CONSTITUTIONAL LAW—FIRST AMENDMENT JURISPRUDENCE IN GREAT BRITAIN—A LOCAL AUTHORITY IS NOT ENTITLED TO MAINTAIN AN ACTION FOR DAMAGES IN LIBEL AGAINST A PUBLICATION WHERE THE PUBLICATION ADDRESSED THE PROPRIETY OF ACTIONS TAKEN BY THE AUTHORITY IN THE COURSE OF ITS GOVERNMENTAL AND ADMINISTRATIVE FUNCTION—*Derbyshire County Council v. Times Newspapers Ltd.*, 1993 App. Cas. 534.

The First Amendment to the United States Constitution, written over two hundred years ago, guarantees Americans one of the most basic of human rights, freedom of expression.[1] Contrastly, Great Britain, the country from whom the United States derived both the basis of its legal system and passion for liberty, lacks any legislatively or constitutionally guaranteed rights.[2] Although much of Great Britain's former empire widely embraced the protections

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1 *See* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (describing freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom"); Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating that freedom of speech and the press "are among the fundamental personal rights and 'liberties' protected by the [Constitution]").

Specifically, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Although many Americans believe freedom of expression is the bedrock upon which the founding fathers built this country, freedom of speech and the press were in reality last-ditch political concessions. J. Louis Campbell III, *From Small Acorns Mighty Oaks Grow: The Legislatures and Free Speech in Colonial Connecticut and Rhode Island, in* PERSPECTIVES ON FREEDOM OF SPEECH 3, 3-5 (Thomas L. Tedford et al. eds., 1987); *see also* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 234 (1985) (stating that by promising a bill of rights, including freedom of the press, the drafters of the Constitution helped guarantee approbation by crucial states where ratification was in doubt).

One commentator has pointed out that there is disagreement in the scholarly community regarding the intended purpose of the First Amendment. EDWARD L. BARRETT, JR. ET AL., CONSTITUTIONAL LAW 1201 (8th ed. 1989). For example, some believe it was a simple grant of freedom. *Id.* The more modern view, however, supports the position that the First Amendment was intended to delegate to the states the power to regulate speech and the press, thereby restraining Congress from acting in this area. *Id.* For a general discussion of free speech under the First Amendment, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-1 to -14, at 785-887 (2d ed. 1988).

2 *See* John A. Andrews, *The European Jurisprudence Of Human Rights*, 43 MD. L. REV. 463, 463 (1984) (noting that the only fundamental rights in the United Kingdom are those established by Acts of Parliament or by judicial decisions); Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 644 (1986) (commenting that the absence of a written constitution allows Parliament absolute sovereignty); *see also* J. Skelly Wright, *The Bill of Rights in Britain and America: A Not Quite Full Circle*, 55 TUL. L. REV. 291, 292 (1981) (observing that Britain is the country "from whom we claim our love of liberty as well as many of the provisions of our Bill of Rights").

of the First Amendment in their own constitutions,[3] today Great Britain offers its citizens no similar guarantees.[4] For example, libel[5] laws in Great Britain do not offer the same protections af-

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[3] *See* Anthony Lester, *Fundamental Rights: The United Kingdom Isolated?*, PUB. L., Spring 1984, at 46, 55, 56-57 [hereinafter Lester, *Fundamental Rights*] (observing that more than half of the 42 British Commonwealth countries and a majority of the remaining self-governed British dependent territories guarantee their citizens fundamental rights, including freedom of speech, in their constitutions); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 539 (1988) [hereinafter Lester, *The Overseas Trade*] (stating that the British Commonwealth countries modelled their constitutions after the Convention On Human Rights and Fundamental Freedoms (European Convention), which is in turn patterned after the United States Constitution); *see also* Anthony Lester, *The American Constitution: Home Thoughts from Abroad*, 49 U. PITT. L. REV. 769, 771 (1988) [hereinafter Lester, *The American Constitution*] (noting that the United States Constitution is "the grandfather of most of the constitutions of the rest of the world").

The European Convention, drafted by the nations of Western Europe after the end of World War II to protect essential human freedoms from government interference, became effective on September 3, 1953. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 222 & n.1 [hereinafter European Convention]. Article One of the European Convention requires that each government signatory guarantee its citizens the rights and freedoms defined in the European Convention. *Id.* art. 1, at 224. To comply, governments may either incorporate the treaty directly into their domestic laws or acknowledge analogous rights under domestic law. Ronald J. Krotoszynski, Jr., Note, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398, 1417.

Britain has neither incorporated the European Convention itself nor established domestic law parallel to the rights secured by the European Convention. *Id.* at 1418; *see also* Andrews, *supra* note 2, at 480-81 ("The obligations of [the United Kingdom, Ireland, Iceland, and the Scandinavian countries] under the Convention remain essentially international treaty obligations. English courts are not bound by the provisions of the Convention . . . ."). Nevertheless, English courts are free to consider the content of the European Convention if English law on the subject under consideration is ambiguous. *Id.* at 481.

[4] Wright, *supra* note 2, at 292. In 1981, the British began considering the creation of a bill of rights. *Id.* In 1987, a Private Member's Bill was introduced in the British Parliament to enact a bill of rights, but failed to secure the requisite votes to progress beyond a second reading. Simon Lee, *Bicentennial Bork, Tercentennial Spycatcher: Do the British Need a Bill of Rights?*, 49 U. PITT. L. REV. 777, 780-81 & n.24 (1988). In Britain, a bill must receive three readings before it is eligible to become a law. 2 THE EUROPA WORLD Y.B. 1993 2925, 2926 [hereinafter EUROPA].

Although there is no written constitution in Britain, a common law right to freedom of expression, which includes freedom of the press, exists. 28 LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND ¶ 834, at 553 (4th ed. 1979). Some critics maintain, however, that this law is too restrictive. *See, e.g., Censorship in the Arts*, 140 NEW L.J. 1374, 1374-75 (1990) (observing that Lord Prosser, a Scottish High Court Judge known for his independent thinking, called for the loosening or abolition of "'our repressive laws against freedom of expression,'" particularly in the area of libel).

[5] Libel, like slander, is a form of defamation. BLACK'S LAW DICTIONARY 417 (6th ed. 1990). Defamation is defined as "[a]n intentional false communication, either published or publicly spoken, that injures another's reputation or good name." *Id.*

forded under American law.[6]

In contrast to American law,[7] libel is a strict liability offense in England.[8] As such, an English plaintiff need only prove that the

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Libel is defamation expressed in "print, writing, pictures, or signs." *Id.* at 915. In its broadest sense, libel refers to any publication that injures the reputation of another. *Id.* Slander, on the other hand, is defamation expressed orally or by transitory gestures. *Id.* at 1388.

At common law, the chief distinction between libel and slander lay in the burden of proof needed to sustain the action. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 785-86 (5th ed. 1984). Certain defamatory words, if written, were deemed to be actionable without proving any actual damage. *Id.* If the words were spoken, however, damage to the plaintiff had to be proven. *Id.* See *infra* note 6 for a discussion on the development of libel law in Great Britain and *infra* note 7 for a discussion on the development of libel law in the United States.

6 Sean T. Prosser, Note, *The English Libel Crisis: A* Sullivan *Appellate Review Standard is Needed*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 337, 345 (1992). Britain's libel laws are rooted in the Middle Ages, an era when the Church was the final arbiter of truth and falsity. BARRETT ET AL., *supra* note 1, at 1197. In the thirteenth century, the English seignorial courts heard matters of slander. Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975). As time progressed, the ecclesiastical courts obtained jurisdiction and treated slander as a spiritual transgression, punishable by penance. *Id.* It was not until the late sixteenth century that the common law courts recognized a civil slander action for damages. *Id.* By the seventeenth century, the law of political or seditious libel developed through prosecutions before the Court of the Star Chamber. *Id.*

The ideology of seditious libel proclaimed that all justice and law derived from the King, whose acts were above reproach. BARRETT ET AL., *supra* note 1, at 1199. Accordingly, the printing or writing of any public criticism of the sovereign became a crime carrying severe penalties, including indefinite imprisonment and large fines. *Id.* The jurisdiction of the Court of the Star Chamber eventually extended to non-political libel. Eaton, *supra*, at 1350. After the abolishment of that court in 1641, the common law courts obtained jurisdiction over libel. *Id.* By the mid-seventeenth century, therefore, the common law courts had jurisdiction over both libel and slander. *Id.*

7 The American law of defamation originally followed the English common law, holding defendants to a strict liability standard if they intentionally published libelous statements. KEETON ET AL., *supra* note 5, at 804. In 1964, however, the United States Supreme Court ruled that the United States Constitution imposed special limits on liability for libel of a public figure or official. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). Specifically, the Court held that a public official cannot maintain a libel action without proving that the defendant had knowledge of the falsity of the communication or acted in reckless disregard of its truth or falsity. *Id.* *See infra* notes 87-95 and accompanying text (discussing *Sullivan*). Similarly, in *Gertz v. Robert Welch, Inc.*, the Supreme Court held that the First Amendment bars the imposition of liability without fault when the plaintiff is a private individual. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). See *infra* note 95 for a discussion of *Gertz*. Thus, irrespective of the status of a plaintiff in a libel action, the American common law's imposition of strict liability has definitively been held unconstitutional. *See* KEETON ET AL., *supra* note 5, at 803-05.

8 28 LORD HAILSHAM OF ST. MARYLEBONE, *supra* note 4, ¶ 1, at 3 (footnotes omitted).

libelous words referred to him.[9] Once a plaintiff has proven the defamatory nature of the words, the law presumes those words to be false.[10] Nevertheless, for public policy reasons, defendants are afforded some protection under this rigid standard.[11] Specifically, the law recognizes the defenses of "absolute" and "qualified" privilege, justification, and fair comment.[12]

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9 28 *id.* ¶ 18, at 10. Prior to 1825, however, a plaintiff was required to prove the element of "malice." Eaton, *supra* note 6, at 1353 n.15. Eventually, this requirement was relaxed, and the pleading of malice became a formality. *Id.*; *see* Bromage v. Prosser, 107 Eng. Rep. 1051, 1055 (K.B. 1825) (declaring that although the plaintiff may introduce evidence of malice to increase the damages awarded, it is not an essential element of the plaintiff's case).

Even accepting a defendant's contention that statements referred to a fictional character, British courts have nonetheless upheld a verdict of libel. Jones v. E. Hulton & Co., [1909] 2 K.B. 444, 445-46, 455, 458 (C.A.), *aff'd*, 1910 App. Cas. 20 (1909). In *Jones*, a newspaper published an article containing statements that one Artemus Jones was having an extramarital affair. *Id.* at 444-45. Both the writer of the article and the newspaper publishers believed Mr. Jones to be a fictitious person. *Id.* at 445-46. Moreover, both believed the name to be too unusual to be the name of an actual person. *Id.* at 446. A British barrister named Thomas Artemus Jones sued the newspaper for libel, alleging that the article defamed him. *Id.* at 444-45. The court upheld the jury's verdict for the plaintiff, reasoning that even if the newspaper did not intend the defamatory statements to refer to the plaintiff, reasonable people who knew the plaintiff would presume those statements referred to him. *Id.* at 455, 458.

