O/A 4-2-84

FILED
SID J. WHITE
FEB 17 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

Case No. 63,753

MID-FLORIDA TELEVISION CORP., et al., and PAT BEAL,
Petitioners,

vs.

JACK BOYLES,
Respondent.

DISCRETIONARY REVIEW OF THE FIFTH DISTRICT COURT OF APPEAL DECISION

BRIEF OF AMICUS CURIAE THE MIAMI HERALD PUBLISHING COMPANY

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INTRODUCTION

The doctrine of libel *per se* was born and nurtured in England during the feudal age. Under this harsh and ancient rule of law, the mere publication of certain words was considered an intentional wrong akin to an assault.

The doctrine was constructed of three presumptions and a rule of strict liability. First, the law presumed the words to have been uttered with a malicious intent to injure or common law "express malice". Second, the law presumed the words to be false. And finally, the words in and of themselves were presumed to cause injury or damage. The presumption of malice was of particular importance since it permitted the publication to be treated like all other intentional wrongs; liability attached without "fault." Since the three presumptions ensured that the utterer of such words would be held strictly liable for his utterance without further elements of proof required, the tort was called libel *per se*.

The doctrine of libel *per se* no longer survives in America for the simple reason that the United States Supreme Court has held that the mere utterance of defamatory words can no longer be regarded as sufficient for liability in libel. Under the rule of constitutional law first articulated in *New York Times v. Sullivan,* 376 U.S. 254 (1964), and elaborated in *Gertz v. Robert Welch,* 418 U.S. 323 (1974), the utterance of words alone is not a sufficient predicate for liability. *Gertz* holds as a matter of federal constitutional law that it is the conduct of the publisher and the truth or falsity of the words published which must first be established in assessing a libel action. There must be "fault" with respect to "falsity". Thus, the plaintiff must prove at least negligence and falsity caused by that negligence to have a cause of action. In addition, *Gertz*

holds the plaintiff must prove actual damage, at least unless he proves "knowing falsity" by the publisher. Thus, *Gertz* eliminates the common law's rule of strict liability and presumption of falsity, and eviscerates the presumption of damage. *Gertz* did not address the presumption of ill will, but it did offer one further distinction. It distinguished between expression which fairly puts the publisher on notice as to its defamatory nature and expression which does not. In short, it redefined the old distinction between defamation *per se* and *per quod* in terms of the obviousness of risk the language presented to the libel defendant.

The issue presented this Court by the decision below and by *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. 1st DCA 1981), is not whether the doctrine of libel *per se* survives in Florida (since liability for the mere utterance of defamatory words does not survive *Gertz*), but rather whether Florida should retain common law presumptions of ill will and damage *under any circumstances*, or whether the plaintiff should be required to prove them in every case. The decision below seems to have decided the presumptions are no longer viable, and to have held that the only remaining difference between language formerly denoted defamatory *per se* and that designated *per quod* is that the former is injurious to reputation on its face without reference to extrinsic facts while the latter is not.[1] As is argued at length below, the harsh presumptions of libel *per se* in the English common law should not

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1. If by this holding the lower court meant only that some language puts the publisher fairly on notice as to its defamatory character and may be called defamatory *per se*—while language defamatory *per quod* fails to afford the defendant such notice—then the Court below has correctly followed *Gertz, supra,* at 810, and probably is not in conflict with *From* at all. However, if the court below meant "libel" *per se,* rather than "defamation" *per se,* it is clearly wrong.

be retained in any respect by this Court. To demonstrate the inappropriateness of those presumptions today, their origins are fully explored *infra* at pp. 5-30. The historical evidence reveals that the presumptions reflect four fundamental aspects of the English feudal system which are contrary to our contemporary social and governmental structure. As discussed more fully *infra* at pp. 30-33, the harsh presumptions of the common law were created (i) to prevent breaches of the peace, (ii) to protect the repressive feudal system from "seditious" expression, and (iii) to act as a means of regulating commerce in the absence of substantive trade regulation. Most fundamentally, the common law age afforded no special protection to speech or expression since its institutions were authoritarian and not democratic.

As this country began to develop with its traditions of individual liberty, democratic processes, and economic freedom, extraordinary social pressure was brought to bear on the old common law presumptions. The courts slowly began to create common law privileges for socially useful speech which in effect reversed the old English presumptions. Expression was presumptively protected rather than presumptively actionable. *See infra* at pp. 33-40. But the common law in Florida, as elsewhere, grew in fits and starts, by accretion and in response to the social conditions of the day, but always in the context of a concrete "case or controversy" to be judged in accordance with precedent. It was not until 1964 in *New York Times v. Sullivan,* 376 U.S. 254 (1964), that the United States Supreme Court self-consciously considered the general relationship between the old common law of libel and the First Amendment. The result has been the elimination of strict liability and libel *per se,* and the reversal or modification of two of the common law presumptions. This

Court should recognize and hold that expression enjoys a "preferred position" in our society and that it should be regarded as presumptively lawful. This Court should hold that a libel plaintiff must always prove actual damage and ill will before he may recover, as well as the proper level of fault and falsity. The social factors in feudal England which caused the adoption of the libel *per se* presumptions have long since ceased to be relevant to modern society, and there is no reason to retain those presumptions in any form.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts the Statement of the Case and Statement of Facts presented by Petitioner.

ARGUMENT

I. HISTORICAL DEVELOPMENT OF LIBEL

Defamation developed late in the evolution of the English common law. In fact the common law did not recognize defamation claims until the 16th century. Before that time the private manorial and the ecclesiastical courts of England handled all defamation claims, *see infra.* These unique historical antecedents created the often bizarre rules of the law of defamation as it existed when it became the law of the colonial states and then of Florida. Both manorial courts and ecclesiastical courts had a common purpose in recognizing the defamation action: maintaining society without bloodshed by preventing breaches of the peace caused by self-help. Lovell, *The "Reception" of Defamation by the Common Law,* 15 Vanderbilt Law Review 1051, 1052 (1962).

A. The Tort Of Defamation Did Not Exist At Early Common Law

Manorial courts were created to maintain order among the serfs on the vast manors of feudal England. Manorial courts gave serfs a monetary substitute for physical retribution, blood feuds, or civil disorders to avenge *insults;* the monetary vengeance was allotted according to a schedule graduated by the degree of the insult.[2] Wade, *Tort*

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2. Inasmuch as these penalties were regarded as compensation to the wronged individual, in exchange for his older right of private vengeance, there was a tendency to make the penalty correspond to the degree of irritation which the wrong would naturally excite. Thus, in early Icelandic law, a man accused of cowardice had the right of slaying his accuser. Veeder I, *infra,* at 548. Thus, the penalty for calling another a "wolf" or a "Hare" was three shillings, for an imputation of unchastity against a woman it was 45 shillings. Veeder, *The History and Theory of the Law of Defamation I,* 3 Columbia Law Review 546, 548 (1903).

Liability for Abusive and Insulting Language, 4 Vanderbilt Law Review 63, 65 (1950).

The manorial courts gave little or no attention to defamation as it is generally considered today—the offense of injuring a person's reputation by false statements. These courts concentrated on the fact of abusive language and its monetary satisfaction. Thus, the paradigm action in the manorial courts was one serf verbally assaulting another by addressing him with some foul epithet. Probably because these courts, composed of mere serfs, predicated the tort on insults, ecclesiastical courts and later the common law[3] did not recognize abusive language as, itself, defamatory. Lovell at 1054.[4] In any event, the remark uttered with malicious intent, true or not, was the gravamen of the manorial court action.

Ecclesiastical courts[5] approached defamation from a different point of view—the prevention of civil strife

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3. Today most modern jurisdiction possessing a tort of abusive and insulting language distinguish it from the defamatory torts and invariably have created it by relatively recent legislation. Wade at 80-81.

