

Thomas David Jones

Human Rights: Group Defamation, Freedom of Expression and the Law of Nations

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THE LAW OF NATIONS

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HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS

by

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DEDICATIONS

To the memory of two noble, nurturing, and brilliant African-American women who fought the good fight with minimal educational, social and economic opportunities: Lucy J. Davenport and Carrie L. Deming

To the memory of Barbara Jean Beasley Downs who showed us all how to "keep the faith," "fight the good fight" and "run the race to the finish"

To the memory of Irene Reed, Murdis Walker, Betty McPherson, and Grace Osborne, my spiritual mothers and friends, who supported and loved me as I passed "through many dangers, toils and snares"

And

To the memory of all those who now have moved from "sense to soul" as the result of a suppositious and mortal belief in the Acquired Immune Deficiency Syndrome

To the Living: Judge David S. Nelson, Jewel Durr (Mama Jaguar), Mavis Durr, Mavis Sewell, Pauline Beasley Johnson, Rubye L. Thornton (my sister), Sharon Wells Florida, Professor Madelyn Squire (my spiritual sister), James Holloway, Steven Pflasterer, Attorney Marsha Brown, Attorney James William Morrison, Attorney George C. Valentine, Professor Blake Morant, Professor Barbara L. Bernier, Dr. Genna Rae McNeil, Professor A.B. Assensoh, Professor Max Hillaire, Howard Osborne, Mona Nason, Attorney Joyce Payne-Yette, Attorney Nancy Langworthy, David Anglin, Sharon Richard, Malcolm Richard, Devan Pardue, Attorney Hobart O. Pardue, Madro Bandaris, Attorney Christine Roach, Dr. Beverly N. Roberts, Ms. Laverne Shelton, Reverend Janet Floyd, Stewart Harville, Angela Allen, Atundra Pierre, Mary Jacobs, Paula Ross, Lionel Burns, David Bell, George Walter, and Mary Ann Parker, all very special human beings whose support and encouragement sustained me as I confronted error with Truth

To Dr. Billie Wayne Young who taught me to laugh at error

To Professor Evelyn Wilson who bravely stood with me as we both confronted error with Truth

To John Andrew Ross who advised me, long ago, not to learn everything from self-experience, but to learn from the experiences of others (Unfortunately, I did not accept his advice)

To Paula Pree for demonstrating undeserved kindness toward me in a time of need and despair

And Finally

To Mary Baker Eddy, the discoverer of Christian Science, for enabling me to re-conceive reality by rejecting the unreality of mortal mind (as opposed to Divine Mind), sin, disease, death and material existence, including the false suggestion of human power, authority and self-will as so beautifully expressed in the *Scientific Statement of Being*:

There is no life, truth, intelligence, nor substance in matter. All is infinite Mind and its infinite manifestation, for God is All-in-all. Spirit is immortal Truth; matter is mortal error. Spirit is the real and eternal; matter is the unreal and temporal. Spirit is God, and man is His image and likeness. Therefore man is not material; he is spiritual.

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Professor del Russo was one of the early eminent scholars in the area of international protection of human rights.

During the spring of 1993, I was a Visiting Professor of American Law at the University of Lagos in Lagos, Nigeria pursuant to a grant from the United States Agency for International Development. USAID funded the Democracy in Africa Program in which I participated. The Nigerian section of this work was prepared during my tenure at the University of Lagos. Therefore, I would be remiss if I did not thank the University of Lagos and the Nigerian Institute of Advanced Legal Studies. Specifically, I could never repay Dean A.O. Obilade and Sub-Dean A.A. Utuama for their constant concern, support, and agapé while I taught at UNILAG. Professors A. Uchegbu, P.K. Fogam, T.A. Osipitan, and Attorney Sam Ijalana were always willing to discuss my research on the Nigerian sedition law and each of them made numerous helpful comments. This work incorporates two prior articles written by the author entitled: *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 Howard Law Journal 429 (1980), and *Human Rights: Freedom of Expression and Group Defamation Under British, Canadian, Indian, Nigerian and United States Law - A Comparative Analysis*, 18 Suffolk Trans. L.J. 427 (1995).

A mountain of gold could not repay my aunt, Lucy J. Davenport, who has passed from "sense to soul" – to a greater Life – to a realm of pure being and metaphysical understanding. The moral, spiritual, and financial support she gave me on my journey over the upward and downward slopes of mortal existence was beyond the pale of duty. The words "thank you" are wholly inadequate to express my gratitude and love. Both Lucy J. Davenport and Carrie L. Deming (Aunt Carrie) showered me with "random acts of kindness and senseless acts of beauty." Their demonstrated love for me can only be compared to that "Love That Wilt Not Let Me Go." Finally, I praise God, Divine Mind, the ultimate, metaphysical consciousness of good, "from whom all blessings flow" and "from whence all my strength cometh." The concern and interest which all of the aforementioned individuals and institutions have exhibited by their support and encouragement are compelling testimonies to the essential goodness of the human being. It is this essential goodness that I seek to encourage and share with others through the publication of this legal work.

THOMAS DAVID JONES
Southern University Law Center
Baton Rouge, LA
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PREFACE

"This Report is a study in the power of words to maim, and what it is a civilized society can do about it. Not every abuse of human communication can or should be controlled by the law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favor of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members of identifiable groups innocently caught in verbal crossfire that goes beyond legitimate debate.

An effort is made here to re-examine, therefore, the parameters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assaults - the nonfactors and the nontruths of prejudice and slander.

Hate is as old as man and doubtless as durable. This Report explores what it is the community can do to lessen some of man's intolerance and to proscribe its gross exploitation."

Preface to the Report of the Special Committee on Hate Propaganda (Bill 3-C, House of Commons of Canada,
An Act to Amend the Criminal Code)

* * * *

"You God Damned, stinken, filthy, black skinned monkeys do not belong among an (*sic*) White Human Society. You shit colored animals will eventually be phased out. In plain English - eliminated."

KKK

Mr. X frequents Y Restaurant twice each month. Each time he enters the restaurant, he is greeted: "Hello Little Black Sambo." None of the White patrons of this restaurant are the brunt of insulting characterizations by the owner. Mr. X is Black; the owner is White. Most of the other patrons who visit the restaurant are White. All other Black patrons are greeted with the same salutation.

* * * *

"The entire creation of Allah (God) is of peace, not including the devils who are not the creation of Allah (God) but a race created by an enemy (Yakub) of Allah. Yakub rebelled against Allah and the righteous people and was cast out of the homes of the righteous into the worst part of our planet to live their way of life until the fixed day of their doom.

These enemies of Allah (God) are known at the present as the white race or European race, who are the sole people responsible for misleading nine-tenths of the total population of the black nation.

The Yacub-made devils were really pale white, with really blue eyes; which we think are the ugliest of colors for a human eye. They were called Caucasian – which means, according to some of the Arab scholars, "One whose evil effect is not confined to one's self alone, but affects others."

There was no good taught to them while on the Island. By teaching the nurses to kill the black baby and save the brown baby, so as to graft the white out of it; by lying to the black mother of the baby, this lie was born into the very nature of the white baby; and, murder for the black people also born in them – or made by nature a liar and murderer."

Elijah Muhammad

* * * *

"All Blacks want is sex, loose shoes, and a warm place to shit."

Earl Butz

CHAPTER I

A Prolegomenon: The International Protection of Human Rights

Introduction

CREON. Come girl, you with downcast eyes – do you
Plead innocent or guilty to these things?
ANTIGONE. Guilty. I deny not a thing.
CREON. . . . Now, tell me, Antigone, as briefly as you can.
Did you know an edict had forbidden this?
ANTIGONE. Of course, I knew. Was it not publicly proclaimed?
CREON. So you chose flagrantly to disobey the law?
ANTIGONE. Naturally! Since Zeus never promulgated
Such a law. Nor will you find
That Justice publishes such laws to man below.
I never thought your edicts had such force
They nullified the laws of heaven, which,
Unwritten, not proclaimed, can boast
A currency that everlasting is valid;
An origin beyond the birth of man.
And I, whom no man's frown can frighten,
Am far from risking Heaven's frown by flouting these.¹

Oedipus, the King of Thebes, has suffered the inevitable fate of death: a fate foretold by the gods before his birth.² The sons of Oedipus, Polyneices and Eteocles, are in violent contention for the Theban throne. Creon, a supporter of Eteocles, acts as regent of the city. As a result of the intrafratricidal, armed conflict between Polyneices and Eteocles, both are killed. Hence, Creon rules as the supreme potentate of Thebes. He proclaims that the body of Polyneices must be left to decay on the battlefield – the just deserts for a traitorous insurgent. Such an end was the very epitome of ignobility for a Greek citizen for the last rites of burial were sacred and natural rights performed out of respect for the dignity of the human person. Antigone, the daughter of Oedipus, is in a double bind: she is caught between the positive law of the state and the duty of divine law which dictates the burial of her dead brother. In defiance of Creon's edict, Antigone heeds the imperatives of "higher law" and buries Polyneices.³ Thus, the final episode of the Sophoclean trilogy unfolds.

Embodied in the introductory colloquy between Creon and Antigone is the idea of the existence and supremacy of a *corpus juris* that may not be arbitrarily restricted by the state. Antigone vociferously denies the validity of Creon's edict as being incongruent with an *a priori* "higher law" that is transcendental in nature and emanative of the *jus naturale*.⁴ In the explication of her legally proscribed behavior, Antigone has articulated the very essence of human rights.

Human rights or fundamental freedoms are not novel concepts.⁵ Even in the time of Sophocles there was an awareness of and respect for these sacrosanct and inviolable rights. Unfortunately, there are often tensions between human rights and the laws of the state. Antigone's dilemma was manifested in the form of a confrontation between the right of burial and the domestic law of Thebes. A conflict of this sort is not unique: it is a recurring legal obstruction to the protection of human rights at the international level. The task that must be effected is the reconciliation of these conflicts, so that respect for human rights does not succumb to the exaltation of domestic law. If the resolution of this Antigone complex does not occur, the deterioration of the state's social and political cohesion may be a consequence.

The purpose of this work is to effect the reconciliation of two potentially conflicting legal rights that are also human rights: the right to be free from racially defamatory falsehood or group defamation and the principle of freedom of expression.⁶ The author will thoroughly probe the nature of freedom of expression as it relates to the categorical proscription of a specific form of group defamation – racial or ethnic defamation – in the international and domestic law contexts. Another analytical focal point of this work will be the alleged conflict between the First Amendment of the United States Constitution⁷ and prospective federal legislation outlawing group defamation. It is the position of this writer that legislation by the United States Congress condemning group defamation would not impinge on the cherished First Amendment right to free speech and press as some commentators have suggested.⁸ However, even if racially defamatory falsehood is viewed as within the ambit of First Amendment protection, the United States has an overriding, countervailing, and compelling governmental interest that would justify such an impingement. The conception of free expression as embodied in international legal instruments and the domestic constitutions of other countries does not significantly differ from the American idea of freedom of speech and press.⁹ The vast majority of nation-states have enacted legislation prohibiting group defamation.

The author does not suggest the proscription of all forms of so-called "hate speech." Prohibition of language merely derogatory of racial or ethnic groups or even language that a reasonable man or woman would find merely racially offensive is not a desirable or compelling state goal. However, the

creation of a law outlawing group defamation, *in stricto sensu*, would pass constitutional muster and allow racial or ethnic groups to exercise the same right to be free of defamatory falsehood that individuals enforce daily in the courts. Therefore, the author's position can be accurately described as constitutional minimalism. We will examine the national legislation against racial defamation and speech that incites racial hatred promulgated by three common law democracies as models for an American federal statute. Great Britain, Canada and India have set excellent examples worthy of our emulation. Finally, the author will discuss the possibilities of prosecuting a group defamation action under Nigerian law. Nigeria is also a common law nation.

Racially defamatory speech, the logical precursor of more "aggressive forms of group discrimination,"¹⁰ should not be classified as constitutionally protected speech in the United States. The value of such speech is so slight that it does not merit the respect of the First Amendment, and it is clearly not protected at international law, nor under the constitutional law of most nation-states.¹¹ It is nothing more than "rotten fruit in the marketplace of ideas;"¹² it must therefore be expurgated before it despoils the healthy fruit or is purchased by some naive consumer. With the recent rise of racial hostility in the United States, federal legislation would act as a catalyst to the expurgatory process.¹³ The United States government has continuously voiced its support for enhancing respect for human rights around the globe.¹⁴ The legal norm of nondiscrimination has become a national policy of the United States. Through the enactment of legislation penalizing racial defamation, speech that by its very nature incites violence and racial hatred, American society will have successfully taken yet another step toward the elimination of all vestiges of racism and toward the resolution of the "American Dilemma."¹⁵

The Nature of Human Rights

I am convinced that a new conscience has awakened. . . . That conscience serves a concept of human rights that is not unique to any one country, but is *universal*. . . . Today, no government in this hemisphere can expect silent assent from its neighbors if it tramples on the rights of its own citizens. The costs of repression have increased, but so have the benefits of respecting human rights.¹⁶

During the twentieth century, international cognizance and normative regulation of human rights through the legislative promulgations of the

United Nations¹⁷ indicate the importance of human rights at international law.¹⁸ Traditionally, customary international law created a barrier inhibiting the international protection of human rights. From a doctrinal vantage point, only the state could be a subject of the law of nations. The cognate principles of sovereignty, independence and matters within the domestic jurisdiction of the state constituted obstacles to any attempts toward making the individual a subject of international law.¹⁹

Historically, respect for the rights of individuals was regarded as a matter for internal legislation by the nation-state.²⁰ The nation-state was a product of the *contrat social*,²¹ the consensual agreement that binds men together in the consociation known as civil society. As a result of the confection of this social contract, the individual was regarded as having relinquished to the state power to make rules governing his socio-economic and political behavior.²² However, in modern times, "the final emergence of the individual as a subject of rights and duties in the law of nations"²³ occurred during the Enlightenment in the eighteenth century. Rousseau, Montesquieu, and the philosophes structured the framework for modern human rights.²⁴ Of these developments, del Russo observes:

The theory of human rights first conceived in the Europe of Montesquieu and Rousseau was transformed on the American continent into a political reality and acquired legal existence in the Declaration of Independence. It was there proclaimed that all men are created equal and endowed with liberties which are inherent to the human person, inalienable and paramount to the powers of the State.

That the State is an entity created by the people and having as its end and aim the function of securing to the people their natural rights to life, liberty and the pursuit of happiness.²⁵

The tragic events of World War II awakened the nations of the world to the necessity for protecting human rights at the international level. The pogroms perpetrated upon Jewish people by Nazi Germany led to the drafting of several international multilateral treaties for the protection of human rights. Professor Richard Bilder writes:

[M]ost of what we now regard as "international human rights law" has emerged only since 1945, when, with the implications of the holocaust and other Nazi denials of human rights very much in mind, the nations of the world decided that the promotion of human rights and fundamental freedoms should be one of the principal purposes of the new United Nations organization. . . . Numerous international instruments have been adopted, including the Universal Declaration of Human Rights and the Genocide Convention in 1948; the Convention on the

Political Rights of Women in 1952; the Standard Minimum Rules for the Treatment of Prisoners in 1957; the Convention on the Elimination of All Forms of Racial Discrimination in 1965; and the International Covenant on Civil and Political Rights . . . in 1966.²⁶

The protection of these sacrosanct rights could not be left to the nation-states. All signatories to the United Nations Charter are obligated to respect human rights. The violation of the human rights of an individual by a signatory is therefore the legal concern not only of the particular nation-state involved, but also of the United Nations.²⁷ The Charter of the United Nations is *jus cogens*.²⁸ Hence, the juridical norms contained therein prevail over obligations under other international instruments that are not peremptory norms. It is commonly held that treaties that violate human rights are in conflict with *jus cogens*, since human rights are themselves peremptory norms at international law.²⁹ Accordingly, the Charter is violated when a signatory refuses to support the programs of the United Nations, whose purpose is to enhance protection of fundamental freedoms.³⁰

The international concern for human rights has not been limited to western nations. After World War II, there arose an eastern theory of human rights.³¹ Considering the former Soviet Union a democracy, socialist proponents of human rights contend that the Soviet legal order was totally consistent with the protection of individual rights and the development of a democratic society.³² These theorists assert that only under a socialist regime are individuals equal before the law. They argue that in capitalist countries equality is a function of class. "Thus, the proclaimed equality before the law is just another fiction of bourgeois democracy."³³ Socialist human rights theorists base their conception of human rights on Marxism. They assert that

all right is derived from the state. . . . Those fighting for bourgeois society under the slogan of "enlightenment" called human rights or eternal or inalienable rights those rights which expressed or protected the fundamental institutions of the social system based on capitalistic private ownership: private property, the freedom of enterprise. These . . . were conceived of as human rights because they were of fundamental importance to the . . . social system.³⁴

Kudryavtsev points to the treatment of African-Americans and to the unpunished white collar crime that permeates capitalist society to buttress his view.³⁵ Moreover, he submits that human rights and the principles of socialism are in perfect harmony.³⁶ However, he characterizes theories of the universality of human rights as "anarchistic discourse":

As can be seen from the foregoing, human rights are a social and class concept. There are no human rights in the abstract, in isolation from society. A right is an opportunity guaranteed by the state to enjoy the social benefits and values existing in the given society. For this reason the one and the same right (for instance, the right to education) has an entirely different content in different historical and social circumstances. True equality can be achieved only in a society where there is no exploitation of man by man, no discrimination or oppression.³⁷

Kudryavtsev is not alone in his culture-bound view of human rights. J.D. Van der Vyver, Abdul Aziz Said, and Marnia Lazreg expound similar relativistic philosophies of human rights. Van der Vyver, a South African, attempts to justify the South African social and legal system of apartheid by invoking relativity theory.³⁸ Said, a Moslem, asserts that "[t]he character and nature of human rights are determined in the crucible of a specific sociopolitical culture."³⁹ He charges that the Western conception of human rights "excludes the cultural realities and present existential conditions of Third World societies."⁴⁰ Lazreg strikes similar themes by asserting that the notion of universality is nothing more than "moralistic universalism"; human rights are used "as a tool of international power politics."⁴¹

Contemporary criticisms of universal human rights are ever abundant. Watson applauds the traditional conception of international law and forcefully suggests that no country has anything to do with how another country treats its own citizenry.⁴² He accuses human rights advocates of

seeking . . . a supranational legal order of the hierarchical, coercive type prevalent in domestic systems to act as a check on governmental malfeasance. But international law is not such a system and it cannot be turned into one no matter how desirable that may be from a humanistic standpoint.⁴³

Watson's criticism is not limited to this attack on human rights. He notes that the practice of states does not reveal an international customary regime of human rights. Practice determines customary law, and if the practice of states does not comport with the promulgated legal rules, those rules are "either unenforceable or devoid of significant social results."⁴⁴ Watson then points to the proliferation of human rights violations throughout the world to support his opinion of the inefficacy of human rights norms.⁴⁵ There is no compliance with these rules; they are mere "paper rules," not "real rules."⁴⁶ They are not obeyed and therefore are not laws. He argues that the "Hobbesian state of affairs" existing with regard to respect for human rights in the world reveals these rules are so ineffective that they are in a state of

desuetude.⁴⁷ For Professor Watson, human rights norms are not binding categorical imperatives. These principles simply reflect desirable policy statements or social goals toward which nation-states might aspire.⁴⁸

William F. Buckley, Jr. once launched a vociferous attack on the American human rights policy articulated by President Carter. Buckley is especially critical of "U.S. human rights legislation" that limits foreign assistance to those countries guilty of human rights violations.⁴⁹ Buckley opines that United States human rights policy has been totally ineffective. He believes that the United States is venturing into foreign waters where it really has no business; and it is not to this country's political advantage to do so. Buckley is not without an alternative human rights policy. He recommends that Congress repeal all existing human rights legislation.⁵⁰ A Commission on Human Rights (the Commission) should be established, composed of a chairman and four members. Buckley suggests that the President of the United States appoint the members to the Commission with the advice and consent of the Senate.⁵¹

Under Buckley's proposal, the Commission would have no power. It would serve the function of reporting factual conditions to the public on human rights violations in foreign countries. The Commission could make no recommendations of policy to the government.⁵² The Commission would instead issue annual reports and be available to the executive and legislative branches of the government for hearings.⁵³ The chairman of the Commission would represent the United States in several posts at the United Nations. He would occupy the chair on the Third Committee of the General Assembly without voting power. He would be allowed to speak out on human rights issues.⁵⁴ The chairman also would be present at the Geneva Session of the Standing United Nations Commission on Human Rights.⁵⁵ Again, the chairman would only report on human rights violations in the world. He would decline voting on recommendations that involve policy decisions.⁵⁶ Buckley catalogs a litany of meaningless activities for his proposed human rights commission. He concludes:

Finally the question is asked: Would such a Commission, with its yearly findings, its reports to the nations, its testimony before Congress, its international broadcast of its findings – would it enhance human rights? It is quite impossible to assert that it would do so – or that it would not do so.

With the best will in the world, Wilsonianism succeeded in making the world most awfully unsafe for democracy. But, as mentioned earlier, there is an encouraging survival, through it all, of the idea of the inviolable individual, and that idea needs watering, not only by the practice of human rights at home, but by the recognition of their neglect abroad. It is a waste of time to argue the inefficacy of telling the truth, the telling of which is useful for its own sake.⁵⁷

Buckley's alternative to the present United States policy on human rights is quite interesting. His powerless commission would be nothing more than window-dressing, a hollow entity, giving lip service to the god of human rights. There is no need for another fact-finding human rights commission. Human Rights Watch, The International Commission of Jurists, Amnesty International, and other nongovernmental organizations do an exceptional job of reporting human rights violations of nation-states to the United Nations and the world.

Fortunately, the world community has no need for Mr. Buckley's impotent human rights commission, since the United Nations has now established the Office of the United Nations High Commissioner for Human Rights.⁵⁸ The High Commissioner has been given the daunting task of proactively engaging in efforts to prevent human rights abuse worldwide.⁵⁹ High Commissioner José Ayala Lasso has described his major responsibilities as focusing upon "urgent measures, prevention, technical assistance, coordination and cooperation."⁶⁰ Providing human rights education and public information are also functions of the office.⁶¹ The United Nations High Commissioner for Human Rights is a creation or by-product of the 1993 World Conference on Human Rights convened in Vienna, Austria in 1993.⁶²

On June 14, 1993, the Vienna Conference on Human Rights, sponsored by the United Nations, commenced its opening session mired in controversy over the validity of a universal human rights doctrine. Many Third World or developing nations contended that Western norms of justice and fairness were not applicable to their societies.⁶³ Thus, the developing nations articulated a culture-bound or relativistic concept of fundamental human rights.⁶⁴ The developing nations' particularistic position was championed by such nations as China, Iran, Cuba, and Vietnam,⁶⁵ signatories to the Bangkok Declaration of 1993.⁶⁶ The Bangkok Declaration provides, *inter alia*, that though human rights are universal, they "must be considered in the context of . . . national and regional particularities and various historical, cultural, and religious backgrounds."⁶⁷ Even the then Secretary-General of the United Nations, Boutros Boutros-Ghali, emphatically echoed the developing nations' sentiment of cultural relativism when he opined: "Universality is not something that is decreed. . . . It would be a contradiction in terms if this imperative of universality . . . were to become a source of misunderstanding among us."⁶⁸ Yet, Mr. Boutros-Ghali astutely observed that fundamental human rights reflect "the enduring elements of the world's great philosophies, religions and cultures. . . . We must remember that forces of repression often cloak their wrongdoing in claims of exception."⁶⁹

The voices of relativism and dissent were met with a firm defense of universalism. Foremost among the advocates of universalism was the United States. Secretary of State, Warren Christopher, addressed the delegates at the conference and stated: "We cannot let cultural relativism become the last refuge of repression."⁷⁰ John Shattuck, Assistant Secretary of State for Human Rights and Humanitarian Affairs, vowed that "[i]t is the strong purpose of the Clinton Administration to side with the worldwide movement for universal human rights against any effort to undermine it."⁷¹ Western nations held the belief that the question of the universality of human rights had been settled with the promulgation of the Universal Declaration of Human Rights in 1948.⁷² Ultimately, the universalists won the battle against their relativist opponents. The Vienna Conference on Human Rights reaffirmed the universal nature of human rights and fundamental freedoms by drafting and adopting the Vienna Declaration and Program of Action, a nonbinding, final, conference document.⁷³

Thus, to debunk the notion of universal human rights is sheer folly. The numerous multilateral treaties promulgated by the United Nations and other international regional organizations are cast-iron proof that there exists a worldwide consensus as to the validity of a core of human rights.⁷⁴ Even Said, who criticizes the notion of universalism, has conceded: "Most other Islamic states have adopted Western concepts of individual rights."⁷⁵

Said also admits:

The establishment of national states in the contemporary Islamic world has been accompanied by intellectual and political discontinuity with the old. Traditional Islamic institutions have lost their usefulness as organizing principles and as safeguards for certain basic human rights. The Shariah which served as a protective code for the individual Moslem for centuries is suffering nearly total neglect. Human rights in the Islamic world are thus in a stage of ferment. There is confusion and near anarchy.⁷⁶

Again, Said states:

In reality, if not in theory, most Islamic states act as if the teachings of the Shariah were inappropriate to their present existential condition.⁷⁷

Eventually, the Islamic world may experience a cycle of evolution of human rights similar to that of the West. . .⁷⁸

Most Islamic states are parties to United Nations human rights legislation.⁷⁹ Further, it is a fact that most of the Third World nations are parties to the human rights treaties promulgated by the United Nations.⁸⁰ This fact cannot simply be attributed to cultural imperialism or neocolonial-

ism. Third World countries were instrumental in drafting much of the human rights legislation passed by the United Nations. Many human rights norms are codified in the constitutional laws of these nations.

In the case of J.D. Van der Vyver and socialist or communist writers, a relativistic theory of human rights is useful in excusing gross violations of the human freedoms in their countries. Van der Vyver invokes his theory of relative human rights to argue that apartheid is a just social order.⁸¹ He states that the system of apartheid comports with the rule of law; the rule of law simply denotes legality and nothing more.⁸² In his view, the South African system of jurisprudence is legal. Van der Vyver accuses the International Commission of Jurists of distorting the meaning of the rule of law.⁸³ The International Commission of Jurists "adopted the concept to serve as a collective term for all those legal principles which the Commission regards as essential for the implementation of human rights."⁸⁴

Watson's view of the inefficacy of human rights norms around the world may be interpreted to mean that because there are those who violate the law, the law is worthless. Is society to do away with the criminal law of the state whenever statistics indicate crime is rising, and these rules do not prevent criminal behavior? As one writer stated concerning human rights violations in Iran: "To argue that lack of compliance invalidates the norms is to argue that an unpunished murder invalidates the laws against homicide."⁸⁵

A new school of international scholars have attempted to find a middle ground between universalism and relativism. They describe their interdisciplinary theory of international law as legal polycentricity. The first international conference on legal polycentricity was held in 1992 at the Institute of Legal Science of the University of Copenhagen.⁸⁶ These scholars reject a "single value approach" to law, but deny "radical universalism."⁸⁷ Legal and moral pluralism is the heart of legal polycentricity.⁸⁸ One of legal polycentricity's foremost advocates is Professor Surya Prakash Sinha. Sinha explains:

Legal polycentricity rejects the model of the single-value approach to matters of morals and law. . . .⁸⁹ While legal polycentricity rejects the absolutism of a single-value approach that does not mean . . . an acceptance of a radical relativism that proscribes moral criticism and ends up maintaining that anything goes. . . .⁹⁰ Legal polycentricity accepts the pluralism of moral values. It conceives the problem of legal relationships in terms of relations among various normative orders with a legal system and seeks their reorganization with that legal system.⁹¹ Applied to the society of states and their law, legal polycentricity focuses upon the civilizational pluralism and civilizational diversity of the

members of this society and it examines the consequences of that focus upon the principles of international law.⁹²

This new school of international legal thought is in its infancy and merits full development.⁹³

Conclusion

As a matter of law and morality, the idea of universal human rights is a valid one. One must not succumb to the position of those who would do injury to this concept in the furtherance of political expediency or for the purpose of justifying violations of fundamental human freedoms. The perspicacious observation of Henkin must be borne in mind:

Legitimate claims of cultural pluralism and some measure of ethical relativism must not be allowed to dilute essential values and reduce them to matters of opinion or taste. Cultural differences and traditions may explain, even justify, different ways of giving expression to the values accepted by all in the international human rights documents; they cannot explain or justify barbarism and repression. No civilized culture – Eastern or Western, old or new – justifies torture or detention, unfair trials and other injustice, and broad denials of civil rights and liberties or even of political freedoms. Respect for the individual is not a Western monopoly, and, moreover, it did not come naturally to the West. It had to be nurtured there; it has equally fertile soil elsewhere and can be nurtured there.⁹⁴

One must listen carefully to the words of MacDonald, Johnston, and Morris:

[T]here is a prevailing tendency among all humans to pursue the same values despite the best efforts to suggest the contrary by self-appointed guardians of particular cultures and ideologies. Whatever tenacity might be applied to the objective of retaining cultural diversity, it is likely to fail in the long run, simply because the facts of geographical remoteness are being overborne by feats of human technology.⁹⁵

And the telling statement of Professor Hedley Bull sums up the more appropriate view of human rights:

The Western doctrine of human rights is not a static one: it is radically different today from what it was even 20 or 30 years ago; and it continues to develop. It owes a good deal both to socialist and to Third World influences:

our conceptions of development and welfare . . . derive in part from the Russian Revolution, and our notions of national self-determination and racial equality have been deeply affected by the anti-colonial movement. Individual human rights . . . have not always been accorded a central place in the Western tradition, and today it is increasingly difficult to distinguish between what in the world is Western and what is not. Even if the historical record did show that individual human rights were the unique property of the West, it would not follow that they should be.⁹⁶

The foregoing discourse makes evident that there has been global concern for protecting those peremptory, juridical norms denominated human rights. Although there has been significant success at the international level in the characterization and codification of human rights, the effective implementation of these rights has been fraught with difficulties. Faith in the "Westphalian legal order,"⁹⁷ a legal order that idolizes the interests of the state and sovereignty, has been the order of the day: "*salus republicae supra lex.*"⁹⁸ The right to be free from racially defamatory falsehood or group defamation is a human right. This right warrants urgent protection by nation-states that refuse to outlaw group defamation for fear of infringing freedom of expression. Hence, it is fitting that this work explore the legality of legislation prohibiting group defamation as it relates to the principle of free expression in domestic and international law.

NOTES

1. Sophocles, *Antigone*, in *The Oedipus Plays of Sophocles* 179-180 (P. Roche trans. 1958).
2. See Sophocles, *Oedipus the King*, *id.* at 23-84; Sophocles, *Oedipus at Colonus*, *id.* at 87-160.
3. *Antigone*, *supra* note 1, at 163-164.
4. The concept of the *jus naturale* or law of nature is defined in three works of Cicero: *De Re Publica*, *De Officiis*, and *De Legibus*. Cicero states:

True Law is right reason in agreement with nature, world-wide in scope, unchanging, everlasting. . . . We may not oppose or alter that law, we cannot abolish it, we cannot be freed from its obligations by any legislature, and we need not look outside ourselves for an expounder of it. This law does not differ for Rome and for Athens, for the present and for the future; . . . [I]t is and will be valid for all nations and for all times. . . . He who disobeys it denies himself and his own nature.

Quoted in 3 W. Durant, *The Story of Civilization: Caesar and Christ* 405 (1944); see generally G.C. Christie and P.H. Martin, *Jurisprudence: Text and Readings on the Philosophy of Law* 118-214 (1995); D.M. Adams, *Philosophical Problems in the Law* 19-52 (2nd ed. 1996); E.W. Patterson, *Jurisprudence: Men and Ideas of the Law* 332-369 (1953) (stating "Cicero is said to have had a conception of heavenly law (*lex caelestis*) from which natural law was derived as the perfected reason of the wise man. . . . The universality and immutability of natural law or 'true' law as proclaimed [by Cicero]."); *Philosophy of Law* (5th ed.) 7-12 (J. Feinberg and Hyman Gross eds. 1995); see generally *The Roman Law Tradition* (A.D.E. Lewis and D.J. Ibbetson eds. 1994); W.L. Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (1989); D. Chambers, *Students' Guide to Roman Law* (1994).

The men of Sophocles' day were aware of human rights or fundamental freedoms, but the ancient Romans also were cognizant of a body of law that transcended the mere positive law of mortal man. The Roman *ius gentium* or *ius inter gentes*, from which the law of nations evolved, is defined in the *Institutes of Justinian* as a system of legal rules that was discoverable or knowable to men through that faculty of mind called reason. At Roman law, the *ius civile* (civil law) governed the social behavior of the citizens of Rome. Slaves or non-Romans were not protected by or subject to the civil law. Because of the expansion of the Roman empire, it became necessary for Rome to "adjust itself to the codes and customs of lands that the Roman arms and diplomacy had won." *Id.*

Hence, the creation of the *ius gentium*, or the law of the people, provided a body of law to govern slaves and foreigners or noncitizens. Laws common to all men were admitted to the Roman system of jurisprudence for the protection of these individuals as human beings. The *ius gentium* was later adopted by the theologians who, in the name of the supreme deity, declared that the *ius gentium* was a part of divine law expressing the dignity of man. The *ius gentium* was seen as synonymous with the dictates of right reason or natural law. Gaius characterized it as the law that natural reason had established among all mankind. See 3 W. Durant, *id.* See generally M. Crawford, *The Roman Republic* (2nd ed. 1993); C. Wells, *The Roman Empire* (2nd ed. 1992); A. Cameron, *The Later Roman Empire* (1993); see also *The Roman Law Reader* (F.H. Lawson, ed. 1969); F. Bernard, *The First Year of Roman Law* (1906); W.W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (1921).

5. See *Human Rights in Western Civilization: 1600-Present* (J.A. Maxwell, J.J. Friedberg, D.A. DeGolia eds., 2nd ed. 1994); M.W. Janis, *An Introduction to International Law* 241-272 (1993); A.H. Robertson and J.G. Merrills, *Human Rights in the World* 3-21 (1989); R. August, *Public International Law: Text, Cases, and Readings* 251-252 (1995).

6. The terms group libel, group defamation, racial defamation or ethnic defamation are used throughout this work as synonymous terms. Technically, group defamation laws include defamatory utterances against groups based on race, nationality, ethnic origin, sex, and religion. At the common law, an action for

defamation of character required proof of several elements: (1) a defamatory statement, (2) falsity, (3) publication to a third party, (4) malice or some other degree of fault, (5) damages, and (6) no defense of privilege. A statement or communication is said to be defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him." See Restatement of Torts 2d § 559 (1977 ed.); see also *Prosser and Keeton on Torts* 773-774 (5th ed. 1984). Further, defamatory statements "tend to hold the plaintiff up to hatred, contempt, or ridicule, or to cause him to be shunned or avoided." *Prosser and Keeton, id.* at 773. Group defamation is that form of defamation (libel or slander) that is directed at racial minorities or individuals of specific nationalities or ethnic origins. (See Chapter IV for further discussion of group defamation or group libel). The proscription of racially or ethnically defamatory speech is found in several international legal instruments. Article 4 of the International Convention of the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, (entered into force Jan. 4, 1969), reprinted in 5 I.L.M. 352 (1969) [hereinafter "Racial Discrimination Convention"] codifies this crime. The Racial Discrimination Convention was signed by the United States on September 28, 1966 and ratified on June 24, 1994. Marian Nash (Leich), *Contemporary Practices of the United States Relating to International Law*, 88 Am. J. of Int'l L. 719, 721 (1994).

The Racial Discrimination Convention was transmitted by President James Carter to the Senate for its advice and consent as mandated by the Constitution. See *President's Human Rights Treaty Message to the Senate*, 14 Weekly Comp. of Pres. Doc. 395 (Feb. 23, 1978). One hundred thirty-seven countries have ratified the Racial Discrimination Convention. B.E. Carter and P.R. Trimble, *International Law: Selected Documents* 423 (1995). The United States contended freedom of expression problems are created by Article 4 of the Convention. The Department of State drafted a reservation to the provision. Article 4 provides:

State parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or groups of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

7. U.S. Const., amend. I provides, in relevant part:

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.

Ironically, though the First Amendment is often cited to support the unconstitutionality of group defamation statutes, Jerome T. Shestack, the United States delegate to the European conference reviewing compliance with the Helsinki Accords, complained that "there are most disturbing reports of voluminous anti-Semitic sentiments thinly disguised as anti-Zionism appearing in the Soviet press and media." *Whatever Happened to Freedom of Speech?*, Boston Globe, Nov. 25, 1980, at 3.

8. See generally commentaries on the Racial Discrimination Convention: K.J. Partsch, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination, in Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (Sandra Coliver ed. 1992); F.C. Newman, *A Nutshell Approach to the U.N. Human Rights Law Protecting Minorities*, 19 Fletcher Forum of World Affairs 5 (1995); J.J. Paust, *Rereading the First Amendment in Light of Treaties Proscribing Incitement of Racial Discrimination and Hostility*, 43 Rutgers L. Rev. 565-573 (1991); J.J. Paust, *International Law as Law of the United States* 313-322 (1996); N. Nathanson & E. Schwelb, *The United States and the United Nations' Treaty on Racial Discrimination* (1965) [hereinafter "Nathanson & Schwelb"]; Comment, *The International Human Rights Treaties: Some Problems of Policy and Interpretation*, 126 U. Pa. L. Rev. 886 (1978). See also C. Ferguson, *The United Nations Convention on Racial Discrimination: Civil Rights by Treaty*, 1 Law in Transition 61 (1965); see generally N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1978); F. Newman, *International Control of Racial Discrimination: A Symposium*, 56 Calif. L. Rev. 1559 (1968); P. Schroth & V. Meuller, *Racial Discrimination: The United States and the International Convention*, 4 Human Rights 171 (1974-75); T. Jones, *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 How. L. J. 429 (1980); T. Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 Am J. of Int'l L. 283 (1985). See also Comment, *Race Defamation and the First Amendment*, 34 Fordham L. Rev. 653 (1966) [hereinafter "Comment"]; J.

Tannenhaus, *Group Libel*, 35 Cornell L. Quarterly 261 (1950); J. Kelly, *Criminal Libel and Free Speech*, 6 Kan. L. Rev. 295 (1958); G.A. Pemberton, *Can the Law Provide a Remedy for Race Defamation in the United States?*, 14 N.Y.L.F. 33 (1968).

9. See Chapter II *infra*.

10. M. Zuleeg, *Group Defamation in West Germany*, 13 Clev. Mar. L. Rev. 52, 63 (1964); see also C.L. Nier III, *Racial Hatred, A Comparative Analysis of the Hate Crime Laws of the United States and Germany*, 13 Dick. J. Int'l L. 242 (1995).

11. See *id.*

12. The idea of "rotten fruit in the marketplace of ideas" is that of Professor Milton Katz, who taught at the Harvard Law School.

13. See Klanwatch Intelligence Report, Southern Poverty Law Center (Nov. 1996); Klanwatch Intelligence Report, Southern Poverty Law Center (Oct. 1995); Klanwatch Intelligence Report, Southern Poverty Law Center (Aug. 1995); Klanwatch Intelligence Report, Southern Poverty Law Center (Feb. 1996); 26 SPLC Report (Special 25th Anniversary Issue 1971-1996) (March 1996) (detailing activities of the Southern Poverty Law Center to fight hate crimes of the Ku Klux Klan and other white supremacists groups from 1971-1996); B. Stanton, *Klanwatch: Bringing the Ku Klux Klan to Justice* (1991); M. Dees, *Gathering Storm: America's Militia Threat* (1996); M. Dees, *Hate on Trial: The Case Against America's Most Dangerous Neo-Nazi* (1993); J.A. Zuniga, *Country Shows Rise in Racial Hate Crimes: Attacks on Jews Level Off*, ADL Reports, Houston Chronicle, Feb. 14, 1996, at 18; G. Lucas, *Hate Crimes Most Often Due to Race: State Report List Links to 672 Incidents in 1994*, Sacramento Chronicle, Dec. 13, 1995, at 1; *Racial, Religious Motives Lead Hate Crimes List*, Chicago Tribune, Nov. 14, 1995, at 2; *Reported Hate Crimes Dip: Most Cases Involved Race*, Greensboro News & Record (N.C.), Nov. 14, 1995, at A6; *Hate Crimes Plunged 15% in U.S. in '94; FBI Says: Anti-Defamation League Doubts Whether Figures Reflect Racial Climate*, Milwaukee Journal Sentinel, Nov. 13, 1995, at 4; M. O'Donnell, *Race Leading Factor in Hate Crimes Increase*, Chicago Sun-Times, Mar. 12, 1995, at 11; E. Gamerman, *Hate Crimes Expose the Complex History of Annapolis' Race Relations*, Baltimore Sun, Dec. 25, 1994, at 4F; K. Kindy, *Schools Attempt to Quell Hate Crimes, Racial Fights, Protests Prompt Board to Track Prejudice on L.A. Unified Campuses*, L.A. Times, Aug. 16, 1994, at N4; S. Moffat, *Anti-Asian Hate Crimes Studied - Race Relations: Legal Group Says Such Incidents Are Underreported Nationally*, L.A. Times, April 26, 1994, at 3; D. Morgan, *President Decries Fires at Churches: Clinton Links Arson to "Racial Hostility," Supports Legislation*, Washington Post, June 9, 1996, at A1 (30 African-American churches in the south destroyed by arson. President Clinton stated that "it is clear that racial hostility is the driving force behind a number of these incidents."); J.S. Landay, *Rise in Hate Crimes Looms Behind Church Burnings*, Christian Science Monitor, June 28, 1996, at 4; P. Thomas, *Klan Members Face Federal Charges in Church Burning*, Washington Post, July 9, 1996, at A3. See FBI (U.S. Dept. of Justice) Uniform

Crime Reports, Hate Crime Statistics (1994); FBI (U.S. Dept. of Justice) Uniform Crime Reports, Hate Crime Statistics (Preliminary Report)(1995); *Hatred Turns Out Not To Be Color Blind: An FBI Report Finds that Most Bias Crimes Are Committed Against Blacks*, Time Magazine, Jan. 18, 1993, at 22 (FBI found that Blacks were targets of most hate crimes (36%)). Whites were 16% of the victims and 17% of the victims were Jews); *Special Report: The Ku Klux Klan - a History of Racism and Violence* (14th Edition), Klanwatch, Southern Poverty Law Center (ed. Sara Bullard, 1991); T. Welch, *Hate Groups Growing, Changing*, The Tennessean, Mar. 26, 1992, 1B, at col. 3; H. Appleman, *Experts Cite Growing Acceptance of Racial Intolerance on Campus*, Morning Advocate (Baton Rouge, La.), Nov. 25, 1991, at 4E; *see also* Hate Crime Statistics Act, Pub. L. 101-275, 104 Stat. 140, 28 U.S.C. 534 (1990); 1 U.S. Code Cong. and Admin. News, 101st Cong., 2d Sess. (1990); Hate Crime Statistics Act, Senate Report No. 101-21, May 1, 1989, 4 U.S. Code Cong. and Admin. News, 101st Cong., 2d Sess. 158-168 (1990); J.M. Fernandez, *Recent Development - Bringing Hate Crimes Into Focus - The Hate Crimes Statistics Act of 1990*, 26 Harv. C.R. - C.L. L. Rev. 261 (1991); T.K. Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 Yale L.J. 845, 845-46 (1990) (three thousand incidents of hate crimes were documented between 1980 and 1986); *see also* D. Benjamin, *Foreigners Go Home*, Time, Nov. 23, 1992, at 48 (racist neo-nazi youth in Germany engage in racial violence against immigrants); G. Burke, *Nazi skins: Back to the Future*, Metropolitan (Italy), April 16 - May 1, 1992, at 16; S. Kinzer, *Germany Creating Police Unit Aimed at Rightist Groups: Officers to Monitor Neo-Nazis in Response to Outcry Over Anti-Foreigner Attacks*, New York Times, Nov. 28, 1992, at A1; M. Fisher, *Germans Link Deaths to Far-Right Climate*, Washington Post, June 4, 1993, at A20 (neo-Nazis slayed five Turks in Solingen, Germany); Boston Police Dept., 1978-91 Statistical Data, Community Disorder Unit Incident Breakdown (1991); *see also* *White Hate Groups Grow*, Emerge, 9 (June 1992) (Klanwatch reports increase in white supremacist groups from 273 in 1990 to 346 in 1991. "Reports of cross-burnings doubled in 1991, bias-related vandalism tripled, and hate-motivated assaults increased significantly." There were 25 documented hate-motivated murders in 1991. This was more than in any year since Klanwatch began in 1981.); S.A. Pressley, *Burnout Overtakes Town Plagued by Klan, Fires*, Washington Post, June 23, 1996, at A3; *Police Use Tear Gas to Quell Violent Protest of KKK Rally*, Washington Post, June 23, 1996, at A23.

14. Human Rights: International Instruments, Chart of Ratification as of 30 June 1995, ST/HR/4/ Rev. 12, No. E. 87. XIV. 2 (1995); J. Shestock, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy*, 2 Hum. Rts. Y.B. 25, 49-50 (1989).

In the *President's Address to the General Assembly*, 13 Weekly Comp. of Pres. Doc. 397 (Mar. 17, 1977), President Carter stated:

I see a hopeful world, a world dominated by increasing demands for basic freedom, for fundamental rights, and for higher standards of human existence.

To demonstrate this commitment, I will seek congressional approval of and sign the U.N. Covenants on Economic, Social, and Cultural Rights, and the Covenant on Civil and Political Rights. And I will work closely with our own Congress in seeking to support the ratification not only of these two instruments but the United Nations Genocide Convention and the Treaty for the Elimination of All Forms of Racial Discrimination, as well.

Id. at 397, 401. See also *Inaugural Address of President Carter*, 13 Weekly Comp. of Pres. Doc. 87 (Jan. 20, 1977).

15. G. Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944). Myrdal writes that the American Dilemma is

the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the "American Creed," where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.

Id. at p. xivii.

16. T. Smith, President Presses Reagan on Human Rights Policy (President James Carter's Speech Before the Organization of American States), N.Y. Times, Nov. 20, 1980, at A1.

17. See generally *The United Nations and Human Rights: A Critical Appraisal* (P. Alston ed. 1992); see N.H. Kaufman, *Human Rights and the Senate: A History of Opposition* 3 (1990); see, e.g., The Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR., 3d Sess., U.N. Doc. A/180 (1948); The International Covenant on Civil and Political Rights, G.A. Res. 220 (XXI), 21 U.N. GAOR, 11th Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force March 23, 1976) [hereinafter cited as Covenant on Civil and Political Rights] (There are 131 parties to the Covenant on Civil and Political Rights); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. 15, U.N. Doc. A/6310 (1966) (entered into force Jan. 13, 1976) [hereinafter cited as Covenant on Economic, Social, and Cultural Rights] (There are 132 parties to the Covenant on Economic, Social and Cultural Rights); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2220 (XXI), U.N. GAOR, 21st Sess., Supp. 15, U.N. Doc. A/6316 (1966) (entered into force March 23, 1976); Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904, U.N. GAOR, 18th Sess., Supp. 15 U.N. Doc. A/5515 (1963);

Racial Discrimination Convention, *supra* note 6; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); European Convention of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). See those multilateral treaties that promote the rule of law during armed conflicts: T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1991); Geneva Convention for the Amelioration of the Wounded and Sick of the Armed Forces in the Field, Aug. 12, 1949, [1956], 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949 [1956], 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [1956], 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [1956], 6 U.S.T. 3516, T.I.A.S. No. 3365; I.C.R.C., Additional Protocols to the Geneva Conventions of Aug. 12, 1949 (1977); L.J. LeBlanc, *The OAS and the Promotion and Protection of Human Rights* (1977); see also Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, Supp. 46, U.N. Doc. A/34/46 (1979), reprinted in 19 I.L.M. 33 (1980); Convention on the Rights of the Child, G.A. Res. 44/25, 28 I.L.M. 1448 (1989); American Convention on Human Rights, O.A.S. Off. Rec. OEA 1/Ser. L/V/II.23, Doc. 21, rev. 6 (1979) (entered into force July 18, 1978); African Charter on Human and Peoples' Rights, OAU Doc. CAB/LC6/67/3 Rev. 5 (1981) (entered into force Oct. 21, 1986). The foregoing enumeration is not intended to be all-encompassing.

18. Dr. A.L. del Russo, Professor Emeritus of the Howard University School of Law, has eloquently characterized the idea of human rights:

Human rights . . . are not derived to man from the fact that he is a national of one particular state, but from his own nature and dignity as a human person. They are not the creation of any one man or nation; they are the heritage of mankind, universal, inviolable, and inalienable. They have the shape, content and flavor of man's social and political experience through the centuries wherever and whenever liberty has lived in the hearts of men and women of all creeds, races and nationalities. But the mere recognition and awareness of the existence of such rights are not sufficient to guarantee men their enjoyment. The human person must also be provided effective and just protection of his rights under law. The securing of fundamental rights to all men is the essential office of every public authority whether at the national level or in the world community.

del Russo, *Foreword: Symposium on the International Protection of Human Rights*, 11 How L. J. 257 (1965).

19. Robertson and Merrills, *supra* note 5, at 2; E. Lauterpacht, *Some Concepts of Human Rights*, 11 How. L.J. 264, 266-267 (1965); see also Janis, *supra* note 5, at 227-240.

20. Robertson and Merrills, *id.*; D.P. Forsythe, *The Internationalization of Human Rights* 15 (1991).
21. J.J. Rousseau, *The Social Contract and Discourses* (G.D.H. Cole trans. 1941). The "contrat social" or social contract is a pact or agreement between the governed and those who govern that allows the civil authorities to regulate and control the people through law for the common good.
22. See *Human Rights in Western Civilization: 1600-Present* 21 (J.A. Maxwell, J.J. Friedberg, D.A. DeGolia eds., 2nd ed. 1994).
23. A.L. del Russo, *The International Protection of Human Rights* 1 (1971) [hereinafter cited as del Russo]; see also A. Cassese, *Human Rights in a Changing World* 3 (1991).
24. del Russo, *id.*
25. del Russo, *id.*
26. Quoted in B.E. Carter and P.R. Trimble, *International Law* 895 (1995); see also F. Newman and D. Weissbrodt, *International Human Rights: Law, Policy and Process* 1-17 (1990). The perceived importance of human rights is reflected by the abundance of scholarly literature written concerning the subject. See generally M. Haas, *Improving Human Rights* (1995); Guide to Interpretation of the International Covenant on Economic, Social and Cultural Rights (L.B. Sohn 1996); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993); E. Henze, *Sexual Orientation: A Human Right* (1995); M.C. Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (1995); *Homosexuality: A European Community Issue* (K. Waaldijk and A. Clapham eds. 1994); P.R. Baehr, *The Role of Human Rights in Foreign Policy* (1994); J. Fitzpatrick, *Human Rights in Crisis* (1994); *International Human Rights: Documents and Introductory Notes* (F. Ermacora, M. Nowak, H. Tretter eds. 1993); *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (D. Gomien ed. 1993); A.G. Mouier, *Regional Human Rights: A Comparative Study of the West European and Inter-American Systems* (1992); J. Humphrey, *No Distant Millennium: The International Law of Human Rights* (1991); A.A. Said, *Human Rights and World Order* (1978); A. Fouad, *Human Rights and World Order Politics* (1978); E. Schwelb, *Human Rights and the International Community* (1964); I. Szabo, *Socialist Concepts of Human Rights* (1966).

There has been a recent proliferation of works on the human rights of women. See, e.g., *Human Rights of Women: National and International Perspectives* (R.J. Cook ed. 1995); *Reconceiving Reality: Women and International Law* (D.G. Dallmeyer ed. 1993); R.J. Cook, *The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women* (1995); *Women's Views of the Political World of Men* (J.H. Stiehm ed. 1984); J.M. Vogelson, *ABA Recommendation and Reports: Women's Human Rights*, 30 Int'l Lawyer 209 (1996); A.E. Mayer, *Where Does the U.S. Stand on Women's Human Rights?*, 6 Human Rights Interest Group Newsletter (ASIL) 18 (1996).

Some legal theorists argue that even animals are entitled to certain rights. See, e.g., *Animals and Women: Feminist Theoretical Explorations* (C.J. Adams and J. Donovan eds., 1995); E.B. Pluhar, *Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals* (1995); G.L. Francione, *Animals, Property and the Law* (1995); J. Rifkin, *Beyond Animal Experimentation: The Moral Issues* (R.M. Baird & S.E. Rosenbaum eds. 1991); T. Regan, *The Case for Animal Rights* (1983); P. Carruthers, *The Animal Issue: Moral Theory in Practice* (1992); P. Singer, *Animal Liberation* (2d ed. 1990); T.H. Shaddow, *Religious Ritual Exemptions: Sacrificing Animal Rights for Ideology*, 24 Loyola of Los Angeles L. Rev. 1367 (1996); A. Johnson, *Animal Rights Cause Gains Credibility*, 1 Animal Law 11 (1995); H.M. Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 Animal Law 79 (1995); M.A. Sanchez, *Is the Death-knell Sounding for Animal Rights? The Sacrifice of Animals for Religious Purposes Under the Guise of the First Amendment Right to the Free Exercise of Religion*, St. Thomas Law Rev. 217 (1994); see also *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); Animal Welfare Act of 1970, 7 U.S.C. §§ 2131 et seq. (governing the "humane handling, care, treatment, and transportation of animals. . . ."); C. McCarthy, *Rabid Rhetoric Against Animal Rights*, Washington Post, June 25, 1996, at C11 (defending "animal rightsters" as not "purely driven by emotion . . . anti-progress and increasingly violent").

27. Specifically, note the preamble and arts. 1, 13, 55, 56, 62(2) 68, 73 and 76 of the U.N. Charter; see also United Nations Yearbook 1001 (1970). These provisions establish the duty of states parties to observe and respect human rights.

28. O. Schachter, *International Law in Theory and Practice* 342-344 (1995); L. Sohn, *The Human Rights Law of the Charter*, 12 Tex. Int'l L. J. 129 (1977). The concept of *jus cogens* or peremptory norms of international law is defined in art. 53 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969); 1968-69 U.N. Conference on the Law of Treaties, Official Records (1st and 2d Sess.), Documents of Conference 296 (U.N. Publ. E. 70 V. 5) (entered into force 1980). See also I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984). See generally B.E. Carter and P.R. Trimble, *International Law* 130-132 (1995).

29. Schachter, *id.* at 343-44; Sohn, *id.* at 131-32. The prohibition against racial discrimination is a human rights norm considered *jus cogens* by many scholars. See 2 Restatement of Foreign Relations Law (Third), § 702 at 174 (1987); R.E. Schwartz, *Chaos, Oppression, and Rebellion: The Use of Self-Help to Secure Individual Rights Under International Law*, 12 B.U. Int'l L.J. 255, 263 (1964); T.K. Ragland, *Burma's Rohingyas in Crisis: Protection of "Humanitarian Refugees" Under International Law*, 14 B.C. Third World L.J. 301, 324 (1994); B. Simma and P. Alston, *The Source of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Int'l L. 82 (1992); V.A. Perry, *Human Rights and Movement of Persons*, 78 Am. Soc'y Int'l L. Proc. 339, 352 (1986); D.G. Partan, *The International Law Process: Cases and Materials* 231-238 (1992). See also G. Alfredsson, *Minority Rights and a New World Order in Broadening the Frontiers*

of Human Rights: Essays in Honor of Asbjørn Eide 55, 60-77 (1993) ("Equality and non-discrimination constitute well-established rules of international human rights law binding on all states.").

30. Sohn, *id.* Article 53 of the Vienna Convention on the Law of Treaties of 1969 specifically states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Since human rights are *jus cogens* and are reaffirmed in the United Nations' Charter which is also *jus cogens*, a violation of the rights provisions of the United Nations' Charter is a violation of *jus cogens*.

31. See generally D.K. Emmerson, *Human Rights Really Divide East and West*, Advocate (Baton Rouge, LA), Apr. 28, 1996, at 9B; see G.M. Danilenko, *Customs in Contemporary International Law* (1988).

32. V. Kudryavtsev, *The Truth About Human Rights*, 5 *Human Rights* 193 (1976); see R. Nordahl, *A Marxian Approach to Human Rights*, in A.A. An-Na'im, *Human Rights in Cross-Cultural Perspectives* 162 (1992) (stating prioritization of human rights should be based upon universal needs).

33. Kudryavtsev, *id.* at 195.

34. F. Newman and D. Weissbrodt, *International Human Rights: Law, Policy and Process* 337 (1990).

35. Krudryavtsev, *supra* note 32, at 195.

36. *Id.* at 194-96.

37. *Id.* at 199. See Newman and Weissbrodt, *supra* note 34, at 338; but see R.A. Mullerson, *Sources of International Law: New Tendencies in Soviet Thinking*, 83 Am. J. Int'l L. 494 (1989); P.H. Juvilier, *Guaranteeing Human Rights in the Soviet Context*, 28 Colum. J. Transnational L. 133 (1990); D. Gusev, *The International Instruments on the Protection of Human Rights and their Interpretation in USSR Judicial Practice*, 89/1 Bull. Hum. Rts. 48 (1990); G.I. Tunkin, *Theory of International Law* (1974).

38. See J.D. Van der Vyver, *Seven Lectures on Human Rights* (1976) (reviewed by Jones), 22 How. L.J. 539 (1979).

39. A.A. Said, *Human Rights in Islamic Perspectives*, in *Human Rights: Cultural and Ideological Perspectives* 86 (A. Pollis & P. Schwab eds. 1979).

40. *Id.*

41. M. Lazreg, *Human Rights, State and Ideology: An Historical Perspective*, in A. Pollis & P. Schwab, *supra* note 39, at 40.

42. J.S. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. of Illinois L. Forum 609.

43. *Id.*

44. *Id.* at 611.

45. *Id.* at 612.

46. *Id.* at 626.

47. *Id.* at 612.

48. Newman and Weissbrodt, *supra* note 34, at 350; see also J.S. Watson, *Normativity and Reality in International Human Rights Law*, 13 Stetson L. Rev. 221 (1984).

49. W.F. Buckley, *Human Rights and Foreign Policy: A Proposal*, 58 Foreign Affairs 784, 784-88 (1980).

50. *Id.* at 793.

51. *Id.*

52. *Id.*

53. *Id.* at 794.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 796.

58. J. Preston, *U.N. Acts to Establish Commissioner for Rights: U.S. Lauds "Milestone" Adding Flexibility*, Washington Post, Dec. 17, 1993, at A36; J.L. Franklin, *Creation of UN Job on Rights is Hailed*, Boston Globe, Jan. 1, 1994, at 7; S. Awanojara, *Asian Compromise: UN Gets Human Rights Chief with Trimmed Powers*, Far Eastern Economic Review, Dec. 30, 1993, at 17; C. Duodu, *Human Rights Finally Gains an Office at the United Nations, Now for an Officer*, Edmonton Journal, Dec. 29, 1993, at A16; *U.N. Human Rights Post: Needed More Than Ever*, Seattle Times, Dec. 16, 1993, at B20; *U.N. Creates Top Post on Human Rights (Reuters)*, Baltimore Sun, Dec. 21, 1993, at 5A; *U.N. to Name Human Rights Commissioner*, New York Times Abstracts, Dec. 21, 1993, at 15; *U.N. Moves to Create Human Rights Post*, Chicago Sun Times, Dec. 17, 1993, at 40.

59. P. Alston, *ASIL Insight: The United Nations High Commissioner for Human Rights*, American Society of Int'l L. Newsletter 1, 2 (1995).

60. *Id.*

61. *Id.*; see also A. Clapham, *Creating the High Commissioner for Human Rights: The Outside Story*, 5 European J. of Int'l Law 556 (1994); H. Cook, *The Role of the High Commissioner for Human Rights: One Step Forward or Two Steps Back?*, in *Human Rights Implementation Through the United Nations (panel)*, Proceedings of the 89th Annual Meeting of the American Society of Int'l Law 225-235 (1995); see generally Reports of the United Nations High Commissioner for Human Rights, UN Docs. A/49/36/1994; E/CN.4/1995/98; and E/1995/000.

62. Alston, *supra* note 59.

63. See I. Guest, *Vision of Rights Lacking in Vienna*, Christian Sci. Monitor, July 15, 1993, at 19; P. Lewis, *Differing Views on Human Rights Threaten Forum*,

N.Y. Times, June 6, 1993, at A1, A6; L. Mouat, *United Nations Addresses Worldwide Human Rights*, Christian Sci. Monitor, June 9, 1993, at 12 (reporting that "some nations now insist that cultural differences must be taken into account when monitoring human rights. . . . They say the West is trying to impose its values on them."); C. Reardon, *Talk of "Universality" Dominates UN Rights Conference*, Christian Sci. Monitor, June 18, 1993, at 7. Conflicting views as to the essence of human rights norms were expressed by many countries. Kenneth Roth, Acting Executive Director of Human Rights Watch in New York, warned:

Cultural differences . . . are not an excuse to violate fundamental human rights. . . . This is in fact a very fundamental attack on . . . the universality of human rights.

Guest, *id.* at 19. See also A. Riding, *Human Rights: The West Gets Some Tough Questions*, N.Y. Times, June 20, 1993, at 5 (China's Deputy Foreign Minister, Liu Huaqiu, stating: "The argument that human rights is the precondition for development is unfounded." Singapore's Foreign Minister, Wong Kan Seng, noting: "[T]oo much stress on individual rights over the rights of the community will retard progress. . . . [T]he community's interests are sacrificed because of the human rights of drug consumers and traffickers." Pierre Sane, the head of Amnesty International, commenting: "[Y]ou can't choose between torture and starvation."). See generally *Life, Liberty and the Pursuit of Torture*, Time, June 29, 1993, at 17 (Chinese Premier Li Peng, stating: "The imposition of a certain conception of democracy and human rights should be opposed." A Burmese Foreign Ministry official, stating: "The Asian countries, with their own norms and standards of human rights, should not be dictated to. . . ." A Malaysian Law Minister noting: "What is worrying is the attempt . . . [to] impose definitions, standards and practices based on one-sided views.").

64. See generally A.D. Renteln, *International Human Rights: Universalism Versus Relativism* 71 (1990). Renteln is en rapport with ethical relativist Schmidt who holds that "there can be no value judgments that are true, that is, objectively justifiable independent of specific cultures." *Id.* (quoting Paul F. Schmidt, *Some Criticisms of Cultural Relativism*, 70 J. Phil. 780, 783 (1955)); M. Hershkovits, *Cultural Anthropology* 364 (1955) (describing cultural relativism as "a philosophy that recognizes the values set up by every society to guide its own life and that understands their worth to those who live by them, though they may differ from one's own."). See also A.B. Bozeman, *An Introduction to Various Cultural Traditions in International Law*, in *The Future of International Law in a Multicultural World* 85 (Rene-Jean Dupuy ed. 1984); M.E. Frankel & E. Saideman, *Out of the Shadows of the Night: The Struggle for International Human Rights* (1989); M. Lee, *North Korea and the Western Notion of Human Rights in Human Rights in East Asia: A Cultural Perspective* (J.C. Hsiung ed. 1985). F.R. Teson describes cultural relativism as follows:

In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society. A central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable. . . . [R]elativists claim that substantive human rights standards vary among different cultures and necessarily reflect national idiosyncrasies. What may be regarded as a human rights violation in one society may properly be considered lawful in another, and Western ideas of human rights should not be imposed upon Third World societies. Tolerance and respect for self-determination preclude crosscultural normative judgments. Alternatively, the relativist thesis holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.

F.R. Teson, *International Human Rights and Cultural Relativism*, 15 Va. J. Int'l L. 869, 870-1 (1985) (citations omitted).

For example, the African conception of human rights has been described as primarily communal as opposed to individual in character by Professor A. Uchegbu of the University of Lagos, in Lagos, Nigeria and Osita C. Eze of the Nigerian Institute of International Affairs in Lagos, Nigeria. In commenting on the nature of human rights as reflected in the African Charter of Human and Peoples Rights [ACHPR], promulgated by the Organization of African Unity in 1981 (entered into force in 1986), Uchegbu writes:

What the Charter was at pains to emphasize, however, is that the African traditional system is founded on group association not individuals as the European bourgeois concept of human rights stresses. The Charter recognized that individuals, being humans, have rights but peoples also have rights independent of the individuals making up the peoples. . . . Thus, when the Charter asserts in Article 20 that all people shall have the right of existence, it refers for example to ethnic groups who here have a right to self-determination.

A. Uchegbu, *Economic Rights – The African Charter on Human Rights in Law and Development* 161, 169-70 (J.A. Omotola & A.A. Adeogun eds. 1987).

Eze explains that the ACHPR reflects a different conception of human rights than the Western idea of human rights by recognizing or emphasizing group or peoples' rights. He theorizes:

Side by side with individual rights and freedoms, the African Charter makes provisions for peoples' rights. Group rights are not by themselves new.

The rights of ethnic, racial or minority groups as well as the right of peoples and nations to independence are examples of such rights.

It is not clear what the term "peoples" comprises. It does embrace independent states as well as colonies. If one adopted our interpretation of "peoples," the term would also include national and ethnic groups as well as other minority groups.

O.C. Eze, *Human Rights in Africa: Some Selected Problems* 215 (1984).

Eze further observes:

The drafters were guided by the principle that the African Charter of Human and Peoples' Rights should reflect the African conception of human rights. The African Charter was expected to take as a pattern the African philosophy of law, and to meet the needs of Africa. One may argue as to the exact import of "African conception of human rights" or "African philosophy of law," but the recognition that the Charter should serve African needs, it is submitted, created a useful frame for the drafters of the African Charter.

The OAU Council of Ministers, in the preamble to the Charter, took "into consideration the virtues of the historical traditions and values of African civilization which should inspire and characterize their reflection of the conception of human rights," and were convinced of the duty to promote and protect human and peoples' rights and freedoms, taking into account the essential importance traditionally attached in Africa to these rights and freedoms. It was, however, recognized by the drafters of the Charter that while sticking to African specifics in dealing with rights, it was thought prudent not to deviate from international norms solemnly adopted in various universal instruments by different member states of the OAU.

Id. at 212.

The emphasis placed on group or peoples' rights distinguishes the African conception of human rights from the Western conception. It is a conception of human rights that reflects the African's belief that the welfare of the group is situated at a higher point on the hierarchy of social values than the rights of individuals. See P.D. Maynard, *Universality and the United Nations* (paper presented at the First United Nations Congress on Public International Law, 1995).

65. C. Krauthammer, *Human Rights Shell Game*, Wash. Post, June 18, 1993, at A25.

66. See generally Bangkok Declaration, Regional Meeting for Asia, Agenda Item 8, U.N. Doc. A/Conf. 157/ASRM/7 (1993) [hereinafter Bangkok Declaration]; Krauthammer, *supra* note 65, at A25.

67. Bangkok Declaration, *id.*, para. 8; Krauthammer, *supra* note 65, at A25.

68. Boutros Boutros-Ghali, quoted in K. Roth, *The U.N. Weak on Rights*, Wash. Post, June 25, 1993, at A25.

69. Boutros Boutros-Ghali, quoted in *Ending Torture Isn't Colonialism*, N.Y. Times, June 13, 1993, at A18.
70. Krauthammer, *supra* note 65, at A25.
71. Lewis, *supra* note 63, at 14.
72. See Riding, *supra* note 63, at 5; see also Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948); J.L. Kunz, *The United Nations Declaration of Human Rights*, 43 Am. J. Int'l L. 316 (1949); René Cassin, *La Déclaration Universelle et la mise en oeuvre de Droits de l'Homme*, 79 Recueil des Cours D'Academie de Droit International [R.C.A.D.I.] 241 (1951).
73. See generally Vienna Declaration and Program of Action, U.N. Doc. DPI/1294-39399 (1993); C. Reardon, *UN Conference Sustains Universal Nature of Rights*, Christian Sci. Monitor, June 28, 1993, at 2; see D.B. Ottaway, *Human Rights Post Suggested for U.N.*, Wash. Post, June 26, 1993, at A18; see also C. Reardon, *Women's Rights, "Universality" Gain at U.N. Rights Conference*, Christian Sci. Monitor, June 25, 1993, at 3.
74. See note 14 *supra*.
75. Said, *supra* note 39, at 88.
76. *Id.*
77. *Id.* at 91.
78. *Id.* at 96.
79. See status of human rights treaties as recorded in *Human Rights: International Instruments, Chart of Ratifications as of June 1995*, U.N. Publ. ST/HR/4/Rev. 12, No. E.87.XIV.2 (1995).
80. *Id.*; see generally M. Hamalengwa, C. Flinterman and E.V.O. Dankwa, *The International Law of Human Rights in Africa: Documents and Annotated Bibliography* (1989).
81. J.D. Van der Vyver, *supra* note 38, at 116.
82. *Id.* at 117.
83. *Id.* at 112.
84. *Id.*
85. *Id.*
86. S.P. Sinha, *Legal Polycentricity and International Law* 1 (1996); see also S.P. Sinha, *Jurisprudence: Legal Philosophy* (1993).
87. Legal Polycentricity, *id.*
88. *Id.*
89. *Id.*
90. *Id.* at 4.
91. *Id.* at 6.
92. *Id.* at 15.
93. Two African scholars, Yemi Osinbajo and Olukonyiosola Ajayi, theorize that human rights in developing nations must, for a period of time, suffer a decline for the benefit of economic development. Y. Osinbajo and O. Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 Int'l Lawyer 727 (1994).

Thus, these writers believe human rights may be suppressed in countries that are in the early stages of economic development for the common good of the society. *Id.* at 736-737. Osinbajo and Ajayi write:

People who are just escaping from a harsh economic existence and who now see a better life are less likely to be interested in political liberation. This acquiescence is likely to disappear with the maturation of a new generation that no longer remembers the period of grounding poverty, that takes economic process for granted, and that therefore is able to develop finer aspirations, such as for political and personal liberties. *Id.* at 737.

* * * * *

[I]f development must mean the sacrifice of certain rights, palliatives by way of welfare and other social security programs may be necessary to prevent instability. *Id.* at 742.

94. L. Henkin, *The Rights of Man Today* 129 (1978).
95. *The International Law and Policy of Human Welfare* 22 (R. St. J. MacDonald, D.M. Johnston and G.L. Morris eds. 1978).
96. H. Bull, *Review Article: The Universality of Human Rights*, 8 *Journal of International Studies* 159 (1979).
97. E. Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 *Hofstra L. Rev.* 269, 288 (1977-1978).
98. The welfare or interest of the republic is the supreme law (translation mine).

CHAPTER II

Freedom of Expression in International Law and Group Defamation

Introduction

Freedom of speech and of the press is only a human idea and is incapable of exact expression. It is an innate, instinctive desire of man for the right of self-expression and for the right to commune freely with his fellow men. This desire is a natural one and hence this freedom is a natural right. Some have described it as inalienable, imprescriptible, but it is better described as primordial. It is an essential of organized society and of progress from barbarism to civilization. Without its existence, individuality of man is suppressed. Without the right to acquire and impart information, knowledge becomes static, and subsequent generations can learn nothing from their predecessors.¹

On January 5, 1977, a group of citizens in the former state of Czechoslovakia,² calling themselves Charter 77, released a manifesto condemning the communist regime of their country for violating fundamental freedoms. Charter 77 described itself as an organization whose aim was the enhancement of respect for human rights in Czechoslovakia.³ The manifesto stated that although the International Human Rights Covenants had become part of Czechoslovakian domestic law (Czechoslovakian Collection of Laws, No. 120, October 1976), these rights had only theoretical value for the Czechoslovakian people. In particular, the manifesto charged that the right of freedom of expression was illusory. The Charter 77 group claimed that tens of thousands of Czechoslovakian citizens were prevented from working in their respective professions because they held opinions inconsistent with those held by the state officialdom. Individuals were subjected to harassment and discrimination by the civil authorities and by public organizations. The exercise of free expression, as described in Article 19 of the Covenant on Civil and Political Rights, prohibits both judicial and extra-judicial sanctions against speakers or writers. In Czechoslovakia, free expression was inhibited by centralized control of the mass media and of public and cultural institutions by the government. No open and robust debate was tolerated in the domains of art and thought. Publications had to be consistent with the

official state conception of aesthetics and politics. There was no right to a public defense against fabricated charges by state propaganda organs.⁴

Many scholars, writers and artists were felled by the state for having published or expressed opinions contrary to the opinions of those holding political power. Many of the signatories to the manifesto were punished for anti-state activities or penalized by the loss of jobs and social security benefits.⁵ In March 1977, Professor Jan Patočka, a noted philosopher, died of a brain hemorrhage after having been interrogated by Czechoslovakian authorities.⁶ For years, President Václav Havel, former president of the Czech Republic, and a famous playwright, had been unable to publish or produce any of his works in Czechoslovakia. In October 1977, Havel attempted to send the memoirs of former Minister of Justice Prokop Drtina out of the country. His unsuccessful endeavor won him a trial, a conviction, and fortunately a suspended sentence of fourteen months.⁷ Professor Jiří Hájek, a politician, had been the Czechoslovakian foreign minister under Alexander Dubček during the unforgettable Prague Spring of 1968. Hájek was subjected to continued surveillance and harassment by the civil authorities.⁸ Charter 77 pledged that its existence would "help to enable all the citizens in Czechoslovakia to work and live as free human beings."⁹ Thus, the fight for the protection of such fundamental liberties as freedom of expression existed even in a once rigid authoritarian nation-state. Patterson's illuminating view that freedom of expression is an innate and instinctive desire is borne out by the activities of groups like Charter 77, whose members were the products of societies where extreme limitations on freedom of expression are enforced.

Though Czechoslovakia has become two separate and distinct republican nation-states, both the Czech and Slovak constitutions include provisions protecting freedom of expression. Article 3 of the 1992 Constitution of the Czech Republic ("1992 Czech Constitution") incorporates by reference the Czech Charter of Fundamental Rights and Freedoms ("the Charter"), promulgated by the Presidium of the Czech National Council on December 16, 1992, as a part of the Czech Constitution.¹⁰ Chapter II of the Charter sets forth fundamental human rights and freedoms. Article 17 (1), (2) and (3) guarantee the right of free expression to all Czech citizens.¹¹ However, article 17(4) enumerates specific conditions that justify the limitation of free speech by law: "protection of the rights and freedoms of others, the security of the State, public security, public health, and morality."¹² Article 10 of the 1992 Czech Constitution makes those international human rights treaties to which the Czech Republic is a party "binding" and "superior to law."¹³ The Czech Republic has ratified the International Covenant on Civil and Political Rights.¹⁴ Articles 18, 19, 20, 21, and 22 of the Civil and Political Rights Covenant protect freedom of expression.¹⁵ Thus, these provisions are

"binding" and "superior to [Czech] law." They are the supreme constitutional law of the Czech Republic.

Similar to the 1992 Czech Constitution, section III, article 26, of the 1992 Constitution of the Slovakia Republic ("1992 Slovakia Constitution") ensures the right to freedom of expression. Article 26(1), (2) and (3) guarantees the right to free speech and a press.¹⁶ As is true of the Czech Constitution, article 26(4) of the Slovakia Constitution delineates permissible governmental restrictions on free expression for "the protection of the rights and freedoms of others, state security, public order, public health and morality."¹⁷ Chapter II, article 11 of the Slovakia Constitution declares that international human rights treaties ratified by the Slovak Republic "take precedence over Slovak laws."¹⁸ Thus, articles 18, 19, 20, 21, and 22 of the Civil and Political Rights Covenant are also the supreme constitutional law of the Slovak Republic.¹⁹

An even more vivid illustration of the position of freedom of expression in the hierarchy of legal and human rights norms is past labor unrest in Poland. On September 1, 1980, a labor strike by Polish workers, which began at the Baltic port of Gdansk, had spread through the country along the northern seacoast. This strike affected all of the major industrial centers in southern Poland. More than 150,000 workers walked off their jobs. The Polish workers demanded a number of radical political reforms, such as free labor unions, the right to strike, the release of all political prisoners, and abolition of censorship.²⁰ The panic-stricken Polish Communist Party leader, Edward Gierek, was heard to warn:

There are limits beyond which we cannot go. We cannot tolerate demands against the basis of the . . . socialist state.²¹

However, this veiled threat fell on deaf ears and did not stop the strike. The Gdansk-based Interfactory Strike Committee persisted as bargaining agent for more than 400 Baltic enterprises until it was successful in negotiating the settlement of the nationwide strike that crippled Poland and drew world-wide attention.²² A prominent emigré commented that "[i]f Marx were alive to see it, he would not believe his eyes."²³ In addition to wage increases and more social benefits, the government agreed to relax censorship and to allow the free exchange of ideas.²⁴

It is said that, during the strike, the Poles – who are accustomed to censorship – experienced a burst of free expression: striking workers were quoted in the newspapers; a sermon by the Polish primate, Cardinal Wyszynski, was broadcast over national television; and the text of the government labor agreement and editorials critical of government economic policies appeared in the party newspapers.²⁵ Also, the government announced that, although restrictions on free speech were being relaxed, it

reserved the right to protect state and economic secrets from public disclosure.²⁶

The most illuminating aspect of this political reform movement was that a people reared under a system of totalitarianism, a people who were the product of a society where limitations on civil liberties were the rule, revolted against official political and economic structures in an effort to exercise freedom of expression, an innate and instinctive right of human beings. Both the Czechoslovakian and the Polish historic episodes are supportive testimony to the claim that freedom of expression not only is a legal norm of customary international law, but is universal in character.²⁷ Ironically, restrictions on human rights in these societies ultimately led to their demise as totalitarian states and to their rebirth as democracies.