10 28 LORD HAILSHAM OF ST. MARYLEBONE, *supra* note 4, ¶ 16, at 9 (footnote omitted).

11 28 *id.* ¶ 3, at 4.

12 28 *id.* ¶¶ 3, 81, 131, at 4, 42, 69-70 (footnotes omitted). An "absolute" privilege affords a defendant a complete defense to libel, regardless of whether the words were published maliciously. 28 *id.* ¶ 3, at 4. An absolute privilege is applied to words spoken by judges, juries, counsel, witnesses, or parties to a judicial action. 28 *id.* ¶ 98, at 48-49 (footnote omitted). The privilege extends to all statements, oral and written, regardless of their relevance to the court proceedings. *Id.* (footnote omitted).

A "qualified" privilege, however, allows the defendant only limited protection. 28 *id.* ¶ 3, at 4. A qualified privilege affords protection to a person who acted in good faith without any improper motive when making a false and defamatory statement. 28 *id.* ¶ 108, at 54. For example, privileged statements are those made in furtherance of a "legal, social, or moral duty" to a person who has a corresponding duty or interest to receive them. 28 *id.* ¶ 111, at 55-56 (footnotes omitted); *see* Stuart v. Bell, [1891] 2 Q.B. 341, 346 (C.A.) (reasoning that an occasion is privileged if it is for society's common convenience and welfare). The plaintiff can negate the protection by establishing that the defamatory words were published with actual or express malice. 28 LORD HAILSHAM OF ST. MARYLEBONE, *supra* note 4, ¶ 3, at 4.

The third recognized defense at common law to England's strict liability standard for libel is the defense of justification, where one alleges that the words complained of were factually true and true in substance. 28 *id.* ¶ 81, at 42 (footnote omitted). Under English common law, every man is presumed to be of "good repute" until proven otherwise. *Id.* Accordingly, the defendant has the burden of proving that the defamatory words are either true or substantially true. *Id.* (footnote omitted).

The defense of fair comment, the fourth common law defense to libel, was first recognized during the Victorian era as a defense distinct from privilege. 28 *id.* at ¶ 131, at 69-70 (footnote omitted). This defense is extended to any member of the

Originally, the American judicial system was modelled after the British common law and long-followed precedent established in English cases.[13] Only recently have British courts turned to their offspring across the ocean for similar guidance in the area of defamation.[14] Even after considering relevant American cases, how-

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public who remarks on matters of public interest. *Id.* (footnote omitted). Fair comment differs from justification because it applies only to statements that were expressions of opinion, not to defamatory statements of fact. *Id.* (footnote omitted).

[13] Robert Stevens, Basic Concepts and Current Differences in English and American Law, Address Before the British Institute of the United States (Apr. 1983), *in* 6 J. LEGAL HIST. 336, 336-37 (1985). During the period of approximately 1880 to 1920, America was particularly reliant on British precedent. *Id.* at 342. American courts are now, however, far less likely to cite to English cases. *Id.* at 345.

[14] Lester, *The Overseas Trade*, *supra* note 3, at 543. Although the two systems diverged drastically due to different social and political pressures, England's concept of law has shifted towards America's concept of law in the last three decades or so. Stevens, *supra* note 13, at 336-37, 346. The federal judiciary has developed legal principles that have served as persuasive authority and have strongly influenced the development of the following four areas of law in England and its dominions: the right to procedural justice and due process of law; the right of equal treatment without unfair discrimination; the right to privacy; and the right to freedom of expression. Lester, *The Overseas Trade*, *supra* note 3, at 543; *see also* Stevens, *supra* note 13, at 346 (noting that constitutional and administrative law in the two countries are more closely aligned than they were 50 years ago).

Although English courts seem less willing to accept some of the fundamental rights mentioned above, the Judicial Committee of the Privy Council has upheld the right to procedural due process and equal protection. *See* Ong Ah Chuan v. Public Prosecutor, 1981 App. Cas. 648, 669, 670 (P.C. 1980) (appeal taken from Sing.) (construing the Constitution of Singapore to guarantee procedural due process and equal protection, even though decisions of the Supreme Court of the United States on its Bill of Rights were deemed to be of little assistance). The Privy Council hears appeals from the highest courts of a number of Commonwealth countries, including New Zealand, Jamaica, Trinidad and Tobago, Malaysia, Singapore, The Gambia, Barbados, Mauritius, Fiji, and the Bahamas. JACKSON'S MACHINERY OF JUSTICE 98 (J.R. Spencer ed., 8th ed. 1989) [hereinafter JACKSON'S]. The Privy Council is comprised of Britain's highest ranking judges, the Lords of the Appeal in the Ordinary, and high-ranking judges from the Commonwealth nations. *Id.* at 93, 98.

Ong Ah Chuan involved mandatory death sentences imposed on two drug traffickers. *Ong Ah Chuan*, 1981 App. Cas. at 663. The two defendants were each caught with an amount of heroin that raised the rebuttable presumption that the possession was for the purpose of distribution. *Id.* at 663, 664. Section 29 of Singapore's Misuse of Drug Act imposed a mandatory death sentence upon conviction for possession of any amount over the minimum quantities stated in § 15 of the same Act. *Id.* at 664. Both defendants argued that the statutory presumption of § 15 was unconstitutional and conflicted with their "presumption of innocence." *Id.* at 669. The Privy Council dismissed the appeal and upheld the defendants' convictions and sentences. *Id.* at 674. The Privy Council based its decision on the fact that the presumption contained in § 15 of the Act was rebuttable and, therefore, did not run contrary to Singapore's constitutional requirement of equal protection. *Id.* at 670, 671-72.

The United Kingdom's acceptance and promotion of American concepts of nondiscrimination and equal protection under the law for all citizens has occurred through Parliamentary Acts. Lester, *The Overseas Trade*, *supra* note 3, at 550; *cf.* D.G.T. Williams, *Aspects of Equal Protection in the United Kingdom*, 59 TUL. L. REV. 959, 965

ever, English courts have continued to impose restrictions on expression and the press in all but a few cases.[15] Consequently, the only recourse available to a litigant challenging the restrictive view of the British courts in the area of free speech was to appeal the case to the European Commission of Human Rights (European Commission).[16] Moreover, although the European Court of Human Rights (European Court), which has adopted the American approach to libel, has often overruled the British courts, the British judiciary continues to adhere to a narrow view of fundamental rights.[17]

(1985) (remarking that the common law restricts British courts from forging new ground in matters of discrimination and equal protection). This adoption has been particularly true in the areas of racial and sexual discrimination and equal pay. Lester, *The Overseas Trade*, *supra* note 3, at 550.

15 Lester, *The Overseas Trade*, *supra* note 3, at 552; *see* Home Office v. Harman, 1983 App. Cas. 280, 300, 301, 307, 309, 318 (1982) (Scarman & Simon, L.JJ., dissenting) (criticizing the majority's decision to hold a solicitor in contempt of court for disclosing documents obtained in discovery to the press, even though the documents had been read in open court, and noting that "there will certainly be a divergence between the common law as understood in the United States and as understood in this country").

16 Andrews, *supra* note 2, at 480-81. One commentator has noted that the process of appeal to the European Commission of Human Rights (European Commission) denies British citizens swift and effective redress. Lester, *Fundamental Rights*, *supra* note 3, at 71. The European Convention established a two-tiered system of review through which individuals could pursue complaints regarding violations of individual rights, including free speech, by member states. European Convention, *supra* note 3, arts. 10, 19, at 230, 234. Under this system, an individual's first recourse is to petition the European Commission. *Id.* arts. 26, 27(3), at 238. This appeal, however, may only be done after all domestic remedies are exhausted. *Id.* art. 26, at 238. If, after reviewing the complaint, the European Commission is unable to reach a "friendly settlement," it may refer the case to the European Court of Human Rights (European Court), the second level of review. *Id.* arts. 47, 48, at 246. While nations subscribing to the European Convention may appeal directly to the European Court, individuals have no such right. *Id.* arts. 44, 48, at 246. For a discussion of the origin of and requirements to belong to the European Convention, see *supra* note 3.

British domestic courts have no direct obligation to consider the dictates of the European Convention. Krotoszynski, *supra* note 3, at 1418. English courts are, nonetheless, free to consider the content of the European Convention if English law on the subject at hand is ambiguous. Andrews, *supra* note 2, at 481; *see also* Attorney-General v. Guardian Newspapers Ltd. (No. 2), [1990] 1 App. Cas. 109, 283 (1988) (observing that it is the court's duty to interpret common law in accordance with the European Convention).

17 *See* Ferdinand Mount, *Sorting out John Bull*, THE TIMES (London), Apr. 14, 1992, at A10 (noting that British judges are often overruled by the provisions of the European Convention, of which the judges take only glancing account).

In *Attorney-General v. Times Newspapers Ltd.*, for example, Britain's highest court, the House of Lords, restrained a newspaper, under threat of contempt of court, from publishing a series of articles on the plight of children born with birth defects who were parties to pending, though long dormant, litigation. Attorney-General v. Times Newspapers Ltd., 1974 App. Cas. 273, 277-79, 301 (1973). *The Sunday Times* filed a

In a recent case, however, *Derbyshire County Council v. Times Newspapers Ltd.*,[18] the House of Lords[19] adopted a more expansive view of free expression, akin to the American approach to free speech and free press.[20] Specifically, the House of Lords addressed for the first time whether a governmental body has a governing

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complaint with the European Commission, charging that the decision of the House of Lords had intruded on their right to free expression guaranteed under a provision of the European Convention. Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 27 (1978). The case eventually reached the full European Court, which decided that the House of Lords had indeed violated the newspaper's rights under the European Convention. *Id.* at 45.

18 1993 App. Cas. 534.

19 The House of Lords is the Upper Branch of the British legislature, comprised of hereditary Peers of the Realm, Life Peers and Peeresses appointed by the Sovereign for outstanding public service, and high-ranking clergy. BLACK'S LAW DICTIONARY 739, 944 (6th ed. 1990); JACKSON'S, *supra* note 14, at 93. The House of Lords, which is also the court of final appeal in the United Kingdom, does not sit en bloc to hear cases. SIR JACK I. H. JACOB, THE FABRIC OF ENGLISH CIVIL JUSTICE 241, 242 (1987). Rather, an inner group, the Lords of Appeal in Ordinary, commonly known as the "law lords," decide most civil appeals and have jurisdiction over impeachment. *Id.*; *see* BLACK'S LAW DICTIONARY 739 (6th ed. 1990) (outlining the extent of the House of Lords jurisdiction). Law lords are not part of the hereditary peerage, but rather are appointed members of the House of Lords who have occupied high judicial office or distinguished themselves in the legal profession. Krotoszynski, *supra* note 3, at 1412 n.75; *see* BLACK'S LAW DICTIONARY 886 (6th ed. 1990) (describing the background necessary to be considered for appointment as a law lord).

Parliament consists of the House of Lords, the House of Commons, and the British Sovereign. BLACK'S LAW DICTIONARY 1116 (6th ed. 1990). The House of Commons is composed of county, city, and borough representatives. *Id.* at 739. The acts of Parliament are "the supreme law of the land" in Britain, and even the judiciary is barred from weighing the constitutionality of Parliament's acts. Wright, *supra* note 2, at 292; *see also* Lester, *The Overseas Trade*, *supra* note 3, at 549 (recognizing that the British Parliament wields unqualified and unrestricted power between elections).

