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Of Libel, Language, and Law: *New York Times v. Sullivan* at Twenty-Five

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OF LIBEL, LANGUAGE, AND LAW: *NEW YORK TIMES V. SULLIVAN* AT TWENTY-FIVE

SHELDON W. HALPERN†

This Article is an exploration of the current state of the law of defamation now that a quarter century has passed since the landmark New York Times v. Sullivan opinion. With that case, the Supreme Court began a process of constitutionalization that has produced a chaotic system that fails to meet the great objective of accommodating the individual's interest in reputation to the strictures of the first amendment. Professor Halpern examines Sullivan and its progeny, placing a realistic perspective on a doctrine that has become accepted notwithstanding its formation through shaky Court majorities and less than compelling logic and suggests an approach toward accommodation of the apparently irreconcilable interests. To realize the ideals of Sullivan without punishing innocent error or leaving the victim of defamation helpless, the author proposes, in place of the present fragmented, confusing, and unsatisfying array of criteria and requirements, a unitary system of practice, damages, and fault predicated on concepts of professionalism.

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I. INTRODUCTION

The 1988 decision of the United States Supreme Court in *Hustler Magazine v. Falwell*¹ was itself not very remarkable. A unanimous Court found, essentially, that a failed libel claim² could not be saved by calling it "intentional infliction of emotional harm."³ A different result, penalizing a blatant, albeit offensive, parody would have been surprising. That the relatively new tort of intentional infliction of emotional harm *through the use of speech* would be subject to constitutional constraints similar to those imposed upon the defamation action seems only a natural corollary of the development in first amendment law over the past twenty-five years.⁴

What is remarkable is the fact that Chief Justice Rehnquist, in his opinion in *Hustler*, took pains to reaffirm a broad reading of *New York Times v. Sullivan*⁵ and its progeny.⁶ The Chief Justice affirmed the Court's "considered judgment that [the *Sullivan*] standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."⁷ Indeed, this unequivocal affirmation of the vitality of *Sullivan*, a gesture more to history than to the exigencies of the case at hand, prompted Justice White's observation that *Sullivan* "has little to do with this case."⁸

Much, of course, has been written about *Sullivan*,⁹ from its direct impact

1. 485 U.S. 46 (1988). The case involved an "ad parody" in *Hustler* magazine, detailing an incestuous rendezvous in an outhouse between Falwell and his mother. Falwell sued for damages for libel and for the intentional infliction of emotional harm. The jury returned a verdict for defendant on the libel claim, finding "that the *Hustler* ad parody could not 'reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated.'" *Id.* at ___, 108 S. Ct. at 878. At the same time, on the emotional harm claim, the jury awarded him \$100,000 in actual damages and \$100,000 in punitive damages, a judgment affirmed by the United States Court of Appeals for the Fourth Circuit, *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), and reversed by the Supreme Court, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

2. The finding of inherent incredibility served to destroy the libel claim; as a nonfactual assertion, the utterance was constitutionally protected "opinion." See *Pring v. Penthouse Int'l*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *infra* notes 153-205 and accompanying text. *But cf.* *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936) (Hand, L., J.) (discussing the irrelevance of credibility to a defamation claim based upon ridicule, a view implicitly rejected by the Supreme Court in *Hustler*).

3. Although the intention to inflict harm is the essence of the emotional distress claim, as distinct from the reputational injury in defamation, the Court held that the former tort, however outrageous the utterance, may not create a wider range of liability than the latter. *Hustler*, 485 U.S. at ___, 108 S. Ct. at 882.

4. For discussion of the *Hustler* opinion and its implications for the tort of intentional infliction of emotional harm, see Note, *Hustler Magazine v. Falwell: The Application of the Actual Malice Standard to Intentional Infliction of Emotional Distress Claims*, 49 OHIO ST. L.J. 825 (1988).

5. 376 U.S. 254 (1964).

6. Justice Rehnquist quoted particularly from three opinions with which he had expressed some reservation: *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485 (1984), and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). See *Hustler*, 485 U.S. at ___, 108 S. Ct. at 879-80 (quoting *Gertz*, *Bose* and *Hepps*); *cf. Hepps*, 475 U.S. at 780 (Stevens, J., dissenting, joined by Justice Rehnquist); *Ollman v. Evans*, 471 U.S. 1127, 1128-30 (1985) (Rehnquist, J., dissenting from denial of certiorari to *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984)); *Bose*, 466 U.S. at 515 (Rehnquist, J., dissenting).

7. *Hustler*, 485 U.S. at ___, 108 S. Ct. at 882.

8. *Id.* at ___, 108 S. Ct. at 883 (White, J., concurring).

9. The literature starts, essentially, with Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191. Exemplary contemporaneous commentary is collected in Smolla, *Let the Author Beware: The Rejuvenation of the American Law*

upon the viability of the young civil rights movement in the South,¹⁰ to a critical reappraisal of the legal validity of the opinion.¹¹ The simply stated issue from which Justice Brennan began produced a complex structure serving to perform three main functions:

The Court's opinion . . . aimed at three general goals: (1) to eliminate yet another weapon in the arsenal of segregationists in the South; (2) to reformulate the law of libel and thereby to eliminate what Justice Brennan called "the chilling" effect of traditional defamation laws; (3) most ambitiously, to link the changes in libel law to a new constitutional approach to free-speech issues, one that supposedly broke away from old legal formulas.¹²

As the starting point for the reformulation of the law of defamation in constitutional terms, *Sullivan* remains one of the most significant and influential Supreme Court opinions. It is the extension of doctrine first enunciated there—the use of *Sullivan* as the linchpin holding together an elaborate structure far removed from the issues directly presented in 1964—that makes the opinion great, whatever views one might otherwise have of it. It is *Sullivan* as we have come to understand it, rather than *Sullivan* as a case concerned with a city commissioner's claim arising from a civil rights movement advertisement, that provides the basis for denying relief to a television evangelist suing a sensational "adult" magazine.¹³

Sullivan at twenty-five represents an era of sweeping change in the law—and in American society's attitude—as it affects the individual's interest in reputation. The quarter century that has passed since the issuance of Justice Brennan's opinion has witnessed the application of an increasingly complex gloss to the comparatively simple proposition with which the Court dealt in *Sullivan*.

of *Libel*, 132 U. PA. L. REV. 1, 7 n.49 (1983). Of the more recent works, compare Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603 (1983) with Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

10. See, e.g., Kalven, *supra* note 9, at 192 ("[A] cursory examination of the case reveals that the decision was responsive to the pressures of the day created by the Negro protest movement and thus raises the question . . . whether the Supreme Court has adhered to neutral principles in reaching its conclusion."); Lewis, *supra* note 9, at 605 ("What was at stake . . . was more than the fate of one newspaper. It was the ability, or the willingness, of the American press to go on covering the racial conflict in the South. . . . [T]he libel suit . . . was a weapon in a political struggle."); Ottley, Lewis & Ottley, *New York Times v. Sullivan: A Retrospective Examination*, 33 DE PAUL L. REV. 741 (1984). Justice Black's concurring opinion describes the importance of the Court's action to the civil rights movement:

The half-million-dollar verdict [upheld by the Alabama Supreme Court] does give dramatic proof . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people . . . to continue state-commanded segregation of races in the public schools and other public places.

Sullivan, 376 U.S. at 294 (Black, J., concurring). See generally Lewis, *Annals of Law: The Sullivan Case*, NEW YORKER, Nov. 5, 1984, at 52 (an extended discussion of the case, counsel, issues, and strategy, as well as the implications of the case).

11. See Epstein, *supra* note 9, at 784-85.

12. N. ROSENBERG, *PROTECTING THE BEST MEN* 243 (1986).

13. See *Hustler*, 485 U.S. at ___, 108 S. Ct. at 882-83.

Justice Brennan articulated a set of substantive and procedural constitutional hurdles in the path of one class of defamation plaintiffs: against the absolute liability inherent in the common-law action for 'defamation is juxtaposed a constitutional fault requirement; against a set of presumptions that served to make the statement and proof of a defamation claim relatively simple is a constitutionally mandated shifting of the burden of proof and heightening of the quantum of proof requisite to recovery. These hurdles have now been refined and tailored to fit different classes of plaintiffs and situations far removed from that facing the *Sullivan* Court.

It is too late in the day to argue productively whether *Sullivan*'s assertion of first amendment constraints on the law of defamation was "right" or "wrong";¹⁴ rather, our concern must be with the wisdom of its elaboration, expansion and extension over the succeeding years. This process must examine whether *Sullivan* and its progeny together constitute a principled application of first amendment concerns to limit the reputational interest.

In examining the changes that have been rung on the *Sullivan* theme to differentiate the principled from the situationally necessary, it seems appropriate to separate the substantive from the procedural components of the constitutionalization process. The great substantive departure from prior law with which *Sullivan* is identified—conditioning the cause of action on a demonstration of the defendant's fault, in the form of "actual malice"¹⁵—seems more the product of accommodation and policy compromise than inevitable constitutional logic.¹⁶ As a result, the refinement and extension of the fault requirement by succeeding opinions of the Court¹⁷ are meandering streams of thought significantly removed from the fountainhead. Conversely, the constitutionalization of inhibitory procedures relating to the burden and quantum of proof¹⁸ emanating from *Sullivan* has a coherence that justifies the succeeding elaboration, whatever one's view as to the appropriate balance between the conflicting interests implicated in a defamation action. In this context, this Article examines *Sullivan* and its progeny, seeking to place a realistic perspective on what has become accepted doctrine, notwithstanding its less than compelling logic, and suggesting an approach that may accommodate the apparently irreconcilable interests. I suggest, in place of the present fragmented, confusing and unsatisfying array of criteria and requirements, a unitary system of practice, damages and fault predicated on concepts of professionalism. This system offers a more productive and workable way to deal with the contemporary complexities that make arcane and virtually inaccessible what was a rather simple attempt by the law to redress injury to reputation.

14. *But cf.* Epstein, *supra* note 9, at 784 ("there is . . . profit in focusing on the law of defamation itself as a source of the present discontent . . . one could argue that the *New York Times* rule was wrong").

15. *See infra* note 22.

16. *See infra* notes 24-40 and accompanying text.

17. *See infra* notes 42-76 and accompanying text.

18. *See infra* notes 85-108 and accompanying text.

II. SULLIVAN AND ITS PROGENY

A. *The Beginning*

The first sentence of Justice Brennan's *Sullivan* opinion is instructive: "We are required . . . to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."¹⁹

Certainly, *Sullivan* was new; it was "the first time" that the Supreme Court spoke directly of the extent to which the first amendment limited the common-law defamation action.²⁰ The Court also addressed and quite summarily disposed of the complex question of state action as a predicate to a constitutional claim, finding state action in "a State's power to award damages."²¹ Whatever other conflict may exist over the scope of constitutional protection for defamatory speech, there is no serious current dispute over the proposition that, by virtue of the fourteenth amendment (making applicable to the states first amendment guarantees of freedom of speech and press), any defamation action implicates first amendment considerations. It is the extent of that implication and the nature and scope of procedural and substantive protection afforded the defamation defendant that has engendered both controversy and confusion.

In *Sullivan* the Court was concerned with the use of a defamation action to inhibit criticism of the official conduct of a public official, and the *Sullivan* "rule," conditioning liability on the defendant's knowledge, or reckless disregard, of falsity, is expressly limited to that situation.²² The Brennan opinion excoriates the ignominious Sedition Act of 1798, with its sanctions against seditious libel, and to all intents and purposes declares it (academically) unconstitutional.²³ The articulated *Sullivan* rule was essentially a compromise between the

19. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

20. As Justice Goldberg noted in his concurrence, "[w]e must recognize that we are writing upon a clean slate." *Id.* at 299 (Goldberg, J., concurring).

21. We may dispose at the outset of . . . the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law only The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265.

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

Id. at 279-80.

Justice Goldberg, concurring (in an opinion in which Justice Douglas joined), took pains to distinguish the "private" defamation action: "The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment." *Id.* at 301-02 (Goldberg, J., concurring). Justice Black (again, joined by Justice Douglas) called for a rule of "absolute immunity for criticism of the way public officials do their public duty." *Id.* at 295 (Black, J., concurring).

23. Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . The invalidity of the Act has also been assumed by Justices of this Court. . . . These views reflect a broad consensus that the Act,

common-law rule of strict liability holding a defendant liable for defamatory utterances irrespective of the degree, if any, of the defendant's fault, and a grant of absolute immunity for criticism of official conduct.²⁴ The compromise requires a public official plaintiff to demonstrate defendant's fault amounting to "actual malice."²⁵

B. *Malice and Fault*

"Actual malice" is one of several infelicitous phrases by which the law of defamation assaults the English language. There is a general understanding of the meaning of "malice" and its companion adjective "malicious." Throughout the long history of the law of defamation,²⁶ "malice" has referred to the defamer's attitude *toward the person defamed*, connoting ill will or hostility.²⁷ As used by Justice Brennan in *Sullivan*, however, the phrase refers to the defamer's attitude *toward the defamatory remark*, connoting knowledge of or indifference to its falsity.²⁸ The two usages are quite distinct, and only the former concerns malice as commonly understood. The latter form of malice is not made any clearer by the prefatory word "actual," when actually it is not malice at all.²⁹ Nevertheless, the phrase survives to create confusion,³⁰ a confusion heightened by the fact that true malice³¹ continues to condition certain of the common-law privileges³² and is a prerequisite in most jurisdictions to the award of punitive damages.³³ The result is that both types of malice may be involved in different

because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

Id. at 276 (Brennan, J.).

24. Such absolute immunity was urged by Justices Black, Douglas, and Goldberg. *See id.* at 295 (Black, J., concurring); *id.* at 298 (Goldberg, J., concurring).

25. *See supra* note 22.

26. *See* L. ELDRIDGE, *THE LAW OF DEFAMATION* 1-29 (1978); S. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* 2-6 (1988).

27. *See* *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting).

28. *See supra* note 22.

29. Indeed, it is difficult to imagine how one would use the word "maliciously" in this constitutional context. To say that an utterance was published "maliciously" would immediately conjure up the idea of hostility, nastiness, or ill will rather than knowledge of or indifference to falsity.

30. Fifteen years after *Sullivan*, Justice Stewart took occasion to express his exasperation over this unnecessary complication of an inherently difficult problem:

Although I joined the Court's opinion in [*Sullivan*], I have come greatly to regret the use in that opinion of the phrase "actual malice." For the fact of the matter is that "malice" as used in the [*Sullivan*] opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility, and the most relevant question in determining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the [*Sullivan*] case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant.

Herbert, 441 U.S. at 199 (Stewart, J., dissenting). As Justice Stevens recently observed: "The phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will." *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2686 n.7 (1989).

31. May we call it "classic" malice?

32. *See generally* W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 16, at 109 (5th ed. 1984) ("when the defendant's behavior is conditioned on a proper motive, the defendant is exercising a privilege, such as the privilege of self-defense").

33. *See, e.g.,* *Home Fin. Co. v. Ratliff*, 374 S.W.2d 494, 496 (Ky. 1964) (to receive punitive damages, plaintiff must show that defendant's actions may "be characterized as willful, wanton,

aspects of the same case.³⁴ If the word must be preserved to describe the *Sullivan* fault standard, it would be better, and certainly kinder to the language, if we called it "constitutional malice."

It is perhaps fitting that in seeking to understand and adumbrate the first amendment limitations on the tort of defamation—reconciling relief for harm from the use of language with the commandment that language must be freely used—the courts have had to struggle mightily, and often clumsily, with problems of definition and meaning. Words that one generally thinks of as having a common core or consensus of meaning take on different coloration and texture, if not entirely new associations, in this context.³⁵

Although it is likely that Justice Brennan chose to define malice in terms of what the publisher *knew* rather than *felt* to avoid the difficulties of tying a constitutional determination to a finding of improper motive,³⁶ the choice carries its own problems of idiosyncratic proof. A plaintiff, under the *Sullivan* standard, establishes requisite malice only by demonstrating, if not defendant's actual knowledge of the facts, then defendant's subjective awareness of probable falsity.³⁷ Demonstration of the requisite malice requires extraordinarily extensive and expensive discovery proceedings in which the plaintiff seeks to discover not what the defendant felt or wanted (the presence of a malicious state of mind),³⁸ but what the defendant knew or thought or should have known or thought from all of the surrounding circumstances. In short, virtually the entire process un-

malicious [or] grossly negligent"); *DiSalle v. P.G. Publishing Co.*, 375 Pa. Super. 510, 568, 544 A.2d 1345, 1370 (1988) ("a public official, who must prove actual malice to establish liability in a defamation action, may not also recover punitive damages absent an additional finding that the defendant acted with common law malice in publishing the defamatory statement"), *appeal denied*, 521 Pa. 620, 557 A.2d 724, *cert. denied*, 109 S. Ct. 3216 (1989).

34. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), in which Justice Stewart reconciled the trial judge's finding of "malice" to impose liability for compensatory damages with the concomitant finding of insufficient "malice" to support punitive damages:

[T]he conclusion is inescapable that the District Judge was referring to the common-law standard of malice rather than to the *New York Times* "actual malice" standard when he dismissed the punitive damages claims. For at the same time [he] refused to grant the respondents' motion for directed verdicts as to [the plaintiffs'] claims for compensatory damages. And [he] was fully aware that the . . . "actual malice" standard had to be satisfied for the [plaintiffs] to recover actual damages. Thus, the only way to harmonize these two virtually simultaneous rulings . . . is to conclude . . . that in dismissing the punitive damages claims he was not determining that [plaintiff] had failed to introduce any evidence of knowing falsity or reckless disregard of the truth.

Id. at 252.

35. The special, "constitutional" meaning of otherwise commonly understood words is particularly troublesome in the context of the "fact/opinion" problem. See *infra* notes 153-205 and accompanying text.

36. Compare the difficulty the United States Court of Appeals for the Eighth Circuit had in determining whether the apparent attribution of a personal retaliatory motive to a state prosecutor's decision to prosecute constituted an actionable statement of "fact" or a constitutionally protected "opinion." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-05 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986).

37. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (White, J.); see *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2695 (1989).

38. That kind of inquiry, however, has long been necessary as a common-law matter in most jurisdictions when a plaintiff seeks punitive damages. See *supra* note 33 and accompanying text.

derlying the publication is placed in issue and must be examined.³⁹ The result is that while we have a clear, carefully defined constitutional criterion (however unreal) called "malice," we concomitantly and necessarily have institutionalized an elaborate, expensive, and ad hoc procedure that inhibits counsel's ability to predict little more than the expense of a defamation action.⁴⁰

1. From the Sedition Act and Public Officials to Public Figures

Working from the broad social context "of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"⁴¹ Justice Brennan found a constitutional privilege for falsely based criticism of the official conduct of a public official. The Court thereafter quickly, clearly, and expansively defined both the class of public officials⁴² and the scope of official conduct⁴³ embraced by the privilege. Had the boundaries of constitutionalization of defamation been left where *Sullivan's* Sedition Act concerns put them—at the outer perimeter of official conduct of broadly defined public officials—it is possible that the case development over the succeeding years would have produced a coherent body of judicial thought from which a sound doctrine of "constitutional malice" might have emerged. However, the *Sullivan* doctrine grew not only in depth through the refinement and expansion of public official and official conduct, but also in breadth, through the broadening of the classes of defamation plaintiffs subject to constitutional inhibition.

Three years after *Sullivan* was announced, the Court, by a strangely produced majority in *Curtis Publishing Co. v. Butts*,⁴⁴ held that the *Sullivan* rule applied to "public figures" as well as public officials. Indeed, although the *Butts* case is today a firmly established member of the pantheon of opinions that constitutionalize the law of defamation, it is one of the more oddly structured and least clear-cut judicial pronouncements.⁴⁵ In fact, the only consensus among the

39. *Herbert v. Lando*, 441 U.S. 153 (1979). As Justice Brennan observed, "[i]t would be anomalous to turn substantive liability on a journalist's subjective attitude and at the same time to shield from disclosure the most direct evidence of that attitude." *Id.* at 192 (Brennan, J., dissenting in part). Similarly, Justice Marshall, while dissenting, conceded that "[s]o long as *Sullivan* makes state of mind dispositive, some inquiry as to the manner in which editorial decisions are made is inevitable." *Id.* at 207 (Marshall, J., dissenting). *But cf. id.* at 199 (Stewart, J., dissenting) (inquiry into the editorial process is irrelevant to the determination of malice).

40. As Justice White observed, "'Reckless disregard' . . . cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication . . ." *St. Amant*, 390 U.S. at 730. The case-by-case adjudication continues, with few unifying principles.

41. *Sullivan*, 376 U.S. at 270.

42. In a subsequent opinion, Justice Brennan wrote:

Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. . . . The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

Rosenblatt v. Baer, 383 U.S. 75, 85-87 n.13 (1966).

43. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 273-77 (1971).

44. 388 U.S. 130 (1967).

45. Justice Harlan wrote for the plurality in *Butts*, joined by Justices Clark, Stewart, and For-

Justices was that a public figure plaintiff must prove that the defendant acted with some degree of fault: four members of the Court proposed a standard of "highly unreasonable conduct";⁴⁶ two Justices preferred an absolute immunity from defamation actions;⁴⁷ and three Justices proposed to extend the *Sullivan* actual malice standard to public figures.⁴⁸ Essentially abandoning the Sedition Act justification (and distinction) underlying *Sullivan*, Chief Justice Warren equated the "public figure" and the "public official" on the grounds of a "blending of positions and power".⁴⁹

To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. . . . [M]any who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. . . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."⁵⁰

The actual malice fault standard for public figures became doctrine as the two absolutists, Justices Black and Douglas, agreed to be counted in support of the Chief Justice's extension of *Sullivan* to create a "majority" position.⁵¹ Notwith-

tas. *Id.* at 133. Chief Justice Warren wrote a concurrence, *id.* at 162, providing a majority for the disposition of the appeal. Justices Black and Douglas, in a separate opinion, disagreed with the reasoning of that majority but specifically concurred with the criteria set forth in Justice Warren's opinion, *id.* at 170, as did Justice Brennan, in an opinion in which Justice White concurred. *Id.* at 172.

46. *Id.* at 155 (Harlan, J., joined by Justices Clark, Stewart, and Fortas).

We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Id.

47. *Id.* at 172 (Black, J., concurring in part, joined by Justice Douglas). Justice Black stated: "I think it is time for this Court to abandon *New York Times Co. v. Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." *Id.* (Black, J., concurring in part).

48. "I . . . adhere to the [*Sullivan*] standard in the case of 'public figures' as well as 'public officials.' It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation." *Id.* at 164 (Warren, C.J., concurring). Justices Brennan and White expressly joined in this view. *See id.* at 172 (Brennan, J., concurring in part).

49. *Id.* at 163 (Warren, C.J., concurring).

50. *Id.* at 163-64 (Warren, C.J., concurring).

51. I concur . . . based on the grounds and reasons stated in . . . the Chief Justice's opinion . . . "[i]n order for the Court to be able at this time to agree on [a disposition of] this important case based on the prevailing doctrine expressed in *New York Times Co. v. Sullivan* . . . In agreeing to [the Chief Justice's] opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation."

standing this tainted ancestry, the proposition—founded on the rickety *Butts* majority—that a public figure must prove that the defendant acted with constitutional malice and must otherwise comply with the *Sullivan* standards as elaborated in succeeding cases is now, as the Court has recently reiterated, accepted without question.⁵²

2. Public and Private Figures/Public and Private Issues

What remained after *Butts*, with its recognition that the first amendment implications of the law of defamation were not bounded by concepts of public officialdom, was the epistemological problem of determining criteria for further adumbration of the boundaries of constitutional protection for defamatory speech. The problem, simply, was defining the penumbra of protection for speech defamatory of one who was neither a public official nor a public figure.⁵³ Was the rigorous standard applied to public officials and figures a consequence of their status or of the correlative fact that they are involved in matters of public interest and concern? In the absence of a first amendment absolutist position,⁵⁴ the answer to that question would determine whether the constitutional

Id. at 170 (Black, J., concurring in part) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring)).

52. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2685 (1989) (Stevens, J.) (“Today, there is no question that public figure libel cases are controlled by the *New York Times* standard.”).

53. A continuing problem, of course, has involved the definition of “public figure” and the parsing of that classification into the further subclasses of “general purpose” and “limited purpose” public figures. The Supreme Court has provided scant guidance beyond the generalizations of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). One federal court has noted:

The Supreme Court has identified two classes of public figures in addition to government officials: general purpose and limited purpose public figures. [The determination] [w]hether a person is a public figure . . . is a difficult and sensitive exercise unsusceptible to the application of rigid or mechanical rules. . . . A person becomes a general purpose public figure only if he or she is a well-known “celebrity,” his name a “household word.” . . . Such persons have knowingly relinquished their anonymity in return for fame, fortune, or influence. They are frequently so famous that they “may be able to transfer their recognition and influence from one field to another.” . . . Thus it is reasonable to attribute a public character to all aspects of their lives. . . . The standard as generally applied is a strict one; the Supreme Court has not found anyone to be a general public figure since *Butts*. . . . Although few people attain the level of notoriety to be public figures in all contexts, many individuals may be public figures for the more limited purpose of certain issues or situations. . . . First, we isolate the controversy at issue, because the scope of the controversy in which the plaintiff involves himself defines the scope of the public personality. . . . Second, we examine the plaintiff’s role in the controversy, to be sure that it is more than “trivial or tangential.” . . . Finally, we determine if the alleged defamation was germane to the plaintiff’s participation in the controversy.

Tavoulaareas v. Piro, 817 F.2d 762, 772-73 (D.C. Cir.), cert. denied, 484 U.S. 870 (1987). For discussion of the *Gertz* decision, see *infra* notes 59-71 and accompanying text. Compare *Blake v. Gannett Co.*, 529 So. 2d 595 (Miss. 1988) with *Wiegel v. Capital Times Co.*, 145 Wis. 2d 71, 426 N.W.2d 43 (1988) (reaching different conclusions as to the status of apparently similarly situated plaintiffs).

54. Justice Black was most closely identified with such a position. See *supra* note 47. If one believes that the first amendment absolutely precludes any action for defamation, then neither the plaintiff’s status nor the subject matter of the utterance are relevant. Justice Black was clear and consistent in his absolutist view. See, e.g., *Justice Black and First Amendment “Absolutes”*; *A Public Interview*, 37 N.Y.U. L. REV. 549, 557 (1962) (“I have no doubt myself that the [first amendment], as written and adopted, intended that there should be no libel or defamation law in the United States . . . , just absolutely none so far as I am concerned.”). Justice Douglas, at first apparently limiting his absolute approach to matters involving public officials and public figures, in later years appeared

inhibitions surrounding the law of defamation would arise from the nature of the person about whom a defamatory utterance is made or from the nature of the subject—the context of the utterance. In short, the issue that emerged, and which had been hidden in the joinder of subject and person in the case of public officials and figures, was whether constitutional doctrine would be subject based or status based. The Court purported to resolve that issue on different occasions and, in the course of that “resolution,” increased the complexity of an already troublesome problem.

The first “resolution” occurred in 1971, with Justice Brennan’s plurality opinion in *Rosenbloom v. Metromedia, Inc.*⁵⁵ That opinion⁵⁶ sought to create a constitutional standard based upon the nature of the defamatory utterance rather than the status of the plaintiff. Justice Brennan wrote, in essence, that the *Sullivan* standard arose from the public interest rather than the plaintiff’s public position:

We honor the commitment to robust debate on public issues . . . by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous. . . . Drawing a distinction between “public” and “private” figures makes no sense in terms of the First Amendment guarantees.⁵⁷

The *Rosenbloom* formula, imposing the *Sullivan* standard on speech “involving matters of public concern” irrespective of the status of the plaintiff, flared⁵⁸ only briefly. In 1974, a decade of *Sullivan* was marked by *Gertz v. Rob-*

fully to join in an absolutely preclusive position. *See, e.g., Gertz*, 418 U.S. at 355-60 (Douglas, J., dissenting). Compare Justice Goldberg’s position in *Sullivan*, in which he made clear both his opinion that defamatory comment concerning the official conduct of a public official was absolutely protected and that the Constitution did not reach “private” defamation. *Sullivan*, 376 U.S. at 297-305 (Goldberg, J., concurring).

55. 403 U.S. 29 (1971).

56. Only Justices Burger and Blackmun joined in Justice Brennan’s opinion. *Id.* at 30. Five opinions, representing the views of eight Justices, were written. Only Justice Brennan’s opinion had as many as three supporters.

57. *Id.* at 43-44 (plurality opinion). Extending his *Sullivan* reasoning, Justice Brennan argued:

[T]he constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. [T]he First Amendment extends to myriad matters of public interest. . . . If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not “voluntarily” choose to become involved. The public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.

Id. at 42-43 (plurality opinion). In dissent, Justice Marshall raised the issue of judicial capability:

Courts . . . are not anointed with any extraordinary prescience. But, assuming that under the rule announced . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent.

Id. at 79 (Marshall, J., dissenting).

58. Indeed, in light of *Rosenbloom* it was proposed that the *Restatement (Second) of Torts* be revised to provide that “one who publishes a false and defamatory communication concerning another on a matter of public interest is not subject to liability, unless he publishes it (a) with knowl-

ert Welch, Inc.,⁵⁹ in which a divided court rejected *Rosenbloom*⁶⁰ and created a schedule of constitutional liability standards dependent upon the position of the plaintiff as a "public" or a "private" figure. In his majority opinion, Justice Powell, departing from the seditious libel and public interest rationales, concentrated on spectra of state and constitutional values, postulating a sliding scale by which the first amendment interest in speech is to be balanced against the state's interest in affording relief for injury to reputation.⁶¹ The balance point for these reciprocal interests—the degree of fault that a defamation plaintiff must establish—was to be a function of the status of the plaintiff. The test arose from the plaintiff's self-help capability and risk assumption:⁶² for the public official or

edge of its falsity, or (b) in reckless disregard of its truth or falsity." L. ELDREDGE, *supra* note 26, at 288 n.70.

59. 418 U.S. 323 (1974).

60. "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest [in protecting the private individual] to a degree that we find unacceptable." *Id.* at 346.

61. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. . . .

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose. . . .

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.

Id. at 340-42.

62. Justice Powell clearly elaborated the distinction he found:

[W]e believe that the *New York Times* rule states an accommodation between [concern for the interests of the press] and the limited state interest present in the context of libel actions brought by public persons. . . . [W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

. . . .
 . . . [W]e have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

. . . An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . .

Those classed as public figures stand in a similar position. . . . For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. . . . [T]hey invite attention and comment.

. . . [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. . . . He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

Id. at 343-45.

public figure, the *Sullivan* standard would apply; for the private figure plaintiff, the states were free to apply a lesser standard, albeit one that entailed some degree of fault:

We hold that so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.⁶³

Gertz, in short, authorized states to use negligence as a minimal fault standard for a private plaintiff; the constitutional malice standard was not extended beyond the public figure⁶⁴ and the public official.

The *Gertz* dissents encapsulate the debate over the limits of constitutional protection of defamatory speech. Justice Douglas forcefully reiterated the absolute prohibitory view⁶⁵ that "recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech honored by the Fourteenth Amendment a diluted version of First Amendment protection."⁶⁶ Justice Brennan, adhering to his *Rosenbloom* position, objected to the use of a lesser, negligence standard to the private plaintiff, urging application of the "knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest."⁶⁷ Against these restrictive views, Chief Justice Burger urged caution, preferring "to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than [having the Court] embark on a new doctrinal theory which has no jurisprudential ancestry."⁶⁸ Justice White, starting a line of thinking that he was to elaborate in subsequent opinions, strongly objected to what he perceived to be an unwarranted interference with the state's interest in protecting private individuals from defamation; he found no basis for further constitutionalization of the common law.

63. *Id.* at 347-48.

64. Interestingly, although Justice Powell appeared to follow the reasoning of Justice Harlan in *Curtis Publishing Co. v. Butts* calling for a fault scale, *see supra* note 46, he stopped short of adopting a tripartite standard that would have required "gross irresponsibility" rather than "malice" in the case of the public figure plaintiff. Justice Powell stated that characterization of individuals as public figures would be determined by such factors as "the notoriety of their achievements [and] the vigor and success with which they seek the public's attention." *Gertz*, 418 U.S. at 342. According to Justice Powell:

For the most part, those who have attained this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. at 345.

65. *See supra* notes 47 & 54.

66. *Gertz*, 418 U.S. at 358 (Douglas, J., dissenting).

