THE "ANTI-HATE" ACT

LLOYD C. WAMPLER*

Probably no other enactment of the 1947 session of the Indiana General Assembly met with stronger public and legislative support at the time of passage than the so-called "anti-hate" bill.[1] For lawyers and law students its popularity may be overshadowed somewhat by concern regarding its validity and by the difficulties inherent in its interpretation and construction. Since many of its provisions are unusual,[2] a brief summary of the statute seems appropriate.

Entitled "An Act concerning hatred by reason of race, color or religion, and to effectuate the Bill of Rights . . . ", the statute declares the public policy of the state and of the act to be the protection of the "economic welfare, health, peace. domestic tranquility, morals, property rights and interests" of the state and its people, the prevention of "racketeering in hatred" and the prohibition of "agreeing, combining, uniting, confederating, conspiring, organizing, associating or assembling for the purpose of creating, advocating, spreading or disseminating hatred by reason of race, color or religion."[3] The malicious doing of the above acts is made unlawful in instances where such acts tend or threaten to cause riot, disorder, interference with highway traffic, destruction of property, breach of peace, violence, or denial of civil or constitutional rights.[4] The act further provides for penalties[5] and

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* Third year student, School of Law, Indiana University.

1. Ind. Acts 1947, c. 56.
2. Compare New Jersey Laws 1935, c. 151, which provided: "Any person who shall, in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state by reason of race, color, religion or manner of worship, shall be guilty of a misdemeanor." The statute was invalidated by the New Jersey Supreme Court in State v. Klapprott, 127 N.J.L. 395, 22 A. (2d) 877 (1941). Also see Ill. Laws 1917, p. 362, Ill. Rev. Stat. (1945) c. 38, § 471, applied in People v. Simcox, 379 Ill. 347, 40 N.E. (2d) 525 (1942).
3. Ind. Acts 1947, c. 56, § 1.
4. Ind. Acts 1947, c. 56, § 2, "(A) It shall be unlawful for any person or persons to combine, unite, confederate, conspire, organize or associate with any other person or persons for the purpose of creating, advocating, spreading or disseminating malicious hatred by reason of race, color, or religion not prohibited by law, for or against any person, persons or group of persons, individually or collectively, not alien enemies of the United States."
   "(B) It shall be unlawful for any person or persons acting

injunctions[6] against violation and prohibits the issuance of corporate charters[7] and privileges[8] to violators or threatened violators and requires the forfeiture of charters[9] and privileges[10] of a corporation which does or exists for the purpose of doing, any of the acts prohibited. Certain presumptions are created.[11]

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with malice to create, advocate, spread, or disseminate hatred for or against any person, persons or group of persons, individually or collectively, by reason of race, color or religion which threatens to, tends to, or causes riot, disorder, interference with traffic upon the streets or public highways, destruction of property, breach of peace, violence, or denial of civil or constitutional rights."

5. Ind. Acts 1947, c. 56 § 3. "Any person violating any of the provisions of Section 2 of this Act shall be deemed guilty of racketeering in hatred, and upon conviction, shall be disfranchised and rendered incapable of holding any office of profit or trust for any determinate period not exceeding ten (10) years, and shall be fined in any sum not exceeding ten thousand dollars ($10,000), to which may be added imprisonment in the state prison for any determinate period not exceeding two (2) years."
6. Id. § 4. "Any of the acts prohibited by Section 2 may be restrained and enjoined by any court having equitable jurisdiction in an action brought by the State of Indiana either on the relation of any Prosecuting Attorney of any judicial circuit or the Attorney General of Indiana. The State either on the relation of any such Prosecuting Attorney or the Attorney General may bring proper actions for contempt of court for the violation of any restraining order or injunction."
7. Id. § 5. "No corporate charter shall be issued for any domestic corporation, nor shall any corporation organized under the laws of another state be admitted to do business within Indiana if said domestic or foreign corporation be organized for the purpose of doing any of the acts prohibited by Section 2 or which shall do any of the acts prohibited by Section 2, and the acts prohibited by Section 2 of any two (2) or more of its members or officers purporting to be pursuant to or for said corporation, or as a part of its activities, whether authorized by the corporate charter or not, shall be deemed to be the acts of said corporation."
8. Id. § 5.
9. Id. § 6. "Any corporation organized for the purpose of doing any of the acts prohibited by Section 2, or which shall do any of the acts prohibited by said Section, shall have its corporate charter forfeited and terminated by an action brought by the State of Indiana on the relation of the Attorney General of Indiana in any circuit or superior court and the acts prohibited by Section 2 of any two (2) or more of its members or officers purporting to be pursuant to or for said corporation, or as a part of its activities, whether authorized by the corporate charter or not, shall be deemed to be the acts of said corporation and subject its charter to forfeiture. If any corporation organized under the laws of another state shall do any of the acts herein prohibited and shall have been admitted to do business within this state, such authority to do business within Indiana shall be forfeited and terminated in the same manner as in this section provided for domestic corporations."
10. Id. § 6.
11. Id. §§ 5, 6.

