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DEFAMATION CASES AGAINST HISTORIANS¹

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***Abstract**—Defamation is the act of damaging another's reputation. According to recent legal research, defamation laws may be improperly used in many ways. Some of these uses profoundly affect the historian's work: first, when defamation laws protect reputations of states or nations as such; second, when they prevent legitimate criticism of officials; and, third, when they protect the reputations of deceased persons. The present essay offers two tests of these three abuses in legal cases where historians were defendants. The first test, a short worldwide survey, confirms the occurrence of all three abuses; the second test (an empirical analysis of twenty-two cases (1965–2000) from nine western European countries) the occurrence of the third abuse. Both tests touch on problems central to the historical profession: living versus deceased persons; facts versus opinions; legal versus historical truth; the relationship between human dignity, reputation, and privacy; the role of politicians, veterans, and Holocaust deniers as complainants; the problem of amnestied crimes. The second test—the results of which are based on verdicts, commentaries, and press articles, and presented in a synoptic table—looks closely into the complainants' and defendants' profiles, the allegedly defamatory statements themselves, and the verdicts. All statements deemed defamatory were about such contemporary events as World War II (particularly war crimes, collaboration, and resistance) and colonial wars. Both tests amount to two conclusions. The first one is about historians' professional rights and obligations: historians should make true, but privacy-sensitive or potentially offending, statements only when the public interest is served; otherwise, they should have a right to silence. The second conclusion concerns defamation itself: defamation cases and threats to sue in defamation have a chilling effect on the historical debate; they are often but barely veiled attempts at censorship.*

¹ I am grateful to my brother Paul De Baets, judge at the Court of Appeals of Antwerp, Belgium; Toby Mendel, Article 19's Head of Law Programme, London, United Kingdom; and dr. Fred Janssens, a specialist in defamation formerly working at the Criminology Department of the University of Groningen, the Netherlands, for their comments on parts of this article. This essay was first published as 'Defamation Cases against Historians', *History and Theory*, 41 (October 2002) 346–66. Many details have been updated.

More than may be expected, historians land in the dock.² Among the charges directed at them in their professional capacity, those involving defamation constitute a separate category. People critically portrayed in works of history may come to think that their reputation was tarnished and they seek redress in court. Prominent persons, in many countries even incumbent or former heads of state, are often among the complainants. For the scholar who wants to study the use and abuse of defamation laws against historians from a comparative perspective, it is not simple to collect the scattered and incomplete relevant information. As far as I know, preliminary attempts have been made only in France and Belgium.³ This is enough reason to take a worldwide view of the phenomenon and then to look more systematically into a series of contemporary defamation cases in western Europe.

The International Centre on Censorship Article 19 defines defamation as the act of damaging another's reputation through words (slander) or publication (libel). Reputation is the esteem in which individuals are generally held within a particular community; it is their honor or good name.⁴ Statements found to be defamatory by the complainant or the judge can be factually true or untrue.⁵ In

² Globally, historians have indeed been accused of every crime conceivable, from the most innocent to crimes against humanity, although not always in their capacity as historians. Numerous examples in Antoon De Baets, *Censorship of Historical Thought: A World Guide 1945–2000* (Westport CT/London: Greenwood, 2002).

³ John Gilissen, 'La Responsabilité civile et pénale de l'historien,' *Revue belge de philologie et d'histoire*, 1960, 295–329 and 1005–39; Jean Stengers, 'L'Historien face à ses responsabilités,' *Cahiers de l'école des sciences philosophiques et religieuses*, 1994, no. 15, 19–50; Jean-Noël Jeanneney, *Le Passé dans le prétoire: l'historien, le juge et le journaliste* (Paris: Seuil, 1998), 105–18.

⁴ Article 19, *Information, Freedom and Censorship: World Report 1991* (London: Article 19, 1991), 412; *Idem*, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (<<http://www.article19.org/docimages/716.htm>> (London: Article 19, 2000), 3 (accessed 6 May 2002). See also Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge: Cambridge University Press, 1982), 168; Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1985), 173; Marie McGonagle, 'Defamation,' in: Derek Jones, ed., *Censorship: A World Encyclopedia* (London/Chicago: Fitzroy Dearborn, 2001), 656–58.

⁵ Identifying the truth value of statements is not simple. Usually, courts distinguish two types of statements: facts and opinions. Proving *facts* is dependent on at least three factors. First, the factor *time*. In some countries, it is not legally possible to prove the truth of statements about facts from the distant past (in France, older than ten years). The idea behind this principle is probably that it is not desirable to keep dragging up the past. It implies, however, that proof of the non-defamatory nature of a given statement cannot invoke the facts themselves. Second, *those in charge of proof*. In some countries, such as the United Kingdom, the burden of proof is on the defendant, not on the complainant. Third, *the intention*. The factual claim must be meant as such and not, for example, as satire. Considering these factors, it is clear that judges and historians can diverge considerably in their weighing of facts and, hence, truth conceptions. *Opinions* (or

many countries defamation is a criminal as well as a civil offense. Reputation is, of course, a legitimate interest that should be protected by law,⁶ but unjustified charges of defamation, let alone unjustified punishment, have a chilling effect on the freedom of expression and on public debate.⁷ In November 2000 the Special Rapporteurs on Free Expression of the United Nations, the Organization for Security and Cooperation in Europe, and the Organization of American States issued a joint declaration in which they denounced the abuse of restrictive defamation laws as one of two major threats to freedom of expression, and declared that it had reached crisis proportions in many parts of the world.⁸ They also endorsed a July 2000 document published with UNESCO's support by Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*. This document contains ten principles which function as international guidelines on defamation laws. For historians, the most revealing of these principles is the second, called 'Legitimate Purpose of Defamation Laws'. It states that only individuals and entities with the right to sue and be sued have reputations and it argues that the harm from an attack on reputation is direct and personal in nature. Consequently, Article 19 identifies three improper uses of defamation laws: first, the reputation of the state or nation as such—if it exists at all—should not be protected by defamation laws; second, these laws should not be used to prevent legitimate criticism of officials or the exposure of official

'comments' or 'value judgments') are not susceptible to proof because they do not fit a true/untrue scheme and therefore enjoy greater legal protection than facts (Gilissen, 'La Responsabilité civile et pénale,' 1012–1015; Schauer, *Free Speech*, 169; Barendt, *Freedom of Speech*, 178–179; Article 19, *Defining Defamation*, 13). What matters here is whether opinions contribute to a legitimate public debate in the first place. In the same vein, a defamatory statement should be distinguished from its literal repetition in a press report or in an essay such as the present one. Reports on defamatory statements enjoy higher protection than these statements themselves (see Article 19, *Defining Defamation*, 14–15).

⁶ See article 12 of the 1948 Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks." See also article 17 of the 1966 International Covenant on Civil and Political Rights.

⁷ *Privacy*—the right to respect for a person's private life, home and correspondence—is closely related to reputation (as the above quoted article 12 of the Universal Declaration proves) but should nevertheless be distinguished from it (Article 19, *Information, Freedom and Censorship*, 412; see also Jeanneney, *Le Passé dans le présent*, 127–136; Simon Davies, 'Private Matters,' *Index on Censorship*, 2000, no. 3, 36–44; Marie McGonagle, 'Privacy,' in: Jones, ed., *Censorship*, 1960–1962). An important (but not foolproof) distinction is that defamatory statements are generally untrue and undesirable; privacy-invading statements may be true, but *even then* undesirable. (Schauer, *Free Speech*, 175–177; Barendt, *Freedom of Speech*, 189–191, notably 190). Like an unjust defamation charge, the invasion of privacy discourages freedom of expression.

⁸ *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression* (London: Article 19, November 2000).

wrongdoing; third, deceased persons do not have reputations, and, therefore, cannot be defamed. Principle Two is a good standard for evaluating defamation cases against historians.

A short worldwide survey

Plenty of examples illustrate the first form of the improper use of defamation laws—the protection of the reputation of abstract entities. Scores of historians in former Communist countries were sued because they had defamed ‘the nation’, ‘the state’, ‘the Soviet system’, ‘the Communist Party’, or its ‘nationalities policy’.⁹ Likewise, in the Middle East and North Africa, there is a tendency to attack critical historians in the name of abstract entities (‘Islam’, ‘justice’).¹⁰ In the light of these cases, Article 19’s fear of broad definitions of defamation is quite understandable. Public bodies and conceptual entities are so broad and vague that they can be said to be always under attack, and the more abstract they are the more arbitrary and fanciful the charges become.