4. Recent developments in Florida law suggest an unfortunate throw-back to the ancient manorial tort for serfs in that libel plaintiffs are being permitted recovery of damages where they have waived their reputational interest or proven no harm to reputation. *Firestone v. Time, Inc.,* 271 So.2d 745 (Fla. 1972); *Miami Herald Publishing Co. v. Ane,* 423 So.2d 376 (Fla. 3d DCA 1982); *Nodar v. Galbreath,* 429 So.2d 715 (Fla. 4th DCA 1983); *Miami Herald Publishing Co. v. Frank,* ..... So.2d ..... (Case No. 82-1190 Fla. 3d DCA October 18, 1983). In none of these cases was the plaintiffs' good name or character placed at issue. This Court should reevaluate whether this trend makes any sense, particularly in light of Florida's "impact rule."

5. Ecclesiastical courts had jurisdiction over canon law which was applied before 1066 by the same courts which employed secular law. The only difference was that when a manorial court dealt with matters under ecclesiastical law a priest presided to explain the law of the Holy Church to the assembly. Lovell at 1052. After the Norman Conquest separate Church courts were established.

through the punishment of sin. But again malicious intent was at the heart of the wrong. The injured party in defamation actions in those courts, usually noblemen, sought and received vindication of his character through public apology for malicious remarks. Canon law regarded defamation as part of its jurisdictional competence over the "cure (or care) of souls". It considered defamation to be a sin, demanding penance before there could be absolution of the sinner. Veeder, *The History and Theory of the Law of Defamation I,* 3 Columbia Law Review 546, 548 (1903) (hereinafter cited as "Veeder I"). The person guilty of making the false allegation (guilt being established by compurgation[6] or ordeal[7]), needed to be absolved of his sin; neither compensation of the party injured by the false statement nor punishment of the defamer was the intent of ecclesiastical courts. This "remedy", however, did not satisfy the great men of feudal England, whose honor demanded direct justice by duelling, and it was duelling which the Church and monarch wanted particularly to abate since it was likely to produce civil disorder. Lovell at 1052.

The canon law definition of defamation turned on whether the allegation was of a wrongful act under that

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6. Several neighbors of the person accused of defamation appeared and swore that they believed him on his oath.

7. Determination of facts in the ecclesiastical courts fell to the judge, who then applied canon law in rendering his decision. If found guilty, the defamer as a sinner was liable to do public penance. Wrapped in a white shroud and holding a lighted candle while kneeling, he acknowledged his "false witness" in the presence of a priest and parish wardens and begged the pardon of the injured party, who, as a Christian was bound to forgive. The final act was the absolution of the sinner. If the defamer was stubborn, the court could order his excommunication. Finally the spiritual court could call upon the royal sheriff to seize and hold all his goods until he truly repented. Carr, *English Law of Defamation,* 18 L.Q. Rev. 255, 269 (1902).

law.[8] The first requirement of the canon law of defamation was that the allegation be "published"—it had to be made to a third party. The central requirement was malice. A statement was sinful and therefore within the jurisdiction of canon law *only when made maliciously.* Veeder, *The History and Theory of the Law of Defamation II,* 4 Columbia Law Review 33, 35 (1904) (hereinafter cited as "Veeder II"). Since malice often did not in fact exist, it was presumed from the words alone so that the jurisdiction of the canon law was preserved.[9] The ecclesiastical courts determined that truth was an absolute defense to the charge of defamation since truth did not require expiation and presumptively should not have required regulation. Carr, *English Law of Defamation,* 18 L.Q. Rev. 255, 268 (1902). Finally, ecclesiastical courts made no distinction between oral and written defamation; although prevailing mass illiteracy meant that most defamations were oral. Lovell at 1053.

The common law in its growth, which was particularly rapid during the 13th century, did not recognize defamation; the common law explicitly denied any interest in the tort. 8 Holdsworth, *A History of the English Law* at 335 (1926); *see also* Wade at 65. In 1285, royal justices assisted Edward I in the formulation of the statute, *Circumspecte Agatis,* which in its definition of ecclesiastical jurisdiction included defamation actions, "providing that money be not demanded, but the suit is prosecuted for punishment of sin."[10] 13 Edw. 1, c.1 (1285). In 1295, a

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8. Thus to call a man a "dog" was unfortunate; to call him a "thief" defamatory. Fifoot, *History and Sources of the Common Law—Tort and Contract* at 126 (1949).

9. Several legal historians have pointed out that the ecclesiastical presumption of malice was often contrary to the actual fact. Veeder II at 35.

10. The wording of the statute, "It has been granted already", makes it clear that the crown was confirming existing ecclesiastical jurisdiction, not in any way creating it. 13 Edw. 1, c.1 (1285).

defamation case came before Parliament as the highest court. In a unanimous opinion, the justices declared that the common law had no jurisdiction over defamation, which instead fell to ecclesiastical tribunals. 2 Holdsworth, *A History of the English Law* at 366 (1923); Veeder I at 551.

By the close of its formative period at the end of the 13th century, the common law offered no remedy for defamation. Canon law sought to pressure temporal and spiritual order by offering the remedy of public penance and limited vindication of the injured by the public apology of the wrongdoer. For servile persons the manorial courts gave damages for bad language, but the purpose was elimination of the fights that "fighting words" would cause, not reparation for real damage to reputation or well-being.

Feudal society was dominated by the lord. That lord was, at the end of the 13th century, dissatisfied with the type of vindication offered him by ecclesiastical courts and unable (and unwilling) to secure the monetary relief given by manorial courts for his social inferiors. His only real satisfaction for defamatory words remained his own sword. This was not a sound basis for an orderly society; the crown needed more control.

B. Mercantile Development Influenced The Development Of The Law Of Defamation

Changes in the economic and social facts of English life in the 14th century produced a small but vocal middle class, whose mercantile attitudes made them aware of how financially crippling defamation could be in the absence of any meaningful regulation of commerce by government. In the absence of pure food and drug laws, a uniform commercial code, or other statutory protection routine today, false statements regarding a merchant's goods were deva-

stating. The middle class, too, was dissatisfied by existing remedies; but its members did not even have the remedy of the sword. By training and personal disposition, they were unlikely to seize weapons to maintain their financial reputation. Lovell at 1058.

Simultaneously, the ranks of the servile began to thin, particularly after the Black Death virtually destroyed both serfdom and the old manorial courts.[11] Lovell at 1058. This fact, together with the growth of the middle class, further concentrated defamation actions in the ecclesiastical courts. Hickson & Carter-Ruck, *The Law of Libel and Slander* at 7 (1953); Fifoot, *History and Sources of the Common Law—Tort and Contract* at 126-127 (1949). The crown did not object to this concentration, but had to remedy the great weakness of ecclesiastical relief—its failure to provide real deterrence to potential defamers in the commercial world of the 14th century. In 1315, a statute authorized ecclesiastical courts to order, in addition to pennance, with its questionable deterrent value, corporal punishment of defamers,[12] but with the proviso that this punishment could be commuted to a fine. *De diversis Libertatibos Clero concessis*, 9 Edw. 2, c.4 (1315).

This statute did give greater deterrent value to the "remedies" afforded by ecclesiastical courts. However, mercantile persons seeking monetary relief for defamation had to turn to their own courts of the great merchant fairs, the courts of pie powder, which used summary procedures so that merchants could move on to the next fair.[13] Lovell at 1059.

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11. Manorial courts would linger in England, half-forgotten, until the early 19th century. They were known as the "courts leet." Lovell at 1058.

12. The corporal punishment usually administered was whipping.

13. The court asked several fellow merchants of the defendant to swear that they believed him on his oath.

C. The Star Chamber Takes Over The Development Of The Law Of Defamation

Expanding the ecclesiatical courts was not enough; these courts were simply not a sufficient ordering force. The development of a substantial remedy at common law for defamation was necessary to control the settlement of defamations by means of the duel and the resultant internal disorders of blood feuds. The crown had an additional and new concern with criticism of its policies by the emerging middle class, who were unwilling to ascribe to the traditional view that the government was ordained by God. Lovell at 1059. These two concerns resulted in the statute *De Scandalis Magnatum* which placed resolution of defamation squarely in the common law courts:

> Whereasmuch as there have been aforetimes found in the country devisers of tales . . . whereby discord or occasion of discord hath arisen between the king and his people or great men of this realm . . . it is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of his realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was first author of the tale.

