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ERIC M FREEDMAN

## Libel Law And The Preservation Of The Republic 1787-1825

To study the legal history of a particular time period without considering at least its intellectual and political histories is to emasculate both law and history. Such an approach makes of the law a series of doctrines related only to each other, and of history a series of discrete events perhaps not even related to each other. A portrait of the intellectual and political developments bearing on the period 1787-1825 is, to say the least, outside the scope of this paper. However, before we move into the slightly more negotiable thicket of a sketch of the development of certain aspects of libel<sup>1</sup> law in this period, let us take a brief look at the forest.

If there was one thing upon which virtually the entire revolutionary generation could agree, it was the belief that republican governments were closely dependent upon a broad distribution of virtue among the people. Virtue was one of those marvelously vague yet crucially important concepts that dotted late-eighteenth-century moral and political thought . . . It signified the personal virtues of industry, honesty, frugality . . . But more importantly, it means as well . . . a willingness to sacrifice personal interest if need be to the public good. Montesquieu had identified virtue as the animating spirit of republican societies: and the American people fully agreed.<sup>2</sup>

Virtue was especially necessary among those entrusted with power:

Power made men unscrupulous . . . The possession of power was seen to unleash men's aggressive instincts, and power-seeking was associated with antisocial behavior.<sup>3</sup>

In 1815, John Adams said:

The fundamental Article of my political creed is, that . . . absolute power is the same in a Majority of a popular assembly, an Aristocratical Counsel, an Oligarchical Junta and a single Emperor. Equally arbitrary cruel bloody and in every respect diabolical.<sup>4</sup>

It was also said:

It was assumed that self-interest was the dominant motive of man's political behavior, and though there was constant

appeals to altruism and patriotism in the political language of the day, there was little tendency to rely on the success of such appeals in the ordinary conduct of politics. Self-interest and . . . a lust for power were anticipated.<sup>5</sup>

This mistrust of those having power was an important basis for the antiparty ideology of the period — a period during which observers of the political scene could see a party system taking shape. Both parties displayed a notable similarity in their opposition to parties. The radical Ezra Stiles said:

It is the insidious art of parties and politicians to keep things concealed from the people, or it they are alarmed and assemble, to excite parties, sow dissensions, and prevent as much as possible the question from coming up fairly before them, instead of harmoniously endeavoring . . . honestly . . . to form and obtain the public mind.<sup>6</sup>

And the aristocratic John Taylor of Caroline warned:

The danger of parties to free government arises from the impossibility of controlling them by the restraints of political law; because being constituted upon selfish views . . . no limitation . . . stops their career . . . They are universally disposed to persecute, plunder, oppress and kill . . . In legislation contrary to genuine republican principles, sustained by a dominant party zeal, lies, in my view, the greatest danger to the free form of government of the United States.<sup>7</sup>

Other statements were:

The frenzied political climate . . . in the 1790's continued unabated after 1800.<sup>8</sup>

Jefferson's party . . . soon became the political expression of those who believed that . . . society had . . . corrupted instead of ennobled.<sup>9</sup>

[What] led many Federalists to foresee the demise of their party [was the] conception of a growing sea of darkness surrounding a few islands of virtue.<sup>10</sup>

The War of 1812 did nothing to lessen such concern which existed across the political spectrum. Andrew Jackson, then a militia commander in western Tennessee, said that the United States was entering the war "to fight for the reestablishment of our national character." When the conflict was over, a Pennsylvania Republican summarized it as

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"the triumph of virtue over vice."<sup>11</sup> A few years later, John Adams asked Jefferson:

Have you found in history one single example of a nation thoroughly corrupted, that was afterwards restored to Virtue, and without Virtue, there can be no political Liberty.<sup>12</sup>

As late as 1827, when Congress appropriated money for the establishment of a naval academy,

Representative Lemuel Sawyer of North Carolina protested that the glamor of a naval education would "produce degeneracy and corruption of the public morality and change our simple Republican habits."<sup>13</sup>

In looking at the development of the law of libel in this period, then, it is important to remember that the opposing political sides considered their differences far from petty. Each group was convinced that the activities of unscrupulous men (the other side) could endanger the very survival of republican institutions, which were historically fragile.<sup>14</sup>

Even without a profound knowledge of specific political developments, the influence of political events on legal ones in this period is apparent. The trials under the Sedition Act<sup>15</sup> are obvious examples, and there are many others. They are multiplied by the fact that most of the libel law in this period was developed on the state level. New York, for instance, was particularly fruitful in litigation of this sort. To take just two examples: between 1812 and 1813, the newspaper editor Southwick was involved in three libel suits with his political opponents;<sup>16</sup> and a governor of the state, Morgan Lewis, was the plaintiff in a case which (to his advantage) limited an important doctrine announced in New York the very same year he brought his action.<sup>17</sup>

The desire to keep a close watch on those in power was manifested in a series of decisions which developed the doctrine that petitions to a forum competent to redress the grievances complained of were not actionable.

In 1802 a petition was presented to the Vermont legislature "when convened . . . for the nomination and appointment of Justices of the Peace." It read in part:

To the Honourable the Legislature of the State of Vermont . . . We humbly state [that] . . . Ebenezer Harris, Esquire, Justice of the Peace . . . is heinously a peace-breaker . . . which we are ready to prove . . . Further . . . he does not possess . . . uprightness . . . and integrity . . . Therefore, [we] . . . do solemnly protest against the appointment of the said Ebenezer.<sup>18</sup>

The said Ebenezer sued the first signer of the petition for \$5,000 and recovered \$1.00. The state

Supreme Court set aside the verdict, however, saying:

An absolute and unqualified indemnity from all responsibility in the petitioners is indispensable . . . for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it.<sup>19</sup>

Basing its opinion on English precedents, the court concluded:

The abuse of the right must be submitted to . . . as subservient to the common welfare . . . The Court, therefore, consider that no action can be maintained for a libel upon a petition for redress of grievances, whether the subject matter of the petition be true or false, simply upon its being preferred to either branch of the General Assembly, or disclosed to any of its members.<sup>20</sup>

This doctrine was carried a step further in the 1806 case, *Reid v Delorme*,<sup>21</sup> which held that material in petitions which was defamatory of third parties was protected. Delorme had presented the legislature a petition against the conduct of the South Carolina attorney general, who had allegedly failed to prosecute Reid for harboring stolen slaves. On the basis of this petition, Reid sued Delorme for libel and won a judgment at trial; but the Constitutional Court arrested the judgment with this opinion.

