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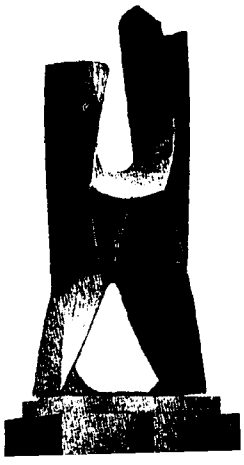

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GROUP DEFAMATION

Geoffrey R. Stone*

Late this spring, the Illinois General Assembly considered the enactment of legislation designed to re-institute the crime of "group defamation" in Illinois. On June 6, I had an opportunity to testify before the Judiciary II Committee of the Illinois House of Representatives concerning the propriety and constitutionality of Senate Bill 1811, the proposed legislation.† Although sympathetic to the

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†Senate Bill 1811, as amended by its sponsors in the Illinois House of Representatives, provided:

(a) Elements of Offense. A person commits criminal group defamation when such person demonstrates or exhibits in any public street, highway, sidewalk, alley, park or parking lot and knowingly displays any sign, slogan, uniform or symbol which portrays, states or implies depravity, criminality or unchastity of a class of persons of any race, color, creed or religion or threatens the life, liberty or property of any class of persons by reason of their race, color, creed or religion, which sign, slogan, uniform or symbol exposes the persons of any race, color, creed or religion to contempt, derision or obloquy and which is intended so to do or which is likely to be productive of a breach of the peace or riot. No demonstration or exhibition shall be unlawful under this Section solely by reason of the hostility or dislike which such demonstration or exhibition arouses in any person or persons who observe it.

(b) Penalty. Criminal group defamation is a Class B misdemeanor.

(c) Injunction. Any public official or any person affected by an imminent violation of subsection (a) above may maintain an action in the circuit court to restrain such a violation.

specific concerns underlying the bill, it was my view that the bill, as drafted, simply could not satisfy the rigorous demands of the First Amendment. What follows is a slightly edited version of my remarks to the Committee.

At first glance, the notion that "group defamation" should be suppressed seems perfectly sensible. It is, no doubt, only common sense to recognize that speech "which portrays, states or implies depravity, criminality or unchastity of a class of persons of any race, color, creed or religion" is in at least many instances abusive and, indeed, despicable. And the common sense urge to suppress such speech may seem especially compelling when it "exposes the persons of any race, color, creed or religion to contempt, derision or obloquy" or when it "is likely to be productive of a breach of the peace or riot." At the same time, however, the First Amendment to the Constitution of the United States, prohibiting as it does the making of any "law abridging the freedom of speech or of the press," cautions that we must not accede too hastily to the apparent dictates of common sense when freedom of expression is at stake. It is, of course, elementary that the principle of freedom of speech lies at the very core of the American political system, for it is through the free and open exchange of all sorts of ideas and information that the citizen must seek to discover the truth and must seek to make those critical decisions of policy which, in a democratic society, are reserved for the citizen to make for himself.

Given the central importance of free speech for our political system, the exercise of the right must be granted ample breathing space if the system itself is to survive and flourish. As the Supreme Court has recognized, the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."[1] Indeed, the Court has declared that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a

[1]New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[2] This does not mean, of course, that the right to freedom of speech is absolute — that it may *never* be regulated or restricted. It does mean, however, that any effort to restrict speech because of its content, in order to pass constitutional muster, ordinarily must at the very least be narrowly drawn, carefully limited, and justified by clearly compelling governmental interests.[3]

This extraordinarily speech-protective standard is thought necessary because such restrictions, if permitted, tend to skew the "marketplace of ideas" and to distort the processes of public decision-making. Moreover, as experience teaches, the use of any less exacting standard inevitably results in the widespread suppression of unpopular and dissenting views. During World War I, for example, there was considerable opposition to the war and to the draft. The government, in an effort to suppress the expression of such criticism, brought almost two thousand prosecutions against critics of the government's policies. The courts, not yet sensitive to the dynamics of a system of free expression, routinely convicted on the theory that such speech might have the tendency to obstruct the war and the draft. The net effect was the suppression of much dissent. Under this "bad tendency" standard, "[i]t became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional though the Supreme Court had not yet held it valid, to say that the sinking of merchant vessels was legal, to urge that a referendum should have preceded our declaration of war, to say that war was contrary to the teach-