The second improper use of defamation laws implies that politicians and civil servants should tolerate more criticism of their activities than other individuals and, therefore, use defamation laws sparingly or not at all. In practice, the reverse is the case. In Thailand, for example, several historians were charged with *lèse-majesté* because their work criticized the monarchy. Many incumbent heads of state have eagerly used the defamation instrument to repress unwelcome historical statements.¹¹

⁹ See, for example, Czechoslovakia (Ivan Jirous), Poland (Robert Moczulski), USSR (Viktor Artsimovich, Vasyl Barladianu, Ivan Dzyuba, Abulfaz Elchibey, Valery Marchenko, Valentin Moroz, Anatoly Nazarov), in: De Baets, *Censorship of Historical Thought*, 161, 384–85, 519, 526, 532–37.

¹⁰ See Egypt (Peter Gran), Iran (Ahmad Kasravi), Tunisia (Hichem Djaït) and see also the case against Teddy Katz (Israel), in: De Baets, *Censorship of Historical Thought*, 195, 290–91, 304, 463–64.

¹¹ For the Thai monarch, see the cases of Saman Kongsuphol, Sulak Sivaraksa, Thongchai Winichakul, in De Baets, *Censorship of Historical Thought*, 459–60; see also R. J. Goldstein and S. Bumroongsook, ‘Lèse-majesté: Europe, Thailand,’ in: Jones, ed., *Censorship*, 1397–1402, and David Streckfuss, ed., *Modern Thai Monarchy and Cultural Politics: The Acquittal of Sulak Sivaraksa on the Charge of Lese Majeste in Siam 1995 and Its Consequences* (Bangkok: Santi Pracha Dhamma Institute, 1996). For other examples (Heidar Aliyev in Azerbaijan, Alyaksandr Lukashenka in Belarus, Franjo Tudjman in Croatia, Suharto in Indonesia, Nursultan Nazarbayev in Kazakhstan, Hastings Banda in Malawi), see: De Baets, *Censorship of Historical Thought*, 57–58, 63, 140, 286, 321, 339–41. Not mentioned there is Indira Gandhi’s libel trial against writer and historian Salman Rushdie for his portrayal of her in the 1981 historical novel *Midnight’s Children* (see Jones, ed., *Censorship*, 2071). All these cases refer to the post-1945 period. Among the earlier cases are the following. In 1882–83 Otto von Bismarck sued historian (and 1902 Nobel Literature Prize winner) Theodor Mommsen in defamation because as a politician he had called Bismarck’s economic policy a swindle during a September 1881 election speech; Mommsen was acquitted, also on appeal. See Lothar Wickert, *Theodor Mommsen: Eine Biographie*, vol. 4, *Grösse und Grenzen* (Frankfurt am Main: Klostermann, 1980) 94–122, and Stefan Rebenich, *Theodor Mommsen und Adolf Harnack: Wissenschaft und Politik im Berlin des ausgehenden 19. Jahrhunderts* (Berlin/New York: Walter de Gruyter, 1997) 333–46. In 1896 Kaiser

The third form of improper use—defamation of deceased persons—has been most common in the case of former heads of state. In Turkey, for example, a law protecting the legacy of Atatürk, modern Turkey's founder, makes his memory sacrosanct.¹² Cases of defamation of other deceased persons are less publicized and hence less visible at first sight, but, as the in-depth research below shows, are by no means absent. However, article 19's thesis that reputations are not hereditary may be overstated, and should be qualified from the viewpoint of the historian's ethics. That the dead have a right to dignity, and that 'the dignity of the dead' is a global concept encompassing, inter alia, physical integrity, name, identity, privacy, and reputation, implies that the dead do have a reputation which can be harmed. But even if this is correct, as I believe it is, Article 19 is probably right in arguing that such harm is not the same as defamation and should not be the court's concern. Furthermore, it is also true that the interest of grieved relatives and friends in the deceased persons' untarnished reputation is not identical to those persons' interest in their own reputation when they were still alive.¹³ Hence, a right to sue in defamation on behalf of deceased persons should be narrowly circumscribed. If it is not, it can easily be abused and might prevent free and open debate about historical events.¹⁴

Be this as it may, defamation does not exist without defamation charges, and defamation charges do not exist without victims to bring suit. Without victims to bring suit, careless or dishonest historians are never summoned to court. Thus, as judge and historian Jean-Denis Bredin has noted, while contemporary history is monitored rather closely, historians of earlier periods—or future

Wilhelm II sued historian (and 1927 Nobel Peace Prize winner) Ludwig Quidde for *lèse-majesté*, officially for his critical remarks at a meeting of social-democrats, but indirectly for his successful booklet on Caligula (thirty editions in 1894 alone), which carried satirical allusions to the Kaiser and for which he had already been boycotted and dismissed. Quidde was imprisoned for three months. See Ludwig Quidde, *Caligula: Schriften über Militarismus und Pazifismus* (new [35th] edition introduced by Hans-Ulrich Wehler; Frankfurt am Main: Syndikat, 1977) 28–50, and Karl Holl, Hans Kloft, and Gerd Fesser, *Caligula—Wilhelm II. und der Cäsarenwahnsinn: Antikenrezeption und wilhelminische Politik am Beispiel des "Caligula" von Ludwig Quidde* (Bremen: Temmen, 2001). I kindly thank my colleague Bert Overbeek for having drawn my attention to these works.

¹² For Atatürk, see the cases of Ismail Besikci, Abdurrahman Dilipak, Sinami Orhan, in: De Baets, *Censorship of Historical Thought*, 467–68, 471, 472. For other examples (Leopold II in Belgium, Sukarno in Indonesia, Francisco Solano López in Paraguay, Simón Bolívar in Venezuela), see: De Baets, *Censorship of Historical Thought*, 66–67, 284, 376, 599. For the case of Pope Pius XII, see below. I did not find examples to illustrate a fourth improper ground—the protection of the 'reputation' of state or religious symbols, flags or national insignia—but flags played a role in some cases of censorship or persecution of historians: see Belarus (Vladimir Orlov), Hungary (Laszlo Rusai), Lebanon (Youssef Chahine), and South Korea (Ahn Byung-ryong, Mun Yong-shik), in: De Baets, *Censorship of Historical Thought*, 60–61, 265–66, 329–30, 336; see also R. J. Goldstein, 'Flags,' in: Jones, ed., *Censorship*, 833–34.

¹³ See also A.L.J.M. Janssens, *Strafbare belediging* (Amsterdam: Thela, 1998), 183–89.

¹⁴ Article 19, *Defining Defamation*, 7. Compare Gilissen, 'La Responsabilité civile et pénale,' 325–29.

historians of the contemporary period—enjoy impunity when writing about the distant past, they do so because their victims no longer exist. As Bredin distinctively puts this point:

“Cherishing the nuclear family, modern law is not interested in distant heirs. Widowers or widows, children, grandchildren, they are allowed to demand before court the price for their honor or suffering when their relative has been wronged. Beyond this, it is doubtful that the heir captures the judge’s attention. Collateral distance, the passing of time, and the notoriety of persons or events make improbable his intervention. Twentieth-century history should be on its guard against the law. The history of the [French] Revolution is almost without risk. Medieval history opens very quiet horizons. There comes a time when graves are no longer adorned with flowers, when the dead seem really dead. Then the law leaves the historian alone.”¹⁵

Defamation cases in Western Europe

In order to study more closely the phenomena of allegedly defamatory statements by historians and of the abuse of defamation laws, I shall now focus on a series of twenty-two cases from nine countries with a comparable political regime, all in western Europe, where information is sufficiently available and reliable.¹⁶ The cases, presented in the synoptic table below, all involve charges against historians or others who between 1965 and 2000 made a historical statement considered defamatory by the complainant. Three observations about the data are noteworthy. First, the data, extracted from judgments and other original documents, press articles, and commentaries on the cases, were collected within the context of broader research on the censorship of history (of which the defamation

¹⁵ “Le Droit moderne qui chérit la famille nucléaire se désintéresse des héritiers lointains. Veufs ou veuves, enfants, petits-enfants peuvent venir en justice réclamer le prix de leur honneur ou de leur peine, si l’on a maltraité leur parent. Au-delà, il est douteux que l’héritier parvienne à intéresser le juge. L’éloignement collatéral, le temps révolu, aussi la notoriété des personnes ou des événements écartent le risque de l’action. L’Histoire du XXe siècle oblige à se méfier du Droit. L’histoire de la Révolution est à peu près sans risque. Celle du Moyen Age ouvre des champs très tranquilles. Il vient un temps où les tombes ne sont plus fleuries, où les morts semblent tout à fait morts. Alors le Droit laisse en paix l’historien.” Jean-Denis Bredin, ‘Le Droit, le juge et l’historien,’ *Le Débat*, November 1984, 93–111, here 98 (quotation), 107; see also Gilissen, ‘La Responsabilité civile et pénale,’ 295, 304. It should be observed in passing that defamation is a risk only in agency-oriented history with its emphasis on the motives, words and acts of individualized human actors; authors of structure-oriented history with collective actors stay aloof from it.

