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Of Malice and Men: The Law of Defamation

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INTRODUCTION

> The First Amendment protects the right to debate vigorously the issues of the day and to avoid stifling that debate, we accord wide latitude to authors and publishers. Yet the freedom of the press, like all rights, carries with it responsibilities. One of these is not to abuse the public trust by knowingly or recklessly publishing [defamatory] falsehoods.[1]

The common law tort of defamation reflects the long-standing interest in protecting reputation. In the ninth century, the Laws of Alfred the Great provided that public slander was "to be compensated with no lighter a penalty than the cutting off of the slanderer's tongue."[2] Although modern remedies are considerably less severe, the common law of England and the United States has always provided remedies for defamation.[3] The separate development of the law in each of the states has been with "no particular aim or plan" and has exacerbated the inherent inconsistencies in the law of defamation.[4] The law of defamation thus "contains anomalies and absurdities for which no legal writer ever has had a kind word."[5]

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1. Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 903 (9th Cir. 1992).

2. Colin R. Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053 (1962) (quoting from the Laws of Alfred the Great).

3. *See* RODNEY A. SMOLLA, THE LAW OF DEFAMATION § 1.02 (1986) [hereinafter SMOLLA].

4. *Id.* § 1.01 (citing W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984)).

5. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, 771 (5th ed. 1984) [hereinafter PROSSER & KEETON] ("There is a great deal of the law of defamation which makes no sense.").

First Amendment interests in freedom of speech have added to the anomalous development of the law. For nearly two hundred years, however, the Supreme Court considered defamation to be unprotected speech[6] and thus the business of state courts and legislatures.[7] The Court did not impose limits on liability for defamation until the landmark case of *New York Times Co. v. Sullivan*.[8] In *New York Times*, the Court held that public officials could not recover for defamation unless they proved the defendants had acted with constitutional malice.[9] The Court used the term "actual malice," but this Article opts for the term "constitutional malice" to avoid confusion with common law malice, which may be as "actual" as the malice of the Court's definition.[10]

In the quarter-plus century since *New York Times*, the Supreme Court has decided twenty-seven defamation cases, averaging about one a year.[11] The Court has struggled to find a reasonable balance between protecting reputation and protecting free speech by fashioning rules of general applicability in order to provide certainty and predictability and to avoid chilling free speech.[12] The Court has generally avoided analysis of the subject matter of allegedly defamatory statements and has instead focused on the plaintiff's status. The plaintiff status approach requires a determination of differing degrees of defendant culpability, depending on whether the plaintiff is a public official, public figure, or private individual.

This Article argues that courts have failed to achieve certainty and predictability in defamation law. Recent changes in membership on the Supreme Court, and the possibility of more to come, may add more confusion and inconsistency to the law of defamation. This Article focuses on issues arising in cases in which the defendants are media entities or in cases that have implications for media defendants. Part I examines the competing interests protected by the First Amendment and defamation law, outlines the common law

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6. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

7. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369-70 (1974) (White, J., dissenting).

8. 376 U.S. 254 (1964).

9. *Id.* at 279-80.

10. *See* Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2430 (1991). The Court stated that the term "actual malice" can confuse as well as enlighten. In this respect the phrase may be an unfortunate one. *Id. See also* Harte-Hanks Communications v. Connaughton, Inc., 491 U.S. 657, 666 n.7 (1989) ("actual malice" is a confusing term because it has nothing to do with bad motives or ill will). Constitutional malice means publishing a defamatory statement with knowing falsity or reckless disregard of the truth or falsity of the statement. *New York Times*, 376 U.S. at 279-80. Common law malice is defined as hate, spite, or ill will.

11. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 n.2 (1991) [hereinafter Anderson, *Reforming*].

12. *See, e.g.*, *Gertz*, 418 U.S. at 343, 346 (case-by-case analysis unwise); *New York Times*, 376 U.S. at 277 (fear of damage awards chills speech).

of defamation, and discusses the major cases imposing constitutional limits. Part II investigates the effect of Supreme Court decisions in the lower courts and argues that the plaintiff status approach adequately protects neither reputational nor free speech interests. Part III proposes basing liability in defamation on traditional negligence theory with a heightened inquiry into the defendant's duty of care. This Article concludes that the suggested approach will better balance the competing interests and be more likely to compensate deserving plaintiffs while having a minimal chilling effect on speech.

I. THE COMMON LAW, THE FIRST AMENDMENT, AND THE SUPREME COURT

Courts and commentators have examined endlessly the interests protected by defamation law, those protected by the First Amendment, and the obvious tension between liability for defamation and freedom of speech. The diverse conclusions concerning precisely what we want to protect and the importance of the protection hinders a synthesis of the interests and contributes to the inconsistency of the law.

A. Reputation Interests Versus Free Speech Interests

1. The Rationale of Protecting Reputation

"Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."[13] The right of an individual to maintenance of his or her 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."[14] Reputation is a dignitary interest worthy of protection apart from any other harm that might attach. Additionally, specific types of harm resulting from damage to the reputation justify legal protection.[15]

Reputational damage involves the loss of esteem in the eyes of others, a threat to existing and future relations with third persons, a threat to an existing positive public image, and the potential for development of a negative public image for one with no previous public reputation. Loss of reputation may also result in lowered self-esteem and personal integrity and may lead to public embarrassment, humiliation, and mental anguish. Defamation law allows a plaintiff to mitigate these damages by setting the record straight in a public

13. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

14. *Id.* at 92 (Stewart, J., concurring).

15. *See* SMOLLA, *supra* note 3, § 1.06, at 1-15; Leon Green, *Relational Interests*, 31 ILL. L. REV. 35, 36 (1936-37); David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 767 (1984) [hereinafter Anderson, *Reputation*].

forum.[16] A defamed individual may also suffer and be compensated for direct economic injury, such as the loss of a job, contract, or client. Direct losses are usually more easily proved than dignitary injuries. In addition to compensating defamed individuals, damages for defamation, particularly punitive damages, deter others from publishing false statements. Damages also provide a check on the media by subjecting news gathering and decision making processes to scrutiny through the judicial process.[17]

2. The First Amendment Protections of Free Speech

First Amendment protections are not absolute, but rather require balancing against other societal interests, such as the deterrence of defamatory publications.[18] The First Amendment provides "principally although not

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16. *See* Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 791-92 (1979) [hereinafter Ingber, *Defamation*]. Awarding damages for emotional distress presents difficulties in terms of proof and the possibility of fraud on the court, particularly in light of a presumption of damages for these harms. SMOLLA, *supra* note 3, at 1-16. Damages for emotional distress have often been limited to the related torts of invasion of privacy and intentional infliction of emotional distress. *Id.* § 1.06[3]. *But see* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (damages for emotional distress in defamation action).

17. SMOLLA, *supra* note 3, § 1.06[5]-[6] at 1-17 to 1-18; *see also* Herbert v. Lando, 441 U.S. 153 (1979) (plaintiff may use discovery to examine editorial process to elicit evidence of malice).

18. The First Amendment's prohibition against congressional action "abridging the freedom of speech or of the press" applies to state action by incorporation through the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). The Speech and Press Clauses have different origins and are aimed at differing interests. For example, in addition to the right to publish, freedom of the press involves the right to gather the news. For a fuller discussion of the Speech and Press Clauses, see David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 466-67 (1983).

Several courts and commentators have compared the apparent absolute terms of the First Amendment that Congress shall make *no* law with the more permissive language of other constitutional provisions, such as the Fourth Amendment's prohibition against *unreasonable* searches and seizures. *See* RONALD D. ROTUNDA ET AL., 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.7, at 19 (1986) [hereinafter ROTUNDA, TREATISE]. Justice Black was perhaps the most consistent voice on the Court arguing for an absolutist position. *Id.* at 20-22; MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.01 (1984) [hereinafter NIMMER, FREEDOM OF SPEECH]. Black asserted that the First Amendment means literally no law without any "ifs" or "buts" or "whereases." Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting); *see also* Edmund Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962). Black also wrote:

> I do not subscribe to that doctrine [that permits First Amendment rights to be "balanced away" whenever the Court finds a sufficient state interest] for I believe . . . that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field . . . . [T]he very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control . . .
> . . .
> . . . [T]he creation of "tests" by which speech is left unprotected under certain

exclusively, immunity from previous restraints or censorship."[19] Injunctions against speech are therefore rare, but subsequent civil or criminal action may chill speech and thus create self-imposed prior restraints.

Protecting speech serves several purposes. All other constitutional freedoms depend on the freedom of speech.[20] The free flow of information in the "marketplace of ideas" ensures the vitality of a democratic government, provides a check on governmental abuse, and aids in the choices among competing opinions and options.[21] Freedom of speech also acts as a safety valve, reducing the incidence of more destructive modes of expressing

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circumstances is a standing invitation to abridge it.

Konigsberg v. State Bar 366 U.S. 36, 61-63 (1961) (Black, J., dissenting). Justice Douglas often took an absolutist position, but waffled considerably during his time on the Court. *Compare* Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) (freedom to speak is not absolute) *with* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 156 (1973) (Douglas, J., concurring) (ban of "no" law is "total and complete") *and with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 357 n.6 (1974) (Douglas, J., dissenting) (no need to decide if First Amendment prohibits all libel action because case involved public affairs).

An unyielding absolutist position would render prosecution for perjury, antitrust violations, fraud, copyright violations, and some conspiracies, among other crimes, unconstitutional. *See* NIMMER, FREEDOM OF SPEECH, *supra*, § 2.01, at 2.5. Even Justice Black recognized the limits of the First Amendment, characterizing some expression as conduct rather than speech. *See, e.g.*, Cohen v. California, 403 U.S. 15, 27 (1971) (Black, J., joining in Blackmun's dissent) (obscene message on jacket is conduct, therefore unprotected); Street v. New York, 394 U.S. 576, 610 (1969) (Blackmun, J., dissenting) (flag burning is conduct). By using "conduct" as a code word for expression that for some unarticulated reason offends the sensibilities, *see* NIMMER, FREEDOM OF SPEECH, *supra*, § 2.01, Black engaged in balancing interests more covertly, but no less in fact, than did others. ROTUNDA, TREATISE, *supra*, § 20.7 at 22; Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 482 (1964).

19. Near v. Minnesota, 283 U.S. 697, 716 (1931); *see also* New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

20. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (free speech essential to "discovery and spread of political truth"); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (free speech is the "matrix, the indispensable condition of nearly every other form of freedom"); *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948) (principle of free speech "springs from the necessities of the program of self-government").

21. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (best test of truth is power to get accepted in marketplace); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (opinion by Learned Hand) (First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues . . . . To many this is, and always will be, folly; but we have staked upon it our all."). Some argue that the First Amendment protects *only* political speech, *see, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971), while others would extend protection to all forms of speech while giving political speech greater protection, *see, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 552-58, 631.

dissatisfaction.[22]

The right to free expression also promotes self-fulfillment, personal growth, and self-realization.[23] An individual with no realistic chance to enlighten others or prevail in the marketplace may feel personal satisfaction even in the face of a hostile crowd.[24] Many consider this function, or result, of the freedom of speech to be of paramount importance.[25]

In balancing the interests protected by free speech with other interests, the Supreme Court historically has employed a "definitional" balancing analysis, in which it balances general types of speech and societal interests, resulting in a categorical identification of unprotected speech.[26] States may regulate unprotected speech, including defamation, provided the regulation is not vague or overbroad and thus it reaches speech the state is not permitted to regulate. States may also impose time, place, and manner restrictions on protected speech, provided the restrictions are content neutral and only incidentally burden speech.[27]

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22. *See Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring) (safety in opportunity to discuss grievances; fear of social disorder not sufficient to justify suppression of speech; "[m]en feared witches and burnt women"); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941) (freedom of speech averts force and explosion).

23. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 n.2 (1980); Cohen v. California, 403 U.S. 15, 24 (1971); *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring); *see also* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 33 (1948) (right to free speech is vital if "life is to be worth living"); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (ensuring personal growth and self-realization is a major function of First Amendment).

24. NIMMER, FREEDOM OF SPEECH, *supra* note 18, § 1.03, at 1-49 to 1-50.

25. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting); *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (self-realization values are more important than enlightenment); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (value to individual, self-realization).

26. *See* NIMMER, FREEDOM OF SPEECH, *supra* note 18, §§ 2.02, 2.03, at 2-9 to 2-24; Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983). The definitional balancing has led to the identification of several categories of unprotected speech, including defamation, incitement, obscenity, invasion of privacy, and, possibly, fighting words. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). For more recent developments in this categorical approach, see Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement); Hess v. Indiana, 414 U.S. 105 (1973) (incitement); Miller v. California, 413 U.S. 15 (1973) (obscenity); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (fighting words); Gooding v. Wilson, 405 U.S. 518 (1972) (fighting words).

27. *See* Colautti v. Franklin, 439 U.S. 379, 389-90 (1979) (vagueness); United States v. O'Brien, 391 U.S. 367, 379 (1968) (time, place, and manner); NAACP v. Button, 371 U.S. 415, 432-33 (1963) (overbreadth).

B. The Defamation Cause of Action and Constitutional Limits

1. The Common Law Cause of Action

a. Elements of a Cause of Action in Defamation

Prior to the constitutionalization of defamation law, the prima facie case in a majority of the states required a showing of unprivileged publication of false and defamatory matter concerning the plaintiff.[28] A defamatory statement might have been either a statement of fact or a statement of opinion based on known, assumed, or undisclosed facts, that tended to harm the reputation of another, lower the other in the eyes of the community, or deter the other's association with third persons.[29] Publication was communication of the statement, intentionally or negligently, to a person other than the one defamed. Each republication, either by the original publisher or by another, was actionable as an original communication.[30] The defendant was held in strict liability; neither mistake nor lack of intent concerning truth or falsity or the defamatory nature of the statement constituted a defense.[31]

Libel, defined as defamation by written word or other means of potentially long life and wide dissemination, was actionable under common law standards without a showing of special, pecuniary damages.[32] Slander, defamation by spoken word, required a showing of special damages unless it fell within one of the four slander per se categories. Those categories were imputing a criminal offense, loathsome or venereal disease, conduct incompatible with one's profession, or--in the case of women--acts of unchastity.[33]

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28. RESTATEMENT (FIRST) OF TORTS § 558 (1938); *see e.g.*, Britton Mfg. Co. v. Connecticut Bank & Trust Co., 125 A.2d 315 (Conn. Super. Ct. 1956).

29. RESTATEMENT (FIRST) OF TORTS §§ 565-67, 559 (1938); RESTATEMENT (SECOND) OF TORTS § 559 (1977). The group in whose eyes the victim is defamed must be a "non-outlaw" group; it is not enough if the group is "one whose standards are so antisocial that it is not proper for the courts to recognize them." RESTATEMENT (FIRST) OF TORTS § 559 cmt. e (1938); RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

30. RESTATEMENT (FIRST) OF TORTS §§ 577-78 (1938); RESTATEMENT (SECOND) OF TORTS §§ 577(A)-78 (1977); *see, e.g.*, Burney v. Southern Ry., 165 So. 2d 726, 729 (Ala. 1964) (requires communication to third party); Larkin v. Gerhardt, 157 N.E.2d 424, 426 (Ill. App. Ct. 1964) (republication).

31. RESTATEMENT (FIRST) OF TORTS §§ 579-80 (1938); LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION ch. 1, § 5, at 14-15 (1978).

32. RESTATEMENT (FIRST) OF TORTS §§ 568, 575 (1938). Defamatory radio or television broadcasts are also libel. RESTATEMENT (SECOND) OF TORTS § 568A (1977).

33. RESTATEMENT (FIRST) OF TORTS §§ 570-75 (1938). A plaintiff proving libel or slander per se could recover nominal damages with no showing of actual reputational damage. *Id.* §§ 570-75, 569 cmt. c. The Second Restatement reflects less sexist attitudes by removing the gender specificity of unchaste acts and making any untruthful allegation of "serious sexual misconduct" slander per se. RESTATEMENT (SECOND) OF TORTS § 574 (1977).

b. Common Law Defenses in Defamation Actions

The common law recognized truth and consent as absolute defenses in an action for defamation. Absolute privilege was given to judges and judicial officers making statements concerning matters before them; parties, witnesses and jurors in a judicial proceeding; members of Congress and state legislatures making statements in the course of their duties; and spouses' communications with one another were also afforded absolute privilege.[34]

Conditional privileges, which included protections of sufficiently important interests of the publisher, the recipient, a third person, or the public, could be lost if abused.[35] Forms of abuse of conditional privileges included a lack of belief in the truth of the statement, acting to advance purposes other than the legitimate purpose for which the privilege was given, and publication to a wider audience than necessary.[36] A conditional privilege playing an important role in the development of constitutional limitations on defamation actions was the privilege of fair comment. Fair comments were statements concerning persons and their actions that were of public concern. They included comments about public officials, criticisms of objects of art and science, indirect criticism of a person through product or enterprise disparagement, and reports of judicial, legislative, or executive proceedings.[37]

c. Burdens of Proof and Roles of Judge and Jury

The plaintiff bore the burdens of production and persuasion with respect to the defamatory nature of the statement, the publication by the defendant, and the fact that the statement was "of and concerning" the plaintiff. In addition, the plaintiff was required to prove the recipient's understanding of the defamatory nature of the statement, the recipient's understanding that the statement was of and concerning the plaintiff, special harm, and abuse of a conditional privilege.[38] Most jurisdictions permitted a presumption of falsity, although the plaintiff was required to plead falsity. The defendant had the burden of proving truth, consent, and the existence and furtherance of an interest protected by a conditional privilege.[39]

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34. RESTATEMENT (FIRST) OF TORTS §§ 582, 583, 585-92 (1938). A minority of jurisdictions made truth a conditional defense that the plaintiff could overcome by showing malicious motive or publication without justifiable end. *Id.* § 582 cmt. a and special note.

