University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 132

DECEMBER 1983

No. 1

LET THE AUTHOR BEWARE: THE REJUVENATION OF THE AMERICAN LAW OF LIBEL

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I. INTRODUCTION: THE LIBEL REJUVENATION

"A libeled American," Zechariah Chafee once wrote, "prefers to vindicate himself by steadily pushing forward his career and not by hiring a lawyer to talk in a courtroom."¹ Americans have changed, Zechariah. America is in the midst of a rejuvenation of the law of libel.² Only a decade ago, the law of defamation appeared headed for obsolescence.³ Yet an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money.

The reinvigoration of the modern law of defamation has been as pervasive as it has been sudden, radiating across the American culture.

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¹ Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 106-07 (1947).

² One prominent media lawyer, James C. Goodale, who represents *Time* magazine and the *New York Times*, states that "What we're seeing is an entirely new era in libel cases." Jenkins, *Chilly Days for the Press*, STUDENT LAW., Apr. 1983, at 23, 25.

³ *Id.* at 28; see also *infra* note 56.

Defendants span a spectrum of size, wealth, power, and respectability, ranging from the mainstream orthodoxy of the national-news giants,⁴ to local news outlets,⁵ to the more sensational press.⁶

Those who are now striking out against the media as defamation plaintiffs⁷ include many who have previously profited from media attention. People deeply involved in the political process, including elected officials and advocates of specific political positions, have not flinched from resort to the courts. Entertainers, writers, and others who have reaped the benefits of media attention also have not been hesitant to seek substantial damages when they believe that the media have begun to do their images more harm than good.

Among the public officials joining the litigation feast have been Philadelphia Mayor William J. Green, who sued a CBS television station for \$5.1 million for reporting that he was under federal criminal investigation;⁸ former Governor Edward J. King of Massachusetts, who filed a \$3.6 million suit against the *Boston Globe* for implications conveyed by articles, editorials, and political cartoons that King was "unfit and incapable of properly performing the duties of governor";⁹ Governor William J. Janklow of South Dakota, who filed a \$10 million suit against *Newsweek* for an article allegedly implying that he had raped an Indian girl;¹⁰ former United States ambassador to Chile, Nathaniel Davis, and two of his ex-assistants, who filed a \$150 million suit against the makers of *Missing*, alleging that the 1982 film implied that the American embassy was connected with the killing of an American free-lance writer during the 1973 coup d'état in Chile;¹¹ and General William Westmoreland, who has sued CBS for allegedly suggesting his complicity or incompetence in connection with the underestimation of enemy troop strength levels in Vietnam.¹² Even former President

⁴ See, e.g., *infra* text accompanying notes 10 & 12.

⁵ See, e.g., *infra* text accompanying notes 8 & 72.

⁶ See, e.g., *infra* text accompanying notes 17 & 21.

⁷ For a categorization of defamation plaintiffs, see Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795, 812-13 & table 18.

⁸ N.Y. Times, Oct. 24, 1982, § 4, at 8, col. 4. The suit was ultimately settled for between \$250,000 and \$400,000. See *infra* note 76 and accompanying text.

⁹ *Id.*, Jan. 5, 1982, at A10, col. 1; see also *id.*, Apr. 3, 1983, § 1, at 30, col. 4.

¹⁰ *Id.*, Feb. 26, 1983, at A7, col. 6.

¹¹ Jenkins, *supra* note 2, at 25.

¹² The Westmoreland case arose out of 1982 CBS documentary, *The Uncovered Enemy, A Vietnam Deception*. The documentary has drawn substantial criticism from other media sources. The Public Broadcasting System's series *Inside Look* recently devoted an entire show to examining the journalism behind the CBS documentary. PTV Productions, *Uncovered Enemy: Unproven Conspiracy (Inside Story)*, program No. 303, Apr. 21, 1983) (copy of transcript on file with the University of Pennsylvania Law Review). CBS's motion for a change of venue in the Westmoreland case to the U.S. District Court for the Southern District of New York was recently granted by the U.S.

Jimmy Carter was prepared to join the list by suing the *Washington Post* for a gossip column item relaying rumors that Blair House had been bugged during Ronald and Nancy Reagan's residence there before Reagan's inauguration. Carter chose not to take action after his public threat of suit was enough to force a retraction from the *Post* and a published letter of apology.¹³

Public interest advocates who are prominent among the list of recent libel plaintiffs include Ralph Nader, who sued Ralph de Toledano for statements de Toledano made in a syndicated column about Nader's crusade against the lack of safety in General Motors' Corvair,¹⁴ and feminist attorney Gloria Allred, who filed a \$10 million libel suit against a California State Senator because of a characterization in a press release.¹⁵

Entertainers, writers, and other media figures have also contributed to the recent resurgence of the libel suit.¹⁶ Carol Burnett's \$10 million libel action against the *National Enquirer*, and the \$1.6 million verdict returned by the jury, although later reduced by the court,¹⁷ obviously added great impetus to the trend. There have, however, been many others. Wayne Newton sued NBC over a report linking him to organized crime,¹⁸ and Elizabeth Taylor filed a complicated action against ABC over a "docu-drama" that depicts Taylor's life.¹⁹ Writer Norman Mailer filed a \$7 million libel suit against the *New York Post*,

District Court for the District of South Carolina. *Westmoreland v. CBS*, 8 Media L. Rep. (BNA) 2493 (D.S.C. 1982). See generally Bruck, *The Mea Culpa Defense*, AM. LAW., Sept. 1983, at 82, col. 1.

¹³ See Note, *Libel and the Reporting of Rumor*, 92 YALE L.J. 85, 85-86 (1982).

¹⁴ *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980). The court affirmed a grant of summary judgment in favor of the publisher, but reversed a summary judgment ruling in favor of the columnist de Toledano.

¹⁵ The sexist slur uttered against Allred was that she was a "slick butch lawyer-ess." L.A. Times, Jan. 23, 1982, pt. I, at 18, col. 1.

¹⁶ The libel resurgence has not, however, been limited to those usually thought of as media figures. For example, William Tavoulareas, the president of Mobile Oil, was awarded over \$2 million in a suit against the *Washington Post* for an article claiming that Tavoulareas had used his influence to set up his son in business. The court subsequently granted a motion for judgment notwithstanding the verdict on the ground that a reasonable jury could not have found actual malice. *Tavoulareas v. Washington Post Co.*, 567 F. Supp. 651 (D.D.C. 1983).

¹⁷ Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied by the trial court in view of plaintiff's acceptance of the court's remittitur reducing the total damage award to \$800,000. *Burnett v. National Enquirer*, 7 Media L. Rep. (BNA) 1321 (Cal. Super. Ct. Los Angeles County 1981). On appeal the total damage award was reduced to \$200,000. *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983).

¹⁸ See Delugach, *Trials and Tribulations: The Wayne Newton Story*, L.A. Times, May 23, 1982, Calendar, at 3, col. 1.

¹⁹ See Chi. Sun-Times, Nov. 30, 1982, at 36, col. 3. ABC has recently relented and agreed not to broadcast the docu-drama.

claiming that the newspaper defamed him in reports about the trial of writer Jack Henry Abbott.²⁰ Kimerli Jayne Pring, Miss Wyoming of 1978, was awarded \$26 million (later reversed on appeal) by a federal court jury in a suit against *Penthouse* magazine.²¹ Even E. Howard Hunt has sought the refuge of the courts to rehabilitate his reputation; Hunt was awarded \$650,000 in damages by a federal jury in Miami against a weekly newspaper called the *Spotlight*, for a story that linked Hunt to the assassination of John F. Kennedy.²²

The increase in the number and prominence of libel suits²³ is more compelling when considered along with data from several studies that indicate a dramatic and continuing change in the resolution of libel cases even within the last decade. The data show a trend toward more generous jury awards, and a corresponding trend toward the media settling suits at a substantial cost. The earliest study, conducted by Professor Marc Franklin, involved cases decided between January 1976 and mid-June 1979.²⁴ Franklin's overall conclusion was that libel actions rarely met with success.²⁵ Sixty-nine percent of the cases studied by Franklin involved nonmedia defendants, and thirty-one percent involved media defendants.²⁶ The study considered only reported cases,

²⁰ Wash. Post, Mar. 11, 1982, § B, at 20, col. 4. Norman Mailer is not the only writer who has recently filed a defamation suit. See Goodman, *Literary Inveective*, N.Y. Times, June 19, 1983, § 7 (Book Review), at 35 (Lillian Hellman has sued Mary McCarthy for \$2.25 million for McCarthy's statements on the Dick Cavett Show that McCarthy "think[s] [Hellman] is terribly overrated, a bad writer and a dishonest writer," and that "[e]verything . . . every word she writes is a lie including 'and' and 'the.'"). Libel suits by writers are not, however, an entirely modern phenomenon. See Cooper v. Greeley, 1 Denio 347 (N.Y. Sup. Ct. 1845) (libel suit brought by James Fenimore Cooper against Horace Greeley).

²¹ The district court ruled that plaintiff was not a public figure and denied *Penthouse's* motion for summary judgment. Pring v. Penthouse Int'l, Ltd., 7 Media L. Rep. (BNA) 1101 (D. Wyo. 1981). The jury's \$26.5 million verdict was reduced by the trial court on remittitur to \$14 million. The Tenth Circuit reversed and dismissed the action, holding that the fictional fantasy about a promiscuous Western beauty queen could not reasonably be considered to state defamatory facts about the plaintiff. Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), cert. denied, 103 S. Ct. 3112 (1983). In a related case, Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280 (D.N.J. 1981), the court granted summary judgment for defendant on the grounds of a failure to present evidence sufficient to find actual malice.

²² Hunt v. Liberty Lobby, No. 80-1121 (S.D. Fla. Dec. 28, 1981).

²³ See Daniels, *Pre-Complaint Phase: Avoiding Litigation—Preventive Counseling*, in LIBEL LITIGATION 1981, at 19 (noting "[t]he increasing number of [libel] suits filed"); see also *supra* notes 8-22 and accompanying text.

²⁴ Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455. Professor Franklin's ground-breaking empirical research on defamation has contributed greatly to clearer thinking about defamation, and demonstrates the usefulness of that type of legal research.

²⁵ *Id.* at 498.

²⁶ *Id.* at 465. The study defined "media" defendants as those involved in broadcasting, or in newspaper, magazine, or book publishing. *Id.*

but concluded that the limited sample would not distort the results, largely because settlement was not an important factor in the disposition of libel cases.²⁷ Interestingly, juries were overwhelmingly more favorable to plaintiffs than were judges, both as to liability and damages. This divergence was most notable in the ultimate success rates after appeal for defamation plaintiffs, which were quite low. In cases in which plaintiffs sued nonmedia defendants, plaintiffs won judgments after appeal in only twelve percent of the cases. In suits brought against media defendants, plaintiffs received winning judgments in only five percent of the appeals.²⁸ Furthermore, the Franklin study uncovered a substantial appellate court tendency to rule against defamation plaintiffs. Although appellate courts affirmed seventy-five percent of the appeals from judgments in favor of defendants, they affirmed less than fifty percent of the lower court rulings for plaintiffs.²⁹ When they did affirm a plaintiff's verdict, appellate courts generally reduced damage awards that trial courts had upheld.³⁰

A second litigation study by Marc Franklin,³¹ designed to assess the impact of two ostensibly "anti-defendant" defamation decisions by the Supreme Court, *Wolston v. Reader's Digest Association*,³² and *Hutchinson v. Proxmire*,³³ was limited to cases involving media defendants. The second Franklin study included most of the media cases from the prior survey, as well as media cases after *Wolston* and *Hutchinson* through September of 1980. The second Franklin study revealed the faint beginnings of an anti-defendant trend in appellate courts, at least in the application of legal doctrine: prior to *Hutchinson* and *Wolston* appellate courts were more inclined to grant defendants constitutional protection³⁴ than after those two cases.³⁵ The study also seemed

²⁷ *Id.* at 461-64.

²⁸ *Id.* at 498.

²⁹ *Id.*

³⁰ *Id.*

³¹ Franklin, *supra* note 7.

³² 443 U.S. 157 (1979).

³³ 443 U.S. 111 (1979). The *Wolston* and *Hutchinson* cases are discussed *infra* text accompanying notes 253-74.

³⁴ See *infra* notes 48-67 and accompanying text for a description of constitutional protection from liability for defamation.

³⁵ Franklin's study thus noted that:

The strongest indication of the impact of *Hutchinson* and *Wolston* is a shift in disputed *Times-Gertz* cases. Before the Supreme Court decisions, appellate courts awarded *Times* protection in 35 of the 39 cases in which the plaintiff contested the defendant's request for such protection. After the Supreme Court acted, the courts granted *Times* protection in 24 of the 34 contested appeals. This difference is statistically significant and suggests that something other than chance explains the shift.

Franklin, *supra* note 7, at 825. The study generally disclosed relatively little percepti-

to indicate that settlements play a more important role in defamation litigation than was originally thought,³⁶ although it stated that the settlements apparently involved relatively small recoveries for plaintiffs.³⁷ Yet on balance, the second Franklin study tended to confirm the findings of the first: plaintiffs were rarely successful, winning only five percent of their appeals.³⁸ Franklin concluded that suits against the media were still "not likely to be rewarding," but noted as a caveat that "even unsuccessful suits may be costly to defend."³⁹

More recent studies by the Libel Defense Resource Center (LDRC)⁴⁰ vividly demonstrate significant changes in defamation cases. Although the LDRC studies have shown a continuing tendency for libel damage awards to be reduced or reversed on appeal,⁴¹ they reveal a dramatic increase in the size of damages awarded at trial.⁴² The most recent data from the LDRC indicate that the typical damage award is now in the millions of dollars,⁴³ a sharp contrast to the Franklin survey which found only one case in the period from 1976 to 1980 in which a damage award was over a million dollars.⁴⁴ Moreover, although data was not compiled on punitive damages in the Franklin studies, one LDRC study showed that thirty out of forty-seven damage awards included punitive damages, and seven of those punitive damage awards

ble change in outcomes after *Wolston*, however. *Id.* at 821-26.

³⁶ *Id.* at 800 & n.12. The study cited one preliminary study indicating that of 118 cases handled by one insurer, 25 were dropped by the plaintiff, 30 were settled for payment, and 55 were litigated. *Id.*

³⁷ *Id.*

³⁸ *Id.* at 802 & table 4, 829.

³⁹ *Id.* at 829; *see also id.* at 800 & n.13.

⁴⁰ The Libel Defense Resource Center is a New York-based information clearinghouse organized by media groups to monitor developments in libel law. The LDRC publishes a quarterly bulletin which contains a section entitled "Damages Watch" detailing and summarizing the results of recent libel and invasion of privacy cases. These studies of libel litigation build on and seek to continue the chronicling of that litigation begun by Marc Franklin. Although they draw from a data base broader than that used by Franklin, *see* Libel Defense Resource Center, Bulletin No. 4, Oct. 15, 1982, at 4 [hereinafter cited as LDRC Bulletin No. 4], there are many valid comparisons that can be made among the various studies, *see infra* notes 41-46 and accompanying text.

⁴¹ *E.g.*, LDRC Bulletin No. 4, *supra* note 40, at 3-4; Libel Defense Resource Center, Bulletin No. 7, July 15, 1983, at 58 [hereinafter cited as LDRC Bulletin No. 7]. *But see* Libel Defense Resource Center, Bulletin No. 6, Mar. 15, 1983, at 2 ("the favorable defense record on appeal previously documented has been eroded somewhat, with the defense winning 64% of the appeals recently decided as opposed to approximately 73% . . . in the prior study").

⁴² *See, e.g.*, LDRC Bulletin No. 4, *supra* note 40, at 3 (comparing the damages in cases in the Franklin studies with those in a study of cases that were decided after the Franklin studies).

⁴³ LDRC Bulletin No. 7, *supra* note 41, at 58.

⁴⁴ *See id.*

were for \$1 million or more.⁴⁵ More recent data from the LDRC indicate even more pervasive punitive damage awards, which have now reached a staggering average of "almost \$8 million per punitive award."⁴⁶

The prospect of such lucrative awards is likely to entice more potential defamation plaintiffs to bring suit despite the fact that their claims do not meet the legal standards that appellate courts are struggling to impose.

Tabulating the changes in the number and outcome of libel suits is more precise and verifiable than identifying the reasons for the changes. Most students of modern defamation law would be likely to argue that the most meaningful way to understand these shifts is by considering the developments in constitutional doctrine during the same time.⁴⁷ Such a starting point is reasonable because the Supreme Court since 1964 has mandated various constitutional requirements in an area of law that had previously been developed by each state according to its own legislation and common law. In 1964 the Supreme Court reviewed for the first time in its history a state judgment in a civil libel suit.⁴⁸ That case, *New York Times Co. v. Sullivan*,⁴⁹ involved the largest libel judgment in Alabama history⁵⁰ awarded to the police commissioner of Montgomery who claimed that he had been libeled by an advertisement, printed in the *New York Times*, that sought contributions to sup-

⁴⁵ LDRC Buttetin No. 4, *supra* note 40, at 3, 5 & table 2, 6 & table 2-B.

⁴⁶ Libel Defense Resource Center, Special Alert, July 29, 1983, at 1.

⁴⁷ This reasoning, for example, apparently affected Professor Franklin's decision in his first survey to consider only cases decided prior to *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). See Franklin, *supra* note 24, at 457, 459-60.

⁴⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 300 n.3 (1964) (Goldberg, J., concurring).

⁴⁹ 376 U.S. 254 (1964). Prosser called the *New York Times* case "unquestionably the greatest victory won by the defendants in the modern history of the law of torts." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 118, at 819 (4th ed. 1971). The classic commentary on the *New York Times* case is Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment'*, 1964 SUP. CT. REV. 191. For additional comment on the *New York Times* case, see Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 46 (1965); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 585-89 (1964); Pierce, *The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1965); *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 166, 201-05 (1964); Note, *State Law Allowing Libel Suit By Public Official Without Proof of Malice Held Unconstitutional*, 42 TEX. L. REV. 1080 (1964); Comment, *First Amendment Requires Qualified Privilege to Publish Defamatory Misstatements About Public Officials* 113 U. PA. L. REV. 284 (1964).

⁵⁰ C. LAWHORNE, *DEFAMATION AND PUBLIC OFFICIALS* 216 (1971). The judgment was for \$500,000, the full amount of the plaintiff's claim. *New York Times*, 376 U.S. at 256.

port civil rights activities.⁵¹

The Court concluded that the state common law rule which provided a strict liability standard for libelous publications⁵² was unconstitutional. The Court held that:

The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁵³

This actual-malice standard was subsequently extended to communications about non-elected public officials⁵⁴ and public figures not employed by the government who, by their positions alone or by purposeful activity, have thrust themselves into a public controversy in some significant way.⁵⁵ Importantly, however, in the 1971 decision in *Rosenbloom v. Metromedia, Inc.*,⁵⁶ only a plurality of the Court was

⁵¹ 376 U.S. at 256. The *New York Times* decision to some degree embodied legal and cultural inclinations that were waiting to be crystalized into more sharply contoured doctrine. The case came before the Court at a time in American history that could not help but influence all legal thought related to free expression. It is no accident that the *New York Times* decision came just as the cultural turbulence of the 1960's was about to be unleashed in full force. The struggle for genuine equality for blacks that followed *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was intimately bound up with the protection of defiant and rebellious speech. Many of the most important legal decisions that helped give impetus to the civil rights movement were not equal protection cases, but rather first amendment cases protecting strategies of mass protest. For first amendment cases with civil rights overtones decided by the Warren court, see, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (denial of parade permit for a demonstration unconstitutional); *Cox v. Louisiana*, 379 U.S. 536 (1965) (demonstration on public street in front of courthouse-jail is protected speech and assembly); *NAACP v. Button*, 371 U.S. 415 (1963) (ban on giving legal representation to a person not a party to a case is unconstitutional); *NAACP v. Alabama*, 357 U.S. 449 (1958) (plaintiff had a constitutional right to deny a request by a state court for its membership list, since protection of the list is closely related to the members' ability to pursue their first and fourteenth amendment rights). *But cf.* *Adderley v. Florida*, 385 U.S. 39 (1966) (demonstration on private road in front of jail was trespass and did not implicate the first amendment). From the perspective of cultural history, the *New York Times* decision was itself largely a civil rights case, for it prevented the law of defamation from being used as a tool against those using the media to protest injustice against blacks.

⁵² 376 U.S. at 263-64.

⁵³ *Id.* at 279-80.

⁵⁴ *Rosenblatt v. Baer*, 383 U.S. 75, 84-86 (1966) (county recreation area supervisor can be a public official and so fall under actual-malice standard).

⁵⁵ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (defamation claims of athletic director of state university and of student participant in a political demonstration are governed by actual-malice standard).

⁵⁶ 403 U.S. 29, 43-44 (1971). *Rosenbloom* involved a suit brought by George Rosenbloom, a distributor of nudist magazines in the Philadelphia area, against the opera-

willing to apply the actual-malice standard in actions brought by private figures damaged by communications about matters of "public or general interest."

It was not until 1974, in *Gertz v. Robert Welch, Inc.*,⁵⁷ that the Court returned to its "struggle[] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."⁵⁸ *Gertz* involved a libel action brought by Elmer Gertz, a well-known Chicago attorney and law professor, against Robert Welch, Inc., for statements it had published in *American Opinion*, its monthly magazine affiliated with the John Birch Society.⁵⁹

tors of radio station WIP in Philadelphia. Following Rosenbloom's arrest during a police crackdown on the distribution of allegedly obscene books and magazines, WIP broadcast a series of news reports describing Rosenbloom's arrest and the seizure of books and magazines from his home and a local warehouse. Rosenbloom sued the radio station, predicated his action on certain errors in the broadcasts, and the station claimed that it was entitled to invoke the *New York Times* actual-malice standard in its defense. The judgment of the Supreme Court was announced in a plurality opinion written by Justice Brennan, who phrased the issue before the Court as whether the *New York Times* knowing-or-reckless-falsity standard "applies in a state civil libel action brought not by a 'public official' or a 'public figure' but by a private individual for defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest." *Rosenbloom*, 403 U.S. at 31-32. Brennan held that the *New York Times* standard applied to any defamatory speech involving matters of "public or general interest," *id.* at 43-44, invoking the phraseology of the famous Warren and Brandeis article on the right to privacy. 403 U.S. at 31 n.2 (citing Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)). "If a matter is a subject of public or general interest," Justice Brennan wrote, "it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." 403 U.S. at 43. Rather, Brennan argued, the public's primary interest is *in the event*; the public's natural attention is on the content, effect, context, and importance of the conduct and actions of the participants in newsworthy events, not in the participants' prior anonymity, notoriety, or fame. *Id.*

⁵⁷ 418 U.S. 323 (1974).

⁵⁸ *Id.* at 325.

⁵⁹ The family of Ronald Nelson, a 17-year-old who was killed by a Chicago police officer named Richard Nuccio, had retained Gertz as co-counsel to pursue civil actions against Nuccio. Nuccio was ultimately convicted of murdering Nelson, but Gertz played no role in Nuccio's criminal prosecution and made no public statements or comments concerning the civil or criminal actions. Shortly after Nuccio's conviction, the article, *Frame-Up: Richard Nuccio and the War on Police*, appeared in *American Opinion*. The article alleged that Nuccio was being "railroaded" as part of a Communist conspiracy to undermine local police so as to pave the way for a national police force which would support and enforce a Communist dictatorship. The article named Elmer Gertz as one of the members of this conspiracy. He was identified as the lawyer of the Nelson family and one of the leaders of the attack on Nuccio. Gertz was further described, among other things, as a "Communist-frontier," a "Leninist," and a "Marxist." Virtually everything of significance in the *American Opinion* article was false. The Court fully recited the facts of the case at 418 U.S. at 325-27.

Welch claimed that Gertz was a public figure and that the actual-malice standard therefore applied to its conduct. The trial court initially held that the communication

In *Gertz*, a majority of the Supreme Court agreed upon the minimum constitutional requirements for any state system that compensates injury to reputation. The requirements are based on the principle that the minimum level of care that a defendant must exercise before communicating information depends on whether the plaintiff is a public or private figure, the same principle that the Court was close to rejecting in *Rosenbloom*.⁶⁰ First, *Gertz* established that suits brought by public officials and public figures, at least against media defendants,⁶¹ must always meet the actual-malice test.⁶² Second, all defamation suits, even those by private plaintiffs based on communications about nonpublic issues, must not provide for liability unless there is a showing of fault.⁶³ Third, damages may no longer be awarded without proof of injury, although a broad range of injury is still compensable and the proof requirements are not stringent.⁶⁴ Finally, there must be proof of actual malice before punitive damages may be awarded.⁶⁵

The *Gertz* compromise, with its focus on the distinction between

was libelous *per se*, but later granted judgment notwithstanding the verdict on the ground that the subject matter of the article was of "public interest," and therefore required a showing of actual malice. The decision was affirmed by the Seventh Circuit, which applied *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). The Supreme Court granted certiorari and reversed. 418 U.S. at 327-32.

Interestingly, in 1982, eight years after the historic Supreme Court decision in *Gertz*, the Seventh Circuit decided the merits of the defendant's appeal from the district court decision on remand. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1233 (1983). In that decision *Gertz* was able to prove both negligence and actual malice, and the Seventh Circuit affirmed a jury award of compensatory damages in the amount of \$100,000 and punitive damages of \$300,000. In summarizing the defendant's behavior, the circuit court noted with regard to Scott Stanley, the managing editor of *American Opinion*, that:

Stanley conceived of a story line; solicited Stang, a writer with a known and unreasonable propensity to label persons or organizations as Communist, to write the article; and after the article was submitted, made virtually no effort to check the validity of statements that were defamatory *per se* of *Gertz*, and in fact added further defamatory material based on Stang's "facts." There was more than enough evidence for the jury to conclude that this article was published with utter disregard for the truth or falsity of the statements contained in the article about *Gertz*.

Id. at 539 (footnote omitted).

⁶⁰ See *supra* note 56 and accompanying text.

⁶¹ See *infra* notes 141-59 and accompanying text.

⁶² 418 U.S. at 343.

⁶³ *Id.* at 347. The *Gertz* Court, in fact, invited state courts to proceed to evolve for themselves the proper standard of liability in suits brought by private plaintiffs. Thus, the Court stated that as long as they do not attempt to dip below the negligence standard, "States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Id.* at 345-46.

⁶⁴ *Id.* at 348.

⁶⁵ *Id.* at 349-50.

public and private figures, still dominates constitutional analysis of defamation cases.⁶⁶ Although the application of the *Gertz* test may now favor plaintiffs and the imposition of liability,⁶⁷ this modification in doctrine hardly explains the large shift in the results between the second Franklin study⁶⁸ and the LDRC studies,⁶⁹ particularly the tremendous increase in the judgments awarded by juries.⁷⁰

I contend that there are four contributing causes to the recent rejuvenation of American libel law, each of which is considered in the next section. The first factor is a new legal and cultural seriousness about the inner self. Tort law has undergone a relaxation of rules that formerly prohibited recovery for purely emotional or psychic injury, a doctrinal evolution that parallels the growth of the "me-generation." A second factor is the infiltration into the law of defamation of many of the attitudes that have produced a trend in tort law over the past twenty years favoring compensation and risk-spreading goals over fault principles in the selection of liability rules. A third cause of the new era in libel is the increasing difficulty in distinguishing between the informing and entertaining functions of the media. The blurring of this line between entertainment and information has affected the method and substance of communications in important ways and highlights the inadequacies of the current legal standards governing defamation actions. The final factor is doctrinal confusion, caused in large part by a pervasive failure to accommodate constitutional and common law values in a coherent set of standards that is responsive to the realities of modern communications. That doctrinal confusion is particularly telling in an environment where cultural trends, such as a heightened concern for the inner self, and legal trends, such as the trend in tort law in favor of strict liability, both work against the ideals of free expression.

I hope that a relatively free spirited inquiry into how defamation law and cultural trends have diverged in recent years will both explain the current rejuvenation of defamation law and suggest that some reforms in the law are necessary.

In the final section of this Article I propose a number of reforms for defamation law. They provide what I believe is the most important reform of all at this time—the simplification of the law. One substan-

⁶⁶ See, e.g., *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

⁶⁷ See *infra* notes 160-64 and accompanying text.

⁶⁸ See *supra* notes 31-39 and accompanying text.

⁶⁹ See *supra* notes 40-46 and accompanying text.

