Vanderbilt Law Review

Volume 15
Issue 4 *Issue 4 - October 1962*

Article 6

10-1962

Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis

Walter Probert

Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis

*Walter Probert**

Does the law of defamation need to be reformed? The author thinks so. Professor Probert rejects the doctrine of libel per se and questions the courts' understanding and use of the term "reputation." It is his belief that plaintiffs on an individual basis should have increased benefit of the knowledge accumulated by the various social sciences in proving the harm done by the alleged defamation, with more liberalization in the requirements of pleading and proof than is now generally countenanced by the courts.

I. Introduction

What are you going to do with the common law? One time you can bless it for its "skepticism" of the theories of the "fuzzy-heads." Another time you can damn it for its old maid and bigoted isolation from the world of realities. Experimentation is quite clearly one feature of the process. But so is inertia. There is little satisfaction in knowing these are features of advancing civilization generally, little satisfaction if you are sold on the notion that there are areas of that common law where the experimentation could safely move a little faster. A case in point involves the doctrine of defamation.

Interests in property and in body have been fully recognized for some time, even though the way they are balanced has been in flux. "Civil rights" have been recognized since at least 1215. Only recently have we seen any frank recognition of psychic interests, as demonstrated by the doctrine concerning the right of privacy and the increasing protection to "emotional tranquility." This is not to say that physic interests have not in fact been protected, but in subtle and probably inadequate fashion. One does not make the wisest plans for protecting a valuable item by placing it in a box and then, closing the lid to sight and memory, asking, "What shall we do with the box?" Warren and Brandeis in their famous law review comment on the subject[1] dramatically demonstrated that the "right of privacy" had been promoted, although surreptitiously, for a number of years. Since their disclosure, the advance of that interest has been even more dramatic. There is some analogy in the workings of the

*Professor of Law, University of Florida; Editorial Consultant, *General Semantics Bulletin.*

1. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

doctrine of defamation. Even though not articulately, maybe even unconsciously, certain psychic interests over and above what can be caught in the notion of "reputation" have been protected. There the analogy becomes fuzzy, for those interests are lost sight of too readily and are easily outbalanced by other interests whose banners are much gaudier and whose vocal proponents are much louder and, so far, more persuasive.

A person who successfully claims a defamation does so ostensibly because he proves a likely hurt to reputation; but just as likely he has also suffered hurt feelings; anxieties worthy of psychiatric concern; bodily hurts to be treated by other medical means; actual economic deprivations; loss of power and influence, love and affection, respect for and from others as well as possibly self respect, potential for self and social fulfillment, opportunity to move as freely as before in various circles affording information and technical improvement—generally a loss of status, or specifically a loss of some enjoyed or enjoyable relationships with others. He argues these complexities in the chilling frame of reference of a motion to dismiss his complaint based on defendant's claim that the utterance was not "defamatory," with all the technical, narrow, mechanical trappings that have grown up around that question, not the least of which is the recent hastening retreat into the messy pits of libel per se. There is little chance here to break through the restrictive bindings and to be persuasive of the value of one's personality and relations with others.

A person whose utterances prove not defamatory wins maybe because they are true or because they do not see much of the light of day in court, buried as they are under the technicalities. But if these barriers do not save him, then he moves into a debate which has some of the most one-sided rules that have been invented in the common law, save those afforded in a criminal trial. This debate comes under the control of the master of privilege, absolute and qualified. Here the utterer may bring into play his whole life history, so to speak, to show that what he did was right for him. Then he may go on to show that it was important to the person who received the message—or to the group. That group may be as small as two or of infinite size, for social interests are considered here too. True, the plaintiff may indeed rise at this point to try to add some weight to his side of the scales.[2] But overriding the debate, ready to apply cloture and gavel home the negative vote, is a shining angel dressed in the most luminous garb Heaven has yet created, an angel who "made this country what it is," whose ideals have guided us almost as well as her master, an angel and a freedom. How do you do battle with a freedom, especially freedom of speech?

2. Not only are the plaintiff's individual interests short-circuited, but the group interests he represents do not seem to receive a balanced treatment. See, *e.g.*, Riesmann, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

Maybe there are absolutes on the defendant's side, maybe the value of that freedom needs exalting, maybe the built in inertia of the common law, particularly in this area, is what most keeps change at bay. Maybe. Yet our law has been known to make signalled, yet dramatic, changes.[3] That thought leaves hope that mere words such as those of the doctrine of defamation can be shaped to a task thought worthwhile. But there are other hopes. There are other doctrines, perhaps more amenable to the task; and if the common law is unequal to the task, there are other legal alternatives, and there are even other social institutions.

Courts in defamation cases are dealing with complex interpersonal relations. Modern psychology and related communication theories have more to offer relevant to a realistic understanding of those relations than much of stare decisis.[4] Courts are not likely to make any dramatie change in their wielding of the defamation doctrine, although they could. But the courts are shaping other principles which may be symbolic of an acceptance of our new era of psychology. While something better than amateur probing is needed in this unexplored "space" of the common law, such effort may along with other forces spur the possible firm union of legal and psychological research which could be so very fruitful in the advance of our efforts to understand and resolve our human problems.

Let us look then at a few of the rigidities of defamation law, trying to observe dimly at least the underlying interests and values which even vague references to modern psychology do expose. Let us look at some of the more technical and thus obscuring doctrinal parts: "Reputation" and its correlative term "defamatory"; the principles and techniques of interpretation of the utterances and the allowable context; and some of the procedural backdrop, special damages, and libel per se.

II. Reputation, Psyche, and Relations

An actionable defamation is generally thought to arise out of words, or sometimes other symbols, which are communicated in such a way as to injure a person's reputation. One of the key words, of course, is "reputation." In any definition or formulation or general intellectual framework

3. Especially regarding federal-state relations, see, *e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See the brilliant treatment of such problems in Hart & Wechsler, The Federal Courts and the Federal System (1953).

4. The word "psychology" as it is used in this article is generally defined in its broadest sense to approach the currently popular term "behavioral science" including much of psychiatry. As will be seen, the word "communication" is defined broadly too. In a sense, such communication theories as general semantics and semiotic fit the psychological perspective. There is a branch of psychiatry now putting the accent on communication "problems." See Reusch & Bateson, Communication, The Social Matrix of Psychiatry (1951).

of inquiry or description, key words tend to become concretized, *i.e.*, to lead to oversimplifications and to the narrowing down of areas of investigation.[5] A choice analogy lies in the area of commercial law. There with regard to the sale of goods stands the key term "title." Various problems concerning the buying and selling of goods can be resolved by resort to the attempt to locate a concretized title which necessarily is only one way of talking about the problem to be resolved. The problem might concern, for instance, who is to bear the risk of loss of goods destroyed in transit from seller to buyer, or how should the seller stand in relation to creditors of the buyer who becomes insolvent. The ramifications of such problems could be ignored, at least prior to the advent of the *Uniform Commercial Code*, by locating title. In the area of defamation, the complexities of other kinds of interpersonal relations can be ignored and a "reputation" conjured up and visualized and used as the basis for judgment.

The "reputation" formalism should be taken only as a road sign—not as the objective. It is not a symbol which well catches the full scope of the problems of defamation, if any one symbol could. For one thing, there is the popular significance of the term which can weigh too heavily in the legal considerations. In this vein, a person's reputation is comprised of what other people say and think about him, maybe what image they hold of him. But this "image" is only a statistical conclusion. Madison Avenue notwithstanding, there is no public image, although there are possibly numerous individual images which can be reduced to a statistical probability (public image). Statistics have their place in solving scientific dilemmas and to some extent in resolving certain social problems, but they can be mighty misleading when it comes to assessing the hurt a particular plaintiff may have in fact suffered. Judicial procedures do not readily allow an accurate assessment of a plaintiff's "public" image, the computation of where he stands in the community before and after the defendant's utterances. Further, he may have no public hurt, just a few private or localized hurts which may be grievous all the same. You cannot capture the variety of individual reactions to comments about a person in any general notion of image or reputation. It is useful mostly as a last resort, where the details of reaction are missing.