One of the many interesting features of the statute, and one which it is well to consider before proceeding further, is Section 10 which states that "no provision of any section of this act shall be construed to prohibit any right protected by the federal constitution or the Constitution of the State of Indiana, including but not limited to rights of freedom of speech, freedom of the press and freedom of religion." If such a provision in statutes were given literal effect it seems improbable that the doctrine of judicial review[12] could long survive in its present form. As an expression of legislative intent Section 10 would seem, at best, to be no more than declaratory of the rule of statutory construction that the legislature will be presumed to have acted with integrity and with an honest purpose to keep within constitutional limits.[13] Construed in this manner, the section would be given a harmless meaning in order to pay respect to another rule of statutory construction, namely, that the legislature cannot be presumed to do a futile thing.[14] This appears to be the most feasible construction of Section 10, especially in view of the fact that the statute also contains the more usual and conventional type of "saving"

12. Marbury v. Madison, 1 Cranch 137 (U.S. 1803). Because the doctrine of this case is so well settled in American jurisprudence it is felt that measures more drastic than § 10 of the Indiana anti-hate act will be required to unsettle it. The doctrine has been reaffirmed by recent Indiana cases: compare, Pennington v. Stewart, 212 Ind. 553, 562, 10 N.E. (2d) 619, 623 (1937); Hollingsworth v. State Board of Barber Examiners, 217 Ind. 373, 28 N.E. (2d) 64 (1940); Heath v. Fennig, 219 Ind. 629, 40 N.E. (2d) 329 (1942). "The power to declare a statute void on the ground that it is in conflict with the constitution is peculiar of the American courts.... The early cases show that the courts at first asserted this doctrine with much hesitation . . . . , but it is now firmly fixed in our law." Robinson v. Schenk, 102 Ind. 307, 319 (1884) quoted in State v. Roby, 142 Ind. 168, 180, 41 N.E. 145, 149 (1895). See Hotel & Restaurant Employees Union v. Wis. Employment Relations Board, 315 U.S. 437 (1942), involving a state statute which provided that nothing in the act should "be so construed as to invade unlawfully the right to freedom of speech."

13. Conter v. Commercial Bank, 209 Ind. 510, 513, 199 N.E. 567, 569 (1935); Butterfield v. Stranahan, 192 U.S. 470, 492 (1904). ["... this presumption, though frequently reiterated, has little operative effect in the determination of a particular case. The presumption is asserted as frequently when the statute is declared unconstitutional as it is when constitutional attack is denied. The presumption is obviously not conclusive and has, apparently, little effect upon the actual decision of cases." Sutherland, "Statutory Construction," § 4509 (3rd ed., 1943)].

14. Groher v. Colgate-Palmolive-Peet Co., 94 Ind. App. 234, 245, 178 N.E. 242 (1931); Sutherland, "Statutory Construction," § 4510 (3rd ed., 1943); Richmond Baking Co. v. Department of Treasury, 215 Ind. 110, 18 N.E. (2d) 778 (1939).

or "separation" clause.[15] An alternative possibility of constitutional attack would be to question the validity of state *action* taken pursuant to the statute. In *Fiske v. Kansas*,[16] for example, the Statute in question was not invalidated although its application to the particular situation was held to be a denial of due process.

It is axiomatic that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. The highest Court has held that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essentials of due process.[17] Is "hatred" a term so vague as to make the statute void for indefiniteness? Though the cases are confusing[18] it is submitted that an attack on this ground might not be without merit.[19] The argument is strengthened by the Court's language in *Connally v. General Construction Co.*,[19a] where, after a consideration of many leading cases on the subject, the Court said: "The question whether given legislative enactments have been . . . wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others declared invalid. The precise point of differentiation in some instances is not easy of statement; but . . . generally . . . the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or special meaning, well enough known to enable those within their reach to

15. Ind. Acts 1947, c. 56, § 12. (If § 12 is to be interpreted literally it obviously would be a non sequitur to interpret § 10 literally. Furthermore, a literal interpretation of both sections would do violence to the rule of construction discussed in note 14, supra.)

16. 274 U.S. 380 (1927).

17. Connally v. General Construction Co., 269 U.S. 385 (1926), cited and relied upon in Lanzetta v. New Jersey, 306 U.S. 451 (1939).