Though the conduct of Delorme may have been unreasonable and malicious, yet, in petitioning the legislature against a public officer he was in the exercise of a constitutional right . . . There is no ground upon which this action can be legally supported. Every citizen has a right to petition the legislature for the redress of grievances, and even on account of grievances which do not exist, if they are supposed to exist, although . . . reputations should be wounded.<sup>22</sup>

Two years later, the New York Court of Errors handed down the most widely cited decision in this area. The case is particularly interesting because it reveals a wide area of agreement between the parties. A man named Thorn had signed a petition which read:

To the honourable the council of appointment of the state of New York . . . We humbly represent, that the manner in which the public prosecutions . . . have been managed by the present district attorney . . . is highly improper . . . that malice towards some, and the emoluments arising from the public prosecutions in other cases, has given rise to many indictments . . . Your petitioners . . . therefore . . . humbly pray that Anthony I Blanchard, the present district attorney . . . may be removed from that office.<sup>23</sup>

Blanchard was dismissed, and brought suit against Thorn. The defendant brought a bill of exceptions

from the ruling of the Supreme Court that the evidence was sufficient for Blanchard to maintain his action. The bill objected to this:

1. Because the council of appointment, to whom the petition was addressed, had competent power to examine the charges exhibited against the defendant in error; and that to address a petition to the council of appointment for the removal of an officer, the tenure of whose office is during the pleasure of the council cannot be deemed libellous...
- 2.... The council having competent authority... it was incumbent on the defendant to have shown, on the trial, express malice.<sup>24</sup>

On oral argument, Thorn's counsel freely admitted —

If this petition had been published in a gazette it would have been libellous. But, it is not so when presented to the proper persons who have power to remedy the evil, which was the subject of the complaint.<sup>25</sup>

The other side granted this point. They argued though that the petitioner,

must come into a court of justice with pure hands and honest intentions, for the purposes of truth and justice; not... to gratify his malice.<sup>26</sup>

Further, it was

admitted by the counsel for the defendant in error [Blanchard] that if the paper had been addressed to the house of assembly, as a grant inquest, no action would be sustained; and their whole defence rests on its being sent to an improper or incompetent forum.<sup>27</sup>

A split court, with the judges scattering in reasoning, found in Thorn's favor.

The following year the state Supreme Court, possibly under political pressure,<sup>28</sup> shrank from carrying this doctrine to its logical conclusion. The plaintiff was the governor of New York, and a candidate for re-election. A public meeting of about 800 citizens, held to nominate an opposition candidate, adopted an address to the people. This document, signed by the chairman of the meeting, charged the governor with various unrepugnant actions and concluded:

He has rendered himself entirely unfit to be continued the chief magistrate.<sup>29</sup>

Governor Lewis brought suit against Few, the chairman. At his trial, Few moved for a non-suit on the ground that the document in question was an address to competent authorities asking them to remove an obnoxious officer. The judge rejected this contention, saying that to accept it,

would equally authorize an individual to libel the character of a candidate under the cloak of an address to the people.<sup>30</sup>

On appeal, the Supreme Court upheld the position of the trial judge. The opinion said:

The doctrine contended for by the defendant's counsel results in the monstrous position, that every publication, ushered forth under the sanction of a public political meeting, against a candidate for an elective office, is beyond the reach of legal inquiry. To such a proposition I can never yield my assent... I cannot discover any analogy whatever between the proceedings of such a meeting and those of... organized tribunals known in our law, for the redress of grievances... It would... be a monstrous doctrine to establish, that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crimes, with impunity. Candidates have rights, as well as electors.<sup>31</sup>

Nonetheless, in 1815 the Constitutional Court of South Carolina squarely held that the electorate was the proper tribunal to try the qualifications of candidates for office. One Richardson had accused Mayrant, a candidate for Congress, of having a weakened mind. Mayrant sued, charging that the accusation had led to his defeat. The court below supported a general demurrer to the declaration.<sup>32</sup> Mayrant thereupon brought a motion to overturn this ruling on the ground that "those words spoken of a Candidate, were in *themselves* actionable," or that they were because of the special damages he had suffered.<sup>33</sup> The Constitutional Court noted that the words imputed a misfortune, not a crime, and continued:

It is not pretended that those words spoken of a private individual would be actionable. And I am not aware of any principle... by which a person by proclaiming himself a candidate... becomes so far elevated above the common level of mankind, as to entitle him to any exclusive privileges. On the contrary, when one becomes a candidate for public honors, he makes a *profert* of himself for public investigation.<sup>34</sup>

Although the court found the words not actionable — "and if they are not actionable, falsehood and malice cannot make them so"<sup>35</sup> — it went on to say:

It is established... that where words, otherwise actionable, are spoken in the course of a regular proceeding before a tribunal having jurisdiction of the matter, no action will lie... The case under consideration is not distinguishable from these. The letters in which the supposed libellous matter was contained, were addressed to the electors of the district in which the plaintiff offered himself as a candidate, and by one having a common interest with them; they were the proper... tribunal. The charge related altogether to the plaintiff's qualifications for the place... No person has a right in such a case to impute... crimes. But talents and qualifications for office are mere matters of opinion.<sup>36</sup>

As this decision indicates, there existed a similar line of cases holding that words published in the ordinary course of judicial proceedings were not actionable unless published maliciously.<sup>37</sup>

In an 1807 case, a witness brought suit against a defendant who said in court upon hearing his testimony: "That is a lie and I can prove it."<sup>38</sup> Without discussing whether the words were material to the accused's defense or whether they actually imputed a charge of perjury, the New Jersey Supreme Court held:

the words . . . were spoken in a court of law . . . in a court of justice; . . . they are not actionable; nothing is more common than for a party to say in his defence, that the evidence given against him is not true, and that he can prove it.<sup>39</sup>

But that same year, in a similar case, a Pennsylvania court gave a somewhat narrower interpretation. During a trial, Palmer said that Vigours had previously taken a false oath and that he would prove it. Vigours sued Palmer for slander:

For the defendant it was contended that the words were used in the course of a judicial investigation of a subject in which the defendant was interested, and therefore were not actionable.<sup>40</sup>

Vigours nonetheless recovered \$100, and Palmer appealed. The court of review agreed and said:

The law is clear, where words are spoken by the counsel, or by a party, which are necessary to his defence and pertinent to the issue, they are not the ground for an action of slander.<sup>41</sup> [But] the point before the Court [below] was really a question of fact, viz. whether . . . the words had reference to the cause then depending . . . or whether they were uttered wantonly.<sup>42</sup>

Considering this point to have been resolved by the verdict, the court refused to disturb it.

The regular course of judicial proceedings was also deemed to include applications for warrants, and the contents of writs. In *Bunton v Worley*, the latter brought a slander suit against the former for words imputing a felony:

The words were spoken in part before a justice of the peace, on . . . application for a warrant.<sup>43</sup>

At his trial, Bunton

moved for instructions to the jury, that if they were of the opinion . . . that the words spoken before the justice, were spoken in the course of the application to prosecute in good faith the plaintiff, and not for the purpose of slandering him, the defendant was not liable.<sup>44</sup>

This motion was overruled. But the Kentucky Court of Appeals, although it denied protection to cases where the application for a warrant was

"mere pretence under the cloak of a prosecution,"<sup>45</sup> granted a new trial. The court said:

If an action would lie for words uttered before a justice, when applied to in good faith for a warrant to apprehend the felon, the culprit might escape for want of prosecution: for but few would subject themselves to the action of slander, by endeavoring to bring to justice offenders.<sup>46</sup>

Three years later, the same court made the parallel ruling concerning words in a writ.<sup>47</sup>

