The U.S. “Innocent Construction” Rule and English Mitior Sensus Doctrine Reexamined

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Words are ambiguous. One cannot say with certainty whether or not a word is defamatory, unless and until the word has been placed in context as to time, place, and association so that its meaning can be determined. When ambiguity of meaning comes into play, the determination of libelous or slanderous expression may become even more difficult. Courts generally say that unless the language precipitating the libel action is not reasonably capable of a defamatory meaning, the case must be submitted to the jury. By contrast, the so-called "innocent construction" rule denies the jury such a role.

Under the rule of innocent construction in use in Illinois and several other states, judges make the initial determination on the question of whether an allegedly defamatory publication is susceptible of an innocent construction. This common law libel rule, as originally enunciated by the Illinois Supreme Court in a 1962 case, John v. Tribune Co., and as modified twenty years later in Chapski...
v. Copley Press,7 requires that judges, as opposed to juries, give allegedly defamatory words an innocent construction and declare them nonactionable if such an interpretation is "reasonable."8

The innocent construction rule is generally understood to derive from the English doctrine of mitior sensus (literally, "milder or more lenient sense"). Laurence Eldredge, for example, characterized the U.S. rule as "a resurrection, in large part, of the rule of mitior sensus."9 Similarly, several commentators explain the history of the innocent construction rule in connection with its conceptual similarity to the mitior sensus doctrine.10 Illinois courts, which use the innocent construction rule more frequently and more extensively than any other jurisdictions adopting the rule, also trace the origin of the rule to the mitior sensus doctrine. For example, in Dauw v. Field Enterprises, Inc.,11 the Illinois Appellate Court stated:

The [innocent construction] rule has a long history. Originally adopted in England as the doctrine of mitior sensus, the rule is that when the words which form the heart of a defamation suit can be given two or more meanings, one of which is favorable and not defamatory, the court will construe the words in the favorable sense.12

Similarly, in 1982 the Illinois Supreme Court in Chapski v. Copley Press, citing libel authority Laurence Eldredge, termed the concept of innocent construction "a resurrection of the long-discarded 16th- and 17th-century rule of mitior sensus."13

While the development of the innocent construction rule in the United States is well documented, analysis of the innocent construction rule's evolution from

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8 Id. at 352, 442 N.E.2d at 199.
12 Id. at 71, 397 N.E.3d at 44 (citing The Lord Cromwell's Case, 4 Co. Rep. 12b, 76 Eng. Rep. 877 (1578-81)).
13 Chapski, 92 Ill. 2d at 349, 443 N.E. at 197 (citing ELDREDGE, supra note 9, at 161). The Illinois Supreme Court in Chapski also examined the English mitior sensus doctrine as the predecessor of the innocent construction rule from the perspective of its similarity to the U.S. rule. See Chapski, 92 Ill. 2d at 349-51, 442 N.E. 2d at 197-98. For a discussion of the Chapski case, see infra text accompanying notes 204-17.
the English mitior sensus doctrine is surprisingly scanty. Nearly all U.S. commentators on the rule have treated its historical connection with the English common law doctrine in a cursory or superficial way. More often than not, only one or two English cases applying the mitior sensus doctrine are discussed in the course of examining the rule of innocent construction.\textsuperscript{14} Likewise, U.S. courts have given only brief consideration to the English doctrine.\textsuperscript{15} In Illinois, the courts have mentioned no more than two English defamation cases in which the mitior sensus doctrine was invoked or noted as a rule.\textsuperscript{16} These courts often rely on secondary sources for a clarification of the relationship between the U.S. rule and the English doctrine.\textsuperscript{17} Some legal scholars and commentators have explained the origin of the innocent construction rule primarily by focusing on how the mitior sensus doctrine was rejected by American courts.\textsuperscript{18} But they have failed to explore the similarities or differences, if any, between these two common law libel rules, one British, the other American.\textsuperscript{19} Given the fact that the innocent construction rule has been a frequent subject of legal studies since it was adopted by U.S. courts in 1962,\textsuperscript{20} it is surprising that there has been no thorough, detailed analysis of the British genesis of this U.S. libel defense. One commentator has noted: "Although the rule [of innocent construction] has been much talked about, it has been little analyzed (more out of ignorance than disinterest, it appears)."\textsuperscript{21}

This Article reexamines the innocent construction rule within the historical context of the English mitior sensus doctrine, focusing on two major questions. First, does the concept of innocent construction as understood and used by U.S. courts and jurists parallel the English mitior sensus doctrine? Second, if the concept of innocent construction does parallel the mitior sensus doctrine, in what way and to what extent are they similar; if the concept and the doctrine are not parallel, what distinguishes the two?

\textsuperscript{14} See Illinois Doctrine, supra note 10, at 526 n.9 (discussed a 1607 English slander case, Holt v. Astrigg, in the course of illustrating how the mitior sensus doctrine was tortiously utilized for the defendant); Reform of the Rule, supra note 10, at 265 n.21 (noted the Holt case as an "extreme example of the mitior sensus doctrine"); Symposium: Libel and Slander in Illinois, 43 CHI.-KENT L. REV. 1, 3 n.9 (1957) (termed Holt the "most ridiculous example" of the mitior sensus doctrine) [hereinafter Libel and Slander].

\textsuperscript{15} For a discussion of the U.S. courts' rejection of the mitior sensus doctrine, see infra text accompanying notes 89-90.


\textsuperscript{17} See Chapski, 92 Ill. 2d at 349–50, 442 N.E.2d at 197–98 (cited in Eldridge, supra note 9); W. Prosser, HANDBOOK OF THE LAW OF TORTS § 111, at 747 (4th ed. 1971); Holdsworth, Defamation in the Sixteenth and Seventeenth Centuries, 40 L.Q. REV. 302, 405–08 (1924) [hereinafter Holdsworth]; Lovell, The "Reception" of Defamation by the Common Law, 15 VAN. L. REV. 1051, 1064–65 (1962) [hereinafter Lovell]; Dauw, 78 Ill. App. 3d at 71, 397 N.E.2d at 44.

\textsuperscript{18} See Polelle, supra note 9, at 199–95; Reform of the Rule, supra note 10, at 264–66.

\textsuperscript{19} See id.

\textsuperscript{20} See generally supra notes 9–10, 14 and infra note 210.

\textsuperscript{21} Libel and Slander, supra note 14, at 11.
This Article will focus on the legal rationale of the innocent construction rule and the *mitior sensus* doctrine as common law libel rules, the parameters of their application in libel litigation, and their strengths and weaknesses as libel rules.

In Part I, the author analyzes the English *mitior sensus* doctrine from the perspective of its judicial application to a number of defamation cases reported during the sixteenth and seventeenth centuries. First, the author discusses the history of the doctrine, primarily focusing on the socio-legal circumstances in England that contributed to the adoption of the *mitior sensus* doctrine in the mid-1500s as a defamation rule. Second, the author examines the gradual demise or modification of the doctrine in eighteenth-century England. In the course of analyzing how the English courts eventually rejected the doctrine, the merits as well as the demerits of the English doctrine are examined in the context of the doctrine's application in defamation litigation.

Part II is devoted to an in-depth discussion of the innocent construction rule, beginning with the U.S. courts' rejection of the English *mitior sensus* doctrine. The author discusses the scope of the application of the rule as a libel defense in various jurisdictions, including Illinois. Modification of the rule in 1982 illustrates how the common law libel defense has survived various challenges both from within and without the courts. In addition, the author assesses the impact of the modified innocent construction rule upon Illinois libel law by analyzing the courts' recent utilization of the rule in defamation actions. The strengths and weaknesses of the rule as a libel defense in Illinois and other jurisdictions are also examined.

In conclusion, the similarities and differences between the English *mitior sensus* doctrine and the U.S. innocent construction rule are set out in terms of their judicial raison d'être and their application as libel defenses.

### I. The English *Mitior Sensus* Doctrine

The *mitior sensus* doctrine required that allegedly defamatory words "be construed, *not in their natural sense, but, whenever possible, in 'mitiori sensu'. That is, they must be held not to be defamatory if a non-defamatory sense could be twisted out of them." As Laurence Eldredge noted, this doctrine was devised by the English common law courts to restrain the sudden proliferation of defamation suits in the late sixteenth and early seventeenth centuries.

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22 Holdsworth, supra note 17, at 406–07 (emphasis added). See also 8 W. Holdsworth, A History of English Law 355 (2d. 1937).

23 Eldredge, The Spurious Rule of Libel Per Quod, 79 Harv. L. Rev. 733, 752 (1966). See also Holdsworth, supra note 17, at 404. On the drastic increase in the number of defamation cases reported under Elizabeth I (1558–1603), James I (1603–25), and Charles I (1625–49) as compared with earlier periods, Richard O'Sullivan observed: "[T]here had been no more than ten [defamation actions] in all the Year Books (1297–1537) down to 1535. Rolle's abridgment (tem. Eliz.) reports no less than 350
The first English defamation action in which the *mitior sensus* doctrine appears, as dictum, was *The Lord Cromwell's Case* decided by the King's Bench in the period of 1578 to 1581. Even though the court did not directly apply the *mitior sensus* doctrine in ruling against the plaintiff, the court noted it with approval.25

Lord Cromwell had brought the action against Edward Denny for the latter's statement: “You like not of me since you like those that maintain sedition against the Queen’s proceedings.”26 The court decided the action for the defendant upon the ground of truth and the occasion of speaking the words. The defense of truth was presented by proving that the plaintiff procured two persons to preach in the Church of Northlinham, who in their sermons inveighed against the Book of Common Prayer, and affirmed it to be superstitious and impious.27 The occasion of the statement showed that the defendant’s allegedly defamatory remark was precipitated by the plaintiff’s insult to him.28 On the other hand, the plaintiff claimed that the defendant’s justification for the statement regarding “sedition” was not a sufficient defense since sedition cannot be committed by words, but by public and violent action.29 The defendant responded that the word “sedition” as used by him did not mean public or violent sedition as the plaintiff described.30 The English court explained its approach in judging the defamatory nature of a statement before upholding the defendant’s interpretation of the word “sedition”:

If a man brings an action on the case for calling the plaintiff murderer; the defendant will say, that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he killed several hares with certain engines; to which the defendant answered and said, “Thou art a murderer,” (innuendo the killing of the said hares) this is no justification, for he does not justify the sense of the words which the declaration imports, and therefore he ought to plead not guilty; but as to that it was answered by the defendant’s counsel, and resolved by the whole Court, that the justification was good. For in case of slander by words, the sense of them appears by the cause and occasion of speaking of them.31