Accordingly, it is the intention of the author to demonstrate that the principle of free expression has long been a recognized juridical norm in customary international law. However, this norm is not absolute in character. Reasonable limitations are provided for in every Constitution of the world that recognizes the right.²⁸ Racially defamatory falsehood is not language that comes within the ambit of protection secured by the principle of freedom of expression as defined and construed in the international legal context. Racial defamation or group defamation is categorized as a form of racial discrimination by the law of nations and is legally proscribed.²⁹

Freedom of Expression in International Law and Group Defamation

The ideas of freedom and liberty are ancient in origin. These concepts found their most ardent advocates in eighteenth-century France. Jean-Jacques Rousseau wrote: "Man is born free; and everywhere he is in chains."³⁰ His view of human freedom was later espoused by French revolutionaries on August 26, 1789, in article 1 of the famous Declaration of the Rights of Man and of the Citizen:

Article 1 – Men are born and remain free and equal in rights. Social distinctions can be founded only on social utility.³¹

Prior to the creation of civil society, the ultimate state of human freedom was characterized by philosophers as the state of nature. The doctrine of fundamental rights is a corollary of the doctrine of the state of nature.³² Fundamental rights are *a priori* rights civil society was created to protect.³³ There are essentially two descriptions of the state of nature. For Hobbes, the state of nature was a brutish existence where each person was "a law unto himself, since there was no law outside the self." Hobbes describes this pre-societal condition as "the war of all against all."³⁴ Locke's vision of this state

of almost absolute freedom is less extreme: his is a picture of a state of limited individual rights, not of license. He believed that a person did not have the liberty to destroy himself or the rest of humankind. The preservation of life, limb, and property constituted the most important values.³⁵ The law of nature revealed these truths to individuals through reason. Though each person was equal in the possession of power over another, he had no absolute or arbitrary power to act according to personal "passionate heats" or "the boundless extravagancy of his own will."³⁶ Even Hobbes agreed with Locke that humanity could not forever persist in this condition of unlimited freedom if it were to survive. In his book, *The Leviathan*, Hobbes writes:

From the fundamental law of nature, by which men are commanded to endeavor peace, is derived this second law; that a man be willing, when others are so too, as farre-forth, as for peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself. For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of warre.³⁷

Thus, Hobbes has simply rephrased the golden rule of doing unto others as one would have others do to oneself. The political entity called the *polis*, or state, was created to protect human and property rights from the whim and caprice of other individuals. The *contrat social* is an agreement between the ruling and the ruled for their mutual benefit, fostering the common good for all persons who are to be treated as equals.³⁸ Civil society is the end product of this compact. It was created to free men from the socio-economical complications that existed in the state of nature.

One of the rights of men, the perimeters of which have been a source of heated debate since the creation of civil society, is the right to freedom of expression. Two conflicting schools of thought on the general nature of freedom create two divergent conceptions of freedom of expression. These differing theories were expounded respectively by Plato and Aristotle.³⁹ Plato and sages such as St. Augustine and Spinoza postulated that a person who acts erroneously or without virtue because he is moved by the influence of passion or mistaken ideas is not an *homme libre*. The person is not a free human being. There is a cadre of individuals to whom truth, goodness, and virtue are known. Since goodness, truth and virtue are known, all things that are incongruent with goodness and truth must be controlled or suppressed.⁴⁰ "Those who are not virtuous must be made to be virtuous."⁴¹ Virtue is known only to those guardians who are the chosen class. By applying restrictions on liberty of choice and action of those less fortunate, individual freedom is not limited. Rather, the individual is saved from the chains of immorality or dangerous ideas that might be in conflict with the common

good.⁴² Under this elitist doctrine, limitations on freedom of expression are justified because those who are graced with the ability to perceive good and evil must be given the power to circumscribe and prevent the spread of odious ideas among members of the community.⁴³

In contradistinction to Plato's restrictive theory is that of Aristotle. Aristotle believed that human freedom is found in an individual's ability to make choices in the exercise of free will. Individual choice should not be prescribed by another's judgment of what is truth and goodness. Disagreement, experimentation, and open debate increase the possibility of realizing truth and virtue.⁴⁴ Hence, individual choice is the essence of freedom. Aristotle held a democratic faith in individual liberty as a means for securing the common good. Association, the free exchange of ideas, and freedom of action or choice are the mechanisms for creating a truly democratic society.⁴⁵

The Aristotelian conception of freedom and individual liberty may be easily discerned in the works of many other philosophers. Charles de Secondat, Baron de Montesquieu, in his monumental treatise, *The Spirit of Laws*, expressed his unfettered faith in free expression. The law should not punish individuals for their thoughts, only for "overt acts."⁴⁶ Montesquieu recounted the death of Marsyas who dreamed he had cut Dionysius's throat. For this dream, Marsyas was put to death by Dionysius. Dionysius justified this death by claiming that Marsyas never would have dreamed such a hideous thing by night, had he not contemplated it by day. Montesquieu described this execution as "a most tyrannical action," since no attempt had been made to carry out the idea.⁴⁷ Every "thought must be joined with some sort of action" to be punishable.⁴⁸ An occasion where thought is coupled with action is the case of indiscreet speeches. Montesquieu believed inciting the public to revolt would be a punishable act because words are coupled with the act of going into the marketplace to foment civil discord among the public.⁴⁹

Though Montesquieu supported and extolled the virtues of freedom of expression, his concept is not without limitations. Montesquieu quotes the emperors Theodosius, Arcadius, and Honorius, who once wrote to Rufinius, *praefectus praetorio*:

Though a man should happen to speak amiss of our person or government, we do not intend to punish him; if he has spoken through levity, we must despise him; if through folly, we must pity him; and if he wrongs us, we must forgive him. Therefore things as they are, you are to inform us accordingly, that we may be able to judge of words by persons, and that we may duly consider whether we ought to punish or overlook them.⁵⁰

Montesquieu adhered to the belief that there should be no censorship of writings unless the works are "preparative to high treason."⁵¹

In 1789, the National Constituent Assembly of France adopted the Declaration of the Rights of Man and of the Citizen. The preamble to the Constitution of France states that "[t]he French people hereby solemnly proclaim its attachment to the Rights of Man and the principles of national sovereignty as defined in the Declaration of 1789. . ."⁵² Article 11 of the French Declaration restates the conception of freedom of expression as articulated by Montesquieu and many of his predecessors. This provision reads:

The free communication of ideas and opinions is one of the most precious rights of man; hence, all citizens may speak, write, and print freely, except that each must assume responsibility for the abuse of this liberty as determined by the law.⁵³

The preceding conditional conception of freedom of expression has been the prevailing view from the beginning of time. It is a conception that reflects the conditional nature of all rights whether they be civil, political, social, or economic. As Gower so astutely observed:

For over the course of our moral experience, we discover that there is no one value that we are prepared to uphold at all costs and in all circumstances. The single-minded pursuit of any right or good may, in some situations, have to be morally condemned. The man who puts loyalty and obedience to authority before all else can become not merely a victim of virtue, but the perpetrator of vice; and the man who tells the truth always, even when he is not asked, is before long avoided as a moral pestilence.⁵⁴

The right of free speech stands as a general norm of customary international law. The discussion thus far has shown, as suggested by Patterson in the epigraph to this Chapter, that virtually all nations of the world have embraced the principle as innate, instinctive, primordial, and imprescriptible. A mode of behavior or form of conduct becomes a customary rule of international law through the continuous practice of states; no mere *pactum tacitum* is sufficient.⁵⁵ The act or usage need not be universally accepted, but it must be adhered to by an overwhelming majority of states in the international community.⁵⁶ The element of *opinio juris sive necessitatis* must be present before a usage may be classified as a customary rule of law. The states adhering to the usage must recognize it as a rule of law that creates a binding legal obligation.⁵⁷ The practice must be viewed as more than *courtoisie internationale* – a norm of international courtesy abided by out of a sense of comity.⁵⁸ Finally, the least important element in determining whether a practice has entered the realm of customary law is

that of time.⁵⁹ The extensiveness, continuity, and uniformity of the practice are much more important indicia.⁶⁰

A customary rule of law may come into being by the general ratification of a codifying treaty.⁶¹ In this instance, the state's act of ratifying or acceding to the multilateral treaty that claims the existence of a rule of law is a concrete and material act "intended to have an immediate effect on the legal relationship of the state concerned."⁶² The state accepts the rule as legally binding upon it.⁶³ The right of freedom of expression not only appears in several multilateral codifying treaties and documents, but is indelibly inscribed in most of the constitutions of the world.⁶⁴ An examination of the right of freedom of speech as it appears in both international and domestic legal instruments dispels any doubt as to whether this legal norm is a universal principle of customary international law.

Evidence of the nature of freedom of expression at international law and its logical corollary – freedom of association – is to be found in article 19 of the Universal Declaration of Human Rights, article 5 of the Racial Discrimination Convention, and articles 18, 19, 21 and 22 of the Covenant on Civil and Political Rights. Article 19 of the Universal Declaration of Human Rights proclaims:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.⁶⁵

However, article 29(2) and (3) of the same document creates restrictive *caveats*:

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition [of] and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.⁶⁶

The free expression principle of customary and conventional international law is reiterated in article 5 of the Racial Discrimination Convention which provides, *inter alia*:

State parties undertake . . . to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin . . . to the enjoyment of the following rights. . . . (vii) the right of freedom of thought, conscience and

religion; (viii) the right to freedom of opinion and expression; . . . and (xi) the right of freedom of peaceful assembly and association.⁶⁷

Article 4 of the Racial Discrimination Convention creates an exception: it categorically condemns group defamation, language that incites racial hatred, and outlaws those organizations that disseminate literature espousing ideas based on theories of racial superiority. Racially defamatory acts that promote racial hatred and discrimination are punishable by law.⁶⁸ These proscriptions are laid down with due regard to the principles expressed in the Universal Declaration of Human Rights and article 5 of the Racial Discrimination Convention.

Articles 18, 19, 21, and 22 of the Covenant on Civil and Political Rights echo the free expression provisions of the above international legal agreements. These articles provide, in relevant parts:

Everyone shall have the right to freedom of thought, conscience and religion . . . [Art. 18]. Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression. . . . [T]his right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The exercise of the rights provided for in . . . this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals . . . [Art. 19]. The right of peaceful assembly shall be recognized [Art. 21]. Everyone shall have the right to freedom of association with others. . . . No restrictions may be placed on the exercise of this right other than those which are necessary in the interests of national security, public order . . . [Art. 22].⁶⁹

Clearly, the concept of free expression as reflected in the foregoing multilateral instruments is nonabsolute and may be subjected to impairment in certain circumstances. The restrictions on this right are evident from the *caveats* delineated in Articles 19 and 21 of the Covenant on Civil and Political Rights. Article 20 of this treaty contains an additional indicium of the conditional character of free expression: it prohibits war propaganda and the advocacy of racial, national, and religious hatred.⁷⁰ The article mirrors article 4 of the Racial Discrimination Convention. The American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Helsinki Accords each codify the right to free speech with specific limitations.⁷¹ Article 13(5) of the American Convention punishes racial defamation or language that constitutes incitement to violence or racial hatred.⁷² The reaffirmation of the right to freedom of expression found in the numerous documents discussed

thus far, juxtaposed against various limitations on the right, bears to reason only if the right is construed as conditional and not absolute in character. The right becomes subordinate to certain overriding state interests or goals that only can be achieved by infringing upon it.

Provisions protecting freedom of expression appear in most of the world's domestic constitutions. Most of the countries of Africa have constitutional provisions granting freedom of expression to their citizenry.⁷³ A characteristic example is article 7 of the Fundamental Law for the Second Republic of Guinea:

He shall be free to believe, to think and to profess his religious faith, his political or philosophical opinions.

He shall be free to express, to manifest and to diffuse his ideas and opinions by speech, by writing and by image.

He shall be free to instruct and inform himself from sources available to all.⁷⁴

These freedoms are limited by article 4, which states:

The law shall punish any act of racial, ethnic or religious discrimination, or any regionalistic propaganda, which could have a grave effect on national unity, the security of the state, the territorial integrity of the Republic or the democratic functioning of its institutions.⁷⁵

An earlier version of article 4 – article 45 of the former Constitution of Guinea – prohibited "any propaganda of *racial* or regionalistic nature."⁷⁶

The presence of constitutional provisions upholding the right to free expression in sub-Saharan Africa is not the result of Western influence. Wai writes that, in precolonial Africa, the traditional African mind-set, institutions, and social practices supported the belief that certain rights "should be upheld against alleged necessities of the state."⁷⁷ Discussion in the traditional African community was "open and robust." Those who harbored different or antagonistic opinions were not ostracized or punished. There was no fear of punishment for expressing one's ideas.⁷⁸ "There was a clear conception of freedom of expression and association."⁷⁹

The Constitutions of both Asian⁸⁰ and Islamic⁸¹ nations recognize the right to freedom of expression. It is also commonplace to view nations of Eastern Europe and other communist or socialist countries as guilty of the most egregious violations of fundamental freedoms. Yet, historically, provisions protecting freedom of expression have appeared in their constitutions. Major communist powers such as the former Union of Soviet Socialist Republics and the People's Democratic Republic of China include free expression provisions in their constitutions.⁸² The former Soviet Union is a multi-ethnic society now composed of independent republics.⁸³ It has,

at least in theory, never retreated from a professed belief in the principles of ethnic or racial equality and freedom of expression as guaranteed by the Soviet Constitution.⁸⁴ Of particular importance is article 50 of the former Soviet Union's Constitution which guaranteed freedom of expression:

In accordance with the interests of people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets, and squares at the disposal of the working people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio.⁸⁵

Article 36 of the same Soviet Constitution, which ensured the equal rights of all the citizens of the former Soviet Union, also condemned "any preaching of advocacy of racial or national exclusiveness, hostility or contempt."⁸⁶ Article 36 was used to combat what was called "Great Russian chauvinism" and to punish members of the Soviet populace who made disparaging remarks about Ukrainians or Georgians or who cast aspersions on the importance of smaller ethnic groups in the country. The Soviets established a Censorship Department through which all publications were required to pass prior to printing. The Censorship Department was a branch of the Ministry of Education in each Union Republic.⁸⁷ The Censorship Department had the power to forbid the printing, publication, and distribution of writings that might "stir up racial hatred or religious fanaticism."⁸⁸

The 1993 Constitution of the Russian Federation ("Russian Constitution"), one of the new independent republics, mirrors the protection for freedom of expression found in the constitution of the defunct Soviet Union. Article 29(1) of the Russian Constitution protects freedom of speech and thought.⁸⁹ Article 29(2) may be construed as specifically prohibiting group defamation or language inciteful of racial hatred. It provides:

No propaganda or agitation inciting social, *racial*, national or religious hatred and enmity shall be allowed. The propaganda of social, *racial*, national, religious or language supremacy shall be prohibited.⁹⁰

Protection of free expression may be found in the constitutions of other independent republics. Article 30 of the 1994 Constitution of the Republic of Tajikistan,⁹¹ article 10 of the 1993 Constitution of the Republic of Kazakhstan,⁹² article 39 of the 1992 Constitution of the Republic of Slovenia,⁹³ article 16(2) of the 1993 Constitution of the Kyrgyz Republic,⁹⁴ article 26 of the 1992 Constitution of Turkmenistan,⁹⁵ article 48 of the Constitution of the Ukraine,⁹⁶ and article 29 of the 1992 Constitution of the Republic of Uzbekistan⁹⁷ all guarantee freedom of expression. Like the 1993

Russian Constitution, article 34 of the 1978 Ukrainian Constitution proscribes "any advocacy of *racial* and national . . . hostility or discrimination" and deems such advocacy as "punishable by law."⁹⁸

It is not contended that freedom of speech was actually exercised in the former Union of Soviet Socialist Republics or is now exercised in the new independent republics or the People's Republic of China to the same extent as it is exercised in the Western world. However, the constitutional commitment to freedom of expression in these countries and the proscription against group defamation reveal the fundamental value of the principle of free speech, even among those nations that allegedly repress civil liberties. This paper commitment to free expression around the globe reveals the fundamental nature of the right.

Conclusion

Freedom of expression is an innate and intuitive fundamental right. Nevertheless, group defamation is not protected under the conception of free expression discussed in this chapter. Group defamation is illegal conduct at international law, and it is punishable as a crime under the laws of the majority of nations in the world. It is classified as a passive form of racial discrimination at the law of nations. Article 1 of the Racial Discrimination Convention defines the concept of discrimination as

any distinction, exclusion, restriction, or preference based on race, colour, descent, or national origin which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.⁹⁹

Vierdag defines discrimination as wrongly equal or wrongly unequal treatment.¹⁰⁰ He writes that

discrimination occurs when the equality or inequality of treatment results from a "wrong" judgment as to the relevance or irrelevance of the various human attributes that are taken into account.¹⁰¹

Vierdag theorizes that there must be a significant reason for a departure from the principle of equal treatment which is the prevailing rule. Unequal treatment is the exception.¹⁰² The act of racial defamation is an act of racial discrimination under this definition because it is an unjustifiable distinction made on the basis of race through the use of language. Because racial groups are the objects of the defamatory comments, these racial groups are being treated differently from the racial majority, though all groups are similarly situated in society. The principle of equality dictates that racial

minorities be treated the same as the racial majority. The racial majority is generally free from verbal assaults of a racially defamatory nature. Since the language is uttered against the victims solely because they are of a different race or ethnic group, the differentiation in treatment accorded them is a racially discriminatory act. Therefore, it is "wrongly unequal treatment" as defined by Vierdag.¹⁰³ There is no legally sufficient reason to justify this discriminatory treatment of racial minorities.

Recently, White supremacist skinheads have used the Internet to sow the hateful seeds of group defamation and language inciteful of racial hatred. The Carolinian Lords of the Caucasus ("CLOC") have used their Internet website to express white supremacist ideas.¹⁰⁴ They have openly boasted:

If you want an organization which makes things happen, visit our victims and learn first-hand what kind of a group we are. . . . CLOC is clearly on the forefront of the great war for Aryan domination of the Internet.¹⁰⁵

One CLOC member describes himself by the name "Racial Theorist."¹⁰⁶ The website of CLOC "features an image of a burning cross."¹⁰⁷ These racist organizations engage in group defamation by spouting the superiority of the white race and the inferiority of minorities. Such speech is often followed by violence. In December of 1995, skinheads were arrested for the murder of an African-American couple who lived in Fayetteville, North Carolina.¹⁰⁸ *The Washington Post* reports:

The victims were shot in the head at close range while strolling down a dirt road just after midnight. Three white soldiers, who told police they were neo-Nazi skin-heads and had set out that night to harass blacks after drinking at a local strip bar, have been charged in the case. One of the suspects, Pfc. James Burmeister, kept a large Nazi flag draped over his bed and *white supremacist literature* in his room off-post.¹⁰⁹

According to the Anti-Defamation League of B'nai B'rith, skinheads have murdered at least 40 individuals during the past eight years.¹¹⁰ They have committed thousands of assaults, firebombings and desecrations.¹¹¹ Thus, racially defamatory language is the logical precursor of most active or aggressive forms of racial discrimination.¹¹²

The act of racial defamation as a form of racial discrimination may be illustrated by the following hypothetical:

Mr. X frequents Y Restaurant twice each month. Each time he enters the restaurant, he is greeted: "Hello Little Black Sambo." None of the White patrons of this restaurant are the brunt of insulting characterizations by the owner. Mr. X is Black; the owner is White. Most of the other patrons who visit

*the restaurant are White. All other Black patrons are greeted with the same salutation.*¹¹³

Viewed in its socio-historical context, the use of the phrase "Little Black Sambo," when referring to an African-American person, is slanderous and insulting. It essentially suggests ideas about African-Americans that are both untrue and defamatory; it is racial stereotyping.¹¹⁴ The act constitutes an act of racial discrimination in a place of public accommodation because African-Americans are accorded wrongly unequal treatment by virtue of the fact that they are of a different race. A chilling effect is placed upon their right to utilize a place of public accommodation. In the situation just described, individuals who are similarly situated have not been treated similarly, but have been treated differently because of their race. Here, the norm of free expression intersects with the norm of nondiscrimination. Application of either norm does not sanction the right to engage in acts of racial defamation or racial discrimination; each racially defamatory act potentially incites racial discrimination, racial hatred and violence.

The nonabsolute character of the right to freedom of expression was reaffirmed by the General Conference of the United Nations Educational Scientific and Cultural Organization (UNESCO) meeting in Paris in 1978 at its twentieth session.¹¹⁵ The conference focused on the mass media and the free flow of information. The ultimate objective of the conference was a new "freedom of information order," which envisioned "the establishment and operation of a world network carrying balanced, multidimensional and multidirectional communications produced in the interest of all peoples of the world."¹¹⁶ The conference adopted two important declarations by acclamation: (1) the Declaration of Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and Understanding, the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War ("Mass Media Declaration"), and (2) the Declaration on Race and Racial Prejudice.¹¹⁷

The Mass Media Declaration's purpose was the creation of a new international information order. Historically, UNESCO has been concerned with the free flow of information. The program's goal was to conquer the problem of a tremendously increased quantum of international communication where there existed a severe imbalance among nations with reference to "the means and structures for the transmission and reception of information." The concept of free expression encompasses the right to receive and impart communications of all character without regard to national boundaries or methods.¹¹⁸ Developing countries are particularly disadvantaged, since they are often the recipients of disproportionate amounts of distorted communications from external sources. These countries lack the technological resources and access to international channels of

communication necessary to make the world aware of their needs, desires, values, and cultural heritage.¹¹⁹ The Mass Media Declaration declares, *inter alia*:

The role of emitter and receiver are unequally shared and distortions of all kinds are typical in the content of information, its density, cost and impact. . . . In practical terms, the approach . . . would lead to a series of measures guided by a desire to overcome imbalances, to replace monopolies by pluralism, to have the conduct of institutions and individuals based on respect for others, together with an awareness of the reciprocity of rights and duties. Such measures would include . . . measures to strengthen the capacity of developing countries in the field of communication, the abolition of tariff privileges, which often work in favor of the developed countries, the establishment of national press agencies, the forming of codes of conduct and measures to protect journalists in the exercise of their profession.¹²⁰

Although the Mass Media Declaration has as its objective enhancing the free flow of ideas, thereby creating better understanding among the nations of the world, the declaration makes specific mention of another fundamental purpose to be achieved by the program: the countering of racism, apartheid, and incitement to war.¹²¹ In its search for and encouragement of the "unrestricted pursuit for objective truth," the declaration specifically recalls and reaffirms the continuing force and validity of Article 20 of the Covenant on Civil and Political Rights, which prohibits group defamation or incitement to national, racial, or religious hatred. The declaration also recalls Article 4 of the Racial Discrimination Convention, which condemns the same offenses and those organizations that commit them.¹²²

In addition, the Mass Media Declaration makes reference to the UNESCO Declaration on Race and Racial Prejudice, which defines the fundamental right of equality and condemns all forms of racial discrimination, including group defamation and incitement to racial hatred.¹²³ Lerner has described the 1978 UNESCO Declaration on Race and Racial Prejudice as "the most comprehensive international instrument dealing with the protection of group identity."¹²⁴ At the twentieth session of UNESCO on November 27, 1978, the declaration won unanimous adoption.¹²⁵ Previously, UNESCO had promulgated four declarations on race: the 1950 Statement on Race, the 1951 Statement on the Nature of Race and Race Differences, the 1964 Propositions on the Biological Aspects of Race, and the 1967 Statement on Race and Racial Prejudices.¹²⁶ Though the 1978 UNESCO Declaration on Race and Racial Prejudice is not law, Lerner believes it "can become a keystone in the struggle against racism and racial prejudice."¹²⁷

The problem of racially defamatory propaganda has plagued the United Nations since its founding. A Conference on Freedom of Information was convened in 1948, and the result was a Draft Convention on Freedom of

Information, which was declared the "Magna Carta of freedom of thought."¹²⁸ Although freedom of information was declared a fundamental right, the Draft Convention did not attempt to prevent efforts to emphasize the danger of propaganda.¹²⁹ The Draft Convention specifically provided for the proscription of group defamation and racially offensive propaganda. The Conference on Freedom of Information passed a number of resolutions critical of the dissemination of propaganda inciting war and racial hatred. Three conventions were adopted: one dealt with freedom of information, another focused on the gathering and transmission of news, and a third concerned the rights of correction. Forty-three resolutions were adopted.¹³⁰ The American delegates to the conference were concerned about the passage of legislation that might infringe First Amendment freedoms. They argued that more freedom was the best antidote for false reporting and war-mongering propaganda, rather than the censorship measures suggested by Soviet Russia.¹³¹

From the discussion on freedom of expression and the law of nations, it can only be concluded the principle of free expression must at times give way to certain paramount state interests. Racial or ethnic group defamation or language inciteful of racial hatred has never been protected by the principle of free expression in international law. The theory of absolutism has never existed at international law, nor has this restrictive theory proved compatible with the right of free speech and press as reflected in the First Amendment to the United States Constitution¹³² and as interpreted by the United States Supreme Court.¹³³

NOTES

1. G.J. Patterson, *Free Speech and a Free Press* 5 (1939).

2. The nation-state of Czechoslovakia is no longer in existence. The Czech and Slovakia republics are now independent states which came into being in 1992 as the result of a national decision to create two countries. See M.J. Porubcansky, *Czechs and Slovaks Part*, Advocate (Baton Rouge, LA), Jan. 1, 1993, at 1; *Havel to Resign as President of Czechoslovakia*, Baltimore Sun, Jul. 18, 1992 at 5A; J. Kaufman, *Czechoslovakia Vote Suggests Breakup*, Montreal Gazette, June 7, 1992, at B1; E.J. Baumeister, *Ex-Czech Dissident Regrets Liberation Led to Split Nation: Happy Dream of Post-Soviet Unity Ends Friday with Parting of Country*, San Francisco Examiner, Dec. 31, 1992, at A12; *Czechoslovakia to Split by September, Leaders Say*, Austin American-Statesman, Jul. 14, 1992, at A18; *In a Few Hours, Czechoslovakia Will be 2 Nations*, Arizona Republic/Phoenix Gazette, Dec. 31, 1992, at A5; J. Eyal, *Europeans Ignore Warning Signs*, Edmonton Journal, Jan. 13, 1993, at A10 (stating a majority of citizens of Czechoslovakia did not support breakup); *Havel Elected President of New Czech Republic*, Austin American-Statesman, Jan. 27, 1993, at D20; *Backing into Divorce: Separating Czechs and*

Slovaks is Risky, Telegram & Gazette (Worcester, MA), Jan. 6, 1993, at A6; R. Young, *Hostility Grew as Split Approached*, The Ottawa Citizen, Oct. 22, 1995, at A11; C. Young, *Czechoslovakia Breakup Echoes Loudly in Canada*, The Edmonton Journal, Oct. 29, 1995, at F8; M. Battiata, *Havel Quits as Czechoslovak President: Slovak Declaration of Sovereignty Prompt's Leader's Resignation*, Washington Post, July 18, 1992, at A1; S. Engelberg, *Czechoslovakia Breaks in Two, To Wide Regret*, N.Y. Times, Jan. 1, 1993, at A1; L.M. Prague and V. Havel, *I Cherish A Certain Hope: No Longer President of Czechoslovakia, Vaclav Havel Talks About his Country's Break-up, his Political Future and the Importance of Good Taste in Public Affairs*, Time, Aug. 3, 1992, at 46.

3. Manifesto of Charter 77, Appendix A, reprinted in A. Dowrick, *Human Rights: Problems, Perspectives and Texts* 199-203 (1982). See generally H.J. Skilling, *Charter 77 and Human Rights in Czechoslovakia* (1981).

4. Dowrick, *id.* at 199-200.

5. *Id.* at 199.

6. *Id.*

7. *Id.*; see V. Havel, *Open Letters: Selected Writings 1964-1990* (1991).

8. Dowrick, *id.*

9. *Id.* at 203.

10. 1992 Constitution of the Czech Republic, art. 3, reprinted in *V Constitutions of the Countries of the World* (A.P. Blaunstein & G.H. Flanz eds. 1993).

11. 1992 Charter of Fundamental Rights and Freedoms, *id.* at art. 17(1), (2), and (3).

12. *Id.* at art. 17(4).

13. 1992 Constitution of Czech Republic, *supra* note 10, at art. 10.

14. See B.E. Carter & P.R. Trimble, *International Law: Selected Documents* 387 (1995).

15. *Id.* at 394-395; see generally J. Azud, *The Charter of Fundamental Rights and Freedoms*, XLVII Bulletin of Czechoslovak Law 5 (1991); L.N. Cutler, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 Chicago L. Rev. 511 (1991); J. Kroupa & K. Schelle, *History and Contemporary Forms of the Czech and Czechoslovak Constitutionalism* (1993); W. H. Luers, *Czechoslovakia: Road to Revolution*, 69 Foreign Affairs Quarterly 77 (1990); C. Saladin, *Self-determination, Minority Rights and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic*, 13 Mich. J. of Int'l L. 172 (1991); S.L. Wolchik, *Czechoslovakia in Transition: Politics, Economics, and Society* (1991).

16. 1992 Constitution of the Slovakia Republic, art. 26(1), (2), and (3), reprinted in *XVII Constitutions of the Countries of the World*, *supra* note 10.

17. *Id.* at art. 26(4).

18. *Id.* at art. 11.

19. Slovakia is also a party to the Civil and Political Rights Covenants. See B. E. Carter & P. R. Trimble, *supra* note 14, at 387.

20. T.A. Sanction, *Poland's Angry Workers*, Time, Sept. 1, 1980, at 20.

21. A. Deming and P. Martin, *Poland's Race Against Time*, Newsweek, Sept. 1, 1980, at 28.

22. T.A. Sanction, *Triumph & New Shocks*, Time, Sept. 15, 1980, at 33.

23. *Id.*; Sancton, *supra* 20, at 20.

24. *Id.*

25. *Id.* at 34-37.

26. *Id.* at 33.

27. The intellectual community of the defunct Yugoslavian state struggled to protect free speech rights guaranteed in articles 166 and 167 of the now repealed Yugoslavian Constitution. On November 3, 1980, 102 intellectuals appealed to the State Presidency requesting that the section of the criminal code penalizing so-called hostile propaganda against the state be repealed. These scholars argued that the provision violated their freedom of expression. The provision was described as being so vague and broad in defining "hostile propaganda" that it allowed courts excessive discretion in interpreting and applying the provision. The provision was used to prosecute many dissidents. See 102 *Yugoslav Intellectuals Protest Propaganda Law*, N.Y. Times, Nov. 4, 1980, at A5. Yugoslavia is now divided into separate states. See V. Gligorov, *Why Do Countries Break Up?: The Case of Yugoslavia* (1994); S. Engelbert, *Breakup of Yugoslavia Leaves Slovenia Secure, Croatia Shaky*, N.Y. Times, Jan. 16, 1992, at 1; H.D.S. Greenway, *West Was Exceedingly Careless in Handling Breakup of Yugoslavia*, Kansas City Star, May 7, 1993, at C5; E. Sullivan, *Slovenia Doesn't Regret Starting Yugoslavia's Breakup*, Portland Oregonian, Jul. 9, 1995, at A5; R. Gutman, *Independence Declared: Slovenia, Croatia Leave Yugoslavia; War Is Feared*, Newsday, June 26, 1991, at 8; C. Bohlen, *Slovenia Is Moving to Independence*, N.Y. Times, June 6, 1991, at A14; C.J. Williams, *Slovenia, Croatia Declare Freedom from Yugoslavia*, L.A. Times, June 26, 1991, at A1; D. Oberdorfer, *A Bloody Failure in the Balkans: Prompt Allied Action Might Have Averted Factional Warfare*, Wash. Post, Feb. 8, 1993, at A1; see also D. Seay, *An American Response to the Balkan Revolutions*, Heritage Foundation Reports, Mar. 29, 1991; P. Maas, *Love Thy Neighbor: A Story of War* (1996); L. Silber and A. Little, *Yugoslavia: Death of a Nation* (1996); D. Owen, *A Balkan Odyssey* (1996).

28. Italy has set an excellent example for the world in its prosecution of individuals who use racially defamatory speech or speech inciteful of racial hatred. Eleven Italian youths were sentenced for committing anti-Semitic acts. These youths carried wooden crosses and shouted anti-Semitic slogans during a basketball game between Israeli and Italian teams in March 1979. The defendants were sentenced to up to three years and four months imprisonment for exalting genocide. They were convicted on October 28, 1980. The sentence was the first ever imposed under the Italian Penal Code provision that prohibits the advocacy of genocide and using language that incites racial hatred. An apology was sent to the Israeli Government by the Foreign Ministry of Italy. The defendants ranged in age from fifteen to twenty-three. A few of the racial slurs shouted were: "Jews to the ovens!" and "Hitler taught us it's no crime to kill the Jews!" *11 Youths Sentenced in Italy for Anti-Semitic Acts*, N.Y. Times, Oct. 29, 1980, at A5. See also N. Marmie, *French Network Fines Two for Provoking Racial Hatred*, Advocate (Baton Rouge, LA), Mar. 13, 1996 (Song called "Casser du Noir" or "Beating up Blacks" sung on TV. Lyrics stated: "Can't stand foreigners, the darkies . . . flick on the lighters, we're going to set them on fire.").

Article 21 of the Italian Constitution guarantees freedom of expression, although it allows for certain limitations.

All are entitled freely to express their thoughts by word of mouth, in writing, and by all other means of communication.

The press may not be subjected to any authority or censorship.

Distraint is allowed only by order of the judicial authorities, for which motives must be given, in the case of offences definitely laid down by the press law, or in the case of violation of the provisions which the said law prescribes for identifying responsible parties.

In such cases, under conditions of absolute urgency and when the immediate intervention of the judicial authorities is not possible, distraint may be applied to the periodical press by officers of the judicial police, who shall communicate the matter to the judicial authorities within 24 hours. If the said judicial authorities do not ratify the measure within the next 24 hours, the distraint is withdrawn and is null and void.

The law may prescribe, by means of provisions of a general nature, that the financial sources of a periodical publication be made known.

Printed publications, performances and all other manifestations contrary to morality are forbidden.

The law lays down proper provisions for preventing and repressing all violations.

See Ital. Const., art. 21, reprinted in IX Constitutions of the Countries of the World (1987), supra note 10.

29. *See International Convention on the Elimination of All Forms of Racial Discrimination, Chapter I, supra at note 6, art. 4.* For general discussion of definition of discrimination in international law see N. Lerner, *Group Rights and Discrimination in International Law* 24-28 (1991).

30. J.J. Rousseau, *The Social Contract (Le Contrat Social)* 1 (G.D.H. Cole trans. 1913).

31. Declaration of the Rights of Man and of the Citizen, art. 1, *reprinted in A. Dowrick, supra note 3, at 153-154:* "Article Premier – Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune."

A theological expression of this idea of human equality is found in the New Testament of the Bible, Colossians III, verse 2:

There is neither Greek nor Jew, circumcision nor uncircumcision, barbarian, Scythian, bond or free; but Christ is all, and in all.

*See also R. Traer, *Faith in Human Rights: Support in Religious Traditions for a Global Struggle* (1991); C.S. Nino, *The Ethics of Human Rights* (1991).*

32. *See J.J. Brierly, *The Law of Nations* 49 (1963).*

33. E. Kant has postulated:

The civil state, regarded purely as a lawful state, is based on the following *a priori* principles:

- (1) The freedom of every member of society as a human being.
- (2) The equality of each with all the others as subject.
- (3) The independence of each member of a commonwealth as a citizen.

These principles are not so much law given by an already established state, as law by which a state can alone be established in accordance with pure rational principles of external human right.

E. Kant, *On the Relationship of Theory to Practice In Political Writings* 60 (H. Reis ed., H.B. Nisbet trans. 1970).

34. T. Hobbes, *The Leviathan* 3-4 (Everyman ed. 1914); see also G.C. Christie and P.H. Martin, *Jurisprudence: Text and Readings on the Philosophy of Law* 394-466 (2d ed. 1995); H. Warrender, *The Political Philosophy of Hobbes* 299-329 (1957); see generally D. Gauthier, *The Logic of the Leviathan* (1969).

35. J. Locke, *Concerning Civil Government*, in *25 Great Books of the Western World* 26 (R.M. Hutchins ed. 1952); see G.C. Christie and P.H. Martin, *id.* at 226-39.

36. Locke, *id.*

37. T. Hobbes, *supra* note 34, at 8.

38. J.J. Rousseau, *supra* note 30. Montesquieu expressed the same idea when he wrote:

Dans l' état de nature les hommes naissent bien dans l'égalité mais ils n'y sauroient rester. La société a leur fait perdre, et ils ne redeviennent égaux que par les lois.

De l'Esprit des Lois (The Spirit of the Laws) 148 (1748). This statement may be translated: "In the state of nature, all men are born in equality, but they do not forever remain so. Society causes them to lose it, and they again become equal only by the law." (translation mine.)

39. The non-Western conception of freedom held by the Islamic nations of the world significantly differs from the Western conception of freedom. Abdul Aziz Said writes that the Western conception of freedom from restraint is foreign to the law of Islam: freedom in Islam is the ability to exist not to act. God is complete freedom and necessity. Because human beings are created in his divine image and are his mortal reflections, they may share in complete freedom and necessity. Personal freedom can be found only by surrendering oneself to the divine will. One must engage in introspection; one must look inward to the self if one is to find freedom.

"Greater is he who is in me, than he who is in the world" expresses the Christian view of Said's philosophy. True freedom cannot be realized by simple liberation from external sources of restraint as Western thought expounding the nature of freedom and individual liberty would suggest. God, the Author of human freedom, alone possesses absolute freedom. Seek God and you will find freedom. However,

after all these exhortations, Said admits that there are conflicting viewpoints among Islamic jurists, theologians, and philosophers as to how this idea of freedom should be interpreted. Finally, Said articulates a goal of freedom which is not wholly consistent with the Western goal of individual rights or freedom:

However, the concept of freedom in Islam implies a conscious rejection of a purely liberal and individualistic philosophy of "doing one's own thing" as the meaning of life or the goal of society. The goal of freedom is human creativity, but freedom is defined as belonging to the community and participating in its cultural creation. . . . From the Islamic perspective, the anarchy of liberal individualism cannot be a creative seedbed of culture.

A. Said, *Human Rights in Islamic Perspectives*, in *Human Rights: Cultural and Ideological Perspectives* 91-93 (A. Pollis and P. Schwab eds. 1979); See *Religious Human Rights in Global Perspectives* (J. Witte Jr. and J.D. Vander Vyver eds. 1996); Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (1996).

40. W. Gellhorn, *Individual Freedom and Governmental Restraints* 50-51 (1968); see Plato, *The Republic* (B. Jowett trans. 1952).

41. This statement has been attributed to Robespierre. Allegedly it was made during the "Reign of Terror" of the French Revolution.

42. W. Gellhorn, *supra* note 40, at 51.

43. *Id.*

44. *Id.* at 51-52.

45. *Id.* at 52; see Aristotle, *Politics* (B. Jowett trans. 1952). Aristotle's democratic faith did not, however, prevent him from justifying slavery:

[H]e who is by nature not his own but another's man is by nature a slave; and he may be said to be another's man who, being a human being, is also a possession. And a possession may be defined as an instrument of action, separable from the possessor. But is there anyone intended by nature to be a slave, and for whom such a condition is expedient and right, or rather is not all slavery a violation of nature? There is no difficulty in answering this question, on grounds both of reason and of fact. For that some should rule and others be ruled is a thing not only necessary but expedient; from the hour of their birth some are marked out for subjection, others for rule.

Id. at 447 (Book I, sec. 1254a, lines 10-20).

46. Montesquieu, *The Spirit of the Laws* 89 (T. Nugent trans. and J.V. Prichard, rev. ed. 1952).

47. *Id.*

48. *Id.*

49. *Id.* at 90.

50. *Id.*

51. *Id.*

52. Preamble, French Const., reprinted in VII *Constitutions of the Countries of the World* (1988), *supra* note 10.

53. Declaration of the Rights of Man and of the Citizen, Art. 11, *reprinted in* Dowrick, *supra* note 3, at 153-54. "La libre communication des pensées est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi."

54. L.C.B. Gower, *Understanding Rights: An Analysis of the Problem*, in Dowrick, *supra* note 3, at 53.

55. See T. Starke, *Introduction to International Law* 34-38 (9th ed. 1984), *reprinted in* B.E. Carter and P.R. Trimble, *International Law* 141 (1995); see H.W.A. Thirlway, *International Customary Law and Codification* 46, 59 (1972); M.W. Janis, *An Introduction to International Law* 41-44 (1993); R. August, *Public International Law: Text, Cases, and Readings* 60-61 (1995); W.R. Slomanson, *Fundamental Perspectives on International Law* 11-12 (1990). Brierly defines custom as follows:

Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that if the usage is departed from, some sort of evil consequences will probably, or at any rate ought to, fall on the transgressor; in technical language there must be a "sanction," though the exact nature need not be very distinctly envisaged. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it and in particular whether they recognize an obligation to adopt a certain course or in the words of Article 38 [of the I.C.J. Statutes], we must examine whether the alleged custom shows a general practice accepted as law.

J.L. Brierly, *The Law of Nations*, 60-61 (1965).

56. Carter and Trimble, *id.* at 145; J.L. Kunz, *The Nature of Customary International Law*, 47 Am. J. of Int'l L. 663, 666 (1953).

57. Carter and Trimble, *id.* at 143-144; H.W.A. Thirlway, *supra* note 55, at 665; Continental Shelf Cases, [1969] I.C.J. 41-44; *see also* Lotus Case, [1927] P.C.I.J., Ser. A, No. 10, 28; Janis, *supra* note 55, at 46-48; August, *supra* note 55, at 60; Slomanson, *supra* note 55, at 11.

58. L. Henkin, *International Law: Politics and Values* 29 (1995) ("Custom is commonly defined as law resulting from a general and consistent practice of states – *opinio juris* – with a sense that the practice is required by law, not merely done as an act of courtesy or grace."); Kunz, *supra* note 56, at 667; *see also* O. Schachter, *International Law in Theory and Practice* 1-15 (1995).

59. Kunz, *supra* note 56, at 666; Continental Shelf Cases, *supra* note 57, at 42-43.

60. *Id.*

61. H.W.A. Thirlway, *supra* note 55, at 58-59. Continental Shelf Cases, *id.* at 42; see H.E. Chodash, *An Interpretative Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 Vand. J. Trans. L. 973 (1995).

62. H.W.A. Thirlway, *id.* at 58.

63. *Id.*; see M. Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 Mich. J. Int'l L. 109 (1995).

64. See generally *Constitutions of the Countries of the World*, *supra* note 10.

65. The Universal Declaration of Human Rights, art. 19, *supra*, Chap. I, note 17.

66. *Id.* at art. 29(2) and (3).

67. Racial Discrimination Convention, art. 5, *supra*, Chap. I, note 6.

68. Racial Discrimination Convention, art. 4, quoted in Chap. I, *supra* note 6.

69. Covenant on Civil and Political Rights, arts. 18, 19, 21, 22, Chap. I, *supra* note 17.

70. *Id.* at art. 20.

71. The American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota 1948, OEA/SER. L/V/I. 4 Rev. (1965). Article IV provides: "Every person has the right of freedom of investigation, of opinion and of the expression and dissemination of ideas, by any medium whatsoever." However, Article XXVII states that "the rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."

Article 13 of The American Convention on Human Rights, signed Nov. 22, 1969 (entered into force July 18, 1978), O.A.S. Treaty Series No. 36 at O.A.S. Off. Rec. OEA/SER. L/V/II, 23 Doc. Rev. 2, reprinted in B.E. Carter and P.R. Trimble, *International Law: Selected Documents* 488-508 (1995), guarantees:

- (1) Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
- (2) The exercise of this right ... shall not be subject to prior censorship, but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to insure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.
- (3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

See also id. at arts. 12, 14.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 312 U.N.T.S. 221 (Nov. 4, 1950), *reprinted in* B.E. Carter and P.R. Trimble, *International Law: Selected Documents* 464-485 (1995), articulates the free speech guarantee of the Convention:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

...
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

There are 28 parties to the European Convention: Austria, Belgium, Bulgaria, Cyprus, Czech Rep., Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, San Marino, Slovak Rep., Spain, Sweden, Switzerland, Turkey and the United Kingdom. Carter and Trimble, *id.* at 464; *see also* L. Clements, *European Human Rights: Taking a Case Under the Convention* (1994).

Finally, Article VII of the Helsinki Final Act of the Conference on the Security and Cooperation in Europe (CSCE), Aug. 1, 1975, 14 I.L.M. 1292 (1975), *reprinted in* B.E. Carter and P.R. Trimble, *International Law: Selected Documents* 519-522 (1995), provides, *inter alia*:

The participating States will respect human rights and fundamental freedoms, including freedom of thought, conscience. . . . *Id.* at 522.

Presently, the CSCE is comprised of 52 parties or member-states: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Belarus, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, and Uzbekistan (Yugoslavia's participation is suspended). *Id.* at 519.

72. Section 5 of Article 13 of the American Convention on Human Rights, *id.*, mirrors Article 4 of the Racial Discrimination Convention (*quoted in* Chap. I, *supra* note 6):

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to lawless violence or to any other similar

illegal action against any person or group of persons on grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law. *Id.*

73. See, e.g., art. 23, Constitution of the Republic of Benin, reprinted in II *Constitutions of the Countries of the World* (1993), *supra* note 10; art. 12, Constitution of Botswana, reprinted in III *Constitutions of the Countries of the World* (1989), *supra* note 10; art. 27, Constitution of the Republic of the Congo, reprinted in II *Constitutions of the Countries of the World* (1993), *supra* note 10; art. XXVIII (1)(a), Constitutional Law of the People's Republic of Angola, reprinted in I *Constitutions of the Countries of the World* (1992), *supra* note 10; preamble, Constitution of the Republic of Cameroon, reprinted in III *Constitution of the Countries of the World* (1987), *supra* note 10; art. 27, 1992 Constitution of the Republic of Cape Verde, reprinted in IV *Constitutions of the Countries of the World* (1994), *supra* note 10; art. 3(b), Constitution of the Kingdom of Swaziland, reprinted in XVIII *Constitutions of the Countries of the World* (1991), *supra* note 10; art. 24, Constitution of the Third Republic of Niger, reprinted in XIII *Constitutions of the Countries of the World* (1994), *supra* note 10; art. 25, Constitution of the Fourth Republic of Togo, reprinted in XIX *Constitutions of the Countries of the World* (1994), *supra* note 10; art. 41, Constitution of the Republic of Côte d'Ivoire, reprinted in V *Constitutions of the Countries of the World* (1994), *supra* note 10; art. 15, Constitution of Sierra Leone, reprinted in XVII *Constitutions of the Countries of the World* (1992), *supra* note 10; art. 21(a), Constitution of the Republic of Namibia, reprinted in XII *Constitutions of the Countries of the World* (1990), *supra* note 10; art. 15, Constitution of the Republic of Liberia, reprinted in X *Constitutions of the Countries of the World* (1985), *supra* note 10; art. 79, Constitution of Kenya, reprinted in X *Constitutions of the Countries of the World* (1988), *supra* note 10; art. 13, Constitution of the Federal Democratic Republic of Ethiopia, reprinted in VI *Constitutions of the Countries of the World* (1995), *supra* note 10; art. 23, Constitution of the Somali Democratic Republic, reprinted in XVII *Constitutions of the Countries of the World* (1981), *supra* note 10; art. 18(1), Constitution of the United Republic of Tanzania, reprinted in XIX *Constitutions of the Countries of the World* (1986), *supra* note 10; art. 76, Constitution of Mozambique, reprinted in XII *Constitutions of the Countries of the World* (1992), *supra* note 10; art 20(1), Constitution of Zambia, reprinted in *Constitutions of the Countries of the World* (1992), (Supplement), *supra* note 10; art. 15, Draft of the Constitution of the Republic South Africa (22 Nov. 1995) (South African Consulate edition).

74. 1990 Fundamental Law for the Second Republic of Guinea, 7 reprinted in VIII *Constitutions of the Countries of the World* (1993), *supra* note 10.

75. *Id.* at art. 4.

76. See Const. for the Republic of Guinea, art. 45, *Constitutions of African States: Asian-African Legal Consultative Committee*, 575-82 (1972).

77. D.M. Wai, *Rights in Sub-Saharan Africa*, in A. Pollis and P. Schwab, *supra* note 39, at 116.

78. *Id.*

79. *Id.* at 117.

80. See, e.g., art. 69, 1992 Constitution of the Socialist Republic of Vietnam, reprinted in *Constitutions of the Countries of the World* (1993), (Supplement), *supra* note 10; art. 14, 1992 Constitution of the Republic of Singapore, reprinted in XVII *Constitutions of the Countries of the World* (1995), *supra* note 10; art. 21, 1947 Constitution of Japan, reprinted in IX *Constitutions of the Countries of the World* (1990), *supra* note 10; art. 35, 1982 Constitution of the People's Republic of China, reprinted in IV *Constitutions of the Countries of the World* (1992), *supra* note 10; art. 11, 1947 Constitution of the Republic of China (Taiwan), reprinted in XIX *Constitutions of the Countries of the World* (1995), *supra* note 10; section 37, 1991 Constitution of the Kingdom of Thailand, reprinted in XIX *Constitutions of the Countries of the World* (1993), *supra* note 10; art. 53, 1972 Socialist Constitution of the Democratic People's Republic of Korea, reprinted in X *Constitutions of the Countries of the World* (1991), *supra* note 10; art. 21, 1987 Constitution of the Republic of Korea, reprinted in X *Constitutions of the Countries of the World* (1987), *supra* note 10.

Article 10 the Federal Constitution of Malaysia provides:

- (1) Subject to clauses (2), (3) and (4) –
 - (a) every citizen has the right to freedom of speech and expression.
 - ...
- (2) Parliament may by law impose –
 - (a) on the rights conferred by paragraph (a) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order, or morality, and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offense.

Federal Const. of Malaysia, art. 10, reprinted in II *Constitutions of the Countries of the World* (1995), *supra* note 10.

Article 149 of the Malaysian Constitution lists the special powers that Parliament might exercise against subversion, and allows for the impingement of free speech where it is necessary for Parliament to exercise its emergency powers. These emergency powers may be exercised where individuals, groups or entities attempt to "promote feelings of ill-will and hostility between different races or classes of the population likely to cause violence." *Id.* at art. 149.

81. See art. 24, 1979 Constitution of the Islamic Republic of Iran, reprinted in IX *Constitutions of the Countries of the World* (1992), *supra* note 10; art. 26, 1970 Iraqi Interim Constitution, reprinted in IX *Constitutions of the Countries of the World* (1990), *supra* note 10; art. 36, 1962 Constitution of the State of Kuwait, reprinted in X *Constitutions of the Countries of the World* (1991), *supra* note 10; art. 41, *Constitutions of the Countries of the World* (1995), (Supplement), *supra* note 10; art. 23, 1973 Constitution of the State of Bahrain, reprinted in I *Constitutions of the Countries of the World* (1985), *supra* note 10; art. 15, Constitution of the Hashemite Kingdom of Jordan, reprinted in IX *Constitutions of the Countries of the World* (1984), *supra* note 10; art. 30, 1971 Provisional

Constitution of the United Arab Emirates, *reprinted in XX Constitutions of the Countries of the World* (1982), *supra* note 10; art. 13, Provisional Constitution of Qatar, *reprinted in XVI Constitutions of the Countries of the World* (1993), *supra* note 10; art. 13, 1969 Constitutional Proclamation of the Socialist's People's Libyan Arab Jamihiriya (Libya), *reprinted in X Constitutions of the Countries of the World* (1993), *supra* note 10, and art. 8, General People's Congress Law No. 20 of 1991 on the Consolidation of Freedoms, *reprinted in X Constitutions of the Countries of the World* (1993), *supra* note 10.

82. Article 45 of the Constitution of the People's Democratic Republic of China declares:

Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration, and the freedom to strike, and have the right to speak out freely, air their views fully, hold great debates and write big character posters. Citizens enjoy freedom to believe in religion and freedom not to believe in religion and to propagate atheism.

Constitution of the People's Democratic Republic of China, art. 45, *reprinted in IV Constitutions of the Countries of the World* (1992), *supra* note 10.

83. Fifteen distinct nation-states resulted from the demise of the Soviet Union: Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. See R.W. Howe, *Countries Are Breaking into Ministates and That's Not Necessarily Bad*, Baltimore Sun, Jan. 23, 1994, at E8.

84. E.L. Johnson, *Introduction to the Soviet Legal System* 98 (1969).

85. Constitution of the Union of Soviet Socialist Republics, art. 50, *reprinted in XIV Constitutions of the Countries of the World* (1979), *supra* note 10.

86. *Id.* at art. 36.

87. E.L. Johnson, *supra* note 84, at 99.

88. *Id.* at 103.

89. Constitution of the Russian Federation, art. 29(1) at 25 (V. V. Belyakov & W. J. Raymond eds. 1994).

90. *Id.* at 29(2).

91. 1994 Constitution of the Republic of Tajikistan, art. 30, *reprinted in XIX Constitutions of the Countries of the World* (1995), *supra* note 10.

92. 1993 Constitution of the Republic of Kazakhstan, art. 10, *reprinted in IX Constitutions of the Countries of the World* (1994), *supra* note 10.

93. 1992 Constitution of the Republic of Slovenia, art. 39 (M. Cerar & J. Kranjc eds. 1992).

94. 1993 Constitution of the Kyrgyz Republic, art 16(2), *reprinted in X Constitutions of the Countries of the World* (1994), *supra* note 10.

95. 1992 Constitution of Turkmenistan, art 26, *reprinted in XX Constitutions of the Countries of the World* (1994), *supra* note 10.

96. 1978 Constitution of the Ukraine (as amended to 1995), art 48, *reprinted in XX Constitutions of the Countries of the World* (1995), *supra* note 10.

97. 1992 Constitution of the Republic of Uzbekistan, art. 29, *reprinted in Constitutions of the Countries of the World* (Supplement), *supra* note 10.

98. 1978 Constitution of the Ukraine (as amended to 1995), art. 34, *supra* note 96.

99. Racial Discrimination Convention, art. 1, *supra* Chap. I, note 6.

100. E.W. Vierdag, *The Concept of Discrimination in International Law* 60 (1974); *see generally* N. Lerner, *supra* note 29, at 25-26; W. McKean, *Equality and Discrimination Under International Law* (1983); *see also* The Main Types and Causes of Discrimination, UN Doc. E/CN.4/Sub.2/40 1 Rev. I (1949).

101. *Id.*

102. *Id.* at 61-62.

103. Vierdag explains that he uses the word *wrong* because it covers a number of opinions in an infinite number of contexts. It may mean illegal, inimical, malevolent or arbitrary. *Id.* at 60. Kipp states that "discrimination can . . . be defined as: unequal treatment of equal objects or equal situations . . . if there exists no meaningful connection between the inequality of treatment and those aspects on which it is based." Kipp, *quoted in* E.W. Vierdag, *supra* note 100, at 54.

104. J. Quittner, *Home Pages for Hate*, Time, Jan. 22, 1996, at 69.

105. *Id.*

106. *Id.*

107. *Id.*

108. S.F. Kovaleski, *American Skinheads: Fighting Minorities and Each Other*, Washington Post, Jan. 16, 1996, at A1, A4; *see* S. Komarow, *Report: Hate Groups Find Army Bases Attractive*, USA Today, Mar. 22, 1996, at 3A ("[o]ne in six [soldiers] has seen 'extremist or racist material' – from recruiting posters to Internet e-mail."); *2 Brothers Accused of Racial Assault*, The Advocate (Baton Rouge, La), Mar. 13, 1996, at 20A (stating bar owner who knew African-American victim said: "I've called the kid Buckwheat before" and the victim "jokingly calls white people crackers.").

109. *Id.* at A4.

110. *Id.* at A1.

111. *Id.*

112. An example of racially defamatory acts mixed with more aggressive forms of discrimination was the 1980 Williams College cross-burning episode. A wooden cross was burned in front of a college dorm. The cross-burning, a symbol of racial hatred of Blacks and other minorities, was called "deeply disturbing" and "an affront to the fundamental values and commitments of Williams College No use of the terrible symbolism of the fiery cross, whether seen as a thoughtless or insensitive prank or a malicious effort to intimidate, will be tolerated on the campus." The cross-burning sparked a week of verbal harassment of Black students on the campus. Black students reported that racial slurs were shouted at them from dormitory windows; racist notes were tacked to their doors; and some students reported having received verbal threats by phone. One Black student related that she received a phone call during which the caller said: "I know who all the nigger leaders are. I know where you live." Letters were sent to the president of Williams College, John W. Chandler, and a minister, the Rev. Muhammed Kenyatta, who was a senior at the college. These letters were described as "very offensive and racist." They were postmarked from Cleveland, Ohio, and signed "KKK." *Williams*

College Cross Burning is Protested by 1500, Boston Globe, Nov. 4, 1980, at 23; M. Cohen, *Issues Tangle Ivied Walls: Racism Forum at Williams College*, Boston Globe, Nov. 12, 1980, at 21; *14,000 at Williams College Discuss Racial Incidents*, New York Times, Nov. 12, 1980, at A16. William College's Student Council President, Darrell McWharter, stated: "It [the cross-burning] just served as a catalyst for a lot of subsequent expressions of hostility." Finally, the ultimate and predictable act of violence occurred when the Black Student Union library was vandalized. Cross-burning, a form of symbolic speech, was the logical precursor to more aggressive forms of discrimination and group defamation.

In November 1980 at Harvard University, the President of the Black Students' Association, Lydia P. Jackson, received an anonymous death threat and an obscene telephone call. Someone had written on the calendar in the Association's office: "10 days to kill" and "KKK United." An obscene telephone caller threatened to rape Miss Jackson if she did not "stop creating trouble and making noise on campus." See *Regional News*, UPI, Nov. 20, 1980, available in LEXIS, Nexis Library, UPI File. On November 8, 1980, L. Gerome Smith, a Black freshman at Harvard, reported a series of racial slurs penciled on the wall of the men's restroom near the Black Student Union in Memorial Hall. It is thought that the November 1, 1980, cross-burning at Williams College in western Massachusetts sparked these acts of racial hostility. See P.E. Hirshson, *Harvard Probes Racial Threat*, Boston Globe, Nov. 20, 1980, at 23.

113. This example of group defamation was personally experienced by the author when he lived in Madison, Wisconsin. (See Appendix XI)

114. See discussion of "Little Black Sambo," *infra* Chap. IV.

115. See 25 U.N. Chronicle 54 (No. 11, Dec. 1978); see also *The Third World and Press Freedom* (P.C. Horton ed., 1978). Most of the articles in this volume are critical of UNESCO efforts. Some contend that the UNESCO freedom of information movement is saturated with Marxist or Soviet ideology.

116. Draft Adjustments to the Medium-Term Plan (1977-1982), UNESCO Doc. 20c/4 II, at 11 (1978) [hereinafter "Draft Adjustments"].

117. Declaration of Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and Understanding, the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, UNESCO Doc. 20c/20 Rev. (1978); Declaration on Race and Racial Prejudice, UNESCO Doc. 20c/18 (1978); N. Lerner, *New Concepts in the UNESCO Declaration on Race and Racial Prejudice*, 3 *Human Rights Quarterly* 49 (1981).

118. S. Marks, *UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture and Communication*, 13 Tex. Int'l L.J. 35, 52 (1977).

119. *Id.*

120. Mass Media Declaration, *supra* note 117; Draft Adjustments, *supra* note 116, at 11.

121. *Id.*

122. *Id.*

123. Article 2 of the Declaration on Race and Racial Prejudice, UNESCO Doc. 20c/18 (1978), provides *inter alia*:

- (1) Any theory which involves the claim that racial or ethnic groups are inherently superior or inferior, thus implying that some would be entitled to dominate or eliminate others, presumed to be inferior, or which bases value judgments on racial differentiation, has no scientific foundation and is contrary to the moral and ethical principles of humanity.
- (2) Racism includes racist ideologies, prejudicial attitudes . . . as well as the fallacious notion that discriminatory relations between groups are normally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practice it, divides nations internally, impedes international cooperation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently, seriously disturbs international peace and security.

See also Explanatory Report on the Draft Declaration on Race and Racial Prejudice, UNESCO Doc. 20c/18 Annex (1978).

124. Lerner, *supra* note 29, at 156.

125. *Id.*

126. *Id.*

127. *Id.* at 159-60.

128. J.B. Whitton, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 Am. J. Int'l Law 73 (1949). See generally I. Osterdahl, *Freedom of Information in Question: Freedom of Information in International Law and the Calls for a New World Information and Communication Order* (1992) (discussing the historical development of The New Wolrd Information and Communication Order in international law).

129. *Id.* at 75.

130. *Id.*

131. *Id.* at 75-87.

132. U.S. Const. amend. I, quoted in relevant part in Chap. I, note 7 *supra*.

133. See Chap. III *infra*.

CHAPTER III

The Myth of Absolutism: The First Amendment Right to Freedom of Expression

Introduction

The sun might as easily be spared the universe as free speech from the liberal institutions of society.

Socrates

No greater calamity could come upon the people than the privation of free speech.

Demosthenes

The First Amendment to the United States Constitution has been described as "the most explicit statement of human rights": its values are expressive of "a central commitment to human rights."¹ The "preferred position" of the legally normative content of the First Amendment was announced by the United States Supreme Court in the case of *United States v. Carolene Products Co.*² In the now famous footnote four, Justice Stone suggested a stricter scrutiny of those restraints that infringe First Amendment freedoms. The presumption of constitutionality should function in a more narrow manner when the courts are examining legislation infringing First Amendment values.³

Contrary to the plain meaning of the language – "Congress shall make no law . . . abridging the freedom of speech, or of the press"⁴ – the First Amendment is not an absolute categorical imperative. The values of the First Amendment find their genesis in the works of two major political philosophers. The notion of the absoluteness of free speech was championed by such classical libertarians as John Milton and John Stuart Mill. Milton writes in *Areopagitica*:

And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do imperiously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth to the worst, in a free and open encounter.⁵

John Stuart Mill, in his *On Liberty*, reiterated this belief in the power of truth. Mill contended the suppression of speech was wrong, even if the opinion be false:

First, if any opinion is compelled to silence, that opinion may, for ought we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be in error, it may, and very commonly does, contain a position of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth had any choice of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth, unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most who receive it, be held in a manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled.⁶

Implicit in these views of free speech is the belief that truth will ultimately conquer falsehood. This wholly unrealistic philosophy has been rejected by those who have perceived certain immutable truths about life. Those jurists who assert the absolutist position typically invoke Mill or Milton to support their arguments. Unfortunately, they fail to realize that Mill and Milton were not pure absolutists. For example, in Chapter III of *On Liberty*, Mill states that not all opinions are immune from proscription. The liberty of the individual may be circumscribed where his opinions are "a positive instigation to some mischievous act."⁷ One must not become a nuisance to other people.

The Olympian belief in the free trade of ideas and that the value of an opinion is based on its ability to compete in the marketplace of ideas may well prove effective among the gods, but it is indeed fatuous to expect the successful operation of such a lofty principle among mere mortals. Indeed, the Supreme Court of the United States of America has stated that "the truth rarely catches up with a lie."⁸ Accordingly, a discussion of First Amendment theory and the evolution of the law with its numerous exceptions is of the utmost import.

The First Amendment: Doctrine and Evolution

Various theories attempt to explain the nature and underlying values of the First Amendment. Contemporary exponents of the doctrine of absolutism or literalism echo the sentiments expressed by Justice Black: "I take no law abridging to mean no law abridging."⁹ However, Justice Black's philosophy allows for the regulation of the time, place, and manner of speech and

speech-related activities. Justice Black explained that he never believed "any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases."¹⁰ Another familiar advocate of the absolutist view is Alexander Meiklejohn, a social scientist. Meiklejohn writes that Congress is absolutely prohibited from promulgating laws that have the effect of impinging on free speech values.¹¹ This prohibition would not prevent Congress from passing laws to enhance freedom of expression.¹² The language of the First Amendment creates an unconditional prohibition; "[i]t admits of no exceptions."¹³ Meiklejohn further argues that the constitutional proscription against infringing free speech rights exists in times of war, as well as in times of peace. "[T]he words of the First Amendment mean literally what they say."¹⁴ Therefore, freedom of expression can never be abridged by Congress.

After uttering what appears to be a categorical imperative without conditions – thou shalt pass no law abridging the freedom of speech – Meiklejohn then states:

Libellous assertions may be, and must be, forbidden and punished. So too must slander. Words which incite men to crime are themselves criminal and must be dealt with as such. Sedition and treason may be expressed by speech or writing. And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare. All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment.¹⁵

Meiklejohn has enumerated forms of speech that lie outside the ambit of First Amendment protection. The First Amendment does not create "the unlimited right to talk."¹⁶ The constitutional amendment forbids Congress from passing laws infringing upon freedom of expression when the speech is used for the purpose of governing the country.¹⁷ The amendment "does not forbid the abridging of speech; . . . it does forbid the abridging of the freedom of speech."¹⁸

To explain this ostensibly self-contradictory position, Meiklejohn puts the pieces of this semantics puzzle together through the example of the town meeting. He relates that the people at a town meeting have gathered to discuss and act on matters of public concern, *e.g.*, roads, schools, bond issues, and health. At the meeting, each individual is given the opportunity to express his views. A free and open deliberation occurs in which varied opinions are aired. Freedom of speech will not be abridged in this setting. However, speech must be abridged if the meeting is to be a successful endeavor.¹⁹

A chairman appointed by consensus calls the meeting to order. The ensuing silence is an indication that speech is being restricted. The

chairman enforces the rules to the extent that he is not overruled by the democratic assemblage. No individual speaks without the chairman's recognition.²⁰ Those who are given the floor must confine all remarks to the relevant issues placed on the agenda of the meeting for its consideration. No one has the right to interrupt the speaker who legally has the floor, unless permitted by the rules. A debater may be declared out of order if he does not speak to the issues on the agenda; and he may ultimately be ousted from the meeting if he persists in being disruptive.²¹ The town meeting would be totally ineffective if speech were not abridged. Meiklejohn says that speech is being regulated. "It is not a dialectical free-for-all. It is self-government."²²

Meiklejohn uses this illustration to convince us that freedom of speech is not being abridged, only free speech is being abridged. Meiklejohn's formulation is an interesting play on words. The fact of the matter is that at Meiklejohn's town meeting free speech is not being abridged; only the time, place, and manner of speech are being controlled. An individual who speaks on irrelevant issues and who is removed might well continue his campaign on the outside of the town hall or by resorting to other forums. Thus, the substantive content of speech is not being censored or abridged. The speaker who is removed is not being forbidden to express his irrelevancies. He simply may not discuss them at the forum of the town meeting at that particular time.

Meiklejohn's theory becomes even more unsatisfactory when he rejects the reality of exceptions to the First Amendment. He asserts that the First Amendment is an uncompromising statement; there are no exceptions to the rule. There are only restrictions and limitations on free speech rights.²³ He stubbornly argues that if the framers of the First Amendment had intended exceptions, they would have written them into the text.²⁴ Yet, this view of constitutional jurisprudence is overly simplistic. Meiklejohn never explains the difference between what legal scholars would consider an exception and what he views as a limitation, or speech not protected by the amendment. His strict constructionist view has never carried the day in the historical evolution of First Amendment jurisprudence. Meiklejohn states that the regulation of speech falling outside of the amendment's protection does not create an exception. If the speech were never encompassed under the umbrella of First Amendment protection, it cannot be an exception.²⁵ The fundamental and obvious problem with Meiklejohn's analysis seems to be definitional. The word "exception" is derivative of the Latin verbal infinitive *exceptare*, which means "to leave out, to exclude." An exception to the First Amendment is expressive behavior or categories of language that have been left out or excluded from the protection of the amendment. Meiklejohn never defines his terms. To say language that was not intended to be protected by the amendment does not constitute an exception to the

amendment is to be confused about the meaning of the word "exception." Meiklejohn's argument reflects a lack of understanding of the meaning, legal usage, and etymology of the term "exception."

This writer takes issue with Meiklejohn's statement that, although Congress cannot make laws abridging the freedom of speech, the people or government may agree to annul or change the First Amendment, because they enacted it.²⁶ Americans as members of a democratic society may limit or destroy freedom at any time.²⁷ Meiklejohn believes that Congress is not the government or the people. As far as Congress is concerned, the amendment specifically denies it the power to circumscribe speech.²⁸ Contrary to Meiklejohn's theory, in a representative democracy, Congress represents the people. The acts of Congress are the expression of the will of the people, the *vox populi*. How else do men and women of the republic make known their desires, save through their duly elected representatives in Congress?

Finally, one must not forget to mention Meiklejohn's belief that the purpose of free speech is to enhance self-governance:

[U]nwise ideas must have a hearing as well as wise ones, unfair as well as fair ones, dangerous as well as safe, un-American as well as American. . . . The principle of freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage. . . . [C]onflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we . . . need to hear them. The freedom of ideas shall not be abridged.²⁹

Meiklejohn's theory of free speech is extremely broad so as to include political, moral, social, cultural, and aesthetic values.³⁰

Thomas I. Emerson presents another theory of the First Amendment that is significantly more liberal than Meiklejohn's. Emerson complains that those who put forth the literal interpretation of the First Amendment have failed adequately to delineate the boundaries of their theory; they have failed also to explain exceptions.³¹ These flaws in the absolutist posture have caused it to be labeled impractical or illogical.³² Hence, Emerson sees the need for a unifying theory of the First Amendment and purports to present one. Emerson's First Amendment theory has as its underlying values four specific goals: (1) a system of free expression allows for the self-fulfillment of the individual; (2) free expression is a method for ascertaining truth; (3) free expression permits members of society to participate in the socio-political and economic decision-making process; and (4) free expression is a means of maintaining societal homeostasis and social cohesion.³³

Emerson explains the concept of individual fulfillment as a process of self-realization. It enables the individual to reach his potential and develop his character.³⁴ Freedom of expression is seen as an important element in the creative process of the development of ideas and positive self-concept.³⁵ The suppression of speech is contrary to the nature of man and an insult to human dignity. Mankind is a naturally gregarious and social species. The expression of beliefs and opinions serves the common good of the society. One must be permitted to share in decisions that will affect one's well-being.³⁶ One must be allowed to receive the knowledge of others, so that one is better able to formulate opinions and communicate needs and aspirations.³⁷

Of course, the most obvious reason for a system of free expression is the attainment of truth.³⁸ Emerson observes that, in a society where free speech is revered, the discovery of truth is made simple. Since all sides of an issue are offered in the marketplace of ideas, the listener may evaluate all positions and arrive at a rational judgment as to what is truth.³⁹ Emerson emphasizes that it is especially critical for radical views to be heard and evaluated. The censoring of information and debate inhibits rational judgment-making and "tends to perpetuate error"; it stifles a "generation of new ideas."⁴⁰ No matter how evil or false the opinion may be, "open and robust debate" is the best policy. The dissemination of novel ideas, the fight between conflicting opinions, and the toleration of the pernicious idea unify society and promote the amelioration of the human condition.⁴¹ Truth is the ultimate end of free expression.

Emerson believes that freedom of expression creates an opportunity for those in a participatory democracy to participate in the process of governing.⁴² This goal of freedom of speech is also the basis of Meiklejohn's theory. The right of each human being to form and communicate beliefs to the other members of the society is essential for an effective decision-making process.⁴³ It is the superlative method of coming to a consensus. Social, economic, and political decisions are shared responsibilities in a democracy.⁴⁴ The government needs to be aware of the needs, attitudes, and aspirations of the governed. The government must permit people to communicate their opinions. The will of the people must be manifested in responsive governmental action.⁴⁵ Freedom of expression makes for an informed and responsive government, a government that receives its powers from the people.⁴⁶

In Emerson's view, the final underlying First Amendment value is described as the "balance between stability and change."⁴⁷ Here, Emerson posits a theory of social control. The stability of the community and social cohesion are maintained through the exercise of free speech rights. A system of free expression maintains societal homeostasis: "[t]he precarious balance between healthy cleavage and necessary consensus."⁴⁸ The

prohibition of certain ideas "substitutes force for logic."⁴⁹ Such suppression may delay social change temporarily, but ideas remain unchanged, and unity and loyalty are impaired.⁵⁰ When ideas are suppressed, positions harden; society becomes static and does not flow with the tides of change. The opposition may be driven underground with no legitimate means of venting its frustrations except by the sword.⁵¹ Open and robust debate has a cathartic or purgative effect; it promotes social cohesion. Freedom of expression channels the frustrations of the opposition into avenues that comport with the dictates of law and order.⁵² Political legitimization is the ensuing result, since all parties have had their day in court. The losers are more likely to accept defeat graciously because they will conclude they have been accorded equal treatment under the law.⁵³ They will realize that there will be other opportunities for them to convince society of the goodness of their positions.⁵⁴ Emerson observes that this system of free expression is not unconditional in nature. Limitations or exceptions must be "clear cut, precise, and readily controlled."⁵⁵ The principle of free expression must be reconciled with other competing rights.⁵⁶

A much more limited theory of the First Amendment has been articulated by those who believe the amendment protects only political speech. Its purpose is to promote the discovery and spread of political truths. These truths concern the operation, behavior, and policies of the government.⁵⁷ Explicitly political speech consists of statements about how people are to be ruled by their rulers. Thus, this form of speech includes criticizing, evaluating, propagandizing, and electioneering.⁵⁸ Bork observes that it specifically excludes scientific, educational, commercial, or aesthetic expression.⁵⁹ Explicitly political speech is therefore the only speech that merits a preferred position.⁶⁰ Political speech under this view does not embrace all speech related to government or the dissemination of political truths. "A novel may have an impact upon attitudes that affect politics, but it would not for that reason receive protection."⁶¹ Speech advocating the overthrow of the government by use of force or speech encouraging the violation of the law may well concern government and be political, but these forms of speech would not be protected.⁶²

Political truths constitute values that are protected by the Constitution and thus are beyond the reach of legislative control. They are paramount truths about the manner in which the government should conduct its affairs as a matter of procedure and substance.⁶³ The majority determines what these truths are; they may differ tomorrow from what they are today.⁶⁴ Bork considers pornography unprotected under his theory because it is not explicitly political.⁶⁵ One might assume racially defamatory falsehood would be easier to proscribe under Bork's theory, since it contributes nothing to the governing process and says nothing about the way the government should conduct itself. In defending his theory, Bork writes:

Any theory of the First Amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line. . . .⁶⁶

Bork suggests that we need not protect all arguably valuable speech. Those who suggest we should are confusing "the constitutionality of the laws with their wisdom."⁶⁷ Political speech is placed in a preferred position because it breeds societal enlightenment and political efficacy.

Hence, it can be seen that the literalist or absolutist approach to the First Amendment is a minority view. Even those who profess adherence to this position do not, in the final analysis, accept the amendment as an unconditional rule of law. They fail to disentangle themselves from the skein of illogical, confused, and somewhat self-contradictory analysis. Absolutism has never been accepted by the Supreme Court of the United States. Justice Holmes in the case of *Gompers v. United States*⁶⁸ states:

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.⁶⁹

Justice Frankfurter put forth a similar view in *Dennis v. United States*:⁷⁰

The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument. . . . Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules.⁷¹

The law of defamation is the most obvious exception to the general rule that speech is protected by the First Amendment.⁷² The gravamen of the libel action is the strong interest society has in protecting the character or reputation of the individual.⁷³ Once tarnished, reputation is virtually impossible to restore. At common law, the concept of strict liability was applied in libel actions. The plaintiff was only required to place the defamatory statement into evidence and prove the statement was uttered or

published by the defendant to others. There was no requirement that the plaintiff prove the statement to be false. Nor was he required to show knowledge on the part of the defendant as to the falsity of the statement, or that the defendant reasonably should have been aware of such falsity. Truth of the utterance was instead an affirmative defense. Actual damages were presumed.⁷⁴

The law of libel remained virtually unchanged until 1964. In the historic decision of *New York Times Co. v. Sullivan*,⁷⁵ the United States Supreme Court held that a public official could not recover damages against a media defendant for a defamatory falsehood related to the defendant's official conduct regarding a matter of public concern, unless the plaintiff proved the libelous utterance was made with reckless disregard for the truth or falsity of the statement or with knowledge of its falsity.⁷⁶ *Sullivan* was the first assault on the common law conception of libel. Its legal progeny encroached further upon the common law libel action. *Rosenblatt v. Baer*⁷⁷ defined the concept of the public official.⁷⁸ In *Curtis Publishing Co. v. Butts*⁷⁹ and *Associated Press v. Walker*,⁸⁰ the constitutionalized privilege set forth in *Sullivan* was expanded to protect media defendants' communications about public figures with respect to public issues and events.⁸¹ *Rosenbloom v. Metromedia, Inc.*⁸² extended the constitutional privilege to all matters of public interest; a subject-matter test replaced the test that turned on the status of the plaintiff and defendant.⁸³ *Gertz v. Robert Welch, Inc.*,⁸⁴ renounced *Rosenbloom*'s subject matter test and held that private individuals instituting actions against media defendants need not prove reckless disregard for truth,⁸⁵ but the states might impose any standard of liability short of liability without fault.⁸⁶ Presumed and punitive damages were not allowed where proof did not comport with the actual malice standard required by *Sullivan*.⁸⁷ The burden of proof against media defendants was lightened. The importance of libel as an exception to the principle of free speech was convincingly expressed by the Court in *Gertz*:

Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.⁸⁸

Another well-known exception to First Amendment protection is the "clear and present danger" rule of *Schenck v. United States*,⁸⁹ a World War I case that upheld a federal statute proscribing agitation against the draft and war effort. The defendant was convicted of obstructing military enlistment and attempting to foment insubordination in the armed forces. Specifically, the defendant was found guilty of distributing pamphlets critical of the motives of those supporting the war effort. These pamphlets advocated violation of the draft laws and the condemnation of conscription.⁹⁰ It was

alleged that the First Amendment protected the form of speech involved in the case. Justice Holmes, in upholding the conviction of Schenck, announced the now-famous formula:

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.⁹¹

A series of subsequent cases applied the clear and present danger test. In *Frohwerk v. United States*,⁹² the defendant was convicted of publishing an article criticizing the American World War I effort. *Debs v. United States*⁹³ upheld the conviction of an individual for speaking in opposition to the war. The "natural and intended effect" of his speech would have been the obstruction of the draft.⁹⁴ *Abrams v. United States*,⁹⁵ *Schaefer v. United States*,⁹⁶ and *Pierce v. United States*⁹⁷ characterized the conduct of the respective defendants as a "clear and present danger."