Both in the case of petitions and that of judicial proceedings, however, the courts did sometimes permit the plaintiff to maintain his action where there was a showing that the defendant had brought the original charges maliciously. In *Bodwell v Osgood*,

the supposed libel was a written communication . . . addressed to the committee of a school district . . . in which the defendant, after stating that he had been informed that the committee had employed the plaintiff to teach the school in that district . . . remonstrates against the appointment, and accuses the plaintiff of want of chastity in several instances, and pledges himself to prove the charges.<sup>48</sup>

The jury returned a verdict of \$1,400 for Bodwell. The defendant moved for a new trial, because:

No action will lie on the supposed libel, however false and malicious it may have been, for that it was a petition to the . . . body of men authorized to grant redress.<sup>49</sup>

The Massachusetts Supreme Court denied the motion for a new trial, saying:

We consider the fact established by the verdict, that the accusation was false . . . and that the defendant knew it to be false at the time of publication. It may, therefore, be admitted, that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection.<sup>50</sup>

Similarly, in 1803 the Constitutional Court of South Carolina had reversed the non-suiting of a plaintiff in a case where the defendant had brought him up for investigation before a military court of inquiry. The Constitutional Court found that the conduct of the defendants was not in accord with martial law, but said that even if

the charges . . . were made . . . in strict conformity to law, yet if the same be falsely made, with a malicious intention . . . and without . . . probable cause, the plaintiff would be entitled to maintain his action.<sup>51</sup>

Nonetheless, the thrust of the cases in this area was not favorable to plaintiffs — including plaintiffs who might happen to be public officers. The range of situations that could be included within these doctrines was expanding. By 1824 it included complaints made to a church against one of its members

by people who were not members. In taking this position, the Massachusetts Supreme Court said:

The law is, that accusations made to a body competent to try the offense cannot be the subject of an action for slander . . . if the church sustain the complaint, and the accused submit to their dealing and discipline, it is enough, without evidence of express malice, to excuse the defendant. . . . That . . . the plaintiff may show that injustice was done him by the church . . . will not affect the defence, which rests only on the institution of the complaint for the purpose of causing an inquiry in an ordinary way; the subsequent proceedings were not under the control of the defendants, and however irregular they may have been, cannot prejudice their defence.<sup>52</sup>

Another series of decisions which would tend to make public officers think twice about bringing libel actions was that which developed the notion that such officers could only maintain their suits upon a showing that the words complained of were related to their official capacities. This would tend to make it difficult for officials to use private libel actions as a method for obtaining revenge against individuals who had stood in their way politically.<sup>53</sup>

In 1799 one Farrington allegedly said: "Squire Oakley is a damned rogue." The full opinion of the New York Supreme Court non-suiting Oakley reads:

These words spoken of a common person are held not to be actionable. Although in this case they were spoken of a magistrate, they had no relation to his official character or conduct. They are, therefore, not more actionable than if he was not in office, or if they were spoken of any other individual.<sup>54</sup>

It is true that this rule could sometimes work to the benefit of the plaintiff. For example, when a defendant said of a county sheriff that "monies which he had collected on execution he had taken and converted to his own use," it was held that the words were actionable because they amounted to a charge of malpractice in office.<sup>55</sup> Similarly, the circuit court for the District of Columbia said in 1800 :

There is no doubt that words not actionable when spoken of a common person may become actionable when spoken of an officer, and in relation to his official conduct.<sup>56</sup>

The cases were generally in favor of the defendant. An action was brought in 1805 for these words:

I have frequently seen him drunk as a coot in the assembly of this state . . . He was unfit for a member of the assembly, and if his character were known to the electors . . . they would not elect him to represent them in the assembly.<sup>57</sup>

The court specifically conceded that "there was a

discourse concerning the plaintiff's fitness for the office of member of the legislature," but said that the action must fail for want of a showing of injury to his trade.<sup>58</sup> Such a requirement would hardly seem encouraging to any other legislator contemplating a libel action.

The American desire to keep a close check on those in power also seems to be at the root of the erosion of the rule which had long been established in England that the truth of the published words was no defense against a charge of criminal libel.<sup>59</sup> Even the Sedition Act specifically allowed the introduction of truth as a defense.<sup>60</sup> Nevertheless, republics were also thought to be vulnerable to a lack of virtue among ordinary citizens. With the exception of prosecutions brought under the Sedition Act, there is not a single criminal case in this time period where the court permitted an attempt to justify the words by proving their truth.<sup>61</sup>

One of the early cases did come close to allowing such a justification. In the 1804 case, *The People v Croswell*, the defendant was charged with libelling President Jefferson by saying that he had paid Calender<sup>62</sup> for defaming Washington and Adams. After being found guilty, Croswell moved for a new trial because, *inter alia*, he should have been allowed to give the truth of his accusations in evidence. The reviewing court split evenly on this question, thus letting the verdict stand.<sup>63</sup> Those who were for overturning it suggested that the rule barring the truth from evidence originated in the discredited Star Chamber, and was inconsistent with American notions of freedom of the press. One of these judges wrote:

I adopt . . . the . . . definition of one of the counsel at the bar, that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government magistracy or individuals.<sup>64</sup>

The remaining judges, resting squarely on the common law, wrote:

Truth may be as dangerous to society as falsehood, when exhibited in a way calculated to disturb the public tranquillity.<sup>65</sup>

This latter view, with provision for a gradually increasing number of exceptions, remained the law throughout our period. In *Commonwealth v Clap*, the defendant had posted notices in several places stating that a certain auctioneer<sup>66</sup> was "a liar, a scoundrel, a cheat and a swindler."<sup>67</sup> At trial, defendant's counsel wanted to prove the truth of the matters charged in the libel;<sup>68</sup> but the court

insisted otherwise, and Clap was convicted. He moved for a new trial, arguing that

to publish the truth from good motives, and for justifiable ends, whether it bears... on public officers or on private citizens cannot be libellous.<sup>69</sup>

Representing him before the Massachusetts Supreme Court, Otis argued, *inter alia*, that there was a public interest in knowing the truth in this instance, since the person defamed was a public officer. The other side rebutted on the basis of common law precedents, and added that the public officer exception sought for was not applicable here. The court ruled:

The cause why libellous publications are offences against the state, is their direct tendency to a breach of the public peace... A man may maliciously publish the truth against another, with the intent to defame his character, and if the publication be true, the tendency of it to inflame the passions... may sometimes be strengthened... The defendant cannot justify himself for publishing a libel, merely by proving the truth of the words in this case to be a justification... the evidence at the trial might more cruelly defame [the auctioneer] than the original libel.<sup>70</sup>

But, the opinion continued:

A man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made... not maliciously... the complaint will not be a libel... And when any man shall consent to be a candidate for public office conferred by election of the people, he must be considered as putting his character in issue, so far as it may respect his... qualifications for the office. And publications of truth on this subject, with the honest intention of informing the people, are not a libel... And every man holding a public elective office may be considered as within this principle.<sup>71</sup>

Clap's conviction was upheld, but only because the auctioneer was an appointed officer.