[2]Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[3]It should be noted that we are dealing here with a restriction on speech because of its content. The Supreme Court has generally applied a somewhat less stringent standard in ruling on the constitutionality of restrictions that apply to all speech, without regard to content. That standard is not in any way at issue here. *Compare, e.g.*, Grayned v. Rockford, 408 U.S. 104 (1972), *with, e.g.*, Police Dept. v. Mosley, 408 U.S. 92 (1972).

ings of Christ."[4] Similarly, the Supreme Court's early experimentation with a "reasonableness" standard resulted in unjustified and dangerous restrictions on speech.[5] Finally, it should be noted that the dangers are particularly acute when the speech we seek to suppress consists of the key tenet, slogan or symbol of a dissident political group. For in such cases, the members of that group will as often as not go to prison as a matter of principle rather than abandon the tenet, slogan or symbol. The practical effect, then, is to eliminate, not only the offensive or undesirable speech, but the group itself — including whatever valuable ideas it might have to offer. This, surely, is a lesson of our efforts to suppress the Communist advocacy of "violent revolution." Thus, we have learned over time that the system of free expression is extraordinarily complex and delicate, and that if the guarantee of the First Amendment is to remain viable, suppression of speech because of its content must ordinarily be prohibited except in the most compelling circumstances.

As drafted, Senate Bill 1811 permits the suppression of speech "which portrays, states or implies depravity, criminality or unchastity of a class of persons of any race, color, creed or religion" if either of two conditions is satisfied. First, the bill provides that such speech may be suppressed if it "exposes the persons of any race, color, creed or religion to contempt, derision or obloquy."[6] This aspect of the bill seems to be directed at the concern that group defamation can, over time, have a corrosive impact upon societal attitudes, contributing ultimately to

[4]Z. Chafee, FREE SPEECH IN THE UNITED STATES 51 (1941).

[5]*See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927). *See also* Abrams v. United States, 250 U.S. 616 (1919); Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920).

[6]I must confess that I do not have the faintest idea as to how this condition is to be applied in practice. What, if anything, does this condition add to the bill's initial description of group defamation? How is a judge or jury to determine whether, in any given case, this condition is satisfied? Given this ambiguity, how is a speaker to know when he crosses the line and incurs a risk of criminal liability? In my judgment, this aspect of the bill is so confusing and imprecise as, by current standards, to be unconstitutionally vague. *Cf.* Papachristou v. Jacksonville, 405 U.S. 156 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971).

racism, bigotry and intolerance, and that the consequences of such attitudes may be hurtful and, in the long run, perhaps disastrous for the members of the defamed group. This concern is, beyond question, a legitimate one. It would, indeed, be naive in the extreme to deny that such speech can at least potentially have such an effect. No one need be reminded of the horrors that were unleashed by the use of hate-mongering propaganda only forty years ago in Nazi Germany. The question remains, however, not whether the concern of this aspect of the bill is legitimate but, rather, whether the suppression of speech is, in our system of government, a proper and permissible way to deal with that concern. The answer, I submit, is an emphatic "no."

However serious the potential consequences of group defamation may be, they are, in the end, remote, indirect and uncertain. Thus, any attempt to suppress such speech for these reasons is, in truth, simply another manifestation of the dangerous and discredited "bad tendency" standard, to which I referred earlier. As Justice Brandeis observed some fifty years ago, the basic theory of our Constitution is that, except in the most extraordinary circumstances, "the fitting remedy for evil counsels is good ones" — not suppression.[7] Unless the danger is clear, substantial and imminent, the matter must be left to the continued processes of public debate and discussion. There are, of course, dangers in such a theory, but in the long run the dangers of suppression are thought to be more threatening to our society than the dangers of speech. "That at any rate is the theory of our Constitution."[8] In the words of the Supreme Court, "[I]t is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up in this relatively permissive, often disputatious, society."[9] Thus, the proper and permissible way for government in our political system

[7]Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[8]Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[9]Tinker v. Des Moines School District, 393 U.S. 503, 508-509 (1969).

to deal with this sort of speech is not to attempt suppression, which in any event will simply give greater publicity to the speech and perhaps create martyrs, but to expose it for what it is — to facilitate the opportunities for counter-speech, to educate our citizens in the ways of tolerance, and to teach by its own example. Therein lies the course of greatest safety for us all.

