

Notes

Group Vilification Reconsidered

The attempts by the Nazi Party of America to march in Skokie, Illinois,¹ afford a recent example of the public dissemination of speech that vilifies large and identifiable racial, ethnic, or religious groups.² Thirty years ago, the question of whether such speech should enjoy First Amendment protection was hotly debated among legal scholars,³ and in 1952 a sharply divided Supreme Court held in *Beauharnais v. Illinois*⁴ that such speech should not be protected.⁵ Interest in the

1. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

2. "Vilifying" speech has been defined as any utterance that, directly or by innuendo, holds up the target of the utterance to "public contempt, hatred, shame, disgrace, or obloquy," or that causes the target or its members to be "shunned, avoided or injured" in business, profession or occupation. Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595, 609 (1947); see RESTATEMENT (SECOND) OF TORTS § 559 (1977). The terms "group-vilifying speech" and "group vilification" will be used in this Note to signify speech that vilifies large and identifiable racial, ethnic, or religious groups.

The particular speech circulated in the Village of Skokie focused on Jews as its target group. See *Collin v. Smith*, 447 F. Supp. 676, 680-81 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Enclosures in Letter from Harvey Schwartz, Corporation Counsel, Village of Skokie (Oct. 25, 1978) (circulars entitled "Smash the Jew System," "We Are Coming") (on file with *Yale Law Journal*). Jews and blacks are frequently the object of group-vilifying speech. See Enclosures in Letter from Miriam Aroner, Librarian, American Jewish Congress, New York City (Dec. 20, 1978) (circulars entitled "Washington's America Sabotaged by Jews," "Scientists Say Negro Still In Ape Stage") (on file with *Yale Law Journal*); Enclosures in Letter from Dr. Henry Pohly, Community Consultant, New York Regional Office, Anti-Defamation League of B'nai B'rith (Dec. 19, 1978) (circulars entitled "Jewish Cabal Rules America," "Instant Nigger") (on file with *Yale Law Journal*).

3. The seminal article, Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942), provoked considerable response and debate. See, e.g., AMERICAN CIVIL LIBERTIES UNION, *THE CASE AGAINST LEGAL RESTRAINTS ON RACIAL LABELS AND ANONYMOUS PUBLICATIONS* (1946); Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950); Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 YALE L.J. 252 (1952); Note, *supra* note 2.

4. 343 U.S. 250 (1952).

5. *Id.* at 266. *Beauharnais* was convicted under an Illinois statute that prohibited any person from publishing:

any lithograph . . . [that] portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.

Id. at 251 (quoting Act of June 29, 1917, Ill. Criminal Code, § 224a, 1917 Ill. Laws 362-63 (repealed 1962)). The lithograph complained of was a leaflet in the form of a petition that demanded that the Mayor and City Council of Chicago "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." The leaflet added that, "If persuasion and the need to prevent the

Vilification

subject has waned in the intervening years,⁶ but many scholars and jurists have come to assume—despite *Beauharnais*—that group-vilifying speech cannot constitutionally be proscribed.⁷

This Note challenges that assumption. It contends that there exists a readily discernible category of group-vilifying speech that can be prohibited by criminal statute without infringing the First Amendment. The Note argues that the categories of speech held to lie outside the protection of the First Amendment share common characteristics that account for and justify their nonprotected status. By applying this analysis to the speech-category of group vilification, the Note defines a subcategory—termed “group defamation”—that can constitutionally be prohibited as a crime.

I. Group Vilification Defined

At common law, the libel of large groups was held to have no remedy. However, the psychological assumptions underlying that rule do not hold true with respect to a particular subcategory of group libel, group vilification.

A. *The Traditional Concept of Group Libel*

Like the ordinary libel of an individual, speech that libels a large group involves three parties: the speaker, the hearer, and the target.⁸

white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.” *Id.* at 252. *Beauharnais* claimed that the statute violated the First Amendment. He also argued that the statute was too vague to support a criminal conviction. In an opinion of Justice Frankfurter, the Supreme Court affirmed the conviction by a 5-4 vote.

6. Since 1952 only six major pieces have addressed the subject: Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281; Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955); Brown & Stern, *Group Defamation in the U.S.A.*, 13 CLEV.-MAR. L. REV. 7 (1964); Kelly, *Criminal Libel and Free Speech*, 6 U. KAN. L. REV. 295 (1958); Pemberton, *Can the Law Provide a Remedy for Race Defamation in the United States?* 14 N.Y.L.F. 33 (1968); Comment, *Race Defamation and the First Amendment*, 34 FORDHAM L. REV. 653 (1966).

7. A number of judicial opinions have assumed that the *Beauharnais* holding is no longer good law, even though it has never been overruled. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring); Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) *cert. denied*, 394 U.S. 390 (1969) (Wright, J., concurring); *United States v. Handler*, 383 F. Supp. 1267, 1277-78 (D. Md. 1974). Similarly, the House Judiciary Committee Staff, examining the possibility of federal group-libel legislation in 1963, expressed “serious doubt respecting the [*Beauharnais*] decision’s importance as precedent.” STAFF OF HOUSE COMM. ON JUDICIARY, 88TH CONG., 1ST SESS., REPORT ON PROPOSED FEDERAL GROUP LIBEL LEGISLATION 10 (Comm. Print 1963); *cf.* Arkes, *supra* note 6, at 284 (“Among ‘professional’ civil libertarians, the concept [of proscribing group vilification] is treated as an anachronism, and its general disuse in recent years is taken as a sign of its ultimate inaptness in our constitutional law.”)

8. *See* RESTATEMENT (SECOND) OF TORTS §§ 558(a)-558(c) (1977); W. PROSSER, *THE LAW OF TORTS* 737 (4th ed. 1971).

As early as 1699, however, the common law distinguished between ordinary libel and group libel:⁹ words that would be libelous if directed against an individual were held not actionable when directed against a group of any appreciable size.¹⁰ That rule has carried down to present-day American law virtually intact.¹¹

The theory of the common-law rule against group-libel actions is that the gravamen of such an action must be individual harm, and that as the target group increases in size, the harmful effect of the statement on any individual member must be diluted, until at some point the harm falls below the threshold of legal recognition.¹² To be plausible, this theory requires the positing of a determinedly rationalistic, even mechanical, model of the human psyche. Such a model supposes that the hearer of a group-libelous statement always treats that statement rationally: in other words, that the hearer does not allow the statement to affect his estimation of an individual member of the target group without reasonable grounds to believe that the general statement holds true for the particular individual. Given this supposition, the model leads to a belief that individual harm cannot occur as the result of a group-libelous statement, because the hearer of the statement will make the rational assessment that such a statement is, by its nature, less likely to be true with respect to every member of a large group than it is to be true with respect to a particular individual. The model thus concludes that the hearer will discount the statement according to the size

9. As used in this Note, the term "group libel" will refer to any vilifying speech, *see* note 2 *supra*, that takes as its target a large and identifiable group of people. Where the target group is identifiable because of some racial, ethnic, or religious distinction, the vilifying speech will be referred to as "group vilification." Group vilification is thus a subset of group libel. An example of vilifying speech that constitutes group libel but not group vilification can be found in *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (employees of department store accused of sexual crimes and deviations).

10. *See* *The King v. Alme & Nott*, 3 Salk. 224, 91 Eng. Rep. 790 (1699) ("Where a writing . . . inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel.") A somewhat different and more extensive account of the same case is given by Lord Raymond, in *Rex v. Orme & Nutt*, 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (1699).

11. *See* Tanenhaus, *supra* note 3, at 267-71 (arguing that present American law developed as result of misunderstanding of *Alme & Nott* holding); Comment, *supra* note 6, at 654-59 (same). The present interpretation is firmly established, not only with respect to criminal prosecutions, *see, e.g.*, *People v. Edmondson*, 168 Misc. 142, 154, 4 N.Y.S.2d 257, 268 (Ct. Gen. Sess. 1938), but also with respect to civil actions, *see, e.g.*, *Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163 (1st Cir. 1977); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); Tanenhaus, *supra* note 3, at 263-65. *But see id.* at 272 (discerning "general if somewhat erratic trend" towards affording "protection to groups of ever-increasing size").

12. *See* *Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163, 1164-65 (1st Cir. 1977); RESTATEMENT (SECOND) OF TORTS § 564A, Comments a, b at 168 (1977); Comment, *supra* note 6, at 659.