Gitlow v. New York,⁹⁸ *Whitney v. California*⁹⁹ and *Dennis v. United States*¹⁰⁰ also involved application of the clear and present danger test. In *Dennis*, the Court sustained the conviction of a defendant for conspiracy to teach the Marxist creed with the intent to overthrow the United States government.¹⁰¹ Although *Yates v. United States*¹⁰² held the mere advocacy or teaching of forcible abolition of government as an abstract principle was not actionable,¹⁰³ *Noto v. United States*¹⁰⁴ and *Scales v. United States*¹⁰⁵ declared that active members of the Communist party with criminal intent and knowledge of the organization's purpose (the violent overthrow of the government "as speedily as circumstances would permit") may be prosecuted. However, prosecution pursuant to the membership clause of the Smith Act is sanctioned only for the "present advocacy" of the overthrow of the government by the use of force.¹⁰⁶

Ultimately, the "clear and present danger" test was limited in the case of *Brandenburg v. Ohio*.¹⁰⁷ In *Brandenburg*, an Ohio syndicalism statute was declared unconstitutional by the Supreme Court. The statute prohibited the advocacy of criminal syndicalism.¹⁰⁸ The Court decided the statute was overly broad and failed adequately to distinguish between mere advocacy of criminal syndicalism and incitement to imminent lawless action:

Accordingly, we are here confronted with a statute which, by its own words, and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California* . . . cannot be supported, and that decision is therefore overruled.¹⁰⁹

Accordingly, this work has briefly surveyed two noted exceptions to the principle of freedom of expression in the decisional law of the United States Supreme Court. Although both of these exceptions have undergone significant evolution, they nevertheless illustrate the falsity of the absolutist position. The Supreme Court has consistently used a balancing approach to determine whether the impairment of First Amendment rights is legally justified.¹¹⁰ A weighing of governmental interests must occur before restrictions on First Amendment freedoms are constitutionally valid. Justice Frankfurter, in *Dennis*, writes:

The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.¹¹¹

Justice Harlan, in *Konigsberg v. State Bar*, recapitulated the viewpoint that a balancing of interests must be used in protecting First Amendment rights.¹¹² He asserted that the amendment does not reflect the absolutist position, nor can one adduce the scope of its protection from the plain meaning of the text.

In recent First Amendment cases, the Court has employed another form of the balancing approach. Where speech falls within the ambit of First Amendment protection, the government must show a "compelling state interest" to justify an intrusion on or impairment of First Amendment freedoms.¹¹³ This is an application of the equal protection doctrine of strict scrutiny. Not only must the governmental interest be compelling, but no less restrictive alternative for achieving the state's goal must be available. There must be a rational relationship between the method of regulation and the speech to be regulated.¹¹⁴ The myth of absolutism must give way to a more realistic and practical approach to protecting First Amendment rights: the balancing technique of strict scrutiny.¹¹⁵

Strict scrutiny analysis has been more often applied in First Amendment cases involving content-neutral abridgements. However, it is the position of the author that it is the most appropriate standard to be applied in cases that involve content-based abridgements. Constitutional scholar Lawrence Tribe writes:

In order to establish that particular expressive activities are not protected by the First Amendment, the defenders of a regulation which is aimed at the communicative impact of the expression have the burden of either coming within one of the narrow categorical exceptions [fighting words, clear and present danger, obscenity etc.] or showing that the regulation is necessary to further a "compelling state interest". . . . The autonomy of the individual and of the press

from government's content-based restrictions is thus nearly absolute. But "nearly absolute" does not mean "absolute" [emphasis added].¹¹⁶

Whether one uses the clear and present danger standard, the fighting words standard, the compelling state interest standard, or some other justificatory standard for restricting freedom of speech, the balancing of competing governmental and individual interests or values is an inevitable part of the analytical process. This balancing process occurs whether the court is engaged in content-based or content-neutral abridgements. Again, Tribe writes:

Thus, determinations of the reach of first amendment protections on either track [content-based abridgement versus content-neutral abridgements] presuppose some form of "balancing" whether or not they appear to do so.¹¹⁷

The rhetoric of absolutism and preferred position is observed in the breach when the United States Supreme Court determines there is a justification for abridging free speech. A recent illustration of the Supreme Court's carving out exceptions to the free speech principle is its decision in *Waters v. Churchill*.¹¹⁸ In *Waters*, the Supreme Court vacated and remanded a court of appeal's decision which held that the First Amendment rights of Churchill, a nurse employed by a public hospital, were violated when she was discharged for allegedly negative, critical, and disruptive statements made to a co-worker concerning the obstetrics department.¹¹⁹ Churchill was accused of having taken the co-worker into the kitchen and informed her about "how bad things [were] in the obstetrics department."¹²⁰ She specifically criticized a cross-training program which trained nurses in one department to work in other departments. Churchill complained that the policy was instituted to remedy staff shortages and threatened the quality of patient care.¹²¹ Churchill also allegedly accused vice-president of nursing, Kathleen Davis, of "ruining" McDonough District Hospital.¹²² As a result of these allegations, Churchill was fired.¹²³ Churchill brought suit against the hospital and certain named defendants pursuant to 42 USC § 1983 for violating her First Amendment rights.¹²⁴ The Supreme Court held that a governmental employee's speech is protected only where it is on a matter of public concern and the employee's free speech right is not outweighed by the damage the speech might cause to the employer's goal of providing public services.¹²⁵ Thus, if it is determined the employee's speech is disruptive of a valid state interest served by the employer and the motivation for discharging the employee is not based upon retaliation for engaging in protected speech activities, the government may discharge the employee without violating the employee's constitutional right to free expression.¹²⁶ The Supreme Court concluded that the disruptiveness of an employee's

speech might "outweigh whatever First Amendment value it might have had."¹²⁷ Further, the majority opinion states:

The government as employer indeed has far broader powers than does the government as sovereign. . . . This assumption is amply borne out by considering the practical realities of government employment, and the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech.¹²⁸

The rule of *Waters* was applied by the Court of Appeals for the Second Circuit in *Jeffries v. Harleston*.¹²⁹ Leonard Jeffries, a professor at City University of New York, sued the university and several named defendants pursuant to 42 U.S.C. § 1983 for violating his free speech rights by reducing his term as Chairman of the Black Studies Department because of a speech he had given in Albany, New York.¹³⁰ In the speech, Professor Jeffries criticized New York state's public school curriculum as biased in its treatment of historical discrimination against African-Americans. Jeffries also made several derogatory, if not racially defamatory, statements about Jews.¹³¹ The Court of Appeals, applying *Waters*, determined that Jeffries' speech was disruptive and the public university's disciplinary action was justified based upon the reasonable belief that the speech might cause disruption of the governmental employer's operations.¹³² Thus, the public university's impingement or restriction of Jeffries' free speech rights was constitutionally justified. The appeals court held:

[A]s a matter of law, this potential disruptiveness [Jeffries' speech] was enough to outweigh whatever First Amendment value the Albany speech might have had. Under *Waters*, then, the jury's finding, if it stood alone, would suffice to show that none of the defendants violated Jeffries' free speech rights.¹³³

Clearly, from the foregoing discussion, the Supreme Court creates exceptions to the First Amendment right to free expression if it deems an exception necessary. A federal criminal statute proscribing group defamation would not require the creation of a new exception to the amendment. The government need only provide groups with the same protection accorded individuals – the right to be free from defamation.

Conclusion

Writers on the subject of group defamation have invoked the legal theory of Meiklejohn in attempting to justify legal restrictions on racially defamatory speech and the display of the swastika. Campisano argues that the United

States Supreme Court has accepted Meiklejohn's theory of the First Amendment and has been applying it in its decisional law.¹³⁴ He reasons that since racial defamation or "group-vilifying speech" plays no important role in the process of self-government and can only cause harm to the public interest, it therefore should not be classified as protected speech.¹³⁵ Campisano states that this position is totally consistent with Meiklejohn's theory. Therefore, he concludes the Skokie demonstration, which involved the dissemination of vilifying and defamatory literature against Jews by Neo-Nazis, given the proper proof,¹³⁶ could have been legally banned without infringing upon First Amendment rights.¹³⁷

Horowitz and Bramson argue for a prohibition on the display of the swastika. The authors contend that the swastika must be viewed historically and that consideration must be given to the audience chosen for its display.¹³⁸ The swastika not only represents one of the most racist movements in history, but it is a symbol that advocates genocide.¹³⁹ The Nazis chose Skokie for display of the swastika because they intended to provoke violence.¹⁴⁰ The display of this symbol goes far beyond an act of political speech. It advertises the desire to exterminate a racial group and therefore is by no means essential to self-governance.¹⁴¹ The display of the swastika constitutes fighting words; it is incitement to public disorder and riot.¹⁴² Thus, Meiklejohn would not categorize such speech as meriting protection.¹⁴³

Although the positions of these writers are analytically sound, it is apparent they have not thoroughly digested the substantive content of Meiklejohn's theory. They have chosen a theorist who prides himself on his absolutism. Meiklejohn's theory is extremely broad, and one can only speculate as to how Meiklejohn would respond to the present inquiry. This author suspects Meiklejohn might well conclude that, even though the racially derogatory forms of expression complained of may be repugnant to the vast majority of decent human beings, they should be protected. Meiklejohn might well argue such speech is essential to the self-governing process. The radical and offensive views of this minority are important so that the government is aware of the group, its opinions, and its mode of operation. Both Meiklejohn and Emerson would probably conclude it is better to allow these hate groups to march and disseminate their literature than to force them to become underground operations, thereby exacerbating tensions between them and the majority while sowing the seeds of violence. Knowledge that a group of citizens has expressed the belief that Jews or Blacks are inferior and are deserving of death might be useful information for a government committed to protecting the human rights of minorities.

This author has attempted to think critically about a hypothetical response to be given by Meiklejohn, consistent with his uncompromising faith in the First Amendment as expressing an "absolute" rule of law. The authors of

the articles discussed in this conclusion would have fared better had they chosen the theory expressed by Bork – an “explicitly political speech” theorist. This more restrictive view of the First Amendment would clearly eliminate racial defamation, in verbal or symbolic form, from the pool of constitutionally protected speech. Under Bork’s view, as previously noted, pornography would not be protected. Consequently, speech as vile and demeaning as “all Blacks want is sex, loose shoes, and a warm place to shit”¹⁴⁴ would be denied First Amendment protection because it is not explicitly political speech as defined by Bork.

Amazingly, the absolutists and other First Amendment theorists agree defamation is unprotected speech in the absence of a privilege, yet they balk when group libel or racial defamation is characterized as unprotected speech. Emerson speaks against all criminal and group defamation statutes. He charges that criminal libel statutes can only result in the suppression of unpopular ideas.¹⁴⁵ Group defamation statutes are inconsistent with an effective system of free expression.¹⁴⁶ “Even if truth is permitted as a defense, the prosecution provides a wider, a more dramatic, and partially official forum for publication of the alleged defamatory statement.”¹⁴⁷ Emerson would argue that one would not want to force these groups underground with no means of venting frustration. This state of affairs would be inimical to social stability.¹⁴⁸

However, Emerson’s position is sorely unconvincing. Racially defamatory utterances are by definition false. So how would a criminal libel statute suppress unpopular beliefs? Should individuals be allowed to damage the reputation of others by uttering lies? The prosecution of any libel action, be it a private act of defamation or group defamation, provides “a wider, a more dramatic, and a partially official forum for publication” of the defamation. Further publicity of the libel by the court proceeding is not sufficient reason to prohibit a defamed person or group from bringing suit. Social and moral value is derived from exposing the lie as a lie and punishing the culprit. Moreover, Emerson’s belief that it is better to suffer these verbal indignities than to force these groups underground overlooks the potential violent response from a victim of such defamatory falsehoods. The victim may seek to redress his grievances through the use of force because no legal recourse is afforded him. Imagine the reaction of Black Americans were it deemed constitutionally permissible for Whites to refer to Black Americans as “niggers.” Emerson suggests that the dissenting opinion of Justice Black in the case of *Beauharnais v. Illinois*¹⁴⁹ expresses the appropriate position.¹⁵⁰ Fortunately, the dissenting opinion in *Beauharnais* is not the law. Elsewhere in this work, the continuing validity of the *Beauharnais* majority opinion and its consistency with *Brandenburg v. Ohio*¹⁵¹ and *R.A.V. v. St. Paul*¹⁵² is strongly argued.

Those theorists who inveigh against group defamation statutes as contravening the First Amendment have been found wanting in their legal analysis. There is both judicial and legislative authority in various jurisdictions of the United States proscribing group defamation.¹⁵³ Those state legislatures that passed group defamation statutes, and courts that have allowed libel statutes to be interpreted so as to cover group defamation, had no doubts as to the constitutionality of their actions. All agree unprivileged defamation is not protected speech under the First Amendment. Why then is group defamation viewed differently? The author would be appalled were any theorist to suggest the following statement is protected by the First Amendment:

You God Damned, stinken, filthy, black skinned monkeys do not belong among an (*sic*) White Human Society. You shit colored animals will eventually be phased out. In plain English – eliminated.

KKK¹⁵⁴

This letter was received by an African-American student at Williams College in Massachusetts. The letter not only contains a threat of genocide against African-Americans, but attributes certain false physical qualities and personal characteristics to African Americans. It is language that "directly . . . holds up the group . . . to public contempt, hatred, shame, disgrace, or obloquy"¹⁵⁵ and causes injury to the public order, harming the public interest.¹⁵⁶ The statement is untrue and libelous. Libel, in any form, should be and is unprotected speech. Even if by some stretch of the imagination one were to conclude that such libelous utterances are protected, the United States has compelling state interests that would justify prohibiting the publication of such utterances. The prevention of civil disorder and adherence to the norm of nondiscrimination which has been accepted as a national legal, moral and social policy are compelling and overriding state interests.¹⁵⁷ Both Emerson and Meiklejohn are theorists. Their opinions are not law. Strict scrutiny is the legal standard that has been applied where First Amendment freedoms have been impaired. Even if such defamatory utterances are considered protected speech, an application of the doctrine of strict scrutiny justifies the legal proscription of the language. This assertion will be supported and scrutinized in the next chapter.

NOTES

1. This belief was expressed by the late Professor Milton Katz of the Harvard Law School in 1979. See P. Reidinger, *Weighing Cost of Free Speech: Do Invective and Talk Shows Signal the Failure of the Marketplace of Ideas?*, A.B.A. J. 88 (Jan. 1996); see also L.J. Lederer and R. Delgado, *The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography* (1995); R.K.L. Collins and D.M. Skover, *The Death of Discourse* (1995).

2. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); J.K. Lieberman, *The Evolving Constitution* 393 (1992) (discussing preferred position concept); Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 Const. Commentary 277 (1995); see also L.H. Tribe, *American Constitutional Law* 576-836 (1st ed. 1978).

3. 304 U.S. at 152-53 n.4.

4. U.S. Const. amend. I.

5. J. Milton, *Areopagitica: A Speech to the Parliament of England for Liberty of Unlicensed Printing* 200-01 (T.H. White ed. 1940).

6. J. S. Mill, *On Liberty* 64 (O. Priest ed. 1956).

7. *Id.* at 67-68.

8. *Gertz v. Welch*, 418 U.S. 323, 344 (1974).

9. See H.L. Black, *James Madison Lectures, The Bill of Rights*, 35 N.Y.U.L. Rev. 865 (1960); see also E. Cahn, *Justice Black and First Amendment Absolutes: A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962).

10. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 517 (1969) (Black, J., dissenting) (case involving symbolic speech, the wearing of black arm bands to protest the Vietnamese conflict).

11. A. Meiklejohn, *Political Freedom* 19 (1960).

12. *Id.*

13. *Id.* at 20.

14. *Id.*

15. *Id.* at 21.

16. A. Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 249-250.

17. Meiklejohn writes:

The First Amendment, as seen in its constitutional setting, forbids Congress to abridge freedom of a citizen's speech, peaceable assembly, or petition whenever those activities are utilized for the governing of the nation.

A. Meiklejohn, *Free Speech and Its Relation to Self Government* 10 (1972).

18. A. Meiklejohn, *supra* note 11, at 21.

19. *Id.* at 24.

20. *Id.*

21. *Id.* at 25.

22. *Id.*

23. *Id.* at 107, 114.
24. *Id.* at 111.
25. *Id.* at 113-14.
26. *Id.* at 110.
27. *Id.*
28. *Id.* at 111.
29. *Id.* at 27-28. Meiklejohn elsewhere explains:

Congress may, in ways carefully limited, "regulate" the activities by which the citizens govern the nation. But no regulation may abridge the freedom of these governing activities

A. Meiklejohn, *supra* note 16, at 257. See L.B. Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 Calif. L. Rev. 729 (1963); W. Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 Vand. L. Rev. 479 (1964); W. Mendelson, *On the Meaning of the First Amendment: Absolute in the Balance*, 50 Calif. L. Rev. 821 (1962).

Kalven writes:

People need free speech because they have decided in adopting, maintaining, and interpreting their Constitution to govern themselves rather than to be governed by others. And in order that it may become as wide and efficient as its responsibilities require, the judgement-making of the people must be self-educated in ways of freedom. We are terrified by ideas rather than challenged and stimulated by them! Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.

- H. Kalven, *Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, 15-16.
30. Meiklejohn, *supra* note 16, at 256-257.
 31. T.I. Emerson, *Toward a General Theory of the First Amendment*, i (1966); see generally Mark Tushnet, *New Meaning for First Amendment: Free Speech May Be Seen as a Tool for Protecting Those in Power*, 105 Yale L.J. 513 (1995); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Cause Cases*, 48 Vand. L. Rev. 1335 (1995).
 32. *Id.*
 33. *Id.* at 3.
 34. *Id.* at 4-5.
 35. *Id.* at 5.
 36. *Id.*
 37. *Id.* at 5-6.
 38. *Id.* at 7.
 39. *Id.*
 40. *Id.*
 41. *Id.* at 8.
 42. *Id.* at 8-9.
 43. *Id.*

44. *Id.*

45. *Id.* at 10.

46. *Id.*

47. *Id.* at 11.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 12.

52. *Id.*

53. *Id.* at 12-13.

54. *Id.*

55. *Id.* at 19.

56. *Id.* at 16-25, 47-117.

57. See, e.g., R. Bork, *Neutral Principles and Some First Amendment Problems*,

47 Indiana L.J. 1, 27, 30 (1971-72).

58. *Id.* at 28.

59. *Id.*

60. *Id.* at 20.

61. *Id.* at 28.

62. *Id.* at 31. Bork believes that speech advocating the overthrow of the government is not political speech because "it violates constitutional truths about processes and . . . is not aimed at a new definition of political truth by a legislative majority." Speech advocating the violation of the law is similarly unprotected because "[a]dvocacy of law violation is a call to set aside the results which the political speech [created by the majority which defines political truth] has produced." *Id.*

63. *Id.* at 30.

64. *Id.* at 31.

65. *Id.* at 28-29. See *Pinkus v. United States*, 436 U.S. 293 (1978); *Miller v. California*, 413 U.S. 15 (1973); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684 (1959); *Roth v. United States*, 354 U.S. 479 (1957).

66. Bork, *supra* note 57, at 28-29.

67. *Id.* at 29.

68. *Gompers v. United States*, 233 U.S. 604 (1914).

69. *Id.* at 610.

70. *Dennis v. United States*, 341 U.S. 494 (1951).

71. *Id.* at 523-24 (Frankfurter, J., concurring) (footnote omitted).

72. The framers of the Constitution did not adhere to an absolute interpretation of the First Amendment. The Alien and Sedition Act of 1798 (expired 1801) was enacted by Congress, although Jefferson believed it to be unconstitutional by reason of the First Amendment. See J. Elliott, 4 *Debates on the Federal Constitution* 541 (1876).

73. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). See R.D. Sack, 1995 *Developments in Defamation Law*, 420 Practicing Law Institute (Course Handbook Series) 687 (1995); see generally G.G. Ashdown, *Gertz and Firestone*:

A Study in Constitutional Policy-Making, 61 Minn. L. Rev. 645 (1977); J.D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975) [hereinafter cited as Eaton]; C. Lovell, *The Reception of Defamation by the Common Law*, 15 Vand. L. Rev. 1051 (1962); J.L. Merin, *Libel and the Supreme Court*, 11 Wm. & Mary L. Rev. 371 (1969); J.S. Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 Tex. L. Rev. 630 (1968); Note, *Developments in the Law - Defamation*, 69 Harv. L. Rev. 875 (1956).

74. Eaton, *id.* at 1353.

75. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); see A. Lewis, *Annals of the Law, The Sullivan Case*, The New Yorker, Nov. 5, 1984, at 52, in *A Tort Anthology* 431 (L.C. Levine, J.A. Davies, E.J. Kionka eds. 1993); see also *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Greenbelt Co-op Publishing Assn. v. Bresler*, 398 U.S. 6 (1970); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Dunn & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); see R.A. Smolla, *Dunn & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 Geo. L.J. 1519 (1987).

76. *Id.* at 279.

77. *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

78. *Id.* at 84-85.

79. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

80. *Associated Press v. Walker*, 388 U.S. 130 (1967).

81. *Id.* at 162-165.

82. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

83. *Id.* at 43-44.

84. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

85. *Id.* at 347-48.

86. *Id.*

87. *Id.* at 348-349.

88. *Id.* at 344 n.9; see M.L. Dragas, *Curing a Bad Reputation: Reforming Defamation Law*, 17 Harv. L. Rev. 113 (1995). Shakespeare commented on libel in this manner:

He who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.

Othello Act III, scene iii (Stevens ed. 1982).

89. *Schenck v. United States*, 249 U.S. 47 (1919).
90. *Id.* at 48-49.
91. *Id.* at 52; see S.D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 Mich. L. Rev. 348 (1995).
92. *Frohwerk v. United States*, 249 U.S. 204 (1919).
93. *Debs v. United States*, 249 U.S. 211 (1919).
94. *Id.* at 215.
95. *Abrams v. United States*, 250 U.S. 616 (1919).
96. *Schaefer v. United States*, 251 U.S. 466 (1920).
97. *Pierce v. United States*, 252 U.S. 239 (1920).
98. *Gitlow v. United States*, 268 U.S. 652 (1925).
99. *Whitney v. California*, 274 U.S. 357 (1927).
100. *Dennis v. United States*, 341 U.S. 494 (1951).
101. *Id.* at 495-498.
102. *Yates v. United States*, 354 U.S. 298 (1957).
103. *Id.* at 312-327.
104. *Noto v. United States*, 367 U.S. 290 (1961).
105. *Scales v. United States*, 367 U.S. 203 (1961).
106. Noto, 367 U.S. at 298-299.
107. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).
108. *Id.* at 444-45. See Ohio Rev. Code Ann. § 2923.13 (1954) (repealed effective Jan. 1, 1974).
109. 395 U.S. at 449.
110. See, e.g., *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Adler v. Board of Educ.*, 342 U.S. 485 (1952); see also G. Gunther, *In Search of Judicial Quality on the Changing Court: The Case of Justice Powell*, 24 Stan. L. Rev. 1001 (1972).

A third famous exception to the First Amendment is the so-called "fighting words exception" announced in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Chaplinsky*, the Supreme Court held:

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. . . . 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.

Id. at 571-72 (citations omitted); cf. *Feiner v. New York*, 340 U.S. 315 (1951) (Black convicted for using language tending to incite riots by Blacks against Whites).

111. 341 U.S. at 524-25.

112. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51.

113. See, e.g., *Burson v. Freeman*, 504 U.S. 191 (1992); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *Buckley v. Valeo*, 424 U.S. 1 (1975); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *DeGregory v. Attorney General*, 383 U.S. 825 (1966); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. 415, 439 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama*, 357 U.S. 449, 464 (1958); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Schneider v. State*, 308 U.S. 147, 161 (1939).

The standard of compelling state or governmental interest has been articulated in the following manner: "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U.S. at 438. "[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. at 546. "It is established constitutional doctrine, after all, that the government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest." *Kleindienst v. Mandel*, 408 U.S. at 777 (Marshall, J., dissenting); see *Levin v. Harleston* 770 F. Supp. 895, 921 (S.D.N.Y. 1991) ("The state must have a compelling state interest in the curtailment of speech when it is the content of that speech which the state aims to interdict.").

Some theorists contend that content-based abridgments are never justifiable. They argue that only content-neutral abridgements are legally acceptable proscriptions. This view is close to the absolutist view and finds no support in the decisional law. Furthermore, it is clear the compelling state interest standard is the appropriate standard for analyzing content-based. See the illuminating discussion of two-tiered First Amendment analysis in Tribe, *supra* note 2, at 576-608; see also *FCC v. Pacifica*, 438 U.S. 726 (1978).

114. E.g., *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. at 546.

115. Commercial speech has not been accorded the same degree of constitutional protection as other forms of speech. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Assoc., Inc. v. Willingsboro*, 431 U.S. 85 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). Though commercial speech was given protection in these cases, the Supreme Court stated that commercial speech was not of the same value as non-commercial forms of speech. In *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), the Supreme Court declared: "We instead have afforded

commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression." Commercial speech is therefore another exception to the First Amendment requirement that Congress shall make no law infringing the right to free speech. *See generally* P.C. Devore, *Commercial Speech Redux in the 1994 Term*, 13 Communications Lawyer 12 (1995) (discussing commercial speech cases decided by U.S. Supreme Ct. in 1994); *see also* D.A. Gallagher, *Free Speech on the Line: Modern Technology and the First Amendment*, 3 CommLaw Conspectus 197 (1995); D. Gordon, *Taking the First Amendment on the Road: A Rationale for Broad Protection for Freedom of Expression on the Information Superhighway*, 3 CommLaw Conspectus 135 (1995); J.S. Weber, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising From Computer Bulletin Board Speech*, 46 Case W. Res. L. Rev. 235 (1995).

116. Tribe, *supra* note 2, at 602, 604. Tribe describes the two approaches that the U.S. Supreme Court utilizes to resolve First Amendment claims:

If a government regulation is aimed at the communicative impact of an act, analysis should proceed along what we will call track one. On that track, a regulation is unconstitutional unless government shows that the message being suppressed poses a "clear and present danger," constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the First Amendment from those open to government regulation with only minimal due process scrutiny. If a government regulation is aimed at the noncommunicative impact of an act, its analysis proceeds on what we will call track two. On that track a regulation is constitutional even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas. On track two, the "balance" between the values of freedom of expression and the government's regulatory interests is struck on a case-by-case basis, guided by whatever unifying principles may be found in past decisions.

Id. at 582.

117. *Id.* at 583; *see generally* L.H. Tribe, *American Constitutional Law* (2nd ed. 1988).

118. *Waters v. Churchill*, 114 S. Ct. 1878 (1994); *see Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Connick v. Meyers*, 461 U.S. 138 (1963); *see also Bd. of County Commissioners of Wabansee v. Umbehr*, slip op. No 94-1654, Sup. Ct. (June 28, 1996)(relying on *Waters v. Churchill*).

119. *Id.* at 1880.

120. *Id.* at 1882-1883.

121. *Id.* at 1883.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1884.

126. *Id.* at 1889.

127. *Id.* at 1890.

128. *Id.* at 1886.

129. *Jeffries v. Harleston*, 52 F.3d 9 (2nd Cir. 1995).

130. *Id.* at 10-11.

131. *Id.* at 11.

132. *Id.* at 13.

133. *Id.* at 13. *But see Levin v. Harleston*, 966 F.2d 85 (2nd Cir. 1992) (holding Professor Levin's free speech rights were violated where City University of New York created an alternative philosophy section for students who were offended by Levin's racially denigrating theories concerning the "intellectual and social characteristics" of African-Americans).

134. M. Campisano, Note, *Group Vilification Reconsidered*, 89 Yale L.J. 308, 320-22 (1979).

135. *Id.* at 325-26. The author defines the elements of the subcategory of group-vilifying speech called group defamation. (1) "[I]t must cause serious harm to substantial public interests." *Id.* at 325. This occurs when a certain racial or ethnic group is held "up to public contempt, shame, disgrace, or obloquy," or when the utterance causes the members of the group "to be shunned, avoided, or injured in occupation." *Id.* (2) "[T]he . . . speech must not have appealed to the conscious faculties of its hearer." *Id.* The concept of "conscious faculties" is the mental capacity that the hearer uses to reason, to evaluate information, and to determine the merits of various opposing arguments. These faculties are different from those that are purely emotional and spontaneous. *Id.* at 318 n.47. This concept might be described as the seat of reason as opposed to the seat of passion. (3) The utterance must convey "a false assertion of fact." *Id.* at 326. Where an opinion implies an assertion of fact, the assertion must not be true. An example of an opinion that implies a false assertion of fact is given by the author; it is taken from the Restatement of Torts § 566, comment (b) (1977): "To say of a person that he is a thief without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the connotation of thievery." If this statement of opinion implies an assertion that is false and that the hearer does not assume, then it qualifies as speech that conveys a false assertion of fact. *Yale Note*, at 323 n.66, 324-25. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (Supreme Court rejected the distinction between expressions of opinion and assertions of fact by describing the difference as an artificial dichotomy).

136. *Yale Note*, *id.* at 330-32.

137. *Id.*

138. I.L. Horowitz & V.C. Bramson, *Skokie, the A.C.L.U. and the Endurance of Democratic Theory*, 43 Law & Contemp. Problems 328, 334 (1979); *see also National Socialist Party v. Skokie*, 432 U.S. 43 (1977).

139. *Id.* at 341-42.

140. *Id.* at 342.

141. *Id.* at 340.

142. *Id.* at 334.

143. *Id.* at 340. It must be remembered that the Skokie case involved prior restraint. The burden is much heavier for placing prior restraints on speech. However, this author feels the burden was met, given the nature of the group-vilifying speech. *See Near v. Minnesota*, 283 U.S. 697, 716 (1931).

144. This statement was made by former Secretary of Agriculture, Earl Butz, who was forced to resign. Butz resigned, making the contradictory statement: "This is the price I pay for a gross indiscretion. . . . The use of a bad racial commentary in no way reflects my real attitude." *People of the Week: The Butz Affair - "He Had to Pay the Price,"* U.S. News & World Rep., Oct. 18, 1976, at 18.

145. T.I. Emerson, *supra* note 31, at 71.

146. *Id.*

147. *Id.*

148. *Id.* at 11-13.

149. *Beauharnais v. Illinois*, 343 U.S. 250, 267-76 (1952) (Black, dissenting).

150. *Id.* at 271.

151. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

152. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

153. Jurisdictions that have adopted group defamation statutes include Connecticut, Massachusetts, and Minnesota. *See* 28 Conn. Gen. Stat. § 53-37 (West 1994); 44A Mass.G.L.A., ch. 272, § 98c (West 1990); 40 Minn. Stat. Ann. § 609.765 (West 1987); *see* F. W. Grinnell, *Group Libeling*, 28 Mass. L. Wkly. 104 (1943); J. O'Callaghan, *Pornography and Group Libel: How to Solve the Hudnut Problem*, 27 New Eng. L. Rev. 77 (1992); L.P. Beth, *Group Libel and Free Speech*, 39 Minn. L. Rev. 167 (1955). Both Illinois and Indiana had group defamation statutes, but they were repealed. *See, e.g.*, Ind. Code Ann. § 35-15-11 (Burns, 1973) (repealed, effective 10-1-77); § 224a Ill. Crim. Code, Ill. Rev. Stat., c. 38, Div. 1, § 471 (1949) (repealed 1962). *See Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (1962), *cert. den.*, 376 U.S. 513 (1963). (Recovery allowed plaintiff who was a full-back on a team of 60 to 70 players. Media defendant accused team members of using drugs). *See also Beauharnais v. Illinois*, 343 U.S. 250 (1952); *State v. Klapprott*, 127 N.J.L. 395 (1941) (New Jersey defamation statute declared unconstitutional); *see generally Drozda v. State*, 86 Tex. Cr. R. 614, 218 S.W. 765 (1920); *Jones v. State*, 38 Tex. Cr. R. 364, 43 S.W. 78 (1897); *People v. Edmonson*, 168 Misc. 142, 4 N.Y.S.2d 256 (1938); *Crane v. State*, 14 Okla. Cr. 30, 166 P. 1110 (1917); *State v. Brady*, 44 Kan. 435, 24 P. 948 (1890); *State v. Cramer*, 193 Minn. 344, 258 N.W. 525 (1935); *People v. Crespi*, 115 Cal. 50, 46 P. 863 (1896); *Alumbaugh v. State*, 39 Ga. App. 559, 146 S.E. 114 (1929); *People v. Spielman*, 318 Ill. 482, 149 N.W. 466 (1925); *People v. Gordon*, 63 Cal. App. 627, 219 P. 486 (1923); *Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163 (1st Cir. 1977); *Neiman Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

154. Quoted in R.A. Jordan, *The Racial Hate Fires Must Be Extinguished*, Boston Globe, Nov. 18, 1980, at 15. Bob Grant, a New York radio talk show host, was fired by his private employer, Walt Disney Co., for using disparaging and offensive language that was often racist. Grant made the following statements:

"The 'ideal solution' to the Haitian boat crisis . . . would be if 'they drowned.'" Grant also described Rep. Charles Rangel as having "a pygmy mentality." N. Hentoff: *Bigotry: A Firing Offence*, Washington Post, July 29, 1996, at A19. Though the above-quoted statements are pejorative and denigrating racial references, they do not legally constitute defamation of character.

155. Model Statute of Columbia Law Review Editors, *An Act to Make Unlawful the Defamation of Racial, Religious, or National Groups*, App. X [hereinafter Model Statute]; see Note, *Statutory Prohibition of Group Defamation*, 47 Colum. L. Rev. 595,609 (1947).

156. *Yale Note*, *supra* note 134, at 325.

157. See, e.g., U.S. Const. Amends. XIII, XIV and XV; *Police Department v. Mosley*, 408 U.S. 92, 99-101 (1972); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948). See also Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 242 (1964), 42 U.S.C. §§ 1971, 1975a *et seq.* (1976); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), 42 U.S.C. § 1973 *et seq.* (1976); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 86 Stat. 314 (1970), 42 U.S.C. § 1973 *et seq.* (1976); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968), 42 U.S.C. § 3601 *et seq.* (1976). There are two federal statutes that may be applicable to the mailing of racially defamatory materials. One makes it a crime to knowingly deposit for mailing libelous, scurrilous, or defamatory matter, 18 U.S.C. § 718 (1976); the other forbids the mailing of materials that tend to incite murder, arson, or assassination, 18 U.S.C. § 1461 (1976).

CHAPTER IV

Human Rights and Freedom of Expression: The Law of Group Defamation in the United States

Introduction

February 12, 1980

To: Everyone in the Law School Community

I was informed recently that writings containing racial slurs have appeared within the past month in the Law Building, one on a blackboard and the other on a restroom wall.

I have no idea who the perpetrators of these evil deeds might be, but I hope all of you in the Law School Community will join with me in making clear whenever the opportunity presents itself that this kind of activity is not to be tolerated even as a joke. It goes well beyond any protected act of free speech.

Orrin L. Helstad, Dean

Silence those who oppose free speech.

Anon.

The preceding quotations vividly reveal two warring notions of freedom of expression. The Helstad memorandum, distributed at the University of Wisconsin School of Law by Dean Orrin Helstad, was in response to a racial slur that expressed the conviction that "the niggers are the spies." During the 1980-81 school year, this author held the position of Hastie Fellow at the University of Wisconsin School of Law. He was approached by an African-American law student who had seen the statement written on a blackboard in the lobby during spring registration. The slur seems to have been a by-product of the American-Iranian hostage conflict. The student explained that perhaps the individual who wrote the statement believed the African-Americans who had been freed by the Iranians were actually spies, instead of the White males who were not released. The author discussed the matter with Dean Helstad. Dean Helstad stated that, although he had not seen the slur written on the

blackboard, he previously had heard the statement. Obviously, the writer of the racially defamatory statement did not feel that the White females released by the Iranians were spies; only "the niggers [were] the spies."

A week after the Dean's letter was circulated, this author read the following graffiti inscribed on a restroom wall: "Silence those who oppose free speech." The two comments are related. Both statements, read together, articulate the problem with which this work is concerned: the perimeters of First Amendment speech rights when faced with potentially conflicting individual or human rights. The thesis of this work is that racially defamatory falsehood or group defamation, which does damage to the individual, the group, and the social order, is not constitutionally protected speech. But the argument must be taken further. The alternative thesis of this work's analytical framework is that even if one were to conclude that a claim such as "the niggers are the spies" is constitutionally protected speech, the federal government has an overriding and compelling governmental interest that would justify infringement of the speaker's First Amendment rights. The compelling state interest is the norm of non-discrimination, a domestic legal principle and the law of the land. Pursuant to the Fourteenth Amendment, the government has the right to implement laws protecting the civil rights of minorities. As has already been argued, racial defamation or group defamation is not only a form of constitutionally unprotected defamation, but is a form of racial discrimination. Therefore, First Amendment values must succumb to the superior value of eliminating all forms of racism and racial discrimination. Domestic tranquility, social cohesion, and the public interest must be safeguarded, particularly in an ethnically pluralistic society.

The criminal law remains the best method of controlling group defamation. One then avoids the civil law requirement of *colloquium*. Those United States' jurisdictions that have passed group defamation laws have passed criminal libel statutes.¹ The civil law action for defamation of character has as its purpose the protection of the individual's reputation. The purpose of criminal defamation statutes is identical with the purpose of the criminal laws as a whole: the prevention and punishment of human behavior that is inimical to the consociation of men called society and the public interest. The criminal laws express the value judgment that a certain mode of behavior is viewed as socially and morally repugnant by civilized men, an affront to commonly held notions of civility. As Durkheim wrote:

[The criminal law's] true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience . . . it serves to heal the wounds made upon the collective sentiments. . . . [W]ithout this necessary satisfaction, what we call the moral conscience could not be conserved. . . . [I]t functions for the protection of society.²

Consequently, the punishment of certain forms of human conduct when legal norms are breached supports, defends, and protects the community.³

Thus, in an instance of group defamation, the community is the victim. Society has been injured, not merely the individual or the racial group. If one fully understands the difference between the criminal and the civil law, group defamation statutes or defamation statutes that have been interpreted to give protection to groups should become legally acceptable. The racially defamatory statement "the niggers are the spies" is not only an offensive derogatory utterance; it asserts a claim against the African-American hostages that was not true. In addition, it lowers the esteem and character of African-Americans in the viewpoint of the community as a whole. The African-Americans were not spies. The very use of the word "nigger," a racial epithet, is not simply offensive, but when viewed in a socio-historical context, becomes synonymous with the Sambo racial stereotype. Arguably, both "nigger" and "Sambo" are libelous or slanderous utterances.

This work is not simply concerned with language that is racially derogatory, offensive, or hateful in nature. A speaker's persistent emphasis of the fact that IQ test scores of African-Americans are fifteen points lower than those of White Americans might be considered racially derogatory by many people. It is especially derogatory when these respective scores are used as the basis for inferring that African-Americans are genetically inferior to White Americans. Nevertheless, Dr. William Shockley should not be civilly or criminally liable for constantly publicizing this test-score disparity. As to the disparity in test scores, he is stating a fact; it could therefore never be libelous.⁴ However, Shockley's conclusions as to what the fact of this disparity in performance by African-Americans on IQ tests means may be characterized as defamation. He claimed the disparity in IQ score is proof of the genetic inferiority of African-Americans. It may be argued he has published an untruth that has set African-Americans up to "ridicule, contempt, obloquy" – damaging the reputation of African-Americans and the public interest. An individual who yells "I hate cheap Jews"⁵ has not committed an act of group defamation. He has simply expressed an opinion about a certain type of Jew. He has not uttered a falsehood, unless it could be proved that no "cheap Jews" exist. Certainly, an individual has the right to dislike or hate cheap Jews, African-Americans, people with brown eyes, or people with blond hair. He has not made a statement that can be classified legally as a defamatory falsehood. The statement may be derogatory or even inflammatory, but it is not defamation.

Hence, the purpose of this chapter is to expand and expatiate on the law of group defamation as it has developed in the United States and its relationship to the First Amendment right to free speech. The author will defend the legality and desirability of a federal criminal group defamation

statute. Specific examples of potentially racially defamatory speech will be discussed to illuminate the problem.

Dean Orrin Helstad of the University of Wisconsin School of Law revealed a deep and abiding respect for the First Amendment during this author's conference with him on the problem of racial slurs at the law school. The same could not be said of the individual who wrote: "Silence those who oppose free speech." Though attempting to express some absolute respect for free speech values, this individual was clearly drowning in his own ocean of confusion about freedom of speech. He would support unfettered speech; yet, if he is to silence those who oppose free speech, he would have to violate the free speech rights of those he would silence. His statement is therefore internally contradictory and reveals a disrespect for the principle of free expression.

Historical Background of Group Defamation Law in the United States

Since the early 1940s, there have been attempts to create both federal and state laws against group defamation. Most of these attempts were unsuccessful.⁶ However, there are several states that have promulgated racial defamation or group libel statutes, among them Connecticut, Massachusetts and Minnesota.⁷ The Indiana group libel statute was repealed.⁸ Though upheld as constitutional by the Supreme Court of the United States, the Illinois group defamation statute was also repealed.⁹ This fact does not detract from the truth that the Illinois statute was held to be a constitutional exercise of the state's police powers. The New Jersey group defamation statute was declared constitutionally defective because of problems that could have been remedied.¹⁰ There are also several jurisdictions that have interpreted their criminal libel statutes so as to permit group defamation actions. California, Kansas, Georgia, Texas, and Oklahoma have permitted such actions at one time or another.¹¹

One of the most important cases that considered the constitutionality of state group defamation statutes is *Beauharnais v. Illinois*.¹² In *Beauharnais*, the president of the White League of America was convicted of distributing a lithograph on the streets of Chicago that, *inter alia*, called for the mayor and city council to prevent further encroachment, harassment, and invasion of white neighborhoods by African-Americans. Beauharnais accused African-Americans of being rapists, marijuana smokers, robbers, carriers of knives and guns, and the mongrelizers of the white race.¹³ For these statements, he was convicted of violating section 224a of the Illinois Criminal Code. The section made it a criminal offense:

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 exposes citizens of any race, color, or creed or religion to contempt, derision or obloquy or which is productive of breach of the peace or riots. . . .¹⁴

Illinois had been the scene of exacerbated tensions among the races that had often resulted in violence and destruction. The Illinois legislature determined that racially defamatory speech or group defamation had a significant instigatory effect in the creation of these disturbances.¹⁵ Therefore, group defamation was punishable because of its tendency to cause breaches of the peace; the use of such language or defamatory depictions might cause violence or disorder.¹⁶ The statute was declared constitutional over challenges that it violated due process of law, was void for vagueness, and infringed the liberty of speech guaranteed by the due process clause of the Fourteenth Amendment against intrusion by the states.¹⁷ In rejecting the vagueness argument, the Court found the law was directed at a clearly defined evil; its language was the result of history and practice in the state of Illinois as well as in other jurisdictions. The Supreme Court of Illinois had confirmed the interpretation of the statute; it had construed the statute and had determined its meaning.¹⁸ Thus, the statute should be read "in the animating context of well-defined usage."¹⁹ A state could not be denied the power to punish utterances promoting friction among racial and religious groups. The Court decided that liberty of speech, guaranteed by the due process clause of the Fourteenth Amendment against the intrusion of the states, had not been violated. Libelous utterances, by their very nature, are not constitutionally protected.²⁰ Consequently, there was no need to discuss the clear and present danger standard,²¹ which applies only when constitutionally protected speech is being abridged. Writing for the majority, Justice Frankfurter quoted from the case of *Chaplinsky v. New Hampshire*:

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. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."²²

Justice Black, in his dissenting opinion, argued that the majority's decision violated vital freedoms safeguarded by the unequivocal command of the First Amendment.²³ Justice Black contended *Beauharnais* was discussing public issues or matters of public interest. Beauharnais had the right to advocate segregation and to petition the government against certain proposed legislation.²⁴ Justice Reed asserted that the statute was overly broad and void for vagueness; freedom of speech was violated.²⁵ Justice Douglas stated the First Amendment had been violated. Thus, the clear and present danger test should have been applied.²⁶ Beauharnais was "protesting in unseemly language" against judicial decisions invalidating restrictive covenants.²⁷

None of these dissenters satisfactorily addressed the holding of the case. They described Beauharnais's utterances as "protesting in unseemly language." Black claimed that Beauharnais was merely advocating segregation; he was expressing his opinion on matters of public concern. The dissenters were in error. Yes, it is true that Beauharnais's language was unseemly. It is true that Beauharnais advocated segregation. However, it is also true much of the language used by Beauharnais was libelous. The dissenters seem to have overlooked the false and defamatory accusations made by Beauharnais. Certainly, his charges that African-Americans are rapists, robbers, marijuana smokers, knife and gun carriers, and the mongrelizers of the white race could not be proved in a court of law. At best, Beauharnais might be able to show that some African-Americans are guilty of these acts. However, it would have been impossible to prove that these generalizations were true about all or the majority of African-Americans. The dissenters failed to deal with the question of whether Beauharnais had committed the crime of criminal libel. They needed to determine whether libel was outside the ambit of constitutional protection, and, if so, what the state could have done to control group libel. Without specifically stating so, these dissenters apparently viewed Beauharnais's statements merely as unseemly or derogatory hate speech, but not as defamation of character.

Finally, the most cited dissenting opinion is that of Justice Jackson. Jackson argued that the Fourteenth Amendment does not incorporate the First Amendment.²⁸ The First Amendment speaks only to the federal government. The idea of liberty in the due process clause of the Fourteenth Amendment places restraints on the states in restricting individual freedom of speech. This principle of liberty protected by the due process clause of the Fourteenth Amendment is not identical with the freedom of speech and press mandated by the First Amendment, which is directed to the Congress of the United States.²⁹ The power of the United States Congress and that of the states in this area are of different dimensions. The states, pursuant to the due process clause of the Fourteenth Amendment, have a greater latitude in

controlling speech than Congress because the First Amendment categorically prohibits such action. Hence, a federal enactment similar to the group defamation statute in *Beauharnais* would be of dubious constitutional validity.³⁰ Justice Jackson further states:

Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquility. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power, such as the protection of interstate commerce. When the federal government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with those conflicting social interests.³¹

The above reasoning of Justice Jackson was presented to condemn a hypothetical federal group defamation statute. However, Justice Jackson continues his dissent by agreeing with the Court that a state group libel statute – “which brings a class of any race, color, creed, or religion within the protection of its libel laws” – is within the power of the state.³² This element of Justice Jackson’s opinion is never mentioned by those who cite his opinion in support of their anti-group defamation law sentiment. Justice Jackson suggested the clear and present danger test be used in group defamation cases as an additional safeguard. He complained that the Illinois statute did not require the test and dispensed with other accepted safeguards.³³ The trial court repeatedly refused the defendant’s offer of proof as to the allegedly defamatory language.³⁴ The jury was not allowed to consider the defendant’s defense of the right to comment upon matters of public interest.³⁵ The jury was not allowed to consider the defense that a petition for redress of grievances is specifically privileged speech.³⁶ Neither the court nor the jury found any person or group had suffered injury.³⁷ Neither the court nor the jury found injury to the public peace or that Beauharnais’s speech would likely cause such injury.³⁸ These procedural matters gave Justice Jackson pause. Nonetheless, he asserts that group libel statutes on the state level are constitutional:

Group libel statutes represent a commendable desire to reduce sinister abuses of our freedom of expression – abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities. While laws or prosecutions might not alleviate racial or sectarian hatred and may even invest scoundrels with a specious martyrdom, I should be loath to foreclose the States from a considerable latitude of experimentation in this field. . . . [O]ur guiding spirit should be that each freedom is balanced with a responsibility and every power of the State must be checked by safeguards.³⁹

Justice Jackson's invocation of the clear and present danger test is somewhat disturbing. We are here concerned with utterances the majority has deemed outside constitutionally protected boundaries. The majority specifically did not reach the issues behind the phrase "clear and present danger" because it was considering libelous utterances – constitutionally unprotected speech. The majority concluded there was no First Amendment issue. Justice Jackson's invocation of the "clear and present danger" test is significant because he has chosen a federal standard to be used in state proceedings. In his dissent, he argued that the states and the federal government were two different entities, exercising different latitudes of control where First Amendment values are concerned. Yet, he decided the "clear and present danger" standard used by the federal government should be applied by the states.⁴⁰

In addition, Justice Jackson was concerned that no finding of breach of the peace, or probability of breach of the peace, had been made in the case. This author strongly asserts all defamatory speech about racial or ethnic groups has a tendency to cause breaches of the peace or social disorder. The result may not be immediate, but if social cleavages along lines of race or ethnicity are constantly aggravated by defamatory language, civil disobedience or violence will be the inevitable response. Why should the states have to wait until the racial sore becomes infected before the government applies appropriate preventive medicine? Why should society allow the virus of racial antipathy to spread before it takes prophylactic measures to eradicate its causes? Justice Jackson's argument is unconvincing as a justification for criticizing the majority's opinion. He concedes that group libel does injury to the public order.⁴¹ It creates unnecessary racial tensions, and the social cost for its existence is much too high in an ethnically plural society. Justice Jackson admits he has seen how the abuse of freedom of expression can tear a society apart.⁴² He applauds group defamation statutes as an effort "to reduce sinister abuses of freedom of expression."⁴³ Therefore, Justice Jackson has rebutted his own argument that the federal government has little concern with personal reputation or local tranquility.⁴⁴

In a multi-ethnic society, the seeds of social discontent spread rapidly in the winds of racial tension. The number of minorities in America has increased dramatically. Some observers have referred to the social phenomenon of the growing minority presence as the "browning of America." It is in the best interest of the nation that the federal government do all that is within its power to promote the general welfare of its minority population and ensure domestic tranquility. In a society where access to information is controlled by an increasingly sophisticated mass media, racially defamatory falsehood will be brought to the attention of everyone.

Group defamation is a form of racial discrimination as well as a form of libel or slander. The federal government has the right to protect the civil rights of minorities pursuant to the Fourteenth Amendment. It may pass laws implementing its constitutional obligations. Group defamation violates the civil liberties of minorities. The right to be free from all forms of racial discrimination is a fundamental human and civil right.

Kalven is critical of Justice Jackson's "two-tiered" theory of speech. He writes:

Surely there cannot be one idea of free speech essential to ordered liberty and binding on the states, and another idea of free speech, not so fundamental, but more stringent, which prohibits the federal government alone. We are having enough difficulty working out one good theory of free speech without having the obligation now to develop two theories – one for the state level and one for the federal level. Further, the Court having so recently in *Mapp v. Ohio* and *Gideon v. Wainwright* reversed itself and held that there is only one standard for search and seizure, and for right to counsel, it would be extraordinary for it, for the sake of federalism, to subscribe to a two-tier view of free speech.⁴⁵

The two-tiered theory of speech created by Justice Jackson is used to condemn a federal group defamation statute. Justice Jackson's two-tiered theory is totally annihilated in the subsequent case of *Roth v. United States*.⁴⁶ In *Roth*, the Supreme Court upheld the constitutionality of a federal criminal obscenity statute as consistent with the First Amendment. The Supreme Court declared that obscenity, like defamation, was not a form of speech within the ambit of constitutional protection.⁴⁷ The Supreme Court relied on *Beauharnais* to justify its conclusion:

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. (*Beauharnais v. Illinois*, 343 U.S. 250, 256). At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is contemporaneous evidence to show that obscenity, too, is outside the protection intended for free speech and press.⁴⁸

Again, as in *Beauharnais*, the Supreme Court rejected the argument that the "clear and present danger" formula should be applied because it had decided that obscenity was not protected speech.⁴⁹ The Supreme Court, relying on *Beauharnais*, concluded both defamation and obscenity are the same class of speech.⁵⁰ The Supreme Court rejected the argument that there is a greater latitude for state action granted by the word liberty under the Fourteenth Amendment than is allowed to Congress by the language of the

First Amendment.⁵¹ Accordingly, the opinion in *Roth* puts to rest the interesting but erroneous theory Justice Jackson presented in *Beauharnais*.

Although *Beauharnais v. Illinois* has never been overruled, some commentators suggest reliance on its holding is of dubious value.⁵² The case of *Brandenburg v. Ohio*⁵³ is cited to support this contention. However, *Brandenburg* and *Beauharnais* are doctrinally consistent. No group defamation statute was involved in *Brandenburg*. The facts of *Brandenburg* involved Ku Klux Klansmen who held a rally on a farm in Hamilton County, Ohio. A reporter from a Cincinnati television station filmed the event. Some of the statements made by the Klansmen were racially derogatory, but not necessarily libelous (e.g., "Personally, I believe the niggers should be returned to Africa, the Jews returned to Israel."). In attendance were twelve hooded men who carried firearms. They burned a wooden cross and made demeaning statements about African Americans and Jews.⁵⁴ Part of the dialogue was as follows:

How far is the nigger going to go – yeah. This is what we are going to do to the niggers. A dirty nigger. Send the jews back to Israel. Let's give them back to the dark garden. Save America. Let's go back to constitutional betterment. Bury the niggers. We intend to do our part. Give us our states' rights. Freedom for the whites. Niggers will have to fight for every inch he [sic] gets from now on. There might have to be some revengeance [sic] taken.⁵⁵

The Klan leader was convicted under the Ohio Syndicalism Statute of 1891, which prohibited "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." The statute also prohibited "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism."⁵⁶ The defendant was found guilty, fined \$1,000, and sentenced to 10 years' imprisonment.⁵⁷ The United States Supreme Court held the statute punished mere advocacy of the criminal action it described without requiring such advocacy be directed to inciting or producing imminent lawless action or be likely to incite or produce such unlawful action.⁵⁸ The Supreme Court concluded any statute that failed to draw this distinction contravened the First and Fourteenth Amendments.⁵⁹ The Supreme Court observed that neither the trial judge's instructions to the jury nor the indictment refined the statute's definition of the crime, so as to make the distinction between mere advocacy and advocacy that incites imminent lawlessness.⁶⁰

Beauharnais is not inconsistent with *Brandenburg*. In *Beauharnais*, the crime of group libel was unquestionably connected to its tendency to cause breaches of the peace or of the "ordre public."⁶¹ Fear of imminent lawlessness was certainly one of the purposes of the Illinois statute and is

the purpose of all criminal libel statutes. The wisdom of the *Brandenburg* decision might be called into question, given the historical use of violence by the Klan against African-Americans. Certainly, the purpose of the syndicalism statute, though unstated, was to prevent the outbreak of senseless violence, which often follows the mere advocacy of criminal or lawless action. In the case of *John Doe v. University of Michigan*, the court suggested the continuing validity of *Beauharnais* when it opined: "Certain kinds of libel and slander . . . are not protected . . . including possibly group libel. *Beauharnais v. Illinois*. . . ."⁶² Elsewhere in this work, it will be argued that the Supreme Court's recent decision in the case of *R.A.V. v. City of St. Paul, Minnesota* affirms the continued validity of *Beauharnais*.

There are several state court cases where group defamation actions were litigated and upheld under criminal libel statutes that were not group libel statutes. In *Crane v. State*,⁶³ *State v. Cramer*,⁶⁴ *People v. Turner*,⁶⁵ *Jones v. State*,⁶⁶ *People v. Spielman*,⁶⁷ *Alumbaugh v. State*,⁶⁸ *State v. Brady*,⁶⁹ and *People v. Gordon*,⁷⁰ group libel convictions were rendered by state courts. *Crane* involved a book written by Professor Ray Crane, which libeled the Knights of Columbus. As to legal cognizability of the group defamation action, the Court stated:

In order to render one amenable to prosecution for publishing or circulating libelous matter, it is not necessary that such matter name the individuals or any one of them composing the class against whom the matter complained of is libelous.⁷¹

In *State v. Brady*, the Court held that libel may be committed upon a class of people. It need not have as its object a particular person.⁷² *State v. Cramer* cites *Crane* in restating the proposition that no specific person need be mentioned as the subject of a libelous utterance when prosecuting a group libel action pursuant to a criminal libel statute. No *colloquium* requirement is necessary.⁷³ All the other group libel convictions in the cases mentioned above are in accord with the holdings of *Crane*, *Brady*, and *Cramer*.

*Drozda v. State*⁷⁴ and *People v. Edmonson*⁷⁵ are two cases that rejected the prosecution of group defamation actions under criminal libel statutes without proving *colloquium*. The Court in *Edmonson* unpersuasively attempts to distinguish those cases previously discussed that upheld group defamation actions. The Court argues that, though these cases involved group libel actions, specific individuals were named in the indictments, and the groups were limited in number.⁷⁶ The Court further asserted that,⁷⁷ both under the prevailing rule in England and at common law, criminal libel cannot lie against a group without proof of *colloquium*.⁷⁸ The Court's decision is incorrect on both counts. First, the prevailing rule in England is

that a group libel action will be recognized in court when filed under the Public Order Act of 1986. Sections 17-28 of the statute specifically proscribes group defamation or language that incites racial hatred and provides for criminal penalties.⁷⁹ Furthermore, in 1952 the Attorney General of England expressed the opinion that no statute would be necessary to proscribe group defamation. The common law would support the action.⁸⁰ The case of *The King & Osborne*, decided in 1732, involved a libel against Jews in England and has been interpreted as a group libel action.⁸¹ The fact that the names of specific members of the group libeled were given in the state cases mentioned herein was not a reason given by the courts as a basis for their decision. Each of the courts specifically ruled that no particular party needed to be mentioned where a class is the victim of libel under a criminal libel statute. Nor was the size of the group mentioned by the courts in these cases. If the size of the groups had been important or outcome determinative, the courts' opinions certainly would have reflected this fact.

Accordingly, by providing a criminal law remedy for group defamation, one avoids the insurmountable barrier of *colloquium* required in all civil law actions. The *colloquium* principle requires each member of the group to show the defamatory utterance referred to him personally before he is allowed to recover. The speech or language complained of must be "of and concerning the plaintiff" if the alleged defamation is to be actionable. The chance of recovery under the *colloquium* standard is extremely poor for large groups.⁸²

The opponents of group libel laws often refer to the 1941 case of *State v. Klapprott*⁸³ as an example of a group defamation statute that was found unconstitutional. The law of New Jersey was very different from the law in the case of *Beauharnais v. Illinois*. The Illinois statute was limited by construction and usage. The utterance of racially defamatory speech was proscribed because of its tendency to incite breaches of the peace in *Beauharnais*, but not in *Klapprott*. In *Klapprott*, the defendants were indicted for "inciting, counselling, promoting, and advocating hatred, abuse, violence, and hostility against a group of persons residing in this state by reason of race, religion, and manner of worship."⁸⁴ The Court does not record the statements made by the defendants, but simply states they contained "unworthy and scurrilous references to the Jewish people."⁸⁵ *Klapprott* and others as trustees and agents of the German-American Auxiliary Company were indicted under New Jersey R.S. 2:157B-5 and B-6 which provided:

Any person who shall, in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state by reason of race,

color, religion or manner of worship, shall be guilty of a misdemeanor. (R.S. 2:157B-5).

* * * *

Any owner, lessee, manager, agent or other person who shall knowingly let or hire out, or permit the use of any building, structure, auditorium, hall or room, or any part thereof, whether licensed or not, to or for the use of any organization, association, society, order, club, group or meeting of three or more persons where it is purposed or intended to hold any meeting or assembly of three or more persons whereat any provision or provisions of sections 2:157B-2 to 2:157B-5 of this title are to be violated, shall be guilty of a misdemeanor; and any person or persons who shall knowingly hire any such building, structure, auditorium, hall, or room, or any part thereof, for the purpose of using or permitting the same to be used by others for the purpose of violating any provision or provisions of said sections 2:157B-2 to 2:157B-5, shall be guilty of a misdemeanor. (R.S. 2:157B-5).⁸⁶

The defendants argued their rights to free speech and assembly, protected by the New Jersey Constitution and the Fourteenth Amendment to the federal Constitution, were violated by the statute.⁸⁷ Further, the defendants asserted the statute was void for vagueness, uncertainty, arbitrariness, capriciousness, and contravened the due process clause of the Fourteenth Amendment.⁸⁸

The New Jersey Supreme Court held the statute subjected the individual defendants to prosecution for spoken words. It was a case of slander, not libel. Words spoken at common law were not indictable unless they directly tended to breach the peace, were seditious, blasphemous, or obscene, or constituted an incitement to the commission of some indictable offense.⁸⁹ Since the statute did not join the utterance of the speech with the tendency of the speech to cause some criminal result, the statute was constitutionally deficient.⁹⁰ Unlike *Beauharnais*, the statute did not require the language to have a tendency to cause breaches of the peace. The New Jersey Supreme Court in *Klaprott* held the words "hostility," "hatred," and "abuse" were abstract and indefinite.⁹¹ The indictment did not allege a breach of the peace or other violence occurred or was likely to occur because of the speech.⁹² In *Beauharnais*, the statute had been refined and construed by the Supreme Court of Illinois. Consideration of usage was a method of ascertaining the meaning of the statute. Also, the statute in *Klaprott* was overly broad. It appeared that even statements made in private could be punished.⁹³ *Beauharnais* required statements or publications be disseminated to the public.

Curiously, the New Jersey Supreme Court then suggested that to make a speaker criminally culpable, the speech must constitute a clear and present danger that would bring about substantive evils to society the state has a right to prevent.⁹⁴ The New Jersey Supreme Court, applying this federal

standard, decided the statements made by the defendants did not fall into "the clear and present danger category."⁹⁵ Of course, this standard was subsequently rejected in *Beauharnais v. Illinois*, since libel and slander are not constitutionally protected speech. The clear and present danger standard applies only when there is an attempt to control protected speech. In *Beauharnais*, the Supreme Court decided that since Beauharnais's language was libelous, there was no need to discuss those issues lying "behind the phrase clear and present danger."⁹⁶ The case of *State v. Klapprott* does not legally vitiate the concept of group defamation. The New Jersey statute was constitutionally infirm. The Supreme Court of New Jersey made no statement as to the constitutional permissibility or practical wisdom of group defamation laws. As previously shown, the statute in *Beauharnais v. Illinois* was quite different from the New Jersey statute.

In 1962, the Supreme Court of Oklahoma upheld a civil defamation claim brought by a plaintiff who was a member of the 1956 University of Oklahoma football team.⁹⁷ The plaintiff was a member of a group and was not specifically named or referred to in an article that accused football team members of using amphetamines during games to enhance their athletic abilities. The evidence adduced at trial demonstrated that only "spirit of peppermint" was administered to the football team to alleviate dryness of the mouth. There were sixty to seventy members on the 1956 team.⁹⁸

Defendants argued plaintiff could not meet the *colloquium* ("of and concerning") requirement. No specific reference was made to the plaintiff in the article.⁹⁹ The Supreme Court of Oklahoma allowed plaintiff to recover citing various authorities. The Supreme Court of Oklahoma agreed with those authorities holding that if the "defamatory matter is used toward the entire group . . . it may generally be said to refer to each member of the group so that each may recover."¹⁰⁰ Finally, the Supreme Court of Oklahoma concluded:

While there is substantial precedent from other jurisdictions to the effect that a member of a large group may not recover in an action for a libelous publication unless he is referred to personally, we have found no substantial reason why size alone should be conclusive.¹⁰¹

We now have considered the significant case law concerning the problem of racial defamation or group libel. There does exist one important study concluding that group defamation laws are undesirable as a matter of law and public policy. This study was produced in 1963 for the U.S. House of Representatives' Judiciary Committee by Benjamin L. Zelenko and Theodore Sky.¹⁰² The report was requested after Representative Emanuel Cellar, Chairman of the Committee, had received a number of proposals against

group defamation. Although the writers' conclusions are against group defamation laws, the report stands as impressive – albeit unwitting – testimony to the constitutional permissibility of group libel laws. First, the authors rely on the dissenting opinion of Justice Jackson in *Beauharnais* to support their claim of the dubious constitutional validity of a federal group defamation law.¹⁰³ Justice Jackson's opinion has been critically analyzed previously in this work. Moreover, *Roth v. United States* totally rejects Jackson's analysis. Nonetheless, the authors of the report are forced to admit:

Beauharnais represents the major pronouncement of the Supreme Court on the validity of group libel legislation. Whether federal entry into the field of control . . . would be upheld by the Court turns upon whether the Court would extend its holding to cover a federal enactment. . . . [T]he answer would seem to be affirmative. The majority of the Court in *Beauharnais* held that speech which libels a group is no more entitled to constitutional protection than speech which libels an individual. Presumably, the type of speech outside the fringes of constitutional immunity should not vary whether the state or the federal government is attempting to restrain it.¹⁰⁴

Zelenko and Sky agree *Roth* supports the view that a federal group libel law would be constitutional.¹⁰⁵ Despite of the state of the law, the authors stubbornly adhere to the weak and erroneous view of Justice Jackson.

Also, they present policy arguments against group defamation statutes. Zelenko and Sky fear that, in an effort to restrain defamatory speech, useful expression might be abridged by the judiciary.¹⁰⁶ This belief that a good shepherd does not possess the ability to separate sheep from goats is unjustified. The task may be a bit difficult for those unable to recognize a goat in sheep's clothing. However, this task creates no problem for the good shepherd. Courts daily make decisions as to whether certain forms of speech are libelous or slanderous. The courts have shown themselves to be excellent shepherds. They will be given the duty of ensuring that only language that defames, libels or slanders the group will be punished. Historically, the courts have been the guardians, shepherds, or watchdogs of civil liberties.

In *Beauharnais*, there was language in the circulars distributed by the defendant that was not defamatory. However, Beauharnais was not punished for those political beliefs. He was punished only for the defamatory falsehoods he published about African-Americans. The courts could not be expected to allow the culprit to escape with impunity because some of his views were privileged. Next, Zelenko and Sky restate the famous "marketplace of ideas" principle where the fight between competing ideas occurs – a concept that assumes good will always defeat evil.¹⁰⁷ This almost

theological theory was refuted very early in this work as naive and untrue. Human experience denies its validity.

Zelenko and Sky present other policy arguments to justify their disenchantment with group defamation laws. They suggest a number of risks are involved when such laws are promulgated. First, they are concerned the publicity resulting from a criminal prosecution would result in a wider dissemination of the defamation.¹⁰⁸ Second, they assert the trial and the defense of truth might allow the defendant to use the trial as a sounding board which would result in his views being made public.¹⁰⁹ Third, if the defamer is convicted, the defendant might acquire public sympathy or even martyrdom. Acquittal might be viewed as vindication or the official sanctioning of the conduct.¹¹⁰ Fourth, the public might believe the defamed group was using the law for the advancement of its own group interests.¹¹¹ Lastly, in a group defamation suit, the individual group members would not have the opportunity to reflect on the possible risks involved in prosecuting the action. The injury could exceed that which resulted from the original libel.¹¹²

Most of the preceding arguments already have been refuted. None of these arguments is legal; they address the wisdom of the law, not its constitutional permissibility. All of the arguments are analytically unsound. Greater dissemination of the original libelous utterance occurs in any defamation suit. This is a consequence of prosecuting defamation in any form. Yet, no one has ever suggested repeal of the laws that allow individual defamation actions simply because the trial causes a greater dissemination of the defamatory statement and gives the defendant a public forum from which to spread falsehoods.

Few sophisticated Americans read the *National Enquirer*; so, most Americans were ignorant of the defamatory statement the tabloid published about actress-comedienne Carol Burnett. The *National Enquirer* published an article that claimed Ms. Burnett had been boisterous, drunk, and had behaved in an unseemly manner at a Washington, D.C., restaurant. Burnett, a famous entertainer, sued the *National Enquirer* for libel. Because both of her parents had been alcoholics, Burnett had a very serious interest in alcoholism and felt her reputation had been tarnished by the article.¹¹³ The trial caused the libelous utterance to be spread throughout the United States. However, the prosecution of her case served to educate all people that the law will be enforced and tortfeasors punished. Wrongdoing does not pay. Burnett won the lawsuit.¹¹⁴ Burnett's victory will serve as a deterrent to other potential defamers, warning them that society will not tolerate such legally condemned behavior. Another important goal or policy of tort law achieved by Burnett's suit was compensation for the delictual wrong committed against her.

The argument that the defamed group would be accused of using the law to advance its own interests is without merit. Interest groups have always attempted legitimately to influence or lobby Congress to pass laws that favor their own socio-economic, political or moral interests. This is a vital part of the democratic participatory and legislative process. Of course, minorities would be using the law to advance their own interests. Civil rights, particularly the right to be free from all forms of racial discrimination, are an appropriate concern of the law. The law is the proper instrument to be used in support and defense of civil or human rights. In addition, there should be no concern the defendant who is convicted will receive the popular sympathy of the people or be ushered into symbolic martyrdom. This excuse should never be sufficient justification for allowing individuals or groups to become the victims of defamatory falsehood. It is not sufficient reason for refusing to protect the civil or human rights of minorities and the domestic tranquility. Should Jean Harris, former headmistress of the Madeira School and the convicted murderer of Dr. Tarnower, have escaped prosecution because prosecution might have won her symbolic martyrdom? In fact, Ms. Harris did become a heroine to some people. However, few reasonable persons would object to her prosecution.¹¹⁵ If the defamer is acquitted, he is indeed vindicated. Such is the nature of the American system of jurisprudence. A man is innocent until proved guilty. To suggest a finding of not guilty would cause people to believe the government endorses the indicted behavior is to suggest that the failure to convict an accused murderer would cause people to believe the government endorses murder. Therefore, a not guilty finding in a group defamation case would not logically be interpreted as "vindication and official approbation."¹¹⁶

Finally, the authors of this report fail to explain how prosecuting the group defamation action would create political risks for the group upon which each member of the group had not had the opportunity to reflect. How could prosecution of the defamation action create injury that exceeds the original injury? The authors' objection is stated in the abstract. They posit no examples to support their viewpoint. In response, it can only be noted that political risks and additional injury are always involved when human rights are defended by those who do not control the means of production and are not members of the majority.

This work has thus far presented the major objections to group defamation laws set forth in the Zelenko-Sky report. A few other minor objections are raised by these authors. Proof beyond a reasonable doubt and the so-called uncertainties of trial by jury are viewed as having a potentially nullifying effect on criminal group defamation laws.¹¹⁷ This argument is unpersuasive given *Beauharnais* and the other group libel cases discussed in this chapter. The authors mention the boomerang effect: minority groups might be prosecuted under the laws created to protect them.¹¹⁸ This would

be a desirable result consistent with the legal principle of equal protection of the laws. All citizens must be subjects of the laws. Why is this result so repugnant? Also, the authors seem to believe that a group libel statute would have to be drawn so narrowly that it would be ineffective.¹¹⁹ Again, the cases discussed in this chapter rebut this conclusion. In sum, the Zelenko-Sky report is analytically deficient. The authors even concede that

[t]here can be no dispute that group defamation constitutes a serious and malignant evil. Scurrilous, defamatory attacks on classes of individuals because of their racial, religious, or ethnic character injure not only the pluralistic forces which comprise the democratic society, but also deprecate the individuals who are members of the group.¹²⁰

Hence, it is indeed puzzling how these authors could conclude it would be undesirable to pass a federal group defamation statute. The Zelenko-Sky report is an unproductive legal exercise: it gives us no alternative method of controlling this "serious and malignant evil," which is called group defamation. To fully understand the exact nature of the racially defamatory falsehood, one must examine specific examples of the crime.

Contemporary Illustrations of Group Defamation

Group Defamation Legal Standard

The ease with which this author found contemporary examples of racially defamatory speech was shocking; they are abundant.¹²¹ It is important to re-emphasize the point that this work is not concerned with merely offensive, derogatory or hateful utterances; it is concerned with libelous or slanderous utterances that constitute group defamation. This section analyzes four examples of potentially racially defamatory language, using the combined definitions and criteria found in the British Public Order Act of 1986 (hereinafter "Public Order Act"),¹²² the Columbia Law Review's Model Group Libel Statute (hereinafter "Columbia Statute"), and criteria created by this writer to create a Model Statute.¹²³ The Model Statute defines a defamatory statement as

any utterance which, directly or by innuendo, holds up the group, person or persons concerning whom it is uttered, to public contempt, hatred, shame, disgrace, or obloquy, or causes him or them to be shunned, avoided or injured in his or their business, profession, or occupation [or lowers the individual's or group's reputation and esteem in the eyes of the community].¹²⁴

The Columbia Statute defines language tending to cause a breach of the peace as

an utterance which, when judged by the probable reactions of a person of normal self-control, tends to provoke violence, or incites to violence, or which tends to stir anger, unrest or violent resentment on the part of those abused or on the part of others against those abused, or tends to create a disturbance.¹²⁵

This definition of breach of peace is broad and would cover not only language so inciteful as to encourage an immediate violent confrontation, but language that would "stir anger, unrest, or violent resentment" on the part of or against the defamed group. The actual civil disturbance need not occur before the speech is punished. This provision is therefore very useful, since it would allow the control of speech before actual physical violence resulted or before social cleavages along lines of race deepened. Definitions of "public place," "utter," "person," and "racial, religious or national group" are the same as those appearing in the Columbia Statute.¹²⁶

If selected elements of sections 18 and 19 of the Public Order Act of 1986 and section III of the Columbia Statute were combined – with modifications and additions by this author – the following formulation would explain how the author's Model Statute is breached:

- I. A person shall be guilty of an offense under this section if he intentionally, recklessly, or negligently utters in a public place a false, defamatory, and unprivileged statement concerning a racial, ethnic or national group, or if he publishes or distributes written matter which is deemed defamatory (as defined by this statute), and having regard to all circumstances, is inimical to the public interest, and which has a tendency to incite breaches of the peace.
- II. An action authorized by this section may be commenced by the Attorney General of the United States only.

Three new elements have been added in section I above: recklessness, negligence, and language inimical to the public interest. The recklessness and negligence standards have been included to broaden the scope of liability. Intent in cases would be extremely difficult to prove. The concept of language – the utterance of which is inimical to the public interest – is an element borrowed from a group libel statute proposed by the authors of an article that appeared in the Yale Law Journal.¹²⁷

For definitions of criminal negligence and recklessness, the author would use the definitions found in the Model Penal Code. Section 2.02(d) defines negligence:

A person acts negligently with respect to a material element of an offense . . . when he should be aware of a substantial and unjustifiable risk that the material element of a crime exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.¹²⁸

Section 2.02(c) defines recklessness:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct a law-abiding person would observe in the actor's situation.¹²⁹

The punishment for the crime of group defamation under the Model Statute would include both a public retraction by the defendant and a possible fine and/or imprisonment. The convicted defendant would be required to use the mass media for retraction at his own expense. The Columbia Statute provides a remedy of fine and/or imprisonment only if the language had a tendency to breach the peace.¹³⁰ The tendency of the language to cause a breach of the peace also would be a requirement under the author's Model Statute. The Public Order Act is silent on the question of retraction, and provides for fine, imprisonment, or both.¹³¹

Section II of the Model Statute would not allow individuals or corporations to bring actions. There would exist no private right of action, since the statute would be a pure criminal law. Under the Columbia Statute, individuals and corporations might sue.¹³² The British proposal is the better approach. It would allow only the Attorney General to bring the action.¹³³ The author's Model Statute would allow only the United States Attorney General the right to sue on behalf of the defamed group.

The author's Model Statute could be easily expanded to include other forms of group defamation such as defamation based on sexual orientation or gender. African-American women have become very concerned with the misogynistic lyrics prevalent in the music of African-American rap music. References to women as "bitches," "whores," "sluts," "big booty bitches" are ever abundant in so-called "gangsta rap."¹³⁴ Often these male rap artists condone violence against women. One popular rap artist, Snoop Doggy Dog, includes art work on his albums that expresses the sentiment: "Kill the ho."¹³⁵ Another group, Partners-N-Crime, has recorded songs with titles such as "We Don't Love Them Hoes" and "Pussy N A Can."¹³⁶ TRU has

recorded a song entitled "Fuck Them Hoes."¹³⁷ The group UNLV has recorded a song called "Another Bitch."¹³⁸ Joan Holmes, a Tampa, Florida cultural diversity consultant, has lamented: "Verbal attacks can and do transpire to the physical, particularly in poor environments where it has almost been a symbol for men to demean women."¹³⁹ C. Delores Tucker, president of the National Political Congress of Black Women, has initiated a campaign against both "gangsta rap" and those record companies who produce such music.¹⁴⁰ Fifty-two percent of those voting in an Essence Magazine survey concerning "gangsta rap" voted in favor of banning hardcore gangsta rap.¹⁴¹ All but 3 percent of the voters were women.¹⁴²

Sambo Litigation

One of the most significant illustrations of language viewed as racially defamatory is revealed in legal action brought against Sambo's Restaurant, Inc. The now defunct restaurant chain was sued because of its use of the name Sambo to identify its establishments. During its short existence in the 1980s, various communities in the United States attempted to force the restaurant chain to change its Sambo trademark. The name Sambo is considered racially offensive and defamatory by African-Americans and many White Americans. Legal actions against the company were not merely reactions to the paternalistically offensive though deceptively innocent Bannerman tale. Legal actions were initiated by those who were aware of the socio-historical tradition underlying the Sambo personality.