67. *Id.* at 361 (Brennan, J., dissenting).

68. *Id.* at 355 (Burger, C.J., dissenting).

For some 200 years . . . [t]he law governing the defamation of private citizens remained untouched by the First Amendment because[,] until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. . . .

. . . As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court . . .⁶⁹

The relationship between fault and the first amendment, begun in *Sullivan*, ripened in *Gertz* apparently to encompass all of defamation. Some of the language in Justice Powell's majority opinion, however, left room for further exegesis. Specifically, there was some doubt, and a division in state court opinions,⁷⁰ as to whether the *Gertz* standards or common-law absolute liability would apply to a private plaintiff suing a private, nonmedia defendant.⁷¹

The Supreme Court could have resolved the issue in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁷² but in that case it chose both to create a new area of confusion and to leave the standard for liability in doubt. Narrowly focusing on the question of permissible damages, the Court made clear, notwithstanding the plethora of opinions,⁷³ that the media or nonmedia status of the *defendant* was irrelevant. With echoes of *Rosenbloom*, the relevant issue became not whether the defendant was part of the media but whether the speech complained of involved "matters of public concern."⁷⁴ However, the plurality opinion, limited to the question of the applicability of the *Gertz* damage standards,⁷⁵ did not directly address the question of whether common-law absolute liability was constitutionally permissible when a private plaintiff complained of speech not involving a matter of public concern.

69. *Id.* at 369-70 (White, J., dissenting).

70. *Compare* *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976) (holding the *Gertz* standards applicable to a private plaintiff's claim against a nonmedia defendant) *with* *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983) (holding the common-law standards applicable in such a situation), *aff'd*, 472 U.S. 749 (1985) (Supreme Court affirmed without a clear resolution of this issue).

71. *See* Smolla, *supra* note 9, at 32-33.

72. 472 U.S. 749 (1985).

73. The plurality opinion was Justice Powell's, in which Justices Rehnquist and O'Connor joined. *Id.* at 751. Chief Justice Burger and Justice White each separately concurred. *Id.* at 763, 765. Justice Brennan wrote a dissenting opinion in which Justices Marshall, Blackmun and Stevens joined. *Id.* at 774.

74. *Id.* at 751 (plurality opinion by Justice Powell); *id.* at 764 (Burger, C.J., concurring); *id.* at 766 (White, J., concurring); *id.* at 775 (Brennan, J., dissenting).

75. *See infra* notes 143-50 and accompanying text.

The result is that one permutation of the defamation fault/constitutionality matrix remains open to question. Although the short-lived *Rosenbloom* test for determining the fault standard—concern with the public or private nature of the utterance rather than the public or private nature of the plaintiff—apparently had been terminated by *Gertz*, it may yet have vitality in a different context: determining application of the *Gertz* constitutional negligence standard to a private plaintiff.⁷⁶

The evolution of the bifurcated—if not trifurcated—fault standard was neither inevitable nor the product of consensus. The movement from the strong *Sullivan* consensus that a public official must carry a heavy burden in basing a defamation action on criticism of his or her official conduct to the Court's fragmentation in *Butts*, *Rosenbloom*, and *Gertz*, when the character of the plaintiff and the nature of the utterance changed, is indicative of the highly charged and difficult balancing problems presented. The fact that we now take it as given defamation doctrine that a public figure plaintiff must demonstrate constitutional malice, and that a private figure plaintiff must demonstrate some fault, although not more than negligence, should not mask the serious division of opinion that precluded anything but slender and makeshift majorities for these constitutional policies. Indeed, it is the context of his own earlier critical words and Justice White's repeated call for reexamination of the *Sullivan* doctrine extensions that makes Chief Justice Rehnquist's *Hustler* reaffirmation of *Sullivan* and its progeny⁷⁷ noteworthy.

Nevertheless, the troubling questions repeatedly posed by Justice White remain. At the lowest level of public policy and interest—the private plaintiff victimized by a private defamation—how does one justify upsetting more than 200 years of history excluding falsehood from the ambit of protected speech? Why has constitutional doctrine reversing the common law of defamation with respect to fault been expansive rather than cautious?⁷⁸ For Justice Brennan the move from *Sullivan* to *Rosenbloom* was neither radical nor illogical; it was a slight shift in focus from public position to public interest. Thus for Justice Brennan, using the public interest as a fault delimiter was understandable, even if one now finds such a dual fault standard undesirable.⁷⁹ However, the use of a

76. Although Justice Powell's plurality opinion was silent on the matter, Justice White inferred (and argued) that "the *Gertz* requirement of some kind of fault on the part of the defendant is . . . inapplicable in cases such as this." *Greenmoss*, 472 U.S. at 774 (White, J., concurring). Justice Brennan, however, found that there is no basis for not applying the *Gertz* fault standard. *Id.* at 781 (Brennan, J., dissenting) ("The question presented here is narrow. . . . [T]he parties [do not] question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages."); see Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1535-46 (1987).

77. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

78. There may be ample reason for federal constitutional review of common law principles, but it need not follow that there is any parallel presumption for constitutional rejection of state common law principles. If anything, our prior intuitions should be just the opposite, for the common law operates from a deep conviction in the importance of freedom of speech If there is any presumption, it should be in favor of the constitutional permissibility of the common law rules. The necessary protection should be provided, where possible, without disrupting the good sense of the common law rules in ordinary cases.

Epstein, *supra* note 9, at 791.

79. See *infra* notes 230-95 and accompanying text.

spectrum of fault, a level intermediate between the common law and that constitutionally mandated through public position, is conceptually troubling. That a court or legislature, in general, *may* seek to define the elements of a cause of action for defamation in such a multilayered way as a matter of state policy does not give constitutional force or mandate to such a definition. This constitutionalization of each policy nuance is in many ways far more troubling than adoption of an absolutely preclusive constitutional doctrine. The essential *Sullivan* balance, allowing the action but conditioning it on a strong showing of fault, was a principled attempt at accommodation; the *Gertz* sliding scale, examining degrees of fault, does not have so solid a foundation.

One should, of course, never discount inertial factors. After *Sullivan* extended first amendment doctrine to defamation, the nature of the inquiry shifted. For subsequent cases and situations the critical issue was not whether first amendment implications existed, but rather how to accommodate those implications. Balancing of one kind having begun, continued balancing, if not juggling, of conflicting concerns, with a concomitant complexity of result, would be consistent with human experience in most activities.

Beyond inertial matters, of course, are power and voice. By the 1970s, the media explosion, both in terms of ownership concentration of print and the power of television, gave new force and a powerful voice to those most benefitted by expansive application of the first amendment to common-law defamation. There is, in short, a strong and experienced defamation "defendant's lobby,"⁸⁰ vigilant and articulate. The call for an expansive reading of the first amendment is—and ought to be—an appealing one. To the extent that a matter implicates the first amendment, it implicates matters at the heart of American democracy. The call to arms, particularly for the academic scholar, is irresistible and leaves only to the most sensitive hearer the cry of the individual injured by the defamatory falsehood. The question then, *why* impair the long-established right of the injured individual, can be heard only faintly, and those who raise it risk much. The absence, *per force*, of a "plaintiff's lobby," an organized and experienced group concerned with the reputational interest itself as a societal value, leaves only the jury, whose willingness to award what appear to be absurdly large sums⁸¹ gives substance to those who see the defamation action as a threat to the first amendment.

It is the jury and the jury's damage awards that the Court addressed as it developed extensions of *Sullivan* paralleling the extensions of the fault standard. One path taken, a direct refinement of Justice Brennan's exposition, concerned the basic procedural profile of a defamation action.⁸² The other path, emanating from *Gertz* and farther removed from *Sullivan*, a virtual labyrinth constructed out of distrust for the jury, concerned the nature and extent of damages⁸³ and

80. Consider the Libel Defense Resource Center in New York, created by media groups to monitor and report on matters of concern to the organized press.

81. See Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 856-57 (1986); Smolla, *supra* note 76, at 1521 n.11.

82. See *infra* notes 85-119 and accompanying text.

83. See *infra* notes 126-50 and accompanying text.

the definition of an actionable defamatory utterance.⁸⁴

C. *The Procedural Revolution*

Of the changes in prior law wrought by *Sullivan* the radical procedural shift was at least as significant as the conditioning of liability on fault. Instead of the common-law presumption of the falsity of a defamatory utterance, with the concomitant burden of proof of truth on the defendant, the plaintiff was required to prove falsity. Moreover, at least certain of the elements of the cause of action were to be proven with "convincing clarity," and the entire process was to be subject to de novo appellate review.

1. Of Truth and Its Burdens

In *Sullivan*, Justice Brennan prohibited recovery by the public official plaintiff "unless he proves that the statement was made with 'actual malice.'"⁸⁵ More than two decades later, in *Philadelphia Newspapers, Inc. v. Hepps*,⁸⁶ the Court made it unequivocally clear that the public official and the public figure plaintiff, required to prove that the defendant acted with knowledge of falsity or reckless disregard with respect thereto, necessarily must bear the burden of proving the falsity of the utterance at issue.⁸⁷ What was less unequivocal in *Hepps* was the treatment of the private plaintiff, as a sharply divided Court held that such a plaintiff, with a lesser fault burden to overcome, nevertheless must prove the falsity of the utterance.⁸⁸ The language of Justice O'Connor's plurality opinion,⁸⁹ however, by referring specifically to the "media defendant,"⁹⁰ appears to revive the media/nonmedia distinction. Justice Brennan concurred separately in *Hepps*, both to object to the apparent reopening of this distinction which *Greenmoss* had abandoned and to make clear his belief "that where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff, whether public official, public figure, or private individual, prove

84. See *infra* notes 153-205 and accompanying text.

85. *Sullivan*, 376 U.S. at 279-80.

86. 475 U.S. 767 (1986).

87. *Id.* at 775 (plurality opinion by Justice O'Connor) ("[A]s one might expect given the language of the Court in [*Sullivan*], . . . a public-figure plaintiff must show the falsity of the statement at issue in order to prevail on a suit for defamation.>").

88. According to Justice O'Connor:

In *Gertz*, as in [*Sullivan*], the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

Id. at 776 (per curiam).

89. Justice O'Connor wrote for herself and Justices Marshall and Powell. *Id.* at 767. Justice Brennan, with Justice Blackmun, concurred separately. *Id.* at 779. Justice Stevens dissented, in an opinion in which Chief Justice Burger and Justices White and Rehnquist joined. *Id.* at 780.

90. "[W]e hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.* at 777 (per curiam opinion by Justice O'Connor).

the statements at issue to be false."⁹¹ The four dissenters⁹² strongly objected to the majority's overturning of the common-law presumption of falsity in the case of a private plaintiff, finding in this intrusion into the state's interest in protecting individuals against assaults on reputation a "pernicious result."⁹³

Pernicious or not, there is of course a certain logical inevitability about linking the burden of proof to the need to demonstrate fault. It appears almost axiomatic to say that a public plaintiff, required to meet the *Sullivan* fault standard, which revolves around the defendant's attitude toward falsity, also must prove falsity of the utterance. With the extension of the fault requirement, albeit at a reduced level, to the private plaintiff, a similar extension of the burden of proof as to truth or falsity is compelling as a matter of logic, even if not as a matter of policy. The linkage of falsity to fault does produce procedural lacunae:⁹⁴ just as *Greenmoss* left open the question whether common-law absolute liability or constitutional fault requirements apply to the private plaintiff complaining of an utterance not involving a matter of public concern, so *Hepps* leaves open the parallel question of burden of proof for such a plaintiff.

2. Convincing Clarity and Procedural Uniqueness

In constructing the procedural constitutional fence around the defamation action in *Sullivan*, Justice Brennan was concerned with the quantum of proof as well as the burden of proof. Striking down the judgment against the defendants, he found "that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment . . . under the proper rule of law."⁹⁵ With no further elaboration, the "clear and convincing" standard, at least with respect to constitutional malice,⁹⁶ has become a part of the constitutionalized law of defamation and a procedural hurdle distinguishing the defamation cause of action from most other private civil claims.

The procedural distinctiveness of the defamation action was embellished by a divided Court in 1986 in *Anderson v. Liberty Lobby, Inc.*⁹⁷ As one of the dis-

91. *Id.* at 779-80 (Brennan, J., concurring).

92. Justice Stevens, with Chief Justice Burger and Justices White and Rehnquist. *Id.* at 780-90 (Stevens, J., dissenting).

93. I do not agree that our precedents require a private individual to bear the risk that a defamatory statement—uttered either with a mind toward assassinating his good name or with careless indifference to that possibility—cannot be proven false. By attaching no weight to the State's interest in protecting the private individual's good name, the Court has reached a pernicious result.
Id. at 781 (Stevens, J., dissenting).

94. See Smolla, *supra* note 76, at 1526-29.

95. *Sullivan*, 376 U.S. at 285-86.

96. There is some confusion, and difference of opinion, as to whether the convincing clarity requirement (as opposed to demonstration by a preponderance of the evidence) extends to the element of falsity or other elements of the defamation claim in addition to that of constitutional malice. Although the Court recently noted this debate, it declined to resolve the question. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2682 n.2 (1989).

97. 477 U.S. 242 (1986).

senters⁹⁸ put it: "The Court, apparently moved by concerns for intellectual tidiness, [held] that the 'clear and convincing evidence' standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case."⁹⁹ For the majority, Justice White argued that because a plaintiff responding to a motion for summary judgment "need only present evidence from which a jury might return a verdict in his favor"¹⁰⁰ and because, as a matter of substantive law, a defamation plaintiff may not get a favorable verdict unless the elements of the claim are established by clear and convincing evidence,

a court ruling on a motion for summary judgment must be guided by the [*Sullivan*] "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.¹⁰¹

One dissenter found this proposition "deeply flawed, and rest[ing] on a shaky foundation of unconnected and unsupported observations, assertions and conclusions."¹⁰² The other dissenters described the majority ruling as one that would "do great mischief" because the Court "created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard [would] be applied to particular cases."¹⁰³ Although *Liberty Lobby* itself apparently has little real practical effect,¹⁰⁴ its intangible impact may be substantial. It not only enhances and effectively encourages the granting of defendants' summary judgment motions by trial courts, but it also departs significantly from what previously had been a strong conceptual separation between matters of procedure and substantive law in the development of the constitutionalization of defamation.¹⁰⁵

98. Justice Rehnquist dissented, in an opinion in which Chief Justice Burger joined. *Id.* at 268 (Rehnquist, J., dissenting). Justice Brennan dissented separately. *Id.* at 257 (Brennan, J., dissenting).

99. *Id.* at 268 (Rehnquist, J., dissenting).

100. *Id.* at 257 (White, J.).

101. *Id.*

102. *Id.* at 257-58 (Brennan, J., dissenting).

103. *Id.* at 272-73 (Rehnquist, J., dissenting, joined by Chief Justice Burger).

104. *Id.* at 269 (Rehnquist, J., dissenting) ("There is a class of cases in which the higher standard imposed by the Court . . . would seem to have no effect at all.").

It may well be . . . that the Court's decision . . . will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury . . . but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion.

Id. at 267 (Brennan, J., dissenting). *But see* Smolla, *supra* note 76, at 1532 ("*Liberty Lobby* is a resounding [defendants'] victory on an issue of critical pragmatic importance.").

105. The process is clearly marked by the 1984 decision of *Calder v. Jones*, 465 U.S. 783 (1984), in which the Court declined "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Calder*, 465 U.S. at 790-91; *see Liberty Lobby*, 477 U.S. at 269 (Rehnquist, J., dissenting); Smolla, *supra* note 76, at 1533-35. Professor Smolla, however, contrary to Justice Rehnquist's opinion, reads the holding in *Liberty Lobby* as part of and consistent with the "principle of procedural neutrality" and "[t]he Court's steadfast rejection of the importation of special first amendment standards to procedural issues." Smolla, *supra* note 76, at 1535.

