

NOTES

THE COMMUNITY SEGMENT IN DEFAMATION ACTIONS: A DISSENTING ESSAY

THAT which is defamatory in the eyes of one segment of the population may be laudatory in the eyes of another and a matter of complete indifference to a third. In determining whether a false utterance can amount to defamation *per se*, it is rare for a court to articulate its reasons for choosing one community segment rather than another.¹ Yet this choice is one of the chief determinants of liability.

The delimitation of a broad community from which a segment is to be chosen may itself be subject to some judicial interpretation and misinterpretation.² For example, it may be difficult to say precisely at what geographical point it becomes defamatory to call a white man a Negro, although it is well recognized that the actual effect varies from North to South.³ In the same way it may be difficult to determine the exact point in time at which community attitude toward Soviet Russia and communism changes, although the courts, in determining the damaging effect of a charge of communism, have clearly attempted to follow each swing of the public mind.⁴ It may be particularly

1. Usually it is possible to delineate the segment by quoting a string of terms imputing all virtue and knowledge to: "readers of reasonable understanding, discretion, and candor," *King v. Pillsbury*, 115 Me. 528, 531, 99 Atl. 513, 514 (1917); "reasonable and fair minded men," *Sack v. New York Times Co.*, 56 N.Y.S.2d 794 (Sup.Ct.1945), *aff'd*, 270 App.Div. 401, 59 N.Y.S.2d 888 (1st Dep't 1946).

2. "We are sensitive to the charge of murder only because our fellows deprecate it in most forms; but a headhunter, or an aboriginal American Indian, or a gangster would regard such an accusation as a distinction, and during the Great War an 'ace,' a man who had killed five others, was held in high regard." L. Hand, J., in *Burten v. Crowell Pub. Co.*, 82 F.2d 154, 156 (2d Cir. 1936). "In determining their actionable nature the courts must, unless controlled by some settled precedent, decide in accordance with the general and fixed current of opinion of the locality of publication. . . . Because of this, judicial decisions of the past are so apt to vary with social and moral views of the different jurisdictions. . . ." *Layne v. Tribune Co.*, 108 Fla. 177, 182, 146 So. 234, 236 (1933). ". . . [T]he courts are no longer on sure ground in this area. . . . No single normative standard governs the community; it could be said that no community exists, but past, present, even future communities tied together in a spatial bundle." Riesman, *Democracy and Defamation*, 42 Col. L. Rev. 1282, 1301 (1942).

3. Compare, e.g., *Williams v. Riddle*, 145 Ky. 459, 140 S.W. 661 (1911) (special damages must be proved), with *May v. Shreveport Traction Co.*, 127 La. 420, 53 So. 671 (1910) (slander *per se*).

4. The Red Scare of the early 1920's produced several holdings that such a charge was defamatory *per se*. *Washington Times Co. v. Murray*, 299 Fed. 903 (D.C. Cir. 1924); *Toomey v. Jones*, 124 Okla. 167, 254 Pac. 736 (1926). But just before the Russo-German pact it was held that so long as the Communist Party was a legal political party, an accusation of membership was not defamatory *per se*. *Garriga v. Richfield*, 174 Misc. 315, 20 N.Y.S.2d 544 (Sup.Ct.1940). However, world communism quickly came into

awkward to delimit the community in space or time in the case of a highly technical or specialized utterance: its effect, if any, may be limited to a community of professional men, whose characteristics may be largely outside common knowledge and experience. An example is *Ben-Oliel v. Press Publishing Company*,⁵ where an article, falsely imputed to plaintiff, a lecturer on Palestine, contained inaccuracies detectable only by another expert. In holding for the plaintiff, the court assumed the significant community for the purpose of the case to be composed of other experts on Palestine.

More usually, however, demarcation of a general community does not present an articulated problem for court decision, and the principal choice to be made is that of an intracommunity group whose esteem the plaintiff claims to have lost.