Statute of Westminster, 3 Edw. 1, c.34 (1275). The "great men of the realm" were all prelates, dukes, earls, barons, and the Chancellor, Treasurer, Clerk of the Council, Lord High Steward, justices, and other great officials of the kingdom. *Id.*

De Scandalis Magnatum, thus, was passed to maintain order, protect persons in high positions and prevent the dissemination of seditious libels. It was *not* intended to protect *private* reputations by means of civil actions. The

statute rather sought to protect the crown and the feudal state from the emerging middle class. Very severe and atrocious penalties followed conviction. Punishment might involve hanging, drawing and quartering, burning on the forehead, cropping the ears, slitting the nose, or a fine, imprisonment and the pillory.[14] Carter-Ruck, *Libel & Slander* at 38 (1972).

In 1389, against a background of lower-class discontent (the recent Peasants' Revolt), and continuing struggles among factions of "the great men of the realm", Parliament re-enacted *De Scandalis Magnatum,* but, significantly, withdrew its enforcement from the common law courts and placed it in the King's Council, a small administrative body which assisted the king. 12 Rich. 2, c.11 (1389). Parliament believed that conciliar jurisprudence was less subject to social pressures than were common law courts and juries. The criminal remedy was enforced by a committee of the King's Council, institutionalized as the Court of Star Chamber, from the name of the room with stars painted on its ceiling where the committee met. The Star Chamber was empowered to correct wrongs which could not be effectively remedied by the common law courts and which could not be corrected immediately by legislation. The Star Chamber had "unrestrained power to do substantial justice."[15] Veeder I at 563.

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14. *De Scandalis Magnatum* originally depended upon the common law courts for its application. The courts hesitated in the troubled 14th century to deal with critics of public officials, since these critics, themselves, might be holding office in a short time. Carr at 261.

15. In 1486 the Star Chamber received statutory recognition in a law which indicated that the Chief Justices of King's Bench and Common Pleas were permanent members, and that the Star Chamber could summon other common law justices to assist it. 3 Hen. 7, c.1 (1486). The wording of the statute clearly indicates the previous existence of the court.

The re-enactment of *De Scandalis Magnatum* thus placed in the Star Chamber the great duty of maintaining the feudal *status quo;* both the Parliament and the Star Chamber regarded defamation as a major threat to rule by nobility. Lovell at 1060. In implementing its mandate, the Star Chamber quickly came to ignore most oral defamations as being numerous but too fleeting to be of much effect. Writing was relatively rare so great weight attached to it. Veeder I at 566. It was the poems and pamphlets of 15th and 16th century England which were the subject of the Star Chamber's stern view. Lovell at 1060-61. The Star Chamber viewed any written criticism of government as a wrong meriting a heavy fine.

The court soon extended its work into non-political, private libels, because they too produced breaches of the peace threatening the social order; the Star Chamber was determined to preserve that order. *Id.* Although the duel remained a common method of vindication, the Star Chamber made every effort to suppress it.[16] The court would fine duelists heavily, and it would compensate a libel plaintiff by ordering his defamer to pay him damages. Veeder I at 555. The creation of the effective damage remedy was the "carrot" to attract the duelist to an orderly solution of his grievance.

The Star Chamber quickly concluded *no* defense was possible for a political libel. The Chamber reached the same conclusion for private libels. Lovell at 1061. Thus, the government official or private complainant had a great advantage in Star Chamber, the only question was whether

16. In 1613 James I issued a royal edict against duelling and this was supplemented in the following year by a Star Chamber decree on the same subject. From this time on the courts waged a continuous war against duelling in all forms. They refused to regard the duel as an affair of honor and held it to be an unlawful assembly in an aggravated form.

the defendant had published the offending remarks. The rule was now clear: words, in and of themselves, carried liability. By the close of the 16th century the law of libel as developed and applied by the Star Chamber was extremely effective:

> Private litigants, at least plaintiffs, had real inducement to turn from the by-then rather meaningless remedy of penance of the Church courts and from the monetary damages of the moribund manorial courts, to Star Chamber. Its consistent favoring of the plaintiff and the certainty that its orders for compensation payments would be enforced made it a popular tribunal for growing numbers of people smarting under written imputations about their characters. . . . The plaintiff in a libel cause before Star Chamber began and ended his own efforts when he filed a bill with its clerk. . . . On the basis of its findings, usually the mere fact of publication, Star Chamber issued its order, generally against the defendant, requiring him to pay a fine to the government, or compensation to the plaintiff, or both.

Id. at 1061-62. The Star Chamber had established the doctrine of libel *per se* in all respects but name: damages and ill will were presumed.

The presumption of ill will in libel actions in the Star Chamber had its historical antecedent in the ecclesiastical courts, which, as noted above, presumed malice as a necessary ground for the assertion of jurisdiction. Of course, for the Star Chamber (and later the common law courts) malice was no longer a *jurisdictional* element; it remained, however, a necessary ingredient of the tort. Veeder II at 35-36. But since order demanded strict application of damages to defamatory words, proof of ill will could not be required (since it would often not be found).

The Star Chamber (and common law courts) had to adopt the ecclesiastical presumption of malice as the gist of the libel action if they were going to effectively invoke the alternative of damages. Malice was, therefore, presumed.

In cases of public defamation, the presumption of malice was particularly logical, given the concerns of the Star Chamber. Any writing critical of government *necessarily* imported malice. In *R. v. Barnardiston,* 9 S.T. 1333 (1684), a common law court explained the reasoning behind that presumption. Defendant's counsel argued that, as there was no evidence of malice in the publication of the writing, the accused was entitled to be acquitted. To that argument the reply was given that malice cannot be proved by direct evidence; but that, just as killing without provocation proved that the killing was with malice aforethought, so the publication of seditious writing proved the malicious intent. The court agreed with the latter argument:

> In case any person doth write libels, or publish any expressions which in themselves carry sedition and faction and ill will towards the government, I cannot tell how to express it otherwise in his accusation than by such words that he did it seditiously factiously and maliciously. And the proof of the thing itself proves the evil mind it was done with. If then, gentlemen, you believe the defendant, Sir Samuel Barnardiston, did write and publish these letters, that is proof enough of the words maliciously, seditiously and factiously laid in the information.

Id. at 1352.[17] Thus, if the jury found that the defendant

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17. The court also explained the reasoning behind the malice presumption this way:

> The law supplies the proof if the thing itself speaks malice and sedition. As it is in murder, we say always in the

(Continued on following page)

published the document, they were directed to return a general verdict of "guilty".

The presumption of malice harmonized well with the accepted pre-18th century view of government as ordained by God:

> If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good . . . it must necessarily follow that it is wrong (and malicious) to censure him. . . .

8 Holdsworth at 338 (1926). It is not immediately clear why the same rule should have followed for private libels, except that the Star Chamber concluded that private libels could be equally destructive of an ordered society. Requiring proof of malice for private libel would interfere with provision of a speedy alternative remedy to social disorder just as it would in the case of seditious libel. Thus, the presumption of malice in seditious libel actions was extended to private libel actions.

Crucially for the history of the law of libel, and inevitably considering its basic orientation, the Star Chamber gave short shrift to truth as a defense. There could never be a "truthful" written criticism of the superior sovereign and his officials. 8 Holdsworth at 338. For example, it was said in the Star Chamber: "Let all men take heed how they complain in words against any Magistrate for

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Footnote continued—

> indictment, he did it by the instigation of the devil: can the jury if they find the fact, find he did it not by such instigation? So, in informations for offences of this nature, we say, he did it falsely maliciously and seditiously, which are the formal words; but if the nature of the thing necessarily imports malice reproach and scandal to the government, then needs no proof but of the fact done, the law supplies the rest.