3. Independent Appellate Review

The final and perhaps most significant procedural thread emanating from *Sullivan* concerns the nature of the appellate process in a defamation claim. In articulating new standards concerning fault and the burden and quantum of proof in a defamation action brought by a public official, Justice Brennan made express findings of the constitutional inadequacy of the evidence presented, not bound by findings of the trial court or the jury:

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. . . . We must "make an independent examination of the whole record," . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.¹⁰⁶

Twenty years after *Sullivan*, in *Bose Corp. v. Consumers Union of United States, Inc.*,¹⁰⁷ these words served to institutionalize appellate de novo review of the record in defamation cases, apparently even to the extent that such review involves findings of fact, superseding the "clearly erroneous" standard of review required by the Federal Rules of Civil Procedure.¹⁰⁸ The 1989 "clarification" of the extent of the reach of *Bose* into jury findings in *Harte-Hanks Communications, Inc. v. Connaughton*¹⁰⁹ has not shed a great deal of light.¹¹⁰ Although

106. *Sullivan*, 376 U.S. at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (footnote omitted).

107. 466 U.S. 485 (1984).

108. We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times v. Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

Id. at 514. Again, the Court was divided, although here along more consistent lines as Justice Rehnquist dissented, joined by Justice O'Connor, *id.* at 515, and Justice White dissented separately, *id.* at 515. At least one state supreme court has taken the position that this extension of *Sullivan* does not go so far as to preclude a different and lesser standard of state appellate review, at least in matters not involving public officials or figures:

[W]here actual malice need not be proven, we decline to embrace the independent review requirement. . . . The negligence standard . . . that we have adopted is not a matter of governing federal constitutional law; . . . we have fixed the standard as a matter of state law. Accordingly, *Bose* . . . is not controlling on this issue. . . . [W]e will continue to adhere to our traditional standard of review in defamation actions involving private-figure plaintiffs.

Lansdowne v. Beacon Journal Publishing Co., 32 Ohio St. 3d 176, 181, 512 N.E.2d 979, 985 (1987) (citations omitted).

109. 109 S. Ct. 2678 (1989).

110. Although there were no dissents to Justice Stevens' opinion, in which all but Justice Scalia concurred, Justice Scalia's concurrence in the judgment, *id.* at 2700, as well as the brief concurring opinions of Justices White, *id.* at 2699, Blackmun, *id.*, and Kennedy, *id.* at 2700, indicate that doubt still remains as to just which findings of fact are to be accepted unless clearly erroneous and which are to be reviewed de novo under *Bose*. The various concurrences each sought to interpret Justice Stevens' carefully limited words to embrace their respective views of the nature of the review process. The result, of course, is that the opinion is ultimately not very surprising in holding that independent review of the record does not necessarily entail independent resolution of conflicting factual testimony. See *id.* at 2696-97. It is also rather anticlimactic in holding, as Justice Scalia describes it, that the appellate court may accept "not all the favorable facts that the jury *could reasonably* have found, but rather only the adequately supported favorable facts that the jury *did* find." *Id.* at 2701 (Scalia, J., concurring in the judgment).

Bose is an example of how constitutional issues create a "constitutional fact" treated as "law" for purposes of appellate review,¹¹¹ "[t]he real issue is not analytic, but allocative: what decisionmaker should decide the issue?"¹¹² *Bose* involves a policy determination that some matters are too vulnerable to be left to the trier of fact, that an appellate fence in the form of unbounded independent review must be erected to protect first amendment values.¹¹³ That such concern warrants such extensive appellate preemption is at least open to question:

[T]he important judicial role in preserving the constitutional order is adequately insured by the universal judicial duty to expound and refine the applicable constitutional law. When necessary, that duty includes further elaboration of the relevant constitutional norms. . . . But it remains to be demonstrated that more is necessary; that is, that the system of civil liberties is in material danger unless both the trial and all appellate courts are required to render independent judgment on every application of constitutional norms to the facts.¹¹⁴

There is indeed a consistency in the flow of judicial opinion¹¹⁵ after *Sullivan* providing an increasingly tight procedural rein on the defamation plaintiff. Certainly, the logical place for the common law to give way to first amendment considerations is the nature of proof and the allocation of its burden rather than the substantive essence of the tort. It is arguably a small, but necessary, constitutional step to reverse the common-law presumption of the falsity of the defamatory utterance.

With the focus shifted to a claim founded on *false* defamatory utterances—*itself* a balance to protect only against wrongly disparaged reputation—there is little justification for presuming the falsity of the utterance and strong reason for requiring the plaintiff to demonstrate its falsity. Although one who utters something harmful to another's reputation arguably should have the burden of defending the utterance,¹¹⁶ at least as compelling is the argument that falsity, being as much a part of the defamation cause of action as the defamation itself, is an element that the plaintiff must establish without benefit of an artificial presumption.¹¹⁷ The place of truth in the defamation action, in short, is more an historical anomaly than an inherent concomitant of recognition of the reputational interest,¹¹⁸ and no violence is done to that interest by shifting the burden

111. This contrasts with what Justice White has called "historical facts" such as credibility determinations or knowledge of falsity, which he suggests remain reviewable only under a "clearly erroneous" standard. *Id.* at 2699 (White, J., concurring).

112. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 237 (1985).

113. *Id.* at 242-43.

114. *Id.* at 268 (footnotes omitted).

115. Albeit by divided courts.

116. The defendant, having caused the harm, must then excuse the act. See Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 555 (1988).

117. Thus, the plaintiff whose injury is proximately caused by the action of the defendant usually may not benefit from a presumption that the defendant was negligent and must, with few exceptions, bear the burden of proving that negligence. The defendant's negligence is part of the cause of action to be proven; it is not for the defense to establish freedom therefrom.

118. Reputation, of course, is as injured by a true defamatory utterance as by a false one, and to the extent that protection of reputation is the focus of the tort, the truth serves only to exacerbate the

with respect to falsity.

When the issue became one of adjusting protection of reputation from communicative harm to constitutional protection of even harmful communication, the logic of removing the anomaly of the place of truth in the traditional defamation action was joined by strong policy considerations to reverse that tradition.¹¹⁹ Irrespective of the substantive nature of the cause of action, the constitutional balance could reasonably have been struck by a coherent set of procedural hurdles; that is, with speech itself being the wrongful act there is a compelling logic to a high constitutional threshold concerning the burden and quantum of proof. Stringent appellate review of the factual basis for crossing that threshold is a necessary corollary.

In short, the gloss on *Sullivan* with respect to the plaintiff's burden of proving falsity and the convincing clarity evidentiary standard provided by *Hepps*, *Bose*, and *Liberty Lobby* is, notwithstanding the Court's divisions, remarkably consistent. Indeed, except for what may be a judicial overreaction with respect to the scope of appellate review,¹²⁰ one need not take an absolutist view of the first amendment's impact on defamation to conclude that the reversal of the common law in this respect is appropriate and should not be dependent upon either the status of the plaintiff or the nature of the speech. Rather, to require *any* plaintiff seeking judicial intervention for *any* harmful speech to demonstrate its falsity clearly and convincingly is consistent with a society that values highly both speech and individual reputation.¹²¹ There is no need for ornamentation or limitation of this fundamental procedural accommodation between the first amendment and individual dignity by judicial inquiry into the content or context of the speech.

harm. See *infra* notes 162-64 and accompanying text. Thus, with "public order" at stake in the case of criminal libel, truth was irrelevant. L. ELDRIDGE, *supra* note 26, § 64; Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 791 (1964); see also Bezanson, *supra* note 116, at 555 (noting the centrality of truth today); Franklin, *supra*, at 808-12 ("[T]he basic proposition underlying the 'truth-is-a-defense' rule today seems to be the importance of free speech in our society."); *id.* at 832-33 (postulating that it is not because of improper past behavior—the subject of the true utterance—that plaintiff is disabled from suit, but because "this added element alters the [free speech] balance sufficiently to warrant denying liability").

119. Cf. Bezanson, *supra* note 116, at 543 ("the constitutional privileges have limited the instances of the tort's operation to the very cases in which the least reputational harm has occurred" (footnote omitted)). Dean Bezanson goes further, suggesting that *Sullivan* and its progeny have altered the nature of the tort itself: "The cumulative impact of the constitutional privileges has been subtly but radically to change the 'reputational' character of the libel tort. The common law tort was premised on harm to reputation. Today the tort protects against injurious falsehood." *Id.*

I am more inclined to believe that, at least with respect to the issues of burden and quantum of proof, the constitutionalization process does not represent such a radical change. The tort has long been concerned with injurious falsehood; the change is in the older presumptions with respect both to falsity, see *supra* notes 118 & 85-108 and accompanying text, and the fact of injury, see *infra* notes 128-133 and accompanying text.

120. A reaction tempered somewhat by the caution exhibited in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678 (1989). See *supra* note 110.

121. In this respect, it is unfortunate that the burden of proof of falsity remains unsettled with respect to the "private" issue plaintiff and that the Supreme Court has expressly left open the question of the applicability of the convincing clarity requirement to proof of falsity. See *supra* note 96.

III. OF PRODIGAL PROGENY: *GERTZ* AND THE LABYRINTH OF DAMAGES AND "OPINION"

Coherent or not, the principal threads first spun by *Sullivan* concerned matters of fault and the process for determining fault and falsity as the means for achieving the balance necessary to accommodate first amendment and reputational concerns. The fundamental ideas of fault-based liability coupled with procedural hurdles relating to falsity were fleshed out with fits and starts in the years following *Sullivan*. One may quarrel with various parts of the theme and its development and question the wisdom of a bifurcated (or trifurcated) status-based fault schema.¹²² Nevertheless, it is essentially comprehensive and comprehensible. It is not the basic cosmology created by the Court's development of the essential *Sullivan* themes that produced a system "dripping with contradictions and confusion and [providing] vivid testimony to the sometimes perverse ingenuity of the legal mind as well."¹²³ Rather, one must look to the apparently gratuitous and elaborate gloss imposed on that cosmology to understand why the law of defamation today "falls substantially short of safeguarding press freedom and fails to safeguard individual reputation."¹²⁴ With concepts rooted in *Gertz* rather than *Sullivan*, the rococo law of defamation today is in many ways similar to the ancient world of Ptolemaic epicycles:¹²⁵ it has so many complexities and legal curlicues that it too is intelligible, if at all, only to a learned few who, with more candor than their priestly predecessors, confess largely to inability to predict the future.

A. *Damages as a Function of Fault*

Gertz created a tiered relationship between fault and first amendment protection for defamatory utterances.¹²⁶ Justice Powell, however, did more than enunciate different fault requirements for differently situated plaintiffs; he also differentiated permissible damages, significantly changing the common law in the process. In *Sullivan* Justice Brennan's response to the issue of the prospect of inhibiting debate on public issues was to alter the nature of the defamation cause of action and its procedural profile rather than to deal with the more idio-

122. See *infra* notes 230-95 and accompanying text.

123. Smolla, *supra* note 76, at 1519. In general, Professor Smolla notes that "the law structuring the procedure for providing legal redress for reputational injury is in a period of unprecedented flux." *Id.* at 1521.

124. Bezanson, *supra* note 116, at 556. Dean Bezanson finds the situation today "profoundly and fundamentally disquieting." *Id.*

125. The theory of epicycles arose out of attempts to rationalize ancient Ptolemaic cosmology with inconsistent observed celestial phenomena. Briefly, as the geocentric Ptolemaic cosmology, with the sun, moon, planets, and stars revolving around a central earth in perfectly circular orbits, conflicted with early telescopic observation, an intricate network of suborbits, or epicycles was constructed through which each of the celestial bodies would march in sophisticated but circular arrays. Through these complex epicycles the basic concepts of a central earth and circular orbiting bodies were maintained. Of course, the structure to maintain it was so complex as to be inaccessible and unintelligible to all but a handful of priests who, learned in the arcana, could pretend to an ability to predict events. See F. HOYLE, *ASTRONOMY* ch. 3 (1962).

126. See *supra* notes 59-64 and accompanying text.

syncratic issue of damages.¹²⁷

In *Gertz* Justice Powell coupled the variable fault requirement to a correspondingly differentiated damages rule. The *Gertz* Court found inimical to the first amendment the common-law presumption of the fact of damage from publication of the defamatory utterance and the concomitant power and duty of the jury to evaluate and quantify the "presumed damages" in the absence of direct proof of harm.¹²⁸

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.¹²⁹

Justice Powell was similarly uneasy over the power in the jury to award punitive damages.¹³⁰

In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship They are not compensation for injury. Instead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.¹³¹

However strong his distaste, Justice Powell nevertheless did not conclude that presumed and punitive damages were simply constitutionally impermissible

127. The size of the damage award in *Sullivan*, however, with the "chilling" prospect it implied, probably had as much to do with the result as more sophisticated doctrinal matters. See *supra* note 10.

128. As Justice Powell described it:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (plurality opinion by Justice Powell). Indeed, the matter is definitional: if a defamatory utterance is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him," RESTATEMENT (SECOND) OF TORTS § 559 (1977), then a finding that the defendant published a defamatory utterance ipso facto entails a finding that the plaintiff has been damaged. See L. ELDREDGE, *supra* note 26, at 151-52, 537.

129. *Gertz*, 418 U.S. at 349 (plurality opinion).

130. At common law, in most jurisdictions, a jury could award punitive damages upon finding that the defendant acted with "malice," in the classic sense of ill will or intention to inflict harm on the plaintiff, as opposed to the "constitutional malice" predicated on defendant's knowledge of falsity or reckless disregard with respect thereto. See L. ELDREDGE, *supra* note 26, at 541; see also *supra* notes 24-40 and accompanying text (describing the difference between "classical" and "constitutional" malice and explaining the role of each in a defamation action).

131. *Gertz*, 418 U.S. at 350 (plurality opinion).

(perhaps because he could not persuade the four others who were otherwise prepared to vote with him). Rather, he prescribed that a plaintiff, of whatever status, may not recover presumed and punitive damages absent a demonstration of that "constitutional malice" requisite to a claim by a public official or public figure. Thus, a private plaintiff who, under the *Gertz* fault standards established liability by proving the defendant's negligence,¹³² but not knowledge of falsity or reckless disregard, may not recover presumed or punitive damages. "[T]he private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury."¹³³

The difference between compensation for actual injury (however broadly defined)¹³⁴ and presumed damages can be enormous. Thus, in *Brown & Williamson Tobacco Corp. v. Jacobson*,¹³⁵ a libel action by the manufacturer of *Viceroy* cigarettes against CBS and a controversial television commentator, the jury awarded plaintiff \$2,000,000 in punitive damages and \$3,000,000 in presumed compensatory damages notwithstanding the complete lack of any evidence that the broadcast had any impact on plaintiff's business or that the plaintiff otherwise had suffered any actual damage. Based on clear findings of both common-law and constitutional malice, the district court found the punitive damage award not excessive considering the defendants' net worth.¹³⁶ However, the \$3,000,000 in presumed compensatory damages was reduced by the court to a nominal one dollar, with the observation that "substantial damages are not presumed . . . [and] '[p]resumed' damages does not . . . mean that a plaintiff is entitled to any amount a jury sees fit to award, entirely independent of the evidence."¹³⁷

On appeal, the United States Court of Appeals for the Seventh Circuit upheld the punitive damages award but modified substantially the holding and reasoning of the district court with respect to presumed damages. It held punitive damages constitutionally permissible if the plaintiff demonstrates both constitutional, knowledge-or-reckless-disregard malice and common-law, "classic" mal-

132. *See supra* notes 59-64 and accompanying text.

133. *Gertz*, 418 U.S. at 350 (plurality opinion). Justice Powell considered the sliding, reciprocal scale on which one weighs the first amendment interest and the state's interest in reputation in holding that a private figure plaintiff's fault burden extended only to negligence. *Id.* at 348-49 (plurality opinion). In this context, he found it "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Id.* at 349 (plurality opinion). Justice Powell took pains to make it clear that "actual injury" was not tantamount to elusive and difficult-to-prove common-law "special damages" or to out-of-pocket loss. Rather, "all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." *Id.* at 350 (plurality opinion). Shortly after *Gertz* the Court had occasion to define "actual injury" broadly, finding the requirement met by a showing of emotional injury, even absent evidence of reputational harm. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

134. *See Firestone*, 424 U.S. at 460.