⁷⁰ In fact, the changes in constitutional doctrine appeared to have at most only a marginal impact on the results in Professor Franklin's second study when compared to the first. See *supra* note 35 and accompanying text.

tial reform would be to move to a "context public figure" doctrine, which would ensure that speech receives actual-malice protection if the object of the defamation is a "public" person when considered within the context of the audience to which the information is published. A second major reform is to reinvigorate the common law system of checks and balances that surrounded libel and slander law before much of it was superseded by constitutional doctrine. Although the addition of the first amendment to the law of libel substantially liberalized the law of defamation, giving life to free expression values that the common law too often slighted, it also had a tendency to displace the natural evolution of the common law. It is necessary that we take common law doctrine seriously again. By combining a reinvigorated common law with a more flexible application of prevailing first amendment jurisprudence, the confusion in the law of defamation can to some degree be eliminated, and the rejuvenated law of defamation restored to a balance more appropriate to modern American life.

A failure to adjust defamation doctrine that is fast becoming outmoded can be expected to have a severe impact on the media. Although appellate courts will likely continue to attempt to police excessive awards, the doctrinal shifts in favor of plaintiffs will certainly result in more affirmances of large judgments against media defendants.⁷¹

Many media outlets simply cannot absorb very substantial awards; they defend libel actions under the peril of shutdown if they lose. The *Alton Telegraph*, a daily paper from Alton, Illinois with a circulation of 38,000, was faced with a \$9.2 million judgment because of a memorandum written by two of its reporters.⁷² The newspaper was forced to

⁷¹ In assessing the impact of outmoded legal doctrine and of developing social attitudes on suits against the media, it should be recognized that libel suits may be subject to a feedback effect in which relatively subtle changes in the prevailing legal doctrine translate into substantial impact on the media.

The feedback effect is the proclivity of certain news events to self-generate into larger phenomena than they would naturally, because the media attention paid to them becomes part of the events themselves. Whatever may be happening to legal doctrine or attitudes toward the media that may explain the proliferation of libel actions, it is clear that the explosion feeds on its own publicity as much as anything. As the media focuses with ever more interest on the efforts of famous and powerful people to sue it for gargantuan damage awards, a litigious atmosphere of libel is created, as if each libel action had the capacity to produce multiple offspring.

⁷² The lawsuit against the *Alton Telegraph*, a small newspaper in Alton, Illinois, arose out of memorandum sent by two *Telegraph* reporters in 1969 to a Justice Department official in charge of a task force investigating organized crime in southern Illinois. A jury awarded James Green, a real estate developer allegedly libeled in the memorandum, \$6.7 million in compensatory damages and \$2.5 million in punitive damages. *Green v. Alton Telegraph Co.*, 77-66 (Madison County, Ill. 1980). The *Alton Telegraph* case has drawn substantial media attention. For some examples, see *60 Minutes*, Oct. 11, 1981 (transcript on file at the *University of Pennsylvania Law Re-*

file for bankruptcy to avoid having to sell its assets. The *Alton Telegraph* finally managed to reach a settlement that allowed it to stay in business,⁷³ but its near-demise was a chilling lesson: however painful a successful libel action may be to CBS or the *National Enquirer*, it can be devastating to small media outlets.

As the *Alton Telegraph* example suggests, large judgments have also increased the cost of settling cases.⁷⁴ Although public announcements of settlement results are rare, because the media defendant will often condition the payment of the settlement on the plaintiff's promise not to disclose the amount, the current climate for defamation actions assures that many settlements will be impressive. The ABC television network reportedly settled a suit brought against it by Synanon, a California communal organization, for \$1.25 million.⁷⁵ In Philadelphia Mayor Green's suit against CBS the *New York Times* reported the settlement as between \$250,000 and \$400,000.⁷⁶

Whether a suit is settled, won, or lost, the legal fees alone can be chilling.⁷⁷ Hundreds of thousands, and even millions of dollars can be spent paying lawyers to defend a single case,⁷⁸ and the ongoing costs for counseling on libel matters and for liability insurance escalate as the media perceive the threat of successful libel actions with increasing

view); Howard, *The Press in Court*, 6 WILSON Q., Special Issue, 1982, at 86, 87-88; Jenkins, *supra* note 2, at 23. An appeal by the *Telegraph* from the \$9.2 million judgment was dismissed by an Illinois appellate court, which ruled that the *Telegraph's* filing of a petition for reorganization under chapter 11 of the Bankruptcy Act, 11 U.S.C. §§ 1101-1174, 1301-1330 (Supp. V 1981), had the effect of removing the entire case to the bankruptcy court. *Green v. Alton Telegraph Co.*, 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982).

⁷³ The U.S. Bankruptcy Court for the Southern District of Illinois approved a \$1.4 million settlement of Green's suit against the *Telegraph*, after necessary funding was obtained from the newspaper's insurance carriers and loans were arranged to allow the newspaper to pay off the remainder of the settlement. News Notes, MEDIA L. REP. (BNA), June 8, 1982. However, two other libel actions based on the same unpublished memorandum are still pending in the bankruptcy court. *Id.* For a poignant discussion of how the settlement has affected the *Telegraph*, see Wall St. J., Sept. 29, 1983, at 1, col. 6.

⁷⁴ Howard, *supra* note 72, at 87.

⁷⁵ Jenkins, *supra* note 2, at 25.

⁷⁶ N.Y. Times, Oct. 24, 1982, § 4, at 8, col. 4. The *Times* described this settlement as "a mere pittance next to the \$120 million Gen. William Westmoreland is asking in his claim that CBS libeled him." *Id.*

⁷⁷ For example, ABC's legal fees for the Synanon suit were reportedly \$6 million. Jenkins, *supra* note 2, at 25.

⁷⁸ Professor Franklin suggests that changes in constitutional doctrine that lead to a restricted application of the *Gertz* public-figure test will increase legal costs for libel defendants. See Franklin, *supra* note 24, at 498-99 ("Expansion of the private plaintiff category and restrictions on summary judgment would add significantly to media litigation costs.").

fear.⁷⁹ Moreover, perhaps due to the confusion in the law, defamation cases are now more likely to go to trial rather than to be decided upon summary judgment motion.⁸⁰ The expense of a full trial is significantly higher than that of a case decided upon summary judgment,⁸¹ and so the current trends in defamation litigation are likely not only to spur more plaintiffs into bringing cases, but are also liable to increase the cost of litigating each of those cases.

The time is overdue for taking account of the reasons for the rejuvenation in our libel law and for beginning to develop a modern law of defamation that is more responsive to the first amendment values of modern society.

II. EXPLAINING THE REJUVENATION OF AMERICAN LIBEL LAW

This part of the Article will isolate the cultural and legal trends that together explain the current volume of libel litigation and the increased risk of liability for defendants, particularly the media. A proper balance between free-speech and reputational values will only be possible when these cultural and legal trends are understood and, when necessary, the legal doctrine is modified to accommodate society's developing attitudes toward reputation and the media.

A. *The Value of Reputation: Heightened Concern for the Inner Self*

In William Shakespeare's *Othello*, the character Iago describes the sanctity of reputation in words that are well-known to the modern ear:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash—'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him

⁷⁹ See Daniels, *supra* note 23, at 19 (arguing that prelitigation counseling on material to be published is "unfortunate but nevertheless essential" in light of modern realities of libel law).

⁸⁰ See Lempert, *Winds of Change Hit Libel Practitioners*, Legal Times, Oct. 31, 1983, at 1, col. 3, 36, col. 1 ("Many media defense lawyers share the perception that they cannot count on summary judgment in cases in which five years ago they would have made the motions with confidence.").

⁸¹ *Id.* at 36, col. 2 (defamation suit carried out to trial costs about four times as much to litigate as one decided on summary judgment).

And makes me poor indeed.⁸²

As often as these famous lines are held up as evidence of the highest regard for reputational values that runs through the Anglo-American cultural tradition, other less-famous words, also spoken by Iago, are usually ignored:

As I am an honest man, I thought you had received some bodily wound; there is more sense in that than in reputation. Reputation is an idle and most false imposition; oft got without merit and lost without deserving. You have lost no reputation at all, unless you repute yourself such a loser.⁸³

Iago, of course, is a duplicitous character who does not hesitate to utter contradictory sentiments in the same play. But the two conflicting views that Iago voices about the importance of reputation are more than merely the self-serving statements of a fickle Shakespearean antagonist;⁸⁴ they reflect a deeper dissonance in Anglo-American culture

⁸² W. SHAKESPEARE, *OTHELLO*, act III, scene iii, lines 158-64, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE: THE CAMBRIDGE TEXT* 955, 971 (1980).

⁸³ *Id.* at act II, scene iii, lines 261-66, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE: THE CAMBRIDGE TEXT* 968 (1980).

⁸⁴ Iago is certainly not alone in voicing conflicting, possibly self-serving statements about the value of one's reputation. The Court has at times written in ringing terms about individuals' right to protection of their good names, treating it as "the immediate jewel of their souls." In *Gertz*, Justice Powell, writing for the Court, quoted with approval a prior statement of Justice Stewart, that "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" 418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). This "essential dignity and worth" was apparently thought of by the *Gertz* Court as constitutional in dimension, for it went on to quote Stewart for the proposition that "[t]he protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." 418 U.S. at 341 (emphasis added). This high regard for reputation evidenced in *Gertz* was resoundingly reemphasized in several post-*Gertz* decisions. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

The Justices who voted to vindicate reputational interests at the expense of free expression in this line of cases, however, voted in precisely the opposite way when the value of reputation was at issue in a different legal context. In *Paul v. Davis*, 424 U.S. 693 (1976), Justice Rehnquist, who authored *Firestone* and *Wolston*, wrote about reputation in a manner that directly contradicted the sentiments of *Gertz* and its progeny. *Paul* was an action brought by Edward Davis, a Louisville newspaper reporter, against two local police chiefs, because the reporter's name and picture had been circulated on a police flyer purporting to identify "active shoplifters." Davis had been arrested for shoplifting, but at the time the materials were circulated the charge had not yet been tried, and it was subsequently dismissed. Davis brought his suit in federal court under 42 U.S.C. § 1983 (Supp. V 1981), claiming that the police flyer branded him as a

concerning the value of reputation, a dissonance that has in turn manifested itself in sharp contradictions within the law of defamation.⁸⁵ Like Iago, American courts have frequently been of two minds in their solicitude for reputation, at times permitting harsh penalties for defamatory speech well out of proportion to the harm of the words or the culpability of the speaker, and at times permitting obviously damaging speech uttered with transparently dark motives to be spoken with complete impunity.⁸⁶ Thus, any attempt to account for changes in defama-

criminal, without the benefit of trial, thereby damaging his reputation and depriving him of "liberty or property" without due process of law. In a Iago-like reversal, the same six Justices who treated reputation as legally hallowed in *Firestone*, found that Davis' reputation was not the type of palpable legal interest encompassed by the words "liberty or property" in the due process clause. *Paul*, 424 U.S. at 701. Just as Iago admonished Cassius that "I thought you had received some bodily wound," for "there is more sense in that than in reputation," the Supreme Court conveniently abandoned its view of reputation as "a basic of our constitutional system," and held that "[t]he words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests [T]he frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, . . . does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is . . . by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* For critiques of the *Paul* decision, see K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 26.12, at 427-29 (2d ed. Supp. 1982); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 423-29 (1977); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 322-38 (1976); Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 KY. L.J. 753 (1976); Note, *Reputation, Stigma, and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191 (1977). For an attempt to rehabilitate *Paul* on grounds other than those used by the Court, see Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company*, 1982 U. ILL. L. REV. 831.

The contrast between the treatment of the importance of reputation in the defamation cases and the due process cases accents the manipulative pliability of "reputation." On the Burger Court today reputation is a "basic to our constitutional system" when measured against the competition of the first amendment, but it is not "a candidate for special protection" when it faces off with the Court's new judicial federalism. The Supreme Court freely manipulates reputational values, either enhancing or diminishing their importance as it sees fit. Perplexingly, the unifying principle appears to be that reputation will be given whatever level of importance is necessary to undermine other constitutional guarantees. The importance of reputation is built up by the Court when such a build-up helps decrease the coverage of the first amendment's free speech guarantees; the importance of reputation is dismantled when the dismantling serves to constrict the scope of the due process clause.

⁸⁵ See W. PROSSER, *supra* note 49, § 111, at 737 ("It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer has had a kind word"); *id.* at 738-39 (history of defamation law is analogized to the "swing[s]" of a "pendulum").

⁸⁶ See *id.* at 737 ("[Defamation] is a curious compound of strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for a real and very serious harm.").

tion law by looking only at the current adjustment between first amendment and reputational values ignores the importance of considering our contemporary attitude toward the value of reputation which, in fact, underlies the whole of defamation law. It is my contention that the rejuvenation of the law of defamation is in part the result of strongly felt cultural attitudes about the importance of protecting psychic well-being, attitudes that have been able to flourish largely because the contradictions in reigning doctrine provide no coherent set of rules to hold them in check.

There has always been some support for the position that the law of torts has no business getting involved in compensation for psychic injury. Calvert Magruder, writing in 1936, noted that "the common law has been reluctant to recognize the interest in one's peace of mind as deserving of general and independent legal protection."⁸⁷ Magruder approved of this reluctance, arguing that it would be quixotic for the law to pursue the general securing of peace of mind: "[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be."⁸⁸ Zechariah Chafee⁸⁹ and David Reisman⁹⁰ both suggested that there was something almost un-American about pursuing a libel suit. Reisman, in fact, argued that protection of reputation is intrinsically unimportant in American capitalist culture:

[T]he American attitude towards reputation is unique. In Europe, where pre-capitalist concepts of honor, family, and privacy survive, reputation is a weighty matter not only for the remnants of the nobility who still fight duels to protect it, but for all the middle groups who flood the courts with petty slander litigations as we flood ours with automobile and other negligence actions. But where tradition is capitalistic rather than feudalistic, reputation is only an asset, "good will", not an attribute to be sought after for its intrinsic value. And in the United States these business attitudes have colored social relations. The law of libel is consequently unimportant.⁹¹

⁸⁷ Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

⁸⁸ *Id.*

⁸⁹ See *supra* note 1 and accompanying text.

⁹⁰ Reisman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

⁹¹ *Id.* at 730.

The social usefulness of providing legal redress for injury to one's reputation and psychological injury generally continues to be questioned. Shortly after the *New York Times Co. v. Sullivan*⁹² decision Arthur Berney stated that "society could survive the abolition of the defamation action,"⁹³ and in his recent book, *Speech and Law in a Free Society*,⁹⁴ Franklyn Haiman follows Magruder's prescription of a "toughening of the mental hide" and advocates the abolition of psychological torts such as invasion of privacy and infliction of emotional distress.

These arguments minimizing the need for protecting psychic well-being are not dominant in either common law tort doctrine, modern tort analysis, or contemporary public sentiment. The common law certainly reflects unease about attempting to place a monetary value on the psychic injury caused by defamation. This unease is apparent in the use by courts of a relatively transparent legal fiction as they attempt to objectify an injury. The orthodoxy has been that the law of defamation does not provide compensation for emotional disturbance, but rather remedies a wrongful disruption in the "relational interest" that an individual has in maintaining personal esteem in the eyes of others.⁹⁵ The common law thereby distinguished an injury to reputation from an invasion of privacy:⁹⁶ "the fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation."⁹⁷

⁹² 376 U.S. 254 (1964). For a discussion of *New York Times*, see *supra* notes 49-53 and accompanying text.

⁹³ Berney, *supra* note 49, at 46. Professor Berney generally discounts the importance of protecting psychic injury, stating that "the interest in psychic well-being is not too highly valued in our society, and it is held in particularly low regard by public officials." *Id.* at 43. Cf. Franklin, *supra* note 24, at 499-500 (questioning whether libel law is dysfunctional because few cases settle, the costs of litigation are so high and plaintiff success rates are low).

Professor Laurence Eldredge, in his comprehensive treatise on defamation, describes the suggestion that society could survive without the law of defamation as a "silly *ipse dixit*." L. ELDRIDGE, *THE LAW OF DEFAMATION* § 53, at 294 (1978). Professor Eldredge states that "I suppose this society could survive abolition of the tort actions for fraud and deceit, or for bodily injuries, or any other tort—or even a nuclear bomb attack—but it would be a more brutish society, and one which reasonably sensitive people would find it hard to endure." *Id.*

⁹⁴ F. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 155 (1981). For a review of Haiman's book, see Farber, *Recent Books on the First Amendment*, 77 Nw. U.L. REV. 729, 730 (1982).

⁹⁵ See L. GREEN, *CASES ON INJURIES TO RELATIONS* 193-276 (1940); Berney, *supra* note 49, at 40-41; Green, *Relational Interests*, 31 ILL. L. REV. 35, 36 (1936).

⁹⁶ Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1094 (1962).

⁹⁷ *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 57, 27

Notwithstanding such rationalizations, it seems clear that the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for any objectively verifiable damage to one's community standing. Even common law doctrine, which presumed the existence of damages when certain types of defamation were proved,⁹⁸ demonstrates that defamation was not originally meant to protect simply a reified interest in reputation.⁹⁹

Modern legal analysis is more openly supportive of compensating injuries to the psyche. Stanley Ingber has recently argued that the function of tort law is the promotion of human dignity "by discouraging the violation of an individual's personal or psychological integrity."¹⁰⁰ The law of defamation promotes individual dignity by providing a forum for an official declaration that the attack on the victim was undeserved, by imposing on the publisher an economic penalty that acts to deter the imposition of such invasions of dignity, and by providing compensation to the victim for the loss that occurs.¹⁰¹

Developments in all areas of tort law *other than* defamation indicate that courts are increasingly willing to recognize the legitimacy of protecting emotional and mental tranquility from injury.¹⁰² Courts have steadily relaxed the rules restricting liability for the negligent and intentional infliction of emotional distress¹⁰³ and are more receptive to the

N.E.2d 753, 755 (1940).

⁹⁸ See C. MORRIS, MODERN DEFAMATION LAW 38 (1978); W. PROSSER, *supra* note 49, § 112, at 754-60, 762.

⁹⁹ See Berney, *supra* note 49, at 41. For a penetrating examination of the contrast between the imagery of the term reputation and the law's actual concern with protecting psychic integrity, see Probert, *Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis*, 15 VAND. L. REV. 1173 (1962). Professor Probert's insight into the law of libel's underlying concern with psychic well-being is not only interesting in its own right; it also serves as another window on how the law of defamation might have evolved without *New York Times*. Probert's article, written two years prior to *New York Times*, is an unabashed celebration of the law's increasing willingness to protect against psychic injury. Probert describes this trend as a liberalizing, humanizing development. Yet after *New York Times*, it almost seemed un-American to take psychic interests seriously when they confronted apple-pie, first amendment rhetoric.

¹⁰⁰ Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 791 (1979).

¹⁰¹ *Id.* at 791-92.

¹⁰² See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mother awarded recovery for emotional trauma and physical injuries suffered when she witnessed the accident that killed her child); *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980) (expanding the parents' recovery for the wrongful death of their child to include the pecuniary, although not the emotional, value of future lost companionship).

¹⁰³ See Note, *The Death of the Ensuing Physical Injury Rule: Validating Claims for Negligent Infliction of Emotional Harm*, 10 HOFSTRA L. REV. 213 (1981) (describing progress in the recognition of emotional injury without accompanying phys-

maintenance of suits based on invasion of privacy.¹⁰⁴ Across various categories of tort law the concept of "injury" has been stretched outward to encompass new legal shelter for mental and emotional calm.¹⁰⁵

This trend in tort law has paralleled and has been responsive to a corresponding trend in American culture. American culture from the mid-1960's to the early 1970's was dominated by mass political action advocating significant social change. Opposition to the Vietnam War vulcanized disparate strands of countercultural energy into a united movement of antiwar dissent. The antiestablishment energy generated by the war protest subsequently dissipated into a range of less directed fads and causes, many of them preoccupied with the discovery and nourishment of various formulations of the individual self.¹⁰⁶

This shift has resulted in what is now widely perceived as the "me generation."¹⁰⁷ Contemporary America's attitude toward a defamed plaintiff is likely to reflect society's increased expenditure of money and

ical harm).

¹⁰⁴ For discussions of both the growth and the worth of the tort of invasion of privacy since its origin in Warren and Brandeis's seminal *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), see generally Barron, *Warren and Brandeis, The Right to Privacy*, 4 *Harvard L. Rev.* 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U.L. REV. 875 (1979); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Pember & Teeter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57 (1974); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Schneiderman, *Constitutional Right of Privacy and State Action*, 6 GONZ. L. REV. 54 (1970); Note, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547 (1971).

¹⁰⁵ See W. PROSSER, *supra* note 49, § 54, at 327-35; Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 61 TEX. L. REV. (forthcoming) (arguing that workers should be able to recover for emotional distress when exposed to harmful chemicals in the workplace); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 152, 165, 179-81 (1982) (noting that several courts "have upheld causes of action or verdicts for black plaintiffs in cases which stemmed in large part from racial insults" and arguing that there should be "[a]n independent tort for racial slurs").

¹⁰⁶ As examples of this societal transition, consider Eldridge Cleaver and Bob Dylan, who were considered spokesmen of the countercultural masses of the 1960's and who then declared their own concern for their inner selves by becoming "born-again" Christians in the 1970's. See generally Wolfe, *The "Me" Decade and the Third Great Awakening*, NEW YORK, Aug. 23, 1976, at 26, 34 ("Many members of the New Left communes of the 1960's began to turn up in *Me* movements in the 1970s It is entirely possible that in the long run historians will regard the entire New Left experience as not so much a political as a religious episode wrapped in semi military gear and guerilla talk.").

¹⁰⁷ The term "me generation" was introduced into the lexicon by the journalist Tom Wolfe. See *id.* The sensitivity of American culture in the contemporary era has been noted by other commentators as well. See, e.g., Wash. Post, Sept. 28, 1983, at B2, col. 1 (Television critic Tom Shales notes the anachronism of a television series because it places in a 1950's setting three characters who "unfortunately . . . all owe their sensibilities to the sensitive '80s.").

effort directed first to finding and then to nurturing the inner self.¹⁰⁸ One does not go to significant personal expense in an effort to define a self image, and then sit idly by as that work is publicly undone by *60 Minutes* or the *National Enquirer*.

This conjecture is supported by the recognition that juries today are becoming notorious for their free and easy attitude in awarding stupendous sums in libel suits,¹⁰⁹ an attitude that must be attributed to their sense of the rough equities of the issues litigated.¹¹⁰ As Henry Kaufman, General Counsel of the Libel Defense Resource Center, notes, "When a libel case gets to a jury, the First Amendment kind of drops to the wayside."¹¹¹ This observation is consistent with the advice offered in a recent book on libel litigation which counselled defense attorneys not to "overuse the First Amendment theme" because "[j]udges and juries are not necessarily sympathetic to claims of the media that they have a special privilege to run roughshod over their fellow citizens."¹¹²

The current reinvigoration of libel law, therefore, seems to be in part a grass roots response by jurors and the society they represent to the threat to psychic equanimity posed by the media.

¹⁰⁸ See Marin, *The New Narcissism*, HARPER'S, Oct. 1975, at 45 (noting "the trend in therapy toward a deification of the isolated self"); see also E. SCHUR, *THE AWARENESS TRAP: SELF ABSORPTION INSTEAD OF SOCIAL CHANGE* 1-8 (1976) (noting the increasing American interest in becoming aware of oneself and one's feelings); Lasch, *The New Narcissist Society*, N.Y. REV. BOOKS, Sept. 30, 1976, at 5, col. 1 ("It is no secret that Americans have lost faith in politics. The retreat to personal satisfactions—such as they are—is one of the main themes of the Seventies."); *id.* at col. 3 (People today hunger not for personal salvation, let alone for the restoration of an earlier golden age, but for the feeling—even if it is only a momentary illusion—of personal well-being, health, and psychic security.") (emphasis added).

¹⁰⁹ See *supra* notes 42-46 and accompanying text.

¹¹⁰ See Winfield, *Introduction*, in LIBEL LITIGATION 1981, at 14 (R. Winfield ed.) ("Libel cases are never decided in a vacuum: they are uniquely sensitive to the prevailing public mood."); *cf.* *New York Times*, 376 U.S. at 294 (Black, J., concurring) ("The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility [toward desegregation] had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages.").

¹¹¹ Jenkins, *supra* note 2, at 28.

¹¹² Schwab & Barton, *Trial of a Libel Case*, in LIBEL LITIGATION 1981, at 293 (R. Winfield ed.).

B. *The Influence of Strict Liability on
the Law of Defamation*

1. Conflict Between the Proscription of Strict Liability in
Defamation and the General Trend Toward
Strict Liability in Tort Law

At the same time that the Supreme Court made its decision in *New York Times* to establish constitutional requirements for state defamation law, many state courts were also in the process of articulating new standards of fault in several other areas of tort law. The *New York Times* rule with its emphasis on higher standards of fault and subjective culpability on the part of the defendant, however, was sharply in opposition to the general trend in tort law toward the deemphasis of fault in favor of the objective measurement of conduct.

In the products liability area, for example, strict liability for the manufacture and sale of defective products was beginning to crystallize during the same period that the 1964 *New York Times* decision began erasing traditional strict liability standards for defamation and imposing fault principles in their stead. *Henningsen v. Bloomfield Motors, Inc.*,¹¹³ one of the critical waystations on the road to strict products liability, was decided in 1960. The California Supreme Court's watershed decision in *Greenman v. Yuba Power Products, Inc.*,¹¹⁴ which finally shed the verbiage of the law of sales and broke through to a straightforward standard of strict liability in tort, was decided in 1962. The *Restatement (Second) of Torts* gave dispositive impetus to the trend in 1965 by publishing section 402A, making strict liability the governing standard in products liability cases.¹¹⁵

Although products liability cases form the most striking counter-

¹¹³ 32 N.J. 358, 161 A.2d 69 (1960) (holding manufacturer of defective steering mechanism liable for injuries suffered when steering failed; liability based on breach of implied warranty of merchantability despite waiver of all but express, limited warranty by purchaser and lack of privity between injured party and manufacturer).

¹¹⁴ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Justice Traynor's landmark decision contained words that many juries apparently believe are equally relevant sentiments for defamation: "The purpose of such liability is to insure that the costs of injuries resulting from defective products [substitute "defective media publications"] are borne by the manufacturers [publishers or broadcasters] that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

¹¹⁵ RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT]. The law was changing so fast during this period that § 402A was actually drafted three times; it first applied only to food and drink, then to any products for "intimate bodily use," and finally to all products. See W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 762 (7th ed. 1982) [hereinafter cited as PROSSER & WADE]; RESTATEMENT, *supra*, at § 402A comment d.

point to the *New York Times* rules, other trends in modern tort law tend to parallel the products liability accentuation of compensation and risk spreading goals over notions of fault. Modern courts have found defendants vicariously liable in new contexts by using enterprise liability concepts to expand the availability of *respondeat superior* as a means of reaching deeper pockets.¹¹⁶ Conventional notions of cause-in-fact and proximate cause have been expanded, sometimes beyond recognition, to facilitate plaintiffs' recoveries.¹¹⁷ Immunity doctrines, such as interfamilial and charitable immunity, that once shielded defendants from liability have been emasculated.¹¹⁸ The defense of contributory negligence, once an absolute bar to recovery, has given way in the majority of states to the ameliorating doctrine of comparative fault, with most of the change taking place in the late 1960's and the 1970's.¹¹⁹

¹¹⁶ See, e.g., *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 172 (2d Cir. 1968) (ship fell off drydock due to mindless prank of drunken sailor; the United States, as the sailor's employer, was held liable because the court believed such an accident was foreseeable given the "proclivity of seamen to find solace for solicitude by copious resort to the bottle"); *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972) (vicarious liability imposed on employer of salesman at a convention who injured plaintiff in a car accident at 2:00 a.m., while returning to hotel from a bar); M. FRANKLIN & R. RABIN, *TORT LAW AND ALTERNATIVES* 16-19 (1983) (discussing economic justifications of vicarious liability); PROSSER & WADE, *supra* note 115, at 685 (noting "tendency to liberalize" vicarious liability rules).

¹¹⁷ See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). *Sindell* allowed an action to be brought by a class of women whose mothers had taken DES during pregnancy, although no injured class member was able to identify the precise manufacturer of the product that her mother actually used. The court apportioned liability for the injuries to the class in *Sindell* according to the market shares of the drug manufacturers. For a review of *Sindell's* relatively radical departure from traditional cause-in-fact requirements, see R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 159-60 (1980); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981); Note, *Beyond Enterprise Liability in DES Cases—Sindell*, 14 IND. L. REV. 695 (1981). See generally Kinsely, *Fate and Lawsuits*, NEW REPUBLIC, June 14, 1980, at 20 (layman's critique of enterprise liability); Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978) (a prospective look at enterprise liability written before the *Sindell* case arose).

¹¹⁸ See, e.g., *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253, cert. denied, 383 U.S. 946 (1965); *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599 (Mo. 1969); *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); *Rabon v. Rowan Memorial Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967). These cases all involve courts declaring an end to charitable immunities for hospitals.

For sources outlining the end of interfamilial immunities, see, e.g., *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978); H. CLARK, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 768-69, 775-76 (1980).

