

RACIAL AND ETHNIC GROUP DEFAMATION: A SPEECH-FRIENDLY PROPOSAL

By Michael J. Polelle

I. Introduction

Freedom of speech and freedom from racial and ethnic discrimination are two fundamental values in our society based as it is both on democratic governance and a population of increasingly diverse racial and ethnic groups. With the symbolic shift of the United States from a melting pot to a mosaic the necessity of respect for all racial and ethnic groups takes on increasing importance. Social harmony depends on peaceful co-existence and respect while at the same time the spirit of open discussion and public debate remains an essential part of our constitutional heritage.

The thesis of this article is that the law should provide a remedy for racial and ethnic defamation because it is paradoxical for the law to allow a remedy for individual defamation but no effective remedy for group defamation. The suggested remedy, which takes the detailed form of model legislation in the appendix to this article, is that of a declaratory judgment which avoids the constitutional and policy problems of either monetary damages, injunctive relief or criminal penalties and which recognizes that the Federal Communications Commission with its laissez-faire ethic is increasingly unwilling to regulate the electronic media. The need for some remedy arises because classic counterspeech as a remedy is largely illusory in an age of multi-billion-dollar media megacorporations which are on the verge of becoming the media landlords of the marketplace of ideas.

II. AIDA v. Time Warner Entertainment Company

The genesis of this article is the author's experience as co-counsel for AIDA (American Italian Defense Association) in a civil action filed in the Chancery Division of the Circuit Court of Cook County, Illinois against Time Warner Entertainment Company, L.P., a subsidiary of AOL Time Warner Entertainment Company, for violation of Article I Section 20 of the Illinois Constitution ("Individual Dignity") by its distribution through Home Box Office (HBO) of one or more episodes of "The Sopranos," a cable television miniseries. AIDA filed its lawsuit solely for a declaratory judgment, without any ancillary request for damages or injunctive relief, based on a jury verdict that "The Sopranos" in whole or part violated Article I Section 20 of the Bill of Rights of the Illinois Constitution which provides: "To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned."¹

An earlier prototype of this constitutional provision was an Illinois criminal libel statute which punished publication or portrayals of "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion." The United States Supreme Court in *Beauharnais v. Illinois*² upheld the constitutionality of this statute in affirming a \$200 fine against Beauharnais for distributing leaflets which attributed criminal proclivities to African-Americans. Imputations of criminality are one of the most common categories of defamation.³ Not only are imputations of a criminal offense defamatory, but because of their serious threat to reputation they have historically been considered slander per se and require no proof of special damage.⁴

The AIDA complaint alleged that the Individual Dignity Clause of the Illinois Bill of Rights was violated in that one or more episodes of “The Sopranos” portrayed the criminal and psychopathically depraved character of the Mafia underworld as the dominant motif of Italian and Italian-American culture.⁵ The contention basically was that the Italian-American characters in “The Sopranos” were almost unanimously portrayed as lacking in civility, respectability, or virtue or as condoning Mafia attitudes and misdeeds even when they were not directly portrayed as Mafia members. More specifically the complaint alleged that a particular episode of “The Sopranos” represented either expressly or by implication that criminality is “genetical” (*sic*) or in the blood of Italian-Americans.⁶ The filing of the lawsuit generated a controversial public debate about the merits of either “The Sopranos” or the lawsuit and involved the author in a number of media appearances. It must be emphasized that without the lawsuit the author and representatives of AIDA, as this article will show, would have had no effective access to the marketplace of ideas in daring to criticize a show as well-advertised as “The Sopranos” and a media enterprise as dominant as Time Warner Entertainment Company.

AIDA, a not-for-profit corporation, had a membership just over 100 persons at the time the lawsuit was filed. It was organized for charitable purposes and specifically for the education of the public regarding the social contributions of Italian immigrants and “the opposition by lawful means of all forms of negative stereotyping and defamation of Italian Americans.”⁷ The defendant, Time Warner Entertainment Company, on the other hand, with alleged consolidated assets of \$24.8 billion as of December 31, 1999 was cited as a subsidiary of AOL Time Warner, the world’s largest provider of Internet services and the world’s leading media and entertainment company with over \$103 billion in

consolidated assets. Time Warner Entertainment Company's cable network business was claimed to involve chiefly its ownership and management of the Home Box Office Division (HBO), the nation's most widely distributed pay television services, which together with its sister service, Cinemax, accounted for about 35.7 million subscribers as of December 31, 1999.⁸

HBO is known for the exhibition of pay television original movies and especially for the television series known as "The Sopranos." There is no doubt that "The Sopranos" has been both popular and widely acclaimed by a number of media critics. But the passing popularity of racial or ethnic depiction says little or nothing about the stereotypical or defamatory nature of the depiction. "The Birth of a Nation," for example, originally entitled "The Klansman," was acclaimed a cinematic masterpiece and its creator, W.D. Griffith, was seen as a visionary film artist when the film was released in 1915, even though the film depicted African-Americans as villains and the Ku Klux Klan as the South's savior. Despite street protests and opposition by the NAACP about the racist and stereotypical nature of this popular movie, the Directors Guild of American continued to bestow the "D.W. Griffith Award" upon 28 directors for distinguished motion picture direction from 1953 until 1999 when the award was finally retired because of its unsavory connection to racial stereotyping.⁹

Without expressly deciding any First Amendment issue, the Chancery Division of the Circuit Court of Cook Count granted the motion of Time Warner Entertainment Company to dismiss the complaint with prejudice both on the basis that AIDA lacked standing, even though the company never raised the issue, and on the more fundamental basis that the legislative history of Article I Section 20 of the Illinois Bill of Rights was

“purely hortatory” and merely a “constitutional sermon” without any legal meaning or effect.¹⁰ The case is now on appeal before the Illinois Appellate Court.

III. The Group Harm of Racial and Ethnic Stereotyping

International law recognizes that racial or ethnic group defamation or communications inciteful of racial hatred is not protected.¹¹ Article 4 of the Racial Discrimination Convention considers group defamation a categorical exception to the right of free expression.¹² A number of major nations have found laws restricting racial hatred and group defamation compatible with their democratic principles of government. Since the 1970's France has extensively applied laws prohibiting racial incitement, group libel, and racial injury both civilly and criminally.¹³ By use of a criminal code amended in 1960 Germany makes it a criminal offense to insult a group of people or to maliciously cause the group to be vilified or defamed.¹⁴ Even nations which share the common law tradition with the United States, such as Great Britain, Canada, India, and Nigeria, prohibit defamatory speech affecting racial groups. Probably because these regulations are found in the penal laws of each of the four common law nations each nation typically requires a mens rea of one sort or another.¹⁵ In *Regina v. Keegstra*¹⁶ the Canadian Supreme Court upheld the validity of a statute which punished the defendant for disseminating hate propaganda. The defendant, Keegstra, had called Jews “money-loving” and “child killers” and had claimed that Jews fabricated the Holocaust

These nations recognize from bitter historical experience not fully shared by the United States that defamatory racial and ethnic stereotypes harm people and can even lead to their destruction. Until recently, one might have assumed the only harm to the

stereotyped group came from the diminished respect that other groups in society had for the stereotyped group. If a stereotype, such as that Gypsies are liars and thieves, can permeate a society and result in diminished cultural, political, and economic opportunities for the stereotyped group who are effectively discriminated against by the force of stereotypical discourse in the society.

More recently, however, psychology professors Claude M. Steele and Joseph Brown have found that students taking academic tests perform more poorly if confronted with cultural stereotypes prior to the test. This negative result occurred even when the tested group was not a racial or ethnic minority chronically targeted by social stereotypes.¹⁷ Referred to as “stereotype threat” by Steele, this concept encompasses the extra pressure members of a stereotyped group feel in test situations with the result that the group members, despite their individual abilities, tend to fulfill the stereotyped expectations of how their racial, ethnic, or gender group is expected to do in such tests. To be affected by the stereotype the stereotyped person need not believe the stereotype nor even take it personally.¹⁸ It may well be that the more insidious harm caused by stereotypes is not the diminished respect of others who are taken in by the stereotype but rather the internalized acceptance of the stereotype by the stereotyped person.

It is a cultural commonplace that Nazi Germany used the defamatory art of racial and ethnic stereotyping to make acceptable to public opinion the imprisonment and death of Jews. Generations of stereotyping had existed to prepare the groundwork even before the Nazis arrived on the scene. Going back to the Middle Ages the blood libel was spread that gentile blood was necessary for the baking of Passover matzo. In the eighteenth and nineteenth centuries anti-Semitic political groups in Europe used this defamatory myth to

justify their prejudice against Jews.¹⁹ “The History of the Protocols of the Elders of Zion,” was a tract, probably concocted by the Czarist secret police, to circulate a fabricated account of a Jewish plot to take over the world. Since 1920 more than 100 editions, reprints, and new versions of this ethnic attack have appeared in the English-speaking world. The Nazis admired Henry Ford for his endorsement of the views in this pamphlet even though Ford later recanted under pressure of a libel lawsuit.²⁰

Building on this history of group defamation the Nazis used the new technology of film to dehumanize Jews in the cinemas of Germany. The best example of this genre of group vilification is a classic propaganda film cleverly crafted with a documentary style in which Jews were depicted as a plague spreading across the world. The film drew an explicit parallel between rats and Jews, as the camera panned into a pack of swarming rats.²¹ Adolf Hitler provided the psychological insight for the effectiveness of group libel based on racial or ethnic origin by the concept of the “big lie.” In *Mein Kampf* he accepted as true the principle that a “big lie” is more effective than a petty lie because the masses of a nation are more taken in by big lies because they find it difficult to believe that anyone would be impudent enough to fabricate on such a massive scale. Even when facts are marshaled to counter the big lie, an aura of truth still lingers around the lie.²²

No reasonable person would suggest that the racial and ethnic malevolence shown by the Nazi media toward the Jews in the pursuit of political objectives exists in the United States. Even though an evil ideology, as in Nazi Germany, does not motivate American media interests, the American electronic media nonetheless exert a powerful influence on the perception of Americans. One advertising study of the psyche of the American public found that television holds “an absolutely central place in people’s

lives” with 68 % of the national sample finding more pleasure and satisfaction in watching TV than in being with friends, helping others, taking vacations, or pursuing hobbies.²³ The study found television to be the prime method of unwinding in America, surpassing relaxation, vacations, music, or reading.²⁴ The millions spent by advertisers attest to the belief that the media affect personal attitudes toward products and services. It is unlikely the media have no similar affect on racial and ethnic perceptions.

If violence, lust, and anti-social characters attract audiences, the temptation will exist to find the stock “villain” who symbolizes these qualities and whose villainy will attract audiences and help attract audiences. In the film “Enemy of the State,” the hero actor, Will Smith, psychologically links the disgusting Mafia characters with Italian-Americans by expressly referring to those “Guido motherfuckers”²⁵ This hardcore ethnic slur is addressed not to the criminal element, as would be appropriate, but to the Italian-American community with the almost subliminal assumption the two concepts are substantially interchangeable. The film industry would most likely find it inexpedient to allow a comparable slur if African-Americans, Hispanics, or perhaps any other racial or ethnic group were targeted.²⁶ Since the celluloid image of the savage Native American or menacing African-American is no longer politically correct, it is understandable why a less politically cohesive group, such as Italian-Americans, should be nominated for the role of media villain. The forbidden attributes of violence, lust, and criminality projected onto the Mafia with a capital M becomes mythologized like the Noble Savage or Childlike Negro and becomes the archetype of the Criminal Italian. That fewer than 1% of Italian-Americans are involved in organized crimes, according to the FBI’s own

statistics, is irrelevant to a media-massaged public perception because racial and ethnic generalization have a far more powerful hold on public imagination than any fact.²⁷

Like other ethnic groups from southern and eastern Europe Italian-Americans suffered discrimination because of a difference in culture and language. The Supreme Court specifically noted in *University of California Regents v. Bakke* that immigrants from southern, middle, and eastern Europe, including Italian-Americans, continued to be shunned in the upper levels of corporate America because of their ethnic origins.²⁸ One court has taken judicial notice that Italian-Americans specifically have suffered a history of “stereotyping, invidious ethnic humor and discrimination,”²⁹ This sometimes lead to bigoted violence against Italian-Americans, such as the lynching of 11 Italians in New Orleans, which remains the largest single lynching in United States history.³⁰ World War II was a traumatic experience for Italian-Americans .

In the Wartime Violation of Italian-American Civil Liberties Act,³¹ Congress found that more than 600,000 Italian immigrants in the United States were branded enemy aliens and not only carried identification cards but also endured travel restrictions and seizure of their personal property. More than 10,000 on the East Coast were forced to leave their homes and prohibited from entering coastal zones solely because of their ethnicity. Although not on the same massive scale as Japanese-Americans, thousands of Italians were arrested and hundreds interned in military camps like Japanese-Americans. Since the full extent of the civil rights violations are unknown, Congress has ordered the Attorney General to conduct a comprehensive review of the treatment of Italian-Americans by the United States government.³² Italian-Americans like other Caucasians, can be considered a “race” for purposes of a civil rights action under 42 U.S.C. § 1981.³³

Because of the widespread belief that the City University of New York (CUNY) discriminated against Italian-Americans the chancellor of the university included Italian-Americans as an affirmative action group. After the discovery of evidence that the university had discriminated against Italian-Americans both on an individual and class basis, a judge later issued a preliminary injunction which resulted in a settlement.³⁴

One Italian-American academic finds a Faustian bargain made by earlier Italian-American immigrants who in exchange for being let alone withdrew from public discourse, unlike African-Americans and Jewish-Americans, and developed a sheltered sense of identity that required a low profile, a shedding of cultural roots, and social passivity regarding racial and ethnic discrimination in the larger society.³⁵ The poverty of southern Italians who came in waves of immigration and the shame of Fascist Italy at war with the United States triggered an urgency to become more American than the Pilgrims and a highly developed defense mechanism of denial in the face of public stereotyping. The author recalls a respected Italian-American judge with a name that ended in vowel who observed during a public lecture how hard it was to get elected with such a name which was not like the “American” name of an Irish-American candidate. The irony of this social conditioning is that the names of another immigrant ethnic group in a multicultural and multiethnic society are assumed to be “American” names while one’s own name is not. The annoyance of some when Italian Americans do resist defamatory stereotyping is indeed partly the result of this deceptive passivity which many took for acquiescence. Much, as other Americans were surprised to find out that African-Americans were not really happy behind the blackface of another generation, it may

come as a jolt that more Italian-Americans are no longer content to accept their ethnic profiling as gangsters.

In resisting what it felt to be the latest in a barrage of defamatory stereotyping of Italian-Americans exemplified by “The Sopranos,” AIDA and its members discovered that the media have a powerful role to play in the way racial and ethnic minorities view themselves and are viewed by others. Although the results highlighted may be those affecting Italian-Americans, this is not to deny the stereotyping that occurs with other racial and ethnic groups. The National Italian Foundation commissioned a survey by Zogby International to determine the impact of televised ethnic stereotyping on teenagers. When asked to identify the role a person of a particular ethnic or racial background would most likely play in a movie or on television 34% said Italian-Americans would be cast as crime bosses, the highest percentage of all ethnic stereotypes. The more television these teenagers watched the more likely they were to cast Italian-Americans in the role of crime boss.³⁶ The study concluded: (1) teens learn the worst parts of their heritage from entertainment industry stereotyping (2) the perception which teens have of other racial, ethnic, or religious groups is shaped by entertainment industry stereotypes.³⁷ A respected consortium of medical professionals has concluded that with the average American child watching television as much as 28 hours a week well over 1,000 studies point overwhelmingly to a causal link between violence and aggressive behavior in some children³⁸. A more recent study found a noteworthy association between the time spent watching television and the likelihood of subsequent aggressive acts toward others, even when other possible causes were taken into account.³⁹ It is unlikely that television would affect only the propensity for violence in children but not the propensity for stereotyping.