Vilification

of the target group, and that he will be influenced in his subsequent dealings with individual members of the group only to this fractional, discounted extent.¹³

Such a psychological model may be credible with respect to the libeling of some kinds of target groups.¹⁴ But when libelous speech takes as its target a racial, ethnic, or religious group, the credibility of that model becomes extremely doubtful. Often, the hearer of such speech is already prejudiced¹⁵ against the target group, because group-vilifying speakers generally focus on precisely those racial, ethnic, and religious groups against which their hearers already hold widespread prejudices.¹⁶ In short, the group-vilifying speaker rarely tells his hearers anything new to them. He merely reinforces and plays upon their old prejudices.¹⁷ In such cases, the justification for the common-law rule

13. Prosser observes that civil libel actions are generally barred when the target group exceeds 25 persons, because in the absence of special circumstances no plaintiff can establish a sufficient personal reference to himself. W. PROSSER, *supra* note 8, at 750. But "[w]hen the group becomes smaller than that, . . . the courts have been willing to permit the conclusion that the finger of defamation is pointed at each individual" to a degree sufficient to support the suit. *Id.* at 750-51 (footnotes omitted).

14. *See, e.g.,* Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952). The defendants had published in a book the charge that "some" of the models and salesgirls in the plaintiff's department store had often served as call girls, and that "most" of the salesmen were homosexuals. All 9 of the models, 15 of the 25 salesmen, and 30 of the 382 saleswomen brought suit. The defendants did not contest the models' suit, but moved to dismiss the salesmen's and saleswomen's complaints. As to the former, the court rejected the defendants' motion, observing that the group was fairly small and that the allegation had been directed at "most" of the group. *Id.* at 316. As to the latter, however, the court accepted the defendants' motion, and dismissed the suit. *Id.* It noted the large size of the saleswomen's group, and concluded that "no reasonable man would . . . conclude from the publication a reference to any individual saleswoman." *Id.*

15. Prejudice has been defined as "an antipathy based upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he is a member of that group." G. ALLPORT, *THE NATURE OF PREJUDICE* 10 (1954).

16. G. ALLPORT, *ABC'S OF SCAPEGOATING* 29 (3d ed. 1959) (victim usually someone who has been traditional object of blame); Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085, 1089 (1942) (weaker groups usually selected as targets of group-vilifying speech).

17. *See* G. SIMPSON & J. YINGER, *RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 142-64 (4th ed. 1972). The authors describe a "field context of discrimination," in which prejudice leads to acts of discrimination, which in turn lead to structured social inequalities between majority and minority groups. These inequalities, spurred by economic and political conflict between majority and minority groups, lead to reinforcement of existing prejudices and, consequently, further acts of discrimination, at which point the cycle begins anew. *Id.* at 157. An integral part of this "vicious circle," *id.* at 156, the maintenance of "traditions of prejudice" and "stereotypes," is achieved, the authors contend, primarily by verbal means. Through the jokes and off-hand remarks of his peers, as well as the "more serious conversations of adults," the child is introduced to the prejudices of his group, and gradually "socialized" to its norms of behavior. *Id.* at 161; *see* G. ALLPORT, *supra* note 16, at 16-25; G. MYRDAL, *AN AMERICAN DILEMMA* 101-06 (1944). This Note contends that group-vilifying speech is the adult analogue to the "socialization" speech of childhood: whereas the latter introduced the

limiting group-libel actions depends for its persuasiveness on the extent to which prejudices against racial, ethnic, and religious groups are held rationally. For if such prejudices are not held rationally, then the common-law rule's psychological model, which assumes a rational hearer, rests on a badly flawed initial assumption.

B. *Group Vilification Distinguished from Group Libel*

The nature of prejudicial beliefs has been the subject of extensive research during the past thirty years. Although these studies are not definitive, they cast substantial doubt on the justification for the common-law strictures against all group-libel actions.¹⁸ A number of social scientists have concluded that the capacity of prejudiced people to evaluate new information rationally, and to reason coherently in general, is substantially less than that of their more tolerant peers.¹⁹ This conclusion buttresses the findings of the many psychological studies indicating that prejudicial beliefs are largely the product of subconscious stresses and conflicts, and are therefore beyond the conscious, rational control of their holders.²⁰ Thus the psychological model behind the common-law limits on group-libel actions is inapposite when vilifying speech is directed at a target group against which the hearer

hearer to his prejudices, the former reminds him of them, both reinforcing overt prejudices and making latent ones overt. Cf. G. MYRDAL, *supra*, at 102 (racial prejudices in America are strengthened by tradition and community consensus, and concocted for opportunistic purposes by "unscrupulous demagogues").

18. It might be argued that nondefinitive studies cannot provide a state legislature with reasonable grounds for proscribing group-vilifying speech, but that argument is insufficient. The same argument was made during the debate over prohibiting obscene speech, *see, e.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973); *Roth v. United States*, 354 U.S. 476, 510-11 (1957) (Douglas, J., dissenting), and the controlling obscenity opinions repeatedly rejected it, *see, e.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-63 (1973); *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968); *cf. Roth v. United States*, 354 U.S. 476, 501-02 (1957) (Harlan, J., concurring in *Alberts v. California*, a consolidated case) (discussing issue at length).

19. *See, e.g.*, G. ALLPORT, *supra* note 15, at 170-71 (cognitive processes of prejudiced people differ from cognitive processes of tolerant people; difference consists of propensity for "two-valued judgments," and "rigid . . . habits of thought," as well as "marked need for definiteness"); Harding, Proshansky, Kutner, & Chein, *Prejudice and Ethnic Relations*, in 5 HANDBOOK OF SOCIAL PSYCHOLOGY 1, 36-37 (2d ed. E. Aronson & G. Lindzey eds. 1969) (reviewing studies that discerned greater "intoleran[ce] of ambiguity," poorer "ability to reason logically," and poorer ability to deal with "abstract ideas" among high-prejudice subjects than among low-prejudice subjects).

20. *See, e.g.*, G. SIMPSON & J. YINGER, *supra* note 17, at 70-75 (reviewing studies attributing prejudice to the projection of subconscious anxieties); Harding, Kutner, Proshansky, & Chein, *Prejudice and Ethnic Relations*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1021, 1044 (G. Lindzey ed. 1954) (reviewing psychological research that concluded that "the prejudiced person attempts to protect himself from the recognition of his own unacceptable tendencies by *projecting* them onto some group to whom they may plausibly be attributed").

Vilification

is already prejudiced. In such conditions, group-vilifying speech often evokes from its hearers a response that is increased, rather than diminished, by the breadth of its accusations.²¹ Furthermore, because prejudicial beliefs are subconsciously motivated, they may be aroused and reinforced by way of the subconscious. Several examinations of the nature of group-vilifying speech and its effects on prejudiced hearers have concluded that often this is precisely what happens: group-vilifying speech can, and often does, gain acceptance subconsciously, without the hearer ever consciously or rationally deliberating over the content of the speech.²² In other words, owing to the character of its hearers, group vilification generally enjoys a greater measure of persuasiveness than does ordinary group libel.

These differences suggest that the magnitude of harm to be expected from group-vilifying speech may be substantially greater than from other types of group libel.²³ Although this harm is usually suffered by the members of the target group as individuals,²⁴ the target

21. Professor Arkes has noted:

[A] libel directed at a group may defame no less because it is directed at the group as a whole [I]n fact, it may defame even more, because it sweeps with a broader brush [This] argument would be impossible to reject unless one were also willing to reject the proposition that certain minority groups in this country have in fact suffered injuries in the past as a result of racist stereotypes that have been perpetuated in the public mind.

Arkes, *supra* note 6, at 292. Professor Riesman advances a similar view:

[W]here the [speaker] is engaged in exploiting the anxieties or the sadism of his [hearers], and can count on built-in prejudice, he may increase his credibility as he increases the scope and violence of his lies. The more daring the lie, the more simple it is to comprehend, the more satisfying as an "explanation," and the more impressive the speaker—if the political and social context provide fuel, and the object of the lies is already held in fear and suspicion.

Riesman, *supra* note 3, at 770 (footnote omitted).