This does not end the matter, however, for the suppression of speech which exposes "persons of any race, color, creed, or religion to contempt, derision, or obloquy" might arguably be viewed, not only as an effort to forestall the possible long-range consequences of group defamation, but also as an effort to protect citizens against any emotional harm that might be caused by their very exposure to statements defaming the groups to which they belong. It seems doubtful that this is in fact a purpose of this aspect of the bill, for if that is its real purpose it would almost surely contain some requirement that a member of the defamed group actually read or hear the statement at issue. More importantly, this is simply not a sufficiently compelling interest to justify the suppression of otherwise protected expression. The Supreme Court has long adhered to the view "that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[10] This is, indeed, a fundamental precept of First Amendment analysis. There may, of course, be a difference between causing "offense" and causing "emotional harm." That difference, though, is at best one of degree — it can neither be defined with clarity nor applied with consistency. Acceptance of causation of emotional harm as a permissible justification for the suppression of speech might in practical effect provide a lever for judges and jurors to censor all sorts of unorthodox and unpopular ideas. It is not, in short, a difference that can safely be incorporated into a sensitive and realistic analysis of the First Amendment.

[10]Street v. New York, 394 U.S. 576, 592 (1969). *See, e.g.*, Spence v. Washington, 418 U.S. 405, 412 (1974); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Watson v. City of Memphis, 373 U.S. 526, 535 (1963); Niemotko v. Maryland, 340 U.S. 268, 284 (1951) (Frankfurter, J., concurring).

The second ground for the suppression of group defamation offered by Senate Bill 1811 is that such speech may be prohibited if it "is likely to be productive of a breach of the peace or riot." There can be no doubt that government has a legitimate interest in the preservation of order. But, as always, restrictions on speech are permissible only when absolutely necessary. Thus, in its unanimous 1969 decision in *Brandenburg v. Ohio*, the Supreme Court, for reasons similar to those already addressed, held in no uncertain terms that even the express advocacy of crime cannot constitutionally be proscribed unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[11] Senate Bill 1811 is, on its face, flatly incompatible with this command of *Brandenburg*. The problem, however, runs deeper. The Court in *Brandenburg* was concerned with the situation in which a speaker expressly urges others to engage in unlawful conduct. The breaches of the peace and riots covered by this bill, on the other hand, will almost invariably be directed *against* the speaker by a hostile audience. We are dealing, in other words, with what Professor Harry Kalven termed the dilemma of the "heckler's veto." To elevate the heckler's veto to a principle of First Amendment interpretation would, in practical effect, grant censorial power to any group with the desire and wherewithal to snuff out any other group's or individual's right to speak through the use of real or threatened acts of violent opposition. This is simply inconsistent with all that the First Amendment stands for. Thus, if we are ever to grant the heckler his veto, we should do so only when the police, after taking all reasonable measures, are clearly unable to prevent the imminent and likely disorder, and the speaker refuses at that time to obey a police order to stop his speech.[12]

The final question that must be considered is whether group defamation, as defined by this bill,

[11] 395 U.S. 444, 447 (1969).

[12] *See* Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963). The reference to the problem of the hostile audience in the final sentence of sub-section (a), which was added by the House sponsors, while helpful, is ambiguous and, in any event, seems not to meet the standards outlined above.

constitutes one of those special and limited categories of speech, such as obscenity, false statements of fact, and fighting words,[13] which the Supreme Court has found to be of such low value in terms of the historical, philosophical and political purposes of the First Amendment as to be exempt from the ordinarily stringent standards of review we have thus far examined. Any attempt to answer this question must begin with the Supreme Court's 1952 decision in *Beauharnais v. Illinois*.[14] Beauharnais, president of the White Circle League of America, participated in the publication and distribution of a rather lengthy leaflet, a portion of which was in the form of a petition to the mayor and city council of Chicago, calling for a halt to racial integration of housing. At one point, the petition stated that, "If persuasion and the need to prevent the white race from being mongrelized by the Negro will not unite us, then the aggressions, rapes, robberies, knives, guns and marijuana of the Negro surely will." Because of this characterization of blacks, Beauharnais was charged with the crime of group defamation. He was prosecuted under a former Illinois statute, quite similar to Senate Bill 1811, which was ultimately withdrawn from the State's Criminal Code in 1961.[15]