The decisions reflect two approaches. One is to inquire whether plaintiff has been damaged "in the minds of right-thinking persons."⁶ The emphasis is usually on normalcy: the eccentric or "wrong-thinking" segments; albeit of considerable size, are disregarded. Inherent in this standard is a quantitative as well as an ethical element, for it seems assumed that "right-thinking" people are in a majority.⁷ But to Mr. Justice Holmes, speaking for the Supreme Court, liability was not "a question of a majority vote."⁸ By his view, it is enough that plaintiff be lowered in the esteem of any substantial and respectable group, though a minority.⁹

disrepute as Russia joined with the Nazis to divide Poland, and the communist label again became legally damaging. *Levy v. Gelber*, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941). With the German attack on Russia, community feeling changed enough so that no plaintiffs seemed to have had the temerity to ask damages for being called a communist. The pendulum has since swung once more as post-war disillusionment has replaced goodwill, and the courts again hold that a charge of being a communist is libelous. *Spanel v. Pegler*, 160 F.2d 619 (7th Cir.1947); *Wright v. Farm Journal*, 158 F.2d 976 (2d Cir.1947); *Grant v. Reader's Digest Ass'n*, 151 F.2d 733 (2d Cir.1945); *Mencher v. Chesley*, 186 Misc. 877, 61 N.Y.S.2d 147 (Sup.Ct.1946), *aff'd*, 297 N.Y. 94, 75 N.E.2d 257 (1947).

An interesting analogy to the treatment of the accusation of communism is the line of early British cases in which the alleged defamation consisted in calling a man a "Papist." Such a charge was held not actionable when the Catholic James I was on the throne. *Ireland v. Smith*, 2 Brownl. 166 (C.P. 1612). A contrary result was reached during the reign of Protestant Charles II. *Row v. Clarges*, 3 Mod. 26 (K.B. 1684). Libel was also found in such a charge during the period between the coronation of James II and the ascension to the throne of William and Mary, *Walden v. Mitchell*, 2 Vent. 265 (C.P. 1694).

5. 251 N.Y. 250, 167 N.E. 432 (1929).

6. See, e.g., *Kimmerle v. New York Evening Journal Ass'n*, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933).

7. "Words are not actionable as defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right thinking men generally." *Tolley v. Fry & Sons, Ltd.*, [1930] 1 K.B. 467, 479.

8. See *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909).

9. *Peck v. Tribune Co.*, 214 U.S. 185 (1909); *Spanel v. Pegler*, 160 F.2d 619 (7th

Essentially, the index groups indicated by these two tests differ only as to number. Under either test the plaintiff cannot succeed in his defamation action if the group in whose eyes he is injured is deemed not "substantial"¹⁰ or antisocial.¹¹

Despite the usual insistence that plaintiff show damage in the eyes of a sizable and a moral segment of the community, these requirements seem to have been imposed largely through intuitive judicial reaction. They seem to have escaped the analysis which they invite.

It may be taken as axiomatic that the social purpose underlying the action

Cir.1947); *Grant v. Reader's Digest Ass'n*, 151 F.2d 733 (2d Cir.1945). It should be noted that there is a tendency on the part of a few courts to hold that a statement is harmless when there are people who would *not* think less of plaintiff for entertaining particular views. Where a school board president was quoted as saying: "Why should kids save . . . let the government take care of them when they are old," the court said: "We are unable to hold that in commenting upon such a question of public policy the inclusion of a statement attributing to a public official economic views of a sort which were then held and accepted by a large part of our population is, in itself and *per se*," a libel. *Harris v. Curtis Pub. Co.*, 49 Cal.App.2d 340, 347, 121 P.2d 761, 765 (1942); *cf. Watkins v. Augusta Chronicle Pub. Co.*, 49 Ga. App. 43, 174 S.E. 199 (1934); *Sullivan v. Meyer*, 91 F.2d 301 (D.C. Cir. 1937). The argument is a strange one. If damage has demonstrably been done the plaintiff, should redress be denied because the damage was not greater?