22. This is so because group-vilifying speech directly addresses the subconscious needs of the overtly or latently prejudiced hearer, including the needs to externalize self-hatred and anxiety, to project repressed desires, and to stereotype the target group in order to avoid uncertainty. See G. ALLPORT, *supra* note 15, at 393. In this sense, group-vilifying speech serves as an emotional crutch to the overtly or latently prejudiced hearer, and he frequently accepts it as such. See L. LOWENTHAL & N. GUTERMAN, *PROPHETS OF DECEIT* 10, 16, 76, 139 (1949); Ackerman & Jahoda, *The Dynamic Basis of Anti-Semitic Attitudes*, 17 *PSYCHOANALYTIC Q.* 240, 260 (1948). Thus

the distinction between the manifest and latent meaning of [a group-vilifying] text must be seen as crucial. Taken at their face value, [such] texts seem merely as indulgence in futile furies about vague disturbances. Translated into their psychological equivalents, [such] texts are seen as consistent, meaningful, and significantly related to the social world.

L. LOWENTHAL & N. GUTERMAN, *supra*, at 140; see A. LEE & E. LEE, *THE FINE ART OF PROPAGANDA* 22-131 (1939); Riesman, *supra* note 3, at 729 & n.16.

23. To the extent that group vilification has the effect of reinforcing latent and overt prejudices in the minds of its hearers, the target group is harmed by a subsequent increase in the degree of discrimination imposed by those hearers. See note 17 *supra*.

24. See Arkes, *supra* note 6, at 292; Riesman, *supra* note 3, at 731.

group as a whole is also frequently harmed. When discrimination increases, the effectiveness of the group's participation in public affairs may be hampered.²⁵ Finally, some studies suggest that continued vilification, combined with the ensuing discrimination, may cause individual members of the target group to develop lower levels of self-esteem, and higher levels of repressed aggressiveness, than they otherwise would.²⁶

The nature of the harms that can be caused by group vilification renders this kind of speech a fit subject for state concern. Although the target group and its members are the most direct victims of group vilification, the general public also suffers harm when group-vilifying speech is disseminated. Such speech contributes to the creation and maintenance of prejudicial beliefs and discriminatory behavior throughout American society.²⁷ The courts and Congress have recognized a public interest in the elimination of discrimination.²⁸ It follows that in the absence of First Amendment considerations, the state and federal governments would clearly be able to regulate group vilification, owing to its encouragement of behavior strongly contrary to public policy.²⁹

25. See Riesman, *supra* note 3, at 731.

26. The traditional view in this regard has been that members of target groups, particularly blacks, internalized the hostility of the dominant group. This accepted self-hatred then manifested itself in various ways, both psychological and physical. See, e.g., A. KARDINER & L. OVESEY, *THE MARK OF OPPRESSION* 301-87 (1951); Adams, *Segregation-Integration: Patterns of Culture and Social Adjustment*, 28 *AM. J. ORTHOPSYCHIATRY* 14, 14-20 (1958); Brown & Stern, *supra* note 6, at 25-29; Riesman, *supra* note 3, at 771. This view has recently been challenged, especially with respect to blacks. See, e.g., E. BAUGHMAN, *BLACK AMERICANS, A PSYCHOLOGICAL ANALYSIS* 37-55 (1971). In particular, the "Black Power" movement is seen as having tended to counteract whatever internalization effects had previously taken place among blacks. See Pinderhughes, *Racism and Psychotherapy*, in *RACISM AND MENTAL HEALTH* 61, 85 (C. Willie, B. Kramer, & B. Brown eds. 1973).

27. See note 17 *supra*.

28. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., announcing judgment of the Court); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977). Indeed, the Supreme Court has become so solicitous of the public interest in eliminating discrimination that it has granted to the *white* tenants of a non-integrated apartment complex standing to sue privately under § 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a) (1976). *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). For examples of congressional recognition of this same public interest, see Titles II-IV, VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201-07, 301-04, 401-10, 701-16, 78 Stat. 243-49, 253-66 (codified at 42 U.S.C. §§ 2000a-2000c, 2000e (1976)) (prohibiting discrimination in public accommodations, public facilities, public education, and employment opportunities); Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 83 (codified at 42 U.S.C. § 3604 (1976)) (prohibiting discrimination in sale or rental of housing).

29. Private causes of action, by whomever brought, have generally been recognized as impractical. See, e.g., *Beth*, *supra* note 6, at 182; Note, *supra* note 3, at 261-63. Under such circumstances, government intervention has been recognized as appropriate. See *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974) (affirming city ordinance prohibiting use of "For Sale" signs in residential neighborhoods).

II. Unprotected Speech and Group Vilification

Because the vulnerability of group vilification to governmental regulation depends on the extent to which such speech enjoys the protection of the First Amendment, it is necessary to examine the various categories of speech that are already recognized as unprotected by the First Amendment. This examination reveals within those categories common characteristics—termed “indicia of nonprotection”—that manifest some of the accepted borders of the First Amendment.

A. *Unprotected Categories of Speech and Their Common Characteristics*

The Court has identified three categories of speech that fall outside the protection of the First Amendment: “fighting words,” as described in *Chaplinsky v. New Hampshire*;³⁰ “incitement to riot,” as illustrated by *Feiner v. New York*;³¹ and obscenity, as defined in *Roth v. United States*³² and its progeny.³³ Each of these three unprotected categories of speech was defined separately by the Court, with a seemingly distinct rationale for nonprotection. Yet in central respects, the three rationales overlap.

The essential attribute of “fighting words” is that the words elicit from the hearer an automatic, undeliberated response likely to lead to a breach of the peace.³⁴ Such utterances, the *Chaplinsky* Court said,

30. 315 U.S. 568, 572 (1942).

31. 340 U.S. 315, 321 (1951).

32. 354 U.S. 476, 489 (1957).

33. See, e.g., *Pinkus v. United States*, 436 U.S. 293, 296-305 (1978); *Miller v. California*, 413 U.S. 15, 20-26 (1973); *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 686-90 (1959).

34. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *Chaplinsky* was convicted of violating a New Hampshire statute that provided that “No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him any offensive or derisive name” *Id.* at 569 (quoting 1926 PUB. LAWS N.H., ch. 378, § 2, 1885 N.H. LAWS 274 (current version at N.H. REV. STAT. ANN. § 570:2 (Supp. 1973))). The violation occurred on a public street when *Chaplinsky* said to a police officer, “You are a God damned racketeer,” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.” *Id.* *Chaplinsky’s* claim that the statute unconstitutionally infringed his First Amendment rights was rejected by the Court:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes omitted). The statute under which *Chaplinsky* was convicted went to the Supreme Court “authoritatively construed” and narrowed by the New Hampshire

"are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."³⁵ Although recent memorandum opinions of the Supreme Court indicate that the unprotected category of "fighting words" may be narrowed in future holdings,³⁶ the existence of "fighting words" as an unprotected category of speech has not been judicially doubted. Indeed, the rationale of the *Chaplinsky* holding has been approved in recent cases.³⁷

Similarly, the gravamen of the offense of "incitement to riot" is that incitement "passes the bounds of argument or persuasion."³⁸ As the *Feiner* Court recognized, the inciting speaker seeks to "arouse"³⁹ one group against another, and succeeds so well that "a clear danger of disorder [is] . . . threatened."⁴⁰ Although the Court today may define this category more narrowly than did the *Feiner* Court, the existence of the category is still recognized.⁴¹

Supreme Court. *Id.* at 572. According to that construction, no words were forbidden by the statute

except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.

Id. at 573.

35. *Id.* at 572 (paraphrasing and citing Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 150 (1941)). Chafee further observed that "[w]ords of this type offer little opportunity for the usual process of counter-argument. The harm is done as soon as they are communicated, or is liable to follow almost immediately in the form of retaliatory violence." Z. CHAFEE, *supra*, at 150.

36. *See, e.g.,* *City of New Orleans v. Lewis*, 257 La. 993, 244 So. 2d 860 (1971), *vacated and remanded mem.*, 408 U.S. 913 (1972) (refusing to review conviction for calling police officer, "'g— d— m— f—'"); *New Jersey v. Rosenfeld*, 59 N.J. 435, 283 A.2d 535 (1971), *vacated and remanded mem.*, 408 U.S. 901 (1972) (refusing to review conviction for use of words, "'m— f—'" by speaker at public school board meeting, to describe teachers, school board, town, and "his own country").

37. *See, e.g.,* *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (separate opinion of Stevens, J.); *id.* at 756 (separate opinion of Powell, J.); *id.* at 763 (Brennan, J., dissenting); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

38. *See* *Feiner v. New York*, 340 U.S. 315, 321 (1951). *Feiner* was convicted of disorderly conduct after making a speech on a street corner in Syracuse, New York. His speech "gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights." *Id.* at 317. The Court found that some of *Feiner's* audience "appeared to be favoring [his] arguments," *id.*, and that consequently "a clear danger of disorder was threatened," *id.* at 319. The Court held that *Feiner* had "passe[d] the bounds of argument or persuasion and undertake[n] incitement to riot," *id.* at 321; that "the principle of freedom of speech [does not sanction] incitement to riot," *id.* at 320; and that therefore *Feiner's* conviction did not abridge his First Amendment rights, *id.* at 321.