35. *Id.* §§ 594-95, 598-99. Sufficiently important interests included pecuniary, business, and family interests, but not idle gossip. *Id.* § 594 cmt. e.

36. *Id.* §§ 600-601, 603-05.

37. *Id.* §§ 607-11.

38. RESTATEMENT (FIRST) OF TORTS § 613 and cmt. a (1938).

39. *Id.*

The roles of the judge and jury were sharply, if sometimes inexplicably, defined. The judge determined whether a statement was capable of defamatory meaning, but the jury determined whether the recipient understood the meaning to be defamatory. In cases involving slander per se, the judge determined whether an imputed disease or crime was of such a character to be slander per se, but the jury decided whether alleged conduct was incompatible with the plaintiff's trade or profession. The court decided the type of damages available, but the jury set the amount. The court determined whether the subject matter was of public concern or otherwise qualified for a conditional privilege, but the jury decided whether the statement abused the conditional privilege.[40]

d. Damages

A prevailing plaintiff in an action for libel or slander per se could receive nominal damages if there was no actual harm, general damages for harm to the reputation, and special damages for actual pecuniary losses. General damages for other slander were awarded only on a showing of pecuniary loss. General damages and damages for emotional distress were presumed if the plaintiff showed harm to his or her reputation.[41]

A plaintiff who proved the defendant acted with common law malice--hate, ill will, or spite--was entitled to punitive damages. Together with the presumption of falsity and presumed damages, the possibility of nearly limitless punitive damages had an enormous potential for chilling speech. It was this potential that guided the Supreme Court in its attempts to limit available remedies in claims of defamation.[42]

2. From *New York Times* to *Dun & Bradstreet*: The Constitutional Limits

a. The Opening Salvo: *New York Times Co. v. Sullivan*[43]

The Court began its foray into defamation law with *New York Times*, a case in which the courts of Alabama had awarded a city commissioner $500,000 in an action against a newspaper and four individuals for publishing defamatory statements in a socio-political advertisement. The plaintiff alleged that the

40. *Id.* §§ 614-19.

41. *Id.* §§ 620-23.

42. *Id.* § 908; *see* SMOLLA, *supra* note 3, § 3.16, at 3-39. Punitive damages often bear little relationship to compensatory damages. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) ($50,000 compensatory, $300,000 punitive). After his case was remanded, Elmer Gertz was awarded $100,000 compensatory and $300,000 punitive damages. *See Birch Society Magazine Must Pay $400,000 for Libeling Lawyer*, WALL ST. J., April 23, 1981, at 24.

43. 376 U.S. 254 (1964).

description of events and his participation in them were untrue. The state courts held that the statements, although not specifically naming the plaintiff, could reasonably be held to apply to him.[44]

The Supreme Court framed the issue as one of whether Alabama's defamation laws, as applied in an action brought by a public official, violated the protections of the First Amendment. The Court stated that the Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes by the people."[45] The issue must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" and may include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[46] The test of truth alone does not provide the necessary "breathing space" needed for survival of free expression because erroneous statements of fact are inevitable in free debate. Whatever the test of truth adds "to the field of libel is taken from the field of free debate," and the test will not ensure that only false speech is deterred.[47] Of importance is the fact that the Court stopped short of according false speech any value in itself. It merely found that adequate protection of speech entails occasionally allowing false speech to go unremedied. Fear of damage awards far in excess of potential criminal penalties would be even more chilling than criminal prosecutions, causing publishers to "steer far wider of the unlawful zone" and deter "would-be critics of official conduct."[48]

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44. *Id.* at 256-58, 263. The advertisement was published during the civil rights movement. The evidence was uncontroverted that the statements were not literally true. Although many of the departures from the literal truth, such as misnaming songs that the protesting students sang and giving the wrong reasons for student expulsions, were not relevant to the lawsuit, several had important ramifications. For example, the advertisement reported that the school dining hall was locked, but only students without meal tickets were actually denied access; that truckloads of police circled the campus, but police had not been summoned to the campus at all; and that Dr. Martin Luther King had been arrested "many" times and assaulted by police during the arrests, but King had been arrested only four times and evidence of assaults was inconclusive. *Id.* at 258-59. Because Sullivan was the commissioner of police, the statements could be read to be "of and concerning" him. *Id.* at 263. The Supreme Court first disposed of two preliminary issues, holding that the state court erred in finding no First Amendment implications in a civil suit. *Id.* The Court stated that the form of state power, whether civil or criminal, was not the issue, but the issue was rather whether state power had in fact been exerted. *Id.* The Court next found that although the defamatory statement was in a paid advertisement it was not necessarily in the ambit of commercial speech. *Id.* at 265-66.

45. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

46. *Id.* at 270 (citing Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) and De Jonge v. Oregon, 299 U.S. 353, 365 (1937)). Because the advertisement was "an expression of grievance and protest on one of the major public issues of our time," it clearly qualified for constitutional protection. *Id.* at 271.

47. *Id.* at 272.

48. *Id.* at 277-78, 279.

As a result of the above reasoning, the Court held that a public official may recover for defamatory falsehoods only on showing that the defendant made the statement with constitutional malice, that is, "with knowledge that it was false or with reckless disregard of whether it was false or not."[49] One court has aptly distinguished common law malice and constitutional malice, noting that the former focuses on the defendant's attitude toward the plaintiff, while the latter focuses on the defendant's attitude toward the truth.[50] The announcement of the malice standard was the heart of the ruling in *New York Times*, but the Court also developed other important principles. A plaintiff must prove malice by clear and convincing evidence, and the importance of the constitutional protections requires independent appellate review of the facts.[51]

Justices Black and Goldberg filed concurring opinions, both joined by Justice Douglas. They would have found unconditional constitutional protection for the advertisement. Black emphasized the political nature of the statement, but presumably his absolutist position would have led him to grant a privilege regardless of the nature of the publication. Goldberg, on the other hand, was willing to allow defamation actions when the subject matter is private. He also raised the issue, important in later cases, of the plaintiff's access to the media.[52]

b. When Plaintiffs are Not Public Officials: *Curtis Publishing Co.* v. *Butts*[53] and *Rosenbloom v. Metromedia, Inc.*[54]

The Court's early attempts to establish constitutional limits on defamation actions brought by plaintiffs who were not public officials resulted in "sadly fractionated" decisions.[55] In *Butts* and its companion case, *Associated Press v. Walker*, the plaintiffs in defamation actions were, respectively, a privately employed university athletic director accused of attempting to fix a football game, and a private citizen who had allegedly violently interfered with federal

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49. *Id.* at 279-80. Reckless disregard was later defined by the Court as "serious doubts as to the truth of the publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Officials are generally immune for statements made in the course of their duties. *New York Times*, 376 U.S. at 282. The citizen-critic has no lesser duty and a fair equivalent of immunity is required. *Id.* at 282-83.

50. Perez v. Scripps-Howard Broadcasting Co., 520 N.E.2d 198, 202 (Ohio 1988).

51. *New York Times*, 376 U.S. at 285-87. The Times' failure to retract and the fact that it had information in its own files showing the statements to be false were not enough to establish malice. *Id.* at 287-88. The information would have had to be brought home to those making the decision to publish. *Id.* at 287. The Court's use of the term "actual" malice emphasizes the subjective element of the standard.

52. *Id.* at 293-97 (Black, J., concurring); *id.* at 301-05 (Goldberg, J., concurring).

53. 388 U.S. 130 (1967).

54. 403 U.S. 29 (1971).

55. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 354 (1973) (Blackmun, J., concurring).

marshals' attempts to enforce court-ordered school desegregation. The Court held that both plaintiffs were public figures--Butts by virtue of his position, and Walker because he had thrust himself into the "vortex" of a public controversy.[56]

In a plurality opinion, Justice Harlan, joined by Justices Clark, Stewart, and Fortas, found that the malice standard did not apply to public figures. The plurality discussed the importance of open discussion of public matters, the public figure's access to the media to correct false statements, and other similarities and differences between public officials and public figures. The opinion concluded that a public figure could receive both compensatory and punitive damages on a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." According to the plurality, Butts had made such a showing, but Walker had not.[57]

Chief Justice Warren concurred in the result, but disagreed with the reasoning. Warren argued that the malice standard should apply because the distinction between public officials and public figures has "no basis in law, logic, or First Amendment policy." He concurred in the result only because the state courts' actions in awarding Butts, but not Walker, punitive damages, indicated that Butts, but not Walker, had proved malice.[58] Justice Brennan, joined by Justice White, agreed the malice standard should apply, but would have remanded *Butts* for a more specific finding.[59] Justice Black, joined by Justice Douglas, restated his absolutist position and would have found both defendants unconditionally privileged.[60]

Not only was the *Butts* opinion "fractionated," the results were somewhat bizarre. Following that case, the malice standard arguably applied to public figures, because Warren, Brennan, and White, along with Black and Douglas, would have voted against a less stringent standard. Had the court strictly adhered to the malice standard, however, it is not at all clear that Butts would have prevailed as he did in the actual case. Brennan and White would have voted, as they actually did, to remand for more specific findings, while Black and Douglas would have voted for reversal. Warren's opinion was controlling, and Butts prevailed only because Warren's independent review of the facts led

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56. *Butts*, 388 U.S. at 135, 140, 154-55 (plurality opinion by Harlan, J.).

57. *Id.* at 148-59. Harlan carefully pointed out that his opinion was not to be read as affecting the *New York Times* holding. The "unreasonable conduct" standard has never gained endorsement by a majority of the Court in any case. *See* SMOLLA, *supra* note 3, § 2.02, at 2-15.

58. *Butts*, 388 U.S. at 162, 166 (Warren, C.J., concurring in the result).

59. *Id.* at 172-74 (Brennan, J., concurring and dissenting).

60. *Id.* at 170-72 (Black, J., concurring and dissenting).

him to conclude he had proved malice. All four members of the plurality would have had to agree with Warren's assessment of the facts for Butts to prevail under Warren's malice standard.[61]

The next step came in *Rosenbloom* v. *Metromedia, Inc.*, in which the plaintiff, a private figure, claimed he was defamed by reports of his arrest for possession of obscene material. Another plurality opinion, authored by Justice Brennan and joined by Chief Justice Burger and Justice Blackmun, concluded that the malice standard applied to matters of public or general concern. The opinion asserted that consideration of such matters reveals the artificiality of the public and private figure distinction. The First Amendment reaches further than its self-government role and embraces "science, morality, and arts in general, as well as responsible government." A subject of public concern does not become of less concern merely because the plaintiff did not choose to become involved. The plurality was unconvinced by the argument that public figures have greater access to the media to correct falsehoods. Finally, after reviewing the facts, the plurality concluded that there was insufficient evidence of malice.[62]

Justice Black concurred, reiterating that the First Amendment prohibited sanctions against media defendants even when they knowingly published false statements.[63] Justice White would have avoided the issue entirely by holding that the statements were protected because they were made concerning public officials in the conduct of their duty.[64]

Justice Harlan in dissent would have held that when the plaintiff is a private figure, a showing that the defendant failed to use ordinary care is sufficient for compensatory damages. Harlan would also have held that punitive damages,

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61. *See* Harry Kalven, Jr., *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 270 [hereinafter Kalven, *Hill, Butts, and Walker*]. *See also Gertz*, 418 U.S. at 336 n.7. Kalven begins his discussion of *Butts* with the heading "You Can't Tell the Players Without a Scorecard." Kalven, *Hill, Butts, and Walker* at 275.

62. *Rosenbloom*, 403 U.S. at 41-45, 53, 57.

63. *Id.* at 57 (Black, J., concurring in the judgment). Although Black limited his conclusion to media defendants, his belief that the First Amendment is absolute, with no "ifs" or "buts" or "whereases," *see supra* note 18, would indicate that any defendant could engage in knowing falsehoods with impunity.

64. *Id.* at 57-62 (White, J., concurring in the judgment). White's position has considerable basis in the common law privilege of fair comment. White ignored, however, that there were two separate broadcasts by the defendant's radio station. The first merely indicated that the plaintiff had been arrested for selling obscene literature. The second broadcast concerned the plaintiff's suit against police officials and other media. That broadcast referred to the "smut literature racket" and "girlie-book peddlers." *Id.* at 56-57. The self-styled characterizations went beyond fair comment on official police activity.

with their great potential for chilling speech, should require proof of malice.[65] Justice Marshall, joined by Justice Stewart, agreed with Harlan to a point, but would have disallowed punitive damages regardless of the degree of fault shown. Marshall expressed the concern that application of a malice standard, coupled with the "constitutionalizing of the fact finding process," would lead to ad hoc balancing and force the courts to consider the "nuances of each particular circumstance."[66]

Thus, the standards to be applied for private figure plaintiffs after *Rosenbloom* were no clearer than those to be applied to public figures after *Butts*. Three Justices would require private plaintiffs to prove malice if the subject matter were of public concern, while three would apply a standard of ordinary care. However, Justice Black would not allow the action at all. Lastly, White's position was unclear, and Douglas took no part in *Rosenbloom*.

c. A Temporary Solidification: *Gertz v. Robert Welch, Inc.*[67]

In *Gertz*, the defendant magazine, an outlet for the John Birch Society, made false accusations against Gertz, an attorney representing the family of a youth killed by the Chicago police. Specifically, the magazine accused Gertz of having a criminal record, planning an attack on the police at the 1968 Democratic National Convention, and engaging in organized communist activities. The Court, in an opinion written by Justice Powell and joined by Justices Stewart, Blackmun, Marshall, and Rehnquist, held that when plaintiffs in defamation actions are private figures, states may fashion their own standards, provided they do not impose liability without fault. Because the state interest in awarding presumed or punitive damages is less than the interest in compensation for proven harm, the Court held that malice is required for the award of punitive or presumed damages.[68]

Much of the opinion is devoted to a discussion of the ways a person may

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65. *Id.* at 62-67 (Harlan, J., dissenting). Harlan summarized some "core propositions" with which all members of the Court could agree. These core propositions included the "perfectly legitimate interest" in preventing and redressing harm and the inadequacy of truth as a defense, with the resultant need to sometimes protect false speech. *Id.* at 64. The latter proposition led Harlan to the conclusion that the Constitution bars liability without fault. *Id.* at 65.

66. *Id.* at 78-87 (Marshall, J., dissenting) ("whatever precision the ad hoc method supplies is achieved at a substantial cost in predictability and certainty"). *Id.* at 81.

67. 418 U.S. 323 (1974).

68. *Id.* at 347-50. Because states cannot impose liability without fault, i.e., strict liability, plaintiffs would have to prove at least negligence. *See infra* notes 90-91 and accompanying text. Justice Blackmun joined the *Gertz* majority reluctantly, writing separately to indicate he joined only to avoid another "sadly fractionated" decision. Blackmun would have preferred a willful or reckless disregard standard. *Id.* at 353-54.

become a public figure. A limited purpose public figure is typically one who thrusts himself or herself voluntarily into the vortex of a public controversy for the purpose of influencing the resolution of the issues involved. However, a person may become a public figure "through no purposeful action of his own" by being drawn into a particular public controversy. A general purpose public figure is one who occupies a position of pervasive power and influence. The Court determined that Gertz did not fit into any of these categories and was thus a private figure. The Court remanded the case for a new trial because the trial court had allowed the jury to impose liability without fault and to presume damages.[69]

To support its holding, the Court reasoned that private figures have limited access to the media and have done nothing to call attention to themselves. They are thus more vulnerable to defamatory publications and more deserving of easy remedies. States therefore have a greater interest in protecting a private figure's reputational rights. Focusing on the status of the plaintiff as a private figure, public figure, or public official reduces the necessity for courts to engage in ad hoc balancing, according to the *Gertz* majority.[70]

In dissenting opinions, Chief Justice Burger and Justice White would have allowed liability without fault because requiring a finding of fault places too great a burden on plaintiffs.[71] Justice Douglas would have found an absolute privilege, and Justice Brennan preferred a malice standard.[72]

d. A Fly in the Ointment: *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*[73]

In another "sadly fractionated" decision, the Court in *Dun & Bradstreet* affirmed a judgment by the Vermont Supreme Court awarding presumed and punitive damages without a finding of constitutional malice. The defendant had issued a credit report to subscribers falsely indicating that Greenmoss, a construction contractor, had voluntarily filed for bankruptcy. The Vermont court affirmed the award of damages, holding that *Gertz* did not apply to non-

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69. *Id.* at 345, 351-52. Involuntary public figures are rare. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979). *See generally* SMOLLA, *supra* note 3, § 2.13, at 2-38 to 2-40.