English courts have traditionally subordinated themselves to the legislature's will. Alan Watson, *A House of Lords' Judgment, and Other Tales of the Absurd*, 33 AM. J. COMP. L. 673, 704 (1985). Moreover, English courts are loathe to act when there is no parliamentary direction. *See id.* (submitting that the law lords interpret absence of legislation as a deliberate intention on the part of Parliament not to act). As a result, in the absence of legislation, the courts often blindly adhere to ancient, perchance unjust, precedent rather than forge into new territory with an open mind. *See id.*

In *President of India v. La Pintada Compañía Navagación S.A.*, for example, the House of Lords did not allow a contracting party to claim as damages interest for nonpayment because payment, though delayed, was made before the proceedings began. President of India v. La Pintada Compañía Navagación S.A., [1985] 1 App. Cas. 104, 114, 118 (1984). One member of the House of Lords acknowledged that its decision was unjust, and stated that "the present state of the law . . . places the small creditor at a grave disadvantage vis-à-vis his substantial and influential debtor." *Id.* at 112. Nevertheless, the House of Lords declined to usurp the power of Parliament, which had declined to remedy the unfairness of the common law disallowance of such interest. *Id.* at 130.

20 Anthony Lewis, *Lawyers, Libel and Liberty*, THE TIMES (London), Feb. 24, 1993, at A16 (noting that the decision of the House of Lords in *Derbyshire* signalled an important movement in the Lords' philosophy towards the American view of free speech,

reputation that it can protect by instituting an action in libel.[21] Applying principles developed under American First Amendment jurisprudence,[22] the Lords held that a local government could not maintain a libel action against a publication that had printed negative articles concerning the local authority's governmental and administrative functions.[23]

In September 1989, three articles regarding stock or share deals of the superannuation fund[24] of the Derbyshire County Council[25] appeared in *The Sunday Times*.[26] Specifically, the House considered two articles from the September 17, 1989 issue entitled *Revealed: Socialist Tycoon's Deals With a Labour Chief* and *Bizarre Deals of a Council Leader and the Media Tycoon*.[27] The court also examined a third article headlined *Council Share Deals Under Scrutiny*.[28] The articles referred to David Bookbinder, a powerful member of the Council, and Owen Oyston, the so-called "media tycoon."[29] The

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"bridging a gap that has long existed between our two cultures"); *Derbyshire*, 1993 App. Cas. at 547-48 (referring to American case law as support for its decision).

21 *Derbyshire*, 1993 App. Cas. at 541-42.

22 Specifically, the House of Lords relied on *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *City of Chicago v. Tribune Co.*, 139 N.E. 86 (Ill. 1923). *Id.* at 547-48. For a discussion of *Sullivan*, see *infra* notes 87-95 and accompanying text. For a discussion of *Tribune*, see *infra* notes 107-09 and accompanying text.

23 *Derbyshire*, 1993 App. Cas. at 541-42, 550. In so holding, the House of Lords found it unnecessary to rely on the European Convention for guidance. *Id.* at 551.

24 To superannuate is to retire, especially with a pension, due to old age or infirmity. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2293 (Philip Babcock ed., 1993). Therefore, a superannuation fund is a retirement or pension fund. *See id.*

25 Derbyshire is a county in central England with a population of approximately 940,000. EUROPA, *supra* note 4, at 2915. County Councils are the preeminent bureau of local government in the United Kingdom. DAVID M. WALKER, THE OXFORD COMPANION TO LAW 300 (1980). Their responsibilities cover such areas as strategic planning, education, waste disposal, police enforcement, fire protection, libraries, and social services. CENTRAL OFFICE OF INFO., BRITAIN 1993 AN OFFICIAL HANDBOOK 55 (1993).

26 Derbyshire County Council v. Times Newspapers Ltd., [1992] 1 Q.B. 770, 802 (C.A.) (Balcombe, L.J.), *aff'd*, 1993 App. Cas. 534. *The Sunday Times*, owned by News International PLC, is one of the most influential newspapers in Britain. EUROPA, *supra* note 4, at 2933, 2934.

27 Peter Hounam & Rosemary Collins, *Revealed: Socialist Tycoon's Deals with a Labour Chief*, THE SUNDAY TIMES (London), Sept. 17, 1989, at A1 [hereinafter Hounam & Collins, *Revealed*]; Peter Hounam & Rosemary Collins, *Bizarre Deals of a Council Leader and the Media Tycoon*, THE SUNDAY TIMES (London), Sept. 17, 1989, at A17 [hereinafter Hounam & Collins, *Bizarre*].

28 *Derbyshire*, [1992] 1 Q.B. at 806 (C.A.) (Balcombe, L.J.). This article actually appeared in the newspaper under another article entitled "Investigation Into Share Dealings of Miss World Group." *Investigation Into Share Dealings of Miss World Group*, THE SUNDAY TIMES (London), Sept. 24, 1989, at A23 [hereinafter *Investigation*].

29 Hounam & Collins, *Bizarre*, *supra* note 27, at A17. Owen Oyston, a flamboyant, self-made millionaire with socialist leanings, operated one of the biggest commercial radio empires in Britain. *Id.* David Bookbinder, a former market trader, had been a

articles questioned the propriety of the Council's investment of Derbyshire's superannuation fund moneys in three deals with Oyston or companies controlled by him.[30]

Following publication of the articles, the Derbyshire County Council, Bookbinder, and Oyston brought actions in damages for

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Labour Council leader for Derbyshire for twelve years and was chairman of Derbyshire's pension fund. *Id.*

[30] Derbyshire County Council v. Times Newspapers Ltd., [1992] 1 Q.B. 770, 776 (1990), *rev'd*, [1992] 1 Q.B. 770 (C.A.), *aff'd* 1993 App. Cas. 534. The articles, written by *The Sunday Times* Insight team, were partially reproduced in the trial court's opinion penned by Justice Moreland. *Id.* The articles provided in pertinent part:

> The funds's external investment advisers, Geoffrey Morley and Partners, have confirmed that although they were told of the scheme, they were not asked to give advice, contrary to a written assurance to a councillor by Reg Beard, the council treasurer, that they had been consulted.
>
> The deals could be *ultra vires* (that is, outside the council's legal powers) and a breach of the Local Government Superannuation Regulations 1986, under which councils are obliged to take proper advice and act 'with reasonable care, skill and caution'.
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> . . . .
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> . . . The outcome of this extraordinary deal was that Derbyshire's pension fund had made Oyston richer on paper by as much as £1m.
>
> Because the transaction was carried out in this way, the loser was Derbyshire's pension fund. As with the Telemags transaction, the only advice taken by Derbyshire before making the £2m investment was from its own financial officers.

Hounam & Collins, *Bizarre*, *supra* note 27, at A17.

The third article appearing on September 24, 1989 contained similar allegations:

> Questionable share deals involving the Miss World group and the pension funds of a county council are being investigated by the Stock Exchange and the City's Takeover Panel after their disclosure by The Sunday Times Insight team.
>
> The inquiries will focus on a suspicious series of share transactions by Derbyshire [C]ounty [C]ouncil prior to the bitterly contested takeover by the Miss World group of Piccadilly Radio in Manchester earlier this year.
>
> . . . .
>
> Such inquiries would determine whether a false market in Miss World shares was created before and during a takeover. In a shares-for-shares takeover, the likely result would be to strengthen the hand of the bidder at the expense of its 'victim'.
>
> . . . .
>
> Insight's new share revelations come after evidence of improper behaviour and legally doubtful share transactions between Oyston and Derbyshire. Last week Insight revealed that some of Derbyshire's earlier associations with Oyston, including a plan to build a holiday resort behind the Iron Curtain, could be *ultra vires*, or outside the council's legal scope.
>
> After a series of share transactions following a failed investment of £305,000 in the News on Sunday newspaper, Oyston benefitted on paper by as much as £1m from investments by Derbyshire's pension fund.

Investigation, *supra* note 28, at A23.

libel against *The Sunday Times*, its editor, and the two authors of the articles.[31] The defendants applied to dismiss the County Council's claim on the grounds that the Council could not maintain a libel action for statements made with respect to the Council's governmental and administrative undertakings.[32]

The trial court never reached the issue of whether the articles were libelous, but instead confined itself to two preliminary points of law.[33] First, the trial court analyzed whether the Council could maintain a libel action for words that reflected upon the Council's governmental and administrative functions, including its statutorily defined responsibility[34] for the investment and supervision of the superannuation fund, even in the absence of pleading financial loss.[35] Next, the court examined the issue of whether the claim was sufficient to maintain a cause of action, even if the financial loss pleading requirement was not met.[36] The trial court unequivocally found not only that a local authority was entitled to sue for libel,[37] but also that the Council had adequately stated a cause of action.[38]

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31 *Derbyshire*, [1992] 1 Q.B. at 775; *Derbyshire*, [1992] 1 Q.B. at 802 (C.A.) (Balcombe, L.J.). The Council also sought to enjoin the defendants from publishing any further libelous articles. *Derbyshire*, [1992] 1 Q.B. at 775. Oyston ultimately settled his case in 1991 after receiving an apology and the payment of damages and costs. *Derbyshire*, [1992] 1 Q.B. at 802 (Balcombe, L.J.).

On October 13, 1991, *The Sunday Times* printed an apology to Oyston, admitting that the allegations contained in the 1989 articles were unfounded. *Sunday Times Apology to Owen Oysten*, THE SUNDAY TIMES (London), Oct. 13, 1991, at A3. The defendants agreed to pay Oysten a "substantial sum" of money as damages and to indemnify him for all legal costs associated with his suit. *Id.*

32 *Derbyshire*, [1992] 1 Q.B. at 776, 789-90.

33 *Id.* at 776.

34 The Superannuation Act, 1972 provides that County Councils are the administering authority of their superannuation funds. The Superannuation Act, 1972, ch. 11, § 8(5) (Eng.). The purposes of the Superannuation Act were to "amend the law relating to pensions and other similar benefits payable to or in respect of persons in certain employment" and to "provide for distribution without proof of certain sums due to or in respect of certain deceased persons . . . and with purposes connected with the matters aforesaid." *Id.* at preliminary note.

The Local Government Superannuation Regulations, (S.I. 1986 No. 24), decree the guidelines for the investment and control of superannuation fund money. *Derbyshire*, [1992] 1 Q.B. at 776 (citation omitted). One of the limitations, for example, decrees that no more than 10% of the fund may be invested in unlisted securities. *Id.*

35 *Derbyshire*, [1992] 1 Q.B. at 778. The trial court examined *The Sunday Times*'s contention that Derbyshire's failure to allege monetary loss barred suit under the Local Government Act of 1972. *Id.* at 788.

36 *Id.* at 776.

37 *Id.* at 788. The justice grounded his opinion on the long-standing recognition that a corporation may sue for libel, and that a local authority is in essence a municipal corporation. *Id.* at 779, 788. The justice emphasized that case law on the issue was unambiguous. *Id.* at 778, 779 (citation omitted).