39. *Id.* at 317.

40. *Id.* at 319.

41. *See, e.g.,* *Benson v. Rich*, 448 F.2d 1371 (10th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972) (Indian youth's rights not infringed when tribal officials prevented his distribution of inflammatory leaflets during Indian Ceremonial).

Vilification

Finally, the distinguishing characteristic of “obscenity” is that such speech, taken as a whole, appeals to the “prurient interest” in sex.⁴² In addition, under current law speech must be found “patently offensive,” and devoid of “serious literary, artistic, political, or scientific value,”⁴³ in order to be deemed obscene. The contours of this category of speech have changed at times,⁴⁴ but the existence of the category is undoubted.⁴⁵

The rationales for the nonprotection of these three categories of speech are quite similar in two central respects. Each category contains only speech that threatens serious harm to some substantial public interest.⁴⁶ In addition, each category includes only speech that by-

42. See *Roth v. United States*, 354 U.S. 476, 489 (1957). Roth was convicted under a federal statute that declared “[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character,” as well as every advertisement for such material, to be nonmailable matter. *Id.* at 479 n.1 (quoting Act of June 25, 1948, ch. 645, § 1461, 62 Stat. 768 (current version at 18 U.S.C. § 1461 (1976))). Roth argued that the statute violated the First Amendment. The Court observed that

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Id. at 484 (footnote omitted). The Court thus held that “obscenity is not within the area of constitutionally protected speech or press.” *Id.* at 485. It went on to observe that the “portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.” *Id.* at 487 (footnote omitted). Only material the “dominant theme” of which, “taken as a whole,” appealed “to prurient interest” in sex, was defined as within the unprotected category. *Id.* at 489 (footnote omitted). The “prurient interest” test remains in the Court’s current definition of obscenity. See *Miller v. California*, 413 U.S. 15, 24 (1973).

43. *Miller v. California*, 413 U.S. 15, 24 (1973).

44. See *Memories v. Massachusetts*, 383 U.S. 413, 419 (1966) (requiring speech to be “utterly without redeeming social value” in order to be deemed obscene).

45. See, e.g., *Pinkus v. United States*, 436 U.S. 293, 296-305 (1978).

46. The interest harmed by “fighting words” is the public interest in the public peace. The unprotected category contains only such words as have the characteristic of plainly tending to cause “a breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). The same public interest is threatened by “incitement to riot.” Speech falls into this category only when it clearly threatens disorder. See *Feiner v. New York*, 340 U.S. 315, 319 (1951); *Benson v. Rich*, 448 F.2d 1371, 1374 (10th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). Obscenity harms two different public interests. First, there is “at least an arguable correlation between obscene material and crime.” *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973). Second, there is “the interest of the public in the quality of life and the total community environment.” *Id.* The category of “obscenity” is defined so as to include only speech that threatens these interests. The “prurient interest” requirement speaks to the first, and the “patent offensiveness” requirement speaks to the second. See generally A. BICKEL, *THE MORALITY OF CONSENT* 73-74 (1975).

It should be noted that a “serious harm to substantial public interests” sufficient to warrant the nonprotection of speech can be caused in either of two ways. If speech poses a “clear and present danger” of some “substantive evils”—for example, breach of the peace—then that harm is considered sufficient to render speech unprotected. *Schenck v.*

passes the conscious faculties of its hearer in some way.⁴⁷ Thus each category describes a kind of speech that not only causes harm, but does so in such a way that it cannot be effectively counteracted by opposing speech.⁴⁸ By denying protection in *Chaplinsky*, *Feiner*, and the obscenity cases, the Court appears to have indicated that when speech exhibits these two indicia of nonprotection—that is, when speech both by-passes the conscious faculties of its hearers and threatens serious harm to substantial public interests—then the claim of that speech to the protection of the First Amendment falls to its lowest ebb. It thus appears that in the absence of countervailing considerations, speech possessing these two characteristics may be prohibited without contravening the First Amendment.

The holdings in *Chaplinsky*, *Feiner*, and the obscenity cases are not sufficiently explicit, in themselves, to warrant the conclusion that these indicia of nonprotection were indeed the characteristics of the speech at issue that led the Court to deny protection. Moreover, those holdings were sufficiently narrow that it is not possible, without further investigation, to assume that their rationales can be applied to other, different categories of speech such as group vilification. Accordingly, it is

United States, 249 U.S. 47, 52 (1919). This is the type of harm threatened by fighting words and incitement to riot. But speech may also threaten "substantive evils" in a slower, more cumulative manner. The obscenity holdings indicate that this sort of harm can also be considered sufficient to render speech unprotected, if the magnitude of the harm is great enough. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-60 (1973). In addition, this latter sort of harm can be established without proving a direct causal link between particular acts of speech and particular incidents of harm. *Id.* at 60-64. Such a direct link must be shown when the harm involved is of the "clear and present danger" sort. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

47. The term "conscious faculties" will be used to describe that capacity, within the hearer's mind, that evaluates information, weighs contrary claims and arguments, and decides how to respond to appeals to action, in a manner of which the hearer is aware. Such faculties are distinct from and opposed to the capacity within the hearer for spontaneous, unreflective, emotional reaction.

Although fighting words, incitement to riot and obscenity arise in very different social contexts, each kind of speech, by definition, by-passes the conscious faculties of its hearer. Speech is punishable as fighting words only "when [it has] this characteristic of plainly tending to excite the addressee to a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (emphasis added). Similarly, speech falls into the unprotected category of incitement to riot only when it "passes the bounds of argument or persuasion," and seeks with some success to "arouse" hearers to action against others. *Feiner v. New York*, 340 U.S. 315, 321, 317 (1951). Finally, speech only becomes obscene when, rather than conveying an idea, it appeals to a "prurient interest" in sex. *Roth v. United States*, 354 U.S. 476, 484, 489 (1957). The *Roth* Court perceived "prurient interest" to be an instinctual, undeliberated desire. *See id.* at 487 n.20.

48. Professor Chafee, whose analysis of the fighting-words category was endorsed and cited by the *Chaplinsky* Court, 315 U.S. at 572 nn. 4, 5, discussed the nonprotection of obscenity and incitements to riot as well. Z. CHAFEE, *supra* note 35, at 149-52. He concluded that "the true explanation" for the denial of protection to these kinds of speech was the same as that for the denial of protection to fighting words. *Id.*

Vilification

necessary to identify the theory of First Amendment rights that underlies these holdings.

B. *An Underlying Theory of First Amendment Rights*

The exact intentions of the authors of the First Amendment are not made plain by the available historical evidence,⁴⁹ but in recent years a number of free-speech theorists have offered a variety of rationales for the special place afforded to speech by the Constitution.⁵⁰ One of these writers was Alexander Meiklejohn. According to Meiklejohn's view, the right to free speech is derived from and required by the principles of self-government. The right of the public to govern itself requires that the public be permitted to receive all information that might affect its collective decisions. This requirement in turn demands free speech.⁵¹ By necessary implication, the only speech that must without question receive protection on this view is speech that can be deliberated upon by the public. Speech that goes beyond the presentation of ideas for public consideration and deliberation need not be permitted, because such speech is not relevant to the process of deliberative consent and self-government from which the right to speak derives.⁵²

49. It has been argued that the authors were "merely denying the power of Congress to legislate in this area, leaving to the states the power to restrain speech as they saw fit." Kelly, *supra* note 6, at 308 (footnote omitted). It has also been contended that the authors had no intentions at all, except the pragmatic ones of "allaying popular fears" and securing the ratification of the Constitution. L. LEVY, *LEGACY OF SUPPRESSION* 225-26 (1960).