135. 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

136. *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240, 1263-65 (N.D. Ill. 1986), *modified*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

137. *Id.* at 1261.

ice.¹³⁸ As to presumed damages, based on a presumption of injury absent actual evidence thereof, the court held they may be awarded in a substantial amount if constitutional malice is demonstrated so long as the jury is "not carried away by passion and prejudice."¹³⁹ Accordingly, the court reinstated \$1,000,000 of the original \$3,000,000 award, noting: "We recognize that this is a very inexact and somewhat arbitrary process. Nonetheless, the process is inherent in the doctrine of presumed damages."¹⁴⁰

The Seventh Circuit assumed that *Gertz*, in expressly holding that punitive and presumed damages are impermissible when the plaintiff need not and does not demonstrate constitutional malice, impliedly authorized these damages if that malice requirement is met. The words of *Gertz*, as words of limitation with respect to the case before the Court, however, need not be read so permissively, and the question in fact remains an open one.¹⁴¹ Certainly, Justice Powell's language relating the balance between the state interest in individual reputation and the constitutional interest in speech to the nature of the plaintiff, the plaintiff's injury, and the level of damages could be equally condemnatory of the use of punitive and presumed damages in any defamation action.¹⁴²

In any event, following *Gertz* the matrix of status, fault, and damages had grown fairly complex. With *Dun & Bradstreet v. Greenmoss Builders, Inc.*¹⁴³ the matrix became bizarre. A majority of the *Greenmoss* Court held that the *Gertz* actual injury requirement, with its preclusion of presumed and punitive damages, was not applicable to a private plaintiff "when the defamatory statements do not involve matters of public concern."¹⁴⁴ Justice Powell, continuing his attempt to find balance among the conflicting forces, found the state interest at its strongest and the constitutional interest at its ebb when a private plaintiff is defamed in a private matter.¹⁴⁵ The author of the *Gertz* actual injury balance found no constitutional inconsistency in allowing the common-law damage rules to apply to this private plaintiff/private matter complex:

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. . . .

. . . .

. . . We have long recognized that not all speech is of equal First Amendment importance. It is speech on "matters of public concern" that is at the "heart of the First Amendment protection." . . . In contrast, speech on matters of purely private concern is of less First Amendment concern. . . .

While such [purely private] speech is not totally unprotected by the First Amendment, . . . its protections are less stringent. . . .

138. *Brown & Williamson*, 827 F.2d at 1138.

139. *Id.* at 1141.

140. *Id.* at 1142.

141. The Supreme Court could have clarified the matter, but chose not to when it denied certiorari in *Brown & Williamson*. 108 S. Ct. 1302 (1988) (mem).

142. See *supra* notes 128-31 and accompanying text.

143. 472 U.S. 749 (1985).

144. *Id.* at 763 (Powell, J.).

145. *Id.* at 757-59 (Powell, J.).

[C]ourts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of “actual malice.”¹⁴⁶

Justice Powell was joined in his opinion by Justices Rehnquist and O'Connor. Chief Justice Burger and Justice White concurred, thereby creating the majority, although they would have preferred to have had *Gertz* overruled and *Sullivan*, as interpreted by the later opinions, reexamined.¹⁴⁷ Justice Brennan dissented, objecting to any diminution of the *Gertz* standards for a private plaintiff.¹⁴⁸ His dissent carried more than a little irony. Justice Powell, in *Gertz*, had rejected unequivocally Justice Brennan's *Rosenbloom* standard by which the public nature of the matter rather than the status of the plaintiff determined the constitutional fault criterion.¹⁴⁹ In *Greenmoss*, however, Justice Powell used a variation on the *Rosenbloom* public concern/private concern theme (first used in *Rosenbloom* to expand the scope of *Sullivan*) to narrow the scope of his own *Gertz* opinion. Justice Brennan, decrying this departure from *Gertz*, urged the impropriety and unworkability of a subject-matter distinction to carve out an exception to the *Gertz* rule prohibiting presumed and punitive damages in the absence of constitutional malice.¹⁵⁰

Whatever the division in the Court, *Greenmoss* provides a gloss on *Gertz*

146. *Id.* at 757-61 (Powell, J.) (citations omitted).

147. *Id.* at 774 (White, J., concurring); *id.* at 764 (Burger, C.J., concurring) (“I continue to believe, however, that *Gertz* was ill-conceived and therefore agree with Justice White that *Gertz* should be overruled [and that *Sullivan*] should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.”); see *infra* notes 230-95 and accompanying text.

148. *Greenmoss*, 472 U.S. at 781 (Brennan, J., dissenting, joined by Justices Marshall, Blackmun and Stevens).

149. See *supra* notes 59-61 and accompanying text.

150. *Greenmoss*, 472 U.S. at 786-94 (Brennan, J., dissenting). One may note, along with the serious commitment, at least some part of the judicial tongue tucked firmly in cheek:

We believe that, although protection of the type of expression at issue is admittedly not the “central meaning of the First Amendment,” . . . *Gertz* makes clear that the First Amendment nonetheless requires restraints on presumed and punitive damage awards for this expression. . . .

. . . .
 . . . [W]hen an alleged libel involves criticism of a public official or a public figure . . . actual malice [is] a prerequisite to any recovery. When the alleged libel involves speech that falls outside these especially important categories, we have held that the Constitution permits states significant leeway to compensate for actual damage to reputation. The requirement of narrowly tailored regulatory measures, however, always mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than a showing of actual malice. . . .

. . . .
 In professing allegiance to *Gertz*, the plurality opinion protests too much. As Justice White correctly observes, Justice Powell departs completely from the analytic framework and result of that case. . . . Even accepting the notion that a distinction can and should be drawn between matters of public concern and matters of purely private concern, . . . the analyses presented by both Justice Powell and Justice White fail on their own terms. Both

and adds another epicycle to the complex cosmology of the defamation action. Granted, *Gertz* had eliminated the short-lived *Rosenbloom* public concern/private concern fault dichotomy when it substituted that of the public figure/private figure. However, it also tied the level and nature of damages to constitutional fault. With *Greenmoss*, the public concern/private concern question returned, to provide a different constitutional authorization for common-law damages and to leave open the question whether it also created a third, constitutional, absolute liability category.¹⁵¹

Some perspective on the labyrinthine constitutional structure resulting from the variations on the *Sullivan* and *Gertz* motifs may best be provided by a graphic presentation:

Defamation: Constitutional Standards¹⁵²

Plaintiff	Liability Standard Minimum Fault Required	Damages Recoverable Damages Standard	Proof of Truth/Falsity Burden, Nature of Proof
PUBLIC OFFICIAL: Issues: Who is? (<i>Rosenblatt</i> ; <i>Monitor Patriot</i>) Official Conduct (<i>Monitor Patriot</i>)	"Constitutional Malice": Knowledge of Falsity or Reckless Disregard (<i>Sullivan</i>) Test of "subjective awareness" (<i>Gertz, St. Amant, Bose</i>)	Presumed Damages and Punitive Damages, subject to review for reasonableness	Plaintiff has burden of proving falsity Plaintiff must establish "malice" with "convincing clarity" (<i>Sullivan, Bose, Liberty Lobby</i>); standard for other elements not resolved (<i>Harte-Hanks</i>)
PUBLIC FIGURE: Definition: (<i>Gertz, Firestone</i> ; <i>Hutchinson</i>) Limited? General?	Same as Public Official (<i>Butts</i> , <i>Gertz</i>)	Same as Public Official	Same as Public Official
PRIVATE FIGURE, PUBLIC ISSUE: Definitions: (<i>Gertz</i> ; <i>Greenmoss</i>)	Negligence and "Actual Injury" (<i>Gertz</i>)	Compensatory Damages for "Actual Injury". No presumed or punitive damages without <i>Sullivan</i> "malice"	Same as Public Official, at least where a "media" defendant is involved (<i>Hepps</i>)
PRIVATE FIGURE, PRIVATE ISSUE: (<i>Greenmoss</i>)	Negligence? (<i>Greenmoss</i> ; Compare Powell, White, Brennan)	Presumed and Punitive Damages (<i>Greenmoss</i>)	Probably burden on defendant (<i>Hepps</i>) "Convincing clarity" not resolved; but probably not applicable

B. A Matter of Opinion

At common law, the privilege of fair comment was the primary vehicle for protecting statements of opinion.¹⁵³ The privilege was qualified and subject to

... propose an impoverished definition of "matters of public concern" that is irreconcilable with First Amendment principles. . . .

... The plurality opinion . . . recognizes, as it must, that the state interest at issue here is identical to that at issue in *Gertz*. . . . Thus, unrestrained presumed and punitive damages for this type of speech must run afoul of First Amendment guarantees.

Id. at 775-76, 780-81, 785-86, 794 (Brennan, J., dissenting) (citations omitted).

151. See *supra* note 76 and accompanying text.

152. This chart is from S. HALPERN, *supra* note 26, at 382.

153. [S]tatements that could not be proved true were actionable, unless they were privileged. Because the defense of truth generally was unavailable for such statements, the courts had to develop other defenses to protect statements that, although they could not be

the defendant meeting an array of criteria.¹⁵⁴ It "allowed everyone in society to comment on matters of public interest, but the privilege extended to expressions of opinions only and not to misstatements of fact."¹⁵⁵ This elaborate qualified privilege now has been effectively superseded by a constitutionalized "opinion" doctrine emanating from *Gertz*.

Although Justice Powell's *Gertz* opinion had significant consequences with respect to the central issues of fault and damages in a defamation action, those of his words most often quoted were in the form of a general context-setting remark, not even amounting to dicta. The Justice observed:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statement of facts.¹⁵⁶

These apparently simple statements (with the syllogistic fallacy equating opinions and ideas) have served as the text for an elaborate and ongoing exegesis by the state and federal courts to define and delimit the fact/opinion dichotomy.¹⁵⁷ In the process, the old common-law qualified privilege of fair comment has been transformed into a constitutional absolute privilege for that which can be labelled "opinion" as opposed to "fact." In short, Justice Powell's remarks have served to alter significantly both the substantive and procedural way in which we determine whether an utterance is defamatory.

That the *Gertz* observation concerning actionable fact and protected opinion should be the source of what is probably the most confusing and least principled aspect of the constitutionalization of the law of defamation is particularly ironic in view of its gratuitous nature: "The problem of defamatory opinion was

proved true, still might contribute to public discussion. Such statements would include matters of taste and critical views on books, restaurants, and the behavior of prominent individuals. The need to encourage these statements led the courts to create the privilege of fair comment.

Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 854-55 (1984) (footnotes omitted). It is beyond the scope of this Article to review the common-law history. Much has been written describing the privilege and its extent. For a thorough discussion see W. KEETON, *supra* note 32, § 115; Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1223, 1240 (1976), and Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001, 1002-03 (1986).

154. A succinct, if not quite complete statement of this rather complex privilege has been offered:

A statement is privileged if: 1) it is about a matter of public concern; 2) it is based on true or privileged statements of fact that are either set forth with the disputed statement or are generally known to the public; 3) it represents the actual opinion of the critic; and 4) it is not made solely for the purpose of causing harm to the one criticized.

Comment, *supra* note 153, at 1002; see RESTATEMENT OF TORTS § 606 (1938) (the first *Restatement*, of course, has been superseded by RESTATEMENT (SECOND) OF TORTS § 566 (1977)). For a comparison of the *Restatement* positions, see Christie, *Defamatory Opinions and the Restatement* (Second) of Torts, 75 MICH. L. REV. 1621 (1977).

155. Keeton, *supra* note 153, at 1223.

156. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (plurality opinion).

157. See Comment, *supra* note 153, at 1008-09 ("Nearly every jurisdiction in the United States cites the *Gertz* dictum as binding constitutional authority."); see also *id.* at 1009 n.52 (collecting cases).

not remotely in issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem."¹⁵⁸ Nevertheless, as if from a magical shibboleth, a constitutional doctrine has sprung from the *Gertz* comment, supporting the assumption that the Constitution protects absolutely that which may be denominated opinion.¹⁵⁹ This assumption was adopted expressly by Chief Justice Rehnquist in *Hustler Magazine v. Falwell*,¹⁶⁰ as he observed: "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."¹⁶¹

The fact/opinion dichotomy is not a reflection of the relative harm done to the stigmatized subject of the utterance. The harm from unwarranted pointed ridicule or misplaced savage criticism can be just as devastating as that from the wrongful accusation of reprehensible conduct.¹⁶² Prior to the more intense constitutional scrutiny accorded speech torts that began with *Sullivan*, the inherent

158. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239 (1976). *But cf.* Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 292-94 (1978) (criticizing *Gertz* for not simply dismissing the action on the grounds that the allegedly defamatory utterances, charges that the plaintiff was a "Leninist" and a "Communist frontier," were protected opinion).

159. [A]t common law, the fair comment doctrine bestowed qualified immunity from libel actions as to certain types of opinions in order that writers could express freely their views about subjects of public interest. However, since *Gertz* . . . the nature of this accommodation has fundamentally changed. In *Gertz*, the Supreme Court in *dicta* seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment.

By this statement, *Gertz* elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment.

Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (Starr, J.), *cert. denied*, 471 U.S. 1127 (1985); *see also* *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir.) ("Opinion is absolutely protected under the First Amendment."), *cert. denied*, 479 U.S. 883 (1986). Professor Schauer has noted:

The absence of factual falsity now constitutionally precludes the imposition of sanctions for defamation, and inquiries into factual truth or falsity have become matters of constitutional importance in determining whether a particular defamation judgment is consistent with freedom of the press.

Schauer, *supra* note 158, at 275.

160. 485 U.S. 46 (1988).

161. *Id.* at ___, 108 S. Ct. at 882 (Rehnquist, C.J.) (quoting *FCC v. Pacific Found.*, 438 U.S. 726, 745-46 (1978)). These words stand in sharp contrast to then Associate Justice Rehnquist's observation in *Ollman v. Evans*, 471 U.S. 1127, 1128-30 (1985) (Rehnquist, J., dissenting from denial of petition for certiorari), with respect to the application of the *Gertz* language by the lower courts. *See infra* text accompanying note 176.

162. As Professor Keeton has observed:

If defamatory matter is defined as matter that discredits a person with a substantial number of respectable people, then derogatory opinions quite clearly are as defamatory as derogatory statements of fact. So, if derogatory opinions are to be held nonactionable, the distinction cannot be based on the notion that opinions are not defamatory. Although people are in a position to judge for themselves whether an opinion is justified so long as the alleged facts utilized as a basis for the opinion are proven to be true and are available to them, most, if not all, people are often influenced by others, especially by the press and the media, in formulating their opinions. . . . [T]he reader is apt to be more influenced by the opinion than the facts set forth to justify it.

Keeton, *supra* note 153, at 1244. Consider, for example, the long-term impact Kim Pring suffered from a *Penthouse* magazine article that was held to be so clearly fantasy as to preclude belief and

unbelievability of an utterance subjecting one to ridicule did not necessarily preclude recovery.¹⁶³ Now, constitutionalization, with the primacy of the interest in the dissemination of truthful communication,¹⁶⁴ surrounds protected "truth" with an insulating layer of tolerated falsity. The result, with respect to the definition of an actionable defamatory utterance, is a kind of demilitarized zone, created as a matter of constitutional policy by a group of state and federal circuit opinions, in which the formulaic designation "opinion" insulates an array of otherwise actionable expression. Such a zone may be necessary, although it

therefore not actionable, *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983):

Now whenever Kim walked down the street, men hollered out of open car windows, "Hey, Penthouse, are you really that good?" She was plagued with obscene phone calls. She literally had been driven out of the University of Wyoming by the laughter and, although she was an above average, personable student, she was unable to get a job in her home state. . . . Finally in desperation she joined the army and became a chaplain's assistant. But even there she was soon recognized. . . . She had no right to her name, no right to peace and privacy, no right to recover for her pain and her humiliation.

Spence, *The Sale of the First Amendment*, 75 A.B.A. J., Mar. 1989, at 52.

163. See *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936). There, Judge Learned Hand upheld a claim for libel arising out of a photograph which, because of the angle and other fortuitous compositional factors made the plaintiff appear grotesque:

We dismiss at once so much of the complaint as alleged that the advertisement might be read to say that the plaintiff was deformed, or that he had indecently exposed himself, or was making obscene jokes. . . . Nobody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake. If [it] is a libel, it is such in spite of the fact that it asserts nothing whatever about the plaintiff, even by the remotest implications. . . . [I]t is patently an optical illusion, and carries its correction on its face as much as though it were a verbal utterance which expressly declared that it was false. . . . [But] notwithstanding all we have just said, it exposed the plaintiff to overwhelming ridicule. . . . Such a caricature affects a man's reputation. . . . Literally, . . . the injury falls within the accepted rubric; it exposes the sufferer to "ridicule" and "contempt."