38 *Derbyshire*, [1992] 1 Q.B. at 790. The defendants unsuccessfully argued that the

In so holding, the justice rejected the *Times*'s attempt to analogize the case at bar to United States case law decided under the First and Fourteenth Amendments.[39]

Local Government Act of 1972 barred the council's suit. *Id.* at 788, 790. Section 222 of the Act, entitled "Power of local authorities to prosecute or defend legal proceedings," reads, in pertinent part:

> (I) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . . .

Local Government Act 1972, § 222 (Eng.).

The defendants contended that an action that does not allege an actual or possible monetary loss cannot conceivably be one for the "inhabitants of the area." *Derbyshire*, [1992] 1 Q.B. at 788. Justice Moreland, however, found a cause of action for libel existed notwithstanding that the parties incurred no actual financial losses. *Id.* at 788, 790.

[39] *Derbyshire*, [1992] 1 Q.B. at 784-85 (citing New York Times v. Sullivan, 376 U.S. 254 (1964); City of Chicago v. Tribune Co., 139 N.E. 86 (Ill. 1923)). The relevant portion of the Fourteenth Amendment to the United States Constitution reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The justice opined: "I must decide this case according to the English law of tort and not American constitutional law, however admirable those sentiments may be." *Derbyshire*, [1992] 1 Q.B. at 785.

In *City of Chicago v. Tribune Co.*, the city of Chicago brought suit against a newspaper company for publishing articles that alleged the city was on the brink of financial ruin. *Tribune*, 139 N.E. at 86. See *infra* note 107 for a rendition of the published libelous statements. After examining the history of seditious libel in England and its subsequent short-lived application in the United States, the Illinois Supreme Court declared that the City could not maintain a cause of action. *Tribune*, 139 N.E. at 87-90. The court noted that unlike the government of England, where the Sovereign was presumed to be the fountainhead of all authority, the government of the United States was rooted in its citizens. *Id.* at 88, 90.

Chief Justice Thompson, writing for a unanimous court, opined that every citizen has the right to criticize the government free from fear of civil or criminal prosecution. *Id.* at 90. The chief justice noted that this liberty was founded on the theory that it was beneficial to the public interest that citizens should be allowed to speak their minds freely. *Id.*

New York Times v. Sullivan involved a case where *The New York Times* was sued in libel for publishing an editorial advertisement which allegedly defamed a commissioner of the city of Montgomery, Alabama. *Id.* at 256. The advertisement levied several false charges of terrorism against the Montgomery police department, which Sullivan supervised. *Id.* at 256-59. The United States Supreme Court, reversing the decision of the Alabama Supreme Court, ruled that the First Amendment precludes a public official, such as Sullivan, from recovering damages for defamatory falsehoods associated with his official capacity unless the official proves that the statements were

The Court of Appeal, Civil Division, reversed.[40] The Court of Appeal[41] unanimously agreed that notwithstanding the general principle that a corporation was entitled to sue in libel to protect its corporate reputation,[42] a local government was not entitled at common law to sue for libel to protect its governing reputation.[43] The Lords Justices reasoned that allowing a public authority to sustain a libel action would stifle legitimate public criticism of its activities,[44] and would therefore interfere with the right of freedom of expression enshrined in Article Ten of the European Convention.[45] In rejecting the Council's claim, the court noted that a lo-

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made with "actual malice." *Id.* at 279-80, 292. Justice Brennan, writing for the Court, defined actual malice as a statement made with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. For a discussion of *Sullivan*, see *infra* notes 87-95 and accompanying text.

40 Derbyshire County Council v. Times Newspapers Ltd., [1992] 1 Q.B. 770, 817 (C.A.), *aff'd*, 1993 App. Cas. 534.

41 Each of the three lords justices hearing the appeal, Lord Justice Balcombe, Lord Justice Ralph Gibson, and Lord Justice Butler-Sloss, authored a separate opinion. *Id.* at 801, 818, 827.

In all, 28 Lords Justices of Appeal are appointed to the Court of Appeal, three of whom are typically assigned to each case. JACKSON'S, *supra* note 14, at 90, 363. The lords justices are appointed from all divisions of the High Court (i.e., the King's (or Queen's) Bench Division, the Chancery Division, and the Family Division) and thus contribute their own unique wisdom and experience to the case at hand, which allows for a well-rounded judgment. SIR JACOB, *supra* note 19, at 218-19; THE BLUEBOOK—A UNIFORM SYSTEM OF CITATION 253 (15th ed. 1991). Due to their varied backgrounds, it is not uncommon for the Lords Justices hearing an appeal to deliver their own separate opinions. SIR JACOB, *supra* note 19, at 219. For a comprehensive introduction to the British legal system, see generally P.F. SMITH & S.H. BAILEY, THE MODERN ENGLISH LEGAL SYSTEM (1984).

42 *Derbyshire*, [1992] 1 Q.B. at 809-10 (Balcombe, L.J.); *see e.g.*, National Union of General & Municipal Workers v. Gillian, [1946] 1 K.B. 81, 87 (C.A. 1945) (Scott, L.J.) (stating that an action in libel was no exception to the general rule that a trade union could maintain an action in tort); South Hetton Coal Co. v. North-Eastern News Ass'n, [1894] 1 Q.B. 133, 133, 139, 140 (C.A. 1893) (holding that a coal mining company could maintain an action for libel calculated to injure business reputation without proof of special damage).

43 *Derbyshire*, [1992] 1 Q.B. at 817 (Balcombe, L.J.). The appellate court concluded that no cause of action existed despite the fact that the authority was technically a "corporate" public authority. *Id.* at 809-10, 817 (Balcombe, L.J.).

44 *Id.* at 825 (Ralph Gibson, L.J.).

45 *Id.* at 832 (Butler-Sloss, L.J.). Article Ten of the European Convention states:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . .
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the

cal government's reputation could be adequately safeguarded by bringing an action for malicious falsehood or a prosecution for criminal libel.[46]

Given leave by the court of appeal,[47] the Council subsequently appealed to the House of Lords.[48] The House of Lords recognized

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> protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention, *supra* note 3, art. 10, at 230.

Both Lord Justice Balcombe, writing the Court of Appeal's leading judgment, and Lord Justice Butler-Sloss noted that the court was not bound to follow the dictates of the European Convention when English law was clear and unambiguous. *Derbyshire*, [1992] 1 Q.B. at 812, 830 (Balcombe & Butler-Sloss, L.JJ.). Accordingly, Lord Justice Butler-Sloss pronounced, the law of libel with respect to individuals did not require that the court consider the European Convention. *Id.* at 830 (Butler-Sloss, L.J.). Lord Justice Butler-Sloss expiated, however, that whenever the law was not settled, it was both the right and the responsibility of the English court to consider the inferences from Article 10. *Id.* With Article 10 in mind, the Court of Appeal reasoned that a right to sue for libel was unnecessary in a democratic society for the protection of a public authority's status. *See id.* at 816, 817 (Balcombe, L.J.).

46 *Derbyshire*, [1992] 1 Q.B. at 816 (Balcombe, L.J.). Ultimately, the court reasoned, the persons allegedly defamed would inevitably be the government officers and ministers because a governmental body can act only through its agents. *Id.* Consequently, the court observed, the right to sue for libel was available to the individual officers of an authority, a remedy already pursued by Bookbinder in the instant case. *Id.* The court subtly insinuated that in such future cases the public authority should subsidize the individual's actions. *Id.*

The Court of Appeal explicated that the distinction between the tort of defamation and the tort of malicious falsehood lay in which party has the burden of proof. *Id.* at 816-17 (Balcombe, L.J.). The court observed that the burden of proof in the former fell on the defendant, i.e., the defendant must prove that the defamatory statements were true, while the burden in the latter fell on the plaintiff, i.e., the plaintiff must prove that the malicious statements were false. *Id.* at 817 (Balcombe, L.J.). Moreover, Lord Justice Balcombe stressed, in an action for malicious falsehood the plaintiff must prove actual malice, in contrast to the proof necessary to sustain successfully an action for defamation. *Id.* Lord Justice Balcombe also noted that no presumption of damage in a claim of malicious falsehood existed as it did in a claim of libel. *Id.* (citation omitted).

47 Prior to 1934, a litigant who lost a case in the Court of Appeal had an unrestricted right to appeal to the House of Lords. JACKSON'S, *supra* note 14, at 94. This procedure was altered by the Administration of Justice (Appeals) Act 1934, which compels the party to obtain leave either directly from the Court of Appeal or from the House of Lords itself. *Id.* This process ensures that the right of appeal will not be misused. *Id.* In very rare instances, a party in a civil suit may appeal directly from the High Court to the House of Lords, thereby bypassing the Court of Appeal. *Id.* This procedure, known as "leapfrogging," however, is employed only in comparatively few cases. *Id.* Moreover, leapfrogging is strictly limited to situations where a legal issue of general public importance is involved in the decision or where a lower court judge, bound by precedent, determines that there are grounds for reconsideration of the issue. *Id.*

48 Derbyshire County Council v. Times Newspapers Ltd., 1993 App. Cas. 534, 536.

that the issue in the case had evolved beyond the initial inquiry of whether a local authority was entitled to maintain an action in libel for statements criticizing its governmental and administrative roles.[49] Consequently, the Lords expanded their analysis to determine whether a local governmental entity could sue in libel at all.[50] Basing its decision on English common law and American First Amendment jurisprudence, the House of Lords held that a local authority had no right to maintain a civil action for libel in any circumstance.[51] Lord Keith of Kinkel, writing the opinion for the House of Lords, found it unnecessary to rely upon the dictates of the European Convention, reasoning that there was no integral difference between English libel law and Article Ten of the European Convention.[52]

Under the common law of England, it is well established that a corporation may maintain an action in libel.[53] For over a century, British courts have construed this right to mean that a corporation may maintain a libel action not only for defamatory words that affect its property, but also for libelous statements that affect its personal reputation.[54] This interpretation was illustrated in *South Hetton Coal Co. v. North-Eastern News Association*,[55] where a mining company sued a newspaper that had published an article alleging that housing provided by the company for its colliers was unfit for habitation and highly unsanitary.[56] The court of appeal held that the company was entitled to maintain a libel suit without proof of particular damages.[57] The *South Hetton* court maintained that regardless of who the plaintiff was, the law of libel was the same.[58]

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49 *Id.* at 542.

50 *Id.*

51 *Id.* at 547-48, 550.

52 *Id.* at 551. Unlike the Court of Appeal's analysis, which relied upon the dictates of the European Convention, the House of Lords analyzed the case differently. *Id.* at 550, 551.

53 *See, e.g.*, Bognor Regis Urban Dist. Council v. Campion, [1972] 2 Q.B. 169, 176-77 (quoting Metropolitan Saloon Omnibus Co. v. Hawkins, [1859] 4 H. & N. 87, 90 (Ex. Ch.)). See *infra* notes 74-86 and accompanying text for a discussion of *Bognor Regis*.

54 South Hetton Coal Co. v. North-Eastern News Ass'n, [1894] 1 Q.B. 133, 138-39 (C.A. 1893).

55 [1894] 1 Q.B. 133 (C.A. 1893).

56 *Id.* at 133.

57 *Id.* at 139.