The most familiar use of the word Sambo is as the name of a young African-American boy in the classic children's tale written by Helen Bannerman: *The Story of Little Black Sambo*.¹⁴³ The story is an account of the mischances of life suffered by a young African American child named Sambo. His mother was named Black Mumbo; his father was called Black Jumbo. One day Sambo was given a red coat, a green umbrella, a pair of purple shoes, and a pair of blue trousers by his parents. After putting on all the wonderful clothing, Sambo took a stroll in the jungle, where he met four tigers. The animals purloined Sambo's clothing under penalty of death. Poor little Black Sambo had lost all his new clothing and could only cry. Suddenly, Sambo heard the four tigers arguing in a vainglorious attempt to determine which of them was "the grandest." During this feud, the tigers became so angry that they removed all the clothing taken from Sambo and began to fight each other. Catching each other by the tails, the tigers circled a tree in a delirious rage. Sambo then quickly retrieved his clothes. The tigers melted into butter. Black Jumbo, on his way home from work, saw the butter and decided to take it to Black Mumbo, who used the tiger butter to make delicious pancakes for the family's supper.¹⁴⁴

Thus, Helen Bannerman, in her famous children's book, has pictorially and verbally portrayed the exploits of a cowardly little black boy with thick lips, a wide mouth, kinky hair, and rainbow-like clothing. The introduction explains that the story is the creation of

an English lady in India, where black children abound and tigers are everyday affairs, who had two little girls she used now and then to invent stories.¹⁴⁵

Yet, the illustrations by Bannerman depict characters who are not Indian, but of African heritage. All the characters possess thick lips, kinky hair, and other Negroid features. The names of the characters imply African origins: Black Mumbo, Black Jumbo, Black Sambo (Mumbo Jumbo?). Even if Bannerman intended her characters to be Indian, no American child would be able to distinguish the characters from caricatured African-Americans. The very title of the book reveals Bannerman's intent. Many editions of *Little Black Sambo*, produced prior to 1950, contained stereotypes and caricatures of African-American people.¹⁴⁶ Often, the story was set in Africa or South America. This was done in spite of the fact that tigers are inhabitants of Asia.¹⁴⁷ The exaggeration of physical features was a predominant element in many versions of the story. Yuill writes:

Mumbo was often shown as a fat barefooted Aunt Jemima, while Sambo might be made nude or little more than a black silhouette in a forest of plumed trees.¹⁴⁸

The following statement was found in the copy of the book this writer borrowed from Lesley College in Boston, Massachusetts:

The story of *Little Black Sambo* was and is an entertaining story for small children, but the development of circumstances concerning the Sambo tradition has been unfortunate. No matter how entertaining a book is, one group of children should never be entertained at the expense of another group's feelings. Whether or not members of every cultural group are within earshot, they should all remain within the teacher's or story-teller's mental horizons. A child's self-esteem fluctuates and responds to attitudes in society. However, books such as this have become classics of a sort and do have value for adults in tracing the historical development of children's literature.¹⁴⁹

The sensitive librarians at Lesley College are not alone in their view. The book has been condemned as racially offensive by educators throughout the country, in part, because of the racially derogatory epithet: Sambo.¹⁵⁰ The book has been removed from the shelves of many libraries in America. The primary criticisms of the story are the bright colors of Sambo's clothing, the use of butter that had been taken from the ground, the extreme appetites of

the characters, and their stereotypical depiction.¹⁵¹ The foregoing elements reinforce the defamatory view of African-Americans as greedy, lazy, and excessively flamboyant. However, the most important element is the use of the racially defamatory name Sambo.¹⁵²

What then is the significance of the name Sambo when scrutinized in its socio-historical context? Historically, the name was used by the Spanish for slaves who were of mixed blood: American Indian and African-American ancestry. In the South, the name was used to refer to mulattos.¹⁵³ Historian Stanley Elkins, a noted African-American scholar, writes: "The name Sambo has come to be synonymous with race stereotype."¹⁵⁴ It is a description of "the most popular and pernicious stereotype of the black slave."¹⁵⁵ Elkins further writes:

Sambo, the typical plantation slave, was docile but irresponsible, loyal but lazy, humble but chronically given to lying and stealing; his behavior was full of infantile silliness and his talk inflated with childish exaggeration. His relationship with his master was one of utter dependence and childish attachment; it was indeed this childlike quality that was the very key to his being. Although the merest hint of Sambo's "manhood" might fill the Southern breast with scorn, the child, "in his place," could be both exasperating and lovable.¹⁵⁶

Yuill attempts to explain the popularity of the children's tale:

It is more probable that the appeal of LBS was established largely because of a fascination with the black stereotypes presented in the entertainment of the early twentieth century. First, the minstrel shows and the silent and sound movies emphasized the image of blacks as shiftless ignorant buffoons or as naive, carefree, humorous characters. Rather than providing a more favorable basis for looking at blacks . . . LBS reinforced the distorted public view.¹⁵⁷

Again, Yuill states:

Although Mumbo and Jumbo are hardly flattering names for the parents in LBS, many teachers and librarians erroneously assumed that it was only the "black" which was offensive in the name of the title character. At one time "black" was used to taunt. . . . [H]owever, the major concern of those who protested against the name "Little Black Sambo" was "Sambo" itself and what it had come to represent to black people in the United States. There is nothing innocent or appealing in its connotations, which were as repulsive as derogatory terms for other groups.¹⁵⁸

Anderson agrees with Yuill:

As late as the mid 1960's, historians and social scientists believed that the Sambo portrait – blacks were submissive, indolent, faithful, superstitious, improvident, and musical – was a sound description of the dominant black personality. . . . The traditional Sambo story held blacks had little to aspire to except the sanctions of the slave system that required and sustained infantilism as a normal feature of behavior.¹⁵⁹

Takaki expresses a similar view concerning Sambo, a *sub specie aeternitatis*:

As southern whites imagined him, Sambo – the typical plantation slave – was childlike, docile, irresponsible, happy and lazy. Indeed whites frequently described the Negro as a "grown up child," and usually referred to adult slaves as "boys and girls." . . . A range of images of the Negro can be found in the white mind of the North. The Negro was a child; he was lazy, irresponsible, and mentally inferior. But these characteristics of laziness and ignorance along with immoral and criminal tendencies also implied a savage quality. The Negro was untrained and unsocialized; he was dominated by his passions, especially sex.¹⁶⁰

The noted historian Blassingame reinforces the foregoing viewpoint:

Sambo became a universal figure in antebellum Southern literature partly because he belonged to a subordinate caste. . . . Sambo, combining in his person Uncle Remus, Jim Crow, and Uncle Tom, was the most pervasive and long lasting of three literary stereotypes (Nat and John were the others). Indolent, faithful, humorous, loyal, dishonest, superstitious, improvident, and musical, Sambo was inevitably a clown and congenitally docile. Characteristically a house servant, Sambo had so much love and affection for his master that he was almost filiopietistic; his loyalty was all-consuming and self-immolating. The epitome of devotion, Sambo often fought and died heroically while trying to save his master's life. Yet, Sambo had no thought of freedom, that was an empty boon compared to serving his master.¹⁶¹

Finally, Joseph Boskin endorses the views of the Sambo personality already set forth above.¹⁶²

The denotations of the word Sambo comport with the meaning of the term as it is used in the English language. The *Random House Dictionary of the English Language* (unabridged edition 1264 (1966)) defines Sambo as "1. a Latin American of Negro and Indian or mulatto ancestry. 2. Disparaging and offensive . . . Negro." *Webster's Third New International Dictionary of the English Language* (unabridged edition 2007 (1986)) is *en rapport* with the definition found in *Random House*: "[Amer Sp zambo Negro, mulatto, perf. fr. Kongo nzambu monkey] 1. Zambo 2. Often cap: Negro - usu. used disparagingly." *The Oxford English Dictionary*

(unabridged, Vol. IX, S-Soldo, 73 (1978)) states that Sambo is "[a]pplied in America and Asia to persons of various degrees of mixed Negro and Indian or European blood; also, a name for a kind of yellow monkey. . . . a nickname for a Negro." From a historical vantage point, the Sambo personality is a demeaning racial stereotype African-Americans equate with the word nigger. Sambo is perhaps even more derogatory than the word nigger. It is the perfect example of language that might be considered racially defamatory; it says something about African-Americans that is not true. It casts aspersions on the humanity of African-Americans and subjects them to public ridicule, contempt, obloquy, shame, and disgrace.¹⁶³ It causes injury to the public interest in that it deepens social cleavages along lines of race, and the use of the word has stirred anger, resentment, and violence on the part of both those African-Americans abused by the use of the term and others.

The Rhode Island Commission on Human Rights [hereinafter "the Commission"] ordered Sambo's Restaurant, Inc., to change the name of its four restaurants in the state.¹⁶⁴ The Commission held that "the use of the name Sambo's has the effect of notifying African-American persons that they were unwelcome . . . because of their race."¹⁶⁵ The Commission determined the name was insulting and derogatory. It surveyed 238 persons, of whom 214 said they would not patronize Sambo's because of its name.¹⁶⁶ Sambo's Restaurant changed the name of eighteen of its restaurants in Massachusetts, Connecticut, and New Hampshire.¹⁶⁷

In Massachusetts, there was judicial and extrajudicial action against the use of the name Sambo by Sambo's Restaurant, Inc. Many communities passed resolutions forbidding use of the name for a restaurant. The New Bedford City Council voted that the Building Department refuse requests for building permits for any restaurant called Sambo's. The chain instead developed a Jolly Tiger Restaurant in the city.¹⁶⁸ The towns of Haverhill, Barnstable, Brockton, and Rockland attempted to prevent the chain from using the name Sambo because of its racially defamatory and derogatory character.¹⁶⁹ The Brockton City Council passed the following resolution:

Resolved:

Whereas, the City of Brockton recognizes the need and responsibility of all of its citizens to promote religious, ethnic, and racial harmony, and

Whereas, the City of Brockton is desirous of securing equality amongst all our people, now therefore be it

Resolved that in order to accomplish these ends, the Mayor and the City Council request that the License Commission inform the petitioner for the license to operate a restaurant at 1362 Main Street, that Sambo's as a name for that restaurant is not in keeping with the above expressed sentiment, and be it

further Resolved that the License Commission shall not issue a license with the aforesaid name.

June 29, 1978¹⁷⁰

Several other cities in Massachusetts passed similar resolutions. In the cities of Woburn and Raynham, two Sambo's Restaurants were opened.¹⁷¹ However, because of community protest, the chain decided to open a Jolly Tiger Restaurant in North Dartmouth.¹⁷² In Reston, Virginia, community organizations were successful in pressuring the restaurant chain to change the name of its only establishment to Jolly Tiger. In a conversation with this author, a former Assistant Attorney General of Massachusetts, Jane Entmacher, reported that Sambo's had won a victory in one locality.¹⁷³ The court held the town's refusal to issue a license or building permit to the commercial concern violated Sambo's First Amendment rights.¹⁷⁴ Nevertheless, the Attorney General of Massachusetts sued the restaurant chain for discriminatory advertising in a place of public accommodation and for practicing racial discrimination in a place of public accommodation.¹⁷⁵ The Commonwealth of Massachusetts alleged the name Sambo was regarded as a racial epithet by the vast majority of African-Americans; it deterred them from using a place of public accommodation. Consequently, African-Americans were denied the equal protection of the laws guaranteed by Massachusetts General Laws.¹⁷⁶

The Commonwealth of Massachusetts, in its memorandum in support of a preliminary injunction against the use of the name Sambo, asserted the term *Sambo* is racist, insulting, and an offensive stereotype of African-Americans. The plaintiff presented the opinions of scholars who defined the term Sambo as it has been historically understood.¹⁷⁷ The plaintiff submitted numerous affidavits from African-Americans and White Americans who described the name Sambo as defamatory and insulting.¹⁷⁸ The plaintiffs cited several cases in which courts have disapproved of discriminatory terms or language. In *United States v. Hunter*,¹⁷⁹ the court held that an advertisement stating an apartment was located in a "private white home" violated the law against discriminatory advertising found in the Fair Housing Act of 1968. The court rejected the argument that the phrase simply gave the location of the apartment. The court ruled that if the advertiser could use the label "white home" instead of "white only" the objectives of the Fair Housing Act of 1968 would be negated and congressional intent circumvented.¹⁸⁰ The plaintiff also relied on *Local Finance Company of Rockland v. MCAD*,¹⁸¹ which held that anti-discrimination laws should be broadly construed because no one could reasonably expect a violator to admit his purpose. Subtle and elusive means of discrimination would be practiced. Advertisers should be legally censured for using code words as substitutes for those terms clearly illegal.¹⁸²

Additionally, the Commonwealth of Massachusetts alleged the defendant intended to discriminate because it was aware of and exploited the historical denotations of the term Sambo. The company used the Little Black Sambo character as a logo and used elements of the story such as tigers and tiger butter syrup. At one time, the story was printed on the menus. The defendant persisted in using the name after it had been advised against its use.¹⁸³ These facts were indicia of the defendant's intent. One must determine the intent of an actor by looking at the objective circumstances surrounding the act. The plaintiffs argued that the court should follow the guidelines for determining intent found in *Arlington Heights v. Metropolitan Housing Corp.*¹⁸⁴ and *Washington v. Davis*.¹⁸⁵ These cases explained:

[T]o establish the existence of discriminatory intent, it is not necessary to show that the discrimination was the dominant or primary purpose for the action taken nor is it necessary to establish the subjective state of mind of the actor. Normally the actor is presumed to have intended the natural consequences of his or her deeds.¹⁸⁶

The State of Massachusetts further contended the use of the name Sambo incited others to make use of the epithet and promoted breaches of the peace. Actual incidents of violence and racial harassment were committed during the opening of one Sambo's restaurant. Picketers were threatened with guns, charged by the drivers of cars, and called Sambos and niggers.¹⁸⁷

Finally, the plaintiff averred the case involved commercial speech. The state has a greater latitude for regulating such speech. Commercial speech does not merit the same degree of constitutional protection as noncommercial forms of speech.¹⁸⁸ As far as the use of the name Sambo's was concerned, the State of Massachusetts argued that the speech must be regulated in order to regulate the conduct:

The right guaranteed . . . to the full and equal accommodations . . . of any place of public accommodation means very little if an operator is permitted to put up a sign saying No Blacks Allowed or White Patrons Preferred even if, as a matter of fact, the operator would admit and equally serve a Black who braved the sign and sought such service.¹⁸⁹

In *Ohralik v. Ohio State Bar Association*,¹⁹⁰ the United States Supreme Court held that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."¹⁹¹ As persuasively argued in the memorandum of the plaintiff: "The interest of the state in eliminating racial discrimination is far greater than the speech to be regulated, indeed, compelling."¹⁹²

The evidence submitted to the court by the State of Massachusetts disclosed that the NAACP's National Board of Directors adopted a

resolution "which called for direct action to be taken against the continued use of the name Sambo."¹⁹³ The resolution directed all NAACP chapters across the country to undertake the appropriate action at the local, state, and federal levels to address the continuing affront the use of the name Sambo represents to African-Americans.¹⁹⁴ Unfortunately, the State of Massachusetts lost its fight for a preliminary injunction against Sambo's Restaurant, Inc. Superior Court Justice Edith W. Fine found that the name *Sambo* was offensive to a large number of African-Americans and White Americans. The name was viewed as racially demeaning by a segment of the public in Massachusetts.¹⁹⁵ However, she decided the resolution of certain First Amendment problems was necessary, even if the speech involved was of a commercial character.¹⁹⁶ Ultimately, the case was dismissed by the agreement of both parties to the lawsuit.¹⁹⁷

The Sambo restaurant chain was successful in at least two decisions rendered by federal courts. In *Sambo's of Ohio v. City Council of Toledo*,¹⁹⁸ the District Court upheld Sambo's Restaurant, Inc.'s right to use its trade name as an exercise of its First Amendment rights. The District Court concluded the trade name was protected speech. With scant legal analysis, the District Court ruled the act of the Toledo Planning Council in forbidding use of the name Sambo as a condition for opening a restaurant was "an unconstitutional deprivation of the First Amendment right of free speech."¹⁹⁹ The District Court, in a conclusory fashion, held that "[i]t is clear that the circumstances of the present case do not bring it within those exceptions to the First Amendment guarantees such as fighting words. . . ."²⁰⁰ The District Court further ruled the defendants had a remedy which was with the jurisdiction of the U.S. Patent Office. Sambo's trade name was registered by the plaintiffs pursuant to 15 U.S.C. § 1051. Section 1052 of the registration act forbids the registration of a trade name that "may disparage . . . institutions, beliefs, or national symbols, or bring contempt or disrepute."²⁰¹ The District Court decided the defendant's exclusive remedy for preventing the use of such a trade name is found under § 1064 of the registration act, which provides for the cancellation of a registered trade name that is "contrary to law."²⁰² Those who were offended by the trade name should have resorted to the U.S. Patent Office.²⁰³

The District Court, in deciding the term Sambo was constitutionally protected, failed to discuss or analyze the socio-historical meaning and usage of the term Sambo. However, the District Court did reveal its perspicacity by stating:

One of the basic premises of advertising is that if it is too offensive to too many people, its use will be counterproductive, for those who are offended will not only refuse to buy the product, but also, if they are sufficiently offended, they

will attempt to persuade others to refuse also. Clearly that route is open to the defendants and to the members and the supporters of the NAACP. If they are offended by the word "Sambo's" not only can they refuse to patronize the plaintiffs, but they, too, can erect signs, carry placards, or publish advertisements designed to persuade others to refuse to patronize the plaintiffs.²⁰⁴

In fact, use of the trade name became counterproductive after significant numbers of citizens began to protest and refuse to patronize the business. Eventually, the restaurant chain collapsed. Its social and moral error was the cause of its own death.

In the case of *Sambo's Restaurant, Inc. v. City of Ann Arbor*,²⁰⁵ the Court of Appeals decided the use of the name Sambo, though offensive to African American people, was commercial speech and therefore protected under the First Amendment.²⁰⁶ The defendants had argued, *inter alia*, the use of the name Sambo's to advertise a restaurant "offends certain citizens and frustrates the City's policy of racial harmony and equality."²⁰⁷ The Court of Appeals agreed with the defendants that racial harmony and equality were substantial state interests. Unfortunately, the defendants did not carry their evidentiary burden of proof. The Court of Appeals ruled:

Significantly, however, the City has produced no evidence to demonstrate that the actual operation of the restaurant under the name "Sambo's" has retarded or impeded achievement or furtherance of its goal of racial equality. Tangible evidence of the disruption of racial harmony in Ann Arbor because of the presence of a restaurant named "Sambo's" is not present in this record.²⁰⁸

As was true of the District Court's analysis in the *Toledo* case, here the Court of Appeals failed to consider the socio-historical significance and meaning of the term Sambo. The appellate court did suggest that proof of disruption of racial harmony might be a basis for denying the plaintiff the right to use the trade name. Perhaps, the Court of Appeals would have applied the fighting words doctrine had evidence of disruption been presented.

The lone dissenter, Judge Keith, stated that it had been judicially determined in other contexts that the word Sambo's was a "fighting word" causing violent reactions when directed at blacks.²⁰⁹ Factual findings before the Rhode Island Commission on Human Rights revealed that all of the witnesses, black and white, viewed the term as "offensive and demeaning." Many of the black witnesses considered the term Sambo a "fighting word." Nine African-Americans testified they had engaged in physical altercations with people who had called them Sambo.²¹⁰ Accordingly, Judge Keith asserted that the case should have been remanded for an evidentiary hearing on whether the term was a "fighting word."

Judge Keith considered the socio-historical meaning of Sambo and concluded it was synonymous with the word nigger.²¹¹ Also, Judge Keith referred to those cases in the employment discrimination area where courts have ruled the use of the term Sambo is substantive evidence of racial harassment and employment discrimination. Judge Keith writes:

For example, in *EEOC v. Murphy Motor Freight Lines*, . . . a Title VII case, the court held that the following statement shouted during the lunch hour constituted racial harassment: "He [a white] would say, 'What are you reading?' The guy [another white] would say, 'I am reading about a black guy named Sambo.' He's got a pancake."²¹²

In both the *Toledo* and *City of Ann Arbor* litigation, the majority opinions failed to analyze the term Sambo using a social-historical approach, so as to derive its meaning and ascertain its usage. Had the courts carefully analyzed the term Sambo, they might have determined that use of the name constituted "fighting words" within the meaning of *Chaplinsky*. Alternatively, the courts may have concluded that Sambo was a case of libel *per quod* when viewed in its socio-historical context.

The Commonwealth of Massachusetts shied away from alleging group defamation, even though there is a group libel statute on the books.²¹³ The choice to proceed solely on a claim of racially discriminatory advertising in a place of public accommodation and racial discrimination in a place of public accommodation was certainly appropriate. Racially defamatory conduct is certainly racially discriminatory behavior in addition to being a form of defamation. Indeed, it would have been a great challenge to argue that the language was libelous and outside First Amendment protection. This would have required invocation of the Massachusetts racial defamation statute. Assistant Attorney General Entmacher stated that she did not proceed under the Massachusetts group defamation statute because she felt the statute might be unconstitutional. She gave no specific reasons for her conclusion. However, in reading the memorandum for the plaintiff supporting its request for a preliminary injunction, one is struck by the extent to which the demeaning, derogatory, and insulting character of the term Sambo is emphasized. The major obstacle to proving a claim of racial defamation under the Massachusetts law is the malicious intent standard. As has been suggested, the standards of negligence and recklessness would be desirable additions to a model group defamation statute, since malicious intent might be extremely difficult to prove. This would be especially true in the Sambo case where one might conclude it would not be to the economic interest of the owners to discriminate intentionally or engage in malicious conduct against African-Americans. The defendants were aware of the controversy surrounding the term Sambo and proceeded to exploit it

for their commercial benefit. It would be easier to characterize their conduct as reckless or negligent. A much simpler case would have existed if a customer had been referred to as "Little Black Sambo." This happened to the writer in a place of public accommodation.²¹⁴

The legacy of Little Black Sambo continues to haunt African-Americans. In Gibsland, Louisiana, a White seventh grade teacher, Cissy Lincoln, read the story to her class during Black History Month. Demarkus Durham, an eleven-year-old, told his mother the story had been read in class. Demarkus realized *Little Black Sambo* was "just kind of a book that's talking about Blacks in a bad way."²¹⁵ Ms. Lincoln stated she never realized the story might offend someone. She had read *Little Black Sambo* as a child: "The book has always been special to me. But if my reading of the book offended anyone in anyway, then I apologize." African-American parents called for Ms. Lincoln's resignation.²¹⁶

The Black Muslims or The Nation of Islam

Another example of racially defamatory language that might be proscribed by the author's proposed model statute is certain teachings of the religious doctrine of the Black Muslims or the Nation of Islam. Until the death of Elijah Muhammad, the Black Muslim sect was the primary black nationalist, religious group in America.²¹⁷ Its doctrine at one time taught that the white man was a devil.²¹⁸ The members of this religion awaited the day when "blue-eyed devils would be treated as he [sic] – 'they' ought to be treated."²¹⁹ This meant the annihilation of all members of the Caucasian race. The Black Muslims were never an aggressive group, but they adhered strictly to the belief that self-defense should be used against those who might initiate acts of violence against them. This method was seen as the only effective way of solving the race problem in "the wilderness of North America."²²⁰ The tenets of the religion held African-Americans were superior beings and had a manifest destiny.²²¹ The White American was the personification of evil and was a hindrance to the moral development, freedom, and closeness with Allah the African-American sought.²²² White Americans kept African Americans in a state of mental bondage. C. Eric Lincoln describes the human condition of African-Americans as understood by Black Muslims:

They have been educated in ignorance, kept from any knowledge of their own origin, history, true names, or religion. Reduced to helplessness under the domination of the whites, they are now so lost that they even seek friendship and acceptance from their mortal enemies, rather than from their own people. They are shackled with the names of the slave master; they are duped by the slave master's religion; they are divided and have no language, flag or country of their own. Yet, they do not even know enough to be ashamed. . . . The

most unforgivable offense of these so-called Negroes is that they "are guilty of loving the white race and all that race goes for. . . . The white race [is] their arch deceiver."²²³

Typical of language that might be categorized as group defamation is a dialogue from a play by Louis X (Minister Louis Farrahkan) called *The Trial*:

I charge the white man with being the greatest liar on earth! I charge the white man with being the greatest drunkard on earth. . . . I charge the white man with being the greatest gambler on earth. I charge the white man, ladies and gentlemen of the jury, with being the greatest peacebreaker on earth. I charge the white man with being the greatest adulterer on earth. I charge the white man with being the greatest robber on earth. I charge the white man with being the greatest deceiver on earth. I charge the white man with being the greatest troublemaker on earth. You, therefore, ladies and gentlemen of the jury, I ask you to bring back a verdict of guilty as charged.²²⁴

The Trial was produced all over America. The play created a symbolic trial of the "white man" for his injustices toward African-Americans. The "white man" was found guilty and sentenced to death.²²⁵ Unquestionably, most people would consider the language libelous. The language is certainly as inflammatory as the charges made by Beauharnais. The language would also qualify as defamatory utterance under the criteria set forth earlier in this chapter. The speech contains false assertions of fact. The utterance was made in public; it directly holds the white race up to contempt, ridicule, obloquy, and hatred. It is injurious to the public interest because it exacerbates racial tensions; and such language might well be instigative of breaches of the peace because of its inflammatory nature. Finally, the question of fault (intent, recklessness, or negligence) would probably be very easy to prove.

It must be interjected at this point that the Black Muslims or Nation of Islam have modified their religious doctrine and no longer emphasize the white-man-is-a-devil theme. Nevertheless, for the purposes of this work, the early teachings of the religion are quite instructive. These teachings constantly emphasized the white-man-as-a-devil theme. The "white man" was considered a doomed race. Elijah Muhammad once stated in an interview:

Whether they are actually blue-eyed or not, if they are actually one of the members of that race [white] they are devils.²²⁶

The doctrine taught the original human was African-American and therefore the primogenitor of all races.²²⁷ The "white man" was created by

a black scientist called Yacub²²⁸ who rebelled against Allah.²²⁹ Elijah Muhammad explained these fundamental tenets of the Black Muslim religion:

Who are [sic] the white race? I have repeatedly answered that question in this [column] for nearly the past three years. Why are they white skinned? Answer: Allah [God] said this is due to being grafted from the Original Black Nation, as the Black Man has two germs (two people) in him. One is black and the other brown. The brown germ is weaker than the black germ. The brown germ can be grafted into its last stage, and the last stage is white. A scientist by the name of Yacub discovered this knowledge . . . 6,645 years ago, and was successful in doing this job of grafting after 600 years of following a strict and rigid birth control law.²³⁰

The experiment of grafting the hybrid man produced the "white man," who is considered both mentally and physically weak.²³¹ The White American's impure character accounts for his lack of morality. Yacub grafted out the humanity of the "white man."²³² Yacub claimed:

The human beast – the serpent, the dragon, the devil, and Satan – all men one and the same; the people or race known as the white or Caucasian race, sometimes called the European race. . . . Since by nature they were created liars and murderers; they are the enemies of truth and righteousness, and the enemies of those who seek the truth. . . .²³³

The theological doctrine once adhered to by The Nation of Islam may be considered racially defamatory. The fact that the doctrine is a religious doctrine might create a conflict with the freedom of religion clause of the First Amendment. The freedom of religion clause does not create an absolute prohibition. One might question the wisdom of legally proscribing the teachings of an entire religious sect; however, this work is concerned primarily with the constitutionality of the law. How far society goes in prohibiting a certain form of speech is a decision of the people and the task of the legislatures, the *vox populi*, that draft and promulgate law.

The Pseudo-Scientific Theory of William Bradford Shockley

Contrasted with the views of the Black Muslims are scientific doctrines that posit the racial inferiority of African-Americans. Foremost among the exponents of these theories are William Bradford Shockley and Dr. Arthur R. Jensen. In 1965, Shockley caused an upheaval in the scientific community when he publicized his theory of retrogressive evolution or dysgenics.²³⁴ The theory holds that African-Americans are genetically inferior to Whites.²³⁵ It has been refuted by numerous eminent scientists.²³⁶

Shockley's conclusions have been championed by such scientists as Dr. Arthur Jensen. In 1969, Jensen concluded that African-American children are less capable of abstract reasoning than their White counterparts. He based his conclusion upon the fact that African-Americans score fifteen points below White Americans on IQ tests. He alleged the difference in performance was due principally to heredity rather than environmental factors.²³⁷ Both Jensen and Shockley believe compensatory educational programs are a waste of valuable economic resources. Jensen concludes:

Studies of the relative importance of genetics and environmental factors in individual differences in I.Q. are based entirely on tests administered to European and North American white populations and cannot be generalized to other populations or used as a basis for inferring the cause of the average difference between racial and cultural groups. But these studies taken together do clearly lead to the conclusion that in the populations sampled genetic factors are at least twice as important as environmental factors in accounting for the I.Q. differences among individuals.²³⁸

Jensen elaborates that compensatory educational programs are inadequate to overcome the learning deficiencies of minorities.²³⁹ Shockley makes a similar assertion:

My research leads me inescapably to the opinion that the major cause for the American Negroes' intellectual and social deficits is hereditary and racially genetic in origin and thus not remediable to a major degree by practical improvements in the environment. . . . I believe society has a moral obligation to diagnose the tragedy for American Negroes of their I.Q. deficit. . . . I proposed a thinking exercise about ten years ago called the Voluntary Sterilization Bonus Plan. What it does is to offer people who may be carrying genes that are defective, including those for intelligence, a bonus for voluntarily agreeing to be sterilized.²⁴⁰

Shockley describes his theory as being encompassed by the branch of science he calls raceology, not racism. Raceology is "the study of racial problems and trends from a scientific point of view."²⁴¹

Shockley and Jensen relied heavily on the scientific studies of Cyril Burt to support their theories. Burt, an eminent English psychologist, held the chair of psychology at University College, London. Burt, more than any of his contemporaries, insisted that intelligence was both quantifiable and the result of heredity; it was "an innate, general, cognitive ability."²⁴² Burt compiled an amazing amount of data supporting his innatist claim. He published statistics that revealed an incredibly high similarity in the IQ's of 53 pairs of identical twins who were separated at or near birth, but who were reared in different environments.²⁴³ In 1979, it was discovered that Burt was

perhaps one of the greatest perpetrators of fraud in the history of science. Two of Burt's co-authors either did not exist or could not have been in contact with him during the time he did his work.²⁴⁴ It has been alleged that Burt flagrantly fabricated statistical data.²⁴⁵ Even his disciple Jensen, who had referred to Burt as the world's greatest psychologist and a nobleman, had to renounce Burt's data as untrustworthy.²⁴⁶ Yet, both Shockley and Jensen relied heavily upon Burt's findings to support their theories.

Accordingly, the conclusions of Shockley and Jensen are based, in part, on data the probative evidence strongly suggests was falsified. Both scientists realized this fact, but continued to espouse the theory of racial and genetic inferiority. Few would disagree the theory of racial inferiority is a derogatory, defamatory falsehood. It holds African-Americans up to contempt, ridicule, obloquy, and public hatred and lowers their esteem, reputation, and humanity in the view of the community. Such views led to Richard Nixon's policy of "benign neglect" toward African-Americans. These theories have caused public unrest and protest wherever they have been discussed by their authors. Shockley was literally shouted down at universities across the country during the early seventies.²⁴⁷ Such theories may be classified as group defamation. They say something about African-Americans that is not true. Given the fact that the authors of these theories are aware of the questionable nature of the data upon which their theories depend, the authors have acted intentionally, recklessly, or negligently in continuing publicly to disseminate racially pejorative group defamation. It would be impossible for Shockley or Jensen to prove the truth of their allegations in a court of law.

Recent proponents of "raceology" such as Hernstein and Murray continue to espouse and support the Shockley tradition by reaching similar conclusions concerning the import of the difference in the IQ of the average African-American when compared to the IQ of the average White American.²⁴⁸ Though the authors' controversial work has been hailed by some critics and disparaged by others, one critical question remains. What standard is to be used in determining who is an African-American as opposed to who is a White American? The work of all raceologists presupposes the ability to adequately determine race. Most African-Americans have White American and/or Native American heritage. What scientific criteria will be used to classify individuals according to race?

Overlooked and underpublicized are the findings of Luca Cavalli-Sforza, Paolo Menozzi, and Alberto Piazza. The results of their empirical research are presented in their 1,000 page, voluminous work entitled *The History and Geography of Human Genes*. The book is the result of fifty years of research in population genetics. The authors conclude that race has no objective reality at the genetic level. It is a meaningless genetic construct.

Once one moves beyond mere phenotypical traits, there exists few differences among racial or ethnic groups on the genetic level.²⁴⁹

Group Defamation and Racially Derogatory Speech on University Campuses

Recently, there has been a dramatic increase in the number of incidents of racial harassment on college campuses throughout the country. These incidents usually involve the use of offensive, defamatory, or derogatory, racist, hate speech or other communicative activities. Many universities have promulgated policies or rules limiting the free speech rights of students.²⁵⁰ University officials have created written policy directives prohibiting racially derogatory, offensive, or demeaning speech. For example, *The Student Handbook* at Middlebury College states:

Middlebury College condemns and will not tolerate any form of racial, ethnic or religious harassment. Such harassment is any remark or act that insults the dignity of or denies the freedom and rights of a person on account of membership in a racial, ethnic, or religious group. Harassment includes: derogatory comments that express racial, ethnic, or religious prejudice such as slurs, jokes or taunts and disparaging references to racial, ethnic, or religious stereotypes; expressions of hatred or intolerance of these groups; attempts to intimidate or coerce another on the basis of such bigotry; violence in word or deed or attempts to incite to violence directed against the members of these groups.²⁵¹

The University of Pennsylvania had a similar policy, which stated:

What is Racial Harassment?

Racial harassment refers to any behavior, verbal or physical, that stigmatizes or victimizes individuals on the basis of race that:

- involves a stated or implicit threat to the victim's academic or employment status, *e.g.*, a person is told he or she will not do well in a particular field because of his or her race.
- has the purpose or effect of interfering with an individual's academic or work performance, *e.g.*, a supervisor, co-worker, peer, or instructor is inconsistent with his or her treatment of persons of different races.
- and/or creates an intimidating or offensive academic, living or work environment, *e.g.*, a particular office, group or department is all-white and participation of minorities is discouraged.²⁵²

These policy statements, which enunciate rules proscribing verbal behavior that "stigmatizes" or "victimizes" "individuals on basis of race" or which constitute "insults," "derogatory comments, jokes or taunts," and "disparaging references to racial, ethnic or religious stereotypes," are clearly

constitutionally overly broad and void for vagueness. These regulations would proscribe language based solely on the fact that the particular utterance is derogatory, offensive, or intimidating without regard to whether such speech is libelous or slanderous. Under all of these university policy statements, speech that has a tendency to incite violence would be proscribed. However, the particular utterance need not incite violence to be prohibited. Incitement to violence or "imminent lawlessness" is not a necessary prerequisite for restricting the speech. Assistant Vice-Provost Barbara A. Cassel of the University of Pennsylvania has informed the author that the University's racial harassment policy which proscribed hate speech has been repealed. No new policy proscribing speech inciteful of racial hatred has been formulated at the University. However, the University has promulgated Guidelines on Open Expression.²⁵³

The federal courts have twice struck down anti-harassment policies as violative of students' First Amendment rights. In the case of *UWM Post v. Board of Regents of the University of Wisconsin System*,²⁵⁴ the District Court invalidated the University of Wisconsin's "Policy and Guidelines on Racist and Discriminatory Conduct." This policy statement permitted the University of Wisconsin to discipline a student for the following reasons:

* * * *

(2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

(b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances. (c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

1. A student would be in violation if:

- a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or jokes; and
- b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

2. A student would be in violation if:

- a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and
 - b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.
3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.
4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems to be no evidence that the student's purpose was to create a hostile environment.²⁵⁵

The District Court correctly held the regulation was overly broad because on its face the regulation was not "narrowly drawn to address only the specific evil at hand."²⁵⁶ Nor was the regulation justified under the fighting words doctrine of *Chaplinsky*.²⁵⁷ The regulation covered speech that was merely demeaning and created an intimidating or hostile environment without the necessity of inciting an immediate breach of the peace as is required under the fighting words doctrine.²⁵⁸

The issue of the constitutionality of the University of Michigan's policy on discriminatory harassment was raised in the case of *Doe v. University of Michigan*.²⁵⁹ The University of Michigan's policy allowed disciplinary action under the following circumstances:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that . . .
- c. Creates an intimidating, hostile, or demeaning environment for educational pursuits. . . .²⁶⁰

Examples of conduct that would violate the policy included, *inter alia*:

A flyer containing racist threats distributed in a residence hall. Racist graffiti written on the door of an Asian student's study carrel.

A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.

A black student is confronted and racially insulted by two white students in a cafeteria.

You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.

You tell jokes about gay men and lesbians. You comment in a derogatory way about a particular person's or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.²⁶¹

Again, the District Court ruled the policy was overly broad on its face and as applied by the University of Michigan. The District Court held that statutes punishing speech merely because the speech may be unseemly or offensive are unconstitutionally overly broad.²⁶² Further, the District Court concluded the language or terms in the policy "were so vague that its enforcement would violate due process."²⁶³ The District Court specifically ruled:

Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct. The structure of the Policy was in two parts; one relates to cause and the other to effect. Both cause and effect must be present to state a *prima facie* violation of the Policy. The operative words in the cause section required that language must "stigmatize" or "victimize" an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.

The first of the "effects clauses" stated that in order to be sanctionable, the stigmatizing and victimizing statements had to involve an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or "personal safety." It is not clear what kind of conduct would constitute a "threat" to an individual's academic efforts. It might refer to an unspecified threat of future retaliation by the speaker. Or it might equally plausibly refer to the threat to a victim's academic success because the stigmatizing and victimizing speech is so inherently distracting. Certainly the former would be unprotected speech. However, it is not clear whether the latter would.

Moving to the second "effects clause," a stigmatizing or victimizing comment is sanctionable if it has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, etc. Again, the question is what conduct will be held to "interfere" with an individual's academic efforts. The language of the policy alone gives no inherent guidance. The one interpretive resource the University provided was withdrawn as "inaccurate," an

implicit admission that even the University itself was unsure of the precise scope and meaning of the Policy.²⁶⁴

Attempts to control racially offensive speech by universities have been discussed for the purpose of reiterating the position that group defamation, not merely offensive or demeaning racial speech, should be legally proscribed. In the foregoing cases, universities drafted overly broad codes proscribing offensive, demeaning, hate speech directed against certain groups. The scope of the regulations reached far beyond the proscription of group defamation. Thus, the author's proposed model statute, a true defamation statute, would not restrict or impinge on constitutionally protected speech. Theoretically, all of the anti-harassment policies of universities reviewed were overly broad and void for vagueness. The very existence of these broad and vague policy statements creates a chilling effect with regard to the exercise of the First Amendment right of free speech.²⁶⁵ Such extreme restrictions on speech do not pass constitutional muster.

The Impact of R.A.V. v. St. Paul on the Law of Group Defamation

I got my 12-gauge sawed-off/And I got my headlights turned off/I'm bout to bust some shots off/I'm bout to dust some cops off . . . die, pig, die!
I'm bout to kill me somethin'/ A Pig stopped me for nuthin' . . . what do you wanna be when you grow up? Cop Killer! . . . I've got my black shirt on/I've got my black gloves on/This shit has been too long.

"Cop killer," from the album Body Count by Ice-T

If black people kill black people everyday, why not have a week and kill white people.

Sister Souljah

In June of 1992, two rap artists, Ice-T and Sister Souljah, earned the ire of much of the White American population. These African-American rap artists were taken to task by members of the media, the police, and several political organizations for allegedly inciting violent conduct toward policemen and White people generally. In his song "Cop Killer," Ice-T becomes a character who is frustrated and angered by police brutality and racism. The character indicates he would act on his frustrations by dusting off some cops. Shouts of "die, pig, die!" create a choral refrain.²⁶⁶ Shortly after the release of the album Body Count, on which the song "Cop Killer" appears, there was an outcry accusing Ice-T of inciting the death of policemen. California Attorney General David E. Lungren characterized the song as "a bold incitement to kill."²⁶⁷ Law enforcement officers and others

who were offended by the lyrics of the song successfully pressured Time Warner, the record's producer, to withdraw the album from the market. Some police associations called for a nationwide boycott of Time Warner products.²⁶⁸ The combined Law Enforcement Associates of Texas claimed in their boycott petition that "Cop Killer" was an "intentional and malicious targeting of police officers for murder."²⁶⁹ Former President George Bush declared that Time Warner was "sick" because it produced a record glorifying the killing of police.²⁷⁰ Former Vice-President Quayle described the record as "obscene."²⁷¹ Sixty members of Congress called the song "despicable" in a signed petition protesting its release.²⁷² However, the National Black Police Association (hereinafter "NBPA") voiced its opinion that Ice-T was describing "the frustration and anger of millions of Americans over police brutality."²⁷³ Ronald E. Hampton, the director of NBPA, opined:

Law-abiding people, not only Black[s] and Latinos, but pockets in the white community, are angry with the police service in this country. . . . These police organizations claim Time Warner has a moral obligation not to promote or condone the kind of words by Ice-T, but we say they have a moral obligation to not allow police brutality. We ought to have an even stroke across the board.²⁷⁴

Ice-T has explained the song as fiction and he is simply "singing in the first person as a character who is fed up with police brutality."²⁷⁵ Ultimately, Time Warner and Ice-T agreed to drop "Cop Killer" from the album. Charles Meeks of the National Sheriffs' Association reflected on the withdrawal of the song by stating:

We hope corporate America has got the message that advocating the death of anyone for the purposes of making money is unacceptable in this country.²⁷⁶

Ice-T showed reporters a video of himself performing "Cop Killer." Pointing to the predominately White audience waiving hands and singing along with him, Ice-T commented: "Ain't no black hands."²⁷⁷ Ice-T has not been without supporters. One critic writes:

[W]hen . . . Los Angeles Police Chief, Daryl Gates, told a congressional hearing casual drug users should be taken out and shot, many of the same politicians who condemn Ice-T were quick to accept Gates's explanation that his remark was merely symbolic of his strong feelings about drug abuse.²⁷⁸

Another defender of Ice-T, in a letter to the editor of the *Washington Post*, writes:

In 1977 Elton John released the "Carabou" album, which concluded with "Tickin," a 10-minute song about a young man who goes into a bar and kills 14 people. The album climbed to the top of the charts and helped to create the Elton mania of the mid-'70s.

In 1983 Bruce Springsteen released "Nebraska," the title song of which told the tale of a man and woman who get into their car and shoot people for no other reason than to have fun. "Nebraska" also included another song, "Johnny 99," about a gun-waving laid-off worker. The album received rave reviews from critics and helped establish Bruce Springsteen's reputation and national standing. In fact, a year later Ronald Reagan quoted Bruce Springsteen in his re-election campaign.

In 1991 Stephen Sondheim's score for "Assassins," which presented songs sung mostly in the first person about the presidential assassins and attempted assassins, was released to rave reviews (including the New York Times top-10 albums list) and was generally considered one of the best of Mr. Sondheim's distinguished and outstanding scores.

In 1991 Ice-T released Body Count, which included a song Cop Killer about a man readying to kill a police officer. This album and song were greeted with disapproval by the president and an attempted boycott, endorsed by the vice president and congressional leaders ["Reaction to Ice-T Song Heats Up," Style, June 26].

Each of the above songs uses an artistic device of extreme examples to help us understand antisocial behavior and the forces that create such behavior. All are sung either in the first person (that is, the singer takes the role of the killer) and/or with tremendous empathy for the killer. Each song seeks to point out social problems that lead to the killer's actions. Only one, however, incited any sort of public criticism or controversy - Ice T's.

Once again it would seem the race card is rearing its ugly head. As leaders, their responsibility for protecting the First Amendment and bringing this racially divided country together takes second place to attempting to rouse white fears and thus garner votes.²⁷⁹

Another African-American rap artist, Sister Souljah, was publicly condemned by President Bill Clinton during his first election campaign. Clinton chastized Jesse Jackson for allowing Sister Souljah to speak before the Rainbow Coalition.²⁸⁰ Sister Souljah, in a Washington Post interview, was reported to have said: "If black people kill black people everyday, why not have a week and kill white people."²⁸¹ The preceding statement was Sister Souljah's reflection on the Los Angeles riots which occurred when the defendants in the Rodney King police brutality case were acquitted. Sister Souljah responded to the presidential critics by arguing that President Bill Clinton had taken her statement out of context.²⁸² Sister Souljah further elaborated that she was describing a gang mentality.²⁸³ One commentator charged that Sister Souljah considered the economic ruin or murder of

Whites as rational acts and a form of redress for the historical exploitation of Blacks by Whites.²⁸⁴

In both the Ice-T and Sister Souljah cases, the vast majority of the media, the general public, and political figures condemned the content of the speech uttered by the performers. In the case of Ice-T, concerted action by certain groups, both private and governmental, was effective in silencing the speaker and thus her viewpoint. The production of "Cop Killer" was discontinued by Time Warner. Charles Meeks of National Sheriffs' Association praised Time Warner's withdrawal of the song "Cop Killers" from Ice T's album by stating that messages "advocating the death of anyone . . . is unacceptable in this country." To African-Americans, a cross-burning constitutes a message that advocates the death of African-Americans. Indeed, historically deaths at the hands of the Ku Klux Klan have accompanied many cross-burnings. It therefore raises the specter of hypocrisy that none of the voices that challenged and protested against Ice-T or Sister Souljah were heard to protest when the United States Supreme Court handed down its enigmatic ruling in *R.A.V. v. St. Paul* (hereinafter "*R.A.V.*").²⁸⁵

In *R.A.V.*, the Supreme Court held that cross-burning was constitutionally protected, expressive activity.²⁸⁶ The city of St. Paul, Minnesota prosecuted R.A.V., a minor, for participating in the cross-burning. The cross was burned inside the fenced yard of Russell and Laura Jones, an African-American family, between the hours of 1:00 a.m. and 3:00 a.m. on June 21, 1990.²⁸⁷ The Joneses had moved into a predominantly White, working class community in east St. Paul.²⁸⁸ The family had suffered a pattern of harassment. Their car tires had been slashed and racial epithets had been hurled at their children by White skinheads.²⁸⁹ One law pursuant to which R.A.V. was prosecuted was the St. Paul Bias-Motivated Crime Ordinance, which provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor.²⁹⁰

At the trial level, *R.A.V.* successfully moved to have the bias-motivated criminal charge dismissed. He asserted the St. Paul law was overly broad and constituted content-based abridgement of speech. Therefore, the statute was unconstitutional because it violated the First Amendment.²⁹¹ However, the Minnesota Supreme Court reversed the trial court's decision rejecting the overbreadth claim and holding the phrase "arouses anger, alarm or resentment in others" was restricted or limited to behavior that might be

classified as "fighting words."²⁹² The Supreme Court of Minnesota explained:

[T]he ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias. . . . [The ordinance is] limited to expressive conduct that amounts to fighting words – conduct that itself inflicts injury or tends to incite immediate violence. . . . [T]he ordinance in question withstands constitutional challenge.²⁹³

Moreover, the Minnesota Supreme Court held that the ordinance was not an unconstitutional content-based abridgement of freedom of expression because

[a]lthough the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the First Amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias motivated threats to public safety and order . . . and therefore is not prohibited by the First Amendment.²⁹⁴

The Minnesota Supreme Court's construction of the statute limited its reach to constitutionally unprotected fighting words.

The decision and analysis of the Minnesota Supreme Court were rejected by the Supreme Court of the United States. The Supreme Court ruled that the St. Paul ordinance was constitutionally invalid on its face because the ordinance proscribed speech based upon its subject matter or content.²⁹⁵ The Supreme Court reached this decision even after accepting the Minnesota Supreme Court's limitation on the reach of the ordinance to expressions that constituted fighting words.²⁹⁶ The high court held the St. Paul ordinance reflected content-based regulation of expression and was presumptively invalid.²⁹⁷

Though previous decisions had held that certain categories of speech were "not within the area of constitutionally protected speech," the Supreme Court explained their prior doctrinal stand did not mean categories, such as defamation, obscenity, and fighting words, were entirely invisible to the Constitution.²⁹⁸ For example, the Supreme Court stated that the government might proscribe libel. However, the government could not engage in viewpoint or content-based discrimination by proscribing only libel that was critical of the government.²⁹⁹ The Court agreed with the Minnesota high court that "fighting words" were a category of speech that is excluded from the scope of First Amendment protection. The meaning of such exclusion was explained:

In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: . Each is . . . a "mode of speech" . . . both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed.³⁰⁰

* * * *

In our view, the First Amendment imposes . . . a content discrimination limitation upon a State's prohibition of proscribable speech.³⁰¹

In *R.A.V.*, the Supreme Court concluded that the city of St. Paul through its ordinance had engaged in selective, content-based or viewpoint discrimination because the ordinance proscribed not all "fighting words," but only those "fighting words" that were insulting or inciteful of violence "on the basis of race, color, creed, religion or gender." St. Paul had chosen a certain subset of "fighting words" and had prohibited their usage because of the viewpoint of the speaker.³⁰² The Supreme Court expatiates:

Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.³⁰³

The highest court of the land ruled the St. Paul ordinance expressed a majority preference by silencing speech based on its content.³⁰⁴ Such selective restriction of speech because of its substantive content or message created the possibility that free expression of ideas might be circumscribed.³⁰⁵

Finally, the Supreme Court reflected the respondents' argument that the content-based discrimination was justified, since the statute was narrowly drafted to promote a compelling state interest.³⁰⁶ The respondents argued that the compelling state interest was the policy of ensuring or protecting the basic human rights of minority groups who have suffered historical discrimination. The state was also attempting to protect minority groups' right to live in peace and tranquility.³⁰⁷ Though the Supreme Court agreed the interests proffered by St. Paul were compelling, the high court ruled there

were other content-neutral alternatives that could be used by the city to promote its compelling governmental interest.³⁰⁸ The St. Paul statute was not a necessary weapon to be used in fulfilling the compelling governmental interest.³⁰⁹ Earlier in the opinion, the Supreme Court intimated that the petitioner's conduct might have been prosecuted under local laws forbidding terrorist threats, arson, or criminal damage to property.³¹⁰

The case of *R.A.V. v. St. Paul* does not destroy the power of the state or the federal government to promulgate group defamation laws. The holding of *R.A.V.* applies to fighting words and not defamation. Moreover, any contention that *Beauharnais v. Illinois* has been overruled is without merit. The *R.A.V.* Court could have overruled *Beauharnais*, but did not do so. Surprisingly, *Beauharnais* was cited twice by the Supreme Court for the proposition that there may be constitutional restrictions on freedom of speech and that there are categories of expression "not within the area of constitutionally protected speech."³¹¹ Had the Supreme Court intended to overrule *Beauharnais*, it could easily have done so. The statute in *Beauharnais* was significantly and critically different from the overly broad St. Paul statute. The *Beauharnais* statute linked or connected the proscribed speech with its tendency to incite violence, "breaches of the peace or riots."³¹² The St. Paul statute banned expressive conduct even if the speech or behavior only aroused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."³¹³ The St. Paul ordinance was overly broad and failed to connect the expressive conduct or message to its tendency to create violence, discord, or breaches of the peace. This legislative flaw was unimportant to the court's majority.

Justice Scalia notes in his opinion for the Court:

St. Paul has not singled out an especially offensive mode of speech expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a *threatening* [emphasis mine] (as opposed to merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender or religious intolerance.³¹⁴

If the St. Paul ordinance had been more carefully drafted to cover those fighting words that have a tendency to create discord and violence, the statute would have been less problematic from a constitutional viewpoint.

It is important to observe that the Court overruled the St. Paul ordinance because of its underinclusiveness. Justice Scalia concluded that though the statute proscribed certain subclasses of fighting words, such as those that refer to race, gender, and religion, the statute did not prohibit the use of fighting words in connection with other ideas such as "political affiliation, union membership or homosexuality."³¹⁵ The problem with Justice Scalia's observation is that it would be virtually impossible to draft a statute that

would be all inclusive, specifically prohibiting all classes or categories of fighting words. There is no valid reason why a state or the federal government should not be permitted to choose those areas of our social life that need regulation and protection. The drafters of the St. Paul statute decided fighting words implicating race, gender, and religion were areas in need of regulation. This policy decision reflects the compelling need to protect often weak minorities from the tyranny of the majority and to preserve law and order, thereby promoting the common good. The city of St. Paul determined the protection of individuals from fighting words that refer to political affiliation or union membership was not an important priority. The city made the conscious decision to regulate speech that was considered harmful and inimical to the public order. As Justice Blackmun writes in his concurring opinion:

In the first instance, by deciding that a state cannot regulate speech that causes harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws.³¹⁶

Justice Blackmun further criticizes the majority's decision because the case could

be regarded as an aberration – a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are greater harm than other fighting words. . . . I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of St. Paul from specifically punishing the race-based fighting words that so prejudice their community.³¹⁷

Justice Blackmun was not alone in his criticism of the majority's decision. Justices White, Stevens and O'Connor concurred in the judgment of the majority; but they were critical of its reasoning. These justices agreed the Minnesota Supreme Court's decision should have been reversed. However, they criticized the majority for unnecessarily deciding the case based upon the substantive issue of fighting words. The concurring justices held that the St. Paul ordinance was unconstitutionally overly broad. The statute criminalized not only unprotected expression, but expressive conduct that was protected by the First Amendment.³¹⁸ The St. Paul statute reached expressive activity that merely caused anger, alarm, hurt feelings, offense, or resentment. The concurring justices stated such generalized reactions are insufficient to make expressive conduct fighting words and an unprotected species of speech.³¹⁹ Fighting words are those words "which by their very

utterance inflict injury or tend to incite an immediate breach of the peace.”³²⁰ Justice White writes:

Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. The ordinance is therefore fatally overbroad on its face.³²¹

Justice White criticized the majority for its confused attempt to create a new First Amendment doctrine. This doctrine would protect those categories of speech that heretofore have been deemed to be unprotected because their expressive content is of no value.³²² The majority’s ruling that the state may not proscribe the use of certain subclasses of fighting words because of their content without proscribing all fighting words conflicts with the categorical approach previously utilized by the Supreme Court.³²³ The majority’s approach to criminalizing fighting words is therefore an “all-or-nothing approach.”³²⁴ Again, Justice White asserts:

Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our own jurisprudence as well. . . . It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil . . . but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection. . . . [T]he Court’s insistence on inventing its brand of First Amendment underinclusiveness puzzles me.³²⁵

Justice White reflected that under the majority’s reasoning 18 U.S.C. § 871, which makes it illegal to threaten the life of the President of the United States, would be unconstitutional. The statute singles out certain threats based on their content.³²⁶ The statute reflects the fact the government particularly disfavors threats directed against the President as opposed to those directed against other individuals.³²⁷ Under the Supreme Court’s underinclusiveness rule, the statute fails because of its selectivity. The compelling state interest justifying the statute would be irrelevant.³²⁸ Justice Stevens reflects:

One need look no further than the recent social unrest in the Nation’s cities to see that race-based threats may cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order. Although it is regrettable that race occupies such a place and is so incendiary an issue, until the Nation matures

beyond that condition, laws such as St. Paul's ordinance will remain reasonable and justifiable.³²⁹

Though the *R.A.V.* Court stated the proscription against content-based regulations or discrimination is not absolute, the high court did not adequately explain those specific circumstances under which content-based regulation of speech is permissible. The high court simply stated that content-based regulation is constitutional "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable; no significant danger of idea or viewpoint discrimination exists."³³⁰ Justice White is correct when he criticized the majority's decision as

[a]n avid doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse lower courts. I join the judgment, but not the folly of the opinion.³³¹

The *R.A.V.* case has received mixed reactions from the media and the legal community. One legal scholar described the decision as "bizarre." Another scholar approvingly described the ruling as a "textbook" free speech statement.³³² Charles Lawrence, professor of law at Georgetown University Law Center, complained:

Here's a Justice who cares about obscenity, but does not care about racism . . . at the bottom Justices don't see this injury as all that serious.³³³

The ACLU charged that "the majority opinion goes much further than necessary to strike the St. Paul ordinance down. The decision is replete with ambiguities that will only confuse the lower courts."³³⁴ Linda Greenhouse of the *New York Times* characterized the decision as "arid absoluteness" that "may have made freedom more painful to bear."³³⁵ The editor of the *Washington Post* noted:

The classic antidote for hateful speech remains: more speech. But with this decision, the court has made it harder, needlessly, to cope with ugly speech.³³⁶

In sum, the *R.A.V.* decision leaves many unanswered questions as to the standard to be applied where there is content-based regulation of speech or expressive activity. Arguably, the decision does not constitute principled decision-making and must be clarified in future Supreme Court decisions.³³⁷ Although *R.A.V.* has been met with some criticism, the decision also has received substantial positive reviews.³³⁸ It is particularly interesting to note

that those who raised their voices in choruses of protest against Ice-T and Sister Souljah were amazingly silent when *R.A.V.* was decided by the Supreme Court. Both Ice-T and Sister Souljah were engaging in the exercise of free speech rights, without engaging in any physical conduct or overt action to carrying out their ideas. The appellant in *R.A.V.* went far beyond mere speech or thought to the physical action of burning a cross on the property of the Jones family. Neither the Congress nor the President protested. Neither the vice-president nor the police authorities protested. No condemnation of *R.A.V.* was heard from societal pockets of power and authority, despite their responsibility for protecting the human rights of minorities.

The ultimate conclusion one might reach if one reflects on the Ice-T and Sister Souljah scenarios is that though the courts, the government, and the people often champion First Amendment rights, there is no general consensus that content-based regulation of speech is unacceptable to the ruling majority in our socio-political order.³³⁹ Perhaps, in the future, a more enlightened Supreme Court will clarify *R.A.V.* by refusing to "legitimate[] hate speech as a form of public discussion."³⁴⁰ As Cervantes writes:

everywhere the crosses are burning, sharp-shooting goose-steppers around every corner, there are snipers in the schools . . . (I know you don't believe this. You think this is nothing but faddish exaggeration. But they are not shooting at you).³⁴¹

Racial Defamation, the First Amendment, and the Law of Nations

On January 4, 1969, the International Convention on the Elimination of All Forms of Racial Discrimination ("Racial Discrimination Convention") came into force.³⁴² This multilateral treaty was a direct response to various forms of anti-Semitism and other manifestations of racial, national, and religious prejudices that surfaced in many nations during the years 1959-60.³⁴³ It was during this tense period of racist activities that a United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, by a resolution of January 12, 1960, condemned all such activities as violative of the United Nations Charter and the Universal Declaration of Human Rights.³⁴⁴ The Sub-Commission searched for the underlying causes for the upsurge in racist propaganda, and, in 1961, recommended that remedial measures in the nature of an international convention on racial discrimination be drafted. The proposed convention

would impose legally binding obligations on the high contracting parties to prohibit racial discrimination and incitement to racial hatred.³⁴⁵

Consequently, during its Seventeenth Session in 1962, the United Nations General Assembly decided to draft a declaration and convention on the elimination of all forms of racial discrimination.³⁴⁶ On November 20, 1963, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination was proclaimed.³⁴⁷ The General Assembly then directed the Economic and Social Council to require the Commission on Human Rights to focus its energies on the preparation of the Racial Discrimination Convention.³⁴⁸

Three committees were involved in the deliberations on and drafting of the Racial Discrimination Convention, which had to receive the General Assembly's approval.³⁴⁹ The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities drafted the initial text during its 405th through 418th meetings. The Sub-Commission adopted the U.S. draft as the basis for the Racial Discrimination Convention in its final form, which was later submitted to the Twentieth Session of the Commission on Human Rights.³⁵⁰ The draft was revised and submitted by the Economic and Social Council to the General Assembly. The General Assembly referred the draft to the Assembly's Third Committee for discussion.³⁵¹ The Convention on Racial Discrimination was approved on December 21, 1965;³⁵² it was open for signature on March 7, 1966. As of August 1996, the Racial Discrimination Convention has been ratified or acceded to by 148 nations.³⁵³

The substantive provisions of the 1965 Racial Discrimination Convention have been said to

represent the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races. With ever-increasing clarity this idea has emerged as the one which more than any other, dominates the thoughts and actions of the post-World War II world. In our time, the idea of racial equality has acquired far greater force than its eighteenth-century companions of personal liberty and fraternity. The aim of racial equality has permeated the law-making, the standard-setting and the standard-applying activities of the United Nations family of organizations since 1945.³⁵⁴

The Racial Discrimination Convention is organized into three parts with a preamble. Article 1 defines the concept of racial discrimination.³⁵⁵ Article 2 declares the obligations undertaken by the contracting parties toward the elimination of racial discrimination in all of its forms.³⁵⁶ Articles 3, 4, and 5 condemn specific forms of racial discrimination and enumerate certain civil, political, socio-economic, and cultural rights that must be respected.³⁵⁷

Article 6 commands state parties to create remedies and procedures for the legal redress of grievances of citizens who have been the victims of racial discrimination.³⁵⁸ Article 7 concerns the adoption of educative measures with a view to combating racial prejudice.³⁵⁹

Part II creates the international implementing machinery of the Racial Discrimination Convention. Articles 8 through 10 establish a Committee on the Elimination of Racial Discrimination ("the Committee"), a reporting system by which states must report on domestic measures taken to fulfill their legal obligations under the Racial Discrimination Convention and the procedural operation of the Committee.³⁶⁰ Articles 11 through 13 provide for interstate complaints to be submitted to the Committee for resolution by the Committee with the assistance of an *ad hoc* Conciliation Commission if necessary.³⁶¹ Article 14 declares the competence of the Committee to hear complaints or petitions from individuals.³⁶² Article 15 creates a procedure that allows the Committee to hear complaints or petitions from non-self-governing territories.³⁶³ Articles 16, 17 and 18 provide for the ratification of and accession to the Convention.³⁶⁴ Article 19 states the Convention shall come into force on the thirteenth day after the deposit of the twenty-seventh instrument of ratification or accession.³⁶⁵ Article 20 is the reservation provision of the treaty,³⁶⁶ and Article 21 provides for the renunciation of the treaty by states parties.³⁶⁷ Article 22 allows reference to the International Court of Justice of any dispute between two or more parties that concerns the interpretation or application of the Racial Discrimination Convention, not settled by negotiation or other acceptable procedures expressly sanctioned by the Racial Discrimination Convention.³⁶⁸ Article 23 creates a procedure for initiating the revision of the treaty.³⁶⁹ Finally, Articles 24 and 25 enumerate certain administrative duties of the Secretary-General and state the Racial Discrimination Convention (in equally authentic Chinese, English, French, and Russian texts) shall be deposited in the United Nations' archives.³⁷⁰ Since the United Nations Charter imposes the duty on all of its signatories to observe and promote human rights, the Racial Discrimination Convention does not create new legal obligations. It elucidates, defines, and codifies those specific pre-existing legal obligations mandated generally by the United Nations Charter.³⁷¹

As previously stated, the Committee on Racial Discrimination, created by article 8(1) of the Racial Discrimination Convention, has the responsibility of monitoring the compliance of states parties with the obligations or duties mandated by the convention.³⁷² Article 11 of the Convention establishes a procedure by which states parties may communicate or file complaints with the Committee against other states who are allegedly violating provisions of the Convention.³⁷³ Articles 11-13 delineate the specific process utilized by

the Committee in attempting to resolve legal issues raised by the complaining state party.³⁷⁴ As of September 26, 1996, no interstate complaint had been communicated to the Committee by a state party.³⁷⁵ Thus, there exists no jurisprudence or body of opinions resolving interstate complaints or petitions. However, petitions have been referred to the Committee pursuant to article 14, which permits individuals to communicate with the Committee concerning alleged breaches of the Convention by states parties.³⁷⁶ Only 21 states parties have declared the Committee competent to receive communications from individuals against them pursuant to article 14(1) of the convention. Article 14(7)(b) vests authority in the Committee to evaluate these individual petitions and to make "suggestions and recommendations" to the accused state party and the petitioner.³⁷⁷ The United States is one of the states parties who have not declared the competency of the Committee to receive interstate or individual communications against her.

Article 8 of the convention requires the Committee to submit findings on individual petitions to the United Nations General Assembly as part of the Committee's annual report.³⁷⁸ These findings are annexed to the Committee's annual report as opinions. The right of an individual to communicate with the Committee by means of an article 14 petition exists only in those cases where the state party against whom the petition is filed has recognized, by declaration, the competence of the Committee to receive communications from individuals or groups within its territory or jurisdiction.³⁷⁹ The Committee has issued five opinions resulting from its consideration of article 14(1) individual complaints.³⁸⁰

A brief summary of the Committee's five opinions resolving article 14(1) individual petitions is appropriate. Only major issues will be discussed. In *Yilmaz-Dogan v. The Netherlands*,³⁸¹ the Committee on Racial Discrimination concluded, *inter alia*, that the Netherlands had violated the petitioner's right to work, protected pursuant to article 5, by permitting an employer to terminate her contract due to absences that resulted from a traffic accident and because the married petitioner later became pregnant. The employer in attempting to justify its request for termination before the Cantonal Court in Apeldoorn claimed:

When a Netherlands [sic] girl marries and has a baby, she stops working. Our foreign workers, on the other hand, take the child to neighbors or family and at the slightest set-back disappear on sick-leave under the terms of the Sickness Act. They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on.³⁸²

The petitioner also argued that article 4 of the convention had been violated by the employer.³⁸³ The Cantonal Court characterized the employer's statement as "unfortunate and objectionable," but allowed the termination of the petitioner's contract.³⁸⁴

The Committee found the employer's conduct violative of article 5 of the convention and decided the Netherlands, through its courts, had failed to protect the petitioner's right to work under article 5(e)(i) of the convention.³⁸⁵ The Committee made the following recommendations:

The Committee . . . is of the opinion that the information as submitted by the parties sustains the claim that the petitioner was not afforded protection in respect to her right to work. The Committee suggests that the state party take this into account and recommends that it ascertain whether Mrs. Yilmaz-Dogan is now gainfully employed and, if not, that it use its good offices to secure alternative employment for her and/or to provide her with such other relief as may be considered equitable.³⁸⁶

*Demba Talibe Diop v. France*³⁸⁷ involved a petitioner who was a Senegalese national and who claimed he had been denied the right to practice his profession as a lawyer in contravention of article 5 of the Convention.³⁸⁸ The Committee ruled that the petitioner's claim of discrimination due to the rejection of his application by the legal bar of Nice, France was not well-founded. Citing French Act No. 71.1130 of 31 December 1973, the Committee ruled that only individuals who were French citizens could practice law in France.³⁸⁹ The preference or distinction made between citizens and noncitizens such as Mr. Diop was ruled permissible.³⁹⁰ It was not discrimination within the meaning of article 1 of the Racial Discrimination Convention.³⁹¹ The petition did not state a violation of obligations flowing to states parties under the Convention.³⁹²

*L.K. v. The Netherlands*³⁹³ is a case where the Committee held an article 4 violation had been committed by a state party.³⁹⁴ The petitioner, L.K., was a Moroccan citizen living in Utrecht, the Netherlands. Among other claims, he alleged he had been a victim of racial discrimination. The petitioner was offered a rental lease by the Utrecht municipality. The house was a dwelling subsidized by the city. When the petitioner visited the house, he was met by neighbors who chanted:

No more foreigners. We've got enough foreigners in the street. . . . They wave knives about and you don't even feel safe in your street.³⁹⁵

Some of the neighbors threatened to burn the house and damage L.K.'s car if he moved into the neighborhood.³⁹⁶ These local inhabitants claimed there was a rule that limited the number of foreigners who could live on a street to 5%. The neighbors drafted a petition requesting that the petitioner be housed elsewhere.³⁹⁷ As a result of this experience with the neighbors, L.K. filed a complaint with the police authority charging racial discrimination, a crime under article 137 of the Netherlands criminal code.³⁹⁸ Though a complaint and a prepared court report were filed by the police, the District Court Prosecutor refused to prosecute the accused individuals.³⁹⁹ The Prosecutor-General at the Court of Appeals level requested that the court declare the complaint "unfounded or to refuse to hear it on public interest grounds."⁴⁰⁰ The Court of Appeals, by judgment of June 10, 1991, dismissed the petitioner's request for prosecution based on its construction of the petition drafted by the residents. The Court of Appeals ruled that the language of the petition was not insulting nor did it constitute incitement to racial discrimination.⁴⁰¹ The specific words focused upon by the Court of Appeals were as follows: "Not accepted because of poverty. . . . Another house for the family please."⁴⁰² The Prosecutor-General of the Supreme Court affirmed the decision of the Court of Appeals.

In its opinion, the Committee held that the threats of racial violence by a public group were an act of incitement to racial discrimination under article 4 of the Convention.⁴⁰³ The state's argument of compliance with article 4 simply because it had made racial discrimination a crime was without merit.⁴⁰⁴ The Committee also recommended that the state party provide relief to the petitioner for injury suffered. Further, the Committee advised the state party to inform the Committee of the action it took with regard to the Committee's recommendation in the state's next article 9(1) report to the Committee.⁴⁰⁵

In *Michael L.N. Narrainen v. Norway*,⁴⁰⁶ the petitioner was a prisoner in an Oslo penitentiary and a naturalized Norwegian citizen. He asserted that his right to be free of racial discrimination as protected by the Convention had been violated.⁴⁰⁷ The petitioner was convicted and sentenced to prison for drug trafficking. He was a member of the Tamil ethnic group and was born in Mauritius.⁴⁰⁸ The petitioner alleged the investigating police officer had a "racist attitude" and "wished that people like me had never set foot in his country."⁴⁰⁹ The petitioner further argued that he was in Mauritius during the time he supposedly bought amphetamines in the Netherlands. After presenting evidence of this fact, the prosecutor modified the indictment.⁴¹⁰ Also, the petitioner charged that two of the jurors were biased against him and made statements that included racial slurs. These jurors were

were challenged, but were permitted to remain on the jury by the judge.⁴¹¹ Petitioner contended the jurors had expressed their opinions that people such as he should be sent back to their own countries because they were being supported by citizens' taxes.⁴¹² Finally, the petitioner claimed the only evidence proffered against him was the testimony of an individual who had been convicted of a drug-related crime. He questioned the trustworthiness of such evidence because he claimed the witness was promised a reduction in his sentence if he cooperated with the prosecution.⁴¹³ Lastly, the petitioner claimed that very few foreigners or foreign born citizens were included in the Norwegian jury pool.⁴¹⁴

The state party responded by asserting that the so-called biased witnesses were not disqualified because their discussion did not concern the guilt or innocence of the accused.⁴¹⁵ As to one of the witnesses, the court decided that "the views she had expressed were not uncommon in Norwegian society."⁴¹⁶ The state party denied the petitioner's assertion that the witness against petitioner was promised a reduced sentence.⁴¹⁷ In addition, the state party observed that counsel for the defense never objected to the ethnic makeup of the jury list at trial.⁴¹⁸

The Committee held that the case raised issues under article 5(a) of the convention, which guarantees an individual equal treatment before state tribunals.⁴¹⁹ The Committee decided that article 5(a) applied to "all juridical proceedings."⁴²⁰ It concluded the remark of one juror might be interpreted as probative evidence of racial bias sufficient to disqualify the juror. However, the Committee found the Norway court had examined the juror's remark and its possible influence on the trial.⁴²¹ No determination could be made as to whether a violation of the Convention resulted from the court's decision on the quality of the witness's statement. It was not within "the function of the Committee to interpret Norwegian rules on criminal procedure concerning the disqualification of jurors. . . ."⁴²² The Committee then made the recommendation:

The Committee recommends to the State Party that every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination. Consequently, the Committee recommends that in criminal cases like the one it has examined due attention be given to the impartiality of juries, in line with the principles underlying article 5(a) of the convention.⁴²³

The final case, *C.P. v. Denmark*,⁴²⁴ concerned a petitioner and his son. The petitioner was an African-American living in Denmark who had married

a Danish woman. Later, the couple was divorced.⁴²⁵ The author of the petition worked for Kodak, Inc., as a shop steward in a warehouse. Subsequently, he was assigned a position as shop steward at the Roskilde Technical School.⁴²⁶ C.P. alleged that students at the school inscribed racist language with a cartoon on red bricks. The racially pejorative language stated: "A coal black man hanging from a gallows, with large red lips. Nigger." This brick and others with similar language were displayed in the petitioner's work area.⁴²⁷ Having informed the school authorities of the problem by showing them one of the bricks at the Staff Council's meeting, petitioner was chastised. After the meeting of the School's Staff Council, the director, head teacher, and technical manager of the school refused to speak with petitioner.⁴²⁸ The petitioner also averred he was the object of racial slurs in the cafeteria.⁴²⁹ He alleged he was fired after "months of racial harassment."⁴³⁰

The petitioner's 15-year-old son was the object of an assault. He was beaten with beer bottles by a group of young males who were 17 and 18 years of age.⁴³¹ The son sustained injuries to his face that required plastic surgery. The petitioner alleged that all of the individuals who attacked his son previously had made racial slurs against his son and at one time had attempted to drown him.⁴³² According to C.P., the drowning incident was characterized as a "boyish joke" by the police.⁴³³ The petitioner was dissatisfied with the punishment meted out to the young men who attacked his son.⁴³⁴ One of the accused received a 60-day suspended sentence. The others were required "to pay ten daily fines of 50 and 100 Danish kronors." The petitioner alleged these sentences were light due to the judge's racial bias.⁴³⁵

The petitioner's complaint of "racial harassment and unlawful dismissal" was dismissed by the judge. Further, the judge would not grant petitioner's request for an appeal.⁴³⁶ The petitioner was then advised by the Attorney-General to file the case with the Civil Rights Department. However, the Civil Rights Department informed the petitioner that his complaint was untimely.⁴³⁷

C.P. filed his petition with the Committee because he believed that as a noncitizen and nonwhite, the domestic laws of Denmark did not protect him from racial harassment and unlawful dismissal.⁴³⁸

The state party countered by claiming the author of the petition had waited several weeks before submitting the matter involving racist language to the school authorities. The lack of due diligence by the petitioner delayed and impeded the investigation of the incident.⁴³⁹ The school's failure to discuss the complaint when it was asked to do so by the petitioner was

described as very unfortunate; but the failure to consider the complaint did not give rise to liability.⁴⁴⁰ Furthermore, the petitioner was not fired, but transferred to another post. The transfer could have been justified on financial grounds.⁴⁴¹ In addition, the state party argued that the petitioner failed to exhaust his domestic remedies by allowing the statute of limitations for taking an appeal to expire.⁴⁴²

As to the petitioner's son, the Chief Constable of Roskilde decided the punishment given one of his teenage batterers was much too lenient, in light of the violent nature of the attack. The sentence was appealed to the Eastern Division of the High Court and the court imposed "an unconditional prison sentence of forty days. . . ."⁴⁴³ The crime committed against the son was properly prosecuted and a judgment of punishment was rendered against the accused. The state party contended the original sentences were not based upon race. C.P.'s son was awarded damages of DKK 3,270 for pain and suffering.⁴⁴⁴

Ruling the communication inadmissible under the rules of procedure governing the Committee, the Committee refused to reach the merits of this case. The petition's author had failed to exhaust his domestic remedies as to his complaint of unlawful dismissal and harassment at the Technical School in Roskilde.⁴⁴⁵ The petitioner rejoined that he had instructed his lawyer to appeal and that his lawyer had negligently failed to perfect an appeal in a timely manner. The Committee ruled that the conduct of a privately retained attorney could not be attributed to the state party. The petitioner had the responsibility of exhausting his domestic remedies consistent with article 14(7) of the Convention.⁴⁴⁶ Nor did the petitioner provide *prima facie* evidence of racially discriminatory behavior by the judicial authorities in Denmark.⁴⁴⁷

The Committee's review of the son's treatment by the state party's judicial system led the Committee to conclude there was no evidence of racial discrimination. The individuals who committed criminal acts against C.P.'s son were arrested, prosecuted, and punished by the state. The prosecutor was successful in increasing the sentence of one of the accused by appealing to a higher court. The son received monetary damages for pain and suffering. Therefore, the petitioner's claims as to his son were inadmissible.⁴⁴⁸

Unfortunately, the opinions of the Committee cannot be characterized properly as "quasi case law", law or jurisprudence. These opinions are recommendations with which a state party may chose to comply or a state party may ignore them with impunity. The Committee has no authority to issue binding legal decisions. Another weakness of the Committee is that

its members need not have legal experience.⁴⁴⁹ Most of the Committee's members have been diplomats.⁴⁵⁰ Approximately half of the members have been lawyers.⁴⁵¹ Partsch writes that the Committee cannot be described as a court or quasi-judicial body.⁴⁵² He suggests that members have been more often chosen because of rank than for "their professional qualifications."⁴⁵³ Moreover, not one of the states parties to the Racial Discrimination Convention has filed an interstate petition pursuant to article 11 of the Convention.⁴⁵⁴ This is a disturbing fact. Perhaps, states parties believe it would be impolitic to start this process of complaining to the Committee, given the risk of losing the proceeding and being censured by the Committee. Opening Pandora's box by encouraging other states to file petitions can be avoided if no state party uses the article 11 complaint process. However, Partsch reveals that some states have raised "disguised interstate disputes" in their article 9 reports.⁴⁵⁵ These reports are required by article 9(1) of the Convention. States parties to the Convention must submit periodic reports to inform the Committee of actions they have taken to implement the Convention at the domestic level.⁴⁵⁶

One value of the opinions of the Committee may be to bring allegations against states parties to the attention of the public. Whether the public actually is aware of the few decisions that have been issued by the Committee is doubtful. In the United States, these decisions generally have not been deemed to be newsworthy.