70. *Gertz*, 418 U.S. at 344-46. The Court thus explicitly rejected the suggestion of the *Rosenbloom* plurality.

71. *Id.* at 354-55 (Burger, C.J., dissenting); *id.* at 376 (White, J., dissenting). Burger and White would have remanded for reinstatement of the jury verdict.

72. *Id.* at 355-60 (Douglas, J., dissenting); *id.* at 361-69 (Brennan, J., dissenting).

73. 472 U.S. 749 (1985).

media defendants.[74]

The Supreme Court affirmed on other grounds, electing not to address the media/non-media issue. A plurality opinion, surprisingly written by Justice Powell and joined by Justices Rehnquist and O'Connor, found that previous decisions limiting defamation actions all involved "expression on a matter of *undoubted public concern.*" The opinion also stated that First Amendment interests in protecting expression of purely private concern are less than they are when the issues are of public concern.[75] Powell supported this conclusion by asserting that the Court in *Gertz* held that the fact that a public issue was involved did not by itself entitle the defendant to the protection of the malice requirement. This is a somewhat disingenuous reading of his own opinion. The *Gertz* opinion resolutely counseled against an ad hoc, case-by-case consideration of subject matter of statements involved because that approach "would lead to unpredictable results . . . and render our duty to supervise the lower courts unmanageable. . . . We doubt the wisdom of committing this task to judges."[76] Contrary to Powell's statement in *Dun & Bradstreet* that nothing in *Gertz* "indicated the *Gertz* standard would be struck regardless of the type of speech involved,"[77] Powell's language in *Gertz* seems to indicate precisely that. In a further unacknowledged departure from previous statements by the Court that false speech would sometimes necessarily be protected, the plurality found that interests here warranted no special protection because the statements were false.[78]

Chief Justice Burger and Justice White concurred in the judgment, but would have overruled *Gertz* to allow liability without fault in any case with a private figure plaintiff.[79] Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, finding inquiry into subject matter of the speech inappropriate and concluding that the plurality undervalued the expression at issue.[80]

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74. *Id.* at 751-53. The error occurred because one of Dun & Bradstreet's employees, a seventeen year-old high school student, attributed the bankruptcy petition of a former Greenmoss employee to Greenmoss itself. Dun & Bradstreet provides reports of various types to business subscribers.

75. *Id.* at 755-56, 759-62 (emphasis added).

76. Gertz v. Robert Welch, Inc., 418 U.S. at 323, 343-46 (1974).

77. *Dun & Bradstreet,* 472 U.S. at 757.

78. *Id.* at 762. This is in direct conflict with the *New York Times* conclusion that special protection is needed because the test of truth alone will not ensure that only false speech is penalized. *See supra* notes 45-49 and accompanying text.

79. *Dun & Bradstreet,* 472 U.S. at 763-64 (Burger, C.J., concurring); *id.* at 765-74 (White, J., concurring). White also addressed the media/non-media defendant issue and would have offered no greater First Amendment protection to media defendants. *Id.* at 773.

80. *Id.* at 774-96 (Brennan, J., dissenting).

3. Constitutionalization of Defamation Law: Some Fine Tuning by the Court, Unanswered Questions, and Unavoidable Difficulties

Application of constitutional standards in defamation cases poses significant problems. Identification of public officials and general purpose public figures poses little difficulty, but the determination that a plaintiff is a limited purpose public figure is less straightforward. Courts must determine whether a public controversy exists, and, if so, whether the plaintiff voluntarily thrust himself or herself into the controversy.

The first task is one of characterization--identifying the specific topic of the allegedly defamatory speech. In *Time, Inc. v. Firestone*,[81] the plaintiff sued for misstatements with respect to evidence presented in her divorce proceedings. The Court identified the statements as those concerning judicial proceedings, declining to consider the proceedings as part of the wider and somewhat public battle between the jet-set plaintiff and her industrial heir husband. The Court found that divorce court proceedings were not "the sort of 'public controversy' referred to in *Gertz*" and that the plaintiff's numerous press conferences did not constitute a thrusting of herself into a controversy to influence its outcome, because press interviews should not affect a legal dispute.[82]

Wolston v. Reader's Digest Ass'n, Inc.[83] also presented the Court with the issue of whether a defamation plaintiff had thrust himself into a controversy, with the added issue of whether the passage of time would affect public figure status. Sixteen years after Wolston had pleaded guilty to failure to appear before a grand jury and after an FBI report had identified him as a Soviet intelligence agent, the *Reader's Digest* published a book referring to Wolston as a spy. The Court did not address the issue of the passage of time, instead holding that Wolston had never been a public figure because involvement in grand jury proceedings is not voluntary.[84] Justice Rehnquist, writing for the Court, noted in a startling footnote that there was no public controversy "because all responsible United States citizens understandably were and are

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81. 424 U.S. 448 (1976).

82. *Id.* at 454-55 & n.3. Justice Marshall in dissent would have found that the plaintiff was a public figure, because she was a member of the "sporting set," initiated the divorce proceedings, eagerly sought publicity, and had ready access to the media. Marshall also concluded that the Court's definition of public controversy in this case would lead to the case-by-case analysis that *Gertz* sought to avoid. *Id.* at 484-90 (Marshall, J., joining Blackmun's dissent).

83. 443 U.S. 157 (1979).

84. *Id.* at 161-63, 166. In the investigation sixteen years earlier, Wolston's aunt and uncle had pleaded guilty to espionage charges. The plaintiff had voluntarily failed to appear before the grand jury, and the non-appearance was detailed in numerous newspaper accounts, at least one book, and an official FBI report. SMOLLA, *supra* note 3, § 2.08[2], at 2-27. The issues here demonstrate the difficulties in characterization of the precise controversy.

opposed to espionage."[85]

The Court in *Hutchinson v. Proxmire*[86] held that a defendant cannot "bootstrap" a plaintiff into public figure status by creating a public controversy with its own publication. In that case, Hutchinson sued based on reports resulting from Senator Proxmire awarding him the "Golden Fleece" award, given to those who Proxmire viewed as being most guilty of wasting public funds. The Court concluded that the award itself created the controversy; thus Hutchinson had not thrust himself into the controversy. In the Court's opinion, concern about public expenditures was therefore insufficient to merit classification as a public controversy. Quoting *Firestone*, the Court found inquiry into the subject matter of the speech improper, while failing to recognize that it had necessarily inquired into the subject matter to determine that the malice standard did not apply.[87] Moreover, the *Dun & Bradstreet* plurality arguably would allow some bootstrapping. There, the plurality opinion noted the narrow dissemination of misinformation of the plaintiff's bankruptcy, leaving the pregnant negative proposition that had there been wider publication, a public controversy might have existed.[88]

Since *Hutchinson v. Proxmire*, the Court has not answered the question of whether the same standards should apply to media and non-media defendants. Justice White and the four dissenters in *Dun & Bradstreet* would apply the same standards to both. However, White would allow strict liability in at least some cases, while the dissenters would require some fault in all cases.[89]

To summarize the Court's current position, a public official must prove

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85. *Wolston*, 443 U.S. at 166 n.8. Defining a public controversy in this way is preposterous and perilous in terms of First Amendment guarantees. Defining the existence of a public controversy in terms of perceived universal agreement would leave litigants at the mercy of the whims of the court. For example, in *Walker*, the companion case to *Butts*, a court could find no public controversy existed because all responsible people supported--or opposed--desegregation. Using supposed unanimity as a yardstick flies in the face of the repeated, although failed, attempts to provide predictability and certainty. Fortunately, lower courts, although at times considering whether there is general agreement on an issue, have rejected such agreement as being dispositive on the question of the existence of a public controversy.

86. 443 U.S. 111 (1979).

87. *Id.* at 135-36. Much of the Court's opinion dealt with the issue of congressional immunity. *Id.* at 123-33. The Court declined to address the issue of whether the malice standard would apply to a non-media defendant because Hutchinson was not a public figure.

88. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761-62 (1985).

89. White indicated in *Dun & Bradstreet* that he would have overruled not only *Gertz*, but also *New York Times*. *Dun & Bradstreet*, 472 U.S. at 767 (White, J., concurring) (Court struck "improvident balance" in *New York Times*). Others also argue that the Court should not have involved itself in defamation issues to begin with, and they would find little in the First Amendment to limit defamation actions.

constitutional malice if the allegedly defamatory speech relates to performance in or fitness for office. A general purpose public figure must also prove malice, as must a limited purpose public figure if the defamation concerns the controversy into which the plaintiff has thrust himself or herself. A plaintiff must prove malice before being awarded presumed or punitive damages, except in cases involving private figures and in cases involving issues of purely private concern.

Dun & Bradstreet left unclear whether courts can award private figures compensatory damages without fault if the subject matter is of private concern. *Gertz* required only some showing of fault when issues of public concern are involved; with respect to punitive damages at least, *Dun & Bradstreet* found that speech of private concern requires less protection than speech of public concern.[90] From that it follows that states should be able to impose liability without fault when speech is of private concern and when the plaintiff is a private figure. The Court's most recent pronouncement on this particular issue leaves the waters muddied. In *Milkovich v. Lorain Journal Co.*, the Court stated that in cases based on defamatory opinion, public officials and public figures must prove malice, and private figures must show some degree of fault if the subject matter is of public concern.[91] The Court's silence indicates strict liability might apply if the subject matter is of private concern.

Regarding issues of proof, plaintiffs must prove malice with clear and convincing evidence,[92] while the standard required for private figures proving negligence is unclear. Justice Brennan predicted in *Gertz* that the Court would accept a preponderance of the evidence standard, but the Court has not ruled on the issue.[93] Constitutional malice is subjective but may be evidenced by objective data and proof of common law malice.[94] To gather the necessary proof of malice, plaintiffs may use discovery to delve into the editorial process.[95] The burden is on the plaintiff to prove falsity.[96] Given the above rules that have been enumerated by the Supreme Court, constitutional standards thus represent a significant departure from common law.

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90. Only strict liability would be "less protection" than negligence. *See* SMOLLA, *supra* note 3, § 3.02[3].

91. 110 S. Ct. 2695, 2706-07 (1990).

92. New York Times Co., v. Sullivan 376 U.S. at 254, 279-80, 285-86 (1964).

93. Gertz, v. Robert Welch, Inc., 418 U.S. 323, 366 (1974) (Brennan, J., dissenting); *see* SMOLLA, *supra* note 3, § 3.08.

94. St. Amant v. Thompson, 390 U.S. 727 (1968); *see supra* notes 49-51 and accompanying text.

95. Herbert v. Lando, 441 U.S. 153 (1979).

96. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

II. THE CONSTITUTIONAL LAW OF DEFAMATION IN THE LOWER COURTS

The results of cases in state and lower federal courts have been anything but certain and predictable. These contradictory results indicate the futility of attempts to attain predictability by utilizing the plaintiff-status approach.

A. Lower Courts and the Public Figure Plaintiff

Lower courts have had minimal difficulties in identifying general public figure plaintiffs who have such fame and notoriety that they are public figures for all purposes, requiring them to prove malice in any defamation action. The most common examples of all purpose public figures are sports personalities, entertainers, and others consistently in the public eye.[97] These persons are less in need of constitutional protection because they may influence debate on wide-ranging issues and they have ready access to the media to correct false statements.[98]

Courts have had more difficulty identifying limited purpose, or "vortex," public figures. The task has been likened to nailing a jellyfish to the wall.[99] Except in the limited instances when a plaintiff has been dragged into a controversy, *Butts* and *Gertz* required that the plaintiff voluntarily thrust himself or herself into the controversy.[100] Lower courts have attempted to establish specific tests to determine when this has occurred. Most of the tests require defining the precise public controversy, analyzing the extent and prominence of the plaintiff's role in the controversy, and determining whether the allegedly defamatory statement is germane to the plaintiff's role in the controversy.[101]

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97. *See, e.g.*, Buckley v. Littel, 539 F.2d 882 (2d Cir. 1976) (well-known author), *cert. denied*, 429 U.S. 1062 (1977); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (entertainer); Cepeda v. Cowles Magazine & Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968) (sports figure), *cert. denied*, 393 U.S 840 (1968). *See generally* Conrad M. Shumadine et al., *The Legal and Practical Problems Associated with the Determination of Plaintiff's Status as a Private Individual, Public Figure, or Public Official*, 252 PUB. LAW INST. LIBEL LITIG. 99, 123-25 (1988).

98. *See Gertz*, 418 U.S. at 344-46; *Butts v. Curtis Publishing Co.*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) (public figure has assumed influential role and must accept consequent risks). The Montana Supreme Court has created a geographically limited "all purpose public figure" for purposes of determining fault standards for locally published material. Williams v. Pasma, 656 P.2d 212, 216 (Mont. 1982). This concept helps by taking into consideration the context of a defamatory statement.

99. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

100. Gertz, 418 U.S at 344-49.

101. *See, e.g.*, Long v. Cooper, 848 F.2d 1202, 1204 (11th Cir. 1988) (courts must isolate controversy, examine plaintiff's role, and determine whether statement germane); Tavoulareas v. Piro, 759 F.2d 90, 103 n.12 (D.C. Cir. 1985) (same). Other courts have formulated the issue with

Although expressed in various terms the tests all have two things in common. First, they add little that is helpful to the *Butts* and *Gertz* definitions. Second, once the elements are defined, the courts determine on an ad hoc basis whether plaintiffs meet the standards. As one court stated, the "public figure concept has eluded a truly working definition, [falling into the] class of legal abstractions where 'I know it when I see it.'"[102]

1. The Public Controversy Requirement

Courts generally agree that for an issue to be a public controversy, it must have some impact on persons not directly involved in the debate. However, the courts define the nature and extent of the impact by diverse methods. Some courts require the outcome of the controversy to affect the general public or a significant segment of the public in an appreciable way, while other courts require that the controversy affect a significant segment of society.[103] All courts agree that whether defined as affecting a segment of the public in an appreciable way or affecting a significant segment of the public, the controversy must be more than merely a matter of public interest, more than just newsworthy, or more than just a private dispute.[104]

Courts have, however, reached widely divergent conclusions on precisely what constitutes a controversy. Some courts have used circular definitions and have held that a public controversy must be a legitimate debate of public concern or a real dispute. The Florida District Court of Appeals, for example, in *Della-Donna v. Gore Newspaper Co.*,[105] defined a public controversy as any issue upon which sizable segments of society have different, strongly held views. This definition calls to mind the *Wolston* footnote implying the need for significant disagreement. On the other hand, the Mississippi Supreme Court

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slightly different language but have required substantially the same analysis. *See, e.g.*, Clark v. American Broadcasting Co., 684 F.2d 1208, 1218 (6th Cir. 1982) (examining extent of plaintiff's voluntary involvement, prominence, access to media), *cert. denied*, 460 U.S. 1040 (1983); Lerman v. Flynt Dist. Co., 745 F.2d 123, 136-37 (2d Cir. 1984) (adding extent of plaintiff's success in inviting attention to *Clark* test), *cert. denied*, 471 U.S. 1054 (1985).

102. *Rosanova*, 580 F.2d at 861 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

103. *See, e.g.*, Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296 (D.C. Cir.) (must affect general public or segment of public), *cert. denied*, 449 U.S. 898 (1980); Brueggemeyer v. American Broadcasting Co., 684 F. Supp. 452, 455-56 (N.D. Tex. 1988) (must have impact on public); Barry v. Time, Inc., 584 F. Supp. 1110, 1116 (N.C. Cal. 1984) (must affect more than direct participants); RE v. Gannett Co., 480 A.2d 662, 666 (Del. Super. 1984) (must affect public), *aff'd*, 496 A.2d 553 (Del. 1985).

104. *See, e.g.*, Silvester v. American Broadcasting Co., 839 F.2d 1491, 1494 (11th Cir. 1988); *Waldbaum*, 627 F.2d at 1296.

105. 489 So. 2d 72, 76 (Fla. Dist. Ct. App. 1986) (citing *Lerman*, 745 F.2d at 138).

decided in *Ferguson v. Watkins*[106] that it was unnecessary that the issue produce an active debate as long as it was in the "public domain." This would apparently solve the *Wolston* and *Della-Donna* problem of requiring disagreement, but the court did not expand on the definition of public domain. In *Brueggemeyer v. American Broadcasting Co.*,[107] a Texas federal district court held that a public controversy exists only if people are actually discussing the matter and are affected by the outcome. Requiring that people be discussing the issue expands the bootstrapping prohibition of *Proxmire*. However, this approach might seriously imperil investigative reporting that brings to the public attention previously unknown instances of wrongdoing, threats to the public well-being, or other urgent matters. This analysis adopts a literal definition of the term "controversy," as did the *Wolston* footnote, although the definitions are different. The Seventh Circuit held in *Woods v. Evansville Press Co.*[108] that the proper question is whether the plaintiff involved himself or herself in a matter of public interest. Requiring that the matter be a public issue or of public concern would help avoid pitfalls of overly rigid definitions of "controversy."