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25 See infra note 31.
27 Id. at 13a, 76 Eng. Rep. at 881.
28 The plaintiff said to the defendant, “Thou are a false varlet, and I like not of thee.” Id. at 13b, 76 Eng. Rep. at 881.
29 Id. at 13b, 76 Eng. Rep. at 881.
30 Id. at 14a, 76 Eng. Rep. at 883.
31 Id. at 13b, 76 Eng. Rep. at 882.
In this case, the *mitior sensus* doctrine was noted as one approach toward the problem of choosing one of the two or more meanings implied by a statement. 32

A 1585 case, *Stanhope v. Blith*, 33 is the first reported defamation action in England in which the doctrine of *mitior sensus* was applied as a rule of law. 34 Writing for the court in *Stanhope*, Chief Justice Wray clarified the purpose of the doctrine: to check the flow of slander actions. He said: “[A]ctions for scandals should not be maintained by any strained construction or argument, nor any favour given to support them, forasmuch as in these days they more abound than in times past, and the intemperance and malice of men increase.” 35 In the same year *Stanhope* was decided, the *mitior sensus* doctrine was successfully invoked in *Hext v. Yeomans*, 36 finding the expression “B seeks my life” to be nonactionable. 37 The *Hext* court held the words were not defamatory because first, “he may seek his life lawfully upon just cause,” and secondly, “seeking of his life is too general and for seeking *tantum* no punishment is inflicted by the law.” 38

Under the *mitior sensus* doctrine, imputing a mere intention to commit a crime was held to be nonactionable. The court in *Eaton v. Allen*, 39 for example, observed: “[T]he mere intent without an act is not punishable.” 40 The court held nondefamatory the statement, “He is a brabler [sic], and a quarreller, for he gave his champion counsel to make a deed of gift of his goods, to kill me, and then to fly out of the country, but God preserved me.” 41 Similarly, it was held nonactionable to accuse a man of an impossible crime. 42

As one U.S. legal scholar has noted, 43 middle-class people in sixteenth-century England were dissatisfied with ecclesiastical reliefs for defamation; the English church courts generally disapproved private libel. 44 Instead, these people turned

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32 In a declaration not directly relevant to the decision, the Cromwell court stated: “*quod sensus verborum est duplex, scil. mitis et asper; et verba semper accipienda sunt in mitiori sensu*” [when the meaning is ambiguous, both mild and harsh is evident, then the milder meaning must be taken]. *Id.* at 13a, 76 Eng. Rep. at 880–81.
34 See Lovell, *supra* note 17, at 1064.
37 *Id.* at 15b, 76 Eng. Rep. at 893.
38 *Id.* at 15b, 76 Eng. Rep. at 893.
40 *Id.* at 16b, 76 Eng. Rep. at 896.
41 *Id.* at 16b, 76 Eng. Rep. at 896.
42 See *Jackson* v. *Adams*, 2 Bing. N.C. 402, 132 Eng. Rep. 158 (1835). In *Jackson*, the court held that to say a churchwarden stole the bell-ropes of his own parish was not actionable because the property of the bell-ropes of a parish church is in the possession of the churchwardens of the parish.
43 Lovell, *supra* note 17, at 1064.
44 The church courts disapproved private defamation suits on the basis of the teachings of the books
to the common law courts which more frequently ruled for defendants in libel litigation. As a result, the common law courts in late sixteenth-century England were inundated with defamation actions. In the face of the sudden increase in defamation suits, the English courts resorted to the *mitior sensus* doctrine as an effective judicial weapon to dismiss the suits on the ground that the allegedly defamatory statement, imputing ecclesiastical sins, would not constitute common law slander in reference to temporal damage. It was held, therefore, in a 1669 slander case, *Barnes v. Bruddel,*\(^4\) that to say of a virgin of good fame, "She was with child by Simons," whereby she lost her parents' favor, was nonactionable.\(^6\) The decision in *Barnes* was no doubt due in part to the rule that defamation, which alleged offenses cognizable only in the church courts, was not actionable at common law.\(^7\)

As with the U.S. innocent construction rule,\(^8\) the early English courts, in applying the *mitior sensus* doctrine, flatly rejected "innuendo" in interpreting the defamatory meaning of words.\(^9\) In a 1599 case, *James v. Rutlech,*\(^10\) for example, the plaintiff attempted to prove the defamatory character of the statement, "He is full of the pox," by using the innuendo that "the pox is the French pox." The *James* court held that the innuendo could not be used in such a way as to extend the general words at issue,\(^11\) stating that the words should be taken in *mitiori sensu.* The court further observed, "The office of an innuendo is to designate a person who has been named in certain, and in effect it stands in place of praedictus [aforesaid]; but it cannot make a person certain who was before uncertain."\(^12\) Three years later, the court in *Barham v. Nethersal*\(^13\) again rejected innuendo in construing the phrase, "to burn my barn," to mean "a barn with corn."\(^14\) The court held that the words were not actionable, for it was not

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\(^5\) See also *Yates v. Lodge,* 3 Lev. 18, 83 Eng. Rep. 555 (1681).


\(^7\) An "innuendo" in pleading in libel action is a statement by plaintiff of construction which he put upon words which are alleged to be libelous and which meaning he will induce jury to adopt at trial. Its function is to set a meaning upon words or language of doubtful or ambiguous import which alone would not be actionable. *BLACK'S LAW DICTIONARY* 709 (5th ed. 1979).


\(^9\) Id. at 17b, 76 Eng. Rep. at 902.

\(^10\) Id. at 17a, 76 Eng. Rep. at 901.


\(^12\) Id. at 20a, 76 Eng. Rep. at 908.
felonious to burn a barn if it is not a part of a mansion-house, nor full of corn, and "the innuendo will not serve when the words themselves are not slanderous."55

In Selby v. Carrier,56 the application of the mitior sensus doctrine was extended to the interpretation of a statement in which an allegedly defamatory word was used as an adjective. "Thou art a bankruptly knave," according to the Selby court, was defamatory.57 The court went on to hold, however, that "a bankrupt knave" was not actionable because the words did not mean that he was bankrupt, but only that he was like a bankrupt knave.58

A search of the reported cases indicates that the first time the mitior sensus doctrine was unsuccessfully applied by the defendant since its inception some 30 years earlier, was in a 1607 case, Dame Morison v. Cade.59 In Morison, the court refused to apply the doctrine to interpret the words: "I have had the use of her [Dame Morison's] body." The defendant asserted that the words may have an innocent meaning, that is, a physician may have the use of the plaintiff's body.60 The court disagreed, ruling: "[T]he words in themselves cannot have any reasonable construction, and they shall be taken according to the usual and common sense of them, which is very slanderous to a lady of such reputation."61 The Morison case was significant because the court's interpretation altered the application of the mitior sensus doctrine by emphasizing the "usual and common sense" of the words used.

Even though Morison somewhat modified mitior sensus, the doctrine's use and vitality was largely maintained in later defamation cases. In 1608, one year after Morison, for example, the court in Robins v. Hildredon62 held it nonactionable to say, "Thou art a thievish knave and hath stolen my wood."63 The court, noting that the word "thief" was used in its adjectival form, observed that unless the plaintiff was called a thief generally, the word was not defamatory because it was used as an adjective to qualify "knave," not as a noun.64 The Robins court added that the defendant's statement charging the plaintiff with stealing his wood was not actionable on the ground that it was not shown that the wood was lumber.65 The Robins court further noted that the wood might have been

55 Id. at 20a, 76 Eng. Rep. at 908–09.
57 Id. at 345, 79 Eng. Rep. at 295.
60 Id. at 163, 79 Eng. Rep. at 142.
61 Id. at 163, 79 Eng. Rep. at 142.
63 Id. at 65, 75 Eng. Rep. at 55.
64 Id. at 66, 79 Eng. Rep. at 56.
65 Id. at 66, 79 Eng. Rep. at 56.
intended for "growing," which was not felonious and therefore not actionable.\textsuperscript{66} In a similar way, it was held nondefamatory to charge a man with having stolen iron bars from windows, as the court in \textit{Powell v. Hutchins}\textsuperscript{67} stated, because the bars were part of the freehold.\textsuperscript{68}

The extreme to which the \textit{mitior sensus} doctrine was extended is illustrated by a 1608 case, \textit{Holt v. Astrigg}.\textsuperscript{69} In \textit{Holt}, the plaintiff [Sir Thomas Holt] brought action for the defendant's statement, "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other."\textsuperscript{70} The words were referring to an act of homicide alleged to be committed by Sir Holt. \textit{Holt} is a case often cited as an example which typifies the strained application of the \textit{mitior sensus} doctrine.\textsuperscript{71} The court, however, found for the defendant in this case and held that "[S]lander ought to be direct, against which there may not be any intendment: but . . . notwithstanding such wounding, the party may yet be living; and it is then but trespass."\textsuperscript{72}

Although the \textit{mitior sensus} doctrine was still being applied as late as 1835,\textsuperscript{73} the doctrine had ceased to be an effective judicial weapon in defamation cases by the early 1800s.\textsuperscript{74} As noted earlier, the \textit{Morison} case strongly implied a modification of the \textit{mitior sensus} doctrine by explicitly stating that the words alleged to be libelous should be taken according to their "usual and common sense."\textsuperscript{75} This modification was reaffirmed in a 1694 case, \textit{Somers v. House},\textsuperscript{76} where the court found the statement, "You are a rogue, and broke open a house at Oxford," actionable, reasoning that:

\begin{quote}
[\textbf{F}or upon all the words together, a man who heard them could not intend other than a felonious breaking of the house. And tho' in the old books the rule was, to take the words in \textit{mitiori sensu};

Yet by Holt C.J. they would give not favour to words, and should give satisfaction to them whose reputation is hurt; and would take
\end{quote}

\textsuperscript{66} \textit{Id.} at 66, 79 Eng. Rep. at 56.
\textsuperscript{68} \textit{Id.} at 205, 79 Eng. Rep. at 179.
\textsuperscript{70} \textit{Id.} at 185, 79 Eng. Rep. at 161.
\textsuperscript{71} See \textit{Illinois Doctrine}, supra note 10, at 526 n.9; \textit{Reform of the Rule}, supra note 10, at 265 n.21; \textit{Libel and Slander}, supra note 14, at 2 n.9.
\textsuperscript{74} See, e.g., \textit{Roberts v. Camden}, 9 East 93, 103 Eng. Rep. 508 (1807); \textit{Eldredge}, supra note 23, at 735.
\textsuperscript{75} For a discussion of \textit{Morison}, see \textit{supra} text accompanying notes 58–60.
words in a common sense according to vulgar intendment of the by-standers.\textsuperscript{77}