¹⁶ The political regime is comparable, the legal one is not. For differences between common-law and civil-law countries, see Article 19, *Information, Freedom and Censorship*, 412; Schauer, *Free Speech*, 168, 171, 219; Barendt, *Freedom of Speech*, 173, 177, 186, 189.

instrument is often but a form) in the period 1945–2000.¹⁷ Although this research was worldwide and systematic and included, as a rule, all lawsuits against historians, it means that the selection of countries and the number of cases for each country represented are partly the result of documentary coincidence. In other words, this is a sample of western European defamation cases against historians, not the universe of defamation cases, let alone the universe of accusations of defamation or of threats with defamation cases. Second, it is particularly worth emphasizing that I did not investigate cases where persons who felt offended threatened, orally or by letter, to sue. Many traces of such threats were found, however,¹⁸ which makes it reasonable to suppose that defamation threats have a much higher frequency than the costly and time-consuming suits or trials themselves. Threats often suffice to instill self-censorship in historians or to make them retract earlier, plausibly argued statements. They are cheaper and smarter than cases surrounded by publicity, with their uncertain effect on public opinion and with their outcome not necessarily favorable to the complainant. Third, trials or suits for which doubts persisted as to whether they were about defamation, were not included. One should also note that because I focus on the defamation aspects from the perspective of Article 19's principles, I will make the following analysis as anonymous as possible; in particular I will not discuss the historical veracity of the historians' allegations so as not to be diverted by the controversies themselves.

1. Profile of complainants and defendants

Even when looking only summarily at the complainants' profiles, a lot of 'ex' and 'former' may be noted. Indeed, many complainants were relatively old, indicating perhaps that reputation is an active long-term condition. One might hypothesize that, except in cases where fame and power are clearly involved, reputation and age generally go together: the older, the more sensitive to insult. A simpler, alternative explanation, however, is that retired complainants usually have more time and money to sue than others. In one case the advanced age of the complainants was used as an argument to request summary proceedings.¹⁹ Apart from age, other noteworthy elements are the following: one American complainant asked a local sympathizer to sue on his behalf in Belgium;²⁰ one complainant sued the same defendant in two cases;²¹ one complainant was suing after he himself was convicted of crimes against humanity the same year,²² and one defendant was sued in two cases with different complainants.²³

¹⁷ De Baets, *Censorship of Historical Thought*, 8, 29–30 nn. 30–31.

¹⁸ See, e.g., Patrick Duportail (Belgium), in: De Baets, *Censorship of Historical Thought*, 68–69.

¹⁹ Case 18.

²⁰ Case 3.

²¹ Cases 1, 2.

²² Case 10.

²³ Cases 14, 15.

Switching to the defendants' profiles, sixteen out of twenty-one defendants were full-time or part-time professional historians,²⁴ while the rest save one had an academic profession also or were writers. In the remaining case the defendant was an institute. As may be expected in cases about history, the defendants were generally younger than the complainants. They often did not take part in the events they described—an argument frequently used against them by the complainants. Sometimes representatives of the channels used by the historian (publishers, institutions) were also sued.²⁵ Among the defendants were two historians not living in the suing country: one was an Israeli historian sued in France because he wrote about French history; the other an American historian sued in Great Britain, a country notorious for severe defamation laws.²⁶

Let us now look at Article 19's preoccupations. The complainants can be divided into two groups: those who sued on their own behalf and those who sued on behalf of others. Among those who felt personally offended, three subcategories are distinguishable: politicians, veterans, and Holocaust deniers. The sample contains some politicians, but not a large number. It does not include heads of state or government, as elsewhere in the world.²⁷ War veterans are remarkably well represented. Here we clearly see that veterans are an ambivalent group: they are interesting sources for historians and therefore their natural allies, but, at the same time, as participants or witnesses some of them are understandably so emotionally involved in the subject (the waging of war) that they may turn into potential adversaries when the historian does not (wholly) share their viewpoint. A special type of complainant is the Holocaust denier, represented by three cases in the table. This is perhaps telling in light of the gradual growth in the 1990s of this extremist (but extremely diversified) minority trying to rewrite history in an immoral way.²⁸ To the second group belong those who sue on behalf of others. In at least five cases, the persons insulted were deceased, which reveals that suing on behalf of deceased

²⁴ Twenty-one defendants because two were sued twice (cases 1–2 and 14–15) and there is one case with two defendants (18).

²⁵ Cases 6, 9, 18, 21, 22.

²⁶ Cases 5, 22.

²⁷ Except for case 13, where the complainant acted on behalf of a deceased head of state.

²⁸ Cases 3, 8, 22. The table contains only defamation cases in which the defendants are *bona fide* historians. This criterion excludes Holocaust deniers, although the latter were often sued themselves for defamation or other charges. Holocaust denial is, however, a form of hate speech and, therefore, a different subject. For the trials against Robert Faurisson, Ernst Zündel and James Keegstra, see: Antoon De Baets, 'Holocaust: Denying the Holocaust,' in: Jones, ed., *Censorship*, 1079–80, and *idem*, 'Holocaustontkenning, censuur en de waardigheid van de doden' [Holocaust Denial, Censorship and the Dignity of the Dead], in: A. De Baets et al., *The Margin of Liberty: On Censorship, Self-Censorship and Tolerance* (Groningen: Onderzoeksschool Rudolf Agricola, 2002) 63–72 [in Dutch].

persons is not limited to heads of state.²⁹ In four instances, the case was taken care of by relatives. In the remaining case, two organizations defended the allegedly offended honor of the deceased person.³⁰

In total there are only three cases in which groups openly sued a historian,³¹ yet to conclude from this fact that groups did not represent complainants (alive or not) very often might be deceiving. Other cases illustrate that individual complainants were supported by pressure groups (such as veterans), not least to cover litigation costs.³² In these circumstances, two options were available: either persons who felt insulted sought or received solidarity and support from the organization to which they belonged, or the organization itself felt attacked and appointed one spokesperson who only formally operated in his or her own name. Article 19 would perhaps not outright reject the second option but it would recommend extreme caution because the supposed tarnishing of reputation is collective, and hence vague and open to easy abuse. In any case, the sample does not contain examples of suits in the name of abstract entities such as the nation or the state.

2. *Context and content of the historians' statements*

When were the offending statements made? With only one exception,³³ at least two decades separated the statement from the historical situation to which it referred. In addition, no statement referred to a historical situation before 1930–40. Again, defamation is clearly an affair of historians of the contemporary period. Where were the offending statements made? Among the channels that historians use to express their opinions, the most common, the lecture, is not represented in the sample: this is probably so because older people—the group from which most complainants are recruited—are under-represented among students, but it may also be an indication of the relative immunity of statements uttered in academe. In half the cases, the medium was a book—a classical vehicle for the historian's views. In one case, a confidential book manuscript was leaked by a reviewer (which raises questions about the latter's professional ethics).³⁴ Five cases concerned a press article or a pamphlet. Remarkably, five other cases were initiated after a written or oral interview. Historians ready to popularize their views have to be careful, because they are watched or listened to, even during fleeting radio interviews!

Surprisingly, statements rather comparable to those for which some historians were sued had been uttered by others before. In seven cases no suit was initiated then, which proves that the perception and timing of the statement is important.³⁵ Many potential complainants probably never find out about

²⁹ Cases 6, 12, 13, 17, 20. Also partly case 18.