In this respect, and contrary to the most limited notion of reputation, when a defendant says uncomplimentary things about John Doe, this does not lead *just* to other sayings and other thoughts by those who hear the statement. It leads to all sorts of human behavior, including very often articulate reaction. Perhaps more important are the reactions which are unconscious, unplanned, but which can be considered "harmful" by Doe

5. See for elaboration, Probert, *Law, Logic and Communication*, 9 W. RES. L. REV. 129 (1958).

and by a court. That is, if "reputation" were to be narrowly defined, somewhat as in the popular sense, then the tort of defamation would amount to even less than it does.

But a plaintiff does not sue simply because his reputation has been hurt, anyway. Usually he will *feel* hurt; he, his person, his sensitivity, his awareness, his expectations, his status, and maybe even his body and his economic interests are believed to have been hurt. "Reputation" is a point of entry into the relational problems involved, not a stopping point. Reputation in the air, so to speak, will not do. There need to be and usually are consequences to talk about. Reputation at most provides the means of doing the hurt, but it must be considered in context, just as the fist which does the striking must be viewed in the larger setting of who did what to whom for what purpose.[6]

There are other objections to the term and the narrow notions of "reputation." It tends to hide the interests which courts actually protect in defamation cases, or better, the interests which come before the courts. The word is possibly part of the reason why there is an overemphasis on but one aspect of communication, the business of giving publicity to an idea. Certainly the reputation formula has encouraged the use of unsophisticated techniques of interpreting the significance of a defendant's utterances.[7]

There are at least two ways of putting it. "Reputation" does not legally mean what it seems to mean in the popular sense at all; or, courts use the term to deal with a variety of interpersonal relations. At any rate, interpersonal relations are involved. One person's relationships with his fellow beings might be graphically represented as of a particular moment. But there is a dynamic process about those relations, like the stream in motion (or the universe). Throw a pebble into a moving stream and you produce cross currents. You disturb the system, although not permanently and maybe not even visibly. Throw in large deposits of cement, and you can change the system altogether. Similarly, introduce an electric charge into an arrangement of iron filings, and you will probably rearrange those filings into a new pattern. The new pattern is a sign of the electro-magnetic field of the charge. Say *anything* to one person about another, and you in some way affect the relationships involved, not only between those two, but between you and each of the others and among all three of you. Perhaps the effect is not noticeable, but the greater the charge, the greater and more dramatic the complexity of the change in the structure of the relationships. In the very nature of human relationships, the effects cannot

6. Of course there are cases where harm to reputation is assumed. The possibly fictional aspects of this assumption will be discussed. The kind of damage described in the text justifies the fiction on the one hand, and on the other suggests that "special damages," where required, ought to be more broadly defined.

7. All these points will be elaborated hereafter.

be limited to three persons. You may well affect the structure of a variety of other groups to which these persons belong.

No matter what the superficial definitions of the common law, no matter how outdated the judicial maps may sometimes seem, the facts of life do get reflected in the judicial action. Courts have actually modernized the definition of "reputation" so as to give greater recognition to the human interrelationships that are involved. Many have moved from the old formulation of "hatred, scorn, contempt, ridicule" to something like "esteem, respect, good will, confidence."[8] One group of legal realists has attempted to define the interests that are actually protected in the following fashion:

> A person's standing in the community with his friends, neighbors—and prospective acquaintances—is of great value and he is entitled to have his relations with them unimpaired by defamatory harms. The regard of those about him more completely conditions his behavior than any other one factor, and it likewise adds more to his stature as a person than any other one factor. This interest has long been identified and valued as reputation, or less accurately, as character. It is an incident of group life and is found in all other group relations as in trade, family, profession and political groups. It takes on the color of the particular group and is given different degrees of protection accordingly. The doctrines of slander and libel have in large part been developed about the protection of community relations.[9]

This definition does not actually say what injuries are actionable, for it leaves "defamatory" undefined; but it does help to suggest the possible scope of the interests involved.

We have moved to this point. An utterance about John Doe communicated to other persons has the potential of disturbing his relationships to those people. In the past we have simplified this field of relationships by the word "reputation." Contemporary knowledge provides considerably more information about these complexities than was available in earlier times. This information gives us some aid in understanding how people do react to statements about a given person and in understanding how that person himself is affected. Thus, if we are willing to take the step of admitting that the common law has been dealing in individual and social psychology, or better, has been dealing in human affairs which are now being more carefully studied by practitioners called psychologists and psychiatrists and social scientists, then we should be willing to consider what these people have to say about the very problems we *are* in our fashion resolving. If the judicial process is to be something more than a method of forcibly settling disputes, if there is to be some correlation between judicial guideposts and current knowledge about human be-

8. See PROSSER, TORTS § 92, at 572 (2d ed. 1955).
9. GREEN, MALONE, PEDRICK, & RAHL, INJURIES TO RELATIONS 332 (1959).

havior, then the channels of communication between the courts and those experts must be opened more widely. The courts always have the freedom to reject what they regard as mere speculation. They should not refuse to listen. To open up judicial inquiry to Freud and Korzybski and Ogden and Richards, and their various successors is not to buy everything they say.

Freud, one of the great figures in our recent intellectual revolution, laid stress on the person and his heredity, and his environment admittedly in some flux. But the stress does seem to have been on the person as a complete, perhaps isolated, entity. Later formulations, showing indebtedness to Freud, yet with varying degrees of independence, have not only changed the emphasis from childhood development and "sex" (pleasure?) *qua* the individual to later stages in human development and to other values (power, meaning, etc.), but also to interpersonal relations.[10] Not only do internal drives and conflicts place the person in stress and account for his behavior, but so do group arrangements and values and conflicts and specific person to person exchanges. Nor are the later views so disparate as some would claim them to be. Rather, what may seem like rumblings or fights, or even revolutions in psychology, are more to be seen as attempts to discover and deal systematically with all the variables that enter into the understanding of human behavior.

For our purposes, then, you may affect a person if you "touch" him in some way. But "he" does not end at his skin; "he" is not to be most fully understood by talking about him as you see him.[11] What "he" is involves a product, so to speak, of him and others. He is a function of his group identities and interrelations, as well as his internal make-up. Neither of these poles which can and does make up the individual "personality" even for legal purposes is, admittedly, fully understood by our specialists or our synthesists. Yet, whatever the status of "personality" in law, we have understood enough for centuries about the "body" and its manifestations and interaction with material things to protect it from certain invasions. As that part of knowledge develops, we add also to the protection and come to deal with it in a more articulate and hopefully more intelligent fashion. Thus, for instance, we now give protection to the foetus in the womb. We allow damages for bodily conditions which can be traced to some human intervention, by allowing the testimony of experts on human behavior who but a comparatively short while ago had difficulty obtaining access to the witness box.

---

10. Some of the names are Alexander, Fromm, Horney, and Kardiner. See BIRNBACH, NEO-FREUDIAN SOCIAL PHILOSOPHY (1961) for a discussion of the leading proponents of the newer view and for a bibliography.

11. Nor do we reach maximum security by emphasis on the "I" of the storm. See WATTS, PSYCHOTHERAPY EAST AND WEST (1961) for a readable elaboration of the notion that the feeling of individuality is a matter of cultural inheritance.

Likewise the law has indeed been giving recognition to the interpersonal side of man, again with the aid of the limited knowledge at hand. Contract and property doctrines have long been involved with the commercial interrelationships; constitutional law with those and others, including what we call political relationships which include the civil rights. At some point we decide that the person disappears from the picture to be subsumed in the relations. The relations are given the emphasis and the remedy. So we talk about society and the public interest, and we get great constitutional declarations and the criminal law. Here is part of the problem for our area of concern, whether to treat problems of defamation as matters which call for remedy for the individual and/or "society" on the one hand, and on the other whether to implement the remedies against individuals as a matter of individual responsibility or against "society" as matters only of social concern. A similar debate has not been resolved in the area of criminal law and that under the non-functional, yet somewhat effective, heading of "insanity."[12]

Tort doctrines, too, have involved interpersonal relations, and the defamation doctrine has been one of the oldest of these, aiding in promoting the non-bodily, non-economic relationships. The relationships at stake have been there, many of them, ready to be talked about, even though we have not been ready to talk about them in any comprehensive cultural way. This is the way of advancing knowledge. We spoke of water at one stage of our "science," later of hydrogen and oxygen, and later of electrons and protons and neutrons, and later of numerous other "particles," tangible if not visible representations of relationships.[13] They were, in scientific philosophy, even if not in the most skeptical philosophies, always there. The products were not always there. The fruitful use of atomic power came long after we understood the first constituent relationships. The common law should not be fearful of some similar evolution of thinking, creating, recognizing, applying. Indeed it has not been, although the process is slowed by the less functional adaptability of the terms in its language.