10. RESTATEMENT, TORTS § 559(e) (1938). *Contra: Meyerson v. Hurlbut*, 93 F.2d 232 (D.C. Cir. 1938) (complaint based on accusation in presence of "at least one" other person held sufficient to state a cause of action for slander *per se*).

11. Where plaintiff has a social "duty" to do what the false statement alleged he had done, the courts may find no defamation, since no one should think ill of him for performing his obligation. *E.g., Fey v. King*, 194 Iowa 835, 190 N.W. 519 (1922) (a charge that plaintiff had acted as a "crank" in reporting gambling at a county fair held not defamatory *per se*); *Connelly v. McKay*, 176 Misc. 685, 28 N.Y.S.2d 327 (Sup.Ct.1941) (see p. 1391 *infra*); *Byrne v. Deane*, 157 L.T.R. 10 (C.A. 1937) (plaintiff charged with being disloyal to his club by reporting gambling).

Even when plaintiff has only a "right," courts sometimes find no defamation. *Hollenbeck v. Hall*, 103 Iowa 214, 72 N.W. 518 (1897) (an accusation that plaintiff "cowardly slinks behind" the statute of limitations held not defamatory *per se*); *Homer v. Engelhardt*, 117 Mass. 539 (1879) (plaintiff charged with avoiding a just claim by setting up a prohibitory liquor law as a defense).

See Riesman, *supra* note 2, at 1300: "[T]he courts have introduced into the factual question of what is defamatory both their notions as to what ought to be defamatory and their judgments as to what ought to be done in the entire situation before them."

The courts are inconsistent in applying the doctrine, however. Consistent application would require a nonsuit at least whenever the plaintiff was falsely accused of being or doing something the legality of which is unquestioned. The courts hold *contra* in all sorts of situations: for example, where a plaintiff recovers on a false accusation of being a Negro. And see *Stevens v. Snow*, 191 Cal. 58, 214 Pac. 968 (1923) (an article charging plaintiff with changing the boundaries of a school district against the public interest, held libelous although it was pointed out in defense that he had followed the legal procedure); *Balabanoff v. Hearst Consolidated Pub., Inc.*, 294 N.Y. 351, 62 N.E.2d 599 (1945) (that the Cheka was a legal instrument of the government of a friendly power is no defense for an accusation of membership in that organization); *Dusabel v. Martz*, 121 Okla. 241, 249 Pac. 145 (1926) (contemptuous article accusing plaintiff of waiting to be drafted instead of volunteering held libelous).

for defamation is to protect members of society against irresponsible or malicious utterances which are false and damaging to plaintiff's name.¹² Unless some extrinsic policy intervenes, then by definition the action should be available whenever the plaintiff's reputation has been disparaged by a false statement, even in the extreme case where the esteem lost be that of but one man, and he a moron, a lunatic, or a murderer. The twin quantitative and ethical limitations developed by the courts, however, closely curtail the operation of the basic policy of defamation law. What valid objectives justify these crippling restrictions?

Something may be said for a numerical limitation. At the outset, it is clear that administrative considerations must set a lower limit to the number of men whose opinion may be deemed legally significant. If plaintiff is damaged in the regard of only a very few, whose opinion is of no particular importance to him, the matter must be considered *de minimis*. It would be administratively impossible for the courts to give redress every time a gossip spreads falsehood to a few acquaintances.¹³ But essentially this limitation turns upon the significance of the damage done, and merely states the platitude that the judiciary cannot concern itself with minor social frictions when serious clashes abound. Where the index group, even if small, is of measurable size or is highly important to the plaintiff, it would seem that its status as a minority in the community should be relevant only to the issue of damage and not to the supportability of the complaint.¹⁴

The same reasoning should apply whether or not damages are alleged and proved. Where damages need not be proved, as in the case of libel¹⁵ and a few kinds of slander,¹⁶ the plaintiff must in any case adduce proof not only of the defamatory utterance and its falseness, but also of the community segment affected thereby.¹⁷ The extent to which this group loses respect for him and the monetary value of the loss is left to the imagination. The judge may have difficulty in estimating the substantiality of the injury, as may the jury in estimating damages, but their difficulties will be no greater if the group is a small one, important to the plaintiff, than if it is large. The problem is one of substantive injury, not of number. Even the Holmesian view, though certainly a more sophisticated approach than the "majority" test, may sometimes be unjustifiably restrictive in its emphasis upon "substantial" numbers.