18. Aigler (R.W.), "Legislation in Vague or General Terms," 21 Mich. L. Rev. 831 (1923), and Indiana cases cited.

19. In an opinion invalidating a somewhat similar penal statute, (note 2, supra), the Supreme Court of New Jersey said: "As well try to point to a spot within a triangle which is equidistant from every point in the area enclosed as say when hatred takes the place of some lesser emotion." State v. Klapprott, 127 N.J.L., 395, 403, 22 A. (2d) 877, 882 (1941).

19a. 269 U.S. 385 (1926).

correctly apply them . . . or a well-settled common law meaning . . . or that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. . . . "

It could hardly be contended that "hatred" is a term having a technical or special meaning.[20] Neither is the author able to discover any well-settled common law meaning of the term.[21] The argument *against* indefiniteness, however, would doubtless rest upon cases recognizing a sufficient standard resulting from the text or subject matter of the statute.[22] Since a court will examine the history of the times in construing a statute,[23] it might not be unreasonable to conclude that most persons understand sufficiently the type of conduct which the legislature sought to prevent. *Quod tacite intelligitur deesse non videtur.* Early convictions under this theory would seem to furnish the basis for a "common law" meaning of the term which, in turn, might save the statute from future attacks as to this form of indefiniteness. The possibility of indefiniteness in a somewhat different sense is discussed below in another connection.

One is impressed by the remarkable similarity between Section 2(B) of the statute and the common law concept of criminal defamation.[24] In view of this similarity, it seems appropriate to inquire why the legislature did not label the crime a "libel" or "slander."[25] Why did the legislature feel

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20. The legislative definition of the term "hatred" leaves much to be desired. § 9 of the act provides: "The term 'hatred' as used in this act shall mean and include malevolent ill will, animosity, odium, detestation and rancor."

21. It has been suggested, however, that the word "hatred" is capable of interpretation in terms of libelous conduct. Note, 42 Col. L. Rev. 857, 862 (1942). Such an interpretation of the word might be feasible if the instant act is construed as a criminal libel statute as suggested below.

22. Omaechevarria v. Idaho, 246 U.S. 343 (1918); United States v. Ragen, 314 U.S. 513, 524 (1942).

23. State v. Roby, 142 Ind. 168, 41 N.E. 145 (1895).

24. For discussion of common law concept of criminal defamation, see 19 A.L.R. 1477 (1922).

25. There is early precedent for the rule that a class may be criminally libelled. In Rex v. Osborn, 2 Barnard K.B. 138, 94 Eng. Rep. 406 (1732), it was held libelous to charge the Portuguese Jews with having burned a bastard child begotten by a Christian of a Jewish woman. Although no particular person could show that he was pointed at more than others, the court said that "the whole commuunity of Jews was struck at" and that whenever that was the case the court ought to interpose. Annotations 19 A.L.R.

it necessary to create a "new" crime called "racketeering in hatred"? One possibility is suggested: The Constitution of the State of Indiana provides that in any prosecution for libel, truth shall be a defense,[26] and this has been held to apply in criminal libel even though the publication was not in good faith.[27] It is understandable that libelous publication is not less likely to produce violations of the public peace merely because it is founded in truth.[28] " 'The greater the truth, the greater the libel' was a maxim of the common law that was applicable in criminal actions for libel on the theory that the criminal aspect of a libel, its tendency to provoke a breach of the peace, was unaffected by the truth or falsity of the defamatory remarks."[29] Certainly it does not require a vivid imagination to understand that skillful or excessive publication of the truth in a particular community might create racial or religious hatred which would threaten the peace and safety of the community. Indeed this is probably the method which a shrewd baiter of minorities would adopt in order to stir up hatred and violence. Consider the effect, for example, of undue emphasis in the public press of serious crimes by negroes and the "playing down" of similar crimes committed by "pinks."[30] The effectiveness of such a technique is too well known to all Americans, including Hoosiers. It is probably still true that "the greater the truth, the greater the libel" if the libel is measured by the quantum of violence produced. It seems quite likely that the draftsmen of the anti-hate bill and the Indiana legislature recognized these social facts when they gave a new name to an old crime.

This introduces the question of whether a white horse if painted black remains a horse or becomes a cow. It is often said that one cannot do indirectly that which he cannot do directly. Does this maxim apply to the legislature? By

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1455, 1532 (1922); 33 Am. Jur. 294, § 313; David Riesman, "Democracy and Defamation: Control of Group Libel," 42 Col. L. Rev. 727 (1942).