¹¹⁹ M. FRANKLIN & R. RABIN, *supra* note 116, at 372 ("Until the late 1960's, only a handful of states had abandoned the all-or-nothing contributory negligence approach. . . . By the end of the 1970's, however, almost 40 states had adopted some version of comparative negligence.").

My hypothesis is that the large jury awards and the doctrinal retreats that have characterized the recent libel explosion are in some degree caused by an unconscious infiltration of strict liability values into the law of defamation, despite the fact that such values have been officially banned. Libel and slander are creatures of the common law of torts, and the law of torts has always been a quintessential example of the law as Holmes described it: the "external deposit of our moral life."¹²⁰ Particularly if one separates formal doctrine from the results of cases, tort law has always seemed more immediately responsive to shifts in cultural winds than any of its common law siblings. Unlike the common law of contracts, property, or crimes, all of which are dominated by what are at least provisionally static bodies of doctrine, the law of torts is explicitly tied to floating community norms. The "ordinary reasonable person" construct is designedly fluid; it reflects no more than a trier-of-fact's discernment as to the consensus judgment of what is ordinary and reasonable in a given time and place.¹²¹ Even when attempts are made to apply more neutral or stable principles to liability decisions, debate over those principles tends to fade into disputes over normative preferences.¹²² The ongoing dialogue over whether negligence or strict liability rules are economically more efficient has yielded no obvious answer.¹²³ Negligence under the traditional Learned Hand formula,¹²⁴ with a contributory negligence defense, seems to be no better or worse at reducing the sum of accident costs and accident prevention costs than strict liability with a contributory negligence defense.¹²⁵

¹²⁰ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹²¹ See, e.g., James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951); Reynolds, *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature,"* 23 OKLA. L. REV. 410 (1970).

¹²² Compare R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.11 (2d ed. 1977) (arguing that neutral economic principles of economics should inform legal liability standards) with Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (arguing that use of economic analysis is not value neutral). See generally *infra* note 130 (negligence associated with deviation from custom).

¹²³ See, e.g., G. CALABRESI, *THE COST OF ACCIDENTS* (1970); R. POSNER, *supra* note 122, § 6.11 at 137-42; Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1056-78, 1082-84 (1972); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 205-15 (1973) [hereinafter cited as Posner, *Strict Liability*]; Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980).

¹²⁴ For a discussion of the Learned Hand negligence formula, see *infra* notes 393-409 and accompanying text.

¹²⁵ This summary statement is of course a severe oversimplification of the rich literature on this problem. I mean only to point out that stripped down to the bare-bones question of which liability system produces the lowest sum of accident costs and accident prevention costs, negligence and strict liability rules produce identical results. See, e.g., Calabresi & Hirschhoff, *supra* note 123, at 1055-78 ("If we make the assump-

Tort theorists on both sides of the negligence/strict liability debate have thus often resorted to elaborate moral arguments to break the ostensible tie.¹²⁶ Intuitive feelings about the relevance of causation, or essentially political choices concerning the redistribution of wealth, and other obviously normative arguments have thus played an integral role in contemporary discussions of tort theory. Given this traditional normative bias in tort law and the current cultural and doctrinal emphasis on compensation, risk spreading, and strict liability, it is reasonable to sus-

tions under which the Learned Hand test would work adequately, the fascinating thing is that as good a result in terms of reducing primary accident costs could be achieved by a liability rule which is the exact reverse of the Learned Hand test." *Id.* at 1058.); Posner, *Strict Liability*, *supra* note 123, at 205-12 ("At least as a first approximation, then, a strict liability standard with a defense of contributory negligence is as efficient as the conventional negligence standard, but no more efficient." *Id.* at 207.). *But see* Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980) (posing an elaborate economic argument showing that, in some cases, the two standards do not provide equivalent incentives to reduce accident losses).

¹²⁶ See, e.g., Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457 (1979). Professor Robert Rabin has succinctly explained the renewed interest in the development of moral perspectives on the tort system:

[I]s a moral conception of liability necessarily distinct from an economic perspective? Perhaps considerations of economic efficiency provide an adequate moral foundation for a liability system. More specifically, could it not be argued that the exclusive concern of a tort system should be to assure that society has neither more nor fewer accidents than its members would "choose" through an ideally operating pricing system?

Whatever the ultimate response to this question, an exclusively economic justification for a system of liability rules will inevitably face challenge from a wide variety of competing moral principles. This point is not lost on the economic theorists themselves.

Liability rules, in other words, could serve as many ends as there are definitions of justice—constitutional issues aside, rules could systematically discriminate in favor of injury victims on the basis of age, wealth, national origin, or a virtually unlimited variety of other characteristics. The quest for a just theory of liability becomes meaningful, of course, only when we begin to explore moral conceptions that are based on widely shared notions of fairness. The paucity of tort literature exploring principles of corrective justice other than those related to fault liability undoubtedly reflects the difficulty in identifying generally accepted norms that would support a comprehensive alternative liability system.

In recent years, however, scholars have begun to indicate an interest in developing new moral perspectives on the tort system. Without a doubt, the recent intense economic debate about liability rules is partially responsible for provoking the new efforts; indeed, the authors . . . assert that economic analysis is an unduly restrictive perspective for deciding what they regard as questions of interpersonal corrective justice. At a more fundamental level, however, the articles . . . are almost certainly an expression of the pervasive unrest created by the relentless assault on the fault principle in both the judicial and legislative forums.

R. RABIN, PERSPECTIVES ON TORT LAW 237-38 (2d ed. 1983).

pect that the general trend toward strict liability has played some role in the rejuvenation of defamation law.

2. Evidence of the Infiltration of Strict Liability into the Law of Defamation

If one accepts that from a longer view of history the law of defamation is more properly treated as part of the grand scheme of tort rather than constitutional law, it makes sense in trying to account for the current state of libel litigation to consider whether the cultural and doctrinal movements toward strict liability that have been prominent in tort law over the last twenty years have also influenced defamation law. Discerning the influences of these strict liability pressures is difficult, however, and may be inherently speculative, because the influences are not acknowledged in the case law, which must conform with the general proscription against strict liability for libel in *New York Times* and *Gertz v. Robert Welch, Inc.*¹²⁷ Insights into the prevailing atmosphere surrounding defamation, however, might still be garnered by examining what shreds of evidence we do have. This evidence consists of, first, the analogous position of the consumer plaintiff in a products liability suit in relation to the defendant corporate producer of consumer goods and the defamation plaintiff in relation to the defendant corporate media outlet, and, second, the reaction in state defamation law to the constitutional mandate of fault standards for liability.

a. *Perceived Imbalance Between Corporate Media Outlets and Private Individual Defamation Plaintiffs*

The application of one of the classic normative arguments for explaining when strict liability rules are most appropriate, George Fletcher's idea of reciprocal risks,¹²⁸ would develop liability rules quite different from those created by *New York Times* and *Gertz*. Fletcher argues that as long as the risks imposed by a particular form of activity are relatively even among various individuals in society, negligence is the appropriate liability standard.¹²⁹ Because all drivers of automobiles impose roughly equivalent or "reciprocal" risks on one another, Fletcher claims, no moral basis exists for imposing liability in the absence of

¹²⁷ 418 U.S. 323 (1974).

¹²⁸ Fletcher, *supra* note 126, at 543-56.

¹²⁹ Fletcher describes the general principle underlying the "paradigm of reciprocity" as: "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks." *Id.* at 542.

negligence, since it is only one person's deviation from standards of ordinary reasonable care that increases risk and upsets the reciprocity balance.¹³⁰ When, however, a particular form of activity creates risks against others that are not matched by corresponding risks imposed by others against those undertaking that activity itself, the lack of reciprocal risk justifies imposing strict liability rules against the enterprise.¹³¹ Thus, those who engage in abnormally dangerous activities, such as the operation of a nuclear power plant, should be strictly liable for harm caused by that which makes the activities abnormally dangerous, such as radiation leaks.¹³² The nuclear reactor at Three Mile Island imposes risks on the surrounding populace of a magnitude that the populace does not impose on the owners and operators of the reactor.

The existing constitutional rules for defamation¹³³ do reflect Fletcher's formulation in one sense. Higher standards of fault are required when the media defames a public person than are required when the media defames a private individual, partly on the logic that the public person has greater opportunity for counter-speech,¹³⁴ a notion analogous to Fletcher's reciprocity norm. But the entire plane of fault in the current law of defamation has been lifted one step higher than would be the case in Fletcher's system. The media remain protected by the negligence standard rather than being subjected to strict liability even though the risks may be grossly nonreciprocal.

Most individuals, even those who are famous or powerful, do not impose reciprocal risks on media outlets. Whereas media outlets can do substantial damage to an individual by incorrectly reporting wrongdoing or other information about the individual, that individual poses little risk of harm to media outlets. Over time, as the risks come to be realized, this nonreciprocal situation would result in what amounts to a transfer in wealth from individuals, in terms of uncompensated damage to reputation, to media outlets, in terms of uninternalized costs of reporting information. Thus, according to Fletcher's analysis, since there is no flow of wealth back from media outlets to defamed individuals through risks imposed by those individuals on the media, the courts

¹³⁰ "[A] negligent risk, an 'unreasonable' risk, is but one that unduly exceeds the bounds of reciprocity. Thus, negligently created risks are nonreciprocal relative to the risks generated by [those] who engage in the same activity in the customary way." *Id.* at 548.

¹³¹ *Id.* at 542, 545-48.

¹³² Cf. Prosser's discussion of the common law's strict liability rule for defamation: "The effect of this strict liability is to place the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals." W. PROSSER, *supra* note 49, § 113, at 773.

¹³³ See *supra* note 48-67 and accompanying text.

¹³⁴ *Gertz*, 418 U.S. at 344.

should ensure compensation by strict liability rather than relying on notions of fault which may leave a long-run imbalance between media outlets and those who are the topics of media reporting.¹³⁵

Media outlets, especially national television and newspaper networks, not only have the appearance of imposing nonreciprocal risks, but they also have the attributes of corporate, deep pocket defendants, rich enough to satisfy the goals of risk spreading and impersonal enough to draw no sympathy from jurors.

An individual who is scrutinized by the *Washington Post* or *60 Minutes* is likely to feel helpless before the whim of the powerful media.¹³⁶ It is quite possible that juries (and perhaps judges)¹³⁷ moved by this perception of imbalance, are unconsciously applying strict liability standards against the media, imposing damages for defamation even though the media acted carefully, while all the time adhering "in principle" to the negligence standard.

Plaintiff's lawyers certainly attempt to exploit this perception of imbalance by trying to associate the harm caused by the media with harm caused by products' manufacturers. In a *60 Minutes* story¹³⁸ on *Green v. Alton Telegraph Co.*¹³⁹ Rex Carr, the trial attorney who successfully handled the plaintiffs' case and obtained a \$9.2 million ver-

¹³⁵ This narrow view of the relationship between individuals and the media does not, of course, take account of the fact that those who are the subject of media reporting generally benefit from media exposure in addition to being subject to risk of harm from defamation, see *supra* notes 7-22 and accompanying text, or that the broader group of all individuals in the United States receive a benefit that cannot be measured in monetary terms through the operation of an independent and unfettered press, see W. PROSSER, *supra* note 49, § 113, at 773 ("In the interest of our traditional freedom of expression, it is not clear that the losses due to innocently inflicted harm to reputation should be borne by the publishing industry . . .").

¹³⁶ Even those in less than helpless positions often find the power of the media intimidating. A New York-based firm called MediaComm specializes in coaching people who will be interviewed by the media, charging as much as \$1400 to \$1700 a day for the coaching sessions. Weisman, *60 Minutes: A Look at Whether the Show's Success Has Affected the Quality and Zeal of Its Reporting*, T.V. GUIDE, Apr. 16, 1983, at 5. The head of MediaComm is quoted by Weisman as stating that: "I have yet to find one single [client] who wants to be on *60 Minutes*. There's a fear that, frankly, they're up against more than they can handle. And there's a very, very significant fear of unfair editing." *Id.* Similarly, the head of the Pentagon's Directorate for Defense Information says that most of the military establishment is reluctant to go on camera before the likes of *60 Minutes*: "'General X tells me, I sit there Sunday nights in front of that TV set and watch those guys take people like me apart. I'm sure as hell not going to be interviewed by them.'" *Id.*

¹³⁷ See Lempert, *supra* note 80, at 36, col. 4 (judges' decisions in defamation cases reflect a negative view of the media).

¹³⁸ *60 Minutes*, Oct. 11, 1981 (copy of transcript on file with the *University of Pennsylvania Law Review*).

¹³⁹ 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982). For a discussion of the *Alton Telegraph* case, see *supra* notes 72-73 and accompanying text.

dict, stated that: "The *Telegraph* newspaper or General Motors or anybody would be responsible for those damages caused Jim Green. They did the same thing here. They wrote a paper, a memo, that caused this damage to Jim."¹⁴⁰

b. *State Defamation Law Reaction to the Constitutional Fault Requirement*

In addition to the pervasiveness of strict liability in tort law and the relationship between corporate media defendants and private individual plaintiffs, the suspicion that strict liability principles retain an important influence on defamation law also arises from two trends in state law: first, some states continue to follow strict liability thinking in the one category of cases in which such adherence remains arguably permissible (cases that do not involve the media); and second, states have overwhelmingly opted for the lowest standard of fault permitted under *Gertz* when a private-figure plaintiff is allegedly libeled by the media.

(i) *Explicit and Implicit Strict Liability in Nonmedia Defamation Cases*

Open traces of strict liability thinking in defamation exist in those decisions that have held that the alterations worked by *Gertz* on the common law are inapplicable to cases that do not involve the media. The literal language of *Gertz* refers only to media defendants; each time Justice Powell stated his holding he was careful to insert the words "publisher" or "broadcaster," using those terms over fifteen times.¹⁴¹ As George Christie pointed out, after *Gertz* "we are left wondering whether an action between private parties is to be governed by the common law."¹⁴² Melville Nimmer also interpreted *Gertz* as limited

¹⁴⁰ 60 Minutes, *supra* note 138, at 15. Cf. *Buckley v. New York Post Corp.*, 373 F.2d 175, 182 (2d Cir. 1967) (Friendly, J.). Judge Friendly observed in *Buckley* that:

Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public, such as providers of food or shelter or manufacturers of drugs designed to ease or prolong life, they must pay the freight; and injured persons should not be relegated to forums so distant as to make collection of their claims difficult or impossible unless strong policy considerations demand.

But cf. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 432 n.52 (1975) (attacking the analogy between enterprise liability and defamation).

¹⁴¹ Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to NonMedia Defendants*, 95 HARV. L. REV. 1876, 1877 n.9 (1982).

¹⁴² Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflict-*

to the media.¹⁴³ The American Law Institute, although suggesting that courts extend *Gertz* to purely private defamation,¹⁴⁴ acknowledges that "[i]f there are some situations where fault is not required, the States will be free to apply their own rules, and they may or may not continue to apply the traditional common law rule,"¹⁴⁵ and that "[t]he precise holding of the [*Gertz*] case . . . does not extend beyond a statement published by a member of the communications media; and the constitutional requirement of fault on the part of the defendant may turn out to be limited to this holding, though this seems unlikely."¹⁴⁶ The *Restatement's* guess that a return to the traditional common law standards was "unlikely," however, underestimated the continuing force of the conventional pro-reputational values of the common law and overestimated the persuasiveness to the states of the Supreme Court's first amendment limitations on those values. Although many states have chosen to apply *Gertz* to nonmedia cases, several have not.¹⁴⁷

ing *Approaches*, 75 MICH. L. REV. 43, 50 (1976).

¹⁴³ Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 649 (1975). See generally the following discussions of the distinctions between the protection afforded media communications and nonmedia communications, and between the rights of a free press and free speech: Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978); Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974).

¹⁴⁴ RESTATEMENT, *supra* note 115, § 580B comment e.

¹⁴⁵ *Id.* at § 613 comment j.

¹⁴⁶ *Id.* at § 580B comment e.

¹⁴⁷ Four states—Colorado, Minnesota, Oregon, and Wisconsin—have expressly held *Gertz* inapplicable to nonmedia defendants when the plaintiff is a private figure. *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), *cert. denied*, 51 U.S.L.W. 3258 (1982); *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975). *But cf.* *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976).

There appears to be general agreement, however, that the *New York Times* actual-malice requirement applies across the board in actions by public officials or public figures, even against a nonmedia defendant. The theory of the decisions is a relatively straightforward one: criticism of public officials and public figures implicates the constitutional values sought to be protected by *New York Times*, and there is no principled reason for distinguishing between media and nonmedia defendants when the plaintiff is a public official or public figure. Several of the major Supreme Court decisions applying the actual-malice standard, including *New York Times* itself, involved defamation actions brought by public officials against nonmedia defendants. *See, e.g.*, *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Garrison v. Louisiana*, 379 U.S. 727 (1964).

Moreover, the Maryland Court of Appeals held *New York Times* applicable to defamation actions by public plaintiffs against nonmedia defendants in *Jacron Sales*

In *Calero v. Del Chemical Corp.*,¹⁴⁸ the Supreme Court of Wisconsin held that "[n]either [*New York Times*] nor *Gertz*' protections apply" to defamation not involving the media, public officials, or public figures.¹⁴⁹ In an even more far reaching nonmedia decision, *Harley-Davison Motorsports, Inc. v. Markley*,¹⁵⁰ the Oregon Supreme Court held that the traditional strict liability rules of the common law, including the rule of the *Restatement (First) of Torts* that one "who falsely, and without a privilege to do so, publishes matter defamatory to another . . . is liable to the other although no special harm or loss of

Co. v. Sindorf, 276 Md. 580, 590-91, 350 A.2d 688, 694-95 (1976), although *Jacron* is more often cited for its extension of *Gertz* to nonmedia defendants. For other, more recent decisions holding that the actual-malice standard applies to nonmedia cases involving public officials and figures, see *Antwerp Diamond Exchange v. Better Business Bureau*, 130 Ariz. 523, 637 P.2d 733, 737 (1981); *Rodriguez v. Nishiki*, 653 P.2d 1145, 1150 (Hawaii 1982); *Anderson v. Low Rent Hous. Comm'n*, 304 N.W.2d 239, 247 (Iowa), *cert. denied*, 454 U.S. 1086 (1981); *Michaud v. Inhabitants of Livermore Falls*, 381 A.2d 1110, 1113 (Me. 1978); *Williams v. Pasma*, 656 P.2d 212, 215 (Mont. 1982), *cert. denied*, 103 S. Ct. 2122 (1983); *Wheeler v. Green*, 286 Or. 99, 108, 593 P.2d 777, 785 (1979); *DeCarvalho v. da Silva*, 414 A.2d 806, 813 (R.I. 1980).

Federal courts also uniformly apply the *New York Times* rules to nonmedia defendants in defamation actions by public plaintiffs. See *Avins v. White*, 627 F.2d 637, 649 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975); *Woy v. Turner*, 533 F. Supp. 102, 104 (N.D. Ga. 1981).

Other state courts in cases involving public plaintiffs and nonmedia defendants have simply applied the *New York Times* rule without discussing the issue. See, e.g., *Jackson v. Filliben*, 281 A.2d 604 (Del. 1971); *Grad v. Copeland*, 280 So. 2d 461 (Fla. Dist. Ct. App.), *cert. denied*, 287 So. 2d 682 (Fla. 1973); *Fox v. Kahn*, 421 Pa. 563, 221 A.2d 181, *cert. denied*, 385 U.S. 935 (1966); *Wollman v. Graff*, 287 N.W.2d 104 (S.D. 1980).

One state court has expressly refused to apply *New York Times* in an action against a nonmedia defendant by an arguably public figure. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980). In *Stuempges*, the Minnesota Supreme Court held that neither *New York Times* nor *Gertz* were applicable to nonmedia defendants. According to the court, "the [*New York Times*] 'actual malice' standard was fashioned as an exception to the common law rule to permit the printed and electronic media to perform their function of informing the public about newsworthy people and events without undue fear of defamation liability." *Id.* at 258. Accordingly, the court treated the case as a common law defamation case, analyzing the facts in terms of conditional privilege, "ill will" malice, and presumed damages.

It should be noted that Chief Justice Burger dropped a footnote in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), stating that the Court had never decided "whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant." *Id.* at 133 n.16. One court has cited this footnote and stated, in dicta, that it is "far from settled" whether *New York Times* applies to a nonmedia defendant. *Thomas Merton Center v. Rockwell Int'l Corp.*, 280 Pa. Super. 213, 221, 421 A.2d 688, 692 (1980), *rev'd on other grounds*, 497 Pa. 460, 442 A.2d 213 (1981), *cert. denied*, 457 U.S. 1134 (1982).

I take the position that *Gertz* should be held applicable to all suits, media and nonmedia. See *infra* text accompanying notes 425-28.

¹⁴⁸ 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

¹⁴⁹ *Id.* at 505, 228 N.W.2d at 747.

¹⁵⁰ 279 Or. 361, 568 P.2d 1359 (1977).

reputation results therefrom,"¹⁵¹ continue to be the law of Oregon, despite *Gertz*.¹⁵² Justice Holman's opinion in *Markley* held that *Gertz* is totally inapplicable to cases not involving media defendants.¹⁵³ Justice Holman drew on Melville Nimmer's argument that the institutional press is entitled to special protection deriving largely from the separate free-press clause in the first amendment.¹⁵⁴ Justice Holman then responded to the argument that because the news media has been granted special protection under *Gertz*, fairness and symmetry require that nonmedia defendants be placed in no less favorable a position:

Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially out-weighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that *Gertz* does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.¹⁵⁵

In addition to such explicit holdings retaining common law rules, there are indications that in the case of nonmedia defendants, many common law courts *implicitly* retain strict liability, but have not had to face the issue directly because common law privileges apply in most of the cases that come before them. This implicit retention of strict liability is made apparent, however, if one examines the standard of fault many courts apply when those privileges are employed.

Many courts continue to follow the principle that common law privileges are lost if the defendant acts negligently in communicating libelous speech.¹⁵⁶ If, however, *Gertz* outlaws liability without fault for

¹⁵¹ 279 Or. at 364, 568 P.2d at 1361-62 (quoting *Hinkle v. Alexander*, 244 Or. 267, 272, 411 P.2d 829, 830 (1966) (quoting 3 RESTATEMENT (FIRST) OF TORTS § 569, ch. 24 (1938)); see also *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979) (reaffirming *Markley*).

¹⁵² 279 Or. at 369-71, 568 P.2d at 1365.

¹⁵³ *Id.* at 371-72, 568 P.2d at 1365-66.

¹⁵⁴ *Id.* at 369, 568 P.2d at 1364 (citing Nimmer, *supra* note 143, at 656).

¹⁵⁵ 279 Or. at 370, 568 P.2d at 1365.

¹⁵⁶ This loss of the common law privilege is sometimes limited to the issue of the scope of the people to whom the speech is published. See, e.g., *Dillard Dep't Stores, Inc. v. Felton*, 276 Ark. 304, 634 S.W.2d 135, 138 (1982) (quoting *Arkansas Associated Tel. Co. v. Blankenship*, 211 Ark. 645, 651, 201 S.W.2d 1019, 1022 (1947)).

Loss of privilege has, however, also resulted from negligence in ascertaining the truth or falsity of the information. See, e.g., *Zeinfeld v. Hayes Freight Lines, Inc.*, 41

defamation in all cases (media and nonmedia), common law conditional privileges are meaningless unless conduct more egregious than negligence is required before the privilege is lost.¹⁵⁷ Prior to *New York Times* and *Gertz*, when strict liability remained the operative law, a privilege that shielded a defendant from liability unless the defendant was negligent made sense, because requiring proof of negligence added a burden to the plaintiff's case. If, however, negligence is required as a matter of course in plaintiff's case for defamation, a privilege that can be overcome by negligence is no privilege at all.¹⁵⁸

The fact that some courts continue to use the negligence standard to rebut common law privileges in nonmedia cases implies that they are rejecting the negligence standard for liability in those cases. They clearly do not intend the common law privileges that they are explicitly applying to be meaningless. The negligence standard for abuse of privilege is thus evidence of an unconscious clinging by judges to strict liability thinking.¹⁵⁹

(ii) State Law Choice of Liability Standards After *Gertz*

A second telling indicator of the prevailing judicial mood lies in the responses of the various states to the option that *Gertz* left open to them. Although the Supreme Court in *Gertz* stated that it did not believe it wise for the Court itself to proceed on a case-by-case basis in attempting to balance the constitutional claims of the press against individual claims for compensation, the Court invited state courts to proceed to evolve for themselves the proper standard of liability in suits brought by private plaintiffs.¹⁶⁰ Thus the Court stated that as long as

Ill. 2d 345, 243 N.E.2d 217 (1968); *Spencer v. Community Hosp.*, 87 Ill. App. 3d 214, 408 N.E.2d 981 (1980); *General Motors Corp. v. Piskor*, 277 Md. 165, 352 A.2d 810 (1976).

¹⁵⁷ See RESTATEMENT, *supra* note 115, ch. 25 special note on conditional privileges and the constitutional requirement of fault.

¹⁵⁸ See PROSSER & WADE, *supra* note 115, at 1077. Alert to this problem, some courts have adopted the actual-malice standard for common law privileges. See, e.g., *British Am. & Eastern Co. v. Wirth Ltd.*, 592 F.2d 75 (2d Cir. 1979); *Luster v. Retail Credit Co.*, 575 F.2d 609 (8th Cir. 1978); *Brown v. Skagg-Albertson's Properties, Inc.*, 563 F.2d 983 (10th Cir. 1977).

¹⁵⁹ It is, of course, also likely that because the law of defamation today is so complicated, many courts have simply not realized that their use of negligence to defeat common law privileges is either a redundancy under *Gertz* or an application of strict liability. As I argue in part III of this Article, the most sensible approach to this conundrum is to elevate common law privileges to the actual-malice standard of *New York Times*, thus synchronizing them with constitutional privileges. See *infra* text accompanying notes 373-83. At this point it is enough to recognize that this inconsistency is substantial evidence of the inertia that strict liability values have retained two decades after *New York Times*.

¹⁶⁰ 418 U.S. at 347.

the states do not attempt to dip below the negligence standard, "[s]tates should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."¹⁶¹

Most states that have considered the issue have chosen the "low option" allowed by *Gertz*, refusing to extend the actual-malice standard to actions brought by "private figure" plaintiffs.¹⁶² Only a handful of

¹⁶¹ *Id.* at 345-46.

¹⁶² In the following cases, courts in 18 states and the District of Columbia expressly adopted the *Gertz* standard of negligence when a private figure sues a media defendant: *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981); *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376 (Fla. App. 1982); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 543 P.2d 1356 (1975); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981); *Wilson v. Capital City Press*, 315 So. 2d 393 (La. Ct. App.), *cert. denied specifically approving decision*, 320 So. 2d 203 (La. 1975); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126 (1978); *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 292 S.E.2d 23, *cert. denied*, 51 U.S.L.W. 3304 (Oct. 18, 1982); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982).

In the following cases, courts in eight additional states have assumed without discussion that *Gertz* represents the law of the state, and have, accordingly, applied the *Gertz* standard of negligence in defamation actions: *Browning v. Birmingham News*, 348 So. 2d 455 (Ala. 1977); *Corbett v. Register Publishing Co.*, 33 Conn. Supp. 4, 356 A.2d 472 (1975); *Savannah News-Press Div. v. Whetsell*, 149 Ga. App. 233, 254 S.E.2d 151 (1979); *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395, *cert. denied*, 434 U.S. 891 (1977); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979); *DeCarvalho v. da Silva*, 414 A.2d 806 (R.I. 1980); *Colombo v. Times-Argus Ass'n, Inc.*, 135 Vt. 454, 380 A.2d 80 (1977); *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo. 1976).

Moreover, in the following cases, federal courts have interpreted state law in three additional states as having adopted *Gertz*: *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (applying Mississippi law); *Mills v. Kingsport Times-News*, 475 F. Supp. 1005 (W.D. Va. 1979) (applying Virginia law); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978) (applying Pennsylvania law).

In the following cases, several other state courts appear to have adopted the *Rosenbloom* standard, although the status of the law in some of these states is ambiguous due to ostensibly conflicting decisions: *Rollenhagen v. City of Orange*, 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981) (4th District), *but cf.*, *Widener v. Pacific Gas & Elec. Co.*, 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (1977) (1st District) (court assumes *Gertz* is the applicable law, but uses the *New York Times* standard because the plaintiff so stipulated), *cert. denied*, 436 U.S. 918 (1978); *Diversified Management v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982); *Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E.2d 246

states have opted for the high option by requiring more than negligence to sustain an action brought by a private figure.¹⁶³ The near unanimity of the states in rejecting the application of the *New York Times* standard when given a chance to do so reveals the tort system's essential antipathy for heightened barriers to recovery for defamation. This post-*Gertz* response arguably indicates that the common law is still basically disposed toward facilitating recovery for libel and slander.¹⁶⁴

3. The Influence of Public Perception and Social Sentiment on the Law

Because we have become unaccustomed to thinking of defamation

(1982) (This nonmedia case does not expressly adopt *Rosenbloom*, but its language and holding appear to implicitly follow *Rosenbloom*. *Colson* is discussed in detail *infra* notes 343-70 and accompanying text); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978).