The second requirement of both tests, that the index group involved be

12. See PROSSER, TORTS 780 (1941).

13. It is not intended to suggest, of course, that all claims for defamation need be large. As in other fields, plaintiff should have recourse to a small claims court where there is little damage.

14. See *Meyerson v. Huribut*, 98 F.2d 232 (D.C. Cir. 1938).

15. PROSSER, TORTS 797 (1941). A few cases have held *contra* to the traditional rule. *E.g.*, *Ellsworth v. Martindale-Hubbell Law Directory*, 66 N.D. 578, 268 N.W. 400 (1936); *Towles v. Travelers Ins. Co.*, 282 Ky. 147, 137 S.W.2d 1110 (1940).

16. *E.g.*, false imputations of crime, or loathsome disease, or reflections on professional reputation. See PROSSER, TORTS 798-805 (1941).

17. PROSSER, TORTS 810-14 (1941).

"right-thinking" or "respectable", is even less explicable in terms of any definable objective.

Interjection of judicial conceptions of what respectable and sound thinking persons do, or should, think becomes highly significant when these conceptions differ from those of the segment of the community whose esteem plaintiff claims to have lost. Where the group under consideration approves of illegal or antisocial acts, or the nonfeasance of judicially approved acts, the courts have refused to recognize as legally damaging the factual injury caused by the false utterance. The relatively recent case of *Connelley v. McKay*¹⁸ provides an excellent example. Defendant spread the false report that plaintiff, operator of a gasoline station, was in the habit of informing on truck drivers violating regulations of the Interstate Commerce Commission. Understandably, plaintiff's business suffered a decline. But the court held that the false and injurious utterance could not be defamatory—for, after all, plaintiff was merely charged with doing that which he had a duty to do.

The *Connelley* decision affords a good clue as to the extrinsic purpose which courts intend to subserve by substituting their own standards for those of plaintiff's community segment. To permit the injured plaintiff to recover would, declared the court, "be contrary to the public interest, in that it would penalize the law-abiding citizen and give comfort to the law violator. It would impede law enforcement for the benefit of the anti-social."¹⁹ Few of the decisions are so specific. Vague reference to "right-thinking men," "respectable members of the community," or "public policy" is more usual.²⁰ But the drift of the opinions seems clear. The effect of a ruling permitting the plaintiff to prevail would in some way be conducive to illegality or immorality in the community. So dangerous would be the impact that the factually injured plaintiff must be sent away without redress, and the spreader of injurious false rumor be dismissed scot-free. This notion, intuitively attractive, deserves scrutiny.

Let it be assumed that judicial opinions delivered in defamation litigation are widely read and are important operative factors in determining social behavior. Let it also be assumed that the court's standards of right-thinking represent a more desirable norm than the criteria of plaintiff's community. Applying these assumptions to the *Connelley* case as an example for analysis, who will be affected by the opinion, and how?

The immediate and obvious effect of that decision is hardly desirable. The fundamental purpose for which the defamation action has been made available is violated. The defendant rumor monger has been openly encouraged to lie and injure again. The plaintiff, returning empty-handed to his idle business, is not apt to praise the fairness of a legal system which has denied him recovery merely because he has acted like millions of other non-informers. And under our assumption of the significance of judicial opinions in shaping social

18. 176 Misc. 685, 28 N.Y.S.2d 327 (Sup.Ct.1941).

19. *Id.* at 687, 28 N.Y.S.2d at 329.