50. See, e.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

51. A. MEIKLEJOHN, *supra* note 50, at 1-27. This approach is also taken by other First Amendment theorists. See Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFFAIRS* 204, 206-22 (1972); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20-35 (1971). Professor Emerson's theory of First Amendment rights, by contrast, posits four different purposes for expression, two of which—expression "as a means of assuring individual self-fulfillment," and as a means of "achieving a more adaptable and hence a more stable community"—cannot be derived from the principle of self-government. T. EMERSON, *supra* note 50, at 6-7 (paraphrasing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Professor Bork has observed, with respect to the "self-fulfillment" purpose posited by Emerson, that speech possessing this attribute alone is "indistinguishable from . . . all other human activity" that promotes self-fulfillment. He therefore concludes that "the principled judge . . . cannot, on neutral grounds, choose to protect speech that has only [this attribute] more than he protects any other claimed freedom." Bork, *supra*, at 25. As for the "stable community" purpose posited by Emerson, Bork argues that the decision whether to repress speech that has only this purpose is properly seen as a political one. He thus conceives that such speech should depend for its protection on the political branches of government, rather than on the courts. *Id.*

52. The rationale behind this view is as follows: A state organized on the principle of self-government rests the moral legitimacy of its collective actions on the proposition that a majority of its citizens have freely arrived at an individual opinion supporting those actions. This means that with respect to all issues requiring collective decision and

Some other First Amendment theorists have agreed with Meiklejohn to this extent, but have then interpreted the process of self-government narrowly. Consequently, these theorists have prescribed a restriction of the protection of the First Amendment to "explicitly political" speech alone.⁵³ Meiklejohn took a broader view, conceiving the right to "self-government" to include a collective right to self-determination not only in the political sphere, but in the cultural and moral spheres as well. Accordingly, the Meiklejohnian view extends the protection of the First Amendment beyond explicitly political speech, to speech relevant to the public's concern with "philosophy," as well as "[l]iterature and the arts."⁵⁴

The indicia of nonprotection, as discerned above and applied by the Supreme Court, closely reflect the Meiklejohnian theory of First Amendment rights. The first indicium relates the nonprotection of certain speech to the fact that it by-passes the conscious faculties of its hearers. When speech possesses this characteristic, it cannot be deliberated upon by its hearers, and therefore cannot play any meaningful role in the process of deliberative public decisionmaking that, under the Meiklejohnian view, alone justifies special protection for speech. Thus the significance attached to this indicium suggests an acceptance by the Court of the central premise of the Meiklejohnian theory. The second essential indicium requires a showing of substantial harm before the conclusion is permitted that speech is unprotected. The fact that this indicium is deemed necessary to a determination of nonprotection means that all relatively harmless acts of self-expression and self-promotion will be protected; thus the emphasis placed on this indicium implies the adoption by the Court of a relatively broad view of the process of self-government, a view that embraces cultural and moral, as well as political, self-determination. This view coincides with that required by the Meiklejohnian theory.

Thus it may be inferred that the Supreme Court, in its *Chaplinsky*, *Feiner*, and obscenity holdings, has employed principles of decision

action, the state must allow its citizens to arrive at their individual opinions freely. In a state so organized, certain kinds of speech—those by-passing the deliberative faculty—cannot consistently be permitted. Suppose, for example, a state where incitement to riot were permitted speech. In such a society, collective actions would sometimes be taken as a result of such incitements. But such collective actions would not have been taken as a result of citizens freely arriving at individual opinions supporting those actions. Therefore, that state would not be observing the principle of self-government.

53. See, e.g., Bork, *supra* note 51, at 28.

54. See, e.g., Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257; cf. Scanlon, *supra* note 51, at 215-22 (prescribing similar extension of First Amendment protection for speech, based on concept of individual autonomy).

Vilification

essentially identical to the Meiklejohnian theory of First Amendment rights. A review of numerous other Supreme Court opinions that discuss the nature of protected speech suggests that the employment of this view by the Supreme Court is not confined to cases involving fighting words, incitement to riot, and obscenity alone, but rather that this view represents the attitude of the Court towards First Amendment cases in general. A number of cases that examine the general nature of protected speech confer unqualified protection only on speech pertaining to the interchange of ideas by means of discussion.⁵⁵ The rationale of these cases plainly rests on principles functionally equivalent to those embodied in the Meiklejohnian theory. These general endorsements of that theory are underscored by the specific holdings in two First Amendment cases, *Kingsley International Pictures Corporation v. Regents of the University of the State of New York*,⁵⁶ and *Brandenburg v. Ohio*.⁵⁷ These opinions envision speech as absolutely protected whenever it contributes to the deliberative process of public decisionmaking.⁵⁸ By contrast, other categories of speech may be pro-

55. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.") (footnote omitted); *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) ("Abridgement of the liberty [of speech] can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.") (footnote omitted).

56. 360 U.S. 684 (1959).

57. 395 U.S. 444 (1969).

58. *Kingsley* involved speech tending to encourage "sexual immorality." Thus the effect feared from this speech closely resembled that feared from the obscene speech held unprotected in *Roth* and subsequent cases. Compare *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 687-88 (1959) (motion picture recognized as alluringly portraying adultery as proper behavior) with *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-60 (1973) (obscenity seen as adversely affecting the style and quality of community life). Similarly, *Brandenburg* involved speech tending to encourage the use of violence by one racial group against another, much like the speech successfully punished in *Feiner*. Compare *Brandenburg v. Ohio*, 395 U.S. 444, 446 & n.1 (1969) (speech urging violence against Jews and blacks) with *Feiner v. New York*, 340 U.S. 315, 317 (1951) (speech urging Negroes to "rise up in arms and fight"). But despite these similarities in feared effect, the speech at issue in *Kingsley* and *Brandenburg* was held protected by the First Amendment. These contrasting outcomes make sense only if it is recognized that the Court found the speech at issue in *Kingsley* and *Brandenburg* to involve the advocacy of ideas, whereas contrary findings were made in *Roth* and *Feiner*. Compare *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (motion picture constitutes "advocacy of the opinion that adultery may sometimes be proper") and *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (speech constitutes "mere advocacy") with *Roth v. United States*, 354 U.S. 476, 487-90 (1957) (materials appealed to "prurient interest") and *Feiner v. New York*, 340 U.S. 315, 321 (1951) (speaker "passe[d] the bounds of argument or persuasion"). In other words, the speech involved in *Kingsley* and *Brandenburg* was found not to have the quality of evoking an automatic, undeliberated response from its hearers: rather, it was found to lie within the bounds of deliberative discussion. The Meiklejohnian theory of First Amendment rights makes the same distinction as was drawn by the *Kingsley* and *Brandenburg* Courts. By the terms of that theory

hibited on a sufficient showing of harm.⁵⁹ This pattern of holdings suggests that the Court employs the Meiklejohnian theory of First Amendment rights as a general principle for determining the boundaries of protected speech.

Given the Court's acceptance of the Meiklejohnian theory, it is plain that the indicia of nonprotection identified earlier are indeed the salient characteristics that led the Court to its holdings in *Chaplinsky*, *Feiner*, and the obscenity cases. Further, it is clear that in contrast to those holdings, the Meiklejohnian theory addresses not simply a particular category of speech, but rather speech in general: according to the theory, the protection of all speech must be justified by reference to its contribution to the process of self-government. Consequently, the Meiklejohnian theory, as accepted by the Supreme Court, properly applies to any category of speech—such as group vilification—that exhibits the indicia of nonprotection.

C. *Protected Subcategories of Group Vilification*

Group vilification, as defined above, can by-pass the conscious faculties of its hearers, and can cause serious harm to substantial public

speech is not rendered unprotected merely on a showing of harmful effect: rather, speech must also be shown to avoid the arena of discussion and debate by evading the conscious faculties of its hearers.

59. "Commercial" speech is an example of such a category. When the sole attribute of speech is a commercial message, it is normally protected by the First Amendment. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-65 (1976). But where such speech is "untruthful," or even "only deceptive and misleading," there is "no obstacle to a State's dealing effectively with [the] problem." *Id.* at 771 & n.24. And when commercial speech possesses the additional attribute of addressing questions of general public concern, it enjoys complete protection. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978). This pattern of outcomes clearly reflects an acceptance by the Court of the Meiklejohnian theory. Ordinary commercial speech does not contribute to the deliberative process of public decisionmaking, and is thus protected only because it does not pose any "serious harm." When such speech does threaten serious harm, as when it is untruthful or even merely deceptive, it is unprotected, because it then displays both indicia of nonprotection. And when commercial speech addresses questions of general public concern, it must be protected just like any other speech that offers ideas for public discussion and deliberation.