On February 23, 1978, President Carter transmitted four multilateral human rights treaties to the Senate for its advice and consent.⁴⁵⁷ Among the three instruments was the Racial Discrimination Convention. The Racial Discrimination Convention was transmitted with certain reservations recommended by the State Department. One such reservation was suggested as a means of nullifying the effect of Article 4 of the Racial Discrimination Convention. Article 4 requires, *inter alia*, that all propaganda of a racially defamatory nature or that incites racial hatred, along with organizations that promote racial hatred and discriminatory racial theories, be prohibited by the penal laws of the states parties.⁴⁵⁸ This obligation is to be taken with "*due regard*" for the principle of free expression enshrined in Article 5 and as codified in the Universal Declaration of Human Rights.⁴⁵⁹ Article 4 of the Racial Discrimination Convention specifically provides:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination

and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The State Department fashioned a broad proposed reservation to Article 4 with the potential effect of negating that provision entirely:

With respect to paragraphs (a) and (b) of article 4, the following reservation is recommended: The Constitution of the United States and article 5 of this Convention contains [sic] provisions for the protection of individual rights, and nothing in this Convention shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practices of the United States.⁴⁶⁰

This overly broad, abrogating reservation of the State Department was unnecessary.⁴⁶¹ The supposed conflict between Article 4 and the First Amendment is present only if one adheres to an absolutist approach to First Amendment freedom protecting all utterances, including the libelous or slanderous. The reservation in its final adopted version reads:

[T]he Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.⁴⁶²

The U.S. Senate gave its advice and consent to ratification of the Racial Discrimination Convention on June 24, 1994.⁴⁶³ The substantive provisions of the Racial Discrimination Convention codify the norms of

nondiscrimination found in the Constitution of the United States and in domestic statutory civil rights law. A U.S. State Department Legal Advisor writes:

As a general matter, the substantive provisions of the Convention reflect the anti-discrimination principles inherent in our constitutional scheme. They require the United States to do what it is already legally obligated to do – eradicate unlawful racial or ethnic discrimination. Ratification of this Convention will constitute an implicit expression of U.S. commitment to fulfill its legal obligation to ensure equality under law.⁴⁶⁴

The Legal Advisor also notes:

[E]xisting U.S. law provides extensive protection and remedies against racial discrimination sufficient to satisfy the requirements of the present Convention. In addition, Federal, State, and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations, and other governmental actions in court, as well as certain forms of discriminatory conduct by private sectors. There is thus no need for the establishment of additional causes of action to enforce the requirements of the Convention.⁴⁶⁵

Despite the foregoing representations, the resolution of ratification adopted by the Senate declares the provisions of the Racial Discrimination Convention non-self-executing.⁴⁶⁶ This means implementing legislation must be promulgated by Congress to bring U.S. international obligations into domestic effect. This declaration of non-self-execution is peculiar given the fact that most of the provisions of the convention are presently United States law. The doctrine of self-executing treaties creates problems of both logic and analysis. If the United States has signed and ratified a treaty, what is its value if it is not the domestic law of the United States until implementing legislation has been passed? Is its value merely symbolic? What does the article VI supremacy clause of the Constitution mean when it includes treaties as the supreme law of the land? The United States concedes no new causes of action need be created because most of the substantive content of the Racial Discrimination Convention is already the domestic law of the United States. Do the statements of the State Department representative really mean the treaty is self-executing after all? These are the imponderable questions created by the confusing doctrine of self-executing treaties. Nevertheless, the ratification of the Racial Discrimination Convention is testimony to the adherence of the United States government to the norm of nondiscrimination.

To recapitulate: The United States Supreme Court has rejected absolutism in matters concerning freedom of expression.⁴⁶⁷ Libel and slander are constitutionally unprotected forms of speech, absent a legal privilege. Even if libelous or slanderous utterances are constitutionally protected, prohibition of such language and the attendant infringement of the right of free speech may be justified by applying the doctrine of strict scrutiny. The norm of racial nondiscrimination has achieved the status of *jus cogens* or a peremptory norm of international law.⁴⁶⁸ Under the domestic law of the United States, the concept of racial equality and the right to be free from racial discrimination may be analogously characterized as peremptory norms.⁴⁶⁹

As a matter of law and national policy, the United States, since the case of *Brown v. Board of Education*,⁴⁷⁰ has attempted to wipe out all traces of racism that were the offspring of a historical epoch now "gone with the wind." Group defamation is a form of constitutionally unprotected expression and a form of racial discrimination. It is attacked for both reasons. It has been explained why group defamation should be considered actionable as libel or slander and is a form of racial discrimination. The legal norm of nondiscrimination, coupled with the affirmative duty to right the present effects of past discrimination,⁴⁷¹ is without a doubt as compelling a state or governmental interest as can be contemplated by the human mind. Under strict scrutiny analysis, this compelling state or governmental interest would justify the limited impairment of First Amendment rights in reference to racially defamatory speech. No less restrictive alternative than social change through law exists as a means of effecting the socially ameliorative end of destroying racial discrimination and protecting groups from invidious, defamatory falsehood. The unqualified adoption of the Racial Discrimination Convention, and the subsequent passage of implementing legislation, would constitute use of a regulatory method rationally related to a legitimate governmental purpose. This argument would hold true for the adoption of a carefully drawn federal group defamation statute.

Schwelb caustically criticizes those Western nations that objected to Article 4 as being in conflict with freedom of expression. He describes several violations of the noble free speech concept by the very nations that proclaimed the concept inviolable:

The argument often made by western representatives that limitations on freedom of expression and the outlawing or banning of associations were under all circumstances incompatible with the rule of law and with democracy as understood and practiced in the West is not fully convincing if confronted with the actual record. In the Peace Treaty of 1947, the Allied Powers, including the U.K. and the U.S.A., imposed upon Hungary the obligation not to permit

Fascist-type organizations as well as other organizations conducting propaganda, including revisionist propaganda hostile to the United Nations, and organizations which have as their aim denial to the people of their democratic rights. (footnote omitted).

In 1947, the Peace Treaties with Bulgaria, Finland, Italy and Romania and the State Treaty with Austria of 1955 contain similar provisions. The latter Treaty also obliges Austria to prevent the existence, resurgence, and activities of any organization having as their aim political or economic union with Germany, and Pan-German propaganda in favor of a united Germany. Austria is also under an obligation to prevent the revival of Nazi organizations and all Nazi propaganda.⁴⁷²

Schwelb mentions such United States legislation as the Subversive Activities Control Act which, though it did not prohibit the existence of so-called subversive organizations, had the effect of controlling the development of these organizations by destroying their ability to propagandize.⁴⁷³ It must be borne in mind that the present work does not advocate the banning of organizations that disseminate racially defamatory propaganda. However, the racially defamatory propaganda, if it constitutes group defamation, may be proscribed by law. Most organizations will hardly be effective if they are prevented from propagandizing and disseminating literature to the public. These organizations would be functionally nonexistent. Thus, it would not be necessary or desirable to prohibit meetings by these associations.

In fairness to Western European nations, it should be noted that the majority of these nations have passed statutes proscribing group defamation or language inciteful of racial hatred. In 1966, the Council of Europe's Consultative Assembly drafted a model statute which its members were encouraged to adopt for the purpose of controlling group defamation or speech that incites racial hatred.⁴⁷⁴ Article 1 of the model law defines the crime of incitement to racial hatred as follows:

A person shall be guilty of an offense:

- (a) if he publicly calls for or incites to hatred, intolerance, discrimination or violence against persons or groups of persons distinguished by color, race, ethnic or national origin or religion;
- (b) if he insults persons or groups of persons, holds them up to contempt or slanders them on account of the distinguishing particularities mentioned in paragraph (a).⁴⁷⁵

Article 2 provides, *inter alia*:

- (a) A person shall be guilty of an offence if he publishes or distributes written matter which is aimed at achieving the effect referred to in Article 1.
- (b) "Written matter" includes any writing, sign, or visible representation.⁴⁷⁶

Article 4 provides:

Organizations whose aims or activities fall within the scope of Articles 1 and 2 shall be prosecuted and/or prohibited.⁴⁷⁷

Article 5 provides:

- (a) A person shall be guilty of an offence if he publicly uses insignia of organizations prohibited under Article 4.
- (b) "Insignia" are, in particular, flags, badges, uniforms, slogans and forms of salute.⁴⁷⁸

The definition of the crime of incitement to racial hatred is very broad. This particular model statute would not withstand constitutional attack in the United States, since it would be declared constitutionally infirm as being void for vagueness and overly broad. All language expressing racial antipathy or bias should not be subjected to the control of the law (*e.g.*, "I do not like African-Americans, Jews, or Hispanic Americans; I hate them."). The European statute reveals the sincere concern that the Council of Europe has toward the problem of group defamation. The model statute is an effort by the Council of Europe to encourage its members to fulfill their obligations under Article 4 of the Racial Discrimination Convention. The offense under the model law does not require violence or breach of the peace as an element of the offense. Incitement is an independent offense that may be committed simply through making racially defamatory or insulting statements.⁴⁷⁹ The actor need only be judged from the objective circumstances as having had the intent to stir up racial hatred. This model statute is much broader than the author's proposed statute. The Council of Europe's model statute would punish not only the libelous or slanderous, but derogatory and insulting speech as well.

The American Convention on Human Rights entered into force on July 18, 1978. There are 25 parties to the Convention.⁴⁸⁰ Article 13 of the American Convention on Human Rights protects the right to freedom of thought and expression. However, paragraph 5 of Article 13 states:

Any propaganda for war or any advocacy of national, *racial*, or religious hatred that constitutes incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of *race*, *color*, religion, language, or national origin shall be considered as offenses punishable by law.⁴⁸¹

This provision requires states-parties to the convention to legally prohibit group defamation in their jurisdictions. The United States has not ratified the American Convention on Human Rights.⁴⁸²

Accordingly, international legal action against group defamation has been widespread because of its inherently inciteful and socially destructive nature. The proscription of such speech provided by Article 4 of the Racial Discrimination Convention is the most recent confrontation the United States has had with the question of group defamation laws at the international or domestic level.

Conclusion

The thesis of this work is that defamation of character, libel or slander, is not protected speech under the First Amendment. Therefore, it does not stand to reason that libelous or slanderous utterances directed against racial or other distinct groups should be classified as constitutionally protected speech. Merely derogatory or insulting speech should not be proscribed by law. However, legal proscription of defamatory falsehood creates no First Amendment problem, since libel and slander do not fall within the ambit of First Amendment protection where there is no legally cognizable privilege. Even if we were to conclude such language is constitutionally protected, the federal government has a compelling state or governmental interest that would justify an intrusion on First Amendment rights. No less restrictive alternative is available to control group defamation. Group defamation is also a form of racial discrimination and foments social discord among racial groups in an ethnically plural society. The norm of nondiscrimination is a legal principle and the national policy of the United States government. It has been shown that racially defamatory speech is proscribed at international law. Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination outlaws such utterances, along with organizations that disseminate racist propaganda. The United States has now ratified the Convention.

The various objections to group defamation laws have been shown to be deficient. They are usually policy arguments rather than legal arguments. None of the authors who have argued against group defamation laws

adequately address the question of why defaming individuals should be proscribed by law, but not the defamation of racial, ethnic or national groups. All these authors agree group defamation is undesirable speech and presents a danger to society. They express a blindly romantic belief in the power of truth to conquer falsehood in that wonderfully mythical marketplace of ideas. Also, there is a sentiment extant that group libel laws will be ineffective as a remedy for group defamation.⁴⁸³ No concrete evidence is ever given to support this conclusion; and as can be seen in the next chapter, Great Britain, India and Canada have met with at least limited success in controlling group defamation through legislation. Those who believe that group defamation laws will be ineffective insist the defamations will continue. Yet, none of these writers would dare suggest criminal laws be repealed because crime continues to rise in American society.

Often, opponents of group defamation statutes express the belief that education is the answer, not the restriction of free speech. These individuals overlook the educative power of legislation and punishment when laws are breached. The World Jewish Congress once asserted:

Laws, particularly the criminal law, have themselves the character and purpose of social enlightenment and often prove to be the most effective means of education. By condemning certain actions, laws not only hold out the threat of punishment to those who violate them, but set standards of decent human behavior to which the citizen, in his social attitude, should conform. Essentially, therefore, criminal laws serve to prevent crimes rather than to exact vengeance for their infringement. . . . Our society has a responsibility to apply this educative influence of the law in countering and combating racist propaganda.⁴⁸⁴

As suggested by the author in a 1980 article, federal criminal legislation is the most appropriate remedy for the problem of group defamation.⁴⁸⁵ Those who oppose group defamation laws lose sight of the fact that the denigration of the social esteem and reputation of a particular racial group through the use of racial defamation usually precedes more "aggressive forms of group discrimination."⁴⁸⁶ The Nazi Germany experience revealed that group defamation was used to condition mentally the German masses, so that the resulting violent discrimination against and murder of six million Jewish people was seen as justified.⁴⁸⁷ Group defamation is a condition precedent to more aggressive and violent forms of racial discrimination. To prevent the recurrence of the holocaust of World War II, Germany has promulgated federal criminal and civil remedies for group defamation.⁴⁸⁸

All arguments in favor of and against group defamation laws have been presented and respectively applauded and rebutted. When this author

discussed group defamation with Professor Derrick Bell at Harvard Law School in 1979, Professor Bell thought the topic was theoretically interesting, but that African-Americans should concern themselves with more important civil rights battles. He stated that he was tired of reading about the NAACP protesting because some white person had used the word nigger.⁴⁸⁹

The urgency and importance of controlling, if not eradicating, racial defamation in a multi-ethnic society cannot be over-emphasized. Federal legislation should be passed even if it only has symbolic value – a reaffirmation that our democratic government is a government by, for, and of all the people. Many who do not like the idea of group defamation laws admit their constitutionality. They concede the problem is a serious one. The United States is among the minority of nations without a group defamation statute promulgated by the national legislature. Professor Richard Bilder of the University of Wisconsin School of Law related that, as an employee of the State Department, he was assigned the task of persuading delegates at the United Nations that Article 4 of the Racial Discrimination Convention was contrary to human rights as an imposition on the principle of free speech. He was amazed to find most delegates could not quite understand why racial defamation would be classified as constitutionally protected speech.⁴⁹⁰ These nations revered the principle of freedom of expression though they did not believe group defamation should be protected speech. Perhaps, Arkes' opinion merits consideration:

All things taken together, it is hard to believe that we would lose our character as a constitutional democracy if a number of cities and towns suddenly took a harder line on the matter of racial and religious defamation, or if a policeman, say in Chicago, moved a shade too quickly one day and took an anti-Negro speaker off a public corner. One has the sense, somehow, that we can survive occasional errors of that sort without impairing the basic character of this regime or absorbing flaws that reach to the level of principle. Or at least, one might say, we could survive those mistakes more easily than we could survive the consequences of making no judgments at all, or professing no recognition of any standards by which one could hope to judge.⁴⁹¹

This work will next consider the group defamation statutes enacted by three common law jurisdictions: Great Britain, Canada, and India. All three democratic republics have adopted broad group defamation or incitement to racial hatred laws. Their democratic forms of government remain intact, and so does their reverence for the sacrosanct principle of free expression. The Nigerian sedition law will be considered also as a means of stemming the tide of racially and ethnically defamatory expressions.

NOTES

1. See Appendices VII, VIII, IX.
2. E. Durkheim, *The Division of Labor in Society* 108-09 (Simpson trans. 1933).
3. See, e.g., R.E. Gahringer, *Punishment and Responsibility*, 66 J. of Phil. 292-93 (1969).
4. As in defamation actions filed by individuals, truth would constitute an absolute defense. The elements of the common law test of defamation are (1) a defamatory statement, (2) falsity, (3) publication to a third party, (4) malice or some other degree of fault (e.g., negligence), (5) damages, and (6) no defense of privilege. See generally R. D. Sack and S. S. Baron, *Libel, Slander, and Related Problems* 63-170 (2nd ed. 1994).
5. E.E. Kallen, *Comment: Group Libel*, 41 Cal. L. Rev. 290, 296 (1953).
6. See Comment, *Racial Defamation and the First Amendment*, 34 Fordham L. Rev. 653 (1966) (hereinafter Fordham Comment); see also B.L. Zelenko and T. Sky, Staff House Comm. on Judiciary, 88th Cong., 1st Sess., Report on Proposed Group Libel Legislation (Comm. Print 1963), cited in Fordham Comment, *id.* at 667 n.123; Tannenhaus, *infra* note 82 at 293 n.139; see also S. Walker, *Hate Speech: The History of an American Controversy* (1994); H.L. Gates, D.E. Lindy, R.C. Post, W.B. Rubenstein, and N. Strossen, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, Civil Liberties* (1995) (arguing against legal restrictions on "hate speech").
7. See Ch. III, note 153, *supra*.
8. See *id.*
9. The Illinois Legislature has repealed its group libel statute. See § 224a of the Ill. Crim. Code, Ill. Rev. Stat., Ch. 38, Div. 1, § 471 (1949) (repealed 1961). The legislature was of the opinion that the criminal law should not be used to punish speech that injured the individual's reputation. Such a private wrong should be remedied by a civil tort action. The justification for legislation prohibiting criminal defamation must be the prevention of breaches of the peace. See H.M. Kallen, *Group Libel and Equal Liberty*, 14 N.Y.L.F. 1, 1-8 (1968).
10. *State v. Klapprott*, 127 N.J.L. 395 (Abbotts) (1941).
11. See Ch. III, note 153 *supra*.
12. *Beauharnais v. Illinois*, 343 U.S. 250 (1951). Like many who erroneously adhere to the view that *Beauharnais* is of dubious legal validity, Dorsen, Bender and Neuborne express the same view in a conclusory and unanalytical manner. See N. Dorsen, P. Bender & B. Neuborne, 1 *Political and Civil Rights in the U.S.*, 480-83 (Law. Sch. ed. 1981). Any suggestion that *Beauharnais* is not good law has been put to rest by the Supreme Court's reliance on *Beauharnais* in *R.A.V. v. St. Paul*.
The case of *Chicago v. Lambert*, 47 Ill. App. 2d 151 (1964), was decided the same day as *New York Times v. Sullivan*. The court upheld the defendants' convictions for distributing leaflets that were defamatory of Jews, while picketing a Sammy Davis, Jr. movie.

The National Labor Relations Board has decided that elections involving racially inflammatory campaign statements will be set aside. The NLRB decided that it "does not intend to tolerate 'electoral propaganda' appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the elections." *See also NLRB v. Schapiro & Whitehouse Inc.*, 356 F.2d 675 (4th Cir. 1966); *NLRB v. Baltimore Luggage Co.*, 387 F.2d 744 (4th Cir. 1967); *Sewell Mfg. Co.*, 138 NLRB 66, 50 L.R.R.M. 1532 (1962).

Delegate Luiz Simmons (R-Montgomery) submitted a bill to the Maryland House of Representatives that would ban "any defamatory matter" such as books, magazines, newspapers, other printed material, photographs, and recordings that "hold citizens of any race, color, creed, or religion up to public contempt, shame, [or] disgrace. . . ." A person convicted under the statute would face up to a year in jail and up to \$1,000 fine for the first offense. Subsequent convictions could result in a 3 year jail sentence or a \$5,000 fine. The bill was introduced because of the 345 incidents of racial hatred (distribution of Ku Klux Klan literature at elementary and high schools, etc.) reported to the Maryland Commission of Human Relations in 1981. Delegate Luiz Simmons proposed his bill in 1982. The bill never became law in Maryland. Wash. Post, Feb. 11, 1982, at 30.

13. 343 U.S. at 250-53. *See Appendix XV* (lithograph published by Beauharnais entitled: "Preserve and Protect White Neighborhoods").

14. *Id.* at 251.

15. *Id.* at 258-61.

16. *Id.* at 258-59. The power and danger of racially defamatory speech is demonstrated by an incident involving Geraldo Rivera. Rivera, a popular talk show host, was arrested after a physical altercation with a Klansman. Rivera stated that the Klansman called him names: "He first called me a 'spic' then a dirty Jew, then threw something at me and kicked me in the left leg. . . . Then I hit him back. Then we fell to the ground and I got on top and we were both arrested." Rivera explained that he had gone to Jonesville, Wisconsin to tape a Klan rally. Rivera was charged with battery. However, the charge was later dismissed. *See Rivera, Klansmen Arrested in Scuffle*, Advocate (Baton Rouge, LA), Aug. 17, 1992, at 3A; *Geraldo Won't Be Charged for Punching Heckler*, Advocate (Baton Rouge, LA), Aug. 31, 1992, at 3A.

Michael Jackson found himself denying charges of anti-Semitism for the lyrics of a song called "They Don't Care About Us." The objectional lyrics of the song include the following language: "Jew me, Sue me, Everybody do me, Kick me, Kike me, Don't you Black-and-White me." M. Dubin and J. Weiner, *Jackson Stirring More Controversy With New Album*, Advocate (Baton Rouge, La), June 20, 1995, at 12A. Jackson apologized for the lyrics by stating that he was actually describing himself as a victim. "I am the voice of the accused and the attacked." *Id.* The regional director of the Anti-Defamation League of B'nai B'rith, David A. Lehrer, and Rabbi Marvin Hier of the Simon Wiesenthal Center for Holocaust Studies were critical of the lyrics. Mr. Lehrer described the language as "hateful and hurtful . . . inartfully crafted." J. Antczak, *Jackson Defends New Song*, Advocate (Baton Rouge, La), June 16, 1995, at 3A; M. Silver, *Michael's Mouth*, U.S. News & World Rep., June 26, 1995, at 20. As a result of criticism, Jackson

altered the lyrics to the song and promised to re-record the song while stating he would include an explanation with the unsold albums containing the original song. *Jackson Album's Sales Decline . . . As Singer Alters Offensive Lyrics*, Wash. Post, July 13, 1995, at C6.

See also *Hate Messages in the Schools*, Wash. Post, July 1, 1995, at 14 (Norman Thomas High School student sent anti-Semitic message to teacher; students at Midwood High School created anti-Black and anti-Semitic advertisement in yearbook); M. D. Shear, *Va. Ball Team Calls "Well Symbol" Good Luck; Others Say It's Racist*, Wash. Post, July 13, 1995, at B1 (Brentsville District High School's baseball team used "the well" symbol for good luck. The symbol is a circle with four quadrants created by an x inside of it. There are two dots in each quadrant. The symbol was a Ku Klux Klan logo. The practice was that an individual drew the symbol and the question was asked: "What is this?" The correct response was: "The last thing a black person sees when he's falling down a well." The quadrants are the hoods of the Klansmen); E. L. Wee, *NAACP Urges Punishment for Va. Team*, Wash. Post, July 19, 1995, at A14 (Prince William County NAACP has requested the Brentsville District High School baseball team be punished by taking away its state championship status for 1994-1995); E.L. Wee, *Rehiring of Teacher Renews Tension: Blacks Question Return of Suspended Baseball Coach to Pr. William System*, Wash. Post. July 10, 1996, at B2; *Ann Landers Column Contains New Apology*, Advocate (Baton Rouge, La), Dec. 10, 1995, at 11A (Ann Landers criticized and apologized for stating: "Of course, he's a Pollack [Pope John Paul II]. . . They're very anti-women.").

17. *Id.* at 253-67.
18. *Id.* at 253.
19. *Id.*
20. *Beauharnais*, *id.* at 255-58.
21. *Id.* at 266.
22. *Id.* at 255-57, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).
23. *Id.* at 267-75. (Black, J., dissenting).
24. *Id.* at 267-70.
25. *Id.* at 277-84. (Reed, J., dissenting).
26. *Id.* at 284-87. (Douglas, J., dissenting).
27. *Id.* at 286.
28. *Id.* at 288. (Jackson, J., dissenting).
29. *Id.*
30. *Id.* at 288-91.
31. *Id.* at 294-295.
32. *Id.* at 299.
33. *Id.* at 299-304.
34. *Id.* at 300.
35. *Id.* at 301.
36. *Id.*
37. *Id.* at 302.
38. *Id.*

39. *Id.* at 304.
40. *Id.* at 302-04; *see also* H. Kalven, *The Negro and the First Amendment* (1965).
41. *Id.* at 304.
42. *Id.*
43. *Id.*
44. *Id.* at 294-95.
45. H. Kalven, *supra* note 40, at 34.
46. *Roth v. United States*, 354 U.S. 476 (1956).
47. *Id.* at 483.
48. *Id.*
49. *Id.* at 486.
50. *Id.* at 487.
51. *Id.* at 492 n.31.
52. E.g., K.L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 Ill. L. Rev. 95, 134 n.160; H.J. Hyde and G.M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to The New Intolerance in the Academy*, 37 Wayne L. Rev. 1469 (1991); Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 Yale L.J. 252 (1952); Note, *Group Libel and Criminal Libel*, 1 Buff. L. Rev. 258, 262 (1952); Note, *Supreme Court 1951 Term*, 66 Harv. L. Rev. 89, 112-14 (1952); *see also Dworkin v. Hustler Magazine, Inc.*, 867 F. 2d 1188, 1200 (9th Cir. 1989); *Collin v. Smith*, 578 F. 2d 1191, 1205 (7th Cir. 1978).
53. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *see generally NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).
54. *Brandenburg*, *id.* at 444-446.
55. *Id.* at 446 n.1.
56. *Id.* at 444.
57. *Id.*
58. *Id.* at 448-49.
59. *Id.* at 449.
60. *Id.* at 448.
61. See § 224a, Ill. Crim. Code, Ill. Rev. Stat., Ch. 38, Div. 1, § 471 (1949), quoted in *Beauharnais v. Illinois*, 343 U.S. at 251.
62. *John Doe v. University of Michigan*, 721 F. Supp. 852, 861 (E.D. Mich 1989).
63. *Crane v. State*, 166 P. 1110 (Okla. 1917).
64. *State v. Cramer*, 258 N.W. 525 (Minn. 1935).
65. *People v. Turner*, 154 P. 34 (Cal. 1914).
66. *Jones v. State*, 43 S.W. 78 (Tex. 1897).
67. *People v. Spielman*, 149 N.W. 466 (Ill. 1925).
68. *Alumbaugh v. State*, 146 S.E. 114 (Ga. 1929).
69. *State v. Brady*, 24 P. 948 (Kan. 1890).
70. *People v. Gordon*, 219 P. 483 (Cal. 1923).
71. 166 P. at 1110.
72. 24 P. at 949.
73. 258 N.W. at 527; *see People v. Crespi*, 46 P. 863 (Cal. 1896).

74. *Drozda v. State*, 86 Tex. Cr. R. 614, 218 S.W. 765 (1920).
75. *People v. Edmonson*, 168 Misc. 142, 4 N.Y.S. 2d 256 (1938).
76. 4 N.Y.S. 2d at 264-68.
77. *Id.* at 260-63; see *The King & Osborne*, 25 Eng. Rep. 584 (K.B. 1732); *The King & Osborne*, 94 Eng. Rep. 425 (K.B. 1732).
78. *Edmonson*, 4 N.Y.S. 2d at 260.
79. See Public Order Act of 1986, Part III at Appendix V(A); see also Race Relations Act of 1965 at Appendix II; Race Relations Acts of 1968 at Appendix III; Race Relations Act of 1976 at Appendix IV; The Public Order Act of 1936 at Appendix XII; The Public Order Act of 1963 at Appendix XIII; and § 5 The Theatres Act of 1968 at Appendix XIV. The provisions of the Race Relations Acts of 1965, 1968, and 1976 that concern group defamation or incitement to racial hatred have been superseded by Part III of the Public Order Act of 1986. Specifically, the Public Order Act of 1986 repeals § 5A of the Public Order Act of 1936 and Ch. 74 § 70 of the Race Relations Act of 1976. Also, § 20 the Public Order Act of 1986 repeals Ch. 54 § 5 of the Theatres Act of 1968.
80. See *The London Times*, Mar. 26, 1952, at 2, col. 4.
81. See Fordham Comment, *supra* note 6, at 655-656; see also *Rex v. Williams*, 5 Barn. & Ald. 595, 597, 106 Eng. Rep. 1308 (K.B. 1822); 2 Starkie, *Slander & Libel* 213 (1830); *W.O. Russell on Crimes* 628 (Int'l ed. 1896).
82. See R.D. Sacks and S.S. Baron, *Libel, Slander and Related Problems*, 154-159 (2nd ed. 1994); *Arcand v. Evening Call Pub. Co.*, 567 F.2d 1163 (1st Cir. 1977); *Neiman Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); M. Ernest and A. Lindley, *Hold Your Tongue* (1932); J. Kelly, *Criminal Libel and Free Speech*, 6 Kan. L. Rev. 295 (1958); R.J. Quigg, *Defenses to Group Defamation Actions*, 13 Clev. Mar. L. Rev. 102, 106-07 (1964); J. Tanenhaus, *Group Libel*, 35 Cornell L.Q. 261, 264 (1950); Restatement (Second) of Torts § 564A, Comment (a) (1977).
83. See Chapter III, *supra* note 153.
84. 127 N.J.L. at 396.
85. *Id.* at 397.
86. *Id.* at 396.
87. *Id.*
88. *Id.* at 398.
89. *Id.* at 399.
90. *Id.*
91. *Id.* at 402.
92. *Id.*
93. *Id.*
94. *Id.* at 403-405.
95. *Id.*
96. 343 U.S. at 266.
97. *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962).

Long Beach State basketball coach, Seth Greenberg, was greeted at New Mexico State University by a message board containing the following message: "Seth, get ready for an ass-kicking, you Jew Bastard." Coach Greenberg reported hearing racial epithets and other hate speech such as "Why not play the white boys? Take

one of the niggers out." Martha King states that Big West Commissioner David Farrell and State Executive Vice President Michael Conroy trivialized the incidents and criticized Greenberg for his comments made concerning the New Mexico incident at a press conference. Coach Gene Barlow of Alabama-Birmingham relates that the African-American basketball players on his team were harassed with racial slurs by fans at a game played in Memphis, Tennessee. M. King, *Hate Messages*, Sports Illustrated, Feb. 5, 1996, at 10.

98. Fawcett, *id.* at 47-48.

99. *Id.* at 48.

100. Anno., 97 A.L.R. 281 (1958), quoted in Fawcett, *id.* at 51.

101. *Id.* Philosopher Otto Gierke writes that the group has personality and is therefore a legal person and a "real" person as a matter of fact. In his book, *Natural Law and the Theory of Society*, he sets forth his theory of "real group personality." Ernest Barker, one of Gierke's translators, explains Gierke's theory:

We come to the third of the theories which seek to explain the inner core of legal Group-persons. This is Gierke's own theory – the theory of the reality of the Group-person. When we seek to discover what lies behind the legal Group-person, and constitutes its inner core, we must not talk of "fictions" which hover in a shadowy and unreal existence above a number of real individuals; we must not talk of "collections" or "brackets" or contractual nets, flung over so many individuals to bind them one to another in the bonds of an impersonal nexus. We must purge our eyes to see something which is real and not fictitious – something which has living personality, and is not an impersonal nexus. We must believe that there really exists, in the nature of things itself, such a thing as a real Group-person, with a real being or essence which is the same in kind as that of the individuals who are its members. "Itself can will, itself can act," in the same way that they will and act. When 100 persons unite to form a group which wills and acts as one, we must say that there is a real new person present – the hundred and first person, the super-person – in which these 100 individuals live and have their being, at the same time that they also continue to live and have their being as so many separate persons. Behind the legal Group-person there is therefore a real Group-being, just as there is a real individual human being behind the individual legal person. Legal group-personality is the shadow cast by real group-personality: it is the reflection of reality in the mirror of law.

O. Gierke, *National Law and the Theory of Society* pp. IXVI-IXVII (E. Barker trans. 1958); see O. Gierke, *Political Theories of the Middle Ages* (F.W. Maillard trans. 1951).

102. B.L. Zelenko and T. Sky, *supra* note 6.

103. *Id.* at 8-12.

104. *Id.* at 11.

105. *Id.* at 13-14.

106. *Id.* at 23.

107. *Id.*

108. *Id.* at 21.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 22.

113. *Burnett v. National Enquirer*, 144 Cal. App. 991, 996-97 (1983).

114. *Id.* at 998.

115. See *People v. Harris*, 84 A.2d 63 (N.Y. 1981).

116. B.L. Zelenko and T. Sky, *supra* note 6, at 21.

117. *Id.* at 23.

118. *Id.*

119. *Id.*

120. *Id.* at 20; see also *President's Committee on Civil Rights, To Secure These Rights* 54 (1947); see generally Z. Chafee, *Government and Mass Communication* (1947).

121. See Sections 2, 3, 4, 5, 6 *infra* and accompanying notes; see also Southern Poverty Law Center, Klanwatch Intelligence Report (Bias Incidents – Cross Burnings, Threats, Harassment sections) Feb. 1996, No. 81, at 11-13; Southern Poverty Law Center, Klanwatch Intelligence Report (Bias Incidents – Cross Burnings, Threats, Harassment sections), Aug. 1995, No. 79, at 14; see generally Special Report of Southern Poverty Law Center, *The Ku Klux Klan: A History of Racism and Violence* (Sara Bullard ed., 4th ed. 1991).

122. See Public Order Act of 1986, §§ 17-28 at Appendix V.

123. See Appendix XI; see also *Statutory Prohibition of Group Defamation*, 47 Colum. L. Rev. 595, 609 (1947) [hereinafter cited as Model Statute].

124. *Id.* at § II(D). Material in brackets derived from § 559 Restatement of Torts (Second) (1977) which states:

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him.

125. *Id.* at § II(G).

126. *Id.* at §§ II(A), (B), (C), (E).

127. Yale Note, *supra*, Ch. III, n.134, at 325; see also Model Penal Code (Official Draft and Revised Comments), American Law Institute (1985).

128. See Model Penal Code and Commentaries, § 2.02(d) (Official Draft and Revised Comments), American Law Institute (1985).

129. *Id.* at § 2.02(c).

130. Model Statute, *supra* note 127, at § IV(B).

131. See Public Order Act of 1986, § 27, at Appendix V(A).

132. Columbia Statute, *supra* note 127, at § III(B).

133. See Public Order Act of 1986, § 27, at Appendix V(A).

134. See T. Reddick, *The Rap on Gangsta Rap: Critics Call for a Boycott of Rap that Puts Down Women. Others Say It's Only a Symptom of Deeper Problems*,

Tampa Tribune, Aug. 7, 1995, at 1; *see also SU Females Respond to Rap's Lyrics*, The Southern Digest, Feb. 2, 1996, at 5 (female students at Southern University in Baton Rouge, LA complaining about misogynist lyrics in rap music); R. Harrington, *Guilty: Free Speech in the First Degree – Bennett Targets Can Be as Nasty as They Wanna Be*, Wash. Post, June 9, 1996, at G4 (stating William Bennett, Senator Joseph Lieberman, Senator Sam Nunn, and C. Delores Tucker (President of National Political Congress of Black Women) commenced a campaign against producers and distributors of "Gangsta Rap" and other "vicious, violent, and vulgar" music using "degrading and indefensible lyrics").

135. Reddick, *id.*
136. Partners-N-Crime, *P.N.C.* (recording) (Big Bay Records, Inc. 1994).
137. TRU, *True* (recording) (Priority Records 1995).
138. UNVL, *6th & Baronne* (recording) (Cash Money Records, Inc. 1993).
139. Reddick, *supra* note 134, at 1.
140. *See Transcript #5242 of The MacNeil/Lehrer News Hour*, June 5, 1995 at 12-21 (Lexus-Nexus pagination); D.B. Wood, *Drumbeat of Criticism Continues as Rap Music Moves in New Direction*, Christian Scientist Monitor, June 26, 1996, at 14 (C. Delores Tucker stating: "These companies have the blood of our children on their hands."); *see also* P. McLaren, *Gangsta Pedagogy and Ghetto-ethnicity: The Hip-Hop Nation as a Counterpublic Sphere*, 25 Socialist Review 9 (1995); *but see* C. Philips, *Rap Finds a Supporter in Rep. Maxine Waters: The Congresswoman Aligns Herself With "Our Children" and Defends Their "New Art Form,"* L.A. Times, Feb. 15, 1994, at F1.
141. R. Cash, *Essence on the Issues: Pop Culture or Cultural Problem*, Essence Magazine, Jan. 1996, at 54.
142. *Id.*; *see also* FBI Hate Crime Statistics 1994, U.S. Department of Justice (1995); D. Van Biema, *After the Burning*, Time, July 1, 1996, at 52; E.L. Spaid, *Church Burnings Ignite Unity*, Christian Science Monitor, June 12, 1996, at 1; R. Marquand, *Clergy See an Attack on Faith Itself in Wave of Black Church Arsons*, Christian Science Monitor, June 20, 1996, at 1; M.A. Fletcher, *Christian Coalition Plans to Cooperate with Black Churches to Squelch Fires*, Washington Post, June 19, 1996, at A6; *Fire Destroys Black Church in N. Carolina*, Washington Post, June 18, 1996, at A3; M.F. Berry, *Bigotry Must Be Denounced*, Washington Post, June 22, 1996, at A15; *Church Fire in N. Carolina Ruled Arson*, Washington Post, July 2, 1996, at A3; D. Howlett, *Black Church Burnings: Why They Did It*, USA Today, July 1, 1996, at 1.

The complexity of determining what kinds of language should be characterized as defamation is reflected in the recent controversy surrounding the song *Leviticus: Faggot*, a song composed and sung by Me'Shell NdégeOcello and recorded on her compact disk entitled: *Peace Beyond Passion*. The lyrics of the song are as follows:

Faggot better learn to run 'cuz daddy's home
His sweet lil' boy just a little too sweet
Every night the man showed the faggot what a real man should be
The man and the faggot will never see

for so many can't even perceive a real man
 Tell me

Not that the faggot didn't find a woman fine and beautiful
 He admired desired their desires
 He wanted love from strong hands
 The faggot wanted the love of a man

Chorus:

His mother would pray
 Save him save him save him from this life

Go to church boy

Faggot you're just a prisoner of your own perverted world
 No picket fence acting like a bitch that's all he sees
 ain't that what faggot means

No love dreams

only the favors sweet Michael performed for money to eat
 'Cause the man kicked the faggot out the house at 16
 Amen mother let it be

Before long he was crowned QUEEN for all the world to see
 bloody body face down

The wages of sin are surely death that's what mama used to say
 So there was no sympathy

Let he without sin walk amongst the hated and feared and know
 true trial and tribulations

See my dear we're all dying for something[,] searchin' and searchin'
 Soon mama found out that god would turn his back on her too

Save me save me from this life

I pray to my Lord above save me they say you're the way the light

Most radio stations throughout the United States refused to air the song fearing the use of the word "faggot" might be construed as derogatory, pejorative, anti-homosexual, even defamatory. However, the lyrics of the song are condemnatory of intolerance against those with a homosexual orientation. See generally E. Gardner, *Give "Peace" a Chance*, Entertainment Weekly, June 21, 1996, at 63; R. Harrington, *After the Debuts, Precious Sounds: From Toni Braxton, Me'Shell NdegeOcello, First-Rate Followups*, Washington Post, June 23, 1996, at G7.

143. H. Bannerman, *The Story of Little Black Sambo* (1899).

144. *Id.* at 1.

145. *Id.* Written on the back of the dust jacket of *The Story of Little Black Sambo* is the following comment:

What a distinguished and experienced critic of children's literature said of The Story of Little Black Sambo.

I cannot imagine a childhood without it for it has fun – hilarious, rollicking fun, and that is rare enough in books of any size for any-sized children. The gift of being funny for little children is one of the rarest to be bestowed upon authors or artists: Helen Bannerman is both at once, and her tiger in blue trousers, her tiger with shoes on his ears – how they touch off the bright spark of laughter! Never let your self be misled in to getting this blessed book with any other illustrations but the author's: indeed once you let your child see them, he will accept no other.

Mary Lamberton Becker
in First Adventures in Reading

146. See P. Yuill, *Little Black Sambo: The Continuing Controversy*, 22 School Library J., Mar. 1976, at 72, 73. S. Loer, "Little Black Sambo" Retold, Boston Globe, Sept. 8, 1996, at B11. Recently, two writers of children's literature have published new revised versions of *The Story of Little Black Sambo*. Julius Lester, an African-American, has created a work called *Sam and the Tigers*. Fred Marcellino, a White American, has published a work called *The Story of Little Babaji*. Both authors have attempted to eliminate the derogatory or racist elements of the book. See B. Luscombe, *Same Story, New Attitude*, Time, Sept. 9, 1996, at 72.

147. Yuill, *id.*

148. Yuill, *id.*

149. Statement found on the inside cover of H. Bannerman's, *The Story of Little Black Sambo* (1899), Lesley College, Cambridge, Mass. The statement is dated 1978.

150. Yuill, *supra* note 146, at 73-75. One of Japan's most popular children books, *Little Black Sambo*, will no longer be published by Japan's major publishing companies because of foreign criticism of its anti-Black sentiments. Japan has been severely criticized by Black groups in the United States for selling toys based on the Sambo character. Black groups have threatened to boycott Japanese products in America. See *Japan's Publishers Bar Sambo*, Wash. Post, Jan. 25, 1989, at C1. Japan has been criticized often for its racially insensitive behavior. 100,000 copies of an "Official Magazine" were destroyed because the magazine "contained a cartoon of a thick-lipped, dark-skinned character holding a frying pan and wearing a chef's hat." In 1989 the Postal Ministry recalled leaflets that advertised watermelons sold by mail from Northern Japan. The advertisement included the word "Kurombo" which is a derogative term for blacks. See *Japanese Magazine Taken Off Shelves for Slur*, The Capitol Spotlight, July 25, 1991, at 7; see also *Japanese Pull Magazine with Racial Cartoon*, Wash. Times, July 16, 1991, at A8. The African-American Anti-Defamation Association has been created as a formal response to the many negative comments that have been made by Japanese government officials concerning the nature, character, and substance of African-American life. A national advertising campaign will be commenced to dissuade individuals and institutions from engaging in derogatory and racist communicative activities against Blacks.

Encouraging racially insensitive conduct in the Far East, Colgate-Palmolive Company marketed "Darkie Toothpaste" in Hong-Kong, Malaysia, Taiwan, Singapore, and other places in the Far East. Its packaging included a top-hatted and gleaming-tooth likeness of Al Jolson. The package design was created by the Chinese founder of the product. The Interfaith Center for Corporate Responsibility, a related movement of The National Council of Churches, protested the package design and use of the word "Darkie" as offensive and racist and requested that the product be withdrawn. A representative of Colgate-Palmolive responded to these charges by stating:

The product is not racially offensive in the areas where it is sold. . . . Our position . . . would be different if the product were sold in the United States or in any Western English-speaking country which, as I have stated several times, will not happen.

See Church Squeezing Company over "Darkie" Toothpaste, The State (Columbia, S.C.) Feb. 16, 1986, at 13B; *see also Colgate's Problem With "Darkie" Brand*, Wash. Post, Feb. 14, 1990, at E17 (Colgate now claims it is doing everything possible to change the toothpaste's name and logo. Reuben Merk, Colgate's chief executive officer, now concedes that the toothpaste brandname is racist and outrageous. Rep. Cardis Collins (D-Ill.) stated that she would call for a boycott of the company). The name of the toothpaste is now "Darlie." The author had the occasion to use this toothpaste while in Bangkok, Thailand during March 1997.

151. Yuill, *supra* note 146, at 73.
152. *Id.* at 73-74.
153. *Id.* at 74.
154. S. Elkins, *Slavery: A Problem in American Institutional and Intellectual Life* 82 (1968).
155. Memorandum in Support of Plaintiff's Application for Preliminary Injunction at 6, *Bellotti v. Sambo's Restaurant, Inc.*, No. 78-4895 (Commonwealth of Mass. Super. Ct. Dec. 1978), [hereinafter "Plaintiff's Application for Preliminary Injunction"].
156. Elkins, *supra* note 154, at 82.
157. Yuill, *supra* note 146, at 73.
158. *Id.* at 73-74.
159. J.D. Anderson, *Political and Scholarly Interests in the Negro Personality: A Review of the Slave Community*, in *Revisiting the Slave Community* 123, 129 (Al-Tony Gilmore ed. 1978).
160. R. Takaki, *The Black Child-Savage in Ante-Bellum America*, in *The Great Fear: Race in the Mind of America* 35 (G. B. Nash and R. Weiss eds. 1970).
161. J.W. Blassingame, *The Slave Community: Plantation Life in the Antebellum South* 137 (1972).
162. S. Boskin, *The National Jester in the Popular Culture*, in *The Great Fear: Race in the Mind of America*, *supra* note 160, at 167.

163. These terms are included in most ordinary libel statutes found in the various American jurisdictions. The terms were a part of the statute in *Beauharnais v. Illinois*.

164. *Socking Sambo's*, The State (Columbia, S.C.), Mar. 24, 1981, at A14.

165. *Id.*

166. *Id.*

167. *Id.*

168. Plaintiff's Application for Preliminary Injunction, *supra* note 155, at 3.

169. *Id.* at 11-12.

170. *Id.*, Exh. 28, City Council Resolution, City of Brockton, June 26, 1978, Approved June 29, 1978 by David E. Crosby, Mayor.

171. *Id.* at 3.

172. *Id.* at 4.

173. Telephone Conversation with Assistant Attorney General of Massachusetts, Ms. Joan Entmacher, Feb. 20, 1981 [hereinafter "Entmacher Conversation"].

174. *Id.* In April of 1978, Massachusetts Superior Court Judge, Edith Fine, ruled that the attempt by the town of Reading to deny Sambo's "a victualler's license solely on the ground that the name proposed is offensive, violates . . . First Amendment Rights. . . . The question is a close one." *Bellotti v. Sambo Restaurant, Inc.*, No. 78-4895 (Mass. Super. Ct., Dec. 8, 1978). A similar ruling was issued by a federal judge in Toledo, Ohio. As a result of a few victories in court, Sambo renamed many of its Jolly Tiger Restaurants, Sambo's Restaurant. Jolly Tiger was the name the restaurant chain adopted to avoid conflict about its using the trade name Sambo's. However, the chain of restaurants is no longer in existence. See Tom Goldstein, *Fight to Keep Sambo's Name*, N.Y. Times, May 4, 1979, at D5.

175. Entmacher Conversation, *supra* note 173.

176. Plaintiff's Application for Preliminary Injunction, *supra* note 155, at 1-2.

177. *Id.* at 4-12.

178. *Id.* at 5; see also Affidavits submitted as exhibits in support of Plaintiff's Application for Preliminary Injunction.

179. *United States v. Hunter*, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972).

180. *Id.* at 215; see Plaintiff's Application for Preliminary Injunction, *supra* note 155, at 16-17.

181. *Local Finance Co. of Rockland v. MCAD*, 355 Mass. 10, 14 (1968).

182. *Id.* at 16; see also *New York Times Co. v. New York Comm'n*, 41 N.Y.2d 345 (1977).

183. Plaintiff's Application for Preliminary Injunction, *supra* note 155, at 19-20.

184. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

185. *Washington v. Davis*, 426 U.S. 229 (1976).

186. Plaintiff's Application for Preliminary Injunction, *supra* note 155, at 20; see *Arlington Heights*, 429 U.S. at 265; *Washington*, 426 U.S. at 253.

187. Plaintiff's Application for Preliminary Injunction, *id.* at 29-30.

188. *Id.* at 26-27.

189. *Id.* at 23.

190. *Oralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).
191. *Id.* at 456.
192. Plaintiff's Application for Preliminary Injunction, *supra* note 155, at 27.
193. See, *id.*, Exhibit 2, Affidavit of Thomas I. Atkins, President of Boston NAACP.
194. *Id.* at 2-4.
195. *Bellotti v. Sambo's Restaurant, Inc.*, No. 78-4895, at 2 (Super. Ct., Middlesex Cty., Mass., Dec. 8, 1978).
196. *Id.* at 3.
197. See *Judgment of Dismissal, Bellotti v. Sambo's Restaurant, Inc., et al.*, No. 78-4895 (Super. Ct., Middlesex Cty., Mass., 1981).
198. *Sambo's of Ohio v. City of Toledo*, 466 F. Supp. 177 (N.D. Ohio 1979).
199. *Id.* at 179.
200. *Id.*
201. *Id.* at 180.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Sambo's Restaurant Inc. v. City of Ann Arbor*, 663 F.2d. 686 (6th Cir. 1981).
206. *Id.*
207. *Id.* at 695.
208. *Id.*
209. *Id.* at 697, 701 (Keith, J., dissenting).
210. *Id.* at 697 n.2.
211. *Id.* at 701.
212. *Id.*
213. See 44A Mass. Ann. Laws, Chap. 272 § 98C (1969) (Law Co-op 1992).
214. See App. XI, *infra*.
215. *Sambo Reading Leads to Call to Fire Teacher*, Advocate (Baton Rouge, La), Feb. 29, 1992, at 4B; see *School Bans "Shortenin' Bread" Song*, Times Picayune, Apr. 22, 1992, at A11 ("Shortenin' Bread" song about slave who steals bread to feed family banned by Spokane system "as racially insensitive." Song contained racial slurs and stereotyped dialect. A Black fifth-grader, Satirhea Goncalves, complained to her father because she was being required to practice the song for a concert).
216. *Id.*
217. C.E. Lincoln, *The Black Muslim in America* 2 (ed. 1994). A recent example of language that might be considered group defamation involves the numerous speeches made by Khalid Abdul Muhammad, a former aide to Louis Farrakhan. The aide accused Jews of "sucking [Blacks'] blood on a daily and consistent basis." He also stated: "You see everybody always talk about Hitler exterminating 6 million Jews. That's right. But don't nobody ever ask what did they do to Hitler. . . . They went in there, in Germany. The way they do everywhere they go, and they supplanted. They usurped . . . they had undermined the very fabric of society." Louis Farrakhan of the Nation of Islam subsequently characterized the

speech as "vile" and "repugnant." Khalid Abdul Muhammad commented on Catholics, whites, homosexuals, and Black Americans. *See Lynne Duke, Farrakhan Rebukes Key Aide*, Wash. Post, Feb. 4, 1994 at A1, A14. Khalid Abdul Muhammad further stated: "We found out that the Federal Reserve isn't really owned by the Federal Government. . . . The Federal Reserve is owned by Jews. Many of our politicians are in the palm, the white man's hand, but in particularly, in the palm of the Jewish white man's hand." *See Alan Finder, Jackson Urges Farrakhan to Reply to Aide's Racist, Anti-Semitic Speech*, N.Y. Times, Jan. 23, 1994 at A15; James H. Andrews, *Anti-Jewish Tone Taints Black Leader's Message*, Christian Sci. Mon., Apr. 12, 1994 at 12; *The Rhetoric of Hate*, Christian Sci. Mon., Mar. 9, 1994, at 22; K. Merida, *Black Caucus Says It Has No Official Working Ties With Nation of Islam*, Wash. Post, Feb. 3, 1994, at A16; *The Stew of Hate*, Los Angeles Times, Feb. 6, 1994, at 16; *see generally* William A. Henry III, *Pride and Prejudice*, Time, Feb. 28, 1994 at 21; *Farrakhan Tones Down Rhetoric*, Wash. Post, Jun. 6, 1994, at A8.

Ms. Lisa Cooke, a student in my Urban Legal Problems class at Southern University Law Center, received a transmission called "Nigger Jokes" while using the Internet at Southern University in Baton Rouge, Louisiana. The language used by the writer is potentially racially defamatory.

Here are some of the better nigger jokes I've managed to come upon. Enjoy.

Nig-ger (nig'er) n. An African jungle anthropoid ape of the primate family pongidae (superfamily cercopithecoidea). Imported to the United States slave labor in the late 1700's-1800's, these wild creatures now roam freely – while destroying the economic and social infrastructures of the nation.

Do you know why flies have wings?
So they can beat the niggers to the watermelons.

Why did the nig run when his girlfriend said she wanted to give him a blowjob?
He was afraid it would cancel his unemployment benefits.

Did you hear about the little nigger boy who had diarrhea?
He thought he was melting.

What do you call three niggers sitting in a garden?
Fertilizer.

What do you call a nigger with an IQ of 15?
Gifted.

What's the difference between a pothole and a nigger?
You'd swerve to avoid a pothole, wouldn't you?

How do you get twelve nigs in a Volkswagen?
Toss a welfare check in the back seat.

How do you get 400 niggers in an Escort?
I don't know, but they figure it out.

What do you call three blacks at a Klan barbecue?
Charcoal.

How do you make a nigger nervous?
Take him to an auction.

Did you hear about Evil Kneivel's cousin, Ku Klux Kneivel?
He tried to jump over 50 blacks – With A Steamroller.

What do you call 50,000 blacks in the bottom of the sea?
A good start.

What do you call a black hitchiker?
Stranded.

What do you call two nigger motorcycle cops?
Chocolate Chips.

Why does Georgia have blacks and California have earthquakes?
California had first pick.

What happens when you put an Odor-Eater in a nigger's shoes?
He disappears.

Why do niggers always have sex on their minds?
Because of the pubic hair on their heads.

What did the black kid get for Christmas?
My bike.

Why don't sharks attack niggers?
They mistake them for whale shit.

Why do niggers call white people "Honkeys"?
That's the last sound they hear before we run them over.

How do you wipe out 250 ape families?
Blow up K-mart.

Why can't niggers do push-ups?
Their lips hit the floor before their chests touch.

A nigger, a jew and a spic get shoved off a building at the same time – which one hits pavement first?

Who cares.

Whats the difference between nigger pussy and a bowling ball?

You can eat a bowling ball.

Why do niggers tint their car windows?

They don't – it's the black rubbing off.

How do you get niggers out of your neighborhood?

Hide all the good cardboard boxes.

How do you get a nigger to commit suicide?

Toss a bucket of KFC into traffic.

Whats another name for the county jail?

The house of apes.

Date: 4/94

From: Organization for the Execution of Minorities (OEM)

See generally P. Elmer-Dewitt, Battle for the Soul of the Internet, Time, Jul. 25, 1994, at 50; R.Z. Chesnoff, Hatemongering on the Data Highway, U.S. News and World Rep., Aug. 8, 1994, at 52; P. Patton, Life on the Net: We Hear America Modeming, Esquire, Dec. 1994, at 131; Hate Speech on the NET, USA Today, Nov. 17, 1995, at 14A; S.F. Kovaleski, Universities Vexed by Use of Their Internet Connections for Hate Mail, Wash. Post, Aug. 4, 1995, at A4; J. Quittner, Home Pages for Hate, Time, Jan. 22, 1996, at 69; P. Geilner, German Internet Provider Shuts 1,500 Sites to Block Neo-Nazis, Advocate (Baton Rouge, LA) Jan. 27, 1995, at 12A. See also M.A. Fletcher, Nissan Cancels Franchise After Racial Remark: VA Car Dealer's Epithet Against Worker Was Secretly Taped, Wash. Post, Dec. 13, 1996, at A6. (Nisan cancelled car dealership franchise after owner taped using word nigger in reference to an employee).

218. Lincoln, *supra* note 217, at 73.

219. *Id.* at 2.

220. *Id.* at 3-4, 13.

221. *Id.* at 71-72.

222. *Id.* at 72-75.

223. *Id.* at 65 (*quoting* Malcolm X, Boston University Human Relations Center, 15 Feb. 1960).

224. *Id.* at 1-4 (*quoting* Louis X, *The Trial*).

225. *Id.* at 2.

226. *Id.* at 69.

227. *Id.* at 71.

228. *Id.* at 72.

229. *Id.*

230. *Id.* (*quoting Muhammad Speaks*, Pittsburg Courier, Jul. 16, 1979).
231. *Id.*
232. *Id.*
233. *Id.* at 73; *see generally* Elijah Muhammad, *Message to the Blackman in America* 2-9, 50, 68, 110-122 (1965). Elijah Muhammad writes of Dr. Yacub:

The great archdeceivers (the white race) were taught by their father, Yakub, 6,000 years ago, how to teach that God is a spirit (spook) and not a man. *Id.* at 9.

As Yakub brought about a people (the present white race) who were a completely new people made out of the original of us, another new people must be made to be the ruling voice of tomorrow out of this old world that is now living her last days. *Id.* at 50.

The entire creation of Allah (God) is of peace, not including the devils who are not the creation of Allah (God) but a race created by an enemy (Yakub) of Allah. Yakub rebelled against Allah and the righteous people and was cast out of the homes of the righteous into the worst part of our planet to live their way of life until the fixed day of their doom.

These enemies of Allah (God) are known at the present as the white race or European race, who are the sole people responsible for misleading nine-tenths of the total population of the black nation. *Id.* at 68.

* * * *

The Yacub-made devils were really pale white, with really blue eyes; which we think are the ugliest of colors for a human eye. They were called Caucasian – which means, according to some of the Arab scholars, "One whose evil effect is not confined to one's self alone, but affects others." There was no good taught to them while on the Island. By teaching the nurses to kill the black baby and save the brown baby, so as to graft the white out of it; by lying to the black mother of the baby, this lie was born into the very nature of the white baby; and, murder for the black people also born in them – or made by nature a liar and murderer. *Id.* at 116.

The general tenets of the Black Muslim religion are found in *The Supreme Wisdom: Solution to the So-Called Negroes' Problem* written by Elijah Muhammad in 1957.

234. *Interview: William Shockley*, Playboy Magazine 69 (Apr. 1980) [hereinafter "Shockley"].

235. *Id.* at 69, 102. *But see Levin v. Harleston*, 966 F.2d 85 (2nd Cir. 1992). Professor Michael Levin, professor of philosophy at City University of New York, sued the university alleging violation of his constitutional rights pursuant to 42 U.S.C. 1983, the First and Fourteenth Amendments. The university created "shadow classes" or alternative philosophy classes for those who were offended by Professor Levin's social views. Professor Levin's writings contained numerous derogatory and defamatory comments about the "intelligence and social

characteristics of Blacks." *Id.* at 85, 86. Specifically, as to the intelligence of Blacks, Professor Levin wrote:

[I]t always being [sic] assumed that Blacks are on average as intelligent as whites and as capable of passing any fair test in proportionate numbers. But there is now quite solid evidence that this assumption is not correct; the average black is significantly less intelligent than the average white. Therefore, the only adjustments in educational measures that will allow blacks their due number of successes amount to making course-work and tests easier and easier, and this is what has been going on for over thirty years. Conversely, if standards are going to be raised, cultural literacy reasserted and college education given its old depth and focus, the American policy will have to reconcile itself to an embarrassing failure rate for blacks.

* * * *

It has been amply confirmed over the last several decades that, on average, blacks are significantly less intelligent than whites. The black mean IQ is slightly more than one standard deviation below the white mean. In more familiar terms, that amounts to a difference of more than 15 points of IQ as measured by such standard tests as the Wechsler Adult Intelligence Scale.

Levin v. Harleston, 770 F. Supp. 895, 902 (S.D.N.Y. 1991) (facts are not repeated in the appeals court decision).

City University of New York's President Harleston appointed an *ad hoc* committee to determine "when speech both inside and outside the classroom may go beyond the protection of academic freedom or become conduct unbecoming a member of the faculty, or some other form of misconduct." *Levin*, 966 F.2d 85, 88. The Second Circuit Court of Appeals ruled that the creation of shadow classes or alternative sections predicated solely on Professor Levin's racial views was an infringement upon political expression and created a chilling effect on the exercise of Professor Levin's First Amendment rights. *Id.* at 88.

The Court noted that

[f]ormation of the alternative sections would not be unlawful if done to further a legitimate educational interest that outweighed the infringement on Professor Levin's First Amendment rights.

Id.

The Court observed that there was absolutely no evidence Professor Levin's expression of his theories harmed the students or the educational process. *Id.* There were no complaints of racially unfair treatment by students. *Id.* at 87. The shadow classes "were established with the intent and consequence of stigmatizing Professor Levin solely because of his expression of ideas." *Id.* at 85, 87. This was

not a group defamation action. Thus, no discussion of racially defamatory falsehood is to be found in the Court's analysis.

236. See, e.g., L.J. Kamin, *The Science and Position of IQ* (1974); L. Kamin, *Review: Jensen's Last Stand*, *Psychology Today*, Feb. 1980, at 117-23.

237. See generally A.R. Jensen, *Bias in Mental Testing* (1980); A.R. Jensen, *Genetics and Education* (1972); A.R. Jensen, *Educability and Group Differences* (1973).

238. A.R. Jensen, *Selection of Minority Students in Higher Education*, 1970 Toledo L. Rev. 430; but see R. Delgado, S. Bradley, D. Burkenroad, R. Chavez, B. Doering, M.S. Smith, J. Windhausen, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race - IQ Research*, 31 U.C.L.A. L. Rev. 128 (1983).

239. Jensen, *id.* at 430. See also A.R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 36 Harv. Ed. Rev. 1 (1969); A.R. Jensen, *Social Class, Race, and Genetics: Implications for Education*, in *Social Class, Race and Psychological Development* 115 (M. Deutsch, I. Katz and A.R. Jensen eds. 1969); A.R. Jensen, *Another Look at Culture Fair Tests*, in *Measurement for Education Planning* 50 (Western Region Conference on Testing Problems, Proceedings for 1968). Compare R. Hamblin, D. Ruckholdt and H. Doss, *Compensatory Education: A New Perspective*, 1970 Tol. L. Rev. 459; see also H. Schuman, *Sociological Racism*, 7 Trans-Action 44 (1969).

240. Shockley, *supra* note 234, at 80.

241. *Id.* at 94.

242. See L.G. Hearnshaw, *Cyril Burt, Psychologist* (1979); S.J. Gould, *Review: The Father of Jensenism*, *Psychology Today* 104 (Dec. 1979).

243. Gould, *id.*

244. *Id.*; but see R. Fletcher, *Science, Ideology and the Media: The Cyril Burt Scandal* (1991); R.B. Joynson, *The Burt Affair* (1989); A.R. Jensen, *IQ and Science: The Mysterious Burt Affair*, 105 *The Public Interest* 93 (1991); D. Cohen, *Debate Reopens on "Fraudulent" Psychologist*, 123 *New Scientist* 24 (Sept. 2, 1989); Column *Psychologist Sir Cyril Burt: Pioneer or Fraud?*, 73 *Encounter* 22 (1989); R. E. Fancher, *The Burt Case: Another Foray*, 253 *Science* 1565 (Sept. 27, 1991); P. Aldhous, *Psychologist Rethink Burt*, 356 *Nature* 5 (Mar. 1992); L. Loevinger, *Raking Over the Coals: Science Ideology, and the Media: The Cyril Burt Scandal*, 352 *Nature* 120 (July 1991).

245. *Id.*

246. *Id.*

247. Compare the racial theory of Dr. F.C. Welsing, *The Cress Theory of Color Confrontation*, *Black Scholar* 32-40 (May 1974); see generally F.C. Welsing, *The Isis Papers* (1991).

248. See generally R.J. Hernstein and C.F. Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994). See also H. Boyd, *The IQ Debate Revisited: Nature or Nurture*, 102 *The Crisis* 23 (Jan. 1995); R. Morin, *Age, Race and Pay II: The Bell Curveball*, *Wash. Post*, Dec. 18, 1994 at C5; C. Milloy, *Scoring High on the Excel Curve*, *Wash. Post*, Dec. 14, 1994 at D1; S.L. Meyers, Jr., *The Important Question Is, Why Low IQs?*, *Fayetteville Observer-Times*, Nov. 27, 1994, at 21A; R.D. Wall, *Observations on 'The Bell Curve,'* *Advocate* (Baton

Rouge, LA), Jan. 21, 1995, at 7B; Brent Staples, *Back Talk: This Is Not a Test*, Essence, Jan. 1995, at 113; *see generally* I. Hannaford, *The Idiocy of Race*, *The Wilson Quarterly* 8 (Spring 1994).

249. *See generally* L. Calvalli-Sforza, P. Menozzi, and A. Piazza, *The History and Geography of Human Genes* (1994); *see also* S. Subramanian, *The Story in Our Genes*, Time, Jan. 16, 1995, at 54.

At a faculty meeting, Dr. F.L. Lawrence, President of Rutgers University, made the following remarks:

The average S.A.T.'s for African-Americans is 750. Do we set standards in the future so we don't admit anybody? Or do we deal with a disadvantaged population that doesn't have that *genetic, hereditary background* to have a higher average? So you've got to respond from a different direction to the different issues, and they're out there.

D. Carvajal, *Three Words Engulf Rutger's President*, N.Y. Times, Feb. 6, 1995, at A8. The statement of President Lawrence caused protests on the Rutgers campus by minority students. There have been demands by many students that Dr. Lawrence resign. See D. Carvajal, *Protests Divide Rutgers Campus*, N.Y. Times, Feb. 9, 1995, at A1, A11; *see also* *A Second Chance at Rutgers*, N.Y. Times, Feb. 8, 1995, at A10; R. Hernandez, *Rutgers Chief's Seeming Aloofness Hurt*, N.Y. Times, Feb. 13, 1995, at A11; D. Carvajal, *Rutgers President Endorsed in Furor Over Race Remark*, N.Y. Times, Feb. 11, 1995, at 9; J. Gold, *Rutgers Board Reaffirms its Support for President*, Advocate (Baton Rouge, LA), Feb. 11, 1995, at 3A; J. Leo, *The Rutgers Star Chamber*, U.S. News & World Rep., Feb. 20, 1995, at 22; R. Weiss, *A Human Face on Gene Theories*, Wash. Post National Weekly Edition, Feb. 27-Mar. 5, 1995, at 37 ("genetic makeup of people from all over the world offers no support for the proposition that some races are smarter or more highly evolved than others"). *See generally* L.R. Kass, *Intelligence and the Social Scientist*, 120 The Public Interest 64 (1995) (analysis of *The Bell Curve*); T. Sowell, *Ethnicity and IQ*, The American Spectator, Feb. 1995, at 32 (analysis of *The Bell Curve*).

250. *See, e.g.*, *Why Tolerate Campus Bigots*, N.Y. Times, Mar. 1990 at B2; K. Magner, *Update on Minority Groups*, Chronicle of Higher Education, Aug. 1, 1990, at A26; R. Wilson, *Colleges' Anti-Harassment Policies Bring Controversies On Freedom of Speech*, Chronicle of Higher Education, Oct. 4, 1989 at A3; *Watching What You Say on Campus*, Wash. Post, Sept. 14, 1989 at A4; *University Can Keep Mascot, But Indian Students are Upset*, N.Y. Times, Dec. 3, 1995, at 20 (Indian mascot used by University of Illinois, Chief Illiniwek, does not foster a hostile atmosphere or environment for Indian students); *see* N. Ravo, *Campus Slur Alters a Code Against Bias*, N.Y. Times, Dec. 11, 1989, at B3 (U. of Connecticut student expelled from dormitory because she hung a poster on dormitory room door that listed types of people who were "welcome," "unwelcomed," "tolerated," and "shot on sight." The last group included "homos." The University found the use of the word "homos" a violation of the University's anti-harassment rule which prohibited "making slurs or epithets based on race, sex, ethnic origin, religious or sexual

orientation."); *Racism Charges Prompt Student Editor's Firing*, Chronicle of Higher Education, Dec. 13, 1989, at A3 (Editor of Duke University humor magazine fined for not responding to charges that two articles about university dining hall workers were racist); *see also Campus Battle Pits Freedom of Speech Against Racial Slurs*, N.Y. Times, Mar. 25, 1989, at A1; *Free Speech at Tufts: Zoned Out*, N.Y. Times, Sept. 27, 1989 at A4; *see also M. Moore, Students Protest KKK Coverage by Recycling Papers*, The Advocate (Baton Rouge, La), May 2, 1996 at 1B (Students gathered *Daily Reveille* newspapers at LSU and deposited them in recycling bins to protest stories about Klan activities in Louisiana).

251. *Student Handbook of Middlebury College*, Middlebury, Vermont, at 62-63 (1991-1992).

252. *See Putting an End to Harassment: Racial, Sexual, Ethnic - A Guide for the Students, Staff, and Faculty of the University of Pennsylvania* (February 1988).

253. Telephone Conversation with Assistant Vice-Provost of University of Pennsylvania, Barbara Cassel, June 1994; *see also The PennBook (94-95): Policies and Procedures Handbook University of Pennsylvania* at 16-19.

254. *UWM Post v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991).

255. *Id.* at 1165-66.

256. *Id.* at 1181.

257. *Id.* at 1172-73.

258. *Id.*

259. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

260. *Id.* at 856.

261. *Id.* at 858.

262. *Id.* at 864.

263. *Id.* at 867.

264. *Id.* A more recent example of a dubious application of the University of Pennsylvania's speech code was cited in the *Washington Post*:

CAMPUS SPEECH CODES outlawing racially offensive speech have not, on the whole, fared well in the courts: Those at the universities of Michigan and Wisconsin, for instance, were successfully challenged as unconstitutionally "overbroad and vague." For an illustration of those terms and the absurd difficulties and injustice to which they can lead, a disciplinary saga unfolding at the University of Pennsylvania provides a sobering example.

The facts of the case, which has gotten extra attention because University of Pennsylvania President Sheldon Hackney is President Clinton's nominee to chair the National Endowment for the Humanities, have an antic quality. A freshman named Eden Jacobowitz is said to have shouted out his dorm window at a group of black sorority students who were making noise, calling them "water buffalo" and saying there was a zoo nearby if they wanted to party. When school authorities asked if anyone in the dorm had shouted racial epithets – apparently some other students had – Mr. Jacobowitz told them what he had shouted but said it was not a

racial epithet. Nonetheless, school disciplinary authorities are now investigating whether his words are actionable under Penn's speech code. One college official reportedly asked him whether he had been thinking "racist thoughts" at the time.

As a constitutional matter, "overbroad" means that a policy can cover behavior that isn't prohibited as well as behavior that is; "vague" means the person engaging in the behavior can't tell beforehand whether it will be ruled prohibited or not. That's speech regulation in a nutshell. Bad enough that this incident has led to lunacies like the involvement of a panel of racial epithet scholars, who combed through linguistic history to ascertain that "water buffalo" has never been used as an ethnic slur toward blacks; that another expert should rejoin that Mr. Jacobowitz may have been translating a Hebrew, non-racial insult meaning "oxen"; that one faculty member would characterize water buffalo as "large, dark, primitive animals that live in Africa," only to debate whether water buffalo live in Africa. All of that merely amplifies what should have been clear already, the futility and intrinsic self-destructiveness in clamping down on speech because it offends somebody.

The Penn speech code has been characterized by a local ACLU chapter as "one of the worst" at universities, and its prohibitions include any "verbal or symbolic behavior" that, among other criteria, "is intended by the speaker or actor only to inflict direct injury on the person or persons to whom the behavior is directed; or is sufficiently abusive or demeaning that a reasonable, disinterested observer would conclude that the behavior is so intended; or occurs in such a context such that an intent only to inflict direct injury may reasonably be inferred." We have added the italics; note that this astonishingly expansive formula does not allow the speaker's interpretation of his own words to be accepted over the interpretation of a listener or third party.

Educational institutions should educate, not least about racism and the need to fight it with stronger arguments; this, not suppression, continues to be the best way to combat offensive speech when, inevitably, it occurs. But that responsibility to educate is also a serious one. It's shameful and ridiculous for such institutions to then squander the moral high ground in the argument by pressing insupportable, trivial positions. Mr. Hackney ought to speak on this subject before he is confirmed to his new job, which after all is about education too.

Wash. Post, May 2, 1993, at C6.

265. See *Laird v. Tatam*, 408 U.S. 1, 11 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); see also *Elrod v. Burns*, 427 U.S. 347, 359 (1976); see generally M. Steger, *A Cautious Approach: Racist Speech and the First Amendment at the University of Texas*, 8 Journal of Law and Politics 609 (1992); R.W. McGee, *Hate Speech, Free Speech and the University*, 24 Akron L. Rev. 363 (1990) (Mr. McGee takes the absolutist position of Justice Black and asserts that all restrictions on speech found in University policy statements are unconstitutional impairments

of First Amendment rights. He contends that students at a state university may be allowed to refer to other students as "nigger," "faggot," and "kike." With scant legal analysis, Mr. McGee simply concludes that such speech is protected under the First Amendment); *but see* M. Matsuda, *Public Response to Racist Speech: Considering the Victims' Story*, 87 Michigan L. Rev. 2320 (1989) (Matsuda cites this author, at 2324, n.22 and 2376, n.282. A careful reading of Matsuda reveals substantial reliance on this author's theoretical position found in his 1980 Howard Law Journal article.); R. Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. Civil Rights-Civil Liberties L. Rev. 133 (1982). (Both Matsuda and Delgado would punish racist speech that is merely derogatory, demeaning, or "hateful" even if it were nonlibelous.); *see also* *At Georgetown University Law Center, Silence Speaks in Protest: Green Ribbons, Placards Replace Angry Words as Author of Race Article Receives Degree*, Wash. Post, May 28, 1991, at B4 (Black law students at Georgetown University Law Center protested in silence by wearing green ribbons during graduation exercise. The protest was launched in response to the law center's handling of an incident where a white student wrote an article claiming that minorities were admitted to the law school with dramatically "unequal" credentials. The student illegally gained access to confidential records of students to amass his statistics). *See* J. Yardley, *In New York, a Bigoted Man on Campus*, Wash. Post, Aug. 12, 1991, at B2, col. 2 (Professor Leonard Jeffries, Jr., Chairman of City College of New York's African-American Studies Department, was accused of making racial remarks against Whites and Jews. Professor Jeffries, speaking at the Empire State Black Arts and Cultural Festival in Albany, was reported as having said that there is a "conspiracy, planned and plotted and programmed out of Hollywood [by] people called Greenberg and Weisberg and Trigiani. . . . Russian Jewry has a particular control over the movies, and their financial partners, the Mafia, put together a financial system of destruction of black people." Jeffries is further accused of stating: "[E]veryone knows rich Jews helped finance the slave trade." As to Diane Ravitch, former professor at Teachers's College, Columbia University, Jeffries characterized her as "a sophisticated, debonair racist" and "a Texas Jew." Yardley argues that Jeffries' comments should not be protected by the concept of academic freedom. Yardley complains: "There we go again: academic freedom. It's the smoke screen behind which Jeffries hides and the justification given both by his defenders and by those too cowardly to oppose him. But talk such as Jeffries engaged in at Albany has nothing to do with ideas - it's bigotry pure and simple - protected and nothing to do with academic freedom. He's fully entitled to his absurd prejudices, and if he wants to shout them to the rooftops that's his business, but he scarcely deserves either the gloss of legitimacy that tenure provides or the endorsement implicit in state financing.")

In May of 1993, a jury in the Federal District Court for the Southern District of New York determined that the First Amendment right to free speech of Professor Jeffries was violated when he was removed as chairman of the black studies department at City College in 1992. M. Newman, *A Free Speech Lesson*, N.Y. Times, May 16, 1993, at 20, col. 4; *see* J. Fleming, *Defending the Right to Views*

That Some Consider Racist, N.Y. Times, May 23, 1993, at 7 (jury awarded Professor Jeffries \$400,000 in punitive damages).

On November 14, 1994, the United States Supreme Court vacated and remanded the \$400,000 judgment and reinstatement of Jeffries as ordered by the Court of Appeals for the Second Circuit. The Supreme Court ruled:

The petition for writ of certiorari is denied. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Waters v. Churchill*. . . .”

Harleston v. Jeffries, 115 S. Ct. 502 (1994) (mem.); see *Waters v. Churchill*, 114 S. Ct. 1878 (1994); see generally H.M. Holzer, *Comment: In Defense of . . . Leonard Jeffries*, 1 The Defender 4 (Jan. 1995); S.F. Rohde, *False Alarm on Free Speech*, 1 The Defender 4 (Jan. 1995); *Professor's Speech Reported as Bigoted*, N.Y. Times, Nov. 28, 1994, at A13; E.M. Yoder, Jr., *A First Amendment with Footnotes*, Wash. Post, Dec. 18, 1994; see also C.W. Arenson, *CUNY Campus Assails Hate But Allows Black-Pride Speakers It Had Barred*, N.Y. Times, Nov. 5, 1996, at B1 (Lenoard Jeffries speaks at CUNY conference).

On remand, the United States Court of Appeals for the Second Circuit reversed itself holding Leonard Jeffries' constitutional rights had not been violated. *Jeffries v. Harleston*, 52 F.3d 9 (2nd Cir. 1995); see N. Glazer, *Levin, Jeffries, and the Fate of Academic Autonomy*, 120 The Public Interest 14 (1995). But see L. Jaroff, *Teaching Reverse Racism: A Strange Doctrine of Black Superiority Is Finding Its Way Into Schools and Colleges*, Time, Apr. 4, 1994, at 74 (discussing Leonard Jeffries' and Clarence Glover's belief in the theory that the presence of melanin, a dark skin pigment, in people of African descent makes them more humane and intellectually superior to Caucasians).

266. C. Hall, *Ice-T Drops "Cop Killer,"* Wash. Post, July 19, 1992 at A1, A14.

267. J. Pareles, *The Disappearance of Ice-T's "Cop Killer,"* N.Y. Times, July 30, 1992, at C13.

268. *Id.*

269. *Id.* at C16.

270. S. Rule, *Rapping Time Warner's Knuckles*, N.Y. Times, July 8, 1992, at C15-C16.

271. *Id.* at C15.

272. *Id.*

273. *Id.*

274. *Id.* at C16.

275. Hall, *supra* note 266, at A14; see A. Light, *Ice-T Talks Back*, Rolling Stone, Aug. 20, 1992, at 30.

276. Pareles, *supra* note 267, at A14; *Iced Out – How "Cop Killer's" Fallout Led to Ice-T's Split With Warner*, Entertainment Weekly, Feb. 12, 1993, at 6.

