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The Problem of Group Defamation

Tom C. Clark*

*Who steals my purse steals trash; 't is something, nothing;
'T was mine, 't is his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.*

Othello (Act III, Scene III) (*Shakespeare*)

OTHELLO'S LAMENT RINGS TRUE and experience echoes it with additional reverberations. Though "filched," most good names are the "poorer indeed" when it comes to restitution. There are exceptions, of course, such as the action of the Congress in repaying the fines that were imposed by the courts on convictions under the Sedition Act of 1798. And, the many hurdles that mark the path of recovery in the area of group defamation are even the more hazardous. A review of these problems by the editors of the Cleveland-Marshall Law Review is, therefore, most appropriate. Revisitation now is not only profitable but particularly well timed in view of the increased scandal mongering that more and more groups are foisting upon the public. And, I also notice my mail is becoming more heavily laden with letters, pamphlets and hymns of hate. It is, therefore, most fitting that the Cleveland-Marshall Law Review deals with this "mischief" to the public welfare and the peace of the community. Hailing back to the common law concept that one may not knowingly cause mischief by publishing or telling lies, group libel statutes "represent a commendable desire to reduce sinister abuses of our freedom of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute even to extermination, its minorities."¹

* Associate Justice of the Supreme Court of the United States.

¹ Mr. Justice Jackson in *Beauharnais v. Illinois*, 343 U. S. 250, 304; 96 L. Ed. 919, 953 (1952).

But there is another side to the coin. Freedom of expression is protected from governmental interferences by the First and Fourteenth Amendments to the Federal Constitution as well as similar provisions in the basic law of the various states. While these freedoms are not absolute,² they are in "a preferred position as contrasted with some other civil rights. . . . Freedom of speech . . . rests on a different constitutional basis. The First Amendment says that freedom of speech, freedom of press and the free exercise of religion shall not be abridged. That is a negation of power on the part of each and every department of government . . . they are above the police power; they are not subject to regulation. . . ." ³ Nevertheless, as to the states it is clear that punishment of libelous words "which by their very utterance inflict injury or tend to incite an immediate breach of peace" presents no serious constitutional problem.⁴ Indeed, Anglo-Saxon experience with defamation laws covers the centuries and remained unchecked until Fox's Libel Act (1792) which for the first time allowed a jury to determine the libelous character of a publication. And not until 1843 was truth permitted under Lord Campbell's Act to be a defense to the charge. Today every state of the United States punishes libel directed at individuals. And since 1952 this Court has permitted libel "directed at a defined group" to be punished by the state where it is not a "wilful and purposeless restriction unrelated to the peace and well being of the state."⁵ However, on the federal side there has been no case from this Court in its entire history that approved any federal group libel law.

This is not to say that the risks present in the curbing of the excesses of libelous utterances are not great. The courts are ever mindful of the constitutional right of free speech and the diffi-

² *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572; 86 L. Ed. 1031, 1035 (1942).

³ *Mr. Justice Douglas in Beauharnais*, *supra* note 1, at 285, 287 (L. Ed. 343, 344).

⁴ *Chaplinsky case*, *supra* note 2, at 571 (L. Ed. 1035).

⁵ *Beauharnais case*, *supra* note 1, at 258 (L. Ed. 928).

culty inherent in attempting to restrain without infringing. In the balance, First Amendment rights have usually prevailed. Apparently the states themselves have recognized this. The fact that the "horribles" painted by the dissenters in *Beauharnais* have not yet appeared even though that decision is over ten years old and the Illinois statute is in its second decade is some evidence.

Civil remedies have likewise proved of little assistance. Suits by a defamed group were unheard of at common law and even today are uncommon. They are allowed in some states as to partnerships, corporations and in lesser degree by unincorporated associations. Individuals in a defamed group can only pursue a remedy where specific damage is suffered by reason of the specificity of the libel. This has proven to be too heavy a burden. In addition, Timothy Sullivan's classic remark, "What's the use of a libel suit? They might prove it on you" is a healthy restrainer.

It is my hope that the work of this symposium will contribute much to an understanding of the problems of group libel. But we cannot expect the judicial process to control such utterances. Heads get too hot and evil is too rampant. The *final* control must await the elimination of the three I's of this evil: Intolerance, Ignorance and Ignobility. They *can* be destroyed. They are not the inevitable results of increased social intercourse. They are not inherited—they are acquired. They cannot be legislated or decreed into the hearts and minds of men. It is for us—in the words of George Washington—"To bigotry, give no sanction."