The Somers court further delineated the boundary for the application of the English doctrine to situations “where the words in their natural import are doubtful, and equally to be understood in the one sense as in the other.”\textsuperscript{78}

In 1714, the court in \textit{Harrison v. Thornborough}\textsuperscript{79} again rejected the defense of \textit{mitior sensus} in a slander action. The \textit{Harrison} court ruled against the defendant on the ground that the phrase, “gone off,” in the sense of the plaintiff’s business going bankrupt, was a defamatory statement.\textsuperscript{80} The \textit{Harrison} court, explaining first why the \textit{mitior sensus} doctrine came to be adopted as a libel rule in England and then how the doctrine lost its favor with the English courts, observed that:

The words which an [sic] hundred years ago did not import a slanderous sense now may; and so \textit{vice versa}. In this kind of action for words, which are not of very great antiquity, the Courts did at first, as much as they could, discountenance them; and that for a wise reason, because generally brought for contention and vexation; and therefore when the words were capable of two constructions, the Court always took them \textit{mitiori sensu}. But latterly these actions have been more discountenanced; for men’s tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. \textit{The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them.}\textsuperscript{81}

The \textit{Harrison} opinion clearly indicates that the \textit{mitior sensus} doctrine was losing its strength as a rule in defamation litigation in England and was being replaced by the “most natural and obvious sense” rule.\textsuperscript{82}

There are several additional reasons for the demise of the English doctrine which illustrate the inherent problems of the rule. First, the rule could not provide an adequate remedy in defamation actions because it was originally

\textsuperscript{77} \textit{Id.} at 39, 90 Eng. Rep. at 919.

\textsuperscript{78} \textit{Id.} at 39, 90 Eng. Rep. at 919.


\textsuperscript{80} \textit{Id.} at 197, 88 Eng. Rep. at 691. The statement at issue in the \textit{Harrison} case was: “Two dyers are gone off (\textit{inuendo} become bankrupt), and for aught I know Harrison will be so too . . . .” \textit{Id.} at 196, 88 Eng. Rep. at 691.

\textsuperscript{81} \textit{Id.} at 197–98, 88 Eng. Rep. at 691–92 (emphasis added).

\textsuperscript{82} Legal historian J.H. Baker obviously implied \textit{Harrison} when he noted that by 1714 the \textit{mitior sensus} doctrine as a judicial approach to libel litigation was brought to an end because “people should not be discouraged that put their trust in the law, for if men could not have a remedy at law for such slanders they would [have] consequences of private revenge. Words are therefore to be taken in their most natural and obvious sense.” \textit{Baker, supra} note 23, at 370.
defendant- or judge-oriented. Consequently, it did not protect the plaintiff against injury to his good name.\textsuperscript{83}

Second, the doctrine was created principally for the effective administration of defamation cases which were inundating the English common law courts in the late sixteenth century. In other words, it was a judicially devised expedient for handling a docket of rapidly increasing defamation cases during that period.\textsuperscript{84}

Third, the \textit{mitior sensus} doctrine was expanded far beyond the scope of any judicially sound rule which could be relied upon in defamation litigation. The rule was almost always successfully applied even to words obviously actionable \textit{per se}.\textsuperscript{85} Thus, the rule was virtually omnipotent as a weapon against defamation actions and produced such unintended side effects as putting libel jurisprudence itself into doubt.\textsuperscript{86}

Fourth, the judges often focused on the act of the plaintiff described in the allegedly defamatory statement, instead of on the damage to the plaintiff arising from the defamatory statement.\textsuperscript{87} Consequently, courts often found it immaterial whether or not the statement in question was defamatory. Rather, courts focused on whether the plaintiff's act was a felony, even though the allegedly defamatory statement should have been the focus of the action. In short, courts which employed the \textit{mitior sensus} doctrine were not concerned about who was verbally hit but \textit{what} was said about the person in the statement at issue.

Finally, the British courts distinguished the crimes under the jurisdiction of common law from those of the church courts. The \textit{mitior sensus} doctrine was applied by English courts in the sixteenth and seventeenth centuries in a way that classified certain kinds of words as actionable \textit{per se} in common law courts. In addition, the doctrine was also recognized as falling within the jurisdiction of the ecclesiastical courts which were extremely lenient in meting out penalties for defamation.\textsuperscript{88}

All these problems, of course, may have had a subversive effect on the \textit{mitior sensus} doctrine. To resolve these problems and to handle the defamation cases

\textsuperscript{83} For a discussion of the adoption by the English courts in the sixteenth century of the \textit{mitior sensus} doctrine as a libel rule, see \textit{supra} text accompanying text notes 23, 24.

\textsuperscript{84} See generally id. and \textit{supra} text accompanying note 43.

\textsuperscript{85} For a discussion of the judicially acrobatic application of the \textit{mitior sensus} doctrine to defamation cases, see \textit{supra} text accompanying notes 68–71.

\textsuperscript{86} For an analysis by one English court of the harmful effect of the \textit{mitior sensus} doctrine on English libel law in the eighteenth century, see Harrison v. Thornborough, 10 Mod. Rep. 196, 88 Eng. Rep. 691 (1714). For a discussion of \textit{Harrison} from the perspective of the demise of the \textit{mitior sensus} doctrine, see \textit{supra} text accompanying notes 78–81.

\textsuperscript{87} For a discussion of the judicial application of the \textit{mitior sensus} doctrine in terms of whether the act of the plaintiff involved was felonious or not, see \textit{supra} text accompanying notes 35–37, 52–54, 61–67.

\textsuperscript{88} For a discussion of the application of the \textit{mitior sensus} doctrine in the cases which obviously involved ecclesiastical sins not actionable in the common law courts, see \textit{supra} text accompanying notes 44–46.
in a more judicially rational way, the court in Harrison stemmed the rampant use of the doctrine in the English courts, making it clear that words should be taken in their natural and obvious sense.99

II. The U.S. Innocent Construction Rule

Unlike in England, courts in the United States have not utilized the mitior sensus doctrine as a common law libel rule. In an 1882 case, Clifford v. Cochrane,90 the Illinois Appellate Court rejected mitior sensus as a libel defense as it was understood and utilized by the English courts in the sixteenth and seventeenth centuries. The Illinois court observed: "In actions for slander and libel, the rule no longer is, that words are to be understood in mitior sensus, but they are to be taken according to their plain and natural import."91

The innocent construction rule, the modified U.S. version of the English mitior sensus doctrine, was first utilized in Young v. Richardson, an 1879 Illinois appellate court case.92 The Young court held that words alleged to be libelous should be innocently construed if it is "fairly" possible. The invocation of the rule may have been a judicial device used by courts to mitigate the assumption of strict liability on the part of libel defendants for allegedly libelous per se words. One legal scholar, for example, noted:

The attempted insinuation of an innocent construction rule in the Young libel case may have been due to the appellate court's concern for libel defendants at a time in Illinois law when all libel was actionable per se, unlike the law of slander, and, therefore, special damages never had to be proved once the language was found defamatory to the jury.93

In Fulrath v. Wolfe,94 the Illinois Appellate Court took judicial note of the innocent construction rule. In that case, the court held that the allegedly defamatory meaning could not be read into the letter in question so as to make the letter libelous when in fact it was nonlibelous.95 In its opinion, the court

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90 Clifford v. Cochrane, 10 Ill. App. 570 (1882).
91 Id. at 575. See also Kamp v. U.S., 176 F.2d 618 (D.C. Cir. 1948); Riley v. Dun & Bradstreet, Inc., 172 F.2d 303 (6th Cir. 1949).
92 Young v. Richardson, 4 Ill. App. 364 (1879).
93 Polelle, supra note 9, at 192. See also Illinois Doctrine, supra note 10, at 531 (termed the scope of the innocent construction rule "considerably" broader than that of libel per se because the libel rule gives the Illinois courts considerably more control over libel actions than libel per se in that the latter applies only where the ambiguity arises from the circumstances that the statement at issue is innocent on its face but libelous in light of other facts while the former rule applies to all ambiguous language).
94 Fulrath v. Wolfe, 250 Ill. App. 130 (1928).
95 In the letter complained of as defamatory, the defendant stated that as a result of an investigation he was discontinuing his business relationship with the plaintiff whom he characterized as a "gypper." Id. at 133.
stated: "The words of an alleged libel where susceptible of it, will receive an innocent construction by interpretation."96 The Fulrath case is distinguished from Young in that the word fairly as used in the latter was omitted from the former, though it cited the 1879 libel case.

Even though not so sweeping as the Young and Fulrath decisions, the Nebraska Supreme Court's 1913 approach toward words innocent but capable of defamatory meaning closely parallels the judicial rationale of innocent construction. In that case, Callfas v. World Publishing Co.,97 the Nebraska high court stated that unless special damages are proved, no cause of action exists for allegedly defamatory expression susceptible to an innocent interpretation.98

In 1940, the Montana Supreme Court in Keller v. Safeway Stores, Inc.,99 though not recognizant of the Illinois innocent construction concept, strongly implied in a similar tone that language with two or more meanings, one of which was innocent, could not be held defamatory. The Keller court held that the language used must be "susceptible of but one meaning and that an opprobrious one" to be found defamatory.100

Almost one hundred defamation cases101 were decided by either state or federal courts in Alabama,102 California,103 Illinois,104 Indiana,105 Missouri,106 Montana,107 Nebraska,108 New Mexico,109 North Carolina,110 Ohio,111 and
Oklahoma since the Illinois Appellate Court in *Young v. Richardson* adopted the common law libel defense.

Of the jurisdictions recognizing and utilizing the innocent construction rule as a libel defense, Illinois has most expansively applied the rule to defamation cases.

A. **Application of the Innocent Construction Rule Prior to Chapski**

In those jurisdictions adopting the innocent construction rule, when a word or phrase in an allegedly libelous statement or publication carries a variety of connotations, the courts commonly deal with the word or phrase in an innocent way. Of course, the application of the rule varies from state to state in terms of scope, role of the jury, and the requirement for proof of special damages. For example, Illinois courts, which have used the rule as a common law libel defense most extensively, have employed it in at least five areas: (1) ambiguous expression; (2) missing “colloquium”; (3) fair comment and criticism; (4) reflexive expression without real meaning; and the “single instance” rule cases. By contrast, California during the 1940s made more limited use of the innocent construction rule, primarily utilizing it where ambiguous language was involved.