In the following case, a federal court interpreted state law as having adopted *Rosenbloom*: *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979) (applying Alaska law). New York follows an approach all its own, opting for a test between *Gertz* and *Rosenbloom*. See *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (private individuals must prove gross negligence in matters of public concern).

The *Restatement* has adopted the lower *Gertz* negligence standard:

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

- (a) knows that the statement is false and that it defames the other,
- (b) acts in reckless disregard of these matters, or
- (c) acts negligently in failing to ascertain them.

RESTATEMENT, *supra* note 115, § 580B (1977).

¹⁶³ See *Rollenhagen v. City of Orange*, 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981); *Diversified Management v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982) (extended protection already granted to defendants by adopting the definition of "reckless disregard" established in *St. Amant v. Thompson*, 390 U.S. 727 (1968)); *Walker v. Colorado Spring Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975); *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 224 S.E.2d 132 (1976).

¹⁶⁴ The choices of the states in response to the decisions that *Gertz* left to them are analogous to the response of states to the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which had struck down the death penalty laws of 40 states, *see id.* at 437 (Powell, J., dissenting). At least 35 states had responded by enacting new death penalty statutes, when the court reconsidered the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976). The *Gregg* decision, permitting the death penalty under certain circumstances, was obviously influenced by the state legislative response. *See id.* at 179 ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*.").

as a basic component of tort law, suggestions that defamation may be largely influenced by strict liability values may not be accepted. Why should strict liability values be thought of as retaining an influence on defamation? Is it likely that judges and juries regard the injury of a libelous article as seriously as the bodily injury caused by a defectively designed appliance? Is it likely that the tort system would be prone to treating the output of a television news broadcast as the equivalent of the physical product that comes off of the assembly line? Theorizing about the continued influence of strict liability may be nothing more than academic speculation over the inertia of the common law, without something more to give those tracings of strict liability credence. Even well-entrenched common law rules can be made to give way if the reforms that displace them capture a widely shared social sentiment. I hypothesize that, when combined with the seriousness with which Americans view the inner self, the lingering influences of strict liability rules are quite likely to be real. If there is an increasing public perception that the information that is spewn forth by modern media outlets is a form of "product," essentially indistinguishable from soap or hair-spray, to which tort liability should attach whenever it is "defective" and causes injury, the influence of strict liability makes perfect sense.

C. *The Blurring of the Entertaining and Informing Functions in Contemporary Mass Communications*

A third phenomenon that has contributed to the libel explosion is a trend toward a general blurring of the line between the informing and the entertaining functions of media broadcasts and publications. News is increasingly packaged as if it were entertainment and entertainment as if it were news.¹⁶⁵ This blurring of the distinction be-

¹⁶⁵ This packaging has been particularly evident in television reporting. See F. FEDLER, AN INTRODUCTION TO THE MASS MEDIA 283 (1978) (noting trend toward "happy news" in TV news broadcasting); A. WESTIN, NEWSWATCH 208 (1982) ("What sells is good" is operative at too many [TV news] stations."); F. WHITNEY, MASS MEDIA AND MASS COMMUNICATION IN SOCIETY 257 (1975) ("Television is an entertainment medium and it cannot seem to escape from this notion even in its performance of the information function in news coverage or documentaries."); Powers, *Eyewitness News*, in AMERICAN MASS MEDIA: INDUSTRIES AND ISSUES 400 (R. Atwan, B. Orton & W. Vesterman eds. 1978) (expressing opinion that if Edward R. Murrow were alive to observe a modern TV news broadcast, "What the hell, Murrow might understandably have asked, 'has all this got to do with news?'"); Seib, *Walters: Newsperson or TV-Age Communicator*, Wash. Post, Apr. 28, 1976, at A13, col. 1 ("The line between the news business and show business has been erased forever. . . . It disappeared with the announcement that Barbara Walters will get a million dollars a year to help preside over the ABC television network's evening news show."). The trend has not, however, been absent from the print media. See Hewitt, *The 61st Minute*, NEWSWEEK, Aug. 1, 1983, at 8 ("[L]et me remind [those who insist on labeling

tween news and entertainment has affected the media's method of reporting as well as the content of the information reported by the media. Each effect has tended to encourage an increase in libel litigation.

1. The Methods of Reporting Information

One important aspect of the contemporary media has been its concern with the way that the news is reported, particularly for television broadcast. Influenced by public opinion polls indicating that viewers want a more relaxed presentation of the news,¹⁶⁶ corporate managers have invested in new faces for news broadcasts and have often encouraged a "happy talk" format for reporting the news.¹⁶⁷ This packaging, which is actually an attempt to provide more entertainment within a news format, is directed toward gaining higher ratings and the higher earnings those ratings represent.¹⁶⁸ This commercial attitude to-

TV news 'showbiz'] that [TV] didn't invent gossip columns, advice to the lovelorn, horoscopes, banner headlines, Maggie and Jigs, Barney Google, crossword puzzles, the quote of the day, and Wingo, a bingo-style numbers game. Newspapers did.".)

¹⁶⁶ See F. FEDLER, *supra* note 165, at 284. Fedler comments that:

Consulting firms, often called 'news doctors,' are largely responsible for the phenomenon known as 'happy news.' Hired to help stations improve their ratings, the firms advocate the use of lively musical themes, attractive sets, and more banter among newscasters. They also recommend the use of more short news stories, and lots of them . . . Many [consultants] deemphasize the coverage of routine government affairs. At some stations, entire staffs have been replaced by persons considered more suitable for the new format.

See generally R. POWERS, *THE NEWSCASTERS* (1977).

¹⁶⁷ See Brown, *ABC Seeks Changes to Lift News Ratings*, N.Y. Times, Mar. 18, 1976, at 83, col. 2 ("the mandate from corporate management [to improve ratings] is expected to lead to changes in the ABC newscast, one of which is bound to be the teaming of Mr. Reasoner with a partner, probably a woman . . ."); see also A. WESTIN, *supra* note 165, at 209 ("In its worst manifestations, 'happy talk' in the seventies meant that news writers were spending more time planning snappy repartee and joke lines than journalistic content."). But cf. *id.* at 228 ("There are some positive signs. The pendulum of 'happy talk new' has swung back. There is still excess but a balance is achieved at many stations.").

¹⁶⁸ According to the *New York Times*:

A [TV] station that climbs from third place to first place in the local news competition, gaining six or seven rating points in the process, will improve its profits by millions of dollars. Some leading television stations derive more than half their total income from the local newscasts in the early and late evening, which in most situations represent less than two hours of the entire broadcasting day.

Brown, *Livelier and Longer TV News Spurs Hunt for Talent*, N.Y. Times, Apr. 22, 1974, at 71, col. 1; see also A. WESTIN, *supra* note 165, at 207 ("It was the search for higher ratings and more revenue rather than desire for 'image' that led most stations to the discovery that news programs run in [local] 'station time' could provide advertising revenues."); Powers, *supra* note 165, at 406 ("Television stations often reap enormous profits from the communities they are licensed to serve. Annual pretax profits of be-

ward the communication of information is likely to reinforce the view that the media is yet another industry with a product to sell, an industry which ought to be held strictly liable for any damages caused by its product.¹⁶⁹

Investigative reporting undertaken by media stars has been another packaging strategy designed to win viewers and readers. This focus on the reporters themselves and their investigative tactics has been profitable for the media. For example, *60 Minutes* reportedly makes a profit contribution of over \$60 million a year to the CBS network.¹⁷⁰ In one CBS season the show's revenues are reported to have spelled the difference between an overall profit and loss for the network.¹⁷¹ The news packaging has also generated a new group of celebrities. As critic John Weisman has noted, the roles of Harry Reasoner, Morely Safer, Ed Bradley, and Mike Wallace "are no less well defined, no less honed and crafted, than *Hill Street's* Capt. Frank Furrillo, *Dallas'* J.R., or M*A*S*H's Hawkeye Pierce."¹⁷² This high-profile, intentionally controversial reporting, however, has generated a large amount of libel litigation. In particular, CBS's *60 Minutes* and ABC's *20/20* are sued with an alarming regularity.¹⁷³

tween \$2 million and \$10 million . . . are not uncommon. Average rates of return on sales are consistently between 30 and 50 percent—robust figures indeed in the American industrial community.”); cf. Seib, *supra* note 165, at A13 (“[When ABC hired Barbara Walters it] went for the quick [ratings] fix: it got itself a star.”).

¹⁶⁹ Cf. Powers, *supra* note 165, at 406-07 (“Until local television news ceases to exploit the entertainment bias that is conditioned by its host medium, and shares some of [its] profit with its ‘market’ in the form of comprehensive, compact newscasts, it is engaging in a pollution of the worst sort: a pollution of ideas.”).

¹⁷⁰ Weisman, *supra* note 136, at 5.

¹⁷¹ *Id.* at 6.

¹⁷² *Id.* at 5. The development of news media stars is more understandable when one realizes that opinion polls indicate that television viewers choose news programs on the basis of the newscaster's “personal charisma” rather than the “news content.” N.Y. Times, Apr. 28, 1981, at C10, col. 3.

¹⁷³ *60 Minutes* has reportedly been sued over 150 times. Weisman, *supra* note 136, at 5.

In the last three years alone, ABC has become embroiled in at least five separate lawsuits brought by alleged victims of Geraldo Rivera's reports on *20/20*. On February 7, 1980, the program included a segment entitled “Arson and Profit” concerning an alleged arson-for-profit conspiracy in Chicago. A Chicago building manager accused in the program of deliberately setting fires to defraud insurance companies, brought a libel and invasion of privacy action against ABC. ABC's motion to dismiss was denied in *Cantrell v. ABC*, 529 F. Supp. 746 (N.D. Ill. 1981). The court ruled that the plaintiff was a private figure, and that the broadcast was not susceptible of an innocent construction under Illinois law and was libelous per se.

In Cleveland, a plaintiff filed a multimillion dollar lawsuit over Rivera's “Injustice for All” segment of the April 17, 1980, *20/20* telecast, claiming that the program had depicted her as a prostitute who had sexual relations with a judge in exchange for a lighter prison sentence. The jury rejected the plaintiff's claims, ruling in favor of ABC and Rivera on May 10, 1982. See N.Y. Times, May 11, 1982, at A13, col. 2. Still

The new methods of reporting information, therefore, have made the media less sympathetic as defendants¹⁷⁴ while at the same time the methods have increased the likelihood of libel litigation.

2. The Substance of Reported Information

Modern reporting is also notable for the subjects it pursues. The distinction between entertainment and news may no longer be meaningful when applied to much of contemporary mass communication. Broadcast¹⁷⁵ and print¹⁷⁶ media have expanded their coverage well beyond political events and now widely report private information that in the past would not likely have been published so prominently to such a wide audience.¹⁷⁷ Also, the intentional mixing of fact and fiction has become an increasingly important method of modern communication. For example, Norman Mailer won the 1979 Pulitzer Prize for fiction for a novel that painstakingly documents the events surrounding the

pending, however, are two other libel actions based on the same program, which examined public corruption in Akron and Summit County, Ohio. News Notes, MEDIA L. REP., May 18, 1982.

In Virginia, Howard Safir, the head of the Justice Department's witness-protection program, is suing ABC and Rivera over a 20/20 broadcast containing various allegations about the witness-protection program. ABC has responded with a counter-suit, alleging that Safir was involved in bugging confidential conversations of ABC reporters. Wall St. J., Feb. 23, 1983, at 31, col. 3. Kaiser Aluminum and Chemical Corporation has filed a \$40 million libel suit against ABC and Rivera over a 20/20 broadcast which accused Kaiser of knowingly selling dangerous household-electrical wiring and withholding information about the product. Chi. Tribune, Apr. 27, 1981, § III, at 6, col. 2.

In another case involving ABC, the Sixth Circuit has ruled that summary judgment was improperly granted to ABC in a defamation action against the network for an April 22, 1977 documentary entitled "Sex for Sale: The Urban Battleground." Clark v. ABC, 684 F.2d 1208 (6th Cir. 1982), cert. denied, 103 S. Ct. 1433 (1983). The plaintiff in *Clark*, who in fact was never a prostitute, brought a libel and invasion of privacy action claiming that the broadcast had depicted her as a "common prostitute" by photographing her walking down the street. See generally Chi. Tribune, Mar. 22, 1983, at 4, col. 1.

¹⁷⁴ See *supra* note 136 and accompanying text.

I sincerely believe that most print and broadcast journalists regard their profession even more seriously than many reporters of the past. I also believe that pressures from within their corporate confines tend to adulterate that seriousness of purpose, confusing entertainment and news.

¹⁷⁵ Consider, for example, the following television shows: *Real People*, *That's Incredible*, *Entertainment Tonight*, as well as *60 Minutes* and *20/20*.

¹⁷⁶ Consider, for example, *People* and *Us* magazines, as well as the *National Enquirer*, the *Star*, and the *Globe* newspapers.

¹⁷⁷ Yellow journalism and tabloids are certainly not uniquely modern phenomena, see F. ALLEN, *ONLY YESTERDAY: AN INFORMAL HISTORY OF THE NINETEEN-TWENTIES* 186-225 (1931), but modern television coverage of this type of material is a new phenomenon that allows for very wide circulation in a very prominent format.

execution of Gary Gilmore.¹⁷⁸ Mailer's account was then recycled as a "docudrama" on prime time television. Because these developments test the proper limits for invoking first amendment protection, they raise doubts about the usefulness of some of the standards currently applied in defamation cases.¹⁷⁹

The media's increased reporting of matters that are entertaining or diverting to the public, but that have little relevance to keeping all citizens well informed on matters of political concern,¹⁸⁰ raises two important problems for current defamation law. First, the distinction drawn in *Gertz* between public and private figures may be misplaced when applied to a claim that a report of this new type is libelous. Although *Gertz* rejected the *Rosenbloom v. Metromedia, Inc.*¹⁸¹ "general or public interest" test in part because that test would require courts "to determine . . . 'what information is relevant to self-government,'" ¹⁸² the public-figure test reaffirmed in *Gertz* is based on a traditional marketplace of ideas, public-controversy model of the first amendment.¹⁸³ The language used by the Court in articulating the test calls for the existence of "public controversies,"¹⁸⁴ "public questions,"¹⁸⁵ or a "public issue,"¹⁸⁶ with the person acting "to influence the resolution of the issues involved,"¹⁸⁷ or "to influence [the] outcome [of the public is-

¹⁷⁸ N. MAILER, *THE EXECUTIONER'S SONG* (1979); see N.Y. Times, Apr. 15, 1980, at 1, col. 3.

¹⁷⁹ For a discussion of the standards for defamation cases established under Supreme Court first amendment jurisprudence, see *supra* notes 48-66 and accompanying text.

¹⁸⁰ A report about a piece of juicy gossip, for example, may not be the type of speech we "would march our sons and daughters off to war to preserve." *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976). See also *New York Times*, 376 U.S. at 301-02 (Goldberg, J., concurring). Justice Goldberg noted that:

Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment. This, of course, cannot be said "where public officials are concerned or where public matters are involved [O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it."

Id. (footnote omitted) (quoting W.O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 41 (1958)).

¹⁸¹ 403 U.S. 29 (1971).

¹⁸² *Gertz*, 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)).

¹⁸³ For a standard articulation of that model see *supra* note 180.

¹⁸⁴ *Gertz*, 418 U.S. at 345.

¹⁸⁵ *Id.* at 351.

¹⁸⁶ *Id.* at 352.

¹⁸⁷ *Id.* at 345.

sue]."¹⁸⁸ Except that *Gertz* provides general public-figure status for any person of widespread notoriety,¹⁸⁹ this public-figure test is entirely unresponsive to news reports that are more entertaining or diverting in subject matter.¹⁹⁰

The new areas of reporting also pose difficulties for courts that must assess the publication according to a negligence standard.¹⁹¹ As I will argue later, analysis of the utility of a publication or broadcast is crucial when applying the negligence standard to an allegedly defamatory statement.¹⁹² Gossip, however, is likely to cause confusion and difficulty for a court that must assess its value. There are certainly as many Americans who find the vivid low brow discourse of the tabloid more relevant and interesting than the endless dissections of the President's budget message in the mainstream press. To many, the romantic life of Elizabeth Taylor or Michael Landon either reveals more of the human condition or provides more of a relief from the mundane routines of daily life than the statistical machinations of David Stockman.¹⁹³ There is nothing in the text of the first amendment to indicate that it is aimed at protecting only elitist speech preferences.

The Supreme Court has, of course, indicated that even the communication of pure entertainment is protected by the first amendment.¹⁹⁴ The problem is not whether to protect entertainment speech,

¹⁸⁸ *Id.* at 352.

¹⁸⁹ This general public figure status would likely be applicable to virtually all celebrities. *See, e.g.,* *Carson v. Allied News Co.*, 482 F. Supp. 406, 407 (N.D. Ill. 1979) (Entertainer Johnny Carson and his wife "admittedly are public figures.").

¹⁹⁰ At least one member of the Court has specifically argued that broad scope be given in determining whether a communication relates to an area of public interest. *See* *Rosenbloom v. Metromedia*, 403 U.S. 29, 42-43 (opinion of Brennan, J.); *cf.* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring) ("Increasingly in this country, the distinctions between governmental and private sectors are blurred. . . . This blending of positions and power has . . . occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions . . .").

¹⁹¹ The negligence standard would be most likely to apply if a court concluded that the plaintiff was a private figure. *See supra* notes 160-64 and accompanying text.

¹⁹² *See infra* text following note 400.

¹⁹³ As writer Ron Rosenbaum has pointed out, the lurid subjects of the typical tabloid front page—the exposed love-triangles, psycho-killers, missing coeds, and movie star gossip—are no more self-evidently absurd than the evening headlines of the *Washington Post* or lead story on the *CBS Evening News*. Rosenbaum, *The Fourth Estate: Link Founding Father to Sleaze King*, *HARPER'S*, Jan. 1983, at 19-21, 24. The only difference is that the craziness of human life that appears on the pages and broadcasts of the "respectable" press is conducted in large scale by established published institutions, rather than individuals. *Id.* at 20.

¹⁹⁴ *See* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("entertainment . . . enjoys First Amendment protection [and] . . . itself can be important news"); *id.* at 580 (Powell, J., dissenting) (The TV news broadcast of a human cannonball in flight "is a routine example of the press' fulfilling the informing function

but how much protection should be granted that type of speech. Lacking any clearly articulated standard for weighing the value of entertainment against the risk of defamation, judges and juries may be liable to undervalue entertainment.

The final area in which the blending of news and entertainment has become important is the use of an artistic form that combines facts about actual people and events with an array of additional details and characters created by the author's imagination to communicate information. Contemporary culture abounds in novels, motion pictures, plays, and television programs based on real people and events.¹⁹⁵ The American artistic tradition of drawing directly on real people and events as the grist for fictional works has served a vital role in revealing and critiquing American culture. Orson Welles' classic movie "Citizen Kane" was a thinly concealed portrayal of William Randolph Hearst; Robert Penn Warren's novel *All the King's Men*¹⁹⁶ was a fictional elaboration on the life of Huey Long. From E.L. Doctorow's *Ragtime*,¹⁹⁷ to Phillip Roth's *Our Gang*,¹⁹⁸ to Father Andrew Greeley's *The Cardinal Sins*,¹⁹⁹ popular American fiction deals constantly in varying degrees of disguise with actual people, often revealing more insight into their lives and the society that surrounds them than would be possible in any nonfictional account.

Despite the importance of this method of communication, current defamation law is conceptually inadequate when applied to fiction, largely because it fails to take proper account of the distinction between the factual (news) and the fantastic (entertainment) elements of the work. Fiction is actually a second-class informational citizen, receiving less first amendment and common law protection than equivalent speech would receive in another medium.

When someone sues the publishers of a fictional work alleging that a fictional character is in reality a portrayal of the plaintiff, the normal vocabulary with which a defamation case is handled under the

so vital to our system.").

¹⁹⁵ See Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); Franklin & Trager, *Literature and Libel*, 4 COMM/ENT 205 (1982); Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065 (1978); Wilson, *The Law of Libel and the Art of Fiction*, 44 LAW & CONTEMP. PROBS. 27 (1981); Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571 (1980); Comment, "Hey, That's Me!"—*The Conundrum of Identification in Libel and Fiction*, 18 CAL. W. L. REV. 442 (1982); Note, *Fiction Based on Fact: Writers' Liability for Libel on Invasion of Privacy*, 14 U.C.D. L. REV. 1029 (1981).

¹⁹⁶ R.P. WARREN, *ALL THE KING'S MEN* (1946).

¹⁹⁷ E.L. DOCTOROW, *RAGTIME* (1975).

¹⁹⁸ P. ROTH, *OUR GANG* (STARRING TRICKY AND HIS FRIENDS.) (1971).

¹⁹⁹ A. GREELEY, *THE CARDINAL SINS* (1981).

common law and the first amendment breaks down. In a defamation case not involving fiction the plaintiff must prove that the speech involved was "of and concerning" her, that it was defamatory, that it was false, that the speaker negligently failed to realize the speech was false (if the plaintiff is a private figure), or recklessly or intentionally disregarded the speech's truth or falsity (if the plaintiff was a public figure).²⁰⁰ Expressions of opinion, as distinguished from misstatements of fact, are not actionable at all.²⁰¹

When these rules are applied to fiction they work very poorly, tending inappropriately to work inexorably toward a plaintiff's victory. The failure in translation can be illustrated by imagining two defamation actions brought by the late John Cardinal Cody, the former Catholic Archbishop of Chicago. (This is a safe hypothetical comparison, for there is no libel against the dead.)²⁰² Father Andrew Greeley has written two books out of which libel suits by John Cardinal Cody might have originated. In a nonfiction work, Greeley in his *The Making of the Popes, 1978*²⁰³ portrayed Cody in a highly unflattering light. The negative portrayal of Cody consists primarily of Greeley's reports about Cody's competence and character as a church official, including charges that three Popes tried to have Cody dismissed from his post.²⁰⁴ Later, in a work of fiction, *The Cardinal Sins*, Greeley wrote about a Cardinal who had several striking similarities to John Cody.²⁰⁵ In *The Car-*

²⁰⁰ The basic elements of the defamation cause of action are set forth in RESTATEMENT, *supra* note 115, § 558 (1977).

²⁰¹ A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. *Id.* at § 566; see also Christie, *Defamatory Opinions and the RESTATEMENT (SECOND) OF TORTS*, 75 MICH. L. REV. 1621 (1977). For cases discussing the constitutional overtones to the common law rule that "pure" opinion is not actionable, see, e.g., *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980); *Good Gov't Group of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978), *cert. denied*, 441 U.S. 961 (1979); *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977); *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980); *Myers v. Boston Magazine Co.*, 7 Mass. App. 676, 389 N.E.2d 779 (1979); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977).

²⁰² RESTATEMENT, *supra* note 115, § 560 ("One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives.").

²⁰³ A. GREELEY, *THE MAKING OF THE POPES*, 1978 (1979).

²⁰⁴ *Id.* at 31, 89-92, 172, 238-39.

²⁰⁵ A. GREELEY, *supra* note 199. Greeley, a catholic priest who is a sociologist, syndicated columnist, and prolific writer, had been a harsh critic of Cody throughout Cody's tenure as archbishop of Chicago. In his book *The Making of the Popes, 1978*, Greeley claimed, among other things about Cody, that Cody had been asked to resign by three popes. A. GREELEY, *supra* note 203, at 31, 172, 238-39. Cody called the charge "a dirty lie." Greeley's fictional work, *The Cardinal Sins*, had many transpar-

dinal Sins the fictitious Cardinal engages in a variety of illicit sexual escapades, and is flawed by a consuming quest for power.²⁰⁶

In Cody's hypothetical suit based on *The Making of the Popes* the odds are extremely high that Greeley would prevail. First, with regard to factual statements made by Greeley about Cody's administrative actions, Cody might well have a difficult time proving factual inaccuracy. Second, even if Cody could prove that defamatory falsehoods were contained in the book, Cody would be classified as a public figure for the purposes of a book written about church affairs, and would thus be forced to meet the *New York Times* standard of knowing or reckless disregard for the truth. The overwhelming likelihood is that he could at best prove negligence on Greeley's part; it would be almost impossible to demonstrate that Greeley knowingly or recklessly printed falsehood.²⁰⁷ Finally, Cody would have run up against the distinction be-

ent similarities to the Cody situation. In a story in the *Chicago Lawyer*, Rob Warden wrote that *The Cardinal Sins* "seems to be something more than prophetic. In fact, it virtually is a blueprint for the [Chicago] *Sun-Times* disclosures that began on [September] 10 about Cody's relationship with Helen Dolan Wilson, his step-cousin." Warden, *The Plot to Get Cody*, Chi. Law., Oct. 1981, at 5, col. 2. In addition to pointing out the similarities between Cody's real world problems and the fictional revelations in *The Cardinal Sins*, Warden's article went so far as to accuse Greeley of plotting to "oust" Cody. *Id.* at 4, col. 3.

The controversy surrounding Cody's finances was the subject of a series of copyrighted stories in the *Chicago Sun-Times* revealing that a federal grand jury in Chicago was investigating the Cardinal to determine if he illegally diverted as much as \$1 million in tax-exempt church funds to enrich a lifelong friend, Helen Dolan Wilson of St. Louis. The allegations included charges that the Cardinal provided money for a \$100,000 luxury vacation home in Florida; that the Cardinal inaccurately identified Wilson as his cousin, when she in fact was a cousin by marriage with no common bloodline with Cody; that Wilson was paid a secret church salary in the Chicago archdiocese from 1969 to 1975, and that Wilson was the beneficiary of a \$100,000 insurance policy on Cody's life. Chi. Sun-Times, Sept. 10, 1981, at 1, col. 1; see also Salerno, *This and Heaven Too*, HARPER'S, June 1982, at 54, 56; see also N.Y. Times, Sept. 11, 1981, at 16, col. 1.

²⁰⁶ See, e.g., A. GREELEY, *supra* note 199, at 129, 170, 177, 251, 253, 261-62, 299.

²⁰⁷ The *New York Times* standard is not satisfied merely by failing to investigate allegations sufficiently, or by failing to verify information given by one source. *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968); *Henry v. Collins*, 380 U.S. 356, 357 (1965); *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964). A plaintiff must prove that the defendant published the information despite the fact that the defendant subjectively "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. at 731 (emphasis in original); see also *Herbert v. Lando*, 441 U.S. 153, 160 (1979) ("essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974) ("subjective awareness of probable falsity").

"[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. at 731. Because Greeley could surely point to a substantial number of sources to support his charges, a jury would probably find for Greeley (assuming no overriding bias in favor of the Cardinal), and if it did not, Greeley would still be likely

tween fact and opinion as an interdiction against recovery for many of the worst things said about him in *The Making of the Popes*. To the extent that Greeley was editorializing about Cody's competence, his statements were opinion and not fact, and therefore beyond the pale of a libel action.²⁰⁸

If Cody, instead, were to bring a libel suit against Greeley for *The Cardinal Sins*, it is ironic that his chances of victory could be substantially higher, even though the novel is ostensibly not about Cody at all. The only significant battle in this litigation would be over the identity issue: Cody would have the burden of convincing the trier of fact that the novel was actually "of and concerning" him,²⁰⁹ an element of the cause of action that the law of defamation, in its love for an obscure terminology all its own, labels "colloquium."²¹⁰ Every reader need not believe that the fictitious character was actually the real Cardinal; it is enough that the jury finds that the "reasonable reader" would so understand the novel.²¹¹ In deciding this issue the jury normally considers the number of similarities between the character and the plaintiff; the presence or absence of a disclaimer; the testimony of the author, of readers, of the plaintiff, of those who know the plaintiff, and perhaps of literary "experts," and circumstantial evidence, such as evidence showing some special connection between the author and plaintiff.²¹² In the case of *The Cardinal Sins*, Greeley's novel would probably be found to be "of and concerning" Cody.²¹³

The conceptual inadequacy of the current law dealing with defamation is revealed in what would happen next. Unlike *The Making of the Popes*, which enjoyed both the protection of the actual-malice standard and the dichotomy between fact and opinion, *The Cardinal Sins* would find both defenses essentially useless. Those aspects of the novel most damaging to Cody—the events depicting ruthless grabs for power, and the illicit sexual affairs—would be, as admitted products of Greeley's imagination, "knowingly false" by definition.²¹⁴ A fictional work,

to prevail on appeal.