Media stereotyping of Italian-Americans and other racial and ethnic groups affects not only the next generation but the current one as well. The Response Analysis Corporation studied the public image of Italian-Americans on behalf of the Commission for Social Justice of the Order of Sons of Italy in America. Among the negative characteristics, the most glaring was that 74% of the sample perceived Italian-Americans as involved with organized crime, far more than attributed criminal tendencies to other racial and ethnic groups.⁴⁰ This s high percentage suggests a persistent and emphatic reinforcement of this negative stereotype by films, television, depictions, and other mass media treatments. Concerned that the media, and specifically shows like “The Sopranos,” were unfairly damaging the collective reputation of 20 million Italian-Americans, the fifth largest ethnic group in the United States, Congresswoman Marge Roukema has sponsored a concurrent resolution of Congress calling on the entertainment industry “to stop the negative and unfair stereotyping of Italian-Americans” and to undertake “an initiative to present Italian-Americans in a more balanced and positive manner.”⁴¹

Research by the Italic Studies Institute supports this suspected connection between the false public stereotype of generalized Italian-American criminality and the role of the film industry in perpetuating that myth. The Image Research Project of the Italic Studies Institute surveyed films produced in the United States from 1928-1999. After four years of research the project found a consistently negative portrayal of Italian-Americans and Italian culture in 74% of the films produced in that period. Images of Italian-Americans as violent criminals predominated in 41% of the films surveyed followed closely by 33% of the films in which those of Italian heritage are depicted as boors, buffoons, bigots, or socially undesirable. Ethnic images that were multifaceted

rather than stereotyped or positive or heroic constituted only 26% of the films.⁴² The influence of “The Godfather” (1972) was dramatic. Of all Italian mob films only a quarter were produced before 1972 and three quarters after “The Godfather” opened the floodgates of copy-cat Mafia films.⁴³ The ability of the movie industry to fictionally shape public perceptions of an ethnic group is indicated by a finding of the Institute that from 1928 through 1999 only 14% of Mafia movies were based on real characters or events. The remaining 86% were based on fictionalized characters or events.⁴⁴

In *Only Words* Professor MacKinnon attacks the distinction between a recovery for individual defamation but not for group defamation by pointing out that the distinction is in conflict with our equal-protection jurisprudence. When a discriminatory act is involved courts readily perceive that an invidiously discriminatory attack on a racial or ethnic group affects everyone within the group. In such cases courts readily accept, unlike the group- defamation scenario, that the individual is only injured precisely because of his or her affiliation with a racial or ethnic group.⁴⁵ To separate individual harm in such cases from group is the equivalent of considering crimes as isolated facts and not as part of a group conspiracy. An individual’s social autonomy or subordination is inextricably linked to the mass stereotype of the individual’s racial or ethnic group.

IV. Counterspeech in a Mass Media Marketplace of Ideas

One of the most persistent rationales for freedom of speech and press has been the marketplace-of-ideas metaphor invoked by Justice Oliver Wendell Holmes in the dissenting opinion of *Abrams v. United States*: “the best test of truth is the power of the

thought to get itself accepted in the competition of the market.”⁴⁶ AIDA’s attempt to negotiate some kind of accommodation with Time Warner Entertainment Company bordered on the ludicrous;. An organization with under 200 members versus a corporation with consolidated assets of \$24.8 billion and part of the AOL Time Warner, Inc., a conglomerate worth \$103 billion in consolidated assets, has no bargaining power to insist on any disclaimers or clarifications related to the symbolic representation of Italian-Americans in “The Sopranos.” The opportunity of AIDA and citizen groups like AIDA to enrich public debate by offering counterspeech in the mass media marketplace is virtually nonexistent. The Framers could not have foreseen the technological developments and economic barriers to market entry that would ensure not only that freedom of the press belonged to those who could afford a modern printing press but that freedom of speech in the electronic media market belonged to those who could buy their own cable or television system.

In his now classic work, *The System of Freedom of Expression*, Professor Emerson observed even then that the most significant threat to freedom of expression was “the overpowering monopoly over the means of communication acquired by the mass media.”⁴⁷ Already in 1967 he noted that out of 1,547 cities with daily newspapers, only 64 cities had a competing daily newspaper and three huge networks controlled what was seen on television.⁴⁸ More than traditional newspapers and television are now at stake. Six companies now control American mass media: General Electric, Viacom, Disney, Bertelsmann, Time Warner, and Rupert Murdoch’s News Corp. Even before AOL’s merger with Time Warner the six had more annual media revenues than the next twenty media firms combined. Now with the historic merger of the world’s largest Internet

provider AOL and Time Warner the resulting AOL Time Warner Inc. has become a corporation worth \$350 billion.⁴⁹

Time Warner Entertainment Company, L.P., the defendant in the AIDA lawsuit, persuaded the United States Court of Appeals to hasten the media consolidation of cable systems and television by striking down as arbitrary and capricious the FCC cable/broadcast cross-ownership rule which had prohibited a cable television system from carrying the signal of any television broadcast station if the cable system owned a broadcast station in the same local market.⁵⁰ Not only has the stage been set for the consolidation of cable and traditional broadcasting, which many originally saw as competitors in the marketplace of ideas, but a further stage has been set for the future consolidation of television networks themselves. On April 19, 2001 the Federal Communications Commission amended its dual network rule to permit any one of the four major television networks ---ABC, CBS, Fox and NBC---to own and control any emerging network, such as UPN and WB.⁵¹ A parallel drive toward consolidation is also occurring at the local station level. Effective November 16, 1999 the Federal Communications Commission revised its duopoly rule to permit any entity to own, or operate or control two television stations licensed in the same designated market area under certain conditions.⁵²

The FCC safeguards of the fairness doctrine, the political editorial rules, and the personal attack rule were designed to provide that diversity of viewpoint had some minimal respect in the monopolistic setting of the mass media. The Supreme Court in *Red Lion Broadcasting Company v. Federal Communications Commission*⁵³ upheld the right of the Federal Communications Commission to adopt by regulation the fairness

doctrine and its derivative political editorial rules and personal attack rule based on the language and legislative history of the Federal Communications Act which had required since 1927 that broadcasters operate in the “public interest.” The fairness doctrine generally required broadcasters to devote a reasonable amount of time to the discussion of controversial issues and to do so by providing fair coverage of opposing positions. Told by a federal court of appeals⁵⁴ that the fairness doctrine was not codified in the 1959 amendments to the Federal Communications Act, the Federal Communications Commission, in response to court order, re-evaluated its fairness doctrine regulation and concluded that the doctrine contravened the First Amendment and disserved the public interest.⁵⁵

The derivative political editorial rules and political attack rules thereafter lived on borrowed time in light of the FCC’s about-face regarding the fairness doctrine in favor of a deregulated electronic media industry at a time when the industry was becoming increasingly centralized. The political editorial rules provided that when a broadcaster endorsed or opposed a legally qualified political candidate the broadcaster had to notify the other candidates and give them a reasonable chance to respond. The personal attack rule, of particular importance to those countering racial and group defamation, provided that when in the course of a broadcasting a controversial issue an attack was made “upon the honesty, character, integrity or like personal qualities of an identified person or group” the broadcaster, no later than a week after the attack, had to notify the person or group attacked, provide a transcript of the attack or accurate summary if not available, and offer a reasonable opportunity to respond over the broadcaster’s facility.⁵⁶

The personal attack rule provided extremely limited protection to groups alleging attacks based on race or ethnicity. Infrequent and insubstantial racial slurs were not enough to deny a television broadcast license.⁵⁷ Even where the Polish American Congress properly processed a substantial complaint both on fairness and personal-attack grounds through the FCC procedures, a federal appellate court found the personal attack rule unavailable to the Polish-American community despite a series of “Polish jokes” told on the Dick Cavett show sponsored by the ABC network. The appellate court concluded that since no controversial issue of public importance existed neither the fairness doctrine nor its corollary, the personal attack rule, could be invoked.⁵⁸ A federal appellate court dismantled the personal attack rule by granting a mandamus against the FCC to compel a repeal of both the personal attack rule and the political editorial rules. Instead of deciding the merits of the rules or whether they even violated the First Amendment the federal appellate court negated the rules for the simple reason that the Federal Communications Commission had delayed its own decision for over two decades.⁵⁹ Without such rules the Supreme Court has made it clear that no one has a constitutional or statutory right of access to a broadcast station and that the electronic media are not common carriers required to broadcast contrary views.⁶⁰

V. Civil Actions for Group Defamation

Those who attempt to use the civil law of defamation to recover damages for group defamation based on race or ethnicity encounter an enormous doctrinal barrier. Generally, defamation of a large group is almost never actionable either by the group itself or by any individual within the group.⁶¹ What constitutes a “large” group as distinct

from a “small” one is uncertain.⁶² The larger the group, the less likely the individual plaintiff can establish that he or she was identified personally by the group defamation. One writer has flatly stated that a member of a political party, a race of people, or other large group which has been defamed will not be able to establish the individual identification necessary for personal defamation.⁶³ This leads to a legal paradox: the more expansive the defamation, the more likely the defamer will totally escape any civil liability. The perverse lesson to the would-be defamer is to defame largely.⁶⁴ Possibly to mitigate the relativistic notions of “large” and “small,” the Restatement (Second) of Torts has arguably created more confusion by attempting to keep the concepts of “large” and “small” groups without making the distinction absolutely determinative. The Restatement (Second) of Torts § 564 A provides:

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it, but only if,
 (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
 (b) the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member.⁶⁵

In commentary the Restatement (Second) acknowledges the impossibility of setting a definite limit between a “large” and “small” class or group but then notes that cases permitting a plaintiff’s recovery involved “numbers of 25 or fewer.”⁶⁶ The result is a type of self-fulfilling prophecy since most authorities now rather rigidly agree the group must consist of twenty-five or fewer members in order for a member of the group to sue.⁶⁷ Sometimes the group is considered small but it is not clear exactly how many members were in the small group.⁶⁸ Other times courts have tweaked the “small” group rule a bit by extending it to 30 members.⁶⁹ At the other extreme a defamation action

brought by American cattlemen, some one million in number, against Oprah Winfrey, television superstar, exceeded the unusually generous 740-person line of demarcation between a “large” and “small” group set by the Texas courts.⁷⁰ The only hope for a member of an obviously large group, such as one consisting of 955 persons, is to claim that he or she is a member of an identifiable small subset within the large group.⁷¹ In the classic case of *Neiman-Marcus v. Lait* a group of 382 saleswomen was too large to permit any one of the saleswomen to sue even though the entire class may have been defamed.⁷²

At bottom, however, the decisive factor under the Restatement (Second) is not the size of the group but whether the group defamation reasonably implicates the individual plaintiff.. Although usually the very nature of a small group means that a defamatory statement as to all or fewer can reasonably apply to the plaintiff member, such as a defamatory statement that all but one person out of a group of 25 are thieves, this is not inevitable. For example, a defamatory statement that one out of a group of 25 has stolen an automobile may not sufficiently defame any particular member of the group under the Restatement (Second) test.⁷³ Conversely, it is possible for even a member of a so-called large group to sue in an unusual situation. The statement, “All lawyers are shysters,” may be defamatory as to an individual lawyer, though the group is clearly large, if the words are published when the lawyer is the only lawyer present and the context indicates the speaker is making a personal reference to the lawyer.⁷⁴

This is small solace to a member of an ethnic or racial group, which by any definition is large, because one has to imagine a situation in which an Albanian, for instance, is the only known Albanian present and a speaker looks at the Albanian from a

few feet away and says, “All Albanians are horse thieves.” Even then any recovery by the individual plaintiff Albanian is only for personal damage and does nothing to protect the group reputation of all Albanians. And, if the “all” is reduced to “some” or “most” even this rarefied hypothetical of linkage between the group and individual plaintiff most likely fails.⁷⁵ Some courts have understandably acted as though no basic distinction exists between an unnamed individual plaintiff defamed by group defamation and an unnamed individual plaintiff defamed personally and not a member of any defamed group. The problem is the same: do the circumstances reasonably identify the plaintiff as a target of the defamation? ⁷⁶ The repeated use of the word “reasonably” in both subsections (a) and (b) of Restatement (Second) § 564 A is a verbal clue that “smallness” or “largeness” of a group are but matters of circumstantial degree rather than the stuff from which black-letter rules are made.⁷⁷

A minority view called the “intensity of suspicion” test de-emphasizes the size of the group at least marginally more than the majority view of the Restatement (Second)⁷⁸ This minority view emphasizes the extent to which a group defamation focuses on each individual member of the group whether large or small. Oklahoma pioneered the “intensity of suspicion” test in *Fawcett Publications Inc. v. Morris*⁷⁹ In *Fawcett* a well-known plaintiff was an alternate fullback on the University of Oklahoma football team which consisted of sixty or seventy persons. Without reference to any individual team member the defendant published an article claiming that the entire Oklahoma football team took illegal drugs. Since the plaintiff was “well known and identified” with the group the court found no reason why the size of the group alone should be conclusive. The Oklahoma Supreme Court later held in another case that the “intensity of suspicion”

test uses group size as only a factor along with other factors, such as the prominence of the group and the prominence of the individual within the group.⁸⁰ Therefore, an alleged defamation of some 19, 686 osteopaths in the United States failed the “intensity of suspicion” test as to a claim brought by one osteopath among many. In adopting this Oklahoma minority test the New York judiciary, while agreeing that group size is not controlling, added further balancing factors, such the definiteness of the group in composition and number and its degree of organization. However, the New York judiciary has acknowledged that group variations are too great for an exclusive list of balancing factors.⁸¹

In reality, the difference between the majority Restatement (Second) test and the minority “intensity of suspicions” test is simply a matter of degree. Neither test makes size controlling but neither excludes size from consideration even though the Restatement (Second) test appears to make the difference between “small” and “large” groups more significant. It has been said the difference is that under the Restatement (Second) test a member of a large group can only sue if there is a “special allusion to a particular member of the group or the circumstances surrounding publication give rise to the inference that there is a particular reference to a specific individual.”⁸² Reference is to the individual plaintiff under the guise of an attack on the group and thus no need exists to ask whether the “intensity of suspicion” focuses on the individual plaintiff. Even though the minority view seems more favorable to plaintiffs, the difference is scant. The only differences are arguably quibbles about how strong the circumstantial evidence must be in a given case to justify a reference to an individual plaintiff and how important group size is as one of those circumstantial factors.