In Illinois, likewise, the innocent construction rule has been utilized most extensively where ambiguous expression is at issue. The Illinois courts frequently consulted the definition of words in authoritative dictionaries. The choice of dictionary meanings, however, was qualified by the Illinois Supreme

165 Ohio St. 549, 138 N.E.2d 391 (1956); England v. Automatic Canteen Co. of America, 349 F.2d 989 (6th Cir. 1965) (applying the Ohio law). *See also supra* text accompanying notes 165–66.

113 For a discussion of the innocent construction rule in cases involving ambiguous expression, see *infra* text accompanying notes 118–30, 232–42.

114 For a discussion of the innocent construction rule involving missing colloquium, see *infra* text accompanying notes 147–64, 248.

115 For a discussion of the innocent construction rule in cases involving fair comment and criticism, see *infra* text accompanying notes 189–94.

116 For a discussion of the innocent construction rule in cases involving reflexive expression, see *infra* text accompanying notes 189–94.


118 For a discussion of the application of the innocent construction rule in California, see *infra* text accompanying notes 131–46.
Court in *John v. Tribune Co.* There, the court held that the words at issue must be given their natural and obvious meaning.\(^{119}\)

Under the innocent construction rule, the word “fix” was found susceptible to an innocent meaning by the Illinois Appellate Court in *Watson v. Southwest Messenger Press.*\(^{120}\) The libel action resulted from a newspaper article about a traffic ticket scandal in which 130 tickets had been issued to citizens for illegally parking their cars in front of their homes overnight. The article said that none of the ticketed persons had paid fines but that the mayor had promised to void them. The newspaper quoted several persons as saying that they had been assured that “Mayor Watson will fix them.” The Illinois Appellate Court, affirming the lower court’s summary judgment for the defendant, reasoned:

> [T]he word “fix” has many dictionary meanings. It could mean the process of repairing, mending or putting in order, or it could mean an arrangement to obtain legal immunity by social influence or even by payment of money. It could possibly be construed as being synonymous with the word “void” which is also used in the article with reference to the tickets. In a situation of this type, the law requires that we read the articles as a whole and that the words used therein be given their natural and obvious meaning. Where the allegedly libelous words are capable of an innocent construction, they must be read in that manner and declared nonactionable as a matter of law.\(^{121}\)

On the other hand, a 1977 decision by the Illinois Appellate Court, *Moricoli v. Schwartz,*\(^{122}\) indicates that the innocent construction rule may have a limited application, even where allegedly defamatory words carry more than two meanings and are capable of various interpretations. The plaintiff claimed in this slander case that a statement concerning the cancellation of his employment as a singer at a nightclub was defamatory. The defendant stated that the plaintiff was a “fag.” The plaintiff contended that this caused the cancellation of his contract. Consulting *Webster’s Third International Dictionary* and finding that the word “fag” admits of four commonly used meanings, the court reasoned that the word was incapable of an innocent construction, as claimed by the defendant and accepted by the trial court. The *Moricoli* court held:

> Although characterized as “slang,” the aforementioned authority [*Webster’s Third International Dictionary*] indicates that the sole occasion upon which the word “fag” is commonly used in the United

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\(^{121}\) *Id.* at 973, 299 N.E.2d at 413 (citation omitted).

States, in the form of a noun and to connote an adult human being, is with reference to a homosexual. To suggest otherwise serves only to further tax the gullibility of the credulous and requires this court to espouse a naivete unwarranted under the circumstances.\textsuperscript{123}

The Moricoli ruling clearly stated how the words in an allegedly defamatory statement are to be given their natural and obvious meaning by reference to the various contexts in which the statement has been used.

In other cases, ambiguity arises not from the semantic meanings of individual words involved but from the syntactic structure of an allegedly defamatory phrase or clause as used in a statement. In \textit{Bruck v. Cincotta},\textsuperscript{124} the plaintiff claimed that the defendant defamed him by referring to him as a “rip-off” speculator. The \textit{Bruck} court disagreed and interpreted the word “rip-off” as nondefamatory. Focusing on the adjectival function of the word in the statement complained of, the court observed that the word was used “not as a verb or noun but as an adjective to qualify ‘speculators,’ which is defined by the dictionary as ‘to enter a business transaction or other venture from which the profits, return of investment, capital, or other goods are conjectural’.”\textsuperscript{125} Similarly, the innocent construction rule prevailed where the expressions such as “alleged racial steering”\textsuperscript{126} and “It could have been . . . crime”\textsuperscript{127} were challenged as defamatory.

The innocent construction rule was also applied in interpreting the meaning of the cover format of a trade magazine which was made up to look like a criminal-wanted poster. The March 1972 issue of the \textit{Gasoline Dealers News}, which carried a picture of the plaintiff, was at issue in \textit{Jacobs v. Gasoline Retailers’ Association}.\textsuperscript{128} Along with the picture were printed the words, “Wanted! from Robert (Bobby) Jacobs $4,435.24!” The plaintiff argued that the cover format conveyed the impression that he was wanted as a criminal. The Illinois Appellate Court, rejecting the argument, held that the cover was capable of an innocent construction. The court stated:

\[\text{T}\text{here is only a general similarity between the picture on the cover of the magazine and a criminal-wanted poster. The cover says “Wanted! from,” not “wanted for.” It states that the plaintiff is wanted for a sum of money, not for a crime. The format undoubtedly calls the reader’s attention to the picture, but it also calls his attention to all the words near the picture and directs him to an}\

\textsuperscript{123} \textit{Id.} at 483, 361 N.E.2d at 76.
\textsuperscript{125} \textit{Id.} at 265, 371 N.E.2d at 879.
\textsuperscript{126} \textit{See infra} text accompanying notes 236, 238.
\textsuperscript{127} \textit{See infra} text accompanying notes 237, 239.
inside page for further information. Taken as a whole the publication is more susceptible to an innocent construction than not.129

The Illinois courts, however, have not confined application of the innocent construction rule to ambiguity arising from the various meanings of the words or from the context in which they are used. That is, when the words or phrases at issue are not ambiguous in terms of their import or context, they may still be construed to be capable of both a defamatory and nondefamatory interpretation and therefore capable of being innocently interpreted. In Levinson v. Time, Inc.,130 for example, an article in Time magazine was alleged by the plaintiff to be libelous. The article quoted a police detective investigating a burglary incident as saying, "He [the plaintiff] was the most uncooperative victim I've seen." The court held the statement nonlibelous and affirmed the trial court's judgment for the defendant. The Levinson court ruled: "Common sense and understanding tell us that a great number of people may be uncooperative with the police for a great variety of innocent reasons" notwithstanding the plaintiff's contention that the reports on his "uncooperative" behavior might have suggested immoral motives or actions on the part of the plaintiff.131 Thus, the circumstances under which the communication in question took place were considered in applying the innocent construction rule in the Levinson case.

As noted above, California was not as overreaching in utilizing its own "possible innocent meaning rule," as the innocent construction concept is usually referred to.132 California courts limited use of the rule, during its brief tenure, to primarily ambiguous language.133 In Peabody v. Barham,134 for example, the origin of the California innocent construction rule, indicates how the California courts from the beginning limited the common law rule to ambiguous expressions alleged to be libelous. The case arose from a statement published in a widely circulated daily newspaper which claimed: "Eddie Peabody's divorcing wife, ten years his senior, is also his aunt."135 Even though the average reader might accept the plaintiff's claim that the words complained of charged him with the crime of incestuous marriage, the Peabody court disagreed, noting that such was not the only interpretation: the woman referred to in the publication might be the plaintiff's aunt because of a former marriage to his consanguineous

129 Id. at 10, 328 N.E.2d at 189.
131 Id. at 342, 411 N.E.2d at 1122.
133 Illinois Doctrine, supra note 10, at 535.
135 Id. at 583, 126 P.2d at 669.
uncle. The California Appellate Court ruled in *Peabody* that the innocent construction rule prevailed as a matter of law. Such an interpretation by the *Peabody* court of the words in question might have returned life to the English *mitior sensus* doctrine, particularly in regard to the doctrine's excesses. One law review article, for example, commented that the reasoning of the *Peabody* case was "a classic illustration of the results of carrying the innocent construction rule to its extreme."138

In 1947, five years after the *Peabody* decision, the innocent construction rule was again utilized by the California Appellate Court in *Babcock v. McClatchy Newspapers* in determining the meaning of the statement: "The people of this county have a right to ask: 1. How was it possible for you, Mr. Babcock, going into office dead broke, on a salary of $4,500 to buy an office building at a purported price of $80,000?" While conceding that the challenged statement was "open to the construction that dishonesty and corruption may be inferred," the California court held that the publication was also capable of being innocently interpreted, that is, that the plaintiff had obtained the money by gift, inheritance, or profitable investment. In other words, the office could have been bought with money from any financial source of those cited.