Those courts attempting a precise definition must eventually analyze the issue on a case-by-case basis. For example, the court in *Ferguson*, once it held that an issue must be in the public domain, found that a plaintiff involved in a program funded in whole or in part by public monies is a public figure. This is so because expenditure of public funds is of sufficient interest and is sufficiently in the public domain to constitute a public controversy.[109] This is at odds with the *Proxmire* conclusion that accepting public funds does not create a controversy. The court in *Della-Donna* strayed even further than *Ferguson*, holding that a dispute over disbursement of a private donor's gift to a private university was a public controversy, and that the attorney involved in the dispute with the trustees was a public figure.[110]

Contrary to these rulings, the Third Circuit held in *Schiavone Construction Co. v. Time, Inc.*[111] that a construction company working exclusively on public contracts would not have been a public figure, without more, because no public controversy existed. The Fourth Circuit held in *Blue Ridge Bank v. Veribanc*[112] that a bank's expenditures are not a public controversy, despite

106. 448 So. 2d 271, 277 (Miss. 1984).

107. 684 F. Supp 452, 455 (N.D. Tex. 1988).

108. 791 F.2d 480, 482-83 (7th Cir. 1986).

109. *Ferguson*, 448 So. 2d at 279.

110. *Della-Donna*, 489 So. 2d at 76-77.

111. 847 F.2d 1069 (3d Cir. 1988). The *Ferguson* court surprisingly stated that it read *Gertz* and other cases to require case-by-case analysis. *Id.* at 1078.

112. 866 F.2d 681, 687-88 (4th Cir. 1989).

overwhelming public interest in the bank's financial health.

This brief review of cases shows the inconsistent results in lower courts' attempts to define a public controversy.[113] As with other issues determining whether public figure status exists, courts often appear to manipulate the analysis to protect those publishing "good" stories and allow juries to punish "bad" publications.[114]

2. The Plaintiff's Involvement

Gertz, *Firestone*, *Wolston*, and *Proxmire* limit the instances when a person may be an involuntary public figure, while leaving the precise parameters of voluntary action undefined. Courts are again in agreement with respect to some threshold questions. Tangential or trivial involvement in matters that merely attract the public's attention is insufficient.[115] The difficulty comes in finding consistent definitions of "tangential" and "trivial."

Seizing on the *Gertz* requirement that the plaintiff attempt to influence the outcome of a public controversy, many courts have made the plaintiff's purposefulness the dominant focal point of their analysis. In *Trotter v. Jack Anderson Enterprises, Inc.*,[116] the Fourth Circuit held that the plaintiff must only seek to influence the outcome, and may be a public figure even if operating behind the scenes, out of public view. In *Waldbaum v. Fairchild Publications, Inc.*,[117] the District of Columbia Circuit held that a person may be a public figure without purposefully seeking to influence the outcome if he or she

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113. Other areas in which courts have disagreed include whether criminal activity constitutes a public controversy. *Compare* Bufalino v. Associated Press, 692 F.2d 266 (2d Cir. 1982) (mob ties not enough for public figure status), *cert denied*, 462 U.S. 1111 (1983) *with* McDowell v. Paiewonsky, 769 F.2d 942 (3d Cir. 1985) (criminal action invites public attention, may be public figure) *and* Ray v. Time, Inc., 452 F. Supp. 618 (W.D. Tenn. 1976) (political assassin is general purpose public figure), *aff'd*, 582 F.2d 1280 (6th Cir. 1978). Teachers may not be public figures; *see* Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32 (Va. 1987); but according to *Butts*, in some instances education officials are public figures. Arguably, teachers are involved in matters of extreme public concern by virtue of their profession and should be public figures.

114. *See* Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 942 (1983) (analyzing courts' ad hoc approach to public figure status).

115. Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989); Brueggemeyer v. American Broadcasting Co., 684 F. Supp. 452 (N.D. Tex. 1988).

116. 818 F.2d 431 (5th Cir. 1987). The plaintiff met with executives, shareholders, and others in an attempt to settle a labor dispute in his Guatemala bottling company. The court found that the dispute was a public controversy. A person cannot erase public figure status by attempting to maintain a low profile and thereby limit the extent of public comment. The desire to influence the outcome of the controversy was more important in the Court's analysis than whether the plaintiff was in the public eye. *Id.* at 435-36.

117. 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

realistically expects to have an impact.

Other courts have found the plaintiffs' purpose of influencing debate less important than the plaintiffs' calling attention to themselves. The Third Circuit in *McDowell v. Paiewonsky*,[118] the New Jersey Supreme Court in *Vassallo v. Bell*,[119] and a Pennsylvania federal district court in *Miele v. William Morrow & Co.*[120] all held that it was not necessary for the plaintiff to seek or desire attention if the plaintiff should have reasonably expected attention would be drawn. Similarly, the *Ferguson* court found that involvement in a publicly funded program was sufficient to call attention to the plaintiff.[121]

A Wisconsin court in *Wiegal v. Capital Times Co.*[122] found the necessary voluntariness when the defamation plaintiff was threatened with legal action if he did not stop cultivating in a way that created pollution in a nearby lake. Reconciliation of *Wiegal*'s holding with *Wolston*'s holding that involvement in grand jury investigations is involuntary, or with *Hill's* holding that divorce proceedings do not consitutute a public controversy, is tenuous at best. The same tenuous reconciliation is true of *Miele*'s holding that the plaintiff's involvement in toxic waste disposal made him a public figure because he was aware of the potential for attention and because of the intense and legitimate concern surrounding toxic waste.[123] The Tenth Circuit also strayed from *Wolston* and *Hill*, holding in *Lee v. Calhoun*[124] that a plaintiff became a public figure by filing a malpractice claim.

A plaintiff's overall involvement in a controversy has been more important in determining status to some courts than the plaintiff's intention or expectation of influencing the outcome or calling attention to himself or herself. Thus, a California federal district court in *Barry v. Time, Inc.*,[125] held that a head coach at a public university was a public figure because he accepted the position after a controversy concerning allegations of recruitment violations arose. The fact situation in *Barry* is similar to that in *Butts*, but differs in material ways. The court in *Barry* did not hold, as did the *Butts* court, that the plaintiff was a public figure merely because of his position. Also, in *Butts*, unlike in *Barry*, the plaintiff was accused of wrongdoing. Conversely, the Michigan Court of

118. 769 F.2d 942 (3d Cir. 1985).
119. 534 A.2d 724, 734 (N.J. Super. 1987).
120. 670 F. Supp. 136, 139 (E.D. Pa.), *aff'd*, 829 F.2d 31 (3d Cir. 1987).
121. Ferguson v. Watkins, 448 So. 2d 271, 277 (Miss. 1984).
122. 426 N.W.2d 43, 47-49 (Wis. Ct. App. 1988).
123. 670 F. Supp. at 139.
124. 948 F.2d 1162 (10th Cir. 1991). The court emphasized the type of suit--malpractice--and the amount of damages sought--$38 million--in reaching its conclusion. *Id.* at 1165.
125. 584 F. Supp. 1110, 1118 (N.D. Cal. 1984).

Appeals in *Hodgins v. Times Herald Co.*[126] found that the plaintiff, who held a contract to dispose of unwanted animals, was not a public figure in the controversy over the county's plans to maintain a shelter. The court reasoned that although the plaintiff had a stake in the outcome, he did not attempt to influence it. Reconciliation of the holdings in *McDowell*, *Miele*, and *Barry*, which require only a stake in the outcome, with the holdings in *Waldbaum* and *Hodgins*, which follow the *Gertz* requirement of involvement for the purpose of influencing the outcome, is impossible.

The extent and visibility of the plaintiff's involvement in a controversy also presents difficulties when determining a plaintiff's status. The Second Circuit found that a pornography distributor was not a public figure in *Lerman v. Flynt Distributing Co.*,[127] because the defendant failed to prove that the distributor successfully invited public attention. A friend of former President Nixon, involved in Nixon's reelection campaign and financial affairs, was a public figure according to the Fifth Circuit in *Rebozo v. Washington Post Co.*[128] However, the Tenth Circuit found that a friend and staff member of the former Vice-President, who was involved in the reelection campaign, was not a public figure in *Lawrence v. Moss*.[129] The *Lawrence* court found that the plaintiff was inconspicuously involved because he made no speeches in Utah where the alleged defamation occurred and had thus not invited attention. Therefore, the *Lawrence* court held that the controlling factor is the plaintiff's status, not the public's nebulous interest in a matter in which the plaintiff might be inconspicuously involved. The *Lawrence* court apparently focused on the "public" nature of the plaintiff's involvement and not on the *Gertz* purpose of influencing debate. *Trotter*'s holding that maintaining a low profile has no effect on determining public figure status is more in line with the *Gertz* focus on the purpose of influencing debate than is *Lawrence*, and therefore, the cases cannot be reconciled.

The courts have been consistent in applying the anti-bootstrapping policy of *Proxmire* coupled with the *Gertz* dictum that a plaintiff could be involuntarily dragged into a controversy. The *Rebozo* court noted that there had been volumes of material from the Senate Watergate Committee and 120 newspaper articles published prior to the alleged defamation. The Fifth Circuit refined the public figure standard in *Rosanova v. Playboy Enterprises, Inc.*,[130] finding that past news reports were relevant to public figure status and holding that the reports would not be bootstrapping unless the defendant set out, alone or with

126. 425 N.W.2d 522, 528 (Mich. Ct. App. 1988).
127. 745 F.2d 123, 136 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).
128. 637 F.2d 375, 378-79 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981).
129. 639 F.2d 634, 636-38 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981).
130. 580 F.2d 859, 861 (5th Cir. 1978).

others, to create a controversy.

Reading all the cases together, one could safely assume that any court would find a public controversy in an issue that appreciably affected a significant segment of society, if the issue was in the public domain and if sizable segments of the public were discussing their strongly held and opposing views. Within that context, plaintiffs would be considered public figures if they voluntarily thrust themselves into the vortex of the controversy in a prominent and nontangential, although not necessarily visible, way in order to influence the outcome, or if they knew or reasonably should have expected to call attention to themselves or the controversy while having an interest in the outcome. In the absence of one or more of the elements of this cumbersome formulation, at least some courts would find that the plaintiff is not a public figure. The cases demonstrate that the status of the plaintiff is as "nebulous" as the public's concern, if not more so.

3. Statements Germane to the Plaintiff's Involvement

Courts generally agree that allegedly defamatory comments must be germane to a limited purpose public figure's involvement in a controversy, or the malice standard need not be applied. However, several courts have added some important, and sometimes inconsistent, gloss on the requirement. *Waldbaum* held that statements about a public figure's talents, education, experience, and motives were germane because these traits relate to the credibility of the individual.[131] The Fifth Circuit, in *Levine v. CMP Publications, Inc.*,[132] held that statements made in an article were not germane to the plaintiff's active opposition to a judge's reelection because the article discussed only the plaintiff's trial and not his opposition. The Second Circuit held in *Bufalino v. Associated Press* that the defendant's failure to identify the plaintiff as a borough solicitor, and instead referring to him only as an attorney, presumptively precluded reliance on the malice standard.[133] *Morgan v. Tice*,[134] an Eleventh Circuit case, required a writer of a weekly column who had been critical of the town manager to prove actual malice in a suit based on the manager's remarks concerning the writer's land development scheme. Predictability of what is germane is no greater than predictability of whether a controversy exists.

131. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294-95 (D.C. Cir.); *cert. denied*, 449 U.S. 898 (1980).

132. 738 F.2d 660, 672 n.17 (5th Cir. 1984).

133. 692 F.2d 266, 272-73 (2d Cir. 1982), *cert. denied*, 462 U.S. 1111 (1983). The court determined that a borough solicitor was not a public official. *Id.* at 273 n.5.

134. 862 F.2d 1495, 1496-98 (11th Cir.), *cert. denied*, 493 U.S. 813 (1989).

4. The Passage of Time

Wolston left unanswered the question of whether passage of time would affect a person's status as a public figure. Lower courts have arrived at dissimilar conclusions. The Sixth Circuit case of *Street v. National Broadcasting Co.*[135] held that once a person becomes a public figure with respect to a particular controversy, the status does not change with the passage of time. The Fifth Circuit, in *Geiger v. Dell Publishing Co.*,[136] and a New Jersey court, in *Barasch v. Soho Weekly News, Inc.*,[137] agreed, finding that the passage of twenty or thirty years did not remove plaintiffs' public figure status or remove the issues from "the sphere of public concern." Conversely, the Second Circuit, in *Lerman v. Flynt Distibuting Co., Inc.*,[138] held that a plaintiff must maintain regular and continuing access to the media, and the Fourth Circuit, in *Fitzgerald v. Penthouse Int'l, Ltd.*,[139] held that public figure status must be determined at the time of the alleged defamation.

5. The Media/Non-Media Distinction

Prior to *Dun & Bradstreet*, the Supreme Court cases all dealt with media defendants. The Court has never ruled on whether different standards should apply to non-media defendants, but all the Justices expressing an opinion on the issue in *Dun & Bradstreet* indicated that they would apply the same standards.[140]

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135. 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981). The plaintiff in *Street* was the victim in the Scottsboro rape trial in which nine black youths were convicted of raping a white woman in the 1930s. At the time of the trial and since, there has been a great deal of debate concerning the veracity of the victim, the fairness of the trial, and the degree to which racial prejudice permeated the trial and affected the verdict. The victim sued the television network after a television movie depicting the events treated her unsympathetically.

136. 719 F.2d 515 (5th Cir. 1983).

137. 505 A.2d 166 (N.J. Super. Ct. App. Div. 1986).

138. 745 F.2d 123 (2d Cir. 1984).

139. 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983).

140. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (plurality opinion by Powell, J., joined by Rehnquist & O'Connor, JJ.) (*Gertz* protection not justified solely by reference to media interests); *id.* at 767 (White, J., concurring in the judgment) (press merits no more protection than others); *id.* at 773 (Brennan, J., dissenting, joined by Marshall, Blackmun, & Stevens, JJ.) (value of speech not dependent on source). Thus, at the time of *Dun & Bradstreet*, at least five justices--the dissenters plus White--would have applied the same standards. The plurality might in some instances give the media greater protection, but those instances would apparently be rare. Chief Justice Burger concurred with the plurality's result, but on the ground that *Gertz* should have been overruled. *Id.* at 769. The possible unanimous agreement that the standards should be the same, therefore, would result from contradictory reasons. The dissent would find that the individuals are entitled to as much protection as the press, while others would find that the press is entitled to no more protection than individuals. To some extent, then, because of the wide disagreement on a standard generally, seeking to discover how the Court might come down on this

Between *Gertz* and *Dun & Bradstreet*, most lower courts held that the malice standard applied to both media and non-media defendants in public figure cases,[141] and the lower courts were almost evenly divided on whether the *Gertz* prohibition against strict liability in private figure cases applied to non-media defendants.[142] After *Dun & Bradstreet*, the lower courts have nearly uniformly rejected any distinction. A partial exception is the Maine case of *Ramirez v. Rogers*,[143] in which the court held without addressing the degree of fault required that a non-media defendant is subject to the common law presumption of falsity when the plaintiff is a private figure.

B. The Private Figure Plaintiff

Gertz allows states to impose liability as they see fit when the plaintiff is a private figure, as long as some standard of fault is required. However, *Dun & Bradstreet* and *Milkovich* may allow liability without fault in cases where the subject matter of the defamatory speech is of purely private concern. The court has never specifically stated what a showing of fault requires, but negligence is undoubtedly the minimum requirement.[144] Certainly no court has defined a standard that would fall between strict liability and negligence.

A majority of states have adopted a negligence standard in private figure cases, with some variations in the precise definition of "negligence." Minnesota and West Virginia, for example, measure the defendant's conduct against what a reasonably prudent person would have done.[145] New Hampshire and Texas consider what the defendant knew or should have known with respect to the truth of the statement and the potential harm.[146] Georgia defines the standard as what the reasonable person would do considering all the circumstances.[147] Some courts have required a showing of malice if the subject matter is of

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particular issue is a bit of a non sequitur.

141. *See, e.g.*, 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). *See generally* SMOLLA, supra note 3, § 3.02[2].

142. *Compare, e.g.*, Rowe v. Metz, 579 P.2d 83 (Colo. 1978) *and* Stuempges v. Park Davis & Co., 297 N.W.2d 252 (Minn. 1980) (both holding that *Gertz* does not apply to non-media defendants) *with* Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. App. 1976) (no distinction between media and non-media defendants).

143. 540 A.2d 475 (Me. 1988).

144. *See* SMOLLA, *supra* note 3, § 3.09[1].

145. Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 491 (Minn. 1985); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 77 (W. Va. 1984).