Barnardiston, supra, at 1349.

they are Gods". Carter-Ruck at 42. Truthfulness of a libel against a private person also was not a defense because a truthful allegation would not prevent a challenge and a breach of the peace. Sir Edward Coke, Chief Justice of Common Pleas and legal scholar, gave an example of this logic in *Libellis Famosis,* 5 Co.Rep. 125a, 77 Eng.Rep. 250 (Star Chamber 1609):[18] "For as the woman said she would never grieve to have been told of her red nose if she had not one indeed". The only "fact" therefore of concern to Star Chamber was that of publication; "truth availed the defendant in a libel action not at all in Star Chamber." Lovell at 1062. Presumptions of malice, falsity and damage followed from the words. If publication could be proved, the remedy was awarded.

In exercising its jurisdiction over libel, the Star Chamber was assisted by the government practice of licensing the press. Veeder I at 561. The absolute monarchy was keenly aware of the danger posed by this latest method for disseminating ideas: the printing press. In earlier times libels were comparatively rare and harmless: rare because few could write, harmless because few could read. A new import was given to the written word when Craxton set up the first press in England at Westminster in 1476. Lovell at 1062. From the very beginning, Church and State alike assumed control over the press as they had previously regulated the diffusion of manuscripts.[19] Veeder I at 561.

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18. 1606 is also often given as the date of *Libellis Famosis.*

19. The Church had long suppressed the diffusion of ideas which it deemed pernicious. Imperial power cooperated by burning condemned books. But the total destruction of pernicious books was no longer feasible after the invention of printing.

(Continued on following page)

Censorship became part of the royal prerogative, and the printing of unlicensed words was visited with severe punishment. Government control of the press was enhanced by the monopoly on printing granted in 1557 to the new Stationer's Company, which had the power to seize all publications it had not published itself.[20] Lovell at 1062. The number of presses and the whole matter of printing was strictly limited in all details.[21] Under Elizabeth, the censorship was enforced by still more rigorous penalties, including mutilation and death. Nothing whatever was allowed to be published, except royal documents and law reports, until it had been first "seen, perused and allowed" by the Archbishop of Canterbury and the Bishop of London. Veeder I at 562. The development of libel *per se* in the Star Chamber as a means of indirectly controlling the printed word was coincidental to, and served the same purpose as, these efforts of the crown to control directly the printed word.

Footnote continued—

The Church attempted to forestall publication by prohibiting the printing of all works save those first seen and allowed. Publications without such license were burned. As this method did not meet with complete success, it was supplemented by indices or catalogues of books, the reading of which by the faithful was prohibited. Such lists were issued in many parts of Europe by sovereigns, universities, and inquisitors during the 16th century. Pope Paul IV issued an index in 1559, but the papacy as such took no part in the process until the Council of Trent, the outcome of which was the famous index of Pius IV, in 1564. Veeder I at 561.

20. The Stationer's Company was composed of 97 London stationers, *i.e.*, printers and their successors.

21. Unauthorized publications, and their printers and authors, fell under the strict view of the Star Chamber, which from time to time drafted press regulations aimed at checking the rash of pamphleteering during the religious and political controversies of the Tudor and early Stuart periods. Lovell at 1062-63. Additionally all printing was prohibited except in London, Oxford and Cambridge. Veeder I at 562.

D. Slander In The Common Law Courts

Finally, in the 16th century, the common law courts (which had jurisdiction of the tort in the original *De Scandalis Magnatum* but were divested of it in the re-enactment of the statute) recognized a claim for defamation on their own. Again, the claim was recognized and the remedy devised to suit prevailing societal interests. It was the lack of a monetary remedy for oral defamation which caused the common law to focus its attention on aspects of defamation.[22] In 1536, a common law court refused to accept a suit of defamation in which one party had called the other a "heretic" on the grounds that the allegation, if true, would have given jurisdiction to the ecclesiastical courts. However, the court stated that had the charge been one of a crime indictable at common law, it would have accepted the action if the plaintiff had alleged (and ultimately proven) actual damages resulting from the imputation. *Y.B. Mich.*, 27 Hen. 8, pl. 4 (1536), *cited in* 3 Holdsworth, *A History of the English Law* 411, n. 2 (1923).

Thus, as the ecclesiastical courts had found defamatory only allegations of canon law offenses, so the common law courts considered defamatory only allegations of crimes indictable under the common law.[23] This approach ex-

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22. The legal reporter *The Abridgements of the Year Books*, which ended in 1536, to be replaced by semi-official Law Reports, failed to show any common law interest in defamation. It is true that the *Year Books* do hint of 10 possible defamation actions between 1327 and 1536. But the *Abridgements* simply do not mention defamation as a common law action. Carr at 388. Thus, before 1536 oral defamation fell to the ecclesiastical courts applying remedies of scant merit to middle-class merchants or nobles with their touchy honors.

23. This requirement that the allegation be of a crime indictable at common law could produce some odd results. Thus a statute in 1570 gave jurisdiction over usury to the Church

(Continued on following page)

cluded much violent or offensive language, no matter how heinous, from the original common law definition of defamation. The common law still did not distinguish between oral and written defamation, but the Star Chamber already offered swift and certain remedies for libel. Thus, the great bulk of defamation cases flowing into the common law courts involved oral expression—slander. Lovell at 1064.

The middle class, utterly dissatisfied with ecclesiastical remedies afforded to one defamed, immediately exploited the common law slander action. Accordingly, the common law courts were inundated with slander actions in the latter part of the 16th century. Carter-Ruck at 39. The justices, overworked as a result, tried to stem the flood they had unleashed by creating doctrines to limit defamation.[24] In theory, the limits applied without regard to whether the statement was written or oral, but, in practice, they applied only to slander. Lovell at 1064. The application of these limiting rules to slander actions would subsequently prove to have major impact on the differing common law treatment of oral and written defamation.

Footnote continued—

courts (*An Act Against Usury,* 13 Eliz. 1, c.8), so that imputation of usury would fall to them and would not be susceptible of monetary compensation for any damages caused thereby. Allegations of sexual offenses, capable of producing extreme damage, were in the same category. Thus charges of fornication, an offense "unknown" to the common law, would receive no remedy from it. And until 1908, when incest was made a secular crime (*Punishment of Incest Act,* 1908, 8 Edw. 7, c.45), an allegation of it would receive no notice from the common law. In fact, between the abolition of defamation jurisdiction of the ecclesiastical courts in 1855 and 1908, there was no remedy anywhere for such a false charge.

24. Coke expressed the prevailing feeling: "We will not give more favor unto actions upon the case for words than of necessity we ought to, where words are apparently scandalous, these actions being now too frequent." *Croft v. Brown,* 3 Bulstrode 167, *cited in* Veeder I at 559.

Borrowing from canon law principles, the common law justices, in their desire to check the flood of slander actions, insisted that the allegation had to be precise as to the common law crime and the person accused of committing it. Vagueness on either count meant dismissal of the action. To accuse a man of having burned a barn was held not to be actionable, as this was no felony if the barn was neither a parcel of a mansion house nor full of corn. *Weaver v. Cariden*, 4 Co.Rep. 16a (1595). The accusation, as in canon law, had to be "published" to a third party for the plaintiff to have suffered any damage. Lovell at 1064. The judges also took a strict view as to what damage would, or would not, be sufficient to sustain an action for slander. They adopted the principle that nothing short of proof of special temporal damage sustained as the direct result of the words complained of would enable the plaintiff to succeed. Carter-Ruck at 40.

Unlike the libel doctrines developed by the Star Chamber, but like the canon law of ecclesiastical courts, the common law afforded the defendant in a slander action the complete defense of truth. The common law reasoned that a true statement, regardless of its defamatory content, could not have caused damage. Veeder I at 558. Thus, the common law justices recognized a freedom to speak the truth in slander actions which had been consistently refused in libel actions coming before the Star Chamber. The principal reason was not the difference in permanence between the spoken word and the written word, but, rather, the utility of requiring trial on the issue of falsity to limit the availability of the tort in common law courts and thus control the case load.