In strong contrast with the rather extreme application of the common law defense in *Peabody* and *Babcock*, the California court in *Menefee v. Codman*, refused to apply the innocent construction rule. The libel action stemmed in part from the publication of an allegedly derogatory article concerning the plaintiff's trip to Paris. The plaintiff asserted that she was libeled by a question in the controversial article: "Who covered Audrey while Audrey covered the water front?" Notwithstanding the fact that the word "cover" has various nondefamatory meanings, the *Menefee* court, rejecting the defense's argument based on the rulings of *Peabody* and *Babcock*, stated: "It is difficult to ascribe an innocent meaning to this publication. The use of the verb 'cover' as meaning copulation is indicated by the dictionary definition generally connected with the breeding of animals."145

Just seventeen years after its debut in *Peabody v. Barham*, California's innocent construction rule was abolished. In *MacLeod v. Tribune Publishing Co.*, the

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136 Id. at 583, 126 P.2d at 669.
137 For a discussion of the English *mitior sensus* doctrine, see supra text accompanying notes 24–81.
138 Illinois Doctrine, supra note 10, at 536.
140 Id. at 531, 186 P.2d at 738.
141 Id. at 533, 186 P.2d at 740.
142 Id. at 534, 186 P.2d at 740.
144 Id. at 400, 317 P.2d at 1034.
145 Id. at 405, 317 P.2d at 1037.
California Supreme Court, using a hypothetical case involving a newspaper story, stated:

[T]he paper reported that “Mrs. A, who was married last month, gave birth to a child last night.” A charge of immoral conduct is apparent to all from the language used, and the paper knows and is fully warned of the defamatory implication. Under the rule of the Peabody case, however, it would escape liability unless special damages are proved, for the language does not exclude the innocent possibility that Mrs. A was widowed or divorced a few months before her recent marriage and that the child is that of her former husband. Such hair-splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communication between ordinary human beings . . . . It protects, not the innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language.\(^{147}\)

As noted earlier, the innocent construction rule has also been applied to cases in which the identification of individuals involved is at issue. In connection with the Illinois Supreme Court’s use of the rule in \textit{John v. Tribune Co.}, where colloquium was at issue, it is noteworthy that the court did little to clarify the question of when the common law libel defense is applicable. Indeed, it was not until 1982 that the Illinois Supreme Court took up the issue of the relationship between the rule and the colloquium issue when the \textit{Chapski} court declared that the rule applies to cases where the identification of the defamed person is unclear or difficult to establish.\(^{148}\)

It is not an easy task to establish the connection between the defamatory words or phrases and the plaintiff. Indeed, the colloquium problem cannot stand alone in establishing the defamatory nature of a publication. It is frequently complemented by inducement and innuendo, as clearly illustrated in a recent media law textbook, \textit{The First Amendment and the Fourth Estate}\.\(^{149}\) But while the three may work together to prove that a publication or statement defames 

\(^{147}\) \textit{Id.} at 550, 343 P.2d at 43–44.

\(^{148}\) For a discussion of \textit{Chapski}, see infra text accompanying notes 204–17.

\(^{149}\) T. Carter, M. Franklin & J. Wright, \textit{The First Amendment and the Fourth Estate} \textit{66} (3d ed. 1985). One authority explains “inducement” and “innuendo” as follows:

\[\text{“inducement” and “innuendo” as follows:}\]

\[\text{When the defamatory meaning of the communication or its applicability to the plaintiff depended upon extrinsic circumstances, the pleader averred their existence in a prefatory statement called the “inducement.” . . . the communication he set forth verbatim and in the “innuendo” explained the meaning of the words. The function of the innuendo was explanation; it could only explain or apply them in the light of the other averments in the declaration.}\]

\textit{Restatement, supra} note 1, § 563, at comment f.
the plaintiff, inducement and innuendo generally cannot be used to upset the use of the innocent construction rule where colloquium is at issue.\textsuperscript{150} The judicial approach toward innuendo and inducement taken by Illinois courts is that when an allegedly defamatory but ambiguous expression can be construed innocently, the aid of extrinsic facts through innuendo or inducement cannot transform the innocent meaning into a defamatory one.\textsuperscript{151}

The problem of proving that the defamatory words are about or concerning the plaintiff, however, does not always involve the identification of a person as specifically targeted in an allegedly defamatory publication or statement. The problem of colloquium may also turn upon the use of an alias which incidentally identifies some other innocent person.

The Illinois Supreme Court in \textit{John v. Tribune Co.}\textsuperscript{152} provided the innocent construction rule with what one legal scholar called a "cornerstone precedent"\textsuperscript{153} for utilizing the common law rule to resolve the issue of the missing colloquium. The \textit{John} case stemmed from the two news articles published in the \textit{Chicago Tribune}, which reported a police raid on a brothel in Chicago. The news articles identified the arrested proprietor of the apartment at issue as Dorothy Clark, also known as "Dolores Reising, 57, alias Eve Spiro and Eve John."\textsuperscript{154} By incredible coincidence, the plaintiff, whose maiden name had been Eve Spiro, and whose name at the time of the police raid was Eve John, was living in the basement of the apartment building in which the allegedly immoral practices were taking place. The plaintiff, a practicing psychologist, was not the proprietor of a house of prostitution as charged in the newspaper stories.

The Illinois Supreme Court, taking analytical note of the linguistic use of the alias, observed:

A name or names reported as the \textit{alias}, also-known, are the names that have been assumed by the subjects identified by the name preceding the \textit{alias} . . . the \textit{alias} names do not change the subject of the publication . . . but simply disclose the subject's false name or names. The \textit{alias} names therefor, [sic] necessarily cannot be read as identifying the of and concerning or target name of the publication.\textsuperscript{155}

And then, turning to the libel issue in the case, the \textit{John} court ruled:


\textsuperscript{151} See generally cases cited at \textit{supra} note 149.


\textsuperscript{153} Polelle, \textit{supra} note 9, at 200.

\textsuperscript{154} \textit{John}, 24 Ill. 2d at 439-40, 181 N.E.2d at 106.

\textsuperscript{155} Id. at 442, 181 N.E.2d at 108.
[T]he language in defendant's articles is not libelous of plaintiff when the innocent construction rule is consulted. The rule holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous but capable of being read innocently must be so read and declared nonactionable as a matter of law. Since both of the publications here are capable of being construed as referring only to Dorothy Clark-Dolores Reising as the keeper of the disorderly house, they are innocent publications as to the plaintiff.156

The problem of colloquium in the innocent construction rule cases also arises when "they," "some," or "any" are used in referring to individuals. Belmonte v. Rubin157 is a case in point in that it involved ambiguous or unspecific pronouns or nouns providing ground for the application of the rule because of the unclear identification of the defamed person. The libel action in Belmonte resulted from a newspaper story concerning an eviction suit. In the story, the defendant was quoted as saying: "[T]hey're trying to steal the girls' home."158 The plaintiff charged that the defendant's statement referred to him and defamed his character. Noting that the suit involved application of the innocent construction rule, the Illinois Appellate Court held that the "they're" as used in the news story was ambiguous and therefore susceptible of being read to include individuals other than the plaintiff under the common law rule.159

The Illinois Appellate Court recently utilized the same reasoning in regard to the question of identification. In Bravo Realty v. CBS,160 the court held that the phrase "some" realtors used in the telecast of the defendant was referring to parties other than the plaintiff. The court further observed that such terms, i.e., "some" in the instant case, are ambiguous enough to be innocently construed. Both Belmonte and Bravo Realty, it should be noted, concerned statements or publications in which the plaintiff was not specifically named.

Because of the uncertainty of identification which sometimes arises in libel actions brought by individuals, group libel actions are expected to cause even more difficulty in establishing colloquium in the future. In Crosby v. Time, Inc.,161 the innocent construction rule was utilized by the defendant in a diversity case involving group libel. The action resulted from an article published in Time magazine on the activities of top Western officials of the International Brotherhood of Teamsters. The article stated that Teamster officials were conspiring with Seattle gamblers to control Portland's law enforcement agencies and to

156 Id. at 442-43, 181 N.E.2d at 108.
158 Id. at 701, 386 N.E.2d at 905.
159 Id. at 701, 386 N.E.2d at 905.
161 Crosby v. Time, Inc., 254 F.2d 927 (7th Cir. 1958) (applying the Illinois law).
organize all the city's rackets, from pinball machines to prostitution. The plaintiff, an official of the Teamster's Union, maintained that the article referred to or included him in the crime organization at issue. The federal court disagreed, stating that such an assertion that included the plaintiff among the top officials of the Teamsters involved was "little more than a figment of the imagination." Affirming the lower court's judgment for the defendant, the Crosby court held:

[A] reading of the article furnishes no reasonable basis for the thought that plaintiff, referred to as the Oregon Teamsters' representative, was one of the top Western officials of the International Brotherhood of Teamsters who were asserted to be conspiring with Seattle gamblers. Even though it be assumed, however, that he was one of such top officials, he could not prevail, under Illinois law, in the absence of a showing that all of such officials were accused of wrongdoing.

The innocent construction rule has also been utilized as a defense in libel actions involving fictitious names. In Smith v. Huntington Publishing Co., for example, a federal district court applied the Ohio innocent construction rule in an action arising from an allegedly libelous newspaper article. The article concerned drug addiction in the area in which the newspaper was circulated. The reporter, using fictitious names, inadvertently used the plaintiff's name in describing the experiences of a son's drug abuse and the efforts of his mother to care for her child. The article stated in bold print that the names were fictitious, but that the story was true. The plaintiff asserted that the article was libelous and that the defendant intended to injure his reputation. The court, rejecting the plaintiff's charge, held:

[N]o reasonable person could have reasonably believed that the article pointed to the plaintiff in the light of a clear statement by the author in boldface print that the names were fictitious. We base this holding on (1) the law, as is stated in the related area of fictional publications and the use of fictitious names, and (2) the innocent construction rule approved by the sixth circuit in the case of England v. Automatic Canteen Co. of America.
The common law defense of fair comment and criticism traditionally protected honest criticism and opinions about matters of general public interest so far as they were reasonable and factually based. In *New York Times Co. v. Sullivan*, a landmark Supreme Court decision, the rationale for the common law privilege of fair comment and criticism was recognized with approval as a matter of constitutional law for defamation actions involving public officials. Ten years later the Supreme Court in *Gertz v. Robert Welch, Inc.* reaffirmed that expression of opinion or belief is protected under the First Amendment. In dicta accompanying the decision, the Court stated: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”

The application of the common law defense of fair comment and criticism has, to a certain degree, been diminished by the constitutional protection of opinion. This is clearly indicated by the treatment given to fair comment and criticism by the *Restatement (Second) of Torts*. Nonetheless, Robert Sack has cautioned against the hasty conclusion that the common law fair comment privilege has now lost its usefulness as a rule in defamation cases. The media law attorney wrote:

> It would be dangerous to assert conclusively that all opinion is ... protected by the First Amendment until the Supreme Court has had an opportunity to rule on the validity of the syllogism which it suggested in *Gertz*. In any event, it is to be expected that courts will frequently employ the common law doctrine to dispose of cases because they are familiar with it. Even if the constitutional protection is broader than, and entirely encompasses, the common law privilege, there is no reason why a state court cannot dismiss a lawsuit on the common law ground without ever reaching the constitutional question.

In this regard, the application of the innocent construction rule to assertions of comment and criticism is a case in point.

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170 *Id.* at 279–80.
172 *Id.* at 339–40.
In *Korbar v. Hite*, the innocent construction rule was applied to criticism of a credit union policy. The litigation resulted from an article published by the defendant in a union newspaper which commented on the insensitivity of the plaintiff, the credit union president, in regard to problems facing members of the union. The court held the language of the newspaper story to be nonlibelous under the concept of innocent construction because it might be construed as criticism of the credit union policy rather than impugnment of the plaintiff's business or professional reputation.