26. Ind. Const. Art. I, § 10.
27. Hartford v. State, 96 Ind. 461 (1884); State v. Bush, 122 Ind. 42, 23 N.E. 677 (1889); Ind. Stat. Ann. (Burns, 1933) §§ 10-3201, 10-3202; Note, 20 Ind. L.J. 225 (1945).
28. Note 19 A.L.R. 1477 (1922).
29. Harper, "Law of Torts," § 244 (1933).
30. Shaw, "Everybody's Political What's What?" pp. 130-131 (1944). In China the "white" man is more accurately described as the "pink" man.

assigning the name "racketeering in hatred" to ingredients which at common law constituted criminal defamation, can constitutional provisions which would apply to the latter, if libel, be evaded by substituting the new label for the old? If the question is answered in the negative, truth would become a justification in all situations arising under the statute which, at common law, would have been criminal libel.[31] Such an interpretation would not invalidate any part of the statute, however, since the statute does not go so far as to say that truth shall *not* be a defense.[32]

It has been noted that sections 5 and 6 create certain presumptions. Inasmuch as Section 5 merely establishes a condition upon which a corporate charter or privilege to do business shall not be *granted*, there would seem to be little doubt, if any, about the validity of the presumption which it creates. It is well settled that a state has very wide discretion in such matters.[33] Therefore, the presumption created by Section 5 is doubtless valid irrespective of the manner in which the Section is construed.

Section 6, however, presents a somewhat different problem. It provides: "Any corporation organized for the purpose of doing any of the acts prohibited by Section 2, or which shall do any of the acts prohibited by said section, shall have its corporate charter forfeited and terminated by an action brought by the State of Indiana on relation of the Attorney General of Indiana in any circuit or superior court and the acts prohibited by Section 2 of any two or more of its members or officers purporting to be pursuant to or for said corporation, or as a part of its activities, whether authorized by the corporate charter or not,[34] shall be deemed to be the acts

31. In Hartford v. State, 96 Ind. 461 (1884), it was held that the word "libel" must be taken in its common law sense, even though the statute concerned did not define the meaning of the words employed in describing the offense.

32. Under this rationale the constitutional provision (note 26, supra) would be self-executing.

33. Cf. Grand Rapids R.R. v. Osborn, 193 U.S. 17 (1904); State v. Ku Klux Klan, 117 Kan. 564, 232 Pac. 254 (1925), appeal dismissed, Ku Klux Klan v. State, 273 U.S. 664 (1927); Horn Silver Mining Co. v. New York, 143 U.S. 305, 312-315 (1892); Hooper v. California, 155 U.S. 648, 652 (1895); Munday v. Wisconsin Trust Co., 252 U.S. 499 (1920); Crescent Oil Co. v. Mississippi, 257 U.S. 129, 137 (1921). See Notes, 7 R.C.L. 619; 20 C.J.S. § 1810.

34. Although ordinarily a corporation is treated as a legal entity separate and distinct in identity from the members who compose it [Dep't of Treas. v. Crowder, 214 Ind. 252, 15 N.E. (2d) 84 (1938)

of said corporation and subject its charter to forfeiture . . ." There is a similar provision with respect to foreign corporations admitted to do business within the state.[35]

Since the exact nature of the presumption created is not made clear by the wording of the statute, the constitutionality of Section 6 may depend upon the manner in which it is construed and applied by the state courts.[36] Inasmuch as it is the purpose of this paper merely to point out certain problems presented by the Indiana statute, no attempt is made here to re-examine in detail the multitude of conflicting state decisions involving the constitutionality of statutory presumptions.[37] But there are certain well-settled principles stated in the leading cases and by the authorities.

Writers and courts have usually divided presumptions into two main classes: (1) conclusive or absolute presumptions, and (2) *prima facie* or rebuttable presumptions.[38] There is considerable modern agreement that the so-called conclusive presumption is really not a presumption at all, but a rule of substantive law[39] couched in "awkward phraseology."[40] Furthermore, there seems to be wide agreement that there is nothing constitutionally objectionable in a conclusive presumption *per se*.[41] One writer points out, for example, that most courts seem to understand the "true character" of

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(for tax purposes)], it is well settled that the corporate entity will be disregarded when it is used to accomplish an illegal act [18 C.J.S. 380 §7 (b)]. When the fiction of the corporate entity has been urged to an intent not within its reason or purpose, the courts have not failed to recognize that a corporation is in fact a collection of individuals [18 C.J.S. 376, § 6].

35. Ind. Acts 1947, c. 56, § 6.

36. Federation of Labor v. McAdory, 325 U.S. 450, 459-463 (1944).

37. For detailed treatments of the subject see Paul Brosman, "The Statutory Presumption," 5 Tulane L. Rev. 17-54, 178-210 (1930); Morgan, "Federal Constitutional Limitations Upon Presumptions Created by State Legislation," Harvard Legal Essays, 323-356 (1934); see also Note, 43 Harv. L. Rev. 100 (1929).

