (3) "Seditious conspiracy". A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.
- (4) "Seditious intention". Without limiting the generality of the meaning of the expression "seditious intention" every one shall be presumed to have a seditious intention who

- (a) teaches or advocates, or
 - (b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means, of accomplishing a governmental change within Canada.
61. Exception. Notwithstanding subsection (4) of section 60, no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,
- (a) to show that Her Majesty has been misled or mistaken in her measures.
 - (b) to point out errors or defects in
 - (i) the government or constitution of Canada or a province
 - (ii) the Parliament of Canada or the legislature of a province, or
 - (iii) the administration of justice in Canada,
 - (c) to procure, by lawful means, the alteration of any matter of government in Canada, or
 - (d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.
62. Punishment of seditious offences. Every one who
- (a) speaks seditious words,
 - (b) publishes a seditious libel, or
 - (c) is a party to a seditious conspiracy,
is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Note that there is no crime of sedition *per se*, but only in the form of seditious libel, words or conspiracy, a classification which is merely declaratory of the common law. This paper will deal primarily with seditious libel, but obviously all the essential elements of the discussion of seditious libel will apply to seditious words and (to a lesser extent) seditious conspiracy as well, since the substantial component of each of these offences is a seditious intention.

Stephen's definition of seditious intention (set forth at this point not as an attempt at definition but rather as a catalogue of the various varieties of seditious intention) is, in part, as follows:

"A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice,

or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.”⁸

There are, therefore, five kinds of seditious libels: (1) those against the person of the Monarch, the Government, or Constitution, or Parliament or the administration of justice; (2) those against the existing order of Church and State; (3) those in disturbance of the peace; (4) those which raise discontent or disaffection among the citizenry; and (5) those which provoke ill-will and hostility between various classes of citizens. Of these heads of seditious libel, the last two are the ones of principal concern in this paper, but, as this has been litigiously the smallest group and as the policy issues involved in all the varieties are analogous, most of the discussion, particularly in the historical part of this paper, will necessarily be devoted to the other varieties.

Perhaps from the historical viewpoint the fundamental policy questions or value judgments have been set out as starkly by Stephen as by anyone:

“Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority. “If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offences, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.

“These are the extreme views, each of which has had a considerable share in moulding the law of England with the practicable result of producing the compromise which I have tried to express in the articles of my *Digest*.⁹

However, this is not an entirely fair statement of the conflicting philosophies today, even if we adopt the more abstract formulation of Professor Chafee: "the law of sedition was a product of the view that the government was master, and . . . the American Revolution transformed into a working reality the second view that the government was servant, and therefore subjected to blame from its master, the people."¹⁰

It is universally accepted today in democracies that the government is the servant and not the master, and that every citizen has the right freely to criticize both the government and his fellow citizens. The question which has divided the courts and legal philosophers is not whether there exists a legal right to speak one's mind about public men and public affairs in a way short of incitement to violence, but whether it exists as a qualified conditional privilege or as an absolute unconditional right. The former view rests on a balancing-of-conflicting-interests approach, with the balance struck somewhere between the two extremes; here the key question is whether all interests are to be regarded as on an equal footing or whether a priority or an absolute position is to be established for freedom of expression. The latter view is based on a theory of fundamental rights which denies the right of the state to interfere at all with certain freedoms, most particularly the freedom of expression.¹¹ There are therefore three commonly held attitudes towards freedom of expression which are compatible with democracy: an absolutist view, a preferred position view and a balancing of interests view.

APPENDIX I

CHAPTER II

SEDITIOUS LIBEL IN ENGLAND

A. At Common Law

Irving Brant has recently argued¹² that seditious libel is not an indigenous growth of the common law but an alien importation of Sir Edward Coke in 1606, subsequently embraced by Sir William Blackstone and Lord Mansfield in the next century. Actually it was the Court of Star Chamber and not Coke personally that developed the new rules of law regarding libel during the reign of Elizabeth I, and Coke's only role as an active participant was one of arguing many of the libel cases before the Court as Attorney General. But in Brant's view it was Coke's extended comment in his report of the Case *De Libellis Famosis* ("Of Scandalous Libels"), tried in the Court of the Star Chamber in the spring of 1606, which brought seditious libel into English law.¹³ In his report Coke makes the point: "A libeller (who is called *famosus defamator*) shall be punished either by indictment at the common law, or by bill (i. e., by complaint to the Star Chamber) . . ."¹⁴ But in point of fact Coke was unable to find any *common-law* precedents for indictment, and it was only 22 years later that he was able to cite two precedents, both of which were allegedly prosecutions for libel in the King's Court in the fourteenth century.¹⁵ Brant conclusively demonstrates that neither of these cases really involved a charge of seditious libel, and so the only precedents supporting the Court of Star Chamber in the Case *De Libellis Famosis* were its own previous decisions. Seditious libel can rightly be said, therefore, to be entirely the creation of the Star Chamber. Brant expresses it thus: "What is called the common-law doctrine of seditious libel is in fact the creation of the Court of Star Chamber, the most iniquitous tribunal in English history. It has been injected into the common law solely by the fiat of Coke and by subsequent decisions and opinions of English judges who perpetuated the vicious procedures by which the Star Chamber stifled criticism of the government and freedom of political opinion."¹⁶

But this summation, invoking a "guilt by Association" technique, is somewhat too intemperate for objective historical analysis. Despite its occasional lapses into injustice in practice, there was nothing theoretically unjust about the Court of Star Chamber, and indeed it is analogous to the French *Conseil d'Etat*, which has proved a bastion of liberty against governmental oppression in that country down to the present. One jurist describes the Star Chamber's structure and work as follows:

"It was composed of the highest dignitaries of Church and State [the chancellor, treasurer, lord privy seal, a bishop, a temporal lord, and the two chief justices, or, in their absence, two other judges as assistants; later the

president of privy council was added], and it exercised practically unlimited authority. Formally constituted a court of criminal equity by Henry VII, the Star Chamber's jurisdiction was based upon the theory which had become familiar in the civil law through operations of the Court of Chancery. There were wrongs which could not be remedied by the ordinary courts of law, and which could not be overtaken immediately by legislation. The venerated forms of action did not cover all classes of wrongs and crimes; nor was even-handed justice always administered between the weak and the powerful. It was necessary that there should be a court with the unrestrained power to do substantial justice. The Star Chamber was thus empowered. It disregarded forms; it was bound by no rules of evidence; it sat in vacation as well as in term time; it appointed and heard only its own counsel. . . .”¹⁷

The Star Chamber was very nearly identical with that respectable body the Privy Council; under Elizabeth I membership in the two bodies was approximately the same, so that they were differentiated in function rather than in personnel. Moreover, the inchoate crimes of attempt, conspiracy and incitement, all acknowledged constituents of today's criminal law, also were developed by the Star Chamber.

It is probable that, if the Court of Star Chamber had not created seditious libel, a common-law court would have found it necessary to invent it. Certainly when the Long Parliament abolished the Court of Star Chamber in 1640, the common-law courts did not shrink from taking over the offence and applying it, without change, for 150 years, until Fox's Libel Act in 1792. Although seditious libel was not originally part of the common law (indeed even civil libel first developed in the ecclesiastical courts), it became part of the common law during the latter half of the seventeenth century. Brant's interpretation is that it was incorporated into the common law by judges in England “hostile to personal freedom in an era of universal and savage intolerance”,¹⁸ but whatever the background, the twelve highest judges in England in 1680 declared it to be a misdemeanor punishable at common law.¹⁹ The only difference between procedure in the common-law courts and in the Star Chamber was that, since there was a jury in the former, questions of fact had to be left to the jury to determine.

For the century preceding the Libel Act of 1792 the law of seditious libel stood as follows: any written censure upon any law or institution whatever amounted to seditious libel. No bad effect need have been intended or even foreseen by the defendant; the only mental element or intention necessary for conviction was the mere intention to publish written blame. All that was therefore necessary for the Crown to prove was the fact of publication and the defendant's intention to publish the matter with the meaning ascribed to it in the indictment. Neither truth nor fair comment were defences. The only defences open to the defendant were to show that the publication had not been intentional (e. g., that the libel had accidentally dropped out of his pocket, or that he had transmitted a closed letter in ignorance of its content) or that the meaning of the whole of the words taken together was not

defamatory (i. e., the impugned words were taken out of context). There were also some highly exceptional circumstances that would justify publication; e. g., an informer would be justified in handing over (i. e., publishing) a libel to the authorities. But in general *only the fact of publication and the defamatory character of the words had to be established by the Crown*. The former question was left to the jury, but the latter was a question of law to be decided by the judge. There was, in effect, no possible defence to a charge of libel arising out of intentional criticism of the government.²⁰

Freedom of speech and of the press in their present sense did not exist; they existed in the eighteenth century only in the form of freedom from prior restraint. In the seventeenth century even that degree of freedom did not exist, for about the middle of the sixteenth century, just at the time when printing was coming to be common in England, the Court of Star Chamber began to make ordinances governing printing, which soon had the effect of prohibiting all publications hostile to the government. When the Star Chamber was dissolved in 1640, the Long Parliament introduced a system of licensing books, and this system was continued after the Restoration until 1694. Subsequently there never was a prior restraint on publishing, but the stringent libel laws had an almost equally restrictive effect. Blackstone's description of freedom of the press makes clear how tenuous was its existence:

“The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.”²¹

There were, however, a number of factors at work which tended to lessen in practice the severity of the letter of the law. Although bad intention on the part of the defendant to a libel charge was strictly immaterial, Stephen points to the fact that “the practice always was to fill indictments and informations with averments of every sort of bad intention on the part of the defendant.”²² Moreover, the law was so harsh and intolerable that the judges often did not state it nakedly, but created the impression that some defences were available to the defendant. Finally, the great advocate Erskine made a spectacular defence in the case of *R. v. Shipley*²³ which, though partially unsuccessful in court, led to the passage of Fox's Libel Act 9 years later.

B. By Statute Law

“We have seen and heard of revolutions in other States. Were they owing to the freedom of popular opinions? Were they owing to the facility of popular meetings? No, sir, they were owing to the reverse of these; and therefore,

I say, if we wish to avoid the danger of such revolutions, we should put ourselves in a state as different from them as possible”.

Charles James Fox, 1795

Fox's Libel Act of 1792 was vague and indecisive in its language. It was obviously intended to embody in the definition of seditious libel the necessity of some kind of bad intention, but it does not clearly say so. Stephen comments:

“The effect of the Libel Act, and of the discussions which led to it, was . . . to embody in the definition of the crime of seditious libel the existence of some kind of bad intention on the part of the offender. I do not think that the mere words of the act abstractly considered have that effect. They are to the effect that the whole matter in issue upon a plea of not guilty to an indictment for libel is to be left to the jury as in other criminal cases, but they do not say what is in issue on such a plea. The general principle is that a plea of not guilty in a criminal case puts in issue all the material averments in the indictment, but the Libel Act does not say whether the averments as to the specific intentions of the defendant in such cases are or are not material. It no doubt, however, assumes them to be so, and the law has ever since been administered upon the supposition that they are.”²⁴

The Libel Act of 1792 thus added to the intention to publish requirement of the former law a specific intention ‘to publish with an illegal intent’. This was definitely an improvement over the old law, but it was far from satisfactory because of the ambiguity of the specific intention required for conviction. Moreover, the old rule was retained which provided that a publisher or distributor (in addition to an author) of a libel was responsible even when publication by him was merely negligent or inadvertent; this rule was not abolished until Lord Campbell's Libel Act of 1843, and even then it was changed only with respect to defamatory libels and not with respect to seditious libels.²⁵

The Libel Act was passed just before the French Revolution passed into its most violent stage and the next four years were anxious ones in England. There were consequently an unprecedented number of trials for political libels, including that of Tom Paine in 1792, for publishing *The Rights of Man*.²⁶ Despite a strong defence by Erskine, Paine was convicted quickly by a jury which was so sure of his bad intention that it dispensed with argument by the Crown. The effect of the Libel Act was thus to make juries *ex post facto* censors of the press.

In 1819 the first statutory definition of seditious libel was attempted, but it merely declared the common law and was actually more a description than a definition.²⁷ The most important case in the early part of the nineteenth century was *The King v. Burdett*,²⁸ in which Sir Francis Burdett, a Member of Parliament, was charged with seditious libel as a result of a letter to his constituents in which he called for public meetings throughout the United Kingdom to protest an incident in Manchester in which soldiers fired into an assembly of people gathered for the

purpose of petitioning parliamentary reform. He was convicted, and his petition for a new trial was turned down by four judges on appeal. Best J., who had also been the trial judge, said on appeal:

"In forming their opinion on the question of libel I told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions calculated to incite them to acts of violence and outrage. If it was of the former description it was not a libel; if of the latter description it was."²⁹

The court refused to accept evidence of the truth of the chief fact alleged in the libel, viz., that citizens had actually been killed and wounded by troops, either with respect to guilt or in mitigation of punishment.³⁰

With this case, despite the fact that the points of law on appeal were decided against the defendant, we see the beginning of what Stephen calls "the modern view of the law",³¹ (which he feels was first clearly stated by the court in *Reg. v. Collins*³²), for the court regarded libel in terms of incitement to violence rather than merely in terms of incitement to discontent or disaffection. The libel in the *Collins* case stemmed from the use of Metropolitan Police to put down riots in Birmingham in 1839, a fact which roused the ire of a group called the General Convention, which published a placard containing three resolutions and stating that an outrage had been committed on the people of Birmingham. Littledale J. instructed the jury as follows:

"With respect to the first resolution, if it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds (for you cannot suppose that persons in an excited state will discuss subjects in as calm a manner as if they were discussing matters on which they felt no interest), that would be no libel . . . With respect to the second resolution . . . you are to consider . . . whether they meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder . . . [T]he people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite tumult. It is imputed that the defendant published this paper with that intent and if he did so, it in my opinion is a seditious libel."³³

Stephen sums up this case: "In one word, nothing short of direct incitement to disorder and violence is a seditious libel."³⁴

It really does not matter at which point the law changed; suffice it to say that it seems to have changed in the nineteenth century, at a date that cannot be determined. Stephen notes that the Reform Bill is a turning point ("Since the Reform Bill of 1832, prosecutions for seditious libel have been in England so rare that they may be said practically to have ceased"³⁵), though he does not attribute any

causal effect to that statute, and, writing in 1883, he observes that it did not appear to be probable that the law of seditious libel would ever be revived.³⁶

However, since there is still some lingering argument about the English definition of seditious libel,³⁷ it is necessary to continue the examination of the leading English cases in the last century in order to establish inductively the present state of the English law. The famous trial of Daniel O'Connell and eight co-defendants in 1844 on the related charge of seditious conspiracy,³⁸ did little to advance the law of sedition, because the House of Lords refused to affirm the convictions in the light of the fraudulent omission of 59 names from the jury list in Dublin.³⁹ However, the judges who were consulted by the Lords (and overruled by them on another point) pronounced good nine counts in the indictment, which charged such conspiracies as: "with intent to raise discontent and disaffection amongst the liege subjects of the Queen; to stir up jealousies, hatred, and ill-will between different classes of Her Majesty's subjects in the other parts of the United Kingdom, and especially in England; to diminish the confidence of Her Majesty's subjects in Ireland in the general administration of the law therein; to bring into hatred and disrepute the tribunals established by law in Ireland for the administration of justice; to bring about changes in the law by meetings held to hear seditious speeches and by seditious writings."⁴⁰ Stephen comments that "the remarkable part of this decision is that it shows how wide the legal notion of a seditious conspiracy is. It includes every sort of attempt, by violent language either spoken or written, or by a show of force calculated to produce fear, to effect any public object of an evil character"⁴¹ The breadth of this definition may well be an indication that the English judges at that time would have defined seditious libel, too, as not requiring incitement to violence, but it is difficult to reach any firm conclusion as to a consummated crime from the inchoate offence of conspiracy because courts have often said it may be an offence to conspire to do something even when that something is not in itself illegal.⁴²

The next important case, *Reg. v. Sullivan* in 1868,⁴³ the trial of the publishers of two weekly newspapers in Ireland for publishing seditious libel against the Government in their papers, is also somewhat ambiguous. In his addresses to the grand jury and to the petit jury Fitzgerald J. appears not to take a clear stand on either side:

"The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government and bring the administration into contempt; and *the very tendency of sedition is to incite the people to insurrection and rebellion*. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; *to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder.*"⁴⁴

And again:

"Without defining sedition further than for the purpose of this trial, I have to tell you if you, in your honest judgment, come to the conclusion that these publications, or any of them, are calculated and intended to excite hatred of the Government and the administration of the laws, or to create dissatisfaction, or disturb the public peace, then they are seditious libels."⁴⁵

The underlined phrases do not all point in the same direction; to excite to hatred and contempt or to discontent or dissatisfaction (though this latter phrase is itself somewhat ambiguous) are clearly something less than to disturb the public peace or to incite to insurrection and rebellion, and the Court apparently makes room for both forms of incitement but his summing up phrase in the address to the grand jury, "generally all endeavours to promote public disorder", and his statement of the general tendency of sedition both suggest that he had in mind a narrower definition. Perhaps the only safe conclusion to draw is that the law in 1868 was not clear.

The case which is often cited as declarative of the present law is *Reg. v. Burns and Others* in 1886,⁴⁶ but in my opinion this case is not decisive on the question whether seditious libel is limited to incitement to violence because not only is the charge unduly verbose but on the facts in the case violence had occurred and the issue was precisely whether the defendants had incited it.

The four defendants were charged with uttering seditious words at a meeting in Trafalgar Square at which they spoke to large crowds in the cause of social reform, and which was followed by a serious riot among these crowds. The Crown did not argue that the defendants desired the disturbances or that they directly incited the disturbances, but that the riot was the natural result of the language they used.⁴⁷ Cave J. charged the jury as follows:

"[I]f you think that these defendants, if you trace from the whole matter laid before you that they had a seditious intention to incite people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty."⁴⁸

"What you are asked to decide on is whether the prisoners – all of them or some of them, and if some of them which of them – did upon this occasion, in Trafalgar Square, incite the people whom they were addressing to redress their grievance by violence. Did they intentionally incite ill-will between different classes in such a way as to be likely to lead to a disturbance of the public peace?"⁴⁹

The jury returned a verdict of not guilty as to each of the four defendants, and Burns later became a cabinet minister.

In the context Mr. Justice Cave's language of course stresses incitement to disorder, but one reason for thinking that he does not mean this to be an exclusive

definition is that he commands⁵⁰ the statement of the law of sedition in Stephen's Digest, which makes provision for stirring up hatred, contempt, and ill-will as well as for outright breach of the peace.⁵¹ Stephen's own comments indicate that he thought the law as he expressed it would never again be applied,⁵² but it was still in his opinion an accurate statement of the law at that time.

However, two twentieth-century cases have taken the view that for a conviction of seditious libel an incitement to force is required. The first is *R. v. Aldred*⁵³ in 1909, the trial of a publisher of an Indian periodical for printing language alleged to imply that it was commendable to use physical force against the government. Coleridge J. charged the jury as follows:

"Nothing is clearer than the law on this head – namely, that whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel. *The word 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form;* but the man who is accused may not plead the truth of the statements that he makes as a defence to the charge, nor may he plead the innocence of his motive; that is not a defence to the charge. The test is not either the truth of the language or the innocence of the motive with which he published, but *the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State? ... That is the test; and that test is not for me or for the prosecution; it is for you, the jury, to decide, having heard all the circumstances connected with the case.*"⁵⁴

Coleridge J.'s words are unequivocal and general in their scope; despite the fact that this case concerned words which were alleged to be incitant to violence, in his statement of the law Coleridge J. does not restrict himself to the narrower situation, but expounds the law of sedition generally as he understands it.

Coleridge J. continued his exposition of the law to the jury:

"In arriving at a decision of this test you are entitled to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled also to take into account the state of public feeling. Of course there are times when a spark will explode a powder magazine; the effect of language may be very different at one time from what it would be at another. You are entitled also to take into account the place and the mode of publication. All these matters are surrounding circumstances which a jury may take into account in solving

the test which is for them, whether the language used is calculated to produce the disorders or crimes or violence imputed.”⁵⁵

This appears to be a complete statement of the present law on seditious libel.

The other twentieth-century case is *R. v. Caunt* in 1947, an unreported case.⁵⁶ The writing in question in the *Caunt* case was a 900-word attack on British Jewry, published shortly after the discovery in Palestine of the bodies of two British soldiers for whose execution Haganah had claimed responsibility. There had been resulting anti-Jewish demonstrations in various parts of England, but none that could be said to be an effect of the publication of the article by the defendant, which had stated in part: “If British Jewry is suffering from the righteous wrath of British citizens, then they have only themselves to blame for their passive inactivity. Violence may be the only way to bring them to the sense of their responsibility to the country in which they live.” The defendant’s explanation under cross-examination was that “I was merely quoting violence as the type of punishment which may come to them if they did not mend their ways . . . ultimately.”⁵⁷ Birkett J. (later Lord Birkett M. R.) charged the jury: “It is not enough merely to provoke hostility or ill-will, because that may be done by speeches which certainly do not come within the realm of seditious libel. Sedition has always had implicit in the word, public disorder, tumult, insurrections or matters of that kind.” The verdict of the jury was not guilty.

In a comment on this case Professor Wade of Cambridge University writes:

“What conclusions are to be drawn from the case? First it is submitted that the present law is strong enough to prevent incitement to violence and disorder and that the crime of sedition should not be extended to punish mere abuse and invective. Secondly, the case illustrates the value of the safeguard provided by Fox’s Libel Act, 1792, in leaving the general issue to the jury.”⁵⁸

It is clear from these remarks that Dr. Wade, one of the leading constitutional experts in England, not only takes the view that the present English law on seditious libel is limited to situations where the writing complained of is capable of inciting to a breach of the peace but that he also considers this to be a desirable development of the law. To uphold this view one has to argue that there was a radical change in the law in the late nineteenth century, confirmed in the twentieth century, wrought by the courts without the assistance of Parliament in an atmosphere of greater social and political tolerance. Wade does take this view in his appendix to Dicey, finding that the modern attitude to seditious libel is expressed by Mr. Justice Coleridge in *R. v. Aldred*,⁵⁹ and maintaining that “it is . . . not helpful to quote the precedents of the eighteenth and early nineteenth centuries for an understanding of the scope of the offence today.”⁶⁰

Wade's view is supported by two English textbooks, Dawson and Odgers, the former stating "The essence of the offence now is the incitement to violence",⁶¹ the latter observing "the test is: Is the language calculated to promote disorder, force or violence."⁶² It is also worth recalling that there has been no successful prosecution of a defendant for a libel inciting to ill-will or hostility short of violence for well over a century. Wade's interpretation of the English law is also that of the Supreme Court of Canada in *Boucher v. The King*.⁶³

But some of the English books still hedge on the issue. *Russell on Crime* makes no statement in its own words of what the law is, but advises "The present view of the law is best stated in *R. v. Burns*",⁶⁴ and proceeds with no further comment to quote from the charge of Cave J., which, as we have seen, is somewhat ambiguous. *Stephen's Commentaries* takes the same course.⁶⁵ In such a situation, until there is an authoritative decision by the House of Lords, or at least by the Court of Appeal, there will probably always remain some slight doubt as to the final position of English law. But as time passes and as other means (e. g., the new Press Council) are sought for the control of the press, it seems less and less conceivable that the "old view" of the law could ever again prevail in England.