³⁰ Case 6.

³¹ Cases 6, 17, 18.

³² Cases 15, 16.

³³ Case 19.

³⁴ Case 15.

³⁵ Cases 1, 3, 8, 10, 11, 16, 22.

damaging statements. Some may do so only when it is too late. Indeed, most cases take place fairly soon after the statement is uttered; in the one case where it took the complainants a decade to decide to sue, this became a strong argument against them.³⁶ Some complainants may notice the statement in time but may not be in a position then to start a lawsuit. Be that as it may, repeating statements formerly declared defamatory by a judge remains risky. The table contains two examples of complainants who, reassured by their success in an earlier case, initiated a suit concerning the same defamatory statement for the second time: one won again, the other lost.³⁷ The reverse is also true: statements of acquitted historians repeated by others normally go unpunished.³⁸ And a statement declared either defamatory or non-defamatory by a judge was also seen as such on appeal, with one exception.³⁹ A last remark: statements central to defamation cases were not necessarily central to the historian's argument. Book passages objected to, for example, were sometimes digressions, sometimes details, with no essential impact on the core of the argument. What were the statements about? Due to the circumstances of data collection described above, identifying patterns is a fragile enterprise. However, it is easy to see that the large majority of statements were about the complainant's acts during World War II, particularly war crimes and acts of collaboration or resistance. A second theme—the behavior of colonial armies during decolonization—is probably significant as well, especially in the Netherlands (Indonesia), and, to some extent and indirectly, France (Algeria). Reputations count in matters of life and death.

This last conclusion leads to a new question: why are French and Dutch cases relatively 'overrepresented' in the table? There may be more at stake here than documentary coincidence. As for France (eight cases), specific cultural factors may account for the high incidence of cases, but hypotheses in this respect must be extremely tentative. First, reputations may be more sensitive in France than elsewhere, but if so, why? Second, the French law—prohibiting proof of statements about facts older than ten years—may lead to proceedings with controversial and inventive twists, worthy of more than the usual press and academic attention. Third, some French historians note a growing tendency to settle historical disputes by law or in court,⁴⁰ but if one thinks, for instance, of the growing number of laws against negationism, this trend is discernible in other European countries as well. As for the Netherlands (five cases), the reason for the higher frequency may be this writer's myopia; he is working in this country and therefore is in a better position to monitor the local situation. In the four months during which the bulk of this essay was written, however, I counted no less than three *public*

³⁶ Case 18.

³⁷ Cases 9, 14.

³⁸ E.g., case 4.

³⁹ Case 1.

⁴⁰ See Henry Rousso, 'Justiz, Geschichte und Erinnerung in Frankreich: Überlegungen zum Papon-Prozeß,' in: Norbert Frei, Dirk van Laak, Michael Stolleis, eds., *Geschichte vor Gericht: Historiker, Richter und die Suche nach Gerechtigkeit* (München: Beck, 2000) 141–63, here 156.

defamation *threats* in which historians were involved, one even directed by a historian to a colleague who had made an allegedly disparaging remark. Other reasons than my *Standortgebundenheit* may be at work, but how to detect them? No doubt, Indonesia is a very sensitive topic in the Netherlands, but it is equally remarkable how frequently censorship attempts and taboos in almost all formerly imperial countries—not only in the Netherlands—revolve around their colonial role.⁴¹ Looking at both France and the Netherlands, World War II is a central focus of French and Dutch collective memory with a proven ability to stir collective passions.⁴² Even so, in Germany, and other countries too, World War II is a highly sensitive topic, but there this is not matched—as far as I know—by a comparably high incidence of defamation cases.⁴³

3. *The verdict of the judges*

Many defamation cases took place in a stormy, often intimidating, atmosphere. In three instances the complainants published their objections in a book.⁴⁴ In other cases the defendants were threatened, sometimes with death, or harassed.⁴⁵ In one case two suits, one of them regarding defamation, were taking place simultaneously against the same defendant.⁴⁶ Three cases were suspended,⁴⁷ but no less than six became appeal and supreme court cases, and one of them was even sent to the European Court of Human Rights.⁴⁸ In at least one case the judge's independence was questioned,⁴⁹ in two others the independence of the complainant's lawyer was.⁵⁰

The basis on which the court pronounced its judgment was at the core of my research. Article 19 maintains that a defendant alleging to speak the truth should be given the opportunity to prove this

⁴¹ De Baets, *Censorship of Historical Thought*, 23.

⁴² See Niek van Sas, 'Towards a New National History: *Lieux de mémoire* and Other Theaters of Memory,' in: Joep Leerssen and Ann Rigney, eds., *Historians and Social Values* (Amsterdam: Amsterdam University Press, 2000), 169–83, here 180–81, and Lucette Valensi, 'Traumatic Events and Historical Consciousness: Who Is in Charge?' in: Leerssen and Rigney, eds., *Historians and Social Values*, 185–95, here 186–90.

⁴³ Toby Mendel commented: "I wonder if there is not a more legal explanation for the high rate of Dutch and French cases. [...] Germany also [i.e. like the United States] has strong protection for freedom of expression, probably applied most meticulously to the question of history" (Personal communication, April 2002).

⁴⁴ In case 3 the defendant became the target of an offending 160-pages pamphlet, published in 1994 by the Holocaust-denying group "Vrij Historisch Onderzoek" ("Free Historical Research") and reportedly distributed to all libraries and history teachers in Dutch-speaking Belgium. The other rebuttals (cases 14, 18) came from the Netherlands. Is the fact that all three rebuttals were written in Dutch coincidence?

⁴⁵ Case 16; death threats in case 12.

⁴⁶ Case 15.

⁴⁷ Cases 3, 12, 15.

⁴⁸ Cases 1, 13, 14, 16, 20, 21; case 21 was treated by the European Court.

⁴⁹ Case 21.

⁵⁰ Cases 1, 2.

and, when sufficient proof is given, be acquitted.⁵¹ This rule is deduced from the principle that a complainant cannot defend an undeserved reputation. The joint Special Rapporteurs recommend that complainants should bear the burden of proving the falsity of any facts. Reality, however, may be very different. In France, for example, the law forbids proof of statements about facts older than ten years—a rule affecting most, if not all, cases against historians.⁵² One case convincingly illustrates this rule: not only was the argument of the defending historian, that some of the archives proving the truth of his statement had disappeared or were destroyed, to no avail, but archivists supporting his version in the courtroom risked being charged with complicity in defamation and were, in addition, reprimanded by the French Archives Directorate and the French Association of Archivists because they violated the existing restrictions on freedom of information.⁵³

However, there is another—in many respects more important—reason than the law why judges, not only in France but also elsewhere, usually avoid considering the crux of the problem itself (the truth value of the offending statement): they are particularly sensitive to the argument that historical truth should be settled by historians in academe, not by judges in court. Following this principle, judges do not initiate research on the cases themselves, but instead make their judgment exclusively on the information provided by the two parties, sometimes after hearing expert witnesses. If, however, judges do not consider the statement's content, on what grounds, then, do they decide? They judge after having inspected the historian's method. Indeed, when motivating an acquittal, judges usually do not say that the historians told the truth; instead they say that the historians acted in good faith, took reasonable care, displayed intellectual honesty, applied professional methods carefully and objectively (notably the disclosure and balanced criticism of all sources, the elimination or correction of falsehoods, the equitable reporting on all parties involved), and that their statements were part of a serious historical debate.⁵⁴ Convicted historians were censured because they did not interview

⁵¹ Article 19, *Defining Defamation*, 11–12.

⁵² Bredin, 'Le Droit, le juge et l'historien,' 104, 109; Jean-Pierre Rioux, 'Sur la liberté de l'historien en correctionnelle à Versailles, le 17 janvier 1985,' *Vingtième siècle*, October–December 1985, 117–21, here 118; Stengers, 'L'Historien face à ses responsabilités,' 23; Jean-Pierre Azéma and Georges Kiejman, 'L'Histoire au tribunal,' *Le Débat*, November–December 1998, 45–51, here 48.