58 *Id.* at 138. Specifically, the court asserted:

> [T]he law of libel is one and the same as to all plaintiffs; and . . . whether the statement complained of is, or is not, a libel, depends on the same question—viz., whether the jury are of the opinion that what has been published with regard to the plaintiff would tend in the minds of people

However, the application of libel law to a plaintiff, the court asserted, may be different.[59] The court commented that some statements, whether made with regard to a firm or individual, would be libelous.[60] In these situations, the court maintained, the determination of damages only requires consideration of the parties' conduct and the circumstances of the case.[61]

A corporation's right to sue in libel was further extended to offer protection to a trade union in *National Union of General and Municipal Workers v. Gillian.*[62] In *Gillian,* the court affirmed that a trade union could proceed with an action in libel against another union and a printing firm for statements contained in a circular and in a journal called *The Chemical Worker.*[63] In allowing such an action, the court of appeal interpreted certain provisions of the Trade Union Act of 1871 as evidence of the British Parliament's

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> of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule, or to injure his character. The question is really the same by whomsoever the action is brought—whether by a person, a firm, or a company.

Id.

59 *Id.* For example, the court postulated that a statement declaring that a person had manners "contrary to all sense of decency or comity" would clearly be libelous against an individual. *Id.* A similar statement made about a firm or company, the court opined, could not possibly have the same effect. *Id.* Thus, the court concluded that although libel law is the same with regard to libel on a firm and libel on a person, the conditions under which a particular statement may be libelous will vary. *Id.*

60 *Id.* Specifically, such a situation would occur, the court exemplified, where the statement concerned one's conduct of business. *Id.* Such statements, the court remarked, might lead ordinary people to believe that a person or firm conducts their business inefficiently. *Id.* at 138-39.

61 *Id.* at 139. *South Hetton Coal Co.* has been cited with approval in the United States. *See* Finnish Temperance Soc'y Sovittaja v. Publishing Co., 130 N.E. 845, 847 (Mass. 1921); *see also* New York Soc'y for the Suppression of Vice v. MacFadden Publications, Inc., 183 N.E. 284, 285 (N.Y. 1932) (following expressly the decision of the *Finnish Temperance Society* court).

Finnish Temperance Society Sovittaja v. Publishing Co. arose after a Finnish language newspaper published two rambling letters from an anonymous correspondent concerning the plaintiff, a Massachusetts society that promoted temperance and morality and owned and operated a social meeting place for its members. *Finnish Temperance Soc'y,* 130 N.E. at 845. The first letter called the society a "'national temperance sour milk broth cake bakery'" and alleged, among other things, that it operated a "'gambling and gaming den'" and an "'old holy secret bar room of the Synod.'" *Id.* at 845-46. The second letter continued in a similar fashion and charged that the plaintiff was a "'pious nest of hypocrites, harmonizers and brawlers.'" *Id.* at 846. Quoting from the judgment of Lord Esher, M.R., in *South Hetton Coal Co.,* the *Finnish Temperance Society* court furthered that because a reputation is as valuable to a corporation as it is to an individual, a corporation may be damaged by libel in the same manner that an individual is harmed. *Id.* at 847 (quoting South Hetton Coal Co. v. North-Eastern News Ass'n, [1894] 1 Q.B. 133, 138, 139, 140 (C.A. 1893)).

62 [1946] 1 K.B. 81, 87 (C.A. 1945) (Scott, L.J.).

63 *Id.* at 81, 86-87 (Scott, L.J.).

intention to endow a trade union with a legal personality similar to that of a corporation.[64] Moreover, the *Gillian* court regarded as strongly persuasive the fact that the House of Lords had recognized, at least in principal, that a trade union is an entity distinct from the individuals who compose it.[65]

While the right of a corporate entity to bring an action for libel is clear, only two reported cases involving an English local governmental authority suing for libel existed prior to *Derbyshire*, neither of which progressed beyond the divisional court.[66] In the first case, *Mayor, Aldermen, and Citizens of Manchester v. Williams*[67] (*Manchester Corp.*), the defendant wrote a letter to the editor of a newspaper charging the plaintiffs, the municipal corporation of the City of Manchester, with corruption.[68] The newspaper subsequently published the letter.[69]

In a brief decision, the court announced that a municipality may sue only for libel affecting property, and not for libel affecting personal reputation.[70] Relying on *Metropolitan Saloon Co. v. Hawkins*,[71] the *Manchester Corp.* court reasoned that only the individuals

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64 *Id.* at 84-86 (Scott, L.J.). Specifically, the lord claimed, the Trade Union Act of 1871 allowed a trade union to assume many of the attributes of a judicial personality. *Id.* at 85 (Scott, L.J.). The only powers a trade union did not have, Lord Justice Scott noted, were those solely attributable to a natural person or those expressly excepted by statute. *Id.* at 86 (Scott, L.J.). Lord Justice Scott thus concluded that "if the persona juridica is liable to be sued for infringing the rights of others, it must equally be able to sue to vindicate its own right." *Id.*

65 *Id.* at 87-88 (Uthwatt, J.) (citing Taff Vale Ry. v. Amalgamated Soc'y of Ry. Servants, 1901 App. Cas. 426, 431 (Farwell, J.)). Justice Uthwatt even described a trade union as a "near-corporation." *Id.* at 88. In *Taff*, the House of Lords found that when Parliament created trade unions, it created a legal entity that could own property, possess servants, and cause injuries to others. *Taff*, 1901 App. Cas. at 436 (Earl of Halsbury, L.C.). Accordingly, Lord Halsbury, the Lord Chancellor, implied that the Legislature gave the courts power to hold trade unions accountable for infringing upon the rights of others. *Id.* The *Gillian* court contended that the *Taff* holding was tantamount to the House of Lords's validation of a union's privilege to vindicate its own rights. *Gillian*, [1946] 1 K.B. at 86-87 (Scott, L.J.). *But see infra* note 85 (observing that the Trade Union and Labour Relations Act of 1974 rescinded a trade union's right to pursue an action in libel).

66 Derbyshire County Council v. Times Newspapers Ltd., 1993 App. Cas. 534, 543, 545.

67 [1891] 1 Q.B. 94 (1890) (*Manchester Corp.*).

68 *Id.* at 94. The published letter alleged that "'in the case of two, if not three, departments of our Manchester city council, bribery and corruption have existed, and done their nefarious work.'" *Id.* at 95. The defendant asserted that the allegedly libelous statements were directed not at the Manchester government, but rather at the individual bureaucrats. *Id.*

69 *Id.* at 94.

70 *Id.* at 96.

71 [1859] 4 H. & N. 87. In *Metropolitan Saloon*, a joint-stock company whose shares had depreciated, initiated an action in libel. *Manchester Corp*, [1891] 1 Q.B. at 95.

comprising a municipal corporation, rather than the municipality itself, could be guilty of corruption.[72] Accordingly, the court implied that a municipality could not maintain an action for libel because such an entity had no personal reputation that could be harmed by a libelous publication.[73]

Conversely, in *Bognor Regis Urban District Council v. Campion*,[74] the second of the two previously recorded British cases in which a local authority brought an action for libel, the court determined that a local government corporation could protect its "governing" reputation through a defamation action against a pamphleteer.[75] The *Bognor Regis* controversy began when a resident of Felpham, an area in the eastern part of the Bognor Regis urban district, distributed a leaflet that contained a vitriolic, disjointed attack on the members of the local council at a meeting of the Felpham Ratepayers' Association.[76] The Urban District Council sued for damages,

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Although the action was maintainable, the *Metropolitan Saloon* court concluded that a corporation "could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." *Id.* at 96.

The *Manchester Corp.* holding was severely criticized in many quarters. *See* Bognor Regis Urban Dist. Council v. Campion, [1972] 2 Q.B. 169, 177-78 (quotation omitted). Specifically, the *Bognor Regis* court chided:

> It is obvious that 'reputation,' in the sense in which it alone concerns the topic of defamation, has relation to the particular person enjoying it. But it must not be forgotten that 'person' for this purpose includes an artificial person: that is to say, it includes both 'a body of persons,' and a firm, . . . That a commercial 'body of persons' has a 'trading character,' and can sue in respect of a publication tending to injure that trading character, is now clearly established: . . . But it is submitted that a 'body of persons' has a collective character independently of the question whether it is a mercantile body or not, which the law is bound to protect; in other words that any such body can sue in respect of an imputation of *any conduct whatsoever* of which its agents, and therefore itself *by its agents*, can be guilty. At present the authorities have not gone so far as this. Indeed, there is one dictum and one decision (not, however, of the Court of Appeal) which are against such a comprehensive proposition. I venture to think that both the dictum and the decision are wrong, and that, as soon as they come under review by the Court of Appeal, will be declared to be so.

Id. (quotation omitted). See *infra* notes 74-86 and accompanying text for a discussion of *Bognor Regis*.

72 *Manchester Corp.*, [1891] 1 Q.B. at 95-96 (quotation omitted).

73 *Id.* at 96.

74 [1972] 2 Q.B. 169.

75 *Id.* at 175.

76 *Id.* at 170-72. The pamphlet, among other things, described Bognor's Council as a "'toytown Hitlerism local government,'" accused certain councilors of "'gutter-snipe' attacks" on taxpayers, and levied charges of political graft. *Id.* at 170-71. Perhaps mindful of a forthcoming suit, the leaflet closed with the following statement:

whereupon Eric William Campion, the defendant, claimed that the majority of the leaflet referred only to the plaintiffs as specific individuals rather than as a corporate body.[77]

The *Bognor Regis* court contended that the right of a governmental body to sue in libel derived naturally from the long-standing principle that a business corporation, whether trading or non-trading, could sue to protect its corporate reputation.[78] Mr. Justice Browne, writing for the court, analogized a trading corporation's reputation, which such an entity is permitted to defend, to a local government corporation's "governing" reputation, which such an authority is similarly privileged to protect.[79] The court recognized, however, that a corporation was not entitled to maintain a libel action for statements reflecting *solely* upon its individual officers or members.[80] Relying on a passage from a United States case that supported this proposition,[81] the court accepted that a corporation

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"'I believe that all statements made in this leaflet are acceptable as "fair comment" or are justifiable in the public interest. I am prepared to withdraw any statement that is untrue or not justified.'" *Id.* at 172.

[77] *Id.* Accordingly, the defendant, Eric William Campion, pled the defenses of privilege, justification, and fair comment. *Id.* See *supra* note 12 for definitions of these defenses.

[78] *Bognor Regis*, [1972] 2 Q.B. at 175; *see also* Lewis v. Daily Telegraph Ltd., 1964 App. Cas. 234, 262 (1963) ("A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money."); National Union of Gen. & Mun. Workers v. Gillian, [1946] 1 K.B. 81, 87 (C.A. 1945) (noting that an action in libel was no exception to the general rule that a trade union could maintain an action in tort); South Hetton Coal Co. v. North-Eastern News Ass'n, [1894] 1 Q.B. 133, 133, 139, 140 (C.A. 1893) (holding that a libel action was maintainable by a coal mining company with respect to libel calculated to injure business reputation). The right of private corporations to sue for libel based upon their civil and private right to a corporate reputation, without proving actual financial loss, descended from the same right guaranteed to individual human beings. Respondent's Brief at 4, Derbyshire County Council v. Times Newspapers Ltd., 1993 App. Cas. 534 (No. 5957).