So, even though plaintiff's interest seems to be localized in his "reputation," as with most law terms, this one has a certain amount of fictional

12. Of course, in the matter of bodily injuries and tort law more generally, debate over the importance of "fault" as a basis of liability involves related concerns. See Leon Green's latest discussion of "fault" in his *Thrust of Tort Law: I*, 64 W. VA. L. REV. 1, 12-16 (1962); also see Probert, *Speaking of Torts*, 49 KY. L.J. 114 (1960) for an analysis of the "fault" problem from a linguistic point of view.

13. We see things, static and in action; but what we see as things may, with difficulty, be seen as relationships. For some purposes, relational thinking is more important. All of tort law, not just part of it, could be analyzed from a relational point of view. Or a usable definition of "property" would be in terms of the individual in his relations with other persons such that he may, with the backing of legal machinery and other pressures, exclude those others from certain activities which clash with his activities and expectations centering around certain tangibles. That perspective takes us into economics, religion, political seience, psychology, etc.

significance, such a syntactic relationship to other terms that judges may deal with the complexities of individual and interpersonal psychology, even if in a primitive fashion. Consider, for instance, the many cases where general damage has been "presumed." The ostensive rationale is that in those cases, the reputation has indeed been hurt, or so probably hurt that the likelihood will stand in proof, especially because specific proof is thought hard to maintain. A rationale like that rarely gets questioned when it serves a purpose. Compare the presumption of damages in trespass to land cases. There the sanctity of possession and the need to provide a means of defending title lend satisfaction to that even more obvious fiction.

Since reputation is not something which exists separate from a person, since as a term it is included in the field of terms bearing on human behavior, and since usually the person is affected whose reputation is affected, then that person may be affected in ways we will more readily recognize as intra-personal rather than inter-personal. While the defendant's utterance may suggest what he thinks of plaintiff and may give some basis for our inferring how some others may come to think of plaintiff, it may also give a basis for inferring what plaintiff may feel about himself and others. He may consequently suffer great hurt to his dignity, his pride, his self esteem. His entire pattern of behavior may be changed. These are facts before the court which are relevant to the problem and which, psychologically, it cannot ignore. Particularly where no "special" damage, as that is narrowly defined today, is in issue, such factors could and should weigh just as heavily psychologically with the decision-maker as does the inference of likelihood of harm to reputation.[14] Like the newly discovered bits of matter of the physicist, these aspects of interpersonal relationships have been there all along; but now we can talk about them. They have a scientific respectability. Now let the courts grant them official recognition.

Again we may fancifully refer to current psychology to aid in the analysis. The psychotherapist does not observe just the patient, he observes himself. His own reactions to the patient inform him of the patient.[15] Nor is that technique peculiar to psychiatry; it spreads over all of "scientific" analysis, the notion that the observer is also a participant in the process

14. Remember that "reputation" is only a word as it appears here, and like all words it can capture symbolically what we are willing to allow. If you will allow yourself such flexibility, then you are not troubled by seeing "reputation" as symbolizing to some extent the activities not only of the recipients of the defamatory utterance, but also the person defamed. Admittedly this is an extension beyond the usual articulated definition (see Probert, *Law and Persuasion: The Language Behavior of Lawyers*, 108 U. PA. L. REV. 35 (1959)), but not necessarily beyond the definitions which courts at least sometimes act out. The references of our symbols are not limited to the ones we can articulate. Courts do not and cannot completely ignore the "personal" damage that is involved in defamation cases.

15. REIK, LISTENING WITH THE THIRD EAR (1948).

he is observing.[16] The very act of locating an "electron" disturbs its location. It is an acceptable psychological notion that the individual's self image is largely a reflection of the way he sees others reacting to him, a finding which would justify the therapist in letting himself act out different roles to catch the reactions of the patient as they duplicate to some extent his social behavior outside the therapist's office.[17] Surely the courts would be justified, then, in considering how the subject-object of the claimed defamation has himself reacted to the utterance.

In a limited way, such considerations have been allowed articulation in defamation cases. "Emotional disturbance" is an allowable item of consequential damage, as is resultant physical damage, where the prima facie case has otherwise been established. But courts increasingly seem to be requiring special damages as an element in the prima facie case. Courts have not allowed "personal" psychological or emotional hurt as such an item of special damages, as a help to establish the prima facie case,[18] even though we could see it as evidence of hurt to personality which flows from upheaval in the individual-social dynamics, the reputation, as broadly defined.[19] The judicial view can now be seen as more a product of an understandable lag than a necessary rule of precedent. Here the formulation of "reputation" in the narrow sense has stood in the way, as any formulation eventually must. As Whitehead said, we are indeed fettered by our current abstractions.

If we think of "reputation" as if it were the interest protected, in the sense that it stands only for other people's reactions, only one end of the dynamism, then we do not look at the other end. If defamation dealt only with those reactions, then it ought to be those other persons who have the causes of action for being deceived, for being defrauded.

We could become sensitive enough to human reactions to realize that if a person thinks he has been hurt in his "reputational" relationships, his prestige and "status" relationships, then he will be, very likely. We may not expect that kind of sensitivity very soon, however, although there is in it no more difficulty than occurs in the notion that a person may be

16. A point well emphasized by JOHNSON, PEOPLE IN QUANDARIES (1946) in explaining general semantics theory.

17. Said to be one of the techniques of the late Harry Stack Sullivan, a leading figure in contemporary interpersonal psychiatry. See THE CONTRIBUTIONS OF HARRY STACK SULLIVAN (Mullahy ed. 1952) for a purportedly complete bibliography of Sullivan's works.

18. The leading case defining "special damages" is Terwilliger v. Wands, 17 N.Y. 54 (1858).

19. Tell a child he is bad often enough, and he may come to believe you mean always. Since he does see himself as others see him, (contrary to Burns' famous lines) the description can become self-actualizing. Adults can react similarly, not only to a defendant's utterances, but also to the reactions of other people stimulated by that utterance. Here then is a good reason for discouraging defamatory conduct.

liable for what he should have thought, rather than what he did think.[20] It certainly comes down as always to a matter of values. The matter is only aided, not determined, by logic.

Yet, where special damages must be pleaded, we could expect a judicial willingness to accept proof of a consequential neurosis of plaintiff, or of something even less dramatic, particularly if there is some physical manifestation of that emotional upset. Psychiatrists and clinical psychologists are now accepted experts on these matters in the trial courts.[21] Of course the question of "causation" will remain a judge-jury one—partly fact, attested by the expert to be believed or not by judge-jury; partly value, again a judge-jury reaction.[22] The question will be whether the defendant did cause the plaintiff to suffer dramatically by his action of talking about him in a defamatory way and did cause him to suffer physical injury, say an ulcer or high blood pressure, or what have you.[23] Of course the defendant is not solely the cause. Yet he may have struck a man who is sick, and the tendency in other areas always has been to say that you take your plaintiff as you find him, with diabetes, or hemophilia, or tendencies to delirium tremens.[24] Whether defamations should be regarded for this purpose as blameworthy as batteries is again a value question, but surely some are. Surely there are some utterances where the risk of kicking off a neurosis or physical illness could place liability on the utterer just as readily as a playful kick by one schoolboy can make him liable for an unforeseeable resulting infection in the leg of his diabetic playmate.[25]

---

20. Reference here is to the "objective" standard of care in negligence cases.

21. See CURRAN, LAW AND MEDICINE (1960).

22. Malone, *Ruminations on Cause-in-Fact,* 9 STAN. L. REV. 60 (1956).

23. We enter here the realm of psychosomatic medicine. In one reported medical case, the patient's husband told their daughter that the patient was no good, she had been pregnant before marriage, and that he married her because no one else would. The daughter had always been warm and confiding, but she became progressively cooler and less confiding. The mother suffered at first "indigestion" and later an ulcer, coming from the interruption of the dependent relationship with the daughter. The illness was fairly easily cured, but it required a therapist. GRINKER & ROBBINS, PSYCHOSOMATIC CASE BOOK 200 (1954). A defamation case could easily involve an analogous situation.