APPENDIX I

CHAPTER III

RELATED OFFENCES IN ENGLAND

Seditious libel is the most serious of the common-law offences in disturbance of the peace,⁶⁶ but it is supplemented by various other common-law and statutory crimes proscribing public disorder or breach of the peace. Breach of the peace is defined by Wharton's Law Lexicon as "a violation of that quiet, peace, and security which is guaranteed by the law for the personal comfort of the subjects,"⁶⁷ and on a descending scale of seriousness the usual common-law catalogue of crimes in breach of the peace is riots, routs, unlawful assemblies and affrays. With the expansion of the law on unlawful assemblies there seems to be no longer any need of distinguishing "routs" as an intermediate stage between riots and unlawful assemblies.⁶⁸

Riot and unlawful assembly are distinguished as different stages on the way to insurrection, riots being actual disturbances and unlawful assemblies being only potential disturbances. As explained by Russell *On Crime*:

"The difference between riot and unlawful assembly is this: if the parties assemble in a tumultuous manner calculated to cause terror, and actually execute their purpose with violence, it is a riot; but if they merely assemble upon a purpose which, if executed, would make them rioters, but do not execute or make any motions to create such purpose and having done nothing, separate without carrying their purpose into effect, it is an unlawful assembly."⁶⁹

Affray is committed when two people fight in a public place to the terror of Her Majesty's subjects, or comport themselves in such a way as to make an outbreak of violence seem likely. Affray differs from riot in that it may be committed by as few as two persons and in that it does not require any previous intention of violence but may break out quite accidentally.⁷⁰ Since situations involving overt violence are comparatively clear-cut, the law with respect to unlawful assemblies is more complex and more important than that with respect to riots and affrays.

An unlawful assembly was defined by Alderson B. in *R. v. Vincent* as "any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighborhood."⁷¹ It was originally considered that the common purpose of the participants had to be unlawful for a charge of unlawful assembly to succeed, but this has been held not to be necessary; any meeting, however lawful in intention and in inception, can become an unlawful assembly.⁷² The test is whether it may reasonably be found that it will endanger the public peace.⁷³ What is not clear

is the legal liability of the proponents of a meeting when the danger to the public peace arises from its opponents.

Wharton's Law Lexicon asserts that the phrase "breach of the peace" includes constructive violations, i.e., those which tend to make others break the peace, as well as actual violations.⁷⁴ But there is some doubt as to how far the constructive meaning extends. Cartwright J. in *Frey v. Fedoruk* observed:

"In my view, the definition of a breach of the peace in Wharton's Law Lexicon . . . is too wide if the concluding words 'or constructive violations by tending to make others break it' are intended to include conduct likely to produce violence only by way of retribution against the supposed offender."⁷⁵

A leading case on this point is *Beatty v. Gillbanks* in 1882.⁷⁶ A number of members of the Salvation Army had assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, but knowing that their assembly would be opposed by others in a way that would cause a breach of the peace by the opposing persons. When such a disturbance arose, the Salvationists were charged with unlawful assembly, and were convicted. On appeal, Field J. said:

"[I]f in the present case it had been their intention, or if it had been the natural and necessary consequence of their acts, to produce the disturbance of the peace which occurred, then the appellants would have been responsible for it, and the magistrates would have been right in binding them over to keep the peace. But the evidence . . . shows that, so far from being the case . . . the disturbance that did take place was caused entirely by the unlawful and unjustifiable interference of the Skeleton Army, a body of persons opposed to the religious views of the appellants and the Salvation Army, and that but for the opposition and molestation, offered to the Salvationists by these other persons, no disturbance of any kind would have taken place . . . The present decision of the justices, however, amounts to this, that a man may be punished for acting lawfully if he knows that his so doing may induce another man to act unlawfully -- a proposition without any authority whatever to support it."⁷⁷

Cave J. (concurring) added:

"If, though their meeting was in itself lawful, they intended, if opposed, to meet force by force, that would render their meeting an unlawful assembly, but it does not appear that they entertained any such intention. On the contrary, when met and resisted by the Skeleton Army they used no violence of any kind, and manifested no intention of meeting their opponents with like violence to that which the latter offered to them."⁷⁸

Beatty v. Gillbanks was distinguished in *Wise v. Dunning* in 1901.⁷⁹ There the facts were that on a number of occasions breaches of the peace had been

committed by Catholics at meetings at which a Protestant street preacher, George Wise, used expressions and gestures which they considered insulting, and it was held that by a panel of three judges in the King's Bench Division that Wise had been rightly ordered to enter into recognisances to keep the peace for a period of twelve months, even though he had not himself breached the peace or directly incited others to do so. *Beatty* was distinguished on the factual ground that there was no evidence in that case to show that the disturbance was the natural consequence of the acts of the defendants, whereas in the instant case, though there was no intention to bring about a breach of the peace, the breach was occasioned by Wise's language and conduct.

That this holding was open to criticism on general principle was recognized at least by Channel J.:

"I quite agree with the proposition that the law does not, as a rule, regard an illegal act as being the natural consequence of any temptation which may be held out to commit it. For instance, a person who exposes his goods outside his shop is often said to tempt people to steal, but it could not be said that it is the natural consequence of it. The House of Lords has recently held, with reference even to leaving a blank space in a cheque, which can easily be filled up by adding to the amount, that it is not the natural consequence if it leads to somebody committing a forgery in writing the further amount in the cheque. These propositions were, of course, quite correct, but I think that the cases show that the law does regard the infirmity of human temperament to such an extent as to consider that a breach of the peace, although an illegal act, is the natural consequence of insulting language on matters of that kind. Possibly it is an exception to the general rule, but it is clearly made out by the cases."⁸⁰

However, any departure from principle is mitigated by the fact that the only sanction imposed by the common law in such a situation was binding over to keep the peace, with imprisonment only in default, and Mr. Justice Cartwright, speaking for the majority in the Supreme Court of Canada in *Frey v. Fedoruk*,⁸¹ refuses to designate as *criminal*, conduct which merely occasions, and is not intended to cause, a breach of the peace -- and moreover, the penalty is not a criminal one. He states:

"In my view it has been rightly held that acts likely to cause a breach of the peace are not in themselves criminal merely because they have this tendency, and that the only way in which such conduct can be dealt with and restrained apart from civil proceedings for damages, is by taking the appropriate steps to have the persons committing such acts bound over to keep the peace and be of good behaviour."⁸²

Beatty v. Gillbanks, therefore, is in no way cast in the shadows by *Wise v. Dunning*. However, its scope does appear to have been radically curtailed by the 1936 case of *Duncan v. Jones*,⁸³ a conviction for obstructing a police officer in the

execution of his duty. There the defendant street speaker was warned by a police officer not to speak near the entrance to an unemployed training center and was told she could speak in another street 175 yards away; when she disregarded the warning she was arrested. A disturbance had occurred in the training center a year earlier after such a meeting of the defendant's, and a Divisional Court was therefore moved to affirm the police officer's judgment and her conviction.

As a note in the *Yale Law Journal*⁸⁴ points out, this decision expands the doctrine of *Wise v. Dunning* in two ways. First, it shifts the issue at trial from the objective fact, what would have been the consequence of defendant's speech, to the question whether the policeman was reasonable in his opinion concerning that consequence. Second, it makes it possible to impose at least a partial previous restraint on speech. In effect, *Duncan v. Jones* makes it possible for the police simply to by-pass *Beatty v. Gillbanks*: they need only order those meeting to disperse and then charge them with obstruction if they fail to do so. However, despite strong academic criticism⁸⁵ it appears to remain the law of England.

Statutory limitations on the right of assembly have also been in effect for more than a century. The Metropolitan Police Act, 1839,⁸⁶ and other local acts prohibited using "threatening, abusive or insulting words or behaviour . . . whereby a breach of the peace may be occasioned." This provision was extended by section 5 of the Public Order Act, 1936.⁸⁷

The principal purpose of the Public Order Act was to control the activities of Sir Oswald Mosley's British Union of Fascists by prohibiting the wearing of political uniforms and the formation of military or semi-military organizations, but the Act also dealt, in section 5, with the law relating to disorder at public meetings:

"5. Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."⁸⁸

S. 7 provides that s. 5 shall be an offence punishable on summary conviction.

In opening the debate on this Bill the Home Secretary, Sir John Simon, attempted to establish the continuity of this section with the previous law:

"Clause 5 of the Bill does not make new law so much as it sets down in simple terms a rule which already applies in some districts and which, I think, ought to apply generally . . . [Here he refers to a section of the Metropolitan Police Act which is almost identical in language with clause 5.] At present, in provincial towns the same result is served by the more cumbrous procedure of by-laws which involve in different places different penalties and sometimes different procedures. I cannot think that it is a reasonable state of affairs . . ."⁸⁹

The Opposition accepted this explanation and this proved to be a non-controversial clause of the Bill.⁹⁰

The leading case under s. 5 of the Public Order Act is *Jordan v. Burgoynes* in 1963.⁹¹ Defendant Colin Jordan, an English Fascist leader, used the following words in addressing a crowd of 5000 (including Jews) at a public meeting in Trafalgar Square: ‘‘More and more people every day . . . are opening their eyes and coming to say with us Hitler was right. They are coming to say that our real enemies, the people we should have fought, were not Hitler and the national socialists of Germany but world Jewry and its associates in this country.’’ Complete disorder and a general forward surge of the crowd towards the speaker’s platform followed, at which point the prosecutor, a superintendent of police, stopped the meeting. Police arrested 20 people for offences involving breach of the peace.

Jordan was charged with having violated s. 5 of the Public Order Act 1936, convicted, and sentenced to 2 months’ imprisonment. On appeal London Quarter Sessions found as a fact that the words used by the defendant were highly insulting, but allowed the appeal because they were not likely to lead ordinary reasonable people to commit breaches of the peace.

However, on further appeal to the Queen’s Bench Division the conviction was restored and the court refused leave to appeal to the House of Lords; a month later the Appeals Committee of the House of Lords also refused leave to appeal. Speaking for the three-man bench, Lord Parker, the Chief Justice, said:

‘‘This is . . . a public order Act, and if in fact it is apparent that a body of persons are present (let us assume in Mr. Jordan’s favour that the persons present are a body of hooligans), yet if words are used which threaten, abuse or insult -- all very strong words -- then the speaker must take his audience as he finds them, and, if those words to that audience, or that part of that audience, are likely to provoke a breach of the peace, then the speaker is guilty of an offence.

‘‘Mr. Jordan . . . has been inclined to elevate this case into a cause célèbre in the sense that, if he is convicted here, there is some inroad into the doctrine of free speech. It is, in my judgment, nothing of the sort. A man is entitled to express his own views as strongly as he likes, to criticise his opponents, to say disagreeable things about his opponents and about their policies, to do anything of that sort, but what he must not do -- and these are the words of the Act -- he must not threaten, he must not be abusive and he must not insult them, ‘insult’ in the sense of hit by words.’’⁹²

It was clear from this judgment that no libertarian restrictions would be read into the clear words of the Public Order Act and that, in the case of public meetings and public places, the English law went beyond the incitement to violence requirement of the crime of seditious libel.

However, despite the firmness of this interpretation, and despite the increase in the penalty under section 5 by the Public Order Act, 1963,⁹³ two decades of experience with the Act and a heightening of racial tensions as a result of heavy non-white immigration persuaded the English Government of the necessity for new legislation which would proscribe not only undesirable language which was likely to lead to a breach of the peace but also language which was "threatening, abusive or insulting" with regard to "any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins" even where there was no danger to the public peace. Such a provision against group defamation was included in the Race Relations Bill of 1965.

The traditional common-law protection against defamation have been the civil law of libel and slander and the criminal law of defamatory libel. The civil law of defamation provides, in effect, no remedy at all against defamation of a group as such. At most, it provides protection to the members of the group as individuals, who must prove that the defamatory words were published of and concerning them as individuals.⁹⁴ As pointed out by Fryer,⁹⁵ there are two sets of circumstances in which a plaintiff is likely to be able so to prove: where language is used in reference to a limited class, it may reasonably be understood to refer to every member of the class; and where the language purports to be an attack on a class but is actually an attack on an individual, the reference to the individual may be clear by inference.

The origin of the criminal action for group libel is the case of *R. v. Osborne* in 1732.⁹⁶ Osborne had published a paper charging that the Jews who had recently come from Portugal and who were living near Broad Street in London had burned to death a Jewish woman who had had sexual intercourse with a Christian and her illegitimate offspring, and that such occurrences were frequent. As a result of the libel breaches of the peace resulted, with mobs attacking Jews in various parts of the City. The Court upheld the action.

However, the three reported versions of the case are not in agreement as to the basis of the prosecution. Only the Barnardiston version states that the prosecution is based on libel, whereas the Kelynge report specifically affirms that breach of the peace, and not libel, is the basis for the information. Tanenhaus relates that the U. S courts have generally accepted the Barnardiston version as authoritative.⁹⁷

In England, despite the fact that the *Osborne* case was cited in 1952 by the Attorney-General, Sir Lionel Heald, to support his contention that the existing criminal law was adequate and that no new group libel legislation was necessary⁹⁸, the Kelynge report of *Osborne* seems to be taken as definitive⁹⁹, and group libel as such cannot be prosecuted as defamatory libel. Gatley states the present law on criminal liability for group libel in England as follows:

"Where the words complained of reflect on an indeterminate class or body of persons, no action will lie at the suit of any individual member or members

of the class or body. But criminal proceedings will lie if the tendency of the words is to excite the angry passions of the body or class libelled, or of the general public against the body or class libelled, and so lead to a breach of the peace.”¹⁰⁰

Despite the absence of any direct remedy for group defamation in English criminal law, a way was found to achieve the same result through the broad category of public mischief in *R. v. Leese and Whitehead*,¹⁰¹ decided in 1936 a few months before the Public Order Act was passed. There the printer and the publisher of a newspaper which had published statements reflecting on the Jewish community as a whole and not on particular individuals were acquitted of seditious libel but found guilty of public mischief. Mr. Justice Denning (as he then was) strongly attacked this case in 1949, commenting “If that were the law . . . all the good done by Fox’s Libel Act, 1792 . . . would be done away with by a side wind.”¹⁰² *R. v. Leese and Whitehead* is an exceptional case which has apparently never been followed.

The Porter Committee on Defamation, reporting in 1948, expressed itself strongly against any change in the existing law on group defamation:

“30. A considerable body of evidence has been tendered to us dealing with what may conveniently be described as Group Defamation -- that is to say, false statements vilifying not identifiable individuals, but groups or classes of persons distinguishable by race, colour, creed or vocation. Under the existing law, such statements cannot form the subject of civil proceedings for libel or slander. If they are made with intent to incite persons to commit any crime, to create a disturbance, to raise discontent or disaffection among His Majesty’s subjects, or to promote ill-will and hostility between different classes of such subjects, they may amount to the crime of seditious libel; but prosecutions for seditious libel, save in the most flagrant cases, may easily present the appearance of political prosecutions which the English tradition tends to view with disfavour.

“31. The most widespread and deplorable examples of Group Defamation at the date at which we commenced our sittings were directed against the Jews; but complaints were also made to us of unfounded vilification of particular trades. It is, we think, symptomatic of Group Defamation that the subject matter varies with current internal and external political trends. Much as we deplore all provocation to hatred or contempt for bodies or groups of persons with its attendant incitement to violence, we cannot fail to be impressed by the danger of curtailing free and frank -- albeit, hot and hasty -- political discussion and criticism. No suggestion has been made to us for altering the existing law which would avoid the prohibition of perfectly proper criticisms of particular groups or classes of persons. The law of seditious libel still stands as an ultimate sanction and we consider that the law as it stands affords as much protection as can safely be given.

"32. We do not, therefore, recommend any general change in the existing law to deal with Group Defamation."¹⁰³

However, such earlier views will now be superseded by the Race Relations Bill of 1965 which,¹⁰⁴ in addition to outlawing racial discrimination at all places of public resort, proscribes defamation against racial and ethnic groups and extends the application of section 5 of the Public Order Act to distribution of written material. The relevant portions of the Bill are as follows:

6. (1) A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins –

- (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
- (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.

(2) In this section the following expressions have the meanings hereby assigned to them, that is to say:—

"public meeting" and "public place" have the same meanings as in the Public Order Act 1936;

"publish" and "distribute" mean publish or distribute to the public at large or to any section of the public not consisting exclusively of members of an association of which the person publishing or distributing is a member;

"written matter" includes any writing, sign or visible representation.

(3) A person guilty of an offence under this section shall be liable:—

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds, or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand pounds, or both; but no prosecution for such an offence shall be instituted in England and Wales except by or with the consent of the Attorney General.

7. For section 5 of the Public Order Act 1936 there shall be substituted the following section:—

"5. Any person who in any public place or at any public meeting –

- (a) uses threatening, abusive or insulting words or behaviour, or

(b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting,

with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

A number of characteristics of the new Bill are worthy of note. First, the groups protected are sections of the public "distinguished by colour, race, or ethnic or national origins" with religion as a significant omission. It is believed by the Government that despite this omission anti-Semitic propaganda will be covered because it is said to go beyond religion and attack Jews as members of an ethnic group whether they are believers or not, and that the omission has the positive advantage of leaving open to continuing controversy all questions of a religious or doctrinal nature. The second characteristic of note is that there is no other exemption for legitimate debate; public discussion in a public place on all matters involving colour, race, or ethnic or national origin is proscribed if it occurs in a form which is "threatening, abusive or insulting" regardless of the merits of its content, i. e., irrespective of its truth or falsity or of its relation to the public welfare.

Third, the Bill is an exception both to the incitement to violence requirement of the sedition law and to the preservation of the peace test of the Public Order Act. Clause 3 substitutes an intention to stir up hatred for an intention to stir up disorder presumably on the view that hatred is likely to lead to disorder and violence. Sir Frank Soskice, the Home Secretary, in introducing the Bill in the House rightly pointed out that from the viewpoint of mens rea this Bill, which requires for conviction an intent to stir up hatred, is a far less radical departure from the principle of the common law than the Public Order Act;¹⁰⁵ but it is also true that from the viewpoint of the traditional common law concern for the preservation of the peace the new Bill, which does not demand that the words or written matter give rise to any disorder for conviction, is the far more radical departure.

APPENDIX I

CHAPTER IV

SEDITIOUS LIBEL IN THE UNITED STATES

A. Federal Law

The American law of seditious libel begins with the common law before Fox's Libel Act — or more accurately, it begins in reaction to that common law, for the contemporary English view of the limited liberty of the press was obnoxious to the men who made the American Revolution, who prized above all the right of unrestricted discussion of public affairs. As it was put by Professor Schofield:

“One of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press . . . Liberty of the press as declared in the First Amendment, and the English common-law crime of sedition, cannot co-exist.”¹⁰⁶

It is true that some of the early American judges, in the years before 1791, continued the common law of sedition in the federal courts, but this was brought to an end by the coming into effect of the Bill of Rights, or the first ten Amendments to the U. S. Constitution, in 1791. The Amendment which is relevant to seditious libel is the First: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

However, only seven years after the First Amendment became law the threat of war with France and the spread of revolutionary doctrines from abroad in America led to the passage by Congress of the Alien and Sedition Laws of 1798. The Alien Law allowed the President to compel the departure of aliens whom he judged dangerous to the peace and safety of the United States, or reasonably suspected of plotting against the Government. The Sedition Law punished false, scandalous, and malicious writings against the Government, either House of Congress, or the President, if published with intent to defame any of them, or to excite resistance of law, or to aid any foreign nation against the United States. The Sedition Act, which in effect made criticism of a public officer a high misdemeanor was bitterly resented by the opposition party, despite the fact that truth was made a defence and it was left to a jury to determine criminality. Jefferson and Madison led the attack on it, denouncing it as unconstitutional, and they were swept into power in 1800, in an election which shattered the Federalist Party which had brought the Act into being. Jefferson pardoned everyone imprisoned under the Act, Congress repaid all the fines on the ground that the Act was unconstitutional and the Act expired by its terms in 1801 during Jefferson's first term as President.¹⁰⁷

There was no further problem with respect to sedition until the sedition statutes during the First World War. The Espionage Act of 1917 included a provision making it an offence to "wilfully obstruct the recruiting service of the United States", and this Act continued in force after the peace, but was limited in its operation to wartime. The Espionage Act of 1918 went much further, in its catalogue of offences, but was repealed in 1921. It added nine more offences, of which the most relevant to our study are uttering or publishing language intended to cause contempt, scorn, contumely or dispute as regards the form of government or the constitution, or language intended to incite resistance to the United States or promote the cause of its enemies, or favouring the cause of any country at war with the United States or opposing the cause of the United States. Of the important cases only the *Abrams* case was tried under this 1918 statute.

The first case of importance in the United States Supreme Court was *Schenck v. United States*,¹⁰⁸ which is notable for Mr. Justice Holmes' statement of the law. The evidence showed that the accused had mailed circulars to draftees denouncing conscription as unconstitutional and urging them to assert their rights. The Supreme Court unanimously upheld the conviction and Holmes J. said for the Court:

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.* It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional rights."¹⁰⁹

The other two decisions handed down in March 1919 at the same time as *Schenck*¹¹⁰ broke no new ground, though in Chafee's view the conviction of *Eugene v. Debs* is hard to reconcile with the Holmes' "clear and present danger" test.¹¹¹

Abrams v. United States,¹¹² decided later in 1917, was the only case decided under the Espionage Act of 1918, and was the case in which Justices Holmes and Brandeis parted company with the rest of the court. The accused had published and distributed leaflets which denounced American military intervention in Siberia in the summer of 1918 and they were charged with interfering with the prosecution of the war with Germany. The Court held that "even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realised, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons . . . not to aid government loans and not to work in ammunition factories . . ."¹¹³ The

minority judges refused to accept such a mechanical chain of cause and effect relationships as valid in a complex social situation, and also refused to accept such an unrestricted notion of causality in the light of the First Amendment protection of free speech, and Holmes J. re-stated his "clear and present danger" test:

"[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."¹¹⁴

By the time of the *Gitlow* case in 1925 it was clear that the majority of the Court no longer adhered to the "danger" test.

Chafee denounces the state anarchy acts as "the first break with the American tradition [of free speech] in time of peace."¹¹⁵ Among the types of state sedition statutes were the "red flag laws", which forbade the display of the red flag, and in some states even forbade the wearing of red neckties or buttons. Another type were laws respecting criminal anarchy and criminal syndicalism. Benjamin Gitlow, a former member of the New York Assembly, was convicted under the New York Anarchy Act of 1902 for advocacy of a general strike, and his conviction was upheld by the Supreme Court. Speaking for that Court, Mr. Justice Sanford gave a clear indication that the "danger" test was not accepted by the majority as an over-riding test of the constitutionality of an enactment:

"By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. . .