Id. at 155. As to the fact that there could not under these circumstances be an issue of "truth" or "falsity," a matter which today, under the even more compelling facts of *Hustler* and *Pring* would constitutionally require dismissal, Judge Hand observed:

It would follow that if . . . the picture was a mistake on its face and declared nothing about the plaintiff, it was not a libel. . . . Nevertheless, although the question is almost *tabula rasa*, it seems to us that in principle there should be no doubt. . . . Usually it is difficult to arouse feelings [causing the harm done to reputation] without expressing an opinion or asserting a fact; and the common law has so much regard for truth that it excuses the utterance of anything that is true. But it is a non sequitur to argue that whenever truth is not a defense there can be no libel; that would invert the proper approach to the whole subject. . . . [B]ecause the picture . . . was calculated to expose the plaintiff to more than trivial ridicule, it was *prima facie* actionable; . . . the fact that it did not assume to state a fact or an opinion is irrelevant. . . .

Id. at 156. Judge Hand's concern with the fact of harm from ridicule was apparent as he considered that case:

When Judge Learned Hand was studying the case on appellate review, [at a luncheon at the Harvard Club] he pulled the advertisement out of his brief case and without any comment passed it around the table. As we looked at it we burst into roars of laughter. "That settles it," said Judge Hand. "It's defamatory."

L. ELDREDGE, *supra* note 26, at 39.

164. As Judge Hand observed:

The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation; it is like a privileged communication, which is privileged only because the law prefers it conditionally to reputation.

Burton, 82 F.2d at 156.

seems broader than that which a sophisticated analysis of both the nature of the utterances and the nature of the harm would produce.

Notwithstanding their common characterization as protected "opinion," there are different categories of apparently fact-laden and offensive or vituperative speech that will be protected. There is the clearly factual statement whose context may indicate rhetorical hyperbole, a warning that the statement is made for effect and not to be taken seriously;¹⁶⁵ there is the related clearly factual statement whose context may indicate rhetorical hyperbole in the sense of a warning that it is made for effect and not to be taken literally.¹⁶⁶ The law has not had a real problem with what is understood in context by the average recipient as rhetorical hyperbole, no matter how apparently fact-based the utterance may appear.¹⁶⁷ The inhibiting word, "opinion," clearly is used here in the sense of an epithet or vituperative or humorous comment, as opposed to judgment, considered conclusion, or that which we generally call "opinion."

The idea that rhetorical hyperbole, verbal license arising from the heat of battle, the demands of humor, or the obviousness of a situation, is not actionable is hardly a novel idea or a peculiar constitutional principle. This concept, really a semiotic analysis, long has been part of the common-law approach to defining what is defamatory. It asks whether the average intended recipient of the remark would understand it in its literal, factual, defamatory sense rather than in a figurative, pejoratively name-calling sense. In short, the common law, no less

165. For example, consider the following excerpt from a newspaper column poking fun at the trend toward the use of men's underwear by women: "An informed source in the fashion industry recently revealed that this fad was started by Mrs. Calvin Klein. She began wearing men's underwear the same day Calvin came home early and found a strange pair of boxer shorts hanging in the shower." Columbus Citizen-Journal (Columbus, Ohio), Aug. 26, 1985. Notwithstanding its apparent implication of adultery, the statement could hardly support a defamation action by Mrs. Klein. In *Myers v. Boston Magazine Co.*, 380 Mass. 336, 403 N.E.2d 376 (1980), the court dismissed the complaint of a sports announcer who was characterized as "worst" in defendant's magazine's "Best & Worst" feature, which described him as "the only newscaster in town who is enrolled in a course for remedial speaking." Considering the context, it was inconceivable to the court that anyone could treat the matter as anything but a joke:

Removed from context, the statement passes for a factual proposition whose sense is clear. Only in context does it assume ironic proportion. . . . If the device is lacking in art, it is no less figurative than a vague epithet or a soaring metaphor. And it deserves the same protection under the First Amendment.

Id. at 344, 403 N.E.2d at 380-81.

166. See, e.g., *Pring*, 695 F.2d at 443 (dismissing an action notwithstanding characterization of the material as "a gross, unpleasant, crude, distorted attempt to ridicule [with] no redeeming features" since "the incidents charged were impossible, the setting was impossible[,] they were obviously a complete fantasy [amounting to] 'no more than rhetorical hyperbole.'"); *Mashburn v. Collin*, 355 So. 2d 879, 888 (La. 1977) (a restaurant review referring to two of the dishes as "trout à la green plague" and "yellow death on duck").

167. When the Supreme Court held in *Greenbelt Cooperative Publishing Association v. Bresler* that the word "blackmail" uttered in a vituperative and pejorative context was mere "rhetorical hyperbole" and not actionable, it was finding that there was a patent, unambiguous nonfactual context: "It is simply impossible to believe that a reader who reached the word 'blackmail' . . . would not have understood exactly what was meant [E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet." *Bresler*, 398 U.S. 6, 14 (1970) (Stewart, J.). The Court reasoned similarly a few years later in holding that the word "scab" in a union dispute context of vituperation could be understood by the recipients only as an expression of opinion. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) (decided the same day as *Gertz* and provoking a dissent from Justice Powell, who found the words factual rather than hyperbolic, see *id.* at 296 (Powell, J., dissenting)).

than the first amendment, protects the flamboyant, the exaggerated, and the utterance that is not intended to be taken seriously or literally where there are sufficient signs alerting the recipient to that circumstance.¹⁶⁸

In some instances, the signs are so obvious that the characterization of rhetorical hyperbole follows as a matter of law, not necessarily by constitutional mandate but by application of long-standing rules of construction for the determination of what is and what is not defamatory.¹⁶⁹ In such blatant situations the courts have decided the issue not because the first amendment automatically withdraws such questions from the jury, but because the courts found that any other conclusion by a jury would be unreasonable and insupportable. Conversely, in *Hustler Magazine v. Falwell*, when Chief Justice Rehnquist acted to protect a blatantly outrageous utterance,¹⁷⁰ he did so on the basis of a jury finding that the material "was not reasonably believable."¹⁷¹

The problem, both for law and language, becomes more complicated when the matter concerns a different category of speech: commentary, whether or not vitriolic, that is neither blatant fantasy nor hyperbole to make a point. In the "political" statement of "fact," notwithstanding the apparent factual content, the context may militate against specific believability, cautioning the audience to take what is presented with several grains of salt. This much more sophisticated problem of deciphering a speaker's signals is further encumbered with a constitutional gloss: the more recent cases, citing first amendment implications, have held that the jury is to have no role in determining whether an utterance contains sufficient opinion signals to be absolutely protected.¹⁷² In essence, determining whether an unclear utterance is a statement of fact has become a question of law and not one of fact! Its resolution, of course, can be dispositive of a case, as a finding of opinion will protect the defendant irrespective of the degree of fault or malice involved.

The proposition that the first amendment implications of the characterization of an allegedly defamatory utterance, a function in which the jury tradition-

168. The restaurant review cases are particularly graphic examples. See, e.g., *Mashburn*, 355 So. 2d at 888 (restaurant review referring to two dishes as "trout à la green plague" and "yellow death on duck"); *Greer v. Columbus Monthly Publishing Corp.*, 4 Ohio App. 3d 235, 448 N.E.2d 157 (1982) (review described food as tasting like ski boots). *But cf.* *Mr. Chow v. Ste. Jour Azur, S.A.*, 759 F.2d 219, 229 (2d Cir. 1985) (finding that the statement that the restaurant "served Peking Duck in one dish instead of the traditional three can be viewed as an assertion of fact. The statement is not metaphorical or hyperbolic; it clearly is laden with factual content.").

169. See, e.g., *Pring*, 695 F.2d at 443 ("it is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else").

170. See *Hustler*, 485 U.S. at ___, 108 S. Ct. at 882-83.

171. *Id.*

172. See, e.g., *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 n.7 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Mr. Chow*, 759 F.2d at 224; *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260, 721 P.2d 87, 90, 228 Cal. Rptr. 206, 209 (1986), *cert. denied*, 479 U.S. 1032 (1987); *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290, 501 N.E.2d 550, 553, 508 N.Y.S.2d 901, 904 (1986); *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 705 (1986); *cf.* *Good Gov't Group v. Superior Court*, 22 Cal. 3d 672, 682, 586 P.2d 572, 576, 150 Cal. Rptr. 258, 262 (1978) (a contrary position, holding that ambiguity requires jury resolution, sharply questioned in *Janklow*), *cert. denied*, 441 U.S. 961 (1979).

ally played a central role,¹⁷³ warrants the total preemption of the jury's function is neither clearly justified nor firmly established. "In a great variety of contexts the pressing question is the extent to which the Constitution itself controls the allocation of functions among the various decisionmakers . . . that commonly participate at some stage in the resolution of *all* types of constitutional claims."¹⁷⁴ Although making it clear that the first amendment precludes predicating a defamation or other communication tort on a statement that is not received as factual,¹⁷⁵ the Supreme Court has *not* as yet adopted the jury preclusive position taken by the lower courts. The assumption that the entire process of determining what is defamatory has been constitutionalized, further and unnecessarily burdens the defamation plaintiff, complicates an already baroque structure, and wreaks more havoc on our language.

Conflicting judicial pronouncements inevitably result as "lower courts have seized upon the word 'opinion' [in *Gertz*] to solve with a meat axe a very subtle and difficult question."¹⁷⁶ In this context, close questions of fact produce sharply divided statements of law in a given case, as the majority may hold that a statement is patently protected opinion while an equally convinced minority finds the same statement just as clearly to be actionable fact.¹⁷⁷ Paradigmatic of the problem are the companion Ohio state court cases, *Milkovich v. News-Herald*¹⁷⁸ and *Scott v. News-Herald*,¹⁷⁹ in which a newspaper columnist wrote that each plaintiff had "lied at [an administrative] hearing after each having given his solemn oath to tell the truth."¹⁸⁰ Although a four-to-three majority in *Milkovich* found this statement to be actionable fact,¹⁸¹ an intervening election, with a concomitant shift in personnel on the court, produced seven separate opinions supporting a four-to-three finding of protected opinion for this same statement in *Scott*.¹⁸²

Having chosen the task of determining as a matter of constitutional law the nature and quality of a given allegedly defamatory utterance, the courts *per force*

173. Generally, "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." RESTATEMENT (SECOND) OF TORTS § 563 (1977). It is for the court to determine whether a communication is capable of bearing a particular and defamatory meaning and, if so, it is for the jury to determine whether it was so understood by the recipients. *Id.* § 614; see *Clark v. American Broadcasting Co.*, 684 F.2d 1208, 1213 (6th Cir. 1982) (applying *Restatement* rule), *cert. denied*, 460 U.S. 1040 (1983).

174. Monaghan, *supra* note 112, at 231.

175. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

176. *Ollman v. Evans*, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting from denial of petition for writ of certiorari).

177. Compare the majority and minority opinions in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc determination in which eleven judges filed seven opinions), *cert. denied*, 471 U.S. 1127 (1985); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); and *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (a four to three majority overruling the earlier divided-court decision in *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), *cert. denied sub nom. Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985)).

178. 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), *cert. denied sub nom. Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985).

179. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

180. *Id.* at 244, 496 N.E.2d at 701; *Milkovich*, 15 Ohio St. 3d at 293, 473 N.E.2d at 1192.

181. *Milkovich*, 15 Ohio St. 3d at 299, 473 N.E.2d at 1197.

182. *Scott*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

have been required to develop constitutional criteria. The result has been a proliferation of judicial fact/opinion tests or standards.¹⁸³ Thus, Judge Starr enunciated a "four factors" test in *Ollman v. Evans*,¹⁸⁴ while Judge Bork focused on a "totality of circumstances" analysis in his *Ollman* concurrence;¹⁸⁵ the New York Court of Appeals made a far-ranging attempt at integration, calling ultimately for judicial "flexibility,"¹⁸⁶ while others endorsed the *Restatement's* "undisclosed defamatory facts" test,¹⁸⁷ or the suggestion that the

183. There has, similarly, been a proliferation of scholarly comment, both viewing the present morass with alarm and suggesting different kinds of tests. See, e.g., Bezanson & Ingle, *Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law*, 90 DICK. L. REV. 585, 606-07 (1986) ("the issues of fact versus opinion and of publisher state of mind—both of which are products of constitutional doctrine, not of the common law—are shadows."); Franklin & Bussel, *supra* note 153, at 869 (suggesting that the problem is obviated by the constitutional shifting of burden of proof: "Perhaps the most important consequence of requiring the plaintiff to prove the falsity of the statement is that the courts now can discard permanently the spurious distinction between fact and opinion."); Gilson and Leopold, *Restoring the "Central Meaning of the First Amendment": Absolute Immunity for Political Libel*, 90 DICK. L. REV. 559, 565, 572 (1986) ("The opinion/fact distinction . . . has . . . created uncertainty. . . . [R]ather than helping to clarify the waters of libel law, the opinion/fact distinction has only made them murkier." In response, the authors propose an "absolute privilege for speech in a political context."); Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359 (1985) (proposing a modified "innocent construction" rule); Comment, *supra* note 153, at 1046 (advocating test "that combines verifiability with an examination of the context of the statement"); Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988) (proposing that in case of matters of public concern, utterances be held to be protected opinion unless explicitly factually defamatory); Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need For a Bright-Line Rule*, 72 GEO. L.J. 1817 (1984) (would absolutely protect that which is clearly labeled "opinion" by the defendant); Note, *The Fact-Opinion Dilemma in First Amendment Defamation Law*, 13 WM. MITCHELL L. REV. 545 (1987) (essentially following the *Restatement*).

184. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

First, we will analyze the common usage or meaning of the specific language of the challenged statement itself. . . . Second, we will consider the statement's verifiability—is the statement capable of being objectively characterized as true or false? . . . Third, . . . we will consider the full context of the statement. . . . Finally, we will consider the broader context or setting in which the statement appears.

Id. at 979 (Starr, J.).

185. *Id.* at 993 (Bork, J., concurring). Disagreeing with the use of any set of categories beyond a broad distrust of the jury in a defamation action, Judge Bork observed:

The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury. . . . This requires a consideration of the totality of the circumstances that provide the context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press. That, it must be confessed, is a balancing test and risks admitting into the law an element of judicial subjectivity.

Id. at 997 (Bork, J., concurring); see also *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260-61, 721 P.2d 87, 90-91, 228 Cal. Rptr. 206, 209 (1986) (explaining California's totality-of-the-circumstances test), *cert. denied*, 409 U.S. 1032 (1987).

186. We eschew any attempt here to reduce the problem of distinguishing fact from opinion to a rigid set of criteria which can be universally applied. The infinite variety of meanings conveyed by words—depending on the words themselves and their purpose, the circumstances surrounding their use, and the manner, tone and style with which they are used—rules out . . . a formalistic approach. A court must have the flexibility to consider the relevant factors and to accord each the degree of importance which the specific circumstances warrant.

Steinhilber v. Alphonse, 68 N.Y.2d 283, 291-92, 501 N.E.2d 550, 554, 508 N.Y.S.2d 901, 905 (1986).

187. See, e.g., *Dunlap v. Wayne*, 105 Wash. 2d 529, 716 P.2d 842 (1986). The *Restatement* provides: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts

problem be obviated by protecting absolutely that which is affirmatively asserted and labelled by the publisher as "opinion."¹⁸⁸ When construing an utterance susceptible of both a nonfactual and a defamatory characterization, the courts appear to have abandoned the generally followed "reasonable construction rule"¹⁸⁹ in favor of the much more limiting "innocent construction rule," by which, as a matter of law, such an utterance is not actionable.¹⁹⁰

As with constitutionalization of the word "malice," we are operating at a *meta* level with respect to language, but without the necessary tools. The discourse is about the language we use, but the language of our discourse is peculiar and distorted. Thus, we speak of "actual malice" when what we mean, actually, is something quite different from malice.¹⁹¹ Similarly, the pivotal role of "factual falsity"¹⁹² engenders the pretense that we can distinguish "opinion," by which we mean that which is not factually false, from other classes of communication. Neither our language nor our thoughts are so easily defined. "Factual statements frequently include some degree of opinion, belief, or interpretation."¹⁹³ The result is a procrustean manipulation of the words to make a complex statement fit one of the two categories. In the process, the courts have created a category of speech we might call "constitutional opinion," utterances which, for a variety of reasons, not all of them concerned with the expression of the speaker's opinion, will be protected as a matter of first amendment policy. This penumbra of protection is the product of an unarticulated¹⁹⁴ policy defining and protecting certain forms of expression. It is a far cry from the general protection of nonfactual utterances afforded by the *Gertz* dictum¹⁹⁵ and by

as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977). For an examination of the background of the present section 566 as an attempt by the American Law Institute to accommodate the *Gertz* language, see Christie, *supra* note 154.

