Cleveland State Law Review

Volume 13
Issue 1 *Group Defamation Symposium*

Article 12

1964

Syposium Conclusion

Pieter J. Hoets

Symposium Conclusion

*Pieter J. Hoets**

IN PRESENTING THIS SYMPOSIUM, the Editors are well aware that this discussion by no means exhausts the subject. Nevertheless, enough old and new material has been collected to enable the reader to come to some tentative conclusions.

As group defamation and bigotry are old problems, it already has been established that, in certain instances, the victim of such defamation can follow two paths in order to challenge the legal fortress of his attacker.

In some States, where group defamation law exists, the defamer can be indicted for violation of a criminal statute, and, in addition, the plaintiff can bring a civil tort action for damages.

Yet in both situations the defamer has formidable means at his disposal to block the path of the plaintiff. The principal defenses are (1) freedom of expression; (2) the size of the group defamed; and (3) difficulties in establishing specific damage on the part of the individual plaintiff.

The Supreme Court of the United States over ten years ago upheld the constitutionality of such a state criminal statute; but the 5 to 4 decision indicated differences of opinion on the issue of freedom of expression, which is guaranteed by the First Amendment to the Constitution of the United States.

Today, the emergence of extreme right-wing organizations, born of frustration and fear, manifests reaction to the nervous wear and tear of the long struggle against world communism. Professional hate mongers have seized upon these organizations as vehicles, ready sources of support, and cloaks of "superpatriotic" respectability. Group defamation by these extremists is mounting. It long has been one of the weapons of the communists.

Senator Kuchel's speech on "The Fright Peddlers" evoked various reactions:

"A brazen attempt to smear millions of patriotic American citizens by innuendo" said fellow California (Republican) Representative James B. Utt—the same man who admitted on national

* B.A., Nederlands Lyceum, The Hague; LL.B., Leiden Law School; LL.M., Yale Law School; Chairman, French Department of University School, Cleveland, Ohio; Fourth-year student at Cleveland-Marshall Law School.

TV that he had spread the scare rumor about "Operation Water Moccasin".

Senator Javits (Republican) of New York, on the other hand, congratulated his colleague from California on his speech and added:

> The thing to do is to take on the rascals frontally, and speak out against organizations like the Birch Society—and not every member of the Birch Society necessarily feels that way—and speak out . . . also in campaigns . . . When this sort of thing begins, it does not stop. It goes on and on, and can be directed against Jews, Catholics, Negroes, Japanese, Mexicans, or any one else.

The *Washington Daily News* of May 4th, 1963, had the following comments:

> Senator Kuchel has been reading his mail. He calls it "fright mail."
>
> The John Birch Society, and similar outfits were the particular—and no doubt appropriate—targets of Senator Kuchel's alarm.
>
> What the Senator did not do, wisely, in exposing and rebutting these extremists, was to demand action against them, punitive and restrictive.

The stuff that alarms the senator from California can be divided in two parts: The first part consists of wildly radical opinions on foreign, military and national policy. The second part consists of group defamation.

The first type of such fright mail clearly falls within the protection of free speech guaranteed by the First Amendment, no matter how idiotic it sounds. Freedom of speech (freedom from censorship) is one of the pillars on which the republican structure of government is built. American and other jurists, and people from all walks of life, have fought and died for this right, in the face of the brutal absolutism of such despots as Kings Philip II, James I, and Charles I, the Bourbons of France, and modern tyrants such as Hitler and Stalin.

We are bound by the Constitution, and by common sense, to let such nonsense speak for itself. If too many Californians believe that the United States is being occupied by U. N. Congolese tribes fresh from Africa with rings in their noses, it would seem that there is something the matter with the American news media, the United States Information Service, or the schools of California.

Yet, all of these defects can be remedied without impairing freedom of expression. It seems that Senator Kuchel's speech,

as to this type of ignorance, had this object in mind: To bring the organized nonsense out in the open. The general public snorts and chuckles will hurt the fright peddlers more than restrictive legislation.

But there is a less innocent parcel in Senator Kuchel's mail box. That is the mounting flow of group-defamation matter. This is no mere foolishness. It is vicious, and dangerous to the nation.