[T]he general statement in the Schenck case, (p. 52) that the 'question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,' . . . has no application to [cases] like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."¹¹⁶

Holmes, J., dissenting, deplored the departure from the "danger" test.¹¹⁷ In the subsequent case of *Whitney v. California*,¹¹⁸ where Anita Whitney was convicted

under the California Criminal Syndicalism Act, the Supreme Court upheld the conviction with Holmes and Brandeis JJ. concurring, but Brandeis J. took the opportunity to restate the "danger" test again:

"Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. *The wide difference between advocacy and incitement, between preparation and attempt, between assembly and conspiracy, must be borne in mind.* In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."¹¹⁹

However, the low water mark of the "danger" test had been passed, and in *Fiske v. Kansas*,¹²⁰ *Stromberg v. California*,¹²¹ *Near v. Minnesota*,¹²² *De Jonge v. Oregon*,¹²³ and *Herndon v. Lowry*¹²⁴ the court set aside convictions in free speech cases, though without in any of them specifically endorsing the "clear and present danger" test. In the *Herndon* case, however, Mr. Justice Roberts, for the Court, was clearly concerned about the wide implications of a mere "dangerous tendency" test and impliedly endorsed the "clear and present danger" standard:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."¹²⁵

It was not, however, until *Bridges v. California*,¹²⁶ in 1941 that the Supreme Court expressly re-adopted the "clear and present danger" rule. But the reign of the rule since that time has been troubled by doubt and judicial distinction, and the most that can be said of the present law is that, while the verbal formalization has continued in use, its meaning has not remained constant.¹²⁷

The problem with which the U. S. Supreme Court has been struggling in its attempt to articulate a satisfactory test of danger is one which has been largely unexplored in English law. The English cases have been by and large concerned with the question: is seditious intention constituted by incitement to violence or by incitement to mere hostility and ill will?¹²⁸ The American courts, as we shall see, have also had to struggle with this question, but, unlike the English courts they have been forced to attempt an answer to the further question: when there is incitement to violence how proximate does the danger of violence have to be before

it is legitimate for the State to proscribe it? The type of cases that have arisen in England,¹²⁹ the lesser degree of statutory experiment in a unitary State, and the absence of a Bill of Rights have undoubtedly all contributed to the lack of emphasis in the English cases on this point.

What is in question for the American courts is the tendency of the act in question for bad. If the bad tendency is remote, then the contention of the Holmes' school would be that the act is not unlawful — or rather, that it would be unconstitutional, as against the First Amendment, to make it unlawful by statute. As Professor Chafee says:

"In order to give force to the First Amendment, Justice Holmes draws the boundary line very close to the test of incitement at common law and clearly makes the punishment of words for their remote bad tendency impossible. He shows the close relation between freedom of speech and criminal attempts by borrowing a phrase from his own opinion in a leading Massachusetts attempt case, 'It is a question of degree'."¹³⁰

Brandes J., as we have already noted, emphasizes "the wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy." The opposite view is expressed by Justice McKenna in *Schaefer v. United States*¹³¹ in 1920, a conviction of three officers of a German-language newspaper in Philadelphia. In Chafee's words, "To all the passages in the defendants' newspaper, Justice McKenna applies the eighteenth-century tests of bad tendency and presumptive intent to see whether the evidence can justify the convictions. The only remoteness which he recognizes seems to depend on the will of the jury."¹³²

Besides the "danger" test and the "bad-tendency" test, the Supreme Court has also developed another test, which may be illustrated from the majority judgments in *Dennis v. United States*,¹³³ where the defendants had been convicted for violation of the conspiracy provisions of the Smith Act. Chief Justice Vinson gave an opinion in which three other justices joined:

"In this case we are squarely presented with the application of the 'clear and present danger' test, and must decide what that phrase imports

"Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a

sufficient evil for Congress to prevent We must therefore reject the contention that success or probability of success is the criterion....

"Chief Judge Learned Hand, writing for the majority below interpreted the phrase as follows: 'In each case (courts) must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger' We adopt this statement of the rule."¹³⁴

This test might well be described as the "sufficient danger"¹³⁵ test; it is in essence a "balancing of interests" criterion.

A variant "balancing of interests" test is revealed in the concurring judgment of Frankfurter J.:

"[W]ho is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility cannot be given to the courts. Courts are not representative bodies....

"Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress."¹³⁶

"It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restrictions on freedom of speech."¹³⁷

All such weighings of interests are anathema to more liberal spokesmen. Brant declares:

"Under that theory [the balancing test] the words Congress shall make no law abridging freedom of the press have this meaning: Congress shall make no law abridging freedom of the press unless, on balance, there seems more reason for abridging it than for not doing that. Ten thousand words of legal opinion boil down to precisely that.... The balancing test does exactly what is done by its spiritual parent, the British 'common law of seditious libel', under which (to repeat the words of May), 'Every one was a libeller who outraged the sentiments of the dominant party'.¹³⁸

He is cited with approval by Douglas and Black JJ.,¹³⁹ whose views on the preferred position of First Amendment liberties will be more fully explored in the next section.

B. State Law

Three cases involving criminal and civil libel are of great importance in helping to attain a more complete picture of the American view of libel. The first of these cases is *Beauharnais v. Illinois*¹⁴⁰ in 1952.

Beauharnais was convicted for violating a section of the Illinois Penal Code which provides:

"It shall be unlawful for any person, firm or corporation to manufacture, sell or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50.00), nor more than two hundred dollars (\$200.00)."

The defendant challenged the statute as violating the liberty of speech and of the press guaranteed by the Fourteenth Amendment.¹⁴¹ The Illinois courts sustained this conviction, as did the Supreme Court by a narrow 5-4 margin.

The majority opinion was delivered by Frankfurter J.:

"The precise question before us... is whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels – as criminal libel has been defined, limited and constitutionally recognized time out of mind – directed at designated collectivities and flagrantly disseminated. There is even authority, however dubious, that such utterances were also crimes at common law. It is certainly clear that some American jurisdictions have sanctioned their punishment under ordinary criminal libel statutes. We cannot say, however that the question is concluded by history and practice. But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a state power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State."¹⁴² [He then goes on to show that, since Illinois has been the scene of great racial tension, the restriction is not unrelated to its peace and well-being].

"It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power....

"Libellous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger'. Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

"We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack."¹⁴³

The alternative view is most forcibly stated by Black J.:

"This statute imposes state censorship over the theater, moving pictures, radio, television, leaflets, magazines, books and newspapers. No doubt the statute is broad enough to make criminal the 'publication, sale, presentation or exhibition' of many of the world's great classics, both secular and religious.

"The Court condones this expansive state censorship by painstakingly analogizing it to the law of criminal libel. As a result of this refined analysis, the Illinois statute emerges labelled a 'group libel law.' This label may make the Court's holding more palatable for those who sustain it, but the sugar-coating does not make the censorship less deadly. However tagged, the Illinois law is not that criminal libel which has been 'defined, limited and constitutionally recognized' time out of mind. For as 'constitutionally recognized' that crime has provided for punishment of false malicious, scurrilous charges against individuals, not against huge groups. This limited scope of the law of criminal libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds. Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment.....

"I think the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.' Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech."¹⁴⁴

The dissenting judgment of Douglas J. is very close in tone to that of Black J., in whose dissent he also joined. Douglas J. clearly states the fundamental principle behind the Black-Douglas position:

"The First Amendment is couched in absolute terms – freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. For example, privacy, equally sacred to some, is protected by the Fourth Amendment only against unreasonable searches

and seizures. There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment.”¹⁴⁵

The contrast presented by this case between the Frankfurter view on the one hand and the Black-Douglas view on the other runs through the whole history of the United States Supreme Court in the last twenty years, with now one view, now the other, ascendant — but with neither ever gaining a decisive and permanent victory.

The Frankfurter position is essentially one of judicial restraint: that courts, not being “representative bodies”,¹⁴⁶ do not have the right to make ultimate decisions in a democratic state, that “primary responsibility for adjusting the interests which compete... of necessity belongs to the Congress.”¹⁴⁷ Courts have the right to interfere only with such legislation as is a wilful and purposeless restriction unrelated to the peace and well-being of the State.¹⁴⁸ It is, in effect, only the bona fides of the exercise of legislative power which is open to the Courts for review not the substance of that power.

The Black-Douglas view¹⁴⁹ does not take issue with this position where only economic issues are involved; after all, this was the substance of the New Deal victory in the Court in the late 30s and early 40s. But what it does insist on is that a line be drawn separating First Amendment liberties, or political liberties, as they are sometimes called, from this common treatment. First Amendment liberties are in a preferred position and cannot be infringed on by legislation. It is therefore the duty of the court, when there is a question of the protection of these liberties, to assume an active role and to disallow the impertinent legislation. The commandment of the First Amendment that “Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” is to be read quite literally.

So much for the philosophy of the judges in *Beauharnais*. Though the result upheld the Illinois statute as construed and applied only by a single vote, the margin of support for the right of the state to legislate in such an area was much larger.¹⁵⁰ However, issues with respect to state libel legislation that were passed over almost entirely unnoticed in *Beauharnais*¹⁵¹ have assumed major importance in two recent cases in the Supreme Court, one dealing with civil libel, the other criminal libel. In both cases the majority opinion was delivered by Brennan J., and in both cases Black, Douglas and Goldberg JJ., though concurring, were not in agreement with the majority as to the requirements of the Constitution.

In *New York Times Co. v. Sullivan*¹⁵² decided in March of last year, the Supreme Court was faced with the case of a civil suit brought by a public official to recover damages for defamatory criticism of his official conduct. The alleged libels were contained in a full-page advertisement in the New York Times in

March, 1960, inserted by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South, and it was common ground to the parties that some of the statements in the advertisement were inaccurate in detail. The Alabama jury found for the plaintiff, awarding him damages of \$500,000 against the *Times* and the four other defendants, and the Supreme Court of Alabama affirmed the verdict. The Supreme Court of the United States unanimously reversed the judgment of the Alabama courts.

Under Alabama law a publication was libelous *per se* if it injured a person in his reputation, and a public official's place in the governmental hierarchy was sufficient evidence to support a finding that his reputation had been affected by statements about the agency of government to which he belonged. Once the libel *per se* was established, the only defence was that the facts in the libel were true in all their particulars. (Punitive damages could be awarded only on a showing of actual malice). Despite the safeguard of the defence of truth, the Supreme Court struck down the Alabama law.

Mr. Justice Brennan writes:

"[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.... [E]rroneous statement is inevitable in free debate, and... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need... to survive'....

"Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error....

"What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel....

"The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California* we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale....

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not....²⁵³

Black J. concurs in the Court's action but does not like the standard adopted:

"I concur in reversing this half-million-dollar judgement against the New York Times Company and the four individual defendants. In reversing the

Court holds 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.' *Ante*, p. 283. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if 'actual malice' can be proved against them. 'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment...

"In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction--by granting the press an absolute immunity for criticism of the way public officials do their public duty."¹⁵⁴

Goldberg J. expresses the same view as Black J.:

"The Court... rules that the Constitution gives citizens and newspapers a 'conditional privilege' immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer....

"In my view, the First and Fourteenth Amendment to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses....[This] does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements.... The public official certainly has equal if not greater access than most private citizens to media of communication."¹⁵⁵

In the case of *Garrison v. State of Louisiana*,¹⁵⁶ decided last November, the Supreme Court completed the development it had begun in the *New York Times* case. The defendant appellant was a District Attorney in Louisiana and was charged with criminal defamation as a result of his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges, of his accusation that the judges had hampered his efforts to enforce the vice laws, and of his questioning "the racketeer influences on our eight vacation-minded judges." He was convicted and his conviction was affirmed by the Supreme Court of Louisiana.

It was argued that, because of the differing history and purpose of civil and criminal libel, the *New York Times* rule limiting state power to impose sanctions for criticism of the official conduct of public officials should not be extended to the criminal sphere. But the Court, through Brennan J., rejected this argument:

"Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations. At common law, truth was no defense to criminal law. Although the victim of a true but defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable since the remedy was designed to avert the possibility that the utterance would provoke an enraged victim to a breach of peace."¹⁵⁷

Brennan J. continues:

"[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. The reasons which led us to hold in *New York Times*... that the unqualified defense of truth was insufficient apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since"... erroneous statement is inevitable in free debate, and.... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'",... only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government."¹⁵⁸

Black, Douglas and Goldberg JJ., in concurring, restate the views they expressed in the *New York Times* case.

These cases illustrate the emergence of a strong "middle force" in the Court which supports neither the Frankfurter "hands off" policy nor yet the Black-Douglas absolutist position. Though Goldberg J. has now joined the latter group, it seems to be isolated in a permanent minority role. The emergent majority group seems to agree with Black J. in granting a preferred position to First Amendment freedoms and in reading this into the Fourteenth Amendment, but what it refuses to do is to read the clause "Congress shall make no law" in a literal fashion. It favours a "balancing" policy in which the balancing will be done by the Court, not by the Legislature, and, it approaches the task with a liberal bias against legislative interference with the fundamental freedoms.

What, then, is the status of the *Beauharnais* case in the light of these two later cases? In the *Garrison* case Douglas J. says of it:

“Beauharnais v. Illinois, . . . a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment. I think it is time to face the fact that the only line drawn by the Constitution is between ‘speech’ on the one side and conduct or overt acts on the other. The two often do blend. I have expressed the idea before: ‘Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it’ . . . Unless speech is so brigaded with overt acts of that kind there is nothing that may be punished.”¹⁵⁹

The majority has not yet, of course, overruled *Beauharnais*, but it has distinguished it, per Brennan J. in the *New York Times* case:

“In *Beauharnais v. Illinois*. . . . the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and ‘liable to cause violence and disorder.’ But the Court was careful to note that it ‘retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel’; for ‘public men, are, as it were, public property,’ and ‘discussion cannot be denied and the right, as well as the duty, of criticism must not be stifles.’ ”¹⁶⁰

The Illinois statute which was upheld in *Beauharnais* penalized the distributor of any writing “which exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots” [emphasis added]. This is not significantly different from the fourth and fifth heads of seditious libel in Stephen’s classification. Despite the ostensible American opposition to seditious libel, it is in effect a seditious libel law, and one which penalizes not only incitement to breach of the peace but also incitement to hatred or ill-will. The Illinois statute, as approved by the U. S. Supreme Court, therefore has a much broader definition of seditious libel than contemporary English law.

However, at the same time there is a safeguard in American law that is not in English law. As Jackson J. points out in *Beauharnais*,¹⁶¹ every state in the Union has recognized either by statute or by judicial decision that in all criminal prosecutions the truth may be given in evidence to the jury, and this provision, which in some states antedated and anticipated Lord Campbell’s Act, has not been considered inapplicable, as in England, to legislation such as that in *Beauharnais*. Moreover, in the light of the *Garrison* case, it is now possible at the very least that other safeguards will be read into such state statutes. This is suggested by a footnote in the Court’s decision:

“In affirming appellant’s conviction, before *New York Times* was handed down, the Supreme Court of Louisiana relied on statements in *Roth v. United*

States.... and *Beauharnais v. Illinois*.... to the effect that libelous utterances are not within the protection of the First and Fourteenth Amendments, and hence can be punished without a showing of clear and present danger.... For the reasons stated in *New York Times*.... nothing in Roth or *Beauharnais* forecloses inquiry into whether the use of libel laws, civil or criminal, to impose sanctions upon criticisms of the official conduct of public officials transgresses constitutional limitations protecting freedom of expression. Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards.”¹⁶²

The instances in which the Illinois statute would be applied to “criticisms of the official conduct of public officials” would seem to be nil, but the concluding sentence of the note perhaps suggests the possibility of the imposition of other constitutional standards as well.

It is also worth querying whether in a case which directly forced a reconsideration of *Beauharnais*, a Court which believes that balancing of interests is a function to be performed by the Courts, and which, even without embracing the Douglas dichotomy between speech and conduct, enters on the delicate mission of adjustment of interests with a bias against legislative interference with First Amendment freedoms, would decide that case in the same way.

APPENDIX I

CHAPTER V

RELATED OFFENCES IN THE UNITED STATES

The United States Constitution guarantees by the First Amendment the right of the people peaceably to assemble, and state constitutions contain similar guarantees. However, these constitutional provisions do not guarantee any place as a legitimate place of assembly, and so there are a number of valid ways through which meetings may be restrained -- municipal ordinances prohibiting obstruction in the streets, ordinances prohibiting meetings in public places without a permit from some authorized authority, and criminal prohibitions against unlawful assembly, breach of the peace and disorderly conduct.¹⁶³ Many Supreme Court cases have arisen as a result of challenges to the application of such laws.

The Court has recognized the right to distribute provocative pamphlets upon the streets and from door to door and has held irrelevant the fact that others may threaten violence provided that the distributor's conduct is peaceable. For example, in *Cantwell v. Connecticut*¹⁶⁴ the Supreme Court overturned a conviction of a Jehovah's Witness for breach of the peace where he had played before two Catholics a speech on a phonograph record to which they took exception. Roberts J. said for the Court:

“The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others.... [T]he State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions....

“Although the contents of the record not unnaturally aroused animosity, we think that... the petitioner's communication... raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.”¹⁶⁵

However, in *Chaplinsky v. New Hampshire*,¹⁶⁶ where there was a state law forbidding offensive language on the streets, the Court upheld the conviction of a Jehovah's Witness who had spoken offensively to a city marshall. The Court observed through Murphy J.:

“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part

of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁶⁷

Similarly in 1949 the Court upheld a municipal by-law forbidding the use of loud speakers on the streets,¹⁶⁸ even though it had a short time previously struck down a by-law which forbade the use of sound amplification devices without the permission of the Chief of Police.¹⁶⁹

However, in *Terminiello v. Chicago*¹⁷⁰ a bare majority of the Court held that a municipal ordinance directed against breaches of the peace was unconstitutional as construed when it was used to convict a speaker whose address, denouncing various racial and political groups, occasioned a disturbance. Mr. Justice Douglas said for the majority:

“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”¹⁷¹

In the 1963 case of *Edwards v. South Carolina*,¹⁷² where 187 Negro students had been convicted of breach of the peace for demonstrating on the grounds of the South Carolina State House, an area open to the general public, even where there was no evidence of trouble and no obstruction of pedestrian or vehicular traffic, the Court *a fortiori* held that the statute was unconstitutional as construed. Citing *Terminiello v. Chicago*, Stewart J. observed: “The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”¹⁷³

With regard to group defamation where there is no question of breach of the peace, there is no significant difference between American and English law. A good outline of the instances in which the civil remedy of a suit for damages has been allowed by courts is found in an article by Joseph Tanenhaus¹⁷⁴, and the general principle is stated to be that “the larger the group defamed, the smaller are the chances of successful action”.¹⁷⁵ The first case of this kind was the English case of *Foxcraft v. Lacy* in 1613¹⁷⁶, in which the plaintiff was one of a group of seventeen designated by the defendant as accomplices to a murder, and it was held that each of the group was entitled to a separate action, just as if they had been specifically named by the defendant.

The American case law which has evolved on the basis of this early precedent asserts the necessity of proof by the individual member of the group of special application of the defamatory matter to himself as an individual, and no case has ever held a defendant civilly responsible for the defamation of a large collectivity.¹⁷⁷ U. S. courts have held that actions by members could succeed when the group was a family, a partnership, a staff of physicians at a particular hospital, the occupants of a house, the members of a particular board, commission or tribunal, etc. In some cases unincorporated associations have been allowed to maintain suits in the name of the association.¹⁷⁸

As to criminal actions for defamation Tanenhaus relates that the U.S. courts have generally accepted the Barnardiston version of *R. v. Osborne* as authoritative,¹⁷⁹ and that the common law was there held to permit prosecutions for libel whether or not a tendency to cause a breach of the peace was present. But even so, in Tanenhaus' words "to date there have been no successful actions, civil or criminal, for the libeling of a large racial or religious group. The traditional law of defamation is so ineffective in combating the group libeler that he can spread his hatred virtually without risk of legal action."¹⁸⁰

This comment is subject to the qualification that prosecutions may successfully be brought under group libel laws in such States as Illinois and Massachusetts.¹⁸¹ The Illinois law was the basis of the prosecution in *Beauharnais v. Illinois*¹⁸², and appears to have been the only successful prosecution under a group libel law in the United States.¹⁸³ There have been many unsuccessful attempts in both Congress and State legislatures to enact other group libel acts; the most recent attempt was in New York State this year, where a bill actually passed the Legislature, but was vetoed by Governor Rockefeller.

In general American feeling has been against group defamation laws. The privately established Commission on the Freedom of the Press for example, opposed any new legislation:

"[T]he Committee on the Freedom of the Press was unanimously opposed to the enactment of group libel legislation. The Committee fully realized the seriousness of the evils of group vilification and the inadequacy of existing legal remedies. Therefore, it strongly believed that methods must be found to combat racial and religious and economic antagonisms. In its opinion such methods must be largely sought outside the law. Extra-legal methods are available, such as the activities of inter-group conciliatory organizations and continuous efforts in the schools. The press can give valuable help by bringing these antagonisms into the area of rational discussion and mutual adjustment. At the present time there is too much hush-hush about such matters in newspapers of large circulation. They are so anxious not to offend any group that they behave as if group antagonisms did not exist. Such timid silence is one of the causes of the vilification in the subsidiary press. When wise men refuse to mention disagreeable facts, foolish

and stupid men will have their say and more than ever. The responsible leaders of the press ought frankly to face the facts of group dissensions whenever a proper occasion demands. When the evil is thus frankly faced, its size will be seen to be smaller than is commonly supposed, and methods for reducing it still further can then be satisfactorily explored. The remedy for bad discussion is not punishment but plenty of good discussion.”¹⁸⁴

Most of the Report of this Commission was written by Professor Chafee, and his strong recommendation against new group libel legislation¹⁸⁵ admittedly was a strong influence on the rest of the Commission.

The President’s Committee on Civil Rights took a similar position, though it recommended legislation to end the anonymity of pamphleteers:

“[O]ne of the things which totalitarians of both left and right have in common is a reluctance to come before the people honestly and say who they are, what they work for and who supports them. Those persons in our country who try to stir up religious and racial hatreds are no exception. . . .