"Symbolic" speech furnishes another example of this pattern of outcomes. Recent Supreme Court holdings in cases involving symbolic speech suggest that such speech is absolutely protected. *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). But an essential characteristic of symbolic speech as thus protected is that *by definition* it poses no serious harm to substantial public interests. *Cohen v. California*, 403 U.S. 15, 19-20 (1971) (rejecting argument that appellant's expression could cause harm analogous to that described in *Roth*, *Chaplinsky*, and *Feiner*); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 514 (1969) (observing that appellees had no reason "to forecast substantial disruption of or material interference with school activities"). Because symbolic speech by definition cannot display the "substantial harm" indicium of nonprotection, the Meiklejohnian theory would prescribe the same outcome—protection—as is reached in the controlling Court opinions.

Vilification

interests. Thus group-vilifying speech can exhibit both of the indicia of nonprotection. But further consideration of the Meiklejohnian theory of First Amendment rights requires the conclusion that certain subcategories of group vilification ought not to be prohibited even though they do exhibit the two indicia of nonprotection.

For example, group vilification can consist of speech that constitutes true statements of fact.⁶⁰ Although the dissemination of true statements of fact regarding a racial, ethnic, or religious group could have the effects of group-vilifying speech,⁶¹ it is clear that under the Meiklejohnian theory there is no information that self-determining citizens need more acutely than true statements about the world around them.⁶² Therefore that theory cannot coherently exclude any true statement of fact from the area of protected speech.⁶³ Accordingly, true statements of fact constitutes one subcategory of group vilification that cannot be prohibited.⁶⁴

Similar considerations require the protection of another subcategory of group-vilifying speech: "simple statements of opinion."⁶⁵ Some verbal statements do nothing more than express the views of the speaker, and are so vague or general that their truth or falsity cannot be objectively ascertained.⁶⁶ Such statements, by definition, cannot be

60. A "statement of fact" is a statement the truth or falsity of which can be objectively determined. See RESTATEMENT (SECOND) OF TORTS, § 566, Comment a (1977). If the burden of proving falsity is placed on the prosecution, then a statement of fact is "true" if it has not been proved false beyond a reasonable doubt.

61. For example, verifiably accurate crime statistics could show that members of a particular racial, ethnic, or religious group commit certain crimes more frequently than average. Dissemination of such statistics might well injure the reputation of the group as a whole. Further, such statistics could easily be received and accepted by prejudiced hearers in an undeliberated and irrational way, as "confirmation" of their prejudices. Cf. G. ALLPORT, *supra* note 15, at 13-14 (illustrating "slippery propensity" of prejudices to adjust themselves to facts).

62. This is so irrespective of the motives of the speaker. See 2 H. SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 538-42 (1921); Kelly, *supra* note 6, at 327.

63. Of course, this does not imply that information genuinely necessary to the national security, and kept secret by the government in good faith, may be disseminated with impunity by citizens who happen to acquire it. Punishment of such "speech" is justified by a wholly different rationale, based on the inherent authority of a government to protect the security of the nation. See *New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring); *id.* at 735-40 (White, J., concurring) (1971); *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

64. The principle that certain verbal statements can be recognized as true statements of fact, and therefore cannot give rise to liability for defamation, has been acknowledged in numerous cases. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-97 (1975); *Cullison v. City of Peoria*, 584 P.2d 1156, 1161 (Ariz. 1978); *Brown v. Briggs*, 569 S.W.2d 760, 762 (Ct. App. Mo. 1978).

65. See RESTATEMENT (SECOND) OF TORTS § 566, Comment b (1977) (defining simple statements of opinion).

66. See *id.* §§ 565-566 (distinguishing statements of fact from expressions of opinion). Statements of fact are defined by their particularity. See *id.* § 565, Comment a (describing statements of fact as "accusation[s] of a particular act or omission") (emphasis

proved false, and therefore may have value to the self-governing citizens whom the Meiklejohnian theory of First Amendment rights seeks to protect.⁶⁷ Accordingly, that theory necessarily mandates protection for simple statements of opinion.⁶⁸

However, two other subcategories of group vilification exist, the speech in which need not be protected. The first of these is the subcategory of "false statements of fact."⁶⁹ Self-governing citizens do not need false statements of fact, as they do true ones, in order to be fully informed regarding all issues related to their collective decisions. Indeed, false statements of fact may well impair the process of self-government.⁷⁰ Thus the Meiklejohnian theory of First Amendment rights permits, and may require, the nonprotection of false statements of fact.⁷¹

The second subcategory of group-vilifying speech that may be unprotected is "mixed statements of opinion that imply false assertions of fact." Some statements of opinion reasonably imply assertions of fact that the hearer of the statement does not already assume.⁷² When such

added). By contrast, statements of opinion are defined by their lack of particularity, which is sufficient to render them objectively unverifiable. For example, the statement, "X is a thief," is not specific enough to constitute a statement of fact. It could be meant metaphorically, and even if meant literally could not in any practical sense be proved false: in order to disprove such a statement, X would have to show that he never committed any act that comes within the common connotation of thievery. By contrast, the statement, "X robbed Y's grocery store yesterday," possesses sufficient specificity to constitute a statement of fact. Such a statement cannot plausibly be meant metaphorically, and if meant literally could be proved false with relative ease, by showing that Y's store was not robbed yesterday, or that X was elsewhere. *See id.* § 566, Comment b (distinguishing between the statement of opinion, "[X] is a thief," and the statement of fact involved in an "assertion that [X] has committed [particular] acts that come within the common connotation of thievery").

67. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea.")

68. The principle that certain verbal statements can be recognized as simple statements of opinion, and therefore cannot give rise to liability, has been acknowledged in numerous defamation cases. *See, e.g., Church of Scientology v. Cazares*, 455 F. Supp. 420, 424 (M.D. Fla. 1978); *Sierra Breeze v. Superior Court*, 149 Cal. Rptr. 914, 916-17 (Ct. App. Cal. 1978); *Mashburn v. Collin*, 355 So. 2d 879, 885, 888-91 (La. 1977).

69. Acknowledgement of the principle that certain verbal statements can be recognized as true statements of fact, which cannot give rise to liability, *see note 64 supra*, necessarily implies that other verbal statements can be recognized as false statements of fact. The burden of proving falsity would be placed on the prosecution. *See note 60 supra*.

70. *See A. MEIKLEJOHN, supra note 50*, at 42 (false statements of fact do not further public interests, but only private ones, and thus are within the field of legitimate potential legislative abridgement).

71. The principle that certain verbal statements can be recognized as false statements of fact, and therefore may give rise to liability for defamation, has been recognized in numerous cases. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *E. W. Scripps Co. v. Cholmondelay*, 569 S.W. 2d 700, 702-03 (Ct. App. Ky. 1978).

72. *See RESTATEMENT (SECOND) OF TORTS* § 566, Comment b (1977) ("To say of a person that he is a thief without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery.")

Vilification

a statement of opinion implies an assertion of fact that is true, then the statement must be protected for the same reasons that express statements of fact that are true are protected. But when a mixed statement of opinion implies an assertion of fact that is false, the statement need not be protected: its effect on its hearer is the same as that of a false statement of fact, and so, like such a statement, its protection is not required by the Meiklejohnian theory of First Amendment rights.⁷³

III. Group Defamation Defined and Illustrated

By applying the Meiklejohnian theory of First Amendment rights, it is possible to identify a subcategory of group-vilifying speech—"group defamation"—that lies outside the First Amendment and thus may be constitutionally proscribed.

A. *Elements of the Offense*

In order to proscribe group-vilifying statements, those statements must exhibit the two indicia of nonprotection common to the currently acknowledged categories of unprotected speech.⁷⁴ In addition, because all true statements of fact and simple statements of opinion may contribute to the deliberative process of public decisionmaking, no such statements can be proscribed.⁷⁵ Thus the class of group-vilifying speech that can be prohibited without contravention of the First Amendment—a class that will be termed "group defamation"—must have three characteristics:

First, it must cause serious harm to substantial public interests. This requirement can be met by showing that the speech in question, in the context in which it was delivered, held a racial, ethnic, or religious group or its members up to public contempt, shame, disgrace, or obloquy, or caused the members of the target group to be shunned, avoided, or injured in occupation.⁷⁶

Second, the speech, in the context in which it was delivered, must not have appealed to the conscious faculties of its hearers. This characteristic, like the "prurient interest" characteristic required of ob-

73. The principle that certain verbal statements can be recognized as mixed statements of opinion that imply an assertion of fact that is false, and that such statements may give rise to liability for defamation, has been recognized in numerous cases. *See, e.g.,* *Regan v. Sullivan*, 557 F.2d 300, 308-09 (2d Cir. 1977); *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1216-18 (Ct. App. Ind. 1978); *Mashburn v. Collin*, 355 So. 2d 879, 885-86, 888-91 (La. 1977).