The importance of policy in determining whether group defamation should be allowed is illustrated by *Auvil v. CBS “60 Minutes,”*⁸³ a class action for a product disparagement claim brought on behalf of 4,700 Washington apple growers because of a “60 Minutes” program which implied that red apples across the United States were tainted with a carcinogen. The federal court acknowledged that the group defamation doctrine, possibly applicable to the product disparagement case, was justified by two reasons: (1) dilution (2) lack of plaintiff’s identification. If a class is sufficiently large, no one person in the group suffers personal injury because the injury is diluted. Even though this made sense in a defamation case, the court nonetheless paradoxically concluded that where “pecuniary interests” are at stake in a product disparagement case no dilution exists. Somehow the court saw intangible defamation harm as different from tangible product disparagement harm even though a group of 4,700 is large by any standard. As for the absence of a specific plaintiff’s identification, the theory is that when defamation of an entire large group occurs it cannot be reasonably taken to include each member of the group. Yet, again the Washington court suggested the lack of a specific plaintiff’s identification was more of a problem in a defamation of a large group rather than a trade disparagement involving a large group. The morale seems to be that when courts consider group defamation based on race or ethnicity at least as harmful as a Washington court considers the trade disparagement of red apples the law will of group defamation will change.

Neither the so-called majority Restatement (Second) test nor the “intensity of suspicion” minority test are useful to a plaintiff of a particular racial or ethnic group who sues on the basis of group defamation. The popular Prosser treatise acknowledges

that even though group defamation has been a “fertile and dangerous weapon of attack” on racial, religious, and political minorities, so far a civil remedy for “broadside defamation” does not exist.⁸⁴ A class action brought on behalf of over 600 millions Muslims for defamation to recover damages for the showing of the film “Death of a Princess” was not actionable⁸⁵. Nor was a Nigerian allowed to bring a defamation action against CBS for damages in his own behalf and on behalf of more than 500 Nigerians engaged in international business with the United States even with the benefit of the presumably more liberal “intensity of suspicion” test.⁸⁶ One concern appears to be that allowing racial or ethnic groups to sue would unleash a flood of litigation, even though courts have typically used the knee-jerk fear of a litigation flood toward major advances in tort law which we now take for granted.⁸⁷ Apparently only one federal case has intriguingly suggested in dictum that group defamation might exist in Illinois because of “Polish jokes” in the film “Flashdance” if the defamation could be said with certainty to include every member of the group because a stereotypical Polish-American who is the butt of “Polish jokes” may be said to represent every individual in the ethnic group.⁸⁸

One treatise writer suggests that group defamation is disfavored because “much group abuse is meaningless invective.”⁸⁹ But obviously much non-group defamation is also meaningless invective that does not meet the definition of defamation.⁹⁰ But neither proposition logically excludes the harmful defamation of either a group or an individual where meaningless invective is not involved. The difficulty with a too facile dismissal of racial and ethnic group defamation is not merely that demagogues may induce a population to adopt defamatory views of a disfavored or subordinate group, as the author himself concedes, but t the author’s assumption that the marketplace- of- ideas metaphor

functions in the mass media in the same way as it does in the public square where all citizens have equal access. The usual reasons given for not allowing a civil action for group defamation are questionable at best.

Concern that lawsuits for defamation of racial or ethnic group will open the floodgates of litigation is speculation at best. A North Dakota statute provides that if a defamation is uttered as to “an entire group or class of agricultural producers or products” a cause of action for damages, actual and exemplary, in addition to injunctive relief, arises in favor of each producer in the group and any association representing an agricultural producer, “regardless of the size of the group or class.”⁹¹ No floodgate of litigation has apparently been opened in North Dakota as a result or in any other state with a similar law. Class action procedures remove the fear that a large number of plaintiffs will automatically create insurmountable procedural difficulties⁹²

The law already permits group defamation in a covert fashion. Corporations, partnerships, and even unincorporated associations, as long as they have legal capacity to sue as an entity, may sue for defamation without regard to whether they are large or small in terms of capitalization or number of shareholders.⁹³ The reality is that the legal entity’s officers, employees, and shareholders all benefit if the legal entity prevails in the lawsuit even though they cannot directly sue for defamation to the legal entity.⁹⁴ A not-for-profit corporation of African-Americans which has thousands of members in a state can be defamed and can sue for that defamation but if those same African-Americans remain a mere large group they cannot sue for group defamation either as a group or as members of the group. It is curious, to say the least, that one corporation may sue for defamation to itself, though it has a huge number of employees and shareholders, but a group of

corporations, larger than 25 or thereabout, which have been defamed as a corporate group, would not be allowed to sue because they are too large a group even though they are hypothetically sole or family corporations with only a few shareholders underneath the corporate veil.

The fundamental reason for the inability of a common law defamation lawsuit for monetary compensation of defamation based on race or ethnicity is that the larger the group the more attenuated becomes the chain of causation linking the defamation to specific persons within the group⁹⁵. The problem, however, is not so much that the defamation fails to cause generalized harm to the group or specifically to all persons within the group. The Supreme Court in *Beauharnais* acknowledged that prejudice based on race can affect the social prospects of all members within the group.⁹⁶ The specific problem is rather the institutional inability of the law to parcel out the damages among members of the defamed group in any satisfactory manner. Even if a defamation proximately causes harm to a group the law must still apportion the monetary damages among the plaintiffs according to some rational principle.⁹⁷

This apportionment problem is compounded by the fact that absent proof of special damages, the typical general per-se damages of defamation law are intangible concepts of reputation, honor, standing in the community, humiliation, and emotional suffering that are much harder to put in terms of dollars and cents, let alone apportion among members of the defamed group.⁹⁸ At least an individual apple grower of red apples can show loss of profits or other dollarized losses where a defendant falsely defames all apples growers in the United States by implying they use a carcinogen on the red apples they grow.⁹⁹ But how does one calculate the real but non-economic harm of a

racial or ethnic community, for example, which is unable to elect members of its group to office because of a continuous defamatory barrage directed against the group ?

There is no reason, moreover, to suppose that the monetarily compensable damage to members of a defamed group will be equal. A publication that “the Italian-American members of the Democratic party in State X are Mafia fellow travelers ” could vary from a particular Italian-American of Democratic persuasion in State X who is fired because his employer read the publication and fired the employee in order to protect the company from Mafia fellow travelers to a Democratic Italian-American from State X who has lived abroad for ten years and plans to do so indefinitely. Furthermore, monetary compensation becomes totally unrealistic when a group, like any racial or ethnic group, is somewhat porous and not rigidly defined. Members of a racial or ethnic group may not be full-blooded members of the group or may not consider themselves psychologically members of the group, even if historically murky pedigrees could be ascertained with reasonable certainty. Conversely, individuals who are not members of the racial or ethnic group by blood may consider themselves such by cultural choice. This would inject courts into the daunting task of determining whether a particular individual is properly aligned with a particular race or ethnic group for the purpose of receiving his or her apportioned damage.

If injunctive relief is suggested as an alternative solution to the insoluble problem of apportioning damages among members of the defamed group, the suggestion would arrive stillborn. Injunctive relief is not available to remedy past defamation but only future harm. And even as to intended defamation not yet uttered, the traditional rule of equity, though questioned, has been that equity will almost uniformly reject injunctive

relief against a libel which damages personal reputation¹⁰⁰ Additionally, the judiciary in the United States has resoundingly rejected injunctive relief in defamation cases as a prior restraint on the First Amendment guarantees of free speech and a free press.¹⁰¹ Although some sparse authority suggests an injunction might lie against further repetitions of a defamation once the plaintiff has secured a jury verdict, the author could find no case in which emergency conditions were ever found sufficient to justify injunctive relief against a threatened defamation not yet published.¹⁰²

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

VI. Criminal Defamation Statutes

Criminal defamation statutes avoid the intractable problem of allocating monetary recovery according to the harm caused each member of the group in a civil defamation action. By use of the criminal law society punishes anti-social conduct without the necessity of compensating for harm to the victim. As AIDA discovered in its lawsuit, the Individual Dignity Clause of Article I Section 20 of the Bill of Rights in the Illinois

Constitution is based on a former Illinois criminal statute which made it unlawful to manufacture, publish, exhibit, or distribute in any public place any “lithograph, moving picture, play, drama or sketch” which portrayed “depravity, criminality, unchastity of lack of virtue of a class of citizens, of any race, color, creed, or religion” and which exposed those citizens to “contempt, derision, or obloquy or which is productive of breach of the peace or riots.”¹⁰³

The landmark case of *Beauharnais v. Illinois*¹⁰⁴ upheld the constitutionality of this statute in a 5-4 decision when the statute was used to impose a \$200 criminal fine on Beauharnais, the president of the racist White Circle League, who had passed out bundles of leaflets to League members for distribution at Chicago’s downtown street corners. The leaflets set forth a petition calling on city officials to halt the Negro invasion of white persons and their neighborhoods. The Supreme Court noted a key phrase in the leaflet which asserted that the “rapes, robberies, knives, guns and marijuana of the Negro” would surely unite the white race.¹⁰⁵ No actual violence or bodily injury was charged or proved in relation to the distribution of the pamphlets.

In upholding the conviction, the Supreme Court rejected the argument that this criminal libel statute violated the First Amendment speech and press protections implicit in the Due Process Clause of the Fourteenth Amendment. The specific issues was whether a criminal libel statute could constitutionally be used to protect racial groups. In answering affirmatively, Justice Frankfurter, writing the opinion of the Court, observed that not only was libel a common law crime and punishable in the American colonies but that at the time of the *Beauharnais* decision every American jurisdiction had a criminal libel statute. His opinion also reasoned that even though it was not completely clear to

what degree these statutes extended beyond individual libel to criminal group libel, it would “arrant dogmatism” for the Court to second-guess the Illinois legislature’s policy determination that a persons’ job, educational opportunities, and other social benefits may depend as much on the reputation of the racial group to which the person accidentally belongs than to the person’s own merits. Thus, speech punishable if directed at an individual could logically also be punishable if directed to the racial group with which a person is inextricably involved.¹⁰⁶

The federal appellate court in *Collin v. Smith*¹⁰⁷ upheld the First Amendment right of neo-Nazis to march in Skokie, Illinois, a village with a large Jewish population, including several thousand Holocaust survivors, partly because the appellate court interpreted “the rationale” of *Beauharnais* to mean that the criminal libel statute in that case, which was substantially the same as the Skokie village ordinance, turned for its validity “quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder.” Since the village did not urge the possibility of a violent reaction by the villagers to the neo-Nazi march the group libel ordinance was not strong enough to act as an exception to the First Amendment rights of the neo-Nazis.¹⁰⁸ This interpretation is questionable not only because it ignores aspects of the *Beauharnais* opinion that indicate criminal libel is punishable in itself without the possibility of a violent reaction¹⁰⁹ but because the *Collin* view runs counter to the well-researched case of *State v. Browne* which had shown that though early common law criminal libel cases turned on breach of the peace, that was not true of later criminal libel law development.¹¹⁰ The major support used by *Collin* is the 1925 Illinois Supreme Court opinion of *People v. Spielman*,¹¹¹ cited in *Beauharnais*, wherein the Illinois Supreme Court had actually

interpreted a different Illinois criminal libel statute from the one involved in *Beauharnais*. Furthermore, when the Illinois Supreme Court in *Spielman* noted in passing that “[c]riminal liability for libels rests upon their tendency to provoke breaches of the peace” it cited early common law cases. In any event, the *Spielman* observation was more likely intended as a truism of general public policy than as an essential statutory or constitutional requirement that would inject an element of uncertainty into every libel case.

To make the constitutional or even statutory validity of a criminal libel statute depend on the “heckler’s veto” leads to the unacceptable result that any group of rowdies can turn an otherwise unconstitutional application of a criminal defamation statute into a constitutional application for the protection of their group reputation, provided only they protest loudly and violently enough. Recent decisions have dismissed the yardstick of the “heckler’s veto” as the measure of a law’s constitutionality.¹¹² However, if the *Collin* view is ultimately correct, then the usefulness of criminal libel statutes is hobbled at the outset because of the difficulty in ascertaining how much clairvoyance of a violent reaction is required by the First Amendment. Criminal defamation statutes are faced with a dilemma. If they are not designed to protect against a violent reaction to the defamation uttered they may be struck down as a violation of the First Amendment by those courts which follow the *Collin* approach of grafting defamation exception to the First Amendment with a historically separate “fighting words” exception. On the other hand, if a criminal defamation statute explicitly incorporates protection against public disorder or breaches of the peace it runs the high risk of violating the First Amendment by an unconstitutionally vague standard as to what constitutes public disorder, breach of the

peace, or similar generic crime. In *Ashton v. Kentucky*¹¹³ the Supreme Court struck down a Kentucky criminal libel statute which required “any writing calculated to create disturbances of the peace” because the statute vaguely required a defendant to calculate the emotional reactions of an audience to which the libel was addressed. To follow the *Collin* approach is likely to place criminal defamation statute in a no-win position where it will either be struck down because it was not designed to protect public tranquility or struck down because it was so designed but is inherently vague in its design.

Aside from the cloud cast by the view that criminal defamation exception to the First Amendment can only be justified if combined with another historically separate “fighting words” exception, traditional criminal defamation statutes must now meet the constitutional requirement of *New York Times v. Sullivan*.¹¹⁴ Because impersonal criticism of government in general often is intermeshed with group defamation of public officials some group defamation of public officials is absolutely prohibited by the First Amendment because to allow the defamation would be “a back door to official censorship.”¹¹⁵ Not surprisingly, therefore, several cases have gone beyond the limitation of *New York Times* “actual malice” to find group defamation of public officials absolutely protected by the First Amendment.¹¹⁶ Even if a group defamation of public officials can be disentangled from a protected criticism of government in general, such public officials, as well as all public figures, who are the victims of a defamatory attack must at least establish “actual malice” for liability, that is, knowledge of the defamatory falsity or reckless disregard whether the statement was true or false.¹¹⁷ In such cases the truth of the defamatory words is absolutely protected under the First Amendment without any qualifications, such as those requiring the uttering of truth for good motives and

justifiable ends.¹¹⁸ Even a criminal libel statute which simply refers to a defendant's "malicious intent" is both overbroad because it permits the prosecution of speech protected by *New York Times* actual malice and inherently vague because it creates a potential confusion between common law "malice" and *New York Times* "actual malice" definition.¹¹⁹

Some authority stops here and refuses to hold that a criminal defamation statute invoked to punish the defamation of private persons who are neither public official nor public figures must also require proof of *New York Times* actual malice.¹²⁰ Under this view a truthful statement if uttered without good motives or justifiable ends can still amount to a criminal defamation as long as it involves the defamation of a private person who is neither a public official nor a public figure.¹²¹ However, other authority has taken a bolder path, beyond the clear holdings of Supreme Court precedent, by deciding that the First Amendment prohibits a conviction of criminal libel for defamation uttered in public without *New York Times* actual malice on a matter of public concern, even if the victim is a private person.¹²² This more expansive view is based on the premise that since *Gertz v. Welch*¹²³ precludes private plaintiffs who are involved in a matter of public concern from recovering punitive damages without proof of *New York Times* actual malice the analogous reasoning should apply to private-person victims of a criminal defamation because of the substantial similarity between punitive damages and criminal fines in chilling First Amendment rights. The Supreme Court since *Garrison v. Louisiana*¹²⁴ has left this difference in limbo by declining to settle the dispute as to private plaintiffs criminally defamed.