²⁰⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

²⁰⁹ See *Fetter v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966).

²¹⁰ See W. PROSSER, *supra* note 49, § 111, at 749.

²¹¹ The recipient of the defamatory communication must "correctly, or mistakenly but reasonably" understand that it was intended to refer to the plaintiff. RESTATEMENT, *supra* note 115, at § 564. It is not necessary that everyone recognize the plaintiff; it is enough that those recipients who do recognize the plaintiff be reasonable in their understanding. The fact that only a few people purport to recognize the plaintiff, however, is a factor in determining the reasonableness of their belief. *Id.* at § 564 comment f.

²¹² See Franklin & Trager, *supra* note 195, at 208-12.

²¹³ See *supra* note 205 and accompanying text.

²¹⁴ See Wilson, *supra* note 195, at 36.

in which characters determined to be based on real people do things imagined by the writer, is a work for which the writer has automatically confessed guilt under *New York Times*.²¹⁵

The Cardinal Sins, unlike *The Making of the Popes*, would not receive the benefit of the rule that opinion is not actionable. The principle that there is no such thing as a false idea²¹⁶ would not protect the novel, for the defamatory elements of the book would be treated as misstatements of fact, rather than opinions or ideas.²¹⁷ Thus, although *The Making of the Popes* would be immune from liability for statements accusing the Cardinal of being power hungry and ambitious because such statements would be construed as opinion, imagined descriptions of the same behavior in *The Cardinal Sins* would be treated as actionable factual falsehood.

The plausibility of this troublesome hypothetical is supported by the result of a recent California decision, *Bindrim v. Mitchell*.²¹⁸ Dr. Paul Bindrim, who led "nude marathon" group therapy sessions, brought a defamation action against Gwen Davis Mitchell, over a novel entitled *Touching*. Mitchell attended a Bindrim therapy session and two months later received a \$150,000 advance from Doubleday to write *Touching*, a book depicting nude encounter sessions run by a fictitious Dr. Simon Herford. Bindrim claimed that the fictitious character was really him, and that the portrayal, which painted him as abusive and insensitive to patients, was libelous. Although the real Bindrim was clean shaven with short hair, the physical description of Herford was that of "a fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face, and rosy forearms."²¹⁹ The only evidence that linked the fictitious character with the real plaintiff were several tape recordings of actual sessions for comparison with the novel and testimony by three witnesses that the nude encounter sessions depicted in the book closely resembled the actual nude encounter sessions conducted by Bindrim.²²⁰ The court found that the evidence was sufficient to support the identification requirements,²²¹ and applied the *New York Times* standard mechanically to find liability against the author and

²¹⁵ See *Gertz*, 418 U.S. at 340 (There is no first amendment value to false statements of fact.).

²¹⁶ See *id.* at 339 ("Under the First Amendment there is no such thing as a false idea.").

²¹⁷ See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984 (1979).

²¹⁸ 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984 (1979).

²¹⁹ *Id.* at 75, 155 Cal. Rptr. at 37.

²²⁰ *Id.*

²²¹ *Id.* at 76, 155 Cal. Rptr. at 38.

publisher, because the negative depiction of Bindrim's personality was made with "knowledge" of falsity.²²²

The shortcomings of this approach are plain. The novel *Touching* was more than anything else an indictment of one peculiar form of fadish Californian therapy. The outcome-dispositive nexus between the real character and the fictitious character—the nude marathon encounter therapy itself—was *true*. The elaborations on the true fact that such therapy exists communicated the *opinion* that such therapy is either frivolous or affirmatively harmful. That the writer chose to express that critique through the vehicle of fiction should not diminish the legal protection to which the speech is entitled. As the dissenting judge noted: "Those practices which are similar to plaintiff's technique are classified as identifying . . . [while] those which are unlike plaintiff's are classified libelous because they are false."²²³ Current libel law analysis of fiction fails because it focuses too narrowly on the identity of fictional characters. It should look more broadly to the fictional work's effect upon the audience in relation to the plaintiff and to the author's conduct in relation to that effect.²²⁴

3. Conclusion

Moved largely by the modern media's desire to earn greater profits, the methods of informing have increasingly come to resemble the methods of entertaining. In addition the information reported by the modern media has begun to appear less like news and more like entertainment (or in the case of much fiction, the appearance is more like news and less like entertainment). This blurring of the line between the media's entertaining and informing functions has likely made juries more willing to decide cases against the media and has led to doctrinal confusion for both the constitutional and common law strands of libel law.

D. *The Constitutionalization of Defamation Law*

The final element that has contributed to the reinvigoration of the American law of libel is the failure of courts to synchronize common law defamation doctrines with the constitutional principles that have been superimposed upon them. Because the common law of defamation in its sometimes elegant and sometimes baffling intricacy has never fully adjusted to the imposition of constitutional rules upon it, there has

²²² *Id.* at 72-73, 155 Cal. Rptr. at 35.

²²³ *Id.* at 86, 155 Cal. Rptr. at 44 (Fites, J., dissenting).

²²⁴ Later, I will suggest a more coherent standard for evaluating whether fiction is libelous. See *infra* notes 411-23 and accompanying text.

been a proliferation of standards and terms that frequently fails to promote either common law or constitutional values. Any given jurisdiction is faced with the task of stating its one "law of defamation," a combination of state and federal doctrine that allows rules of decision to be applied to a variety of cases in a coherent manner. As long as the two sources of doctrine remain unsynchronized, however, both reputation and speech are intermittently undervalued or overvalued without rhyme or reason. There is no widely shared conceptual understanding of how defamation law is supposed to operate.

1. Overly Confusing Standards

The confusion of defamation standards is perhaps best illustrated by identifying some of the distinctions that must currently be made when a defamation action is brought. The plaintiff's public- or private-figure status has become crucial,²²⁵ and in some states the media or nonmedia status of the defendant may also be important.²²⁶ A defendant may claim a common law privilege²²⁷ in addition to its constitutional privilege. The finding whether the two types of privileges are lost may depend on separate determinations of the existence of "malice." Malice currently has two totally different definitions: common law malice (roughly equivalent to ill will) and *New York Times* actual malice (reckless or intentional disregard of the truth).²²⁸

The complexity inherent in these basic distinctions is indicative of the effect of imposing new constitutional standards in what had already been a confusing area of the law. Legal scholarship in the years following *New York Times* has also reflected the confusion resulting from one old and one new source of defamation law. As Marc Franklin has remarked, tort scholars applying traditional tort analysis seem to have been frightened away by the progeny of *New York Times* from analyzing the new law of libel.²²⁹ Many articles written about defamation since 1964 have tended to emphasize constitutional theory, either ignoring altogether any serious discussion about the development of common law doctrines, or treating the development as secondary.²³⁰ Franklin

²²⁵ See *supra* text accompanying notes 60-62.

²²⁶ See *supra* notes 141-47 and accompanying text.

²²⁷ See *infra* notes 298-320 and accompanying text.

²²⁸ See *infra* notes 374-75 and accompanying text.

²²⁹ Franklin, *supra* note 24, at 457-58.

²³⁰ But see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. And Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L. REV. 519 (1979); LaRue, *Living With Gertz: A Practical Look at Constitutional Libel Standards*, 67 VA. L. REV. 287 (1981); Sowle, *Defamation and the First*

suggests that tort theorists who never considered themselves constitutional lawyers were reluctant to venture into unfamiliar first amendment territory.²³¹ The same may be true in reverse; to many constitutional academics the arcane complexity of the traditional tort rules surrounding libel and slander may appear almost comically Byzantine. Rather than delve into the cluttered labyrinth of checks and balances that had evolved in the common law to accommodate interests in free expression with interests in reputation, constitutionalists seem to have found it easier to sweep the law of defamation clear and apply the progressive new jurisprudence of *New York Times* to solve everything.

The result has been complex and conflicting doctrine regarding which few attempts have been made to develop a coherent and consistent body of law.

2. Insufficient Attention to Common Law Doctrine in the Formulation of Constitutional Standards

The last two decades of defamation decisions highlight the perils of displacing the common law. Ever since *New York Times*, there has been a tendency to forget that defamation is still preeminently part of the common law of torts, with an evolution that is bound up as intimately with general trends in tort law as with evolving constitutional interpretations.²³²

An important example of this tendency can be seen in the understanding of common law conditional privilege. The orthodoxy after the *New York Times* decision was that many of the rules formerly applied to conditional privileges under the common law had been taken over by the constitutional privilege recognized in *New York Times*, thus rendering the conditional privilege doctrines largely obsolete.²³³ This orthodox vision, however, grew out of a period in which the Supreme Court's jurisprudence was characterized by an expansion of first amendment protection for defamatory utterances at the expense of reputational interests. The perceived obsolescence of common law privileges was thus the product of a conviction that the *New York Times* decision would inevitably expand privilege concepts beyond what the common law had ever contemplated. Constitutional privilege was regarded as the animated and vigorous sphere of defamation law; it would be through

Amendment: The Case for a Constitutional Privilege of Fair Report, 54 N.Y.U. L. REV. 469 (1979); Spencer, *Establishment of Fault in Post-Gertz Libel Cases*, 21 ST. LOUIS U.L.J. 374 (1977).

²³¹ Franklin, *supra* note 24, at 457-58.

²³² See *supra* notes 113-20 and accompanying text.

²³³ See W. PROSSER, *supra* note 49, §§ 115, 118, at 792, 819-33.

the progressive evolution of an approach to the constitutional privilege based on the "public interest" in the subject matter of the communication that free speech values would come to fruition. The highwater mark for this vision came after *Rosenbloom v. Metromedia, Inc.*,²³⁴ in which a plurality of the Supreme Court extended the actual-malice standard of *New York Times* "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."²³⁵

Since *Rosenbloom*, the Supreme Court has tended to devalue the role of the first amendment in insulating defamation defendants from liability. The narrower view of the first amendment's role in modern society has emerged in the last decade, a view that sees the amendment's primary function as the encouragement of untrammelled debate about controversies related to self-government.²³⁶ The same new solicitude for protective self-worth by encouraging recompense for defamation that has captured an emerging social consensus has met with sympathetic ears on the Court, and media claims for special first amendment protection in suits brought by individuals who are only on the periphery of mainstream news events have failed.

When the United States Supreme Court was "progressive" in emphasizing first amendment values over reputational values, it was true that the constitutional jurisprudence spawned by *New York Times* had a liberalizing effect on state defamation law. But today the Supreme Court is vigorously opposed to the *Rosenbloom*-style enhancement of first amendment principles at the expense of protection of reputation.²³⁷ The retreat from *Rosenbloom* began in *Gertz*,²³⁸ in which the Court ruled that *New York Times* protection was required only for "public" figures and officials, but not for private persons, and has proceeded through a series of Supreme Court decisions that have drastically constricted the constitutionally based definition of "public figure."

The hopes for a pervasive constitutional privilege that sprang from *New York Times* and *Rosenbloom* ended with *Gertz*. In an ironic turn of legal and cultural history, constitutional doctrine now acts as a stulti-

²³⁴ 403 U.S. 29 (1971).

²³⁵ *Id.* at 44 (footnote omitted).

²³⁶ See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials . . . it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate . . .").

²³⁷ See *infra* note 242 and accompanying text.

²³⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For a discussion of *Gertz*, see *supra* notes 57-65 and accompanying text.

fying force on the natural evolution of the common law of defamation in most states. As the Supreme Court narrows the scope of its public-figure doctrine, it threatens to contract the scope of common law privileges below the level to which they would have naturally evolved had the law of defamation not become constitutionalized.

In addition to substantially undermining any evolution in the protection offered by common law privileges, the Supreme Court has been largely insensitive to long-standing and beneficial doctrines of the common law when mandating the constitutional requirements of state defamation law. The Court's insensitivity is most apparent both in its formulation and subsequent elaboration of the public-figure doctrine and in its lack of attention to the content of the fault standard.

The failure of first amendment jurisprudence to bring new order to the law of defamation is in large part the result of the Court's distastefully mechanistic implementation of the compromise it established in *Gertz*. This compromise was the public-figure doctrine, which offered enhanced protection for the media when their reports concerned a public figure.²³⁹ A public figure was defined in the following way:

For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.²⁴⁰

The limited purpose public figure described in the last sentence theoretically gave the Court flexibility in deciding whether a plaintiff was a public figure because it "look[ed] to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."²⁴¹ It is apparent, however, that the flexibility was intended to be limited because the *Gertz* Court also rejected *Rosenbloom's* "ad hoc" approach of granting constitutional protection to communications that address issues of "general or public interest."²⁴²

*Time, Inc. v. Firestone*²⁴³ was the first case to demonstrate the practical rigidity of *Gertz's* public-figure doctrine. The case involved

²³⁹ See *supra* notes 52-62 and accompanying text.

²⁴⁰ *Gertz*, 418 U.S. at 345.

²⁴¹ *Id.* at 352.

²⁴² *Id.* at 346.

²⁴³ 424 U.S. 448 (1976).

Mary Alice Firestone, who was married to Russell Firestone, the scion of the wealthy Firestone family. In 1964 the Firestones became embroiled in a vigorously contested divorce proceeding in Palm Beach County, Florida. Mary Alice had filed a complaint seeking separate maintenance, and Russell had counterclaimed for divorce on grounds of "extreme cruelty and adultery." The circuit court granted the divorce, and included in the final judgment the following language:

"This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses

. . . .

According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida

. . . .

In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

. . . .

The premises considered, it is thereupon
ORDERED AND ADJUDGED as follows:

1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

. . . .

4. That the defendant shall pay unto the plaintiff the sum of \$3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every

month thereafter until the death or remarriage of the plaintiff.”²⁴⁴

Time magazine printed the following brief account of the divorce in its “Milestones” section:

“DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, ‘to make Dr. Freud’s hair curl.’ ”²⁴⁵

Mary Alice Firestone sued *Time* for defamation and won a jury verdict for \$100,000, which was ultimately affirmed by the Florida Supreme Court.²⁴⁶ On appeal to the United States Supreme Court, *Time* argued that the actual-malice standard should have applied because the Firestones’ divorce was a “cause célèbre,” a characterization of the Florida Supreme Court,²⁴⁷ and Mary Alice Firestone was a “limited public figure” with regard to the divorce proceedings.²⁴⁸ The magazine further pointed out that Mrs. Firestone subscribed to a press clipping service to chronicle her media exposure, and held several press conferences during the course of the divorce litigation in order to answer questions regarding the case.

The Supreme Court held that Firestone was not a public figure and that *Time* magazine was not entitled to the protection of the *New York Times* standard with regard to her claim. Mary Alice Firestone’s prominence in what Justice Marshall in his dissent depicted as “the sporting set”²⁴⁹ did not qualify her as a person of “‘especial prominence in the affairs of society.’ ”²⁵⁰ Even though Mary Alice Firestone initiated litigation in a public court of law, the Court held, her action was hardly a purposeful insertion into a matter of public controversy, since state law compelled her to resort to legal process in order to obtain lawful release from the bonds of matrimony. The Court also rejected the argument that *New York Times* protection should extend to

²⁴⁴ See *id.* at 450-51.

²⁴⁵ *Id.* at 452.

²⁴⁶ *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1974), *vacated and remanded*, 424 U.S. 448 (1976).

²⁴⁷ *Firestone v. Time, Inc.*, 271 So. 2d 745, 751 (Fla. 1972).

²⁴⁸ See 424 U.S. at 454.

²⁴⁹ 424 U.S. at 486 (Marshall, J., dissenting).

²⁵⁰ *Id.* at 453 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

all reports of judicial proceedings. The Court held that even if narrowed to reports of what actually transpires in a courtroom, application of the *New York Times* privilege would sweep too broadly, for "the details of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues."²⁵¹ Although the Court conceded that some participants in some litigation may be legitimate public figures, either generally or for the limited purpose of press coverage concerning the litigation, the Court indicated its belief that the majority will resemble poor Mary Alice Firestone, "drawn into a public forum largely against their will in order to obtain the only redress available to them or to defend themselves against actions brought by the State or by others."²⁵²

This narrow and rigid approach toward the public figure doctrine was reaffirmed in *Wolston v. Reader's Digest Association*,²⁵³ which involved a book written by John Barron and published by the Reader's Digest Corporation entitled *KGB: The Secret Work of Soviet Secret Agents*. The *KGB* book listed the plaintiff, Ilya Wolston, as being among a group of "Soviet agents identified in the United States," and further stated that those in the list were "Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution."²⁵⁴ Wolston sued, claiming that the charges were false and defamatory. The trial court, in a decision affirmed by the District of Columbia Circuit Court of Appeals, held that Wolston was a "public figure" and that the actual-malice standard of *New York Times* thus applied.²⁵⁵ The court granted summary judgment for defendants, finding that although the book was in error in implying that Wolston had been indicted for espionage, there was nonetheless no evidence to support a finding of actual malice on the part of the defendants.²⁵⁶

The Supreme Court reversed, holding that Ilya Wolston was not a public figure within the meaning of *Gertz* and that it was therefore error to apply the actual-malice standard to Wolston's claim. The Supreme Court's analysis in *Wolston* is strong evidence of just how constricted is the Court's current conception of "public figure." The Court heavily emphasized the fact that Wolston had been "dragged unwill-

²⁵¹ *Id.* at 457.

²⁵² *Id.*

²⁵³ 443 U.S. 157 (1979).

²⁵⁴ *Id.* at 159.

²⁵⁵ *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (1978), *rev'd*, 443 U.S. 157 (1979).

²⁵⁶ 429 F. Supp. at 180.

ingly" into the controversy surrounding KGB presence in the United States, rather than having "voluntarily thrust" or "injected" himself into the forefront of public attention.²⁵⁷ Wolston's connection to the issues depicted in the book arose out of a special federal grand jury investigation conducted during 1957 and 1958 in New York City to investigate the activities of Soviet intelligence agents in the United States. As a result of the grand jury probe, Wolston's aunt and uncle, Myra and Jack Soble, were arrested in January 1957 and charged with espionage. The Sobles later pleaded guilty to the espionage charges, and in the ensuing months, the grand jury's investigation focused on other participants in a suspected Soviet espionage ring, resulting in further arrests, convictions, and guilty pleas. On the same day that the Sobles were arrested, the FBI interviewed Wolston at home in Washington, D.C. Wolston was subsequently interviewed several more times by the FBI, and traveled to New York on various occasions pursuant to the special grand jury's subpoenas. On July 1, 1958, however, Wolston failed to respond to a grand jury subpoena, and a federal district judge in New York issued an order to Wolston to show cause why he should not be held in criminal contempt of court. The Supreme Court explicitly acknowledged that "[t]hese events *immediately attracted the interest of the news media*, and . . . *at least seven news stories* focusing on petitioner's failure to respond to the grand jury subpoena appeared in New York and Washington newspapers."²⁵⁸

Wolston ultimately did appear in response to the show cause order. Wolston pleaded guilty to the contempt charge,²⁵⁹ and received a one-year suspended sentence and three years' probation, conditioned on his cooperation with the grand jury in any further inquiries regarding Soviet espionage. In all, Wolston's episode with the grand jury was the focus of fifteen newspaper articles in New York and Washington. The Supreme Court itself described this as a "flurry of publicity," but then noted that the publicity subsided after Wolston's sentencing, and that Wolston thereafter "succeeded for the most part" in returning to "the private life he had led prior to issuance of the grand jury subpoena."²⁶⁰ The Court's qualifying phrase, "for the most part," was a bit of an understatement, however: Wolston was subsequently mentioned in two publications other than Barron's book on the KGB. In a book entitled *My Ten Years as a Counterspy*, Boris Morros, a former confederate of

²⁵⁷ *Wolston*, 443 U.S. at 166.

²⁵⁸ *Id.* at 162 (emphasis added).

²⁵⁹ The Court implied that Wolston's guilty plea resulted at least in part from his concern about his wife's well being. *See id.* at 163.

²⁶⁰ *Id.*

Jack Soble who became a double agent, wrote that Soble had identified Wolston as a Soviet agent.²⁶¹ In a report prepared by the FBI entitled *Exposé of Soviet Espionage May 1960*, Wolston was listed as among people "the FBI investigation resulted in identifying as Soviet intelligence agents."²⁶²

Despite these facts, the Supreme Court concluded without apparent second thought that Wolston was not a "public figure" for the purposes of triggering the actual-malice standard. Wolston, the Court noted, was clearly not a "general public figure" under *Gertz*, for he had achieved no general fame or notoriety and had assumed no role of special prominence in the affairs of society as a result of his contempt citation or his connection to the grand jury investigation into Soviet spying activity.²⁶³ But why would Wolston not be squarely within the concept of a "limited public figure" under *Gertz*, a figure to whom the *New York Times* standard would apply for the limited purpose of comment on his connection to or involvement with the Soviet espionage activities that precipitated the federal grand jury inquiry? Since Barron's book dealt only with Wolston's link to the Soviet espionage world, why shouldn't the actual-malice test shield Barron from liability when that same linkage had already resulted in Wolston's mention in fifteen newspaper articles, one other book, and an official public FBI report? At the very least, it would have seemed that Wolston's refusal to appear before the grand jury, and his subsequent plea of guilty and acceptance of a probationary sentence conditioned on further cooperation with the grand jury espionage investigation, would qualify Wolston as having purposefully involved himself in a matter of legitimate public interest, and thereby having assumed the position of inviting attention and comment regarding the investigation of espionage.

The Supreme Court's refusal to accept this argument demonstrates how myopic the Court's contemplation of "limited public figure" is. There was no "controversy" about espionage that Wolston could have thrust himself into, the Court said, "because all responsible United States citizens understandably were and are opposed to it."²⁶⁴ This is a facially spurious argument, for it would restrict the limited public-figure status to people involved in public *disputes*, as opposed to persons involved in significant or dramatic public events. John Hinckley, Jr. would not qualify as a public figure merely for having shot President Ronald Reagan, because the assassination attempt was not a matter of

²⁶¹ *Id.* at 163 n.6.

²⁶² *Id.* (quoting S. REP. NO. 114, 86th Cong., 2d Sess. 24, 26-27 (1960)).

²⁶³ 443 U.S. at 163-69.

²⁶⁴ *Id.* at 166 n.8.

"public controversy," assuming "all responsible United States citizens understandably were and are opposed to" presidential assassination. John Hinckley, Jr. would become a public figure, however, after his acquittal on attempted murder charges by reason of insanity, because the insanity defense is an issue over which Americans are divided. This distinction is ludicrous; it rests on a hypertechnical construction of the term "controversy" that treats only *debate* as a matter of first amendment concern,²⁶⁵ eliminating a plethora of issues and events such as crime and violence which are obviously subjects of profound concern, and for which full first amendment protection for speech is vital, whether or not "all responsible United States citizens" are opposed to them.

The Supreme Court's decision that Wolston's involvement in the controversy (assuming one did exist) about Soviet espionage was totally "involuntary" is similarly flawed in its restrictiveness. It is of course true that Wolston did not intentionally invite the FBI and the grand jury to investigate his connection with serious criminal activity. No one ever does. But how can the fact that Wolston did not "voluntarily thrust himself" before the grand jury be a legitimate factor in the analysis? The whole point of Barron's book, of the newspaper stories about Wolston, and of the grand jury investigation was that Wolston and others like him were in some way implicated in spying against the United States for the Soviet Union. Spies are supposed to remain secretive and not invite attention to their surreptitious activity—that's what makes them spies. Under the *Wolston* Court's analysis, a good Soviet agent is entitled to better protection from media investigation than a bad one, for the good agent has not been caught. Even when the public authority of the United States is brought to bear on an alleged agent, that agent is entitled to private-figure status in any media reports about the arrest or investigation because prior to being investigated he or she (like any self-respecting spy) leads a "private life."

The *Wolston* Court thus rejected the view that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his or her conviction.²⁶⁶ That rejection is wrong because it equates (in the context of crime) the *Gertz* requirement of "voluntariness" for limited public figures as voluntariness in getting caught and convicted rather than voluntariness in committing the crime itself. Furthermore, Wolston did

²⁶⁵ Cf. *supra* notes 180-90 and accompanying text (discussion of the *Gertz* distinction between public and private plaintiffs and the difficulty of applying it to modern communications).

²⁶⁶ 443 U.S. at 168.

voluntarily refuse to appear before an extremely important and obviously "public" body—a special federal grand jury—and he voluntarily pleaded guilty to the contempt charge and was sentenced in a court of law, another obviously public institution. That Wolston did not wish these unhappy events upon himself and did not seek media attention does not vitiate their substantial social importance, and does not undercut the need for first amendment breathing space for commentary upon them.

Further restrictions on the public-figure formula came in *Hutchinson v. Proxmire*,²⁶⁷ which involved a suit brought by Ronald Hutchinson, an adjunct professor at Western Michigan University and the Director of Research at Kalamazoo State Mental Hospital in Michigan, against William Proxmire, a United States Senator from Wisconsin, and Proxmire's legislative aide. Proxmire invented, in 1975, a mock prize that he termed the "Golden Fleece of the Month Award," through which Proxmire, playing the role of a self-appointed vigilante against wasteful federal spending, awarded the "Golden Fleece" to persons or agencies that he perceived to be engaging in egregious episodes of wasteful or frivolous governmental spending.²⁶⁸ In April 1975 the Proxmire Golden Fleece was awarded jointly to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research, for spending over \$500,000 over a seven-year period to fund Dr. Hutchinson's research. Hutchinson's research involved the study of emotional behavior through objective measurement of behavior patterns of certain animals, such as the clenching of jaws by primates when exposed to irritating or stressful stimuli.²⁶⁹ Proxmire ridiculed federal spending on such research in a speech and press release that belittled Hutchinson's work.²⁷⁰

Legitimate doubts can be raised as to whether the law of defama-

²⁶⁷ 443 U.S. 111 (1979).

²⁶⁸ *Id.* at 114.

²⁶⁹ *Id.* at 115.

²⁷⁰ "The finding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw. It seems to me it is outrageous.

Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

It is time for the Federal Government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer."

Id. at 116 (quoting 121 Cong. Rec. 10,803 (1975)).

tion was even intended to facilitate the expenditure of substantial social resources in the resolution of so inane and petty a dispute; the case, nonetheless, reached the Supreme Court. Most of the Supreme Court's opinion involved the determination that Proxmire was not absolutely shielded from liability under the speech or debate clause of the Constitution.²⁷¹ The Supreme Court did, however, secondarily deal with Proxmire's argument that he was entitled to the benefit of the actual-malice standard because Hutchinson was a "limited public figure" for the purpose of commentary on his publicly funded research. Hutchinson had, after all, voluntarily applied for federal funds, and reports of his successes in obtaining federal grants appeared in local newspapers. Further, Hutchinson was not without access to the media; some newspapers and wire services reported Hutchinson's response to the Golden Fleece Award.

But the Court found that Hutchinson was not a public figure within the narrowed meaning of that term after *Firestone* and *Wolston*. Repeating the familiar bootstrap argument, the Court noted that Proxmire could not turn Hutchinson into a public figure by virtue of Proxmire's own allegations, for that would permit a defendant to create a public figure defense through the defendant's own conduct.²⁷² Picking up on *Wolston*'s emphasis on the term "public controversy" as limited to matters of public debate, the Court noted that Hutchinson did not thrust himself into the public eye "to influence others."²⁷³ General concern about public expenditures, even large ones, was not enough in the Court's view to activate the *New York Times* test, for that would involve the Court in illegitimate *subject matter* classification, and ignore the public-figure compromise struck in *Gertz*.²⁷⁴

The Court's application of the public-figure test has become rigid because it focuses exclusively on the person allegedly defamed by the communication. The test would be more flexible and still be responsive to its underlying policies²⁷⁵ if the Court looked for guidance to the application of the common law privileges. Those privileges provide heightened protection to speech that is determined to be of particular importance to the community based on the entire context of the com-

²⁷¹ U.S. CONST. art. I, § 6, cl. 1.

²⁷² 443 U.S. at 135 ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.").

²⁷³ *Id.*

²⁷⁴ *See id.*

²⁷⁵ The policies underlying the *Gertz* public-figure test were that public figures must expect that their reputations may be attacked and that public figures have access to the media for purposes of rebutting any defaming communications. These policies are discussed in detail *infra* at notes 361-68 and accompanying text.

munication.²⁷⁶ A more responsive test based on the common law's contextual approach is proposed in the next section.²⁷⁷

The Court's requirement in *Gertz* that states require some showing of fault before holding "a publisher or broadcaster" liable for defamation²⁷⁸ also has been less coherent because the Court has failed to consider and to integrate common law notions of fault. Although *Gertz* intentionally allowed the states to "define for themselves the appropriate standard of liability,"²⁷⁹ the constitutional prohibition against strict liability is meaningless unless there is some minimum additional range of communication permitted under the fault standard. The Court, however, has not given proper attention to this issue and may, in fact, fail to distinguish the liability/fault issue from the public-figure determination.