There is no real line between "physical" and "emotional" disturbance. "Practising internists, and also discerning surgeons, are plagued by the fact that daily they see evidence of the influence of emotion on visceral function in healthy and sick persons." ALTSCHULE, BODILY PHYSIOLOGY IN MENTAL AND EMOTIONAL DISORDERS 3 (1953).

24. McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911) (recovery for death from delirium tremens triggered by defendant's harmful conduct).

25. Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891) (the manysided "battery" case in point). In another time and place, during the German occupation of Holland, a young Dutch girl was being courted by a young man who was not acceptable to her parents. Violent quarrels between the girl and her parents ensued. The patient developed, as a medical consequence, a serious diabetic complication, probably more readily foreseeable today than the traumatic diabetic complication of the *Vosburg* case. See WOLFF, STRESS AND DISEASE 121 (1953). See also DUNBAR, EMOTIONS AND BODILY CHANGE (4th ed. 1954).

The unjustified risk-taking of hurting reputation could support that *psychial* damage, certainly if there was "intent" to harm reputation or person, even if no other special damage were shown. Recovery for caused neurosis has already been allowed in other doctrinal areas.[26]

Such experimentation, as some might view it, runs parallel to what has been going on elsewhere in the common law. Whereas in previous times, "mental" disturbance was only an item of allowable damage under various nominate tort headings, we can now talk freely about protection against wrongful invasion of the interest in emotional tranquility, at least as it is evidenced by physical harm, and more and more when it is not.[27] That is actually a vague way of talking, and sooner or later courts will have to be more specific in their ways of talking about the "emotional" interests involved. Surely the experts in psychology and human relations will be of help here too. Conceivably the person who suffers neurosis and physical injury as a result of a defamation might be remedied by this new way of talking. To take that path would do as well for that case. But sooner or later the next stage of the problem would arise. The next stage of the common law evolution would be to consider this problem: a defamation producing no tangible physical injury in the current senses, just neurosis say, or anxiety of some duration and aggravation. Why not try out this bridge then, the bridge that has already been carefully modelled in other tort streams?[28]

The point is that the evolution that is affecting tort law generally has got to affect the doctrine of defamation sooner or later. More functionally speaking, the "reputational" interests, more broadly the interpersonal social interests, will sooner or later be protected in their larger manifestations; and what are presently called emotional interests will sooner or later be recognized as containing one sub-division which correlates with what we now call reputational interests along with many other sub-divisions comprising the interpersonal social categories of "emotional" interests. If defamation doctrine is so inflexible as to stand in the way of that evolution, then it will be by-passed and suffer atrophy, as perhaps it should, or it will be pushed aside to the the lesser tasks it can handle. In the meantime, of

26. Hood v. Texas Indem. Ins. Co., 146 Tex. 522, 209 S.W.2d 345 (1948) (a case of compensation neurosis).

27. At first physical damage was the nub of recovery, but with successful experiment the courts have reduced the nub to a fiction. PROSSER, TORTS § 37, at 176 (2d ed. 1955). The fiction is in the process of disappearing, as good fictions should.

28. In the "emotional tranquility" cases courts have worried about a flood of litigation and use of fraud and perjury. That worry is waning. See Battalla v. State, 10 N.Y.2d 237, 176 N.E. 2d 729 (1961); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958) (Musmanno, J., dissenting); Amaya v. Home Ice, Fuel & Supply Co., 23 Cal. Rptr. 131 (Dist. Ct. App. 1962). Surely this same worry has been involved in the narrowness of the definition of special damages in defamation cases. Also relevant is the evolution of the right of privacy.

course, the evolution will move only slowly. The process can easily be speeded by a flexibility in definition.

Beyond the point of "emotional" hurts evidencing "reputational" hurts do lie possibly even broader analyses of the various social relationships involved, some of which have already been suggested and others which will be. What we need now or soon is a great deal of information, to aid in intelligent analyses and planning and decision-making. The recently developing activity in so-called social psychiatry could be producing much of that information.[29] Sooner or later such information will find its way into the common law, of course. Yet the inflow of that information could be spurred by research and public comment. If only appropriate members of the legal profession could team up with some of the varied specialists in psychology to discover how people do react to defamatory statements, for instance, and what happens to persons who are defamed.[30] Cases actually in the law books could be tracked down to reveal interesting case histories preceding and following the litigation. But practicing psychiatrists must have much of this information moving right across their couches. The job is to collect it and evaluate it. What kind of personality disorders arise, what physical disturbances, what social disturbances, etc.? Several law schools already are pioneering in law and psychiatry courses.[31] Those are the most likely places for such research to get going.

III. The Camouflage of "Meaning" and of Libel Per Se

The elements of a prima facie defamation case include damage to "reputation," the shorthand relational concept just discussed. While an allegation of special damages may also be an element, the reputational aspect marks the case as one of defamation. At common law, in libel cases, damages were presumed and did not have to be proven—if a "defamation" was established. The utterance was actionable if it was de-

29. Lasswell and McDougal have analyzed legal, political, and social problems generally in this vein. See, *e.g.*, McDougal, *The Comparative Study of Law for Policy Purposes*, 61 Yale L.J. 915 (1952). For a critical but friendly analysis of Lasswell as being in the camp of social psychiatry, see Birnbach, Neo-Freudian Social Philosophy (1961). The analysis is from a political scientist, not a lawyer.

30. See Leighton, Explorations in Social Psychiatry (1957). Psychiatry is no longer, if it ever was, merely a matter of dealing with sick people. The findings of psychiatry become more and more of concern to the law. Since ultimately any "undesirable" change in social status flowing from a defendant's "wrongful" conduct ought to be remediable in some way, we need scientific aid in forming the norm for "desirability."

31. The law schools of Michigan, Pennsylvania, and Yale have done the most diligent work. Temple and the University of Florida law schools also are now involved in their own approaches. The author and two colleagues have participated in such an experimental course. So intrigued are they with its potentialities for legal education that they hope to report on it. There are undoubtedly other experiments in this unheralded swing in legal education.

famatory. It was that simple! The judge determined if it was susceptible of a defamatory meaning, and the jury determined if it was understood that way. Although the commentators have discussed the point very little, apparently witnesses could be heard as evidence of how the defendant's utterances were actually understood. Still, their opinions were not necessarily final. In the first place, credibility is a jury determination. But even greater jury discretion seems to come out of some sort of a rule of reason which makes the jurors better qualified than the recipient wituesses to know how the witnesses did receive the statements.[32] Almost unbelievable are the rulings that such evidence is not even admissible,[33] unbelievable if you are skeptical of the "meaning" approach to interpretation of claimed defamatory statements.

Plaintiff's objective is to convince the decision-makers at various stages of the litigiation that he *probably* was hurt, because of the "natural" tendencies of the defendant's utterances—under the circumstances. The inference of probable hurt must support the presumptien of damages where it prevails, in theory, insofar as it gives discretion to the jury to return a substantial verdict. Of course, plaintiff may not be seeking just damages; he may be seeking vindication, a return of his "good name" by judicial sanction. The courts could pause for that thought in weighing defendant's utterances—at the pleading stage.[34]

How might the trial judge treat the damage question? In a personal injury case, a plaintiff pleads that he has been hurt by the defendant, and if he shows the other elements of a prima facie case, he is allowed to go to trial to try to prove that he was hurt. He may not have been hurt at all, or not by the defendant. But we may say that we will "presume," for the satisfaction of this aspect of the case, that he was hurt by the defendant. To be consistent, in a defamation case a plaintiff could be allowed to plead that he had been hurt in his "reputation" in such a way as to seriously affect his psyche and/or seriously damage him in his interpersonal relations. Even the conservative court, looking to esteem, prestige, good will, etc., for damage, could be satisfied at the early stages by a pleaded conclusion by plaintiff that he has been hurt in that way—just to let him get to trial to prove his claim.