Constitutionally under attack at the fringes, criminal libel statutes are also under attack as broadly unconstitutional because the stringent doctrine of void-for-vagueness, especially in matters involving a criminal statute and the First Amendment, indicates that the common law and statutory definitions of defamations are both incapable of reasonably informing citizens what is prohibited and conducive to arbitrary enforcement of the law. In *Tollett v. United States*¹²⁵ the federal appellate court struck down as unconstitutional a federal statute which punished the mailing of any “libelous, scurrilous, defamatory, and threatening” matter on the outside of envelopes or on postcards. Aside from a barrage of criticisms directed to a lack of clarity in the statute concerning its application to private libel, the truth defense, the role of “malice,” the role of fault, and whether and to what extent a “breach of the peace” was required, the appellate court observed: “The Act does not in any way attempt an objective definition of “libelous” and “defamatory.”¹²⁶ The appellate court in *Tollett* cited approvingly *Ashton v. Kentucky*¹²⁷ for Justice Douglas’ broad dictum that the English common law of criminal libel was inconsistent with constitutional principles and too indefinite and uncertain for enforcement as a criminal offense.¹²⁸ In addition, the court in *Tollett* found the governmental interests supporting the statute insufficient, including the argument that criminal libel laws supplement civil libel laws by protecting the dignity of the individual.¹²⁹ Another court, which reached the same result, found that although this federal criminal statute might rationally deter potential defamers who would not be frightened of a civil law judgment, this still did not satisfy the compelling interest justification required by the First Amendment.¹³⁰

The Alaska Supreme Court has reached much the same conclusion. Alaska had a misdemeanor criminal defamation statute which punished the willful publication of “defamatory or scandalous matter” concerning another with “intent to defame” In *Gottschalk v. State*¹³¹ the statute was applied against a citizen who had accused a state trooper of having taken money from the citizen’s vehicle. The supreme court in *Gottschalk*, besides reversing the prosecution on narrower grounds, took the broader position found in *Ashton* and *Tollett* that the concept of defamation was inherently vague. Since the statute did not define what was “defamatory” or “scandalous” the supreme court turned to the common law definition which it also found lacking in sufficient precision.¹³² The supreme court was influenced by Dean Leflar’s study in which he found that nearly half of all criminal defamation cases brought between 1920 and 1955 were basically political in that they were filed against unsuccessful political candidates or the candidate’s supporters or against private citizens who had offended those who were politically powerful.¹³³

The continued validity of *Beauharnais v. Illinois*, therefore, remains in considerable doubt, even though it has never been overruled, because of basic changes in the law of defamation in relation to freedom of expression.¹³⁴ The federal Court of Appeals for the Seventh Circuit has concluded that *Beauharnais* is no longer good law.¹³⁵ A number of other cases have also questioned the current validity of *Beauharnais*.¹³⁶ Yet the United States Supreme Court has in at least two cases assumed the continued vitality of *Beauharnais*.¹³⁷ But, whatever the remaining constitutional validity of *Beauharnais*, a more fundamental reason remains for the inefficacy of criminal defamation law as a remedy for group defamation based on race or ethnicity. Since *Beauharnais* the trend of

legislation and public policy has moved decisively against the continuation of criminal defamation statutes.

The *Beauharnais* opinion noted that at the time of that decision every one of the then forty-eight states, including the District of Columbia, Alaska, Hawaii, and Puerto Rico punished criminal libels of individuals.¹³⁸ Some of these statutes were even used to punish group libel.¹³⁹ To the extent *Beauharnais* relied on this unbroken pattern of support for criminal libel laws the reliance has been gravely undermined as a constitutional authority by subsequent events. At the time of this article the author could only find nineteen states which still have some form of criminal libel or criminal defamation either by statute or common law.¹⁴⁰ Nevada was not included because even though it has a criminal libel statute no one has ever been prosecuted under the statute and in an unpublished order the United States District Court approved an agreed order that the Nevada statute was unconstitutional.¹⁴¹ Of those nineteen states Kentucky's statute is limited to defamation actions brought by judges against those who defame judges in the course of their duties.¹⁴² And several of those nineteen states have statutes or common law that have been invoked minimally and sometimes not since the nineteenth or early twentieth century.¹⁴³ Others are limited criminal defamation statutes targeted to specialized problems without general application.¹⁴⁴

In addition, what *Beauharnais* failed to note was the infrequency with which these laws were invoked even around the time of the *Beauharnais* decision. Professor Robert A. Leflar did a cited study of 110 reported criminal defamation cases between 1920 and 1955 in which he found a declining number of cases in each ten-year period. He found 58 cases reported in the ten-year period of 1920-1929, 24 in the twelve-year period of

1930-1941, and only 18 in the fourteen years from 1942 through 1955. Nearly half of all cases were political in the sense that they involved public officials or candidates for public office. Only 10 of the 110 involved group libel, typically involving attacks on religious or racial groups such as Jews, Blacks or Catholics.¹⁴⁵

In updating Leflar's study from 1956 through 2001 the author of this article found the declining trajectory of prosecutions for criminal defamation even more remarkable. The author found 16 reported cases of criminal defamation from 1956 through 1966 , 14 cases from 1966 through 1976 , a sharp fall-off to 5 cases from 1976 through 1986, just 1 case from 1986 through 1996, and then only 2 cases from 1996 through 2001. Of the total number of 38 cases reported in the Decennial Digests during this period only 1 involved racial group libel and 20, almost two-thirds, were political in the sense of involving alleged defamatory attacks on political candidates or public officials, such as judges, district attorneys, an attorney general, a police chief, a sheriff, a presidential candidate, and both a senator and a town in one swipe.¹⁴⁶ A hypothesis for this decline since Leflar's study is that prosecutors have heeded the cumulative impact of *Garrison v. Louisiana*¹⁴⁷ in 1964, *Ashton v. Kentucky*¹⁴⁸ in 1966 and *Gertz v. Welch*¹⁴⁹ in 1974 by not bringing defamation actions. It is unlikely public discourse has become more courteous and less defamatory in this period. The Supreme Court has probably doomed criminal defamation law not by a sudden-death thrust of inherent unconstitutionality but rather by the ultimately mortal wounds of *New York Times* "actual malice" and the void-for-vagueness doctrine. At some point the Supreme Court may then put a criminal defamation on life support out of its misery by administering the coup-de-grace of reverse-*Beauharnais* reasoning that since so few states have criminal defamation laws

and how few are effective even in those states which do have them , therefore, no compelling state interest justifies the consequent limitation on freedom of expression under the First Amendment. This is particularly true inasmuch as approximately two-thirds of the cases decided between 1956 and the present involve political officials or political candidates who tried to invoke criminal libel law against their opponents. This borders on penalizing defamation of government which has been held expressly unconstitutional ever since *New York Times v. Sullivan*¹⁵⁰ denounced the Alien and Sedition Acts of 1798 which punished defamation against the federal government.

Criminal libel law is, therefore, a useless and increasingly unconstitutional remedy for the redress of racial or ethnic group defamation.. Since 1956 the author has found only one Illinois case that applied a criminal libel statute against detractors of Jewish-Americans and African-Americans.¹⁵¹ Criminal defamation is not recognized in the Model Penal Code nor by a leading criminal law treatise.¹⁵² Even though racial and ethnic defamation affect the public weal and not merely individual interests the criminal law of libel is no longer effective to redress that group wrong.

VII. Declaratory Relief: A Solution

Support for declaratory relief as a general solution to the haphazardous First Amendment dangers of a traditional defamation action for monetary relief is substantial. The Restatement (Second)¹⁵³ of Torts discussed a number of advantages that a declaratory judgment action has over a traditional damages action for defamation. Former Supreme Court Justice White expressed the view that declaratory relief, with damages banned or curtailed, might better serve both First Amendment interests and a plaintiff's

interest in reputation than an action for damages as limited by the Supreme Court in *Gertz*.¹⁵⁴ Then Congressman Shumer proposed to the 99th Congress a bill that would have protected “the constitutional right to freedom of speech by establishing a new cause of action for defamation” in which a public official or public figure who was the subject of a publication or broadcast by the print or electronic media may sue for a declaratory judgment that such publication was false and defamatory. Proof of defendant’s state of mind was not required but, on the other hand, no damages were awardable under this action.¹⁵⁵ The Libel Reform Project of the Annenberg Washington Program also recommended a declaratory judgment action for any defamation lawsuit as an alternative option to a lawsuit for damages. Under this declaratory approach the defendant’s state of mind was also not an element of proof.¹⁵⁶

The constitutional concern of the Supreme Court regarding civil defamation is the chilling effect of monetary damages on the First Amendment rights of freedom of speech and press.¹⁵⁷ The holdings of *Sullivan* and *Gertz*, which used First Amendment concerns to delimit the traditional law of defamation, were related to a traditional action for damages. Declaratory relief, however, does not require an ancillary request for damages or injunctive relief, even though often one of these two alternate remedies are also requested.¹⁵⁸ Unlike other judgments, a judgment of declaratory relief is not coercive and does not compel the parties against whom it is entered to take or not take any action. Except for that difference no other difference exists between a declaratory judgment and any other kind of judgment.¹⁵⁹ Yet, a declaratory judgment differs from an advisory opinion in that its is a binding determination on the merits and by reason of res judicata may preclude relitigation of the same issue.¹⁶⁰

It is probable that the quagmire of *New York Times* “actual malice” would not be a constitutional requirement of a declaratory action brought to determine whether a communication was defamatory at law. An action for declaratory judgment is also better than an alternative variation that would unconstitutionally force a media defendant to publish a correction or retraction in its own medium of communication.¹⁶¹ Because of First Amendment concerns the FCC and judiciary have changed course and no longer force an electronic media defendant to open up a station to outsiders under the fairness doctrine, the political attack rule, or the political editorial rules.¹⁶² A declaratory action, on the contrary, does not hypothetically trench on the First Amendment by forcing a media defendant to publish state-dictated content in its media communications or to spend its own finances in publishing a state-dictated retraction.

The further attractiveness of a declaratory remedy for racial and ethnic group defamation is that it circumvents entirely the First Amendment objection that criminal libel statutes are unconstitutional because they are facially vague and overbroad¹⁶³ The juxtaposition of the First Amendment and the criminal law raises vagueness and overbreadth challenges to their maximum effectiveness.¹⁶⁴ But since a declaratory judgment action is not a criminal action the vagueness objection is less stringent.¹⁶⁵ It would be startling for the Supreme Court at this late date to declare over two-hundred years of civil defamation law, which has permitted damages, unconstitutionally vague, particularly when only a declaratory remedy is sought without damages or injunctive relief.

A more serious attack on a declaratory remedy for racial and ethnic group libel is that when government acts through its court system to brand a communication

defamatory by means of a declaratory judgment it improperly chills freedom of speech and the press. At the outset, however, the paradox of such a position is again that it would ban a declaratory judgment without damages under the First Amendment whereas the Supreme Court has generally refused to invoke the First Amendment to limit civil defamation lawsuits for damages, aside from the *Sullivan* and *Gertz* doctrines. The Supreme Court has instead indicated that a governmental right to speak does not necessarily violate the First Amendment rights of those affected by government speech. In *Meese v. Keene*¹⁶⁶ the Supreme Court upheld the statutory authority of the federal government to label three Canadian films “political propaganda” without violating the First Amendment rights of a California senator who wanted to show the films. The Court noted that Congress did not by means of the statute prohibit, edit, or restrain the distribution or exhibition of the films and left the senator free to critically comment on the federal government’s action. On the contrary, the district court’s injunction against the government’s speech narrowed the marketplace of ideas by eliminating the government’s views. In *Pestvak v. Ohio Elections Commission*¹⁶⁷ a federal appellate court upheld an Ohio statute insofar as it allowed a state commission to declare the truth or falsity of statements made by candidates during an election. The Sixth Circuit observed that the “truth-declaring” function of the commission was comparable to other activities carried on by government, such as governmental agents declaring the truth or falsity of inflation statistics, the unemployment rate or Congressmen declaring the truth or falsity of public policy matters¹⁶⁸

Ever since *Milkovich v. Lorain Journal Company*¹⁶⁹ the Supreme Court has taken the clearly expressed position that opinions, as well as factual assertions, may be held

accountable for defamatory harm without any violation of the First Amendment. Only those opinions are protected which constitute “rhetorical hyperbole” or “imaginative expression” or which are based on a complete set of disclosed and true facts so that a reader or listener has sufficient information to independently evaluate the credibility of the defendant’s opinion inferred from the facts. However, opinions that imply false statements of fact, without stating them, or which are based on incompletely disclosed facts may still be actionable without violating the First Amendment.¹⁷⁰ Aside from the distinguishable characteristic that they involved claims for damages and not declaratory relief, earlier defamation cases which suggest that a civil action for group libel might automatically violate the First Amendment are more broadly undercut by the *Milkovich* decision to permit some actions for defamatory opinions¹⁷¹ Unless reversed *Milkovich* clearly allows some actions for defamatory opinions.

Unlike the Indianapolis ordinance which was struck down for impermissibly prohibiting protected “pornographic” speech that went beyond the “obscenity” exception to the First Amendment, a declaratory action for defamation is squarely within a traditional exception to the First Amendment.¹⁷² Such a declaratory action would not affect lawful speech, such as the Indianapolis ordinance, but only defamation, a historically recognized exception to the First Amendment. More importantly, the action would not prohibit a defendant’s speech like the Indianapolis ordinance whether or not the speech is considered protected under the Constitution. Finally, a declaratory judgment action could be drafted so that it avoids the viewpoint discrimination found in the Indianapolis ordinance.¹⁷³ Critical race theory also differs from a declaratory approach because the theory rests on the problematic premises of either prohibiting racist

and bigoted insults as a new exception to the First Amendment or of providing monetary damages for a new tort of racial insult.¹⁷⁴

In the author's role as AIDA co-counsel, one tactical advantage of a declaratory judgment action became apparent. By not requesting monetary or injunctive relief a plaintiff assumes the high ground of principle over suspected mercenary or censorious motives. With a pure declaratory judgment action the plaintiff is simply trying to correct the defamatory stereotyping of the racial or ethnic group in the public mind. The judiciary has shown some recognition of the fact that words and images, unless rebutted, can condition a society to accept falsity as truth.¹⁷⁵ The most empirical study thus far done on the general subject of defamation law has found that some plaintiffs see themselves as "winners" by the very act of suing for defamation even though they have little chance of obtaining damages in a traditional defamation suit.¹⁷⁶ Since groups like AIDA are often more concerned about public vindication they are most likely to use a declaratory remedy, particularly since alternative methods of relief are basically illusory. Beyond vindication a declaratory judgment of defamation could be used by the racial or ethnic group to counter the social forces that feed the defamation. It may be, for example, that such declaratory judgments could be used a shareholders' meetings to prevent corporate assets from being wasted on defamatory activity or as evidence when a broadcaster sought license renewal that the broadcaster has not served the public interest. There is even some support for the view that once a trial has found defamation the doctrine of prior restraint does not prevent court of equity from enjoining repetitions of the same or similar defamation.¹⁷⁷ The declaratory judgment would thus have practical consequences beyond the moral implications of the community judgment.

VIII. CONCLUSION

In summary, the major nations of the world have recognized that racial and ethnic defamation is a harm that requires some form of remedy just as individual defamation is remedied. But, unlike these nations, the United States has historically accorded freedom of speech and press greater weight in balancing the harm to be remedied against the infringement of free expression caused by the legal remedy. This can be seen in *Sullivan* and *Gertz* which impose constitutional levels of fault based on the status of the plaintiff and in cases suggesting that the criminal law of defamation is unconstitutionally vague and overbroad. But, aside from any constitutional issues, the current civil damage lawsuit for defamation is inapplicable because courts have consistently refused to award damages for group defamation. But even if they did the perplexing problems of apportioning class damages among a racial or ethnic group pose raise specters of impractical complexity. Likewise, criminal defamation statutes, whatever constitutional validity *Beauharnais* may still have, are now found in less than half of the states and even in those states cases have rarely been brought within the last thirty years. Even when they have been brought the alleged victims are most often public officials or public figures rather than the powerless private citizen who most needs their protection.