Firestone is an example of the lack of attention to the issue of fault. In that case, the Court, although ultimately remanding for a determination of liability,²⁸⁰ appeared ready to infer and to approve a finding of fault by the Florida Supreme Court despite the failure of the Florida courts to make a determination on that issue.²⁸¹ The facts of the case indicate, however, that *Time* could hardly have been found negligent under traditional, common law notions of fault:²⁸² *Time's* alleged libel involved at best a legalistic and picayune error.

The trial judge in the divorce proceeding had stated that there was testimony that both Firestones had engaged in frequent extramarital sex, and that some of Mary Alice Firestone's alleged activity "would have made Dr. Freud's hair curl."²⁸³ The only "falsehood" in the brief two-sentence article was that the grounds of the divorce were "extreme cruelty and adultery." The trial court actually made no formal finding of adultery, even though adultery had been alleged in Russell Firestone's pleadings. In fact the trial court made no finding as to the grounds for the decree. The Florida Supreme Court concluded that the basis of the judgment was actually "lack of domestication of the parties," a ground *not pleaded* and *not theretofore recognized by Florida*

²⁷⁶ See *infra* notes 298-301 and accompanying text.

²⁷⁷ See *infra* notes 297-372 and accompanying text.

²⁷⁸ *Gertz*, 418 U.S. at 347.

²⁷⁹ *Id.*

²⁸⁰ *Firestone*, 424 U.S. at 464.

²⁸¹ See *id.* at 463 ("It may well be that petitioner's account in its 'Milestones' section was the product of some fault on its part . . .").

²⁸² See *id.* at 466-70 (Powell, J., concurring) (Justice Powell surveys the facts surrounding the publication of the "Milestones" section and concludes that "there was substantial evidence supportive of *Time's* defense that it was not guilty of actionable negligence." (emphasis in original)).

²⁸³ See *Firestone*, 424 U.S. at 450.

law.²⁸⁴ What, then, could possibly have been negligent about *Time's* assumption, an assumption that most qualified Florida lawyers would probably have made, that the trial court's grounds were in fact those pleaded—extreme cruelty and adultery—the only grounds recognized by Florida law at the time of the judgment? The answer offered by the Florida Supreme Court, which the United States Supreme Court seemed prepared to accept, was that *Time* had engaged in “flagrant” “journalistic negligence” because it had not realized that adultery could not have been the basis of the decree, because Florida law prohibited an award of alimony to a wife found guilty of adultery and Mary Alice Firestone had been awarded alimony.²⁸⁵ This hyperlegalistic view of negligence seems hardly consistent with common law notions: *Time* was negligent for not realizing that its interpretation of the judgment was inconsistent with then-existing Florida law, yet *Time* was not permitted to defend itself on the ground that any alternative interpretation of the basis of the decree (such as “lack of domestication”) was *also* inconsistent with then-existing Florida law.

The *Wolston* decision²⁸⁶ also illustrates the Court's failure to define the substance of a fault standard. The *Wolston* Court seemed to be most concerned with Barron's serious charge that Wolston was at least an “indicted” Soviet agent, when in fact he was a relatively minor figure in the overall scheme of the 1957 and 1958 investigation into Soviet espionage and was never actually indicted for the crime of espionage. Although the author and publisher emphasized the critical importance of Soviet espionage as a public issue, the Supreme Court concluded that it is not the issue but the person that is dispositive, and Wolston was only a small player in the public events that transpired. The Court's conclusion seems to be based partly on sympathy for Wolston: he was only tangentially related to an investigation into Soviet espionage, and his own worst known crime was contempt of court, for which he had passively accepted his punishment and paid his debt to society. The Court, therefore, seemed to have been moved by a feeling that the libel was disproportionate to the crime. In effect, *Wolston's* message is that when an author embarks on a subject, such as espionage, that can be seriously defamatory, and “innocent” persons are erroneously accused, the *New York Times* standard will not apply unless the person defamed plays a major role in the subject matter and virtually mounts a rostrum

²⁸⁴ *Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972).

²⁸⁵ *Firestone v. Time, Inc.*, 305 So. 2d 172, 178 (Fla. 1974), *vacated*, 424 U.S. 448 (1976).

²⁸⁶ The facts of *Wolston* are discussed *supra* at notes 253-62 and accompanying text.

to proclaim that role prior to drawing initial media attention. This message, however, confuses the issue of ultimate liability—how false was the publication and what type of conduct resulted in the falsity—with the issue whether *New York Times* should apply in the first instance—whether Wolston was a public figure.

In addition to the Court's failure to separate clearly the public figure and fault analysis, the Court's sense of the defendants' culpability was not fully informed. It is perfectly proper to compare the gravity of the harm with the burden of greater care when assessing fault.²⁸⁷ The more damaging an accusation, the more careful the reasonable person is in making it. An accusation that someone is a spy for a foreign power requires more diligence in investigation to avoid characterization as reckless than an accusation that someone is mean to her cat.²⁸⁸ But as will be discussed later,²⁸⁹ the calculation of fault cannot

²⁸⁷ Under Learned Hand's familiar *Carroll Towing* algebra, a party is liable when the burden (B) is less than the injury (L) multiplied by the probability (P). See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173-74 (2d Cir. 1947) (L. Hand, J.).

²⁸⁸ Whatever standard one adopts on the continuum of fault from negligence to recklessness to intentional misconduct, ultimately some comparison of the gravity of the harm (discounted by its probability) and the burden of further precaution must be made. In the defamation context, the burden should include the actual "cost" of further investigation into the truth of the allegations, as well as the "cost" of delaying the speech—some news items, for example, may be so "hot" that almost immediate publication without careful verification is perfectly reasonable. In assessing the other side of the equation, the injury multiplied by its probability are factors that will be heavily influenced by the harmfulness of the accusation and by the inherent plausibility of the accusation. There is a greater duty to investigate (thus increasing the burden) as the accusation gets more seriously damaging, and also, as the likelihood of it being true decreases. It is true that the Supreme Court has held that in applying the "recklessness" half of the *New York Times* standard, the mere failure to investigate a story before publishing it when a reasonably prudent publisher would have so investigated is not recklessness for first amendment purposes. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). There must instead "be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* But the *St. Amant* standard does not preclude traditional *Carroll Towing*-type assessments of fault in *New York Times* cases; it rather utilizes precisely those traditional tort law variables that Judge Hand identified. *St. Amant* simply made it clear that there must be a substantial imbalance in the fault equation against the defendant's conduct before it will be labeled "constitutionally reckless." Thus, the Court in *St. Amant* noted that mere claims by the defendant that he or she subjectively believed a story was true do not insulate the defendant from liability. The trier of fact must still find the claims believable. The Court noted that "[p]rofessions of good faith" will not be persuasive when the story is fabricated by the defendant, is a product of his or her imagination, or "is based wholly on an unverified anonymous telephone call." *Id.* at 732. More importantly, the Court recognized that such claims of subjective innocence will not be convincing "when the publisher's allegations are so *inherently improbable* that only a reckless man would have put them in circulation . . . [or] where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* (emphasis added).

²⁸⁹ See *infra* text following note 400.

be made without also including an assessment of the social importance of inquiry into the subject matter of the defamatory speech. This is a lesson of the common law²⁹⁰ and the Supreme Court's refusal to draw upon that lesson means that the constitutional fault requirement may not serve its function of "shield[ing] the press and broadcast media from the rigors of strict liability for defamation."²⁹¹

3. Conclusion

The Supreme Court's efforts, begun in *New York Times*, to fashion a coherent body of defamation law that responds to both the interests in free speech and in protecting reputation have failed and have actually contributed to the current increase in libel litigation. The Court's failure can be traced to the new, increased number of defamation standards and to the lack of integration of constitutional and common law doctrine. Modern defamation law is overly confusing.²⁹² All else being equal, this confusion is most likely to cause courts to leave the decisionmaking to juries, and juries are likely to entertain an anti-media bias.²⁹³

III. REFORMULATING THE AMERICAN LAW OF DEFAMATION

The labyrinth of conflicting common law and constitutional rules that surrounds defamation today is unacceptable. Legal thought about defamation since *New York Times Co. v. Sullivan*²⁹⁴ has been dominated by the large issue, the fundamental clash between speech and reputation, and not enough energy has been devoted to the more technical tasks of straightening out defamation rules so that they have some chance of actually reflecting whatever balance between reputation and speech is finally struck. The law of defamation should be streamlined, simplified, stripped of internal contradictions, and generally made more coherent. If nothing else, common law rules and constitutional rules should be made sufficiently compatible so that neither plaintiffs nor defendants stand to gain from the confusion alone.

The cultural and doctrinal bias discussed in the previous section²⁹⁵

²⁹⁰ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173-74 (2d Cir. 1947).

²⁹¹ *Gertz*, 418 U.S. at 348.

²⁹² Cf. Winfield, *supra* note 110, at 15 (the "same qualities that make libel litigation so exasperatingly imprecise and so interesting suggest that the quality of advocacy has a disproportionate effect on the outcome of a case").

²⁹³ See *supra* notes 41-46 and accompanying text.

²⁹⁴ 376 U.S. 254 (1964).

²⁹⁵ See *supra* text accompanying notes 82-293.

and the empirical evidence of a rejuvenation of the American libel law²⁹⁶ demonstrate that confusion in the law has resulted in a benefit to defamation plaintiffs. If such a benefit in fact resulted from clear, reformulated standards, it would be a welcome reflection of constitutional doctrine and state policy, rather than a random reflection of shifting attitudes about reputation and the media. The reforms suggested below are proposed in the hope that they will aid in clearing up the confusion that has plagued the law of defamation and help to ensure that decisionmakers in defamation suits properly weigh all of the interests involved in such suits.

Four basic reforms will be suggested: a new context public-figure standard, revitalized common law conditional privileges, a uniform set of common law standards that integrates relevant constitutional standards, and the abolition of punitive damages.

A. *The Context Public Figure: A Formula for Flexibility*

Perhaps the most critical element of necessary reform for the law of defamation is a new flexibility in the application of the public figure test. A more flexible and rational application of the test established by *Gertz v. Robert Welch, Inc.*²⁹⁷ is possible even while retaining its basic policies. Ironically, the framework for this flexibility is supplied by borrowing from the common law system.

1. The Common Law Privileges

Long before *New York Times*, the common law protected certain speech by recognizing conditional privileges if a functional inquiry into the social importance of the speech viewed in the context of the relationship between the speaker, listener, and victim made it important for the community to encourage the speech and discourage liability for false statements arising from it.²⁹⁸

Common law conditional privileges, unlike the public figure doctrine of *Gertz*,²⁹⁹ do not attach to speech about certain individuals; nor do they follow the path of the Supreme Court plurality in *Rosenbloom v. Metro-Media, Inc.*³⁰⁰ of protecting particular topics of speech in

²⁹⁶ See *supra* text accompanying notes 41-46.

²⁹⁷ 418 U.S. 323 (1974).

²⁹⁸ The common law privileges, in existence long before *New York Times*, were created out of the common law's own developing sense that in certain recurring factual situations values of free and open communication should transcend concern for reputation. See Eaton, *supra* note 230, at 1359-64.

²⁹⁹ See *supra* notes 57-65 and accompanying text.

³⁰⁰ 403 U.S. 29 (1971); see *supra* note 56 and accompanying text.

which there is a strong public interest. Rather, common law conditional privileges attach to particular "occasions," or contexts of communication.³⁰¹

A conditional privilege exists to make statements for the protection of one's own legitimate interests, such as statements made to defend one's reputation in response to attack by another, or statements made in connection with the retrieval of stolen property, or in the course of collecting a bona fide debt.³⁰² The privilege is roughly analogous to the common law privilege to defend oneself from physical attack and the privilege to defend property.³⁰³ Just as the self-defense privilege is lost if excessive force is used, this conditional defamation privilege is traditionally regarded as lost if the speaker says more than is reasonably necessary to defend his or her interest.³⁰⁴ The protection is also lost if the speaker publishes the speech beyond the audience to whom the self-defensive action would be relevant.³⁰⁵ For example, the privilege is lost if one complains to another that a third party will not pay a debt, when the listener is in no position to render legitimate assistance in obtaining payment.³⁰⁶ Again, the analogy to the self-defense and defense-of-property privileges is apt, for excessive publication parallels the use of excessive force in self-defense of person or property. The common law conditional privilege also has been considered to have been abused, and thus lost,³⁰⁷ if the speaker acted with ill will or malice³⁰⁸ in the communication or did not believe or have any reasonable grounds for be-

³⁰¹ See RESTATEMENT, *supra* note 115, ch. 25 scope note & §§ 593-598A.

³⁰² See *id.* at § 594; W. PROSSER, *supra* note 49, § 115, at 785-87.

³⁰³ See RESTATEMENT, *supra* note 115, at §§ 63, 68, 77-86; W. PROSSER, *supra* note 49, § 114, at 776.

³⁰⁴ See RESTATEMENT, *supra* note 115, at §§ 605-605A.

³⁰⁵ See *id.* at § 604; W. PROSSER, *supra* note 49, § 115, at 787.

³⁰⁶ See W. PROSSER, *supra* note 49, § 115, at 787.

³⁰⁷ For one current formulation of what can constitute abuse of a conditional privilege sufficient to entail the loss of that privilege, see RESTATEMENT, *supra* note 115, at §§ 599-605A.

³⁰⁸ See, e.g., *Hardee v. North Carolina Allstate Servs., Inc.*, 537 F.2d 1255, 1259-60 (4th Cir. 1976); *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373, 1379-80 (D. Mass.), *aff'd mem.*, 636 F.2d 1199 (1st Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); see also W. PROSSER, *supra* note 49, § 115, at 794-95.

The common law was and still is somewhat confused and imprecise in its use of the term "malice" as a standard for abuse of common law privilege where the showing of abuse is actually grounded on the basis "that the privilege is lost if the publication is not made primarily for the purpose of furthering the interest which is entitled to protection." *Id.* at § 115, at 795 (citing RESTATEMENT (FIRST) OF TORTS, § 603 (1938)); see also RESTATEMENT, *supra* note 115, § 603 comment a. This original confusion surrounding the use of the term malice has only been compounded by the use of the term "actual malice" (meaning reckless or intentional disregard for the truth) as the standard for abuse or loss of the constitutional privilege of *New York Times* and *Gertz*.

believing the truth of the defamatory statement.³⁰⁹

The common law also recognizes a conditional privilege to make statements for the protection of the legitimate interests of another, particularly when the speaker's relationship with the protected party entails a moral or legal obligation to render protection.³¹⁰ This privilege finds a parallel in the common law privilege to use force to protect the safety of another. The defamation privilege protects speech in a wide variety of situations.³¹¹ As in the case of the conditional self-interest privilege, the privilege to protect another's interests is lost if the publication extends beyond the scope necessary to defend the interest.³¹²

³⁰⁹ The basic formulation of the common law appears to be that the privilege is lost if the speaker knows the statement is false or lacks probable cause for believing it is true. *Mercedes-Benz of N. Am., Inc. v. Finberg*, 58 A.D.2d 808, 809, 396 N.Y.S.2d 260, 262 (1977); see also *Zuschek v. Whitmoyer Laboratories, Inc.*, 430 F. Supp. 1163, 1166 (E.D. Pa. 1977) (privilege abused if defendant "does not believe in the truth of the statements" or "has no reasonable ground for so believing"), *aff'd mem.*, 571 F.2d 573 (3d Cir. 1978); W. PROSSER, *supra* note 49, § 115, at 795-96. Prosser describes this rule as a requirement "to act as a reasonable man under the circumstance." *Id.* at 796. That formulation has a negligence ring to it that is troublesome when one considers that *Gertz* already requires a negligence showing as a matter of course, at least in defamation suits involving the media. If negligence defeats the privilege and negligence is required for liability with or without the privilege then the privilege is meaningless. See *infra* notes 376-77 and accompanying text. The RESTATEMENT, *supra* note 115, attempts to remedy this problem by suggesting that the common law rule that the privilege is lost if the speaker "did not believe the statement to be true or lacked reasonable grounds for so believing," *id.* at § 600 comment a, be replaced by a standard of knowledge of falsity or reckless disregard as to truth, *id.* Universal adoption of this standard, perhaps even through a constitutional mandate like the *Gertz* mandate of a finding of fault for liability, would be a welcome development and would help to place common law privileges back in the position they enjoyed prior to *Gertz*. See RESTATEMENT, *supra* note 115, ch. 25, special note on conditional privileges and the constitutional requirement of fault; *infra* notes 373-83 and accompanying text.

³¹⁰ See, e.g., *Schlaf v. State Farm Mut. Auto. Ins. Co.*, 15 Ill. App. 2d 195, 145 N.E.2d 791 (1957); see also RESTATEMENT, *supra* note 115, at § 595; *Eaton, supra* note 230, at 1361.

³¹¹ For example, Prosser suggests that this privilege protects speech in the following circumstances: a warning to a woman that a prospective fiancée is an ex-convict; a doctor's statements to protect a patient; an attorney's statements on behalf of a client, and statements to a landlord that a tenant is undesirable. W. PROSSER, *supra* note 49, § 115, at 787-88; see also *Eaton, supra* note 230, at 1361 (stating that the privilege protects an answer to a prospective employer's inquiry concerning a person's fitness for a job).

There has been a long-standing controversy about whether the statements of credit reporting agencies are protected by this privilege. See W. PROSSER, *supra* note 49, § 115, at 790; *Smith, Conditional Privilege for Mercantile Agencies—Macintosh v. Dun*, 14 COLUM. L. REV. 187, 296 (1914) (supporting the privilege); Note, *Defamation and the Mercantile Agency*, 2 DE PAUL L. REV. 69 (1952) (supporting the privilege with a special standard of care); Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1050-51 & nn.85 & 87 (1971) (noting that all but two states that have considered the problem have granted the privilege).

³¹² See, e.g., *Cook v. East Shore Newspapers, Inc.*, 327 Ill. App. 559, 581-83, 64 N.E.2d 751, 761-62 (1945); W. PROSSER, *supra* note 49, § 115, at 788-89.

A conditional privilege exists when the speaker and recipient have common legitimate interests in a particular subject matter, and the communication is made in furtherance of those interests.³¹³ The privilege had its roots in cases in which there was a legal obligation to speak, such as communications by officers or directors of a corporation to stockholders,³¹⁴ but it has been expanded to encompass a broad range of situations in which persons with shared interests in organizations or enterprises exchange information relevant to that common activity.³¹⁵

The common law has long recognized a conditional privilege for speech that constitutes "fair comment" on the conduct of public officials.³¹⁶ This fair comment privilege in its original form applied to opinion and criticism rather than to misstatements of fact.³¹⁷ It therefore could be viewed not as a privilege but rather as a threshold means of ensuring that pure opinion was protected in all cases.³¹⁸ The fair comment privilege at common law was not limited solely to comment on the conduct of public officials, but also was applied to comment on matters of concern to the community such as the management of institutions and even private businesses whose operations had significant impact on the community.³¹⁹ For example, complaints made to school boards about the conduct or fitness of teachers have been held to be protected by this privilege.³²⁰

³¹³ See, e.g., *Judge v. Rockford Memorial Hosp.*, 17 Ill. App. 2d 365, 376-77, 150 N.E.2d 202, 208 (2d Dist. 1958); *Cook v. East Shore Newspapers, Inc.*, 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1945); see also W. PROSSER, *supra* note 49, § 115, at 789-90.

³¹⁴ See Eaton, *supra* note 166, at 1361.

³¹⁵ E.g., *Jamison v. Rebenson*, 21 Ill. App. 2d 364, 369, 158 N.E.2d 82, 84 (1959); W. PROSSER, *supra* note 49, § 115, at 789-91.

³¹⁶ E.g., *Foltz v. Moore McCormack Lines*, 189 F.2d 537 (2d Cir.), *cert. denied*, 342 U.S. 871 (1951); *Pecue v. West*, 233 N.Y. 316, 135 N.E. 515 (1922).

³¹⁷ See W. PROSSER, *supra* note 49, § 118, at 819-20; Eaton, *supra* note 230, at 1363.

³¹⁸ See Eaton, *supra* note 230, at 1363. Pure opinion is nonactionable in common law libel and is directly contradictory to the core of the *New York Times/Gertz* first amendment jurisprudence. Regarding this matter, the Court stated in *Gertz* that: "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." 418 U.S. at 339-40.

³¹⁹ See W. PROSSER, *supra* note 49, § 118, at 822-23.

³²⁰ E.g., *Segall v. Piazza*, 46 Misc. 2d 700, 260 N.Y.S.2d 543 (N.Y. Sup. Ct. 1965); W. PROSSER, *supra* note 49, § 115, at 792; cf. *Johnson v. Board of Junior College*, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1975) (applying the constitutional actual-malice standard to speech concerning a teacher's conduct on the theory that teachers are public figures within a school); *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir. 1974) (en banc) (applying absolute privilege to statements made about the fitness of a school teacher during an open executive session of a school-board meeting), *cert. denied*, 421 U.S. 965 *clarified*, 527 F.2d 611 (7th Cir. 1975).

2. The Context Public Figure

The "context public figure" concept is an attempt to extrapolate from the traditional common law privileges a notion that for most people speech concerning the neighborhoods, the workplaces, and other institutions in which they operate daily is more immediately vital than the speech that appears in the *CBS Evening News*, the *Washington Post*, or *Harper's*. There are national marketplaces of ideas and local marketplaces of ideas, and for most citizens the local marketplaces are usually where wide-open, robust, and uninhibited discussion is most relevant. Few people purposefully inject themselves into arenas of national attention, but many people involve themselves actively in events and controversies in their neighborhoods, their children's schools, and their workplaces. A professor at a law school, for example, is not likely to be a public figure as defined in *Gertz*, and an article in *Newsweek* about that professor should probably not be protected by the actual-malice standard. Within the law school community, however, that professor is a "public figure."³²¹ Statements in a student newspaper attacking the professor for poor teaching, bad scholarship, diffident public service, or arbitrary grading deserve the special protection of the actual-malice standard, just as statements made within the faculty committee reviewing the professor's application for tenure and promotion should be actionable only upon a showing of actual malice.³²² There are indications that, despite the near unanimity with which the states have ac-

³²¹ See *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973) (assistant dean and professor at a law school should be treated as a public figure); *Torgerson v. Minneapolis Star & Tribune*, 7 Med. L. Rep. (BNA) 1805 (D. Minn. 1981) (dean of law school held to be a public figure).

³²² In 1972 the *Arkansas Gazette* acquired documents allegedly prepared by six members of the faculty at the School of Law at the University of Arkansas at Fayetteville that cast doubt upon the teaching and scholarship of then assistant dean James Gallman. The *Gazette* ran an article detailing the intra-faculty dispute, and Gallman sued. The Arkansas Supreme Court stated with "no hesitancy" that Gallman, as an assistant dean and professor at a state law school, was a public official. *Gallman v. Carnes*, 254 Ark. at 992, 497 S.W.2d at 50.

The *Gallman* court apparently reasoned that among the slings and arrows of outrageous fortune one accepts in becoming an administrator and teacher at a state university law school is the risk of public debate concerning one's professional qualifications. Wide-open and robust communications relating to the qualifications of those who undertake to serve the state by educating its inchoate lawyers may often be unpleasant, but such communications serve the vital state interest of helping to ensure that a quality legal education is purchased (largely at state taxpayers' expense). Assistant Dean Gallman would certainly not have been a public figure in any national sense; commentary on his teaching is hardly the stuff of the *CBS Evening News*. Such commentary, however, is of significant local importance and deserves the special shelter of the *New York Times* standard when it is published in a newspaper limited almost exclusively to statewide circulation.

cepted *Gertz's* invitation to establish liability on a showing of negligence when a plaintiff is a private figure,³²³ many lower courts simply will not follow the drastically constricted definition of a public figure³²⁴ that the Supreme Court has adopted in *Time, Inc. v. Firestone*,³²⁵ *Wolston v. Readers Digest Association, Inc.*,³²⁶ and *Hutchinson v. Proxmire*.³²⁷ A number of courts have found school officials, teachers, and athletic coaches to be public figures over many different educational levels.³²⁸ In particular contexts, courts have quite appropriately found public-figure status for a wide variety of persons including a student class president,³²⁹ the head of an agricultural cooperative,³³⁰ a reputed mobster,³³¹ an undercover policeman,³³² a Roman Catholic

³²³ See *supra* note 161-64 and accompanying text.

³²⁴ See *supra* notes 239-74 and accompanying text.

³²⁵ 424 U.S. 448 (1976).

³²⁶ 443 U.S. 157 (1979).

³²⁷ 443 U.S. 111 (1979).

³²⁸ See, e.g., *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (professional basketball player); *Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (1978) (high school teacher); *Byers v. Southeastern Newspaper Corp.*, 161 Ga. App. 717, 288 S.E.2d 698 (1982) (dean of college); *Johnson v. Board of Junior College Dist. No. 508*, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1975) (junior college teachers); *State v. Defley*, 395 So. 2d 759 (La. 1981) (school superintendant and school supervisor); *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251 (1975) (high school principal); *Reaves v. Foster*, 200 So. 2d 453 (Miss. 1967) (school principal); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978) (grade school wrestling coach); *Grayson v. Curtis Publishing Co.*, 72 Wash. 2d 999, 436 P.2d 756 (1967) (college basketball coach).

³²⁹ *Henderson v. Kaulitz*, 6 Med. L. Rep. (BNA) 2409 (1981). The plaintiff in *Henderson* was president of his high school student senate, an announced candidate for the school board, and a counselor at a drug center. In a controversy surrounding the moving of the drug center, the plaintiff was held to have public figure status with regard to criticism about his stand on the drug-center issue. *Id.* at 2410.

³³⁰ *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

³³¹ *Rosanova v. Playboy Enters.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). This holding should be contrasted with *Wolston*. In *Rosanova* the court emphasized that the plaintiff "voluntarily engaged in a course [of organized crime] that was bound to invite attention and comment." 580 F.2d at 861 (quoting 411 F. Supp. at 445).

³³² *Cassidy v. ABC*, 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978). *Cassidy* is another lower court decision that contrasts interestingly with the Supreme Court's narrow view of what constitutes a public figure as set out in *Wolston*. *Cassidy* involved an undercover policeman who was filmed by Channel Seven News in Chicago, without his knowledge or consent, while in a massage parlor. The television station showed film depicting the undercover policeman gathering evidence in the massage parlor for arrests for solicitation of prostitution. The court held that the broadcasters were entitled to the *New York Times* defense, because the policeman was discharging a public duty. *Id.* at 837-38, 377 N.E.2d at 131-32: The press is protected under *New York Times* from privacy actions as well as libel actions, the court held, while engaged in gathering and disseminating news concerning an official's discharge of public duties. *Id.* at 838, 377 N.E.2d at 131-32. *Cassidy* is an interesting counterpoint to the Supreme Court's *Wolston* decision, in which alleged involvement in surreptitious antisocial behavior (spying for a foreign power) did not trigger *New York Times* protection. In combination, the

priest,³³³ a doctor,³³⁴ an author of pop psychology,³³⁵ a football player,³³⁶ a social worker,³³⁷ the head of a credit union,³³⁸ a former

two decisions create the anomalous possibility that a person engaged in secretive illegal activity—a mafia figure, drug smuggler, or Soviet spy—would have only to prove negligence in an action for defamation or invasion of privacy while the undercover governmental agent, working in secret opposition to that person, would have to prove *New York Times* malice.

To illustrate this anomaly, imagine that a concealed "action news mini-cam" films what appears to be a cocaine sale on a streetcorner, and the film is shown with commentary accusing the two principals of criminal activity. Unknown to the broadcaster, the would-be seller is actually an undercover Drug Enforcement Administration (DEA) agent trying to penetrate the higher levels of cocaine trafficking, and the other party is an underworld drug dealer. If the story ultimately turned out to be false and defamatory (perhaps there was no drug deal actually made or discussed on that day), the underworld figure would have a much stronger privacy or defamation action than the agent, who would be encumbered by the *New York Times* barrier. See *Meinens v. Moriarty*, 563 F.2d 343, 352 (7th Cir. 1977) (DEA agent held to be a public official); *Ethridge v. North Miss. Communications, Inc.*, 460 F. Supp. 347, 350 (N.D. Miss. 1978) (undercover narcotics agent held to be a public official). This anomaly strongly supports the holding in *Rosanova v. Playboy Enters.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) (discussed *supra* at note 331), that a reputed member of organized crime is a public figure. It is worth noting that police officers have usually been found to be public officials or figures. See, e.g., *Time, Inc. v. Pape*, 401 U.S. 279, 291-92 (1971) (deputy chief of detectives); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (deputy sheriff); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam) (city police chief and county attorney); *Meiners v. Moriarty*, 563 F.2d 343, 352 (7th Cir. 1977) (federal DEA agent); *Ethridge v. North Miss. Communications, Inc.*, 460 F. Supp. 347, 350 (N.D. Miss. 1978) (undercover narcotics agent); *Thuma v. Hearst Corp.*, 340 F. Supp. 867, 869 (D. Md. 1972) (police captain); *Rosales v. City of Eloy*, 122 Ariz. 134, 135, 593 P.2d 688, 689 (1979) (police sergeant); *Hines v. Florida Publishing Co.*, 7 Media L. Rep. (BNA) 2605 (Fla. Cir. Ct. 1982) ("moonlighting" policeman). *But cf. Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981) (undercover police informant is not a public official).