How does the trial judge, and necessarily the reviewing judges, determine if plaintiff likely was hurt? They interpret the utterances for their "meanings" and "tendencies." But the implications of the standard rules for interpretation are not necessarily the same here as they are in other situations where judges interpret words such as those in statutes, contracts, wills, previous judicial opinions, etc. Here is where the subtlety

32. RESTATEMENT, TORTS §§ 563, 614 (1938).
33. Note, 16 N.C.L. REV. 184 (1938).
34. Consider how realistic a declaratory judgment kind of remedy would be.

comes. We are all pretty much predisposed toward this "meaning" technique so that it is hard to see it as a simplification of again a highly complex problem of psychological and cultural interrelationships.

Under the common law approach in libel and slander per se cases, the interpretive approach used is sufficiently flexible so that the trial judge may readily send the dispute on to the trial stage. Yet the same technique may be used in such a way as to strain out cases where real harm may be done but which do not offend the value systems of the trial judge and the reviewing appellate judges. The justification will not be in that vein, however, rather in the vein that the words could not be or do not tend to be defamatory, hurtful to reputation. For instance, while today it is generally agreed that labeling a person a Communist is defamatory, it has not always been so.[35] Admittedly, in previous days it did not *tend* to be as hurtful as a statistical matter as it would today. The courts had the means then as they do now in other situations where the harm also is not so apparent—in situations where the judges cannot readily sympathize with plaintiff because they rely on *their own reactions*—to get below the statistical level to some of the specifics of the situation, at the trial, to see if the plaintiff actually was hurt.[36] Admittedly a plaintiff may bring a defamation suit to avenge what he regards as an insult, but a court need not be so zealous of our freedom to gossip and to hurt by careless statement as to assume that hurt feelings are all that are involved. After all, the prevailing notion has at least lately been that whether a statement may be defamatory is not to be determined by the reactions of the most open minded persons.[37] So it is that maybe even today, in this time of changing morals, a false charge that a woman was raped,[38] or even that she endorsed a particular brand of liquor,[39] could be seen as hurtful to reputation.

The decision on "meaning," and "tendencies," the decision by the judge as to what the defendant's utterances meant and what harm they probably did, is a decision on an issue that is in some ways an umbrella issue like that of proximate cause in negligence cases. As we now well know, the proximate cause formulation has more to do with value judgments on the greatest variety of ticklish, unanalyzed problems than it has to do with the physical relationship between defendant's behavior and plaintiff's hurt. What happens when judges ask whether certain statements are susceptible

35. See McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A.2d 780 (1950).

36. The courts now agree that the *tendency* of a charge of communism is to be hurtful to reputation. See Burrell v. Moran, 82 N.E.2d 334 (Ohio Comm. Pleas 1948). The technique of looking for the tendency shows the distrust of the plaintiff's complaint and reliance by the courts on their own reactions.

37. Peck v. Tribune Co., 214 U.S. 185 (1909).

38. *Cf.* Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581, 99 A.L.R. 864 (C.A. 1934).

39. *Cf.* Peck v. Tribune Co., *supra* note 37.

of being defamatory is that they determine what meaning *they* give to the words, fallacious semantically speaking; whether plaintiff likely was hurt by that meaning, a test involving far from the best statistical means where statistical means may not even be necessary; and whether defendant's utterance was appropriate under the circumstances; maybe whether plaintiff deserved the comment; and so forth. These latter two questions would be more candidly discussed as matters of privilege or mitigation of damages.

Perhaps everyone would agree that to call an average citizen, falsely, a democrat, would not be actionable, not today at least. Yet even the non-politically employed person could be seriously hurt by that charge and have only his own private social resources to mend the harm to the fabric of his relationships. The justification for dismissing a suit based on such an utterance may lie in our political structure and in remaining notions of rugged individualism, but the justification should not be that the words are not susceptible of being "defamatory," for that hides the issues really at stake. As hard as it might be for a trial judge and his overseeing appellate judges to see that such a statement could be harmful, even seriously harmful, we now do know that private, individual reactions to statements that *seem* to have a public significance are only predictable statistically.[40] The case before the court is not a statistic. It is a specific. In this area, our current knowledge of psychology and semantics and communication theory generally should lead us to expect the unexpected and to ask whether the plaintiff has indeed been hurt and whether the defendant acted in such a way as to justify imposing some sort of responsibility on him.[41]

Now remember, this is not the libel per se problem we are talking about. The way is being prepared for that discussion. Under primary discussion are libel cases where damages may be presumed, where there is as much doctrinal flexibility as is needed. Yet a judge may be deceived into using narrow interpretive techniques, techniques too much related to the everyday interpretations of person to person communications. Or he may smuggle in unstated preferences regarding unanalyzed and undebated issues. At the heart of the probable confusion is the still too widespread faith in the supposed independent significance of our language. What we must realize more fully is that word "meanings" and significance are a function of the particular individual who reacts to the words. The point will be labored because the naivete and the camouflage may be

40. Relevant are all the writings on general semantics, semiotic, and semantics. See as leading works, KORZBSKI, SCIENCE AND SANITY (4th ed. 1958); MORRIS, SIGNS, LANGUAGE, AND BEHAVIOR (1946); OGDEN & RICHARDS, THE MEANING OF MEANING (5th ed. 1938).

41. *X* cannot with great accuracy predict how a stranger will react to his statement about *Y*, whatever their import may be to *X*; accuracy is greater when *X* is communicating with his intimates. A court by and large is a stranger to the defamation situation brought into court, surely in the pleading stages.

doing unnecessary harm, particularly in cases where courts are applying the libel per se rule. It is too easy to move from the general common law approach to the libel per se approach unless the semantic fallacies are exposed in the areas of doctrinal fundamentals. When is a statement defamatory? That is the present doctrinal fundamental.

While it may have been thought that the presumption of damages of the common law has favored plaintiffs, what may really have happened is that the rule has hurt plaintiffs in the long run. The courts have bent over backward to prevent the frivolous case from getting to the jury, have worried about fraud, perjury, etc. It might have been better if the courts had asked for better proof of damage, not the restricted, defendant-favoring kind of special damage which is required in slander or in libel per quod cases, but damage of the broader kind already suggested in this article, something tangible if you will, to prove that plaintiff is not just being a nuisance or querulous. Actually it is not too late to turn in that direction. For instance, while the usual assumption would be that to call a person promiscuous is defamatory, it may not be under particular circumstances. Such a statement made in the barracks or in the locker room could be to some people the highest form of flattery. It might be that even if printed in a newspaper, although rarely. Yet if it produced an estrangement or a divorce, or a loss of position, or an ulcer, or even provable deterioration in social relations, then let it be actionable. Of course, if the action of defamation is as much to allow setting the picture straight, to allow setting the lie aright, then perhaps the burden on plaintiff of proving special damages is too much. If so, the developing rule of libel per se is a great danger, not the blessing some would make it out.

If reputation is being protected against severe damage by inappropriate behavior (a fairly descriptive definition, really), and if "reputation" involves in some degree the way in which part or all of plaintiff's public reacts to him, and the damage refers to the way those reactions are changed, then the goal should be to allow a trial to permit evaluation of evidence germane to that claimed change. The best evidence would be to put some or all of plaintiff's public under hypnosis or "truth" serum or a lie detector or at the interviewee end of a "non-directive" interview with expert questioning, not by a lawyer but by a trained psychologist—and observe the actual reactions. Probably none of these techniques has been tried or would be allowed, a reflection less on the evidence than on the *rules* of evidence.[42]

Next best would be evidence—next best to observable first-hand reactions —of how plaintiff's public has in fact reacted to him outside the courtroom,

42. See Loevinger, *Facts, Evidence and Legal Proof,* 9 W. RES. L. REV. 154 (1958) for a discussion of the need for more "science" in fact inquiry and of the emphasis of bias which is involved in the rules of evidence.

before and after the utterance. This kind of evidence is presently admissible, certainly to support certain allegations of special damages, where those are appropriate, or to show what plaintiff's reputation was before the utterance. Next best would be evidence from plaintiff's public on how they felt about the plaintiff after the statement. Even less trustworthy would be to ask them what they thought the words meant. Still less trustworthy would it be to have the judge ask what the words meant, to ask that of himself or the jurors. *Less trustworthy but precisely what is most often done.*

The person who purports to determine both the public and the varying individual reactions to a set of words via what he believes is the "meaning" or even the "tendency" of the words is acting in a partial vacuum. It is not an absolute vacuum because that approach does account for some of the ambiguity and relativity, particularly if the words are placed in context to the degree of allowing some explanatory statement. While a comment that "*X* had twins yesterday" is not defamatory in most situations of *X*, the one in which *X* is not married makes it more likely so, likely enough to go to a jury, for vindication and possibly for compensation. In libel cases, at least before the per se and per quod outrages, *X* could place the statement in context.