The solution is to enact at the state level a declaratory judgment statute to remedy the specific problem of group defamation based on race or ethnicity. The declaratory theory would provide some remedy where at present none realistically exists both for constitutional and policy reasons. Such a statute should be carefully crafted to avoid any possible collision with the First Amendment and to remedy the most serious wrongs

perpetrated by the mass media. The floodgate must not be opened so that every trivial charge of backyard group defamation streams into the courts. The goal should be to focus on the most harmful kind of group defamation and to have the action controlled by a state official in such a way as to avoid any clouded issues of standing to bring the declaratory lawsuit.

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

*Professor of Law, John Marshall Law School. B.A., Loyola University of Chicago; J.D., Harvard Law School; Fulbright Scholar in comparative law at Christian-Albrecht University in Kiel, Germany; LL.M., John Marshall Law School in Intellectual Property; co-author of ILLINOIS TORT LAW (3d ed.2001); Professor-Reporter for the Illinois Judicial Conference.

¹ Complaint, AIDA v. Time Warner Entertainment Co., No.01CH05819 (Cir. Ct.Cook County,.filed Apr.5, 2001). Victor Arrigo, the sponsor of Art. I Sec.20, indicated his motivation for sponsorship in the legislative history:

As an American of Italian descent, I can speak with authority on this carcinoma of the soul that I became acquainted with at the age of twelve when I was stopped by a policeman on my way home from a public library branch with two books under my arm. The greeting was, "Hey, Wop, where did you swipe those books ? " This was immediately followed by a kick in the backside and the parting remark, " Don't tell me you Dagos are now learning to read," when I showed him the library card and tried to prove my innocence of any wrongdoing in my possession of the books. The trauma of that experience and the feeling of degradation that followed has been a deeply engrained memory that has remained with me since. *Sixth Illinois Constitutional Convention, Record of Proceedings, Verbatim Transcript, June 10, 1970, at 1637-38.*

² 343 U.S. 250 (1952).

³ Bruce W. Sanford, LIBEL AND PRIVACY § 4.12, at 129 (1993 Supp.).

⁴ Restatement (Second) of Torts § 571 (1977) (punishable by imprisonment or involving moral turpitude). Claim of "alleged mob ties" was enough for defamation. *Bufalino v. Associated Press*, 692 F.2d 266,269 (1982). *Accord, Clemente v. Espinosa*, 749 F.Supp.. 672, 677 (E.D.P.1990). But statement that plaintiff had "mob connections" and would "order a hit" on defendant does not impute plaintiff in fact committed any crimes for slander per, even though the words may be obviously defamatory. *Biondi v. Nassimos*, 300 N.J. Super.148, 692 N.E.2d 103, 107 (1997) ("It is not uncommon for the mass media to report that an entertainer or other celebrity has 'mob ties' or 'mob connections.' "). In states equating libel per se to the slander per se categories an imputation of a crime likewise does not require proof of special damage. *See, e.g., Kevorkian v. AMA*, 602 N.W.2d 233 (Mich.App.1999).

⁵ AIDA Complaint, supra , at ¶ 13.

⁶ *Id.* at ¶ 13(d).

⁷ *Id.* at ¶ 2 & 4.

⁸ *Id.* at ¶ 6-8.

⁹ *Showcase: Directors drop Griffith award*, Chi.Sun-Times, Dec.16, 1999, at 59.

¹⁰ *AIDA v. Time Warner Entertainment Co.*, Memorandum Opinion & Order, No.01CH5819, slip op., at 4 & 6 (Cir.Ct. of Cook County Sept.19,2001).

¹¹ Thomas David Jones, *HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS* 42 (1998) (“Group defamation is illegal conduct at international law, and it is punishable as a crime under the laws of the majority of nations in the world..”).

¹² *Id.* at 39.

¹³ *UNDER THE SHADOW OF WEIMAR* 48-49, 51 (Louis Greenspan & Cyril Levitt eds.,1993). (“Such laws have existed for one generation at least, and nobody advocates their repeal.”). A 1990 reform makes it a criminal offense to deny the Nazi genocide of the Jews. *Id.* at 56. A federal court has held that the First Amendment bars enforcement in the United States of a French court order seeking to compel Yahoo ! to either prevent its French subscribers from viewing Nazi memorabilia or pay a fine of \$13,000 per day. *Yanhoo ! Inc. v. La Ligue Contre Le Racisme et L’Antisemetisme*, 169 F.Supp.2d 1181 (N.D.Cal.2001).

¹⁴ *Id.* at 87 (Article 130).

¹⁵ Thomas David Jones, “Human Rights Freedom of Expression and Group Defamation under British, Canadian, Indian, Nigerian and United States Law---A Comparative Analysis,” 18 *Suffolk Transnat’l L.Rev.* 427, 427-28 (1995).

¹⁶ 3 S.C./R. (Canada) 697, 713-714 (1990). *See* Catharine A. MacKinnon, *ONLY WORDS* 99 (1993) (“We argued that group defamation is a verbal form inequality takes, that just as white supremacy promotes inequality on the basis of race, color, and sometimes ethnic or national origin, anti-Semitism promotes the inequality of Jews on the basis of religion and ethnicity.”). For a comparison of Canadian and United States perspectives on group defamation, *see generally* The James McCormick Mitchell Lecture (edited transcript), “Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation.,” 37 *Buff.L.Rev.*337 (1998/1999)

¹⁷ Joshua Aronson et al. and Claude M. Steele and Joseph Brown, “When White Men Can’t Do Math: Necessary and Sufficient Factors in Stereotype Threat,” 35 *Journal of Experimental Psychology* 29-46 (1999).

¹⁸ Claude M. Steele, “A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance,” 52 *American Psychologist* 613.,616-17,618 (1997).

¹⁹ *THE BLOOD LIBEL LEGEND*, 233 (Alan Dundes ed.,1991). Even now the blood libel persists. The editor of a Saudi newspaper apologized for several articles which described Jews as “vampires who bake cookies with the blood of non-Jews” and people admonished by the Torah to eat “pastries mixed with human blood.” Donna Abu-Nasr, “Saudi editor retracts anti-Semitic articles,” *Chi.Trib.*, March 21, 2002, § 1, at 10.

²⁰ Benjamin W. Segel, *A LIE AND A LIBEL*, 25-27 (Richard S. Levy, ed. & trans., 1995)

²¹ Fritz Hippler, “Der Ewige Jude”[The Eternal Jew] (UFA 1940). Another depicted a grasping Jewish financier who is publicly executed. Veit Harland, “Jud Suss.” A nine-minute film of Jews being deloused was titled “Juden, Lause, Wanzen,” [Jews, Lice, Typhus]. The use of such propaganda extended to the Balkans where a film portrayed a Jew who raped his servant and caused her death from an abortion and Jews who sold Croatian girls into Mideast slavery. *Kako Se Stvaraju Izlobe* (Havat Sk Slikopsis, 1942).

²² Adolf Hitler, MEIN KAMP 231-32, Ralph Mannheim ,trans., (First Marine Books ed.1999).Although he projects use of the “big lie” onto the Jews he clearly endorses it as a “sound principle” The judicial distrust of group defamation is based on the assumption that the larger the group the less likely a third person would rationally understand the defamation to refer to a particular person. But one court has noted that this psychological assumption, which isolates an individual from the group with which he or she is identified, has been challenged on the basis that when a third person thinks irrationally by harboring pre-existing prejudice against a group the subsequent group defamation reinforces the prejudice regardless of group size. *Brady v. Ottawa Newspaper, Inc.*, 84 A.D.226, 445 N.Y.S.2d 786, ,788 n.2. (1981).

²³ The study was performed by mail using the Consumer Panel of the advertising firm, D’Arcy, Masius ,Benton & Bowles, Inc. The panel consisted of 4,000 households, four separate panels of 1,000 households each, with each panel representative of U.S. households. D’Arcy, Masius, Benton & Bowles, Inc., *Fears and Fantasies of the American Consumer: An American Consensus Report* 34 (May 1986) (next highest category with 61%: being with friends).

²⁴ *Id.* at 35 (next highest category with 60 %: just relaxing).

²⁵ Tony Scott, “Enemy of the State,” (Buena Vista 1998). “I have argued that the burden placed on the Italian immigrants was, in fact, an aspect of American racism, naturalizing (as based on a brute fact of race)the structural injustice abridging basic human rights on grounds of dehumanizing stereotypes that arose from the abridgement.” David A. J. Richards, ITALIAN AMERICAN:THE RACIALIZING OF AN ETHNIC IDENTITY 199 (1999).

²⁶ Compare ,e.g., Celeste Garrett,Business, *Toyota to spend \$8 billion to increase its diversity*, Chi.Trib., Business, Aug. 10, 2001 (Toyota pulled an offensive ad showing a black man smiling with a gold front tooth highlighted with the shape of Toyota’s RAV 4 sports utility vehicle.). No Title VII claims existed even though plaintiff Italian-American produced affidavits that union managers had stated “all the Italians were going to be fired: and “all the Italians were nothing but mobsters and gangsters” *Indurante v. Local 705, International Brotherhood of Teamsters*, 160 F.3d 364, 369 (7th Cir.1998) (Rovner, J., *dissenting*: “Indeed, I am aware of no case from this circuit suggesting a remark akin to ‘We’re going to fire all of the Blacks,’ or ‘We’re not going to hire any women’ would not amount to direct evidence of discrimination solely because it does not single out the plaintiff for individual mention.”).

²⁷ Mafia membership peaked around 5,000 in the 1960’s. By 1999 it had dropped to about 1,150, with 750 members in New York. The national “commission” of mob bosses that resolved mob disputes has not met in 20 years. Rick Hampson, “ Death of the Mob,” USA Today, July 28, 1999, at 1A-2A. Even if all 5,000 criminals in the heyday of organized crime were hypothetically all Italian-American, that would have constituted only .0025% of the estimated 20 million Italian-Americans in the United States. *See* H.R. Con. Res. 141, 107th Cong. (2001) at 2, sponsored by Rep. Marge Roukema (N.J.).

²⁸ 438 U.S. 265, 294, n.32 (1978) (“Members of various religious and ethnic groups, but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religions and/or national origin. CFR § 60-501(b)(1977).”

²⁹ *United States v. Biaggi*, 673 F.Supp.96, 101 (E.D. N.Y. 1987) (“cognizable group” for *Batson* challenges), *aff’d*, 853 F.2d 89 (2d Cir.1988).

³⁰ *See generally*, Richard Gambino, VENDETTA (1977).

³¹ Pub.L.No.106-451. 114 Stat.1947 (Nov.7,2000).

³² The effect of World War II and the restrictive measures taken against Italian-Americans induced a sense of shame in Italian-Americans about their heritage.UNA STORIA SEGRETA: THE SECRET HISTORY

OF ITALIAN AMERICAN EVACUATION AND INTERNMENT DURING WORLD WAR II 303-311
("How World War II Iced American Culture") (Lawrence Di Stasi, ed.2001).

³³ St. Francis College v. Al-Khazraji, 481 U.S. 604, 611 ("Encyclopedias of the 19th century also described race in terms of ethnic groups, which is a narrower concept of race than petitioners urge."). Italian-Americans were specifically allowed to sue under 42 U.S.C. § 1981. DeSalle v. Key Bank of Southern Maine, 685 F.Supp.282, 284 (D.Me. 1988) ("Section 1981 was designed to protect identifiable classes of persons, such as Italo-Americans.") and Bisciglia v. Kenosha Unified School Dist.No.1, 45 F.3d 223, 230 (7th Cir.1995). It appears a § 1983 claim for violation of equal protection can also be raised by an Italian-American if the evidence is sufficient. Benigni v. City of Hemet, 879 F.2d 473, 478 (9th Cir.1988) ("The evidence in this case on discrimination because of Benigni's Italian ancestry is admittedly thin").

³⁴ Scelsa v. City University of New York, 806 F.Supp.1126, 1131-32 (S.D.N.Y.1992).

³⁵ David A.J. Richards, *supra* note 15, at 189-90 &193-94.

³⁶ The criminal stereotype of Italian-Americans increases to 44.2 % if the 9.9% of those who associate Italian-Americans with "gang members" is added to the "crime boss" category. Zogby International, *Teen Survey: Testing the Influence of Media on Racial Stereotypes*, at 16-17 (Sept.29, 2000). "The National Italian American Federation is then on the right track in trying to lobby for a better image of Italians through protests and in school curriculum, although such teachings need to involved families." *Id.* at 5.

³⁷ *Id.*, Executive Summary, at 4.

³⁸ American Academy of Pediatrics, American Academy of Child & Adolescent Psychiatry, American Psychological Association, and American Medical Association, *Joint Statement on the Impact of Entertainment Violence on Children*, Congressional Public Health Summit (July 26, 2000).

³⁹ Jefferey G. Johnson et al., *Television Viewing and Aggressive Behavior During Adolescence and Adulthood*, 29 Science 2468 (2002) (assessment over a 17-year period with a community sample of 707 individuals). See also Craig A. Anderson & Brad J. Bushman, *The Effects of Media Violence on Society* 295 Science 2377 (2002) ("Despite the consensus among experts, lay people do not seem to be getting the message from the popular press that media violence contributes to a more violent society.").

⁴⁰ Response Analysis Corporation, *Americans of Italian Descent: A Study of Public Images, Beliefs, and Misperceptions*, Executive Summary, at 5 (Jan.1991)("Notice that about three out of every four adults make the connection between Italian-Americans and organized crime. None of the other groups are associated with this item more than about one out of four adults.").

⁴¹ "Expressing the sense of Congress that the entertainment industry should stop the negative and unfair stereotyping of Italian-Americans, and should undertake an initiative to present Italian-Americans in a more balanced and positive manner." H.R.Con.Res.141, 107th Cong. (2001) at 2.

⁴² Italic Studies Institute, Image Research Project, *Italian Culture on Film (1928-1999)* (updated Aug.1999), at Charts I. & II.

⁴³ *Id.* at Chart 4.

⁴⁴ *Id.* at Chart 3. The increasing tendency of Hollywood to fictionalize characters and events and the rise of litigation claiming these fictionalized movies distort history and damage reputations is discussed in Richard Willing, "Can Hollywood handle the truth ?" USA Today, Cover Story, at A-1 (Jan.,8 2002).

⁴⁵ Catharine A. MacKinnon, ONLY WORDS 51-52 (1993) (" Does any Black man doubt, upon encountering 'Nigger Die' at work, that it means him ?"). Justice Frankfurter recognized that a legislature

could rationally determine that individuals are socially affected for better or worse by the reputation of the racial group to which they belong. *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952)

⁴⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (“ ‘ Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”) . *See* Lee C. Bollinger, *THE TOLERANT SOCIETY* 18 (1986) (“[W]ithin the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech.”).