[79] *Bognor Regis*, [1972] 2 Q.B. at 175.

[80] *Id.* (quotation omitted).

[81] Warner Instrument Co. v. Ingersoll, 157 F. 311, 311 (S.D.N.Y. 1907). In *Warner Instrument*, the plaintiff corporation alleged that the defendant's publication of the plaintiff's advertisement in connection with a separate printed article defamed the plaintiff corporation. *Id.* at 311-12. In overruling the demurrer, the court recognized the well-settled rule "that a false and defamatory publication regarding the acts of a corporation are not libelous per se, unless the printed words import an indictable offense involving moral turpitude, or such malevolence, misconduct or obloquy as affects the financial standing of the corporation or occasions a pecuniary loss." *Id.* at 311 (quotation omitted). The court further noted, however, that:

> To *merely* attack or challenge the rectitude of the officers or members of a corporation, and hold them or either of them up to scorn, hatred, contempt, or obloquy for acts done in their official capacity, or which would render them liable to criminal prosecution, does not give the corporation a right of action for libel.

would have to plead more than ridicule of its officers to recover damages in a civil action for libel.[82] With this principle in mind, the court did not even consider Article Ten of the European Convention.[83]

Sitting without a jury, the court found, nonetheless, that some of the defendant's statements defamed the Council.[84] After considering and rejecting the defenses of privilege, justification, and fair comment, the court awarded the plaintiff damages in the amount of £2000 and enjoined the defendant from further pamphleteering.[85] By extending a corporation's right to maintain a libel action to a governmental authority, the *Bognor Regis* court disregarded the divisional court's ruling in *Manchester Corp.*[86]

Id. (emphasis added). Thus, the court concluded that because the advertisement and the article, when read as a whole, implied that the plaintiff was trying to gain an unfair advantage over its competitors, the complaint set forth a cause of action. *Id.* at 311-12.

82 *Bognor Regis*, [1972] 2 Q.B. at 175.

83 *See id.* at 169-78 (deciding the case without reference to the European Convention).

84 *Id.* at 178.

85 *Id.* The *Bognor Regis* court was particularly influenced by the holding in *National Union of General and Municipal Workers v. Gillian*. *Id.* at 173. See *supra* notes 62-65 and accompanying text for a discussion of *Gillian*. Interestingly, the implementation of the Trade Union and Labour Relations Act of 1974 revoked the right of a trade union to pursue an action in libel. *See* Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd., [1980] 1 Q.B. 585, 598-601 (1979) (noting that with the enactment of the Trade Union and Labour Relations Act of 1974, "Parliament has deprived the trade union of the necessary personality on which an action for defamation depends"). *See supra* note 12 (defining the defenses of privilege, justification, and fair comment).

86 *Bognor Regis*, [1972] 2 Q.B. at 175-76. Similar to the hierarchal structure of courts in the United States, courts in England adhere to the principle of stare decisis. SIR JACOB, *supra* note 19, at 57. Thus, decisions of the High Court are binding upon itself and upon High Court judges sitting alone. Police Auth. v. Watson, [1947] 1 K.B. 842, 848. *Contra* Elderton v. United Kingdom Totalisator Co., [1945] 61 T.L.R. 529, 530 (Chancery Division judge declined to follow the decision of a Divisional Court of the Queen's Bench Division).

The High Court and County Court are the lowest courts under the structure of the British judicial system. JACKSON'S, *supra* note 14, at 39. The High Court was created under the Judicature Acts of 1873-75 and currently consists of three divisions: the Queen's Bench, the Chancery Division, and the Family Division. *Id.* The High Court may generally hear any type of case unless a statute requires a case to be brought in the county court. *Id.* at 36. Litigants in the High Court may appeal to the Court of Appeal, the second tier in the English court system. *Id.* at 39, 90. In England and Northern Ireland, the House of Lords is the final appellate court for both civil and criminal matters. *Id.* at 94. For an overview of the British court system, see generally *id.* at 30-68, 90-104.

Mindful of this policy of stare decisis, Mr. Justice Browne distinguished the case at hand from the decision in *Manchester Corp. Bognor*, [1972] 2 Q.B. at 175-78. See *supra* notes 71-73 and accompanying text for a discussion of the court's reasoning in

Although England's court of last appeal had never before addressed the question of whether a governmental entity could sue for libel, the United States Supreme Court had already tackled the issue in the landmark case of *New York Times v. Sullivan*.[87] *Sullivan* involved a libel action brought by L.B. Sullivan, the Commissioner

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Manchester Corp. The *Bognor Regis* court proclaimed that the *Manchester Corp.* court's holding—that a corporation may not sue for a libel affecting personal reputation—if ever valid, had effectively been overruled by *South Hetton Coal Company v. North-Eastern News Association* and *National Union of General and Municipal Workers v. Gillian. Id.* at 177.

Mr. Justice Browne also criticized and rejected a second principle propounded in *Manchester Corp. Id.* That principle, the court noted, stated that because a corporation could not be guilty of corruption, it necessarily followed that oral or written statements claiming the corporation had been guilty of corruption could not be defamatory. *Id.* (citing South Hetton Coal Co. v. North-Eastern News Ass'n, [1894] 1 Q.B. 133, 144). The *Bognor Regis* court then admonished that such a rule of law was unsound and "'would not be upheld in the Court of Appeal.'" *Id.* (quotation omitted).

87 376 U.S. 254, 256 (1964). Justice Brennan began his opinion by declaring that this was the first time the Court had been called on to determine the possible constitutional limitations upon a state's power to award libel damages to a public official suing those who had criticized his official conduct. *Id.*

The Supreme Court had, however, considered a similar question in *Schenectady Union Publishing Co. v. Sweeney.* Eaton, *supra* note 6, at 1350 n.3 (citing Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 642 (1942) (per curiam) (mem.)). In *Sweeney*, the Supreme Court affirmed a Second Circuit opinion that reversed the district court's grant of the defendant's motion to dismiss. Sweeney v. Schenectady Union Publishing Co., 122 F.2d 288, 289 (2d Cir. 1941), *aff'd per curiam*, 316 U.S. 642 (1942) (mem.). The plaintiff in *Sweeney*, a congressional representative, claimed that the defendant's publication of an article libeled him. *Id.* The article, published in the widely circulated newspaper, the *Schenectady Union Star*, discussed a priest's effort to prevent the appointment of a judge to the United States District Court because the judge was Jewish and not born in the United States. *Id.* at 289-90. The article further stated that Congressman Martin L. Sweeney, the plaintiff and chief congressional spokesman for the priest, had called a caucus of Ohio representatives to protest the appointment. *Id.* at 289. In declaring the complaint sufficient to state a cause of action, the Second Circuit noted that when a false statement is made about a public official, such accusations may "lead right-thinking people to believe him unworthy of public trust and confidence" and are therefore libelous per se. *Id.* at 290 (citation omitted). Thus, because the article accused the Congressman of trying to deprive an individual of appointment to a public office on the basis of race and religion, the court concluded the plaintiff would become "an anathema" and a bigot, subject to the scorn and contempt of society. *Id.* at 290-91.

For a discussion of *Sullivan* and its progeny, see generally Eaton, *supra* note 6, at 1364-1451; Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986); Sheldon W. Halpern, *Of Libel, Language, And Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273 (1990); Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *In Its Proper Place*, 101 HARV. L. REV. 1287 (1988); Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603 (1983); Frederick Schauer, *Fear, Risk And The First Amendment: Unravelling The "Chilling Effect"*, 58 B.U. L. REV. 685, 705-21 (1978).

of Public Affairs of Montgomery, Alabama, against four African-American clergymen and *The New York Times*.[88] Sullivan alleged that a paid advertisement concerning the civil rights movement, submitted by the clergy and published by *The New York Times* on March 29, 1960, defamed him by imputing to him certain inaccurately described actions.[89]

Writing for the Court, Justice Brennan reversed the decision of the Alabama Supreme Court[90] and declared that the Alabama courts' interpretation of the law was constitutionally deficient.[91]

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88 *Sullivan*, 376 U.S. at 256. In his capacity as Commissioner of Public Affairs, Sullivan was charged with overseeing the Police Department, the Fire Department, the Department of the Cemetery, and the Department of Scales. *Id.*

89 *Id.* at 256-59. The editorial advertisement, entitled "Heed Their Rising Voices," was signed by sixty-four widely known persons and leveled several charges of terrorism against the police department. *Id.* at 256, 257. The falsity of some of the statements was uncontroverted. *Id.* at 258. The advertisement charged, for instance, that nine students at a local college had been expelled for leading a march on the state capitol. *Id.* at 258-59. In reality, the students were expelled for participating in an illegal lunch counter sit-in. *Id.* at 259. The advertisement also claimed that when the students protested the expulsions and refused to re-register, the police padlocked the dining hall of the college in an attempt to starve the students into submission. *Id.* at 257. Once again, such an action had never occurred. *Id.* at 259. A large number of the students had protested the expulsion, but only by boycotting classes for a day. *Id.*

Sullivan alleged that the third paragraph of the advertisement, which stated in part that "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus," could be imputed to him because he was the Commissioner of the Police. *Id.* at 257, 258. Sullivan further charged that the sixth paragraph of the advertisement implied that he was responsible for bombing the home of Dr. Martin Luther King and for harassing Dr. King by continuously arresting him. *Id.* at 257-58. Justice Brennan maintained, however, that such erroneous statements were inevitable in a democratic society and added that "[w]hatever is added to the field of libel is taken from the field of free debate." *Id.* at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)) (footnote omitted).

90 New York Times v. Sullivan, 144 So. 2d 25, 52 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964). The Alabama Supreme Court affirmed a jury award to Sullivan of $500,000 against *The New York Times*. *Id.* at 28, 52.

91 *Sullivan*, 376 U.S. at 264. The Court determined that the Alabama courts' application of traditional libel law to a case involving a public official suing those who criticized his official conduct neglected to adequately protect freedom of speech and freedom of the press as guaranteed by the First and Fourteenth Amendments. *Id.* at 265. Moreover, the Court rejected the Alabama Supreme Court's terse dismissal of *The Times*'s constitutional contentions. *Id.* The Court determined that the Alabama Supreme Court had misguidedly relied upon a previous United States Supreme Court ruling, which held that statements protesting official conduct contained in a paid advertisement were not constitutionally protected. *Id.* at 265 (citing Valentine v. Chrestensen, 316 U.S. 52, 52-54 (1942)). The Court pronounced that the critical issue was not whether the allegedly libelous statements in *Valentine* were published in a paid advertisement. *Id.* at 266. Rather, the Court stated that the focus should be whether the statements were for purely commercial purposes, which would not be afforded First Amendment protection, or whether the statements were expressions of opinion, which would be constitutionally safeguarded. *Id.*

The Court proclaimed that without proof of "actual malice," defined as a statement made with "knowledge that it was false or with reckless disregard of whether it was false or not," a state cannot award general damages to a public official for libelous statements relating to his official conduct.[92] Justice Brennan asserted that First Amendment protections do not turn upon the popularity, social utility, or truth of the beliefs and ideas involved.[93] Rather, the Justice explained, such protections are founded upon the theory that false statements are an inevitable consequence of free debate which must be safeguarded if such freedom is to survive.[94] Accordingly, the Court explained that such protections cease only where

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The Court predicated its decision on the fundamental proposition that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270 (citation omitted).