38. Brosman, "The Statutory Presumption," 5 Tulane L. Rev. 17-18 (1930).

39. Id. at 24.

40. Morgan, "Federal Constitutional Limitations Upon Presumptions Created by State Legislation," Harvard Legal Essays, 323, 329 (1934). See 4 Wigmore, "Evidence" (3rd Ed. 1940) p. 715, for instances in which a conclusive presumption is a rule of evidence.

41. 4 Wigmore, "Evidence" (3rd Ed. 1940) § 1353, p. 714; Thayer, "Preliminary Treatise on Evidence" (1898), p. 316; Brosman, "The Statutory Presumption," 5 Tulane L. Rev. 17, 28 (1930); Morgan, "Federal Constitutional Limitations Upon Presumptions Created by State Legislation," Harvard Legal Essays, 323, 328-330 (1934).

the conclusive presumption and consider it as a rule of substantive law, regardless of the form in which it is expressed. Other courts, however, have considered it as a rule of evidence which prevents the courts from investigating and determining the truth of the particular issue.[42] The "true test" is stated to be: "Can the legislature constitutionally do what it is seeking to do independently of the language of the presumption? If it can, the particular statutory [conclusive] presumption is unobjectionable; but if some constitutional principle operates to forbid it, the statute must be held bad."[43] Using this test, the presumption created by Section 6 of the anti-hate act would seem to be valid if construed as a conclusive presumption. It is settled that the Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business within the state,[44] and in a recent decision the highest court re-affirmed the proposition that a state's power to exclude a foreign corporation does not end as soon as the corporation has lawfully entered the state. "Subsequent legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process."[45] Similar reasoning would seem to apply to domestic corporations where the public interest sought to be protected by the statutory provision for forfeiture reasonably outweighs the interest in the continuation of the charter.[46]

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42. The Indiana court seems to have adopted this view in both civil and criminal cases. In B. & O. S. W. Ry. v. Reed, 158 Ind. 25, 33, 62 N.E. 488, 491 (1901), it was stated: "The rule is well settled that the legislative department is not authorized to declare that certain facts or evidence shall create a conclusive presumption and thereby override the essential facts in the case, or preclude a party in an action from asserting and proving the truth." Citing many Indiana cases. Cf. Voght v. State, 124 Ind. 358, 24 N.E. 680 (1890); Darbyshire v. State, 196 Ind. 608, 149 N.E. 168 (1926).

43. Brosman, "The Statutory Presumption," 5 Tulane L. Rev. 17, 31 (1930); cf. Morgan, "Federal Constitutional Limitations Upon Presumptions Created by State Legislation," Harvard Legal Essays, 323, 328-330 (1934).

44. Note 33, supra.

45. Asbury Hospital v. Cass County, 326 U.S. 207, 211-212 (1945), citing cases.

46. Although a corporate charter has long been held to constitute a contract within the meaning of the contract clause of the Federal Constitution [Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (U.S. 1819)], there has been a tendency on the part of the Court to restrict the application of the contract clause to situations where the state "unreasonably" impairs the obligation of

This result, however, would not necessarily follow if the court chooses to regard the conclusive presumption as a rule of evidence rather than a rule of substantive law.[47]

If the presumptions created by Section 6 are construed as *prima facie* presumptions their validity will depend upon whether there can be said to be a sufficiently rational connection between the fact proved and the ultimate fact presumed.[48] The presumption is invalid if the inference of the ultimate fact from the fact proved is arbitrary because of lack of connection between the two in common experience. The Court has observed, however, that the test is not whether the statutory presumption rests upon a view of relation broader than that which a jury might take in a specific case, but whether the inference is "so strained as not to have a reasonable relation to the circumstances of life as we know them."[49] Whether the doing of acts prohibited by Section 2 by two or more officers or members of a corporation who purport to act for the corporation is a sufficient basis to support an inference that they are in fact acting for the corporation is a matter to be determined by a court when the situation arises. Much may depend upon the character of the corporation involved. For example, should two officers of an automobile manufacturing corporation be the offenders a court might be reluctant to treat the inference created by the presumption a reasonable one. On the other hand, if two or more members or officers of the Ku Klux Klan were the offenders a court probably would consider the connection a reasonable one on the ground that experience has shown the latter organization to be one which traditionally has engaged in the type of activity prohibited by Section 2.[50] However, it is the conclusion of the author that the presumption, construed as a *prima facie* presumption, should be upheld in either case,

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contract; the modern concept being that all contracts are made subject to the state's exercise of its police power. Cf. Home Building and Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934); East New York Savings Bank v. Hahn, 326 U.S. 230 (1945).

47. Note 42, supra. In State v. Beach, 147 Ind. 74, 79 (1897), the court said: "A law which would in effect exclude the evidence of a party and thereby deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proof of guilt would be unconstitutional."