Finally, judges sought to stem the number of slander actions by employing the legal doctrine of *mitior sensus*. According to this doctrine, language which could be tor-

tured into a harmless statement, by any process of scholastic ingenuity, would not be actionable. *Id.* at 558. The doctrine of *mitior sensus* was apparently first applied in *Stanhope v. Blith,* 4 Co.Rep. 15a, 76 Eng.Rep. 891 (K.B. 1585), and produced the remarkable judicial "logic" of viewing a "forger" as simply an honest blacksmith.[25] Perhaps the most absurd case was *Holt v. Astgrigg,* Cro. Jac. 56 (1608), cited in 8 Holdsworth 360 (1926), where a seemingly clear accusation of homicide had been made: "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder and the other on the other." The court, however, held that these words were not actionable:

> . . . it is not averred that the cook was killed, but argumentative. The Court was of that opinion, Fleming, Chief Justice, and Williams *absentibus;* for slander ought to be direct, against which there may not be any intendment: but here notwithstanding such wounding the party may yet be living; and it is then but trespass. Wherefore it was adjudged for the defendant.

Id. Remarkable judicial acrobatics in applying *mitior sensus*[26] did check the flow of slander actions, which was

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25. Frequently cited decisions employing the twisted logic of *mitior sensus* include *Hext v. Yeomans,* 4 Co.Rep. 15b (1585); *Weaver v. Cariden,* 4 Co.Rep. 16a (1595); *Barham v. Nethersal,* 4 Co.Rep. 20a (1602); *Eaton v. Allen,* 4 Co.Rep. 16b (1598); *Jackson v. Adams,* 2 Bing. N.C. 402 (1835). A thorough analysis of doctrine of *mitior sensus* appears in 8 Holdsworth at 351-60 (1926).

26. It has been very truly said that because of the doctrine of *mitior sensus* it was mere lottery whether or not any particular words were held to be defamatory or actionable. As Sir F. Pollack said: "Minute and copious vituperation was safer than terms of general reproach, such as 'thief', inasmuch as a layman who enters on details will probably make some impossible combination" and therefore the statement will not be actionable. Pollack, *Torts* (12th ed.) at 242.

frankly admitted by Chief Justice Wray to be the purpose of the doctrine. 8 Holdsworth at 353-55 (1926).

Once the initial flood of slander actions had been checked, the common law justices, during the first half of the 17th century, refined the doctrines used to limit slander. Lovell at 1065. The judges held that particular allegations were so obviously defamatory that the words were actionable in and of themselves, *i.e.,* slander *per se.* While having to allege damages in these actions, the plaintiff did not have to prove them and their actual measurement was left to the jury. The imputations termed "slander *per se*" were described in *March's Actions for Slander,* published in 1647, *cited in* Carter-Ruck at 41. Thus, the allegation of an indictable crime was slander *per se* because, if true, the charge would have deprived the plaintiff of his liberty and even his life. Similarly, the allegation of a loathsome, contagious disease (initially leprosy but later enlarged to include venereal disease) was slander *per se* because, if true, it would have caused the issuance against the plaintiff of the writ *de leproso amovendo,* cutting him off from society. The third type of slander *per se,* reflecting middle-class concern about commercial fiscal standing, was the imputation of unfitness of the plaintiff in his trade or profession. Veeder I at 558.

The common law rules of slander were firmly established by the early 17th century. With the exception of *per se* claims, slander remained an action where the plaintiff was required to allege and prove a precise connection between the defamatory words and damages suffered. In both slander and slander *per se* actions, the jury could mitigate damages and also find for the defendant by finding that his words had been true. Although the common law did not limit the applicability of these defamation doctrines to oral communications, in practice in the early 17th

century they governed only slander because slander was all the common law courts had the opportunity to consider. Libel fell almost entirely to the Star Chamber, which only rarely took note of verbal defamation.

Practically, therefore, by the mid-17th century there were three separate systems of jurisprudence for defamation. Canon law, viewing defamation as a sin to be corrected, had lost most of its jurisdiction due to the inadequacy and uncertainty of its remedies for middle-class people. The two active systems were the administrative system of Star Chamber and the judicial system of common law courts. Libel was primarily handled by the former and operated on the assumption that the printing of a defamatory word caused damage. Slander was managed principally by the common law courts which were significantly less willing to presume liability.

E. The Development Of Common Law Libel In The English Common Law Courts From 1680 Until The Independence Of The Former English Colonies

The informal separation of slander and libel actions which existed in the early-17th century was agreeable to the common law judges, who saw no reason to add actions for libel to their already busy calendars. Lovell at 1066. The monopoly by the Star Chamber over libel cases was approved by Coke in the landmark case of *Libellis Famosis, supra.*[27] The cause arose out of an "infamous libel in verse" by which the Archbishop of Canterbury and the Bishop of England were "traduced and scandalized".

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27. *Libellis Famosis, supra,* is regarded by some as the formal starting point of the English law of libel. Veeder I at 566. While such a conclusion is certainly overdrawn, *Libellis Famosis* does clearly state the law of libel as applied by the Star Chamber and its reasoning.

Veeder I at 565. When the anonymous writer and printer of the poem were uncovered, the Star Chamber acted promptly and sternly. Coke admitted that the injured parties might have applied to the law courts for relief, but he clearly indicated that the Star Chamber was the proper tribunal for libels, particularly anonymous ones:

> [F]or in a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, . . . and of such [secret] nature [as poisoning] is libelling, . . . and therefore when the offender is known, he ought to be severely punished.

Libellis Famosis, supra at 77 Eng.Rep. 251.

Between 1650 and American independence, the crown's greatest concerns remained the keeping of the peace and the prevention of criticism of the government and its officials. The Star Chamber's libel decisions reflected these concerns until 1640:

> Coke and his brethren were men of the upper classes, profoundly conscious of how narrow was the line between internal order and anarchy, and they clearly regarded the tort-damage approach of the common law to slander as insufficient to deal with libel. Instead, they preferred to have administrative jurisprudence with much more stringent doctrines deal with libels, rather than seek to assimilate them to the common law tort of slander.

Lovell at 1067. Until 1640 the Star Chamber's control of the law of libel was virtually exclusive; slander remained in the common law courts.

In the turbulent time prior to the beheading of Charles I in 1649, the Long Parliament abolished the Star

Chamber (as well as the ecclesiastical courts)[28] as part of its attack on non-common law tribunals. Libel actions were now in the common law courts. But the abolition of the Star Chamber did nothing to extinguish its repressive libel doctrine, which had already been absorbed into the corpus of the common law. Veeder I at 568. The Star Chamber has lived on long after its formal death through the doctrine of *stare decisis*. The effect of the common law tradition of precedent, powerful in any circumstances, was only enhanced by the prevailing view that government would fall without a strict law of libel. As one common law court observed in the early-18th century:

> If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it.

R. v. Futchin, 14 S.T. at 1128 (1704), *cited in* 7 Holdsworth, *A History of the English Law* at 341 (1926). This view of the law had harsh consequences for libel defendants. For example, in *R. v. Barnardiston*, *supra*, the defendant was required to pay the monstrous fine of 10,000 pounds for the mere expression of political opinions to a private friend in a private letter.

Truly Draconian press licensing and censorship by the government waned by the late 17th century. Yet for

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28. The ecclesiastical courts were later restored in 1661, but were stripped of any practical means of exercising jurisdiction over defamation. Lovell at 1067.

precisely that reason, it was believed that the Star Chamber's harsh libel doctrine needed strict enforcement in the common law courts. Press licensing and censorship lessened during this period, thus Restoration judges needed a potent judicial weapon against political libel during the turbulent period after the crown was reinstated in 1660.