The innocent construction rule was also employed as the basis for the denial of a slander action in *Bougadis v. Langefeld*. The plaintiff alleged that the defendant had made a defamatory statement about the plaintiff's collection of money. The gist of the statement at issue was that the plaintiff's comments "sounded to him like extortion." The Illinois court ruled that the defendant's statement was made to describe the substance of the plaintiff's conversation, not to accuse the plaintiff of committing a crime or of being unfit for his professional duties. In particular, the opinion focused on the term "like extortion," which the court found susceptible of an innocent construction.

In *Garber-Pierre Food Products v. Crooks*, the Illinois Appellate Court, explaining the applicability of the innocent construction rule to fair comments and criticism, observed that: "To determine whether comments are actionable *per se*, Illinois courts apply the innocent construction rule . . . ." In *Garber-Pierre*, the trial court had granted summary judgment to the plaintiff, who contended in the complaint that the defendant's letter accused him of committing crimes of "blackmail" and "extortion" under federal law. The Illinois Appellate Court reversed, reasoning that the words at issue were capable of being innocently construed in the context of the letter. The court noted that the words reflected the defendant's opinion that the plaintiff's negotiation concerning payment for goods was unreasonable. The court based its decision on the interpretation of the words "blackmail" and "extortion" on a U.S. Supreme Court libel decision, *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*. In *Greenbelt*, the Supreme Court reviewed a libel verdict for a

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176 *Id.* at 638, 357 N.E.2d at 136-37.
177 *Id.* at 640, 357 N.E.2d at 138.
179 *Id.* at 1012, 387 N.E.2d at 967.
180 *Id.* at 1014, 398 N.E.2d at 968.
181 *Id.* at 1014, 387 N.E.2d at 968.
183 *Id.* at 359, 397 N.E.2d at 213
184 *Id.* at 358, 397 N.E.2d at 213.
185 *Id.* at 360, 397 N.E.2d at 214.
prominent local real estate developer. The position he had taken in negotiations with the city council to obtain zoning variances had been characterized by participants in public meetings as "blackmail." The defendant newspaper reported the allegation in two separate articles. The developer complained that in using the term "blackmail," the newspaper had charged him with a crime and that since the newspaper knew he had not committed such a crime, it should be held liable for the knowing publication of falsehood. The Supreme Court concluded that as a matter of constitutional law, the word "blackmail" in these circumstances was not libelous. In so holding, the court stated:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiation proposals that were being criticized. No reader could have thought that either the speakers at the meeting or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

Usually, the language used in epithets, insults, name-calling, or hyperbole is no more than either an idle comment or the venting of the speaker's or writer's emotions and therefore is not considered injurious to the good name of the insulted person. As one commentator noted, from the perspective of judicial efficiency, courts cannot solve all the issues involving nonactionable comments which arise in libel litigation.

In light of the nature of vituperative or opprobrious expression, the Illinois courts apply the innocent construction rule when considering such statements on the ground that the effect of such expression has more to do with emotional feelings than with the actual meaning of the words. In Sloan v. Hatton, an Illinois court held nonactionable as a matter of law the defendant's letter criticizing the plaintiff's business. The court characterized the defendant's words as a "verbal jab" prompted by the plaintiff's action toward him. In addition, the court noted that although the statement might allude to the fitness of the

187 Id. at 7–8.
188 Id. at 14.
191 In a letter to the Illinois Attorney General, the defendant charged the plaintiff with poor management of his mobile home business. Id. at 42, 383 N.E.2d at 260.
plaintiff's business ability, the "unguarded statement" was made in the midst of a business or commercial dispute and could not be libel \textit{per se} in all cases.\footnote{Id. at 44, 383 N.E.2d at 262.}

Similarly, the Illinois Appellate Court in \textit{Angelo v. Brenner},\footnote{Angelo v. Brenner, 84 Ill. App. 3d 594, 406 N.E.2d 38 (1980).} focused on the context of the precipitating circumstances involved. The court ruled for the defendant who said that the plaintiff, a police officer, was "unfit to be a policeman."\footnote{Id. at 596, 406 N.E.2d at 40.} Terming the statement "an angry comment" by the husband of a woman who had violated a traffic law, the court held:

\begin{quote}
[T]he statement was made before only three other police officers who were assumedly aware of the reason for defendant's presence at the police station and assumedly accustomed to the not uncommon response of a motorist or other interested party upon receiving a traffic citation. In light of all these circumstances . . . an innocent construction should be placed on defendant's statement.\footnote{Id. at 599, 406 N.E.2d at 42.}
\end{quote}

To err is human; no one is infallible. Such maxims appear to be the rationale for the "single instance" rule in libel litigation.\footnote{For the judicial definition of the single instance rule, see supra note 116.} Sack explained the rule in a similar way: "[E]veryone makes a mistake now and then. The wrongful assertion that a person erred in a single instance therefore does not lower him in the estimation of others."\footnote{SACK, supra note 173, at 70.} The single instance rule has been recognized by New York and several other states as a libel defense.\footnote{See Brower v. New Republic, 7 MED. L. REP. 1605 (N.Y. Sup. Ct. 1981); Craig v. Moore, 4 MED. L. REP. 1402 (Fla. Cir. Ct. 1978); Cinquanta v. Burdett, 154 Colo. 37 (1965); Dooling v. Budget Pub. Co., 144 Mass. 258 (1887).}

In Illinois, however, the innocent construction rule has been employed where the single instance rule may have been appropriate. In \textit{Britton v. Winfield Public Library},\footnote{Britton v. Winfield Public Library, 101 Ill. App. 3d 546, 428 N.E.2d 650 (1981).} an Illinois court noted that the alleged defamatory words concerned "one incident" and not a generalized character attack on the plaintiff.\footnote{The publication challenged to be libelous in the Britton case was a letter written by the defendant and published in newspapers. In the letter, the defendant stated that the plaintiff, then village administrator, used "dirty tricks" as part of his "cheap and dishonest government." \textit{Id.} at 547, 428 N.E.2d at 651.} The Illinois court employed the innocent construction rule, in holding that the article at issue was nondefamatory.

The U.S. Court of Appeals, Seventh Circuit, also applied the innocent construction rule rather than the single instance rule in \textit{Fleck Bros. Co. v. Sullivan}.\footnote{Fleck Bros. Co. v. Sullivan, 385 F.2d 223 (7th Cir. 1967) (applying the Illinois law).} The alleged libel was in a letter stating that the defendant collection agency
collected a certain amount of money from the plaintiff corporation for a service fee. The Seventh Circuit noted that the statement merely indicated "a single instance in which the plaintiff failed to pay an obligation in the ordinary course of business." Furthermore, the court observed that a single such instance could result from mistake or a good-faith dispute over liability.\textsuperscript{202} The court held that under the Illinois innocent construction rule the publication was not actionable "without proof of special damage."\textsuperscript{203} In connection with the Seventh Circuit's decision, it is noteworthy that in applying the innocent construction rule to the case, the federal court modified it by requiring proof of special damage. Insofar as the Illinois courts are concerned, the rule is not conditioned or qualified by proof of special damage. It is not clear whether the Fleck Bros. Co. court was attempting to alter the Illinois rule. It can be inferred from the court's reasoning, however, that utilization of the innocent construction rule was based upon the concept of the New York single instance rule as defined in November v. Time, Inc.\textsuperscript{204}

\textbf{B. Application of the "Modified" Rule After Chapski}

In 1982 the Illinois Supreme Court modified that state's innocent construction rule in \textit{Chapski v. Copley Press}.\textsuperscript{205} The \textit{Chapski} case stemmed from a series of articles published by the defendant's newspaper. The newspaper articles concerned juvenile and divorce proceedings in which the plaintiff was involved as an attorney. Chapski contended that the stories damaged his reputation as a lawyer. The newspaper, however, argued that it carried the articles only for the purpose of questioning a court procedure as a whole, not the involvement of the plaintiff. Therefore, the defendant argued, the newspaper was not libelous as to the plaintiff, as asserted, because of a failure to establish colloquium. The case was decided for the defendant by the Illinois Appellate Court, Second District, when it affirmed the trial court's judgment.\textsuperscript{206} The Illinois Appellate Court held that the defendant's articles were susceptible of an innocent construction in that the publication at issue criticized the judicial system's handling of the proceedings involving the plaintiff.\textsuperscript{207}

\textsuperscript{202}Id. at 224.  
\textsuperscript{203}Id. at 224.  
\textsuperscript{204}November v. Time, Inc., 13 N.Y.2d 175, 244 N.Y.S.2d 309 (1963). The New York Court of Appeals in \textit{November} stated: "[T]he rule . . . holds that language charging a professional man with ignorance or mistake on a single occasion only and not accusing him of general ignorance or lack of skill cannot be considered defamatory on its face and so is not actionable unless special damages are pleaded." \textit{Id.}, 13 N.Y.3d at 178, 244 N.Y.S.2d at 311.  
\textsuperscript{205}Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195 (1982).  
\textsuperscript{207}Id. at 1017, 427 N.E.2d at 642.
The Appellate Court's decision in *Chapski* was appealed to the Illinois Supreme Court. In a unanimous opinion, the Illinois high court noted that a modification in the common law rule would better protect the individual's good name in a libel suit and at the same time encourage the First Amendment principle of the "robust discussion of daily affairs." The court held that:

[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved by the court in the first instance; whether the publication was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury should the initial determination be resolved in favor of the plaintiff.

The Illinois Supreme Court in *Chapski* carefully examined the innocent construction rule as a defense in libel litigation, focusing upon both its legal efficacy and its historical development. It was the first time that the Illinois court had analyzed the status of the rule in an in-depth manner since its recognition in 1962 as a common law libel defense in *John v. Tribune Co.*. The *Chapski* court first traced the origin of the innocent construction rule in Illinois to *John*, and termed the court's 1962 statement concerning the rule as "obiter dictum." The court then noted the inconsistent application of the rule in defamation cases, citing eleven cases decided by both Illinois appellate courts and federal courts sitting in Illinois as examples.