48. Cf. Tot v. United States, 319 U.S. 463, 467 (1942); Western and Atlantic R.R. v. Henderson, 279 U.S. 639, 642 (1928).

49. Tot v. United States, 319 U.S. 463, 468 (1942).

50. Bryant v. Zimmerman, 278 U.S. 63, 75 (1929).

since the corporation would have ample opportunity to offer evidence in rebuttal.[51]

Finally, it is appropriate to inquire whether the penal and injunctive provisions of the statute are unconstitutional under the Fourteenth Amendment as denials of freedom of speech and assembly.[52] The inclusion of Section 10, previously discussed, indicates that the legislature itself had some doubt on this point. It was submitted at the beginning of this paper that the inclusion of Section 10 did not foreclose the raising of constitutional issues, and this contention is reiterated.[53]

In *Herndon v. Lowry*[54] the Court said: "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." In the same opinion, Mr. Justice Roberts, writing for the majority, said: "The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state."

It appears that the mere finding of, or declaration by, the legislature that an emergency exists,[55] is in itself insufficient to justify the abridgement of free speech and assembly.[56] Therefore, one may ask with propriety whether the

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51. Cf. Mobile, J. & K. C. R.R. v. Turnipseed, 219 U.S. 35, 43 (1910). In the Indiana case of State v. Beach, 147 Ind. 74, 79 (1897), the court said: "If the legislature in prescribing the rules of evidence in any class of cases leaves a party a fair opportunity to establish his case or defense and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause, to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional." not unconstitutional."

52. Note that the penal provisions are strikingly similar to the invalidated New Jersey statute, N.J. Laws, 1935, c. 151. That act, however, contained no provision for the issuance of injunctions.

53. There is authority for the proposition that not even the presumption of constitutionality (note 13, supra) will be indulged in where the statute interferes with a civil liberty as distinguished from legislative impairment of an economic privilege. See, Schneider v. Town of Irvington, 308 U.S. 147, 161 (1939); U.S. v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1937); Note, 40 Col. L. Rev. 531 (1940). Thomas v. Collins, 323 U.S. 516, 530 (1944).

54. 301 U.S. 242 (1937).

55. Ind. Acts 1947, c. 56.

56. "It is . . . always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it." From concurring opinion by Mr. Justice Brandeis

"emergency" here envisaged by the Indiana legislature in enacting the anti-hate bill was of the type which justified the enactment of so drastic a measure. The matter would seem to be governed by the so-called "clear and present danger" test, the history of which is instructive as to its meaning.

Schenck v. United States,[57] in which the "test" originated, involved an indictment under the federal Espionage Act. In the opinion in that case a full court stated the test of validity to be as follows: "The question in every case is whether the [prohibited] words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent."[58]

In 1925 in *Gitlow v. New York*[59] the Court was called upon to decide whether an indictment and conviction under a state penal statute defining "criminal anarchy" had denied to the appellant his right of free speech under the Fourteenth Amendment. In this opinion Mr. Justice Sanford, speaking for the majority, confirmed the conviction, saying, " . . . a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means," adding that "the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state," continued Mr. Justice Sanford, "cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. . . . It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency . . . "

In a dissent Mr. Justice Holmes repeated the substance

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in Whitney v. California, 274 U.S. 357, 377 (1926). Also note 53, supra.

57. 249 U.S. 47 (1919).

58. Mr. Justice Holmes, writing for the Court, added: "It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right." Id. p. 52.

59. 268 U.S. 652 (1925).

of his opinion in the *Schenck* case, *supra*, and of his dissent in the case of *Abrams v. United States*,[60] saying: "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."

Although the "clear and present danger test" ennunciated in the *Schenck* case was not expressly repudiated in the *Gitlow* case, the Court thought that the test was not to be applied "where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character." In the opinion in *Herndon v. Lowry*, *supra*, the Court returned to the standard of the *Schenck* case. In the *Herndon* case a majority held that it was insufficient to sustain a conviction under a Georgia statute, punishing the offenses of insurrection and inciting to insurrection, that the accused intended that an insurrection "should happen at *any* time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."[61]

It should be noted that in each of the above cases the statute in question sought to prevent combinations and utterances which threatened or were thought to threaten the security of organized government itself. The Indiana statute is not so restricted in its purposes, making the malicious doing of the acts prohibited by Section 2 (B) unlawful whenever they cause, tend, or threaten to cause "riot, disorder, interference with traffic upon the streets or public highways, destruction of property, breach of peace, violence, or denial of civil or constitutional rights." Nowhere is it contended that these consequences go so far as to threaten immediately the security of organized government; nor is such a threat made a condition precedent to the illegality of the acts.