The Restoration press licensing statute expired in 1679. Less than a year later, Charles II asked the justices of the King's Bench whether prosecution for seditious libel was possible absent statutory authorization to license the press.[29] The justices unanimously advised that such a prosecution was possible because royal power to license the press was not statutorily derived but was part of the royal prerogative.[30] *R. v. Carr,* 7 How. State Tr. 1111 (Nisi Prius 1680). Chief Justice Scroggs[31] extended the doctrine even further in stating that any publication printed without government permission and which was "scandalous" (*i.e.,* offensive to the crown, public officials, or private persons by conveying "false" news) should be regarded as an indictable offense at common law. *Id.* at 1124-30. Soon afterward in *R. v. Harris,* 7 How. State Tr. 927 (Nisi Prius 1680), Scroggs declared flatly that no public or private dissemination of news was legal without government per-

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29. Charles II request was prompted by a burst of "unauthorized" pamphleteering, largely by Whigs, and often violently opposed to prevailing royal religious and foreign policy. One particularly virulent publication by Henry Carr, *The Weekly Pacquet of Advice from Rome, or the History of Popery,* stirred the king. Lovell at 1068.

30. Long afterwards Lord Camden pronounced this resolution of the judges "extra judicial and invalid." *Entick v. Carrington,* 2 Wils. K.B. 275, 95 Eng.Rep. 807 (1765).

31. In 1680 a change in the political tides caused the House of Commons to impeach Scroggs on various charges, among them, not that he had enunciated the high prerogative doctrine borrowed from Star Chamber about the press, but that he had applied it to Protestants. 8 Holdsworth at 340 (1926). Scroggs was dismissed before being brought to trial.

mission and that lacking such authorization, the dissemination, no matter how narrow or by what means, constituted a breach of the peace.

Royal prerogative soared to new heights. The Star Chamber's views on political libel became criminally enforceable in the law courts. The Restoration had numerous trials for seditious libel.[32] Lovell at 1069.

The only issue for *jury* determination in such trials for seditious libel was that of publication. No factual defense of truth was permitted; the truth or falsity of the statement was a matter for *judicial* decision. 8 Holdsworth 343 (1926). But the judicial "decision" was preordained. In their decisions on this issue the justices continued the view of the Star Chamber that written criticism of the government must always be "false" and malicious and so merit severe punishment. No change had occurred; a conclusive presumption of falsity arose from the words themselves. Nor would Restoration judges permit a defense of lack of ill will any more than had the Star Chamber in seditious libel cases; malice, too, was conclusively presumed. Lovell at 1069.

In 1670 Chief Baron Hale took the *formal* step of separating libel and slander in the common law. *King v. Lake*, 145 Eng.Rep. 552 (Exch. 1670).[33] The case arose from the written statement by the defendant that a petition by

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32. Seditious libel cases culminated with *The Case of the Seven Bishops*, 3 Mod. 212, 87 Eng.Rep. 136 (K.B. 1688). In that case the malicious and seditious intent of the writing was left to the jury, and the jury thwarted the bench by a verdict simply of "not guilty". All the legal talent of the day was enlisted on the side of the bishops and it proved too great for a bench of judges approved by James II. Thus, it is impossible to look to *The Case of the Seven Bishops* as precedent for any legal proposition whatever. 8 Holdsworth at 344.

33. For a detailed and entertaining account of the case, see Hickson & Carter-Ruck at 17-18.

the plaintiff, a barrister, was "stuffed with illegal assertions, ineptitudes, imperfections, clogged with gross ignorances, absurdities and solecisms. . . ." *Id.* Hale held that although the words "spoken once" would not be actionable, "they being writ and published" contained more malice and were therefore actionable. *Id.* at 553.

Baron Hale's decision formally set out libel as a separate tort in the common law courts, accepting the doctrinal basis for the tort set out in the decisions of the extinct Star Chamber. Private libel thus differed dramatically from slander. It carried with it presumptions of malice, falsity, and damage that slander did not. Like slander *per se* but unlike slander, private libel did not require plaintiff to *prove* damage. Like seditious libel but unlike slander, it left only the question of publication for the jury. Malice was conclusively presumed. Truth was a technical defense in a private libel action *as a matter of law,* but as noted above, the courts always found the defamatory statement to be false. Lovell at 1071. Thus, as the tort passed to the American Colonies and then to American jurisprudence following adoption of the Constitution in 1791, libel had become a separate tort with harsh presumptions substantially similar to those of seditious libel.

F. The Harsh Presumptions Associated With Libel *Per Se* Under The English Common Law Reflected Fundamental Socio-Economic Needs Of The Feudal Age Which Do Not Exist Today

The quasi-punitive presumptions triggered by written defamation at common law reflected the governmental and societal interests of feudalism. The Star Chamber and the common law courts designed a powerful and efficient libel action to prevent breaches of the peace to prevent

criticism of the king and the great men of his realm, and to protect the infant commercial enterprises. Falsity, malice and damage were presumed because had they not been, the provision of a speedy alternative remedy to social disorder would have been impaired.

1. Libel Presumptions Were Established To Prevent Breaches Of The Peace

The doctrine of common law libel developed in a semi-civilized society; maintaining order was still a serious matter. A written defamation, at the time rare and therefore given great importance, was likely to incite revenge. For serfs revenge came in the form of blood feuds—small wars between families likely to grow and cause great disorder. For a nobleman the code of honor at the time demanded a challenge and duel. The Church and the government sought to eliminate this violence, but offered no alternative to private revenge.

The Star Chamber and the common law recognized this problem and in an effort to prevent future breaches of the peace offered the defamed person a very attractive alternative—the libel action. The plaintiff in a libel action needed only to prove that the defendant published the defamatory language. Ill will and damages were presumed, and the truth or falsity of the statement mattered not at all. The courts were not interested in freedom of expression nor even protection of reputation, but merely in stopping the violence that written defamations inevitably produced in feudal England. Resort to private revenge became minimal as the powerful weapon of certain damages for the libelous statement emerged.

2. Libel Presumptions Protected The King And The Great Men Of Feudal England From Criticism

In the 14th century a small middle class of merchants emerged in England. They were critical of the king's feudal policies which limited their financial growth. The king wished to maintain feudal society and suppress middle class criticisms. To that end strict criminal libel statutes with harsh penalties were enacted while oral criticisms were virtually ignored.

The Star Chamber and the common law courts protected the king and the great men of his realm with these statutes. After all, the prevailing view was that government was ordained by God. Therefore, anything critical of it was defamatory, malicious, false, and damaging. The common law applied these presumptions to private libel actions as well. Thus, the common law libel presumptions were established to protect the "divine" king and suppress freedom of expression.

3. Libel Presumptions Protected The Financial Interests Of The Emerging Middle Class

The middle class merchants of that time relied solely on their reputation as reliable and honest businessmen for their financial success. If someone defamed them, the merchants could be financially ruined. There was no governmental regulation of business to maintain quality standards. Customers relied solely on the reputation of the various merchants in the community when deciding to make a purchase.

The merchants demanded protection from defamation and its devastating effects. The response of the common

law courts was mixed. Slander was not taken seriously and the courts attempted to discourage merchants from bringing such actions. But almost as if to compensate for their light treatment of slander actions, the courts took a stern view of libel. The common law libel presumptions of malice and damages protected merchants from written defamation, and customers dared not criticize the merchants for fear of severe penalties. Again freedom of expression was given short shrift.

The libel presumptions, with their origins in feudal society, became increasingly incongruous with society's changing views of government and freedom of expression:

> [H]aving their origin and commencement in conditions of medievalism, are asserted and enforced as they were in the time of the bigotry and superstition from which they sprung; here gross falsehoods, under the name of fictitious and presumptions, still masquerade as sober truths, here we have the same crochets, conceits, shams, and legalized falsehoods which prevailed in the law three hundred years ago.

Courtney, *Absurdities of the Law of Slander and Libel*, 36 American Law Review 552, 552-53 (1902).