“The principle of disclosure is, we believe, the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups. We have considered and rejected proposals which have been made to us for censoring or prohibiting material which defames religious or racial minority groups. Our purpose is not to constrict anyone’s freedom to speak; it is rather to enable the people better to judge the true motives of those who try to sway them.”¹⁸⁶

Strongly influenced by the “great obstacles to successful prosecution for group defamation”,¹⁸⁷ Tanenhaus reaches a tentative conclusion against new legislation:

“The dearth of necessary data does not permit a definite determination whether group libel legislation could be effective and desirable. Until such information is made available, the presumption must run against group libel legislation as a method of combating group defamation.”¹⁸⁸

One of the few authorities who has supported the extension of the law is Professor David Riesman.¹⁸⁹ Riesman favours a civil rather than a criminal remedy because of the risks that convictions could not be obtained in every case in the light of such obstacles as “the need for a unanimous verdict, the proof beyond a reasonable doubt, the hardly inevitable politics of the district attorney’s office”.¹⁹⁰ Among civil actions he finds the equitable remedy of injunction preferable to the common law action for damages. Besides the difficulty of the ascertainment of damages, there would also be the problem that the publisher of defamatory untruths is often insolvent and the consideration that “the very fact that he is suing for damages puts the plaintiff in the position of a gold-digger, unless he explicitly asks for a nominal recovery”.¹⁹¹ The United States courts have, however, he comments,

refused to give injunctive relief against libels, largely because of their acceptance of the Blackstonian conception of freedom as consisting in the absence of prior restraints, and he regards *Near v. Minnesota*¹⁹² as an example of this policy. It is, he feels, an outdated civil libertarianism:

"Very generally, these [liberal] writers who are hostile to the use of libel law as a control upon opinion are still under the influence of attitudes which historically were shaped by experiences and fact-situations of the pre-nineteenth century period. Then the chief menace to freedom of discussion came from the absolutist state and other authoritative bodies like the church. The attitudes of these writers have been reinforced, in many cases, by experiencing the rise of totalitarianism as a justification of their anti-governmental fears. In the more or less democratic lands, however, the threat of fascism and the chief dangers to freedom of discussion do not spring from the 'state', but from 'private' fascist groups in the community. These groups try to repress criticism of themselves, sometimes with the help of government, but more often and more subtly by 'private' pressure and coercion. This pressure often takes the form of defamation against opposing weaker groups like 'labor', which further weakens these groups in the eyes of the community as a whole -- and even in their own eyes. Or the defamation aims to shift to relatively powerless scapegoats -- Negroes, Jews, Mexicans -- the attacks which might otherwise be made against the prevailing system. Usually, both strategies are combined. In this state of affairs, it is no longer tenable to continue a negative policy of protection from the state; such a policy, in concrete situations, plays directly into the hands of the groups whom supporters of democracy need most to fear."¹⁹³

The question must of course be raised in this context whether there is some difference between the relationship to true discussion of utterances defamatory of groups and those defamatory of individuals; it might be argued that group libels have a valid and close relationship to free speech.

In summary, then, the law of defamation may be extended by criminal or civil remedies. The extension of the criminal remedy gives rise to the same policy issues whether it is done by way of extension of the crime of seditious libel or by way of broadening defamatory libel; group libel is somewhere between libel of the government and libel of an individual and it can hypothetically be linked with either -- depending on which choice is made, the conceptualization will be somewhat different, but the policy question of whether it is desirable to proscribe abuse short of incitement to physical injury will remain.

Professor Riesman is clearly on the side of a civil remedy. So, too, is Tanenhaus, if any remedy is to be chosen:

"The civil remedy is not so easily extended to create liability for group defamation because the purpose of civil relief has long been to permit the

individual to seek financial reparation for injury to his reputation. . . . Yet the several distinct advantages of the civil over the criminal law are so important that serious attention has been given to ways of eliminating these drawbacks. The advantages are four in number. The civil law has traditionally covered the spoken as well as the written word; the more limited role of the jury in civil suits makes them far easier to win without an increase in the danger to discussion; the government plays no part in the action; use of the equitable remedy, the injunction, is at least a possibility.”¹⁹⁴

Probably the only American legislation which provides such a remedy is the Indiana “racketeering in hatred” law,¹⁹⁵ which, besides making it subject to criminal penalty to advocate, conspire to, or actually disseminate hatred with certain stated effects with respect to individuals or groups by reason of race, colour or religion, also provides for an injunction in an action brought by the Attorney General or by a prosecuting attorney. Tanenhaus condemns this statute for its prior restraint.¹⁹⁶ Tanenhaus also criticizes the draft statute presented in the June 1947 issue of the *Columbia Law Review*¹⁹⁷ which, aside from criminal provisions, also provides for a retraction, injunction, and posting of bond for persons who “utter in a public place any false and defamatory statement of fact concerning a racial, religious or national group”. Tanenhaus does not attempt a draft of his own.¹⁹⁸

APPENDIX I

CHAPTER VI

SEDITIOUS LIBEL IN CANADA

The distinctively Canadian law of seditious libel began in 1892 with the first Canadian Criminal Code; up to that time the English common law had been in force in this country. The sections of the new Code dealing with sedition, as Taschereau J. has pointed out, "were undoubtedly inspired by arts. 114 and 115 of Stephen's Digest on Criminal law, as they read at the time."¹⁹⁹ It does not, however, follow that the sections on sedition in the Code were intended to have the meaning which Stephen assigned to the crime of sedition, especially since the key passage in Stephen's *Digest*, the first paragraph of art. 114, where he defines seditious intention, has never been in the Code; this omission is all the more remarkable in that the second paragraph of this article, the "proviso" section, has been in and out and in again.²⁰⁰ The obvious conclusion is that Canadian legislators purposely left the definition of seditious libel to the Courts.

The first significant change in Canadian law that was not based on common-law precedent was the "unlawful association" section, enacted in 1919.²⁰¹ This section defined an unlawful association as one whose professed purpose was to bring about governmental, industrial or economic change within Canada by unlawful means -- force, violence or physical injury to person or property, or threats of these. Members and others associated with the cause of such an unlawful association were made subject to stringent penalties.

In the same Act Parliament provided for the deletion of the proviso section.²⁰² It was, however, restored in 1930.²⁰³ Subsequently, in 1936, as a result of some years of public agitation, the "unlawful associations" section was repealed,²⁰⁴ and a sub-section partially defining seditious intention was substituted in its place.²⁰⁵

The relevant sections of the Criminal Code at the time of the Boucher case were therefore as follows:²⁰⁶

- "133. Seditious words are words expressive of a seditious intention.
- "2. A seditious libel is a libel expressive of a seditious intention.
- "3. A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention.
- "4. Without limiting the generality of the meaning of the expression 'sedition' everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada. R. S., c. 146, s. 132; 1936, c. 29, s. 4. [Now s. 60]

"133A. No one shall be deemed to have a seditious intention only because he intends in good faith, ---

"(a) to show that His Majesty has been misled or mistaken in his measures; or

"(b) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or,

"(c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects. 1930, c. 11, s. 2. [Now s. 61]

"134. Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy. 1930, c. 11, s. 3, [Now s. 62]

"136. Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest.

R. S., c. 146, s. 136." [Now s. 166]

The case of *Boucher v. The King*²⁰⁷ is the decisive Canadian case in the area of seditious libel. The accused Boucher was a farmer in Quebec and a Jehovah's Witness. He was arrested for distributing a four-page pamphlet entitled "Quebec's Burning Hate for God and Christ and Freedom Is the Shame of all Canada", which after a preliminary appeal to calmness and reason, described generally and then specifically the allegedly vindictive persecution of the Witnesses in Quebec, and concluded with an appeal to the people of the Province to reform. He was charged with publishing a seditious libel contrary to s. 133 of the Criminal Code, was convicted by a jury, and had his conviction affirmed by the Court of King's Bench (Appeal Side) of the Province of Quebec, with Letourneau C. J. and Galipeault J. dissenting.

Boucher's appeal was allowed in the Supreme Court of Canada, but a majority of the Court (Rinfret C. J. C., Kerwin and Taschereau JJ.) directed a new trial. Rand and Estey JJ. dissented in part, directing an acquittal. However, Kerwin J. agreed with the minority judges as to the law, though coming to a different decision on the facts. Because of the confusion resulting from the fact that the court was split 3-2 (with one lineup) on the proper order to be made, and 3-2 (with a different lineup) on the law, the motion of appellant's counsel for a rehearing was allowed under rule 64 of the Supreme Court Rules. The rehearing was held before the full bench of nine judges, who held by a vote of 5 to 4 that a verdict of acquittal should be entered. The four judges not present at the first

hearing split evenly, and the margin of decision was provided by Kerwin J. who altered his view of the proper result, though adhering to his original view as to the nature of seditious libel.

The judges were all willing to accept the statement of Sir James Stephen in article 114 of his *Digest* as at least a classification of the various types of seditious libel (though not necessarily as a complete definition). On the first hearing attention was focussed on head 4, "an intention..... to raise discontent or disaffection amongst His Majesty's subjects," and on head 5, "an intention... to promote feelings of ill-will and hostility between different classes of such subjects." The principal substantive issue on the first hearing was whether these words, and particularly the words of head 5 (which are less ambiguous on the surface than those of head 4) should be taken at face value, or whether they should be given a non-literal interpretation.²⁰⁸

Taschereau J. holds that the Code definition is the English common-law definition of 1892, as stated by Stephen,²⁰⁹ and that "nowhere do we find that incitation to violence is a necessary element of the crime, as suggested by counsel for the appellant."²¹⁰ Rinfret C.J.C. concurs in this view and maintains "we have it here (in s. 133(4)) that the advocating of force is not the only instance in which an accused could be found guilty of a 'seditious intention'."²¹¹ Nevertheless, although these two judges held that the pamphlet contained statements that a jury might reasonably find to be seditious libels, they agreed that there should be a new trial because of misdirection by the trial judge.²¹²

Kerwin J. took a different view of the law:

"The main element which it was necessary for the jury to find was an intention on the part of the accused to incite the people to violence or to create a public disturbance or disorder The use of strong words is not by itself sufficient nor is the likelihood that readers of the pamphlet in St. Joseph de Beauce would be annoyed or even angered, but the question is, was the language used calculated to promote public disorder or physical force or violence."²¹³

However, on the facts he agreed with Rinfret C. J. C. and Taschereau J.:

"There was evidence in the document itself, taken, as it must be, with all the other circumstances, upon which a jury after a proper charge as outlined above, could find the accused guilty...."²¹⁴

Estey J. agreed with the view of the law taken by Kerwin and Rand J.²¹⁵ and with the view of the facts taken by Rand J.

The most important judgment on the first hearing (in fact the most important judgment on either hearing)²¹⁶ was that of Rand J. He begins with a statement of judicial philosophy:

"The crime of seditious libel is well known to the common law... Up to the end of the 18th century it was, in essence, a contempt in words of political

authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive. In that lay sedition by words and the libel was its written form. "But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public. The basic nature of the common law lies in its flexible process of traditional reasoning upon significant social and political matter; and just as in the 17th century the crime of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, call for new jural conclusions: *Bourne v. Keane*. (1919) A. C. 815 . . ."²¹

He then examines the cases and continues:

"There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency. What is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally. "Although Stephen's definition was adopted substantially as it is by the Criminal Code Commission of England in 1880, the latter's report, in this respect, was not acted on by the Imperial Parliament, and the Criminal Code of this country, enacted in 1891, did not incorporate its provisions. The latter omits any reference to definition except in s. 133 to declare that the intention includes the advocacy of the use of force as a means of bringing about a change of Government and by s. 133A, that

certain actions are not included. What the words in (4) and (5) [heads (4) and (5) in Stephen's definition] must in the present day be taken to signify is the use of language which, by inflaming the minds of people into hatred, ill-will, discontent, disaffection, is intended, or is so likely to do so as to be deemed to be intended, to disorder community life, but directly or indirectly in relation to Government in the broadest sense: Phillimore J. in *R. v. Antonelli & Barberi* (1905), 70 J. P. 4 at p. 6, 'seditious libels are such as tend to disturb the government of this country'. That may be through tumult or violence, in resistance to public authority, in defiance of law."²¹⁸

Next he turns to a study of the Code:

"These considerations are confirmed by s. 133A of the Code. . . . "This [s. 133A]. . . is a fundamental provision which, with its background of free criticism as a constituent of modern democratic Government, protects the widest range of public discussion and controversy, so long as it is done in good faith and for the purposes mentioned. Its effect is to eviscerate the older concept of its anachronistic elements. But a motive or ultimate purpose, whether good or believed to be good is unavailing if the means employed is bad; disturbance or corrosion may be ends in themselves, but whether means or ends, their character stamps them and the intention behind them as illegal.

The condemned intention lies then in a residue of criticism of Government, the negative touchstone of which is the test of good faith by legitimate means toward legitimate ends. That claim was the real defence in the proceedings here but it was virtually ignored by the trial Judge. On that failure, as well as others, the Chief Justice of the King's Bench and Galipeault, J. have rested their dissent, and with them I am in agreement."²¹⁹

Finally he considers whether the accused must be subjected to a second trial:

"The Courts below have not, as, with the greatest respect, I think they should have, viewed the document as primarily a burning protest and as a result have lost sight of the fact that, expressive as it is of a deep indignation, its conclusion is an earnest petition to the public opinion of the Province to extend to the Witnesses of Jehovah, as a minority, the protection of impartial laws. No one would suggest that the document is intended to arouse French-speaking Roman Catholics to disorderly conduct against their own Government, and to treat it as directed, with the same purpose, towards the Witnesses themselves in the Province, would be quite absurd; in relation to the Courts, it is, to use the language of s. 133A, pointing out, 'in order to their removal', what are believed to be 'matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects'. That some of the expressions, divorced from their context, may be extravagant and may arouse resentment, is not, in the circumstances, sufficient to take the

intention of the writing as a whole beyond what is recognized by s. 133A as lawful.

"Where a conviction is set aside, this Court must dispose of the appeal as the justice of the case requires; and where the evidence offered could not, under a proper instruction, have supported a conviction, the accused must be discharged . . ."²²⁰

On the second hearing the Rand view won hands down as far as heads 4 and 5 were concerned: Rand, Kerwin, and Estey JJ. repeated their previous opinions, and were joined by Kellock and Locke JJ; Cartwright and Fauteux JJ. concurred on this point, and Taschereau J. made a graceful concession.²²¹ Of the whole court only Rinfret C. J. C. took an opposing view, and he refused to change his previous judgment at all.

The main issue on the rehearing was not head 5 or head 4 but that part of head 1 which relates to the administration of justice — "an intention . . . to excite disaffection against . . . the administration of justice," since the pamphlet had admittedly contained remarks critical of the administration of justice in Quebec. Despite the fact that counsel had devoted little attention to this point in argument, Cartwright J. took up the issue:

"In my opinion at common law an intention to bring into hatred or contempt or to create disaffection against the administration of justice is a seditious intention and I do not find anything in the provisions of the Criminal Code to negative this view. . . .

"If it is suggested that there is an inconsistency in rejecting the definition of seditious intention contained in the Draft Code as incomplete insofar as it deals with the intention to create ill-will and hostility between different classes of His Majesty's subjects and accepting it as accurate in so far as it deals with the intention to bring the administration of justice into hatred and contempt, the answer is that, in my view, the former branch of the definition is not supported by authority, whereas the latter is. . . .

"It cannot be successfully argued that because a matter appears to be a criminal contempt of Court it may not also be a seditious libel. . . .

"I think that in the case at bar, and in the case of every charge of publishing a seditious libel, where the gravamen of the charge is the alleged intention to bring the administration of justice into hatred and contempt, the question to be left to the jury is whether the real intention of the person charged was to vilify the administration of justice, destroy public confidence therein and to bring it into contempt; or whether the publication, however vigorously worded, was honestly intended to purify the administration of justice by pointing out, with a view to their remedy, errors or defects which the accused honestly believed to exist. . . . It appears to me that the words of the pamphlet furnish evidence upon which a properly instructed jury could reasonably find the existence of an intention to bring the administration of justice into hatred or contempt or to create disaffection against it."²²²

This view of Cartwright J., if correct, would mean that vilification of the Courts, criticism with the intent of bringing the administration of justice into contempt, was seditious, regardless of whether or not it incited to violence or disorder against the administration of justice. Cartwright J. was joined on this point by Taschereau and Fauteux JJ. All the other members of the Court were against him, except Rinfret C. J. C. who failed to deal with it. The most concise answer to his holding was given by Estey J., who said: "With great respect, I am of the opinion that *in all* cases the intention to incite violence or public disorder or unlawful conduct against His Majesty or an institution of the state is essential."²²³

The *Boucher* case leaves at least one important point unanswered: exactly what degree of incitement to violence or disorder is necessary? Rand J. speaks of an incitement which is "intended, or is *so likely to do so as to be deemed to be intended*, to disorder community life."²²⁴ Cartwright J. comments that "it must... appear that the intended, or *natural and probable*, consequence of such promotion of ill-will and hostility is to produce disturbance of or resistance to the authority of lawfully constituted Government."²²⁵ These formulations are helpful and more concrete than those of the English Courts, but they are only obiter and do not have the authority of a firm rule. This is a point that could be cleared up by legislation.

Another point that might well be spelled out in legislation is head 5 of the Stephen definition of sedition, even with the qualification of incitement to violence put on it by the *Boucher* case. There are very few precedents for the application of the law of seditious libel to the protection of groups even in this limited way, and, while the court in *Boucher* negatively and impliedly approved the positive application of this branch of the rule in a proper case, it might be as well to make it legislatively certain.

The basis of the law of seditious libel, whether applied for the protection of social groups or of government, appears to be the protection of the State. Lord Cockburn, in a non-judicial utterance in 1853, wrote:

"The guilt, when analysed, resolves into disrespect towards the authority of the State... To give the attack the quality of seditiousness, it must be capable of being justly viewed as a contempt of public authority. Hence the usual objects of the offence are, the sovereign, the Houses of Parliament, the administrators of justice, public officers and departments wielding and representing the State's power or dignity. It is the public majesty that must be assailed, and that must be required to be protected. Sedition is the same thing, in principle, against the State, with the misconduct of the member of the private society who, because he dislikes something that is done, insults the present and defies the majority. The guilt of sedition is often described as consisting of its tendency to produce *public mischief* -- and

so it is. But it is not every sort of mischief that will exhaust the description of the offence. It must be that sort of mischief that consists in, and arises out of directly and materially obstructing public authority.”²²⁶

But is it still open for counsel to argue that the interest of the State in public order is not at stake when the incitement is directed, not against the State itself, but against a social group? It would be well to settle this question once and for all.

APPENDIX I

CHAPTER VII

RELATED OFFENCES IN CANADA

Canadian criminal law differs from English and American criminal law in that it tends to be concentrated in a single statute, the Canadian Criminal Code, though, as we shall see, much provincial quasi-criminal legislation is very hard to distinguish from federal criminal law.

The Criminal Code provisions on riot and unlawful assembly are found in sections 64 - 67:

“64. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

- (a) will disturb the peace tumultuously, or
- (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.

(3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.

65. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

66. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.”

The additional offence of causing a disturbance is defined by section 160:

“160. Every one who

- (a) not being in a dwelling house causes a disturbance in or near a public place,
 - (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
- ... is guilty of an offence punishable on summary conviction.”

Public place is defined in section 130 (b) as including "any place to which the public have access as of right or by invitation, express or implied."

The difference between the offences of riot and unlawful assembly is that for a riot the peace must actually be disturbed through physical violence, whereas for an unlawful assembly a mere threat to the public peace is sufficient. It is not necessary for unlawful assembly that the assembly should be for an unlawful purpose, but only that there should be reasonable grounds for believing the peace to be endangered. It is, however, necessary for unlawful assembly, as opposed to causing a disturbance, that there should be proof of a common purpose in at least three persons in the assembly, whereas for causing a disturbance misconduct by only one person is necessary.

The Canadian law on breach of the peace under the old Criminal Code was laid down by the Supreme Court of Canada in *Frey v. Fedoruk*.²²⁷ The plaintiff in that case was a peeping-tom who had been apprehended and imprisoned by the defendant Fedoruk pending the arrival of police. The plaintiff's conviction of the common-law offence of acting in a manner likely to cause a breach of the peace was quashed and he then brought a civil action for damages for false imprisonment against Fedoruk and two policemen. The majority in the Court of Appeal held that the plaintiff was guilty of a criminal offence at common law and that defendants were therefore justified in arresting him without a warrant. O'Halloran J.A. for the majority defined breach of the peace broadly: "Breach of the peace has two significations: the narrow and common one applicable to riots, tumults and actual physical violence; and the other and wider one which goes so deeply into the roots of the common law, viz., any disturbance of the tranquillity of people, which if not punished, will naturally lead to physical reprisals, with wider and more aggravated disturbances of the 'King's peace.'"²²⁸ And he added with respect to the instant case: "Quite apart from the 'peeping-tom' aspect, the presence of a prowler in such circumstances, the dread of the hostile unknown at night would naturally frighten the inmates of the house, and incite them to immediate violent defensive or offensive action against him."²²⁹

Cartwright J. for the Supreme Court²³⁰ held that the plaintiff's conduct was not criminal at common law and specifically disapproved of O'Halloran's definition of breach of the peace:

"Once the expression 'a breach of the King's peace' is interpreted, as O'Halloran J. A. undoubtedly does interpret it, not to require as an essential ingredient anything in the nature of 'riots, tumults, or actual physical violence' on the part of the offender, it would appear to become wide enough to include any conduct which in the view of the fact-finding tribunal is so injurious to the public as to merit punishment.

"I am of opinion that [this] proposition . . . ought not to be accepted. I think that if adopted, it would introduce great uncertainty into the administration of the criminal law, leaving it to the judicial officer trying any

particular charge to decide that the acts proved constituted a crime or otherwise, not by reference to any defined standard to be found in the Code or in reported decisions, but according to his individual views as to whether such acts were a disturbance of the tranquillity of people tending to provoke physical reprisal.”²³¹

On the question of whether a man can breach the peace because of the hostile reaction of his audience to his language or message, Cartwright J. declares that there is no criminal liability on the part of the speaker and that at most the speaker may be bound over to keep the peace:

“I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the criminal law, becomes criminal because a natural and probable result thereof will be to provoke others to violent retributive action. If such a principle were admitted, it seems to me, that many courses of conduct which it is well settled are not criminal could be made the subject of indictment by setting out the facts and concluding with the words that such conduct was likely to cause a breach of the peace. Two examples may be mentioned. The speaking of insulting words unaccompanied by any threat of violence undoubtedly may and sometimes does produce violent retributive action, but is not criminal. The commission of adultery has, in many recorded cases, when unexpectedly discovered, resulted in homicide; but except where expressly made so by statute, adultery is not a crime....

“In my view it has been rightly held that acts likely to cause a breach of the peace are not in themselves criminal merely because they have this tendency, and that the only way in which such conduct can be dealt with and restrained, apart from civil proceedings for damages, is by taking the appropriate steps to have the persons committing such acts bound over to keep the peace and be of good behaviour.”²³²

The 1954 revision of the Criminal Code created the new offence of trespassing by night to take care of peeping-toms, and also made a highly significant change in the wording of s. 160, the offence of causing a disturbance. Causing a disturbance was originally included in the offence of vagrancy,²³³ but in 1947 was made into a separate offence²³⁴ after the realization had grown that it belonged rather with nuisance than with vagrancy. In neither previous state did it ever proscribe the use of “insulting or obscene language,” but this phrase found its way into the Code in the revision. In my opinion these words change the traditional law as laid down in *Frey v. Fedoruk* and create an offence, much like that created by the broadest words of s. 5 of the English Public Order Act, where someone uses insulting language in or near a public place and a disturbance results, even without any intention on the part of the speaker to provoke a breach of the peace. Thus the occasioning of a breach of the peace by insulting language appears now to be a criminal offence punishable on summary conviction in Canada as well as

being subject to supplementary sanction by way of recognizance, if this latter sanction remains applicable.²³⁵

Under the Canadian Criminal Code there is no room for group defamation even when it involves breach of the peace, unless it comes under seditious libel or causing a disturbance. Tremear comments:

"It was... held in *Ex parte Genest v. R.* (1933), 71 Qué. S. C. 385 that an indictment for publishing a defamatory libel against the Roman Catholic clergy of a particular diocese disclosed no offence. S. 248 specifically refers to a 'person,' and the definition of 'person' in s. 2(15) is not sufficiently wide to include an unincorporated group, which has no legal entity. At common law, apart from the Code, an indictment might be laid for libelling a class generally. (See *R. v. Williams* (1822) 5 B. & Ald. 595, 106 E. R. 1308), but in this case it would be necessary to allege, and prove, that the tendency was to excite hatred against all members of the class, and to provoke a breach of the peace."²³⁶

The law respecting civil actions for group defamation is the same in Canada as in England.²³⁷

The only Canadian legislation is section 20 of the Manitoba Defamation Act, which provides that any member of an affected racial or religious group may sue for an injunction against the author, publisher or circulator of a libel against his race or religious creed.²³⁸ There is also a requirement in Manitoba law that the name of the printer, publisher or advertiser be placed on every poster, leaflet or brochure distributed in the Province.²³⁹ The same year as the enactment of the statute a permanent injunction was obtained in the unreported case of *Tobias v. Neufeld and Whittaker* for libelling the Jewish race and creed. In a recent comment on this case Melvin Fenson observes that this statutory procedure has the advantage of avoiding a jury trial, which could not be avoided in an action under the Criminal Code; he feels that it would be difficult to get unanimous verdicts from 12-man juries, and that this points to the fact that a criminal provision might therefore do more harm than good.²⁴⁰

But is an injunctive remedy really a civil remedy or is it rather a disguised criminal remedy? This is a question which does not assume any significance in the United States, where the criminal law power is shared by the State and Federal Governments, but s. 91(27) of the B.N.A. Act assigns the criminal law to exclusive Federal jurisdiction. The question is one of great difficulty, if only because of the impossibility of reconciling all the judicial statements on the subject.