More in the traditional mold was the 1811 case, *The State v Lehre*. The South Carolina Court of Appeals began with the observation that:

All the great expounders of the law, from Lord Coke, down to Mr Justice Blackstone,<sup>72</sup> have uniformly laid it down as a rule of the common law, that the truth of a libel cannot be given in evidence in a criminal proceeding; and this rule has never been departed from in a single instance.<sup>73</sup>

The court then gave two arguments to buttress the position that

There does not exist in the whole system of our laws, a rule better supported by reasons than the one under consideration.<sup>74</sup>

First came the familiar notion,

A libel is an offence, not because it is false, but because it

tends to *provoke* quarrels and... the objects therefore of punishing a libel are to preserve the public peace and to enforce a due submission to the laws.<sup>75</sup>

The second reason given for the rule barring the truth from evidence was that:

It serves to protect from public exposure secret infirmities... which have been repented of and forgiven... a woman... who may have yielded to some seducer, or even been the willing servant of vice, may have since become the faithful partner of some worthy man and the mother of a virtuous offspring... And she is in the enjoyment of the esteem and respect of all her neighbors. Will anyone say that these expiated sins may be... presented to the view of an unfeeling world; be punished afresh by disgrace and odium, in which innocent connexions must participate; and that the author of all this misery may justify the act by showing the truth of the charges?<sup>76</sup>

The rigidity of this point of view was outside the main line of the cases. We can see the proof of this statement in an 1825 case which is the most comprehensive display of both the traditional viewpoint and of how much the American mistrust of power-holders had modified it. The Commonwealth of Massachusetts prosecuted one Blanding for having charged, in his report of an inquest,<sup>77</sup> that the death of a guest at an inn kept by one Fowler had been caused by the latter's serving him a large quantity of liquor:

Evidence of the truth of the charges contained in the article was rejected... The jury were instructed... that the malicious intent charged in the indictment was an inference of law, it not being competent for the defendant to prove the truth of the fact alleged.<sup>78</sup>

After a verdict was returned for the Commonwealth, the defendant moved to set it aside, and for a new trial. Denying the motion, the Massachusetts Supreme Court said:

As to that part of the instructions of the judge which states that the malicious intent charged in the indictment... was in inference of law; this is certainly the common law doctrine, and it has never been repealed... and if the doctrine be true that the gist or essence of the offense of libel is, that it tends to provoke a breach of the peace, and this certainly is maintained in all the books, then it must follow that where the publication complained of is of a libellous nature, it must be taken to be of a malicious character.<sup>79</sup>

The court cited the *Clap* decision<sup>80</sup> to show that true and non-malicious reports of proceedings in courts of justice and legislative assemblies were privileged. Moreover, it reiterated:

If the truth only is told of public elective officers, or of acknowledged candidates for office, in a decent manner and with a view properly to influence an election, it is justifiable.<sup>81</sup>

Freedom of the press was defined in traditional terms:

It is immaterial to the character of a libel as a public offense, whether the matter of it be true or false... Nor does our constitution abrogate the common law in this respect. The sixteenth article declares that "The liberty of the press... ought not... to be restrained." The liberty of the press; not its licentiousness; this is the construction which [is] just... This provision... was intended to prevent... previous restraints on publications... The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse.<sup>82</sup>

Yet the opinion declares that, unless malicious,

[h]ad the inquisition been published without any defamatory comment, it certainly would not have furnished ground for this prosecution.<sup>83</sup>

To the objection

that this is a matter of public concern... the answer is, that the defendant did not select a proper vehicle for the communication.<sup>84</sup>

Any other holding would open the door wide to reckless libels on any matter of public concern. To the objection that the aggrieved party could recover damages in a civil suit if he were injured by such recklessness, the court opposed the uncertainty and troublesomeness of the remedy. Yet even here, the court admitted the possible existence of extreme cases, such as that of a druggist selling poison in the form of medicine, where a newspaper would be the proper forum to air the charges.

Admittedly, the court concludes that this

is a case where the defendant cannot be allowed to excuse himself by showing the truth of the accusation which he has unjustifiably made.<sup>85</sup>

This is, in fact, a conservative decision which merely restates fully the existing law; but those portions of that law developed in America, as the court says,

go far to render harmless that most decried rule, that the truth is no defense in a prosecution for libel.<sup>86</sup>

In civil cases, where the offense presumably posed less of a threat to the stability of the country, the courts were more early persuaded that (if the proper conditions were met) the truth of a libel would justify the publishing of it. There is only one case replete with political overtones, which could be read to deny the right of such justification altogether. This was the 1814 ruling of the Circuit Court for Pennsylvania that:

No man is at liberty to trifle with the repose of another, by publishing to the world charges against his character, which

are calculated to bring him into general contempt, and then justify himself, by stating his authority and proving the statement.<sup>87</sup>

The road to the establishment of such a justification was often strewn with legal obstacles.

The courts, however, applied the following rule:

The justification must be confined to the words charged to have been spoken.<sup>88</sup>

Thus, a defendant who had charged a plaintiff with bestiality with a horse was not permitted to prove the commission of it with a cow.<sup>89</sup> At the same time, the defendant had to define very narrowly what he was going to prove. In a Kentucky case, Samuel said: "Bond is a thief; he has stolen corn."<sup>90</sup> When sued by Bond for slander, the defendant's plea in justification<sup>91</sup> was rejected. The state Court of Appeals upheld this action, saying:

The plea which was... rejected by the Court... is... "The defendant... says that the plaintiff aforesaid his action ought not to have... because... the said plaintiff is a thief, and this he is ready to verify; &c." This plea is evidently defective... To make this plea a good justification, the defendant in the court below should have confessed the speaking of the words, and alleged that the plaintiff was guilty of a felony of that species mentioned in the declaration.<sup>92</sup>

This opinion points up another hazard of offering the truth justification: such a plea could be used as proof of the publication of the words charged.<sup>93</sup> Even more important, some courts held:

A plea of justification deliberately made and placed upon the public records, and which the jury found was unwarranted... is to be regarded as a deep aggravation of the slander.<sup>94</sup>

This doctrine had earlier been accepted in Ohio, where the court in 1816, in *Wilkinson v Palmer* held:

If the defendant's plea in justification is not supported by evidence, his putting such a plea on the record is greatly in aggravation of the damages, and it is at this hazard that such a plea is always put in.<sup>95</sup>

In short, some courts held, the justification

plea... is not only a confession, but a repetition of the injury complained of, in a more aggravated form.<sup>96</sup>

Moreover, justification required meeting a strict standard of proof. For example, one Beniss published of a man named Brooks:

In open court, under the solemnities of an oath, this paltry but ambitious politician... testified to the existence of a fact, which a jury of his own country, of whom eleven were



democrats too, declared by their verdict they did not believe.<sup>97</sup>

Beniss offered numerous witnesses to testify that they had disbelieved Brooks, and that he was addicted to falsehood, but the court ruled:

The charge imputed that the plaintiff was a liar... That charge cannot be justified by giving the opinion of one or more individuals. Such a species of defence might lead to the grossest... calumny... The defendant can only justify the charge by proving the fact.<sup>98</sup>

In *Maybee v Avery*, the slanderous words were an accusation of having stolen a hen. The defendant offered in evidence the plaintiff's conviction on the charge of having stolen a hen. Although the reviewing court found this evidence admissible, it said:

However... the verdict was not conclusive... it was merely *prima facie* proof and... the plaintiff ought to have been allowed to controvert the fact anew. Such a judgment would only be conclusive when it came in question collaterally; not when the issue was directly when the plaintiff was guilty of the larceny or not.<sup>99</sup>

Any defendant planning to offer the truth in justification would have been well advised to make sure his proof was "certain to a certain intent."<sup>100</sup>

Furthermore, the truth justification could not be pleaded under the general issue. The Vermont Supreme Court expressed this view as early as 1801 in a brief *per curiam* opinion which apparently accepted counsel's view that

the admission of such evidence under the *general issue*<sup>101</sup>... must operate as a surprise upon the plaintiff; [and] would bring on trial the conduct of his whole life, which no man... could be presumed to [be] prepared to defend *instanter*.<sup>102</sup>

This point was so well established that defendants who pleaded the general issue normally tried to put forth the truth of the words only in mitigation of damages. They were consistently unsuccessful. The complete opinion handed down by a New York trial court in 1808 reads:

Under the general issue, the truth of the words can never be given in evidence in mitigation of damages.<sup>103</sup>

The Massachusetts Supreme Court stated that the reasoning behind this rule was the same as that used to keep truth from the general issue as a justification.<sup>104</sup> The New York Supreme Court seems to have been on firm ground when it said in 1816:

No principle is better established, than that the truth of slanderous words cannot be given in evidence under the

general issue, either as a defence, or in mitigation of the damages.<sup>105</sup>

The courts generally did accept the proposition that:

Evidence which falls short of a justification, may be competent to mitigate damages... the defendant, on the general issue, may prove, in mitigation of damages, such facts... as show a ground of suspicion.<sup>106</sup>

Courts were eternally vigilant to make certain that the facts offered did not show such strong grounds of suspicion as to amount to a backhanded justification. Just this situation was before the Connecticut Supreme Court of Errors in *Treat v Browning*. The latter had accused the former of fornication and bearing a bastard child. The defendant pleaded the general issue.

The defendant offered, in mitigation of damages to prove, by the testimony of sundry witnesses, that... the plaintiff had frequently left her bed in her father's house in the night-season, and lodged in bed with a young man in an adjacent store; that she had been detected in a wanton and lascivious situation with the same young man, in a secret place, in a field, among broom-corn, and at another time, in a similar situation, with the same young man, upon a haymow in a barn. This testimony, being objected to, by the plaintiff, was rejected by the judge.<sup>107</sup>

Upon being convicted, Browning moved for a new trial on the ground that this evidence should have been received in mitigation. The court, after summarizing the rejected testimony, said:

The above facts, by a strongly probable presumption, establish the truth of the words alleged... These facts all lead to the same conclusion. If anything short of this were intended to have been done in those places of secrecy and suspicious omen, it should have been definitely mentioned... The evidence offered... amounts to a justification... and without notice, the truth of the charge is not admissible.<sup>108</sup>

The modern standards for the truth defense in civil actions had still to be formulated. It would be an overstatement to say that the law on the criminal side was fixed; but there, the directions in which development would take place were fairly clearly marked. The weight of the evidence seems to lend support to the conclusion that the greater relative speed of development in the criminal area was a measure of the fact that fears about the abuse of power by politicians, growing in response to the rise of party conflict, were urgent ones — exacerbated by fears of the consequences of a lack of public spirit among citizens.

Such a conclusion is further supported by the

wide protection given to petitions and judicial proceedings. In this sense, the course of the development of the law of libel fits nicely into the political era which produced such expressions of fear about the fragility of the republic as Washington's denunciation of the "self-created" societies and Jefferson's vigorous enforcement of the Embargo. It would be

arrogant historical over-simplification to assert that every legal, political, and moral phenomenon of this period can be illuminated by the intellectual beacon of "virtue."<sup>109</sup> It would be legalistic myopia to fail to search for the political, moral, and intellectual forces which shaped the picture reflected by that social mirror, the law.■

## NOTES

- 1 Only rarely did lawyers and judges of this period insist on a sharp distinction between libel and slander; they sometimes used the words interchangeably in the same sentence. The same attitude is adopted throughout herein.
- 2 John R Howe Jr *Federalists vs Republicans: A Generation Of Passionate Partisanship*, in Norman K Risjord, ed, *The Early American Party System* 169 (New York 1969). On the subject of political virtue, see Baron de Montesquieu, *De l'Esprit des Lois*, IV, 6. Edmund S Morgan, *The Birth Of the Republic, 1763-89*, at 157 (Chicago 1967) says of Montesquieu: "No author was so widely quoted in the debates on the Constitution."
- 3 James Sterling Young *The Washington Community 1800-1828* at 55 (New York 1966). This book focuses on the cultural determinants of political behavior, and, although one may quibble with certain conclusions, it is a forceful presentation of a perspective which is too little even considered.
- 4 Adams to Jefferson, November 13, 1815, in Lester J Cappon, ed, *II The Adams-Jefferson Letters* 456 (Chapel Hill 1959). See also Thomas Gordon, *Cato's Letters* No 33, I, at 255 (London, 1733).
- 5 Cecilia Kenyon ed *The Antifederalists* xxix (New York 1966).
- 6 Edmund S Morgan ed *Puritan Political Ideas, 1558-1794* at 376 (New York 1965).
- 7 John Taylor *An Inquiry Into The Principles And Policy Of The Government Of The United States* 559-60 (New York 1969).
- 8 James M Banner *To The Hartford Convention* xi, 317 (NY 1970).
- 9 Shaw Livermore Jr *The Twilight of Federalism* 5 (Princeton 1962).
- 10 *Id* at 43, and also at 75, 126, 205.
- 11 Samuel Eliot Morrison, Henry Steele Commager and William E Leuchtenburt *The Growth Of The American Republic* I, 362, 366 (6th ed New York 1969).
- 12 Adams to Jefferson December 21 1819 in Cappon *supra* note 4 at 550.
- 13 Morison *et al supra* note 11, 414.
- 14 The revolutionary generation was profoundly aware [that]... republics had proved vulnerable historically to hostile threats from the outside, both direct military attack and more subtle forms of influence. John Howe in Risjord *supra* note 2 at 168. See Richard Hofstadter *The Idea Of A Party System* 85 (Berkeley, 1970), and the third and fourth numbers of *The Federalist*. High hopes, elaborately expounded during the formation of the federal Constitution, generated expectations that the young nation would avoid the rivalry and corruption, the tumult and the violence that had infected and doomed earlier experiments in free government... Experience under the new regime was profoundly disillusioning. In the eyes of many... forces lurked everywhere bent on subverting the carefully wrought structure of 1787 and overturning the social order. Networks of aristocrats, monarchists, and Jacobins, financial manipulators, "wild Irishmen", clerical bigots and blaspheming *Illuminati*, paid foreign agents and sowers of sedition and treason, they thought, roamed the republic plotting its destruction. Paul Goodman in Frank Otto Gatell *et al* eds *The Growth Of American Politics* I at 159 (New York, 1972), and see also page 176.
- 15 The Act provides, in relevant part:  
Section 2 That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them or either or any of them, the hatred of the good people of the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States done in pursuance of such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years. Section 3 That if any person shall be prosecuted under this act for the writing or publishing any libel aforesaid, it shall be lawful for the defendant upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

Henry Steele Commager ed Documents Of American History I at 177-8 (New York 1958).