146. Brown v. Town of Allenstown, 648 F. Supp. 831 (D.N.H. 1986); A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71 (Tex. Ct. App. 1982).

147. Triangle Publications, Inc. v. Chumley, 317 S.E.2d 534 (Ga. 1984).

sufficient public interest or concern to be newsworthy.[148]

New York has adopted a "gross irresponsibility" standard when the subject matter is of public concern. This standard requires that the plaintiff prove by a "preponderance of evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[149] The standard is similar to that enunciated by the *Rosenbloom* plurality, which has since been rejected by the Supreme Court. As an intermediate standard between negligence and constitutional malice, the gross irresponsibility standard requires some minimal investigation in some cases. This gross irresponsibility standard is unlike the malice standard, which places no onus of investigation on the publisher.

A plaintiff seeking presumed and punitive damages must show differing degrees of fault in various jurisdictions, ranging from constitutional malice[150] to common law malice.[151] Some states allow punitive damages only against media defendants,[152] while other states do not allow punitive damages in any defamation case.[153]

C. Inevitable Problems in the Plaintiff Status Approach

Concerned with the need for rules of general applicability that would provide predictability and certainty, the Supreme Court developed a plaintiff status analysis in the constitutionalization of defamation law. This Article's brief review of cases in the lower courts reveals the failure of the Supreme Court's approach to achieve the desired goal. Despite the Court's desire to avoid ad hoc analysis by focusing on the plaintiff's status, only a case-by-case analysis can determine whether the plaintiff is a public or private figure. Even if courts could ignore the subject matter of allegedly defamatory speech as *Gertz* requires, but *Dun & Bradstreet* counsels against, doing so has grave consequences for First Amendment interests. With the inconsistent application of the standards in lower courts, defendants are at the mercy of plaintiffs' choice

148. *See, e.g.*, Woods v. Evansville Press Co., 791 F.2d 480 (7th Cir. 1986); Gay v. Williams, 486 F. Supp. 12 (D.C. Alaska 1979).

149. Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975). The standard is intended to avoid editorial second-guessing when an issue is "arguably in the sphere of public concern." Gaeta v. New York News, Inc., 465 N.E.2d 802 (N.Y. 1984); *see* SMOLLA, *supra* note 3, at § 3.13.

150. *E.g.*, Jacobson v. Rochester Communications Corp., 410 N.W.2d 830 (Minn. 1987).

151. Ramirez v. Rogers, 540 A.2d 475 (Me. 1988).

152. *See, e.g.*, Brantley v. Zantop Int'l Airlines, Inc., 617 F.Supp. 1032 (D.C. Mich. 1985).

153. *See, e.g.*, Wheeler v. Green, 593 P.2d 777 (Or. 1979) (state constitution bars punitive damages in defamation actions).

of forum and the choice of law problems. Of more concern, however, are the basic flaws in the plaintiff status approach that adequately protect the interests of neither the plaintiff nor the defendant in defamation cases.

1. The Choice of Law Problem

Constitutional, statutory, and other rules governing a plaintiff's choice of forum generally permit an action to be brought in any jurisdiction in which the defendant has minimal contacts.[154] The plaintiff's power to choose a forum might have little impact in defamation cases if constitutional standards were applied uniformly, but in the current atmosphere, the plaintiff's ability to forum shop can have enormous consequences.

Because the national media do business everywhere, all courts in the country have personal jurisdiction. In *Keeton v. Hustler Magazine, Inc.*,[155] the Court held that "invisible radiations" from the First Amendment cannot defeat otherwise properly imposed personal jurisdiction. In *Keeton*, the statute of limitations on defamation actions had run in every state except New Hampshire. The plaintiff was allowed to bring suit there even though she was a New York resident and the defendant was an Ohio corporation, doing business mainly in California, and having less than one percent of its magazine circulation in New Hampshire. The Court ruled the same day in *Calder v. Jones*[156] that to introduce First Amendment concerns at the jurisdictional inquiry or other procedural stages would be an impermissible form of "double counting."

A shrewd plaintiff may thus bring suit in a forum less likely to find public figure status and thus avoid having to prove malice. Variations in substantive laws and procedural rules provide even more encouragement to forum shop

154. The constitutional restrictions on personal jurisdiction over defendants arise from the Due Process Clauses of the Fifth and Fourteenth Amendments. Historically, the limits were very rigid, and states could not exercise jurisdiction over persons beyond their borders. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877). In response to increasing mobility of individuals and the frequency of interstate business ventures, the Court began to relax the restrictions in 1945. It permitted the exercise of jurisdiction where the defendant had minimal contacts with the state such that the exercise of jurisdiction did not offend traditional notions of justice and fair play. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Defendants may be subject to jurisdiction if they avail themselves of the privilege of conducting business in the state, thereby invoking the protection of the state's laws. Hanson v. Denckla, 357 U.S. 235, 253 (1958). In determining whether contacts are sufficient, courts should consider the burden on the defendant, the efficiency of the judicial system, the interests of various states in advancing fundamental social policy, and the defendant's ability to foresee the potential for being brought into court in the forum state. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-97 (1980).

155. 465 U.S. 770, 781 n.12 (1984).

156. 465 U.S. 783, 790-91 (1984).

when plaintiffs are private figures.[157] Considering the "special place" of the First Amendment among other constitutional rights and the need to avoid chilling speech, double counting may not be as much an evil as the Court supposes.

Once a plaintiff has selected a forum, the court may decide that the laws of several states may apply. Choice of law rules are as diverse, complex, and esoteric as the law of defamation, leaving little hope for predictability.[158] Courts have applied variously the law of the forum, the law of the plaintiff's domicile, and the law of the place of publication.[159] Coupled with the principle in *Keeton*, the place of publication alternative presents complex problems in the case of national media. The better law approach, used in Minnesota, presents its own unique pitfalls for potential defamation defendants.[160] The concepts of federalism and states' rights justify in the minds of most the inconsistency in substantive laws and choice of law rules.[161] These principles cannot, however, justify unequal protection of First Amendment rights.

2. Basic Flaws in the Plaintiff Status Approach

The constitutionalization of defamation law has failed to achieve desired

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157. *See* SMOLLA, *supra* note 3, at § 12.03[1][b].

158. *See id.* (as many approaches to choice of law problem as there are states); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 16-38 (1982) (growing problem with increasing number of choice of law theories employed by states). The most common choice of law theories include the territorial or place of wrong approach, the most significant relationship analysis, the better law approach, and the interest analysis to determine which state's laws are paramount. Robert Leflar argued that courts actually apply the better law, regardless of the choice of law theory they purport to use. Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, LAW & CONTEMP. PROBS. Spring 1977 at 10, 13; Robert A. Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U. L. REV. 267, 298-301 (1966). Of the combined morass of defamation law and choice of law, Prosser wrote: "The realm of the conflict of laws is a dismal swamp, filled with quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon." William L. Prosser, *Interstate Publications*, 51 MICH. L. REV. 959, 971 (1953).

159. *See, e.g.*, International Adm'rs, Inc. v. Life Ins. Co. of N. Am., 753 F.2d 1373, 1376 n.4 (7th Cir. 1985) (place of publication because that is place of harm); Fleury v. Harper & Row Publishers, Inc., 698 F.2d 1022, 1025 (9th Cir. 1983) (defamation is transitory tort and law of forum applies); Dowd v. Calabrese, 589 F. Supp. 1206, 1210 (D.D.C. 1984) (place of harm); Denenberg v. American Family Corp., 566 F. Supp. 1242, 1247 (E.D. Pa. 1983) (place of publication); Zimmermann v. Board of Publications of the Christian Reformed Churches, Inc., 598 F. Supp. 1002, 1011 (D. Colo. 1984) (plaintiff's domicile); Davis v. Costa-Gauras, 580 F. Supp. 1082, 1091-92 (S.D.N.Y. 1984) (plaintiff's domicile).

160. Minnesota seeks to determine which law is the better one, given the circumstances. *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408, 416-17 (Minn. 1973). The Supreme Court has found the better law approach strange but not unconstitutional, upholding the application even when the defendant barely met jurisdictional requirements. Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

161. *See* SCOLES & HAY, *supra* note 158, at 16-38.

certainty and predictability and does not protect sufficiently either First Amendment or reputational interests. The plaintiff status approach gives inadequate weight to material issues apart from the plaintiff's status. These issues include the subject matter of the speech, the context and scope of publication, and, except for constitutional malice, the culpability of the defendant. The plaintiff status analysis does not eliminate ad hoc balancing, but merely requires balancing without consideration of all relevant circumstances.

A public official or a truly voluntary public figure may indeed be less deserving of protection against defamation and have greater potential to cure falsehoods than a private individual.[162] To end the inquiry at the status of the plaintiff, however, shortchanges the analysis. A reasonable resolution to the tension between First Amendment interests and protecting reputation requires inquiry into what, as well as whom, the defamatory statement concerns. A public controversy must affect at least a segment of the public in some way, but not all controversies affect the public in the same way or with the same degree of urgency. The plaintiff status approach makes no concession that, as the necessity for rapid dissemination increases, the likelihood of false statements about private individuals also increases. Nonetheless, the analysis gives no more leeway to a media defendant when publishing accounts of an immediate terrorist threat than to a defendant when publishing an account of the city council's debate over what flowers to plant in the parkway.[163]

The public figure analysis also fails to consider the context or extent of the publication in determining liability, although these factors would presumably play a part in determining damages. The *Dun & Bradstreet* plurality did give a passing acknowledgment that the extent of publication affects the analysis, but

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162. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974) (discussing public figure's assumption of risk and access to media). The cure for bad speech is more speech, Whitney v. California, 274 U.S. 357, 375-76 (1927), so access to the media is an important and valid consideration. Protection of speech necessarily means protecting some false speech, New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964), even though falsehoods have no "identifiable value worthy of constitutional protection," Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 64 (1971) (Harlan, J., dissenting), and "truth rarely catches up with a lie." *Gertz*, 418 U.S. at 344 n.9.

163. In *Gertz*, the Court was concerned that a public interest analysis would serve adequately neither First Amendment nor reputational interests because on the one hand, a private individual would have to meet the "rigorous requirements of the *New York Times* standards" if the speech was of public concern, while on the other hand, a publisher of defamatory error about a matter not of public concern would be liable even if it took every reasonable precaution to ensure accuracy. *Gertz*, 418 U.S. at 346. That argument, however, assumes that the only standards available are constitutional malice and strict liability. *Gertz* itself prohibited liability without fault, so a publisher taking every reasonable precaution could not be held liable. Moreover, the choices are not, and should not be, as black and white as painted by the Court. Assuredly, an analysis that looked only at the subject matter of the allegedly defamatory statement would provide no better balance than does the plaintiff status analysis.

arguably, the Court arrived at the wrong conclusion. The plurality found that the speech was not of public concern because of its limited publication, because of its interest to the specific business audience, and because of the contractual obligations of the recipients to disseminate the information to no one else.[164] The plurality failed to recognize that its own analysis indicated that the segment of the public that received the information was the same segment to whom it was of legitimate concern.

These incurable flaws in the plaintiff status approach result in a failure to protect the media from suits by undeserving plaintiffs and failure to ensure remedies for deserving plaintiffs. Studies by the Iowa Research Group reveal that approximately ninety percent of defamation suits filed never receive a hearing on the fundamental issues of truth, falsity, and the plaintiff's damages. The vast majority of the cases are decided by pretrial rulings on the standard of fault.[165] These figures are particularly disturbing when considered in light of the further finding that the majority of defamation plaintiffs do not sue for the purpose or expectation of winning damage awards, but rather for vindication, and then only after meeting with unsatisfactory and often arrogant responses to attempts to obtain an apology, retraction, or correction.[166]

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164. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985).

165. RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 106-07 (1987) [hereinafter LIBEL LAW]. The book is a report of the findings, conclusions, and suggestions of the authors, who were members of the Iowa Research Group. *See also* RANDALL P. BEZANSON ET AL., LIBEL AND THE PRESS: BEZANSON, SETTING THE RECORD STRAIGHT (1985) (preliminary report of the study) [hereinafter BEZANSON, SETTING THE RECORD STRAIGHT]. The study found that the constitutional fault issue was the main issue litigated in a majority of defamation cases and that only thirteen percent of defamation cases are adjudicated on issues of truth and falsity. *Cf.* Anderson, *Reforming*, *supra* note 11, at 499. Professor Anderson discusses one case, Herbert v. Lando, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986), that was in the courts for 13 years, including two trips to the court of appeals and one to the Supreme Court, before being dismissed on the ground of insufficient evidence of constitutional malice.

166. Nearly 50% of the plaintiffs interviewed reported that they sued primarily to restore their reputation or stop further publication. Another 30% sued for the less noble vindictive reason of punishing the publisher. Only about one-fifth expected to be awarded damages. LIBEL LAW, *supra* note 165, at 79. Nearly 90% of the plaintiffs contacted the eventual defendants before filing the action, and 75% of that group would have been satisfied with an apology, correction, or retraction, and would not have sued if the defendant had been more sympathetic. Only 3.9% of the plaintiffs contacting the defendant would have sought money damages at that point. *Id.* at 24-25. Responses from the media, ranging from indifference to arrogant and defensive hostility, left plaintiffs angered and dissatisfied. *Id.* at 38-53. These statistics indicate that a substantial majority of cases could be avoided or settled without expensive litigation with better attention to public relations. *See id.* at 82-83 (media's negative attitude major factor in decision to sue). The statistics may be skewed because they were based on after-the-fact self-reports, and responses may have been self-serving. *See* GANNET FOUNDATION, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS (1986) [hereinafter THE COST OF LIBEL]. Even assuming a gross exaggeration, however, a significant number of suits could be eliminated by public relation efforts. Defamation suits are expensive and only 10% of all plaintiffs win, but over a third of plaintiffs report satisfaction with the process, and

Cases involving public figures are almost always decided on the basis of the plaintiffs' inability to prove constitutional malice. Therefore, the plaintiffs can claim a victory by maintaining that the loss was a result of a technicality, implying that had the truth or falsity issue been heard, they would have won. The implication is accepted because most people, unsophisticated in the fine points of defamation law, assume that the plaintiff would not have sued if the statement were true.[167] Thus, rather than discouraging nonmeritorious suits, the currently applied standards and procedures may in some instances encourage suits with no underlying merit. Prior to the constitutionalization of defamation, resolution often revolved around the truth of the statement. A plaintiff faced the possible embarrassment of having the statement proved true in open court, giving the plaintiff even wider publicity.

Private plaintiffs, on the other hand, often abandon their suits after years of pre-trial argument on the fault issue, again with truth or falsity never being considered. The ultimate loser may be the one the Court sought to favor--the deserving private figure who has suffered actual economic harm caused by a false statement damaging his or her reputation.[168]

III. REFORMATION OF THE CONSTITUTIONAL LAW OF DEFAMATION

Any standard for imposing liability in defamation cases must rest on a balancing of First Amendment interests with reputational interests. The definitional balancing and plaintiff status standards of the Court have failed to provide uniform, predictable, and fair results. Although some have suggested a return to common law standards by "deconstitutionalizing" the tort, and others advocate a complete bar to defamation actions, both interests are of sufficient importance to make neither of the extreme solutions reasonable.[169] The

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86.5% would sue again in the same situation. LIBEL LAW, *supra* note 165, at 156-57. Although prospects for winning are slim, plaintiffs obviously derive some satisfaction from the suit itself.

167. *Id.* at 214-15; BEZANSON, SETTING THE RECORD STRAIGHT, *supra* note 165, at 30.

168. The constitutional requirements have thus turned defamation law on its head. Defendants will nearly always assert that the plaintiff must prove constitutional malice, resulting in expensive pretrial litigation that the plaintiff may not be able to afford. A majority of defamation attorneys handle cases on a contingent fee basis, but other costs may be prohibitive for the private figure plaintiff facing economic hardship. The Research Group reported that over 70% of the plaintiffs reported costs in excess of $1,000, with 34% spending more than $5,000 on their lawsuits. LIBEL LAW, *supra* note 165, at 71. The plaintiff most in need and most deserving of compensation may thus be the least likely to receive it.

169. Justice White implicitly advocated a return to common law standards for public officials and public figures, and explicitly preferred common law standards for private figures. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773 (1985) (White, J., concurring). White asserted that limiting damages may not completely eliminate a chilling effect, but noted that other commercial enterprises must pay for harm caused in the course of doing business. That may be true, but the media is the only business whose activity has explicit constitutional protection.

problem is not, as the Court has feared, in ad hoc analysis, which must occur regardless of the standards. Rather, the problem lies in the incomplete analysis of the plaintiff status approach. All of the circumstances must be considered on a case-by-case basis, with some general guidelines to give litigants some assistance. These general guidelines must begin with a clear hypothesis concerning the scope of First Amendment protection, the importance of protecting reputation, and the relative value of each.[170]

A. The Basis for Reform: First Amendment and Reputation Interests

1. The First Amendment and Free Speech Interests

Much debate has centered on which, if any, of the rationales for protecting speech--ensuring a marketplace of ideas, aiding self-government, serving as a safety valve, or providing avenues of self-expression and self-fulfillment--is or should be of primary importance.[171] The position of this Article is that attempts to categorize speech and prioritize its value are futile. For example, allowing individuals to achieve self-fulfillment by both freely expressing themselves and having ready access to the ideas of others contributes as much to the democratic process as purely "political" speech. The democratic process requires a citizenry informed not only in depth, but also in breadth. It would be anomalous to protect the foundation of our other freedoms while allowing those freedoms to be curtailed. First Amendment protections must extend to all speech, whether political, aesthetic, philosophical, or merely gossip.