But even under that approach, the more subtle psychology of persons mediated by language may well be missed. Every person has had numerous experiences of being misunderstood, although he may have passed off many of them as involving the stupidity of the other fellow. The other fellow "misunderstood," not, "the message was ambiguous, bringing one reaction to the sender in his context, another to the receiver in his context." To an extent possibly too subtle to be taken into account by courts, all messages are ambiguous because every interpreter, including the sender, operates in varyingly different contexts.[43] It will make a vast difference to a plaintiff suing for claimed defamation if he is under the control of decision-makers who are sympathetic to the difficulties of communication. They will cast their doubts differently. A case would more likely go to trial where fuller explanations and evaluations could be made. If a judge does not favor defamation actions generally, it might be better if he said so. That is his prerogative. Of course his "preference" may be unconscious, for the "meaning" technique all too readily favors such unconscious preferences. A process purportedly of "reason," such as the common law, should favor conscious reason wherever it is available.

It may be felt that if the judge cannot be persuaded at the pleading stage by the utterance and so much of the context as the plaintiff cares to plead (and pleading context may be suicide in a libel per se jurisdiction),

43. See the works cited note 40 *supra*. See also *Symposium on the Language of Law*, 9 W. RES. L. REV. 115 (1958).

then the defendant should not be responsible for whatever damage may have been produced by what seem to be unforeseeable contingencies. Of course, if defendant intended hurt, why favor him? Or if he were indifferent or careless about the hurt, under circumstances which could make defendant appear "unreasonable," why not place him in balance before the jury? Short of that, why not face the question which has been faced in some of the other areas of tort law: How if at all should plaintiff or defendant share in the "loss" in light of the risk that was involved and in light of the values at stake on *both sides* and in society? The retort may come that "freedom of speech" calls for plaintiff to bear the risk of verbal shots that "accidentally" go astray. Why assume that? Why not argue it out in each case, at least where plaintiff is able to claim that his reputation has been hurt in such a dramatic way as to call for further consideration?

Thus communication theory also gives support to the conclusion that defamation theory would work more realistically if a pleading of psychological or interpersonal disruption would serve to tip the interpretive balance in plaintiff's favor at the pleading stage. Unless you are convinced that *any* statement in our everyday language is ambiguous, relative to each interpreter, then you will probably not buy the notion that any description or evaluation of a person has the potential of being defamatory of him, that is, of having an adverse effect on some personal relationship he deems important. Each person may prove these assumptions for himself, if he is sufficiently and appropriately motivated. The literature and the opportunities are at hand. Strangely, lawyers have been slow to use these findings in their arguments. It may be that "conversion" does not come easily and that we do have to await the process of cultural infiltration before lawyers and thus judges will freely adopt this interpretive approach. Such an approach is probably also an administrative burden to him who would have fewer rather than more trials. Perhaps the best remedies to damaged relationships do not lie in court. At any rate such communication information is becoming more and more a part of our culture. Judges may not often cite the leading writers, but they do show they are being affected.[44] The time will come.

In the meantime, the advancement of civilized values may be delayed by such doctrines as libel per se. We have been told that the vast majority of courts now apply this doctrine.[45] We are told they do so because a libel that does not show itself upon its face is less likely to do damage. What has been said before, said where it is harder to see, becomes dramatically clearer here. To say to a plaintiff that if he can show the defamation only by reference to extrinsic circumstances that are not contained in the utter-

44. See Justice Traynor's opinion in MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959).

45. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960).

ance, then he must show he has been hurt in the narrow ways that presently make up the definition of special damages is to say that now only certain obvious defamations are actionable. While the rationale is that damages are less likely, there are cases where it is less likely and there are cases where it is not. At least the test should be the likelihood under the circumstances, and the circumstances necessarily include the members of the communication network and their backgrounds, *i.e.*, the extrinsic circumstances.

If X says falsely that Y is an immigrant and he says this to the members of a club requiring natural citizenship for membership, Y has been unjustly hurt, if he cares, even though *that* hurt does not appear on the face of the statement. If the statement is made in the newspaper, he is even more likely to be hurt, for there may be other persons who will now react negatively to Y for other contextual reasons. True, the chances are less that he is hurt than if he is called falsely a communist. So now the rule becomes, how likely is he to have been badly hurt by statements that would hurt almost anybody. How can this be?

The place to prove extent of damage is at trial. The place to establish and debate the interests to be protected is first the pleading stage, but also at trial and on appeal. Whether through naivete or plan or both, courts who apply the libel per se rule in its extreme forms are simply shrinking the interests to be protected—as if the privilege rules were not enough.[46] Justice Black will yet have his day on this matter.[47]

The most extreme form of the rule is, of course, the one which says that if the statement can be made out to be ambiguous and the ambiguity includes a non-defamatory meaning, then special damages must be shown. This is a return to the *mitiore sensus* rule of yore,[48] and there the fiction and the anti-defamation mood were at least clear in the sheer nonsense of the logic involved. So it becomes here. The holding and opinion of the California Supreme Court in a recent case are well worth noting on this score.[49]

In that case the plaintiff pleaded that he was a candidate for a local public office. The defendant newspaper stated that another newspaper, a

46. See Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528, 186 P.2d 737 (1948) to see how the libel per se doctrine can be made to perform the role of the privilege doctrine but as a judge, not jury question.

47. See *Recorded interview: Justice Black and First Amendment "Absolutes,"* 37 N.Y.U.L. REV. 549 (1962), where the Justice says that the first and fourteenth amendments of the United States Constitution should be read to prohibit all damage suits for defamation. If refutation of this really be needed, see one of many possible ones below in the section on the Battle Cry of Freedom.

48. An English rule of interpretation which facilitated the search for "innocent" meanings in a fashion somewhat parallcling the peppercorn hunt in contract cases. BROWER, ACTIONABLE DEFAMATION 332 (1908).

49. MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1908).

communist-line newspaper, had recommended plaintiff in its pages for the public office. Plaintiff, of course, argued that such a statement, presumptively false, could reasonably be interpreted to indicate that plaintiff was a communist sympathizer. The defendant claimed that the communist newspaper could support persons who were not communist sympathizers, therefore the defendant's statement was susceptible of an innocent interpretation, not libelous on its face. So, plaintiff would have to plead appropriate special damages.

The court, through Justice Traynor, did not deny the possible "innocent" interpretation, but it did not choose to go that far with the libel per se rule. "When such a statement," said the court, "is addressed to the public at large, it is reasonable to assume that at least some of the readers will take it in its defamatory sense." The court disapproved what it called the "possible-innocent-meaning rule" which had seemingly been established by prior decisions in the state. In so doing, it made this remarkable statement:

> Such hair-splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communications between ordinary human beings. It is inconsistent with the rule that "the publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." [Citation omitted] It protects, not the innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language.[50]

The decision involves a major step in the right direction. There does remain in the above quotation what may be an unwitting trap, the standard for interpretation of "the natural and probable effect upon the mind of the average reader." Such a statement still allows a more subtle projection, remember, of a judge's own reaction to the words which may be in question.

We can now see more clearly than ever the effect of an interpretive approach which speaks of plain meanings, or libels on the face, or innocent ambiguities, an approach that did not originate, actually, in defamation cases or even in court but in everyday assumptions, maybe supported in court by an understandable desire to facilitate the administration of cases. Whenever a court says that the meaning of words cannot be varied or proven by external evidence, and the libel per se rule is that kind of rule, it probably is excluding highly relevant material. Compare will interpretation problems. A court likely will declare that it may look only at the four corners of a will unless there is a patent ambiguity in the words. Yet no court has ever restricted itself to the four corners of any set of words. It

50. *Id.* at 44.

cannot. That is a psychological impossibility. Only the pre-literate individual can do that. Meaning is not in the words but in the reactions which words set off. These reactions are the product of all prior experience, including in the judge's case, hopefully, a mountain of previous readings. What the four corners approach becomes is an unwillingness to allow the introduction of other word buttons which will bring other reactions, a refusal to be confused by the facts, as it were. In commercial settings, in will cases even, there may be need to pressure people to reduce their negotiations and their dispositions to writing. There is room for debate even there, as the many exceptions show, but the parallel justification in our present area is even less apparent.