The clause on truth was nullified by the courts, the right of the jury to decide on the criminality of the writing was usurped by the presiding judges, and the test of intent was reduced to the seventeenth-century common-law test of bad tendency.

James Morton Smith *The Sedition Law, Free Speech, And The American Political Process*, (1952) 9 Wm & Mary Q 504.

Some representative statements from the charge to the jury in one such case are:

I can scarcely conceive a charge can be made against the president . . . of a more heinous nature . . . This is a charge on the president, not only false and scandalous, but evidently made with intent to injure his character. These charges are made not only against the president, but against yourselves.

The evident design of the traverser was to arouse the people against the president . . . The traverser was actuated by improper motives.

US v Cooper 25 FedCas 631 No 14,865 at 640, 641 (PennCC 1800). Cooper had charged President Adams with threatening the country with the existence of a standing army, with borrowing money at eight percent interest in time of peace, and with interfering with the course of justice in a certain instance. Another defendant under the law

was an active opposition member of the House of Representatives, where the vote was so equally balanced as to make his withdrawal of national political consequence; and he was then a candidate for re-election [which he won from jail].

A full account (including the defendant's own) is in Francis Wharton *State Trials Of The United States During the Administrations Of Washington and Adams* 333-44 (Philadelphia 1849), also in re Lyons 15 FedCas 1183 No 8646. Cf US v Callender 25 FedCas (VaCC 1800) 239 No 14,709, Wharton 688; US v Haswell 26 FedCas 218 No 15, 324, Wharton 684 (VtCC 1800). For the view that "Despite these prosecutions the repressive impact of the Sedition Act has been exaggerated," see Leonard W Levy *Judgments* 164 (Chicago 1973).

- 16 Spencer v Southwick 9 Johns 314, 10 Johns 259 (NY 1812); Southwick v Stevens 10 Johns 443 (NY 1813); Coleman v Southwick 9 Johns 45 (NY 1812).

- 17 Lewis v Few Anthon's NP 102, 5 Johns 1 (NY 1808). This case is discussed *infra*. Cf Van Vechten v Hopkins 5 Johns 211 (NY 1809) and Genet v Mitchell 7 Johns 120 (NY 1810).

- 18 Harris v Huntington 2 Tyler 129, 130-1 (Vt 1802).

- 19 *Id* at 139-40.

- 20 *Id* at 146. The Vermont Constitution of 1793, I, 13, provides:

The people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government.

Azel F Hatch *Statutes . . . On Libel and Slander* 111 (New York 1895). With this provision, cf the state's 1777 Declaration of Rights, XIV. The same document also provides clear statements of the need for virtue among public offi-

ers, XVI, V. Bernard Schwartz *The Bill Of Rights: A Documentary History I*, 323-4 (New York 1971). On the necessity for submitting to abuse of the privilege, see *Mayrant v Richardson* 1 Nott & McC 347, 351 (SC 1815). This case is discussed *infra*.

- 21 Reid v Delorme 2 Brev 76 (SC 1806).

- 22 *Id* at 79. See Schwartz *Bill supra* note 20 at 325.

- 23 Thorn v Blanchard 5 Johns 508 (NY 1808).

- 24 *Id* at 512. See also Gray v Pentland 2 Serg & R 23, 30 (Penn 1815).

- 25 *Id* at 515.

- 26 *Id*.

- 27 *Id* at 530, opinion of Senator Clinton.

- 28 On the other hand, it is possible they were just being stubborn, since it was their opinion that had been rejected in Thorn. See text between notes 12-14.

- 29 Lewis v Few *supra* note 17 at 5 note 11, 5 Johns at 5.

- 30 *Id* Anthon's NP at 105.

- 31 *Id* Johns at 36.

- 32 In English law, the court supported Richardson's claim that even if the facts charged against him were true, Mayrant had no cause of action. A demurrer was sometimes held to admit the truth of the charges, and be a claim that *although* the facts were true, the plaintiff had not suffered a cognizable injury. The general form for a general demurrer was:

And the said CD by EF his attorney, comes and defends the wrong injury, when, &c. and says, that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said A B to have or maintain his aforesaid action thereof against him the said C D, and that the said C D is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the said C D prays judgment, and that the said A B may be barred from having or maintaining his aforesaid action thereof against him. . . .

See Joseph Chitty A *Treatise On Pleading* 678 (New York 1809). This is a useful volume, since it not only provides an easily-used guide to the pleading labyrinth for the modern reader, but was in wide contemporary use.

- 33 *Mayrant v Richardson* 1 Nott & McC 347 (SC 1815) (*supra* note 20).

- 34 *Id* at 350. Cf New York Times Co v Sullivan 376 US 255, 279-80 (1964).

- 35 *Mayrant supra* note 20 at 351.

- 36 *Id* at 352-3. For the holding that "The loss of an election . . . must be conceived injurious, for which the law will afford redress," see *Brewer v Weakley* 2 Tenn (2 Overt) 99 (1807). For the expansion of the proper tribunal doctrine to cover those being considered for appointive office see *Law v Scott* 5 Har&J 438, 459 (Md 1822). This case cites both Thorn, *supra* note 23 and *Marbury v Madison*.

- 37 If the libellous words were directed at the court itself, they were sometimes punished as contempt. One such case

was *Respublica v Oswald* 1 US 319 (1 Dallas Penn 1788). On its way to punishing Oswald for contempt, the court said (at 324-5):

Libelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeller it is more dark and base than that of the assassin or than his who commits a midnight arson . . . Shall such things be transacted with impunity in a free country, and among an enlightened people? Let every man make this appeal to his heart and understanding, and the answer must be — no!

- 38 *Badgley v Hedges* 2 NJL 217 (1 Penning) (1807).
- 39 *Id* at 220.
- 40 *Vigours v Palmer* 1 Browne 40 (Penn 1807).
- 41 *Id* at 41.
- 42 *Id*. Pennsylvania adopted a Declaration of Rights in 1776: Schwartz Bill *supra* note 20 at 262 says:  
Article XII of the Pennsylvania Declaration for the first time in any constitutional enactment . . . guarantees freedom of speech, as well as freedom of the press.
- 43 *Bunton v Worley* 7 Ky (4 Bibb) 38 (1815).
- 44 *Id*.
- 45 *Id* at 39.
- 46 *Id* at 38-9.
- 47 *Hardin v Cumstock* 9 Ky (2 Marsch) 480 (1820).
- 48 *Bodwell v Osgood* 20 Mass 379, 380 (1825).
- 49 *Id* at 382.
- 50 *Id* at 383. The court says that this ruling meets the standards of Thorn *supra* note 23.
- 51 *Milam v Burnside* 1 Brev 295, 296 (SC 1803).
- 52 *Remington v Congdon* 19 Mass (2 Pick) 310, 314-5 (1824).
- 53 As early as 1808, the availability of legislative privilege for the same purpose began to be limited by the courts — at least in Massachusetts: see *Coffin v Coffin* 4 Mass 1 (1808).
- 54 *Oakley v Farrington* 1 Johns 129, 130 (NY 1799).
- 55 *Dole v Van Rensselaer* 1 Johns 330 (NY 1800). There may be a political factor here, simply on the strength of the second party's name.
- 56 *Forrest v Hanson* 9 FedCas 456 No 4, 943 (DCCC 1802). The plaintiff — a bank director who had been called a swindler — recovered 1¢ in damages. Other cases requiring a showing of official capacity are *Lindsey v Scott* 7 Johns 359 (NY 1811) and *McGuire v Blair* 4 NC 328 (NC 1816).
- 57 *Gilbert v Field* 3 Caines 329f, 329g (NY 1805).
- 58 *Id*. See also *Reports Of Criminal Cases Tried . . . Before Peter Oxenbridge Thacher* 458 (Boston 1845).
- 59 Some of the most important English precedents, including the trials of John Wilkes, the seven bishops, and the North Briton, are collected in *The Law Of Libels* (London 1765). For the view that the federal constitution bars the national government from proceeding against seditious libel at all, see C John Rogge, *The First And The Fifth* 35 (New York 1971); *The Kentucky Resolutions of 1798 and 1799* in Johnathan Elliott, comp, *The Debates . . . on the Adoption*