In our search for answers to this problem we have sought and obtained opinions from legal experts in France, England, the Netherlands, and West Germany. In all four countries freedom of expression is recognized as a basic ingredient of democratic society and government. But variations among the legal views from these countries are manifest.

From France we learn that group defamation there is not much of a problem. This opinion can be accepted on the following grounds: Frenchmen in general are both nationalistic and individualistic. The latter trait, encouraged by Voltaire and Rousseau, exploded to the foreground during the French Revolution, and ever since has been part of the French national image.

Individuality is respected in France and the people are freely allowed to be different as long as they are French. Thus, the genuine desire of French governments and legislators to integrate foreign and colored elements in Metropolitan France with the rest of the population, has met with considerable success. Thus, too, there was some legislation in the wake of the Nazi occupation, to protect the hard hit Jewish groups, but also there is strict interpretation of these laws by the courts, as if to remind minority groups that the better way to solve their problems is to become truly Frenchmen.

From the Netherlands we learn that the problem of group defamation can be met squarely by courageous legislation, both criminal and civil. The forthright and logical Dutch legislation on the subject can well be a model for American emulation, though we probably should be more cautious about entrusting censorship powers to elected local officials. The Dutch seem to have solved the problem, and we should study their methods most particularly.

From England we find, as expected, that most of the legal principles which apply to group defamation in the United States originated in the mother country. There, the Lords have argued that legislators should stay out of this legal area, as it touches

on human morality. Furthermore, they say, it seems to be natural for man to vent his emotions against those who are different and foreign. At first examination this rule of English common sense seems reasonable. But many second thoughts crowd in. We wonder if a rule that served well in a "tight little isle" really is best for our new society.

Man, since he first crawled out of his caves, has come a long way. In the long span of history many old "rules" have been discarded. Thus, gladiatorial spectacles, once generally approved, have been outlawed. Slaves have been emancipated. Absolute kings have lost their heads. The Geneva Convention humanized the treatment of prisoners of war. Many nations have outlawed capital punishment.

Germany particularly had come a long, hard way. Then it happened. A disastrous World War I; a defeated and exhausted German nation; mass unemployment and despair; a search for a scapegoat. Then, Adolf Hitler and Dr. Joseph Goebbels. The latter, a journalist by profession, applied his genius to, and developed, group defamation into a diabolic science and an evil art such as the world never before had seen.

The descent into barbarism started in Germany with systematic group defamation. It ended with the murder of six million Jews, with half of Germany lost to the communists, and all of Germany temporarily in ruins. The cost to the world, in blood and tears, never can be calculated. This so recent set back in the upward trend of Western civilization can not be ignored.

It is obvious that the Constitution of the United States and the common sense of the American people must prevent similar excesses in this country. And we feel a chill of foreboding as we think of the recent riots in Alabama, culminating in the bombing of a Negro church, causing the death of several American children.

True, the governor of Alabama has promised a reward for the apprehension of the culprits. But the real cause of these outrages was group defamation.

It is almost certain that premeditated, malicious, and repeated group defamation incited to violence the men who murdered those children.

Thus we see on the one hand an explosive racial defamation situation and resulting violence, and on the other hand the 20th century text books and lessons of Dr. Goebbels.

Clearly the situation in the United States of 1963 is different from that of Merrie Old England, where the rule could develop into law, that courts should not unduly interfere with the tendency of man to vent his emotions against groups that are different. A "healthy British contempt" for all that was foreign fitted perfectly into the pattern of European historic rivalry, in the precarious continental balance of power and maintenance of a dominant British position in European and world affairs. Moreover, no racial problems plagued the British Isles in pre-war times.

In the United States of 1963, with fifty different states, and various territories, and with a population composed of many different races, colors, religions, and nationality backgrounds, the situation calls for a different approach. Too much hate propaganda in the successful melting pot may turn it into a cracked pressure cooker.

With group defamation and group violence mounting daily, we will do well to review right now how absolute our rules on Freedom of Expression ought to be.

We all know, already, that if a man should enter a crowded theater and shout "Fire!" he soon will find out that he has violated a criminal statute. Clearly, his freedom of speech is not absolute.