188. See, e.g., *Scott v. News-Herald*, 25 Ohio St. 3d 243, 262, 496 N.E.2d 699, 715 (1986) (Wright, J., concurring) ("I would . . . grant the media the right to attain absolute protection by identifying an article as opinion.").

189. See *supra* note 173.

190. The "innocent construction rule," successor to the old common-law doctrine of *mitior sensus*, which required only a possible, not necessarily a reasonable, innocent construction of the words to dismiss the claim, has been expressly adopted only in a few jurisdictions. See, e.g., *Chapski v. Copley Press*, 92 Ill. 2d 344, 442 N.E.2d 195 (1982); *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983); cf. Zimmerman, *supra* note 183, at 436-46 (advocating a modified innocent construction rule).

191. See *supra* notes 24-40 and accompanying text.

192. "If any given factor marks the line between protection and nonprotection, that factor inevitably involves a legal judgment subject to constitutional review. For defamation . . . the division between factual truth and factual falsity marks the line between constitutional protection and nonprotection." Schauer, *supra* note 158, at 276.

193. *Id.* at 278.

194. The clearest attempt at articulation, recognizing that indeed what is involved is policy rather than doctrine arising from the concepts of "fact" and "opinion," may be found in Judge Bork's concurring opinion in *Ollman v. Evans*, 750 F.2d 970, 993-98 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

195. Referring to the sweep of the *Gertz* dictum, Professor Keeton observed:

Perhaps, only general ideas about such areas as politics, government, philosophy, sociology, and race—as distinguished from opinions about people and their conduct—deserve such affirmative protection. On the other hand, arguably the Supreme Court will ultimately hold that the first amendment guarantees of free speech and press include the absolute privilege to express all kinds of opinions about people and their conduct.

Keeton, *supra* note 153, at 1245.

Hustler.

Moreover, one must question the assumption that such a policy-protected category of what otherwise might be actionable speech is necessary to provide first amendment breathing space. The process begun by *Sullivan* used fault and procedural tools to strike the constitutional balance, affording protection from absolute liability for certain defined kinds of speech. The broad proposition that speech without credible factual content also is protected is hardly equivalent to absolute protection for "political," "public," or similar expressions that otherwise would be actionable. Protection for speech in such sensitive contexts already exists in the heightened fault standards.¹⁹⁶

Leaving aside an arbitrary policy choosing simply to protect absolutely speech in certain sensitive contexts, the fact that the protection of opinion is constitutionally mandated does not necessitate exclusion of the jury from the interpretive process. While "an erroneous determination of [an utterance's perceived] factual truth in an area such as libel . . . may have the effect of improperly denying first amendment protection,"¹⁹⁷ so too would an erroneous determination of the fact of malice or of the truth or falsity of a disputed but unquestionably factual utterance. That a matter implicates constitutional concerns does not for all purposes remove the jury from the process of determining the appropriate facts. In the case of the meaning of a communication,¹⁹⁸ the *fact* involved is that of how the communication is, or reasonably ought to be, received. In short, the question asked is how the "signs" emitted are interpreted by the recipient.

If in fact our concern is with the signs that inform the specific words—the degree to which a recipient is alerted to the nature of the utterance—then the present preemption of the jury is unwarranted. "[T]he audience, or interpretive community, . . . is the site of reputational harm. If no one interprets communicative material as defamatory or disparaging, no harm exists, despite the falsity of that material."¹⁹⁹

Opinion, as it is employed today, is simply a description of audience interpretation. It cannot be meaningfully employed as a question of law to be decided by the content of the words, the purpose of the speaker, and the general context of publication, independent of the specific setting and interpretation of the audience. . . .

. . . .

196. As then Judge Scalia stated in his *Ollman* dissent:

It is difficult to see what valid concern remains that has not already been addressed by first amendment doctrine and that therefore requires some constitutional evolving—unless it be, quite plainly, the concern that political publicists, even with full knowledge of the falsity or recklessness of what they say, should be able to destroy private reputations at will.

Ollman, 750 F.2d at 1037 (Scalia, J., dissenting).

197. Schauer, *supra* note 158, at 276-77.

198. *But cf. id.* at 276 (suggesting that the constitutional significance of the distinction "leads necessarily to judicial evaluation, as a matter of constitutional law, of the truth or falsity of factual statements").

199. Bezanon & Ingle, *supra* note 183, at 600.

A legal framework which does not encourage, and at times does not permit, inquiry into the actual interpretations and responses of a reputational community endangers the very concept of reputation and the validity of a body of law designed to protect it. . . . To acknowledge the participant/receiver in the negotiation of meaning within a defamation context is only to restate a truism in mass communication theory: that it is less important what a speaker intends than what a listener hears.²⁰⁰

If the audience response is central, the jury is in the best position to discern that response. To the extent that the proper and constitutional concern is with the factual nature of the utterance *as perceived*, then this semiotic analysis can be made comfortably only on a case-by-case basis in which the idiosyncratic fact of the perception of the specific utterance under all of the subsisting circumstances can be determined. Such a determination is no less a question of fact for the trier of fact than other difficult fact issues; that it involves speech, with the corollary first amendment implications,²⁰¹ does not alter the essential nature of the process. As with other such questions, of course, when a court can find that no reasonable person would perceive the utterance in its "factual" sense, either because it is a form of rhetorical hyperbole or otherwise because of the signs inherent in the utterance, then the matter can be said to be "opinion" as a matter of law.

If the fact/opinion issue is seen not as a separate species of defamation problems but as a subset of the overall problem of determining the meaning and intent of an utterance, the well-established rules allocating functions between judge and jury should apply.²⁰² There is no reason to use either the *Gertz* dictum or the proposition that the Constitution protects matters of opinion to

200. *Id.* at 606, 607-08. One writer argues that the focus should be on the speaker and the speaker's intention, rather than on the recipient of the remark:

[D]efamatory language is best defined as the illocutionary act of accusing. . . . [E]very accusation contains an implicit statement that the charge is supported by fact.

On the other hand, an opinion, belief, or idea is simply a mental state. An expression of an opinion is thus a report, statement, or assertion regarding one's own state of mind. . . . Expressions of opinion . . . do not have the force of accusing and are excluded from the accusation definition of defamatory language.

. . . .

[The various tests are not dispositive.] They are not the distinction between reporting an opinion and accusing, but are clues the hearer may use to interpret an utterance when the speaker does not clarify its force. . . .

The ultimate question is whether the speaker is expressing her state of mind or accusing. The latter speech act implicitly represents that the charge is true according to culturally accepted criteria, and only this act should be regarded as defamatory.

Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 343, 347-48 (1987).

201. Thus, it also triggers heightened standards of proof and appellate review. See *supra* notes 85-121 and accompanying text.

202. See, e.g., *Good Gov't Group v. Superior Court*, 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978), cert. denied, 441 U.S. 961 (1979). Denying summary judgment to a defendant who had characterized the conduct of a local political figure with respect to a construction project as "blackmail" and "extortion," Judge Mosk observed:

In our view the article is ambiguous, and we cannot as a matter of law characterize it as either stating a fact or an opinion. In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion charg-

abrogate the reasonable construction rule²⁰³ in favor of a special and isolated application of the innocent construction rule.²⁰⁴ In this light, little purpose is served by the array of confusing and conflicting tests²⁰⁵ that have accompanied constitutionalization of this problem. Rather, the test is embraced in the general rules requiring an examination of context and circumstances in determining meaning.

IV. OF PEOPLE AND PRINCIPLE—AN EVALUATION

Most of those who have encountered the current law of defamation—the fruits of the unfolding and embellishment of *Sullivan*—find it to be in a dreadful state.²⁰⁶ The very explication of the law and its nuances is a formidable task²⁰⁷ and to characterize it as byzantine²⁰⁸ is charitable:

In recent years we've heard an unremitting chorus of criticism about the present law of libel. The attacks have come from all quarters—from judges, academics, journalists, victims of libel, defendants in libel suits and attorneys for both defendants and plaintiffs. The

ing [plaintiff] with crime, or whether the statements were generally understood as an opinion respecting his public conduct in regard to the development project.

This conclusion is not contrary to our statement . . . that the distinction between fact and opinion is a question of law; that remains the rule if the statement unambiguously constitutes either fact or opinion. Where, as here, however, the allegedly libelous remarks could have been understood by the average reader in either sense, the issue must be left to the jury's determination.

Id. at 682, 586 P.2d at 576, 150 Cal. Rptr. at 262. *But cf.* *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir.) (upholding summary judgment on the basis that *Newsweek* article was protected opinion and expressly rejecting *Good Gov't Group*), *cert. denied*, 479 U.S. 883 (1986); *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986) (upholding trial court's demurrer on the basis that allegedly defamatory broadcast was opinion rather than fact), *cert. denied*, 479 U.S. 1032 (1987).

203. *See supra* note 173.

204. *See supra* note 190 and accompanying text.

205. *See supra* notes 183-190 and accompanying text.

206. As has been observed:

Because of the apparent lack of any coherent consensus on the Supreme Court as to what the first amendment rules for defamation ought to be, and the proliferation of proposals for dramatic alterations in the law of torts, the law structuring the procedure for providing legal redress for reputational injury is in a period of unprecedented flux. . . . [The Supreme Court's recent decisions have] thrown the already confused law of defamation into yet deeper levels of chaos.

Smolla, *supra* note 76, at 1521, 1523; *see also* Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 829, 832 (1985) ("Currently, the law of defamation fails both to insulate the press from self-censorship pressures and to protect adequately the individual's reputation. . . . In summary, the present system of liability for defamation does not . . . compensate the plaintiff rationally, yet it continues to threaten or chill communication."). For one author's proposal to reform the law of available remedies for defamation, *see* Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986) [hereinafter *Alternative*], building on the earlier Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983) [hereinafter *Proposal*].

207. *See supra* chart accompanying note 152.

208. Smolla, *supra* note 76, at 1519 ("The law of defamation is dripping with contradictions and confusion and is vivid testimony to the sometimes perverse ingenuity of the legal mind. From its inception, the law of defamation has been singularly bent on establishing its reputation for quirky terminology and byzantine doctrine.").

current system does not work well for anyone.²⁰⁹

The complications and curlicues that characterize the law are the product of constitutionalization—the balancing process of accommodating the individual's interest in reputation to the perceived strictures of the first amendment. The nature of the accommodating compromise has, as Justice Black warned from the beginning,²¹⁰ inevitably produced both complication and practical failure. Perhaps one reason for the failure is the fact that the focus has been too much on abstraction and not enough on reality.

It is very easy to posit the great problems in the law of defamation in terms of abstract principle: the tension between the interest in reputation and the interest in the free dissemination of ideas. When the issue is framed as one between the first amendment, with all that this phrase connotes, and the evanescent concerns of a single individual over the opinions of others, the first amendment wins hands down. Compared to the perceived enduring needs of a free society, reputation is indeed a transient thing. As careful readers of Othello have noted, its glowing paean to invaluable reputation²¹¹ was uttered by Iago, one of literature's greater miscreants, who also tells us of the vacuous, ephemeral, and, ultimately, valueless nature of the esteem of others.²¹² In this context,²¹³ it is not surprising that, quite apart from the question of power,²¹⁴ thoughtful people have applauded each step in the process of constitutionalization of the law of defamation and expressed concern over those smaller steps that have left open some windows for the individual to base a claim upon the use of words or for the deliberation of a jury. When the fact of media power and organization is added to the compelling abstract appeal of the cause of freedom of speech (turning those who in another context would be called "defendants"

209. REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM: PROPOSAL FOR THE REFORM OF LIBEL LAW 9 (1988) [hereinafter THE ANNENBERG REPORT].

210. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 171 (1967) (Black, J., concurring in part) ("It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally . . . libelous under this Court's rulings."); *Sullivan*, 376 U.S. at 293 (Black, J., concurring) (urging the Court to prohibit states from awarding damages to public officials even when they show actual malice because it "is an elusive, abstract concept, hard to prove and hard to disprove").

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

W. SHAKESPEARE, *THE TRAGEDIE OF OTHELLO, THE MOOR OF VENICE*, Act III, Scene iii.

212. I thought you had received some bodily wound;
There is more sense in that than in reputation,
Reputation is an idle and most false imposition;
Oft got without merit and lost without deserving.

Id. at Act II, Scene iii.

213. See, e.g., Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 777 (1984) ("Many of our ideas about reputation are products of a simpler era. . . . In today's pluralistic society, much is tolerated and little is universally condemned.")

214. See *supra* text accompanying notes 80-81.

tort lawyers into 'constitutional statesmen' ")²¹⁵ reform too often is measured by how effectively it insulates the defendant from a monetary judgment.²¹⁶

Any workable approach to extrication from the unsatisfying present morass must first abandon the idea that defamation plaintiffs are merely greedy parasites feeding on the protectors of American liberty.²¹⁷ Defamatory matter does hurt, even if the hurt cannot be quantified. It would take a truly callused soul not to feel pain from public ridicule or from the public accusation of misconduct. It is all too easy to forget that the claim which implicates the constitutional questions—and which, for good or ill, is increasingly difficult to sustain—is founded on that pain.²¹⁸ In short, the law of defamation is very much about people and our view of individual dignity. To the extent that an otherwise supportable claim is disallowed on constitutional grounds, the price we pay is in terms of human pain. We must be very sure, therefore, that the benefit to the public good justifies that price. Meaningful reform of libel law must respond to the twin realities of the harm caused by defamation and the power of those in a position to inflict such harm.²¹⁹

There are, of course, many who do understand that the stakes in the act of

215. Judge Pierre Leval (United States District Judge for the Southern District of New York), Remarks at the Annenberg Washington Program Conference (Feb. 13, 1989). See *infra* note 218.

216. As Professor Epstein notes, the tendency is to regard "the interest of the press as dominant, so that once we can identify a chink in its legal armor, the proper response is to afford the press still greater protection by edging closer to the absolute privilege." Epstein, *supra* note 9, at 785.

217. Dean Bezanson asserts:

The view of libel plaintiffs as persons with no confidence in their claim who manipulate the legal process for personal ends seems greatly overbroad . . . Rather than suing for improper or manipulative reasons, most plaintiffs seem to resort to litigation as a means of self-help and legitimization of their claim. . . . Nor does the fact that some plaintiffs use the legal system to pursue a meritless claim discredit the motives of all plaintiffs. Rather . . . most plaintiffs sue for the simple reason that they have no effective alternative for redressing reputational harm.

Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 807 (1986).

218. This was dramatically brought home at a conference sponsored by the Annenberg Washington Program on February 13, 1989 in Washington, D.C. to consider the ANNENBERG REPORT, *supra* note 209. There were several panels composed primarily of journalists, media counsel and legal academics; one panel, however, had a well known plaintiff, General William Westmoreland, whose suit against CBS was highly publicized and ultimately discontinued. See generally R. SMOLLA, *SUING THE PRESS: LIBEL, THE MEDIA, AND POWER*, 198-201 (1986) (describing case). What struck one immediately, both in private conversation with General Westmoreland and in his public remarks, was his continued virtual obsession with "his" case, his need to tell his story and, in his eyes, to set the record straight for those whom he might encounter. Rightly or wrongly, truthfully or falsely, responsibly or irresponsibly, CBS had hurt him with its charges and the hurt lingered not far beneath the surface several years after the rest of us had essentially forgotten the entire matter. See also J. FAULK, *FEAR ON TRIAL* (1983) (plaintiff's detailed discussion of the circumstances surrounding *Faulk v. Aware, Inc.*, 35 Misc. 2d 302, 231 N.Y.S.2d 270 (Sup. Ct. 1962), *modified*, 19 A.D.2d 464, 244 N.Y.S.2d 259 (1963), *aff'd*, 14 N.Y.2d 899, 200 N.E.2d 778 (1964), *cert. denied*, 380 U.S. 916 (1965)); *cf.* Spence, *supra* note 162, at 52 (describing the impact of ridicule on the plaintiff in *Pring v. Penthouse Int'l*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983)).