Second, the *Chapski* Court noted four appellate court cases in which the rule's judicial appropriateness as "a fair statement of the law" was strongly ques-

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208 *Chapski*, 92 Ill. 2d at 351, 442 N.E.2d at 198.
209 *Id.* at 352, 442 N.E.2d at 199 (emphasis added).
211 *Chapski*, 92 Ill. 2d at 348, 442 N.E.2d at 197. In *Valentine*, Justice Ward, dissenting and joined by two justices, stated: "I consider the innocent construction rule from *John v. Tribune Co.* . . . (which I read as obiter dictum) has no place here." *Valentine*, 60 Ill. 2d at 172, 328 N.E.2d at 268. One practicing attorney noted the *Chapski* court's *obiter dictum* comment on the *John* adoption of the innocent construction rule as "one of the severest of judicial ad hominem." Kohn, *Chapski and the Loss of Innocence*, 65 CHI. B. REC. 212, 214 (1984).
212 *Chapski*, 92 Ill. 2d at 348, 442 N.E.2d at 197.
213 *Id.* at 348, 442 N.E.2d at 197. See, e.g., *Levinson v. Time*, Inc., 89 Ill. App. 3d 338, 411 N.E.2d 1118 (1980) (the rule should apply as a question of fact, not as a matter of law, and be limited to where the identification issue is involved); *Kakuris v. Klein*, 88 Ill. App. 3d 597, 410 N.E.2d 984 (1980) (the Illinois courts have recently tended to erode the rule and so the rule should not apply to the case); *Vee See Construction Co. v. Jensen & Halstead*, Ltd., 79 Ill. App. 3d 1084, 399 N.E.2d 278
tioned. Third, the court dealt with the question of how and when the Illinois courts have applied the innocent construction rule. The court noted that: (a) the rule has been applied in slander as well as in libel cases; (b) the rule has been utilized to determine whether the words or phrases in question are actionable per se; and (c) the rule has been employed where the missing colloquium issue arises.\(^1\)

Fourth, in the course of discussing the critical treatment accorded to the innocent construction rule by legal scholars, the court called attention to the connection between the rule and the English *mitior sensus* doctrine.\(^2\) Given the fact that the Illinois Supreme Court had never discussed the innocent construction rule as an outgrowth of the English doctrine until *Chapski*, it is surprising that it would do so twenty years after *John*.\(^3\)

And finally, in justifying the innocent construction rule, the court explicitly accepted the desirable contribution to mitigating the harshness of the doctrine of strict liability in defamation law.\(^4\) More importantly, the court observed that the rule enhances the interests of the First Amendment because the common law defense encourages the uninhibited discussion of daily affairs in accordance with the constitutional guarantee of free speech and free press.\(^5\)

As a result of the *Chapski* modification, the innocent construction rule as applied by the Illinois courts between 1962 and 1982 is qualified by the “reasonable” requirement in interpreting an allegedly ambiguous expression of defamatory nature. This was primarily intended to prevent judges from striving to find any possible innocent meanings of words where the words can be more reasonably construed in a defamatory way. Furthermore, the Illinois Supreme Court in *Chapski* hoped to curb further judicially inconsistent and confusing applications of the innocent construction rule as evidenced in the post-*John* defamation rulings in Illinois.

The Court’s modification of the innocent construction rule in *Chapski* has been characterized by some critics as the beginning of the rule’s eventual demise\(^6\) or as a step forward in Illinois libel law by striking a balance between

\(^{213}\) *The Mitior Sensus Doctrine*.

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\(^{214}\) *Chapski*, 92 Ill. 2d at 348–49, 442 N.E.2d at 197.

\(^{215}\) *Id.* at 349–50, 442 N.E.2d at 197–98.

\(^{216}\) For a discussion of the conceptual relationship between the *mitior sensus* doctrine and the innocent construction rule, see supra text accompanying notes 9–13.

\(^{217}\) *Chapski*, 92 Ill. 2d at 350, 442 N.E.2d at 198.

\(^{218}\) *Id.* at 350, 442 N.E.2d at 198 (citing Dauw v. Field Enterprises, Inc., 78 Ill. App. 3d 67, 71, 397 N.E.2d 41, 44 (1979)).

the individual's interest in vindicating his reputation and the public's right to freedom of expression. So far as application of the rule as modified by Chapski is concerned, however, the demise of the common law libel defense is far from evident. Indeed, it apparently still retains much of its vitality as one of the most effective protections afforded to the Illinois press, though its application is considerably less freewheeling than before Chapski. Since the Chapski modification of reasonableness in 1982, the innocent construction rule has not been as successful a libel defense as it was in Illinois during the 1962-1982 period. In twenty-three libel cases reported between late 1982 and February 1986, both state and federal courts in Illinois have based their decisions on the modified rule of innocent construction. The rule prevailed in sixteen and failed in seven of these twenty-three cases. Thus, the modified rule has been nearly 70 percent successful as a defense in libel actions. This is noteworthy in that between 1962 and 1982 the pre-Chapski rule was successfully applied in 54 out of 62 reported libel cases, or 87 percent of the court judgments were for defendants. The frequency with which the courts have applied the rule for defendants in libel litigation has declined since 1982. This is without doubt related to the judicial fiat announced by the Chapski court that the rule should be applied only as long as the innocent construction is reasonable.

Costello v. Capital Cities Media, Inc. is the first post-Chapski libel case in which the "reasonable" requirement of the innocent construction rule was applied.

220 Modification of the Rule, supra note 10, at 234.

222 For a list of libel cases in which Illinois courts applied the innocent construction rule from Young v. Richardson of 1879 to Chapski v. Copley Press of 1982, see Youm, supra note 100, at 203-09.
223 For a discussion of Chapski, see supra text accompanying notes 204-17.
The Illinois Appellate Court interpreted the modified common law rule as placing the editorial in question beyond the protection of the innocent construction rule. The case involved an editorial published in the defendant's newspaper in which the writer called the plaintiff, the county board chairman, "a liar" and characterized his leadership as a "brand of lying." The plaintiff contended that the publication was libelous per se since it reflected adversely upon him with respect to his honesty and his ability as chairman of the county board. The trial court disagreed, ruling that defendant was not liable for its publication under the innocent construction rule because the editorial in question was a criticism of the plaintiff's conduct in a particular instance, not a general attack on his honesty or character. The trial court applied the rule where the single instance approach could have been used as a defense.

On appeal, the Illinois Appellate Court reversed, holding that the editorial was actionable per se because it imputed that the plaintiff was unable to perform his duties and lacked integrity. To find the editorial innocent, the court noted, would not be consistent with the Chapski ruling because it would "strain to find a possible, but unnatural, innocent meaning, when a defamatory meaning is far more probable."

In a 1984 libel case, Erickson v. Aetna Life & Cas. Co., the Illinois Appellate Court in applying the Chapski rule focused on the contextual circumstances in which an allegedly defamatory publication was prepared. Noting the Chapski statement that allegedly defamatory statements should be interpreted in context, the court held:

[Considering the context of the statement made by defendant concerning plaintiff-chiropractor's treatment], we do not believe it can be given an innocent construction. Although ... the statement on its face was limited to comments on "the care and treatment in this

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225 Id. at 1012, 445 N.E.2d at 15.
226 For a discussion of the application of the innocent construction rule where the single instance rule might have been more appropriate, see supra text accompanying notes 195–203.
227 In Illinois, words which on their face and without the aid of extrinsic evidence impute to the plaintiff any of the following are deemed actionable per se: (1) commission of a crime; (2) infection with a loathsome disease; (3) unfitness or lack of integrity in performing the duties of office or employment; or (4) inadequate ability of the party in his or her profession, business, or trade. Fried v. Jacobson, 107 Ill. App. 3d 780, 438 N.E.2d 495 (1982), vacated, 99 Ill. 2d 24, 457 N.E.2d 392 (1983); Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n, 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1982); Springer v. Harwig, 94 Ill. App. 3d 281, 418 N.E.2d 870 (1981).
228 Costello, 111 Ill. App. 3d at 1014, 445 N.E.2d at 17.
229 Id. at 1014, 334 N.E.2d at 17. But cf. Delis v. Sepsis, 9 Ill. App. 3d 217, 292 N.E.2d 138 (1972) (Under the pre-Chapski rule of innocent construction, the word "liar," "dishonorable," and "deluded" in reference to the plaintiff's activities as secretary of an organization were held innocent because they were merely "name calling").
231 Id. at 759, 469 N.E.2d at 683.
case," . . . we nonetheless believe that when one considers the context of the entire statement, an innocent construction cannot be found.\textsuperscript{232}

Although post-Chapski courts are more reluctant to apply the innocent construction rule for defendants in libel cases, the rule is still used by defendants as a defense in suits involving ambiguity in terms of meanings, contexts, and colloquium. Indeed, on some occasions where the "reasonable" innocent construction rule has been invoked, Illinois courts have dealt with the interpretation of the allegedly defamatory statements in a manner similar to the pre-Chapski approach. In Antonelli \textit{v. Field Enterprises, Inc.},\textsuperscript{233} for example, the Illinois Appellate Court used the rule in holding nondefamatory the \textit{Chicago Sun-Times} story which referred to the plaintiff as a "reputed mobster" and "reputed hit man," among other terms. Consulting the definitions of the phrase at issue as set forth in authoritative dictionaries,\textsuperscript{234} the court held that:

The term "reputed" means "supposed, thought, or reckoned . . . ." "Supposed" in turn, is defined as "believed to be or accepted as such usu [sic] on slight grounds or in error: erroneously imputed or ascribed . . . ." Therefore, Field [defendant] accurately depicted plaintiff as one about whom the word "mobster" had been "supposedly," perhaps "erroneously imputed," as the balance of the article reveals, thereby supporting the "innocent" construction of the word "mobster."\textsuperscript{235}

In interpreting the term "mobster," the court also took note of the plaintiff's record of breaking the law and observed that "mobster" as used in the news story was an accurate portrayal of the plaintiff on the ground that it connotes the kind of person who breaks or violates the law.\textsuperscript{236}

The reasoning of the court in applying the modified innocent construction rule to the Antonelli libel case is very similar to \textit{Homestead Realty Co. v. Stack}\textsuperscript{237} and \textit{Makis v. Area Publications Corp.},\textsuperscript{238} two libel cases before Chapski, because \textit{Antonelli} was largely based on ambiguity stemming from the structure of the allegedly defamatory statement. In \textit{Homestead}, the court found nonlibelous the phrase "alleged racial steering" which the defendant charged the plaintiff with engaging in. The court, calling attention to the word "alleged" in the defendant's

\textsuperscript{232} \textit{Id.} at 740, 469 N.E.2d at 684.
\textsuperscript{235} \textit{Antonelli}, 115 Ill. App. 3d 435, 450 N.E.2d at 878 (citation omitted).
\textsuperscript{236} \textit{Id.} at 435, 450 N.E.2d at 878-79.
\textsuperscript{238} \textit{Makis v. Area Publications Corp.}, 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979).
statement, ruled that the statement did not say that he was engaged in racial steering but that he was alleged to be the violator of the real estate law. Similarly, in Makis the Illinois Appellate Court applied the innocent construction rule to the statement: “It could have been ... plain crime” that prompted owners of certain businesses to take flight. Rejecting the argument of the plaintiff that the word “crime” implies that the plaintiff committed a crime, the court held that the word, qualified by the phrase “could have been,” does not impute any specific criminal act to him.