³³³ *McManus v. Doubleday & Co.*, 513 F. Supp. 1383 (S.D.N.Y. 1981).

³³⁴ *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969). Doctors have not fared as well as lawyers in libel litigation, making one suspicious that lawyers and judges may have an unconscious tendency to protect their own. A dissenting justice recently made this suggestion in an Arkansas Supreme Court case holding that a suspended lawyer was not a public figure with regard to reports about his bar examination results, despite his status as an officer of the court who had been suspended for a breach of the public trust. *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 640-41, 590 S.W.2d 840, 846 (1979) (Hickman, J., dissenting), *cert. denied*, 444 U.S. 1076 (1980).

³³⁵ *Harris v. Tomczak*, 94 F.R.D. 687 (E.D. Cal. 1982) (action brought by authors of *I'm Okay—You're Okay*).

³³⁶ *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979); *see also Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (professional basketball player).

³³⁷ *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978).

³³⁸ *Korbar v. Hite*, 43 Ill. App. 3d 636, 357 N.E.2d 135 (1976), *cert. denied*, 434 U.S. 837 (1977). *Korbar* is a good example of the context-public-figure approach. In *Korbar*, the plaintiff was the president of the Reynolds-McCook Employees' Credit Union. The defendant wrote an article in the *Aluminum Workers News* implying that the plaintiff was incompetent and stating that the plaintiff had in essence proclaimed "he could not care less" about the steel and aluminum workers' problems. *Id.* at 638,

president's personal friend,³³⁹ a woman who posed for a *Playboy* centerfold,³⁴⁰ and a belly-dancer.³⁴¹ Those decisions, which sometimes jump intermittently between constitutional and common law vocabulary, evidence a willingness to consider the public-figure notion more flexibly, in ways similar to the "context public figure" notion espoused here.

One particularly revealing application of the context-public-figure approach is a recent Illinois Supreme Court case that may quite radically alter the whole shape of the law of defamation in Illinois. It is worth examining in some detail for what it reveals about the potential flexibility of the public-figure concept. In *Colson v. Stieg*,³⁴² John Calvin Colson, an assistant professor in the Department of Library Science at Northern Illinois University, brought suit against Lewis Stieg, the chairman of the school's Library Science Department. Colson had accepted the position at Northern Illinois with the expectation that he would ultimately be granted tenure. Colson's tenure expectations were never realized, however, and it was Northern Illinois' denial of Colson's request for promotion and tenure that precipitated the suit against Stieg. Stieg had on two occasions stated to review committees that he had information which he could not divulge that reflected adversely on Colson's performance as a teacher. Colson learned of these statements

357 N.E.2d at 137. The court held that the statements were protected by the *New York Times* actual-malice standard because within the contours of the credit union's activities the plaintiff was a public figure. *Id.* at 640-42, 357 N.E.2d at 138-39. Looking to the nature and extent of the plaintiff's involvement in the controversy that gave rise to the alleged defamation, the Court noted, it was apparent that the plaintiff had thrust himself into the forefront of the dispute by virtue of running for and being elected president of the credit union. In so doing, he invited attention and comment within the institutional parameters in which the credit union operated. *Id.* at 642, 357 N.E.2d at 139.

Korbar is an eminently sensible opinion, for it is grounded in the commonsense notion that to the average aluminum worker, proper conduct by the president of a worker's credit union is probably as important to the worker's day-in and day-out livelihood and happiness as proper conduct by the President of the United States. Also, the *Aluminum Workers News* is likely to be as significant an informational source and forum for debate to that aluminum worker as the *New York Times* (or any other newspaper with a national circulation). Unless the *New York Times* privilege is understood as an elitist standard shielding the national corporate press, it seems obvious that to many average hardworking people localized trade or labor publications have just as strong a claim to first amendment protection as CBS News or the *Washington Post*. "Wide-open, uninhibited, and robust debate" is as strong a social value to most Americans in discussing mismanagement of a small-town credit union or small union pension fund as it is in discussing the mismanagement of the Federal Reserve Board.

³³⁹ *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981) (Bebe Rebozo, personal friend of former President Nixon), *cert. denied*, 454 U.S. 964 (1981).

³⁴⁰ *Vitale v. National Lampoon, Inc.*, 449 F. Supp. 442 (E.D. Pa. 1978).

³⁴¹ *James v. Gannett Co.*, 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976).

³⁴² 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

and sued Stieg for defamation.

The basic methodology of the Illinois Supreme Court's analysis in *Colson* was to treat the first amendment principles enunciated in *New York Times* as subsuming the privileges that the common law had previously evolved at a subconstitutional level, but then to ignore the more conservative limitations that the United States Supreme Court placed on those first amendment requirements in the wake of the cases that defined the content of the public-figure doctrine created in *Gertz*. *Colson* is in many ways a doctrinal throwback to the Warren Court era, a decision that cuts decidedly against the grain of United States Supreme Court decisions of the last eight years.

The court began its analysis of John Colson's defamation claim by noting that, since *New York Times*, the first amendment has taken over and altered a large part of the law concerning common law privileges.³⁴³ As a result of these first amendment "considerations,"³⁴⁴ the court stated, "the scope of the privileges has been broadened beyond that within which they had previously been recognized."³⁴⁵ The court then stated that the *New York Times* holding had "essentially replaced the common law qualified privilege . . . of 'fair comment.'"³⁴⁶ The fair-comment privilege "was not limited to public discussion of public officials or figures, but also extended to the discussion of matters of public concern."³⁴⁷ The court then noted with approval William Prosser's statement several years before the Supreme Court's decision in *Gertz* that "there is no reason the constitutional privilege of *New York Times* should not be extended to all matters of public concern."³⁴⁸

In these preliminary remarks, the court worked a clever bit of lawyering. The deliberate intermingling of the *New York Times* decision and the history of the fair-comment privilege served to lay the groundwork for the court's ultimate conclusion that Stieg's statements concerning Colson were protected by the *New York Times* privilege. The court linked the common law privilege of fair comment that it was ostensibly interpreting to the constitutional privilege established in *New York Times*. Then it subtly broke that link and generated an even more aggressive common law privilege when the constitutional doctrine became too restrictive. Although the court was surely correct in stating that the *New York Times* decision did supersede much of what had pre-

³⁴³ *Id.* at 209, 433 N.E.2d at 247-48 (citing Schaefer, *Defamation and the First Amendment*, 52 U. COLO. L. REV. 1 (1980)).

³⁴⁴ 89 Ill. 2d at 209, 433 N.E.2d at 248.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 210, 433 N.E.2d at 248.

³⁴⁸ *Id.* (citing with approval W. PROSSER, *supra* note 49, § 118, at 823).

viously been encompassed by the common law fair-comment privilege,³⁴⁹ the court was absolutely mistaken in its effort to distill from the United States Supreme Court's current jurisprudence the principle that the actual-malice standard should apply whenever the subject of the defamatory speech is a matter of public interest or concern.³⁵⁰ The Supreme Court in *Gertz* emphatically rejected the *Rosenbloom* test based on the public interest in the subject matter as the touchstone for the application of the first amendment privilege;³⁵¹ the Illinois Supreme Court's reincarnation of that test in effect mischaracterized federal constitutional law in the service of expanding Illinois common law.

The *Colson* opinion strongly emphasized the importance of avoiding self-censorship on controversial subjects. In order to accord the "breathing space" essential to the exercise of first amendment rights, the court observed, the actual-malice standard is imposed.³⁵² Applying that standard minimizes the chance that a speaker will forgo constitutionally protected speech rather than risk liability because his or her assessment of a given set of facts is subsequently determined to be wrong. In reaching an accommodation between the competing concerns of the first amendment and the state's interest in protecting reputation, the *Colson* court held, "the challenged statement must be assessed in the context in which it was published."³⁵³ Rather than focus exclusively on the public or private status of the person defamed, the *Colson* court focused on the statement, the audience, and the functional relationship between the two. Thus, the court emphasized that "whether or not one is defamed depends upon the effect the publication had upon those who received it," and that "[t]he focus therefore must be upon the statement and its predictable effect upon those who received the publication."³⁵⁴

This functional relationship analysis led easily to the invocation of a *New York Times*-style privilege. The publication of Stieg's comments concerning Colson was not made to the general public, but to a small, specialized group of committee members. The audience apparently consisted of four state employees charged with the duty of evaluating the academic performance of another state employee.³⁵⁵ This departmental personnel committee was thus involved in a matter of central importance to the function of Northern Illinois University, a public institution. It is certainly understandable that the Supreme Court of Illinois

³⁴⁹ 89 Ill. 2d at 209-10, 433 N.E.2d at 247-48.

³⁵⁰ See *id.* at 212-13, 433 N.E.2d at 249.

³⁵¹ *Gertz*, 418 U.S. at 346.

³⁵² 89 Ill. 2d at 212-13, 433 N.E.2d at 249.

³⁵³ *Id.* at 212, 433 N.E.2d at 249.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

would treat speech concerning the teaching ability of a professor at a state university as a matter important enough to require breathing space for free and uninhibited discussion. In the court's words, "[t]he need for the free flow of information and for vigorous and uninhibited discussion in a situation [involving tenure and promotion decisions] is such that the first amendment privilege defined in *New York Times* must apply to the publication of statements to this committee."³⁵⁶ Whether one accepts the first amendment pedigree of these concerns, the court's worries about self-censorship intuitively ring true. Most of us are not heroic. Without some degree of enhanced protection frank appraisals of teachers would not be forwarded to personnel committees;³⁵⁷ people are more likely to run the institutional risk of allowing persons they deem unqualified to be considered for promotion without objection if they must run the personal risk of a suit for defamation if a statement they make later proves false.

What is remarkable about the *Colson* opinion, however, is not the wisdom of its commonsense appraisal of the functional importance of Stieg's speech in relation to the personnel committee. Rather, it is the court's almost schizophrenic insistence that its opinion was based on the first amendment values expressed in *New York Times* and *Gertz*,³⁵⁸ while it simultaneously rejected completely the public figure/private figure distinction that *Gertz* and its progeny created. Thus, although the *Colson* court repeatedly phrased its holding squarely in terms of the first amendment—stating, for example, that “we find that the first amendment privilege of *New York Times* must be applied to the statement made by the defendant”³⁵⁹—the court also managed to remain totally unencumbered by the *Gertz* matrix.

The Illinois court's rethinking of the public-figure concept is persuasive because it is fully consistent with the two policy considerations articulated in *Gertz*. These considerations were a normative judgment about the types of persons who may properly be held to have assumed the risk of heightened public scrutiny and a more pragmatic judgment concerning the types of persons best equipped to counter defamatory statements through their own access to the media.³⁶⁰ *Colson* applied these two concepts in a manner that made them more relevant to the communications of everyday life.

The first rationale that the Supreme Court utilized to prop its de-

³⁵⁶ *Id.* at 213, 433 N.E.2d at 249.

³⁵⁷ *See id.*

³⁵⁸ *See id.* at 208-13, 433 N.E.2d at 247-49.

³⁵⁹ *Id.* at 213, 433 N.E.2d at 249 (emphasis added).

³⁶⁰ *Gertz*, 418 U.S. at 344.

cision in *Gertz*,³⁶¹ and the rationale that came to be heavily reemphasized in *Firestone*,³⁶² *Wolston*,³⁶³ and *Hutchinson*,³⁶⁴ was the normative judgment that one who seeks fame must accept some of its resulting outrageous slings and arrows; there is a certain equity to a rule that those who voluntarily enter and achieve either general or limited prominence in the public arena accept as a *quid pro quo* heightened public scrutiny and a greater risk of reputational attack. The "context public figure" concept recognizes that few Americans inject themselves into the public arena on a national level, thereby inviting scrutiny by national media outlets. Nor do most Americans inject themselves into local controversies of the sort that usually command the attention of the small-town newspaper or local television and radio stations. For the vast majority of citizens, it is still a rare event to be mentioned in a news article or broadcast. But events and controversies of interest to national or local media are by no means the only events and controversies that are both interesting and important to most Americans. Workplaces, schools, and churches are among the myriad institutions in which disputes constantly arise, and the ordinary citizen is frequently involved quite voluntarily in expressing views involving both fact and opinion within the context of such institutions. *Colson* recognizes that robust exchanges of information are essential to the functioning of such institutions, and that it is equitable to subject those who have power and who enter controversies in such institutions to the heightened scrutiny and criticism afforded by a defamation privilege with regard to matters affecting those institutions as long as the audience of the defamatory speech is also limited to those in the same contextual setting.

The second of the two analytic bases of the *Gertz* decision was the Court's belief that public officials and public figures enjoy greater access to channels of communication than do private citizens.³⁶⁵ Because public officials and public figures have a more realistic opportunity to parlay their notoriety into media access, they are more likely to be able to engage in self-help when defamed, by countering the defamatory speech with their own speech published through the same media channels as the original falsehood.³⁶⁶ The context public figure concept as developed in *Colson* accepts this analytic prop of *Gertz*, but shapes it to fit the realities of a more localized information market. Assistant Pro-

³⁶¹ *Id.*

³⁶² See *Firestone*, 424 U.S. at 456.

³⁶³ See *Wolston*, 443 U.S. at 164, 166-67.

³⁶⁴ See *Hutchinson*, 443 U.S. at 134-35.

³⁶⁵ *Gertz*, 418 U.S. at 344. Ironically, however, *Gertz* also noted that "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Id.*

³⁶⁶ *Id.* at 344.

fessor Colson, the court noted, had ample opportunity to present his own case before the very persons to whom the allegedly defamatory remarks were spoken.³⁶⁷ Whatever effect Stieg's remarks may have had on those charged with evaluating Colson's career, the remarks were not spoken in a vacuum: Colson could both offer his own counter-speech and appeal the initial decision of the department's personnel committee to a university-wide forum.³⁶⁸

³⁶⁷ 89 Ill. 2d at 214, 433 N.E.2d at 250.

³⁶⁸ *Id.* There is an unspoken interplay in *Colson* between Colson's opportunity to meet the impact of the allegedly defamatory remarks and procedural due process constraints on a state university's decision not to grant an assistant professor tenure and promotion. Under the Supreme Court's landmark decisions in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972), an untenured professor at a state university is entitled to no federal due process protection whatsoever unless the professor can demonstrate a state-created entitlement to continued employment. *Roth*, 408 U.S. at 577-78; *Perry*, 408 U.S. at 599, 601. A detailed discussion of *Roth* may be found in Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1983). For a review of the progeny of *Roth*, see, e.g., 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 350 (1979); J. ELY, DEMOCRACY AND DISTRICT 19 (1980); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 480-97 (1978); Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978); Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS, NOMOS XVIII 182 (J. Pennock & J. Chapman eds. 1977); Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS, NOMOS XVIII 126 (J. Pennock & J. Chapman eds. 1977); Monaghan, *supra* note 84; Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in DUE PROCESS, NOMOS XVIII 172 (J. Pennock & J. Chapman eds. 1977); Smolla, *supra*; Tushnet, *The New Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

Without undertaking a similarly detailed analysis here, one can safely say that the state of Illinois provided Colson with all (and probably more) of the procedural due process to which he was entitled under the United States Constitution. Since the real heart of Colson's *defamation* claim was that he was injured professionally by Stieg's remarks, in that they allegedly cost him his job and will injure his prospects at other colleges and universities, it would be anomalous if Colson could force Northern Illinois University through a defamation action to abide by a higher standard of accuracy in reaching personnel decisions about untenured faculty than the University would otherwise be subject to under mainstream doctrines of constitutional and administrative law.

Doctrines of procedural due process and defamation would be working at cross-purposes if a state university's supervisory personnel could be in full compliance with state and federal procedural due process dictates in handling a subordinate and yet still be subject to a tort suit for defamation arising from the same conduct, without the benefit of any conditional privilege in the tort suit. *Colson* thus may embody a sort of first amendment due process concept engrafted onto the common law of Illinois, for it treats the conditional-privilege concept as triggered to a large degree by the existence of built-in channels for counter-speech within the context of the original defamatory statements. This aspect of *Colson* was emphasized in an early Illinois appellate court decision applying *Colson*. See *American Pet Motels v. Chicago Vet Medicine Ass'n*, 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1982). A more thorough discussion of the relationship between the existence of state tort remedies and federal due process requirements

Intimately tied into this counter-speech notion in *Colson* is the repeated caveat that the conditional privilege recognized is itself conditioned on restraining the publication of the speech within the confines of the "localized market" within which the speech is of vital interest. Thus, the *Colson* court indicated that "[i]f the defendant in our case would have published the statement in question to the public in general, it is possible that the plaintiff would not have had sufficient access to the channels of communication to overcome or offset the damaging effect of defendant's statement."³⁶⁹ Although the court did not explicitly state that such an excessive publication would constitute abuse of the qualified privilege and loss of the advantage of the *New York Times* malice standard, it strongly intimated that such a result would follow.³⁷⁰

3. Conclusion

The *Colson* decision thus illustrates a more subtle application of the public-figure notion, an approach that courts in a number of states appear to be embracing.³⁷¹ By integrating common law privilege notions with *Gertz's* constitutional rule that media reports about public figures receive enhanced protection against libel claims, a new public-figure definition grounded in long-standing Supreme Court policy is possible. Advocacy of this context public figure concept, however, must come with a disclaimer. Although I believe that the context public figure notion ought ultimately to be incorporated into the set of first amendment rules set forth in *Gertz*, as a litigation strategy it may be preferable for defendants to frame the context public figure approach in both constitutional and common law terms. In light of the Supreme Court's current conservatism in its formulation of the public-figure doctrine there is a danger that any lower court that adopts a more flexible approach to the public-figure definition will be reversed on appeal. To the extent that the context public figure concept is treated as an elaboration on common law conditional privileges, however, this danger may be substantially diminished.³⁷²

may be found in Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies*: *Parratt v. Taylor* and *Logan v. Zimmerman Brush Co.*, 1982 U. ILL. L. REV. 831.

³⁶⁹ 89 Ill. 2d at 214, 433 N.E.2d at 250.

³⁷⁰ *Id.*

³⁷¹ See *supra* notes 328-41 and accompanying text.

³⁷² The most significant recent example of the perils of confusing state and federal law in the context of *New York Times* and its progeny come in the "human cannonball case," *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd*, 433 U.S. 562 (1977). *Zacchini* involved an entertainment act in

B. *Rediscovering the Common Law Privileges*

Conditional, common law privileges protect specific communica-

which Hugo Zacchini was shot from a cannon into a net 200 feet away, a performance that lasted 15 seconds from take-off to landing. A free-lance reporter filmed the act, after Zacchini had asked him not to. The film clip, lasting 15 seconds and including a favorable commentary, was televised on the local news that evening. The Supreme Court of Ohio held that, although state tort law recognized that Zacchini enjoyed a "right of publicity" regarding his performance, 47 Ohio St. 2d at 231-33, 351 N.E.2d at 459-60, the media enjoyed "a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private." *Id.* at 234, 351 N.E.2d at 461.

As in *Colson*, the Ohio court's opinion discussed both first amendment and common law concepts. The Ohio court, however, placed its principal reliance on United States Supreme Court opinions after *New York Times*, primarily *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The court stated that "the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether *First Amendment principles* require that the right of privacy give way to the right to be informed of matters of public interest and concern." 47 Ohio St. 2d at 234 n.5, 351 N.E.2d at 461 n.5 (emphasis added). The United States Supreme Court granted certiorari and reversed. 433 U.S. at 578-79.

Had the Ohio Supreme Court explicitly rested its decision on both state and federal grounds so that either would have been dispositive, the "independent and adequate state ground" doctrine, *see, e.g., Herb v. Pitcairn*, 324 U.S. 117, 123-24 (1945), would have precluded Supreme Court review of the decision. *Zacchini*, 433 U.S. at 566. The article III principle that federal courts may not render "advisory opinions," *see Herb*, 324 U.S. at 126, deprives the Supreme Court of jurisdiction to review a state-court judgment even if that judgment erroneously interprets federal law, whenever the significance of the error concerning federal law is obviated by a state law precept also invoked by the state court that will independently support the judgment. *See, e.g., Wilson v. Loew's Inc.*, 355 U.S. 597 (1958); *Herb*, 324 U.S. at 125.

The Supreme Court, in discussing the independent and adequate state ground issue, conceded that "[t]here is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law." 433 U.S. at 566. The Supreme Court further admitted that the "source of [the] privilege [relied on by the Ohio court] was not identified." *Id.* Nevertheless, the Supreme Court held that a careful reading of the Ohio court's opinion convinced it that the decision rested on the Ohio court's perceptions of federal constitutional law and not on an interpretation of Ohio law. The Supreme Court noted that the Ohio court's opinion was phrased in terms of first amendment principles, cited first amendment cases, and did not mention the Ohio Constitution. *Id.* at 568. "That the Ohio court *might* have, but did not, invoke state law," the Supreme Court stated, "does not foreclose jurisdiction here." *Id.* (emphasis added).

Far more critical to the tactics for attempting to implement a context public figure approach, however, was the following language included by the Court in *Zacchini*: "Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Id.* (emphasis added). In such a case, the Court held, it has jurisdiction to decide the federal issue. *Id.* The United States Supreme Court thus found jurisdiction to reverse the Ohio Supreme Court in *Zacchini*. Because the liberal jurisprudence that informs *Colson* is substantially inconsistent with the Burger Court's current retraction of first amendment defenses to defamation, it is probably wise strategy in light of *Zacchini* that decisions such as *Colson* be placed clearly on state law grounds.

tions that a state determines are particularly important to the community.³⁷³ At common law, the privilege was considered abused and lost by the defendant if there was excessive publication, common law malice, or in some states a lack of probable cause to believe the statement to be true.³⁷⁴

Although malice and excessive publication continue to be at least arguably relevant in determining abuse of privilege,³⁷⁵ the lack of probable cause (or negligence) does not continue to be a persuasive ground for concluding that a privilege has been abused. Because *Gertz* has prohibited liability for defamation without fault, conditional privileges are meaningless, unless they require conduct more culpable than negligence before they are lost.³⁷⁶ When strict liability was the operative law, a conditional privilege that protected certain speech by shielding from liability a defendant who was not negligent was reasonable, because requiring proof of negligence added a new burden to the plaintiff's case. *Gertz*, however, requires a similar showing of fault (or negligence) before there can be liability in any case.

In order for the common law to continue to offer special protection to certain types of speech in the post-*Gertz* era, conditional privileges should be rebuttable only by malice, and not by mere negligence.³⁷⁷ The question of how to define malice sufficient to rebut a common law conditional privilege remains. Should the plaintiff be required to prove the defendant's express malice of personal ill will as required at common law, or the actual-malice standard used in constitutional cases since *New York Times*?

One could plausibly argue that ill-will malice is more appropriate, on the reasoning that the standard developed by the common law should be used for common law privileges, while use of the constitutional standard should be limited to constitutional privileges. The ostensible symmetry of that view, however, obscures the confusion inherent in its scheme. The law of defamation will evolve much more coherently if ill-will malice is discarded altogether, and the knowing or reckless disregard of the truth standard is used for all conditional privileges,

³⁷³ See *supra* notes 298-320 and accompanying text.

³⁷⁴ C. MORRIS, *supra* note 98, at 42.

³⁷⁵ But see *infra* notes 378-83 and accompanying text (arguing that the existence of common law malice should no longer result in loss of a privilege).

³⁷⁶ See *supra* notes 156-59 and accompanying text.

³⁷⁷ See RESTATEMENT, *supra* note 115, ch. 25 special note on conditional privileges and the constitutional requirement of fault; cf. C. MORRIS, *supra* note 98, at 48 ("*Gertz* requires at least negligence for liability but *permits* the states to use [*New York Times* malice to determine whether or not a conditionally privileged defendant has abused his privilege." (emphasis in original)).

whether their pedigree is common law, constitutional, or both.³⁷⁸

There are at least two grounds to support this unified standard. First, because the purpose of a common law privilege is to protect speech that furthers interests to which the law attaches special importance,³⁷⁹ it should not matter whether the speaker acts out of ill will if the speech furthers those interests, as long as the speaker does not know the statements are false, and does not recklessly disregard indications of their falsity.³⁸⁰ For example, the common law grants a conditional privilege for a call to a police station reporting that a neighbor has committed a crime, because the law favors the reporting of crime.³⁸¹ As long as the speaker does not act with knowledge of falsity or with reckless disregard for the truth, the social interest in the report, even if it turns out to be false, requires that it not be actionable. The social interest is only diminished if the speaker is knowingly or recklessly lying to the police. If the caller is not intentionally or recklessly fabricating the report, the social interest is in no way lessened because the caller happens to hate the neighbor or because the caller makes the report with a perverse relish. In cases involving constitutional privilege, ill-will malice is not enough to defeat the qualified privilege of *New York Times*, precisely because of this reasoning.³⁸² The editor of a newspaper may hate with the darkest of hearts the politician lambasted by the newspaper, but that hate does not subtract from the first amendment value of the speech and, unless the editor knowingly or recklessly defamed the politician, no liability exists. This is not to say that *evidence* of ill will is inadmissible, for it may be highly probative of whether the speaker knew the communication was false or was so blinded by spite as to act recklessly. But the ultimate fact to be proved should be knowledge of falsity or reckless disregard for the truth.

The second reason for unifying constitutional and common law malice standards is simplicity. Constitutional and common law privileges often coexist in the same case, and the existence of more than one definition of malice can only bewilder juries (and possibly the judges and lawyers who try to explain the differences to them). Rather than

³⁷⁸ For an example of a hybrid privilege employing the actual-malice standard, see *Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

³⁷⁹ See W. PROSSER, *supra* note 49, § 115, at 785-92.

³⁸⁰ Ill-will malice has long been criticized as an imprecise formulation of the concern that privileges not be abused. See *supra* note 308.

³⁸¹ In *Baker v. Mann*, 276 Ark. 278, 280, 634 S.W.2d 125, 126 (1982), the court found that a letter sent by a mayor and five members of the city council to a prosecuting attorney concerning possible police misconduct was conditionally privileged.

³⁸² See, e.g., *Hirman v. Rogers*, 257 N.W.2d 563, 566-67 (Minn. 1977); see also *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 83-85 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

maintain diverging standards in the part-constitutional, part-common law field of defamation, one comprehensive standard should be established whenever possible, so that neither plaintiffs nor defendants can unfairly exploit ambiguity and confusion.

Requiring the plaintiff to allege and prove actual malice—knowing or reckless disregard for the truth of the statement—in cases protected by conditional privileges³⁸³ would both restore the hierarchy of specially protected types of speech that the common law has traditionally recognized and help to clear up the confusion in defamation law by the adoption of a unified standard for the rebuttal of both constitutional and common law conditional privileges.

C. *Standards for Evaluating the Defendant's Conduct*

Defamation law could be greatly improved and simplified by focusing attention on the standards that govern a defendant's conduct. The content of the fault standard, the inappropriate standard for evaluating works of fiction, and a confusing duplication of standards should be reevaluated and necessary changes should be made.

1. Applying the Learned Hand Negligence Formula to Defamation

The *Gertz* requirement that there be no liability without fault requires some core constitutional content to the term fault.³⁸⁴ Although the Court in *Gertz* made no effort to define fault,³⁸⁵ there is absolutely no reason to believe that the Court had anything in mind other than the traditional "ordinary reasonable person" standard as it has evolved in the negligence branch of tort law. If conventional tort notions of fault are what the *Gertz* Court had in mind, then the need to examine to some degree the content and context of the speech remains alive, despite the official repudiation of such thought in *Gertz*.³⁸⁶ An assessment of the social utility of the speech involved is implicit in the fault calculation employed by the common law.

The statement in *Gertz* that there can be no liability in a defamation action without a finding of fault has drawn attention primarily on

³⁸³ A similar result is suggested in the RESTATEMENT, *supra* note 115, § 600, but that result is reached through somewhat different means, *see supra* notes 308-09.

³⁸⁴ *See supra* text following note 278.