⁴⁷ Thomas I. Emerson, *THE SYSTEM OF FREEDOM OF EXPRESSION* 627 (Vintage paperback 1970). *See also* *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 390 (1974) (White, J., dissenting: “The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the nation and into almost every home.”). In a case of non-actionable group defamation the Florida District Court of Appeal, nonetheless, criticized the commercial motivations of television news. *Thomas v. Jacksonville Television, Inc.*, 699 So.2d 800, 805- 806 (Dist.Ct.App.) (“The alleged continued broadcast of the advertisement prepared by Save Our Sealife, Inc. after the named television stations received reliable evidence that the advertisement contained false and misleading information to their viewing public, if true, is very serious.”)

⁴⁸ Emerson, *supra* note 46, at 627.. (“The economics of radio and television press inevitably in the direction of programs that appeal to the lowest common denominator of a mass audience.”).

⁴⁹ Ben H. Bagdikian, *THE MEDIA MONOPOLY* x (Preface) (6th Beacon Press paperback 2000). “In 1983, 50 companies controlled more than half of the media in the United States. On paper at least, a mere 50 companies controlling most of American media would seem to be a cause for concern in itself but today just 20 years later, the number has dropped to six, six gigantic corporations control the vast majority of television, cable, radio, newspapers, magazines and the post popular (*sic*) Internet sites and consequently the majority of information, public discourse, and even artistic express in the united States. We have on our hands what one might call a merger epidemic in the media industry and like any other epidemic this is an unhealthy one.” *Media Concentration: Hearing Before the Senate Committee on Commerce, Science & Transportation*, 107th Cong. 53 (stenographic transcript) (July 17, 2001) (statement of William Baker, president of WNET). Twenty years ago thousands of family-operated families dominated cable television. Today a pending deal between Comcast and AT& T broadband would leave three companies in control of 65% of the cable market. “Why the Sudden Rise in the Urge to Merge and Form Oligopolies?,” *Wall St. J.*, Feb.25, 2002, at AL & A10. By comparison, what might happen in the United States if present trends continue is illustrated in Italy where one company, Mediaset, controls about half of the television market. Tom Hundley, “Italian leader eyes media in Germany,” *Chi.Trib.*, Apr.1, 2002, at 4, section 1.

⁵⁰ *Fox Television Stations, Inc. v. FCC*, No. 00-1222 et al., 2002 WL 233650 (D.C.Cir.Feb.19, 2002) (additional rule prohibiting any entity from controlling TV stations if control resulted in an audience reach beyond 35% of the TV households in the United States remanded to FCC for further consideration). The former radio-television cross ownership rule generally prohibited joint ownership of a radio and television station in the same local market. The new rule permits more joint ownership of radio and television stations in the same market than the former “one-to-a-market” rule. *In the Matter of Review of the Commission’s Regulations Concerning Television Broadcasting*, Report & Order, MM Docket No. 91-221 & No.87-8, 1999 FCC Lexis 3817, 14 FCC Rcd 12903 (Aug.5, 1999). Meanwhile the cross-ownership limitations on a newspaper owning a radio or television station remain in place for the time being. Second Report & Order, Docket No.18110, 50 FCC2d 1046 (Jan.28, 1975). But the FCC is considering the revision of even this limitation. *In the Matter of Cross Ownership of Broadcast Stations and Newspapers*, Order & Notice of Proposed Rule Making, Docket No. 96-197,2001 WL 1097041, 16 F.C.C.R. 17,283, 16 FCC Rcd. 17,283 (Sept.13, 2001).

⁵¹ *FCC News*, MM Docket 00-108, 2001 FCC Lexis 2165 (Apr.19, 2001).

⁵² In re Application of Kentuckiana Broadcasting, Inc., No.BALCT-19991116AAK, 16 FCC Rcd 6974, 2001 FCC Lexis 1641, at *2 –3 (Mar.22, 2001).

⁵³ 395 U.S. 367, 380 (1969).

⁵⁴ Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C.Cir.1986).

⁵⁵ Based on an extensive hearing the FCC concluded the fairness doctrine did not serve the public interest but the agency did not definitively resolve the doctrine's constitutionality and continued to enforce the agency doctrine because of uncertainty whether the doctrine had been codified by federal statute. *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, , 102 FCC2d 145 (1985). In *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir.1987) the federal appellate court ordered the FCC to re-evaluate both the constitutional and public policy bases for the doctrine. In re Syracuse Peace Council, Memorandum Opinion & Order, 2F.C.C.Rcd 5043 (1987) the FCC found the fairness doctrine chilled speech and disserved the public interest, even though the FCC admitted broadcasting still had an allocational scarcity of more applicants for stations than spectrum space available. The federal appellate court upheld the repeal of the fairness doctrine as within the FCC's authority with reaching any constitutional issues. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir.1989), *cert. denied*, 493 U.S. 1019.

⁵⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367,373-75 (1969). The political editorial rules were later codified in 47 C.F.R. § 73.1930 (1981) and the personal attack rule in § 73.1920.

⁵⁷ *National Ass'n for Better Broadcasting v. FCC*, 591 F.2d 812, 820 (D.C.Cir.1978). The allied fairness doctrine did not provide for monetary recovery based on group libel. *Provisional Government of the Republic of New Afrika v. ABC*, 609 F.Supp.104, 108 (D.C.D.C. Cir.1985). A fairness-doctrine claim could not be raised in federal court until administrative remedies had been exhausted. *Michigan United Conservation Clubs v. CBS News, a Div. of CBS,Inc.*, 485 F.Supp.893, 903 (W.D.Mich.1980) (group libel claim).

⁵⁸ *Polish American Congress v. FCC*, 520 F.2d 1248 (7th Cir.1977). The Seventh Circuit has historically taken a dim view of the fairness principle . *See Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir.1968) (prematurely concluding 1st amendment precluded political editorial rules and personal attack rule in a pre-*Red Lion* decision).

⁵⁹ *Radui-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 ((D.C.Cir.2000)

⁶⁰ *Columbia Broadcasting System,Inc. v. Democratic National Committee*, 412 U.S. 94, 111 (1973).

⁶¹ *See generally*, Dan B. Dobbs, THE LAW OF TORTS § 406, at 1137 (2000). "Thus far, any civil remedy for such broadside defamation has been lacking." W. Page Keeton et al. PROSSER AND KEETON ON TORTS §111, at 785 (5th ed.1984).

⁶² One perceptive decision summarizes well the untidy "rules of thumb" that often divide "large" from "small":

In short, the cases surveyed from other federal and state jurisdictions do not establish a "bright line" above which a defamed group is "too big" for an unnamed individual member to sue for defamation. The cases do evince a consistent rule of thumb, however, that unnamed group members generally are not permitted to sue for group defamation if the group has more than 25 members; they will almost invariably not be permitted to sue if the group has more than 100 members. *Alexis v. District of Columbia*, 77 F.Supp.35, 41 (D.D.C.1999).

⁶³ William E. Francois, MASS MEDIA LAW AND REGULATION 105 (5th ed.1990) (criminal libel offered as a possible solution).

⁶⁴ At least one court appears to have extended the notion of group libel to a product disparagement claim brought as a class action by 4,7000 Washington state apple growers against the CBS television program “60 Minutes” for airing a program alleging a growth chemical used on the apples was a carcinogen. *Auvil v. CBS “60 Minutes.”* 800 F.Supp.928, 936 (E.D. Wash 1992) (“Blindly applying the concept [group defamation limitation] to all disparagement cases, however, would be tantamount to counseling potential disparagors (sic) that they are home free if only they succeed in wreaking damage on a sufficient number of manufacturers.”). Some courts have also used the group defamation concept to bar a lawsuit against defendants in a federal civil rights action under 42 U.S.C. § 1983. *See, e.g., Sacco v. Pataki*, 114 F.Supp.2d 264, 271 (S.D. N.Y.2000). Qualified privilege applied to civil rights lawsuit because pre-1977 group defamation precedents raised serious doubt whether unnamed individual had a right to sue for group defamation even if a listener could find out the group members’ identities. *Alexi v. Williams*, 77 F.Supp.2d 35 (D.D.C. 1999).

⁶⁵ Restatement (Second) of Torts § 564 A (1977). A standard tort treatise seems to juggle the specificity of the statement with the size of the group (1)defamation generally disparaging an entire group (2) a more specific defamation about a “rather definite number of persons” (3) defamation involving only some members of a “relatively small group.” W.Page Keeton et al. PROSSER AND KEETON ON TORTS § 111, at 784 (1984). *Accord*, *Action Auto Glass v. Auto Glass Specialists*, 2001 WL 1699205 (W.D. Mich.) Case No. 1:00-CV-756.(whether group defamation referred to plaintiff left to jury).

⁶⁶ *Id.* at cmt.b.

⁶⁷ *In re New York Life Ins. Co. Agents’ Class Claimants Solicitation Litigation*, 92 F.Supp.2d 564, 569 (E.D. La. 1997) (“most authorities”) and *Gintert v. Howard Publications, Inc.*, 565 F.Supp. 829, 833 (N.D.Ind. 1983) (“The rule has been applied quite uniformly to comparatively large groups or classes of a definite number exceeding, say, twenty-five persons.”). *Accord*, *Thomas v. Jacksonville Television, Inc.*, 699 So.2d 800, 805 (Fla.Dist.Ct.App. 1997) (“[W]hen a group is large, that is, composed of twenty-five or more members, courts consistently hold that plaintiffs cannot show the statements were “of and concerning them.”).*See also e.g., Bujol v. Ward*, 778 So.2d 1175,1189 (La.Ct.App.2001) (23 members of a street crimes unit of 46- persons who were allegedly defamed: too large) and *Lines v. Evening News Assoc.*, 129 Mich.App. 419, 342 N.W.2d 573 (1983) (7 group members: small enough). Sometimes, however, courts have found a group too large even though it was under 25 persons. *See, e.g., Coker v. Sundquist*, 1998 WL 736655 (*Tenn.Ct.App. No.01A)1-9806-BC-00318* (3 group members: insufficient because plaintiff not named in defamation). Some courts have held groups under 25 too large when the group consists of public officials for fear of violating the constitutional rule of *New York Time v. Sullivan*, 376 U.S.254 (1964) that prevents government from suing for defamation in the guise of a group of public officials who do the suing. *See, e.g., Dean v. Town of Elkton*, 2001 WL 184223 (Va.Cir.Ct 2001) No.CL00-11958 (5 to 8 police officers of Elkton police department could not sue because of *New York Times* even though the group was small).

⁶⁸*See, e.g., Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C.502, 506 S.E.2d 497 (1998) (“family”: small group) and *Hoffman v. Roberto*, 85 B.R. 406 (W.D. Mich.1987) (“relatively small group”). Sometimes the reverse occurs. A court considers a group too large without giving exact numbers. *Price v. Viking Press, Inc.*, 625 F.Supp.641, 645-46 (D.Minn.1985) (even though as few as 10 assigned special agents formed part of group judicial notice taken that number of agents “exceeded the number typically assigned” to bar the lawsuit).

⁶⁹ *Alexis v. District of Columbia*, 77 F.Supp.3d 35, 41 (D.D.C. 1999) (“The courts traditionally have required quite a small number—no more than 20 or 30 members—before they will hold that defamation of the group should be deemed to have particular application to a group member who is not named in the defamatory remarks [cases cited].”).

⁷⁰ *Texas Beef Group v. Winfrey*, 11 F.Supp.2d 858, 864 (N.D.Tex.1998), *aff’d* ,201 F.2d 680 (5th Cir.2000).

⁷¹ See, e.g., *Weatherhead v. Globe Internat'l, Inc.*, 832 F.2d 1126 (10th Cir.1987) (A class of 955 dog breeders was too large and was also not an identifiable small subset within the class of "dog breeding farms").

⁷² 13 F.R.D. 311 (S.D. N.Y.1952) (But the 15 salesmen out of 25 suing on their own behalf and on behalf of the others was a small enough group for a lawsuit even though only "most" were referred to in a defamatory manner.). For an account of the case see Michael F. Mayer, *WHAT YOU SHOULD KNOW ABOUT LIBEL AND SLANDER* 104 (1968) ("The justice of the ruling seems doubtful").

⁷³ Restatement (Second) of Torts § 564A , cmt. c (1977). See *Chapman v. Byrd*, 124 N.C.App.13, 475 S.E.2d 734 (1996) (alleged defamation referring to "someone" in a group of 9 insufficient). A member of a group has no claim for defamation aimed at some or less than all of the group if there is nothing to single out the plaintiff. *Evans & Lorton v. Lahaie*, 986 S.W.2d 69, 77 (Tex.Ct.App.1999).

⁷⁴ *Id.* at cmt. d. If the plaintiff is not part of a "small" group under § 564 A (a) then subsection (b) is to be used for a "large" group. *Bolanin v. Guam Publications, Inc.*, 4 N.Mar.I.176, 184 (1994). See, e.g., *Provisional Government of the Republic of New Afrika v. ABC, Inc.*, 609 F.Supp. 104, 108 (D.D.C. 1985) ("In order to be actionable by an individual, the publication must contain 'statements that are reasonably susceptible of application' to the individual." *Gintert v. Howard Publications, Inc.*, 565 F.Supp. 829, 835 (N.D.Ind.1983).").

⁷⁵ Conceivably, the defamation of racial slurs made of an African-American worker in the workplace could become individualized actionable defamation through "group defamation" if the worker was the only member of the racial group present when the statement was made or the words are reasonably understood to refer to the worker, but worker lost claim on other grounds. *L & D. of Oregon, Inc. v. American States Ins. Co.*, 171 Ore.App.17,25, 14 P.3d 617, 622 (2000) ("big, black and round like your d--k," "nigger work," "being asked what's long and hard on a black man and being told the answer was the 'second grade'," and similar racist and derogatory jokes and comments).

⁷⁶ *Church of Scientology v. Flynn*, 744 F.2d 694, 697 n. 5 (9th Cir.1984) ("This approach [Restatement 2d § 564A(b)] is not analytically different from our conclusion that the group libel rule does not apply." Compare *Gintert v. Howard Publ'ns, Inc.*, 565 F.Supp.829, 832-33, 837 (N.D. Ind.1983) where the Indiana non-group rule prohibits a member of a large defamed group from suing for that defamation "unless he can show special application of the defamatory matter to himself" and the Restatement (Second) of Torts § 564A (b) which prohibits the same thing unless "the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member." Aside from semantic parsing, what is the practical difference ?

⁷⁷ In *Eyal v. Helen Broadcasting Corp.*, 411 Mass.426, 583 N.E.2d 228 (1991) the owner of a corporation and the corporation itself which operated a delicatessen in Brookline sued for a media defamation alleging "The owner of a Brookline [d]elicatessen and seven other people are arrested in connection with an international cocaine ring." Because the reference was to only one unnamed person the supreme court disagreed with the trial court's view that the owner's claim was a 'group defamation.' Thus, the order dismissing the complaint was reversed. Apparently it was unimportant to the supreme court how many delicatessens operated in Brookline. Cf. *Auvil v. CBS "60 Minutes,"* 800 F.Supp. 928,936 (E.D.Wash. 1992) ("For example, suppose the broadcast occurred Just as it did but instead of apples, the subject was pineapples. While the grower is not identified, the public can hazard a decent guess as to who it is. Why the Dole Pineapple Company should escape the group libel rule but he plaintiffs in this action should not lacks a ready answer.").