4. The Factors Underlying The Three Presumptions Of Libel *Per Se* Are No Longer Viable Reasons For Presuming Speech To Be Actionable

Society today is not semi-barbaric. Self-help and violent revenge by armed conflict are not imminent threats to orderly living. Consequently, the central reason for the harsh libel presumptions of the old English common law is no longer viable. Citizens today are protected by a sophisticated law enforcement apparatus, and the rule of

law is thoroughly and deeply ingrained. Expression need not be presumed malicious, false, or damaging in order to deter the average person from taking the law into his own hands.

Similarly, the desire to insulate the feudal system and its authoritarian social structure from criticism may no longer be regarded as a basis for presuming expression to be harmful. As shown *infra,* the assumptions upon which government in this country is based are democratic in nature, not authoritarian. Speech is to be preferred and protected, not feared and repressed.

Finally, as the merchant class evolved in this country, extensive commercial legislation developed to protect both the public and merchants from unscrupulous businessmen. The need for a trade slander action diminished, and as shown *infra,* the commercial world instead required relief from the harsh libel presumptions to allow for commercial expression.

As the development of libel doctrine in this country demonstrates, *see infra,* Part III, the presumptions against expression forged by the old English common law should be eliminated. Expression should be presumptively protected.

II. THE HARSH PRESUMPTIONS OF THE ENGLISH COMMON LAW WERE LARGELY REVERSED BY AMERICAN COURTS WHICH ADOPTED QUALIFIED PRIVILEGES TO PROTECT SOCIALLY DESIRABLE SPEECH

By the eighteenth century, criticism of the doctrine of seditious libel permeated English political discourse. Attacks on the doctrine were even stronger in the colonies where the values that underlay the doctrine were definitively rejected. Concern for the serious threat to free-

dom posed by the doctrine of seditious libel was reflected in the First Amendment of the Bill of Rights. The clearest statement of the purposes of the Amendment as understood by its drafter, James Madison, is contained in the Virginia Report of 1799-1800. Criticising the Alien and Sedition Acts, Madison argued that our "altogether different" form of government necessarily implied "a different degree of freedom of the press." *New York Times v. Sullivan,* 376 U.S. 254, 274-75 (1964), *quoting* 4 Elliot's Debates on the Federal Constitution 569-70 (1876) (J. Madison). Seditious libel might have its place in England but it could not be tolerated in the new nation. "[T]he right of freely examining public characters and measures" had to be preserved, for it constituted "the only effectual guardian of every other right". *Id.* at 274, *quoting* 4 Elliot's Debates at 554 (resolution of General Assembly of Virginia). *See generally* V. Blasi, *The Checking Value in First Amendment Theory,* 3 American Bar Foundation Research Journal 521, 529-38 (1977).

A. American Courts Significantly Altered The English Common Law In Order To Protect Socially Desirable Speech

The harsh presumptions which constituted libel *per se* were too restrictive of freedom of expression to survive undisturbed. Over time, the common law in America evolved to reflect the dramatic difference between feudal English and modern American values. Courts gradually altered their interpretation of the elements of the tort of libel to mitigate the force of the presumptions. For example, although malice and damages were still presumed when certain words were used, evidence which had traditionally been excluded was admitted to help the defendant rebut—but not defeat—the presumptions. Thus, courts began to admit evidence of the substantial truth of

the statement made, not to justify or excuse the statement, but to partially rebut the presumption of ill will the words raised and thereby mitigate damages. *See, e.g., Jones, Varnum & Co. v. Townsend's Administratrix,* 21 Fla. 431, 442-43 (Fla. 1885).

However, the most powerful common law tool employed by the courts in undercutting the presumptions of libel *per se* was the qualified privilege. It was primarily with the aid of the common law qualified privileges that American courts adapted the libel tort to American values. Malice remained, as it does today, one of the key elements of the tort. But if a defendant could show that his communication was protected by a qualified privilege, the court would not presume that he had acted with ill will. Instead, the court would presume the defendant's good faith and the plaintiff would be required to prove with extrinsic evidence that the defendant had been motivated by malice. By placing the burden of showing ill will on the plaintiff, American courts recognize a value the Star Chamber had rejected—the value of speech. The Star Chamber was implementing a social structure which loathed written expression as dangerous to the continued vitality of the structure itself. The doctrine of qualified privilege recognized that expression in America is the very cornerstone of our social structure. Reversing this burden reflected the change in social values between the free society of a rapidly industrializing heterogeneous culture and the static authoritarian society of feudal England.

The concept of qualified privilege—developed in England in the early 19th century[34] and increasingly em-

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34. *Toogood v. Spyring,* 1 C.M.&R. 181, 193, 149 Eng.Rep. 1044, 1050 (Ex. 1834) ("If fairly warranted by any reasonable occasion or exigency, and honestly made [some], communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.").

ployed by American courts in the 20th century—undermined the libel *per se* presumptions in two ways: (i) the analysis was fact-specific, thus opposed to the general logic of presumptions, and (ii) where a privilege was specifically found, the presumption of malice would be defeated. Interpreted expansively, the qualified privilege allowed American courts to restrict the common law doctrines of libel law and increase the protection given preferred forms of expression.

B. The Qualified Privilege Analysis Employed By The Courts Necessitated A Fact-Specific Inquiry Which Further Undermined The Libel *Per Se* Presumptions

Initially, qualified privileges were recognized in those instances in which no real reason to presume malice existed. A privilege would be found when the party making the communication and the party receiving it had some mutual interest—whether legal, or otherwise—in the subject matter of the communication which could be served by making the communication. *Abraham v. Baldwin,* 52 Fla. 151, 42 So. 591, 592 (Fla. 1906); *see Briggs v. Brown,* 55 Fla. 417, 46 So. 325, 330 (Fla. 1908). Thus, in order to decide whether a privilege existed which shifted the burden of actually proving malice to the plaintiff, the courts were forced to look beyond the words themselves to the full set of circumstances attending the communication:

> In determining whether or not a communication is privileged, the nature of the subject, the right, duty, or interest of the parties in such subject, the time, place, and circumstances of the occasion, and the manner, character, and extent of the communication, should all be considered.

Abraham v. Baldwin, supra, at 592.

Thus, the very mode of analysis necessitated by the recognition of the concept of the qualified privilege ran counter to the notion of the Star Chamber rules of libel and its fact-blind presumptions. Whether a court eventually found a privilege to exist in a particular case or not, it was nonetheless required to consider all of the facts involved; the mere allegation that certain words had been communicated to some third party could no longer sustain a cause of action in libel in most cases. As the Fifth Circuit (applying Florida law) ultimately stated:

> No general rule can be laid down defining absolutely what words are defamatory and what are not. Words which would injure A's reputation, might do no harm to B's. In determining whether or not particular language is defamatory, the particular facts in each case govern and the effect, not the form, of the language is the criterion.

Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., 378 F.2d 377, 381 (5th Cir. 1967).[35]

C. The Doctrine Of Qualified Privilege Expanded To Protect A Wide Variety Of Communications Considered Socially Desirable

The general qualified privilege "formula" of right, interest, and duty was employed by the courts to insulate an ever broader range of expression. Where society recognized the interest furthered by the communication as legitimate, courts would find a qualified privilege to protect the communication. Defamatory statements made in

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35. Part of the new fact-specific libel inquiry was the "effects" test noted in *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254 (Fla. 2d DCA 1970). According to the *Hill* Court, if the libel published had the same effect on the mind of the reader as the pleaded truth would have had, no actionable libel could be considered to have occurred.

the course of business to parties having an interest in that business were early recognized as privileged, *see Montgomery v. Knox,* 23 Fla. 595, 3 So. 211 (Fla. 1887). Society, and therefore the courts, recognized the interests of business which demanded that communication in certain circumstances be free. This privilege for business communications reached a range of statements, from those concerning the honesty of employees, *see Abraham v. Baldwin, supra,* to those relating to the creditworthiness of potential customers, *see Putnal v. Inman,* 76 Fla. 553, 80 So. 316 (Fla. 1918). It explicitly did *not* encompass communications intended to deter competition, communications society had no interest in fostering. *See Teare v. Local Union No. 245,* 98 So.2d 79 (Fla. 1957).