³⁸⁵ *See Gertz*, 418 U.S. at 347-48 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

³⁸⁶ *See id.* at 346.

the question whether it applies to nonmedia cases as well as cases with media defendants.³⁸⁷ Relatively little thought has been given to defining the contours of the fault standard itself. Cases such as *Firestone v. Time, Inc.*,³⁸⁸ however, lead to a suspicion that the negligence requirement as applied to defamatory speech has not been applied with much intellectual rigor.³⁸⁹ Whereas tort theorists have amassed in recent years an impressively rich body of scholarship exploring in detail the meaning of negligence—an effort that has triggered substantially more thoughtful and sophisticated opinions from the bench in areas such as products liability³⁹⁰—and whereas constitutional theory has progressed with some detail in defining the knowing or reckless disregard of the truth standard of *New York Times*,³⁹¹ judicial opinions do not evidence any comparably serious attempt to elaborate on the meaning of simple negligence in a defamation action.³⁹² Thus, as much as *Gertz* may have eliminated the applicability of the public-interest standard in determining the level of fault to be applied, *Gertz* actually invited inquiry into the degree of public interest as part of the fault calculation once that level is determined. What the Supreme Court did not realize, and what many lower courts continue to fail to realize, is that the traditional formula for determining negligence liability cannot be meaningfully employed in an action for defamation without plugging in some measure of the social utility of the subject matter of the defamatory communication.

Judge Learned Hand's classic formula for determining whether conduct is negligent, as set forth in his famous *United States v. Carroll Towing Co.*³⁹³ decision, is a function of three variables: the probability of injury, the gravity of the injury, and the burden of adequate precautions. Liability exists when the burden of preventing the injury's occurrence (B) is less than the loss suffered (L) multiplied by the probability of occurrence (P); that is, when B is less than $P \times L$.³⁹⁴ The *Restatement* adopts the same essential calculus, stating that an "act is negligent

³⁸⁷ See *supra* notes 141-59 and accompanying text.

³⁸⁸ 424 U.S. 448 (1976).

³⁸⁹ See *supra* notes 280-85 and accompanying text.

³⁹⁰ See generally Wade, *On Product "Design Defects" and their Actionability*, 33 VAND. L. REV. 551, 554-66 (1980) (short survey of the development of products liability law with a discussion of major cases).

³⁹¹ See, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (defendant must have entertained "serious doubts as to the truth of his publication").

³⁹² Judge Richard Posner has made a brief but interesting start on the development of an economic theory of defamation in an article that focuses primarily on the right to privacy. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFFALO L. REV. 1, 30-41 (1979).

³⁹³ 159 F.2d 169 (2d Cir. 1947).

³⁹⁴ *Id.* at 173.

if the risk is of such magnitude as to outweigh what the law regards as the utility of the act."³⁹⁵ Elaborating on the concept of social utility, the *Restatement* lists three factors: (1) the social value that the law attaches to the interest that is to be advanced or protected by the conduct; (2) the probability that the conduct actually will advance that interest; and (3) the extent that the interest can be advanced by some less dangerous course of conduct.³⁹⁶

If the negligence minimum set by *Gertz* is to be applied conscientiously, some effort must be made to translate these negligence formulas into terms that are meaningful in the context of defamation. The application of such algebraic thinking to speech issues is not unfamiliar in our jurisprudence: Judge Hand himself applied a variation of his *Carroll Towing* formula when he interpreted the "clear and present danger" test as an issue of "whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger."³⁹⁷ The Supreme Court accepted Hand's formulation, legitimizing the use of cost/benefit theory in first amendment analysis.³⁹⁸ Because this approach to liability is both conventional tort methodology and a legitimate component of first amendment thinking, it seems ideally suited for use in defamation, the principal area in which first amendment and tort analyses coalesce.

Yet, court opinions evidence almost no systematic consideration of the negligence formula in defamation cases. Assessments of negligence are almost always one dimensional, tending to focus only upon the extent to which the defendant thoroughly investigated the truth of what was said prior to publishing the defamatory communication.³⁹⁹ Often, the carelessness in investigation is extrapolated almost completely from the fact of falsity itself, in a sort of unspoken application of *res ipsa loquitur*, on the reasoning that ordinarily one does not publish false and damaging information about another unless there has been a failure to investigate properly. If the negligence test is correctly applied to defamation, however, the thoroughness of investigation is merely one

³⁹⁵ RESTATEMENT, *supra* note 115, § 291.

³⁹⁶ *Id.* at § 292.

³⁹⁷ *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). See generally Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

³⁹⁸ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-70 (1976); *Dennis v. United States*, 341 U.S. 494, 510 (1951) ("We adopt [the Learned Hand] statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time."). But see *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1166-67, 1183-86 (1970).

³⁹⁹ See, e.g., *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

factor in a larger equation. Also, the extent of investigation is itself necessarily dependent upon the interplay of a number of factors that in combination yield the total burden of more complete investigation.⁴⁰⁰

It is impossible to talk intelligently about negligence in a defamation case without making a judgment about the social importance of the speech involved. Since the *Restatement* explicitly requires consideration of the social utility that the law attaches to an act as part of the measurement of an actor's negligence, some weighing of the utility of speech is implicit. The utility of the act of communicating or publishing a statement naturally depends upon the utility of the content of the statement. Any weighing of the utility of speech must be done cautiously, to minimize the potential for offending first amendment values, because it apparently contemplates content-sensitive prioritization of speech. The *Restatement* speaks boldly of evaluating negligence by weighing the "nature" of the interests a defendant is seeking to promote by publishing the communication, explaining that "[i]nforming the public as to a matter of public concern is an important interest in a democracy," while "spreading of mere gossip is of less importance."⁴⁰¹ This type of first amendment elitism suggests the problems already identified in this Article that result from the blurring of the line between news and entertainment.

The inquiry into the social utility of the speech at issue is further complicated by two statements in *Gertz* that may hopelessly polarize the weighing process. *Gertz* states that under the first amendment "there is no such thing as a false idea."⁴⁰² Two sentences later, however, the *Gertz* opinion also declares that "there is no constitutional value in false statements of fact."⁴⁰³ If these two platitudes are accepted literally, there seems to be little room for the type of assessment of the importance of the speech that the Learned Hand formula and the *Restatement* would require. If the speech involved is a false statement of fact, *Gertz* defines its social utility as zero. If we expect to measure, not the value of the particular facts that are false and defamatory (those facts with zero value), but rather the value of discussion about the subject matter within which the defamatory facts were contained, we run squarely into the first *Gertz* maxim that there is no such thing as a false idea.

The *Restatement's* common sense solution to this conundrum has been largely ignored, and deserves new attention. The *Restatement*

⁴⁰⁰ See *infra* notes 404-09 and accompanying text.

⁴⁰¹ RESTATEMENT, *supra* note 115, § 580B comment h.

⁴⁰² 418 U.S. at 339.

⁴⁰³ *Id.* at 340.

seems to suggest that courts make a functional appraisal of the entire context of the offending speech, including the relationship of speaker, speech, audience, and victim, in much the same way that they determine whether "legitimate interests" justify the application of common law privileges to a certain context.⁴⁰⁴ Similarly, there is no reason why many of the subtleties that are applied to assessments of fault in other tort cases cannot also be used for defamation. The seriousness of the allegation, for example, ought to be a primary touchstone in judging the gravity of the harm. The harm to Mary Alice Firestone in describing the grounds for her divorce as cruelty and adultery, for example, should be regarded as greater than an allegation that she lies about her age, but less than an allegation that she is a murderer.⁴⁰⁵ This self-evident proposition should not merely be a factor taken into account to mitigate damages;⁴⁰⁶ it should be part of the underlying calculation of fault. More duty to investigate is required as the allegations become more damaging, because the law should encourage greater expense on prevention of damages as the potential harm from defamation increases. Similarly, the element of time should be considered in assessing fault.⁴⁰⁷ Less care ought to be required in a fast-breaking story whose value to society depends on immediate publication than is required for a story that is planned and developed without any special time constraints,⁴⁰⁸

⁴⁰⁴ The comment to section 580B of the *Restatement* states:

The constitutional requirement of fault on the part of the defendant may be held to extend beyond the defendant's ascertainment of the truth or falsity and the defamatory character of the statement to other elements of the defamation action such as excessiveness of publication. If this happens, then it seems likely that the determination of fault in this regard will supplant the common law method of balancing the conflicting interests of the parties by establishing a system of qualified privileges protecting the promotion of particular interests and of "abuses" of the privileges by using them in an improper fashion.

RESTATEMENT, *supra* note 115, § 580B comment l.

⁴⁰⁵ *Id.* at § 580B comment h ("A third factor is the extent of the damage to the plaintiff's reputation or the injury to his sensibilities that would be produced if the communication proves to be false.").

⁴⁰⁶ See, e.g., *Firestone*, 424 U.S. at 460-61 (content of *Time's* defamatory statement is considered in determining the extent of the damage to Mrs. Firestone).

⁴⁰⁷ RESTATEMENT, *supra* note 115, § 580B comment h.

⁴⁰⁸ It is interesting to contrast this approach to whether a defamatory statement has been negligently published with Justice Blackmun's analysis in his concurring opinion in *Wolston*:

This analysis implies, of course, that one may be a public figure for purposes of contemporaneous reporting of a controversial event, yet not be a public figure for purposes of historical commentary on the same occurrence. Historians, consequently, may well run a greater risk of liability for defamation. Yet this result, in my view, does no violence to First Amendment values. While historical analysis is no less vital to the marketplace of ideas than reporting current events, historians work under different condi-

because the cost of not publishing a particularly timely story (largely a first amendment cost) is properly considered a burden when evaluating negligence.⁴⁰⁹

In light of the strong tendency for strict liability values to slip surreptitiously into the law of defamation,⁴¹⁰ a new seriousness when evaluating whether conduct is negligent in a defamation action is an important element in developing consistency in this area of the law.

2. New Standards for Evaluating Fiction

The modern law of defamation is particularly unresponsive to fiction as a form of communication. In evaluating fiction when claims of defamation are raised, courts seem ready to conclude that the supposed fiction is actually a depiction of a real person. Having taken that step, the barriers that would normally impede recovery for a nonfiction work—standards of intent, or the nonactionability of opinion—have quickly come tumbling down.⁴¹¹

The objective in devising a coherent approach to handling libel claims in fiction should be to create a standard that would give fiction the same rough quantum of constitutional and common law protection enjoyed by nonfiction. Because the same verbal formulation under *New York Times* and *Gertz* is applied to both fiction and nonfiction, there is a surface equality in the treatment they receive. The equivalency, however, is spurious, because it inherently tends to produce liability when applied to fiction. One might argue that fiction deserves this fate, because it is, after all, a lie, and there is no first amendment value to false statements of fact.⁴¹² But that argument is wholly unpersuasive, and it is doubtful that courts, if they reflected on the point, would maintain

tions than do their media counterparts. A reporter trying to meet a deadline may find it totally impossible to check thoroughly the accuracy of his sources. A historian writing *sub specie aeternitatis* has both the time for reflection and the opportunity to investigate the veracity of the pronouncements he makes.

Wolston, 443 U.S. 157, 171 (Blackmun, J., concurring).

Although Justice Blackmun's observations about the level of care that ought to be expected from historical reporting as opposed to daily (or weekly) news reporting are consistent with the level of care advocated by me, Justice Blackmun has confused the analysis of the defendant's conduct with the determination of the plaintiff's public-figure status. Cf. *supra* text following note 286 (majority in *Wolston* failed to analyze the defendant's standard of care properly).

⁴⁰⁹ RESTATEMENT, *supra* note 115, § 580B comment h ("Was the communication a matter of topical news requiring prompt publication to be useful, or was it one in which time and opportunity were freely available to investigate?").

⁴¹⁰ See *supra* notes 127-64 and accompanying text.

⁴¹¹ See *supra* notes 200-24 and accompanying text.

⁴¹² *Gertz*, 418 U.S. at 340.

that fiction grounded in reality is undeserving of treatment substantially the same as that applied to nonfiction depicting the same reality. Fiction is a critical component in a robust and open culture. It may help a reader escape or transcend reality, or it may incisively explore reality. Authors portray life in an infinite variety of ways for an infinite variety of reasons, among them the search for truths deeper than what surface facts reveal.⁴¹³ Fictional portrayals are drawn with infinite gradations of grace and skill. Courts need just enough literary insight to realize that they are not literary critics, and would be poor judges if they tried to be.⁴¹⁴ Regardless of the perceived quality of the work at issue, courts should ensure that it receives approximately the same level of insulation from liability that would apply to information about the same subject if it were written as something other than fiction.

The problem, however, is to come up with legal words that accomplish this result. One recurring suggestion is to give fiction an absolute privilege against liability.⁴¹⁵ It is possible to rationalize such an absolute privilege by arguing that all fiction is properly classified as "pure idea" which cannot ever be either true or false.⁴¹⁶ But that rationalization goes too far. An absolute privilege would not provide equivalent protection for fiction and nonfiction, it would instead remedy the present imbalance by a counter-imbalance of its own. Some safety-valve is required to allow defamed plaintiffs legal recompense when the fictional garb of a work is nothing but a sham employed to shield intentional reputational attacks.⁴¹⁷

The better nominee for handling the problem of libel in fiction is to use the same knowing or reckless disregard standard employed by *New York Times*, but to change the focus of the inquiry from the author's culpable knowledge of reckless disregard of *truth or falsity*, to a culpable knowledge or reckless disregard *that the ordinary reasonable reader would conclude that the author intended the reader to understand the events described in the work as depictions of real life*

⁴¹³ See Silver, *supra* note 195, at 1066-70.

⁴¹⁴ Cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.") (Holmes was warning against judges selecting, on the basis of their personal preferences, what works of art were worthy of copyright.).

⁴¹⁵ See Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, *supra* note 195.

⁴¹⁶ See *Gertz*, 418 U.S. at 339 ("We begin with the common ground. Under the First Amendment there is no such thing as a false idea.").

⁴¹⁷ See *Franklin & Trager*, *supra* note 195, at 223-25; *Wilson*, *supra* note 195, at 44-46.

events.⁴¹⁸ There is absolutely no harm in an author drawing characters and events from real life, *even if those characters are readily identifiable as actual people*, as long as the author does not attempt to identify his or her fantasy as reality. As long as the ordinary reasonable reader is not led into believing that what is packaged as fiction is meant to be taken as fact, conventional first amendment and common law doctrine should make the work nonactionable. As a matter of first amendment jurisprudence, speech that is neither intended nor understood as factual should fall into the realm of "ideas," which *Gertz* flatly declares cannot be "false."⁴¹⁹ There is no better example of "idea" than fantasy, whether it be the dreams in our minds or the dreams we commit to paper. Similarly, even if the fictional character is clearly understood as depicting an actual person, as a matter of common law doctrine, linkage in identity is not enough. The communication must also be defamatory, and it cannot be defamatory as a matter of law if the ordinary reasonable reader would not treat the *actions* of the character as real, even if the reality of the *character* is conceded.⁴²⁰

⁴¹⁸ Professor Wilson proposes a thoughtful solution to the libel in fiction problem which centers on three questions: (1) Has the plaintiff been identified to his or her detriment? (2) Is the work fiction? (3) Was the characterization intended to defame the plaintiff? Wilson, *supra* note 195, at 43-49. My approach is quite similar to Professor Wilson's, and certainly my general disposition toward increasing the law of libel's protection for fiction exactly parallels hers. Professor Silver's evocative essay on this problem similarly voices sentiments with which I agree. Silver, *supra* note 195. I would emphasize even more, however, the need to superimpose upon the normal inquiries required by the common law, the standards of fault set forth in *New York Times* and *Gertz*, altered so as to focus primarily on the question whether the author has intentionally or recklessly (assuming a public figure plaintiff) misled the reader into treating fiction as if it were fact. See Wilson, *supra* note 195, at 46-47.

⁴¹⁹ *Gertz*, 418 U.S. at 339.

⁴²⁰ For example, consider the Cardinal Cody hypothetical discussed *supra* at notes 202-17 and accompanying text. Even if everyone who reads *The Cardinal Sins* identifies the fictional Cardinal as the real John Cody, there would be no actionable harm as long as a reasonable reader also understands that Greeley did not intend that the reader believe that Greeley is claiming that Cody actually ever did what Greeley has publicly fantasized about him doing.

The one type of work that my proposal admittedly handles somewhat poorly is a work where the writer *admits* that he or she desires to confuse the reader by making it impossible to separate real people and events from fictitious people and events, precisely because that confusion enhances the particular message or effect the author is hoping to achieve. A fascinating example is provided by the "disclaimer" that appears at the beginning of Frederick Forsyth's novel, *The Odessa File*:

As in the case of Mr. Forsyth's first novel, *The Day of the Jackal*, many characters in *The Odessa File* are real people. Some will be immediately recognized by the reader; others may puzzle the reader as to whether they are true or fictional, and the publishers do not wish to elucidate further because it is in this ability to perplex the reader as to how much is true and how much false that much of the grip of the story lies.

Nevertheless, the publishers feel the reader may be interested or as-

An approach to works of fiction similar to the approach advocated here was taken by the court in *Pring v. Penthouse International, Ltd.*⁴²¹ The court of appeals in *Pring* considered a fictional story about the experiences of Miss Wyoming at a Miss America Pageant. The court concluded that there was sufficient evidence to support the jury's decision that the story was "about the plaintiff, . . . of and concerning her as a matter of identity."⁴²² The court held, however, that despite the identity the story was not libelous because it could not be understood to describe actual events in the plaintiff's life.⁴²³

If the law of defamation does not adopt this type of adjustment, litigation concerning fiction will inevitably be reduced to two questions on which many important works will be abject losers: the question of identity and the question of falsity. Because the whole intent of much fiction drawn from reality is to create an identity linkage and then intentionally "falsify" reality by fantasizing about it, a reduction to only the issues of identity and falsity results in wholly unwarranted liability for libel.

3. Sensible Standards

Defamation standards would be more coherent if there were only one legally relevant definition of malice and if defamation standards were the same for all defendants. Common law conditional privileges should be available to protect the defendant unless the plaintiff can make a showing of actual malice—knowing or reckless disregard for the truth.⁴²⁴ Malice in the sense of personal ill will or spite should be erased from the vocabulary of defamation law. Two separate malice standards lead only to confusion and arbitrary decisionmaking. Adoption of actual malice as the unified standard for loss of both constitutional and common law conditional privileges will make the law easier to understand and will lead to well-considered decisionmaking in defa-

sisted to know that the story of former SS Captain Eduard Roschmann, the commandant of the concentration camp at Riga from 1941 to 1944, from his birth in Graz, Austria, in 1908 to his present exile in South America, is completely factual and drawn from SS and West German records.

F. FORSYTH, *THE ODESSA FILE* (1972). Forsyth and his publishers, of course, probably felt they had little to fear, for few Nazi war criminals are likely to come out of hiding to sue for libel. But the problem does remain that when the confusion is known, and yet is vital to the message conveyed, first amendment protection ought to be provided. Exactly how one's disclaimer should read, however, remains troublesome.

⁴²¹ 695 F.2d 438 (10th Cir. 1982).

⁴²² *Id.* at 439.

⁴²³ *Id.* at 442-43.

⁴²⁴ See *supra* notes 373-83 and accompanying text.

mation cases.

A unified standard for liability for media and nonmedia defendants would also help to make defamation law more coherent. Under *Gertz* media and nonmedia defendants may be held to different standards of liability for defamation.⁴²⁵ Apparently, courts may continue to impose strict liability principles in those cases involving nonmedia defendants.⁴²⁶

If the United States Supreme Court does finally face this issue squarely, it should hold that the minimum standards imposed by *Gertz* do apply to nonmedia defendants. First, there is a certain elitism to the notion that speech published by media outlets is more hallowed than speech published by ordinary persons and enterprises. Whether the speaker is a preacher on the pulpit or a bartender behind the spigot, such communication is as much a part of our first amendment tradition as the information that appears on the op-ed page of the Sunday paper. In cases involving private plaintiffs and private defendants, the *Gertz* requirement of a showing of fault⁴²⁷ ensures the proper breathing space for routine speech that is critical to a free society.

Second, establishing a two-tiered law of defamation, with one set of rules for the media and another for the nonmedia, needlessly complicates an already bewilderingly complex area of the law. Finally, a double standard forces courts to make the difficult choice, fraught with first amendment peril, of deciding who qualifies for the preferred position of media status. Would the "media" encompass only the mainstream corporate press, or would it also include the underground radical flyer, the pamphlets of special-interest groups, or the intermittently published student newspaper? Picking and choosing between publications worthy of *Gertz* protection would involve courts in a content-sensitive status game that is antithetical to the egalitarian marketplace of ideas that the first amendment contemplates.⁴²⁸

⁴²⁵ See *supra* notes 141-55 and accompanying text.

⁴²⁶ See *supra* notes 141-47 and accompanying text.

⁴²⁷ *Gertz*, 418 U.S. at 347.

⁴²⁸ The literature on the question whether the institutional press deserves special first amendment protection is quite extensive. See, e.g., Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979); Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Blanchard, *The Institutional Press and its First Amendment Privileges*, 1978 SUP. CT. REV. 225; Eaton, *supra* note 530; Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979); Lange, *supra* note 143; Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); Nimmer, *supra* note 143; Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655 (1979); Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979); Shiffrin, *supra* note 143; Van Alstyne, *The First Amendment and the Free Press: A Comment*

D. Damages

Prior to the Supreme Court's involvement in the common law of defamation, damages were usually available to plaintiffs who were able to prove that they were defamed without any required showing of special damages or economic loss.⁴²⁹ The Supreme Court has now addressed the question of damages in *Gertz* and *Firestone*, providing a constitutional dimension to the availability of punitive⁴³⁰ and compensatory⁴³¹ damages. *Gertz* allows punitive damages to be awarded only after the plaintiff has met the actual-malice standard.⁴³² In suits by public officials, this means that after *Gertz* punitive damages may be awarded by juries *any time* a plaintiff proves a *prima facie* case. Similarly, if one takes the position that I have advocated⁴³³ and applies the actual-malice test to determine whether a common law privilege has been abused, punitive damages would be available as a matter of course when a privilege has been lost. Thus, *Gertz*, which elevated defamation liability standards, is likely to result in the award of punitive damages as a matter of course when liability is proved. In light of the increasing awards for libel⁴³⁴ and the general attitude of the public toward the media, such a general availability of punitive damages may substantially chill the exercise of first amendment rights.

One alternative to current law is to allow punitive damages only when the plaintiff, in addition to proving actual malice, proves common law ill-will malice. The disadvantages to this approach, however, are the same as those that led to my proposal that ill-will malice be eliminated as a ground for abuse of conditional privileges.⁴³⁵ Having two definitions of malice extant in the same litigation is an invitation to distorted verdicts and judgments handed down by baffled juries. Emphasis on the existence of ill will might result in accidental liability in some cases in which the defendant did not knowingly or recklessly disregard the truth. Conversely, a defendant who does act with actual malice might manage to escape liability by emphasizing the lack of ill

on *Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1 (1980); Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977); Comment, *Problems in Defining the Institutional Status of the Press*, 11 U. RICH. L. REV. 177 (1976).

⁴²⁹ See *supra* note 98 and accompanying text.

⁴³⁰ *Gertz*, 418 U.S. at 348-50.

⁴³¹ *Firestone*, 424 U.S. at 460-61; *Gertz*, 418 U.S. at 349-50.

⁴³² *Gertz*, 418 U.S. at 350 ("The private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.").

⁴³³ See *supra* note 373-83 and accompanying text.

⁴³⁴ See *supra* note 41-46 and accompanying text.

⁴³⁵ See *supra* notes 373-83 and accompanying text.

will and trying to obfuscate the difference between the malice standards.

More important than these difficulties, however, is the fact that the court in *Firestone* stated that compensatory damages may constitutionally include reimbursement for "personal humiliation [and] mental anguish and suffering" in addition to the value of the damage to reputation.⁴³⁶ Based on this expansive notion of compensatory damages, I contend that there is no strong social interest served by allowing the award of punitive damages. The elements of permissible compensatory damages are incapable of any exact proof and, therefore, are pliable enough to permit juries to punish particularly egregious misconduct in the occasional case that warrants it. Because it is likely that juries have always looked primarily at the seriousness of the falsehood and the culpability of the defendant's conduct when awarding large punitive damages, the principal effect of eliminating such damages is to streamline defamation litigation by eliminating multiple standards of fault and giving courts greater control over juries.

IV. CONCLUSION

The major problem confronting any court or commentator who sets out to evaluate honestly the current state of the law of defamation is that it is almost impossible to avoid reducing the entire discussion to one simple proposition: "Whatever is added to the field of libel is taken from the field of free debate."⁴³⁷ The protection of reputation and the protection of free expression are natural antagonists. The substance of a responsive accommodation between reputation and free-expression will depend upon essentially unanchored value choices concerning the relative worth of reputation and expression in American culture. I have attempted, as best I can, to transcend this central conflict by applying a "logic of simplicity" to a body of law that is peculiarly sensitive to cultural forces.

Having recognized in empirical data an emerging rejuvenation of defamation law in the 1980's, I have set out to explain that rejuvena-

⁴³⁶ *Firestone*, 424 U.S. at 458; see also *Gertz*, 418 U.S. at 350 ("[A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."); cf. RESTATEMENT, *supra* note 115, § 623 ("One who is liable to another for a libel or slander is liable also for emotional distress and bodily harm that is proved to have been caused by the defamatory publication.").

⁴³⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)(quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir.) (Edgerton, J.), *cert. denied*, 317 U.S. 678 (1942)).

tion on the basis of cultural and legal trends extant in today's society. It appears that the rejuvenation is based at least in part upon a tendency of Americans to value more highly the sanctity of individuals' reputations and inner peace. The trend in tort law to favor strict liability for the sake of compensation and risk spreading over fault notions of liability may be reflected in the current libel law rejuvenation despite the express prohibition of any such strict liability by the Supreme Court. Moreover, the blurring of the line between news and entertainment in today's communications and publications may itself create situations in which large libel verdicts for plaintiffs are more likely than they would be if news were news and entertainment were entertainment. Finally, the relatively recent constitutionalization of the law of libel has made the typical defamation suit even more confusing than it was at common law. The Supreme Court, by allowing multiple standards where unified ones could be applied, by failing to define adequately the standards it has established, and by generally failing to synchronize constitutional law with common law, is largely responsible for the confusion.

Out of concern that confusion should not be the basis for a major shift in legal outcomes, I have attempted to outline a number of reforms for the law of defamation that would help clear up the confusion and lead to decisions in defamation cases that more accurately reflect the interests in free speech and in reputation that are involved in those cases. I have suggested a new context public figure standard that would follow the lesson of the common law and grant the constitutional privilege established in *New York Times Co. v. Sullivan*⁴³⁸ on the basis of the overall context of the speech rather than on the somewhat arbitrary basis of who the plaintiff is. Wherever possible, multiple standards for similar issues in defamation suits should be unified: the actual-malice standard should apply for the loss of both constitutional and common law conditional privileges; and the *Gertz* requirement of fault should apply to cases involving nonmedia as well as media defendants. The fault requirement of *Gertz* needs to be more clearly defined, relying on the Learned Hand formula to balance the risks of given conduct against its social benefits and by defining better what those risks and benefits are in the context of defamation. The rules for liability for defamation in works of fiction should be altered so that ideas expressed through fiction are granted roughly the same degree of protection from incurring defamation liability as that granted to ideas expressed through nonfiction. Finally, punitive damages should be abolished in defamation cases. Compensatory damages in defamation cases are broad and plia-

⁴³⁸ 376 U.S. 254 (1964).

ble enough to vindicate the personal and social interests at stake in those cases.

Although I have found it impossible to escape completely the approach of defamation articles that focus almost exclusively on the constitutional issues,⁴³⁹ I have tried to proceed in the first instance descriptively, by simply cataloguing the conscious and unconscious factors that have had an important influence on the current law of defamation, and have ventured only secondarily into prescriptive judgments, and then primarily with an eye toward simplification and internal consistency. If in the end there has been some duplicity in my approach, and I am no better than Iago, so be it: it still seems more true than not that we have lost no reputation at all, unless we repute ourselves such losers.

⁴³⁹ See Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979). My discussion of defamation has, at times, admittedly resembled Marc Tushnet's ascerbic but brilliant indictment of the "standard" modern article on constitutional law: The author describes recent Supreme Court cases and their antecedents (*New York Times*, *Gertz v. Robert Welch, Inc. v. Firestone*, *Hutchinson v. Proxmire*, *Wolston v. Reader's Digest*), notes difficulties in their internal logic (the application of the public figure doctrine is inconsistent), makes observations that the more recent cases are somewhat inconsistent with prior decisions (*Wolston* is not the inevitable product of *Gertz* or *New York Times*), suggests modifications in the prevailing doctrine (adjust the public figure formulation to make more persons public), and concludes that what is needed is a balancing test with the balance struck usually being a modestly liberal position espousing roughly the ideology of the moderate left of the Democratic Party. See *id.* at 1322.