⁷⁸ See *O'Brien v. Williamson Daily News*, 735 F.Supp.218, 223, n.4 (E.D. Ken. 1990) and *Mc Cullough v. Cities Serv. Co.*, 679 P.2d 833, 835 (Okla. S.Ct. 1984) ("so-called" majority rule)

⁷⁹ 377 P.2d 42 (Okla.S.Ct.1962). The Oklahoma Supreme Court distinguished early Anglo-American cases which had confused group criminal defamation with civil cases. *Id.* at 51 {“From our examination of the authorities we have reached the conclusion that the English courts have never barred recovery in group libel cases unless the group is extremely large.”}. The supreme court cited a Canadian appellate precedent which allowed a Jewish plaintiff in Quebec, home to 75 Jewish families out of a city population of 80,000, to sue in defamation for the entire Jewish group even though only the group was defamed and not the plaintiff individually. This “intensity of suspicion” test has been called the “true” test in which group size is not controlling. *Brock v. Thompson*, 948 P.2d 279, 292 (Okla.S.Ct.1997) and *Gaylord Entm’t Co. v. Thompson*, 958 P.2d 128,147 (Okla.S.Ct.1998)

⁸⁰ 676 P.2d 833,837 (Okla.S.Ct.1984).

⁸¹ *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786, 793 (1981) (23 unindicted city police officers out of 53 in 1972 could sue for defamation of unindicted officers). The plaintiffs success in *Brady* occurred because of key factors, such as, the group was limited to unindicted officers, was a highly visible group into which entry was limited, and was a locally prominent group easily identified by the public. *In re Houbigant, Inc.*, 182 B.R. 958, 975 (1995)

⁸² *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786, 793 (1981).

⁸³ 800 F.Supp. 928 (E.D. Wash.1992).

⁸⁴ W. Page Keeton et al. PROSSER AND KEETON ON THE LAW OF TORTS §111, at 785 (1984).

⁸⁵ *Khalid Abullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F.Supp.186 (N.D. Cal.1980).

⁸⁶ *Anyanwu v. CBS*, 887 F.Supp. 690 (S.D.N.Y. 1995).

⁸⁷ “Statements about a religious, ethnic, or political group could invite thousands of lawsuits from disgruntled members of these groups claiming that the portrayal was inaccurate and thus libelous.” *Michigan United Conservation Club v. CBS News*, 485 F.Supp.893, 900 (W.D. Mich. 1980) (organization of hunters and several of its members, who belonged to a group of more than one million hunters, could not sue as a matter of law for defamation of Michigan hunters because under the Restatement (Second) of Torts § 564A the only way for a group member to sue is “if the circumstances surrounding publication give rise to the conclusion that the member was being focused on.” *Id.* at 899.

⁸⁸ *Pawelek v. Paramount Studios Corp.*, 571 F.Supp. 1082, 1085, n.9 (N.D.Ill. 1983) (complaint dismissed on other grounds), *citing*, *Brewer v. Hearst Pub. Co.*, 185 F. 2d 846, 848-49 (7th Cir.1950). and *McGuire v. Jankiewicz*, 8 Ill.App.3d 319,320, 290 N.E.2d 675, 676 (1972)

⁸⁹ Dan B. Dobbs, THE LAW OF TORTS § 406, at 1137 (2000).

⁹⁰ *Id.* § 403, at 1130 (“Beyond ridicule and name-calling, may assertions can cause harm to the plaintiff’s reputation but are not defamatory.”).

⁹¹ N.D. Cent. Code § 32-44-03. A 2-year statute of limitation no doubt helps prevent a floodgate of litigation. *Id.* at 32-44-04. A similar Texas statute was found inapplicable in *Texas Beef Group v. Winfrey*, 11 F.Supp.2d 858 (N.D. Tex.1998) *aff’d*, 201 F.2d 680 (5th Cir.2000) but constitutional. These “veggie libel laws” allow all producers of a general food to sue if the food is wrongly said to be dangerous. Dan B. Dobbs, THE LAW OF TORTS § 406 (2000).

⁹² *See, e.g.*, *Wilkinson v. Federal Bureau of Investigation*, 99 F.R.D. 148, 156 (C.D. Ca.1983) in which the court found that a class action against officers and agencies of the federal government was the “superior method” of litigating false stigmatization claims, which were “closely analogous to a group defamation claim.” *Accord*, *Auvil v. CBS “60 Minutes,”* 800 F.Supp. 928 (E.D.Wash.1992) (class action for group

product disparagement). *See also* 13 F.R.D. 311 (S.D.N.Y. 1952) (suit on behalf of others as well as named plaintiffs). If a defendant were to defame thousands of Irish-Americans in a city by picking likely Irish-American names out of a telephone book and personally defaming each person by reason of their Irish ancestry, the law has no concern about a floodgate of litigation because each plaintiff is named. Yet the same potential for mass litigation exists as though it were a group defamation case. The Supreme Court has indicated group defamation is not an automatic constitutional defense to a civil defamation lawsuit brought by an individual plaintiff from the group. *Rosenblatt v. Baer*, 383 U.S. 75, 82, n.6 (1966) (“[W]e do not mean to suggest that the fact that more than one person is libeled by statement is a defense to suit by a member of the group.”).

⁹³ Restatement (Second) of Torts §§ 561 & 562 (1977). *See also* *McConathy v. Ungar*, 765 So.2d 1214 (La.App.Ct. 2000) and *La Luna Enters. v. CBS Corp.*, 74 F.Supp.2d 384 (S.D. N.Y.1999) (actionable claim by restaurant for “Russian mob” assertion). Libel of a partnership trade name is considered a libel of all the partners. *Poorbaugh v. Mullen*, 99 N.M. 11,12,653 P.2d 511,520 (1982). Investors in an unincorporated business venture cannot directly sue, however, for defamation to the business venture. *Aids Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir.1990).

⁹⁴ *Auvil v. CBS “60 Minutes,”* 800 F.Supp. 928,935 (E.D.Wash.1992) (“It would matter not a whit whether all of the apple orchards in the state were owned by a single corporation or, as here, by thousands of ‘ma and pa’ operations. The injury would be the same.”)

⁹⁵ *See* discussion of the dilution problem in *Auvil v. CBS “60 Minutes,”* 800 F.Supp.928, 935-36 (E.D. Wash.1992).

⁹⁶ *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

⁹⁷ The determination of whether defendant’s act has caused an injury precedes and is analytically different from the question of what damages should be compensated. Leon Green, RATIONALE OF PROXIMATE CAUSE 193 (“The steps which are taken in all prior stages of a case may affect the extent of recovery very greatly but they do not involve the damage problem in its correct sense.”).

⁹⁸ *See generally*, Dan B.Dobbs, THE LAW OF TORTS § 422 (2000) and W.Page Keeton, PROSSER AND KEETON ON TORTS § 116A (1984).

⁹⁹ *Auvil v. CBS “60 Minutes,”* 800 F.Supp.928, 935 (E.D. Wash.1992) (“In a disparagement action where pecuniary interests are at stake, there is no dilution.”).

¹⁰⁰ Henry L. McClintock, McCLINTOCK ON EQUITY § 159, at 430 (2d ed.1948) (“There are dicta in Missouri that an injunction could be issued after a judgment at law for a libel had proved to be uncollectible.”) *Accord* Dan B. Dobbs 1 LAW OF REMEDIES § 2.9(5), at 243 (2d ed.1993). Ohio, Georgia, and Minnesota have been named as states no longer following the equitable maxim that equity will not enjoin a libel. *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir.1991).

¹⁰¹ *CBS, Inc. v. Davis*, 510 U.S. 1315,1318 (1994) (“Subsequent civil criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in a First Amendment context.”). *Accord*, *Near v. Minnesota*, 283 U.S. 697 (1931). Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58,70 (1963). *Accord* *New York Times Co. v. United States* (Pentagon Papers Case), 403 U.S. 713,714 (1971). *See* *Near v. Minnesota ex rel. Olson*, 283 U.S. 697,716 (1931) (striking down a statute treating a “malicious, scandalous and defamatory newspaper or other periodical” as a public nuisance subject to injunction). “It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546,549 (1973) (presumption against prior restraints heavier and speech protection broader than judicial limitations set for criminal penalties affecting speech).

¹⁰² *Kramer v. Thompson*, 947 F.2d 666, 676 (1991) (“To begin with, our research reveals four Missouri cases that suggest in *dicta* that an injunction can issue against further publication of defamatory statements once the plaintiff has secured a jury verdict.”). The Supreme Court has also warned that it has never held all injunctions against the press would violate the First Amendment. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376,390 (1973) (“The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.”).

¹⁰³ Ill.Rev.Stat.ch.38 § 471 (1949). David R. Miller, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS 17 (4th ed.1996) (“This section [Individual Dignity Clause] is based on a former Illinois criminal law [Ill.Rev.Stat.ch.38 § 471:1949].”).

¹⁰⁴ 343 U.S. 250 (1952).

¹⁰⁵ *Id.* at 252. “No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana.” *Id.* at 257-58.

¹⁰⁶ *Id.* at 263.

¹⁰⁷ 578 F.2d 1197 (7th Cir 1978), *affirming*, 447 F.Supp.676 (N.D.Ill.1978)

¹⁰⁸ 578 F.2d at 1204.

¹⁰⁹ The *Beauharnais* majority rejected use of the clear-and-present danger test which would be expected had a tendency toward violence been a constitutional necessity for the criminal libel statute. *Beauharnais v. Illinois*, 343 U.S.250, 266 (1952). The defendant was allowed to offer evidence on the truth of the charges which would have been as irrelevant as it had been in the earliest days of common law libel if fear of social unrest had the dominant concern. *Id.* at 253-54 Most importantly, the case went to the jury as a libel case whether or not the words threatened violence or breach of the peace. *Id.* at 253. Even the text of the criminal libel statute under which the case was tried was worded in the disjunctive (“contempt, obloquy or derision or which is productive of breach of the peace or riots.”) Ill.Rev.Stat. ch.38 § 471 (1949). The *Beauharnais* majority cited *Chaplinsky v. New Hampshire*, 315 U.S. 568,571-72 ()for the separate delineation of the categorical exceptions to the First Amendment: “the lewd and obscene, the profane, the libelous, and the insulting or “fighting words”—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 256

¹¹⁰ *State v. Browne*, 86 N.J. Super. 217, 200 A.2d 591, 596 (19650);

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

¹¹¹ 318 Ill. 482, 149 N.E. 466, 469 (1925), *cited in* , *Beauharnais v. Illinois*, 343 U.S. 250, 254 n.3 (1952), *further cited without name*, in *Collin v. Smith*, 578 F.2d 1197, 1204 (1978) to limit the *Beauharnais* holding to cases where the criminal libel has a strong tendency to provoke a violent reaction.

¹¹² *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (improper to base administrative costs for demonstrations on degree of hostile listeners’ reaction to the demonstration) (“Speech cannot be financially burdened ,any more than it can be punished or banned, simply because it might offend a hostile

mob.”). *Accord*, *Collins v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir.1972) and *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 50 F.3d 695, 701 (7th Cir.1998) (improper to waive administrative fees for established politicians and parties) (“Such a policy would be a form of the heckler’s veto.”). *See also* *Terminiello v. Chicago*, 337 U.S. 1 (1949)

¹¹³ 384 U.S. 195, 200 (1966) (“This kind of criminal libel ‘makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.’ Chafee, *Free Speech in the United States* 151 (1954).”). *Accord* *Boydston v. State*, 249 So.2d 41 (Miss.1971) (statute punishing publication of a “libel” without statutory definition and no case precedent since 1910 unconstitutionally vague) and *Williams v. State*, 249 Ga. 851, 295 S.E.2d 305 (1982) (libel limited to that which “tends to promote breach of the peace” unconstitutionally vague). *But see* *People v. Henrich*, 104 Ill.2d 137, 145, 470 N.E.2d 966, 970 (1984) (“which tends to provoke a breach of the peace” constitutional because legislative history showed phrase limited to “fighting words”).

¹¹⁴ 376 U.S.254 (1964).

¹¹⁵ Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 12-12m at 863 (2d ed,1988).

¹¹⁶ “It would appear after this holding in *New York Times v. Sullivan* the ‘small group theory’ cannot be constitutionally utilized to prove the ‘of and concerning’ element of a defamation action if the defamatory statement is directed at a government or governmental agency no matter what its size.” *Dean v. Town of Elton*, 2001 WL 184223 (Va.Cir.Ct) No.CL00-11958 (Feb.21, 2001) (“the Elkton police department”). *See also* *Andrews v. Stallings*, 119 N.M. 478, 892 P.2d 611, 617 (1995) (“Did you Mr. Norwood, get tired of the village’s appearance of impropriety by having the same people serve on several boards where money switches hands.”), *citing*, *Saenz v. Morris*, 106 N.M. 530, 534, 746 P.2d 159, 163 (Ct.App.) (impersonal criticism of government is not libel of government official).

¹¹⁷ *See* *Garrison v. Louisiana*, 379 U.S. 64, 77-78 (1964) . *See also* *Moity v. Louisiana*, 379 U.S.201(1964) *Accord*, *e.g.*, *Ivy v. State*, 2001 WL 755666 (Alabama S.Ct..2001) No.1001412; *Fitts v. Kolb*, 779 F.Supp. 1502 (D.S.C. 1991); *Madison v. Yunker*, 180 Mont.54, 589 P.2d 126 (1978); *Eberle v. Municipal Court for Los Angeles Judicial Dist.*, 55 Cal.App. 3d 423, 127 Cal.Rptr. 594 (1976); *Weston v. State*, 258 Ark. 707, 528 S.W.2d 412 (1975); and *State v. Browne*, 86 N.J. Super.217, 206 A.2d 591 (1965). Sometimes a court will save a criminal defamation statute by construing it to incorporate *New York Times* actual malice. *Phelps v. Hamilton*, 59 F.3d 1058 (10th Cir.1995), *reversing*, 828 F.Supp. 831 (D.Kan.1993), and *People v. Ryan*, 806 P.2d 935 (Colo.1991).

¹¹⁸ *State v. Helfrich*, 922 P.2d 1159, 1161 (Mont.S.Ct. 1996) (“vast majority” of courts refuse to judicially narrow qualified-truth statutory defenses to save them from constitutional invalidity: precedent cited).

¹¹⁹ *Fitts v. Kolb*, 779 F.Supp.1502,1513-14 (D.S.C.1991).

¹²⁰ *People v. Ryan*, 806 P.2d 935, 941 (Colo..S.Ct.1991) (“The statute remains valid to the extent that it penalizes libelous attacks under the facts of this case, where one private person has disparaged the reputation of another private individual.”).

¹²¹ *People v. Heinrich*, 104 Ill.2d 137, 470 N.E.2d 966 (1984).

¹²² *State v. Powell*, 114 N.M.395, 839 P.2d 139,145 (1992) (“A false defamatory public statement involving a matter of public concern can be subject to criminal penalty only if made with actual malice.”). Some of the authority supporting this view are pre-*Gertz* cases which cite the earlier view of *Rosenbloom v. Metromedia,Inc.*, 403 U.S. 29 (1971) that the First Amendment requires proof of *New York Times* actual malice on all public issues and events of general interest regardless of the plaintiff’s status. *See,e.g.*, *Commonwealth v. Armao*, 446 Pa. 325, 286 A.2d 626 (1972).

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

¹²⁴ 379 U.S. 64, 72 (1964) (“We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels.”).