92 *Id.* at 279-80, 283. Prior to 1825, America adhered to the principle that "malice" was an essential element in a cause of action for libel. Eaton, *supra* note 6, at 1353 n.15. Eventually, however, American courts followed Britain's lead, and the pleading of malice became a mere formality. *Id.* Only when dealing with issues relating to punitive damages and the availability of privileged defenses did the courts require a showing of malice. *Id.*

The American common law of defamation derived from English common law. Jamie D. Batterman, Comment, *The First Amendment Protection of the Freedoms of Speech and the Press and its Effect on the Law of Defamation as Seen Through the Eyes of Justice Brennan: His Impact and its Future*, 13 WHITTIER L. REV. 233, 235 (1992) (footnote omitted). The *Restatement (Second) of Torts* defines a defamatory statement as one which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977). Much like their English counterparts, American courts offered some defendants protection for statements that were either absolutely or conditionally qualified. KEETON ET AL., *supra* note 5, §§ 114-16, at 815-42; *see also* Eaton, *supra* note 6, at 1360-63 (distinguishing among the multifarious exceptions to the common law rule of strict liability).

Although the exceptions were likely prompted by the First Amendment's proclamation of freedom of expression, their development was not advanced by any express constitutional declarations. *Id.* at 1363. It was not until 1925 that the Supreme Court decreed that the First Amendment applied to the states through the Fourteenth Amendment. *Id.*; *see* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that although freedom of speech and the press are protected by the First and Fourteenth Amendments, it is fundamental that this freedom is not absolute).

Even after this recognition, however, the Supreme Court refused to extend First Amendment protection to defamatory falsehoods. Eaton, *supra* note 6, at 1364; *see also* Roth v. United States, 354 U.S. 476, 483 (1957) (noting that "the First Amendment was not intended to protect every utterance"); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (maintaining that libelous utterances are not protected by the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the libelous . . . .") (footnote omitted).

93 *Sullivan*, 376 U.S. at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).

94 *Id.* at 271-72 (quoting *Button*, 371 U.S. at 433).

actual malice occurs.[95]

Against the backdrop of scattershot British judicial precedent in the libel area and the strict American approach of *New York Times v. Sullivan*, emerged the decision of Britain's House of Lords in *Derbyshire County Council v. Times Newspapers Ltd.*[96] The issue, narrowly framed, was whether a local authority had the right to maintain a suit for defamatory words pertaining to its governmen-

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95 *Id.* at 279-80. Moreover, the *Sullivan* Court declined to venture "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." *Id.* at 283 n.23 (citation omitted). Subsequent cases, however, have elaborated on the public official designation. Eaton, *supra* note 6, at 1375-81 (footnotes omitted).

For example, in *Rosenblatt v. Baer*, the Court expanded the definition of public official to include anyone having substantial responsibility for the conduct of a government's affairs. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). In *Rosenblatt*, a former supervisor of a county recreational facility brought a civil libel action against a newspaper columnist who published a column criticizing the fiscal management of the area under Rosenblatt's supervision. *Id.* at 77, 78-79. Although the column did not mention Rosenblatt by name, a jury award of damages was upheld by the New Hampshire Supreme Court. *Id.* at 77, 79. The United States Supreme Court, in a decision once again written by Justice Brennan, reversed the decision of the New Hampshire Supreme Court and remanded the case. *Id.* at 77, 88. Mindful of the fact that when *Rosenblatt* went to trial the decision in *New York Times v. Sullivan* had not yet been handed down, the Court nonetheless decided that the trial judge should have made a determination of whether there was sufficient proof to show that Rosenblatt was a public official. *Id.* at 87-88.

One year later, the Court extended the definition to include "public figures" as well as officials. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). Moreover, in *Rosenbloom v. Metromedia, Inc.*, the Supreme Court further abandoned the distinction between public and private people in public figure libel cases. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971). Justice Brennan, writing the Court's plurality opinion, extended the actual malice standard of *Sullivan* to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. *Id.* at 30, 43. Justice Brennan focused on society's interest in such matters, noting that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Id.* at 43.

In *Gertz v. Robert Welch, Inc.*, however, the Court retreated somewhat by refusing to apply the *Sullivan* standard to media defamation of private individuals even though the published statements involved an issue of general or public interest. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974). The Court reasoned that applying *Sullivan* in such a manner would unacceptably abridge the legitimate state interest in compensating private individuals for injury to reputation. *Id.* at 346.

Additionally, the Court toughened *Sullivan*'s recklessness standard in *St. Amant v. Thompson* by ruling that recklessness was not to be measured by a reasonable man standard. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Rather, the Court stated that recklessness was to be measured by the subjective standard of whether the defendant in the case subjectively entertained doubts about the truth of his statements. *Id.*

96 1993 App. Cas. 534.

tal and administrative functions.[97] Writing for a unanimous court, Lord Keith of Kinkel, however, chose to address the broader question of whether a municipal corporation could sue for libel under any circumstances.[98]

Accordingly, the House first paid deference to the long-standing rule that a trading corporation may bring an action for defamatory words that impinge on its business functions.[99] In so doing, the Lordships disagreed with the *Bognor Regis* court's interpretation of *South Hetton*.[100] The House of Lords explained that *South Hetton* did not, as the *Bognor Regis* court had interpreted, stand for the proposition that a trading corporation can maintain a suit with respect to actions that do not damage its business.[101] Rather, the House of Lords clarified, *South Hetton* supported the proposition that a trading corporation is entitled to sue only for defamatory words that traduce its business functions.[102] Furthermore, the House submitted that the same principles applied to charitable organizations, trade unions, and perhaps even local governmental entities.[103]

Nevertheless, the House emphasized that certain characteristics unique to a local authority precluded automatic application of libel principles developed with regard to corporations, whether trading or non-trading.[104] Foremost among these characteristics, the House asserted, was that a local authority is a democratically elected governmental body.[105] As such, the House declared, public importance demanded that the authority hold itself open to unfettered public criticism.[106]

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97 *Id.* at 541-42.

98 *Id.* at 542.

99 *Id.* at 547. For example, the House opined that statements that reflect negatively on a corporation's financial status, possibly deterring banks from extending it credit, would tend to damage a trading corporation's business and are actionable. *Id.* In addition, the lord noted that allegations regarding the working conditions of its employees, which not only might make people reluctant to do business with the corporation, but also might deter the best qualified workers from applying for employment, are also actionable. *Id.* (citing South Hetton Coal Co. v. North-Eastern News Ass'n, [1894] 1 Q.B. 133 (C.A. 1893)).

100 *Id.* at 545-47, 551. *See supra* notes 55-61 and accompanying text (discussing the *South Hetton* decision).

101 *Derbyshire*, 1993 App. Cas. at 547.

102 *Id.*

103 *Id.* The House recognized that certain defamatory statements might have the effect of dissuading qualified potential employees from applying for jobs, which in turn might curtail the government authority's efficiency. *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

The House buttressed this conviction by citing the Illinois Supreme Court's decision in *City of Chicago v. Tribune Co.*[107] Lord Keith of Kinkel noted that the Illinois Supreme Court, after considering English and American libel law,[108] approached defamation of a public entity solely with the intention of advancing public policy and fundamental principles of government in concluding that the city of Chicago could not maintain a libel action for damages.[109] The House of Lords then observed that the United States Supreme

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[107] *Id.* (quoting City of Chicago v. Tribune Co., 139 N.E. 86, 90 (Ill. 1923)). The city of Chicago, the plaintiff in *Tribune*, brought suit against a newspaper company for publishing articles that alleged that the city was in financial straits. *Tribune*, 139 N.E. at 86. Chief Justice Thompson's decision contained the following account of the articles:

> [I]n various articles appearing from time to time in 1920 [the Tribune Company] charged that the city was 'broke'; that it 'owes millions of 1921 funds'; that 'bankruptcy is just around the corner from the city of Chicago'; that 'its credit is shot to pieces'; that 'the city is headed for bankruptcy unless it makes immediate retrenchments'; that 'the city's financial affairs are in a serious way'; that 'it is the issue between this Tammany government, which has bankrupted the treasury of the city of Chicago, which is in default to the city creditors'; that the city administration, 'having busted the city, and having reduced it to such insolvency that it is issuing Villa script to pay its bills, is reaching out for the state'; that the administration 'is paying city debts with city hall script, and we have just begun to feel the effects of being busted'; that 'Chicago is drifting into a receivership'; that 'the city is hurrying on to bankruptcy, and is threatened with a receivership for its revenue'; that the city 'is bankrupt, and the banks of the city have refused it credit'; that 'the city government has run on the rocks'; that 'the city cannot pay its debts; it is bankrupt; the bankers have refused it credit'—and divers other similar false and defamatory statements.

Id. *See supra* note 39 (discussing *Tribune*).

[108] *Tribune*, 139 N.E. at 87-90 (citations omitted). The *Tribune* court stressed that although the American law of libel once followed British precedent, the United States no longer recognized the crime of seditious libel. *Id.* at 88-89. In fact, the court claimed, it was the desire to free themselves from the oppression of seditious libel that inspired many of the American colonists to revolt. *Id.* at 87.

American citizens view free press in spite of its flaws as necessary to the process of self-government and public debate. Prosser, *supra* note 6, at 345. This philosophy has been recognized since the infancy of the United States, when former President James Madison declared that "some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 546, 571 (1836).

[109] *Derbyshire*, 1993 App. Cas. at 547-48 (quoting *Tribune*, 139 N.E. at 90). The *Tribune* court declined to differentiate between the governmental and proprietary functions of a city. *Tribune*, 139 N.E. at 91. Instead, the court proclaimed the right of a citizen, or of any entity, to criticize actions of the government free from fear of civil or criminal prosecution. *Id.* at 90. Emphasizing that the "American system of government is founded upon the fundamental principle that the citizen is the fountain of all authority," the *Tribune* court held that the action was "out of tune with the American spirit, and [had] no place in American jurisprudence." *Id.* at 90, 91. For an additional discussion of *Tribune*, see *supra* note 39.

Court, in the seminal case *New York Times v. Sullivan*, endorsed the propositions forwarded in *Tribune*.[110] Though cognizant of the fact that *Sullivan* and *Tribune* were primarily applicable to American First Amendment considerations, the law lords contended that the underlying public policy factors were equally valid in Great Britain.[111] Addressing these factors, Lord Keith of Kinkel articulated that "the chilling effect" on freedom of speech resulting from the threat of a civil action for libel could not be taken lightly.[112] Elaborating on this principle, the House speculated that there might be instances in which certain facts, known to be true, would justify publication of defamatory information although admissible evidence of truth is unavailable.[113]

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110 *Derbyshire*, 1993 App. Cas. at 548 (citing New York Times v. Sullivan, 376 U.S. 254, 277 (1964)). See *supra* notes 87-95 and accompanying text for a discussion of *New York Times v. Sullivan*.