⁵³ Case 10. See *Le Monde*, 27 February 1999, 11; Verne Harris, 'Knowing Right from Wrong: The Archivist and the Protection of People's Rights,' *Janus: Archival Review*, 1999, no. 1, 32–38, here 36; Theo Thomassen, "Archivists between Knowledge and Power: On the Independence and Autonomy of Archival Science and the Archival Profession" (Paper at the International Archival Conference "The Destruction and Reconstruction of Historical Memory: Integrity and Autonomy of Archives", Dubrovnik, 1999), *Arhivski Vjesnik (Zagreb)*, 1999, no. 42: 149–67; Sonia Combe, *Archives interdites: L'Histoire confisquée* (second ed.; Paris: La Découverte, 2001) xvii–xxiii.

⁵⁴ Gilissen, 'La Responsabilité civile et pénale,' 311–15, 1010–12, 1016–17, 1038–39; Bredin, 'Le Droit, le juge et l'historien,' 100, 102–3; Jeanneney, *Le Passé dans le prétoire*, 36. Also see Article 19, *Defining*

eyewitnesses or because they magnified some texts or acts of the complainant,⁵⁵ did not consult original sources but literature only,⁵⁶ or attached excessive importance to single sources.⁵⁷ One French defendant—the historian who was not given the opportunity to prove the truth of his allegations—was finally found guilty of defamation; but although a symbolic penalty was demanded, damages were not awarded because of the defendant’s careful method.⁵⁸ A partial exception to this emphasis on the defendant’s method is the British situation. British libel laws put the burden of proof on the defendant. In one such case, the defendant and her publishers employed three experts who for two years combed all the complainant’s publications to prove the truth of her allegations. As it transpired, the judge agreed with her, and at the same time exposed the methods utilized by the defendant, a writer, in his works.⁵⁹

A subject causing problems in some defamation cases is the amnestied crime. The question here is whether one is allowed during legal proceedings or in historical research to mention a crime that has been amnestied, and if not, whether mention of it equals defamation or an invasion of privacy. The usual line of thought seems to be that mention of amnestied crimes, spent convictions, and similar sensitive statements such as the naming of names of murderers, torturers, spies, traitors, or persons who made confessions under torture—in view of their detrimental effect upon reputation and

Defamation, 12–13 (‘Reasonable Publication’). Bredin (‘Le Droit, le juge et l’historien,’ 111) says: “dans le regard du juge, l’image du ‘bon’ historien: consciencieux, scrupuleux, toujours modéré d’opinion et de ton, apparemment neutre, sans passion avouée ni audace dérangeante. Il ressemble comme un frère au bon juge.” (“In the judge’s view, the image of the ‘good’ historian [is]: meticulous, scrupulous, always moderate in opinion and tone, apparently neutral, without avowed passion, or irritating nerve. He resembles the good judge like a brother does.”) A comprehensive comparison of judges and historians, however, is complex. Both professions share the search for evidence and truth, but proceed differently at all stages of their work. The start of action, the questions asked, and the work rhythm are more narrowly defined for judges than for historians. Their treatment of evidence (access, admissability, witnesses, burden of proof, required level of certainty, logic) and their emphasis on the value of context diverges, as does their view of causality. It follows that their truth conceptions are diverging as well. The work of judges leads to judgment and punishment, that of historians to understanding and explanation (and only for part of them to judgments). Finally, revision of judges’ work is a possibility, of historians’ work a professional rule.

⁵⁵ Case 5. In this case the judge acknowledged that the defendant had the right to judge the complainant’s texts but not his behavior (Pierre Assouline, ‘Enquête sur un historien condamné pour diffamation,’ *L’Histoire*, June 1984, 98–101, here 100). He probably distinguished opinions (value judgments about the complainant’s texts) and facts (statements about the latter’s behavior). See also note 5.

⁵⁶ Case 20.

⁵⁷ Case 9.

⁵⁸ Case 10; *Le Monde*, 29 March 1999, 8.

⁵⁹ Case 22.

privacy—is allowed in historical research only if it serves the public interest.⁶⁰ One of our cases is about just such an amnestied crime: the judge allowed mention not only in the courtroom but also in the defendant's work on the grounds that solid historical research would otherwise become impossible.⁶¹

Finally, which judgments were pronounced? In one third of all cases, damages were awarded or punishment meted out. If we leave aside the dismissal of three cases, historians were acquitted in ten cases and convicted in five. In the remaining four cases, the judgment was (finally) qualified or divided.⁶² Two convicted historians had to go to prison, each time in a southern European country.⁶³ In six or seven cases the complainant was awarded damages. In one British case, the damages were disproportionately high, even the highest in the nation's history: they were eventually successfully challenged before the European Court, but in the meantime five years had elapsed.⁶⁴ In some cases, publication of the court's judgment was ordered.

Conclusion

Both the worldwide survey and the empirical analysis of defamation cases inevitably turn attention to the improper uses of defamation laws, threats, and cases as instruments which discourage historical research in the longer term. Defamation cases may have an effect in three directions. If the historians' position is confirmed by the judge, they may feel that their scholarship and professional responsibility are strengthened.⁶⁵ If the judge disagrees with their position, and if that position is indeed untenable, historians should, at the very least, conduct better and more responsible research in the future. But if the judge disagrees with their position, and if that position can be shown to be plausible or probable, the lesson is bitter and will make historians muse on the differences between legal and historical judgment and the distance between legal and historical truth. They will devote sad reflections on the limits of the expression of historical truth. Knowing and expressing the historical truth are two different things indeed.

The example of amnestied crimes, among others, shows that true statements may be privacy-sensitive or potentially offending. Therefore, such true but sensitive or controversial statements

⁶⁰ Regardless even of whether the media mention these facts. Schauer, *Free speech*, 176–77; Stengers, 'L'Historien face à ses responsabilités,' 27, 29, 37–38. Compare Gilissen, 'La Responsabilité civile et pénale,' 318, 1034–35.

⁶¹ Case 4; for a similar case, see Georges Kiejman, 'L'Histoire devant ses juges,' *Le Débat*, November 1984, 112–25, here 124.

⁶² Cases 5, 10, 11, 21.

⁶³ Cases 13, 19.

⁶⁴ Case 21.

⁶⁵ See, e.g., Loe de Jong, *Het koninkrijk der Nederlanden in de Tweede Wereldoorlog*, volume 13 (The Hague and Leiden, SDU, 1988), 69–76.

should be made only when the public interest is served. This implies that the second part of Cicero's adage—"The first law for the historian is that he shall never dare utter an untruth; the second is that he suppress nothing that is true"—should be qualified. Where the public interest is not present, historians should have a right to silence.⁶⁶ This *right* to silence, however, is fundamentally different from the *order* to be silent, which stems from censorship or self-censorship: the order is determined by political considerations, the right by ethical ones.⁶⁷ The argument for a historians' right to silence should not eclipse another, more important conclusion: worldwide, many defamation laws have a chilling effect on the expression and exchange of historical ideas, and are often but barely veiled attempts at censorship.

⁶⁶ Forty years ago, magistrate and historian John Gilissen already defended this right. See 'La Responsabilité civile et pénale,' 1039 and 1006–12, 1021–30. See also Barendt, *Freedom of Speech*, 63–67. Article 12 of the *Universal Declaration of Human Responsibilities*, drafted by the InterAction Council in 1997, implicitly contains this right: "Every person has a responsibility to speak and act truthfully. No one, however high or mighty, should speak lies. The right to privacy and to personal and professional confidentiality is to be respected. No one is obliged to tell all the truth to everyone all the time."

⁶⁷ Alongside the *right* and the *command* to be silent, there is the *obligation* to be silent, when sources and informants have to be protected, but this is another (and equally controversial) subject.