¹²⁵ 485 F.2d 1087 (8th Cir.1973). The court concluded that, unlike other contexts, it was merging the concepts of vagueness and overbreadth in striking down the statute because the statute dealt with a First Amendment activity. *Id.* at 1096, n.22 (“We hold that the provision of § 1718 which attempts to prosecute libelous and defamatory statements is void as being vague and overly broad.”).

¹²⁶ *Id.* at 1097.

¹²⁷ 384 U.S. 1087 (1973).

¹²⁸ *Tollett v. United States*, 485 F.2d 1087,1097 (1973), *citing*, *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966):

We agree with the dissenters in the Court of Appeals who stated that...since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as penal statute in Kentucky.

¹²⁹ *Id.* at 1096 (“Self-censorship through fear of criminal punishment can diminish the boundaries of original thought and expression of utilitarian emotions and ideas.”).

¹³⁰ *United States v. Handler*, 383 F.Supp. 1267, 1278 (D.Maryland 1974).

¹³¹ 575 P.2d 289 (Alaska.S.Ct. 1978)

¹³² “What is defamatory or scandalous is not defined in AS11.15.310; therefore, the common law definition must be relied on. At common law, any statement which would tend to disgrace or degrade another, to hold him up to public hatred, contempt or ridicule, or to cause him to be shunned or avoided was considered defamatory. In our view this falls far short of the reasonable precision necessary to define criminal conduct.” *Id.* at 292.

¹³³ *Id.* at 294. The Alaska Supreme Court left open the possibility that a narrowly drawn statute with more precise definitions related to breach of the peace might be upheld. *Id.* at 295.

¹³⁴ *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1200 (9th Cir.1989)

¹³⁵ *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323,331, n.3 (7th Cir.1985) (“In *Collin v. Smith*, *supra*, 578 F.2d at 1205, e concluded that cases such as *New York Times v. Sullivan* had so washed away the foundation of *Beauharnais* that it could not be considered authoritative.”). *Accord*, *Dworkin v. Hustler magazine, Inc.*, 867 F.2d 1188, 1200 (8th Cir.1989) (“We agree with the Seventh Circuit that the permissibility of group libel claims is highly questionable at best.”).

¹³⁶ *Sambo’s Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686,694, n.7 (6th Cir.1981) (cases questioning *Beauharnais* cited).

¹³⁷ *New York v. Ferber*, 458 U.S. 747, 763 (1982) (“Leaving aside the special considerations when public officials are the target, *New York Times v. Sullivan*, 376 U.S. 254 (1964), a libelous publication is not protected by the Constitution. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).”). In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (“We have recognized that ‘freedom of speech’ referred to by the First Amendment does not include a freedom to disregard these traditional limitations.”) the Court cited *Beauharnais* as an example of a traditional limitation on freedom of speech.

¹³⁸ Eight punished criminal libel by common law, Twelve made “libel” a crime without defining the term. The remaining jurisdictions used the common law definition in their statutes. *Beauharnais v. Illinois*, 343 U.S. 250, 255, n.5 (1952). Even as late as *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir.1973), which struck down a federal libel statute as unconstitutionally vague, the federal appellate court conceded that “most states” had some type of criminal libel statute.

¹³⁹ *Id.* at 258,

¹⁴⁰ (1) Colorado, C.R.S. § 18-13-103, upheld constitutionally in *People v. Ryan*, 806 P.2d 935 (Colo.1991); (2) Florida, West’s F.S.A. § 836.01 *et seq.*; (3) Georgia, O.C.G.A. § 16-11-39, limited to direct tendency to cause acts of violence by person to whom defamation is addressed in *Klinakis v. State*, 206 Ga.318, 425 S.E.2d 665 (1992); (4) Idaho, I.C. § 18-4801 *et seq.*; (5) Kansas, Kan.Stat. Ann. §21-4004, upheld constitutionally in *Phelps v. Hamilton*, 59 F.3d 1058 (10th Cir. 1995); (6) Kentucky, KRS § 432.280 statute limited to slander or libel of a judge; (7) Massachusetts, M.G.L.A. 272 § 98C; (8) Michigan, attribution of crime, infamous or degrading act, or unchastity of a female, MCLA 750 & MSA 28.602, or false statements about financial condition of certain financial institutions, MCLA 750.97, MSA 28.292 & MCLA750.389, or to accuse one of having been a convict or jail inmate, MCLA 750:409 & MSA 28.641; (9) Minnesota, M.S.A. §§ 609.77 & 609.765; (10) Montana, MCA §§ 13-35-234 & 45-8-212; (11) New Hampshire, RSA 644:11; (12) North Carolina, N.C.G.S. §14-47; (13) North Dakota, § 12/1-15-01; (14) Oklahoma, Okla.Stat. tit.21 § 771-81; (15) Tennessee, indictment for criminal libel in T.C.A. § 40-13-214 based apparently on common law criminal libel; (16) Utah, Utah Code Ann. § 76-9-404; (17) Washington, Wash. Rev. Code §§ 9.58.010 & 9.58.020; West Virginia, apparent common law criminal defamation last reviewed in *State v. Clifford*, 52 S.E.684 (W.Va.1906); (19) Wisconsin, W.S.A. § 942.01

¹⁴¹ NRS § 200.510. *See* LIBEL DEFENSE CENTER 50-STATE SURVEY 2001-2002 (Libel Defense Resource Center, Inc. ed.) 711 (“In an unpublished order, the U.S. District Court approved an agreement between the Nevada Press Association and the Office of the Attorney General for the State of Nevada that Nevada’s criminal libel statutes were unconstitutional.”).

¹⁴² KRS § 432.280

¹⁴³ Oklahoma has had only one reported case since 1931. *Pegg v. State*, 659 P.2d 370 (Okla.Crim.App.1983) (aff’d conviction under “false rumor” statute accusing a person of being a prostitute). Tennessee’s last case seems to be *Melton v. State*, 22 Tenn. 389 (1842) and West Virginia’s last common law case appears to be *State v. Clifford*, 52 S.E.684 (W.Va.1906).

¹⁴⁴ Georgia limits application to threat of direct violence by the subject of the defamation, Kentucky, to defamation of a judge, and Michigan, to various isolated kinds of criminal libel situations. *See fn. 125, supra*. *Aston v. Kentucky*, 385 U.S. 195 (1966), struck down Kentucky’s general criminal libel statute on vagueness grounds.

¹⁴⁵ Robert A. Leflar, “The Social Utility of the Criminal Law of Defamation,” 34 *Texas L.Rev.*984, 985 (1956). *Gottschalk v. State*, 575 P.2d 289, 294-95 (Ala.S.Ct.1978) relied substantially on the article’s findings in striking down Alaska’s criminal libel statute.

¹⁴⁶ Like Professor Leflar the author based his research on West’s Decennial Digests. The author used the keynote system by researching under Libel and Slander, Criminal Responsibility, §§ 141-162 in the Seventh Decennial Digest (1956-1966); the Eighth Decennial Digest (1966-1976); the Ninth Decennial

Digest, Part I (1976-1981); the Ninth Decennial Digest, Part II (1981-1986); the Tenth Decennial Digest, Part I (1986-1991), the Tenth Decennial Digest, Part II (1991-1996), and the Eleventh Decennial Digest, Part I (1996-2001). Like Leflar the author eliminated duplicate citations to the same case and went further by eliminating civil cases and Wisconsin criminal slander of title cases which had been misclassified as criminal defamation cases.

¹⁴⁷ 379 U.S. 64 (1964)/

¹⁴⁸ 384 U.S. 195 (1966).

¹⁴⁹ 418 U.S. 323 (1974).

¹⁵⁰ 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”). *Sullivan* cited *City of Chicago v. Tribune Co.*, 307 Ill.595 (1923) in which the Illinois Supreme Court concluded free expression prevented a city, as a governmental entity, from suing its citizens for defamation. *Id.* at 277. *See also, supra*, fn. 100 & 101. As Prof. Leflar noted earlier, public figures, such as Hollywood movie stars, as well as government officials, are apt to use their influence to initiate criminal defamation charges. *See, e.g.*, *Eberle v. Municipal Court*, Los Angeles Judicial Dist, 127 Cal.Rptr. 594, 55 CA 3d 423 (1976) (Angie Dickinson).

¹⁵¹ *City of Chicago v. Lambert*, 47 Ill.App.2d 151, 197 N.E.2d 448 (1964) (affirming conviction for distribution of leaflets attributing to African-Americans and Jews criminal tendencies, unchastity and degrading sexual inclinations).

¹⁵² *See* MODEL PENAL CODE COMPLETE STATUTORY TEXT (1985) and Wayne R.LaFave & Austin W. Scott, Jr., CRIMINAL LAW (2d ed. 1986). Another criminal law treatise writer suggests libel should be left to the civil law. Rollin M. Perkins & Ronald N. Boyce, CRIMINAL LAW § G.[Libel], at 492.(3d ed. (1982).

¹⁵³ § 623m”Special Note on Remedies for Defamation Other Than Damages,” at 326-29 (1977). *Id.* at 327-28. “In a jurisdiction where declaratory relief is available as a general remedy and statutory provisions do not preclude it, resort may be had to a suit for a declaratory judgment that the defamatory statement is untrue.”).

¹⁵⁴ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S.749,771 (1985) (White,J., concurring:” At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name.”) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 391-92 (1974) (White, J., dissenting: “I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages he should be able to prevail and have a judgment that the publication was false.”).

¹⁵⁵ H.R.2846, 99th Congress (1985). The avoidance of the *New York Times* “actual malice” standard makes a plaintiff’s case much easier. The empirical evidence indicates the *New York Times* standard has reduced a plaintiff’s likelihood of success in a libel case by as much as 60%. Larry J. Sabato, FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS 70 (1991).

¹⁵⁶ Libel Reform Project of the Annenberg Washington Program, *Proposal for the Report of Libel Law*, § 4, at 16 (1988). North Dakota has adopted the Uniform Correction or Clarification of Defamation Act which provides that a defendant who makes a timely and sufficient correction or clarification can only be sued for provable economic loss “mitigated” by the correction or clarification. N.D. Cent.Code § 32-43-05 (1995).

¹⁵⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (“We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”). The threat of imprisonment under a criminal libel statute is remote. In fact Justice Brennan in *Sullivan* thought that a civil defamation action potentially chilled the First Amendment even

more than a criminal defamation action because of the greater procedural and constitutional safeguards built into the criminal law. *Id.* at 277. See also *Gertz v. Welch*, 418 U.S. 323, 349-50 (1974) (uncontrolled discretion of juries in awarding damages both compensatory and punitive).

¹⁵⁸ Dan B. Dobbs, *LAW OF REMEDIES* § 1.1, at 8 (2d ed.1993).

¹⁵⁹ Walter H. Anderson, *ACTIONS FOR DECLARATORY JUDGMENTS* §457, at 1070 (2d ed. 1951).

¹⁶⁰ Edward D. Re, *CASES AND MATERIALS ON REMEDIES* 343-44 (1996).

¹⁶¹ A state violates the First Amendment by requiring a newspaper to provide a “right of reply” by a political candidate whose was attacked by the newspaper. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (violation of First Amendment by intrusion into editorial judgment and control over size and content of the newspaper). The Supreme Court has not expressly extended the *Tornillo* doctrine to the electronic media and in fact distinguished newspapers from cable in *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994).

¹⁶² See generally *supra* text accompanying notes 53-59. The FCC cited *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) in explaining why its fairness doctrine as to broadcasters should be abandoned. *Report Concerning General Fairness Doctrine Objections of Broadcast Licensees*, 102 F.C.C.2d 145, 151-52 (1985) (*Tornillo* “right of reply” statute less speech-inhibiting than fairness doctrine). Citing *Tornillo* again the FCC rejected replacement of the fairness doctrine with mandated access by the public for discussion of controversial public issues. *Inquiry Concerning Alternatives to the General Fairness Obligations of Broadcast Licensees*, 2 FCC Rcd 5272, 5283 nn. 87 & 92 (1987) (would inject government into day-to-day operations and erode editorial discretion).

¹⁶³ Laws that inhibit the First Amendment can be facially attacked by the vagueness doctrine *City of Chicago v. Morales*, 527 U.S. 41, 55-56 (1999). *Accord*, *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (“Where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness]doctrine demands a greater degree of specificity than in other contexts.”).

¹⁶⁴ When a criminal law implicates the First Amendment the law must be so clear that persons of ordinary intelligence have a reasonable opportunity to know what is prohibited. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir.2000). The other peculiarly criminal law concern is that a vague law impermissibly delegates basic policy to policemen, judges, and juries for resolution on a subjective basis with the consequent dangers of arbitrary and discriminatory law enforcement. *Grayned v. City of Rockford*, 408 U.S. 104,109 (1972). Vagueness and overbreadth attacks in a First Amendment setting more drastically invalidate on a facial basis while if done on a Due Process basis they usually invalidate only on an as-applied basis to a specific defendant. Kathleen M. Sullivan & Gerald Gunther, *CONSTITUTIONAL LAW* 1299 (14th ed. 2001).

¹⁶⁵ *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982) (“The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”).

¹⁶⁶ 481 U.S. 465 (1987). *Accord*, *Block v. Meese*, 793 F.2d 1303,1313 (D.C.Cir.1986) (“We know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech’s content.”). Every time a court allows a civil defamation

judgment for damages against a defendant government is being “critical” of the defendant’s defamatory speech. *See also* Richey v. Tyson, 120 F.Supp.2d 1298, 1324-25 (S.D.Ala.2000) (upholding “political committee” statutory label imposed on plaintiffs by government).

¹⁶⁷ *Pesttrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir.1991).

¹⁶⁸ *Id.* at 579.

¹⁶⁹ 497 U.S. 1 (1990).

¹⁷⁰ *Id.* at 18-20.

¹⁷¹ *Khalid Abdullah Tariq al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F.Supp.186, 187 (N.D.Calif.1980) (“If the court were to permit an action to lie for the defamation of such a multitudinous group we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import.”). *Accord* *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786, 789 (1981) (“Thus the incidental and occasional injury to the individual resulting from the defamation of large groups is balanced against the public’s right to know.”). *Fanning* involved a claim for \$20 billion on behalf of 600 million Muslims, a remedy far more likely to chill First Amendment rights than simple declaratory relief. Although *Milkovich* requires that even for a defamatory opinion a public figure must still prove *New York Times* “actual malice” and a private figure of public concern must prove some level of fault, unincorporated racial and ethnic groups who are usually the gratuitous victims of group defamation simply cannot reasonably be deemed “public figures”, let alone a “private figure,” even if such cases are not distinguishable on the more basic ground that these requirements were designed for defamation cases seeking damages.

¹⁷² *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323,332 (1985). (“The definition of ‘pornography’ is unconstitutional.”).

¹⁷³ *Id.* at 331 (“We come, finally, to the argument that pornography is ‘low value’ speech, that it is enough like obscenity that Indianapolis may prohibit it) and at 332 (“But the Indianapolis ordinance, unlike our hypothetical statute, is not neutral with respect to viewpoint.”).

¹⁷⁴ *See generally* Mari J. Matsuda et al. WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

¹⁷⁵ *American Booksellers v. Hudnut*, 771 F.2d 323, 329 (7th Cir.1985) (“Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.”).

¹⁷⁶ Donald M. Gillmor, POWER, PUBLICITY AND THE ABUSE OF LIBEL LAW 11 (1992), *citing*, Randall P. Bezanson, LIBEL LAW AND THE PRESS 78 (1987).

¹⁷⁷ *See supra* note 102 and accompanying text.