In one of its earliest attempts to distinguish the criminal law power from the property and civil rights power the Judicial Committee of the Privy Council said that "laws... designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment,

belong to the subject of public wrongs rather than to that of civil rights.”²⁴¹ Obviously since by 92(15) of the B.N.A. Act the provinces were given power to enforce their laws by the imposition of punishment by fine, penalty, or imprisonment, no test in terms of the penal consequences of particular legislation could prove decisive, though the Privy Council’s additional attempt to define the purpose of criminal legislation was of value. Subsequently in 1922 Lord Haldane spoke of “subject matter . . . which by its very nature belongs to the domain of criminal jurisprudence”²⁴² and proceeded to hold ultra vires the Federal Parliament legislation regulating the formation and operation of trade combinations. A decade later the Privy Council, again faced with federal anti-combines legislation rejected the “domain of criminal jurisprudence” notion and upheld the legislation.²⁴³ However, the new test laid down by Lord Atkin was no more satisfactory: “The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?”²⁴⁴ Lord Atkin had another try a few years later, at which time he said: “The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92.”²⁴⁵ The Board here laid down, in addition to the penal consequences test, a good faith requirement which would appear generally difficult of application, but which it later applied once, to strike down federal legislation forbidding the manufacture, importation, sale or possession of oleomargarine.²⁴⁶

The Supreme Court of Canada in 1959 clearly rejected “the domain of criminal jurisprudence theory”.²⁴⁷ Kerwin C.J.C. said “In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at”,²⁴⁸ and Rand J. declared:

“Into this branch of his argument Mr. Brewin injected the idea of a ‘domain’ of criminal law which, as I understood it, was in some manner a defined area existing apart from the actual body of offences at a particular moment; and that it was characterized by certain distinguishing qualities. Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, enacted to serve what is considered a public interest or to interdict what is deemed a public harm or evil. In a unitary state the expression would seem appropriate to most if not all such prohibitions; but in a Federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment. . . .

“Beyond or apart from such broad characteristics, of no practical significance here, which describe an area by specifying certain enactments, no such ‘domain’ is recognized by our law. . . . [He goes on to cite Lord Atkin’s test in the *P. A. T. A.* Case].”²⁴⁹

The upshot of these cases is that most federal legislation based on the exercise of the criminal law power has been upheld, however imprecise and unsatisfactory the test used; the exceptions have been only with respect to new economic offences developed in the twentieth century. But when we turn to provincial legislation which has been challenged as being in conflict with the criminal law power²⁵⁰ we find that much of it has also been sustained, especially in the field of automobile regulation. The general principle in the event of conflict between federal and provincial legislation was proclaimed by the Privy Council in a 1930 case: "There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."²⁵¹ As Professor Bora Laskin (as he then was) has recently pointed out, this statement is the beginning rather than the end of the argument.²⁵² Professor Laskin argues that there are really four occupied field situations:

"The first carries its own logic: where there is incompatible operation of the provincial and federal legislation, as where the observance of one involves breach of the other. The second is where the federal penal statute is more restrictive and embracing than the provincial enactment which purports to establish offences at a level more liberal to an accused. Here, too, logic should dictate federal preclusion or supersession of the provincial enactment because the federal statute has gone beyond it. Third, there is the case of similar or identical legislation (so determined as a matter of construction), a similarity or identity regardless of the difference of object or purpose in the constitutional sense. If the two enactments apply the same yardstick and cover the same acts (whether or not the punishments vary), policy as much as, or perhaps rather than, logic must give the answer. Literally, 'the two legislations meet' in their substantive operation, and if they are directed to the same social problem, there should be compelling reasons for exposure of persons to double liability and penalty. Fourth, there is the case where the federal penal statute establishes a standard of culpability which does not exclude the possibility of stricter control of the conduct aimed at, and provincial penal legislation addresses itself to that stricter (and hence more embracive) control. Although the two legislations do not coincide, it should be a relevant inquiry whether the federal enactment was pitched to its particular standard as an assertion of exclusive control in the field or whether it was not designed to be preclusive. Of course, if the courts conclude, as appears to be the case, that such an inquiry is immaterial, the constitutional conclusion is simple: paramountcy is ruled out once the provincial enactment is found not to be an invasion of the federal criminal law power."²⁵³

The most difficult and most controverted situations are the third and fourth, where the two legislations meet or the provincial statute imposes a stricter control of conduct. In the field of highway regulation the Supreme Court of Canada has been tolerant of provincial legislation of the same or greater compass than the federal. Thus in a 1941 case provincial legislation which provided for automatic

suspension of a driver's licence on conviction under the Criminal Code of driving under the influence of intoxicating liquor or drugs was upheld despite the provision in the Criminal Code (now in s. 225) providing for a discretionary power in a court to make an order prohibiting the convicted person from driving on a highway.²⁵⁴ Similarly in 1960 the Court upheld a provincial "due care and attention" driving provision despite the criminal negligence provisions in the Code.²⁵⁵ Judson J. said for the majority of the Court:

"There is no conflict between these provisions in the sense that they are repugnant. The provisions deal with different subject-matters and are for different purposes. Section 55(1) [provincial legislation] is highway legislation dealing with regulation and control of traffic on highways, and s. 221 [of the Criminal Code] is criminal law dealing with negligence of the character defined in the section. Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative..."²⁵⁶

Again, despite the fact that by s. 224(4) of the Code no one is required to take a breath test, a provincial enactment providing for the suspension and revocation of the driving licence of a person suspected of driving while intoxicated who refuses to submit to a breath test was upheld.²⁵⁷

However, in all the cases where provincial legislation, though not incompatible in operation with federal law, has trespassed on fundamental liberties, the Supreme Court of Canada has found against provincial legislation. Thus in the famous *Saumur* case²⁵⁸ the Court granted a declaration that a municipal by-law requiring a licence for the distribution of pamphlets could not prevent the distributing of religious tracts in the streets without a licence, and four members of the Court held that such legislation was ultra vires the Province. In two other cases in the 'fifties the Court struck down a provincial statute permitting municipalities to make by-laws requiring all stores to close on Catholic holy days (*Henry Birks & Sons Ltd. v. Montreal*)²⁵⁹ and also the Quebec "Padlock Law" (*Switzman v. Elbling*).²⁶⁰

In the *Birks* case the Court looked at the history of holy day legislation as well as at its legal effect in order to determine its nature and character. The Court unanimously agreed that the legislation, like Sunday observance legislation, fell within the criminal law power and so was ultra vires the Province. Three judges²⁶¹ also held that even if the legislation was not within the criminal law power, it would still be incompetent to a province as being legislation with respect to freedom of religion. In *Switzman v. Elbling* the Court had to consider the validity of the Communistic Propaganda Act of Quebec, which conferred on the Attorney-General the power to close a house against its use for any purpose whatever for the period of one year. The majority found the statute ultra vires *in toto*

and refused to consider the remedy in detachment from the purpose of the statute as a whole, which was, in the words of Rand J. "by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities."²⁶² The Court held that the doctrine of unoccupied field is inapplicable where the matter in question is exclusively within federal competence.

The Court of the 'sixties has been taking a narrower approach to civil liberties issues, as indicated by its ducking the substantive issue in the new *Saumur* case on the ground that the plaintiff had no standing to attack the provincial legislation, since he had not been interfered with under the statute.²⁶³ In the recent "election signs" case, though the Court decided by a 5-4 vote that a municipal by-law regulating the erection of signs did not prevent the displaying of election posters, it was called on to decide only the true construction of the by-law, not its validity nor the validity of the enabling legislation by the Province; the majority opinion of Cartwright J. limited itself to the statement that legislation prohibiting federal election signs would be ultra vires the provincial legislature: "A political activity *in the federal field* which has heretofore been lawful can, in my opinion, be prohibited only by Parliament."²⁶⁴

The fundamental problem in this whole area is the lack of depth in conception and consistency in formulation by the courts. As Professor Laskin expresses it, "From the time that the paramountcy principle was expounded . . . there has been no general examination of it in any Privy Council or Supreme Court of Canada judgment. The approach has been particularist, with no discernible concern for ramifications."²⁶⁵ This makes it extremely difficult to predict the constitutional status of provincial group libel legislation of an injunctive kind, especially in the light of present pressures towards cooperative federalism, which in its judicial manifestation demands the sustaining of as much penal legislation of both jurisdictions as possible.

Nevertheless it seems that there is a slight tipping of the scales against the validity of such provincial legislation. In *Johnson v. Attorney-General of Alberta*²⁶⁶ the Supreme Court of Canada held by a 4-3 margin that a provincial enactment which provided for the confiscation of slot machines without personal penalty was ultra vires. The minority held that the legislation was not aimed at gambling and emphasized that no offence was created. But Cartwright J. for the majority held that the confiscation section was in substance a criminal sanction, though phrased in property terms:

"I have not overlooked the fact that the Alberta statute provides no penalty by way of fine or imprisonment . . . but I am driven to the conclusion that under the form of denying the existence of ownership in the defined machines and providing procedures for their seizure and confiscation the substance of the enactment is to forbid their use under penalty of forfeiture."²⁶⁷

The remedy of injunction as in the Manitoba Defamation Act would seem to be in an analogous position.²⁶⁸ Moreover, the confiscation provision in the statute under consideration in *Johnson* would seem to be more closely related to the provincial power over property and civil rights than the injunctive remedy for group defamation would be. And the minority had some difficulty with this problem even in the *Johnson* case; as Laskin puts it, "the minority's choice of mechanical constitutional formulae to buttress its view that the provinces had a stake in bolstering federal gambling legislation was dictated by the fact that it could not fall back on any regulatory base, such as highway control on which *O'Grady v. Sparling* was rested."²⁶⁹ This problem would be a fortiori in the case of injunctive relief for group defamation.

In a case even more in point, *Attorney-General for Ontario v. Koynok et al.*,²⁷⁰ provisions in the Judicature Act empowering the Attorney-General to bring an action for an injunction to restrain any printer, publisher or distributor who continuously or repeatedly publishes articles which are obscene, immoral or otherwise injurious to public morals were held ultra vires as being legislation in relation to criminal law. Kelly J. said:

"It appears to me that the section seeks to prohibit an act already prohibited and made criminal by s. 207 of the *Criminal Code*, viz., the publishing of obscene or immoral written matter, and imposes an additional penalty. If the acts sought to be prohibited by the two enactments are not identical, then s. 16 amends or supplements the provisions of s. 207; creates a new criminal procedure, and removes a ground of defence. In express words, s. 16 aims at the protection of public morals and, it seems to me, deals only with wrongdoers and wrongful acts, not at all with property or private rights."²⁷¹

Specifically on the question of the remedy Kelly J. said:

"It seems to me that the section no more deals with property than if the injunction authorized by it were one to restrain the making of an obscene speech. If the injunction is granted and obeyed, no property comes into existence. If an injunction is disobeyed, an offence is committed, namely, the breach of the injunction, which may be punished by fine, imprisonment, or both. The lands and premises dealt with by the Quebec legislation [upheld in *Bédard v. Dawson* by the Supreme Court of Canada], injunction or no injunction, remained at all times in existence, the proper subject of provincial legislation."²⁷²

On balance it would seem that provincial legislation on group defamation would be *ultra vires*. Cases such as *Switzman v. Johnson*, and *Koynok* indicate that the character of the remedy does not affect the character of the legislation, and when the character of the legislation is put in question, it seems clearly to fall within the federal criminal law power. *Switzman v. Elbling* would preclude even supplementary provincial remedies in a field so exclusively within federal competence.

APPENDIX I

CHAPTER VIII

CONCLUSION

In the long run all questions come down to the great divide of fundamental policy choices. How widely the State will extend the ambit of legal protection to groups depends on its social philosophy and on the degree of its commitment to conflicting values.

One view the State may hold is that the values of free speech must be weighed in the scale with all other democratic values. Chief Justice Vinson gives expression to this philosophy:

“Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. Freedom of speech thus does not comprehend the right to speak on any subject at any time. The important question that came to the Court immediately after the First World War was not whether, but how far, the First Amendment permits the suppression of speech which advocates conduct inimical to the public welfare.”²⁷³

Another possible position is that a certain priority, though not an absolute guarantee, must be given to free speech. Witness Murphy J.:

“If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being over-protective of these precious rights....”²⁷⁴

A third position is one which will brook *no* restraints on the freedom of speech. Black J. is the champion of this view:

“Seditious libel, as it has been put into practice throughout the centuries, is nothing in the world except the prosecution of people who are on the wrong side politically: they have said something and their group has lost and they are prosecuted. Those of you who read the newspapers see that this is happening all over the world now, every week somewhere. Somebody gets out, somebody else gets in, they call a military court or a special commission, and they try him. When he gets through sometimes he is not living.”²⁷⁵

These are the alternatives with respect to freedom of expression generally, and they present themselves most starkly in the field of libel, for as a commentator has recently said, "A study of the law of criminal libel is significant because no other segment of the law reflects, with such unique precision, the evolution of the right to freedom of speech in a democratic society."²⁷⁶

APPENDIX I

FOOTNOTES

1. Sir William Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1924), 40 L.Q.R. 302, at p. 302 (This article is incorporated into Holdsworth's *History of English Law*, vol. 8, beginning at p. 333).
2. C.A. Wright, *Cases on the Law of Torts*, 3rd ed. (1963), p. 958.
3. The new Ontario Libel and Slander Act, R.S.O. 1960, c. 211 (enacted by 1958 (Ont). c. 51) inspired by the English Defamation Act, 1952 (15 and 16 Geo. VI and I Eliz. II, c. 66), still retains the distinction between libel and slander, but provides that defamation through broadcasting is to be classed as libel rather than slander, and also broadens the category of slanders where proof of damage is not necessary. See Gatley *On Libel and Slander* (5th ed. 1960), p. 59, n. 5.
4. *R. v. Penny* (1697), 1 Ld. Raym. 153, 91 E.R. 999 established that slander is not a crime.
5. The offence of blasphemous libel is retained by s. 248 of the Canadian Criminal Code, but seems to be no longer of much practical significance, though in 1935 a Protestant minister was held guilty of blasphemous libel for attacking the Catholic Church (*R. v. Rahard* [1935] 3 D.L.R. 230, Montreal Court of Sessions of the Peace). A contemporary English conviction for blasphemy is *R. v. Gott* (1922), 16 Cr. App. R. 86. The effect of subsection 3 of section 246 [“No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject”] appears to be that any religious controversy is protected from liability if it is in good faith and in decent language. On the offence generally see Schmeiser, *Civil Liberties in Canada* (1964) pp. 111–113.
Obscenity was once but is now no longer conceptualized as a libel -- see ss. 150 ff. of the Canadian Criminal Code. Forms of libel recognized at common Law which reflected on the administration of justice are now usually dealt with as contempts of court.
6. W. Blake Odgers, *A Digest of the Law of Libel and Slander*, 6th ed. (1929), pp. 368 - 369.
7. The present Canadian law on defamatory libel is contained in ss. 247 - 267 of the Criminal Code, 1953–54 (Can.), c. 51. The more basic of these sections are as follows:
 248. (1) *Definition.* A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.
 - (2) *Mode of expression.* A defamatory libel may be expressed directly or by insinuation or irony (a) in words legibly marked upon any substance, or (b) by any object signifying a defamatory libel otherwise than by words.
249. “*Publishing.*” A person publishes a libel when he
 - (a) exhibits it in public,
 - (b) causes it to be read or seen, or
 - (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

250. *Punishment of libel known to be false.* Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and is liable to imprisonment for five years.

251. *Punishment for defamatory libel.* Every one who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years.

Some cases such as *R. v. Holbrook* (1878), 4 Q.B.D. 42 have appeared to support the view that only libels which tend to promote a breach of the peace are criminal, and have led to attempts at definition as in Note: "Libels Which Tend to Promote a Breach of the Peace" (1932) Fortnightly L.J. 273. But *R. v. Wicks* (1938) 1 All E.R. 384, 25 Cr. App. R. 108 held that there was no need for the prosecution to prove that the particular libel in question was such as to be likely to cause a breach of the peace, adding that the court could find no support for that theory in any judgment. Tremear's Annotated *Criminal Code Canada*, 6th ed. (1964), at pp. 405-406 and Schmeiser, *op. cit.*, at p. 204, are in agreement.

However, prosecutions for defamatory libel are rare in most jurisdictions. Riesman, "Democracy and Defamation: Control of Group Libel" (1942), 42 Col. L. Rev. 727, at p. 748, writes: "Attorney General Jackson, testifying before the Senate Committee passing on his appointment to the Supreme Court, referred to his Department's 'established policy of declining to prosecute criminal libel cases where there is open to the individual a civil remedy, and where there has been no breach of the peace or other public injury done by the libel.' "

8. Sir James Fitzjames Stephen, *A Digest of the Criminal Law*, art. 114. There is an interesting analysis of Stephen's contribution to the law in Edmond Cahn, "Fact Skepticism: An Unexpected Chapter" (1963) 38 N.Y.U.L. Review 1025.
9. Stephen, *A History of the Criminal Law of England* (1883), vol. 2, pp. 299-300. Holdsworth comments on this passage, *art. cit.*, p. 307: "The first of these two views was the accepted view in the seventeenth century. The second was gathering strength during the latter part of the eighteenth century, and is now the accepted view."
10. Zechariah Chafee Jr., *Free Speech in the United States* (1941), p. 22. Professor Chafee is commenting in this passage on Stephen's statement of the two views.
11. Mr. Justice Black of the United States Supreme Court goes so far as to argue that even tort actions for libel are unwarranted infringements on the freedom of speech: Black and Cahn, "Justice Black and First Amendment 'Absolutes': A Public Interview" (1962), 37 N.Y.U.L. Review 549, at p. 558. But most partisans of the absolute right of free speech would not go this far.
12. Irving Brant, "Seditious Libel: Myth and Reality" (1964), 39 N.Y.U.L. Rev. 1. This article is cited with approval by Douglas J. (Black J. concurring) in *Garrison v. State of Louisiana* (1964), 85 S. Ct. 209, at p. 219.
13. *Ibid.*, p. 5. Coke's Reports were not a verbatim account of the arguments and reasons for judgment, like today's reports, but rather an editorial comment, sometimes of considerable length.
Shortly after this case was decided, Coke was appointed in June 1606 Chief Justice of the Court of Common Pleas, which made him one of the Star Chamber judges.
14. 5 Co. Rep. 125a, at p. 125a; 77 E.R. 250, at p. 251.
15. Coke, *The Third Part of the Institutes of the Laws of England*, (6th ed. 1680), p. 174.
16. Brant, *art. cit.*, p. 5.
17. Van Vechten Veeder, "The History and Theory of the Law of Defamation" (1903), 3 Col. L. Rev. 546, at pp. 562-563. Veeder, like Brant, sees the case *De Libellis Famosis* as "the formal starting point of the English law of libel" (p. 566) and he

points to the later Roman law of the *libellus famosus*' as the source of the Star Chamber 'legislation' -- though with some important modifications (p. 567).

18. Brant, *art. cit.*, p. 11.
19. Trial of Benjamin Harris, in 7 Howell, *State Trials*, p. 925.
20. Holdsworth, *art. cit.*, p. 314, comments:
 "This state of the law harmonized admirably with the current views as to the relations of rulers to their subjects. But, when those views changed, it gradually came to be wholly out of touch with current public opinion. The law as to what amounted to a seditious libel, having been formed in the period when the ruler was regarded as the superior of his subjects, assented badly with the new view that he was their agent or servant. Therefore the desire for greater freedom of speech than the existing law allowed took the technical form of the contention, that the seditious defamation or otherwise malicious intention with which libel was published, was the essence of the offence, and therefore a matter of fact for the jury."
21. Blackstone, *Commentaries on the Laws of England*, vol. 4, pp. 1552-1553.
22. Stephen, *A History of the Criminal Law of England*, II, p. 353. Stephen adds at p. 354: "It was natural and obvious to ask why those averments were introduced if they were wholly immaterial and were on a level with the averments in indictments for murder that the prisoner acted at the special instigation of the devil? It would hardly have been considered decorous in that age to give the true answers, which would have been that the indictments preserved the style and temper of an age when round, foul-mouthed abuse of people who gave offence to the government was thought natural and proper; that the law being vague, ill-ascertained, and perhaps if clearly ascertained likely to be extremely unpopular, it was best to err on the side of averring too much, so as to make the defendant look, at all events on the face of the proceedings, not only like a criminal, but like an extremely wicked man; that the draftsman was paid by the folio; and, above all, that in formal documents slavish adherence to precedents is the safest course."
23. (1883) 21 State Trials 961. Shipley was charged with publishing a pamphlet which was alleged to counsel popular revolt. Erskine lost at trial before Buller, J. (21 State Trials 953), and on his motion for a new trial before Lord Mansfield. However, he was eventually successful when he moved for a stay of judgment on the ground that the matter set forth in the indictment was not libellous.
24. Stephen, *History*, II, pp. 358-359.
 The lack of precision in the kind of intention required for conviction led to a great deal of trouble in the cases, especially because of the confusing by counsel and courts of intention and motive. Stephen writes, *History*, II, p. 360:
 "In the many trials for seditious libel which followed the passing of the Libel Act, I have not found an instance in which the distinction [between intention and motive] was pointed out. The words are constantly used as if good motives and good intentions were convertible terms. It is, however, obvious as soon as the matter is mentioned that the two are distinct. A man may be led by what are commonly regarded as pure motives to form seditious or even treasonable intentions, and to express them in writing, just as he might be led to commit theft or murder by motives of benevolence. If a man who steals in order to give away the stolen money in charity, or a man who kills a child in order to save it from the temptations of life, is not excused on account of the nature of his motives, why should a man who writes a libel calculated and intended to produce a riot be acquitted because his motive was generous indignation against a real grievance?"