If freedom of speech is not absolute, should freedom to defame large groups of fellow citizens remain absolute? We think not.

Under existing law in most American jurisdictions the defamer of large groups seems to be in an absolute position of power, protected in an impregnable legal pocket. From his sanctuary behind the shibboleth of "free speech," he can hurl, without risk, his deeply hurtful slanders and libels against any large group of other Americans. He almost never realizes or cares that, in so doing, he causes irreparable damage to his country and ultimately to himself.

This legal situation plainly is no longer tolerable.

The time for federal and state legislative action has arrived. This is not so much because we shed tears for the defamed minority group—we still like to think of an American as a tough individual who can take care of himself against all comers—but because such law does not fit the American concept of fair play, and because it is a clear and present danger to the nation.

The question then is: What to do about this law?

And *mirabile dictu,* the answers seem to come from Germany. We are not surprised at finding that Dutch law already has grappled with the problem, apparently with great success.

Out of the German ruins of World War II emerged not only an economic miracle of reconstruction, but also a positive attitude as to how to cope with poisonous group defamation, especially after a minor renewal of swastika-manifestations in 1958-1959.

Although the principle of freedom of speech is recognized as one of the important legal foundations on which the modern German Federal Republic is built, this right definitely now is not absolute in cases of group defamation. The German Supreme Court on at least one occasion has given a broad interpretation of the law in favor of the plaintiff in a group defamation case.

In addition, German legislators have widened the second path referred to in the beginning of this paper.

Thus, the defaming of groups in Germany, as well as in the Netherlands, now can be a very costly pastime for the defendant, under multi-pronged criminal and tort action rules.

Referring to the classic difficulty of proving specific damage to the complaining member of a defamed group or class in the United States, we should note that this problem now seems to be nearing solution, because of an extrinsic development. In the increasing influence of medico-legal experts on personal injury cases, and growing realization of the manifestations and symptoms of despondency and other psychiatric and mental troubles of victims of group defamation, in the last decades, a new factor is visible. Medical experts now have substantial answers to the question of what specific damage is done to the psyche and the emotional stability of the individual, even if he is only an unidentified member of a large defamed group or class. Such medical expert testimony already is substantial enough to guide the courts. Indeed, in recent years American courts already have begun to treat acts causing "merely" emotional and mental suffering as separate, actionable torts in themselves.

Of course, premeditated, malicious and repetitious group defamation, especially if carried on for profit, ought to be distinguished from other group defamation. Whereas "ordinary," "casual" group defamation might still be left alone, the more vicious type should be outlawed. In addition, there should

be legislation to keep hate propaganda out of the United States mails, radio, television, and other public communication avenues.

"The thing to do is to take on the rascals frontally," as suggested by Senator Javits. Responsible, aggressive reporting can take care of the organized nonsense fomenters. But premeditated, malicious and repetitious group defamation requires federal and state legislative action.

Tort liability, based on modern medical understanding of the very real injury to an individual member of a defamed group, probably is the readiest and best preventive of abuse of the right of free speech until sound legislation is adopted. But we need both criminal and civil law.

This does not mean that the extremists shall have no right to be heard. Their bizarre contributions are part of the great debate which never should be barred. But the poisonous fallout of group defamation must be eliminated.

The murder of President John F. Kennedy undoubtedly was a product of the hate campaigns that now are "normal" throughout the world. Just before that awful event, also in Dallas, Adlai Stevenson, our ambassador to the United Nations, was struck and spat upon by other extremists. President Lyndon B. Johnson, not long before in the same state, had faced insults and threats from other haters. Poisonous hatreds, carefully planted and cultivated, are blossoming into flowers of evil. Left wing, right wing, and all kinds of bigots and hate mongers are diabolically busy, sowing and nurturing the defamations that are the seeds of destruction.

This Law Review planned this Symposium a year ago. The death of our noble and beloved President makes frighteningly urgent the need (for better law to curb hate mongers) that inspired this Symposium.

In the last analysis all legislation deals with morality—legislates morality. The law serves not only to regulate but also to educate, elevate, and dignify. It must deal with group defamation *now*. We *must* have law that will protect us from the sick and evil souls who poison our society with hatreds.