[13]The "fighting words" doctrine, it should be noted, has no application in this context for at least three reasons. First, that doctrine has been limited, from its inception, to the use of personal insults or epithets which are intended and understood, not as communication, but as verbal assaults. Second, the doctrine contains an implicit requirement of likely and imminent danger, in that the speech must be such as to cause the average addressee to respond with violence. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). And third, the Court has carefully and consistently limited the doctrine solely to face-to-face encounters where the speech is directed at a particular, individual addressee. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969). Although this third requirement may at first glance seem artificial, it is in fact an essential component of the doctrine. For unlike personal insults addressed to a particular individual, statements critical of a group addressed to a general audience are by their very nature generalized and therefore of potentially greater importance to public debate. Finally, it should be noted that the Supreme Court has not upheld a conviction on the basis of the "fighting words" doctrine in some thirty-five years. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. New Orleans, 415 U.S. 130 (1974); *but cf.* Lucas v. Arkansas, 423 U.S. 807 (1975).

[14]343 U.S. 250 (1952).

[15]*See* Smith-Hurd, Ill. Stat. Ann. (1949), chap. 38, § 471. The 1961 revision merged the three prior criminal libel laws into a single brief statute keyed to breach of peace. *See* Smith-Hurd, Ill. Stat. Ann. (1961), chap. 38, §§ 27-1, 27-2, and the committee comments.

At this trial, Beauharnais offered to prove the truth of the statement by showing that crimes were more frequent in black districts. The trial judge rejected this offer of proof, because under then-prevailing Illinois law, truth alone was not a defense. Rather, in order to make out a defense to a charge of group defamation, it was incumbent upon the defendant to prove, not only that the statement was true, but also that it was published with "good motives." The trial judge also refused to instruct the jury that it could convict only if it found that the statement created a clear and present danger of some serious evil. Beauharnais was convicted. The Supreme Court, by the slim margin of a single vote, and over the vehement dissents of Justices Black, Douglas, Reed and Jackson,[16] affirmed.

In my view, and in the view of most courts and commentators who have addressed the question in recent years,[17] *Beauharnais* was untenable at the time it was decided and, in any event, is no longer controlling authority today. In the quarter-century since *Beauharnais*, the Supreme Court has not in a single instance relied upon that decision as a controlling precedent. Although that fact, standing alone, is surely not dispositive of the point, it does indicate the degree of respect accorded *Beauharnais* by the Court itself. Moreover, it must be emphasized

[16]Justice Jackson, it should be noted, had recently returned from Nuremburg, where he had served as Chief United States Prosecutor at the War Crimes Trials. Jackson was thus particularly attuned to the possible dangers of group defamation and, indeed, he had previously expressed his concern over that issue in several prior decisions. *See* Kunz v. New York, 340 U.S. 290, 295-314 (1951) (Jackson, J., dissenting); Terminiello v. Chicago, 337 U.S. 1, 13-37 (1949) (Jackson, J., dissenting). It is instructive, then, that in *Beauharnais* Jackson felt that the effort to suppress such speech went too far, because it did not allow for the defense of truth or the application of the clear and present danger standard. *See* 343 U.S., at 287-305 (Jackson, J., dissenting).

[17]*See, e.g.*, Tollett v. United States, 485 F.2d 1087, 1094 n. 14 (8th Cir. 1973); Anti-Defamation League of B'nai B'rith v. F.C.C., 403 F.2d 169, 174 n. 5 (D.C. Cir. 1968) (concurring opinion); Colin v. Smith, 447 F. Supp. 676, 694-98 (N. Dist. Ill. 1978); T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 393-97 (1970); H. Kalven, THE NEGRO AND THE FIRST AMENDMENT 7-64 (1966); Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 Md. L. Rev. 555, 603-04 (1976). *But see* Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 Sup. Ct. Rev. 281.

that *Beauharnais* was decided at a time when the Court, relative to the present, was rather notably insensitive to the need for jealous protection of the right of free speech. To cite just one example other than *Beauharnais*, the preceding year the Court upheld the convictions of the leaders of the Communist Party under the Smith Act.[18] That decision has long been the subject of spirited criticism and, indeed, has as a practical matter been discredited by the Court itself.[19] In the twenty-six years since *Beauharnais*, the Court has made extensive, indeed revolutionary, doctrinal changes in its interpretation and application of the First Amendment. And although it is impossible even to begin to trace those developments here,[20] it seems only fair to say that those changes leave *Beauharnais* looking a bit antique.