277. Pareles, *id.* at A14.

278. Rule, *supra* note 270, at C16.

279. Letters to the Editor, Wash. Post, July 14, 1992, at A12.

280. L. Rodriguez, *Harder Times for Jackson*, Houston Chronicle, June 29, 1992, at 25.
281. *Id.*; see J. Pareles, *Dissing the Rapper is Fodder for the Sound Bite*, N.Y. Times, June 28, 1992, at C20.
282. Rodriguez, *supra* note 280, at 25; Pareles, *id.*
283. Rodriquez, *id.*; Pareles, *id.*; see generally S. Howard, *White America's Greatest Nightmare?*, Newsday, June 29, 1992, at 35.
284. E. Zibart, *Defending Rap Rights*, Wash. Post (Weekend Section), Jul. 3, 1992, at 12.
285. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); see M.S. Degan, *Adding the First Amendment to the Fire: Cross Burning and Hate Crime Laws*, 26 Creighton L. Rev. 1109 (1993); Note, *Hate Speech Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 Harv. L. Rev. 1314 (1993); A.L. Crowley, *R.A.V. v. City of St. Paul: How the Supreme Court Missed the Writing on the Wall*, 34 Boston College L. Rev. 771 (1993); W.H. Huffman, *R.A.V. v. St. Paul*, 17 Law & Psychology Rev. 263 (1993); D.A. Farber, *Hate Speech After R.A.V.*, 19 Wm. Mitchell L. Rev. 889 (1992).
286. *R.A.V.*, *id.*
287. *Id.* at 380; see *In re Welfare of R.A.V.*, 464 N.W. 2d 507, 508 (Minn. 1991); E.A. Young, *Recent Development – Regulation of Racist Speech: In Re Welfare of R.A.V.*, 14 Harv. J. of Law and Public Policy 903-904 (1991).
288. *Recent Development*, *id.* at 903.
289. *Id.*; see *Burning Cross Greets Black Family on St. Paul's East Side*, Minneapolis Star Tribune, June 22, 1990, at 1A.
290. *R.A.V.*, *id.* at 380; *In re Welfare of R.A.V.*, 464 N.W.2d at 508.
291. *R.A.V.*, *id.* at 382; *In re Welfare of R.A.V.*, *id.*
292. *In re Welfare of R.A.V.*, 464 N.W. 2d at 510.
293. *Id.*
294. *Id.* at 511.
295. *R.A.V.*, 505 U.S. at 381.
296. *Id.* at 387. Fighting words are expressions or expressive conduct that "itself inflicts injury or tends to incite immediate violence." They are the kinds of expressive behavior that are "of such slight social value as a step to truth that any benefit that may be deemed from them is clearly out-weighed by the social interest in order and morality." *Id.* at 383 (quoting *In re Welfare of R.A.V.*, 464 N.W. 2d 507, 510).
297. *Id.* at 382.
298. *Id.* at 383.
299. *Id.* at 384.
300. *Id.* at 386.
301. *Id.* at 387.
302. *Id.* at 391.
303. *Id.* at 391.
304. *Id.* at 392.
305. *Id.* at 390.
306. *Id.* at 395.

- 307. *Id.*
- 308. *Id.*
- 309. *Id.* at 380.
- 310. *Id.* at 385.
- 311. *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952).
- 312. *R.A.V.*, 505 U.S. at 380.
- 313. *Id.*
- 314. *Id.* at 393-394.
- 315. *Id.* at 391.
- 316. *Id.* at 415 (Blackmun, J., concurring).
- 317. *Id.* at 415-416.
- 318. *Id.* at 397.
- 319. *Id.* at 414 (White, J., concurring).
- 320. *Id.* at 413.
- 321. *Id.* at 414.
- 322. *Id.* at 402.
- 323. *Id.* at 401.
- 324. *Id.*
- 325. *Id.* at 401-402.
- 326. *Id.* at 407.
- 327. *Id.* at 408.
- 328. *Id.* at 407-408.
- 329. *Id.* at 433 n.9 (Stevens, J., concurring).
- 330. *Id.* at 388.
- 331. *Id.* at 415 (White, J., concurring).

332. See R. Marcus, *Supreme Court Overturns Law Barring Hate Crimes*, Wash. Post, June 23, 1992, at A1; M. Jordan, *Ruling Seen Stifling Controversial Campus Speech Codes*, Wash. Post, June 23, 1992, at A6; K. Sullivan, *Area Jurisdictions Call Hate-Crime Laws Solid*, Wash. Post, June 23 1992, at A6; D. Terry, *Decision Disappoints the Victims of Cross-Burning*, N.Y. Times, June 23, 1992, at A16; L.M. Keen, *High Court's Hate Crimes Opinion Could Be Ominous*, Wash. Blade, June 26, 1992, at A1; N. Hentoff, *Scalia Outdoes the ACLU*, Wash. Post, June 30, 1992, at A10; C. Krauthammer, *Scalia's Noble Fight*, Wash. Post, June 28, 1992, at C7; L. Greenhouse, *The Court's 2 Visions of Free Speech*, N.Y. Times, June 24, 1992, at A13; W. Celis, *Universities Reconsidering Bans on Hate Speech*, N.Y. Times, June 24, 1992, at A13; *Loosing Hateful Speech*, N.Y. Times, June 24, 1992 at A20; *Hate Crimes and Free Speech*, Wash. Post, Jun. 23, 1992, at A20; M. Ingwerson, *U.S. Supreme Court Decision Puts Tight Limit on "Hate Speech" Laws*, Christian Sci. Mon., June 24, 1992, at 9; *Black St. Paul Mother Reacts to Court's Ruling*, Christian Sci. Mon., June 24, 1992, at 9; *Legal-Not Right*, Christian Sci. Mon., June 25, 1992, at 20; J. Biskupic, *Hate-Crime Laws Face Challenge of Free Speech*, Advocate (Baton Rouge), Dec. 14, 1992, at 24.

333. *Legal - Not Right*, Christian Science Monitor, *id.*

334. Ingwerson, *supra* note 332.

335. Hentoff, *supra* note 332.

336. *Hate Crimes and Free Speech*, *supra* note 332.

337. H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); see also M. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, in *Modern Constitutional Theory: A Reader* (3 ed., J.H. Garvey & T.A. Aleinkoff eds. 1994).

338. See generally articles cited *supra* note 332.

339. See *Rust v. Sullivan*, 500 U.S. 173 (1991).

340. *R.A.V.*, 505 U.S. at 402 (White, J., concurring).

341. L.D. Cervantes, Poem for the Young White Man Who Asked Me How, I An Intelligent Well Read Person Could Believe in the War Between Races, in M. Sanchez, *Contemporary Chicano Poetry* 90 (1986), quoted in *Wisconsin v. Mitchell*, 485 N.W. 2d 807, 819 (Wis. 1992) (W.A. Bablitch, J., dissenting).

But see *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). (Respondent's enhanced sentence for aggravated battery because victim was selected by race does not violate first amendment right of respondent. The Wisconsin penalty-enhancement provision of the criminal code held constitutional. The law enhanced or increased the penalties where crimes are committed against a person because of his "race, religion, color, disability, sexual orientation, national origin or ancestry.") *Id.* at 364-365. See M. Boot, *Supreme Court Upholds Wisconsin Hate-Crime Law*, Christian Sci. Mon., Jun. 14, 1993, at 7; A "Hate Crime" Ruling, Wash. Post, Jun. 14, 1993, at A18; see also J.S. Justice, *Ethnic Intimidation Statutes Post-R.A.V.: Will They Withstand Constitutional Scrutiny?*, 62 U.Cinn. L. Rev. 113 (1993).

Recently, Circuit Judge Deborah Servitto upheld the constitutionality of Michigan's ethnic intimidation law. The judge convicted two White suburban residents for threatening an off-duty Black police officer. One of the defendants, Lisa Marie Haack, called the victim a racial name and ordered a co-defendant to assault the victim, Officer Mortarice Collier. Though Haack's lawyers argued the law was unconstitutional in light of *R.A.V.*, the judge disagreed and stated that the Michigan law was different "because it prohibits ethnic inspired intimidation which communicates ideas in a threatening, as opposed to [an] obnoxious manner [as] cited in the Minnesota case." See *Ethnic Intimidation*, Advocate (Baton Rouge, La), Aug. 27, 1992 at A2.

A federal judge refused to grant a new trial to three Ku Klux Klansmen convicted of cross-burning in Shreveport, Louisiana. The judge ruled that the Klansmen had no right to threaten violence. District Court Judge Tom Stagg wrote: "It is well settled that violence and threats of violence enjoy no protection under the First Amendment." The Klansmen invoked *R.A.V.* and contended their conduct was protected under the First Amendment. See *Judge Denies New Trial to Klansmen*, Advocate (Baton Rouge, La), Nov. 6, 1992, at 5B; see also M. Fryer, *Klan Still Trying to Sell Hate*, Advocate (Baton Rouge, La), Jan. 28, 1996, at 7B (Klan distributed racist fliers and held rallies in southern Louisiana).

In spite of the Wisconsin Supreme Court's ruling striking down its hate crime law on June 23, 1992, the Wisconsin Attorney General has decided that certain racial nicknames may be discriminatory. The Attorney General of Wisconsin issued an opinion that stated that such names as Warhawks, Braves, Chiefs, Redmen, and Redskins may be discriminatory because they reinforce stereotypes and create "an intimidating or offensive environment thus perpetuating past discrimination." See

A. Shadid, *Wisconsin Attorney General Rules Nicknames May Be Discriminatory*, Advocate (Baton Rouge, La), Oct. 19, 1992, at 6A; *see also* C. Page, *Fighting a Native American Racial Epithet*, Advocate (Baton Rouge, La), Sept. 22, 1992, at 7B (Redskins, Cleveland Indians, Atlanta Braves are Native American racial epithets that should be abolished by sports teams).

342. Racial Discrimination Convention, *supra* Ch. I, note 6.

343. E. Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 Int'l & Comp. L. Quarterly. 996, 997 (1966). Mr. Egon Schwelb served as the Deputy Director of Human Rights in the United Nations Secretariat. His view is fully supported by the *travaux préparatoires*. See Report of the 16th Session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Jan. 13-31, 1964, U.N. Doc. E/CN. 4/873; *see also* Commission on Human Rights, Report of the 20th Session, Feb. 17 - March 18, 1964, Economic and Social Counsel Official Records, 37th Sess. Supp. No. 8, E/3873; General Assembly 20th Session (1965), Agenda Item 58, Draft of International Convention on the Elimination of All Forms of Racial Discrimination, Report of the Third Committee, Dec. 18, 1965, A/6181.

Prof. Richard Bilder of the University of Wisconsin School of Law has posited a contrary view. In a conversation with this author, he has described the Racial Discrimination Convention as "a response to deep resentments about discrimination against Black and non-Western peoples."

344. Universal Declaration of Human Rights, G.A. Res. 217(111), U.N. GAOR, 3rd Sess., U.N. Doc. A/180 (1948) (hereinafter "Universal Declaration").

345. Schwelb, *supra* note 343, at 998-99.

346. G.A. Res. 1780 (XVII), Dec. 7, 1962.

347. G.A. Res. 1904 (XVIII), Nov. 20, 1963.

348. G.A. Res. 1906 (XVIII), Nov. 20, 1963.

349. *See* Report of the 16th Session of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, *supra* note 343; Commission on Human Rights, Report of the 20th Sess., *supra* note 343; General Assembly 20th Session (1965), Agenda Item 58, Draft of International Convention on the Elimination of All Forms of Racial Discrimination, Report of the Third Committee, *supra* note 343.

350. *See* Report of the 16th Session of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, *supra* note 343; *see also* Commission on Human Rights, Report of the 20th Session, *supra* note 343.

351. *See* General Assembly 20th Session (1965), Agenda Item 58, Draft of International Convention on the Elimination of All Forms of Racial Discrimination, Report of the Third Committee, *supra* note 343.

352. U.N. Doc. A/PV. 1406; G. A. Res. 2106 A(XX), Dec. 21, 1965.

353. Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 51st Sess., Supp. No. 18 (A/51/18), at 106 (Annex I) (1996).

354. F. Schwelb, *supra* note 343, at 1057.

355. Racial Discrimination Convention, art. 1, *supra* Ch. I, note 6.

356. *Id.* at art. 2.

357. *Id.* at arts. 3, 4, 5.

358. *Id.* at art. 6.

359. *Id.* at art. 7.
360. *Id.* at arts. 8, 9, 10.
361. *Id.* at arts. 11, 12, 13.
362. *Id.* at art. 14.
363. *Id.* at art. 15.
364. *Id.* at arts. 16, 17, 18.
365. *Id.* at art. 19.
366. *Id.* at art. 20.
367. *Id.* at art. 21.
368. *Id.* at art. 22.
369. *Id.* at art. 23.
370. *Id.* at arts. 24, 25.
371. See generally N. Nathanson & E. Schwelb, *supra* Ch. I, note 8.
372. Art. 8(1), Racial Discrimination Convention, *supra* Ch. I, note 6.
373. *Id.* at art. 11.
374. *Id.* at arts. 11-13.
375. Conversation with an official of the United Nations Centre for Human Rights, Geneva, Switzerland, September 30, 1996. See H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* 560 (1996).
376. Art. 14, Racial Discrimination Convention, *supra* Ch. I, note 6.
377. *Id.* at art. 14(7)(b).
378. *Id.* at art. 8.
379. *Id.* at art. 14.
380. According to an official at the United Nations Centre for Human Rights in Geneva, Switzerland, a sixth opinion is in press.
381. *Yilmaz-Dogan v. The Netherlands*, Communication No. 1/1984, Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 43rd Sess., Supp. No. 18 (A/43/18), Annex IV, at 59 (1988).
382. *Id.* at 60.
383. *Id.* at 59.
384. *Id.* at 60.
385. *Id.* at 63.
386. *Id.* at 64.
387. *Demba Talibe Diop v. France*, Communication No. 2/1989, Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 46th Sess., Supp. No. 18 (A/46/18), Annex VIII, at 124 (1992).
388. *Id.*
389. *Id.* at 130.
390. *Id.*
391. *Id.*
392. *Id.*
393. *L.K. v. The Netherlands*, Communication No. 4/1991, Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 48th Sess., Supp. No. 18 (A/48/18), Annex IV, at 130 (1994).
394. *Id.*
395. *Id.* at 131.
396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at 131-132.

400. *Id.* at 132.

401. *Id.*

402. *Id.* There appears to be an error in the text of the opinion. On page 131 the language of the petition is stated to be "Not accepted because of poverty? . . ." Yet, on page 132 the language of the petition has been recorded as "Not accepted because of a fight?"

403. *Id.* at 135.

404. *Id.*

405. *Id.* at 136.

406. *Michael L.N. Narrainen v. Norway*, Communication No. 3/1991, Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 49th Sess., Supp. No. 18 (A/49/18), Annex IV, at 119 (1995).

407. *Id.*

408. *Id.*

409. *Id.* at 120.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* at 121, 124-125.

415. *Id.* at 120, 121.

416. *Id.* at 120.

417. *Id.* at 124.

418. *Id.* at 123.

419. *Id.* at 126.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 127.

424. *C.P. v. Denmark*, Communication No. 5/1994 (Decision on Admissibility), Committee on the Elimination of Racial Discrimination, UN GAOR 46th Sess., CERD/C/46/D/5/1994 (30 Mar. 1995).

425. *Id.* at 1.

426. *Id.*

427. *Id.*

428. *Id.* at 2.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* at 2-3.

437. *Id.* at 3.

438. *Id.*

439. *Id.*

440. *Id.* at 3-4.

441. *Id.* at 4.

442. *Id.*

443. *Id.* at 5.

444. *Id.* at 6.

445. *Id.*

446. *Id.* at 7.

447. *Id.*

448. *Id.*

449. K.J. Partsch, *The Committee on the Elimination of Racial Discrimination*, in *The United Nations and Human Rights: A Critical Appraisal* 340 (P. Alston ed. 1992).

450. *Id.*

451. *Id.*

452. *Id.* at 341.

453. *Id.* at 340.

454. *Id.* at 361.

455. *Id.*

456. *Id.* at 348.

457. *President's Human Rights Treaty Message to the Senate*, 14 Weekly Comp. of Pres. Doc. No. 395 (Feb. 23, 1978), reprinted in Four Treaties Pertaining to Human Rights: Message From the President of the United States Transmitting the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social, and Cultural Rights; The International Covenant on Civil and Political Rights; and the American Convention on Human Rights, 95th Cong., 2d Sess. III (1978).

458. See Racial Discrimination Convention, art. 4, *supra* Ch. I, note 6.

459. *Id.*

460. As to the validity of reservations to humanitarian treaties, art. 20(2) of the Racial Discrimination Convention provides:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to the Convention object to it.

See also Advisory Opinion on Reservations to the Genocide Convention, 1951 I.C.J. Rep. 29-30; G.G. Fitzmaurice, *Reservations to Multi-Lateral Conventions*, 2 Int'l & Comp. L.Q., 1, 1-26 (1953).

461. See T.D. Jones, *Article 4 of the International Convention on All Forms of Racial Discrimination and the First Amendment*, 23 How. L. J. 429 (1980); see also J. Paust, *Reading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 Rutgers Law Rev. 565 (1991) (Paust cites

Jones at 565, 567 n.7, 570 nn.12 and 13); M.A. Korengold, Note, *Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(A) of the Convention on the Elimination of All Forms of Racial Discrimination*, 77 Minn. L. Rev. 719 (1993) (Korengold cites Jones at 721, 725, 732, and 736).

462. Quoted in M. Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 Am. J. Int'l L. 719, 727 (1994).

463. *Id.* at 719.

464. *Id.* at 723.

465. *Id.* at 726.

466. *Id.* at 728.

467. See Ch. III, notes 110-15 and accompanying text, *supra*.

468. See R.E. Schwartz, *Chaos, Oppression, and Rebellion: The Use of Self-help to Secure Individual Rights Under International Law*, 12 B.U. Int'l L.J. 255, 262-263 (1994); T.K. Ragland, *Burma's Rohingyas In Crisis: Protection of "Humanitarian" Refugees Under International Law*, 14 B.C. Third World L.J. 301, 324 (1994); B. Simma and P. Alston, *The Source of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Int'l L. 82 (1992); V.A. Perry, *Human Rights and Movement of Persons*, 78 Am. Soc'y Int'l L. Proc. 339, 352 (1986); see also 2 Restatement of Foreign Relations Law (Third), § 703 at 174 (1987); see, e.g., H.G. Lasswell & L. Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. Fla. L. Rev. 639 (1976); M.S. McDougal, H.G. Lasswell & L. Chen, *The Protection of Aliens From Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 Am. J. Int'l L. 432 (1976); McDougal, Lasswell & Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 Am. J. Int'l L. 497 (1975); M.S. McDougal, H.G. Lasswell & L. Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination*, 74 Mich. L. Rev. 865 (1976); see, e.g., Schwelb, *supra* note 343, at 1054; N. Nathanson & E. Schwelb, *supra* Ch. I, note 8, at 30; W. McKean, *Equality and Discrimination Under International Law* 264-288 (1983). McKean writes:

There are thus sound reasons for accepting that the principles of equality and non-discrimination, in view of their nature as fundamental constituents of the international law of human rights, are part of *jus cogens*.

Id. at 283.

469. See Ch. III, note 113 and accompanying text *supra*.

470. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

471. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

472. Schwelb, *supra* note 343, at 1022.

473. *Id.* at 1023.

474. Council of Eur. Consult. Ass. 17th Sess. Rec. 453, Model Law of Council of Europe (Jan. 17, 1966), quoted in F.S. Haiman, *Speech and Law In a Free Society* 89 (1981); See also N. Lerner, *International Definitions of Incitement to Racial Hatred*, 14 N.Y.L.F. 49 (1968).

475. *Id.* at 52.

476. *Id.*

477. *Id.*

478. *Id.*; see also Council of Eur. Consult. Ass., Texts Adopted by the Assembly: Recommendation 453 for Model Law, 17th Sess. (Jan. 27, 1966); Council of Eur. Consult. Ass., Official Rep. of Debate: 3 Council of Eur. Consult. Ass. Deb. 17th Sess. (part 2) at 728 (Jan. 27, 1966).

479. N. Lerner, *The Crime of Incitement to Group Hatred* 53 (1965); see generally *Hate Crime: International Perspectives on Causes and Control* (M.S. Hamm ed. 1994).

480. American Convention on Human Rights, reprinted in B. Carter and P. Trimble, *International Law: Selected Documents* 488 (1995), 9 I.L.M. 673 (1970).

481. *Id.* at 493, art. 13.

482. *Id.* at 488.

483. See generally Fordham Comment, *supra* Ch. I, note 8.

484. Lerner, *supra* note 479, at 24-25.

485. Jones, *supra* note 461.

486. M. Zuleeg, *Group Defamation in West Germany*, 13 Clev.-Mar. L. Rev. 52 (1964); C.L. Nier, III, *Racial Hatred, A Comparative Analysis of the Hate Crime Laws of the United States and Germany*, 13 Dick. J. Int'l L. 241 (1995) (citing German laws prohibiting incitement to racial or ethnic hatred and holocaust revisionism under German Criminal Code); A. Allen, *German Lawmakers OK Penalty for Holocaust Denial*, Times-Picayune (New Orleans, LA), May 21, 1994, at A21 (Crime bill punishing those who deny the existence of the Holocaust passed by lower house of German legislature).

487. Zuleeg, *id.* at 52-63.

488. *Id.* See Appendix XVI, *The Holocaust Controversy, The Case for Open Debate* by B.R. Smith (1992) (pamphlet expressing views of holocaust revisionist); see A.R. Butz, *The Hoax of the Twentieth Century* (1977); K. Dennis, *Reveille Publishes Controversial Ad: Group Denies Holocaust*, The Daily Reveille (Louisiana State University), Jan. 29, 1992, at 4; see also R. Wolf, *Advertisement Undefendable*, The Daily Reveille, Jan. 29, 1992, at 4 (denouncing LSU's Daily Reveille's decision to publish a holocaust revisionist advertisement written by Bradley R. Smith, a co-director of the Committee for Open Debate on the Holocaust). Holocaust revisionists deny the historical occurrence of the Holocaust – an attempt by Nazi Germany to perpetrate a pogrom against the Jews. See generally *McCalден v. California Library Association*, 919 F.2d 538 (1990), rehearing *en banc*, 955 F.2d 1214 (1992). Holocaust revisionists sued California Library Association [hereinafter "CLA"] for breach of contract, tortious interference with contract, deprivation of constitutional rights, violation of California Unruh Civil Rights Act. *Id.*, 955 F.2d at 1217. District Court dismissed complaint pursuant to Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief could be granted. *Id.* Appellant, holocaust revisionist, claimed the CLA canceled its contract to present a program called "Free Speech and the Holocaust." Appellant averred the political conduct of the American Jewish Committee, the Simon Wiesenthal Center, and the City of Los Angeles through action of the City Council

pressured the CLA to cancel contracts. *Id.* The Court of Appeals affirmed the District Court in part, and reversed in part remanding the case for trial. *Id.* at 1215. See *Speech and the Holocaust*, Wash. Post, June 8, 1992, at A18; see also E. Walsh, *Professor's Views Put Freedom Issues on Line*, Wash. Post, Jan. 12, 1997, at A3 (Arthur R. Butz, holocaust revisionist and Professor of engineering at Northwestern University in Chicago, has created a homepage on the university's internet website where he advertises his book *The Hoax of the Twentieth Century* and other holocaust revisionist propaganda. Prof. Sheldon Epstein, a former part-time professor at Northwestern, described Butz's activities as libelous).

Holocaust revisionists have republished *The Protocols of the Learned Elders of Zion*, a fraudulent document which purports to be a Zionist blueprint, drafted by a "secret Jewish government, detailing a plan of Jewish conspiracy to conquer and dominate the nations of the world." See L. Elliot, *This Lie Will Not Die*, Reader's Digest, Apr. 1995, at 115; see also B.W. Segel, *A Lie and a Libel: The History of the Protocols of the Elders of Zion* (1995). Holocaust revisionists list the *Protocols* as one of their many anti-Semitic books for sale by Noontide Press. On page 7 of a catalog entitled The Great Noontide Book Sale, the following descriptions appear:

0202 THE PROTOCOLS OF THE LEARNED ELDERS OF ZION:

The Protocols: Often denounced, seldom read. What do they say? Are they a forgery? Are they "hate literature," or merely an outdated curiosity? Or does this famous document afford a priceless insight into the secret councils of Zion? Offered *caveat lector* by The Noontide Press, this deluxe edition contains extensive notes, a history of the *Protocols* (including the many attempts to ban the book), and other fascinating background material on this perennially controversial best-seller.

0995 AUSCHWITZ: THE END OF A LEGEND – A Critique of J.C. Pressac by Carlo Mattogno. Searching, devastating analysis of French Exterminationist J.C. Pressac's recent attempt to use Auschwitz blueprints and records recently released in Moscow to shore up the Holocaust extermination myth. Mattogno painstakingly analyzes crematoria records and capabilities, the "testimony" of Auschwitz commandant Höss, and a wealth of other documentation – to convert the latest, most tangible evidence from the German concentration camp into hard, new nails hammered into the coffin of the Auschwitz lie. Cutting-edge Holocaust Revisionism!**0689 THE HOLOCAUST STORY AND THE LIES OF ULYSSES** by Paul Rassinier. Tenth anniversary reissue of Paul Rassinier's (the father of Holocaust revisionism) classic studies of the German concentration camps and the alleged extermination of European Jewry. No revisionist library is complete without these ground-breaking studies by the French resistance hero, national legislator, and inmate of Buchenwald and Dora. Previous title: *Dubunking the Genocide Myth*.

0389 THE DISSOLUTION OF EASTERN EUROPEAN JEWRY by Walter N. Sanning, foreword by Arthur Butz. A masterly, unprecedented and so far unique demographic study of European Jewry 1931-1945, *The Dissolution* gives the most probable accounting of the actual fate of millions of Jews airily consigned to nonexistent "gas chambers" by the Holohoaxers. Sanning analyzes the (often fragmentary) census data and the extraordinary population displacements that occurred before, during, and after World War II, which involved great migrations of (very much alive) Jewish refugees into the Soviet Union, North and South America and Palestine.

0955 FLASHPOINT - KRISTALLNACHT 1938: Instigators, Victims and Beneficiaries by Ingrid Weckert. At last, a thorough, skeptical, revisionist study of the 1938 "Crystal Night" incident, which marked an irrevocable turning point in German-Jewish relations. The author lays to rest long-standing myths about Kristallnacht, shatters the taboo against putting the affair in its actual historical context, and raises tantalizing questions as to the shadowy instigators who organized the pogrom.

0253 THE LIFE OF AN AMERICAN JEW IN RACIST, MARXIST ISRAEL by Jack Bernstein. Idealistic Jack Bernstein emigrated to Israel after the 1967 Six-day War. Like the 50,000 other American Jews who emigrated about that time, Bernstein was filled with the challenge of pioneering and the spirit of building a Jewish homeland. But the author learned during his stay in Israel that some Jews are more equal than others; Bernstein learned about racism, not in the U.S., but in Israel, when he married a woman of Sephardic Jewish origins. First-hand information on how political factions dominate the Israeli government and manipulate its institutions. A good corrective to starry-eyed admiration of Israel.

489. Conversation with Professor Derrick Bell at Harvard Law School, September 1979.

490. Conversation with Professor Richard Bildner at the University of Wisconsin School of Law, October 1980.

491. H. Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 Supreme Ct. Rev. 281 333.

CHAPTER V

Group Defamation Under British, Canadian, Indian and Nigerian Law

Introduction

Great Britain, Canada, India and Nigeria are four common law nations that share the same reverence for the principle of freedom of expression, so closely guarded by the American democratic republic. Great Britain has no formal constitution; the constitutional law is enshrined in numerous legal documents. It consists of British political practice, custom, and usage. The constitutional jurisprudence includes specific principles known and accepted by those who participate in the legal system.¹ The right to freedom of speech is protected in several legal instruments: the Magna Carta of 1215, the 1512 Privilege of Parliament Act, the 1689 Bill of Rights, and the 1911 Parliament Act.² The Canadian Charter of Rights and Freedoms protects freedom of speech and press in article 2 as fundamental rights.³ Article 19(1)(a) of the Indian Constitution provides that "all citizens shall have the right to freedom of speech and expression."⁴ Article 38(1) of the Nigerian Constitution provides that "every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference."⁵

However, none of these conceptions of free expression is unconditional in character. This fact is evident since Great Britain, Canada and India have promulgated legislation regulating group defamation or speech that incites racial hatred. Also, it has been suggested that a group libel action is cognizable under the Nigerian sedition law. Moreover, article 1 of the Canadian Charter of Rights and Freedoms allows "demonstrably justifiable," reasonable limitations on freedom of expression.⁶ Article 19(2) of the Indian Constitution specifically provides for "reasonable restrictions" on freedom of speech.⁷ Article 43 of the Nigerian Constitution allows restrictions on free expression for the purpose of protecting the nation (*e.g.*, public safety, public order, public morality).⁸

Great Britain, Canada, and India are democratic nation-states that have a profound respect for freedom of expression. They have seen fit to legislate

specifically against group defamation. To protect the marketplace of ideas from rotten produce, they have taken the courageous step of legally proscribing racial defamation or speech that incites racial hatred. The legislation protects the naive, innocent, or ignorant consumer who might well purchase such "rotten fruit in the marketplace of ideas." An examination of the operation of group defamation or racial hatred statutes in these countries will prove their statutes, though much broader than the author's proposed model statute, are not destructive of free expression or the democratic way of life. A review and discussion of the Nigerian sedition law will reveal the potential for utilizing this law to control group defamation in the Nigerian republic.

Great Britain: The Race Relations and Public Order Acts

Presently, group defamation and language that incites racial hatred are controlled by §§ 17-28 of the Public Order Act of 1986. However, prior to the enactment of the Public Order Act of 1986, there were several statutes that proscribed group defamation and incitement to racial hatred. These included the Race Relations Acts of 1965, 1968, and 1976 and the Public Order Acts of 1936 and 1963. Prior to the passage of the Race Relations Act of 1965, there existed common law precedents supporting an action for group libel based on race. Statutes penalizing *scandalum magnatum*, or libel among high officials and peers of the realm, were promulgated during the reigns of Edward I (1307-27) and Richard II (1377-99).⁹ Although these laws were repealed in 1888, their purpose was to protect the public peace by preventing rumors and defamatory falsehood "whereby discord or slander may grow between the Queen [or King] and her [or his] people or the great men of the realm. . ." One statute provided:

Spreading False News: Everyone commits a misdemeanor who cites or publishes any false news or tales whereby discord or slander may grow between the Queen and her people or the great men of the realm (or which may produce other mischiefs).¹⁰

Queen Elizabeth I punished this form of defamation or seditious libel with the loss of an ear for spoken words and the loss of sight for written words.¹¹ The sedition laws made it a criminal act "to promote feelings of ill-will and hostility between different classes of His Majesty's subjects."¹²

The oft-cited case of *The King & Osborne* well illustrates the common law action for group defamation.¹³ The defendant was tried and convicted

for publishing a libelous paper against Portuguese Jews who had arrived in England. The Jews lived in London. The libel alleged the Jews had burned to death a mother and a child whose father was a Christian.¹⁴ As a result of this defamation, some Jewish immigrants were attacked and beaten by mobs in the city; others were threatened with death.¹⁵ The Court held that the defendant had published a libel that "[t]ended to raise tumults and disorders among the people, and inflame them with a spirit of universal barbarity against a whole body of men, as guilty of crimes scarcely practicable, and totally incredible."¹⁶

The Court declared that when a group is the victim of libel, every individual of the class is "stained by the sweeping brush."¹⁷ However, there were two ostensibly conflicting reports of the case. Whereas Justice Barnardiston interpreted the case as a group defamation action,¹⁸ Justice Kelynge reasoned that the Court condemned the action of the defendant as incitement to breach of the peace: "and tho' it is too general to make it fall within the [d]escription of a [l]ibel, yet it will be pernicious [f]or such scandalous [r]eflections to go unpunished."¹⁹ Kelynge's interpretation was buttressed in 1819 when the court of the Chancery construed *Osborne* to be a breach of the peace case.²⁰ Nevertheless, three years later, an individual named Williams was convicted of libeling the clergy of the diocese of Durham.²¹ The Court used *Osborne* as authority "for a libel reflecting on a public body." This more expansive interpretation of *Osborne* articulates the more prevalent viewpoint.²²

The prosecution of James Caunt was the medium out of which the offense of incitement to racial hatred grew.²³ In July 1947, two British sergeants were murdered by the Irgun gang of Palestine. Civil disorder and riots swept through Great Britain. In certain sections of the country, there were demonstrations and mob violence against the Jewish people.²⁴ The British legal system meted out firm justice to those who had participated in "un-British and unpatriotic acts" of violence, looting, and vandalism.²⁵ James Caunt, the editor of the *Morecambe and Heysham Visitor*, published an editorial entitled: "Rejoice Greatly." The inciteful and anti-Semitic statement in the article read:

On the morn of the announcement of "another catalogue of pains and penalties" there is very little about which to rejoice greatly except the pleasant fact that only a handful of Jews bespoil the population of the Borough! The foregoing sentence may be disregarded as an outburst of anti-Semitism. It is intended to be and we make no apology neither do we shirk any responsibility nor repercussions. . . . If British Jewry is suffering today 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.²⁶

James Caunt was prosecuted at Liverpool Assizes for the seditious libeling of the Jewish faith and Jewish people in Britain. He conceded at the trial that he intended the writing to be pejorative and offensive to Jews.²⁷ Nevertheless, he asserted his purpose was not to incite breaches of the peace or violence against Jews.²⁸ The judge, prosecutor, and defense counsel agreed the prosecution had to prove that Caunt had intended to create a breach of the peace or to stir up a racial disorder.²⁹ The verdict was in Caunt's favor because he denied any intent to promote disorder or to stir up racial hatred between classes of people in Britain.³⁰ No violence had occurred as a result of Caunt's editorial.³¹ It has been opined that other factors motivated the jury's decision: the fact that only six Jews lived in Caunt's borough, the trial judge's emphasis on freedom of expression, and popular resentment of alleged murders in Palestine.³²

Lester and Bindman contend the test used by the Court in the *Caunt* case was too narrow. It was a subjective test. They argue that the proper objective test was explained in *R. v. Aldred*.³³ The authors write:

Instead of insisting that the accused should be proved subjectively to have intended to promote disorder, Coleridge, J. had applied an objective test, namely, taking into account the language used, the audience addressed, . . . mode of publication, was the publication likely to promote public disorder or violence? The test was not the innocence of motive with which the matter had been published.³⁴

Because of the failure to convict Caunt, British Jews consistently petitioned successive English governments to legislate against incitement of racial hatred, ridicule, and contempt without regard to intention to promote breaches of the peace.³⁵ 1965 proved to be the year of deliverance when the Race Relations Act was passed by Parliament.³⁶

Another common law criminal offense invoked to stem the flow of group defamation was "the offence of effecting a public mischief."³⁷ It has been defined as "all offences of a public nature . . . and all such acts or attempts as tend to the prejudice of the community."³⁸ Arnold Leese of the Imperial Fascist League was prosecuted under this doctrine for publishing an article that claimed Jews had slaughtered some children as part of their religious ritual.³⁹ The Jews did slaughter cattle as part of their religious rites. Leese was accused of "inciting a public mischief by rendering His Majesty's subjects of the Jewish faith liable to suspicion, affront and boycott."⁴⁰ The

offense of public mischief was broad. It included actions that tended to stir up racial prejudice without regard to whether a breach of the peace was likely to occur or whether such a result was intended.⁴¹

Section 5A of the Public Order Act of 1936, as amended in 1963 and 1976, was another law that had been invoked to prevent group libel or incitement to racial hatred.⁴² Section 5A was titled — "Incitement to Racial Hatred." It provided, in part:

- (1) A person commits an offence if
 - (a) he publishes or distributes written matter which is threatening, abusive, or insulting; or
 - (b) he uses in any place or at any public meeting words which are threatening, abusive, or insulting, in a case where having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.

Under the old section 5 of the Public Order Act, the provision did not specifically prohibit incitement to racial hatred. The section was amended in 1976 by section 70(1) of the Race Relations Act of 1976 (c. 74, section 70). The section appears above in its amended form. However, the section in its unamended form was used to prosecute cases involving incitement to racial hatred and group defamation.⁴³ One conviction involved insulting and defamatory words used by a speaker in London's East End who had in an open air meeting used the language "dirty, mongrel, Russian Jews, . . . are the lice of the earth and must be exterminated from the national life."⁴⁴ The speaker was sentenced to pay fifty pounds for six months and faced imprisonment if he did not cease and desist in his behavior.⁴⁵

Other prosecutions were brought resulting in a significant decrease in Fascist propaganda against Jews and anti-Fascist groups.⁴⁶ One reason for the effectiveness of section 5 was that an offense was committed if the defendant intended a breach of the peace by his conduct or if his conduct was likely to cause violence.⁴⁷ Therefore, it would not be a defense that the accused did not intend to provoke violence where the statements were of a violence-producing nature or language likely to cause a breach of the peace.

In 1963, the Public Order Act of 1936 was applied against the National Socialist Movement in the case of *Jordon v. Burgoyne*.⁴⁸ A speech was delivered by John Tyndall at a public meeting in Trafalgar Square. Order had to be restored by the police several times at the rally attended by 5,000 people.⁴⁹ John Colin Campbell Jordan, the leader of the National Socialist Movement, caused even more disorder by making the following statement:

[M]ore and more people everyday . . . 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 Nationalist Socialists of Germany but world Jewry and its associates in this country. . . . As for the red rabble here present with us in Trafalgar Square, it is not a very good afternoon at all. Some of them are looking far from wholesomeness, more than usual I mean. We shall of course excuse them if they have to resort to smelling-salts or first aid. Meanwhile, let them howl, these multi-racial warriors of the left. It is a sound that comes natural to them, it saves them from the strain of thinking for themselves.⁵⁰

On hearing these words, the crowd "surged" toward the speaker's platform, and police stopped the meeting.⁵¹ The crowd was dispersed and twenty arrests were made "for offences involving breaches of the Queen's peace."⁵² The crowd contained Jews, communists, and supporters of the campaign for nuclear disarmament.⁵³

The issue with which the High Court reckoned was whether the words of section 5 – "whereby a breach of the peace is likely to be occasioned" – would properly be construed to mean likely to lead to a breach of the peace by the ordinary citizen in the circumstances of the case.⁵⁴ The lower court at Quarter Sessions had held the words should be so interpreted as to include the reasonable man or ordinary citizen standard. The lower court had decided that though many of the words were "highly insulting," they would not lead a reasonable man to commit a breach of the public order.⁵⁵ Lord Parker refused to accept the conclusions of the lower court:

I cannot myself, having read the speech, imagine any reasonable citizen, certainly one who was a Jew, not being provoked beyond endurance, and not only a Jew but also a coloured man and quite a number of people in this country who were told that they were mere tools of the Jews and that they had fought in the war on the wrong side, and matters of that sort.

Be that, however, as it may there is no room here, in my judgment, for any test whether any member of the audience is a reasonable man or an ordinary citizen, or whatever epithet one might like to apply. This is a public order act, something to keep the public order in public places. . . . [I]f words are used which threaten, abuse or insult – all very strong words – then the speaker must take the 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 the offence.⁵⁶

Moreover, Lord Parker rejected the free speech claim of Jordan. Freedom of speech gave the individual the right to disagree with opponents

and to criticize their position, but not to threaten, abuse, or insult the opponents in such a fashion as to create the potential for breaches of the peace.⁵⁷ The Public Order Act of 1936 preserved "the delicate balance between public order and personal liberty."⁵⁸ It was invoked to control language that incited racial hatred and that was often racially defamatory.⁵⁹

Even before the passage of the Race Relations Act of 1965, English law was capable of dealing with the problem of group defamation and language that incited racial hatred. The Race Relations Act of 1965 created a new offense of incitement to racial hatred. The 1965 statute was much broader than those state group defamation statutes in the United States of America. The British statute not only prohibited libelous or slanderous communications, but it punished language inciteful of racial hatred. For example, the statement of the American evangelist, the Rev. Bailey Smith, would be actionable under the British law:

God does not hear the prayers of Jews and I do not know why God chose Jews to work more intimately with than others. I think they got funny looking noses, myself.⁶⁰

This statement, though derogatory and outrageous, is not necessarily libelous or slanderous. Under the Columbia Law Review's Model Statute, only false statements of fact are actionable. A fact has been defined as a statement, the truth or falsity of which is subject to objective proof.⁶¹ Statements of fact are to be distinguished from simple statements of opinion, which are "so vague and general that their truth or falsity could not possibly be proved or disproved."⁶² There are opinions of the mixed variety: a mixed opinion based on undisclosed facts that are true, and a mixed opinion based on undisclosed facts that are false.⁶³ If an opinion is based on undisclosed facts that are false, then Professor Prosser would allow an action for defamation.⁶⁴ If the opinion is based on undisclosed facts that are true, no action for defamation can be sustained.⁶⁵ The problem with all these categories is that they are, to some extent, artificial and overlapping. The evidentiary difficulties created by attempting to distinguish between statements of fact and statements of opinion are legend. The problem becomes even more complex when one begins to deal with mixed opinions. Reverend Bailey's comment might be considered a simple statement of opinion. However, the Supreme Court of the United States has characterized the distinction between statements of fact and expressions of opinion as the creation of an "artificial dichotomy."⁶⁶

Section 6 of the Race Relations Act of 1965 was a prophylactic measure against breaches of the peace that resulted from inciting racial hatred. Section 6(1) of the Act provided:

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 origin.⁶⁷

The requisite *mens rea* under the statute was the intention to "stir up hatred" by publishing or uttering words that were racially defamatory or inciteful of racial hatred in a public setting.⁶⁸ The cause was not actionable without this intent. This is an objective test. The mere fact that a person says he did not intend to stir up racial hatred would not absolve him. If his behavior was such that a reasonable person would conclude he intended to "stir up" hatred, the defendant had fulfilled the *mens rea* requirement. When the Race Relations Bill was introduced to the House of Commons, the Home Secretary made the following remark:

The nature, virulence, and persistence of the propaganda, the methods by which and the circumstances in which it was conducted would . . . ordinarily afford the clearest pointers to the court as to what really had been the accused person's intent.⁶⁹

In addition to the *mens rea* requirement, the language had to be likely to stir up racial hatred. Therefore, the *actus reus* consisted of oral or written words that were "likely to stir up hatred against" a particular segment of the British community on the basis of race, colour, ethnic, or national origins.⁷⁰ Those who were convicted under the Act were fined and/or imprisoned from six months to two years.⁷¹ Prosecution under the statute could be initiated only by the Attorney General or with his consent.⁷² This provision was included to prevent opening the floodgates to frivolous lawsuits. Legitimate debate and speech were protected. This requirement has been severely criticized because it has been shown to limit the number of cases filed in court.⁷³

Some observers contend that minimal positive results accrued to the British community. Regularly published journals and magazines of racist

organizations became moderate in tone.⁷⁴ These organizations would otherwise have been subject to prosecution under the statute. Circulation of such journals became severely restricted by law to members of racist organizations or to those desiring to receive materials as members of private book clubs. The outdoor gatherings of these organizations slowly disappeared, and the owners of halls became cautious about allowing such organizations to use their facilities. These owners feared civil disorders and property damage.⁷⁵

Lester and Bindman argue such changes are at most illusory. Racial propaganda has simply become more sophisticated. Propagandists specifically disclaim the intention to stir up racial hatred in their articles.⁷⁶ Articles are more cautiously worded; their content is less anti-Semitic. The writers purport to contribute to public education; and the discussion often takes on a pseudo-national flavor.⁷⁷ Lester and Bindman state this moderation has lent respectability to racial propaganda and the potential audience has been widened.⁷⁸ Since the purpose of the Race Relations Act was to control language so inciteful and defamatory as to cause racial disturbances and hatred in Great Britain, Lester and Bindman's observations are instructive. The Race Relations Act of 1965 may have achieved that purpose. The purpose of the Act was not to stop all racial propaganda; its purpose was to stop virulent and inciteful forms of group libel and speech that incites racial hatred. No intelligent and sensitive citizen will be deceived by wolves wearing the habiliments of sheep. There are limitations beyond which the law is powerless. It must be reiterated that the purpose of this writing is not to suggest that all speech derogatory of people of color should be banned. However, speech that constitutes group defamation and therefore is not within the ambit of First Amendment protection should be the subject of legal control. The total abolition of racially derogatory or offensive speech in all of its forms would be an impossibility and would be constitutionally impermissible. Though section 6 of the Race Relations Act of 1965 is criticized by Lester and Bindman, they are against its repeal. They assert that its impact has been marginal. However, repeal "would encourage a spate of scurrilous racialist literature purporting to be circulated with Parliamentary approval."⁷⁹

The case law under the Race Relations Act of 1965 is sparse, but significant. The first case prosecuted was *R. v. Britton*.⁸⁰ Christopher Britton, the defendant, was convicted of the offense of distributing racist literature with the intent to stir up racial hatred.⁸¹ The victim, Mr. Bidwell, a member of Parliament for Southall, was about to take his dog for a walk one Saturday morning when he heard a loud crashing noise. When he went to his front door, he found broken glass panels and saw a young man fleeing

the scene of the crime. He chased the man and caught him. He then took the young man back to his house. Stuck on his door was a poster bearing large black letters that read: "Blacks Not Wanted Here." A big hand was depicted on the poster, along with the words, "Stop, Stop Further Immigration." The poster was signed by the Great Britain Movement.⁸² Four or five pamphlets had been left on the porchway, along with a beer bottle, around which had been wrapped another leaflet. Britton complained to the police that Bidwell was the one responsible for bringing Blacks to Britain. In Britton's pocket was found a leaflet with the question, "Do you want a black grandchild?" This leaflet was never distributed.⁸³

On appeal, Lord Parker reversed the lower court's conviction by holding that there had been no distribution within the meaning of the Race Relations Act.⁸⁴ The Race Relations Act required distribution "to the public at large or to any section of the public not consisting exclusively of members of an association of which the person . . . distributing is a member."⁸⁵ The defendant was perhaps guilty of publication, but he was not charged with publication.⁸⁶ The court questioned the young man's intent to stir up racial hatred, since Mr. Bidwell was a member of Parliament.⁸⁷

In 1967, John Colin Campbell Jordan, the leader of the National Socialist Movement, was prosecuted under the Race Relations Act. The National Socialist Movement published and distributed a pamphlet called "The Coloured Invasion."⁸⁸ Charges were made in the pamphlet that millions of colored immigrants were a menace to Great Britain. The National Socialist Movement also distributed to the public certain anti-Semitic stickers. Jordan argued he was only attempting to inform the populace of a national problem. It was his desire to encourage patriotism and legally solve the problem of "coloured" immigration.⁸⁹ The judge instructed the jury to apply an objective test of intent. They were to look at the nature of the language used by the accused, the disclaimer by Jordan that he did not intend to stir up racial hatred, and the philosophy, aims, and goals of the National Socialist Movement.⁹⁰ Jordan was convicted and sentenced to eighteen months in prison.⁹¹ Later the same year, Vincent Carl Morris, another member of the National Socialist Movement, was found guilty at Leek Magistrate Court of "inciting two youths to distribute racist leaflets." He was convicted and sentenced to six months in prison.⁹²

Ironically, section 6 of the Race Relations Act of 1965 was invoked to prosecute Blacks. This is called the "boomerang effect." In the case of *R. v. Malik*, an appeals court upheld the defendant's conviction for using insulting, threatening, and abusive words that were intended to stir up racial hatred.⁹³ Malik was head of the Black Muslims and leader of the Racial

Adjustment Action Society. He made a speech in Rainbow Hall at Reading on July 24, 1967.⁹⁴ The specific statements made by Malik are not repeated in the opinion of the Criminal Court of Appeals. However, the *Times of London* reports the following statement:

[W]hite [people] are vicious and nasty people. . . . [C]oloured people should not fear white monkeys. . . . I saw in this country in 1952 white savages kicking black women. If ever you see a white man lay hands on a black women, kill him immediately. If you love your brothers and sisters, you will be willing to die for them.⁹⁵

The opinion of the court discloses only the following language:

I want to tell you about souls. The black man has a soul. He [the white man] is a soulless person. . . . Don't let the thought of prison terrify you. I have been to prison. At first I was terrified, but it is a coloured man's job to go to prison. You get to know a lot in prison, a lot can terrify the white man.⁹⁶

During the same month of Malik's prosecution, Ray Sawha, Alton Alexander Watson, Ajoy Shankar Ghose, and Uyornumu Michael Ezekiel were prosecuted under section 6. They all were members of the Universal Coloured People's Association. The incident occurred in Hyde Park.⁹⁷ Watson was heard to say:

Anglo-Saxons are the number one enemy of the human race and responsible for racialism. Each time we kill a white man in Africa, they say we are going back to the jungle, but is not England a jungle?⁹⁸

Sawha stated that, when he returned home to Guyana, no Englishmen would be allowed to live there. "Let's murder them. . . . The English are not human beings. The only way Black people [in South Africa] can emancipate themselves is to burn the White man's homes."⁹⁹ The members of the audience were advised to buy boxes of matches for the purpose of burning down houses owned by Whites. Sawha further admonished Black nurses in the audience to give the wrong medicine to White patients. He encouraged "coloured bus drivers" to pass all White passengers.¹⁰⁰

Watson charged at trial the police were biased against Black speakers in Hyde Park.¹⁰¹ He said the police had not understood him because of his language difficulties.¹⁰² He claimed to have merely expressed his frustration with the manner in which Blacks were treated by the system. He had no intention to violate the Race Relations Act.¹⁰³ Sawha denied that his speech incited racial hatred; it was a political message. Black power was a form of

political organization.¹⁰⁴ Ezekiel pleaded that he had not been advocating the use of force to effect social and political change. The concept of black power was not concerned with hatred or use of force: it concerned equality of the races.¹⁰⁵ Watson, Sawha, and Ghose were fined a total of two hundred seventy pounds. Ezekiel was granted a conditional discharge.¹⁰⁶

R. v. Hancock was heard at Sussex Assizes in Lewes in March 1968. The action was brought against four members of the Racial Preservation Society.¹⁰⁷ The organization purported to be concerned about the preservation of the white race. The organization published and distributed the *R.P.S. Southern News*. Alan Vivian Hancock was chairman of the organization and editor of its journal. Sidney Hardy, Geoffrey Dominy, and Edward Badden were also members of the Society who were prosecuted.¹⁰⁸ The *Southern News* was distributed to mailboxes in East Grinstead. The copy of the journal chosen for prosecution discussed the danger of miscegenation, characterized politicians as race levelers, and made claims concerning genetic differences among the races. The writers claimed white Britain was threatened by liberals, communists, and colored immigrants. The paper disavowed any intent to stir up racial hatred or contempt toward minorities.¹⁰⁹ Its purpose was to encourage people of other races to return to their countries of origin. Those who advocated immigration were traitors and persons of abnormal character.¹¹⁰ The defendants were acquitted of all charges.¹¹¹ A few commentators have observed that the particular issue of the journal chosen for prosecution was mild compared to some of the other broadsheets. As a result of the acquittals, the Racial Preservation Society reprinted the issue as a souvenir edition.¹¹² Although the victory appeared to be for the Racial Preservation Society, the application of the law in this instance proved that it need not infringe freedom of speech and press, if applied fairly.¹¹³

Between the years 1965 and 1976, twenty prosecutions were brought by the Attorney General pursuant to the Race Relations Act of 1965. Of these prosecutions, four were filed against Blacks and sixteen actions were instituted against Whites. Approximately one third of the defendants were acquitted.¹¹⁴ Concerning the acquittals, Lasson writes:

Among the acquittals was the case of Kingsley Read, leader of the avowedly racist Democratic National Party, who in a public speech in London referred to "niggers, woggs, and coons" and, in reference to an Asian killed in a race riot, said, "One down, a million to go." In his summation to the jury the judge urged that Read's words were not in themselves unlawful, adding that "Britain was still a free country and people should be able to say what they liked provided they did not incite to violence." To the defendant, after he had been acquitted by the

jury, the judge said, "By all means propagate your views. You have been rightly acquitted. But use moderate language. I wish you well." In many, if not all, cases it appeared that the relative potential for physical violence was a major factor in both the Attorney General's decision whether or not to prosecute and the court's decision to acquit or convict.¹¹⁵

The Race Relations Act of 1976 amended the Public Order Act of 1936 by inserting Chapter 74, section 70 of the Race Relation Act (1976) as section 5A of the Public Order Act. Chapter 74, § 70 of the Race Relations Act of 1976 (§ 5A of the Public Order Act of 1936) permitted conviction of a speaker, using oral or written words, with proof that "threatening, abusive or insulting" speech or publication of words "having regard to all the circumstances" was likely to stir up hatred against any racial group in Britain.¹¹⁶ Unlike the 1965 Act, the speaker did not have to intend to incite racial hatred as a condition precedent for prosecution. However, prosecution under the 1976 Act was almost non-existent.¹¹⁷ The Attorney General refused to prosecute all but a few cases.¹¹⁸

Chapter 74, § 70 of the Race Relations Act of 1976 is nearly identical to § 6 of the Race Relations Act of 1965. Chapter 54 § 5 of the Theatres Act of 1968¹¹⁹ duplicated section 6 of the Race Relations Act of 1965. Section 5 applied the formula of section 6 to theatrical performances. Section 5 prohibited the performance or direction of a play that used threatening, abusive, or insulting words with the intent to stir up racial hatred and that would be likely to stir up racial hatred against a segment of the community.¹²⁰ No exception existed for a performance presented to members of a theatrical club or for a racial play performed in a private dwelling.¹²¹ Chapter 54, § 5 of the Theatres Act of 1968 has now been repealed by § 20 of the Public Order Act of 1986.

In 1980, a Green Paper was published by the British Home Office and the Scottish Office which was called *Review of the Public Order Act of 1936 and Related Legislation*. The Green Paper included a critical analysis of the incitement to racial hatred section of the 1936 law.¹²² Several other reports followed which recommended strengthening the incitement to racial hatred laws; these included Lord Scarman's *Report on the Brixton Disorders, 10-12 April 1981, Report on Criminal Laws: Offences Relating to Public Order*, and ultimately the British government's *White Paper – Review of Public Order Law (1985)*.¹²³ The various reform proposals endorsed in the 1985 White Paper were, to a significant extent, enacted into law by the Public Order Act of 1986.¹²⁴ The Public Order Act of 1986 was the result of a seven-year review and examination of public order law.¹²⁵

Part III of the Public Order Act of 1986 (hereinafter "the 1986 Act") codifies the new law governing the offense of incitement to racial hatred in its many forms.¹²⁶ Section 17 of Part III defines "racial hatred" as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins." Section 18 criminalizes the use of "threatening, abusive, or insulting words or behaviour" of a racially derogatory character. The section proscribes the displaying of written material that is racially "threatening, abusive, or insulting." Words, behavior, and display of written material must be used with the *intent* to stir up racial hatred or such words, behavior, or written material must be *likely* to stir up racial hatred.

Section 19 prohibits the publishing or distributing of written material that is threatening, abusive, or insulting, if it is intended or likely to stir up racial hatred. Section 20 of the law repeals Chapter 54 § 5 of the Theatres Act of 1968 and proscribes the direction or presentation of the public performance of a play that involves threatening, abusive, or insulting words, if such action is intended or likely to stir up racial hatred. Section 21 of the Act prohibits the distributing, showing, or playing of a "recording of visual images or sounds" that are intended or likely to stir up racial hatred. Section 22 makes it a criminal offense to broadcast or to include in a cable program service a program involving threatening, abusive, or insulting visual images or sounds where such conduct is intended or likely to stir up racial hatred.

Section 23 creates the new offense of possessing racially inflammatory material. The racially inflammatory material may be written or a "recording of visual images or sounds." If the material is threatening, abusive, or insulting and the individual possesses it with a view to displaying, publishing, distributing, broadcasting or showing it, the person is guilty of an offense. However, the possessor must have the intention to stir up racial hatred or the stirring up of racial hatred must be likely by virtue of possession. Section 24 authorizes the issuance of a warrant to enter and search any premises, if there are reasonable grounds to suspect the presence of written or recorded materials possessed in violation of section 23. If an individual is convicted under sections 18, 19, 21, or 23, a court has the power to order the written material or recording forfeited pursuant to section 25 of the 1986 Act.

Section 26(1) states that Part III of the 1986 Act is not applicable to a "fair and accurate report of proceedings in Parliament." Section 26(2) exempts any "fair and accurate report of proceedings, publicly heard before a court or [judicial] tribunal" . . . where the report is published contemporaneously with the proceedings or . . . as soon as publication [of the report]

is reasonably practicable and lawful." As was the case with both the 1965 Race Relations Act and Chapter 74, § 70 of the Race Relations Act of 1976 (§ 5A of the Public Order Act of 1936), the consent of the Attorney General is required for the initiation of legal action. Section 27(1) codifies the requirement of the Attorney General's consent. Section 27(3) provides that the punishment for violating Part III is a maximum of two years' imprisonment, a fine or both. An individual subject to summary conviction may be sentenced to a maximum of six months' imprisonment, a fine or both. Finally, section 28 sets out the conditions for corporate liability under Part III of the 1986 Act.¹²⁷

Peter Thornton summarizes the differences between Part III of the Public Order Act of 1986 and its predecessor, § 5A of the Public Order Act of 1936, as amended by Chapter 74, § 70 of the Race Relations Act of 1976, as follows:

Part III of the Public Order Act [of] 1986 provides controls on the stirring up of racial hatred (§§ 17-29). It replaces the single offence of incitement to racial hatred contrary to the now repealed Public Order Act of 1936, § 5A, and extends this area of public order law in the following ways:

- (a) by dividing the old § 5A offence into two separate offences of publishing or distributing written material (Public Order Act of 1986, § 19) and the use of words or behaviour (§ 18);
- (b) by creating a further offence of possessing racially inflammatory matter (§ 23);
- (c) by replacing the offence of incitement to racial hatred by public performance of a play contrary to the Theatres Act of 1968, § 5, with a new offence (§ 20);
- (d) by creating offences to punish the stirring up of racial hatred by means of recordings (§ 21) and broadcasts and cable programmes (§ 22), except those transmitted by the British Broadcasting Corporation or the Independent Broadcasting Authority;
- (e) by adding to the test of "racial hatred is likely to be stirred up" an alternative test of "intends to stir up racial hatred" [a combination of the language found in the Race Relations Acts of 1965 and 1976];
- (f) by removing § 5A's [Public Order Act of 1936 as amended by Chap. 74 § 70 of the Race Relations Act of 1976] exemption for material circulated privately to members of an association; and
- (g) by creating a power of arrest for the offence of using words or behaviour to stir up racial hatred (§ 18(3)).¹²⁸

The penalties for violation of the provisions of Part III of the 1986 Act are the same as those found in § 5A of the Public Order Act of 1936 and the Race Relation Act of 1965.¹²⁹ The provision requiring the Attorney General's consent for prosecution is retained in section 27 (1) of the 1986 Act.¹³⁰

Few cases have been reported or prosecuted under Part III of the 1986 Act.¹³¹ As of October 1995, the Attorney General's office in London had received 21 applications or requests for consent to prosecute since the passage of the 1986 Act.¹³² The Attorney General refused to grant consent in four cases out of the 21 referred. In three of the four cases, there was insufficient evidence. In the other case, the Attorney General concluded it would not have been "in the public interest" to institute legal proceedings against the accused.¹³³ However, in 17 cases, consent to prosecute was granted. Fourteen of the 17 defendants were convicted.¹³⁴ One defendant died during the course of his prosecution and the case was never litigated to a final decision.¹³⁵ Another case was "discontinued and the remaining case proceeded on charges which did not . . . include any charges under Part III of the 1986 Act."¹³⁶

In 1988, a "soapbox orator" was convicted under the 1986 Act for making a "racist speech" and "distributing racist literature."¹³⁷ Another defendant was convicted and fined 100 pounds for placing Neo-Nazi stickers on lamp posts.¹³⁸ In 1990, Major Galbraith, a member of the Conservative Party in Cheltenham, described John Taylor, a Black parliamentary candidate, as a "Bloody Nigger." He was charged under the 1986 Act, but died before trial.¹³⁹

In 1991, Lady Birdwood was convicted for distributing anti-Semitic publications.¹⁴⁰ Later in 1991, three Ku Klux Klan members were convicted for possessing racially inflammatory materials.¹⁴¹

Bindman writes that § 5 of the 1986 Act is now being used as an option to Part III prosecution. Section 5 prohibits "threatening, abusive or insulting words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress."¹⁴² If one "does not cease such conduct following a police warning, he may be arrested without warrant and convicted of the offence."¹⁴³ The consent of the Attorney General is not needed to institute criminal proceedings under § 5 of the 1986 Act.¹⁴⁴

Bindman further observes that letters and telephone calls inciteful of racial hatred may be prosecuted under the Mass Communications Act of 1988.¹⁴⁵ Bindman then reflects:

The series of attempts in the UK to create an effective legislative framework in the hope of curtailing the spread of racist propaganda and the activities of racist organizations have achieved little in practice. Doubtless [,] enforcement has been inhibited by anxieties about what could be presented as invasion of the right to freedom of speech. But it is beyond argument that freedom of speech is not an unqualified human right; it yields . . . to the right not to be defamed. How much greater is the right of racial groups to be protected from vilification which denies their equal humanity.¹⁴⁶

Despite the reform of the incitement to racial hatred law, one commentator insists the continued requirement of the Attorney General's consent for prosecution will prevent the control of racially defamatory or derogatory speech in Great Britain.¹⁴⁷ Whether *vel non* his observation rings truthfully is less important than the strong symbolic significance of Great Britain's legal effort to stem the tide of racial intolerance through the abuse of freedom of speech.¹⁴⁸ The 1986 Act attests to the serious regard and respect the people of Great Britain have for the human rights of minorities. As Card has observed:

In our multi-racial society, the time may have come when obviously racist words are too disruptive of social harmony, both short- and long-term, to be tolerated by the criminal law despite the infringement of freedom of expression which an extension of the law would involve.¹⁴⁹

Thus, Great Britain has made a commendable effort to create an effective and comprehensive set of laws regulating group defamation or speech that incites racial hatred.

Canada: Section 281 of the Canadian Criminal Code (Chapter 46, §§ 318-320), Hate Propaganda

In 1970, Bill 3-C became section 281 of the Canadian Criminal Code. The bill amended the code by making it a criminal offense to communicate racial propaganda that incited racial hatred or defamed a group.¹⁵⁰ The historical roots of group defamation in Canada date back to 1934. The province of Manitoba enacted a group libel statute called the Marcus Hyman Law.¹⁵¹ In October 1934, a cause of action was filed against the *Canadian Nationalist*, which in its October 30, 1934 edition published two libelous articles: "The Murdering Jew, Jewish Murder" and "The Night of Murder . . . Secret of the Purim Festival." An injunction was issued prohibiting the defendants from

publishing libelous statements against the Jewish race or members of the Jewish faith.¹⁵²

The present group defamation amendment to the Canadian Criminal Code is the result of the appearance in the 1950s and 1960s of extreme right-wing organizations that were anti-Semitic, anti-Black, and anti-Catholic.¹⁵³ Efforts to pass legislation against group defamation and incitement to racial hatred were spearheaded by the Canadian Jewish Congress. In 1953, a delegation for the Canadian Jewish Congress appeared before a joint committee of the Canadian House of Commons and Senate to lobby for the creation of a criminal offense punishing group defamation or incitement to racial hatred.¹⁵⁴ The delegation asked that the crime of sedition, which required incitement to violence, be restored to the criminal law.¹⁵⁵ Despite the Canadian Jewish Congress's persistence, including annual requests to the legislature, success was not forthcoming during the 1950s.¹⁵⁶

During 1963 and 1964, an organization of neo-Nazis in Toronto and Montreal began a campaign of racial hatred against Jews in particular. The members of this organization distributed racially defamatory leaflets and brochures.¹⁵⁷ The organization used the mail to distribute the defamatory material. They wrote racial graffiti on bridges and underpasses; they showered streets with leaflets from the windows of skyscrapers and stuffed mailboxes with their defamatory literature.¹⁵⁸ A youth named David Stanley led the neo-Nazis.¹⁵⁹ The Canadian Jewish Congress decided to drop the so-called "quarantine treatment" given these acts of racial hatred. It decided to make its campaign a public affair.¹⁶⁰ It sought support in the non-sectarian public for legislation to curb the dissemination of racially defamatory literature. These efforts were fruitful:

Resolutions and motions from numerous agencies and individuals, all unsolicited – Church leaders, lawyers' groups, veterans' associations and a national women's federation – urged the Government to take action to cope with this evil. . . . Most felt that there were legal means the Government could use or devise to curb the threat.¹⁶¹

In 1966, the Cohen Committee, established by the Minister of Justice and headed by Dean Maxwell Cohen of McGill University School of Law, submitted a volume of recommendations consisting of 327 pages.¹⁶² The committee recommended legislation to control racial and religious hate propaganda. The report recommended an incitement to racial hatred statute that would penalize:

- (a) advocacy or promotion of genocide;
- (b) incitement to hatred or contempt against racial, ethnic or religious groups where such incitement is likely to lead to a breach of peace; and
- (c) willful promotion of hatred or contempt against racial or religious groups.¹⁶³

In February 1969, the Canadian Senate heard deputations for and against Bill S21, introduced in the Senate in 1966 as Bill S49.¹⁶⁴ There were numerous proponents of the bill: the Canadian Jewish Congress, the Manitoba Human Rights Association, the Canadian Council of Christians and Jews, the United Nations Association of Canada, the Canadian Polish Congress, a Chinese-Canadian group, the Canadian Labor Congress, the Association of Concentration Camp Survivors, and the Nova Scotia Negro Group.¹⁶⁵ Opponents of the bill included the Canadian Civil Liberties Union and the Jehovah's Witnesses. Of course, the opposition put forth the usual freedom of expression argument.¹⁶⁶

The bill was finally approved by the Senate in 1969 and by the House of Commons in 1970 to the chagrin of the press.¹⁶⁷ Supporters of the bill realized it would not eliminate much of the hate propaganda, but the law would serve as a policy statement by the government disapproving defamatory propaganda.¹⁶⁸ The bill became § 281 of the Canadian Criminal Code entitled "Hate Propaganda."¹⁶⁹ The "Hate Propaganda" statute now appears in Chapter 46 of the Canadian Criminal Code, §§ 318-320. The statute provides, *inter alia*:

319. [281.2] (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.
- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;

- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

* * * *

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

* * * *

320. [281.3] (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

The above statute was applied in the case of *Regina v. Buzzanga and Durocher*.¹⁷⁰ The defendants were indicted for willfully promoting hatred against an identifiable group: the French Canadians. The defendants published and distributed the following handbill:

Wake up Canadians
Your Future Is At Stake!

It is your tax dollars that subsidize the activities of the French Minority of Essex County.

Did you know that the Association Canadian Francais de L'Ontario has invested several hundreds of thousands of dollars of your tax money in Quebec?

And that now they are still demanding 5 million more of your tax dollars to build a French Language High School?

You are subsidizing separatism whether in Quebec or Essex County.

Did you know that those of the French Minority who support the building of the French Language High School are in fact a subversive group and that most French Canadians of Essex County are opposed to the building of that school? Who will rid us of this subversive group if not ourselves? If we give them a school, what will they demand next . . . independent city states? Consider the ethnic problem of the United States and take heed. We must stamp out the subversive element which uses history to justify its freeloading on the taxpayers of Canada, now.

The British solved this problem once before with the Acadians, what are we waiting for . . . ?¹⁷¹

The defendants were French Canadian sympathizers interested in building a French language secondary school in Essex County. The majority of the local school board opposed its construction. The defendants charged that the Essex County community was prejudiced against the French minority. Racial prejudice, not economics, was the reason for opposing the school. The defendants contended that the handbill was a satire intended to create a furor that would compel the government to act on the French language secondary school question. They denied any intention to stir up or promote racial hatred.¹⁷²

The defendants were convicted by the trial court of the willful promotion of racial hatred. The trial judge defined willful as intentional conduct contradistinguished from accidental conduct. He also ruled that

the accused themselves testified they wished to create furor, controversy, and an uproar. What better way of describing active dislike, detestation, enmity, or ill-will. The motives of the accused may or may not be laudable. The means chosen by the accused was the wilful promotion of hatred.¹⁷³

On appeal, the lower court's decision was reversed. The appeals court stated that the issue in the case was what "mental attitude" must be established to constitute an intent to promote racial hatred.¹⁷⁴ The foresight of the defendants that a specific result was highly probable as opposed to substantially certain to occur was not synonymous with the intent to bring about that specific result.¹⁷⁵ However, one who foresees the consequences of his acts, or is reasonably certain a particular result will occur from an act he performs to achieve some other goal, intends the consequences.¹⁷⁶ The appeals court held:

In this case then the accused willfully promoted hatred if (a) their conscious purpose in distributing the handbill was to promote hatred against the French Canadian community, (b) they foresaw that the promotion of hatred against that group was certain or morally certain to result from the distribution of the pamphlet, but distributed it as a means of achieving their purpose of having the high school built. The trial judge erred in holding that "willfully" means intentionally as opposed to "accidental" and this error inevitably caused him to focus on the intentional nature of the accused's conduct rather than on the question whether they actually intended to produce the consequence of promoting hatred. What the accused intended or foresaw must be determined on a consideration of all the circumstances, including their own evidence, as to

what their state of minds or intention was. . . [T]he trial judge . . . in fact erred in equating their admitted intention to create controversy, furor or uproar with an intention to promote hatred.¹⁷⁷

The Supreme Court of Canada has upheld the constitutionality of Canada's hate propaganda law in *Regina v. Keegstra*.¹⁷⁸ In *Keegstra*, the defendant, a social studies teacher in Alberto, taught students anti-Semitic ideas. Keegstra described Jews as "money-loving" and "child killers." He told students that Jews invented the Holocaust.¹⁷⁹

Regina v. Andrews involved two members of the Nationalist Party of Canada, a White supremacist organization, which preached the inferiority, uncleanliness, and propensity for violence of "non-Whites and non-Aryan groups." Andrews and Smith were responsible for publishing and distributing the organization's bi-monthly magazine called the *National Reporter*.¹⁸⁰ Section 319(2) of the Canadian Criminal Code was declared constitutional though it impaired freedom of expression guaranteed by § 2(b) of The Canadian Charter of Rights and Freedoms. The restriction on freedom of expression was deemed to be a reasonable governmental limitation.¹⁸¹ Sandler reflects:

The harms associated with hate propaganda are so significant that they outweigh the limited entrenchment upon freedom of speech that the section entails. As the Court noted, there are two types of injury caused by hate propaganda. First, there is the harm done to members of the target group. Persons belonging to a racial or religious group under attack are humiliated and degraded. That derision, hostility and abuse encouraged by hate propaganda have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with others. Second, hate propaganda can influence society at large. The act of dissemination of hate propaganda can attract individuals to its cause and, in the process, create serious discord between various cultural groups and society. Even if the message of hate propaganda is outwardly rejected, the premise of racial or religious inferiority upon which the message is based may persist in a recipient's mind as an idea that holds some truth. Hate propaganda seriously threatens both the enthusiasms with which the value of equality (to which the Charter is committed) is accepted and acted upon by society, and the connection of target group members to their community.¹⁸²

The consensus is that the Canadian group defamation statute will not eliminate most scurrilous hate propaganda. However, most believe it will improve the racial climate. As Kayfetz writes:

An argument frequently used is that since the law will not eliminate race hatred why enact it? The same consideration is never made when dealing with laws against theft, murder, or physical assault, all equally unworkable in the sense that committing the offenses has not vanished simply by being outlawed. As the point is made as it used to be made when anti-discrimination laws were first broached, since it cannot eliminate hatred why try the legislation? This of course ignores the fact that the target is not so much the emotion of hatred as the external projection of it upon others.¹⁸³

India: Section 153A of the Indian Penal Code

Section 153A of the Indian Penal Code provides:

- (1) Whoever –
- (a) by words, either spoken or written or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or
 - (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or
 - (c) organises any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,
- shall be punished with imprisonment which may extend to three years or with fine, or with both.
- (2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.¹⁸⁴

The section has been characterized as a law that prohibits class defamation.¹⁸⁵ It clearly prohibits stirring up of racial hatred, as well as other forms of hatred involving conduct destructive of the public tranquility.

The law was passed to preserve order and cooperation among various segments of the Indian citizenry.¹⁸⁶ Sastry and Singh comment:

It only means that no person is entitled to write or say or do anything whereby the feelings of one class of citizens should be inflamed against another. . . . [The section was created] to effectively check fissiparous communal and separatist tendencies and to secure fraternity assuring the dignity of the individual and the unity of the nation.¹⁸⁷

India is composed of people of numerous ethnic groups, languages, religions, and cultures. Consequently, it is imperative that racial, cultural, and religious tolerance exist. Racially defamatory falsehoods or ethnically pejorative utterances might cause civil disorder in such a multi-ethnic society. Group defamation and language that incites racial or ethnic hatred are not mutually exclusive categories. The former category is a subset of the latter. Both categories of speech eventually lead to breaches of the peace, if they are allowed to flourish. At one time, Section 153A excluded honest criticism without malice from its proscription. This exclusion was deleted on the ground that, no matter how honest or nonmalicious the criticism, if the law was to "effectively check fissiparous communal and separatist tendencies," no action prejudicial to maintaining communal harmony or disruptive of public tranquility could be excepted from the statute's operation.¹⁸⁸

The statute appears to create a strict liability offense. The requisite *mens rea* is the intent to promote feelings of enmity or hatred among certain groups in Indian society. The statute does not specifically state that intent is an element of the offense. The Indian courts have clarified the matter. In the case of *P.K. Chakravarty v. Emperor*,¹⁸⁹ Judge J. Rankin set forth the standard of intent:

It is settled law that Sec. 153A, I.P.C., does not mean that any person who published words that have a tendency to promote class hatred can be convicted under that section. The words "promotes or attempts to promote . . . feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient. It is quite true that whether or not the promoting of enmity is the intention is to be collected in most cases from the internal evidence of the words themselves, but I know of no authority for saying that other evidence cannot be looked at; and it appears to me that the explanation shows quite conclusively that, in many matters on which other evidence could assist, it may be taken.¹⁹⁰

Judge Rankin elaborated in *Satya Ranjan Bakshi v. Emperor*:¹⁹¹

In *P.K. Chakravarty v. Emperor*, I had occasion to point out that although the internal evidence of the words published will generally be decisive on the question of intention, they are never more than evidence of intention and it is the real intention of the accused that is the test. I pointed out also that the mere fact that ill-feeling may result or may be likely be result from the publication is not in itself sufficient and that there may be circumstances . . . which would rightly prevent a judge of fact from holding that the publication was an attempt to promote ill-feeling.¹⁹²

In several other cases, the necessity of proof or intent has been established. In *Lajpat Rai v. Emperor*,¹⁹³ it was held that malicious intent, which might be proved by extrinsic evidence, or inferred from the nature of the words spoken or written, must be shown by the Crown. Judge Lindsey in *Kali Charan Sharma*¹⁹⁴ explained that

[i]f the language is of a nature calculated to produce or to promote feelings of enmity or hatred[,] the writer must be presumed to intend that which his act was likely to produce. This was the principle laid down by Best, J., in Burdett's case in dealing with a case of seditious libel and the same principle clearly applies to the case of a publication punishable under section 153A, I.P.C.¹⁹⁵

The Court ruled that each case was to be considered on an individual basis.¹⁹⁶

Sastray and Singh see no reason why *mens rea* should be made an essential element of the crime.¹⁹⁷ "There can be no justification for introducing the phrase 'with intent to' in the section."¹⁹⁸ They argue the framers would have specifically used the phrase "intentionally promotes . . . feelings of enmity or hatred" if they had desired to do so. Sastry and Singh submit there are a number of crimes under the penal code that do not require intent.¹⁹⁹ Whenever intent is an element of the crime, it is specifically mentioned in the statute.²⁰⁰ The predecessor version of the present section was inserted by Act 41 of 1961, and the legislature did not think it necessary to use the word "intentionally."²⁰¹ These authors state that the rule of *mens rea* has been displaced in the statute and that the statute creates an absolute prohibition: strict liability.²⁰² They further assert:

Even if a question of intention were to arise, such intention must be gathered from the words spoken or written, and they themselves would be conclusive, and it would not be necessary for the prosecution further to prove that such an intention was behind the use of such words.²⁰³

Sastry and Singh appear to hold a minority view.