of the Federal Constitution . . . 540-1 (Washington 1836); George Hay, *Two Essays On Liberty Of The Press* (New York 1970; reprints of essays from 1799 and 1803). "Profound effect was produced by [these] two pamphlets." Charles Warren, *The Early Law Of Criminal Libel In Massachusetts* 27 MassLQ 10 (1942); dissenting opinion of Mr Justice Holmes in *Abrams v US* 250 US 616, 630 (1919). For the opposite point of view, see Leonard W Levy, *Freedom Of Speech And Press In Early American History: Legacy of Suppression*, Preface to the Torchbook Edition, 1 (New York 1963).

- 60 *Supra* note 15. Stanley Nider Katz, ed *A Brief Narrative Of The Case And Trial Of John Peter Zenger* 31 (Cambridge Mass 1963).

The Federalist Sedition Act of 1798 . . . introduced an important reform of the common law of libel, a reform that comprehended all the changes that had been demanded in the course of the century by critics of the harsh English tradition. Henceforth . . . truth was a defense, juries could judge the law as well as the fact, and . . . the intent of the speaker (as well as the tendency of his speech) was a criterion for judging libelousness.

Katz at 29-30, takes a jaundiced view of the power of the Zenger case as precedent, and he suggests that the reason for the outcome was the success of counsel in making the argument that the American situation required a greater freedom to criticize rulers than did the English one (especially at 23).

- 61 But Clyde Augustus Duniway *The Development Of Freedom Of The Press In Massachusetts* 146, 156 (New York 1960, 1969 reprint) says that *Commonwealth v Carlton* (1803) and *Commonwealth v Buckingham* (1824) are rule-proving exceptions.
- 62 This was James Thompson Callender, the defendant in *US v Callender* *supra* note 15. It is true that Callender had published the defamatory things about Washington and Adams which said he had. It is also true that Callender had received \$150 at various times from Jefferson. (For Jefferson's explanation see the letters reproduced in Wharton *State Trials* 720-1). On the other hand, Callender had also defamed Jefferson, after the latter refused to appoint him postmaster of Richmond, Wharton, 719. Leonard W Levy ed, *Freedom Of The Press From Zenger To Jefferson* 397 (New York 1966) says of the *Croswell* case:  
From prosecution to appellate opinions, political expediency rather than devotion to principle governed the behavior of the participants.
- 63 The attorney general, however, did not move for a judgment on the verdict. The following year New York passed a statute which provided (3 Johns 412):

That in every prosecution for writing or publishing any libel, it shall be lawful for the defendant, upon trial of the cause, to give in evidence, in his defence, the truth of the matter contained in the publication charges as libellous: *provided always*, that such evidence shall not be a justification, unless, on the trial, it shall be further made satisfactorily to appear, that the matter charged as libellous was published with good motives and for justifiable ends.

In consequence of this declaratory statute, the court . . . unanimously awarded a new trial: *id* at 413.

- 64 *The People v Croswell* 3 Johns 337, 393-4 (NY 1804).
- 65 *Id* at 402-3.
- 66 Auctioneers were public officers: *Duniway Freedom* *supra* note 61 at 151-2.
- 67 *Commonwealth v Clap* 4 Mass 163 (1808).
- 68 *Id*.
- 69 *Id* at 164.
- 70 *Id* at 168-96.
- 71 *Id* at 168-96. *Duniway Freedom* *supra* note 61 at 152, calls this "novel doctrine."
- 72 William Carey Jones, ed, *Commentaries On The Laws Of England*, II, 2335-7 (San Francisco, 1916) says:  
The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and... therefore... it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate its guilt.
- 73 *The State v Lehre* 4 Hall's AmLJ 48, 50 (SC 1811).
- 74 *Id* at 52.
- 75 *Id* at 53.
- 76 *Id* at 54-5. It is quite possible that the same conclusion would be reached today through the concept of the right to privacy. The most generally accepted rule seems to be that a person has the right  
to be free from... the publishing of... private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to... cause mental suffering, shame or humiliation to a person of ordinary sensibilities.  
*Hull v Curtis Publishing Co* 125 A2d 644, 646 (Penn 1956). See also *Reardon v News Journal Co* 164 A2d 263, 266 (Del 1960).  
The right of privacy is not a branch of the law of defamation... In actions to recover damages for defamation, truth is a defense; in actions to recover damages for invasion of privacy it is not. Damages in actions of defamation are for an injury to reputation, while damages in actions for invasion of privacy are for injury to one's own feelings.  
*Hull* at 650 n. See generally: *Korn v Rennison* 156 A2d 476 (Conn 1959); *Grushcus v Curtis Publishing Co* 342 F2d 775, 776; (US 1965); *Stedrig v Battistoni* 208 A2d 559, 562; (Conn 1964); *Aquino v Bulletin Co* 154 A2d 422 (Penn 1959); *Biederman's of Springfield Inc v Wright* 222 SW2d 892, 895 (Mo 1959).
- 77 Courts seem to have adopted with little variation the rule that fair accounts of judicial proceedings were not actionable, but that commentary in such report was. Typical examples are: *Thomas v Croswell* 7 Johns 264, 272-3 (NY 1810); *The State v Lehre* *supra* note 73 at 55; *Clark v Binney* 19 Mass (2 Pick) 113, 117 (1824). Cf *Paul P Ashley Say It Safely* 50-51 (Seattle, 1969). Robert H Phelps and E Douglas Hamilton 126 Libel (New York 1966). This is an excellent practical manual on where the law stands today.
- 78 English pamphleteers waged a bitter campaign against this doctrine. They argued:

Juries, in all criminal prosecutions, have an undoubted right to try the whole matter in issue before them; and nothing can be more absurd, than to suppose that juries, in trials for libels, are to find a fellow-citizen guilty of a crime, though they have no conviction of his having done anything criminal; for if they find nothing but the mere facts of writing, printing, or publishing, they find nothing that necessarily involves in it the least degree of criminality.