The more difficult questions concern the limits of protection and the types of threats from which speech is protected. Certainly protection against prior

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Chief Justice Burger also favored re-examining *New York Times*, believing that the Court erred in not applying a "reckless disregard of the truth" standard that would allow courts to impose liability if the exercise of reasonable care would have revealed a statement to be false. *Id.* at 764 (Burger C.J., concurring). Although Burger's position was not completely consistent with the common law, it recognized few First Amendment problems with defamation liability. *See also* Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 790 (1986) (suggesting problem in *New York Times* was not common law, but rather the Alabama courts' application of it).

170. Perhaps no case better exemplifies the opposing views on the scope of First Amendment protections than Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *See* Kalven, *Hill, Butts, and Walker*, *supra* note 61, at 275 (can't tell the players without a scorecard). For Justice Harlan, the First Amendment was a personal right to make thoughts known as much as it was a protection of the political system. *Butts*, 388 U.S. at 149. Chief Justice Warren and Justices Brennan and White would have given more protection to political speech or issues of public concern, defining these terms with varying degrees of breadth. *Id.* at 164 (Warren, C.J., concurring in the result); *id.* at 173 (Brennan, J., concurring in part, dissenting in part). Justices Black and Douglas would have given absolute protection to all speech. *Id.* at 170-72 (Black, J., concurring in part, dissenting in part). *See also supra* notes 55-61 and accompanying text.

171. *See supra* notes 17-22 and accompanying text.

restraints is a major function of the First Amendment.[172] Criminal sanctions after publication punish targeted speech and may chill other speech. The *New York Times* holding that states cannot achieve by civil liability what they cannot achieve by criminal sanctions is entirely reasonable.[173] Tort law generally, and defamation law particularly, does not, however, seek to punish a wrongdoer or deter future conduct as does criminal law. Instead, tort law seeks to compensate victims.[174] Unlike the defendant burdened by prior restraints or criminal sanctions, the tortfeasor pays for the harm inflicted, not for the speech.[175] However, when civil penalties are sufficiently severe and arbitrary, they will undoubtedly have a pronounced chilling effect on speech. Thus, the interest in compensating the plaintiff must be balanced with special care against

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172. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 716 (1931). Even the prior restraint ban is not absolute. *See* New York Times Co. v. United States, 403 U.S. 713 (1971). The government sought an injunction against the *Times* and the *Washington Post* to prevent publication of the Pentagon Papers, which discussed the United States' involvement in Viet Nam. Two Justices, Black and Douglas, maintained that prior restraints were never permissible. The seven remaining Justices held that such restraints were sometimes allowed. Four of them--Brennan, White, Stewart, and Marshall--concluded that this was not one of those times, and with Black and Douglas formed a majority denying the injunction. *See also supra* note 18 and accompanying text (copyright laws, national security, other instances of prior restraint).

173. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964). This principle, as have many others in the case, slowly eroded with subsequent cases, particularly in the area of presumed and punitive damages. *See id.* at 264 (malice required for punitive damages); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974) (malice required for private figure plaintiff only if speech is of public concern); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (punitive damages on ill-defined, possibly non-existent fault standard). Because punitive damages often far exceed compensatory damages, and it is the fear of large damage awards that chill speech, *see supra* notes 42, 68-71 and accompanying text, the Court has moved dramatically from its first pronouncement.

174. *See* PROSSER & KEETON, *supra* note 5, § 1 at 5. Tort law seeks to assess fault and liability in such a way that losses are equitably distributed and self-help remedies do not disrupt the peace. Arguably, there is some deterrent value in tort law, *see id.* at §§ 1-7, but the deterrent effect on negligent conduct is questionable, particularly when the conduct places the tortfeasor at peril. The most common example is the "kamikaze" driver, who is unlikely to be deterred by fears of tort liability if concern for his or her own safety is not a deterrent.

175. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). In *Claiborne*, the plaintiff alleged that speeches by supporters of black boycotters amounted to incitement under Brandenburg v. Ohio, 395 U.S. 444 (1969). The Court disagreed and held that the speeches were protected and the defendants could not be found liable. The Court went on to say, however, that if the strong language "had been followed by acts of violence, a substantial question would be presented whether [the defendants] could be held liable for the consequences . . . ." *Claiborne*, 458 U.S. at 928. The Court itself thus recognized the difference in this case between imposing liability for speech itself and liability for the harm flowing from speech. *See* Gerald R. Smith, Note, *Media Liability for Physical Injury Resulting from the Negligent Use of Words*, 72 MINN. L. REV. 1193, 1216-17 & n.135 (1988) [hereinafter Note, *Media Liability*].

the interest in protecting First Amendment rights.[176]

2. Reputational Interests

To the extent that the First Amendment allows the expression of self, free speech and reputational interests merge. Defamation leads to loss of personal esteem and dignity, reducing the range of choice in relations and lifestyle, thus limiting ultimate self-expression. The "concept of the essential dignity and worth of every human being" is at "the root of any decent system of ordered liberty," and defamation law protects against "unjustified invasion and wrongful hurt" of that dignity and worth.[177] Reduction of self-worth by invasion of harmful falsehoods is no less damaging to liberty than is a reduction by invasions on the freedom of speech.

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176. The categorical, definitional balancing approach of the Court has resulted in the identification of defamation as a unique form of unprotected speech. Unlike other categories of unprotected speech, defamation requires further balancing. Once speech has been defined as obscenity or incitement, however, states may impose regulation with no further balancing.

Obscenity is perhaps the most analytically troubling category that the Court has declared unprotected. The case law has been nothing less than bizarre since the early cases of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) and Beaurnais v. Illinois, 343 U.S. 250, 266 (1952). The Court decided only material that is "utterly without redeeming social importance" may be regulated as obscene. Roth v. United States, 354 U.S. 476, 481-85 (1957). The Court later decided that the material must be "*utterly* without redeeming social value." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 419 (1966) (emphasis in original). It is unlikely that the simple italicizing of a word has ever created greater difficulties. The Court subsequently determined that the "*utterly*" test of *Memoirs* had drastically altered the "utterly" test of *Roth* and placed an impossible burden on prosecutors, particularly considering the burdens of proof in criminal cases. Miller v. California, 413 U.S. 15, 21-22 (1973). *Miller* developed a three part test: whether the average person applying contemporary community standards would find the work as a whole appeals to prurient interest; whether the work describes or depicts sexual conduct in a patently offensive way; and whether the work as a whole lacks serious literary, artistic, political, or scientific merit. *Id.* at 24. Perhaps Justice Stewart's "I know it when I see it" test remains the most concise, if not the most precise, standard. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Whatever the test, obscenity is subject to prior restraints. No less a champion of the First Amendment, Zechariah Chafee, Jr. defended prior restraint of obscenity, maintaining that "profanity and indecent talk and pictures" are punishable because they espouse no ideas and have an immediate consequence on the senses. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 150 (1941). Chafee was quoted by a Pennsylvania court that found that "obscenity is indictable just because it is obscenity." Commonwealth v. Gordon, 66 Pa. D & C 101, 146 (1949). Apart from the difficulties in definition, regulation of speech as speech is problematic vis-a-vis the First Amendment. Certainly, one is hard put to define any positive value in pornography, particularly in its more degrading forms. Although eradication of pornography may well be a socially desirable goal, doing so through threatening other forms of free speech is more harmful than allowing its proliferation.

177. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

3. A Synthesis of the Interests

The shared functions of protecting free speech and safeguarding reputations argues in favor of balancing the interests to determine liability in defamation cases. Three important considerations, however, require that the balancing be done with care and precision. First, free speech, unlike reputation, has specific constitutional protection. Nonetheless, in the same way that the "penumbras" of the Bill of Rights protect the right to privacy, they may also protect the right to maintain one's good name.[178] If, as the concept of the right of privacy suggests, an individual has a penumbric constitutional right "to be let alone," a fortiori the individual has a right to be free from the invasion of published falsehoods. Moreover, if defamation liability is to compensate for harm caused and not to punish the speech, no conflict exists. There is no constitutional right to inflict injury. As Justice Holmes put it, the right to swing one's arm stops at the point of the other person's nose.[179]

The second consideration is that the First Amendment, as with most other constitutional protections, limits governmental infringement on personal freedoms. Defamation cases bring to bear governmental action that threatens speech against private action that threatens reputation. Arguably, a defamed individual has suffered no harm from the state, so the Constitution is not implicated. However, governmental failure to act to protect or vindicate an individual may in itself violate due process.[180] Contrary to several decisions by the Court, judicial refusal to enforce basic rights threatens to curtail those rights as surely as does direct legislative or executive infringment.[181]

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178. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Justice Douglas wrote the opinion striking down state laws that prohibited the use of contraceptives. What other rights that might emanate from the penumbras is unclear. Although the Court has not specifically held, dicta and individual opinions mention the Ninth Amendment as a source of penumbric emanations. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980) (plurality opinion by Burger, C.J.) (Ninth Amendment adopted to allay fears that expressing certain freedoms would exclude others); Roe v. Wade, 410 U.S. 113 (1973) (Ninth Amendment mentioned, but due process relied on for right to abortion); *id.* at 210 (Douglas, J., concurring) (Ninth Amendment does not create rights, but allows courts to identify them).

179. *Cf.* Weirum v. RKO General, Inc., 539 P.2d 36, 38-40 (Cal. 1975) (First Amendment does not permit injury merely because injury caused by words rather than conduct).

180. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-14 at 650 (1978) (failure to provide remedy for invasion of privacy by approbation). Judicial enforcement of private action is state action. Shelley v. Kraemer, 334 U.S. 1 (1948) (privately contracted restrictive covenant).

181. *But see* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S 464 (1977). By holding that the refusal to fund abortions for indigent women, even when their lives are at stake, does not violate constitutional rights, the Court has found that states have no duty to play an active role in the attaintment of rights. The Court has gone much further and held that due process does not require the state to protect life, liberty, and property. More recently, the Court has specifically held that the purpose of due process is to protect persons from the state, not to require the state to

A final consideration is that when reputations are damaged, individuals may have the opportunity to cure the harm by correcting the false statement. When the right to free expression is curtailed, no comparable corrective measures are available. False speech may be cured by more speech, but enforced silence is unremediable. Threats to free speech are also likely to affect a far greater number of people. Any theory of liability for defamation must therefore place a heavy burden on plaintiffs to ensure a proper balance. The task is to balance all interests and concerns in such a way that equitably protects the rights of all.

B. An Overview of Some Suggested Reforms

There is no shortage of suggestions of ways to reform the law of defamation. Many of the suggested approaches attempt to clarify current standards by refining the definitions of public controversies, public figures, voluntary involvement, and other elements of the plaintiff status analysis.[182] These suggestions are inadequate as they do not address the fundamental problems of the plaintiff status approach.

Other suggested reforms may be of more help in disentangling courts from the morass of defamation law. The Iowa Research Group has suggested several extra-legal measures that may help avoid litigation while satisfying both sides. The Group recommends that publishers better define policies and procedures to handle complaints of falsehoods, thus satisfying those potential plaintiffs who merely want to set the record straight.[183] Well-established policies of

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protect its citizens from each other. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 192 (1989). The author would argue that these cases are clearly wrong.

182. *See, e.g.*, Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931 (1983). The note reviews several suggestions and concludes with a definition of public controversy that is even more restrictive than the Court's, tying it closely to the political process.

183. *See* LIBEL LAW, *supra* note 165, at 25-26, 31, 35. Almost three-quarters of the plaintiffs interviewed contacted the media within two days of publication or broadcast. Some contacted the individual reporter, but the overwhelming majority talked, or attempted to talk, to editors, publishers, news directors, or station managers. The majority contacted the eventual defendants by phone or in person; letter writers were almost exclusively those who had already sought the assistance of counsel. Less than 1% of those contacting the media initially asked for monetary compensation. Over 85% wanted a retraction, correction, or apology, or merely no further publication. Five percent only wanted to discuss the story. The lack of established procedures to handle complaints and the rush to get out the next edition or broadcast played important roles in dissatisfaction with media response. Haphazard reporting of complaints resulted in lack of knowledge of complaints on the part of management, legal representatives, and others who might formulate responses. Of 61 editors interviewed, only seven had provided written guidelines to those most likely to have first contact with complaints. Few knew or had any way of knowing how many complaints were received. The authors of the report suggest five steps to alleviate the number of suits filed: instruction on the media's power to do harm, in-house instruction in public relations, centralization of the responsibility of responding to complaints, development of written procedures,

sympathetically responding to legitimate complaints could significantly reduce the number of lawsuits filed.

Suggestions that declaratory judgments be used to determine the truth or falsity of the publication[184] also have merit, particularly if the Group is correct that many plaintiffs' primary interests are in setting the record straight. Some have suggested that if the statement is found to be false, the defendant should be required to publish a retraction. Others, concerned about First Amendment implications in requiring publication, would give the defendant the choice of publishing the retraction or paying the cost of publishing elsewhere.[185]

Other suggestions focus on the damages issue, particularly presumed or punitive damages, which may have the greatest threat of chilling speech.[186] Recommendations include barring presumed and punitive damages, severely limiting damages for emotional distress and other difficult to prove harms flowing from loss of reputation, and placing a cap on all types of damages.[187]

Many of these proposed changes have much to offer and should be incorporated into any reformation of the law of defamation. The ultimate solution requires combining these suggestions with abolishing the plaintiff status approach to determining liability, which would ensure all interests are fairly protected.

C. A "Constitutional" Negligence Standard of Liability

The plaintiff status analysis fails to consider adequately the totality of the

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and making "sitting-on" complaints a firing offense. Considering the grave concern over defamation actions, it is surprising that the majority of the media do not have such minimum, and relatively inexpensive, standards and practices in operation.

184. *See, e.g., id.* at 211-12 (defamation should be replaced with a cause of action for setting the record straight); H.R. No. 2846, 99th Cong., 1st Sess. (1985). Declaratory judgments would be considerably less expensive for all parties because the defendants' degree of fault, which now involves the major expense, would be irrelevant. Others have suggested more emphasis on negotiation and settlement and that a retraction be a complete defense if published prior to suit. *See, e.g.*, THE COST OF LIBEL, *supra* note 166, at 19. While these suggestions have merit, they do not address the need for compensation to monetarily harmed plaintiffs.

185. *See id.* at 14-15.

186. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 83-87 (1971) (Marshall, J., dissenting) (presumed and punitive damages leave too much discretion to jury; resolution of "clash of values" should be to restrict damages to actual, proven losses).

187. RODNEY A. SMOLLA, SUING THE PRESS 241-42 (1986); William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press --An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793 (1984). Suggestions also include awarding or sharing attorneys' fees or otherwise splitting the costs of litigation. *See, e.g.*, Anderson, *Reforming*, *supra* note 11, 143 U. PA. L. REV. at 532.

circumstances and results in inconsistent application with little chance for certainty and predictability. The analysis must be abandoned in favor of an analysis responding more fully to the unique facts of each case. Arguments concerning the difficulty ad hoc balancing poses for the courts are well-taken, but it is the courts' responsibility to make difficult decisions.[188] A case-by-case balancing of interests in a "constitutional negligence"[189] analysis would better protect the interests with a minimum of additional problems. Careful attention to detail would soon develop precedents giving potential plaintiffs and defendants a measure of certainty and predictability they do not now have.

1. The Issue of Truth or Falsity

Before plaintiffs may proceed in a suit for damages in a defamation action, they should first be required to seek a declaratory judgment that the statement was false. Currently, this issue is rarely adjudicated, with most suits being resolved on the standard of fault issue.[190] If the statement is deemed false, the defendant would have the choice of publishing a correction or paying for publication elsewhere.[191] This requirement would deter suits brought for purposes of harassment and those suits brought by plaintiffs who know that the truth will not be determined. The declaratory judgment would not be an either-or choice. A plaintiff would be required to seek the judgment and then be permitted to proceed with a suit for damages only if the statement were declared false.

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188. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 81 (1971) (Marshall, J., dissenting) (ad hoc balancing would require almost constant supervision); Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-45 (1974) (difficult to determine public interest). *But see* Branzburg v. Hayes, 408 U.S. 665, 745-46 (1972) (Stewart, J., dissenting) (making "delicate judgments . . . after all, is the function of courts of law"). Courts cannot abdicate their responsibility when fundamental rights are at stake merely because the decisions are difficult.