It was once thought section 153A was an unconstitutional infringement of freedom of expression. However, Article 19(2) of the Indian Constitution saved the provision from unconstitutionality.²⁰⁴ This provision allows the Indian government to impose reasonable restrictions on freedom of expression in the interest of "public order."²⁰⁵

Cases prosecuted under section 153A have not been numerous. In *Zaman, A.M.A. v. Emperor*,²⁰⁶ the defendant wrote an article that criticized British imperialism and the rulers of India. The author charged Britain and India with exploiting and oppressing the proletariat in their respective countries. The Court held that there was no promotion of hatred among classes of people in India.²⁰⁷ In *Munshi Singh v. Emperor*,²⁰⁸ the defendant made a speech accusing the Indian government, the Zamindars, and the Talukdars of Oudh of causing all the evils, misfortunes, and sufferings in the country. The Court held that the defendant intentionally promoted hatred or feelings of enmity among the Kisans, the Zamindars and the Talukdars.²⁰⁹

*Kali Charan Sharma v. Emperor*²¹⁰ involved a Hindu who wrote an extremely critical book ridiculing the prophet Mohammed as part of a propaganda effort by a group of individuals. The Court held that the book promoted feelings of hatred and enmity between Hindus and Mohammedans.²¹¹ Most of the actions litigated in India have come as a result of the defamation of religious groups or classes of people, as opposed to the defamation of racial groups. Nevertheless, since most groups, religions, and classes are made up largely of individuals from certain specific ethnic groups, it is sometimes difficult to determine whether the defamation or hate propaganda was religiously or ethnically motivated.²¹² There is a paucity of recent cases under § 153A of the Indian Penal Code. Most defendants are now prosecuted by the "police authority" before a magistrate. The actual prosecution of criminal defamation cases is rare in India.²¹³

Nigeria: Chapter 7 of the Criminal Code Act and Group Defamation

The Federal Republic of Nigeria gained its independence from the colonial rule of Great Britain on October 1, 1960.²¹⁴ Nigeria is a common law jurisdiction and much of English law has been received into Nigerian law.²¹⁵ The organizational structure and substantive content of the 1989 Constitution of Nigeria are patterned on the Constitution of the United States.²¹⁶ The substantive content of the document reflects at least a paper commitment to human rights. This commitment is memorialized in Articles 32 through 44

of Chapter IV of the Nigerian Constitution (hereinafter "Constitution"). Chapter IV of the Constitution is entitled "Fundamental Rights."²¹⁷ These fundamental rights include the right to life,²¹⁸ the right to dignity of the human person,²¹⁹ the right to personal liberty,²²⁰ the right to freedom from discrimination,²²¹ the right to freedom of thought, conscience, and religion,²²² and the right to freedom of expression and the press.²²³

The right to freedom of expression and the press is codified in Article 38 of the Constitution. Article 38 provides:

(1) Every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:

Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society –

(a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts on regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or

(b) imposing restrictions upon persons holding office under the government of the Federation or of a State or of a Local Government, members of the Armed Forces of the Federation or members of the Nigeria Police Force or other government security services established by law.²²⁴

However, article 43 of the Constitution reveals that the right of free expression is not an absolute right. Article 43 enumerates the conditions justifying derogations from fundamental human rights. It states, *inter alia*:

(1) Nothing in sections 36, 37, 38, 39, and 40 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights of other persons.²²⁵

Chapter 10 of the Laws of the Federation of Nigeria contains the African Charter on Human and Peoples' Rights Ratification and Enforcement Act

(hereinafter "ACHPR Act").²²⁶ Chapter 10 constitutes the implementing legislation which brought the African Charter on Human and Peoples' Rights (hereinafter "ACHPR"),²²⁷ promulgated by the Organization of African Unity (hereinafter "OAU"), into force at the domestic level in Nigeria. The ACHPR was unanimously adopted by the Council of Ministers of the OAU in Banjul, Gambia in January of 1981. Subsequently, it was adopted by the Heads of States and Governments at the Nairobi Summit in Kenya in July 1981. The ACHPR came into force in 1986 after half of the members of the OAU had ratified it.²²⁸ The OAU Council of Ministers considered traditional values of African civilization in drafting the ACHPR.²²⁹ Most of the principles found in the charter are contained in other Western international legal instruments such as the Universal Declaration of Human Rights, the American Convention on Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²³⁰

Freedom of expression is one of the many universal values found in the ACHPR. Article 9 of the ACHPR states:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.²³¹

Article 27 of the ACHPR evidences the nonabsolute nature of the African concept of free expression. Article 27(2) declares:

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.²³²

Though there is an honest regard for the sanctity of freedom of expression in Africa, the preceding discussion supports the author's contention that the character of free expression under Nigerian law is nonabsolute. Chapter 7 of the federal Criminal Code Act of Nigeria is a specific legal restraint on freedom of expression in Nigeria.²³³ Chapter 7 of the Criminal Code Act prohibits "[s]edition and the [i]mportation of [s]editious or undesirable [p]ublications."²³⁴ The law of sedition has been described as the "most important abridgement of freedom of expression under the Nigerian Constitution."²³⁵ There is no specific law proscribing group defamation or incitement to racial hatred in Nigeria. Nonetheless, the author and other African scholars adhere to the position that group defamation or incitement to racial or group hatred might be controlled by

instituting a cause of action pursuant to the sedition law of Chapter 7 of the federal Criminal Code Act.²³⁶ Section 50 of Chapter 7 states, *inter alia*:

50. (1)(b). . . "seditious publication" means a publication having a seditious intention; "seditious words" means words having a seditious intention.
- (2) A "seditious intention" is an intention . . .
- (c) to raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or
 - (d) to promote feelings of ill-will and hostility between different classes of the population of Nigeria.

* * * *

(3) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall 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.

51. (1) Any person who -

- (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
- (b) utters any seditious words;
- (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
- (d) imports any seditious publication, unless he has no reason to believe that it is seditious;

shall be guilty of an offence and liable on conviction for a first offence to imprisonment for two years or to a fine of two thousand naira or to both such imprisonment and fine and for a subsequent offence to imprisonment for three years and any seditious publication shall be forfeited to the state.

(2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and liable on conviction, for a first offence to imprisonment for one year or to a fine of one hundred naira or both such imprisonment and fine, and for a subsequent offence to imprisonment for two years; and such publication shall be forfeited to the State.²³⁷

Similar to the requirement of Section 27²³⁸ of Great Britain's Public Order Act of 1986, section 52(1) of the Nigerian sedition law requires the written consent of the Attorney General of the federation or state to prosecute an offense under the Act.²³⁹

The prohibition in section 50(2)(c) and (d) against promoting hostility and ill-will between different classes of people in Nigeria or raising discontent or disaffection among citizens in society is broad enough to cover legal actions against individuals or organizations who engage in group defamation that incites hatred or animosity among ethnic or religious groups. Although the Nigerian society is racially homogenous, there are over 300 ethnic tribes.²⁴⁰ The Ibo (or Igbo) in the East, the Yoruba in the West, and the Hausa and Fulani in the North are the major ethnic tribes. Peripheral zones are occupied by minority groups such as the Ijaw, Kanuri, Nupe, Kwale, and Urhobo.²⁴¹ There are two major religious groups: Muslims and Christians.²⁴² As a Visiting Professor of Law at the University of Lagos in 1993, the author often heard stereotypical descriptions of certain tribes. For example, the Hausa were often referred to as slovenly or lazy. As to ethnic tensions, Osita C. Eze writes:

With independence, . . . ethnic conflicts have surfaced and in many African countries threatened the fragile geo-political bases of the new states. If it was thought that the forces of modernization would lead to the accommodation of the various primordial loyalties, the history of many African states tends to point to the contrary. So it is that because of the patent underdevelopment of these states, as well as the socio-economic systems anchored on those exploitative relations that in fact create a fertile base for recourse to ethnicity as the area of control of economic and political power, ethnic factors now play a major role in African polity.²⁴³

Recently, First Republic Information Minister, Chief Anthony Enaharo, warned Nigeria against the rising tide of ethnic nationalism in the country.²⁴⁴

Historically, the problem of ethnicity in Nigeria has been so serious as to precipitate civil wars.²⁴⁵ Social cleavages along lines of religion have often precipitated rioting among religious groups.²⁴⁶ The importance of rifts along religious lines is emphasized by the existence of Articles 259-263 of the Nigerian Constitution of 1989 which establish Sharia courts. These courts have jurisdiction over suits involving Islamic law where all parties are Muslims or the parties have consented to the jurisdiction of the court.²⁴⁷ Nigeria is therefore fertile soil for the growth of group defamation. The sedition law of Nigeria, as codified in Chapter 7 of the Criminal Code Act, is remarkably similar to the now-repealed seditious libel law of Great Britain discussed in the beginning of this chapter. The English seditious libel statute prohibited acts that promoted "feelings of ill-will and hostility between classes of his majesty's subjects."²⁴⁸ As stated earlier in this chapter, the English seditious libel statutes have been used to prosecute group libel actions. Thus, the criminal sedition laws of Nigeria would be the

most appropriate means of controlling group defamation based upon membership in an ethnic or religious group.

Fogam and Osinbajo raise questions about the constitutionality of the sedition law.²⁴⁹ However, the constitutionality of the sedition law has been upheld in the very cases discussed and analyzed by these authors.²⁵⁰ Professor Oko has critically analyzed *Nwankwo v. The State*,²⁵¹ an appellate court decision that declared the sedition act unconstitutional. Professor Oko endorses the use of the sedition law to stem the spread of group defamation or seditious language used to foment discord among ethnic groups. Professor Oko writes:

Section 15(4) of the 1979 Constitution further provides that the State shall foster a feeling of belonging and of involvement among the various people of the Federation to the end that loyalty to the Nation shall override sectional loyalties. Why then should the court declare unconstitutional an existing law which facilitates the attainment of the political objectives contained in sections 14(3) and 15(4). Better still, why should the state not punish anybody who utters or publishes anything with the intention of promoting ill-will and hostility between different ethnic or sectional groups of the Federation. It is, in my view, reasonably justifiable in a democratic society in the interest of public safety and public order that anyone who publishes anything with the intention of promoting feelings of ill-will and hostility between different classes of the population should be punished. If D is charged with sedition for publishing an article which incites the Igbos against the Yorubas or Hausas, it will be absurd if reliance is placed on the authority of *Arthur Nwankwo v. State* to discharge him on the ground that the law of sedition is unconstitutional.²⁵²

The Nigerian sedition law has been upheld as constitutional by the Nigerian Supreme Court.²⁵³

As for a civil remedy, Nigeria has adopted the common law rule which does not allow civil actions for group defamation.²⁵⁴ The common law rule is that an action for defamation will not be maintainable when the defamatory words, oral or written, refer to a class or body of individuals generally. Each individual must demonstrate that the statement refers to or is "of and concerning" him or her specifically.²⁵⁵ This is the common law doctrine of *colloquium*. The doctrine is an accepted rule of defamation law in the United States. Fogam and Osinbajo explain the underlying rationale for the rule by stating:

This is because a derogatory statement of a large and indeterminable number of persons described by some general name (e.g., all Ibos or Yorubas) will hardly reflect on any single member of the group.²⁵⁶

These authors provide the following caveat:

A prudent journalist should however still avoid writing derogatory things about any group, body, or class of people because if the class or group is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it, then a member of the class can sue, or if the words are capable of being shown to point to any one individual an action for libel will lie at the suit of such individual.²⁵⁷

Fogam and Osinbajo have characterized questions regarding identification where the alleged defamatory utterance is directed at a body of individuals as "one of the most troublesome" inquiries.²⁵⁸

There is a paucity of cases involving group defamation charges under Nigerian law. In *S.B. Dalumo v. The Sketch Publishing Co. Ltd.*,²⁵⁹ the Supreme Court of Nigeria ruled that there was sufficient reference to the plaintiff, a corporate official of Nigerian Airways, because the class of individuals referred to in a defamatory article published by the media defendant was small and ascertainable.²⁶⁰ There could be no doubt that the plaintiff was a member of the class.²⁶¹ In *Dalumo*, the *Daily Sketch* published the following claim:

Oath of Secrecy at Airways?

Are top officials of the Nigeria Airways Corporation taking oath [sic] of secrecy again? A staff of the corporation said yes to a sketch reporter at the weekend. The source hinted that very recently, some officials of the Airways swore by the Bible, Koran, and the concoction of Kola nuts and alligator pepper. The purpose of the oath, the source added, was to "keep our secrets secret." The swearing would bind or prevent any of the participants from divulging any forms of secret and information. By this oath, the source stated, the swearers must not expose any form of corruption, mismanagement or any pattern of irregularity with the company.²⁶²

The Acting Secretary of Nigerian Airways sued the *Daily Sketch* newspaper for libel, though his name was not specifically mentioned in the article.²⁶³ The plaintiff averred that the defendants by publication of the article "meant and were understood to mean that the plaintiff, a top official of Nigerian Airways, was corrupt, incompetent and dishonest."²⁶⁴ The Supreme Court of Nigeria held that

[i]n an action for defamation, it is not necessary that the words complained of should refer to the plaintiff by name, provided that they would be understood

by reasonable people to refer to him; and the test of whether words which do not specifically name plaintiff refer to him or not is this: Are the words used such as, reasonably in the circumstances, would lead persons who know the plaintiff to believe that he was the person referred to.²⁶⁵

Because the plaintiff was a top official of Nigerian Airways, the words published by the defendant were reasonably capable of being understood as referring to him. Reasonable persons who knew the plaintiff would conclude that the article was "of and concerning" him. The Supreme Court of Nigeria held that the trial judge wrongly found Nigerian Airways was not the same organization as Nigeria Airways Corporation.²⁶⁶ The group subjected to the defamatory statement was small in number.

The insistence by some common law jurisdictions upon adhering to the ancient common law principle of *colloquium*, despite the historical evolution of law and experience, is anathema to the dynamic concept of law which requires that legal principles be modified or abolished so as to be functional for the particular historical epoch.²⁶⁷ In *Fawcett Publications, Inc. v. Morris*, the Supreme Court of Oklahoma permitted a group defamation action.²⁶⁸ As to the *colloquium* or the "of and concerning" requirement, the court observed that though there were a substantial number of precedents that supported the proposition that group libel actions should not be allowed where the group is large, there was "no substantial reason why size alone should be conclusive."²⁶⁹ The Oklahoma court agreed with those legal authorities that held that when a group is the object of defamatory falsehood, the defamation refers to each member of the group.²⁷⁰

There is no reason why a Third World state or the developing nation of Nigeria should rigidly adhere to a *colloquium* rule promulgated by the British colonial masters for their own nation, which has for most of its history been ethnically homogenous. Great Britain has now seen fit to promulgate the Public Order Act of 1986²⁷¹ which protects minorities from group defamation and language that incites racial hatred. A similar federal remedy should be provided by the federal laws of Nigeria and the United States. Rules of law must change as society changes. No blind adherence to the doctrine of *stare decisis* should reign supreme in the Nigerian legal order.²⁷² As noted in the American case of *Woods v. Lancet*:

We act in the finest common-law tradition when we adopt and alter decisional law to produce common-sense justice . . . legislative action, there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.²⁷³

The Nigerian legal system now has allowed private individuals to bring a cause of action to abate a public nuisance.²⁷⁴ Thus, the Nigerian legal system has rejected the common law rule that initiation of a suit to abate a public nuisance can be prosecuted only by the state or with the consent of the Attorney General.²⁷⁵ This break with past British common law principles should be the death knell of the rule of *colloquium*. The ruling allowing private individuals to bring a cause of action to abate a private nuisance is a harbinger of future modifications of legal principles more appropriate for British culture and the time in which they were born. The rule of *colloquium* which prevents a civil action for group defamation is an archaic English legal principle which should be abolished.

Additionally, the African Charter of Human and Peoples Rights (ACHPR) reflects the importance of the group or community in African society by dividing rights into the categories of human or individual rights and peoples' or group rights.²⁷⁶ Uchegbu writes:

What the Charter was at pains to emphasize however is that the African traditional system is founded on group association not individuals as the European bourgeois concept of human rights stressed. The Charter recognized that individuals, being humans, have rights but peoples also have rights independent of the individuals making up the people. . . . Thus, when the Charter asserts in Article 20 that all peoples shall have the right of existence, it refers for example, to *ethnic groups* who here have a right to self-determination.²⁷⁷

Eze explains that the ACHPR's use of the phrase "peoples' rights" is synonymous with group rights which include ethnic groups. He states:

Side by side with individual rights and freedoms, the African Charter makes provisions for peoples' rights. Group rights are not by themselves new. The rights of ethnic, racial or minority groups as well as the right of peoples and nations to independence are examples of such rights.

It is not clear what the term "peoples" comprises. It does embrace independent states as well as colonies. If one adopted our interpretation of "peoples," the term would also include national and ethnic groups as well as other minority groups.²⁷⁸

The emphasis placed on group rights or peoples' rights is unique to the ACHPR. It is an African conception of human rights and indubitably reflects the African's belief that the welfare of the group is situated at a higher point on the hierarchy of societal values than the rights of individuals. The ACHPR is the law of Nigeria. It was implemented by Chapter 10 of

the Laws of the Federation of Nigeria on March 17, 1983.²⁷⁹ Therefore, given the extraordinary importance accorded the group in African society, a civil cause of action for group defamation is absolutely justifiable from a legal vantage point.

The ancient common law principle of *colloquium* is a doctrine developed for a European society that cherishes individual rights and that has been racially and ethnically homogenous. The unquestioning reception of this doctrine into the jurisprudence of Nigeria, an African nation, can be best characterized as a by-product of colonialism. Accordingly, a continued adherence to the *colloquium* principle is not justified and is inconsistent with the African system of jurisprudence.

Conclusion

Four democratic nation-states that have a profound respect for freedom of expression have provided legal means for redress against group defamation and speech that incites racial hatred. Legislation in India, Canada, Great Britain and Nigeria stands as potential models for American legislative action. Legislation of this sort would be a requirement under Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination. It is of great interest that the British reservation to Article 4 of the Racial Discrimination Convention reaffirms a belief in freedom of expression, association, and peaceful assembly. Yet, the British government had passed the Race Relations Act of 1965, as amended by the Race Relations Act of 1968, prior to ratifying the Racial Discrimination Convention in 1969.²⁸⁰ Great Britain perceived no conflict between freedom of expression and section 6 of the Race Relations Act of 1965. Subsequently, Great Britain promulgated the Race Relations Acts of 1968 and 1976 and the Public Order Act of 1986. Sections 17-28 of the latter statute provide for regulation of group defamation or language that incites racial hatred. Both India and Canada ratified the Racial Discrimination Convention and took positive legal measures to comply with Article 4 by legislating against group defamation and language inciteful of racial or group hatred.²⁸¹

Nigeria became a party to the Racial Discrimination Convention on October 16, 1967.²⁸² In its Twelfth Periodic Report (1992), the government of Nigeria clearly indicates that group defamation might be covered under its sedition laws. The Report states:

Nigeria conforms with the principles embodied in the Convention. However, our position on Article 4(a) is that paragraph (d) of subsection (2) of Section 50

of the Nigerian Criminal Code which defines "seditious intention" is sufficient to criminalize social discrimination as it is the official view of the Government that different "classes" of the population of Nigeria includes by necessary implication different races of the population.²⁸³

This governmental position leaves little doubt that group defamation based on race, ethnicity or nationality could be prosecuted under the Nigerian sedition laws as previously argued by this author. Article 4 of the Racial Discrimination Convention would proscribe group defamation as a subset of hate speech which could cause discord or discontent among the various ethnic groups or classes in Nigerian society.

In a valiant effort to protect the marketplace of ideas from rotten produce, Canada, Great Britain, and India have legally prohibited group defamation and language inciteful of racial hatred. The legal potential for proscription of group defamation exists under Nigerian law. Legislation proscribing group defamation protects the naive, innocent, or ignorant consumer who might unwittingly purchase rotten fruit sold in the marketplace of ideas. The United States should learn from the experiences of these common law nations. Every year, defamatory hate literature creeps into the homes of millions of Americans. Something must be done to combat this corrupting and sinister verbal force, since "[p]opular opinion is far more readily built up on rumors and impressions than on objectively observed facts."²⁸⁴

NOTES

1. See generally United Kingdom Constitution, XX *Constitutions of the Countries of the World* (A.P. Blaunstein and G.H. Flanz eds. 1992); see also A. MacLeod, *Constitution-less Britain Debates the Need for One*, Christian Science Monitor, July 8, 1996, at 7 (stating that Labour and Liberal Democratic Parties have called for a written constitution with a bill of rights, and that European Bill of Human Rights might be received into British law).

2. *Id.*

3. Constitution Act, 1982 (79), Schedule B, Canadian Charter of Rights and Freedoms, art. 2, reprinted in IV *Constitutions of the Countries of the World* (A.P. Blaunstein and G.H. Flanz eds. 1991).

4. The Indian Constitution, art. 19(1), reprinted in VII *Constitutions of the Countries of the World* (A.P. Blaunstein and G.H. Flanz eds. 1994).

5. The Nigerian Constitution, art. 38(1), reprinted in XIV *Constitutions of the Countries of the World* (Nigerian Supp.) (A.P. Blaunstein and G.H. Flanz eds. 1990).

6. Canadian Charter of Rights and Freedoms, *supra* note 3, at art. 1.
7. Indian Constitution, *supra* note 4, at art. 19(2). This provision provides:

19(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense. *Id.*

8. See text of article 43, *infra* at 216.
9. Of Slanderous Reports, 1275 (De Scandalis Magnatum), 3 Edw. 20, ch. 34 (Eng.), reprinted in 1 *Statutes of the Realm* 35 (1963):

None shall report slanderous news, whereby discord may arise. Forasmuch as there have been oftentimes found in the Country Divisors of tales, whereby discord, or occasion of discord, hath many times arisen between the King and his people, or great men of his Realm; for the Damage that hath and may thereof ensue; It is commanded, That from henceforth none be so hardy to tell or publish any False News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his people, or the Great Men of the Realm; and he that doth so, shall be taken and kept in Prison, until he hath brought him into the Court, which was the first Author of the Tale.

Id. (footnotes omitted).

10. F.R. Scott, *Publishing False News*, 30 Can. B. Rev. 37, 39 (1952) (quoting Sir J.F. Stephen, *Digest of Criminal Law*, art. 95 (1st ed. 1878)). But see *King v. Alme & Nott*, 3 Salkeld 224, 91 Eng. Rep. 790 (K.B. 1700). This case was decided before the *Osborne* case and the court held:

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

11. Scott, *id.* at 39.
12. J.F. Stephen, *Digest of Criminal Law*, arts. 23, 91 (1883), quoted in K. Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 Boston College Third World L.J. 161, 162 (1987).
13. *The King & Osborne*, 2 Barn. 166, 94 Eng. Rep. 425 (K.B. 1732); see Comment, *Race Defamation and the First Amendment*, 34 Fordham L. Rev. 653, 655 (1966) [hereinafter cited as Fordham Comment].

14. A. Lester and G. Bindman, *Race and Law in Great Britain* 345-46 (1972); see *In Re Bedford's Charity*, 2 Swans. 471, 532, 36 Eng. Rep. 696, 717 (Ch. 1819). The facts are much clearer as retold in this case.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *The King & Osborne*, W. Kel. at 230, 25 Eng. Rep. 584, 585 (K.B. 1732).
20. Fordham Comment, *supra* note 13, at 656; *In Re Bedford's Charity*, 2 Swans. 471, 532, 36 Eng. Rep. 696, 717 (Ch. 1819).
21. *Rex v. Williams*, 5 Barn. & Ald. 595, 597, 106 Eng. Rep. 1308 (K.B. 1822).
22. See generally Fordham Comment, *supra* note 13; A. Dickey, *English Law and Race Defamation*, 14 N.Y.L.F. 9 (1968); M. Partington, *Race Relations Act of 1965: A Too Restricted View*, 1967 Crim. L. Rev. 497 (1967); D.G.T. Williams, *Racial Incitement and Public Order*, Crim. L. Rev. 320 (1966). See also B.A. Hepple, *Race Relations Act of 1965*, 29 Mod. L. Rev. 360 (1966).
23. A. Lester and G. Bindman, *supra* note 14, at 347.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 347-48.
28. *Id.* at 348.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *R. v. Aldred*, 22 Cox C.C. 1 (1909).
34. A. Lester and G. Bindman, *supra* note 14, at 348.
35. *Id.* at 349.
36. Race Relations Act of 1965, Ch. 75 § 6, 1 Halsbury's Stat. of Eng. 108 (1972); see Race Relations Act of 1976, Ch. 74, § 70, 46 Halsbury's Stat. of Eng. 488 (1977); see also Race Relations Act of 1976, Ch. 74, § 70, 6 Halsbury's Stat. of Eng. 817 (Butterworth, 4th ed. 1985), reproduced in Apps. II, III, & IV *infra*; see also Public Order Act of 1986, Part III, §§ 17-30, 12 Halsbury's Stat. of Eng. 1030 (Butterworth, 4th ed. 1994) (reissue), reproduced in Appendix V(A); A. Dickey, *supra* note 22, at 16-17; M. Partington, *supra* note 22, at 497; see generally D. Feldman, *Freedom of Expression in The International Covenant on Civil and Political Rights and the United Kingdom Law* (D. Harris and S. Joseph eds. 1995)
37. A. Lester and G. Bindman, *supra* note 14, at 349.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 350.
42. Reproduced in Apps. XII and XIII.

43. Section 5 of the Public Order Act of 1936, 8 Halsbury's Statutes of Eng. 332 (1969), reproduced in App. XII *infra*, provided in its unamended form:

5. Prohibition of offensive conduct conducive to breaches of peace.

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 on an offence.

See also Public Order Act of 1963, 8 Halsbury Stat. of Eng. 522 (1969), reproduced in App. XIII.

44. A. Lester and G. Bindman, *supra* note 14, at 351, 522.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Jordon v. Burgoyne*, 2 All E.R. 225, 226 (1963).

49. *Id.*

50. *Id.* at 226-227.

51. *Id.* at 226.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 227.

57. *Id.*

58. A. Lester and G. Bindman, *supra* note 14, at 354.

59. It has been argued that racially inciteful or defamatory speech should be classified as obscenity and regulated by law. *Id.* at 355; see also *John Calder Publications L.T. Div. v. Powell* [1965] 1 Q.B. 509; *D.P.P. v. A&B.C. Chewing Gum Ltd.* [1967] 1 Q.B. 1959; *R. v. Calder & Boyars Ltd.* [1968] 1 Q.B. 151.

60. *Baptist Offers Jews Apology*, Boston Globe, Nov. 15, 1980, at 3.

61. Restatement (Second) of Torts, §§ 565, 566 (1977).

62. *Id.* at § 544 Comment b; see also Note, *Group Vilification Reconsidered*, 89 Yale L.J. 308, 323 (1979).

63. Restatement, *supra* note 61, § 566.

64. *Id.* See W. Page, Keaton, et al., *Presser and Keaton on the Law of Torts* § 11, at 773.

65. *Id.*

66. See Milkovich, *supra* note 135, Ch. III. Race Relations Act of 1965, Ch. 75, § 6(1) (a), (b), reproduced in App. II.

67. Race Relations Act of 1965, *id.*; A. Dickey, *supra* note 22, at 17.
68. Race Relations Act of 1965, ch. 75, § 6(1) (b) (Eng.); A. Dickey, *supra* note 22, at 20; *see also* B.A. Hepple, *supra* note 22 at 314; D.G.T. Williams, *supra* note 22 at 323-25.
69. Statement, Rt. Hon. Sir Frank Soskice, Q.C., M.P., Second Reading, 711 Parl. Deb. H.C. (5th Ser.) 926-43 (3 May 1965).
70. Race Relations Act of 1965, ch. 75 § 6(3); A. Dickey, *supra* note 22, 22-23.
71. Race Relations Act of 1965, ch. 75 § 6(3); A. Dickey, *supra* note 22, at 23.
72. *Id.*; A. Dickey, *supra* note 22, at 26-27; A. Lester and G. Bindman, *supra* note 14, at 317.
73. Richard Card writes:

It is alleged that the requirement of the Attorney-General's consent in effect precludes prosecutions other than in the most blatant cases because Attorneys-General have shown excessive caution in bringing prosecutions, on the ground that an unsuccessful prosecution does more harm than good to racial equality. . . . The charge of excessive caution appears to be borne out by the statistics. . . . For example, in the period 1976-1981, only 21 people faced charges under § 5A of the Public Order Act of 1936 [§ 70 of the Race Relations Act of 1976], although during that period the Commission for Racial Equality referred 43 cases to the Attorney-General in 1978 alone and 31 in 1979. In addition, references were made by other bodies and individuals. The Attorney-General declined to prosecute in some cases because he did not consider the material was threatening, abusive or insulting; in others because he did not consider that there was evidence of distribution to people likely to be stirred to racial hatred. It may well be that the requirement of the Attorney-General's consent discourages the police from taking action in many cases where they would otherwise do so.

R. Card, *Public Order: The New Law* 116 (1987); *see* P. Thornton, *Public Order Law* 70 (1987); *see also* Lasson, *supra* note 12, at 161, 171.

74. A. Dickey, *supra* note 22, at 24-27; A. Lester and G. Bindman, *supra* note 14, at 371-72.
75. A. Dickey, *supra* note 22, at 28; A. Lester and G. Bindman, *supra* note 14, at 299.
76. A. Lester and G. Bindman, *supra* note 14, at 370.
77. *Id.* at 371.
78. *Id.* at 372.
79. *Id.* at 374.
80. *R. v. Britton*, 2 Q.B. 51 (1967), 1 All E.R. 486 (C.A. 1967).
81. *Id.* at 486.
82. *Id.* at 487.
83. *Id.*

84. *Id.* at 487-88.

85. Race Relations Act of 1965, Ch. 75, § 6(2)(b) [Eng.].

86. *R. v. Britton*, 1 All E.R. at 488.

87. *Id.*

88. *Colin Jordan Jailed for 18 Months*, Times (London) Jan. 26, 1967, at 1, col. 2; *see also* A. Lester and G. Bindman, *supra* note 14, at 368, for an account of the case. This case, which is not reported, is styled Jordan and Pollard. Jordan and Pollard were prosecuted at the Devon Assizes at Exeter.

89. A. Lester and G. Bindman, *supra* note 14, at 368.

90. *Id.*

91. *Id.*

92. Accounts of this unreported case appear in *The Evening Sentinel* (Hanley) May 23, 1967; A. Lester and G. Bindman, *supra* note 14, at 369; A. Dickey, *Prosecutions Under the Race Relations Act of 1965, § 6 Incitement to Racial Hatred*, 1968 Crim. L. R. 489, 492; A. Dickey, *The Race Formula of the Race Relations Acts (1965 & 1968)*, 19 Jur. Rev. 282 (1974).

93. *R. v. Malik*, 52 Cr. App. R. 140 (1968), 1 All E.R. 582 (C.A. 1968).

94. *Id.*

95. *Bitter Attack on Whites*, Times (London), July 25, 1967, at 1; *see also Michael X Gives Views on Colour: Trial on Race Hate Charge*, Times (London) Nov. 9, 1967, at 1.

96. *R. v. Malik*, 1 All E.R. at 583.

97. This case is not reported. The defendants were convicted at the Central Criminal Court. The facts and judgment were taken from *Race Speeches: £270 Fines*, Times (London), Nov. 29, 1967, at 3.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Race Act Not a Curb*, Times (London), Nov. 30, 1967, at 2. Accounts of these cases can also be found in A. Lester and G. Bindman, *supra* note 14, at 369; A. Dickey, *Prosecutions Under Race Relations Acts*, *supra* note 92, at 493.

107. This case is not reported. *See Four Cleared in Race Action Trial*, Times (London), Mar. 28, 1968, at 2; R. P. Longaker, *The Race Relations Action of 1965: An Evaluation of the Incitement Provision* 132 (1969).

108. A. Dickey, *Prosecutions Under Race Relations Acts*, *supra* note 92, at 493.

109. A. Lester and G. Bindman, *supra* note 14, at 370.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Lasson, *supra* note 12, at 170.

115. *Id.*

116. *Id.* See also App. IV.

117. Lasson, *id.*

118. Lasson, *id.*; Thornton, *supra* note 73, at 61 ("Prosecutions were still few in number and many failed."); see, e.g., *R. v. Relf*, 1 Cr. App. R.(S) 111 (C.A. 1979) (Defendant received a nine months' sentence for publishing leaflets containing demeaning references to members of the West Indian community. These leaflets were distributed in public places.); *R. v. Edwards*, 5 Cr. App. 145 (1983) (twelve months' imprisonment for comic strip containing derogatory messages against Jews; the comic strip was created for publication in a magazine and was intended to prejudice children against Jews); see also *Mandla v. Dowell Lee*, 1 A11 E.R. 1062 (1983) (H.L.).

John Tyndall, chairman of the British National Party, and John Morse, editor of the *British Nationalist*, were convicted under the 1976 Act for publishing articles that condemned a "multiracial society" and made defamatory attacks on Asians, Jews and Blacks. Their twelve months' prison terms were reduced to six months by the appellate court. *Sentence on Tyndall Partly Suspended*, Times (London), Oct. 21, 1986, at 7; Thornton, *id.* at 73.

Richard Card reports that the number of prosecutions under section 70 of the 1976 Act (§ 5A of the Public Order Act of 1936) between 1976 and mid-1982 was twenty eight. Of those prosecutions, twenty defendants were convicted. In 1982, fifteen prosecutions occurred, four in 1983 and fifteen in 1984. See Card, *supra* note 73, at 94; see generally A.T.H. Smith, *Offences Against Public Order Including the Public Order Act of 1986* (1987); P.M. Leopold, *Public Law* (1977); C. Gordon, *Incitement to Racial Hatred* (1982); J. Cotterell, *Prosecuting Incitement to Racial Hatred: Public Law* (1982).

119. Theatres Act of 1968, 35 Halsbury's Stat. of Eng. 310-311 (3rd ed. 1971), reproduced in App. XIV.

120. *Id.* at § 5(1).

121. *Id.* at § 7; A. Lester and G. Bindman, *supra* note 14, at 365-66.

122. R. Card, *supra* note 73, at 3.

123. *Id.*

124. *Id.*; Lasson, *supra* note 12, at 171-172.

125. Thornton, *supra* note 73, at 1-2.

126. See generally provisions of the Public Order Act of 1986, 12 Halsbury's Stat. of Eng. 1046-1055 (Criminal Law) (Butterworth, 4th ed. 1994 (reissue)), reproduced in App. V(A); see also section 154 of the Criminal Justice and Public Order Act of 1994, 12 Halsbury's Stat. of Eng. and Wales (4th ed., Current Statutes Service, Issue 74)(1997) at 111-112, reproduced in App. V(B). Section 154 amends Part I of the Public Order Act of 1986 by adding section 4A which

prohibits, *inter alia*, "causing intentional harassment, alarm or distress" by using or writing "threatening, abusive or insulting language."

127. See generally App. V(A), *id.*, for provisions of the 1986 Act.

128. Thornton, *supra* note 73; at 60.

129. *Id.*

130. *Id.*; see § 27(1) of the Public Order Act of 1986, at App. V(A).

131. Letter of John Hudson, Legal Secretariat to the Law Officers, Attorney General's Chambers (London) to Professor Thomas David Jones (Oct. 24, 1995).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. G. Bindman, *Outlawing Hate Speech*, 89 (No. 14) Law Society's Gazette 17 (1992).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* There have been two attempts to rewrite or modify the story of Sambo by deleting its racial elements. See J. Lester and J. Pinkney, *Sam and the Tigers* (1996); F. Marcellino, *The Story of Little Babaji* (1996). See also L. Weeks, *Taking a Tiger by the Tale: "Little Black Sambo" Loses Racist Elements in Two Retellings*, Washington Post, Sept. 17, 1996, at B1; B. Luscombe, *Same Story, New Attitude: Two Publishers Resuscitate a Children's "Classic,"* Time, Sept. 9, 1996, at 72; H. Jackson, *No More "Little Black Sambo,"* Baltimore Sun, Sept. 21, 1996, at 6A; C. Spratling, *Living Classic Tale Is Back Minus Racist Nuances: 2 Updated Versions of "Sambo" Concentrate on Story's Positives*, Orlando Sentinel, Sept. 27, 1996, at E1; C. Spratling, *Lifestyles: Redrawing Little Black Sambo for the '90's*, Buffalo News, Sept. 9, 1996, at F1; S. Loer, *"Little Black Sambo" Retold*, Boston Globe, Sept. 8, 1996, at B11.

144. *Id.*

145. *Id.*

146. *Id.*

147. Lasson, *supra* note 12, at 181; Card, *supra* note 73, at 116-117; see *Thorne v. British Broadcasting Corp.*, 2 All E.R. 1225 (1967), 1 WLR 1104 (C.A. 1967) (holding that Thorne, a private citizen, and of German descent, could not bring an action under the 1965 Race Relation Act for breach of section 6 (incitement to racial hatred). The Court of Appeal ruled that the remedy of bringing a course of action was under the exclusive control of the Attorney General. The Attorney General must exercise his discretion and consent to sue where section 6 of the 1965 Act was violated).

148. The Northern Irish Parliament has promulgated the Public Order (Northern Ireland) of 1981. Article 13 provides, *inter alia*, that an individual will be guilty of the offense of public incitement of hatred (not limited to racial hatred) if with intent to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland –

- (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 or arouse fear of any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origins.

See Public Order No. 609, art. 13, 17 Ir. Pub. Gen. Arts. 1987, SI 1987/463, Pt. III, quoted in Card, *supra* note 73, at 97.

149. Card, *id.* at 103.

150. Group Defamation, R.S.C., ch. 11, § 281 (1st Supp. 1970) as amended by R.S.C., ch. 46, §§ 318-20 (1985), reproduced in App. I. The Canadian group defamation or "Hate Propaganda" statute now appears at Chap. C-46 (Criminal Code) §§ 318-320 of the Revised Statutes of Canada (1985), pp. 189-193. The statute is substantially identical to its predecessor statute.

151. Manitoba Marcus Hyman Law, The Defamation Act, R.S.M., ch. 60, § 20(1) (1934).

152. See M. Fenson, *Group Defamation: Is the Cure Too Costly?*, 1 Man. L.S.J. 255, 257-59 (1964-65); see also M. Cohen, *The Hate Propaganda Amendments: Reflections on a Controversy*, 9 Alta. L. Rev. 103 (1970) [hereinafter cited as Cohen]; M. Gropper, *Hate Literature, The Problem of Control*, 30 Sask. B. Rev. 181 (1965).

153. See Cohen, *supra* note 152, at 104-106; B.G. Kayfetz, *The Story Behind Canada's New Anti-Hate Law*, 4 Patterns of Prejudice 5-8 (1970); see also Bill 3-C, An Act to Amend the Criminal Code, House of Commons, 2nd Sess., 28th Parliament (Royal Assent on June 11, 1970); The Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada (1966).

154. Kayfetz, *id.* at 5.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 6.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 7.

168. *Id.*

170. *Regina v. Buzzanga*, 25 O.R. 2d. 706 (1979), "Hate Propaganda," Chap. 46, §§ 318-320, Canadian Criminal Code, Revised Statutes of Canada, pp. 189-193 (1985 ed.), The Annotated 1990 Tremeear's Criminal Code 457-461 (David Watt and Michelle K. Fuerst, eds. 1989).

171. *Id.* at 711.

172. *Id.* at 706.

173. *Id.* at 723.

174. *Id.* at 714-21.

175. *Id.* at 719-20.

176. *Id.* at 720-21.

177. *Id.*

178. See *Regina v. Keegstra*, 3 S.C.R. (Canada) 697 (1990); see also *Regina v. Andrews*, 3 S.C.R. (Canada) 870 (1990); see also *Canadian Human Rights Commission v. Taylor*, 3 S.C.R. (Canada) 892 (1990). In *Taylor*, John Ross Taylor, former leader of the Nationalist Party, was convicted for use of the telephone to propagate his anti-Semitic views. *Id.* at 903-904. The Supreme Court of Canada found the application of § 13(1) of the Canadian Human Rights Act did not violate § 2(b) of the Canadian Charter of Rights and Freedoms. Section 13(1) provides:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Section 2 of the Human Rights Act defines discriminating practices as

practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

See Canadian Human Rights Act, R.C.S. 1985, c. H-6.

179. *Keegstra*, *id.* at 713-714.

180. *Andrews*, *id.* at 874-875.

181. See generally *Keegstra*, *supra* note 178.

182. See M. Sandler, *Hate Crimes and Hate Group Activity in Canada*, 43 U.N.B.L.J. 269 (1994); I.B. McKenna, *Canada's Hate Propaganda Laws - A Critique*, 26 Ottawa L. Rev. 159 (1994); M. Valois, *Hate Propaganda, Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma*, 26 Revue Juridique Themis 373 (1992); see also *Judge Apologizes for Holocaust Remark*, The Advocate (Baton Rouge, La.), Dec. 13, 1995, at 2A (Judge in Montreal apologizes after stating: "The Nazis did not eliminate millions of Jews in a painful and bloody manner: They died in the gas chambers without suffering.").

183. Kayfetz, *supra* note 153, at 8; see *Regina v. Zundel*, 31 C.C.C. (3d) 97, 580 O.R. (2d) 129 (Ont. C.A.) (1987); but see generally *Regina v. Zundel*, 2 S.C.R. (Canada) 731 (1992) (declaring unconstitutional section 181 of the Canadian Criminal Code, which prohibits spreading "false news"). See *Canadian Convicted in Anti-Semitism Case*, N.Y. Times, July 11, 1992, at 3 (Jim Keegstra, a teacher, who taught class that Jews conspired to control the world was convicted in 1985 under Hate Propaganda law, but verdict was overturned in 1991 and new trial ordered. He was convicted after the second trial on July 10, 1992. Keegstra taught his high school students "that a small, elite Jewish group had planned every major war dating to the French Revolution. . . . Mr. Keegstra told jurors . . . that he truly believed that Jews . . . had a blueprint to create a world government.") (*Id.*)

184. The Indian Penal Code, Ch. VIII, § 153A, 170-173 (R. Ranchhoddas and D.K. Thakdore eds., 27th ed. 1992) and cases cited therein; Indian Penal Code, ch. VIII, § 153A, 147-150 (Dr. Sir H. Singh Gour ed., 10th ed. 1990) and cases cited therein; see App. VI(A) and (B). See also old version of 153A in Indian Penal Code, § 153A (S.S. Sastry & S.D. Singh eds. 1982). It provided:

Whoever –

- (a) by words, either spoken or written, or by signs or by visible representation or otherwise, promotes, or attempts to promote, on grounds of religion, race, language, caste or community or any other ground whatsoever, feelings of enmity or hatred between different religious, racial or language groups or castes or communities, or
- (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which disturbs or is likely to disturb the public tranquility

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

185. Sastry & Singh, *id.* at 707.

186. *Id.* at 708.

187. *Id.* at 707-08.

188. *Id.* at 708.

189. *P.K. Chakravarty v. Emperor*, 1926 A.I.R. (Cal.) 1133.

190. *Id.* at 1135.
191. *Satya Ranjan Bakshi v. Emperor*, 1929 A.I.R. (Cal.) 309.
192. *Id.* at 314.
193. *Lajpat Rai v. Emperor*, 1928 A.I.R. (Lah.) 245.
194. *Kali Charan Sharma v. Emperor*, 1972 A.I.R. 649.
195. *Id.* at 652.
196. *Id.*
197. Sastry and Singh, *supra* note 184, at 712.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*; see also Appendix VI(A).
202. *Id.*
203. *Id.*
204. See Indian Constitution, *supra* note 4.
205. *Id.*; see also *Kedar Nath Singh v. State of Bihar*, 1962 A.I.R. (S.C.) 955; *Shelkh Wajinhaddn v. State*, 1963 A.I.R. (All) 335; *Debi Satan v. State*, 1954 A.I.R. (Pat.) 254.
206. *Zaman, A.M.A. v. Emperor*, 1933 A.I.R. (Cal.) 139.
207. *Id.*
208. *Munshi Singh v. Emperor*, 1935 A.I.R. (Oudh) 347.
209. *Id.* at 349.
210. *Kali Charan Sharma v. King-Emperor*, 1927 A.I.R. (All) 654.
211. *Id.*
212. See *Chandanmal v. State of West Bengal*, 1978 Crim. L.J. 182 (Cal.); *Gopal Vinayak Godse v. Union of India*, 1971 A.I.R. (Bom.) 56; *M/S Varsha Publications Pvt. Ltd. v. State of Maharashtra*, 1983 Crim. L.J. 1446 (Bom - S.B.); *Nand Kishore Singh v. State of Bihar*, 1985 Crim. L.J. 797 (Pat - S.B.); *Babu Rao Patel*, 1980 A.I.R. (S.C.) 763; 1980 Crim. L.J. 529; *K. Neelakantha*, 1978 Crim. L.J. 780 (S.C.); *Ramlal Puriv v. State of Madhya Pradesh*, 1971 M.P.L.J. 388; *Azizul Haq Kausar Naquvi v. State*, 1980 A.I.R. (All.) 149; *Sheikh Wajih Uddin v. State*, 1963 A.I.R. (All.) 335; *Shiv Kumar Mishra v. State of Uttar Pradesh*, 1978 All. L.J. 789; *Lalai Singh Yadav v. State of Uttar Pradesh*, 1975 All. Crim. Cas. 376. See also the following cases: *King Emperor v. Raj Pal*, 1962 A.I.R. (Lah.) 195; *Iswari Prasad Sharma v. Emperor*, 1927 A.I.R. (Cal.) 747; *Emperor v. Banomali Maharana*, 1943 A.I.R. 382; *Devi Shaem Sharma v. Emperor*, 1927 A.I.R. (Lah.) 594; *M.L.C. Gupta v. Emperor*, 1936 A.I.R. (All.) 314; *Ram P. Sadarangani v. Emperor*, 1945 A.I.R. (Sind.) 106; *Narayan Vasudev Phadke v. Emperor*, 1940 A.I.R. (Bom.) 379; *Vishambhar Dayal Tripathi v. Emperor*, 1941 A.I.R. (Oudh) 33; *Maniben Liladhar Kara v. Emperor*, 1933 A.I.R. (Bom.) 65; *M.L. Guatam v. Emperor*, 1936 A.I.R. (All) 561.
213. Interview with Attorney Sudhir Joshi, Consulate of India in Washington, D.C. (Nov. 3, 1995).

214. A. Aguda, *The Judicial Process and the Third Republic* p. v (1992); see A. Oyebode, *The Treaty-Making Power in Nigeria* in *Law and Development* 145 (J.A. Omotola and A.A. Adeogun eds. 1987); G. Ezejiofor, *Sources of Nigerian Law in Introduction to Nigerian Law* 1 (C.O. Okonkwo ed. 1980).

215. As to the influence of English Law on the Nigerian legal system, Ezejiofor writes:

Because of Nigeria's historical connection with Great Britain, it is not surprising that much of her laws derive from British sources. . . . British statutes which were, or are, in operation in Nigeria fall into two groups - those which were made to apply directly to Nigeria by their own force or by order of the British Government and those which were received into Nigeria by local legislation.

Ezejiofor, *id.*; see also B.O. Nwabueze, *A Constitutional History of Nigeria* (1982); see generally, I.O. Ewelukwa, *Constitutional Law*, in Okonkwo, *id.* As an example of an English statute that was received into Nigerian law, Ezejiofor discusses the Interpretation Act. He writes:

An example of such a statute is the Interpretation Act which in Section 45 provides as follows: "(1) subject to the provisions of this section, and except insofar as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, insofar as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation."

Ezejiofor, *id.* at 4; see T.A. Aguda, *Towards a Nigerian Common Law* in *Fundamentals of Nigerian Law* 249, 251 (M.A. Agomo ed. 1989); see also A.O. Obilade, *The Nigerian Legal System* 69-82 (1979).

216. Ezejiofor, *id.* at 4; see also T.K. Kargbo, *What Type of Government for Sierra Leone?*, African News Weekly, Mar. 10, 1995, at 6 ("The American constitution forms the backbone of all fledgling constitutions in sub-Saharan Africa."). As this book goes to press, the illegitimate military regime of Sani Abacha has suspended the operation of the civil liberties provisions of the 1989 Nigerian Constitution. Arguably, Abacha's act of constitutional modification and suspension by decree is an illegal act. His conduct has been criticized by the U.S. See generally *Nigerian Human Rights Practices*, 1993, U.S. Dept. of State Dispatch (Feb. 1994).

217. See Chapter IV, Constitution of the Federal Republic of Nigeria (Promulgation), Decree No. 12, 1989, Supplement to Official Gazette Extraordinary, No. 29, vol. 76, part A (May 3, 1989).

218. *Id.* at art. 32(1).

219. *Id.* at art. 33(1).
220. *Id.* at art. 34(1).
221. *Id.* at art. 41.
222. *Id.* at art. 37.
223. *Id.* at art. 38.
224. *Id.* at art. 38.
225. *Id.* at art. 43(1) (a) and (b).
226. 1 Laws of the Federation of Nigeria, Chapter 10 (rev. ed 1990).
227. African Charter on Human and Peoples' Rights, OAU Doc. CAB/Lc6/67/3 Rev. 5, 21 I.L.M. 59 (1981), reprinted in B.E. Carter and P.R. Trimble, *International Law: Selected Documents* 509-518 (1995).
228. O.C. Eze, *Human Rights in Africa* 210, 212 (1984).
229. A. Uchegbu, *Economic Rights in African Charter on Human Rights in Law and Development* 161, 166 (J.A. Omotola and A.A. Adeogun, eds. 1987).
230. Eze, *supra* note 228, at 212; Uchegbu, *id.* at 165-166. Eze comments on the idea of an African conception of human rights as reflected in the ACHPR by stating:

The drafters were guided by the principle that the African Charter of Human and Peoples' Rights should reflect the African conception of human rights. The African charter was expected to take as a pattern the African philosophy of law, and to meet the needs of Africa. One may argue as to the exact import of an African conception of human rights or "African philosophy of law," but the recognition that the charter should serve African needs, it is submitted, created a useful frame for the drafters of the African charter.

The OAU Ministers, in the preamble to the Charter, took "into consideration the virtues of their historical traditions and values of African civilization" which should inspire and characterize their reflection of the conception of human rights, and were convinced of the duty to promote and protect human and peoples' rights and freedoms, taking into account the essential importance traditionally in Africa of these rights and freedoms. It was, however, recognized by the drafters of the Charter that while sticking to African specifics in dealing with rights, it was thought prudent not to deviate from international norms solemnly adopted in various universal instruments by different member states of the OAU.

Eze, *supra* note 228, at 212.

231. Art. 9 (1) and (2), ACHPR, *supra* note 227.
232. *Id.* at art. 27(2).
233. 5 Laws of the Federation of Nigeria, Chapter 7, §§ 50-60 (rev. ed. 1990).
See Appendix XVII for complete text of law.
234. *Id.*
235. Y. Osinbajo and K. Fogam, *Nigerian Media Law* 99 (1991).

236. Discussions with Dean A.O. Obilade and Professor A. Uchegbu support the author's contention that application of Chapter 7 of the Federal Criminal Code Act would be appropriate to control group defamation that created discord among ethnic or religious groups in Nigeria. Elsewhere in this work, it has been argued that group defamation has a tendency to incite violence or breaches of the peace. Such potential power to cause disaffection or violent confrontation in society would justify application of the sedition law to quell those elements that would foment discord through the use of group defamation.

A.O. Obilade has opined that "it is difficult to justify the existence of sedition as a law intended to protect public order or national security in the absence of incitement to violence or intent to cause breach of the peace as an element of the offence." A.O. Obilade, *Recent Developments in Libel and Sedition Actions and Law* (unpublished paper for Seminar on the Mass Media, National Security and Law) (1992).

237. Chapter 7, §§ 50-51, *supra* note 233.
238. See § 27, Public Order Act of 1986, *supra* note 127.
239. Chapter 7, § 52(2), *supra* note 233.
240. Nzwabeuze, *supra* note 215, at 150; see C. Buchanan and D. Pugh, *Land and People in Nigeria* 94 (1955).
241. Nwabueze, *id.*
242. *Id.*
243. Eze, *supra* note 228, at 135; see W.J. Breytenbach, *Inter-Ethnic Conflict in Africa*, 1 Human Rights Case Studies (The Hague) 312 (1975); O. Nnoli, *Socio-Economic Insecurity and Ethnic Politics in Africa*, 4 African Review 1 (1973).
244. See F. Akinola and E. Nwosu, *Enahoro Warns Against Ethnic Nationalism*, Daily Times (Lagos, Nigeria), Mar. 10, 1993, at 1; K. Idowu and C. Abiandu, *Enahoro Canvasses New National Order*, The Guardian (Lagos, Nigeria), Mar. 10, 1993, at 1. Ethnic tension and rivalry are not peculiar to Africa. War-torn Yugoslavia is slowly being decimated by an ethnic war. Serbian forces have engaged in a concerted policy of "ethnic cleansing" against Bosnian Moslems. See J.S. Landay, *Warring Factions Resume Talks On Bosnian War*, Christian Science Monitor, Dec. 31, 1992, at 1; L. Pressler, *Justice Must Be Demanded for 'Ethnic Cleansing' Crimes*, Christian Science Monitor, Dec. 29, 1992, at 19; S. Budiansky, *Bosnia: Too Little, Too Late?*, U.S. News and World Report, May 17, 1993, at 22; J.S. Landay, *Bosnian City Averts Ethnic Hatred and Economic Collapse, for Now*, Christian Science Monitor, April 14, 1993, at 1; F. Agami, *America Squirms as a People Slowly Dies*, U.S. News and World Report, May 10, 1993, at 4; P. Talwar, *On Bosnia - Don't Blame the United Nations*, Christian Science Monitor, Jan. 29, 1993, at 18; see also W. Safire, *Ethnic Cleansing*, N.Y. Times Magazine, Mar. 14, 1993; D.P. Moynihan, *Pandemonium: Ethnicity in International Politics* (1993); J. Kotlan, *Tribes* (1993); H.S. Lewis, *Ethnic Loyalties Are on the Rise Globally*, Christian Science Monitor, Dec. 28, 1992, at 18 ("There is no justification for calling the phenomenon 'tribalism' in Africa and 'nationalism' or 'ethno-politics'

elsewhere."); *World Democracy Gains, But Threats Arise from Ethnic, Racial Tensions*, Christian Science Monitor, Dec. 23, 1992, at 1; *Ethnic-Based Dissent Tests Ethiopia's Move to Democracy*, Christian Science Monitor, Jan. 21, 1993, at 7; K.B. Noble, *Tens of Thousands Flee Ethnic Violence in Zaire*, N.Y. Times, Mar. 21, 1993, at 3.

245. Eze, *id.* at 135; see Nwabueze, *supra* note 215, at 145-153; see also Dr. Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Mich. J. Int'l L. 1113 (1995).

246. Nwabueze, *id.* at 129-130 (discussion of 1951 Kano riots between Moslems and Christians). Nwabueze notes that

[t]he Muslim north and the population of the South are quite different peoples, separated not just by tribal and language differences but also by those of race, culture, religion, social and political organization, economic and even geography, which are superimposed upon differences of tribe and language.

Id. at 129. See R. Ebene, *Religious Disturbances: 19 Appear in Court*, Daily Satellite (Lagos, Nigeria) Mar. 22, 1993, at 1; *That Kataf Trial Is Annoying*, Daily Satellite (Lagos, Nigeria), Mar. 22, 1993 at 7, ("religious and communal clashes and violence have been recurring, particularly in the northern parts of this country. . . there had been such religious violence in Katsina, Kano, Kaduna, Zaria, Yola and Bauchi which led to the loss of hundreds of precious human lives and millions of naira worth of property. It must be pointed out that in nearly all the religious riots that took place in the north, the majority of those who lost their lives or property were either Christians or Southerners living in the north."); see also *Seminar on Religious Tolerance*, Daily Times (Lagos, Nigeria), Mar. 31, 1993, at 3 ("Organized by Life Theological Seminary, Lagos, the theme of the seminar is 'panacea for religious intolerance in Nigeria.'"); see *Riots, Boycott Follow Ban on Nigerian Vote*, Washington Post, June 30, 1993, at A15 ("Critics contend that the vote [for the presidential election] was annulled because the apparent winner, Moshood Abiola, once Babangida's associate, belongs to the southern Yoruba tribe, which has long been shut out of political power in the polarized nation split between Muslims and Christians, between northerners and southerners and among 250 tribes.").

247. See Articles 259-263 of 1989 Nigerian Constitution, *supra* note 217. Section 259 provides:

- (1) There shall be for any State that requires it a Sharia Court of Appeal for that State.
- (2) The Sharia Court of Appeal of the State shall consist of -
 - (a) a Grand Khadi of the Sharia Court of Appeal; and
 - (b) such number of Kadis of the Sharia Court of Appeal as may be prescribed by the House of Assembly of the State.

Section 260 provides *inter alia*:

- (1) The appointment of a person to the office of Grand Kadi of the Sharia Court of Appeal of a State shall be made by the Governor of the State on the advice of the State Judicial Service Commission subject to the confirmation of such appointment by the House of Assembly.
- (2) The appointment of a person to the office of a Kadi of the Sharia Court of Appeal of the State shall be made by the Governor of the State acting on the recommendation of the State Judicial Service Commission.
- (3) A person shall not be qualified to hold office as Grand Kadi or Kadi of the Sharia Court of Appeal unless –
 - (a) he is a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years and has obtained a recognised qualification in Islamic law from an institution acceptable to the State Judicial Service Commission; or
 - (b) he has attended and has obtained a recognised qualification in Islamic law from an institution approved by the State Judicial Service Commission and has held the qualification for a period of not less than 10 years; and
 - (c) he either has considerable experience in the practice of Islamic law or he is a distinguished scholar of Islamic law.
- (4) If the office of the Grand Kadi of the Sharia Court of Appeal of a State is vacant or if the person holding the office is for any reason unable to perform the functions, of the office, then, until a person holding the office has resumed those functions, the functions shall be performed by a person to be designated from time to time in that behalf by the Governor of the State, acting in his discretion, from among the Kadis of the Sharia Court of Appeal.
- (5) Except with the approval of the House of Assembly of the State, an appointment pursuant to subsection (4) of this section shall cease to have effect after the expiration of 3 months from the date of such appointment, and the Governor shall not re-appoint a person whose appointment has lapsed.

Section 261 provides:

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the Law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic law where all the parties are Muslims.

249. Osinbajo and Fogam, *supra* note 235, at 110-121.
250. Osinbajo and Fogam, *supra* note 235, at 110.
251. *Arthur Nwankwo v. State*, N.C.L.R. 288 (1985).
252. O.C. Oko, *Arthur Nwankwo v. The State: Constitutionality of Nigeria Sedition Law*, 3 Nigerian Judicial Rev. 184 (1988).
253. See *D.P.P. v. Chike Obi*, 1 All N.L.R. 186 (1961).
254. Osimbajo and Fogam, *supra* note 235, at 170.
255. *Id.*; see also discussion, *supra*, Chapter IV at 137-142; see R.D. Sack and S.S. Baron, *Libel, Slander, and Related Problems* 136, 152, 154-159 (1994) for discussion of the concept of *colloquium*. See *Brady v. Ottaway Newspaper, Inc.*, 84 A.D. 2d 226, 233-236, 445 N.Y.S.2d 786, 8 Media L. Rep. 1671 (N.Y.A.D., 2d Dept. 1981). In *Brady* 53 policemen were accused of having knowledge of corruption in the police department. The newspaper editorial described these policemen as "accessories after the fact, if not, before and during." In discussing group libel, the court stated:

Size is too narrow a focus to determine the issue of individual application in group defamation. An absolute limit on size [of the group] is not possible. *Id.* at 233-234.

The court further held:

The intensity of suspicion test recognizes "that even a general derogatory reference to a group does affect the reputation of every member" despite the size of the group. ... In order to determine personal application, it requires that a factual inquiry be made to determine the degree that the defamatory comments or accusations of [sic] the group focuses on each of the individual members of the group. . . . With the intensity of suspicion test, size is a consideration and the probability of recovery diminishes with increasing size. Size, however, is not the only factor evaluated. It is balanced against the definiteness in number and composition of the group and its degree of organization. . . . This test of balancing factors or reference elements is not meant to be exclusive. *Id.* at 235-236.

256. Osinbajo and Fogam, *supra* note 235, at 170.
257. *Id.*
258. *Id.*
259. *S.B. Dalumo v. The Sketch Publishing Co., Ltd.*, 1 All N.L.R. 567 (1972); but see *Zik Enterprises Ltd. v. Awolowo*, 14 W.A.C.A. 696 (1955).
260. *Id.*
261. *Id.* at 569.
262. *Id.*
263. *Id.*
264. *Id.* at 567.

265. *Id.* at 572-573.

266. *Id.*; see *D.P.P. v. Chike Obi*, 1 All N.L.R. 186 (1961); *State v. Ivory Trumpet Publishing Company & Ors*, 5 N.C.L.R. 736 (1984).

267. See generally E. Levi, *An Introduction to Legal Reasoning* 1-2 (1948) ("Change in the rules is the indispensable, dynamic quality of law.").

268. *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 51 (Okla. 1962).

269. *Id.*

270. *Id.*

271. See generally section B of Chapter V. The label Third World is perhaps a misnomer. However, international scholars refer to the developed western democratic nations as the First World, the developed Communist nations as the Second World and nations which are underdeveloped as the Third World.

272. In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), Justice Stewart in his dissenting opinion wrote concerning the principle of *stare decisis*:

A substantial departure from precedents can only be justified . . . in the light of experience with the application of the rule to be abandoned or in the light of an altered historical environment.

Id. at 634-35. The experience with religious and ethnic violence in Nigeria justifies a departure from the principle of *colloquium*. The principle of *colloquium* is a historic relic of an English society which has now seen fit to avoid the rule by promulgating the Public Order of 1986 which proscribes language having a tendency to incite racial hatred.

273. *Woods v. Lancet*, 102 N.E.2d 691, 694 (N.Y. 1951).

274. See generally Sam Ijalana, *The Law and You: Private Individual Can Sue for Public Nuisance*, Sunday Times (Lagos, Nigeria), Jan. 19, 1992, at 10; see also *J.A. Adediran & Ors v. Interland Transport Limited*, 9 N.W.L.R. 155 (Sup. Ct. Nigeria 1991).

275. Ijalana, *id.*

276. Uchegbu, *supra* note 229, at 167, 169, 170.

277. *Id.* at 169-170; see A.S. Makarenko, *Marxism and Ethics* 403 (1969). Enahoro in warning of rising ethnic nationalism in Nigeria refers to the various ethnic groups in Nigeria as "nationalities." See Don McWara, *A Timely Warning*, Tell Magazine, Mar. 12, 1993, at 20, col. 1.

278. Eze, *supra* note 228, at 215.

279. See ACHPR Ratification and Enforcement Act, *supra*, at note 226.

280. N. Nathanson and E. Schwelb, *supra* Chapter I, n. 8, at 64.

281. See *Queen v. Andrews*, 65 O.R. (2d) 161 (1988); see generally United Nations Committee on the Elimination of Racial Discrimination, Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, U.N.Doc.A/CONF. 119-10 (1983).

282. Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 49th Sess., Supp. No. 18 (A/49/18), Annex I, at 108 (1995).

283. See Twelfth Periodic Report of States Parties Due in 1992 (Nigeria), CERD/C/226/Add. 9, at 5 (21 Apr. 1993).

284. R. Loewenstein, *Christians and Jews* 126 (1951).

CHAPTER VI

Conclusion: "The Right to Equal Concern and Respect"

The fundamental tenet of the legal formalist faith posits that legal decision-making is reasonably restrained by juridical norms. The nativity of legal realism signaled the beginning of a forceful assault on legal formalism and its sister religion – positivism.¹ American legal realists refused to accept the notion of law as sheltered from things external. The law is subject to social experience and social fact. Law is a function of power and ideology; one can only attempt to predict the courts.² Justice Holmes expressed the realist account of law in this manner:

The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices, which judges share with their fellow men have a good deal more to do than the syllogism in determining the rules by which man should be governed.³

Legal realism was a direct response to the formalistic and positivistic credo that described law as composed of a special system of norms in the form of rules – separate, distinct, and autonomous from morality.⁴ H.L. Hart, a leading exponent of positivism, believes that legal decision-making is a rational process. There is a well-defined core of rules mechanically applied by judges. Where this core gives out, there exists a penumbral area that allows for the use of discretion by judges who are faced with cases incapable of being subsumed under a particular rule. It is in the area of the penumbra that law and morality intersect.⁵

Legal realists and their contemporary successors, critical legal studies proponents (CLS),⁶ object to the rigid adherence by positivists and formalists to the view that judges act with total objectivity when using a particular rule of law to decide a case. They criticize formalism and positivism as nothing more than intellectual nonsense. They debunk the use of rules as the sole determinants of judicial decisions; the desired consequences are equally important. Both realists and CLS proffer a realistic description of the legal process. Law must be related to the ends the particular legal system has as its social aspirations. Law is not autonomous from social reality or morality; it does not exist in a vacuum.⁷ Law must be utilitarian and instrumental in

nature: the amelioration of the human condition or the common good is one of its primary goals.

Thus, "the penumbra to the realist is the entirety of the universe."⁸ There is no one rule; there are plural, contradictory and parallel rules. Chance and indeterminacy are present at all levels of the law. Facts are indeterminant. Facts are pulled out of the fact-rich world of the particular case, *sub judice*, and accepted or rejected by the court.⁹ The truth about formalism is that it reveres the status quo.¹⁰ It is a mere ideological disguise. It accomplishes nothing more than the reification of rules as the essence of law.¹¹ These rules are used as guises for so-called neutral decision-making. Formalists and positivists imbued the law with a blessed, heavenly, or transcendental quality.¹²

However, neither the realists nor CLS intend to suggest that rules have no place in our system of jurisprudence. They are not anarchists, and do not suggest the total absence of decisions based on rules of law. They do not "perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place."¹³ The realists and CLS have painted a verbal picture of a concept of law that simply de-emphasizes the importance of rules. Their vision of law is one that encompasses the influence of social life, morality, ideology and ethical values in judicial decision-making and legislation.¹⁴ These jurisprudential movements attempted the de-reification of rules as the essence of law – a deconstruction of law as a system of sacred rules. It is a description of how the legal order operates rather than an epistemological inquiry into the meaning of law. Professor L.D. Sargentich noted:

[T]he realists mainly add to the rule-formalist account, and should not be taken to deny any role for rules or norms at all.¹⁵

The ultimate goal of the legal realists and CLS is to expand the competency of the courts unencumbered by rigid bodies of rules that are used as pretexts for judicial decisions.¹⁶ Social facts are important and must be considered by judges who are the guardians of the social order. Consequently, the realists' and CLS' revolution simply endeavors to destroy the pathological leaves of the tree; the essence of the tree – its root and trunk – remains firmly intact. If a legal order is to exist, these theorists must believe in norms. Their account of law has been best described as "a synthesis between norms plus realism."¹⁷

Professor Cohen, in his thought-provoking essay, *Transcendental Nonsense and the Functional Approach*, presents an excellent explication of legal realism.¹⁸ His work is convincing testimony that realists had absolutely

no intention of obliterating the concept of law as composed of a system of rules. Cohen's major thesis is not that rules are nonexistent or functionless. Rules do not exist in a suburb of purity, isolated and protected from social forces.¹⁹ Yet, the judiciary insists on using the "language of transcendental nonsense" to cloak the true reasons for legal decisions.²⁰ Such concepts as good faith, bad faith, due process, laches, rights *in rem*, presence, and personality of corporations constitute the "language of transcendental nonsense."²¹ This language flagrantly fails to explain or justify judicial decisions.²² Cohen writes:

Valuable as is the language of transcendental nonsense for many practical legal purposes, it is entirely useless when we come to study, describe, predict, and criticize legal phenomena. And although judges and lawyers need not be legal scientists, it is of some practical importance that they should recognize that the traditional language of argument and opinion neither explains nor justifies court decisions. When the vivid fictions and metaphors of traditional jurisprudence are thought of as a reason for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged. Thus, it is that the most intelligent judges in America can deal with a concrete practical problem of procedural law and corporate responsibility without any appreciation of the economic, social, and ethical issues which it involves.²³

Cohen does not deny the existence of rules; he has simply suggested law should be demystified. Cohen has labeled his approach "the functional approach" – expressing a basic disregard for positivist "mechanical jurisprudence," "legal magic," and "word jugglery."²⁴

Realists and CLS scholars have been successful in presenting a compelling argument for the inadequacy of the legal rule. This inadequacy is due to underlying, undulating, political, moral, and socio-economic influences that are the motive forces in the judicial decision-making process.²⁵ Cohen demands the realist judge be about the business of assessing and weighing those inapposite and conflicting human values that present themselves in legal controversies.²⁶ The judge must appraise the social significance of precedents to which each side appeals.²⁷ He must open the courtroom to all evidence that will "bring light to the delicate practical task of social adjustment and consign to Von Jhering's heaven of legal concepts all attorneys whose only skill is that of the conceptual acrobat."²⁸ The realist or CLS advocate must bring those human values before the court that tends to favor his case.²⁹ He must appeal to the

"sociological brief" if necessary, as was done in *Brown v. Board of Education*.³⁰ In *Brown*, sociological evidence, in addition to the neutral principle of equal protection under the law, was used to derive and fashion a rule of law. This evidence aided the legal decision-making process.³¹ The author has provided the reader with his interpretation of legal realism so as to refute those castigating views about the realist account of law.

A new group of legal scholars calling themselves critical race theorists have created a jurisprudence that is best described as a form of legal realism. Derrick Bell has been christened the father of critical race theory by some of its proponents.³² The writings of these theorists focus upon the intersection between law and race. They argue there is a symbiotic relationship between law and racial subordination. These scholars of color speak with a different voice – the voice of the "outsider" or "other" – and present a legal perspective that attempts to inform the dominant, majority, legal discourse of a minority perspective. Critical race theorists admittedly speak and write from a "positioned perspective."³³ These minority scholars concede they do not speak with a so-called objective or neutral voice. One of the characteristics of the writings of critical race theorists is storytelling or the use of narrative. These stories are either fictitious or personal narratives from the lives of the writers or others. They are utilized to illustrate and to make concrete or accessible abstract concepts of law with racial implications.³⁴ Professor Milner Ball makes the following observation about critical race theorists:

The stories, chronicles, tales, parables, and autobiographical narratives of minority scholars may perform powerfully and effectively, may get at the curve of someone else's experience and convey at least something of it to those whose own bends differently.³⁵

Though this author eschews all labels, like critical race theorists, he speaks from a positioned perspective. A few of these theorists have been credited for proposing passage of legislation prohibiting "hate speech." Two leading exponents of critical race theory are Richard Delgado and Mari Matsuda. In a *New York Times* article Stephanie B. Goldberg writes:

In 1982, Professor Delgado wrote an article in the Harvard Civil Rights – Civil Liberties Law Review that was the first to suggest that racial hate speech be punishable as a crime. Professor Matsuda followed that up [in 1989] with a Michigan Law Review article that proposed a scheme for regulating hate speech on campus, touching off what has been dubbed the political correctness movement.³⁶

Professor Delgado has been erroneously credited for being the first writer to advocate the criminalization or proscription of hate speech by the law. In 1980, the author of this work, in a Howard Law Journal article, recommended the promulgation of a federal criminal statute proscribing racial defamation, a form of hate speech.³⁷ In the Howard Law Journal article, the author writes:

The natural policy of the United States to seek out and destroy all vestiges of racism will be furthered by federal law prohibiting racially defamatory speech. . . . Through the enactment of appropriate legislation in this area, the American society will have successfully taken yet another step toward the eradication of the American Dilemma.

* * * *

Legislation against racial defamation will enhance the possibility of reaching this goal.³⁸

Indeed, a careful review of the footnotes in the Howard Law Journal article reveals the use of stories, a technique characteristic of critical race scholarship.³⁹ Moreover, a review of Professor Matsuda's 1989 article reveals a substantial reliance on the ideas of this author.⁴⁰ It is important to note that throughout the twentieth century bills have been submitted in state legislatures and the U.S. Congress to penalize racial defamation or group libel.⁴¹ The idea of a law proscribing group defamation is not of recent origins. The critical difference between this writer's doctrinal position and the views of critical race theorists such as Delgado and Matsuda is that this author's approach is best described as constitutional minimalism. It is not his purpose to endorse the proscription of hate speech generally. Merely derogatory or offensive racial utterances should not be proscribed (*e.g.*, "I hate Blacks. Send them all back to Africa."). The constitutional minimalist argument asserts groups should have legal redress for defamation of character just as individuals may sue for defamation of character. Arguably, the common law requirement of *colloquium* should be abolished as a prerequisite for successfully proving a civil cause of action for group defamation. This rule is a creation of another historical epoch and functioned adequately in a homogenous English society. The alternative, as heretofore described, is to promulgate a criminal statute as has been done by a few states in the United States.

Throughout this discourse, the author has argued that group defamation does not merit First Amendment protection. It has been shown that libel and

slander are not forms of speech lying within the ambit of First Amendment protection, except where there is a specific legal privilege. Unfortunately, some commentators on the subject argue defamatory speech in the form of group defamation cannot be proscribed consistently with the First Amendment. This work has examined their reasons for deciding a federal law proscribing group defamation is undesirable and has found their rationales analytically deficient. However, even if one considers group defamation constitutionally protected speech, the state or government has an overriding and compelling interest justifying the infringement of First Amendment rights. The compelling state or governmental interest is the norm of nondiscrimination – the right to racial equality and freedom from all forms of racial discrimination. There is no less restrictive alternative for confronting the social evil of group defamation. Racial defamation is a form of racial discrimination in international law and it should be treated as such by our domestic law as well. Racially defamatory acts constitute a differentiation of treatment among individuals who are similarly situated. This constitutionally impermissible difference of treatment is based solely on the individual's racial heritage and therefore is discriminatory behavior.

A theory of Professor Derrick Bell may be applied to justify the legal proscription of group defamation. Professor Bell has formulated a legal realist or critical race principle described as "the interest-convergence principle."⁴² The principle maintains that

[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.⁴³

Bell postulates that the quantitative or qualitative allocation of blame upon Whites or the proved harm suffered by African-Americans will not determine whether courts will grant Fourteenth Amendment protection in certain racial cases.⁴⁴ The remedy administered by judges will come as a result, conscious or unconscious, of a determination that the legal remedy will enhance or, at a minimum, not do damage to the societal interests of middle and upper class whites.⁴⁵ Racial equality and justice have only an occasional importance in the process of judicial decision-making and the application of the rule of law codified in the Fourteenth Amendment.⁴⁶ Though notions of racial equality and equal protection may be given as the principles applied in a particular case, this rule is used as a cloak to camouflage operation of the *sub rosa* interest-convergence principle.⁴⁷

Further, Professor Bell tells us that, though the Supreme Court in *Brown* would have us believe its decision was based on the equal protection clause of the Fourteenth Amendment, the Supreme Court was not really concerned with the harm segregation and unequal facilities inflicted on African-American children.⁴⁸ The Supreme Court's decision had a superior or greater value to White Americans. The *Brown* decision created socio-economic and political gains for the United States within its own borders and around the world.⁴⁹

Professor Bell identifies three benefits gained by White Americans as a result of the *Brown* decision and the demise of segregation: (1) *Brown* secured the support of Third World peoples and provided a boost to the American struggle against communism. It dramatically improved the prestige of the United States in the international arena.⁵⁰ (2) The decision presented African-Americans with some hope that equality and freedom were not unachievable illusions. There was great anger on the part of returning African-American veterans of World War II, who found themselves second-class citizens in a nation they had defended abroad. This anger was a source of consternation and fear for White Americans.⁵¹ The anger might have spread among the minority populace, and African-Americans might have begun to support the communist cause.⁵² Therefore, the Supreme Court "gave the dogs a bone" and successfully stifled the potential racial fires that might have flared out of control. (3) Also, segregation was thought by some to be an obstruction to further industrialization in the South.⁵³ Professor Bell is careful to point out there were those for whom the moral principle of racial equality was a worthwhile justification for the decision. Yet, Professor Bell asserts those who would have proceeded on the dictates of moral conviction alone were not of adequate numbers to force the needed changes.⁵⁴

In formulating and applying his interest-convergence principle, Professor Bell looks behind the rule articulated as the justificatory standard for judicial decision-making. He finds other social, economic, political or ideological interests that act as extremely important influences though they are not articulated. If the interest-convergence principle is applied to the problem of group defamation one could reach only one conclusion: First Amendment or not, such language is not socially, economically, or politically advantageous to middle- and upper-middle-class White Americans and certainly not to African-Americans. The interest of African-Americans to be free from all forms of racial discrimination, including racially defamatory falsehoods, converges with the interest of middle- and upper-middle-class White Americans in preserving public order and harmony among the races. Group defamation needlessly exacerbates racial tensions between White

Americans and African-Americans, ultimately leading to violent confrontations. The control of group defamation does not in any way threaten or infringe the social interest of middle- and upper-middle-class White Americans. It is highly likely these middle- and upper-middle-class White Americans would be much too sophisticated to indulge in such racist behavior even if they were racists. The deliberate stirring up of racial hatred among the minority populace cannot possibly serve the interests of any Caucasian person, regardless of his or her socio-economic level. Thus, the interests of both African-Americans and White Americans unmistakably and irrefutably converge.