Defamation cases against historians (Sample from 9 western European countries, 1965–2000) ⁶⁸					
Case number, country	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
1 <i>Austria</i>	Jörg Haider (1950–), politician	Anton Pelinka (1941–), political scientist	Haider trivialized Nazism.	May 1999—interview Italian television station	May 2000–April 2001, Vienna: found guilty; fined 60.000 shillings; acquitted on appeal.
2 <i>Austria</i>	Jörg Haider (1950–), politician	Anton Pelinka (1941–), political scientist	Pelinka compared Haider's linking of Austria's level of unemployment with the number of foreigners in the country to the way the Nazis linked high unemployment rates to the size of the Jewish population.	Spring 1999—interview CNN	October 2000, Vienna: acquitted. ⁶⁹
3 <i>Belgium</i>	Siegfried Verbeke (1941–), printer, on behalf of Fred Leuchter (1943–), American constructor of execution apparatus	Gie van den Berghe (1945–), moral philosopher	Leuchter (author of a 1989 report denying the use of Nazi gas chambers for murder) is not an engineer; his report is deceptive.	February and May 1992—interviews Flemish radio	1992–96, Brussels, case dismissed. ⁷⁰
4 <i>France</i>	Jean Lousteau, ex-collaborator	Michèle Cotta, historian	Lousteau was found guilty of betrayal for his collaboration with the Germans in 1940–44; he was amnestied later.	1964—book <i>La collaboration 1940–44</i> (Paris)	November 1965, Paris: acquitted. ⁷¹

⁶⁸ Summary descriptions of all cases except 11, 17 and 18 in De Baets, *Censorship of Historical Thought*, 56–57, 67–68, 204–9, 223, 307, 360–62, 450, 553–56.

⁶⁹ For both Pelinka cases, see the American Association for the Advancement of Science, *Human Rights Action Network Case AU0003.pel* (Washington 17 July 2000); *Index on Censorship*, 2000, no. 4, 86; 2001, no. 1, 100; 2001, no. 3, 96–97; *NRC-Handelsblad*, 18 April 2001, 5. See for two comparable cases (Haider vs. Kurier and Haider vs. Grisse mann and Stermann): *Index on Censorship*, 2000, no. 6, 9, 166.

⁷⁰ Gie van den Berghe, personal communications (January–February 1997; November–December 2000).

⁷¹ Translation of title: *Collaboration 1940–44*. Bredin, 'Le Droit, le juge et l'historien,' 104; Jeanneney, *Le Passé dans le prétoire*, 124–25; Kiejman, 'L'Histoire devant ses juges,' 123.

Defamation cases against historians (Sample from 9 western European countries, 1965–2000) ⁶⁸					
Case number, country	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
5 <i>France</i>	Bertrand de Jouvenel (1903–87), economist	Zeev Sternhell (1935–), Israeli historian	Sternhell's book contains eight passages in which de Jouvenel is presented as a theorist of French Fascism with pro-Nazi sympathies.	1983—book <i>Ni droite ni gauche: l'idéologie fasciste en France</i> (Paris)	October 1983–February 1984, Paris: six times acquitted; twice found guilty; 1 FF of damages; fined 1500 FF; publication of judgment in three newspapers but not in the book itself. ⁷²
6 <i>France</i>	Two organizations of former deportees, on behalf of Marcel Paul (–1982), Communist and ex-minister	Laurent Wetzel (1950–), historian, & Philippe Meaulle, publishers	Paul displayed cruel behavior as a Communist deportee in Buchenwald concentration camp.	October 1983—article in <i>Courrier des Yvelines</i>	October 1983–January 1985, Versailles: acquitted. ⁷³
7 <i>France</i>	Henri Frenay, former resistance leader	Institut national de l'audiovisuel (INA)	INA showed part of Frenay's testimony on his resistance during World War II only and juxtaposed his view with those of others.	?—documentary	July 1984, Paris: acquitted. ⁷⁴
8 <i>France</i>	Robert Faurisson (1929–), ex-professor of French literature	Georges Wellers (1905–91), historian, medical researcher	Faurisson falsified the history of the Jews during the Nazi period.	?— <i>Le Monde juif</i>	February 1990, Paris: acquitted. ⁷⁵

⁷² Translation of title: *Neither Right nor Left: Fascist Ideology in France*. Bredin, 'Le Droit, le juge et l'historien,' 108–110; Jeanneney, *Le Passé dans le prétoire*, 105–110; Kiejman, 'L'Histoire devant ses juges,' 123; Yan Thomas, 'La Vérité, le temps, le juge et l'historien,' *Le Débat*, November–December 1998, 17–36, here 25; Assouline, 'Enquête sur un historien condamné pour diffamation,' 98–101; Robert Wohl, 'French Fascism, Both Right and Left: Reflections on the Sternhell Controversy,' *Journal of Modern History*, 1991, 91–98.

⁷³ Rioux, 'Sur la liberté de l'historien,' 117–21.

⁷⁴ Jeanneney, *Le Passé dans le prétoire*, 36–37; Kiejman, 'L'Histoire devant ses juges,' 117–18.

⁷⁵ Thomas, 'La Vérité, le temps, le juge et l'historien,' 25; Madeleine Rebérioux, 'Le Génocide, le juge et l'historien,' *L'Histoire*, November 1990, 92–94, here 92.

Defamation cases against historians (Sample from 9 western European countries, 1965–2000) ⁶⁸					
Case number, country	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
9 <i>France</i>	Raymond Aubrac and Lucie Aubrac (1912–), former resistance fighters	G�rard Chauvy (1952–), journalist and historian, & Albin Michel, publishers	The Aubracs betrayed resistance leader Jean Moulin in 1943.	1997—book <i>Aubrac, Lyon 1943</i> (Paris)	1997–June 2000, Paris: found guilty; damages; confirmed by the European Court of Human Rights (June 2004). ⁷⁶
10 <i>France</i>	Maurice Papon (1910–), former civil servant, ex-minister, ex-chief of the Paris police (1958–67)	Jean-Luc Einaudi, civil servant and historian	Papon ordered the police to organize a razzia against Algerians in Paris—leading to a massacre with at least two hundred deaths in October 1961.	May 1998—article in <i>Le Monde</i>	July 1998–February/March 1999, Paris: guilty (the statement was defamatory), but damages not awarded because of Einaudi’s careful method. ⁷⁷
11 <i>France</i>	Jean-Marie Le Pen (1928–), leader of the extreme-right National Front	Pierre Vidal-Naquet (1930–), historian	Le Pen was a torturer during the war in Algeria (1954–62)	1998—memoirs <i>Le Trouble et la lumi�re 1955–1998</i> (2nd volume; Paris : Seuil, 1998)	September 1999, Paris: guilty but acquitted because Vidal-Naquet had acted in good faith and within the context of a legitimate debate. ⁷⁸
12 <i>Germany</i>	Erwin Janik, journalist, on behalf of his deceased brother Emil Janik	Anja Rosmus-Wenniger (1960–), historian	Emil Janik (from Passau, Bavaria) sympathized with the Nazis.	1983—book <i>Widerstand und Verfolgung: am Beispiel Passaus 1933–1939</i> (Passau)	[1990], Passau: discontinued after proof. ⁷⁹

⁷⁶ Jeanneney, *Le Pass  dans le pr toire*, 114–18; Az ma and Kiejman, ‘L’Histoire au tribunal,’ 45–51; ‘L’Affaire Aubrac: v rit  et mensonges,’ *L’Histoire*, June 1997, 78–85; Fran ois Hartog, ‘L’Historien et la conjoncture historiographique,’ *Le D bat*, November–December 1998, 4–10, here 6–7; *Le Monde*, 15 October 1991, 11; Richard Evans, ‘History, Memory, and the Law: The Historian as Expert Witness’, *History and Theory*, October 2002: 326–45, here 338–40; European Court of Human Rights, *Case of Chauvy and others vs. France: Judgment* (WWW-text; Strasbourg 29 June 2004).

⁷⁷ Amnesty International, *Report 2001* (London: Amnesty International, 2001), 103; Harris, ‘Knowing Right from Wrong,’ 36; Thomassen, ‘Archivists between Knowledge and Power’, 149–67; Combe, *Archives interdites*, xviii–xxiii; *Le Monde*, 25 October 1997, 20; 20 May 1998, 14; 19 June 1998, 8; 11 September 1998, 11; 5 February 1999, 1, 8; 6 February 1999, 9; 8 February 1999, 9; 13 February 1999, 13; 15 February 1999, 8; 24 February 1999, 14; 27 February 1999, 11; 29 March 1999, 1.

⁷⁸ Translation of title: *The Rebellion and the Light 1955–1998*. *Le Monde*, 15 septembre 1999, 12. Vidal-Naquet had made the allegation already years before, in his book *Torture: Cancer of Democracy* (Harmondsworth, Eng.: Penguin Books, 1963).