20. See cases cited note 11 *supra*.

behavior, society now knows that, as long as some laws are unpopular, a little selection in falsehoods will enable one to ruin another with impunity, at least so far as actions for defamation are concerned.²¹

It is apparently the feeling of the court that, in refusing relief to the plaintiff, it has struck a blow for the enforcement of ICC regulations, and that this social interest outweighs the clearly unfortunate effects of the immediate decision.

Will the ICC now be flooded with informants? Henceforth, if *X* reports truck drivers to the ICC, and to his detriment he is accurately rumored to be an informer, he must bow to the defense of truth. If he does not report, and is injured by false rumors that he has, he fails under the *Connelley* rule. Thus the case provides a remarkable form of incentive to the performance of acts considered desirable by the judiciary, for it says to prospectively defamed plaintiffs: "Act as you will, for whether you behave as the law thinks you should, or not, you may not win your suit." In sum, the opinion provides no more than a sanctionless affirmation that the judiciary approves of the ICC.²² This statement is hardly startling, scarcely apropos in the context of the legal issue at bar, and certainly without sufficient significance to the ICC to justify the undesirable results of the *Connelley* decision.

The negative form of statement in the *Connelley* opinion suggests, however, that the court was persuaded less by the merits of its conclusion than by the demerits of an opposite holding.

The favorable aspects of a contrary decision are apparent. The defendant panderer of falsehoods must compensate for the injury he has done. The plaintiff is not singled out from among 140 million other non-informers to suffer a severe penalty unmentioned in the Interstate Commerce Act. Society is warned that the law will punish those who injure others by untrue statements.

The dire consequences which are thought to overcome these benefits, and to require the *Connelley* decision, can, at most, be two. If plaintiff is permitted to prevail, the court will have "adopted" the standards of the antisocial; the prestige of the judiciary will be jeopardized, and, indirectly, the ranks of the non-informers will be swollen. Secondly, it might be argued that a holding

21. An alternative action would be for what is generally known as "disparagement" (other names, such as "injurious falsehood," are sometimes given to the tort) which consists in publication of injurious falsehoods concerning plaintiff's property or business. Special damages as to the monetary value of business loss must be alleged and proved for the action. Whether, given proof of such damage, a court would still pose the objection raised in the *Connelley* case seems doubtful, but no cases on the matter seem to have arisen. See, generally, Wham, *Disparagement of Property*, 21 ILL. L. REV. 26 (1926); Hibschan, *Defamation or Disparagement?* 24 MINN. L. REV. 625 (1940); Green, *Relational Interests*, 29 ILL. L. REV. 1041, 30 ILL. L. REV. 1 (1935). Where the defamation is uttered by a competing businessman, it may of course be unfair competition and actionable as such.

22. Other explanations are possible. It is conceivable that the courts feel that their own approbation of an act offsets the disapproval of an unethical group.

contrary to the *Connelley* decision would establish a rule of law tending directly to discourage informing the ICC.

The vagueness of the first contention, explicitly relied upon by the *Connelley* court, is so extreme that an answer is difficult to formulate. But even within the framework of our initial assumption that judicial decisions are vital factors in shaping social action, it is difficult to see why a judgment for plaintiff must discredit the judiciary and indirectly lead to an increase in the practice decried. In the first place the court would not be "adopting" as its own the standards of an antisocial group. Recognition of fact is not approval of principle. To refuse to recognize in a court of law that many citizens are not fond of informers is to play legal ostrich.²³

Further, as the analysis above indicates, denial of plaintiff's claim in the *Connelley* case yielded no benefits to the ICC other than a sanctionless generalization of approval. A court could offer precisely the same exhortation—with equal effect—without imposing upon plaintiff the weight of judicial disfavor of the opinions and actions of others. An opinion permitting recovery but decrying the social ethics of the community would thus entail equal benefits for the ICC, meager though they may be, without the obvious drawbacks of the *Connelley* decision.