In striking down the New Jersey statute, previously referred to,[62] the New Jersey court apparently applied the above strict "clear and present danger" test. Shortly following the decision in that case it was suggested in a note published in the Columbia Law Review[63] that the New Jersey court had

60. 250 U.S. 616 (1919).
61. The appellant was a paid organizer for the Communist Party in the South.
62. Note 2, Supra.
63. 42 Col. L. Rev. 857 (1942).

erred in its holding. It was noted that the "clear and present danger" test seemingly has been "broadened to justify restrictions upon expression which threatens to bring about 'destruction of life or property, or invasion of the right of privacy, or breach of peace.'" Dissenting opinions in three cases—all holding unconstitutional restrictions upon freedom of expression—were cited.[64] Also cited were *Chaplinsky v. New Hampshire*,[65] *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*,[66] and *Carpenters and Joiners Union v. Ritter's Cafe*.[67]

It is often repeated that, quite apart from utterances threatening the security of organized government, "the right of free speech is not absolute at all times and under all circumstances." Better stated perhaps, society has an interest in protecting against actual injuries, and when words have the effect of inflicting a "present injury" or "render highly probable an immediate breach of the peace," the words may be treated as 'acts' and dealt with accordingly.[68] Thus certain picketing has been enjoined, not as speech, but as a type of conduct which is not protected by the Fourteenth Amendment.[69] The Court in the *Chaplinsky* case held that it was proper to punish for a breach of the peace for calling an officer a "damned racketeer" and a "damned fascist." The Court thought that these were "fighting words"—not merely a communication of ideas.[70] It was held in *Cantwell v. Connecticut*,[71] however, that the playing of a phonograph record containing an attack upon a religious organization of which some of the listeners were members did not justify a conviction for breach of the peace. This was 'speech' within the

64. Bridges v. California, 314 U.S. 252 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940).

65. 315 U.S. 568 (1942).

66. 312 U.S. 237 (1941).

67. 315 U.S. 722 (1942).

68. Chafee, "Free Speech in the United States" (1940), pp. 149 et seq.

69. Gregory, "Labor and the Law" (1946) pp. 334-377, discussing the Ritter and Meadowmoor cases.

70. In the more recent case of Prince v. Massachusetts, 321 U.S. 158 (1944), it was held that a law prohibiting child labor may be enforced against one who allows a child under his care to sell religious literature on the streets. This result was reached by labeling the child's activity as 'labor' rather than an exercise of religious liberty.

71. 310 U.S. 296 (1940).

protection of the Fourteenth Amendment, notwithstanding the fact that the contents of the record provoked the indignation of listeners and stimulated in them a desire to strike the operator of the phonograph. The Court said: "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute *narrowly drawn to define and punish specific conduct* as constituting a clear and present danger to a substantial interest of the state, the petitioner's communication raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." (Italics added.) Whether the Indiana statute is *"narrowly drawn to define and punish specific conduct"* is the pertinent question.

In this connection it should be noted that the Indiana legislature did not attempt to determine in advance the type of conduct which shall be held to result in the consequences enumerated, but left it to the courts to make this determination as the particular situations arise.[72] This feature of the Indiana act would seem to exclude it from the rule of the *Gitlow* case *supra*, "where the legislative body itself [had] previously determined the danger of substantive evil arising from utterances of a special character," and at the same time may render the statute void for an indefiniteness similar to that discussed in *United States v. Cohen Grocery Co.*[73] In that case the Court said: "Observe that the section forbids no *specific or definite act* . . . [To] attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."[74] (Italics added.) Similarly, the Indiana statute would seem to license the court "to create its own standard [of guilt] in each case."[75]

Under the injunctive provisions of Section 4 the judge alone would be able to create and enforce the standard of guilt, since there is no right to trial by jury in equity proceedings.

72. Compare State v. Klapprott, 127 N.J.L. 395, 402, 22 A. (2d) 877, 881 (1941).
73. 255 U.S. 81, 89 (1921). See Nash v. United States, 229 U.S. 373 (1913); Fox v. Washington, 236 U.S. 273 (1915); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
74. Quoted in Herndon v. Lowry, 301 U.S. 242, 263 (1937).
75. Cf. Herndon v. Lowry, supra, at 263.

The opportunity for abuses inherent in this feature of the statute is obvious, and much popular criticism has resulted when courts have exercised their equity powers in the prevention of crime. The reasons for such criticism are multiplied when the crime to be enjoined is in the nature of defamation[76] or otherwise consists of communication of ideas. Under the Blackstonian interpretation of free speech, only 'previous restraint' was prohibited, there being no "freedom from censure for criminal matter when published."[77] Though this interpretation is no longer recognized as adequate,[78] previous restraint remains the most obvious threat to freedom of speech[79] and should be resorted to, if at all, only in extreme situations, that is, situations in which there is a "clear and present danger" that the threatened communication will bring about "a substantive evil that the state has a right to prevent."