⁷⁹ Translation of title: *Resistance and Persecution: The Example of Passau 1933–39*. Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (London/New York: Jonathan Cape 1994), 262–75. See

Defamation cases against historians (Sample from 9 western European countries, 1965–2000) ⁶⁸					
Case number, country	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
13 <i>Italy</i>	Niece of Pope Pius XII (1876–1958), on his behalf	Robert Katz (1933–), writer	Although informed about Nazi plans to retaliate against Italian partisans for the killing of SS soldiers, Pius XII did nothing.	1967—book <i>Death in Rome</i> (New York)	July 1981, Rome: found guilty on appeal; 13 months' imprisonment and fined, released on bail pending further appeal. ⁸⁰
14 <i>The Netherlands</i>	Hendrik Willem van der Vaart Smit (1888–1985), ex-pastor, ex-member of the National Socialist Movement NSB	Loe de Jong (1914–2005), historian at the Netherlands State Institute for War Documentation RIOD	(Inter alia:) In his work about World War II, De Jong mentioned that in 1963 another author called Van der Vaart Smit a liar.	1969—book <i>Het koninkrijk der Nederlanden in de Tweede Wereldoorlog</i> , vol. I	1971–73, Amsterdam: acquitted (June 1972), also on appeal (April 1973) and cassation (December 1973). ⁸¹
15 <i>The Netherlands</i>	Hans Düster ([1919–]), ex-commander Batavia Intelligence Service Central Department; author of official study on the Police Actions of 1947–48 [1969]	Loe de Jong (1914–2005), historian at the Netherlands State Institute for War Documentation RIOD	De Jong's leaked draft on the Dutch-Indonesian relations in 1945–49 contains a section entitled <i>War Crimes</i> , which is defamatory to the Dutch army in Indonesia.	October 1987—manuscript <i>Het koninkrijk der Nederlanden in de Tweede Wereldoorlog</i> , vol. 12b	[1987]–88, Amsterdam: [case, including demand for non-publication, dismissed]; upon publication of part 12b (1988), the relevant section was entitled <i>Excesses</i> . ⁸²

also Michael Verhoeven, *Das Mädchen und die Stadt oder: wie war es wirklich?* (German documentary: 1992; 45 minutes).

⁸⁰ *Index on Censorship*, 1981, no. 5, 45.

⁸¹ Translation of title: *The Kingdom of the Netherlands in World War II*. J. J. Buskes, *Hoera voor het leven* (Amsterdam: Ten Have, 1963), 174; Loe de Jong, *Het koninkrijk* (The Hague: SDU), volume 1 (1969), 361, 491; volume 13 (1988), 71–72, 83; volume 14 (1991), 62–63, 938–40; Max Pam, *De onderzoekers van de oorlog: Het Rijksinstituut voor Oorlogsdocumentatie en het werk van dr. L. de Jong* (The Hague: SDU, 1989), 72–73; Ivo Schöffer, 'Kroniek: algemeen', *Bijdragen en mededelingen betreffende de geschiedenis der Nederlanden*, 1974, 144–45; H. W. van der Vaart Smit, *Wetenschappelijke kritiek I op het geschiedwerk van prof. dr. L. de Jong: Het koninkrijk der Nederlanden in de Tweede Wereldoorlog* (Amsterdam: De Pauw, 1975), 31–50; idem, "Strafdossiers bijzondere rechtspraak," *Nederlands Juristenblad*, 4 November 1972: 1070–73; idem, "Rijksinstituut," *Nederlands Juristenblad*, 4 October 1975: 1097–1100; "Hoge Raad, 14 december 1973," in: *Nederlandse jurisprudentie: Uitspraken in burgerlijke en strafzaken 1974* (Zwolle 1974) no. 301: 798–802.

⁸² Translation of title: *The Kingdom of the Netherlands in World War II*. De Jong, *Het koninkrijk*, volume 12b (1988), 1011–12, 1059–60; volume 13 (1988), 63; volume 14 (1991), 900–18, 985–87; Pam, *De*

Defamation cases against historians (Sample from 9 western European countries, 1965–2000) ⁶⁸					
Case number, country	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
16 <i>The Netherlands</i>	Lodewijk Buma, veteran during colonial war in Indonesia; ex- policeman	Graa Boomsma (1953–), writer, & Eddy Schaafsma, interviewer, translator	The behavior of the Dutch military in Indonesia in 1945–49 was sometimes comparable to the behavior of SS soldiers during World War II.	March 1992—interview in newspaper <i>Nieuwsblad van het Noorden</i>	1992–95, Groningen: case dismissed in October 1992 but reintroduced in November 1993; acquitted (June 1994), also on appeal (January 1995). ⁸³
17 <i>The Netherlands</i>	Ten family members of W. van de Langemheen (–1987), on his behalf	Madelon de Keizer (1948–), historian at the Netherlands State Institute for War Documentation NIOD	Van de Langemheen was a traitor; in October 1944 he gave away the whereabouts of the resistance to the police and the German occupier.	1998—book <i>Putten, de Razzia en de Herinnering</i> (Amsterdam; four editions)	September 1999, Arnhem: acquitted; changed ‘traitor’ into ‘accused of betrayal’ in the fifth edition (1999). ⁸⁴

onderzoekers, 85–86; André J.F. Köbben and Henk Tromp, *De onwelkome boodschap—of hoe de vrijheid van wetenschap bedreigd wordt* (Amsterdam: Mets 1999), 45–47; Stef Scagliola, *Last van de oorlog: De Nederlandse oorlogsmisdaden in Indonesië en hun verwerking* (Amsterdam: Balans, 2002), 111–12, 221–40, 322–31, 413–14.

For other lawsuits against de Jong, see de Jong, *Het koninkrijk*, volume 13, 75; volume 14, 762, 900–18, 931, 941; Pam, *De onderzoekers*, 82–84; Ralph Boekholt, *De staat, dr. L. de Jong en Indië: Het proces van het Comité Geschiedkundig Eerherstel Nederlands-Indië tegen de Staat der Nederlanden over deel 11A van ‘Het Koninkrijk der Nederlanden in de Tweede Wereldoorlog,’ 29 maart 1986–10 april 1990* (The Hague: Moesson, 1992), 119–375, notably 209–14, 286–90, 369–75; Peter Romijn, ‘Fifty Years Later: Historical Studies of the Netherlands and the Second World War,’ in: N.C.F. van Sas and Els Witte, eds., *Historical Research in the Low Countries* (The Hague: Nederlands Historisch Genootschap, 1992), 102–3; *Idem*, personal communication (December 2000), Amsterdam.

⁸³ ‘Zaak-Boomsma’, *Mediaforum*, 1994, nos. 7/8, B66; 1995, no. 3, B36–37; ‘Zaak-Schaafsma’, *Mediaforum*, 1994, nos. 7/8, B67; 1995, no. 3, B37–38; *Index on Censorship*, 1994, no. 3, 179; 1994; nos. 4–5, 245; 1995, no. 2, 181; International PEN Writers in Prison Committee, *Ifex Action Alert*, 13 January 1995; *NRC-Handelsblad*, 10 May 1994; 20 May 1994, 7; 23 May 1994, 10; 24 May 1994, 9; 25 May 1994, 9; 26 May 1994, 11; 27 May 1994, 6; *Volkskrant*, 11 February 1995, 16; Scagliola, *Last van de oorlog*, 113.

⁸⁴ Translation of title: *Putten: Razzia and Memory. Vonnis van de President van de Arrondissementsrechtbank te Arnhem* (summary proceedings; Arnhem 27 September 1999, 6 pages); Hans Blom, personal communication (5 November 2001).