The recommendation that the United States adopt federal legislation proscribing group defamation actualizes and fulfills the "right to equal concern and respect" of minorities.⁵⁵ Those opponents of group defamation laws who raise their voices in defense of First Amendment rights are attempting to use a formalistic and positivistic approach in order to suppress the good works of those who would make meaningful to minorities the "self-evident truths" which the founding fathers expounded in the Declaration of Independence.⁵⁶ They would deprive minorities of "the right to equal concern and respect." Federal legislation against group defamation is constitutionally permissible: The First Amendment is not expressive of an absolute norm. If racially defamatory utterances are within the ambit of First Amendment protection, the federal government has an overriding, countervailing, and compelling interest that justifies the restraint of such speech. There are competing values fighting for position in the constitutional marketplace of ideas. Certain values must give way to other interests that have been deemed more socially compelling. The problem must be attacked from the perspective of legal realism. One must adopt an analysis of the First Amendment consistent with the realist account of law as encompassing morality, ethical values, and social experience:

Men often say that one cannot legislate morality. I should say that we legislate hardly anything else. All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society.⁵⁷

We must, in the fashion of a constitutional non-interpretivist, move beyond the plain meaning of the words in a particular provision of the Constitution. There are values that cannot be perceived or discovered through a textual analysis of the four corners of the legal document and the language contained therein. Language is subject to multitudinous interpretations, for "a word is but the skin of a living thought."⁵⁸ If the Constitution is to be a viable, evolving, and flexible instrument, it must not

be strictly construed. Thomas Jefferson once informed James Madison that "the earth belongs in usufruct to the living, the dead have neither powers nor rights over it."⁵⁹

The United States as a nation has a compelling state interest to rid itself of all badges of slavery created and perpetuated, *de jure*, by the legal system.⁶⁰ It has a moral responsibility to continue to promote the national policy of eliminating all forms of racial discrimination. Legislation against group defamation will enhance the possibility of reaching this goal. The issue, therefore, is not one of a conflict with free speech that needs resolution; this contention is mere subterfuge. The issue is whether, as a matter of "simple justice," the United States will choose to ensure the protection and survival of minorities through the use of law as an instrument of social change.⁶¹

The respect for human rights the American society grandly and incessantly proclaims to the world must be translated into some meaningful form of legislation and social action⁶² – lest society be resigned to reaffirm the lack of respect for the dignity of the human person on the part of White America as perceived by Mark Twain in his 1884 classic, *The Adventures of Huckleberry Finn*. Aunt Sally cried:

"Good gracious! Anybody hurt?"

"No'm. Killed a nigger."

"Well, it's lucky; because sometimes people do get hurt."

"Two years ago last Christmas, your Uncle Silas was coming up from Newrleans on the old Lally Rook, and she blowed out a cylinder-head and crippled a man."⁶³

NOTES

1. H.J. Steiner and L.D. Sargentich, *Course Lectures: Theories About Law* (given at the Harvard Law School, Spring Semester 1979) (no pagination). For an in-depth discussion of legal realism, see generally *American Legal Realism* (W.W. Fisher, M.J. Horowitz, T.A. Reed, eds. 1993); S.B. Presser and J.S. Zarnaldin, *Law and Jurisprudence in American History* 761-820 (1995); R. Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697, 701 (1931); F.S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935); K.N. Llewellyn, *Some Realism About Realism – Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931); K.N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 Colum. L. Rev. 431 (1930).

2. H.J. Steiner and L.D. Sargentich, *supra* note 1.

3. O.W. Holmes, *The Common Law* 1 (1881).
4. H.J. Steiner and L.D. Sargentich, *supra* note 1.
5. H.L. Hart, *The Concept of Law* 77-150 (1961).
6. See G.C. Christie and P.H. Martin, *Jurisprudence: Text and Readings on the Philosophy of Law*, 1051-1138 (1995); J. Boyle, *Critical Legal Studies* (1993); R.M. Unger, *The Critical Legal Studies Movement* (1986); M. Kelman, *A Guide to Critical Legal Studies* (1987).
7. H.J. Steiner and L.D. Sargentich, *supra* note 1.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Cohen, *supra* note 1, at 809.
13. D. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 520 (1980).
14. H.J. Steiner and L.D. Sargentich, *supra* note 1.
15. L.D. Sargentich made this comment on an unpublished work written by this author.
16. H.J. Steiner and L.D. Sargentich, *supra* note 1.
17. *Id.*
18. Cohen, *supra* note 1.
19. *Id.*
20. *Id.* at 812.
21. *Id.* at 809.
22. *Id.* at 812.
23. *Id.*
24. *Id.* at 821.
25. This is the belief of Professor Roberto Unger of the Harvard Law School. The statement was made during a lecture in Professor Unger's Jurisprudence course in 1979.
26. Cohen, *supra* note 1, at 842.
27. *Id.*
28. *Id.*
29. *Id.* at 841.
30. *Brown v. Board of Education*, 327 U.S. 483 (1954).
31. Cohen, *supra* note 1, at 842.
32. See generally D. Bell, *And We Are Not Saved* (1987); D. Bell, *Faces at the Bottom of the Well* (1992); D. Bell, *Confronting Authority: Reflections of an Ardent Protestor* (1994); D. Bell, *Gospel Choirs: Psalms of Survival in an Alien Land Called Home* (1996).
33. See generally C.R. Lawrence, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. Cal. L. Rev. 2231, 2252 (1993).
34. See *Critical Race Theory – The Cutting Edge* (R. Delgado, ed. 1995); K. Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991); R.D. Barnes,

Race Consciousness – The Thematic Content of Racial Distinctions in Critical Race Scholarship, 103 Harv. L. Rev. 1864 (1990); see also R. Delgado and J. Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 Va. L. Rev. 461 (1993); I.F. Haney López, *White by Law: The Legal Construction of Race* (1996); G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* 167-185 (1995).

35. M.S. Ball, *The Legal Academy and Minority Scholars*, 103 Harv. L. Rev. 1855, 1858-59 (1990). Kimberle Crenshaw writes:

This interpretation of antidiscrimination law is part of a larger critique loosely termed critical race theory. While no determinative definition of this work is yet possible, one can generally say that the literature focuses on the relationship between law and racial subordination in American society. It shares with liberal race critiques a view that law has provided an arena for challenging white supremacy. Critical race theory goes beyond the liberal critiques, however, in that it exposes the facets of law and legal discourse that create racial categories and legitimate racial subordination.

Other broad themes common to critical race theory include the view that racism is endemic to, rather than a deviation from, American norms. This developing literature reflects a common skepticism toward dominant claims of meritocracy, neutrality, objectivity, and color blindness. Critical race theory embraces a contextualized historical analysis of racial hierarchy as part of its challenge to the presumptive legitimacy of societal institutions. The work manifests an appreciation of the role of the lived experience of people of color in constructing knowledge about race, law, and social change.

Critical race theory draws upon several traditions, including poststructuralism, postmodernism, Marxism, feminism, literary criticism, liberalism, and neopragmatism and discourses of self-determination such as Black nationalism and radical pluralism. The work is thus aggressively interdisciplinary in an effort to understand more fully how race is constructed, rationalized, and experienced in American society. Critical race theory goes beyond liberal understandings of race and racism by exploring those of its manifestations that support patriarchy, heterosexism, and class stratification. The normative stance of critical race theory is that massive social transformation is a necessary precondition of racial justice.

K. Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics* 196, 213-214, n. 7 in *The Politics of Law* (D. Kairys ed. 1990).

36. S.B. Goldberg, *The Law, A New Theory Holds, Has a White Voice*, N.Y. Times, Jul. 17, 1992, at A23.

One might strongly argue that there is no new theory of jurisprudence known as Critical Race Theory. Scholarship concerning the intersection of law and race with a focus on the racially subordinating and marginalizing function or power of law has existed as long as the Howard Law Journal, Texas Southern University Law

Review (Thurgood Marshall Law Review) and the North Carolina Central Law Review have been published. These are scholarly journals of historically African-American law schools. Ironically, it appears that the majority of so-called critical race scholars are not African-American and are not of a phenotypically dark skin color. At one law conference for teachers of color, sponsored by the American Association of Law Schools in 1992, there were few African-American male scholars on major panels. The opening panel for the conference had no African-American male presenters; but two White American males presented papers, one of whom was Mark Tushnet of the Georgetown University Law Center.

37. T.D. Jones, *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 How. L.J. 429 (1980).

38. *Id.* at 433-434, 473.

39. *Id.* at 465 n.170.

40. See M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989); see also R. Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 Harv. C.R. - C.L.L. Rev. 133 (1982). See also M. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 Women's Rights L. Rep. 297 (1992) (borrowing the idea of "double consciousness" from W.E.B. Dubois, but calling the concept "multiple consciousness").

41. See generally Comment, *Race Defamation and the First Amendment*, 34 Fordham L. Rev. 653 (1966) (No author).

42. Bell, *supra* note 13.

43. *Id.* at 523.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 523-24.

49. *Id.* at 524.

50. *Id.*

51. *Id.* at 524-25.

52. *Id.* at 525.

53. *Id.*

54. *Id.*

55. R. Dworkin, *Taking Rights Seriously* 180 (1977). M.J. Perry in his book *Love and Power* presents one explanation of the right to equal concern and respect:

Indeed, according to a common version of the stratagem, being concerned about the well-being of all human beings no less than one is concerned about one's own well-being ("equal concern"), respecting the well-being of all human beings no less than one respects one's own ("equal respect"), is

what it means to be "moral." To be "moral" is to be "impartial" in that sense.

M.J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* 36 (1991).

56. For an interesting discussion of the Declaration of Independence and its lack of meaning for Blacks, see A.L. Higginbotham, Jr., *In the Matter of Color – Race & The American Legal Process: The Colonial Period* 371-89 (1978) [hereinafter "Higginbotham"]. Higginbotham poses the interrogatory: A self-evident truth or a self-evident lie?

The advice of Chief Justice Marshall should be given some consideration: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 321 (1819); see A.L. Higginbotham, Jr., *Fundamental Rights and the Constitution: A Heavenly Discourse, in African Americans and the Living Constitution* (J.H. Franklin and G.R. McNeil eds. 1995). But see D. D'Souza, *The End of Racism* (1995) (endorsing the repeal of civil rights laws and claiming that existing forms of racism are impotent, having no significant effect on the lives of African-Americans).

57. E.V. Rostow, *The Sovereign Prerogative* 69 (1962).

58. J.H. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 Indiana L.J. 399 (1978); see J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); S. Fish, *There's No Such Thing as Free Speech* (1994) (arguing deconstructionist viewpoint that language is characterized by indeterminacy).

59. 5 *Writings of Thomas Jefferson* 121 (P. Ford ed. 1894), cited in Ely, *supra* note 58, at 413.

60. See generally Higginbotham, *supra* note 55.

61. See the documentary study of S. Yette, *The Choice: The Issue of Black Survival in America* (1971).

62. See Commission on Human Rights, Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination, Report by Mr. Maurice Glélé-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on his Mission to the United States of America from 9 to 22 October 1994, Submitted Pursuant to Commission on Human Rights Resolution 1993/20, U.N. Doc. E/CN.4/1995/78/Add.1, 16 Jan. 1995 (concluding "racism and discrimination persist in American society, even if not as a result of a deliberate policy on the part of the United States Government"). *Id.* at 31. The Special Rapporteur recommends that the government take "measures . . . to prohibit the establishment of racist organizations and ban racist propaganda." *Id.* at 32. The Special Rapporteur reports:

It should be explicitly acknowledged that 30 years of intense struggle against racism and racial discrimination have not yet made it possible to eliminate the consequences of over 300 years of slavery and racial discrimination, particularly where African-Americans are concerned.

Id.

Another important report that has not received appropriate dissemination was written by a commission of international jurists on August 3-20, 1979. The report is titled *The Report of International Jurists' Visit with Human Rights Petitioners in the United States*. This report and investigation was completed at the behest of the National Conference of Black Lawyers and several other civil rights organizations in the United States. The panel of international jurists studied alleged human rights violations in the United States. The panel was composed of Prof. A.K. Asmal of South Africa, Mr. Justice Harish Chandra of India, Chief Judge Per Eklund of Sweden, Richard Harvey of Great Britain, Ifeanyi Ifebigh of Nigeria, Sergio Insunza Barrios of Chile, the Honorable Sir Arthur Hugh McShine of Trinidad-Tobago, and Babacar Niang of Senegal. The panel's purpose was to assist the United Nations Commission on Human Rights Subcommission on Prevention of Discrimination and Protection of Minorities in determining the admissibility of a petition filed by the National Conference of Black Lawyers, *et al.*, alleging a consistent pattern of human rights violations in the United States. The panel reached the following findings:

We find a *prima facie* case has been made out that there exists in the United States today a consistent pattern of gross and reliably attested violations of the human and legal rights of minorities, including policies of racial discrimination and segregation.

In reaching these findings we have at all times been conscious that individual cases of injustice occur in all systems of criminal justice. However, we find that, based upon all the evidence we have examined, the number of factors shared commonly between individual cases and reliably attested materials demonstrates a clear *prima facie* case that patterns of violations exist which call for an immediate full inquiry under the authority of the Commission on Human Rights.

Report and Findings: Report of International Jurists' Visit with Human Rights Petitioners in the United States (Aug. 3-20, 1979); see also L.S. Hinds, *Illusions of Justice: Human Rights Violations in the United States* (1979); Human Rights Watch, *Human Rights Violations in the U.S.* (1994); *Brutality Unchecked: Human Rights Abuses Along the U.S. Border with Mexico* (1992); Amnesty International, *United States: Human Rights and American Indians* (1992); Amnesty International, *United States of America: Police Brutality in Los Angeles, California: Torture, Ill-Treatment and Excessive Force* (1992).

63. M. Twain, *The Adventures of Huckleberry Finn* 258 (S. Kellog, illus.) (ed. 1994). (In the *Afterword* written by Peter Glassman, Glassman describes Twain's work as a satire and asserts the work has been unjustifiably labeled racist. Many critics have berated the work because of the use of the word "nigger." However, Glassman defends Twain's use of the racial epithet:

Many modern critics have denounced *Huck Finn* for its constant use of the word nigger – a hateful and dehumanizing term. But it is precisely by constantly referring to Jim, the book's most noble, brave, and humane character – with this hateful word that Twain shows the sheer stupidity of judging and categorizing a man by the color of his skin. Further, Twain shows that it was only by dehumanizing black men and women with this offensive term – much as Nazis dehumanized the Jews by making them wear yellow stars – that white men and women were able to justify to themselves their disgraceful treatment of their fellow human beings.

Id. at 347; *see also* J. Rabinowitz, *Huckleberry Finn Without Fear*, Wash. Post, July 25, 1995, at B1 (noting word nigger used more than 200 times in the novel).

APPENDIX I(A)
(PREDECESSOR STATUTE)

§ 281 of the Canadian Criminal Code:

"Hate Propaganda"¹

.1(1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.

(2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:

- (a) killing members of the group, or
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

.2(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

1. The Canadian "Hate Propaganda" statute now appears at Chap. C-46 (Criminal Code) §§ 318-320 of the Revised Statutes of Canada (1985 ed.), pp. 189-193 (*reproduced in App. 1(B)*). The statute is substantially identical to its predecessor statute.

- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
 - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
 - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

(4) Where a person is convicted of an offence under section 281.1 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 181 (6) and (7) of section 171 apply *mutatis mutandis* to section 281.1 or subsection (1) or (2) of this section.

(6) No proceeding for an offence under section (2) shall be instituted without the consent of the Attorney General.

(7) In this section –

"communicating" includes communicating by telephone, broadcasting or other audible or visible means; "identifiable group" has the same meaning it has in section 281.1;

"public place" includes any place to which the public has access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs, or other visible representations.

.3(1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda, shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct..

(5) If the court is not satisfied that the publication is hate propaganda, it shall order the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsections (4) and (5) by any person who appeared in the proceedings,

- (a) on any ground of appeal that involves a question of law alone,
- (b) on any ground of appeal that involves a question of fact alone,
or
- (c) on any ground of appeal that involves a question of mixed law
and fact, as if it were an appeal against conviction or against a
judgment or verdict of acquittal, as the case may be, on a
question of law alone under Part XVIII, and sections 601 to 624
apply mutatis mutandis.

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

(8) In this section "court" means a county or district court or, in the Province of Quebec,

- (a) the court of the sessions of the peace, or
- (b) where an application has been made to a judge of the provincial court for a warrant under subsection (1), that judge;

"genocide" has the same meaning as it has in section 281.1; "hate propaganda" means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 281.2; "judge" means a judge of a court or, in the Province of Quebec, a judge of the provincial court.

APPENDIX I(B)

(NEW LAW)

§§ 318-320 of the Canadian Criminal Code:

"Hate Propaganda"¹

318. [281.1] (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

- (a) killing members of the group; or
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin

319. [281.2] (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;

1. The Annotated 1995 Tremear's Criminal Code (David Watt and Michelle K. Fuerst eds. 1994).

- (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as in section 318;

"public place" includes any place to which the public have [sic] access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations. . . .

320. [281.3] (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

- (a) on any ground of appeal that involves a question of law alone,
- (b) on any ground of appeal that involves a question of fact alone,
or
- (c) on any ground of appeal that involves a question of mixed law
and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

(8) In this section

"court" means

- (a) in the Province of Quebec, the Court of Quebec;
- (a.1) in the Province of Ontario, the Ontario Court (General Division);
- (b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench;
- (c) in the Provinces of Prince Edward Island and Newfoundland, the Supreme Court, Trial Division; and
- (d) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory and Northwest Territories, the Supreme Court;
- (e) in the Yukon Territory, the Northwest Territories, the Minister of National Health and Welfare.

"genocide" has the same meaning as it has in section 318;

"hate propaganda" means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319: . . .

APPENDIX II

Race Relations Act of 1965 (Ch. 75, § 6)

"Incitement to Racial Hatred"

(Great Britain)

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 meaning hereby assigned to them, that is to say:

- (a) "public meeting" and "public place" have the same meanings as in the Public Order Act 1936;
- (b) "publish" and "distribute" means 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;
- (c) "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.

APPENDIX III

Race Relations Act of 1968 (Ch. 71, § 6)

"Advertisements and Notices"

(Great Britain)

6(1) It shall be unlawful for any person to publish or display, or to cause to be published or displayed, an advertisement or notice which indicates, or which could reasonably be understood as indicating, an intention to do an act of discrimination, whether or not it would be unlawful by virtue of any other provision of this Act.

(2) Subsection (1) above shall not render unlawful the publication or display, or causing the publication or display, of an advertisement or notice which indicates that Commonwealth citizens of any class of such citizens are required for employment outside Great Britain or that persons other than such citizens are required for employment in Great Britain.

APPENDIX IV

Race Relations Act of 1976 (Ch. 74, § 70)

"Incitement to Racial Hatred"

(Great Britain)

70(1) The Public Order Act 1936 shall be amended in accordance with the following provisions of this section.

(2) After section 5 there shall be inserted the following section:

5A. Incitement to Racial Hatred

(1) A person commits an offence if -

- (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
- (b) he uses in any place or at any public meeting words which are threatening, abusive or insulting, in a case where having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.

(2) Subsection (1) does not apply to the publication or distribution of written matter consisting of or contained in -

- (a) a fair and accurate report of proceedings publicly heard before any court or tribunal exercising judicial authority, being a report which is published contemporaneously with those proceedings, or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, is published as soon as publication is reasonably practicable and (if previously unlawful) lawful; or
- (b) a fair and accurate report of proceedings in Parliament.

(3) In any proceedings for an offence under this section alleged to have been committed by the publication or distribution of any written manner, it shall be a defence for the accused to prove that he was not aware of the content of the written matter in question and neither suspected nor had reason to suspect it of being threatening, abusive or insulting.

(4) Subsection (3) above shall not prejudice any defence which is open to a person charged with an offence under this section to raise apart from that subsection.

- (5) 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 four hundred pounds, or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, 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.

- (6) In this section –

"publish" or "distribute" means 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;

"racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and in this definition "nationality" includes citizenship;

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

- (7) In section 7(2) after the words "section 5" there shall be inserted the words "or 5A."

APPENDIX V(A)

Public Order Act of 1986, 12 Halsbury's Statutes of England,

Part III, §§ 17-29

(Criminal Law) (Butterworth, 4th ed. 1994 (reissue))

PART III

RACIAL HATRED

Meaning of "racial hatred"

17 Meaning of "racial hatred"

In this Part "racial hatred" means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

Acts intended or likely to stir up racial hatred

18 Use of words or behaviour or display of written material

(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if -

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behavior are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) In proceedings for an offence under this section, it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme [included in a programme service].

19 Publishing or distributing written material

(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if -

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) In proceedings for an offence under this section, it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(3) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

20 Public performance of play

(1) If a public performance of a play is given which involves the use of threatening, abusive or insulting words or behaviour, any person who presents or directs the performance is guilty of an offence if -

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances (and, in particular, taking the performance as a whole) racial hatred is likely to be stirred up thereby.

(2) If a person presenting or directing the performance is not shown to have intended to stir up racial hatred, it is a defence for him to prove -

- (a) that he did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour, or
- (b) that he did not know and had no reason to suspect that the offending words or behaviour were threatening, abusive or insulting, or

(c) that he did not know and had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up.

(3) This section does not apply to a performance given solely or primarily for one or more of the following purposes -

- (a) rehearsal,
- (b) making a recording of the performance, or
- (c) enabling the performance to be [included in a programme service];

but, if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purposes mentioned above.

(4) For the purposes of this section -

- (a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,
- (b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction, and
- (c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;

and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.

(5) In this section "play" and "public performance" have the same meaning as in the Theatres Act 1968.

(6) The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under section 2 of that Act -

section 9 (script as evidence of what was performed),
section 10 (power to make copies of script),
section 15 (powers of entry and inspection).

21 Distributing, showing or playing a recording

(1) A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening, abusive or insulting is guilty of an offence if -

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) In this Part "recording" means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public.

(3) In proceedings for an offence under this section, it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(4) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be [included in a programme service].

22 Broadcasting or including programme in cable programme service

(1) If a programme involving threatening, abusive or insulting visual images or sounds is [included in a programme service], each of the persons mentioned in subsection (2) is guilty of an offence if -

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) The persons are -

- (a) the person providing the . . . programme service,
- (b) any person by whom the programme is produced or directed, and
- (c) any person by whom offending words or behaviour are used.

(3) If the person providing the service, or a person by whom the programme was produced or directed, is not shown to have intended to stir up racial hatred, it is a defence for him to prove that -

- (a) he did not know and had no reason to suspect that the programme would involve the offending material, and
- (b) having regard to the circumstances in which the programme was

[included in a programme service], it was not reasonably practicable for him to secure the removal of the material.

(4) It is a defence for a person by whom the programme was produced or directed who is not shown to have intended to stir up racial hatred to prove that he did not know and had no reason to suspect –

- (a) that the programme would be [included in a programme service], or
- (b) that the circumstances in which the programme would be . . . so included would be such that racial hatred would be likely to be stirred up.

(5) It is a defence for a person by whom offending words or behaviour were used and who is not shown to have intended to stir up racial hatred to prove that he did not know and had no reason to suspect –

- (a) that a programme involving the use of offending material would be [included in a programme service], or
- (b) that the circumstances in which a programme involving the use of the offending material would be . . . so included, or in which a programme . . . so included would involve the use of the offending material, would be such that racial hatred would be likely to be stirred up.

(6) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not know, and had no reason to suspect, that the offending material was threatening, abusive or insulting.

Racially inflammatory material

23 Possession of racially inflammatory material

(1) A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to –

- (a) in the case of written material, its being displayed, published, distributed, [or included in a programme service], whether by himself or another, or
- (b) in the case of a recording, its being distributed, shown, played, [or included in a programme service], whether by himself or another,

is guilty of an offence if he intends racial hatred to be stirred up thereby or,

having regard to all the circumstances, racial hatred is likely to be stirred up thereby.

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, [or inclusion in a programme service] as he has, or it may reasonably be inferred that he has, in view.

(3) In proceedings for an offence under this section, it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

24 Powers of entry and search

(1) If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of section 23, the justice may issue a warrant under his hand authorising any constable to enter and search the premises where it is suspected the material or recording is situated.

(2) (Applies to Scotland only).

(3) A constable entering or searching premises in pursuance of a warrant issued under this section may use reasonable force if necessary.

(4) In this section "premises" means any place and, in particular, includes

- (a) any vehicle, vessel, aircraft or hovercraft,
- (b) any offshore installation as defined in section 1(3)(b) of the Mineral Workings (Offshore Installations) Act 1971, and
- (c) any tent or movable structure.

25 Power to order forfeiture

(1) A court by or before which a person is convicted of -

- (a) an offence under section 18 relating to the display of written material, or
- (b) an offence under section 19, 21 or 23,

shall order to be forfeited any written material or recording produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates.

(2) An order made under this section shall not take effect -

- (a) in the case of an order made in proceedings in England and Wales, until the expiry of the ordinary time within which an appeal may be instituted or, where an appeal is duly instituted, until it is finally decided or abandoned;

(b) (applies to Scotland only).

(3) For the purposes of subsection (2)(a) –

- (a) an application for a case stated or for leave to appeal shall be treated as the institution of an appeal, and
- (b) where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned.

(4) For the purpose of subsection (2)(b) the lodging of an application for a stated case or note of appeal against sentence shall be treated as the institution of an appeal.

Supplementary provisions

26 Savings for reports of parliamentary or judicial proceedings

(1) Nothing in this Part applies to a fair and accurate report of proceedings in Parliament.

(2) Nothing in this Part applies to a fair and accurate report of proceedings, publicly heard before a court or tribunal exercising judicial authority where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful.

27 Procedure and punishment

(1) No proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General.

(2) For the purposes of the rules in England and Wales against charging more than one offence in the same count or information, each of sections 18 to 23 creates one offence.

(3) A person guilty of an offence under this Part is liable –

- (a) on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both;
- (b) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

28 Offences by corporations

(1) Where a body corporate is guilty of an offence under this Part and it is shown that the offence was committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as it applies to a director.

29 Interpretation

In this Part –

"distribute," and related expressions, shall be construed in accordance with section 19(3) (written material) and section 21(2) (recordings);

"dwelling" means any structure or part of a structure occupied as a person's home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose "structure" includes a tent, caravan, vehicle, vessel or other temporary or movable structures;

"programme" means any item which is [included in a programme service]; ["programme service" has the same meaning as in the Broadcasting Act 1990;]

"publish," and related expressions, in relation to written material, shall be construed in accordance with section 19(3);

"racial hatred" has the meaning given by section 17;

"recording" has the meaning given by section 21(2), and "play" and "show," and related expressions, in relation to a recording, shall be construed in accordance with that provision;

"written material" includes any sign or other visible representation.

APPENDIX V(B)

**Criminal Justice and Public Order Act of 1994, section 154
(amending Part 1 of the Public Order Act of 1986 as section 4A)**

**12 Halsbury's Statutes of England and Wales (4th ed., Current
Statutes Service, Issue 74) (1997) pp. 111-112**

154 Offence of causing intentional harassment, alarm or distress

In Part I of the Public Order Act 1986 (offences related to public order), after section 4, there shall be inserted the following section –

4A Intentional harassment, alarm or distress

(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he –

- (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
- (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

thereby causing that or another person harassment, alarm or distress.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.

(3) It is a defence for the accused to prove –

- (a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
- (b) that this conduct was reasonable.

(4) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

APPENDIX VI(A)
(PREDECESSOR STATUTE)
Indian Penal Code, § 153A

Whoever –

- (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes, or attempts to promote, on grounds of religion, race, language, caste or community or any other ground whatsoever, feelings of enmity or hatred between different religious, racial or language groups or castes or communities, or
- (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which disturbs or is likely to disturb the public tranquility

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

APPENDIX VI(B)

(NEW LAW)

Indian Penal Code, Ch. VIII, § 153A

(R. Ranchhoddas & D.K. Thakdore eds. 27th ed. 1992)

(1) Whoever –

- (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or
- (b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or
- (c) organises any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of caste or insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment which may extend to three years or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

APPENDIX VII

28 Connecticut General Statutes, § 53-37 (1958) (West 1994 Supp.)

§ 53-37. Ridicule on account of race, creed or color

Any person who, by his advertisement, ridicules or holds up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class or persons, shall be fined not more than fifty dollars or imprisoned not more than thirty days or both.

APPENDIX VIII

40 Minnesota Statutes Annotated, § 609.765 (West 1987)

609.765 Criminal defamation

Subdivision 1. Definition. Defamatory matter is anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to business or occupation.

Subdivision 2. Acts constituting. Whoever with knowledge of its defamatory character orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed is guilty of criminal defamation and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

Subdivision 3. Justification. Violation of subdivision 2 is justified if:

- (1) The defamatory matter is true and is communicated with good motives and for justifiable ends; or
- (2) The communication is absolutely privileged; or
- (3) The communication consists of fair comment made in good faith with respect to persons participating in matters of public concern; or
- (4) The communication consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings; or
- (5) The communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with intent to further such interest or duty.

Subdivision 4. Testimony required. No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty.

APPENDIX IX

Mass. Ann. Laws, Ch. 272, § 98c (West 1969)

Libel of Groups of Persons Because of Race, Color or Religion

Whoever publishes any false written or printed material with intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion shall be guilty of libel and shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. The defendant may prove in defense that the publication was privileged or was not malicious. Prosecution under this section shall be instituted only by the attorney general or by the district attorney for the district in which the alleged libel was published.

APPENDIX X

Model Statute of *Columbia Law Review* Editors: "An Act To Make Unlawful the Defamation of Racial, Religious, or National Groups"

Section I. Findings

The State has a special interest in the preservation of harmonious relations among its people. In order that the people be permitted to reach decisions on matters of public concern on the basis of free choice among conflicting doctrines, freedom of speech must be guarded jealously, not only from governmental interference but from private restraint and obstruction as well. Where such doctrines involve discussion of racial, religious and national groups, special problems arise. False representations of fact about these groups made in support of a course of action impede the free interchange and wise choices of ideas because the enormity and repetition of such falsehoods have been shown to increase their acceptance. Free interchange and wise choices are also impeded when resort is had to violence, or when threats or insults are uttered for the purpose of intimidation. Experience has shown that substitution of such conduct for free and frank discussion endangers the peace of the community by engendering unrest, anger, violent resentment and a clear and present danger of grave evil in the community.

Section II. Definitions.

As used in this Act:

A. *Public place* means any publicly owned place, any public conveyance, any place where at the time of the offense the public is present by invitation or sufferance with or without the payment of a fee, or any place where 20 or more persons are present;

B. *Utter* means to communicate, cause to be communicated, or assist in communicating, by the spoken or written word or by any sign, picture, or symbol including, but not limited to, communication by any electrical or mechanical means;

C. *Person* means any individual, partnership, corporation, unincorporated association, or organization;

D. *Defamatory statement* means any utterance which, directly or by innuendo, holds up the group, person or persons concerning whom it is uttered, to public contempt, hatred, shame, disgrace, or obloquy, or causes him or them to be shunned, avoided or injured in his or their business,

profession or occupation.¹

E. *Racial, religious or national group* means any racial, religious or national group, a portion thereof, or a person because of his belonging to such group or portion thereof;²

F. *Authorized corporation* means a non-profit corporation, chartered by the United States or any state thereof, authorized to do business in this State and which has as its purpose, or among its purposes, the protection of the civil or political liberties or other rights of the aggrieved group;

G. *Breach of the peace* means an utterance which, when judged by the probable reactions of a person of normal self-control, tends to provoke violence, or incites to violence, or which tends to stir anger, unrest or violent resentment on the part of those abused or on the part of others against those abused, or tends to create a disturbance.

Section III. Group Libel and Slander Prohibited

A. No person shall utter in a public place³ any false and defamatory statement of facts⁴ concerning a racial, religious or national group.

B. An action authorized by this section may be commenced by:

- (1) a representative number of individuals who are members of an aggrieved racial, religious or national group,
- (2) an authorized corporation,
- (3) the Attorney General, or
- (4) the district attorney of any county.

1. These terms are found in the usual definition of defamation

2. If it is thought advisable, resort may be had to standard treatises in anthropology and religion for exact definitions of such groups to be included in the statute. Classification bases used by the United States Census Bureau and the United States Immigration Service might also be helpful.

3. Limiting the statute's application to utterances made in a public place would avoid one of the defects pointed out in *State v. Klapprott*, 127 N.J. L. 395, 403, 22 A.2d 977, 981 (Sup. Ct. 1941), which also resulted in the dismissal of the complaint in *People v. Simcox*, 379 Ill. 347, 40 N.E. 525 (1942).

4. The difficulty of distinguishing between fact and opinion is well-known to the courts in the administration of the rules of evidence. In the context of the proposed statute, similar difficulties can be foreseen. Very probably, general statements in support of reputation, of which reasonably adequate evidentiary data are available, will be characterized as statements of fact. Where such evidentiary data is lacking, the general statement will probably be considered one of opinion. Where the statement refers to specific acts or events, it would undoubtedly be termed fact.

C. Any person who has violated subsection A of this section shall be ordered to retract, in a manner deemed appropriate by the court, the false and defamatory statement which he uttered, and may be ordered (1) to refrain from repeating the false and defamatory statement which he uttered or its substantial equivalent, and (2) to post a bond in a reasonable amount and for a reasonable period of time conditioned upon his not violating this section; provided that after a person has had three judgments rendered against him under this section, an order to post such a bond shall be mandatory. No money damages shall be awarded a plaintiff in an action brought under this section.

D. An action commenced under this section may be discontinued only with the court's permission.

E. If an action under this section is commenced by a plaintiff or plaintiffs authorized by paragraph (1) subsection B of this section, the defendant may move to dismiss the action on the ground that the plaintiff or plaintiffs are not representative of the defamed group, but such motion may be made only before answering. If the court finds for the defendant on the motion, the court, before dismissing such action, shall afford the plaintiff or plaintiffs a reasonable period in which to join as party plaintiffs additional members of the group. A dismissal of an action upon such a motion shall not be deemed or stated by the defendant to have been upon the merits. Such a statement is a defamatory statement.

F. Actions brought under this section must be commenced within one year after the occurrence of the defamatory conduct complained of.

G. An action under this section may be brought in any court of general jurisdiction in this State.

H. Upon motion of the defendant in an action commenced by a plaintiff or plaintiffs authorized under paragraphs (1) and (2) of subsection B of this section, an undertaking shall be provided by such plaintiff or plaintiffs in the amount of \$300 conditioned upon the action's being carried forward and upon the payment of costs should the action be unsuccessful.⁵

I. Any judgment on the merits rendered in an action authorized by this section shall constitute a defense in any subsequent suit brought under this section based on the same utterance.

Section IV. Breach of Peace Prohibited

A. It shall be unlawful for any person to utter, in a public place, concerning a racial, religious or national group

(1) any threat of violence,

5. Patterned after Cal. Gen. Law Act 4317 § 1 (Deering, 1944).

- (2) any offensive, abusive, insulting or derogatory words except when used in the course of and as part of an exposition primarily directed to the advocacy of ideas on matters of public concern, or
- (3) any false and defamatory statement of fact.

B. Any person violating this section shall, upon the first conviction thereof, be fined not less than \$25 nor more than \$250, or imprisoned for not more than 3 months, or both and upon the second or subsequent conviction, be fined not less than \$50 nor more than \$1,000 or imprisoned for not more than 6 months, or both. In addition to such punishment the Court may order the defendant to post a bond in a reasonable amount and for a reasonable period of time conditioned upon his not violating this section. An order to post such a bond shall be mandatory upon the third conviction for violating this section.

Section V. Burden of Proof

Wherever in an action under section 3 [or in a prosecution under paragraph (3), subsection A of section 4]⁶ the plaintiff [or prosecution] has shown that the utterance is defamatory, the burden shall be upon the defendant to come forward with evidence of its truth until, but only until, a *prima facie* case of its truth has been established.

Section VI. Separability of Provisions

If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

6. In light of the obvious impossibility of the prosecution's or plaintiff's proving a defamatory statement false as to all, or substantially all, members of a defamed group, the requirement that the defendant come forward with evidence of truth is reasonable and necessary both in civil and criminal actions brought under the proposed statute. Where a large group is defamed in general terms, it seems clear that proof adduced by the defendants that the statement is true of an insignificant number of that group would not be a sufficient defense.

APPENDIX XI

Letter by Thomas David Jones on Subject of Sambo

April 15, 1980

Dear Proprietors,¹

The classic children's story, *The Story of Little Black Sambo*, is an account of the mischances of life suffered by a little Black child named Sambo. His mother was named Black Mumbo; Sambo's father was known as Black Jumbo. One day Sambo was given a red coat, a green umbrella, a pair of purple shoes, and a pair of blue trousers by his parents. After putting on all the wonderful clothing received by him from Black Mumbo and Black Jumbo, Sambo took a stroll in the jungle where he met four tigers who purloined Sambo's clothing "sous peine de mort" – under the penalty of death. Poor little Black Sambo had lost all his new clothing and could only cry.

Suddenly, Sambo heard the four tigers arguing in a vainglorious attempt to determine which of them was "the grandest." During the process of the feud, the tigers became so angry that they removed all the clothes taken from Sambo and began to fight each other. Catching each other by the tail, the tigers circled a tree in a delirious rage. Sambo then quickly retrieved his clothes. The tigers were so distraught that they ran faster and faster around the tree. Finally, the tigers melted into butter. Black Jumbo, on his way home from work, saw the butter and decided to take it to Black Mumbo who used the tiger butter to make delicious pancakes for the family's supper.

Thus, Helen Bannerman in her famous children's book pictorially and verbally portrayed the exploits of a cowardly "little black boy" with thick lips, a wide mouth, and kinky hair.

The introduction of the tale reveals that the story is the creation of

an English lady in India, where black children abound and tigers are everyday affairs, who had two little girls. To amuse these little girls she used now and then to invent stories.

The following statement was found in the cover of the book which the

1. Footnotes deleted. Letter was written to the proprietors of "Going My Way," a disco in Madison, Wisconsin.

writer borrowed from Lesley College:

The story of Little Black Sambo was and is an entertaining story for small children, but the development of circumstances concerning the Sambo tradition has been unfortunate. No matter how entertaining a book is, one group of children should never be entertained at the expense of another group's feelings. Whether or not members of every cultural group are within ear-shot, they should all remain within the teacher's or storytellers's mental horizon. A child's self-esteem fluctuates and responds to attitudes in society. However, books such as this have become classics of a sort and do have value for adults in tracing the historical development of children's literature.

The librarians at Lesley College are not alone in their view. The book has been condemned as racially offensive by eminent educators throughout the country because of the use of the racially derogatory epithet Sambo. Hence, Yuill writes:

[T]he major concern of those who protested against the name "Little Black Sambo" was "Sambo" itself and what it had to represent to Black people in the United States. There was nothing innocent and appealing in its connotations, which were as repulsive as derogatory terms for other groups.

What then is the significance of the name "Sambo" when scrutinized in its socio-historical context? Historian Stanley Elkins opines: "The name 'Sambo' has come to be synonymous as a racial stereotype." It is descriptive of the most "popular and pernicious stereotype of the Black slave."

Sambo, the typical plantation slave, was docile but irresponsible, loyal but lazy, humble but chronically given to lying and stealing; his behavior was full of infantile silliness and his talk inflated with childish exaggeration.

Though scholars differ as to the origin of this stereotype, they accept and recognize the existence of this demeaning racial stereotype. This writer's alleged denotations of the word "Sambo" comport with the meaning of the term as it is used in the English language. The Random House Dictionary of the English Language (Unabridged Edition) (1966) defines "Sambo" as: "disparaging and offensive. Negro (emphasis in original)." The Webster's Third New International Dictionary of the English Language (Unabridged) (1964) is *en rapport* with the Random House:

Sambo/Negro, mulatto, . . . Kongo nzambu monkey/
1. Zambo 2. often cap. Negro usu. used disparagingly.

Per chance you are somewhat nonplussed about the purpose of the foregoing dissertation on the Sambo tradition. On Saturday night, 12 April 1980, I entered your disco on Main Street. After having paid the admission and coat check fees, I presented my coat to an individual in the coat check room. This individual of the Caucasian race took the coat and at the same time responded: "Okay, little black Sambo. . . ." I was at once insulted and angered by this racially offensive statement; but I decided to ignore it. I do not know the name of the male who made the statement. However, he is an individual who seems to have a witticism for every occasion. Even if the statement was made in jest, such utterances should not be brooked - especially in establishments of public accommodation.

The phrase "little black Sambo" as used in reference to me, Thomas David Jones, is a racial epithet; it is indeed racially pejorative in the eyes of most Blacks and many Whites. The use of the name "Sambo" by the restaurant chain is presently being challenged in courts throughout the United States. The federal Constitution, the decisional law of the United States Supreme Court, and the Constitution of Wisconsin categorically proscribe acts of racial discrimination in places of public accommodation. It might also be mentioned that this was not the first time I have heard a racial slur in your establishment. I am certain that you as decent and reasonable beings do not condone racially condescending behavior on the part of your employees. It is therefore hoped that you will take the appropriate action in censuring individuals who commit these onerous offenses.

The American society has displayed a commitment to the creation of a society where racial parity before the law is the order of the day. This national policy is frustrated when those who perpetrate racial injustice in any manner or form are allowed to foster and protect the lingering geist of the American Dilemma. Unfortunately, the conduct of your employee might well constitute an obstruction in the road of equality. The language used by him could have resulted in a resort to violence by an offended victim. Moreover, it is true that racial slurs of this character go far beyond the ambit of first amendment protection.

Consequently, the gravity of your employee's offense should not be underestimated. His ostensible insensitivity to the human sensibilities of Blacks is a valid source of legal, moral and social consternation. I will assume that this individual was ignorant of the meaning of his act; "the ignorant should be pitied not punished." Or perhaps education is a better solution? Accordingly, as an educative measure, I have been moved by the dictates of right reason to formally register this complaint with you. I have gone to great lengths in sketching a verbal picture of the "Sambo" tradition to demonstrate that my reaction is not purely emotional - founded upon mere whim, caprice or triviality. I hope that you will give this matter your

immediate attention. I have enjoyed frequenting your establishment, and sincerely hope that I will not be dissuaded from doing so in the future.

Thank you for your cooperation.

Respectfully,

Thomas David Jones, Esq.

(A.B., J.D., LL.M., S.J.D.

Candidate, Hastie Teaching Fellow - University of Wisconsin
School of Law)

TDJ:th

APPENDIX XII

Public Order Act of 1936, §§ 5-10

5. Prohibition of offensive conduct conducive to breaches of peace

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.

6. Omitted.

7. Enforcement

(1) Any person who commits an offence under section two of this Act shall be liable on summary conviction to imprisonment for a term not exceeding six months or to fine not exceeding one hundred pounds, or to both such imprisonment and fine, or, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine.

(2) Any person guilty of [any offence under this Act other than an offence under section 5] shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding fifty pounds, or to both such imprisonment and fine.

(3) A constable may without warrant arrest any person reasonably suspected by him to be committing an offence under section one, four or five of this Act.

8. (Applies to Scotland)

9. Interpretation, etc.

(1) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say:

"Meeting" means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters.

"Private premises" means premises to which the public have [sic] access (whether on payment or otherwise) only by permission of the owner, occupier, or lessee of the premises;

"Public meeting" includes 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;

"Public place" means 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;

"Public procession" means a procession in a public place;

"Recognized corps" means a rifle club, miniature rifle club or cadet corps approved by a Secretary of State under the Firearms Acts, 1920 to 1936, for the purpose of those Acts.

(2) The powers conferred by this Act on the Attorney-General may, in the event of a vacancy in the office or in the event of the Attorney-General being unable to act owing to illness or absence, be exercised by the Solicitor General.

(3) Any order made under this Act by the council of any borough or urban district or by a chief officer of police may be revoked or varied by a subsequent order made in like manner.

(4) The power conferred by this Act on any chief officer of police may, in the event of a vacancy in the office or in the event of the chief officer of police being unable to act owing to illness or absence, be exercised by the person duly authorized in accordance with directions given by a Secretary of State to exercise those powers on behalf of the chief officer of police.

10. Short title and extent

- (1) This Act may be cited as the Public Order Act, 1936.
- (2) This Act shall not extend to Northern Ireland.

APPENDIX XIII

The Public Order Act of 1963, Ch. 52, §§ 1-3

An Act to increase the penalties for offences under section 5 of the Public Order Act 1936 and section I of the Public Meeting Act 1908 [31st July 1963]

Northern Ireland. This act does not apply; *see .2(2), post.*

1. Increased penalties for certain offences

(1) A person guilty of an offence under section 5 of the Public Order Act 1936 (offensive words and behavior in public places or at public meetings conducive to breach of the peace) or under section 1(1) of the Public Meeting Act 1908 (disorderly conduct designed to break up public meetings) shall be liable

- (a) On summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding 100 pounds, or both;
- (b) On conviction on indictment, to imprisonment for a term not exceeding twelve months or to a fine not exceeding 500 pounds, or to both.

2. (Amends the Public Order Act 1936, s. 7(2), p. 330 *ante*, and repeals in part the Public Meeting Act 1908, s.1 (1), p. 239, *ante*).

3. This section does not apply to offences committed before the passing of this Act.

APPENDIX XIV

Theatres Act of 1968, Ch. 54, §§ 5-7

35 Halsbury's Statutes of England 310-311 (3rd ed. 1971).

5. Incitement to racial hatred by means of public performances of a play

(1) Subject to section 7 of this Act, if there is given a public performance of a play involving the use of threatening, abusive, or insulting words, any person who (whether for gain or not) presented or directed that performance shall be guilty of an offence under this section if -

- (a) he did so with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins; and
- (b) that performance, taken as a whole, is likely to stir up hatred against that section on grounds of colour, race or ethnic or national origins.

- (2) A person guilty of an offence under this section shall be liable -
 - (a) on summary conviction, to a fine not exceeding £ 200 or to imprisonment for a term not exceeding six months, or both;
 - (b) on conviction on indictment, to a fine not exceeding £ 1,000 or to imprisonment for a term not exceeding two years, or both.

6. Provocation of breach of peace by means of public performance of a play

(1) Subject to section 7 of this Act, if there is given a public performance of a play involving the use of threatening, abusive or insulting words or behavior, any person who (whether for gain or not) presented or directed that performance shall be guilty of an offence under this section if

- (a) he did so with intent to provoke a breach of the peace; or
- (b) the performance, taken as a whole, was likely to occasion a breach of the peace.

- (2) A person guilty of an offence under this section shall be liable -
 - (a) on summary conviction, to a fine not exceeding £ 100 or to imprisonment for a term not exceeding three months or both;
 - (b) on conviction on indictment, to a fine not exceeding £ 500 or to imprisonment for a term not exceeding twelve months, or both.

7. Exceptions for performances given in certain circumstances

(1) Nothing in sections 2 to 4 of this Act shall apply in relation to a performance of a play on a domestic occasion in a private dwelling.

(2) Nothing in sections 2 to 6 of this Act shall apply in relation to a performance of a play given solely or primarily for one or more of the following purposes, that is to say –

(a) rehearsal; or

(b) to enable –

- (i) a record or cinematograph film to be made from or by means of the performance; or
- (ii) the performance to be broadcast; or
- (iii) the performance to be transmitted to subscribers to a diffusion service;

but, in any proceedings for an offence under section 2, 5 or 6 of this Act alleged to have been committed in respect of an offence at common law alleged to have been committed in England and Wales by the publication of defamatory matter in the course of a performance of a play, if it is proved the performance was attended by persons other than persons directly connected with the giving of the performance or the doing in relation thereto of any of the things mentioned in paragraph (b) above, the performance shall be taken not to have been given solely or primarily for one or more of the said purposes unless the contrary is shown.

(3) In this section –

"broadcast" means broadcast by wireless telegraphy (within the meaning of the Wireless Telegraph Act 1949), whether by way of sound broadcasting or television;

"cinematograph film" means any print, negative, tape or other article on which a performance of a play or any part of such a performance is recorded for the purposes of visual reproduction;

"record" means any record or similar contrivance for reproducing sound, including the sound-track of a cinematograph film; and section 48(3) of the Copyright Act 1956 (which explains the meaning of references in that Act to the transmission of a work or other subject-matter to subscribers to a diffusion service) shall apply for the purposes of this section as it applies for the purposes of that Act.

APPENDIX XV

Appendix To Opinion Of Mr. Justice Black in *Beauharnais v. Illinois*

People's Exhibit 3

PRESERVE and PROTECT WHITE NEIGHBORHOODS!
FROM THE CONSTANT AND CONTINUOUS INVASION, HARASS-
MENT AND ENCROACHMENT BY THE NEGROES
(WE WANT TWO MILLION SIGNATURES OF
WHITE MEN AND WOMEN)

PETITION

To The Honorable Martin H. Kennelly
and City Council of the City of Chicago

WHEREAS, the white population of the City of Chicago, particularly on the South Side of said city, are seething, nervous and agitated because of the constant and continuous invasion, harassment and encroachment by the Negroes upon them, their property and neighborhoods and -

WHEREAS, there have been disastrous incidents within the past year, all of which are fraught with grave consequences and great danger to the Peace and Security of the people, and

WHEREAS, there is great danger to the Government from communism which is rife among the Negroes, and

WHEREAS, we are not against the Negro; we are for the white people and the white people are entitled to protection:

We, the undersigned white citizens of the City of Chicago and the State of Illinois, hereby petition the Honorable Martin H. Kennelly, Mayor of the City of Chicago and the Alderman of the City of Chicago, to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro - through the exercise of the Police Power; of the Office of the Mayor of the City of Chicago, and the City Council.

WANTED

ONE MILLION SELF RESPECTING WHITE PEOPLE IN CHICAGO TO UNITE UNDER THE BANNER OF THE WHITE CIRCLE LEAGUE OF AMERICA to oppose the National Campaign now on and supported by TRUMAN'S INFAMOUS CIVIL RIGHTS PROGRAM and many Pro Negro Organizations to amalgamate the black and white races with the object of mongrelizing the white race!

THE WHITE CIRCLE LEAGUE OF AMERICA is the only articulate white voice in America being raised in protest against [N]egro aggressions and infiltrations into all white neighborhoods. The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and the need to prevent the white race from becoming mongrelized by the [N]egro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the [N]egro, SURELY WILL.

The Negro has many national organizations working to push him into the midst of the white people on many fronts. The white race does not have a single organization to work on a NATIONAL SCALE to make its wishes articulate and to assert its natural rights to self-preservation. THE WHITE CIRCLE LEAGUE OF AMERICA proposes to do the job.

WE ARE NOT AGAINST THE NEGRO! WE ARE FOR THE WHITE PEOPLE!

We must awaken and protect our white families and neighborhoods before it is too late. Let us work unceasingly to conserve the white man's dignity and rights in America.

THE WHITE LEAGUE OF AMERICA, INC. - Joseph Beauharnais,
Pres.-FR 2-8533, Suite 808, 82 W. Washington St.

**VOLUNTEERS NEEDED TO GET 25 SIGNATURES ON PETITION!
COME TO HEADQUARTERS!**

I wish to be enrolled as a member in THE WHITE CIRCLE LEAGUE OF AMERICA and I will do my best to secure ten (10) or more members.

THE FIRST LOYALTY OF EVERY WHITE PERSON IS TO HIS RACE. ALL THE COMBINED PRO NEGRO FORCES HAVE HURLED THEIR ULTIMATUM INTO THE FACES OF THE WHITE PEOPLE. WE ACCEPT THEIR CHALLENGE.

THEY CANNOT WIN!

IT WILL BE EASIER TO REVERSE THE CURRENT OF THE ATLANTIC OCEAN THAN TO DEGRADE THE WHITE RACE AND ITS NATURAL LAWS BY FORCED MONGRELIZATION.

THE HOUR HAS STRUCK FOR ALL NORMAL WHITE PEOPLE TO STAND UP AND FIGHT FOR OUR RIGHTS TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS.

JOSEPH BEAUCHARNAIS.

APPLICATION FOR 1950 MEMBERSHIP
THE WHITE CIRCLE LEAGUE OF AMERICA, INC.
(Not For Profit)

Mail To -

THE WHITE CIRCLE
LEAGUE OF AMERICA, INC.
82 W. Washington St.
Chicago 2, Illinois
Tel. FR 2-8533

DATE: 19

- | | |
|--|---|
| THE WHITE CIRCLE LEAGUE OF AMERICA, INC. | <input type="checkbox"/> Membership \$1.00 |
| | <input type="checkbox"/> Subscription to Monthly Magazine (WHITE CIRCLE NEWS) per year \$3.00 |
| | <input type="checkbox"/> Voluntary Contribution \$ |
| | <input type="checkbox"/> I can volunteer some of my time to aid the WHITE CIRCLE in getting under way |

(SIGNED) (Print Name)

NAME :
ADDRESS:
PHONE:
CITY:
STATE:

(Note: Tear Off and Mail to Headquarters with Your Remittance)

APPENDIX XVI

Bradley R. Smith

THE HOLOCAUST CONTROVERSY (1992)

The Case for Open Debate

THE CONTEMPORARY ISSUE

No subject enrages campus Thought Police more than Holocaust Revisionism. We debate every other great historical issue as a matter of course, but influential pressure groups with private agendas have made the Holocaust story an exception. Elitist dogma manipulated by special interest groups corrupts everything in academia. Students should be encouraged to investigate the Holocaust story the same way they are encouraged to investigate every other historical event. This isn't a radical point of view. The premises for it were worked out centuries ago during a little something called the Enlightenment.

THE HISTORICAL ISSUE

Revisionists agree with establishment historians that the German National Socialist State singled out the Jewish people for special and cruel treatment. In addition to viewing Jews in the framework of traditional anti-Semitism, the Nazis also saw them as being an influential force behind international communism. During the Second World War, Jews were considered to be enemies of the State and a potential danger to the war effort, much like the Japanese were viewed in this country. Consequently, Jews were stripped of their rights, forced to live in ghettos, conscripted for labor, deprived of their property, deported from the countries of their birth and otherwise mistreated. Many tragically perished in the maelstrom.

Revisionists part company with establishment historians in that Revisionists deny that the German State had a policy to exterminate the Jewish people (or anyone else) by putting them to death in gas chambers or by killing them through abuse or neglect. Revisionists also maintain that the figure of 6 million Jewish deaths is an irresponsible exaggeration, and that no execution gas chambers existed in any camp in Europe which was under German control. Fumigation gas chambers did exist to delouse clothing and equipment to prevent disease at the camps. It is very likely that it was from this life-saving procedure that the myth of extermination gas chambers emerged.

Revisionists generally hold that the Allied governments decided to carry their wartime "black propaganda" of German monstrosity over into the postwar period. This was done for essentially three reasons. First, they felt it necessary to continue to justify the great sacrifices that were made in fighting two world wars. A second reason was that they wanted to divert attention from and to justify their own particularly brutal crimes against humanity which, apart from Soviet atrocities, involved massive incendiary bombings of the civilian populations of German and Japanese cities. The third and perhaps most important reason was that they needed justification for the postwar arrangements which, among other things, involved the annexation of large parts of Germany into Poland. These territories were not disputed borderlands, but included huge parts of Germany proper. The millions of Germans living in these regions were to be dispossessed of their property and brutally expelled from their homelands. Many hundreds of thousands were to perish in the process. A similar fate was to befall the Sudeten Germans.

During the war, and in the postwar era as well, Zionist organizations joined with the Allied Governments and became deeply involved in creating and promulgating anti-German hate propaganda. There is little doubt that their purpose was to drum up world sympathy and political and financial support for Jewish causes, especially for the formation of the State of Israel. Today, while the political benefits of the Holocaust story have largely dissipated for the others, the story still plays an important role in the ambitions of Zionist and other organizations in the Jewish community. It is the leaders of these political and propaganda organizations who continue to work to sustain the orthodox Holocaust legend and the myth of German monstrosity during the Second World War.

Those who would claim that these interpretations are anti-Jewish are reading into them something which simply is not there. Revisionists do not claim that Jewish leaders or organizations did anything in the war and postwar era which the Allied Governments themselves did not do.

For those who believe that the Nuremberg Trials revealed the truth about German war crimes, it is a bracing shock to discover that the then Chief Justice of the U.S. Supreme Court, Harlan Fiske Stone, described the Nuremberg court as "a high-grade lynching party for the Germans."

The Photographs

We've all seen "The Photographs." Endlessly. Newsreel photos taken by U.S. and British photographers at the liberation of the German camps, and especially the awful scenes at Dachau, Buchenwald and Bergen-Belsen. These films are typically presented in a way in which it is either stated or implied that the scenes resulted from deliberate policies on the part of the

Germans. The photographs are real. The uses to which they have been put are base.

There was no German policy at any of those camps to deliberately kill the internees. In the last months of the war, while Soviet armies were advancing on Germany from the east, the British and U.S. air arms were destroying every major city in Germany with saturation bombing. Transportation, the food distribution system and medical and sanitation services all broke down. That was the purpose of the Allied bombing, which has been described as the most barbarous form of warfare in Europe since the Mongol invasions.

Millions of refugees fleeing the Soviet armies were pouring into Germany. The camps still under German control [were] overwhelmed with internees from the east. By early 1945, the inmate population was swept by malnutrition and by epidemics of typhus, typhoid, dysentery and chronic diarrhea. Even the mortuary systems broke down. When the press entered the camps with British and U.S. soldiers, they found the results of all that. They took "The Photographs."

Still, at camps such as Buchenwald, Dachau and Bergen-Belsen *tens of thousands* of relatively healthy internees were liberated. They were there in the camps when "The Photographs" were taken. There are newsreels of these internees walking through the camp streets laughing and talking. Others picture exuberant internees throwing their caps in the air and cheering their liberators. It is only natural to ask why you haven't seen those particular films and photos while you've seen the others scores and even hundreds of times.

Documents

Spokesmen for the Holocaust Lobby like to assure us that there are "tons" of captured German documents which prove the Jewish genocide. When challenged on this, however, they can produce only a handful of documents, the authenticity or interpretation of which is always highly questionable. If pressed for reliable documentation, the Lobby will then reverse itself and claim that the Germans destroyed all the relevant documents to hide their evil deeds, or it will make the absurd claim that the Germans used a simplistic code language or whispered verbal orders for mass murder into each others' ears.

With regard to the alleged genocide of the European Jews, all available documentation indicates that there was no order for it, no plan, no budget, no weapon (that is, no so-called execution gas chamber) and no victim (that is, not a single autopsied body at any camp has been shown to have been gassed).

Eyewitness Testimony

As documentary "proofs" for the mass-murder of the European Jews fall by the wayside, Holocaust historians depend increasingly on "eyewitness" testimonies to support their theories. Many of these testimonies are ludicrously unreliable. History is filled with stories of masses of people claiming to be eyewitnesses to everything from witchcraft to flying saucers.

During and after the war there were "eyewitnesses" to mass murder in gas chambers at Buchenwald, Bergen-Belsen, Dachau and other camps in Germany proper. Today, virtually all recognized scholars dismiss this eyewitness testimony as false, and agree that there were no extermination gas chambers in any camp in Germany proper.

Establishment historians, however, still claim that extermination gas chambers existed at Auschwitz and at other camps in Poland. The eyewitness testimony and the evidence for this claim is, in reality, qualitatively no different than the false testimony and evidence for the alleged gas chambers at the camps in Germany proper.

During war crimes trials many "eyewitnesses" testified that Germans made soap out of human fat and lamp shades from human skin. Allied prosecutors even produced evidence to support these charges. For decades, highly respected scholars at the most prestigious universities in the Western world sanctioned these stories, leading us to believe that they were "irrefutable truths." But with time, many such stories have become untenable, and in May 1990 Yehuda Bauer, director of Holocaust studies at Hebrew University in Tel Aviv, admitted that: "The Nazis never made soap from Jews . . ." (quoted in the Jerusalem Post, International Edition, 6 May 1990, p. 6). This is only one recent example where an "irrefutable" Holocaust "truth" has been exposed as a monstrous lie.

With regard to confessions by Germans at war crimes trials, it is now well-documented that many were obtained through coercion, intimidation and even physical torture.

Auschwitz

British historian David Irving, perhaps the most widely read historian writing in English, has called the Auschwitz death-camp story a "sinking ship" and states that there were "no gas chambers at Auschwitz . . .".

The Auschwitz State Museum has recently revised its half-century-old claim that 4 million humans were murdered there. The Museum now says maybe it was 1 million. But what proof does the Museum provide to document the 1 million figure? None! The communist propagandists who manage the museum have put on display piles of hair, boots and eyeglasses, etc. While such displays are effective propaganda devices, they are

worthless as historical documentation for "gassings" or a program of "extermination."

Meanwhile, Revisionists want to know where those 3 million souls have been the last 45 years. Were they part of the fabled Six Million?

Those who promote the Holocaust story complain that "the whole world" was indifferent to the genocide which allegedly was occurring in German occupied Europe. When asked why this was the case the promoters usually respond by saying that it was due to some great moral flaw in the nature of Western man. At other times they make the absurd claim that people did not realize the enormity of what was happening. It is true that the world responded with indifference. How else should people have responded to that which they did not believe, and which for them was a non-event?

It is certain that if there had been "killing factories" in Poland murdering millions of civilians, then the Red Cross, the Pope, humanitarian agencies, the Allied governments, neutral governments, and prominent figures such as Roosevelt, Truman, Churchill, Eisenhower and many others would have known about it and would have often and unambiguously mentioned it, and condemned it. They didn't! The promoters admit that only a tiny group of individuals believed the story at the time – many of whom were connected with Jewish propaganda agencies. The rise of the Holocaust story reads more like the success story of a PR campaign than anything else.

Winston Churchill wrote the six volumes of his monumental work, *The Second World War*, without mentioning a program of mass-murder and genocide. Maybe it slipped his mind. Dwight D. Eisenhower, in his memoir *Crusade in Europe*, also failed to mention gas chambers. Was the weapon used to murder millions of Jews unworthy of a passing reference? Was our future president being insensitive to Jews?

POLITICAL CORRECTNESS and HOLOCAUST REVISIONISM

Many people, when they first hear Holocaust Revisionist arguments, find themselves bewildered. The arguments appear to make sense, but "How is it possible?" The whole world believes the Holocaust story. It's just not plausible that so great a conspiracy to suppress the truth could have functioned for half a century.

To understand how it could very well have happened, one needs only to reflect on the intellectual and political orthodoxies of medieval Europe, or those of Nazi Germany or the Communist-bloc countries. In all of these societies the great majority of scholars were caught up in the existing political culture. Committed to a prevailing ideology and its interpretation of reality, these scholars and intellectuals felt it was their right, and even their duty, to protect every aspect of that ideology. They did so by

oppressing the evil dissidents who expressed "offensive" or "dangerous" ideas. In every one of those societies, scholars became Thought Police.

In our own society, in the debate over the question of political correctness, there are those who deliberately attempt to trivialize the issues. They claim that there is no real problem with freedom of speech on our campuses, and that all that is involved with PC are a few rules which would defend minorities from those who would hurt their feelings. There is, of course, a deeper and more serious aspect to the problem. On American campuses today there is a wide range of ideas and viewpoints that are forbidden to be discussed openly. Even obvious facts and realities, when they are politically unacceptable, are denied and suppressed. One can learn much about the psychology and methodology of Thought Police by watching how they react when just one of their taboos is broken and Holocaust Revisionism is given a public forum.

First they express outrage that such offensive and dangerous ideas were allowed to be expressed publicly. They avoid answering or debating these ideas, claiming that to do so would give them a forum and legitimacy. Then they make vicious personal attacks against the Revisionist heretic, calling him dirty political names such as "anti-Semite," "racist" or "neo-Nazi," and they even suggest that he is a potential mass murderer. They publicly accuse the Revisionist of lying, but they don't allow the heretic to hear the specific charge against him or to face his accusers so that he can answer the slander.

The Holocausters accuse Revisionists of being hate filled people who are promoting a doctrine of hatred. But Revisionism is a scholarly process, not a doctrine or an ideology. If the Holocaust promoters really want to expose hatred, they should take a second look at their own doctrines, and a long look at themselves in the mirror.

Anyone on campus who invites a Revisionist to speak is himself attacked as being insensitive. When a Revisionist does speak on campus he is oftentimes shouted down and threatened. Campus libraries and bookstores face intimidation when they consider handling Holocaust revisionist materials. All this goes on while the majority of faculty and university administrators sit dumbly by, allowing political activists to determine what can be said and what can be read on their campus.

Next, the Thought Police set out to destroy the transgressor professionally and financially by "getting" him at his job or concocting a lawsuit against him. The courts are sometimes used to attack Revisionism. The Holocausters often deceptively claim that Revisionist scholarship has been proven false during a trial. The fact is that Revisionist arguments have never been evaluated or judged by the courts.

Finally, the Thought Police try to "straighten out" that segment of academia or the media that allowed the Revisionists a forum in the first place.

It can be an instructive intellectual exercise to identify taboo subjects, other than Holocaust Revisionism, which would evoke comparable responses from Thought Police on campuses.

Recently, some administrators in academia have held that university administrations should take actions to rid the campus of ideas which are disruptive to the university. This is a very dangerous position for administrators to take. It is an open invitation to tyranny. It means that any militant group with "troops at the ready" can rid the campus of ideas it opposes and then impose its own orthodoxy. The cowardly administrator finds it much easier and safer to rid the campus of controversial ideas than to face down a group of screaming and snarling militants. But it is the duty of university administrators to insure that the university remains a free marketplace of ideas. When ideas cause disruptions, it is the disrupters who must be subdued, not the ideas.

CONCLUSION

The influence of Holocaust Revisionism is growing steadily both here and abroad. In the United States, Revisionism was launched in earnest in 1977 with the publication of the book *The Hoax of the Twentieth Century* by Arthur R. Butz. Professor Butz teaches electrical engineering and computer sciences at Northwestern University in Evanston, Illinois.

Those who take up the Revisionist cause represent a wide spectrum of political and philosophical positions. They are certainly not the scoundrels, liars and demons the Holocaust Lobby tries to make them out to be. The fact is, there are no demons in the real world. People are at their worst when they begin to see their opponents as an embodiment of evil, and then begin to demonize them. Such people are preparing to do something simply awful to their opponents. Their logic is that you can do anything you want to a demon.

That logic will not succeed.

* * *

For those wishing to verify the truthfulness of statements made in this paper, you may want to contact experts who are prominent authorities on these matters. It's important to ask specific, concrete questions on matters of fact and receive direct and unambiguous answers. Organizations such as the Simon Wiesenthal Center, Hillel and the Anti-Defamation League are not scholarly institutions, but are primarily political and propaganda organizations.

Committee for Open Debate on the Holocaust (CODOH) was founded in 1987. The purpose of CODOH is to provide access to Revisionist scholarship to all who have an interest in it. CODOH co-directors Bradley R. Smith and Dr. Robert Countess and other CODOH speakers have presented the revisionist view of the Holocaust controversy to many campus meetings and other public groups.

Bradley R. Smith is an author and playwright and has been a spokesman for the Institute for Historical Review. Smith has spoken on The Holocaust Controversy to millions across the country during some 300 interviews on radio, television and with print journalists.

Dr. Robert Countess studied New Testament Greek at Bob Jones University (Ph.D., 1966), and Liberal Studies at Georgetown University (M.L.S., 1978). He has taught at the graduate level at Tennessee State University and at other colleges. Dr. Countess has published several books, some 60 articles and has lectured widely. He is a member of the ACLU and is a regional vice-president of the Arab-American Anti-Discrimination Committee.

CODOH is a member of the American Civil Liberties Union, the National Association for College Activities (NACA), and the Free Press Association. CODOH has no affiliation whatever with any political organization or group.

CODOH speakers are available to address student organizations and other appropriate groups about the Holocaust controversy. For information contact:

Bradley R. Smith
Committee for Open Debate on the Holocaust
Tel/Fax: (209) 733 2653
PO Box 3267, Visalia, CA 93278

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APPENDIX XVII

The Laws of the Federation of Nigeria, 1990, Vol. V, Chapter 7

Criminal Code Act

Chapter 7 – Sedition and the Importation of Seditious or Undesirable Publications

50.(1) In this Chapter, unless the context otherwise requires, "import" includes –

- (a) to bring into Nigeria; and
- (b) to bring within the inland waters of Nigeria whether or not the publication is brought ashore, and whether or not there is an intention to bring the same ashore;

"periodical publication" includes every publication issued periodically or in parts or numbers at intervals whether regular or irregular;

"publication" includes all written or printed matter and everything, whether of a nature similar to written or printed matter or not, containing any visible representation, or by its form, shape, or in any manner capable of suggesting words or ideas, and every copy and reproduction of any publication;

"seditious publication" means a publication having a seditious intention; "seditious words" means words having a seditious intention.

(2) A "seditious intention" is an intention –

- (a) to bring into hatred or contempt or excite disaffection against the person of the President or of the Governor of a State or the Government of the Federation; or
- (b) to excite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established; or
- (c) to raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or
- (d) to promote feelings of ill-will and hostility between different classes of the population of Nigeria.

But an act, speech or publication is not seditious by reason only that it intends –

- (i) to show that the President or the Governor of a State has been misled or mistaken in any measure in the Federation or a State, as the case may be; or
- (ii) to point out errors or defects in the Government or constitution of Nigeria, or of any State thereof, as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or
- (iii) to persuade the citizens or other inhabitants of Nigeria to attempt to procure by lawful means the alteration of any matter in Nigeria as by law established; or
- (iv) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Nigeria.

(3) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall 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.

51.(1) Any person who –

- (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
- (b) utters any seditious words;
- (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
- (d) imports any seditious publication, unless he has no reason to believe that it is seditious;

shall be guilty of an offence and liable on conviction, for a first offence to imprisonment for two years or to a fine of two hundred naira or to both such imprisonment and fine, and for a subsequent offence to imprisonment for three years and any seditious publication shall be forfeited to the State.

(2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and liable on conviction, for a first offence to imprisonment for one year or to a fine of one hundred naira or to both such imprisonment and fine, and for a subsequent offence

to imprisonment for two years; and such publication shall be forfeited to the State.

52.(1) No prosecution for an offence under section 51 shall be begun except within six months after the offence is committed.

(2) A person shall not be prosecuted for an offence under section 51 without the written consent of the Attorney-General of the Federation or of the State concerned.

(3) No person shall be convicted of an offence under paragraph (b) of subsection (1) of section 51 on the uncorroborated testimony of one witness.

53. Any person who -

- (1) administers, or is present at and consents to the administering of, any oath, or engagement in the nature of an oath, purporting to bind the person who takes it to commit any offence punishable with death; or
- (2) takes any such oath or engagement, not being compelled to do so; or
- (3) attempts to induce any person to take any such oath or engagement;

is guilty of a felony, and is liable to imprisonment for life.

54. Any person who -

- (1) administers, or is present at and consents to the administering of, any oath, or engagement in the nature of an oath, purporting to bind the person who takes it to act in any of the ways following, that is to say -
 - (a) to engage in mutinous or seditious enterprise;
 - (b) to commit any offence not punishable with death, other than a simple offence;
 - (c) to disturb the public peace;
 - (d) to be of any association, society, or confederacy, formed for the purpose of doing any such acts as aforesaid;
 - (e) not to inform or give evidence against any associate, confederate, or other person;
 - (f) not to reveal or discover any unlawful association, society, or confederacy, or any illegal act done or to be done, or any illegal oath or engagement that may have been administered or tendered to or taken by himself or any other person, or the import of any such oath or engagement; or
- (2) takes any such oath or engagement, not being compelled to do so; or
- (3) attempts to induce any person to take any such oath or engagement;

is guilty of a felony, and is liable to imprisonment for seven years.

55. A person who takes any such oath or engagement as is mentioned in the two last preceding sections shall not set up as a defence that he was compelled to do so, unless within fourteen days after taking, or, if he is prevented by actual force or sickness, within fourteen days after the termination of such prevention, he declares by information on oath before some peace officer, or, if he is on actual service in the armed forces of Nigeria, or in the police forces, either by such information or by information to his commanding officer, the whole of what he knows concerning the matter, including the person or persons by whom and in whose presence, and the place where, and the time when, the oath or engagement was administered or taken.

56. A person who has been tried, and convicted or acquitted, on a charge of any of the offences hereinbefore in this Chapter defined, shall not be afterwards prosecuted upon the same facts for the offence of treason, or for the offence of failing, when he knows that any person intends to commit treason, to give information thereof with all reasonable despatch [sic] to a peace officer, or use other reasonable endeavors to prevent the commission of the offence.

57.(1) Any person who –

- (a) without the permission of the President or of the Governor of the State concerned trains or drills any other person to the use of arms or the practice of military exercises, movements, or evolutions; or
- (b) is present at any meeting or assembly of persons, held without the permission of the President or of the Governor of the State concerned, for the purpose of training or drilling any other persons to the use of arms or the practice of military exercises, movements, or evolutions;

is guilty of a felony, and is liable to imprisonment for seven years.

(2) Any person who at any meeting or assembly held without the permission of the President or of the Governor of the State concerned is trained or drilled to the use of arms or the practice of military exercises, movements, or evolutions or who is present at any such meeting or assembly for the purpose of being so trained or drilled, is guilty of a misdemeanour and is liable to imprisonment for two years.

The offender may be arrested without warrant.

(3) A prosecution for any of the offences defined in this section shall be begun within six months after the offence is committed.

58.(1) If the appropriate Minister is of opinion that the importation of any publication or series of publications would be contrary to the public interest he may by order prohibit the importation of such publication or series of publications.

(2) If the appropriate Minister is of opinion that it would be in the public interest to do so he may by order prohibit the importation of all publications published by or on behalf of any organisation or association of persons specified in the order.

(3) An order made under the provisions of subsection (1) of this section shall, unless a contrary intention is expressed therein, have effect –

- (a) with respect to all subsequent issues of such publication; and
- (b) not only with respect to any publication under the name specified in relation thereto in the order, but also with respect to any publication published under any other name if the publishing thereof is in any respect in continuation of, or in substitution for, the publishing of the publication named in the order.

(4) An order made under the provisions of subsection (2) of this section shall, unless a contrary intention is expressed therein, have effect not only with respect to all publications published by or on behalf of the organisation or association of persons named therein before the date of the order but also with respect to all publications so published on or after such date.

(5) An order made under the provisions of subsection (1) or subsection (2) of this section shall, unless a contrary intention is expressed therein, apply to any translation into any language whatsoever of the publication specified in the order.

(6) Any person who imports, publishes, sells, offers for sale, distributes or reproduces any publication, the importation of which has been prohibited under subsection (1) or subsection (2), or any extract therefrom, shall be guilty of an offence and liable, on conviction, for a first offence to imprisonment and fine and for a subsequent offence to imprisonment for three years; and such publication or extract therefrom shall be forfeited to the State.

(7) Any person who without lawful excuse has in his possession any publication the importation of which has been prohibited under subsection (1) or subsection (2), or any extract therefrom, shall be guilty of an offence and liable, on conviction, for a first offence to imprisonment for one year or to a fine of one hundred naira or to both such imprisonment and fine, and for a subsequent offence to imprisonment for two years; and such publication or extract therefrom shall be forfeited to the State.

(8)(a) Any person to whom any publication the importation of which has been prohibited under subsection (1) or subsection (2) or any extract therefrom, is sent without his knowledge or privity or in response to a

request made before the prohibition of the importation of such publication came into effect, or who has such a publication or extract therefrom in his possession at the time when the prohibition of its importation comes into effect, shall forthwith if or as soon as the nature of its contents has become known to him, or in the case of a publication or extract therefrom coming into the possession of such person before an order prohibiting its importation has been made, forthwith upon the coming into effect of an order prohibiting the importation of such publication deliver such publication or extract therefrom to the officer in charge of the nearest police station or to the nearest administrative officer, and in default thereof shall be guilty of an offence and liable, on conviction, to imprisonment for one year or to a fine of one hundred naira or to both such imprisonment and fine; and such publication or extract therefrom shall be forfeited to the State.

(b) A person who complies with the provisions of paragraph (a) of this subsection or is convicted of an offence under that subsection shall not be liable to be convicted for having imported or having in his possession the same publication or extract therefrom.

(9)(a) Any of the following officers, that is to say -

- (i) any officer of the Nigerian Postal Services Department not below the rank of assistant surveyor;
- (ii) any officer of the Customs and Excise Department not below the rank of collector;
- (iii) any police officer not below the rank of assistant superintendent of police;
- (iv) any other official authorised in that behalf by the President,

may detain, open and examine any package or article which he suspects to contain any publication or extract therefrom which it is an offence under the provisions of subsection (6) to import, publish, sell, offer for sale, distribute, reproduce or possess, and during such examination may detain any person importing, distributing, or posting such package or article or in whose possession such package or article is found.

(b) If any such publication or extract therefrom is found in such package or article, the whole package or article may be impounded and retained by the officer and the person importing, distributing, or posting it, or in whose possession it is found, may forthwith be arrested and proceeded against for the commission of an offence under subsection (6) or subsection (8) as the case may be.

59.(1) Any person who publishes or reproduces any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that such statement,

rumour or report is false shall be guilty of a misdemeanour and liable, on conviction, to imprisonment for three years.

(2) It shall be no defence to a charge under the last preceding subsection that he did not know or did not have reason to believe that the statement, rumour or report was false unless he proves that, prior to publication, he took reasonable measures to verify the accuracy of such statement, rumour or report.

60. Any person who, without such justification or excuse as would be sufficient in the case of the defamation of a private person, publishes anything intended to be read, or any sign or visible representation, tending to expose to hatred or contempt in the estimation of the people of any foreign State any person exercising sovereign authority over that State is guilty of a misdemeanour, and is liable to imprisonment for two years.

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Human Rights: Group Defamation, Freedom of Expression and the Law of Nations

by Thomas David Jones

In his book *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*, Thomas David Jones presents a discussion and analysis of the laws governing group defamation and speech inciteful of racial hatred in Great Britain, Canada, India, Nigeria, and the United States. Although there exists no federal group defamation law in the United States, a few state legislatures have promulgated group defamation statutes, while a cause of action for group defamation has been recognized as justiciable in the decision law of other states. Mr Jones describes his theory as constitutional minimalism because he does not advocate the legal proscription of all derogatory hate speech. Only the sub-category of hate speech that fulfills the standard elements of proof found in common law defamation claim will be prosecuted criminally by the federal government. The author further asserts that a carefully and narrowly drafted federal criminal group defamation statute will pass constitutional muster without creating a conflict with First Amendment rights.

Mr Thomas David Jones has published several scholarly works on human rights. He received a BA in Political Science from Case Western Reserve University, a JD degree from the Howard University Law Center where he graduated first in his class, and an LLM degree from the Harvard Law School where he was a Visiting Fellow in the Human Rights Program during the 1996-1997 academic year. He is presently a Visiting Scholar at the Georgetown University Law Center in Washington, DC.

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