In a 1984 libel case, Sivulich v. Howard Publications, Inc., the plaintiff asserted that the defendant’s newspaper defamed him in publishing that “charges” of aggravated battery had been filed against him. He argued that the word “charge” was used only for felonious crimes and, therefore, as used in the story, implied that he had committed a felony. The Sivulich court did not agree with the plaintiff, noting that: “The natural and ordinary meaning of the word ‘charged’ is broad enough to encompass civil as well as criminal charges. In a generic sense, it includes any assertion against an individual, including averments in a civil complaint.” In ruling against the plaintiff, the court made it clear that the modified innocent construction rule does not apply to the technical and legal meanings of words. Thus, the “reasonable” requirement of the Chapski decision does not affect the application of the rule where the ambiguous meanings of words, one of which is innocent, are at issue.

In Cartwright v. Garrison, a 1983 libel action, the judicial parameters of the modified innocent construction rule are outlined through several issues which involve the interpretation of the common law libel defense. The case is also significant in that the plaintiff challenged the court to abandon even the modified rule of innocent construction, replacing it with a so-called “reasonable construction” rule. The Cartwright case arose from a newspaper story concerning a statement made by the defendant. The story quoted the defendant as mentioning “misdeeds by the administration” involving the plaintiff as the

240 Makis, 77 Ill. App. 3d at 457-58, 395 N.E.2d at 1189 (citing Homestead Realty Co. v. Stack, 57 Ill. App. 3d 575, 373 N.E.2d 429 (1978)).
242 Id. at 131-32, 466 N.E.2d at 1220. The battery charges against the plaintiff arose from his altercation with the grandfather of one of his students.
243 Id. at 132, 466 N.E.2d at 1220.
245 The “reasonable construction” rule is defined thus: “[W]ords are to be taken in the sense in which they are reasonably understood under the circumstances, and are to be presumed to have the meaning ordinarily attached to them by those familiar with the language used.” Prosser & Keeton on Torts, supra note 1, at 781. See also F. Harper & F. James, The Law of Torts 362 (1956). For a discussion of the proposal that the Illinois innocent construction rule should be replaced by the reasonable construction rule, see Polelle, supra note 9, at 218–19.
superintendent of the school board. The plaintiff contended that the statement was defamatory of him because it falsely accused him of committing a crime and injured his professional reputation.

In ruling on the defamation issue, the *Cartwright* court applied the innocent construction rule as modified in 1982. First, the court focused on the context in which the allegedly defamatory statement was made, i.e., a closed meeting of the school board at which the defendant was asked to resign. Noting that the only violations of the law specifically mentioned in the news story were related to the board’s violations of the Illinois Open Meetings Act, the court stated that nothing in the story implicated the plaintiff in the violations as an individual.

Second, the Illinois Appellate Court in *Cartwright* turned to the colloquium issue involving the phrase “misdeeds by the administration.” Rejecting the plaintiff’s contention that the statement was about him, the court held:

> The word “administration” covers a broad group of people beyond the plaintiff and therefore can reasonably be interpreted as referring to someone other than the plaintiff . . . . As the only violations of law expressly mentioned in the article were Open Meetings Act violations by the board, the reference to “criminal penalties” in defendant’s allegedly defamatory statement, when considered in context, can reasonably be interpreted as referring to the board and not the plaintiff.

The court pointed out that so long as the identification is unclear and unspecific in an allegedly defamatory expression, the modified concept of innocent construction is prevalent.

Third, the court held nondefamatory the defendant’s comment on the legal ramifications of the state’s attorney’s investigation of the school board. The Illinois court noted that the comment at issue “may reasonably be read as defendant’s opinion” on this subject. As the pre-*Chapski* courts used the innocent construction rule in fair comment and criticism cases, the modified rule continues to be utilized in post-*Chapski* cases, as the *Cartwright* ruling indicates.

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246 *Cartwright*, 113 Ill. App. 3d at 539, 447 N.E.2d at 447.
247 *Id.* at 540, 447 N.E.2d at 448.
248 *Id.* at 541, 447 N.E.2d at 449.
249 *Id.* at 541, 447 N.E.2d at 449.
250 *Id.* at 542, 447 N.E.2d at 449.
251 For a discussion of the Illinois courts’ use of the innocent construction rule where the fair comment and criticism privilege was involved, see supra text accompanying notes 174–84.
With regard to the plaintiff's demand that Illinois should abandon the innocent construction rule and instead adopt the reasonable construction rule, the Cartwright court held: "In light of our supreme court's recent modification of the innocent-construction rule in Chapski v. Copley Press . . . we decline consideration of any further changes in the rule."253

Notwithstanding the criticism that the innocent construction rule more often benefits sloppy journalists than innocent ones,254 the rule has proven to be an effective defense for defendants in defamation litigation involving a publication capable of various meanings, one of which is innocent.255 First, the common law libel rule is broad in its application in that it focuses solely on the language of a publication or statement in question. Thus, the rule has provided a judicial sanctuary for defendants in libel actions involving ambiguous expression susceptible of an innocent construction in those jurisdictions applying the common law defense.

Second, as the Illinois Appellate Court in Dauw v. Field Enterprises, Inc.256 and the Illinois Supreme Court in Chapski257 observed, the innocent construction rule provides the so-called "breathing space" needed to foster vital social values of freedom of expression.

Third, the application of the innocent construction rule has largely been an attempt to mitigate the strict application of another underlying concept of defamation litigation, that is, that it matters who was hit, not who was aimed at. This application is useful when the missing colloquium is at issue in defamation cases.258 The libel defense also limits the traditional presumption of liability without fault in allowing an early resolution of the action as a matter of law.

Finally, although it is not the primary goal of the innocent construction rule to reduce or speedily administer defamation cases, it may have the effect of discouraging frivolous litigants from turning to the court for recovery of dam-

253 Cartwright, 113 Ill. App. 3d at 542, 447 N.E.2d at 450 (citation omitted). See also Renard v. CBS, 126 Ill. App. 3d 563, 467 N.E.2d 1090 (1984), cert. denied, 105 S. Ct. 2358 (1985) (the innocent construction rule does not violate due process and equal protection under the federal and state constitutions).


255 The impact of the pre-Chapski rule of innocent construction has been verified by a 1981 study of libel litigation. The empirical study, conducted by Stanford law professor Marc Franklin, indicated that Illinois media defendants won 93 percent of all appellate decisions. Franklin, Suiting Media for Libel: A Litigation Study, 1981 Am. B. Found. Res. J. 797, 828. This "startlingly high" success rate of defense for the media in Illinois, which is higher than any other, is attributed to the innocent construction rule. Id. at 828–29.


257 Chapski, 92 Ill. 2d at 352, 442 N.E.2d at 199 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

258 For a discussion of the innocent construction rule in cases involving missing colloquium, see supra text accompanying notes 151–64.
ages to reputation in that a majority of such libel actions have resulted in rulings for the defendant.

In spite of these advantages, the innocent construction rule does present problems which courts must address. The first and foremost weakness of the rule, based upon historical developments, is that it has the potential of being abused by libel defendants as a cheap weapon against liability for defamation.259

Even when the innocent construction rule is utilized in a missing colloquium context, it is subject to criticism insofar as such application may unjustly and unfairly protect the defendant at the expense of the plaintiff's reputation and good name.

III. SUMMARY AND CONCLUSIONS

The English *mitior sensus* doctrine and the American innocent construction rule bear particular resemblance so far as ambiguous expression capable of defamatory interpretation is concerned. At the same time, however, there are considerable differences in origin, scope of application, and rationale as defamation rules.

As the history of the *mitior sensus* doctrine indicates, the evolution of the doctrine was not in accord with the intention of the defamation laws, which was to discourage defamation against others by punishing those who defame. The primary raison d'être of the English doctrine was to stem the proliferating defamation cases then inundating the English courts in the sixteenth and seventeenth centuries.

On the other hand, even though the concept of innocent construction was basically borrowed from the *mitior sensus* doctrine, it was purported to mitigate the assumption of strict liability arising out of the libel *per se* problem. More importantly, in terms of the rationale of this rule, the American libel rule serves the constitutional interests of free speech and press by encouraging the robust discussion of daily affairs by providing the breathing space for the fruitful exercise of the First Amendment guarantees.

The *mitior sensus* doctrine is also distinguished from the innocent construction rule in its scope of application in that the doctrine was more broadly utilized as a libel defense than the rule. Finally, and perhaps more importantly, the judicial definition of the *mitior sensus* doctrine was different from that of the innocent construction rule. Under the English doctrine, the words complained of must be construed in a milder sense whenever possible, not in their natural sense.

259 For an analysis of the potential abuse by libel defendants of the innocent construction, as given by the California Supreme Court in 1959, see supra text accompanying note 146. See also Eldredge, supra note 23, at 742 (the rule permits newspapers to destroy an individual's reputation without liability merely by phrasing a defamatory statement so that it is capable of being innocently construed).
By contrast, the innocent construction rule holds that the publication is to be understood as a whole and the words given their "natural and obvious meaning." The "natural and obvious meaning" approach in interpreting allegedly libelous words was recognized in England after the mitior sensus doctrine had already lost its judicial soundness as a libel rule, not as part of the mitior sensus doctrine. Furthermore, the "reasonable" innocent construction rule is even further removed from the now defunct mitior sensus doctrine.

Clearly, the English doctrine was an arbitrary manipulation of the defamation law in Great Britain for a particular period of time, without any regard of the primary purpose of an action for defamation, the vindication of the plaintiff's good name. The innocent construction rule, on the other hand, may be viewed as an ongoing judicial attempt to solve the difficulty of dealing with the ambiguous language in allegedly defamatory publications and statements while protecting the interests of individuals to their good names and at the same time providing maximum protection for freedom of expression.