In *Her Majesty's Advocate v. Grant and Others* [1848] Shaw's Justiciary R. 62, which was a trial of Chartists for seditious libel, the jury found Grand not guilty, and two others guilty of using language calculated (but, the jury specifically declared, not intended) to excite popular disaffection and resistance to lawful authority, and defence counsel objected that this was not a verdict of guilty. Lord Mackenzie in the majority commented on appeal at pp. 96–97:

"I think the crime of sedition is sufficiently constituted by using... language calculated (*which, of course, means plainly calculated*) to excite popular disaffection, and resistance to lawful authority, provided that this be done wickedly or seditiously, i.e. without lawful justification or excuse. I do not think that to constitute sedition, it is essential that there shall be in the delinquent a desire or intention to excite this disaffection and insurrection, or resistance, provided he intends to use the words, *plainly calculated to excite these*, and uses them; and that without justification or excuse." [Emphasis added].

Even today the concept of intention involves problems-- see, e.g., Dr. Glanville Williams' discussion of intention in *Criminal Law, The General Part*, 2nd ed. (1961) pp. 34-44 -- and it has therefore been entirely avoided in the American Law Institute's *Model Penal Code*: see s. 2.02, which defines criminal culpability in terms of the concepts 'purposely', 'knowingly', 'recklessly', and 'negligently'.

On 'calculated' Dr. Williams has this to say, at p. 66:

"The primary meaning of 'calculate' is to reckon or design: but in the past participle the notion of design gradually disappeared, leaving merely the sense 'suited; of a nature proper or likely to.' It is submitted that if the word is found in a criminal statute it should, in accordance with the general presumption that *mens rea* is required, be interpreted in the primary sense of the verb as involving design or at least foresight. However, this submission is made without much confidence for statutes creating 'public welfare offences': here the courts generally adopt the objective meaning."

Dealing with the intention required by seditious libel he writes, p. 69:

"The crime of seditious libel is defined by Stephen to require intention; but he follows this by saying that a man must be deemed to intend the natural consequences of his acts. There have, in fact, been cases where mere probability of the consequence has been taken to justify conviction, without the jury being instructed to determine whether the accused probably foresaw the probable consequence. As will be seen ... present opinion holds that the presumption that a man intends the probable consequence is rebuttable, and that in truth it is merely a presumption of fact, an evidentiary presumption, not a persuasive one. It would accord both with this opinion and with the general requirement of *mens rea* at common law to say that in sedition there must be foresight of the consequence regarded by the law as harmful, for one can hardly suppose that sedition may be committed by inadvertent negligence. Support for this view is derived from the charge of Fitzgerald J in *Sullivan* (1868), where he said that 'the intentions of men are inferences of reason from their actions *where the actions can flow but from one motive, and be the reasonable result of but one intention*' (italics supplied). The requirement of the criminal state of mind was laid down even more clearly by Cave J. in *Burns* (1886)."

25. See below, n. 30. The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict., c. 60), gave the press even greater protection as to defamatory libel, for it provided that no prosecution against a newspaper libeller might be begun without the leave of the Director of Public Prosecutions.

Stephen, *History*, II, comments acidly "I think the press has far more power over the reputation of people in general than it ought to have" (p. 384) and "Far from relaxing the law as to newspaper libel, I should wish to see its stringency increased". (pp. 384-385).

26. (1792) 22 State Trials 318.
27. This definition is incorporated in that contained in Stephen's classic definition of seditious intention.
28. (1820), 4 B. & Ald. 95; 106 E. R. 873. The question of mitigation of punishment was heard separately: (1821) 4 B. & Ald. 314; 106 E. R. 952.
29. *Ibid.*, at p. 131 (B. & Ald.) p. 887 (E.R.).
30. At common law truth was no defence to a criminal action for defamation but was an unqualified defence to a civil action. Fleming, *The Law of Torts* (2nd ed. 1961) pp. 516-517, writes:

"At common law, truth is a complete answer to a civil action for defamation, and is the only defence known under the name of justification. Actionable defamation consists in a false statement affecting the reputation of another

"The position taken by the common law has not met with universal approval. A distinguished Select Committee of the House of Lords, set up in 1843 to examine the existing law of defamation, recommended that in both civil and criminal proceedings truth should be a defence if, but only if, the publication was for the public benefit. This proposal was embodied in Lord Campbell's Libel Act of 1843, in respect of criminal prosecutions, but the law relating to civil actions remained unaltered in England. In New South Wales, however, the Committee's recommendations were fully accepted in 1847, probably in order to give some protection to emancipated convicts whose integration into the free community was an imperative object of contemporary policy."

Lord Campbell's Libel Act, 1843 (6 & 7 Vict., c. 96) thus established truth as a valid defence to a prosecution if the publication were for the public benefit, and as relevant in mitigation of sentence even where it was not for the public benefit. However, it has been held that the Act does not apply to seditious libels, largely on the ground that their publication could never be of public benefit: *Reg. v. Duffy* (1846), 2 Cox C.C. 45; *Reg. v. M'Hugh* [1901] 2 I.R. 569. In the latter Case Madden J. said at p. 585:

"It is evident, from the title, the preamble and every section of the Act, that it applies to the offence against the person, known as 'defamatory libel', and not to the offence against public order known as sedition."

Stephen points out (*History*, II, p. 383, fn. 1) that the Act leaves doubtful the situation of a seditious libel which is also defamatory -- he gives the example of an article imputing to George IV, while still Prince of Wales, that he had secretly married a Roman Catholic, and that his subsequent marriage was bigamous.

Williams *op. cit.*, pp. 67-68, is prepared to argue that Lord Campbell's Act did not make a total change in the law:

"It is generally said that at common law truth was no defence to a prosecution for libel, and therefore belief in truth was no defence either. In fact the authorities before 1843 did not settle this beyond doubt. Bayley J., at least, was prepared to contemplate the defence of truth or belief in truth in some circumstances -- perhaps when publication of the defamatory statement was in the public interest. (*Burdett* (1820), 4. B. & Ald. at 147, 106 E.R. at 893; *Harvey* (1823), 2 B. & C. at 263-4, 107 E.R. at 382). The matter is now partially settled by section 6 of the Libel Act, 1843, which provides that the truth of the matters charged may be enquired into, but shall not amount to a defence unless that it was for the public benefit that such matters should be published. This Act leaves open the question whether, independently of the truth of the statement, the defendant can excuse himself by saying that he honestly (or reasonably) believed in the existence of facts which would both establish the truth of the statement and establish that its publication was in the public interest. The analogy of *Tolson* would suggest an affirmative answer."

The unavailability of the defence of truth for seditious libel has not been a serious problem in later years. Stephen comments, *History*, II, p. 381:

"This principle [of the irrelevancy of the truth of the matter] came to be qualified by an exception so nearly co-extensive with it that it has for common purposes, and in quiet times, practically superseded the rule. The exception is that criticism of existing institutions, intended in good faith for their improvement and for the removal of defects in them, is lawful, even if it is mistaken. With respect accordingly to such criticisms, it may still be said that the truth of the matter stated in a writing prosecuted as a seditious libel is immaterial."

Cf. the charge to a modern jury by Coleridge, J. in *R. v. Aldred* (1909), 22 Cox C.C. 1, at p. 3:

"The test is not either the truth of the language or the innocence of the motive with which he published, but the test is this -- was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State?"

31. Stephen, *History*, II, p. 374.
32. (1839), 9 C. & P. 456, 173 E.R. 910, Rand, J. in *Boucher v. The King (No. 1)*, [1950] 1 D.L.R. 657, at p. 680-681, perhaps influenced by Stephen, also sees *Collins* as the turning point in the law.
33. *Collins*, at pp. 460-461 (C. & P.), p. 912 (E.R.). The jury found the defendant guilty.
34. *History*, II, p. 375. This comment of Stephen is quoted by Rand, J. in *Boucher No. 1*, at p. 681.
35. *Ibid.*, II, p. 373.
36. *Ibid.*, II, p. 376.

37. For example, Taschereau, J. in *Boucher No. 1* at p. 677 suggests that it is only "some recent judgments in England" which define sedition as incitement to violence and that the main stream of nineteenth century English case law is different; undoubtedly his own misstatement of *Reg. v. Burns* (1886), 16 Cox C.C. 355 contributed to this interpretation of legal history.

That there has been no definitive statement of the law of seditious libel in England is, however, clear from *Wallace-Johnson v. The King* [1940] A.C. 231, on appeal to the Judicial Committee of the Privy Council from the Gold Coast Colony. The appellant was charged with unlawfully publishing in his newspaper a seditious writing against the government contrary to the Colony's Criminal Code. Counsel for the appellant argued that by English common law the words had to incite to violence before they could be seditious. Viscount Caldecote, L.C. commented at p. 239: "if this was a case arising in this country, they [the Lords] would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant." But the Board held that the governing law was the Criminal Code of the Colony rather than the common law, and that under the Code incitement to violence was not a necessary ingredient of the crime of sedition.

The facts that counsel for the Crown took issue with the interpretation by the appellant's counsel of the English common law (though the Board dispensed him from arguing on the point) and that the Board itself did not feel able to state the English law on the point *en passant* are further indications of a residual uncertainty.

38. *O'Connell v. Reg.* (1844), Cl. & F. 155; 8 E.R. 1061.
39. The Lords took this stand despite the unanimous opinion of the common law judges whom they summoned. William V. Shannon, *The American Irish* (1963), p. 14, writes of the jury-packing incident: "When O'Connell was arrested in 1843 for 'incitement

to sedition', the government packed the Dublin jury by using an antiquated register that listed only twenty-three Catholic citizens instead of three hundred, and managed to draw from it twelve jurors, none of whom was Catholic."

40. This simplified version of the immensely complicated indictment is taken from Stephen, *History*, II, p. 379.
41. Stephen, *History*, II, p. 380.
42. Cf. Lord Tucker in *Shaw v. D.P.P.* [1962] A.C. 220, at p. 285:
"Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury?".
43. (1868), 11 Cox C.C. 44. In *R. v. Fuselli* (1848), 6 St. Tr. (N.S.) 723 Wilde, C.J. said that advocacy of change by regular and constitutional means was not sedition but that only advocacy of change by violence or tumult was.
44. *Ibid.*, at p. 45 [emphasis added] -- from the address to the grand jury, which proceeded to bring in true bills in both cases.
45. *Ibid.*, at p. 53 [emphasis added] -- from the address to the petit jury, which, thus instructed, found the defendant guilty.
46. (1886), 16 Cox. C.C. 355.
47. Cave, J. commented on this at pp. 364-365;
"I am unable to agree entirely with the Attorney-General when he says that the real charge is that, though these men did not incite or contemplate disorder, yet, as it was the natural consequence of the words they used, they are responsible for it ... It is very proper to ask a jury to infer, if there is nothing to show the contrary, that he did intend the natural consequences of his acts, if it is shown from other circumstances, that he did not actually intend them, I do not see how you can ask a jury to act upon what has then become a legal fiction ... [But] there does come a point when one must say, This was so violent and reckless that it is impossible to conceive that the man who uttered this did not intend the consequence which must ensue from it."
48. *Ibid.*, at p. 363.
49. *Ibid.*, at pp. 366-367.
50. *Ibid.*, at p. 359: "The law upon the question of what is seditious and what is not is to be found stated very clearly in a book by a learned judge, my brother Stephen, who has undoubtedly a greater knowledge of the criminal law than any other judge who sits upon the bench."
- Chafee, *op. cit.*, at p. 506 comments: "Judge Cave's qualified definition ... is so loose that guilt or innocence must obviously depend on public sentiment at the time of the trial."
51. Stephen's statement of the law of sedition was as follows in the first edition of his *Digest of the Criminal Law*:
"Art. 91. *Seditious Words and Libels.* Every one commits a misdemeanour who publishes verbally or otherwise any words or any document with a seditious intention. If the matter so published consists of words spoken, the offence is called the speaking of seditious words. If the matter so published is contained in anything capable of being a libel, the offence is called the publication of a seditious libel."

"Art. 92. Seditious Conspiracy. Every one commits a misdemeanour who agrees with any other person or persons to do any act for the furtherance of any seditious intention common to both or all of them. Such an offence is called a seditious conspiracy.

"Art. 93. Seditious Intention Defined. A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs and successors, or the Government and Constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects.

"An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the Government or Constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of Her Majesty's subjects is not a seditious intention.

"Art. 94. Presumption as to Intention. In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

In later editions the numbers of the articles were changed, so that art. 91 is now 112, art. 92 is 113, art. 93 is 114, and art. 94 is 115; also there have been a few additions to the text in later editions, the most important of which is the insertion of head 3, the clause "or to incite any person to commit any crime in disturbance of the peace" in article 93 (114) immediately after the words "the alteration of any matter in Church or State by law established." A footnote acknowledges that these words were not in the earlier editions of the work, but adds: "I do not think they enlarge the sense, but they make it more explicit." See 9th ed. (1950), pp. 91-93.

This comment might indicate that Stephen would define all forms of seditious intent in terms of incitement to disorder and violence, and indeed Birkett, J. in *Caunt* cites him to that effect. E.C.S. Wade comments at (1948), 64 L.Q.R. 203, at p. 204:

"Sir James Stephen it is true, defined a seditious intent as including any intent 'to promote feelings of ill-will and hostility between different classes'. This definition is, however, followed in the second part of the same article by a statement of what does not amount to a seditious intent. 'An intention ... to point out, in order to their removal, matters which are producing, and have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention'."

It is relevant here to note that there is a substantial correspondence between Stephen's exposition of the law in his *Digest* and the provisions of the Criminal Code of the Gold Coast interpreted by the Judicial Committee of the Privy Council in *Wallace-Johnson v. The King* [1940] A.C. 231 as not to require incitement to violence as an essential constituent of seditious intention. Viscount Caldecote, L.C. admits that "There is a close correspondence at some points between the forms of the section in the Code and the statement of the English law of sedition by Stephen ..." (p. 240), but continues: "The elaborate structure of s. 330 suggests that it was intended to contain, as far as possible, a full and complete statement of the law of sedition in the Colony ... Their Lordships find these words clear and unambiguous Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient to the crime of sedition." (pp. 240-241)

Note also that Stephen himself refers to his statement as representing a "compromise" (*History*, II, p. 300) between the two extreme views. This is perhaps a more meaningful comment if his statement is read as preserving in some literalness the conception of inciting to hatred or ill-will.

Stephen's *Digest* was used by him as the basis for a bill codifying the English criminal law which he introduced into parliament in 1878. The bill was not passed, but a Royal Commission was appointed to report upon the possibility of codifying the criminal law. The Report of the Commission was presented in 1879 with a new draft bill appended. This draft bill was introduced into parliament in 1880, but it encountered strong criticism on various points. An election was forced before the bill could be passed and it was never subsequently revived.

The Commissioners substantially accepted the statement on sedition in Stephen's *Digest*. He himself comments, *History*, II, pp. 298-299: "The articles from my *Digest*...state the present law on this subject as I understand it, and I may observe that these articles were adopted by the Criminal Code Commission almost verbatim in their Draft Code, in which they form section 102. In the report the Commissioners say that this section appears to them 'to state accurately the existing law'."

52. *History*, II, p. 376.

53. (1909), 22 Cox C.C. 1.

54. *Ibid.*, at p. 3 [emphasis added].

55. *Ibid.*, at pp. 3-4. The jury brought in a verdict of guilty, and Aldred was sentenced to 12 months' imprisonment.

56. Although the case is unreported except for *The Times*' report (Oct. 14, 1947), it is substantially reproduced in Turner and Armitage, *Cases on Criminal Law*, 3rd ed. (1964), pp. 624-628, from which the following partial account is taken:

BIRKETT, J., "Everybody in this country commits a misdemeanour who, with a seditious intention, publishes anything capable of being a libel....It is thus defined: 'Sedition, whether by words spoken or written, or by conduct, is a misdemeanour indictable at common law...It embraces all those practices, whether by word, deed, or writing, which fall short of high treason, but directly tend to have for their object to excite discontent or dissatisfaction; to excite ill-will between different classes of the King's subjects; to create public disturbance or to lead to civil war; to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder.'

.....A seditious intention may take all sorts of forms, some of which we are not concerned with here at all. For example, a seditious intention to excite His Majesty's subjects to attempt, other than by lawful means, the alteration of any matter in Church or State might be a seditious libel. The usual citation in the matter with which we deal was always put in this way, that a seditious intention is an intention to promote feelings of ill-will and hostility between different classes of His Majesty's subjects.

"Some of the reported cases follow those words; but you heard from the rather dramatic quotation by Mr. Slade from speeches of Mr. Churchill and Sir Stafford Cripps that it would be rather a difficult law to apply if it remained exactly in that simplicity. [In the course of his argument defence counsel had pointed out that language used by Churchill and Cripps during the 1945 election campaign might well be considered to promote feelings of ill-will and hostility between different classes and thus be sedition if the requirement of promoting violence or disorder were not an essential element of the offence].

"Therefore counsel submitted that the proper statement of the law was that a man publishes a seditious libel if he does so with the intention of promoting violence by

stirring up hostility and ill-will between different classes of His Majesty's subjects — in this case, of course, between Jews and non-Jews. In asking you to consider the law, that is the law of seditious libel which I declare to you. It is not enough merely to provoke hostility or ill-will, because that may be done by speeches which certainly do not come within the realm of seditious libel. Sedition has always had implicit in the word, public disorder, tumult, insurrections or matters of that kind.

"Therefore, the simple question which you now have to determine is this: is it proved beyond all reasonable doubt that on 6 August 1947, at Morecambe in the county of Lancaster, by writing and publishing the article in the newspaper, the Morecambe and Heysham Visitor, James Caunt published that libel with the intention of promoting violence by stirring up hostility and ill-will between different classes of His Majesty's subjects?..."

57. There is a note on the *Caunt* case by E.C.S. Wade, "Seditious Libel and the Press" (1948), 64 L.Q.R. 203, The excerpt from the cross-examination is reported there, while that from the alleged libel is reproduced in Turner and Armitage, *op. cit.*, at p. 624. Denning, *Freedom Under the Law* (1949), p. 44, reveals that the jury retired for only 15 minutes before reaching a unanimous verdict.
58. *Ibid.*, at p. 204.
59. A.V. Dicey, *The Law of the Constitution*, 9th ed. (1945) with appendix by E.C.S. Wade, at p. 579.
60. *Ibid.*, p. 580.
61. Dawson, *Law of the Press*, (2nd ed. 1947) p. 80.
62. *Odgers on Libel and Slander*, 6th ed. (1929), at p. 412.
63. [1950] 1 D.L.R. 657. See Kerwin, J. at p. 670, Rand, J. at pp. 681–683, and Estey, J. at p. 688. Even Taschereau, J. at p. 677 commented "Some recent judgments in England seem to go further, and support the appellant's view", but added "but I do not think that they settle the law of this country" (which he considered to be based on the English common law definition in 1892). In *Boucher* (No. 2), [1951] 2 D.L.R. 369, see Kellock, J. at pp. 382–391, and Locke, J. at pp. 395–406.
64. *Russell on Crime*, 12th ed. (1964) by J.W.C. Turner, vol. 1, at p. 217.
65. Henry John Stephen, *Commentaries on the Laws of England*, 21st ed. (1950), vol. 4 at p. 142.
66. Seditious libel is not, of course, usually conceptualized as an offence in breach of the peace, but the description is accurate if the "new view" of the law is taken to prevail.
67. (14th ed. 1938) p. 747.
68. A rout was defined by Holyroyd J. in *Redford v. Birley* (1822), 1 St. Tr. (N.S.) 1071, 3 Stark. 76, 171 E.R. 773, at p. 783, as follows: "A rout or routous assembly is where they come for some unlawful purpose, intending to do something in violence, but do not go to the full extent, or take any actual step for accomplishing their purpose." Russell *On Crime* (12th ed. 1964), p. 256, comments that "Indictments for rout alone are rarely, if ever, preferred", and the Canadian Criminal Code admits of no stage between riot and unlawful assembly: see sections 64–67.
69. *Op. cit.*, p. 257. The law on riot is laid down in *Field v. Metropolitan Police Receiver* (1907) 2 K.B. 853.

70. *Russell*, pp. 263–4.
71. (1839), 3 St. Tr. (N.S.) 1037; 9 Car. & P. 91, at p. 109; 173 E.R. 754, at p. 762.
72. *R. v. Graham and Burns* (1888) 16 Cox C. C. 420.
73. *Russell*, p. 256.
74. *Op. cit.*, p. 143.
75. (1950), 10 C.R. 26, at p. 34.
76. (1882), 15 Cox C.C. 138.
77. *Ibid.*, at pp. 145–147.
78. *Ibid.*, at p. 148.
79. [1900–3] All E.R. Rep. 727.
80. *Ibid.*, at pp. 732–733. Lord Alverstone C.J. decided the case on the interpretation of the Liverpool Improvement Act, 1842, which provided that any person who uses threatening or abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned is subject to fine. However, Darling J. added (at p. 732): “[T]he law. . . is perfectly ample, even without the help of the local Act of Parliament. . . to warrant the stipendiary magistrate in coming to the conclusion to which he did in this particular case.” Channell J. concurred with both other judgments.
81. [1950] 3 D.L.R. 513; 10 C.R. 26.
82. *Ibid.*, at p. 551 (D.L.R.), p. 32 (C.R.). The three authorities cited with approval by the Court in *Wise v. Durning (Reynolds) v. County Cork Justices* (1882), 15 Cox C.C. 78, *R. v. Cork Justices* (1882), 15 Cox C.C. 149, and *R. (Orr) v. Londonderry Justices* (1891), 28 L.R. Ir. 330) confirm the view of Cartwright J. as they were all cases in which persons were ordered to give sureties to keep the peace and be of good behaviour.
83. [1936] 1 K. B. 218. There is a short note on the case in L.Q.R. 158.
84. “Public Order and the Right of Assembly in England and the United States: A Comparative Study” (1938), 47 Yale L.J. 404, at p. 411.
85. *Duncan v. Jones* is attacked in the Note in the Yale Law Journal, *ibid.*, at pp. 410–412, and also by Wade, “Police Powers and Public Meetings” (1937) 6 Camb. L.J. 175. Wade concludes (at pp. 180–181): “Two opinions are possible as to whether street meetings should be permitted at all. . . But if street meetings are to be prohibited, surely it would be better to say so in general terms of a statute as in the Public Order Act, 1936, s. 3, in relation to processions in certain circumstances, rather than to rely upon so doubtful a decision as *Duncan v. Jones*, granted that some form of prohibition is necessary.”
- In a companion article to Professor Wade’s, “Public Meetings and Processions” (1937), 6. Camb. L.J. 161, Professor Goodhart outlines the doubtful state of the law

on assembly. A meeting held on a street is apparently a trespass against the relevant urban authority, and may also be a nuisance against the public if it renders the way less commodious than before to the public, even if no one is actually obstructed. Professor Goodhart sums up at p. 174: "[T]here is no right to hold a meeting in the highway in the sense in which there is a right to take part in a procession. This distinction is a fundamental one, for although a procession is *prima facie* lawful, there is no such rule in the case of a meeting. But even in the case of a procession the right is not an absolute one — the right is only to use the highway in a reasonable manner, and this depends on the facts of each particular case."