Defamation cases against historians (Sample from 9 western European countries, 1965–2000) ⁶⁸					
Case number, country	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
18 <i>The Netherlands</i>	25 World War II veterans and relatives of soldiers killed in action and of deceased veterans [led by Wim Jagtenberg (1915–)], two veterans' associations, & a military personnel trade union	Herman Amersfoort (1951–), and Piet Kamphuis (1953–), military historians editing the book, & the Ministry of Defense, their employer	Both Dutch military and German units committed war crimes on an incidental basis during the May 1940 German invasion. One example concerned a Dutch soldier who allegedly continued shooting after his capture by the Germans on the Grebbeberg.	1990—book <i>Mei 1940: De strijd op Nederlands grondgebied</i> (The Hague)	November–December 2000, The Hague: acquitted; editors would take into account veterans' criticism in new edition. ⁸⁵
19 <i>Spain</i>	?	Francisco Carballo, priest and historian	A wave of terror in Galicia in August 1975 led to the killing of a political leader, attributable to the police.	?—book [<i>Historia de Galicia</i>]	1981: found guilty; six months' imprisonment; fined 20.000 pesetas. ⁸⁶
20 <i>Switzerland</i>	Son of lawyer Wilhelm Frick (–1961), on his behalf	Walther Hofer (1920–), historian and former Member of Parliament	Frick had connections with the Gestapo during World War II.	1983—article in <i>Neue Zürcher Zeitung</i>	1983–99, Lausanne: found guilty (1986); despite new evidence submitted by Hofer confirmed by the <i>Bundesgericht</i> (1998–99); 2000 CHF in damages; 2000 CHF legal costs. ⁸⁷

⁸⁵ Translation of title: *May 1940: The Struggle on Dutch Territory. Vonnis van de President van de Arrondissementsrechtbank te 's-Gravenhage* (summary proceedings; The Hague 22 December 2000, 4 pages); pleading notes for both parties (12 December 2000); *Defensiekrant*, 11 January 2001; C. M. Schulten, *Notitie politieke verantwoordelijkheid en militaire geschiedschrijving* (The Hague, 2001), 3–4, 6, 11; *Volkskrant*, 13 December 2000; *NRC Handelsblad*, 22 December 2000; Piet Kamphuis, personal communication, December–January 2002.

⁸⁶ Translation of title: *Historia de Galicia*. Amnesty International, *Report 1982* (London, 1982), 291.

⁸⁷ *Der Bund*, 10 November 1999, 15; Peter Hug and Brigitte Studer, “‘Historische Wahrheit’ contra ‘Thesen’ zur Zeitgeschichte,” *Traverse*, 1998, no. 3, 128–39, here 129–30; Sacha Zala, personal communications (March–December 2000); Peter Stettler, ‘Walther Hofer,’ in: *Historisches Lexikon der Schweiz* (WWW-text; Bern 12 November 1998).

Defamation cases against historians (Sample from 9 western European countries, 1965–2000) ⁶⁸					
Case number, country	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
21 <i>United Kingdom</i>	Lord Aldington (?1914–2000), formerly called Toby Low, Member of Parliament	Nikolai Tolstoy Miloslavsky (1935–), historian, & Nigel Watts, property developer, publisher of the pamphlet	Low (in May 1945 a brigadier in Carinthia) was coresponsible for the slaughter of 70,000 prisoners-of-war and refugees handed over by the British to Soviet and Titoist forces; therefore, Low is a war criminal.	March 1987—pamphlet <i>War Crimes and the Wardenship of Winchester College</i>	October–November 1989: found guilty; £1,5 million in damages; injunction restraining Tolstoy from further writing about Aldington; financial problems impede Tolstoy’s appeal; July 1995: European Court found award of damages disproportionate. ⁸⁸
22 <i>United Kingdom</i>	David Irving (1938–), writer	Deborah Lipstadt (1947–), American historian, & Penguin Books, publishers	Irving is a Holocaust denier.	1993—book <i>Denying the Holocaust</i> (Harmondsworth)	Autumn 1996–April 2000, London: acquitted. July 2001, London: Irving refused permission to appeal. ⁸⁹

⁸⁸ European Court of Human Rights, *Case of Tolstoy Miloslavsky versus the United Kingdom: Judgment* (WWW-text; Strasbourg 13 July 1995); Nikolay Tolstoy, *Victims of Yalta* (London, etc.: Hodder and Stoughton, 1977), 231, 277; Nikolay Tolstoy, *The Minister and the Massacres* (London etc.: Century Hutchinson, 1986), xix–xxi; *Guardian*, 12 July 1990, 2; 20 July 1990, 4; 25 July 1990, 39; James Wilson, ‘Defending Eighth Army’s Reputation: Military Problem, Legal Outcome,’ *The Army Quarterly and Defence Journal*, 1998, 128, no. 1, 5–9; Srdja Trifkovic, ‘Lord Aldington : Dead, but no R.I.P.’ (WWW-text; 19 December 2000); McGonagle, ‘Defamation,’ 658; Barbara Mensah, *European Human Rights Case Summaries 1960–2000* (London/Sydney: Cavendish Publishing, 2002) 978–79.

⁸⁹ Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (originally 1993; Harmondsworth, Eng.: Penguin Books, 1994), 8, 111, 161–62, 179–81, 234; *Guardian* (WWW-text), 8 January 2000; 3 March 2000; 16 March 2000; *International Herald Tribune* (WWW-text), 1 March 2000; 12 April 2000; 12 April 2000; *Index on Censorship*, 2000, no. 2, 5, 32, 120, 128–29; 2000, no. 3, 98, 111; Michael Shermer and Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?* (Berkeley etc.: University of California Press, 2000), xv, 48–58, 258–59; Deborah Lipstadt, ‘Perspectives from a British Courtroom: My Struggle with Deception, Lies and David Irving’, and Christopher R. Browning, ‘Historians and Holocaust Denial in the Courtroom’, both in: John K. Roth, and Elisabeth Maxwell, eds., *Remembering for the Future: The Holocaust in an Age of Genocides*, vol. 1 (Houndmills, Basingstoke: Palgrave, 2001), 769–72 and 773–78; Evans, ‘History, Memory, and the Law’, 328, 340–43; *BBC News Online* (WWW-text; London 20 July 2001).

<i>Annex :Two Canadian Cases</i>					
Case number	Complainant: name, age, profile	Defendant: name, age, profile	Alleged defamatory statement, act	Time, place of statement, act	Period, place of trial/suit: judgment, penalty
<i>Canada</i>	Anne, Marie, Jeanne, and Jean Bourassa	Fernand Ouellet (1926–), archivist and historian at the universities of Laval and Carleton; and Les Presses de l'Université Laval (PUL), publisher.	Ouellet portrayed the Papineau family (and especially Julie and her daughters, of one of which the Bourassas were great-grandchildren) as a mentally unstable Quebecois family of the 1830s.	Mai 1961—manuscript in print <i>Julie Papineau: Un Cas de mélancolie et d'éducation janséniste</i>	January 1970: defamatory in certain regards, but not banned; Bourassas awarded \$400 in damages. November 1970—Supreme Court : amount demanded by the Bourassas (\$600) too small to permit appeal. Neither PUL (who had shredded copies of the book already printed) nor others ever published the manuscript. ⁹⁰
<i>Canada</i>	Pierre and Claude Michaud, businessmen in Quebec	Pierre Turgeon, writer and historian	A biography of businessman Paul-Hervé Desrosiers (1898–1969), great-uncle of the Michaud brothers, written under contract by Turgeon, invaded Desrosiers's privacy and was insulting to his memory and to that of his heirs, inter alia because of passages on his political ties, bribery and lobbying of several prime ministers.	1992—manuscript <i>P.-H. le magnifique: éminence grise de Duplessis</i>	August 1996: temporary injunction of manuscript when Turgeon, upon refusal by the Michauds to publish it, offered it to another publisher. March 1998: court ordered Turgeon not to publish the biography, to renounce his copyright, to return all his research documents, and not to publicize any information about Desrosiers. May 2003 Turgeon's appeal rejected; case before Supreme Court (underway). ⁹¹

⁹⁰ Translation of title: *Julie Papineau: A Case of Melancholy and Jansenist Education*. Ronald Rudin, *Making History in Twentieth-Century Quebec* (Toronto etc. 1997) 149–61, 253–57; Daniel R. Woolf, ed., *A Global Encyclopedia of Historical Writing* (New York/London 1998) 681–82.

⁹¹ Translation of title: *P.-H. the Magnificent: Duplessis's Wise Old Man*. *Le Devoir*, 28 February 1998: A10; 14 March 1998: A12; 27 March 1998: A1 (WWW-text); *La Presse*, 17 December 1996: A9; 3 February 1998: B3; 10 February 1998: B2 (WWW-text); *Reno against Freedom of Speech* (WWW-text); *Stop Censoring Quebec History* (WWW-text); L. Loiselle, "L'Affaire Pierre Turgeon: Étude historique et juridique" (WWW-text [1997]); P. Bergeron, "L'Auteur Pierre Turgeon est débouté en Cour d'appel mais ira en Cour suprême" (WWW-text; *La Presse Canadienne*, 2003). I kindly thank my colleague Micheline Dumont for having drawn my attention to these two cases.