Finally, and most importantly, the Supreme Court has flatly rejected the underlying premise of the *Beauharnais* decision. The Court in *Beauharnais* rested its analysis squarely upon its conclusion that libelous utterances are not "within the area of constitutionally protected speech. . . ."[21] Accordingly, there was no need to worry about the truth or falsity of the statement, and no need to consider the applicability of the clear and present danger standard. Some twelve years later, however, in its landmark

[18]Dennis v. United States, 341 U.S. 494 (1951). For an additional example, see Feiner v. New York, 340 U.S. 315 (1951).

[19]*See* Brandenburg v. Ohio, 395 U.S. 444 (1969). *See also* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719 (1975); Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons*, 43 U. Chi. L. Rev. 151 (1975).

[20]To cite just a few examples, *see, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech held protected by the First Amendment); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (lawyer advertising held protected by the First Amendment); Cohen v. California, 403 U.S. 15 (1971) (use of profanity held protected by the First Amendment); New York Times v. Sullivan, 376 U.S. 254 (1964) (libel held protected by the First Amendment); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (symbolic speech by school students held protected by the First Amendment); Watts v. United States, 394 U.S. 705 (1969) (hyperbolic threat held protected by the First Amendment).

[21]343 U.S., at 266.

decision in *New York Times v. Sullivan,* the Court declared that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[22] Thus, although *New York Times* and its progeny do not tell us precisely how to deal with the problem of group libel, there can be no doubt that *Beauharnais* has been stripped of any doctrinal support. It is, in short, a relic of a bygone era.

Despite all this, there are those who still maintain that, since the decision has not as yet been expressly overruled, it remains "good" law. That argument is, to me, simplistic and unpersuasive. Let us suppose that, in 1902, the Supreme Court, applying the then accepted principle of "separate but equal," upheld the constitutionality of racial segregation of a public hospital. It seems to me clearly untenable to maintain that that decision is still "good" law today, just because the Supreme Court has not as yet had an opportunity to hold racial segregation in the specific context of public hospitals unconstitutional. *Beauharnais,* like my hypothetical 1902 decision, is simply no longer "good" law.

Putting *Beauharnais* to one side, then, the question remains whether group defamation, as defined by this bill, can fairly be said to be of such "low" constitutional value as to be exempt from the ordinarily stringent standards of First Amendment review. At the outset, it should be noted that the potential scope of this bill's applicability is, to say the least, rather broad. It would seem to reach, not only Mr. Beauharnais, but also, perhaps, a black activist who accuses whites of being racists; not only Mr. Colin, but also, perhaps, Anita Bryant; not only the leader of the Ku Klux Klan, but also, perhaps, a feminist who rails against the Catholic view on abortion. This bill is simply not a narrowly drawn, carefully limited restriction on speech. Although 1811 finds its roots in the current controversy over Skokie, its language and effect reach well beyond that situation. That is, indeed, a basic problem with the very concept of group defamation. It is, however, but the tip of the problem.

Speech "which portrays, states or implies

[22]376 U.S. 254, 269 (1964).

depravity, criminality or unchastity of a class of persons of any race, color, creed or religion" may be distasteful, but there can be no doubt that it is, in many instances, relevant to issues of general public concern. Although we might prefer that all persons be treated solely as individuals, rather than as members of groups, we live in a heterogeneous society consisting of many overlapping but distinct groups. This diversity is, indeed, one of our greatest strengths as a nation. Our perceptions of such groups may affect our views, not only of society generally, but of such controversial issues as affirmative action, busing, crime control, government aid to parochial schools, abortion, and our treatment of homosexuals. Moreover, at least some statements proscribed by this bill may amount to nothing more than true statements of fact, such as "Blacks commit a disproportionate number of crimes," or "American Indians commit a disproportionate number of suicides." Such statements are valuable, not because they tell us something "bad" about those groups but, rather, because it is important to be aware of and to recognize such facts if society is to understand the causes of the problems and if it is to attempt to ameliorate them. It is simply inconceivable to me that true statements of fact, relevant in any way to public debate, can be said to be of "low" First Amendment value.[23] In many other instances, speech proscribed by this bill will consist of statements of opinion, or efforts at sarcasm, ridicule, or hyperbole. Such rhetorical devices, although at times cruel and often in bad taste, have long been recognized as effective and important techniques of public debate.[24] However unpleasant they might be, they cannot fairly be said to be outside the realm of permitted public debate in a genuinely free and open society. As the Supreme Court has recognized, debate on public issues may at times be "vehement, caustic"

[23] *Cf.* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977).