The libel per se variations (and its half-blooded ancestor in the slander cases) of course do give judges the doctrinal outlet for excluding juries from fact-finding and policy-making roles. Further, this rule-complex along with the flexible but more candid privilege rules provide the means of practically erasing what seems like the "strict" basis of liability for statements that are voluntarily published, supposedly at the risk of the publisher that there lurks a defamatory content. The libel per se rule-complex now puts the risk of defamatory content on the defendant only where the "meaning" is clear.[51] This is tantamount, perhaps, to a requirement that defendant intend the harm, or that there be special damages present.

Such a functional allocation of power may seem desirable, although the judges could give themselves this priority without abandoning the trial of the case. There is still the directed verdict. But to conclude that this functional allocation is the objective of the judges who use the rule is no better a guess than that they are misled or confused.

There has been a great deal of confusion regarding the libel per se approach. Dean Prosser in his recent article on the problem agreed with other commentators in part that probably *some* judges have been led down the garden path, so to speak. As he says, "Our revered courts of ultimate conjecture have no gift of infallibility, and in this maze anyone may be forgiven for losing his way."[52] Unfortunately, the good Dean has not straightened out the maze; indeed he may have added another bend or two to it. Being the eminent authority that he is,[53] there is real risk that some courts may reach the point of no return on that path if they mistakenly regard his statement of preferences as firmly implanted dogmas of law. The Dean does, after all, stand just a little bit right of center, *inter alia,* in his philosophy of law and his emphasis of doctrine. So like all of us, he could be expected to jump at judicial statements which seem to go in his preferred direction. His preferred direction, a part of a larger preference

51. Unless the limited kinds of special damages can be shown, of course.

52. Prosser, *supra* note 45, at 849.

53. He is often cited by courts on various aspects of tort law, as a perusal of PROSSER & SMITH, TORTS (3d ed. 1962) will show.

for doctrinal consistency, is that the distinctions between libel and slander be abolished. He sees the libel per se mechanism as (forgive the figure) the integrating force. And, too, he would prefer limiting defamation actions to those which show in the pleading stage a likelihood of "serious and major damage." So he may be excused for his subtle but possibly very effective form of flattery of the judges when he says, "It may be suggested that, as is so often the case, the courts have known exactly what they were doing, and that it is the critics who are confused."[54]

We who also serve may only gulp and nod. But we can only know what they are doing, as a group, by a careful, functional, not just doctrinal, analysis of what each does in each case, followed by a careful matching of the doings, not just the surface sayings.[55]

No such full analysis nor case counting has been accomplished by this writer either, but a sampling on that order has provided the basis for skepticism and this note of caution. Dean Prosser has said that the rule has been accepted by the overwhelming majority of our courts. The cases show that the safer statement is that the courts have overwhelmingly used the expression "libel per se" and that there are a number of cases where an actionable libel requires a pleading of special damages of the narrow kind.[56] The term "libel per se" has been used at one extreme in superfluous fashion to describe the situation where even the likely injury was not sufficiently serious to justify remedy,[57] at the other extreme where the nonsense of *mitiore sensus* has been approached,[58] and at various points in between including the possible position that special damages are needed to help push the doubt at the pleading stage in plaintiff's favor.[59]

The one Colorado case cited in the article shows that the court could easily reject or limit the rule, for that case is easily analyzed as a case

54. Prosser, *supra* note 45, at 849.

55. At the other extreme from Dean Prosser in legal approach was Felix Cohen. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Cohen's kind of approach can at least lead to several viewpoints of what cases stand for, what the law is, etc. The leading torts casebook which has helped in the training of lawyers for such a functional approach is GREEN, MALONE, PEDRICK, & RAHL, TORTS (1957). A compromise between Prosser and Green is the latest KALVEN & GREGORY, CASES AND MATERIALS ON TORTS (1959), although in some portions the book does take a newer "policy" approach also. Its presentation of the whole area of the law and psychic interests is certainly the most complete from a functional viewpoint, thanks no doubt in part to the Green kind of analysis thirty years ago.

56. This is a conclusion on the order of the "maximal predictable value" as Llewellyn put it three decades ago in THE BRAMBLE BUSH (1930). Prosser's statements are of "minimal predictable value," *i.e.*, the courts *could* eventually develop in the direction that he states. The process is too much in flux to say that they have gone so far as he suggests. Again, a functional analysis could help to stem that possible tide if appropriately used by capable lawyers on plaintiff's side.

57. Harriss v. Metropolis Co., 118 Fla. 825, 160 So. 205 (1935).

58. Becker v. Toulmin, 165 Ohio St. 549, 138 N.E.2d 391 (1956).

59. Although this is a good reason, it is not the kind a court will give.

of privilege which appears on the face of the complaint.[60] The one Connecticut case cited involves a defamation action by a corporation, the kind of case which probably ought to require proof of special damage as a kind of trade libel case.[61] Furthermore, the opinion seems to say that special damages were indeed pleaded. And so on.

IV. THE BATTLE CRY OF FREEDOM

So, the point has been argued. Only limited protection is being given to our psychic relationships. Why is that so? So far as defamation doctrine goes part of the "why" must indeed be that we have not fully appreciated what psychic interests we have had. It will take time for them to reach full flower. But it is not that simple. New values are involved here. They will be challenged by the old. There could be a bloody battle, for remember, the old values fostered a Revolution and chartered a Bill of Rights. They are now buried deep in our culture, especially our mythology. Hear the trumpet? We must listen and answer the call of the angel, the freedom of speech.

No doubt courts have worried about plaintiffs and reputations and various related damages, but no doubt they have worried a little more about this matter of being free to speak one's mind without censorship or undue governmental pressures. Leon Green has most recently and succinctly summarized the viewpoint from an original perspective.[62] He suggests that the judicial treatment of defamation litigation is merely one of the ways the "right to communicate" has developed. This right is backed up by the section of the Constitution dealing with freedom of speech. His accent is on the importance to our Democracy of the freedom to communicate.

Do we get involved here in a Fourth of July kind of oratory? Freedom of speech was memorialized in our Bill of Rights at a time when the need for such slogans—or enduring principles if you prefer—was still apparent. Patriotism is important right now, but so is a more general concern for the advance of *all* civilized values, all the values of the individual as well as those of his societies. "Freedom of speech" was a principle which fitted the time and the knowledge. The "right to communicate" does better fit today. But it has been too narrowly defined by Dean Green.

In the first place, "communication" is not most usefully defined if it involves looking at only one end of the channel of communication, the person sending the message. You have no real "right," for instance, if the channel is blocked by static—or cut off at the other end—with no one to

60. Knapp v. Post Printing & Publishing Co., 111 Colo. 492, 144 P.2d 981 (1943).
61. Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955).
62. Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903 (1960).

receive and interpret. Also, we should be able to question a "right" which does not concern itself with the kind of message which is sent out, if it be the kind which, for instance, involves predominantly false information.

Nor will it do just to accent the part of communication which involves verbal symbols.[63] The business of communication is these days being defined much more broadly in terms of intra and interpersonal behavior.[64] Even in the simplest channel of communication from one person to another, the non-verbal context of the message looms important, maybe most important. Even without accompanying words, the seemingly mute portions of our environment can now be seen as filled with symbolism. When we come to realize the symbolic nature of dreams, then we come to see that things themselves cannot be separated from words, for the very business of learning to use language in a representative, symbolic fashion involves giving the things represented, themselves, a symbolic aspect.[65] The baby learning to recognize, non-verbally, his mother, apparently does so by an arduous process of linking up some successive images with some former images. The latter images are sufficiently symbolic of the earlier to provide the nexus and the generality of experience to support the even latter added complexity of the purer symbol, the word—in this case, the word "mother." We see that words and things are multiply symbolic. The child learning to recognize the thing spoon may and probably does confuse it with the thing fork. The non-verbal impressions of the fork, searching for generality, as it were, bears some lingering symbolism of the non-verbal impressions of the thing spoon. Ultimately, the words "spoon" and "fork" must have some primitive, unconscious symbolism each for the other and for their references. In this vein we can make sense of what may be the overworked Freudian emphasis on sex symbols in the environment. We can see that the "sick" person who seems to be talking about his environment, about things, may also be talking about his sickness, so to speak.[66] We can talk about psychopathology as a breakdown in communication.[67] And so on.