189. This article adopts a label for the proposed standard with some trepidation. Rigid interpretation of words and phrases often results in angels-on-a-pinhead arguments. *See, e.g.*, Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 n.8 (1979) (no public controversy because all agree spying is undesirable); *supra* note 85 and accompanying text; *see also* Miller v. California, 413 U.S. 15, 21-22 (1973) (difference in "utterly" and "*utterly*"); *supra* note 174. The term "constitutional negligence" may face some of the difficulties as the term "actual malice," *see supra* note 161 (term "actual malice" confusing and unfortunate), but the term has the benefit of conveying the accurate perception that it is based in both constitutional law and negligence law.

190. Only 16 of the cases surveyed by the Iowa Research Group were resolved on the issue of truth, while 84% turned on the plaintiff's status and consequent standard of fault. Defendants won 91% of the time, a marked increase over the 71% of defendants winning cases in 1975. LIBEL LAW, *supra* note 165, at 119, 123. Over half the cases took three years or longer to resolve, with a quarter taking more than five years. *Id.* at 61. Some take considerably longer. *See supra* note 11, (*Hebert v. Lando* took 13 years). Declaratory judgments would be quicker and less expensive for all. The judgment would end the affair for those plaintiffs merely seeking to set the record straight.

191. *See supra* note 185 and accompanying text.

2. The Constitutional Negligence Standard: Duty and Breach

Although the courts have based liability for defamation on negligence, they have generally failed to analyze cases with reference to traditional elements of negligence, particularly the elements of duty and a breach of that duty.[192] In its simplest formulation, a duty is defined as what a reasonable person would do after having considered the utility of the conduct and the magnitude of the foreseeable harm. Utility of the conduct is measured by the legally recognized value of the interest to be advanced by the conduct, the probability that the conduct will advance or protect the interest, and the availability and cost of less dangerous alternatives. The magnitude of foreseeable harm is measured by the value of the interest invaded or threatened, the probability of invasion, the likely extent of the harm, and the number of people likely to be affected.[193] The constitutional negligence standard would apply a similar analysis in defamation cases with particular emphasis on the utility of the conduct--that is, publication--in terms of First Amendment interests.

a. The Utility of Publication

The first part of a negligence inquiry would be easily answered in the context of speech. All publications advance the interests of free speech, and therefore, the investigation must focus on the extent to which free speech interests are advanced. The analysis would include the interest of the publisher as well as those of the audience.[194]

The publisher's role would be one factor in determining the utility of the publication. A media defendant may have a greater interest in publication than may a back-fence gossip, particularly when the double protection of the Speech and Press Clauses are considered. The interest of the audience may also be greater in instances of media publication because the media is charged with, and

192. Ordinary negligence requires a plaintiff to prove four elements: duty, breach, causation, and harm. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1963); PROSSER & KEETON, *supra* note 5, § 30 at 164-65.

193. RESTATEMENT (SECOND) OF TORTS §§ 292-93 (1963). Judge Learned Hand attempted to reduce the analysis to a simple mathematical formula: If B is less the P times L, where B is the burden of the alternative, P is the probability of harm, and L is the extent of harm, the actor has a duty to act. United States v. Carol Towing Co., 159 F.2d 169 (2d Cir. 1947). In any negligence analysis, an initial difficulty is assigning comparable weights to often incomparable interests. Thus, formulations, whether stated mathematically or verbally, are easier to define than to apply.

194. The First Amendment involves not only the right to speak, but also the right to hear. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 77 (1976) (Powell, J., concurring) (central concern of First Amendment is need to maintain access of public to the expression); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) (public has right of access to social, aesthetic, and moral ideas and expressions) (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)).

uniquely situated for, the widespread dissemination of information and ideas.[195]

The subject matter of the speech, including the false statement about the plaintiff, would also be considered in determining the utility. Subject matter may be of even greater value when the audience's right to hear is considered because the audience may have a greater interest in receiving the information than does the defendant in publishing it. For example, the public has a substantial interest in political matters. However, in the modern world, the national mass media's real interests are often more commercial than constitutional.

The utility to the audience would be determined with reference only to those at which the publication was directed and only to those who actually received it. Thus, a defendant would have some duty--the exact nature of which would be determined by all the circumstances--to exercise care not only in ascertaining the truth but also in the act of publication.[196]

b. Magnitude of Foreseeable Harm

The probability of harm and the likely extent of harm often would be proportional because as harm is more probable, the extent of harm is greater. The probability of harm and its likely extent are both obviously greater in an accusation that a person is a child molester than in an accusation that he has an unmown lawn. The status of the plaintiff is also relevant in assessing the magnitude of foreseeable harm. The Court was correct in concluding that public officials and public figures have greater access to the media to correct errors and harm is thus less likely.[197] However, the Court remains underinclusive in its analysis because it stops at the plaintiff's status.

The context of a publication will also affect the measure of foreseeable harm. A widely or repeatedly published statement is more likely to cause harm than is a statement with narrow and one-time publication. Thus national media

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195. *See Columbia Broadcasting*, 412 U.S. at 102. The number of people gaining access may be a factor in the utility, and also in the foreseeability of harm. Thus, although the same standard would apply to media and non-media defendants, the totality of the circumstances might require imposing differing duties with respect to publication of similar statements.

196. This would correspond somewhat to the common law's concept of abusing a privilege by publishing to a wider audience than necessary. Size of the audience, either intended or actual, would never be determinative of the utility. *Cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985). The Court, in *Dun & Bradstreet* placed too much emphasis on the size of the audience in discounting the value of the speech. Utility must be measured by the number of people affected and the extent to which they are affected.

197. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

publications may have greater utility, but they would also include foreseeable harm of a greater magnitude. In some instances, however, a local publication might be more effective in getting the statement before the audience whose opinion of the person would be of importance.

c. The Reasonable Person and the Standard of Care

As in any negligence analysis, assessment of liability in defamation under a constitutional negligence standard would require courts to determine, with hindsight, how a reasonable person would have acted.[198] The importance of the subject matter, the ease of discovering the truth, and the context of publication would all be important considerations. In the case of a media defendant, the ordinary practice of the media would be evidence of reasonable conduct, but would not be dispositive.[199]

In some situations, reasonable care might require only that the defendant not publish with knowledge of falsity, duplicating the constitutional malice standard. Conceivably, publishing even with serious doubts as to the truth would be insufficient to impose liability if the subject matter were of such grave concern as to outweigh the risk that the statement was in fact false. At the other end of the spectrum, legitimate First Amendment interests might be so minimal and foreseeable harm so great that a reasonable standard would require far-reaching investigation to determine the truth. Strict liability would never apply.

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198. In speaking, writing, or broadcasting, as in any other endeavor, the actor rarely pauses reflectively to consider the potential effects of the action with the same scrutiny later given by the courts. This may be particularly true of media publication of back-page articles. In-depth investigative reporting is not the source of most defamation actions, with less than one-half the suits arising from front page stories. LIBEL LAWS, *supra* note 165, at 20. As one editor rather graphically put it: "Investigative stories are done with great care and are not nearly as troubling as the stories that appear on the inside of the paper. It's the routine stories that rise up and bite you in the ass." BEZANSON, SETTING THE RECORD STRAIGHT, *supra* note 165, at 8.

199. Some states have adopted a professional standard for media defendants in private figure cases. *See, e.g.*, Triangle Publications, Inc. v. Chumley, 317 S.E.2d 534, 537 (Ga. 1984); Benson v. Griffin Television, Inc., 593 P.2d 511, 513 (Okla. Ct. App. 1978). Making professional standards dispositive poses several problems, including difficulties in defining a standard for such diverse entities as the *Washington Post*, *People Magazine*, and the *National Enquirer*. *See* SMOLLA, *supra* note 3, § 3.25[1]. Minimum standards of professional responsibility have a much wider variance in journalism than in professions such as law and medicine. *Id.* (citing Diana M. Daniels, *Public Figures Revisited*, 25 WM. & MARY L. REV. 957, 959 (1984)) (publishers have no generally recognized standards associated with learned professions); David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 455 (1975) (fundamental disagreement within the profession over what constitutes reasonable journalism). Journalism has no licensing requirements as do law and medicine, so self policing is impossible. Moreover, even if well-defined standards existed, it is of questionable value to allow professional standards to be dispositive. *Cf.* Gates v. Jensen, 595 P.2d 919 (Wash. 1979) (ordinary medical practice of not giving glaucoma tests not reasonable).

d. Countering Chilling Effects

The constitutional negligence standard would require ad hoc, case-by-case analysis of all the circumstances, leaving the potential for inconsistency and lack of predictability. Application of the constitutional negligence standard, with well-delineated opinions both in trial courts and on review, would establish a body of case law serving to put potential defendants on notice. Conversely, the wide discrepancies in the application of the plaintiff status analysis lend certainty in only the most obvious cases. Currently, defendants are unable to predict when courts will find a public controversy, a voluntary thrust into the controversy, and other elements of the public figure issue.[200] The constitutional negligence standard would have the advantage of allowing the courts to engage more openly in ad hoc analysis. Defendants would then at least know the elements that the courts would be considering and could prepare to address those elements.[201] Even assuming refinement of the public figure analysis could provide certainty--an assumption emphatically rejected here--the approach is unsatisfactory because it gives insufficient weight to First Amendment concerns in private figure cases.

e. Comparison with Other Standards

Constitutional negligence is similar to the common law standards, which grant conditional privileges to protect the interests of the publisher, recipient, or third persons, and to protect the privilege of fair comment. At common law, the privileges were defenses to the action. However, in constitutional negligence, these factors would be part of the duty analysis, which is an element of the cause of action itself. The common law treated the factors of privilege, abuse, and others serially rather than balancing all the interests to determine the nature and extent of the defendant's duty.[202]

Individual and various combinations of Justices have articulated principles involved in the constitutional negligence standard, but none have advocated

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200. Some Justices have been content with some degree of uncertainty in any event. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44-45 (1971) (plurality opinion) (leave reach of "issues of public concern" to future cases). The Court never determined the reach, because it rejected the plurality's proposed standard in *Gertz*. *Dun & Bradstreet* reintroduced the concept of issues of public concern, but the Court still has not defined it.

201. The courts' *sub rosa* ad hoc analysis leaves litigants with no opportunity to address issues the court may deem vital. The standard would also reduce the likelihood of the more radical alternative of overruling *New York Times* completely and returning to strict liability. *Cf. Gertz*, 418 U.S. at 389-92 (White, J., dissenting). White would find the requisite degree of fault in the publisher's knowledge of potential harm. He concluded that the publisher, by "circulating a falsehood he was not required to publish" was the only culpable party.

202. *See supra* notes 28-37 and accompanying text.

adoption of such a standard. Justice Harlan, in *Rosenbloom*, suggested that the Constitution requires no more than that the defendant act with reasonable care, but gave little guidance on how he thought courts should measure reasonableness.[203] The *Rosenbloom* plurality noted how matters of public interest reveal the artificiality of the public/private figure distinction, but chose to adopt the constitutional malice standard.[204] *Dun & Bradstreet* recognized the difference between speech of public and private concern, but failed to give adequate weight in terms of First Amendment interests to purely private speech.[205]

State courts applying negligence standards in private figure cases vary considerably in the degree to which they balance interests. The Alabama Supreme Court, in *Mead Corp. v. Hicks*,[206] has perhaps come closest to the constitutional negligence standard. The court stated that the finder of fact must determine the thoroughness of the investigation a reasonable person would undertake considering the interest promoted by the statement and the extent of harm to which the plaintiff was exposed. The court left open the question of how much weight First Amendment interests should carry, leaving the determination to the finder of fact.

f. Hypothetical Application of the Standard

Dun & Bradstreet provides an excellent framework to exemplify the application of the constitutional negligence standard. The Court found that a false statement claiming that the plaintiff had filed for bankruptcy was of purely private interest, and thus of "less First Amendment concern."[207] A court applying the constitutional negligence standard would balance the utility of the conduct against the foreseeable harm. Beyond the irrebuttable presumption that

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203. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 72 (1971) (Harlan, J., dissenting). Harlan did suggest that damages be limited to foreseeable harm. *Id.* at 68 (speaker entitled to assume audience is not susceptible to distress, is of average sensibilities). Harlan was thus more concerned with limiting damages than with establishing a cogent standard of liability in the first instance.

204. *Rosenbloom*, 403 U.S. at 41 (plurality opinion). The opinions in this and other cases reveal an interesting assumption among those favoring different foci of interests. For example, the *Rosenbloom* plurality found the plaintiff status analysis inadequate, and the *Gertz* majority found the public interest analysis inadequate. The courts are not faced with an either/or choice between analysis of the plaintiff's status versus analysis of the public interest, however. *Cf. supra* note 164 (choices of standards of liability go beyond malice or strict liability). Neither of the approaches are adequate by themselves. Only a combination of them, along with other factors, will fairly protect all interests.

205. *Dun & Bradstreet* thus returns to the *Rosenbloom* analysis for a private figure, but only after the *Gertz* analysis determines the plaintiff is a private figure. This further points out the problems of considering interests serially rather than in conjunction with one another.

206. 448 So. 2d 308 (Ala. 1983).

207. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S 749 (1985).

all speech has some value, utility would be found in the publisher's business interests and the interest of the creditors to whom the information was furnished. On the other hand, the foreseeability of harm, including the inability to obtain financing and the resulting possibility of actual bankruptcy, would appear obvious. Assuming that delay in checking the accuracy of the report would not substantially increase the threat to the interest of the publisher or audience, a reasonable person would investigate. This is true particularly when the defendant obtained the information through the efforts of an inexperienced high school student.[208] Based on the facts given, the defendant apparently did not investigate to determine the truth; thus imposing liability led to the correct result. This was a fortuitous event, however, because the Court's analysis was short-sighted.[209]

Altering the facts of *Dun & Bradstreet* slightly would yield a different result. For example, if a knowledgeable person had checked the public record before publication and the record did in fact indicate that the plaintiff had filed for bankruptcy, the defendant would have satisfied its duty. In the normal course of this particular defendant's business, accuracy of public records is to be assumed; it would be unreasonable to impose a duty to investigate further. Given this set of facts, the plaintiff would have to look elsewhere for compensation.

To alter the facts even more, assume that the defendant had been a member of the general media, such as a daily newspaper of general circulation. The foreseeability of harm might be greater, affecting not only the plaintiff's business, but also affecting his personal finances and relationships. The utility of publication to the wide audience of the general media might also be less because the general public would have less interest than would potential creditors in a person's financial affairs. A reasonable general media defendant might then check with the plaintiff before publishing. In addition, the public interest would be greater if the plaintiff received public funding.[210]

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208. *Dun & Bradstreet*, 472 U.S. at 763. If defendant could show that checking accuracy would mean delaying publication until a potential creditor had made a substantial loan, the lengths to which defendant should have gone to investigate would be lessened.

209. Combined with Hutchinson v. Proxmire, 443 U.S. 111 (1979), *Dun & Bradstreet*'s downplaying of financial considerations significantly expands the scope of what is purely private, leaving much room for mischief with respect to the First Amendment.

210. These variations all involve a private plaintiff, but the analysis would be substantially the same if the plaintiff were a public official or a public figure. Generally the utility of the publication increases as the plaintiff becomes more public. In *New York Times*, for example the publication was of enormous utility in terms of the public debate occurring at the time. The plaintiff had ready access to the media to correct misstatements. The likelihood of actual harm to the plaintiff's reputation was substantial. Given the fact that most of the inaccuracies were relatively minor, and assuming the defendant made some check of the major facts, the duty was met, particularly

In cases involving public officials and those now identified as public figures--a term that would pass silently into the night under the constitutional negligence standard--utility of publication would be greater than for a person not in the public eye. Unlike *New York Times*, however, a defendant would, in instances where the potential for harm is great, be obligated to investigate and not merely rely on an absence of malice.[211]

3. Damages

a. Compensatory Damages

Constitutional negligence, like traditional negligence theory, would require the plaintiff to prove the defendant's breach of duty caused actual harm. A court should never allow presumption of damages in a defamation action regardless of the defendant's degree of culpability, the plaintiff's innocence, or any other factor. Plaintiffs may often suffer harm they cannot prove, a consideration first leading to permitting presumption of damages. Nonetheless, permitting a jury to presume damages skirts too close to punishing speech as speech rather than compensating victims for the harms caused.[212]

This does not mean that a plaintiff could be compensated only for actual monetary damages. Distress and the loss of relational interests are no less harmful than monetary losses resulting from losing a job, even though the former do not lend themselves to easy proof of precise value.[213] Despite the difficulties, a plaintiff would have to provide evidence of reputational damage,

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considering the context of a paid advertisement. Again the result was probably correct, but only probably because the analysis employed left out important facts. However, the rationale was wrong. Applying a constitutional negligence standard to *Rosenbloom* would require a different result. The foreseeable harm in being identified as a "smut peddler" is unquestionable. There was no indication of urgency that would require immediate publication. Assuming falsity, the defendant would be liable because it did not check further. Justice White's argument that the report was merely a report of police activity is unconvincing because the defendant's characterizations of the plaintiff went beyond merely reporting the arrest and investigation.