[24] Indeed, one of the most disturbing features of the Sedition Act of 1798 was that it permitted the suppression of such speech under the guise of the libel concept. *See, e.g., Trial of Matthew Lyon for Seditious Libel,* in F. Wharton, STATE TRIALS OF THE UNITED STATES 333 (1849); *Trial of James T. Callender for Seditious Libel,* in *id.* at 688. *See generally,* J. Smith, FREEDOM'S FETTERS (1956).

and unpleasant.[25] And although "the immediate consequences of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance," these are, "in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."[26]

It is true, of course, that individuals may at times engage in such speech for "bad" reasons. But speech that is not on its face of low First Amendment value cannot magically be transformed into low value speech because of the intent or motives of the speaker. Concepts such as intent and motive are extraordinarily slippery, and if they are made the sole determinants of the distinction between "good" and "bad" speech they can easily lead to abuse, consciously or unconsciously, by judges and jurors who are offended by the ideas themselves. This results, not only in arbitrariness of enforcement, but also in a substantial chilling of public debate. Moreover, and perhaps most importantly, as Professor Zechariah Chafee has observed, "truth is truth, and just as valuable to the public" regardless of the speaker's motive or intent.[27]

There is, finally, one class of statements encompassed within the notion of group defamation which might, at least arguably, be a legitimate basis for suppression. The Supreme Court has held that "there is no constitutional value in false statements of fact."[28] Thus, if this bill were re-drafted so as to apply only to false statements of fact, made with reckless disregard for the truth, it might well be constitutional. There are, however, at least three possible problems with such a law, and I would like to note them briefly. First, as the Supreme Court has observed, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the com-

[25]New York Times v. Sullivan, 376 U.S. 254, 270 (1964). *See also* Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[26]Cohen v. California, 403 U.S. 15, 24-25 (1971).

[27]Z. Chafee, FREE SPEECH IN THE UNITED STATES 51 (1941).

[28]Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

petition of other ideas."[29] Accordingly, such a law, to be constitutional, must clearly be limited to false statements of fact, and may not reach statements of opinion, sarcasm, ridicule or hyperbole. Second, in upholding restrictions on false statements of fact, the Court has dealt primarily with libel of individuals, where the harm is direct and substantial. In the group defamation context, the harm is ordinarily somewhat more remote. It is thus an open question whether the Court would uphold a restriction on false statements in such circumstances. Finally, there may well be serious objections of policy to such a law. It seems to me unseemly, at best, and dangerous, at worst, for a judge or jury to find a statement of the "depravity, criminality or unchastity of a class of persons of any race, color, creed or religion" to be *true*. It might be that the potential costs to society of such a possibility outweigh any benefits that might be derived from the law itself.

I should note, in concluding,[30] that I have the utmost sympathy with the concerns that underlie this bill, and have nothing but disdain and contempt for much of the speech it would prohibit. The First Amendment, however, renders my judgments on such matters irrelevant. That is the way it should be, and it is the way it must be. It is my firm belief that this bill, as drafted, is in direct violation of the Constitution of the United States. It should not be enacted into law.

[29]*Id.* at 339-40. *See also* Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 283-87 (1974) (use of terms like "scab" and "traitor" cannot be deemed false statements of fact). *See generally* American Law Institute, RESTATEMENT (SECOND) OF TORTS § 566 (1977); Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 Mich. L. Rev. 1621 (1977).

[30]Senate Bill 1811 has been amended by its House sponsors so as to make it applicable to threats as well as to group defamation. This aspect of the bill seems clearly unconstitutional. Threats directed against a class of persons merge, practically and analytically, with the problem of incitement. Indeed, *Brandenburg* itself dealt, in reality, with threats rather than with incitement as such. The two problems are, in this context, so entwined as to be inseparable. Thus, whatever may be the status under the First Amendment of threats directed against a particular, named individual, *cf.* Watts v. United States, 394 U.S. 705 (1969), threats against a group must be tested against the *Brandenburg* requirement that, in order to justify suppression, the harm must be likely and it must be imminent.

Although the Illinois Senate had quickly and overwhelmingly approved Senate Bill 1811, the House Judiciary II Committee, at the conclusion of its June 6 hearings, voted 16 to 4 against passage of the bill. One week later, the House as a whole voted not to discharge the bill from Committee.