Joseph Towers *Observations On The Rights And Duty Of Juries In Trials For Libel* 7-8 (London 1784). See also Francis Maseres, *An Inquiry Into The Extent Of The Power Of Juries On Trials... For... Libels* 55-6 (London 1770). This matter was resolved in 1792 by Fox's Act, which provided that (Hatch, *Statutes*, 122):

On the trial of... any libel, where an issue or issues are joined between the king and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to... give a general verdict... upon the whole matter put in issue... and... not be required or directed... to find the defendant or defendants guilty, merely on proof of the publication... of the paper charged to be a libel, and of the sense ascribed to the same... Provided always, that... the court... shall... give... directions to the jury... as in other criminal cases.

In the United States, the character of the publication was almost always left to the jury; in fact, plaintiffs seem to have been even more insistent on this than defendants. As typical examples, see: *Genet v Mitchell* *supra* note 17; *Vigours v Palmer* *supra* note 40; *Dexter v Spear* (RICC 1825) 7 FedCas 624 No 3, 867; *Levy Legacy* *supra* note 59 at 28. As an atypical example, consider the following from *US v Callender* *supra* note 15 at 253:

Chase: We all know that juries have the right to consider the law, as well as the fact — and the constitution is the supreme law of the land, which controls all laws which are repugnant to it. Wirt for [Callender]: Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution. Chase: A non sequitur, sir.

- 79 *Commonwealth v Blanding* 15 Am December 214, 216 (Mass 1825). The preceding quotation is at 215.
- 80 *Supra* note 67.
- 81 *Blanding* *supra* note 79 at 220.
- 82 *Id* at 218. This is a very close paraphrase of Blackstone. Jones *Commentaries* *supra* note 72 at 2338.
- 83 *Id* *Blanding* *supra* note 67 at 222.
- 84 *Id* at 223.
- 85 *Id* at 224.
- 86 *Id* at 219. In 1827, Massachusetts provided by statute:  
That in every prosecution for writing and publishing any libel, it shall be lawful for any defendant upon trial of the cause to give in evidence in his defence, the truth of the matter contained in the publication charged as libellous: *Provided, always*, that such evidence shall not be a justification, unless on the trial it shall be further made satisfactorily to appear, that the matter

charged as libellous was published with good motives and for justifiable ends.

The passage of this act marked the removal of the last substantial legal restriction upon the freedom of the press in Massachusetts.

Duniway Freedom *supra* note 61 at 159-60.

The policy of liberality had . . . been established by the constitutions of Mississippi (1817), Connecticut (1818), Missouri (1820), and New York (1821). (*Id* at 158 note 1).

- 87 Ronayne v Duane 20 FedCas No 12,028 (Penn CC 1814). Duane was the editor of a highly partisan "Aurora". Even so, it is more than probable that the court was holding only that the truth justification, though admissible, also required a showing of lack of malice.
- 88 Frederitze v Odenwalder 7 Penn (2 Yeates) 243 (1797); this is one of our rare *nisi prius* cases. For an even stricter statement of the rule, see Kerr v Force 3 DC (3 Cranch CC) 8, 14 FedCas 386 No 7,730 (1826). JQ Adams had endorsed the allegedly forged note in this case. *Cf* Phelps Libel *supra* note 77 at 110.
- 89 Andrews v Vanduzer 11 Johns 38 (NY 1814).
- 90 Samuel v Bond 16 Ky 158 (1812).
- 91 Depending on the statutes and court rules of the state involved, a plea in justification on a charge of theft would be roughly to the tenor and effect following, to wit:  
And the said C D, by E F his attorney, comes and defends the wrong and injury, when, &c. and says that he is not guilty of the premises above laid to his charge, in manner and form as the said A B hath above hereof complained against him. And of this he the said C D puts himself upon the country. [So far, we have pleaded the general issue, which could be done alone. See below.] And for a further plea in this behalf as to the speaking and publishing of the said several words of and concerning the said A B as in the said courts mentioned, the said C D by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said A B sought not to have or maintain his aforesaid action thereof against him, because he says, that the said A B before the speaking and publishing to the said several words, of and concerning him the said A B, as in the said counts mentioned, to wit, on, April 3, 1973, at the Yale Law School Library did feloniously steal, take and carry certain goods and chattels, to wit, one paper on libel law between 1787 and 1825, of one E F of great value, to wit, of the value of 10¢ wherefore he the said C D afterwards, to wit, at the said several times in the said counts mentioned, at, the Yale Law School Faculty Lounge aforesaid, did speak and publish the said words of and concerning the said A B, as in the said

counts mentioned, as he lawfully might for the cause aforesaid. And this he the said C D is ready to verify; wherefore he prays judgement, if the said A B sought to have or maintain his aforesaid action thereof against him.

Chittys Pleading *supra* note 32, at 504.

- 92 Samuel *supra* note 90 at 159.
- 93 Jackson v Stetson 15 Mass 49 (1818). The second section of the 1827 Massachusetts statute *supra* note 86 reads:  
Be it further enacted, That in all actions . . . for writing and publishing any libel, and in all actions for slander wherein the defendant or defendants may plead the general issue, and also in justification that the words written and published or spoken were true, such plea in justification shall not be held or taken as evidence that the defendant or defendants wrote and published or spoke such words or made such charge. Nor shall such plea of justification, if the defendant or defendants fail to establish it, be of itself proof of the malice of such words . . .  
Duniway Freedom *supra* note 61 at 159. See Hix v Drury 22 Mass (5 Pick) 296, 303.
- 94 Clark v Binney 19 Mass (2 Pick) 113, 121 (1824).
- 95 Wilkinson v Palmer (Ohio 816) Tapp 66, 69. Chitty Pleading *supra* note 32, I, at 487, agrees.
- 96 Alderman v French 18 Mass (1 Pick) 1, 9 (1822).
- 97 Beniss v Brooks 8 Johns 356 (NY 1811).
- 98 *Id* at 358. But Beniss won a new trial on other grounds.
- 99 Maybee v Avery 18 Johns 352, 355 (NY 1820). But the plaintiff was denied a new trial.
- 100 Kerr v Force *supra* note 88 at 393 quoting Lord Coke.
- 101 See *ante* note 91, and note that up to the brackets, we have not given the plaintiff any indication at all of what ground we plan to put our defense on.
- 102 Barns v Webb 1 Tyler 17, 17-18 (Vt 1801).
- 103 Else v Ferris Anthon's NP 36 (NY 1808). As a typical case see Samuel v Bond *supra* note 90 at 159; as an atypical case see Cooke v O'Brien 2 Cranch CC 17, 6 FedCas 438 No 3, 177 (DCCC 1810).
- 104 Alderman v French *supra* note 96 at 17.
- 105 Shepard v Merrill 13 Johns 475 (NY 1816).
- 106 Bailey v Hyde 3 Conn 463, 466 (1820). Another example is Buford v M'Lung 1 Nott & McC 268, 271 (SC 1818).
- 107 Treat v Browning 4 Conn 408, 410 (1822).
- 108 *Id* at 418. The opinion cites Bailey v Hyde *supra* note 106.
- 109 *Cf* George Bancroft, V History Of The United States Of America 121 (New York, 1885).