211. *New York Times* reversed even though the defendant had not investigated. 376 U.S. at 286-88. Courts have continued to hold that defendants have no duty to investigate even when a reasonable person would do so. *See, e.g.*, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 901 (9th Cir. 1992) (quoting *Harte-Hanks*, 491 U.S. at 688).

212. *Cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 83 (1971) (Marshall, J., dissenting) (effect of presumed damages gives jury unlimited discretion, incurs the same problems as punitive damages). Proving harm in the form of a loss of reputation may be difficult because people who actually think less of the plaintiff might be reluctant to testify and admit their gullibility in being taken in by a falsehood. *See* Anderson, *Reputation*, *supra* note 15, at 767.

213. *See, e.g.*, Town of South Padre Island v. Jacobs, 736 S.W.2d 134 (Tex. Ct. App. 1986) (harms no less real than monetary losses).

beyond mere self-testimony.[214] Such evidence could include divorce proceedings, verifiable family disruptions, or loyal friends' testimony. As the damage becomes more severe, proof of damages should become easier.

Once a plaintiff has proved harms, the precise value would be equally difficult to establish.[215] Courts must take care to ensure awards do not take the form of presumed damages. Particulary in this area, a ceiling on damages should be imposed. Moreover, courts must consider whether the loss exceeds reasonable expectations.[216]

In assessing damages, courts should consider mitigating circumstances, including timing and context of retraction, corrections, and apologies. A retraction would not extinguish the right to sue--as some have suggested it should--but often would have an effect on the severity of the harm. Retraction would lessen the extent of the harm by shortening the time span that people thought the plaintiff was evil, unsavory, or otherwise less reputable. Similarly, a defendant should be allowed to show that a declaratory judgment that the statement was false removed any further stigma.

b. Punitive Damages

Punitive damages would never be permitted under the constitutional negligence standard. Punitive damages bear little, if any, relationship to actual harm. Further, because they are often substantially larger than compensatory damages, they have an unacceptable potential for chilling speech.[217] Even when the defendant has published false information, knowing it was false and for the basest of motives, punitive damages should not be available to the

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214. *Cf., e.g.*, State by Woyke v. Tonka Corp., 420 N.W.2d 624 (Minn. Ct. App. 1988) (claim of emotional distress cannot be based on plaintiff's own testimony). Although the goal of the constitutional negligence standard would be to compensate all, but only deserving plaintiffs, the difficulties of proof would result in some being uncompensated. This reflects the imperfections of a system that makes compensation generally dependent upon a culpable defendant with the ability to pay.

215. *Town of South Padre Island*, 736 S.W.2d at 141 (damages purely personal, must be left to discretion of the jury).

216. *Cf. Rosenbloom*, 403 U.S. at 68, 72 (Harlan, J., dissenting) (defendant entitled to assume people not unusually sensitive).

217. The Court's willingness to allow punitive damages despite its concern for limiting the danger of chilling speech is contradictory. This is particularly true considering that in most instances the plaintiff need prove no greater fault for punitive damages than for liability generally. The exception may be a private figure harmed by speech whose subject matter is of public concern. *See supra* notes 90-91 and accompanying text. The precise standards are unclear.

plaintiff.[218] Punishing intentional falsehoods may present no real threat to First Amendment interests. However, no standard of proof can ensure that only falsehood--whether intentional, negligent, or innocent--is punished. Similarly, punishing big business media and irresponsible, sensational, and exploitive tabloids may promote desirable social goals, but courts are not the proper forum to ensure a responsible press. That goal is best left to the marketplace of ideas and of circulation. Even if courts could ensure only that intentional falsehoods were punished, punitive damages would still punish speech as speech. The foundation of the constitutional negligence standard is that liability is assessed for the harm resulting from speech, not for the speech itself.[219]

c. Cost of Litigation

Although technically not an element of damages, the cost of litigation is properly considered here because the threat of such costs may have a chilling effect.[220] Some have suggested that the American rule, where each party bears the financial burden of litigation, be abandoned in defamation cases. The losing party would pay the costs and fees of the other.[221] The problem with this solution is the chilling effect may then be toward plaintiffs with legitimate complaints who do not file suit out of fear they themselves will have to pay a substantial amount for litigation. The problem of litigation costs is common to all legal actions, and ways must be found to ensure in all areas, that the law does not become a tool merely for the wealthy.[222]

The requirement of a declaratory judgment will aid in reducing costs. Many plaintiffs will be satisfied with the judgment. Others, knowing the statements are true, will not initiate litigation in the hope of gaining a victory in

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218. Punitive damages are essentially private fines. *Rosenbloom*, 403 U.S. at 84-86 (Marshall, J., dissenting). False speech may have no value worthy of constitutional protection in itself, *Gertz*, 418 U.S. at 341, but neither should it be punished as speech itself, which is precisely the effect of punitive damages.

219. The distinction between punishing speech as speech and imposing liability for the harm caused cannot be overemphasized. *See supra* note 175 and accompanying text.

220. Indeed the threat of large damage awards may be less chilling than the threat of litigation costs. Only a small minority of plaintiffs are awarded damages, but unless the claims are frivolous, defendants' attorney fees and other costs may be significant. LIBEL LAW, *supra* note 165, at 79-81; *see also* Anderson, *Reforming*, *supra* note 11, at 528.

221. *See* RODNEY A. SMOLLA, SUING THE PRESS 239 (1986). Eighty percent of the expense to defendants in defamation cases goes to costs and attorney fees, with only twenty percent for damage awards. Requiring the losing party to pay would substantially reduce expenses because defendants win over 90% of the time. *See* LIBEL LAW, *supra* note 165, at 79-81.

222. *See, e.g.*, *Final Report of the Committee on Pretrial Phases of Civil Cases*, 115 F.R.D. 454 (suggestions for stemming spiraling litigation costs).

the eyes of the public.[223]

4. Burdens of Proof

The plaintiff would bear the burden of production and persuasion on all elements of the action: duty, breach, causation, and damages. To some extent, the burden would be practically if not legally on the defendant to establish the utility of the conduct within the duty analysis. Because the constitutional standard more fully considers all interests, the potential threats to free speech which induced the Court to adopt the clear and convincing evidence requirement will be reduced within the analysis. Therefore, plaintiffs would be held only to a preponderance of the evidence standard.[224]

5. Roles of Judge and Jury

The roles of the judge and jury have been implicitly defined in the preceding discussion. In summary, duty would be a matter of law, requiring judicial determinations of the utility of the conduct, magnitude of foreseeable harm, and requisite standard of care. This exceeds the role of the court in traditional negligence cases where foreseeability and reasonableness of the conduct are often left to the jury. The First Amendment interests, however, require consistency and mandate a more extensive judicial role.[225] Juries would determine whether the defendant's conduct conformed to the duty as defined by the court, whether the breach caused harm, and the amount of damages within the prescribed limits.

6. Appellate Standard of Review

In *New York Times*, the Court found that constitutional guarantees require independent appellate review of the facts to ensure proper application of the

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223. *See* LIBEL LAW, *supra* note 165, at 214-15; *see also supra* notes 188-89 and accompanying text.

224. The various standards of proof--preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt--may be of questionable utility because juries may be unable to draw such fine distinctions. For an amusing account of the Court's formulation of "clear and convincing evidence" and evidence of "convincing clarity," see Thomas A. Woxland, *Through a Glass Darkly*, 4 CONSTAL. COMMENTARY 5 (1987).

225. Judges would also consider carefully the advisability of judgments notwithstanding the verdict and remittitur of damages. This expanded role for judges is not new. Current standards require independent appellate review of the facts to ensure proper application of constitutional safeguards. *See infra* note 226 and accompanying text. If appellate court judges are to review facts independently, it is sensible to have trial judges make the threshold determinations at trial.

principles.[226] This need for independent review and its resultant burden on appellate courts was one factor resulting from attempts to fashion rules of general applicability and the anomalous granting to the states a right to fashion their own standards in private figure cases.[227] First Amendment concerns are present in any defamation case, and appellate courts should independently review plaintiff victories in all cases to ensure the adequate protection of free speech.

Thus appellate courts should review the entire record, including factual evidence and conclusions of law. Although potentially burdensome at first, such review will become less onerous as the constitutional negligence standard is repeatedly applied. Additionally, both trial and appellate courts would expect a reduced workload in defamation cases as a result of the declaratory judgment requirement, which will necessarily reduce the number of cases requiring fault and damages determinations.[228]

The Supreme Court has never clearly stated whether independent review is required when defendants prevail in defamation actions, and the circuits are split on the issue.[229] However, if the purpose of independent review is to protect

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226. "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

227. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) (scrutinizing every jury verdict would render unmanageable duty to supervise lower courts). The Court thus refused to constitutionalize defamation of private figures beyond requiring some showing of fault out of concern for its and other courts' workload and the difficulties in making precise judgments. Such "simplistic and stultifying" analysis denies force to the First Amendment. *See* Branzburg v. Hayes, 408 U.S. 665, 745-46 (1972) (Stewart, J., dissenting); *supra* note 188 and accompanying text.

228. Appeals from the declaratory judgment would be reviewed under the clearly erroneous standard. Because the overwhelming majority of plaintiffs initially want only to set the record straight, LIBEL LAW, *supra* note 165 at 79, and wind up seeking damages only because they cannot succeed in other ways, the declaratory judgment will satisfy many who now seek damages. In any event, the limited review now given in private plaintiff cases sacrifices principle for expedience.

229. The Court restated the need for independent review in Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 514-16 (1984). Both *New York Times* and *Bose* leave open the question whether independent review applies when defendants prevail. *See* Alice Neff Lucan, et al., *Defining Appellate Review: Bose's Problems and Opportunities*, 252 Pub. Law Inst. Libel Law, 311, 318 (1988). The majority of courts have held that independent review is not appropriate when defendants prevail. *See, e.g.*, Planned Parenthood Ass'n v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985) (purpose of review is to assure judgment not forbidden by First Amendment); Daily Herald Co. v. Mumro, 838 F.2d 380 (9th Cir. 1988) (clear error appropriate when First Amendment not threatened). *But see* Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987) (independent review when defendant prevails), *cert. denied*, 485 U.S. 981 (1988); Bartimo v. Horseman's Benevolent and Protective Ass'n, 771 F.2d 894 (5th Cir. 1985) (same), *cert. denied*, 475 U.S. 1119 (1986). The *Bartimo* court was concerned that failure to give independent review in all cases would result in application of different standards as the case went through the stages of appeal. Thus, an appellate court would apply independent review to reverse and the Supreme Court would affirm that ruling on a clearly erroneous standard. 771 F.2d at 897

First Amendment interests, such review would not be necessary when defamation plaintiffs prevail.

7. Some Old Problems Revisited: Bootstrapping, Passage of Time, Opinion and Fact, Defamation in Fiction, and the Media/Non-Media Distinction

The constitutional negligence standard, by fully considering all the circumstances of publication, would alleviate many of the issues facing courts in defamation actions by subsuming those issues into the duty analysis. Courts could avoid the specific issue of bootstrapping versus voluntary involvement in a controversy. The relative notoriety or obscurity of the plaintiff would be a part of the inquiry into reasonable conduct, thus placing these issues into proper context with other issues. Similarly, the passage of time would be part of the duty and reasonableness analysis. The issues would not require an answer applicable to all cases as they would be part of the total circumstances for courts to consider.

Two of the more troubling issues in defamation cases have been in distinguishing between fact and opinion and in the occurrence of defamation in works of fiction.[230] Cases involving alleged defamation in fiction often

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n.2. Apart from a lack of symmetry, the problem is more apparent than real. Some courts have also held that independent review applies only to findings of constitutional malice while others hold it applies to all facts, inferences, and other matters. *Compare* Brasslett v. Cota, 761 F.2d 827, 840 (1st Cir. 1985) (review finding of malice only) *with* Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 450 (3d Cir. 1987) (independent review of entire record) *and* Mr. Chow v. Ste. Jour Azur, S.A., 759 F.2d 219, 230 (2d Cir. 1985) (same). *See Defining Appellate Review*, *supra* at 318-27. *New York Times* discussed whether the statements were of and concerning the plaintiff, implying a broader scope of appellate review, but the discussion was dicta because the case was determined on the malice standard.

230. The common law approach to opinion based liability on whether the opinion implied the existence of defamatory fact underlying it. RESTATEMENT (SECOND) OF TORTS § 566 (1963). Courts have attempted to define the parameters of opinion by determining whether a statement is verifiable. *See* Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984); Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980). These cases typify the problems related to defamation in opinion. *See generally* SMOLLA, *supra* note 3 ch. 6. A related issue concerns hyperbolic statements and whether they can reasonably be said to ascribe factual matters. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). The Court held no reasonable person would believe that the defendant was actually charging the plaintiff with treason by calling strikebreakers scabs and identifying a scab as a "traitor to his God, his country, his family, and his class." *Id.* at 268.

The Supreme Court has ruled that in actions based on alleged defamation in opinion, the same constitutional standards apply as in other defamation cases. Milkovich v. Lorain Journal Co., 110 S.Ct. 2695, 2706-07 (1990) (public figures and officials must prove malice; private figures must prove some degree of fault if subject matter is of public concern).

The problem of defamation in fiction is also of interest. *See, e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61, *cert. denied*, 444 U.S. 984 (1979). In dealing with the issue of whether a fictional work about a therapist conducting nude counseling sessions was meant to apply to the plaintiff, the

revolve around the issue of whether the statement is of and concerning the plaintiff. The issue would be resolved in a constitutional negligence analysis by determining whether a reasonable person would foresee that the plaintiff would be harmed by the statement. Because creative works have a high First Amendment value, courts should be reluctant to impose liability for works of fiction.

The issue of the media/non-media distinction would also evaporate as the standard would apply to both. As previously discussed, utility of publication and foreseeability of harm might vary depending on whether the defendant is a member of the media, but the standard will be the same. What is recognized as reasonable in one context might not be recognized as reasonable in another context.[231]

Application of the constitutional standard will not completely solve the problems associated with these issues or with others. Requiring courts to focus on the totality of the circumstances, however, will prevent concluding the analysis at what should be only preliminary inquiries and will avoid conclusory judgments. The standard would be no more and almost certainly less chilling of free speech than the plaintiff status analysis.[232] The standard also has the advantage of being easily adapted to other claims of harm implicating the First Amendment. These claims include invasion of privacy, infliction of emotional distress, and physical injury allegedly arising from publication.[233]

CONCLUSION

In *New York Times v. Sullivan*, the Supreme Court first constitutionalized

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court unwittingly exemplified the major problem with defamation in fiction. The court used the similarities between the fictional therapist and the plaintiff to conclude that the work was about the plaintiff, then used the dissimilarities to conclude that the work was defamatory.

231. The interest of the public in media publication, deadline pressures, the media's resources for investigation for the truth, the greater potential for harm, and possibility of corrections are all considerations that would go into the determination of reasonable conduct. The need to identify media versus non-media is eliminated, thus bypassing the need to determine whether high school newspapers, mailings from public interest groups, church newsletters, and other organs should qualify as media and have different standards.

232. The potential for chilling speech is almost always discussed in terms of the lack of certainty. *See, e.g., Gertz*, 418 U.S. at 246. The constitutional negligence standard, because it prohibits presumed and punitive damages, and because it requires a declaratory judgment, will chill speech less than current standards.

233. *Cf., e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (infliction of emotional distress); Time, Inc. v. Hill, 385 U.S. 374 (1967) (invasion of privacy); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (same). For a review of cases dealing with claims of physical injury arising from use of words and an argument for applying a negligence standard in such cases, see Note, *Media Liability*, *supra* note 175.

the tort of defamation, holding that public officials could recover damages only on a showing of constitutional malice. Constitutional malice required that the defendant acted with knowing falsity or serious doubts as to the truth or falsity of the statement. The Court also held that a malice standard also applies to public figures, but allowed states to impose liability as they saw fit in private figure cases, so long as some degree of fault was required.

The goals of the Court have been to provide certainty and predictability and to eliminate the need for ad hoc analysis. However, the plaintiff status analysis has failed to achieve these goals. Litigation costs continue to spiral upward. At the present time, cases are almost always resolved on the basis of costly determinations of the plaintiff's status, without reaching the issue of truth or falsity.

This Article proposes abandoning the plaintiff status analysis in favor of a constitutional negligence standard. Courts would consider the totality of the circumstances to determine whether the defendant acted reasonably. A significant part of the duty analysis would include an assessment of the First Amendment interests. To reduce the chilling effect on speech, presumed and punitive damages would be barred, and a cap would be placed on all damages. Costs would also be reduced by requiring plaintiffs to obtain a declaratory judgment that the statement was false before proceeding further.

Adopting the constitutional negligence standard would give greater protection to free speech than the plaintiff status analysis, because First Amendment interest would be considered in all cases. The standard would relieve defendants and the courts of time consuming and expensive litigation on fault issues. The overall cost of defamation suits for the media, both in terms of monetary costs and chilling effects, would be significantly reduced and deserving plaintiffs suffering economic harm would have an easier route to their deserved compensation.