A similar privilege protected communications between governed and government concerning governmental affairs, *see Coogler v. Rhodes,* 38 Fla. 240, 21 So. 109 (Fla. 1897) (privilege protects letter from voter to governor concerning would-be appointee). It was, in fact, in this all-important area that the greatest expansion of qualified privilege and the range of protected expression occurred. The expansion occurred along two planes: both the subject matter to which the qualified privileges could apply and the class of person entitled to receive the privileged communication were enlarged as the law developed. In 1885, this Court in *Jones, supra,* refused to recognize a privilege for publications of a newspaper concerning a candidate for office because the audience reached was too large. By 1927, however, this Court was willing to acknowledge that a qualified privilege did protect a newspaper's articles concerning the character of a candidate for city commissioner. *State ex rel. Arnold v. Chase,* 114 So. 856 (Fla. 1927). To the extent the information communicated related "to the public welfare", the Court noted, the "public" had a cognizable and protected interest in the com-

munication. *Id.* Thus, if the article in question involved an issue of public concern, it was, according to the general definition of qualified privilege, protected barring a showing by plaintiff that it had been motivated by malice. *Cf. Kennett v. Barber,* 31 So.2d 44 (Fla. 1947) (individuals seeking public employment put private character in issue as well).

One specific news-related privilege that grew out of the general qualified privilege protecting the newspaper/public relationship, was the privilege for "republication" recognized in *Layne v. Tribune Co.,* 146 So. 234 (Fla. 1933). There, the Court ruled that the "mere reiteration" of an "apparently authentic news dispatch" from a "generally recognized reliable source" was privileged, barring an actual showing of malice. *Id.* at 238. To hold otherwise, the Court argued, would be to unduly hamper the press in the performance of its essential task. Moreover, the fact that the news item was simply *re*published "implied rebuttal of any presumption of malice." *Id.* The traditional presumptions of libel had to give way to the actual circumstances of the case at bar.

Although the qualified privileges recognized and developed by Florida courts greatly increased the protection afforded speech considered socially valuable, the protection that the privileges could provide was necessarily limited by the common law categories from which the privileges grew. Having recognized a qualified privilege for newspaper accounts of events of public interest, courts nonetheless remained hesitant to extend the privilege in some cases. The privilege of "fair comment" was interpreted unevenly, and often failed to provide protection for just those controversial communications which needed and deserved it most. *See, e.g., Crowell-Collier Publishing Co. v. Caldwell,* 170 F.2d 941 (5th Cir. 1948); *O'Neal v. Tribune*

Co., 176 So.2d 535 (Fla. 2d DCA 1965); *Miami Herald Publishing Co. v. Brautigam*, 127 So.2d 178 (Fla. 3d DCA 1961). The presumption that every false statement was a malicious one, although not explicit, lingered as the common law.

Thus, even prior to the advent of the United States Supreme Court's self-conscious reevaluation of the continuing viability of the Star Chamber presumptions in libel law in light of the First Amendment, this Court (and courts in other states) had for certain classes of speech substantially reversed the presumptions of common law libel to protect the important values embodied in the American social structure. While acknowledging the need to find damage, falsity, and ill will as the predicate for the publisher's liability, this Court recognized that in many cases (and specifically in newspaper accounts of events of public interest), placing the burden of showing the existence of ill will on the plaintiff better suited American social values.

III. THIS COURT SHOULD ELIMINATE THE REMAINING PRESUMPTIONS OF LIBEL *PER SE*

It was not until 1964 that the United States Supreme Court did self-consciously reevaluate in light of the First Amendment the doctrine of libel *per se* inherited from the Star Chamber. This case affords this Court an opportunity to continue the process of rationally reappraising the appropriateness of the common law libel doctrines in a society which protects rather than suppresses expression.

Qualified privilege, where it existed, shifted the burden of proving malice and damage to the plaintiff. If the plaintiff could show the defendant had acted with malice, the plaintiff had met his burden and could recover. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the

United States Supreme Court introduced a new doctrine to defamation law which protected the defendant from liability even where the plaintiff had succeeded in affirmatively establishing common law malice. The Court held that if the plaintiff were a public official, he could not prevail absent clear and convincing evidence of "actual malice" defined as knowledge of the falsity of the defamatory statement or reckless disregard of its truth or falsity. *Id.* at 279-80. "Actual malice" did not refer to the ill will that had always been an essential element of the libel tort at common law, but instead constituted an entirely new fault requirement unrelated to defendant's motive. An "actual malice" requirement was a necessity, the Court held, if defendants were to receive the protection the Constitution guaranteed them and which state common law privileges had failed to provide.[36]

Ten years later, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court again altered the face of defamation law. Considering a case in which the plaintiff was a private figure rather than a public official, the Court held that the Constitution mandated that such a plaintiff must show the defendant had acted with some degree of fault with respect to falsity and must prove he suffered actual damages unless he could show "knowing falsity" by the publisher. The degree of fault to be required was left to the states to determine;[37] the Court

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36. The state tort law examined in *New York Times* was Alabama's. Alabama's definitions of libel *per se* and of the qualified privileges are very similar to Florida's.

37. The question of the proper fault standard to apply in private figure libel cases is currently pending before this Court in *Tribune Co. v. Levin*, Case No. 63,217, *argued* January 10, 1984, and *Miami Herald Publishing Co. v. Ane*, Case No. 63,114, *argued* January 10, 1984. In those cases, petitioners argued that, in light of Florida's history of strong common law privileges, it would be inappropriate to require plaintiff to show only negligence on the part of defendant in order to recover.

held that the Constitution required only that *some* fault be shown.

Like *New York Times, Gertz* added constitutional elements to the states' existing common law tort requirements of publication, falsity, malice and injury. With the imposition of these constitutional requirements, the Supreme Court largely eviscerated the libel *per se* presumptions. Thus, after *Gertz,* in order to recover in libel, a plaintiff, regardless of his status, must establish ill will, the falsity of the statement, the defendant's fault in publishing it ("actual malice" in the case of a public official or public figure plaintiff and perhaps in matters of general or public concern), and the actual damages he suffered as a result (unless actual malice is proved). The question remains whether any element of his cause of action should be presumed under any circumstances. More particularly, the issues are whether ill-will should be presumed from language that is defamatory *per se* and whether damages should be presumed where "knowing falsity" is found.

As the Supreme Court recognized in *Gertz,* in order to secure "the vigorous exercise of First Amendment freedoms", "state remedies for defamatory falsehood [must] reach no farther than is necessary to protect the legitimate interest involved." *Gertz,* 418 U.S. at 349. But the only way to ensure that restrictions on expression are "narrowly tailored" to accommodate individual interests in reputation is to make the libel inquiry fact-specific and require actual proof of each of the elements. *Cf. Press-Enterprise Co. v. Superior Court,* 52 U.S.L.W. 4113, 4115 (1984) (limitations on the First Amendment right of access are constitutional only if narrowly tailored to accommodate some legitimate competing interest).

The old libel *per se* notion that the defendant's ill will or the plaintiff's damages can be presumed from the

words themselves is incompatible with this constitutionally-required focus on the *actual* circumstances of the challenged communication. This Court should recognize that fact and hold, as many other states already have, that the presumptions associated with libel *per se* should no longer be retained. The reasons they were adopted have long since passed from our society,[38] and they are contrary to our most cherished values. It is therefore proper that plaintiffs today be required to plead and prove damage and ill will in every case.

CONCLUSION

This Court should hold that libel *per se* no longer exists in Florida and that the distinction between words defamatory *per se* and those defamatory *per quod* is only that the former put the publisher on notice as to their defamatory nature without reference to extrinsic facts while the latter do not.

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38. The protection of an individual's good name does not justify any presumption against expression since the reputation of the publisher as not being a "libeler" is as much to be protected as is the reputation of the plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Amicus Curiae The Miami Herald Publishing Company was served by mail this 6th day of February, 1983 upon:

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