111 *Derbyshire*, 1993 App. Cas. at 548. The *Derbyshire* House additionally relied upon the decision in *Die Spoorbond v. South African Railways*. *Id.* at 549-50 (citation omitted). In *Die Spoorbond*, the *Derbyshire* House noted, the Supreme Court of South Africa held that a governmental department, responsible for running South Africa's railway system, was not permitted to maintain a defamation action against a publication that allegedly injured its governmental reputation. *Id.* at 549 (quotation omitted). Thus, the *Derbyshire* House implied, it appears that where the judiciary, regardless of the country, has weighed competing public interests, the judgment is always the same. *Id.* at 539. Governmental entities, the House therefore concluded, cannot maintain an action pertaining to their governmental reputation. *Id.* at 550.

112 *Derbyshire*, 1993 App. Cas. at 548.

113 *Id.* As a result, the House concluded, the press might be inhibited from publishing desirable public information. *Id.* (quoting Hector v. Attorney-General of Antigua & Barbuda, [1990] 2 App. Cas. 312, 318 (P.C.) (appeal taken from Ant. & Barb.)).

The *Sullivan* Court expressed a similar concern, stating that "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." New York Times v. Sullivan, 376 U.S. 254, 279 (1964). In the United States, this principle is commonly known as the "chilling effect" doctrine, first coined by Justice Frankfurter in his concurrence in *Wieman v. Updegraff*. Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). The chilling effect doctrine is defined as: "In constitutional law, any law or practice which has the effect of seriously discouraging the exercise of a constitutional right . . . . The deterrent effect of governmental action that falls short of a direct prohibition against the exercise of First Amendment rights." BLACK'S LAW DICTIONARY 240 (6th ed. 1990).

In *Hector v. Attorney-General of Antigua and Barbuda*, the Judicial Committee of the Privy Council decided whether a criminal conviction could stand against a newspaper editor charged with publishing an article that violated section 33B of the Public Order Act of 1972, as amended by the Public Order (Amendment) Act of 1976. *Hector*, [1990] 2 App. Cas. at 313, 314, 316. Section 33B provides in pertinent part:

> Notwithstanding the provisions of any other law any person who—(a) in any public place or at any public meeting makes any false statement; or (b) prints or distributes any false statement which is likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs, shall be guilty

After addressing the public policy factors, the law lords noted that the Court of Appeal relied on Article Ten of the European Convention in reaching the same conclusion, namely that a local authority was not entitled to maintain an action in libel.[114] The law lords articulated that certain rights available to private individuals cannot be exercised by governmental entities absent a showing of public interest.[115] Lord Keith of Kinkel then indicated that no compelling social need existed meriting the extension of a corporation's right to sue in libel to a municipal corporation seeking to protect its reputation.[116] Indeed, the lord illuminated, the mere fact that only two known cases had been filed in the past century supported that very proposition.[117]

> of an offence and shall be liable on summary conviction to a fine not exceeding 500 dollars or to a term of imprisonment not exceeding six months.

Hector, [1990] 2 App. Cas. at 316 (quoting Public Order Act, 1972 § 33B). Quashing the criminal proceedings against Hector, the Privy Council stressed that it was highly suspicious of statutory provisions that criminalize statements likely to subvert the public's confidence in the government's conduct of public affairs. *Hector*, [1990] 2 App. Cas. at 318, 319-20. The Privy Council even scolded that "[a]ny attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind." *Id.*

114 *Derbyshire*, 1993 App. Cas. at 551.

115 *Id.* at 549 (citing Attorney-General v. Guardian Newspapers Ltd. (No. 2), [1990] 1 App. Cas. 109 (1988)).

116 *Id.* at 551 (citations omitted). Lord Keith of Kinkel noted that the balancing test performed by the Court of Appeal, as per the requirements of the European Convention, further verified declining the extension of a government authority's right to sue. *Id.*; *see also* Lingens v. Austria, 8 Eur. Ct. H.R. (ser. A) at 416, 418 (1986) (finding that the signatories of the European Convention must assess whether a "pressing social need" exists warranting restrictions on speech) (footnote omitted).

In *Lingens*, the retiring Chancellor and President of the Austrian Socialist Party pursued a private prosecution under Austria's criminal laws against Mr. Lingens, the editor of a magazine; the prosecution accused the Chancellor in two articles of protecting former Nazi SS members for political reasons. *Id.* at 408, 409, 411. The European Court determined that its inquiry should not be confined to whether the interference with speech was permitted under the second paragraph of Article Ten of the European Convention, which permitted restrictions on speech if aimed at such goals as "'national security, . . . public safety, . . . the prevention of disorder or crime, . . . [or] the protection of the reputation or rights of others . . . .'" *Id.* at 416-17 (quoting European Convention, *supra* note 3, art. 10, at 230). Rather, the European Court pronounced that it must determine whether the interference with speech was in proportion to the stated goal, and whether the reasons offered by the Austrian courts were sufficient to justify the objective. *Id.* at 418 (footnote omitted). Consequently, although the European Court agreed with the Austrian government's contention that Lingens's conviction was designed to protect "'the reputation or rights of others,'" it was both an unnecessary remedy in a democratic society and a disproportionate remedy to the legitimate aim sought. *Id.* at 417, 421 (quoting European Convention, *supra* note 3, art. 10, at 230).

117 *Derbyshire*, 1993 App. Cas. at 551; *see* Bognor Regis Urban Dist. Council v. Cam-

Opining that *Bognor Regis* had been wrongly decided, the House ultimately concluded that that case should be overruled.[118] The House, enunciating that its decision was grounded on common law principles, found no need, therefore, to rely upon the European Convention.[119] Nevertheless, Lord Keith of Kinkel expressed pleasure that the common law of England was in accord with the European Convention in this particular field.[120] Thus, the House of Lords unanimously dismissed the county council's appeal.[121]

Until *Derbyshire*, English libel law clung to principles from the Middle Ages.[122] In fact, many commentators, both in the United States and abroad, have long been calling for English libel reform.[123] Prior to *Derbyshire*, English law apparently afforded plaintiffs easy victory in libel actions.[124] Indeed, some plaintiffs purposely filed suit in England, knowing that its strict liability standard was more favorable than their own countries' laws.[125] Now, however, the House of Lords finally appears to be moving towards

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pion, [1972] 2 Q.B. 169; Mayor, Aldermen, & Citizens of Manchester v. Williams, [1891] 1 Q.B. 94 (1890).

118 *Derbyshire*, 1993 App. Cas. at 551.

119 *Id.*

120 *Id.*

121 *Id.*

122 BARRETT ET AL., *supra* note 1, at 1197.

123 *See, e.g.*, Prosser, *supra* note 6, at 338-39 & n.11 (noting that libel reform in England is especially needed in the area of appellate review of jury awards) (citations omitted); *A Swallow Can Make A Summer*, 139 NEW L.J. 741, 741 (1989) (calling for a speedy reform of Britain's libel laws). Similarly, scholars in the United States advocate reform in this country. *See, e.g.*, David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847 *passim* (1986) (stating that limitless damage awards in libel actions have created a crisis in the United States, and advocating that parties to libel actions should have the option of declaratory relief in an effort to stem the large amount of damages awarded to public officials and public figures); Epstein, *supra* note 87, at 815 (recommending a return to the strict liability approach to libel); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 *passim* (1986) (promoting legislative creation of a declaratory judgment remedy to libel actions, and setting forth a proposed "Plaintiff's Option Libel Reform Act"); Leval, *supra* note 87, at 1291-1302 (championing the development of a no-money, no-fault libel suit as a means of restoring a falsely damaged reputation without requiring the plaintiff to meet the obstacles of the *Sullivan* test or the defendant to undergo the effort of litigating a *Sullivan* issue).

124 Prosser, *supra* note 6, at 342 (footnote omitted).

125 Don J. DeBenedictis, *Moving Abroad—Libel Plaintiffs Say It's Easier Suing U.S. Media Elsewhere*, A.B.A. J., Sept. 1989, at 38. When the former Prime Minister of Greece, Andreas Papandreou, decided to institute a suit against *Time* magazine over an article linking him to a $200 million bank scandal, his American attorney filed the action in England. *Id.* The attorney, Leonard B. Boudin, candidly admitted that he did not sue in the United States because "'the English law of libel is much more favorable than the American law of libel.'" *Id.* Furthermore, Boudin remarked, "[t]he Prime

a more enlightened approach.[126]

Although the *Derbyshire* court did not go so far as to apply the "actual malice" standard of *Sullivan*, the House of Lords at least recognized that in a democratic society, individuals must be free to express criticism about the government openly,[127] principles long recognized in the United States.[128] It is encouraging that the House of Lords did more than summarily reject relevant American case law.[129] The House of Lords was undoubtedly swayed in its determination because of its recognition that *Sullivan* and *Tribune* were sound decisions in accordance with English common law.[130]

Derbyshire signals a new leaf in the history of English libel law that is long overdue. It is possible that the embarrassing defeats in matters of free expression that the United Kingdom has suffered in recent years at the hands of the European Court has instilled in the House of Lords a realization that it had to update its thinking to keep step with much of the world.[131] Unfortunately, it appears unlikely that the decision in *Derbyshire* will have widespread significance, unless the House of Lords adopts wholeheartedly the "actual malice" standard of *Sullivan*.[132] Absent any Parliamentary

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Minister, as a public figure, would have had a much harder go at it in the United States" under the "actual malice" standard of *Sullivan*. *Id.*

Even though American journalists fear the English law of libel, some commentators have noted that the amount of damages awarded in Great Britain is often substantially smaller than that awarded in the United States. Lewis, *supra* note 87, at 615-16 (footnote omitted).

126 Lewis, *supra* note 20, at A16 (noting that the decision of the House of Lords in *Derbyshire* signalled an important movement in the Lords' philosophy towards the American view of free expression, thus "bridging the gap that has long existed between our two cultures").

127 Derbyshire County Council v. Times Newspapers Ltd., 1993 App. Cas. 534, 547.

128 *See, e.g.*, City of Chicago v. Tribune Co., 139 N.E. 86, 90 (Ill. 1923). In fact, the *Tribune* court noted, one of the reasons American colonists revolted was to obtain freedom from the crown's oppression. *Id.* at 87.

129 *See Derbyshire*, 1993 App. Cas. at 547-48.

130 *Id.* at 547-48, 551.

131 *See, e.g.*, Sunday Times v. United Kingdom (No. 2), 217 Eur. Ct. H.R. (ser. A) at 10, 11, 31 (1978) (holding that the United Kingdom had violated Article Ten of the European Convention under the guise of ensuring national security when it enjoined a newspaper from publishing excerpts from a memoir, already published in the United States and Australia, and widely discussed elsewhere, that contained intimate details about the operation and activities of the British Security Service); Observer & Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 35 (1991) (same); Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 27, 45 (1978) (holding that a violation of Article Ten had occurred when a newspaper was restrained, under threat of contempt of court, from publishing a series of articles on the plight of children born with birth defects who were parties to pending, though long dormant, litigation). For a more detailed discussion of the first *Sunday Times* case, see *supra* note 17.

132 *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (defining "actual

direction, either in the form of a Bill of Rights or a specific statute, such progress might never occur.[133]

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malice" as a statement made with "knowledge that it was false or made with reckless disregard of whether it was false or not").

133 *See* Watson, *supra* note 19, at 704 (explaining that British courts are loathe to act without Parliamentary direction).