86. 2 & 3 Vict., c. 47, s. 54 (13).

87. 1 Edw. 8 and 1 Geo. 6, c. 6.

88. By s. 9 "meeting" is said to mean "a meeting held for the purpose of the discussion of matters of public interest or for the purposes of the expression of views on such matters"; "public meeting" to include "any meeting in a public place and any meeting which the public or any section thereof are permitted to attend, whether on payment or otherwise"; and "public place" to mean "any highway, public park or garden, any sea beach, and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not: and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise."

The best short description of the background of The Public Order Act is contained in the note in the Yale Law Journal at p. 405:

"Under the leadership of Sir Oswald Mosley, England had witnessed the rise of uniformed troops, dedicated to the eradication of Jews and Communists and the establishment of a Fascist dictatorship for Britain. Grave danger to public order from the activities of Mosley's Blackshirts was long brewing; it culminated in the fall of 1936 with serious violence in the Jewish quarter of London. Jews were verbally abused and threatened; occasionally injured. Their shop windows were broken and stores raided. Counter-attacks and marches were organized; streets were barricaded. The East End of London was rapidly developing into an armed camp. Liberals and other anti-Fascists demanded that the police take action. The Government maintained that existing laws were insufficient to cope with the situation."

89. Hansard, vol. 317, col. 1362 (16 Nov. 1936). He repeated these same sentiments at the end of the debate: vol. 318, col. 1761.

90. The only substantial discussion of clause 5 occurred in committee when Mr. Stephen moved that the words "calculated to excite social or religious prejudice or "should" be substituted for "with intent to provoke a breach of the peace": Hansard, vol. 318, col. 638. The amendment, which was defeated without a recorded vote, was for the purpose of limiting the clause by confining it to a particular kind of abusive language. Earl Winterton, in reply, commented: "To say that no one shall make a speech showing racial or religious prejudice is preposterous. It has existed in this country for hundreds of years, and will always exist": col. 640.

At least one lawyer was troubled by section 5: see Barrister, "Insulting Words and Behaviour" (1936) 12 *New Statesman and Nation* 845 (Nov. 28, 1936), at p. 846: "Before the Public Order Bill is finally passed into law it is essential that the insulting words and behaviour clause is either omitted altogether or the offence much more strictly defined."

91. [1963] 2 All E.R. 225. There is a note on this case at (1963), 79 L.Q.R. 322. Earlier cases were *R. v. Miles, The Times*, May 20, 1937, p. 10, col. c; *R. v. Pinfold, The Times*, June 7, 1937, p. 11, col. 6.
92. *Ibid.*, at p. 227.
93. 11–12 Eliz. II, C. 52. Maximum penalties were increased to 3 months' imprisonment and a fine of £ 500. on conviction on indictment.
94. *Knupffer v. London Express Newspaper, Limited* [1944] A.C. 116 at p. 123 (per Lord Russell of Killowen).
- In a student note, "Liability for Defamation of a Group" (1934), 34 Col. L. Rev. 1322, at pp. 1324–5 the writer remarks: "A more realistic approach would recognize that even a general derogatory reference to a group does affect the reputation of every member, and would adopt as its test the intensity of the suspicion cast upon the plaintiff."
95. Fryer, "Group Defamation in England" (1964) 13 Clev-Mar. L.R. 33, at pp. 37–42.
96. (1732) 2 Barn. K.B. 138, 166; 94 E.R. 406, 425; 2 Swans. 502 n. 4; 36 E.R. 705, 717; W. Kel. 230; 25 E.R. 584.
97. Tanenhaus, "Group Libel" (1950), 35 Cornell L.Q. 261, at p. 269.
98. The London *Times*, March 26, 1952, p. 2, reports the statement of the Attorney-General and states that as a result the House of Commons Standing Committee considering the Defamation (Amendment) Bill rejected two proposed new clauses relating to group libel. One amendment would have made it an offence to libel any group distinguishable as such by race, creed or colour, whereas the other would have provided for an injunction to restrain further publication of such defamatory statements. The Attorney-General does note that the basis of the charge in *Osborne* was a breach of the peace, but does not advert to the consequence that the *Osborne* case and the existing law might not then adequately achieve what the mover of the amendments desired.
99. See Tanenhaus, *op. cit.*, at p. 268, fn. 48.
100. *On Libel and Slander* (5th ed., 1960), p. 14. Among the successful cases of prosecution for group libel cited by Gatley are *Osborne, R. v. Gathercole* (1828), 2 Lewin C.C. 237, 168 E.R. 1140, and *Emperor v. Wahid Ahrari* [1935] I.L.R. (All.) 1012. In *Gathercole's* case where the defendant had libelled the residents of the Scorton Nunnery Alderson B. instructed the jury that if the libel were on the Roman Catholic Church generally, the defendant should be acquitted, because a person has the right to attack the Roman Catholic religion and its institutions, but that he has no right in doing so to libel a particular body of persons; the jury returned a verdict of guilty. In the *Ahrari* case, where the defendant had published defamatory articles in a newspaper alleging habitual immoral conduct of the girls of a particular college, the Allahabad Court held that all the girls in the college collectively and each girl individually must suffer in reputation and that the defendant was rightly convicted of criminal defamation.
101. This is an unreported case found only in *The Times*, Sept. 19 at p. 14 and Sept. 22 at p. 11, 1936. Leese was the publisher and Whitehead the printer of a newspaper called *Fascist*. An article in one issue on the situation in Palestine contained the following: "The Jews are not wanted anywhere on earth. Unfortunately they are on earth and all over it destroying everything good and decent by their contaminating

influences. The alternatives are (1) to kill; (2) to sterilize; or (3) to segregate, and our policy is the last one conducted and maintained at their own expense. "The newspaper had also published allegations of ritual murder of Christians and of ritual slaughter of cattle by Jews. The jury found the defendants guilty of public mischief after a deliberation of 40 minutes. Whitehead was fined £ 20 and Leese sent to jail for 6 months in default of accepting the penalty of a fine. Neither defendant was represented by counsel.

102. *Freedom under the Law* (1949), p. 43. Denning also attacks *R. v. Manley* (1933) 1 K.B. 529, the case in which the doctrine of public mischief was first developed. Public mischief as a common law offence, has no application in Canada by reason of s. 8 of the Criminal Code.

103. *Report of the Committee on the Law of Defamation*, Cmd. 7536 (1958), p. 11.

104. The Race Relations Bill received its third reading with amendments in the House of Lords on August 5, 1965 (*House of Lords Parliamentary Debates*, col. 519) and was returned to the Commons. Parliament adjourned for the Summer recess before the Bill as amended was considered by the House of Commons, which had passed a slightly different version. The amendments do not affect the provisions on incitement to racial hatred.

105. Hansard, May 3, 1965, cols. 398-399.

106. Schofield, *Essays on Constitutional Law and Equity*, II, (1914) at pp. 521-522 and 523, quoted by Chafee, *Free Speech in the United States* (1946), at p. 20. My account of sedition in the United States up to the beginning of the Second World War is largely drawn from Professor Chafee's book. For a recent analysis of Chafee, see Roy Lechtreck, "Chafee on Law and Freedom of Speech" (1965), 11 *The Catholic Lawyer* 41.

107. Because of its early demise, the Act was never tested in the Courts. Chafee, *op. cit.*, firmly believes that it was unconstitutional. He writes: "the crime of sedition . . . was abolished by the First Amendment" (p. 149). And again: "The Sedition Act of 1798 was . . . a violation of the First Amendment, especially as it included criticism of the President and Congress, which was very remotely injurious to the United States." (p. 174).

Madison argued at the time that it was unconstitutional as being beyond the limited powers of the Federal Government and against the First Amendment. See, e.g., Madison's address of January 23, 1799, which is appended to the judgment of Douglas, J. (with whom Black, J. concurred) in *Garrison v. Louisiana* (1964), 85 S. Ct. 209, at p. 220.

During the winter of 1919-1920 the Wilson administration presented a draft Sedition Act to Congress and Congress had about 70 similar bills to consider during that same period, but due to strenuous opposition none of them was passed, and the agitation for a Sedition Act died down.

However, the Alien Registration Act of 1940, commonly called the Smith Act (after Rep. Howard Smith of Virginia, who introduced the bill) is in fact, though not in name, a federal sedition act, and is recognized as such by Chafee, *op. cit.*, p. 440 ff.

The material sections of the Smith Act are as follows:

"Sec. 2.

"(a) It shall be unlawful for any person ---

"(1) to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United

States by force or violence, or by the assassination of any officer of such government; "(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purpose thereof.

"(b) For the purpose of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

"Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title."

The constitutionality of these two sections was at stake in *Dennis v. U.S.* (1951), 341 U.S. 494 and was upheld by a 6-2 vote.

Professor Perkins, *Criminal Law* (1957), pp. 380-381, isolates the present federal statutes on sedition besides the Smith Act, as follows: the legislation on seditious conspiracy (18 U.S.C.A., s. 2384) and the statute on wartime sedition (18 U.S.C.A., s. 2388).

108. (1919), 249 U.S. 47. There is a good account of all these "free speech" cases in Covington, "The Dynamic American Bill of Rights" (1948), 26 Can. Bar Rev. 638.

109. *Ibid.*, at p. 52 [emphasis added].

110. *Frohwerk v. U.S.* (1919), 249 U.S. 204: *Debs v. U.S.*, *ibid.*, at p. 211.

111. Chafee, *op. cit.*, p. 84.

112. (1919), 250 U.S. 616.

113. *Ibid.*, at p. 621 per Clarke, J.

114. *Ibid.*, at p. 630 [emphasis added].

115. Chafee, *op. cit.*, p. 159. I include some discussion of Supreme Court treatment of state legislation in this section because it is relevant to the analysis of the "clear and present danger" test.

116. *Gitlow v. New York* (1925), 268 U.S. 652, at pp. 668-671.

117. *Ibid.*, at pp. 672-673.

118. (1927), 274 U.S. 357.

119. *Ibid.*, at p. 376 [emphasis added]. Holmes J. joined in this opinion.

120. (1927), 274 U.S. 380.

121. (1931), 283 U.S. 359. Here the Supreme Court declared the California "red flag" statute invalid.

122. (1931), 283 U.S. 697. In this case the Supreme Court invalidated as conflicting with the Fourteenth Amendment a state statute which allowed the courts to issue injunctions to restrain as a public nuisance malicious, scandalous and defamatory newspapers,

magazines, and other periodicals. Hughes, C.J. wrote (at pp. 718-719): "Public officers... find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publications of newspapers and periodicals."

123. (1937), 299 U.S. 353.

124. (1937), 301 U.S. 242.

125. *Ibid.*, at p. 258 [emphasis added].

126. (1941), 314 U.S. 252. Black, J., giving the opinion of the Court (at pp. 261-262) said of the "danger" test: "We recognize that this statement, however helpful, does not comprehend the whole problem.... nevertheless...[it] has afforded practical guidance in a great variety of cases in which the scope of constitutional protection of freedom of expression was an issue."

127. *American Communications Association, C.I.O. v. Douds* (1950), 339 U.S. 382 upheld the constitutionality of the non-Communist affidavit provision of the Labour Management Relations Act of 1947 (Taft-Hartley Act), which required every union to file an affidavit from every officer that he was not a member of the Communist Party or of any other organization that taught the forcible overthrow of the U.S. Government.

Vinson, C.J. wrote for 3 of the 6 judges sitting (at pp. 394-400): "[T]he attempt to apply the term, 'clear and present danger', as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea... It is the considerations that gave truth to the phrase 'clear and present danger,' not the phrase itself, that are vital in our decision of questions involving liberties protected by the First Amendment.

"So far as the Schenck case itself is concerned, imminent danger of any substantive evil that Congress may prevent justifies the restriction of speech. Since that time this Court has decided that however great the likelihood that a substantive evil will result, restrictions on speech and press cannot be sustained unless the evil itself is 'substantial' and 'relatively serious', Brandeis J., concurring in *Whitney v. California*... or sometimes 'extremely serious', *Bridges v. California*... And it follows therefrom that even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake.... In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that communists and others identified by s. 9 (h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task...' to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights".

In *Dennis v. U.S.* (1951), 341 U.S. 494 the Court adhered to the "clear and present danger" formulation, but reinterpreted it. Only Jackson, J. (concurring) refused to apply it at all: "The authors of the clear and present danger test never applied it to a case like this, nor would I." (at p. 570) Corry, *Elements of Democratic Government* (2nd ed. 1951), at pp. 399-400 comments: "What constitutes a clear and present danger does not depend primarily on the words used but rather on the circumstances of their use and the conditions of the time.... The upholding of the Smith Act (in *Dennis*) appears to be on the ground that it struck at a course of systematic preparation for the realm of action and not at discussion in the realm of ideas."

The *Dennis* case was interpreted by the Supreme Court six years later in *Yates v. U.S.* (1957), 354 U.S. 298 as involving no departure from the "clear and present danger" rule. In *Yates* fourteen leaders of the Communist Party in California were indicted under s. 3 of the Smith Act for conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. The Court, by a 6-1 vote (two judges did not participate at all in this case), reversed the convictions, acquitting five defendants and ordering a new trial for the other eight. Black and Douglas JJ., otherwise with the majority, dissented with respect to the question of a new trial for the eight defendants, holding that there was insufficient evidence for conviction, and that all the defendants should therefore be acquitted.

The two principal issues of law in *Yates* were the proper interpretation of the word "organize" and the proper interpretation of *Dennis* with respect to advocacy of violence. Applying the rule that criminal statutes are to be construed strictly, the word "organize" as used in the Smith Act was construed as referring only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though the latter might loosely be designated "organizational." The majority therefore held that, since the Communist Party came into being in 1945 and the indictment was not returned until 1951, the three-year statute of limitations had run on the "organizing" charge and required the withdrawal of that part of the indictment from the jury's consideration. Burton J., otherwise concurring, joined Clark, J. in dissenting from this holding.

On the second point the Government, which at trial requested the court to charge in terms of incitement (though the trial judge did not), took the position that the true constitutional dividing line is not between inciting and abstract advocacy of forcible overthrow, but rather between advocacy as such, irrespective of its inciting qualities, and the mere discussion or exposition of violent overthrow as an abstract theory. Harlan J., with the concurrence of all the judges except Clark J., rejected that argument:

"We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not.

"The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court. . . .

"In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough. The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement," *id.*, at 511-512, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of doctrination preparatory to action

which was condemned in *Dennis*. As one of the concurring opinions in *Dennis* put it: "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." *Id.*, at 545. There is nothing in *Dennis* which makes that historic distinction obsolete... The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe in something*." (pp.318-325).

128. Of course, after Fox's Libel Act the English Courts had to give some attention to questions of bad intention or bad tendency of words or an act (see n. 24 *above*), and they came frequently to use the word "calculated" as descriptive of the kind of intention or tendency required: see, for example, Best J. in the *Burdett* case in 1820, 4 B. & Ald. 95, at p. 131, or Coleridge in the *Aldred* case in 1909, 22 Cox C.C. 1, at p. 3. Lord Mackenzie in *Grant* (1848) Shaw's Justiciary R. 62, at pp. 96-97 adds a qualifying adverb:
- "I think the crime of sedition is sufficiently constituted by using . . . language calculated (*which, of course, means plainly calculated*) to excite popular disaffection, and resistance to lawful authority, provided that this be done wickedly or seditiously, i.e. without lawful justification or excuse. I do not think that to constitute sedition, it is essential that there shall be in the delinquent a desire or intention to excite this disaffection and insurrection, or resistance, provided he intends to use the words, *plainly calculated to excite these*, and uses them; and that without justification or excuse." [Emphasis added].
- But in general the English cases do not push the concept of intention or calculation very hard. See also note 129.
129. The English cases have generally not concerned speculative writings but rather those with an immediate practical orientation. For example, in *Collins*, (1839), 9 C. & P. 456, the placard in question was inciting to immediate violence, if it was inciting to violence at all, and in *Burns* (1886), 16 Cox C. C. 355 the violence had already occurred and the question was whether the defendants were responsible for it. Undoubtedly the fact that English prosecutions have been restricted to face situations where immediate violence was threatened reflects a decision by English prosecutors, or at least an attitude on their part, not to bring charges in other situations. It was stated by the defence in the *Caunt* case, in 1948, and not challenged by the prosecution, that this was the first prosecution of an editor of a newspaper for seditious libel for over a hundred years.
- Perhaps the English case most parallel to the American experience is *R. v. Aldred* (1909), 22 Cox C. C. 1, where the immediate threat was somewhat less than in most of the other cases. Coleridge, J. there stresses the importance of the circumstances surrounding publication, including the audience addressed, the state of public feeling at the time, and the place and mode of publication. This is as close as the English Courts have come to a "clear and present danger" test.
130. *Op. cit.* p. 82.
131. (1920), 251 U. S. 468, at p. 479: "Were they [the newspaper articles] the mere expression of peevish discontent, aimless, vapid and innocuous? We cannot so conclude. We must take them at their word, as the jury did, and ascribe to them a more active and sinister purpose . . . Their effect on the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offence . . ."
132. *Op. cit.*, p. 89.
133. (1951), 341 U.S. 494. The text of the relevant sections of the Smith Act in note 107 *above*. In *Scales v. U. S.* (1961), 367 U. S. 203 the Smith Act was upheld on another point, though only by a 5-4 margin.

134. *Ibid.*, at pp. 508-510.
135. Vinson, C.J. uses this phrase himself (at p. 511), but not as a tag for the rule.
136. *Ibid.*, at p. 525.
137. *Ibid.*, at p. 550.
138. *Art. Cit.*, at pp. 17-19.
139. *Garrison v. Louisiana* (1964), 85 S. Ct. 209, at p. 219.
140. (1952) 343 U.S. 250. Beauharnais was arrested for publishing and distributing in Chicago leaflets entitled "PRESERVE and PROTECT WHITE NEIGHBOURHOODS from the Constant and Continuous Invasion, Harassment and Encroachment by the Negroes." The leaflets were in the form of a petition to the Mayor and City Council to halt "the further encroachment, harassment and invasion of white people, their property neighbourhoods and persons, by the Negro — through the exercise of the Police Power." There was also a tear-off application form for membership in The White Circle League of America and an extensive description of that organization.
141. The First Amendment applies only to the Federal Government and so any protection which citizens have against State action has to be conferred by the Fourteenth Amendment. For many years there was a question as to how much of the First Amendment was to be read into the Fourteenth. It is now clear that all the protections of the First Amendment are incorporated into the Fourteenth. Redlich, "Are There 'Certain Rights . . . Retained by the People'?" (1962), 37 N.Y.U.L. Rev. 787, at p. 791 declares: "A long line of decisions has established that the protections of the First Amendment apply equally against the states." The remaining question is how much of the rest of the Bill of Rights will be read into the Fourteenth Amendment. Mr. Justice Brennan's theory of "selective incorporation" has succeeded in incorporating in the Fourteenth Amendment almost all of the Bill of Rights except the privilege against self-incrimination, though he has not yet developed a rationalization which has succeeded in stilling all criticism against that aspect of the theory that specific provisions of the Bill of Rights must be incorporated in their totality. Redlich suggests, pp. 802-812, that the seldom used Ninth and Tenth Amendments, which refer to rights retained by the people, might serve as the basis of the theory.
142. *Ibid.*, at p. 258.
143. *Ibid.*, at pp. 261-266.
144. *Ibid.*, at pp. 271-275. Black, J. notes in his judgment (at p. 271) that "lithograph" had been construed (presumably by the Illinois Courts) to include any printed matter, and so the breadth of his opening statement here is warranted.
145. *Ibid.*, at p. 285. Douglas, J. also joined in the dissent of Reed J., who found that statute as construed unconstitutionally vague because of the generality of the words "virtue", "derision" and "obloquy".
- Jackson, J., the fourth dissenter, did not agree with the other dissenters that the Fourteenth Amendment incorporates the first, but found that the statute as applied denied the accused constitutional safeguards (at pp. 299-301):
- "The Illinois statute, as applied in this case, seems to me to have dispensed with accepted safeguards for the accused. Trial of this case ominously parallels the trial of *People v. Croswell*, *supra*, in that the Illinois court here instructed the jury, in substance, that if it found that defendant published this leaflet he must be found guilty of criminal libel."

"Rulings of the trial court precluded the effort to justify statements of fact by proving their truth. The majority opinion concedes the unvarying recognition by the States that truth plus good motives is a defence in a prosecution for criminal libel. But here the trial court repeatedly refused defendant's offer of proof as to the truth of the matter published.... If the court would not let him try to prove he spoke truth, how could he show that he spoke truth for good ends?..."

"Another defence almost universally recognized, which it seems the jury were not allowed to consider here, is that of privilege..."

146. *Dennis*, at p. 525.

147. *Ibid.*

148. *Beauharnais*, at p. 258.

149. Douglas, J. has of course been much less absolutist in his upholding of these values than Black, J. The very next case reported in the U.S. Reports after Douglas, J. enunciation of this rule in *Beauharnais* is *Zorach v. Clauson* (1952), 343 U.S. 306, where Douglas, J. gives the majority opinion while Black, J. dissents, upholding a more absolute view of the separation of Church and State.

150. Reed, J. (dissenting) clearly says (at p. 283): "The Court speaks at length of the constitutional power of a state to pass group libel laws to protect the public peace. This dissent assumes that power." And Jackson, J. comments (at p.288): "The history of criminal libel in America convinces me that the Fourteenth Amendment did not 'incorporate' the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not."

151. They were touched on by Jackson J.

152. (1964), 376 U.S. 254.

153. *Ibid.*, at pp. 270-280.

154. *Ibid.*, at pp. 293-295.

155. *Ibid.*, at p. 298-305. Douglas J. did not write a separate concurring opinion but joined both Black J. and Goldberg J.

156. (1964), 85 S. Ct. 209.

157. *Ibid.*, at p. 212.

158. *Ibid.*, at pp. 215-216.

159. *Ibid.*, at p. 219 [emphasis added].

160. (1964), 376 U.S. 254, at p. 268.

161. (1952), 343 U.S. 250, at pp. 296-298.

162. (1964), 85 S. Ct. 209, at p. 212, n. 3.

163. For an outline of U.S. law see Note (1938), 47 Yale L.J. 404, at p. 412 ff.

164. (1940), 310 U.S. 296.

165. *Ibid.*, at pp. 308-311.

In a somewhat different situation the Supreme Court recently refused to allow the violence of a popular reaction to a lawful act to lead to a restriction on the act: *Cooper v. Aaron* (1958), 358 U.S. 1 [The Little Rock case]. There, under a plan of gradual desegregation adopted by the petitioning school trustees and approved by the

Courts Negro children were ordered admitted to a previously all white high school. As a result of actions by the Governor and Legislature of the State and of threats of mob violence, the respondents were unable to attend the school until troops were sent and maintained there by the Federal Government for their protection. The Court refused, however, to suspend the School Board's plan for a further period of two and a half years. The Court's opinion [this was an unprecedented case where the majority opinion was attributed to the whole Court and no individual judge's name was attached to it] stated in part (at p. 16):

"The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature...[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."

And Frankfurter, J. (concurring) added (at p. 22): "Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society."