74. *See* pp. 317-18 *supra*.

75. *See* pp. 322-24 *supra*.

76. *See* Note, *supra* note 2, at 609 (using similar language to describe effect of the proscribed speech-category).

scenity, must be found by the jury to have been present in the particular speech in question.⁷⁷ But again like the "prurient interest" characteristic, this requirement can be satisfied either by showing that the speech in question would not appeal to the conscious faculties of the average person in the general population,⁷⁸ or by showing that it would not appeal to the conscious faculties of the average person in a particular subpopulation—for example, persons already prejudiced against the target group—that was an intended or probable recipient of the speech.⁷⁹

Finally, the speech must convey a false assertion of fact. If the speech is in the form of a statement of fact, that statement must be false. If the speech is in the form of a statement of opinion that reasonably implies an assertion of fact not assumed by its hearers, that assertion must be false.

As thus defined, group defamation is a class of speech that, pursuant to the Meiklejohnian theory of the First Amendment currently applied by the Supreme Court, can be prohibited without contravention of the freedom of speech.⁸⁰

77. *Cf. Miller v. California*, 413 U.S. 15, 24 (1973) (trier of fact must decide whether work in question appeals to prurient interest). Plainly, this requirement often focuses on the form of a statement as much as on its substance. *See* note 58 *supra* (discerning similar focus on form in obscenity cases).

78. *Cf. Pinkus v. United States*, 436 U.S. 293, 298-301 (1978) (approving jury instruction in obscenity case, where instruction was "to judge these materials by the standard of the hypothetical average person in the community, . . . includ[ing] everyone [sensitive and insensitive] in the community").

79. *Cf. id.* at 301-03 (approving obscenity conviction based on jury finding that materials appealed to prurient interest of "members of a deviant sexual group"); *Mishkin v. New York*, 383 U.S. 502, 508 (1966) ("Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied . . . [by reference to] the members of that group.")

80. Because of the importance attributed to speech, any statute making the dissemination of group defamation a crime must be drawn so as not to "chill" protected speech. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). Because a chilling effect on First Amendment freedoms can be "generated by vagueness, overbreadth and unbridled discretion to limit [the rights] exercise," *Walker v. City of Birmingham*, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting), the language of a group-defamation statute must avoid these three infirmities. It must be narrowly drawn, *see Gooding v. Wilson*, 405 U.S. 518, 522 (1972), and specific enough to make plain the kind of speech that is prohibited, *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Additionally, in order to "bridle" governmental discretion, certain substantive and procedural safeguards should be provided in favor of the defendant in a group-defamation prosecution. With respect to each element of the offense, the prosecution should bear the burden of satisfying the trier of fact beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). Further, the trial judge, rather than the jury, should be given the responsibility of determining three matters that could arise with respect to the offense: first, whether a statement is one of fact or opinion; second, whether a statement of opinion could reasonably imply an assertion of fact not assumed by the hearer; and third, whether a statement could cause any of the harms to the target group or its

Vilification

B. *Standard for Criminal Liability*

There remains the question of the degree of fault that should be required of a group-defaming speaker in order to render him liable to criminal sanctions for his speech. An answer is suggested by an examination of three closely related Supreme Court decisions—*New York Times Co. v. Sullivan*,⁸¹ *Garrison v. Louisiana*,⁸² and *Gertz v. Robert Welch, Inc.*⁸³—and by a consideration of the nature and effects of group defamation.

In *Sullivan*, the Court held that in a civil action brought by a public official for criticism of his official conduct, the constitutionally prescribed minimum standard of liability is “actual malice”: the defendant must have published a false statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁸⁴ In *Garrison*, the Court determined that this “actual malice” standard of fault “also limits state power to impose *criminal* sanctions for criticism of the official conduct of public officials.”⁸⁵

In *Gertz*, however, the Court held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private* individual.”⁸⁶ In other words, *Gertz* held that a state may permit a private individual who sues for libel to succeed on a showing of the defendant’s negligence, without being required to prove the higher degree of fault known as “actual malice.”⁸⁷

Inspection of the *Gertz* opinion, combined with an examination of the characteristics of group defamation, shows that the proper standard

members deemed requisite to satisfy the “serious harm” element of the offense. Cf. RESTATEMENT (SECOND) OF TORTS §§ 614, 617 (1977) (proposing similar allocation of functions between court and jury). The determination of all other matters pertaining to the elements of the offense should be left to the jury. *Id.* This allocation of the burden of proof and the trial functions of judge and jury would minimize the incidence of improper convictions under the statute.

81. 376 U.S. 254 (1964).

82. 379 U.S. 64 (1964).

83. 418 U.S. 323 (1974).

84. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

85. *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (emphasis added). The adoption of the “actual malice” standard had a dramatic effect on the ability of plaintiffs to succeed in defamation suits. By 1971, the burden of proof imposed on such plaintiffs was so heavy that it “became virtually impossible to overcome.” Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471, 477 (1975). The “overwhelming majority of plaintiffs” thus “failed to meet the requirement.” *Id.* at 478 & nn.44 & 45.

86. 418 U.S. at 347 (emphasis added) (footnote omitted).

87. *See id.* at 375-76 (White, J., dissenting).

for imposing liability in group-defamation prosecutions is negligence. The *Gertz* Court gave two reasons for permitting a lower standard of fault in suits involving private individuals. Both reasons pertained to distinctions the Court saw between private individuals and public figures. First, the Court observed that public figures, because of their "significantly greater access to the channels of effective communication . . . have a more realistic opportunity to counteract false statements than private individuals normally enjoy."⁸⁸ Second, the Court noted that a public figure, by "invi[ing] attention and comment, . . . relinquish[es] . . . part of his interest in the protection of his own good name," while "[n]o such assumption is justified with respect to a private individual."⁸⁹

The *Gertz* Court thus rested its holding on two characteristics of the private individual: his lesser capacity to rebut defamatory statements, and his greater retained privacy interest. The Court viewed its allowance of a lower standard of liability as striking the proper balance between the right of free speech and "the state interest in . . . the reputation of private individuals."⁹⁰ Because this state interest was perceived as greater than the state interest in the reputation of public officials or public figures, a lower standard of liability was deemed proper.

By analogy, the state interest in the elimination of group defamation and its harmful concomitants should be sufficient to warrant the lower standard of liability permitted in *Gertz*. The state has a substantial interest in protecting the reputation of defamed target groups and their members,⁹¹ just as it has an interest in the reputation of private individuals. According to the two characteristics focused on in *Gertz*, the victims of group defamation deserve protection similar to that afforded to libeled private individuals. The nature of the appeal of group defamation to its hearers,⁹² as well as the amorphous and general nature of its content, suggests that antiprejudice propaganda will have relatively little effect;⁹³ consequently, a target group and its members have a fairly small capacity for "self-help." In addition, the notoriety of a target group and its members is generally quite involuntary: it cannot be said that the victims of group defamation

88. *Id.* at 344 (footnote omitted).

89. *Id.* at 345.

90. *Id.* at 343.

91. See p. 314 *supra*.

92. See p. 313 *supra*.

93. See, e.g., G. SIMPSON & J. YINGER, *supra* note 17, at 668-72 (observing inability of anti-prejudice propaganda to effect extensive changes).

Vilification

“thrust themselves” into the public eye in the manner of public officials or public figures.⁹⁴

Thus the state interest in the reputation of defamed target groups and their members appears comparable in nature with that held to warrant a negligence standard of liability in *Gertz*. When the general state interest in eradicating discrimination is also taken into account, it seems proper to conclude that the standard of fault prescribed by the *Gertz* Court—negligence, rather than actual malice—should properly apply in prosecutions for group defamation.

C. *Group Defamation Illustrated*

The intended scope and limits of the proposed prohibition of group-defaming speech may be clarified by applying the definition developed above to particular examples of speech.

1. *William Shockley*

William B. Shockley achieved national notoriety in the early 1970's for his views on the inheritability of human intelligence.⁹⁵ Basing his conclusions on the results of standardized intelligence tests,⁹⁶ Shockley argued that “Negro-white differences in [test scores] may be evidence for racial genetic differences in neurological organization rather than due to environmental differences,” and suggested that, accordingly, “[g]iving a bonus to low I.Q. groups that do not reproduce might be worth discussion.”⁹⁷ For present purposes, the following passage, as reported in the *New York Times*, adequately represents the character of Shockley's speech:

My research leads me inescapably to the opinion that the major cause of American Negroes' intellectual and social deficits is

94. Of course, in some religious groups membership is plainly voluntary. If such a religious group were to thrust itself to “the forefront of particular public controversies in order to influence the resolution of the issues involved,” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), then the “actual malice” standard applicable to public figures would more properly apply. Cf. *Church of Scientology v. Cazares*, 455 F. Supp. 420, 423 (M.D. Fla. 1978) (holding plaintiff religious organization to be a public figure, and thus to be required to prove actual malice).