The realization that even non-verbal things and actions actually inform us as well as affect us in various ways prepares the way for broader definition. "Communication" involves interplay of persons in complex networks as they are involved and mediated by the various kinds of symbols around them—not just the words of the sender. The "right" to communicate in this more realistic and useful sense becomes the "right" to interact with other people. In the eyes of the law it could be the "right" to interact

63. RUESCH & KEES, NONVERBAL COMMUNICATION (1956).

64. RUESCH & BATESON, COMMUNICATION: THE SOCIAL MATRIX OF PSYCHIATRY (1951).

65. LANGER, PHILOSOPHY IN A NEW KEY (3d ed. 1957) has provided speculative suggestions for the scientifically inclined to implement.

66. SZASZ, THE MYTH OF MENTAL ILLNESS (1961).

67. HOCH & ZUBIN, PSYCHOPATHOLOGY OF COMMUNICATION (1958); RUESCH, DISTURBED COMMUNICATION (1957).

in accustomed ways or to have the potential of interaction remain as unrestricted as possible. Such a definition should cause us to look at all the parties to the communications: the receiver, the sender, and the persons talked about. If the person talked about is deprived of his freedom to communicate, to interact, what sort of social "right" do you have? Even as "defamation" was historically defined, producing shunning, avoiding, etc., you actually have defamation if you interrupt the channels of communication of a person. Whether you want to call it "defamation" or not, you have something of concern.

Emphasis of what was formerly the most evident aspect of communication is not justified, then, until all the values involved are uncovered, debated, and ranked for the purpose at hand. Little doubt is there that Dean Green is right when he, too, sees that emphasis in the doctrine of defamation. The paths part when we reach his seeming assumption that the emphasis is good.

But what of the Constitution? It says that no person shall be deprived of freedom of speech. The Constitution has proven much more malleable than its separate parts. We are also guaranteed life, liberty, and property. What obstacle is there to an interpretation of these value-words as calling for a protection of personality in its individual aspects and its relating-to-others aspect? We can thus recognize the "freedom" to preserve or improve, for instance, our prestige relationships and to protect them against "unfair" limitations by persons who are exercising a conflicting "right" from some superior position of influence that circumstances have afforded them. The conflicting "right" might even be that of speech.

The latter freedom turns out to be the embodiment of a revered institution, but the specific of speech gives way to the more general of life and liberty. In short, there is not sufficient reason to afford superior rank to the "capacity" to hurt by "speech" simply because it has been concretized and glorified. The process of living and feeling and dying by degrees cannot be thus caught up in such static figures. Words like "right" are ordinarily used to espouse a cause. The subtle aspects of human behavior and interaction may get lost.

Yet there may be a deeper significance to the tendency so well caught by Dean Green. It may be that courts feel unable to resolve the conflicts that are put to them. It may be, too, that we witness toward "social competition" a sort of laissez-faire attitude of the kind not yet dead in the economic arena. It may be that the restrictions that have pushed back the economic "freedoms" and other governmental "impositions" have forced some inherent "freedom" seeking energy to find its way out in some other direction. Perhaps people are to work out their own lives in their own ways. The Devil take the hindmost!

That cannot be the end of it. Faith enters in here; and a view of civiliza-

tion, through all its super tragedies. We have the ethic and the zeal and the workers to chart another course. Almost inevitably it seems, the more we look for the "truth" about man—the guiding principles—the more complex the matter becomes. The more we look for the "real" man, the more we do see him, but in a mirror of other men. He is what he is because he is related, physically and psychially, to his brothers. To recognize the relation need not be to ignore the man. Your freedoms can be had, the more so as they be seen in their full complexities of "freedom and responsibility . . . ."

V. Conclusion

This has not been a call for a complete overhaul of the law of defamation. That would be a futile call. Yet it turns out to be as real a need as the need for reform in the handling of automobile accident litigation. As we become more civilized, we will see that. We will see more clearly the important dignitary values that are presently obscured.

Comparatively minor reforms have been suggested here. Liberalize the rules of pleading. Open up the scope of interests to be protected. Broaden the kind of special damages that may help establish the case. Additionally, it would be good if more use could be made of a declaratory judgment kind of remedy. Defendants might not fight that kind of litigation so hard, but it might accomplish much of plaintiffs' purpose. A plaintiff's greatest need is not necessarily compensation, even if he at first thinks so. What he may most need is aid in readjusting. Pursuit of the compensation remedy could do him harm. He might, then, be better going to one of the several kinds of psyche counsellors, rather than a lawyer. Of course that costs money. Maybe such costs could be the measure of a proper jury verdict. Certainly the lawyer who receives this kind of a client could become more aware of his potential role, not as a psychotherapist, but as a helping counsellor. He can serve as a sounding board, lend a strong hand in helping, not the mentally disturbed but the confused client adjust his relations. So, his advice might well preclude litigation. The lawyer must be willing to charge for this service, although he might wish his bar associations would do a little educating of the public on the value of such lawyer services. Attorneys often serve such a function in many kinds of cases, even without full realization of it. This is a part of their social status, if you will.

There ought to be a fuller analysis of the values at stake in this area, on both sides. Contemporary psychology and communication theory could aid even further in the attempt to strike a balance. Of course such an analysis would necessarily end in a call for a complete revamping. A doctrine as old as defamation simply has to be obsolete.

Just for example. The notion of truth as a defense is not semantically sound, so that values are obscured. "Truth" has a number of significances,

which necessarily suggests it involves relative references. We can only talk about "truth" in absolute terms, never find "it." What we get at best is agreement by the people in position of say-so on what are "appropriate" statements to make about a particular person. Juries do not find truth, they reach agreement. Look how "truth" and privilege might merge here. Furthermore, whether an utterance is true turns on the order of abstraction involved. If you say *X* is a pig, you'd better prove he is a pig. But if you say he is a beast, you have all sorts of ways of proving your statement. So there seems to be an art in defaming without suffering responsibility. That is a dubious function for legal traditions to serve.

Then there is the question of opinion versus fact. Strictly speaking, as present doctrines go, a statement of "opinion" should not be actionable at all. For one thing, it is "true" if actually held. Again, it is probably "appropriateness" of the statement. Careful analysis might lead to the conclusion that the responsibility of a defendant for his utterances should be based on the harm he may do. The potential of harm is partly a function of the degree of sophistication of the receiving audience. If we had in our culture a high level of linguistic sophistication, *an act of defamation would be difficult to accomplish.* Then just saying it would not make it so. The potential of harm turns also on the influence of the defendant. His responsibility should turn in part on his capacity to check his statements. And so on. It might be that negligence formula better fits the bill than defamation doctrine, yet a more precise formula ought to be obtainable.

Then there is the question of the kinds of words that are used. If *X* says he does not like *Y*, that would not be actionable. Yet semiotic analysis holds that many seemingly descriptive, factual reports really amount only to such self-reflective utterances. It is our iguorance of such matters that facilitates the defamation kind of damage. Of course we could add that if everybody were perfectly adjusted, defendants would rarely defame, and plaintiff would hardly care, and his public would be sympathetic. Yet as our mass information increases on these matters, courts may have to turn this kind of analysis.

As a final example, consider the question of motivation. One whose motive is "bad" loses a conditional privilege he might otherwise have. But how in the world is "motive" discovered. Analysts spend maybe years uncovering what we purport to uncover in court, usually in no more than a few hours. Also, we treat lightly the notion of overdetermination, that every act has multiple motives (causes?). Further, consider the professional critic of the arts. Arguably they are feeding their aggressions and hostilities with every pen stroke. Shall we ignore these probably unconscious factors? But how can we? Again, does it boil down to a question of "appropriateness," "fairness"?

If it does, then we return to the original position. The plaintiff in a defamation case may not be getting a fair shake. He does not if the "appropriateness" of *his* damage and expectations very often is only obscurely if at all considered.