It is submitted, therefore, that the validity of an injunction drawn in the language of Section 2 (B) and the validity of the criminal provisions, previously discussed, should be determined by the same test. If the danger is so clear, so imminent and so serious as to warrant application of the statute's criminal provisions, it seems that the public interest in preventing the evil would more than outweigh the interest in avoiding, in the particular case, the possible abuses attendant upon the issuance of injunctions against crimes. Otherwise, it is submitted, the "clear and present danger" test means little, if anything. Both Section 4 and Section 3, which provides for penalties, have as their purpose the prevention of the type of activity prohibited by Section 2. When the legislature seeks to accomplish an objective in one case by threat of punishment and in the other by previous restraint, the distinction to be drawn seems tenuous if the validity of either means depends upon an application of the "clear and present danger" test.[80]

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76. Gee v. Pritchard, 2 Swanst. 402 (1818); Brandreth v. Lance, 8 Paige 24 (1839).

77. Blackstone, Commentaries, IV, 151; Chafee, Free Speech in the United States (1940), p. 9.

78. Near v. Minnesota, 283 U.S. 697, 714 (1931).

79. State v. Klapprott, 127 N.J.L. 395, 22 A. (2d) 877 (1941).

80. In People v. American Socialist Society, 202 App. Div. 640, 195 N.Y.S. 801 (1st Dept., 1922), the court said: "A state has as much right to guard against the commission of an offense against its laws as to inflict punishment upon the offender after it shall have

Although in *Near v. Minnesota*[81] the Court, by way of dictum, applies a more rigid test to statutes involving previous restraint than to those involving criminal sanction only,[82] it may be significant that some of the recent cases which are said to have relaxed the "clear and present danger" standard have been cases involving injunctions.[83]

Another aspect of the Indiana statute worth noting is that the act does not limit the penal sanctions to those instances where the actor *intends* one or more of the enumerated results.[84] Finally it should be observed that subsection (A) of Section 2 fails even to specify the consequences which are made a condition precedent to the operation of subsection (B). It is suggested, however, that a court might well read these two subsections together.

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been committed." Cf. Danskin v. San Diego Unified School District, 171 P. (2d) 885, 899 (1946); Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

81. 283 U.S. 697, (1931).

82. The Court had reference to criminal libel, and said, at page 715: " . . . it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions . . . [but] in the present case we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws . . . The statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." The Court declared this type of statute unconstitutional.

83. E.g., Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 237 (1941); Carpenters and Joiners Union v. Ritters Cafe, 315 U.S. 722 (1942).

84. Cf. Whitney v. California, 274 U.S. 351 (1926), which involved an application of the California Criminal Syndicalism Act. This Act defined "criminal syndicalism" as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or affecting any political change." The Act declared guilty of a felony "any person who organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage or persons organized or assembled to advocate, teach or aid and abet criminal syndicalism." The decision of the state court upholding the statute was affirmed on procedural grounds. Mr. Justice Brandeis, however, wrote a brilliant and inspiring concurring opinion in which Mr. Justice Holmes joined. In this opinion it was said that " . . . where a statute is valid only in case certain conditions exist, the en-

Conclusion

Whatever may be the constitutional fate of Indiana's anti-hate act, it is difficult to refute the merit or deny the applicability of these words of the late Mr. Justice Brandeis:

"Those who won our independence believed that . . . without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. . . .

"No danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[85]

And ponder the words of Chafee:

"The danger is not in the suppression of any particular doctrine or group, but in the very existence of suppression . . . The suppression of opponents has the same delightful fascination in our day that cutting off head had in the French Revolution. But the moderate republicans who first rejoiced in that method soon found it employed by their opponents, and the control of the guillotine shifted from group to group, of increasingly extreme views, until finally the conservatives seized it and beheaded Robespierre."[86]

THE ANTI-STRIKE ACT

Chapter 341 is designed to prevent disruption of public utility services resulting from strikes, slowdowns, lockouts or similar work stoppages in the electric, gas, water, telephone or transportation industries.[1] Strikes are prohibited

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actment of the statute cannot alone establish the facts which are essential to its validity." For complete concurring opinion see pp. 372-380 of the report.

85. Concurring opinion in Whitney v. California, 274 U.S. 351, 375, 377 (1926).

86. Chafee, Free Speech in the United States (1940), p. 527. Cf. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

1. The act has been informally interpreted as not being applicable to municipally owned utilities in view of the construction that a statute must be in terms applicable to the sovereign or its po-