166. (1942), 315 U.S. 568.

167. *Ibid.*, at pp. 571-572.

168. *Kovacs v. Cooper* (1949), 336 U.S. 77.

169. *Saia v. New York* (1948), 334 U.S. 558.

170. (1949), 337 U.S. 1.

171. *Ibid.*, at p. 4.

172. (1963), 372 U.S. 229.

173. *Ibid.*, at p. 237. In *Cox v. State of Louisiana* (1965), 85 S. Ct. 453, where defendant minister had been convicted of obstructing public passage for leading a group of students in a protest against segregation and discrimination by assembling at the state capital building and the courthouse, Goldberg J. said for the Court at pp. 464-465: "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order.... We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." However, with White J. dissenting, it reversed the lower court judgment because the Louisiana contained no precise standards and was unevenly applied.

174. "Group Libel" (1950), 35 Cornell L.Q. 261, at pp. 263-6.

175. *Ibid.*, at p. 266.

176. Hobart 89a; 80 E.R. 239.

177. *Louisville Times v. Stivers* (1934), 252 Ky. 843; 68 S.W. 2d 411.

178. Tanenhaus, *op. cit.*, at pp. 263-6.

179. *Op. cit.*, at p. 269.

180. *Ibid.*, at p. 276.

181. Illinois Criminal Code, s. 224 a, as amended in 1917. 111. Rev. Stat., 1949, c. 38 Div. 1, s. 471 Massachusetts Annotated Laws, c. 272, s. 98c (enacted in 1943). The Massachusetts law extends criminal libel to include false material published "with intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion." New Jersey passed a group libel law in 1935 (New Jersey Laws (1935), c. 151), but it was held quickly unconstitutional by a New Jersey court on grounds of vagueness and violation of freedom of speech; *State v. Klapprott* (1941), 127 New Jersey L.R. 395. There are also broad definitions of criminal libel in California, Nevada and New Mexico legislation, but in Tanenhaus' view they do not clearly cover large racial and religious groups: *op. cit.*, at pp. 286-7. See also his catalogue of municipal regulation: *ibid.*, pp. 283-5.
182. (1952), 343 U.S. 250 However, as noted by Brown and Stern, "Group Defamation in the U.S.A." (1964), 13 Clev. Mar. L.R. 7, at p. 19: "The decision produced no similar legislation nor has it produced increased litigation. In total effect, *Beauharnais* exists in a vacuum."
183. Natan Lerner. *The Crime of Incitement to Group Hatred* (1963), p. 22 See *Revins v. Prindable* (1941), 39 F. Supp. 708, affd. (1941), 314 U.S. 573: three Jehovah's Witnesses had been convicted under the Illinois statute for distributing material defamatory of the Catholic Church. An interlocutory injunction was sought in an action by Jehovah's Witnesses against state officials to restrain them from enforcing the statute. The court refused the application because the statute was not clearly unconstitutional and the danger of irreparable loss neither great nor immediate.
184. *Government and Mass Communications*, A Report from the Commission on Freedom of the Press (1947), pp. 129-130 [emphasis in the original]. The Commission was established under a grant of funds by Time, Inc., and Encyclopaedia Britannica to the University of Chicago. It consisted of Dr. Robert M. Hutchins (chairman). Professors Zechariah Chafee, Jr. (vice-chairman), John M. Clark, John Dickinson, William E. Hocking, Harold D. Lasswell, Charles E. Merriam, Reinhold Niebuhr, Robert Redfield, Arthur M. Schleisinger, Messrs. Archibald MacLeish and Beardsley Ruml, Dr. George N. Shuster, and foreign advisors.
185. *Ibid.*, at pp. 122-129. The Commission acknowledges his influence at p. 129 "Because of such arguments as have just been set forth, the Commission...was unanimously opposed to the enactment of group libel legislation."
186. *To Secure These Rights*. The Report of the President's Committee on Civil Rights (1947), pp. 51-52.
187. *Op. cit.*, at p. 300. In fn. 165, p. 300, he observes that the two cases which come closest to indicating what can be expected in trials for group defamation are *R. v. Leese and Whitehead* and *R. v. Caunt*.
188. *Ibid.*, at p. 302.
189. "Democracy and Defamation: Control of Group Libel" (1942), 42 Col. L. Rev. 727 Professor Riesman wrote a companion piece on individual libel: (1942), 42 Col. L. Rev. 1085 and 1282.
190. *Ibid.*, at p. 756.
191. *Ibid.*, at p. 774.
192. (1931), 283 U.S. 697. See *above* n. 17.
193. *Op. cit.*, at pp. 779-780.
194. *Op. cit.*, at pp. 289-290.
195. Ind. Stat., sec. 10-904-914 (Burns 1933). This legislation, passed in 1947, was aimed at the Ku Klux Klan.

196. *Op. cit.*, at p. 290.

197. Note (1947), 47 Col. L. Rev. 595 at p. 609; Tanenhaus, *op. cit.*, at p. 291.

198. In March 1962 the Government of Israel released a draft defamation bill which led to the exchange between Edmond Cahn and Premier Ben-Gurion which is reproduced in Cahn, "Defamation Control v. Press Freedom: A Current Chapter in Israel" (1964), 13 J. of Public L. 3.

199. *Boucher v. The King* [1950] 1. D.L.R. 657, at p. 674.

200. Article 114, in the later editions of Stephen's *Digest*, is as follows:

"Article 114

"Seditious Intention Defined

"A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

"An intention to show that His Majesty has been misled or mistaken in his measures or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention."

Locke J. notes at [1951] 2 D.L.R. 369, at p. 395: "When the Code was drafted in 1892 and introduced into Parliament it contained a clause defining a seditious intention in terms similar to those contained in s. 102 of the Code which was drafted but never adopted in England and which accepted Stephen's definition, but this was rejected in the House of Commons."

201. 1919 (Can.), c. 46 s. 1, enacting it as s. 97 of the Criminal Code. In the 1927 general revision of Federal statutes it became s. 98, R.S.C. 1927, c. 36. The principal subsections were as follows:

"98. Any association, organization, society or corporation, whose professed purpose or one of whose purposes is to bring about any governmental, industrial or economic change within Canada by use of force, violence or physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, terrorism, or physical injury to person or property, or threats of such injury, in order to accomplish such change, or for any other purpose, or which shall by any means prosecute or pursue such purpose or professed purpose, or shall so teach, advocate, advise or defend, shall be an unlawful association.

"2. Any property, real or personal, belonging or suspected to belong to an unlawful association, or held or suspected to be held by any person for or on behalf thereof may, without warrant, be seized or taken possession of by any person thereunto authorized by the Commissioner of the Royal Canadian Mounted Police, and may thereupon be forfeited to His Majesty.

"3. Any person who acts or professes to act as an officer of any such unlawful association, and who shall sell, speak, write or publish anything as the representative or professed representative of any such unlawful association, or become and continue to be a member thereof, or wear, carry or cause to be displayed upon or about his person or elsewhere, any badge, insignia, emblem, banner, motto, pennant, card, button or other device whatsoever, indicating or intended to show or suggest that he is a member of or in anywise associated with any such unlawful association, or who shall contribute anything as dues or otherwise, to it or to any one for it, or who shall solicit subscriptions or contributions for it, shall be guilty of an offence and liable to imprisonment for not more than twenty years.

"4. In any prosecution under this section, if it be proved that the person charged has

"(a) attended meetings of an unlawful association; or

"(b) spoken publicly in advocacy of an unlawful association; or

"(c) distributed literature of an unlawful association by circulation through the Post Office mails of Canada, or otherwise;

it shall be presumed, in the absence of proof to the contrary, that he is a member of such unlawful association.

"6. If any judge of any superior or county court, police or stipendiary magistrate, or any justice of the peace, is satisfied by information on oath that there is reasonable ground for suspecting that any contravention of this section has been or is about to be committed, he may issue a search warrant under his hand, authorizing any peace officer, police officer, or constable, with such assistance as he may require, to enter at any time any premises or place mentioned in the warrant, and to search such premises or place, and every person found therein, and to seize and carry away any books, periodicals, pamphlets, pictures, papers, circulars, cards, letters, writings, prints, handbills, posters, publications or documents which are found on or in such premises or place, or in the possession of any person therein at the time of such search, and the same, when so seized may be carried away and may be forfeited to His Majesty.

"8. Any person who prints, publishes, edits, issues, circulates, sells, or offers for sale or distribution any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind, in which is taught, advocated, advised or defended, or who shall in any manner teach, advocate, or advise or defend the use, without authority of law, of force, violence, terrorism, of physical injury to person or property, or threats of such injury, as a means of accomplishing any governmental, industrial or economic change, or otherwise, shall be guilty of an offence and liable to imprisonment for not more than twenty years.

"9. Any person who circulates or attempts to circulate or distribute any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication, or document of any kind, as described in this section by mailing the same or causing the same to be mailed or posted in any post office, letter box, or other mail receptacle in Canada, shall be guilty of an offence, and shall be liable to imprisonment for not more than twenty years.

"10. Any person who imports into Canada from any other country, or attempts to import by or through any means whatsoever, any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind as described in this section, shall be guilty of an offence and shall be liable to imprisonment for not more than twenty years.

202. 1919 (Can.), c. 46, s. 4.

203. 1930 (Can.), c. 11, s. 2.

204. 1936 (Can.), c. 29, s. 1.

205. 1936 (Can.), c. 29, s. 8.

206. The Code also contained the following sections dealing with seditious offences, none of which was relevant in *Boucher*, and all of which were dropped in the 1954 revision of the Code:

“130. Every one is guilty of an indictable offence and liable to fourteen years’ imprisonment who

“(a) administers, or is present at and consenting to the administration of, any oath or any engagement purporting to bind the person taking the same to commit any crime punishable by death or imprisonment for more than five years; or

“(b) attempts to induce or compel any person to take any such oath or engagement; or

“(c) takes any such oath or engagement. R.S., c. 146, s. 129.

“131. Every one is guilty of an indictable offence and liable to seven years’ imprisonment who

“(a) administers or is present at and consenting to the administration of any oath or engagement purporting to bind the person taking the same

“(i) to engage in any mutinous or seditious purpose,

“(ii) to disturb the public peace or commit or endeavour to commit any offence,

“(iii) not to inform and give evidence against any associate, confederate or other person,

“(iv) not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done, or any illegal oath or obligation or engagement which may have been administered or tendered to or taken by any person, or the import of any such oath or obligation or engagement; or

“(b) attempts to induce or compel any person to take any such oath or engagement; or

“(c) takes any such oath or engagement. R.S., c. 146, s. 130.

“132. Any one who, under such compulsion as would otherwise excuse him, offends against either of the last two preceding sections, shall not be excused thereby unless, within the period hereinafter mentioned, he declares the same and what he knows touching the same, and the persons by whom and in whose presence, and when and where, such oath or obligation or engagement was administered or taken, by information in oath before a justice for the district or city or county in which such oath or engagement was administered or taken.

“2. Such declaration may be made by such person within fourteen days after the taking of the oath, unless he is hindered from making it by actual force or sickness, in which case it may be made within eight days of the cessation of such hindrance.

“3. The declaration may be made on such person’s trial if it happens before the expiration of either of the periods aforesaid. R.S., c. 146, s. 131.

“135. Every one is guilty of an indictable offence and liable to one year’s imprisonment who, without lawful justification publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state. R.S., c. 146, s. 135.

207. [1950] 1 D. L. R. 657; on rehearing [1951] 2 D. L. R. 369. There is a case comment by F.A. Brewin at (1951), 29 Can. Bar Rev. 193. The pre-*Boucher* Canadian cases are summarized in Schmeiser, *op. cit.*, pp. 200–201.

208. There is also the possibility that these words of Stephen J. should not be accepted as the proper starting point. Unfortunately of the three judges in the majority on the question of definition, only Rand J. faced the issue squarely, holding that Stephen’s words must today be taken to mean only such use of language as is intended or as is likely “to disorder community life” (p. 683.).

Kerwin and Estey JJ. both cite Stephen but do not make it clear how they are interpreting him.

Cartwright J., on the rehearing, at p. 409, remarks plainly that "the definition. . . . ought not to be accepted without qualification, and that before a writing can be held to disclose a seditious intention by reason of being calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects it must further appear that the intended, or natural and probable, consequence of such promotion of ill-will and hostility is to produce disturbance of or resistance to the authority of lawfully constituted Government."

The definition to which he is referring is one from Halsbury, but it is based on Stephen.

209. *Ibid.*, at p. 677.

210. *Ibid.*, at p. 676.

211. *Ibid.*, at p. 664.

212. Although the trial judge rightly charged the jury that the truth of the facts alleged was not a defence, he told the jury a number of times that particular passages were false.

213. *Ibid.*, at p. 670.

214. *Ibid.*, at p. 671.

215. *Ibid.*, at pp. 688 and 694.

216. Brewin, *art. cit.*, remarks (at p. 196): "The judgment of Rand J. deserves to rank, I venture to say, with the great legal judgments of history."

217. *Ibid.*, at p. 680.

218. *Ibid.*, at pp. 682-683. A fuller quotation from Phillimore J. reveals that *R v. Antonelli & Barberi* provides only very oblique support for Rand's conjunction of direct and indirect relationships to Government:

"The count first set out relates to libel, that is, a criminal libel. Seditious libels are such as tend to disturb the government of this country, in my opinion a document published here which was calculated to disturb the government of some foreign country is not a seditious libel, nor punishable as a libel at all. If that is all that this document is then the prisoners are entitled to be acquitted. To hold otherwise would be to hold that all the strong language used against the government of Turkey at the time of the Bulgarian rebellion was seditious libel, and it would make many of our great statesmen guilty of seditious libel, and these persons also who espoused the cause of Italian freedom and gave the present King of Italy his throne. You must look at this libel here only as inciting people to murder the present King of Italy, or the rulers or sovereigns of Europe, in other words there is not much gained by charging this as a libel. If I were you I would ask myself whether this document incites to murder. If so, the prisoner, Antonelli, is guilty, otherwise he is not. The second pair of counts charge, in effect, the inciting to murder the sovereigns and rulers of Europe, and the third pair the inciting to murder Emmanuel III, King of Italy."

219. *Ibid.*, at pp. 683-684.

220. *Ibid.*, at pp. 685.

221. [1951] 2 D.L.R. 369, at p. 379: "in view of the opinions now expressed by the majority, it is settled I think that generally speaking, the writings complained of must, in addition to being calculated to promote feelings of ill-will and hostility between different classes of his Majesty's subjects, be intended to produce disturbance of or resistance to the lawfully constituted authority."

Of the judges who participated in the first hearing Rinfret C.J.C. and Rand J. stand by their original judgments; on the second round, Kerwin and Estey JJ. add to theirs,

and Taschereau J., after giving way on the one point, joins with Cartwright J. in dissenting on another.

222. *Ibid.*, at pp. 419-421.
223. *Ibid.*, at pp.393 [emphasis added]. Despite the 5-3 vote on clause 1 and the 8-1 vote on clause 5, the vote on acquittal was a narrow 5-4, with Rinfret C. J. C.'s vote from clause 5 being joined to the three minority votes from clause 1.
224. [1950] 1 D.L.R. 657, at p. 683 [emphasis added].
225. [1951] 2 D.L.R. 369, at p. 409 [emphasis added].
226. Quoted by Kellock J., *ibid.*, at pp. 385-386. The definition of the Commissioners on Criminal Law (6th Report 1841) p. 17, quoted in *Reg. v. Fussell* (1848), 6 St. Tr. (N.S.) 723, at p. 817, is to the same effect: "an offence which, though inferior to treason, is so far similar, that it tends to injure and endanger the political constitution by engendering public dissensions, tumults and conflicts, by exciting discontent in men's minds against the institutions and laws, or the manner of their administration, or by exposing the Sovereign or public functionaries to hatred and contempt, and thus exciting them to effect certain political changes by unlawful means; such offences, therefore, may be regarded in the light of assaults on the constitution, which, although they do not aim at its destruction, ought, for the sake of its safety and security, to be prohibited under proportionate penalties."
227. [1950] 3 D.L.R. 513; 10 C.R. 26.
228. [1950] 3 D.L.R. 513, at p. 521.
229. *Ibid.*, at p. 517.
230. Cartwright J. spoke for 6 of the 7 judges and the concurring judgment of Kerwin J. was to the same effect. Kerwin J. stated at p. 544 (D.L.R.), p. 39 (C.R.); "Mere annoyance or insult to an individual, stopping short of actual personal violence, is not a breach of the peace. Thus a householder--apart from special police legislation --cannot give a man into custody for violently and persistently ringing his door-bell."
231. *Ibid.*, at pp. 553-4 (D.L.R.), p. 35 (C.R.).
232. *Ibid.*, at pp. 550-1 (D.L.R.), pp. 31-2 (C.R.).
233. R.S.C. 1927, c. 36, s. 238 (f).
234. Stat. 1947, c. 55, s. 5, adding 222B to the Code.
235. The power to prevent an offence by binding over a person to keep the peace sprang from the common law: *MacKenzie v. Martin* (1954) S.C.R. 361. But by reason of s. 8 of the Code a person can no longer be convicted of an offence at common law, and recourse must now be had exclusively to s. 717 for a recognizance to keep the peace. S. 717 is narrowly drawn and probably would not catch a person expected to occasion breaches of the peace at public meetings.
However, it could be argued that the common law power of granting recognizances still remains in a Justice of the Peace on the ground that binding over to keep the peace is not dependent on criminality and is not a criminal sanction at all: it is not a punishment but a precautionary proceeding. This view would be supported by the dicta of Cartwright J. in *Frey v. Fedoruk* and by the Supreme Court of Canada decision in *MacKenzie v. Martin* (1954) 3 D.L.R. 417 where it was held the common law jurisdiction of a Justice of the Peace to require sureties for good behaviour is not limited to circumstances where the defendant has done something which tends to a

breach of the peace. Crankshaw's *Criminal Code of Canada* (7th ed. 1959) p. 1248, takes the view that the common law is still in effect whereas Tremear's *Annotated Criminal Code* (6th ed. 1964), p. 1542, questions it.

236. Tremear's *Annotated Criminal Code* (6th ed., 1964), p. 406.
237. See the article "Defamation" 5 C.E.D. (2nd ed., 1951) at s. 49, p. 569. In *Ortenberg v. Plamondon* (1914), 24 Que. K.B. 69, 35 Can. L.T. 262, a Jewish plaintiff was successful under art. 1053 of the Civil Code against a defendant who in a public lecture accused the Jews of permitting the killing of Christians and of approving usury against Christians; the plaintiff resided in the City of Quebec where only 75 Jewish families out of a total population of 80,000. *Germain v. Ryan* (1918), there were 53 S.C. 543 establishes that in Quebec too there is no individual action for insults to a group, when the members as in the case of a race are so numerous that the defamation cannot affect anyone in particular.
238. Stat. Man., 1934, c. 23, now R.S.M. 1954, c. 60, s. 20. In *Near v. Minnesota* (1931), 283 U.S. 697 the U.S. Supreme Court struck down as unconstitutional censorship a Minnesota statute which provided for the enjoining of "malicious, scandalous and defamatory" publications.
239. Stat. Man., 1934, c. 31, now R.S.M. 1954, c. 185 s. 10(3).
240. "Marginal Comment", The Israelite Press of Winnipeg, Feb. 12, 1965.
241. *Russell v. The Queen* (1882), 7 App. Cas. 829, at p. 839.
242. *In re the Board of Commerce Act*, [1922] 1 A.C. 191, at pp. 198-199.
243. *Proprietary Articles Trade Association v. A.G. Can.*, [1931] A.C. 310.
244. *Ibid.*, at p. 324.
245. *A.G. B.C. v. A.G. Can.*, [1937] A.C. 368, at p. 375 (the Criminal Code Case). The Privy Council upheld federal legislation against preferential discounts or rebates.
246. *In re a Reference as to the Validity of S. 5(a) of the Dairy Industry Act*. Can. Fed. of Agri. v. A.G. Que. [1951] A.C. 179. The Board held that the statutory prohibition was in pith and substance a law for the protection of the dairy industry in Canada. The *Criminal Code* Care was distinguished on the ground that there the essential nature of the legislation was the safeguarding of the public, not a particular class.
247. *Lord's Day Alliance of Canada v. A.G.B.C.* (1959), 19 D.L.R. (2d) 97.
248. *Ibid.*, at p. 102.
249. *Ibid.*, at pp. 107-8.
250. Provincial legislation was under consideration in the *Lord's Day Alliance* case, but only by reason of a provision in the federal Lord's Day Act, R.S.C. 1952, c. 171, s. 6 which makes the federal legislation subject to "any provincial Act or law now or hereafter in force."
251. *A.G. Can. v. A.G. B.C.* [1930] A.C. 111, at p. 118 (the Fish Canneries Case) per Lord Tomlin.
252. "Occupying the Field: Paramountcy in Penal Legislation" (1963), 41 Can. Bar Rev. 234, at p. 234.
253. *Ibid.*, at pp. 261-2.
254. *Provincial Secretary of P.E.I. v. Egan*, [1941] 3 D.L.R. 305.

255. *O'Grady v. Sparling* (1906), 25 D.L.R. (2d) 145.
256. *Ibid.*, at p. 160.
257. *Reference re s. 92(4) Vehicles Act* (1958), 15 D.L.R. (2d) 225.
258. *Saumur v. City of Quebec and A.G. Que.* [1953] 4 D.L.R., 641.
259. *Henry Birks & Sons v. Montreal* (1955) 5 D.L.R. 321.
260. *Switzman v. Elbling* (1957), 7 D.L.R. (2d) 337.
261. Kellock, Locke and Rand JJ.
262. 7 D.L.R. (2d) at p. 357.
263. *Saumur v. A.G. Que.* (1964), 45 D.L.R. (2d) 627.
264. *McKay et al v. The Queen*, not yet reported. [Emphasis added].
265. *Op. cit.*, at p. 257.
266. [1954] 2 D.L.R. 625.
267. *Ibid.*, at p. 661. It should be noted, however, that the Criminal Code also contained confiscation provisions and this allows some possibility of distinction of the defamation statute from the *Johnson* case.
268. There seems to be no analogy between the injunctive relief in a group defamation law and the injunctive power under s. 31 of the Combines Investigation Act, R.S.C. 1927, c. 26, supplementary to s. 498 of the Criminal Code, R.S.C. 1927, c. 36 sustained by the Supreme Court of Canada in *Goodyear Tire & Rubber Co. of Canada Ltd., et al v. The Queen* (1956), 2 D.L.R. (2d) 11. It was held there that in creating the offences under s. 498 of the Code Parliament was acting under the criminal law power, and that by enacting s. 31 of the Combines Investigation Act its purpose and object was to provide an additional means to suppress and prevent the occurrence of such offences.
269. *Op. cit.*, at pp. 252-3.
270. [1941] 1 D.L.R. 548.
271. *Ibid.*, at p. 551.
272. *Ibid.*, at p. 553.
273. *American Communications Assn. v. Douds* (1950), 339 U.S. 382, at pp. 394-395.
274. *Jones v. Opelika* (1942), 316 U.S. 584, at p. 623.
275. *Art. cit.*, at pp. 557-558.
276. Case Comment (1965), 11 Catholic Lawyer 61.

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