Extreme examples can be imagined in which a judgment for plaintiff might be shocking to many. Take the case of a murderer whose mobster pals snub him because of a false report that he failed to get his man. Assuming the unlikely situation that a criminal would seek to identify himself as the perpetrator of such an offense, any court would presumably refuse its aid, in the name of "public policy." Ordinarily, however, recovery at law should not be denied solely on the ground of plaintiff's misconduct. In the *Connelley* case, where the plaintiff merely failed to inform, the court avoided such a holding, preferring the ground that plaintiff must lose because others think and act undesirably. And even if plaintiff's conduct had been actively illegal, it would not follow that he should fail in his defamation action. In most cases, in fact, a nonsuit would be inappropriate as a punishment for plaintiff's unrelated wrong.

As to the second contention which might militate against reversing the *Connelley* holding, would a court holding for plaintiff establish a rule of law operating directly to discourage informers? There would still be no

23. The objection is in no way to the substitution of judicial conceptions of morality for those of the market place. Such elevation of standards perhaps forms one of the great functions of the judiciary. Exception here is taken rather to the unreasoned misapplication of notions of social ethics. The *Connelley* court apparently conceived the issue to be the difficult one of choosing between promoting defamation law and supporting the ICC. The issue is not actually raised, and the court's conclusion succeeds only in confounding one valid policy without benefiting the other.

It might be pointed out, moreover, that the social group most pleased at the outcome of the *Connelley* decision may be the antisocial group to whom the court most expressly desires not to "give comfort." To the extent that they remain convinced that plaintiff did in fact inform as he was reported to have done, the undesirable community element will rejoice at the further loss which he has suffered.

positive incentive to act desirably, for the defense of truth bars any recovery if plaintiff actually reported to the ICC.²⁴ If he did not report violations, however, and is factually damaged by the false rumor, he will win under a rule *contra* to the *Connelley* decision. The lesson of the latter rule, on its face, seems socially undesirable: "Act reprehensibly (do not inform), for if, to your detriment, you are then falsely rumored to have acted desirably (informed), you may win your defamation suit."

Thus it is possible, by fine-spun logic, to arrive at an extrinsic policy for denying plaintiff's recovery, although such was not the policy which led to the court's decision. But will the policy in fact be furthered? Are our initial assumptions made as to the effect of a court opinion supportable? Clearly they are unwarranted. Even if it be assumed, as it sometimes must, that the public knows the law, in the situation under discussion such knowledge cannot affect behavior, for the operation of the law is here only remotely concerned with the act done. Men do not and cannot plan their action or inaction for the purpose of creating a cause of action in defamation in the event that someone subsequently makes a false statement about them. The possibility of such a statement is a chance that must always be present, regardless of the course of action taken. A defamation decision may have great force as a precedent impeding or furthering the social purpose of defamation law; as a sanction for extrinsic objectives, its effect is a nullity.

Defamation law is tort law, with compensation for damage its sanction and remedy. It is not relevant, except in the *de minimis* case, that the damage is less than it would have been had the community segment been larger, or the group homogeneous. Nor is it pertinent that the damage was greater than it would have been had the community segment held different, albeit more desirable, views. No extrinsic consideration is properly involved; factual determination of the degree of injury caused by the falsehood should alone concern the court.

24. In a few states, whose statutes or case law require that truth must be coupled with good motives for the defendant to escape liability, (see Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43 (1931)) the opposite result would presumably be reached. Here, in fact, may be a case *par excellence* where plaintiff should be compensated for the disparaging remarks, despite their veracity.

Usually, where the utterance is true, the plaintiff is the reprehensible party, and notoriety is a punishment to him which may be deserved and may be public service. Here, however, the plaintiff is one with standards higher than his community and higher than those of his accuser. He certainly deserves no punishment, and the agitation of public opinion against him is the reverse of a benefit to society. Only the policy in favor of free dissemination of all truth in all cases would tend against his recovery, although this might well be considered compelling.