95. Shockley was then a Professor of Electrical Engineering at Stanford University. In 1972 he was denied permission to teach for credit a course on his theory of intelligence. One reason given for this denial was that Shockley was not qualified to teach such a course. *N.Y. Times*, May 2, 1972, at 9, col. 1.

96. See *id.*, Dec. 5, 1973, at 38, col. 2 (acknowledging that Shockley's views were based on results of standardized intelligence tests); *id.*, Oct. 28, 1973, § 4, at 7, col. 4 (advertisement by Committee Against Racism; same).

97. *Id.*, May 3, 1970, § 1, at 58, col. 4 (bracketed words in original).

hereditary and . . . racially genetic in origin and thus not remediable to a major degree by practical improvement in environment.

[It might be necessary to sterilize persons of very low intelligence to avoid] retrogressive evolution through the disproportionate reproduction of the genetically disadvantaged.⁹⁸

Shockley's speech might well be described as group vilification. If believed, such speech could easily have injured the reputation of blacks as a group, harming both the group and its individual members. Moreover, racially prejudiced hearers of Shockley's speech could have received and accepted it in an undeliberated, irrational way, as scientific confirmation of their prejudices.

Nevertheless, Shockley's speech was not group defamation as that term is defined above. The quoted passage is a "simple statement of opinion":⁹⁹ Shockley stated the facts on which he based his opinion—namely, racial differences in intelligence-test scores—and then expressed a comment as to the character of the target group and the implications of that character for future public policy.¹⁰⁰ The statements of fact on which Shockley based his opinion were recognized as true.¹⁰¹ Because Shockley's speech involved neither false statements of fact nor mixed statements of opinion, it would not and could not constitute group defamation.¹⁰²

2. *The Nazis in Skokie*

In March 1977 the National Socialist Party of America announced plans to conduct a public demonstration in Skokie, Illinois.¹⁰³ As a

98. *Id.*, Dec. 5, 1973, at 38, col. 2, 3 (bracketed words in original).

99. See RESTATEMENT (SECOND) OF TORTS § 566, Comment b & Comment c, Illustration 4 (1977) (defining and illustrating "simple" expressions of opinion).

100. Shockley's statement that "the major cause of American Negroes' intellectual and social deficits is hereditary," is not a statement of fact, because its truth or falsity cannot be ascertained. See notes 60, 66 *supra*. Therefore the statement must be one of opinion.

101. Shockley's critics conceded that whites as a group scored higher than blacks as a group on traditional standardized intelligence tests. These critics disagreed with Shockley only as to the inferences that could properly be drawn from the fact of these differential scores. See *N.Y. Times*, Dec. 5, 1973, at 38, col. 3; *id.*, Nov. 21, 1973, at 41, col. 3; *id.*, Oct. 28, 1973, § 4, at 7, col. 4 (advertisement by Committee Against Racism).

102. See pp. 322-24 *supra* (explaining that simple statements of opinion must be protected under Meiklejohnian theory of First Amendment rights).

103. See *Village of Skokie v. National Socialist Party of America*, 51 Ill. App. 3d 279, 282, 366 N.E.2d 347, 349-50 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (describing events leading to litigation).

Vilification

prelude to the planned demonstration, the Party circulated a leaflet entitled "We Are Coming,"¹⁰⁴ which read in part:

An old maxim goes: "Where one finds the most Jews, there also shall one find the most Jew-haters." With this basic truth in mind, we are now planning a number of street demonstrations and even speeches in Evanston, Skokie, Lincolnwood, North Shore, Morton Grove, etc. This leaflet is but the first of a number now being prepared for eventual mass-distribution. A beautiful, full-color poster, 18 inches by 30 inches, with non-removable adhesive on the back, is already in the works. The poster shows three rabbis involved in the ritual murder of an innocent Gentile boy during the hate-fest of Purim. Our propaganda will deal at large with exposé after exposé of the Talmud, the Protocols of Zion and revealing quotes, many never before presented anywhere from loose-lipped Hebes¹⁰⁵

This passage refers to two publications that could fall into the category of group defamation: the poster of the three rabbis, and the "exposé" known as the *Protocols of Zion*.¹⁰⁶ Given the proper proofs, publication of both the poster and the *Protocols* would be prohibited under the analysis of this Note, and that prohibition would not contravene the First Amendment.

The "exposé" known as the *Protocols of Zion* consists of assertions that are both specific and objectively verifiable; it is therefore a statement of fact, and subject as such to being proved false.¹⁰⁷ According to the proposal of this Note, if the trier of fact were satisfied that the *Protocols* was false, and if the trier were further satisfied that the statement referred to Jews as a group, caused them harm, and did not ap-

104. Letter from Harvey Schwartz, *supra* note 2.

105. *Id.* (enclosure).

106. The *Protocols of the Learned Elders of Zion* is a fraudulent document that has served as a pretext and rationale for anti-Semitism. The document purports to be a report of a series of meetings held in Basel, Switzerland, at the time of the first Zionist congress. There Jews and Freemasons were said to have made plans to disrupt Christian civilization and erect a world state under their joint rule. Liberalism and socialism were to be the means of subverting Christendom; if subversion failed, all the capitals of Europe were to be sabotaged. 8 *ENCYCLOPAEDIA BRITANNICA (MICROPAEDIA)* 253 (1974).

The *Protocols* were first printed in Russia in 1903. They were soon translated into other languages and became a classic of anti-Semitic literature. In the United States, Henry Ford's private newspaper, the *Dearborn Independent*, often cited them as evidence of a Jewish threat. Their spurious character was first revealed in 1921 by Philip Graves of the *London Times*, who demonstrated their obvious resemblance to a satire by the French lawyer Maurice Joly on Napoleon III, published in 1864. Subsequent investigation, particularly by the Russian historian Vladimir Burtsev, revealed that the *Protocols* were forgeries compounded by officials of the Russian secret police out of the satire of Joly, a fantastic novel by Hermann Goedsche in 1868, and other sources. *Id.*

107. Indeed, the *Protocols* have already been conclusively shown to be false. *See id.*

peal to the conscious faculties of its hearers, then the *Protocols* could be constitutionally prohibited as group defamation.

The poster, by contrast, is a symbolic, impressionistic representation of an event. Lacking specificity, its message is incapable of being proved true or false, and thus constitutes a statement of opinion. But because it is described as depicting a "ritual" murder, the poster may reasonably be taken as implying that the event that it portrays in fact occurs, and occurs regularly. This implied statement of fact—"Rabbis regularly murder innocent Gentile boys at the festival of Purim"—is susceptible to verification.¹⁰⁸ Under the proposal of this Note, if the trier of fact were satisfied that the statement of fact reasonably inferred from the poster is false, and if the trier were further satisfied that the statement referred to Jews as a group, caused them harm, and did not appeal to the conscious faculties of its viewers, then the poster could be constitutionally prohibited as group defamation.¹⁰⁹

Conclusion

Currently, all group-libeling speech is widely viewed as protected by the First Amendment. But that view is simplistic and incorrect. It fails to take into account the psychological effects of prejudice; consequently, it applies the "marketplace of ideas" justification for freedom of speech¹¹⁰ to group vilification, which trades not in ideas but in pernicious and undeliberated passions. A more realistic assessment of the nature of group-vilifying speech, combined with an appreciation of the proper and recognized purposes of the First Amendment, leads to the conclusion that certain kinds of group vilification can be prohibited. Such a prohibition would not violate, but would rather fulfill, the ideal of deliberative self-government that underlies the First Amendment.

108. See RESTATEMENT (SECOND) OF TORTS § 566, Comment b & Comment c, Illustration 3 (1977) (defining and illustrating "mixed" expressions of opinion).

109. See pp. 324-25 *supra* (explaining that false statements of fact, and statements of opinion that reasonably imply false assertions of fact not assumed by the hearer, need not be protected under Meiklejohnian theory of First Amendment rights). With respect to the definitional and procedural checks on improper conviction, see note 80 *supra*.

110. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).