219. As Professor LeBel notes, in a somewhat different context, "[r]ather than subjecting reputational interests to a first amendment trump, the participants [in what he sees as the political debate over the reach of defamation law] ought to be increasingly responsive to more popular notions of the fair treatment of individuals and the control of largely unchecked institutions capable of inflicting serious harm." LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 782 (1984).

balancing are indeed high.²²⁰ Certainly, the concept of "chilling" takes on deeper meaning in the context of the possible financial ruin of a newspaper from a libel judgment.²²¹ So too, after all of the snickers and knowing nods, the meaning of "reputation" to an injured individual becomes clear only when one can feel that individual's pain. Both concern for this pain and the problem of a self-righteous and hubristic press clearly inform Justice White's strong dissent from the *Gertz* imposition of fault and damage standards on the private defamation plaintiff,²²² which he characterized as "deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves."²²³ Clearly, it was a sense of the consequences of *Sullivan*'s constitutional compromise that caused him, in his concurrence in *Greenmoss*, to suggest not only reversal of *Gertz* but reevaluation of *Sullivan*.²²⁴

Recognition of the untoward complexity of the constitutionalized law of defamation and its failure to accomplish its purpose has produced a strong movement for reform.²²⁵ One path of reform, seeking to uncouple the interest in vindication of reputation from the complexities of fault and the vagaries of jury damage awards, would create an alternative declaratory judgment system in which the plaintiff who establishes the publication of false and defamatory matter, not appropriately retracted by the defendant, may obtain a judicial declaration of falsity. In such an action, the plaintiff, who need not demonstrate any degree of fault by the defendant, may not recover money damages.²²⁶ The recent proposal of the Libel Reform Project of the Annenberg Washington Program in Communications Policy Studies of Northwestern University, modeled on this approach, goes a step farther and makes retraction an absolute bar to any action. Moreover, it allows either the plaintiff or the defendant to preempt a

220. Professor Ingber, for instance, attempts to conceptualize the process as one involving the powerful tension between "decency" and "reason." See Ingber, *Defamation: A Conflict Between Reason and Decency*, 56 VA. L. REV. 785 (1979); see also Ingber, *supra* note 206, at 819-39 (describing the defamation-law problem of having to choose between the important social values of free expression and protecting citizens from unwise, hurtful expression).

221. See Smolla, *supra* note 9, at 12 n.72 (describing the plight of the *Alton Telegraph*, a small newspaper that had filed a petition for reorganization under the Bankruptcy Act after a jury awarded more than nine million dollars to an individual libeled by a memorandum sent by two of its reporters to a Justice Department official investigating organized crime).

222. See *supra* notes 59-64 and 126-33 and accompanying text.

223. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369-70 (1974) (White, J., dissenting); see *supra* text accompanying note 69 (quoting Justice White's opinion).

224. I joined the judgment and opinion in [*Sullivan*]. I also joined later decisions extending the [*Sullivan*] standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. . . . I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the [*Sullivan*] case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985) (White, J., concurring).

225. "Reforming the law of defamation has become a prominent topic of national conversation, as high visibility libel suits . . . pit powerful public plaintiffs against powerful media outlets, leaving in their wake a flurry of commentary critical of the modern defamation system." Smolla, *supra* note 76, at 1520-21; see Ingber, *supra* note 206, at 832-39. Professor Smolla describes several of the libel reform proposals. See Smolla, *supra* note 76, at 1521 n.8.

226. See *Alternative*, *supra* note 206.

damage action by invoking the declaratory judgment alternative.²²⁷ The goals of this vindicatory system are indeed laudable: for most purposes the defamation action would be simple, predictable, and inexpensive as the complexities of the fault and damage rules would be obviated, the threat of "gargantuan jury awards and runaway litigation costs"²²⁸ eliminated, and the plaintiff afforded a public expurgation of the defamatory matter. I must question, however, its underlying assumptions²²⁹ and the degree to which action on the basis of such assumptions would in fact ameliorate the harm defamation can inflict on individuals.

Simplification is a vital consideration.²³⁰ Of course, the simplest solution is Justice Black's: the inconsistency between the first amendment and an action for defamation cannot be reconciled or compromised, and, therefore, the action cannot be maintained.²³¹ Such an absolute preclusion might well be better than the present chaos,²³² as would a return to the common law of absolute liability,²³³ presumed and punitive damages, and pleading and procedural rules that are reasonably comprehensible. Indeed, the English experience at least causes one to question the reality of a "chilling effect" justification for the complete distortion of the nature of a defamation action produced by our constitutionalization process. Although the unhappy experience of the *Alton Telegraph*²³⁴ is frequently cited, there is no clear evidence that it is particularly exemplary²³⁵ or that the

227. THE ANNENBERG REPORT, *supra* note 209; see Barrett, *supra* note 81, at 851-52.

228. Smolla, *supra* note 76, at 1521 n.11; see Barrett, *supra* note 81, at 856-61.

229. See *infra* notes 242-45 and accompanying text.

230. According to Professor Keeton:

Securing to persons and other legal entities the good reputation to which they are entitled and which they have earned, without discouraging the free flow of ideas and information so important to a free society, has proven a difficult task The maintenance of this balance has . . . engendered a complex doctrinal structure The complexity of the law alone is enough to provoke serious criticism. Distinctions that often seem to be theoretically sound become impractical in the actual administration of justice. Neither the values that are protected by free speech nor those protected by the recognition of a tort action to protect reputation can be safeguarded and promoted when the resolution of competing values necessitates a large number of difficult decisions. Complexities can make it virtually impossible to predict what the legal outcome of a simple controversy will be in advance of trial or to complete a trial of a defamation case without making an error. Thus, protracted and expensive litigation often results.

Keeton, *supra* note 153, at 1224. Professor Keeton describes 23 "decision points" essential to resolution of a modern defamation claim. *Id.* at 1233-35.

231. See *supra* note 54.

232. One might argue that public awareness of the absence of the remedy would cause recipients of the defamatory remarks to be wary of taking them seriously, thereby mitigating the possibility of any real harm. Such a result is not necessarily salutary:

If there is no law of defamation, then the mix between truthful and false statements will shift. More false statements will be made. The public will then be required to discount the information that it acquires because it can be less sure of its pedigree. The influence of the press will diminish as there will be no obvious way to distinguish the good reports from the bad, in part because no one can ever be held legally accountable for their false statements.

Epstein, *supra* note 9, at 800.

233. See *id.* at 802 ("[T]he proper rule in defamation is strict liability, as it was at common law.").

234. See *supra* note 221.

235. Indeed, the newspaper's problems arose not from a story it published but from a memorandum sent by its reporters to an investigative body. See R. SMOLLA, *supra* note 218, at 74.

American press has become particularly timorous notwithstanding the high cost of defamation litigation. Meanwhile, the English press, largely still subject to the common law, is notoriously "unchilled" and the threat of litigation does not seem to have produced moderation over the years.²³⁶ As Lord Goodman, then the chair of the Newspaper Publishers' Association, observed in 1975:

A great newspaper—if it believes that some villainy ought to be exposed—should expose it without hesitation and without regard to the law of libel. If the editor, his reporters and his advisors are men of judgment and sense, they are unlikely to go wrong; but if they do go wrong the principle of publish and be damned is a valiant and sensible one for a newspaper and it should be responsible. Publish—and let someone else be damned—is a discreditable principle for a free press.²³⁷

This is not to suggest that the English model is either applicable or preferable for us. Rather, it suggests that the array of fault standards and other encumbrances that characterize the current American law of defamation—most of which are the product of closely divided Supreme Court opinions—are not so obviously and necessarily requisite to the functioning of a free society. As discussed above, the development of the complex matrix of defamation following *Sullivan* was neither inevitable, nor logical, nor the product of any coherent consensus.²³⁸

The declaratory judgment proposals do indeed simplify the law of defamation by eliminating the complex fault issues and allowing the focus to be where it should: on truth. However, they do so at a price. Echoing the *Gertz* sliding, reciprocal relationship between fault and damages,²³⁹ the cost of this simplification is the elimination of damages entirely. The plaintiff seeking an effective remedy for reputational harm produced by a false and defamatory utterance must choose²⁴⁰ between the almost impossible obstacle course of the present action for damages or a judicial declaration of defamatory falsehood. If the threat of damages today chills the press into somewhat more responsible behavior—a questionable assumption—there is little reason to believe that the limitation of sanctions to a form of reprimand would not serve as a license to defame.²⁴¹

However, issues of responsible journalism and the excesses of the press be-

236. *But cf. TRB, Tea and Toleration*, THE NEW REPUBLIC, Aug. 21, 1989, at 6 ("In Britain, journalists live in dread of lawsuits.")

237. REPORT OF THE COMMITTEE ON DEFAMATION, CMND. NO. 5909 ¶ 211, at 53 (1975), *quoted in Keeton, supra* note 153, at 1238; *cf. N.Y. Times*, Apr. 18, 1989, at 22, col. 4 ("The British press is under increasing criticism for one of its most pungent features: recklessness.")

238. *See supra* text accompanying note 77.

239. *See supra* notes 126-33 and accompanying text.

240. Under the *Annenberg Report*, on the other hand, the plaintiff would have the choice imposed, because the defendant may elect to convert an action for damages into one for a declaratory judgment. *See THE ANNENBERG REPORT, supra* note 209.

241. As Professor Franklin has noted, the "mandatory" declaratory judgment proposal affords the defendant the right to turn an action for damages into one for a declaration in which the defendant risks "exposure to nothing more than [attorneys'] fee shifting. The defendant's election removes any deterrent effect of libel law by allowing irresponsible publishers to choose either to retract and escape liability for attorneys' fees or to default and face only minimal fee shifting." *Alternative, supra* note 206, at 839.

come secondary if the declaratory judgment procedure would in fact afford the defamed individual redress in a simple and efficient manner. The proposals assume that retraction or declaration affords such redress. The empirical work of the Iowa Libel Research Project²⁴² has led to the conclusion that "effective response to alleged falsity, emotional relief, and vindication of reputation chiefly appear to motivate most plaintiffs."²⁴³ This in turn has led to the assumption that vindication, in the form either of an appropriate retraction or a judicial declaration of falsity, is paramount and sufficient redress for reputational harm. On that assumption (and without considering the issue of deterrence or license for media excess), the trade-off—a simple, no-fault determination of truth in exchange for damages—appears fair. But the issue is not that simple. On the one hand, it cannot be said that the Iowa Project demonstrates the lack of necessity for monetary relief, either as compensation or deterrence.²⁴⁴ On the other, the data hardly support such a gross departure from our damages-based right/remedy system.²⁴⁵

That the injury to reputation²⁴⁶—the consequences of being exposed to ridicule, obloquy, or contempt, to use the old common-law formula—is often not precisely quantifiable does not mitigate its severity. The injury may be intangible, but it is nonetheless real, and the law in other contexts has been able to deal effectively with that kind of harm.²⁴⁷ To be sure, money damages cannot restore a damaged reputation, no more than such damages can restore a damaged limb or a bruised psyche; nevertheless, absent any restorative remedy we have created a legal structure that provides for a translation of the intangible harm into compensatory tangible form.²⁴⁸ When Justice White spoke of the vindicatory func-

242. The Iowa Libel Research Project was an undertaking "designed to explore the feasibility of non-litigation processes through which libel disputes might be resolved." R. BEZANSON, G. CRANBERG & J. SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* ix (1987). The Project was begun by Professors Randall Bezanson, Gilbert Cranberg, and John Soloski, building on the work of Professor Marc Franklin in Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 AM. BAR FOUND. RES. J. 455, and Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. BAR FOUND. RES. J. 797. See Bezanson, *supra* note 217, at 789. The work of the Iowa Project is described in detail in R. BEZANSON, G. CRANBERG & J. SOLOSKI, *supra*.

243. Bezanson, *supra* note 217, at 808.

244. "The self serving assertion of many plaintiffs that they sue for non-monetary relief does not support a conclusion that no plaintiff should be permitted a nontrumpable election to seek damages." *Alternative*, *supra* note 206, at 837 (footnote omitted). Indeed, there is little uniformity of opinion as to just what the Iowa Project results mean with respect to the fairness or utility of eliminating damages as a remedy for defamation, as demonstrated by the divergence of interpretive opinion expressed at the Annenberg Washington Program Conference, discussed *supra* note 218.

245. Of course, nothing precludes a trial judge from requiring a special verdict, by which the jury can determine the questions of falsity, fault, and damages separately, thereby effectively providing the vindicatory declaration in the context of the traditional action, a procedure followed in *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) (the jury verdicts are reported in N.Y. Times, Jan. 25, 1985, § 1, at 1, col. 2).

246. For a discussion and analysis of the values informing our concept of "reputation" see Belah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743 (1986) (in *New Perspectives in the Law of Defamation*, 74 CALIF. L. REV. 677 (1986) (symposium)); Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) (in symposium); Reston, *Reputation and the Modern Journalistic Imperative*, 74 CALIF. L. REV. 753 (1986) (in symposium).

247. See generally Ingber, *supra* note 206 (discussion of how the system of tort law has and should compensate plaintiff for intangible harms).

248. See *id.* at 775-76.

tion of the defamation remedy,²⁴⁹ or noted that "libel plaintiffs are very likely more interested in clearing their names than in damages,"²⁵⁰ he was concerned about *limiting* the damages remedy, not *eliminating* it. If the law of defamation is more complex and inaccessible than it need be, there nevertheless is something perverse about a no-fault/no-damages solution that benefits most those who suffer least and leaves the truly injured to muddle through the mess as best they can.²⁵¹ In short, simplification need not be at the expense of the vulnerable.

An effective law of defamation must contemplate redress in the form afforded to other tort victims—money damages. Since the harm is individual and not a function either of the plaintiff's status or of the public or private nature of the speech, there is little reason for so differentiating the rules for *compensatory* damages or for creating different fault standards for compensatory damages than for liability. Nevertheless, that is the result of the *Gertz/Greenmoss* damages rules.²⁵² They seem to be the product of a confusion of logical types or policy expediency rather than a considered application of constitutional principle. Compensatory damages should follow from liability. To the extent that presumed damages are constitutionally permissible or desirable, they are compensatory in nature; there is no sound basis for predicating the allowance of presumed damages on showings of fault different from those requisite to liability. Thus, the *Greenmoss* holding applying the common-law damages rules²⁵³ makes sense only if, as Justice White suggests,²⁵⁴ it implies that the common-law liability rules apply as well, while *Gertz* logically should have served to bar presumed damages in any action.

A proper accommodation between the reputational interest and the first amendment precludes the allowance of compensatory awards in the form of presumed damages that of necessity must be speculative, irrespective of the status of the parties, the nature of the speech, or the degree of fault demonstrated.²⁵⁵ There simply is no rational framework within which the court can assess the propriety of a jury's presumed damages award and thereby carry out its constitutional review function.²⁵⁶ Rather, the *Gertz* standard of awarding compensatory damages for actual injury provides a fair basis for compensating all plaintiffs. As articulated in *Gertz*, such a standard relates to the fact of harm and not its quantification, so that the injured plaintiff can be compensated so long as the injury is attributable to the defendant's wrongful conduct. With

249. See *supra* text accompanying note 224.

250. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring).

251. See *Ingber, supra* note 206, at 832-39 (proposing a remedial scheme that attempts to avoid this imbalance).

252. See *supra* notes 129-50 and accompanying text; chart accompanying note 152.

253. See *supra* notes 143-50 and accompanying text.

254. See *supra* note 76.

255. There is a general consensus among those proposing reform that presumed damages should be eliminated from damage actions. See, e.g., THE ANNENBERG REPORT, *supra* note 209, at 25.

256. See *Anderson, supra* note 213, at 749-50 ("the process of fixing an amount of presumed damages is inherently irrational"); cf. *Brown & Williamson Tobacco Co. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987) (discussed *supra* notes 135-40 and accompanying text), *cert. denied*, 108 S. Ct. 1302 (1988).

proof of injury, traditional concepts of proximate cause sanction recovery for direct and parasitic damages, controllable compensation for both the tangible and intangible actual harms resulting from a defendant's act.²⁵⁷

Punitive damages, on the other hand, are peculiarly and definitionally related to degrees of fault. Despite the general distaste for them,²⁵⁸ unless we are prepared to say that punitive damages should never be allowed in any private legal action under any theory,²⁵⁹ it is difficult to understand objection to a punitive award against one who has willfully and maliciously (in the true sense of the word) inflicted harm on another.²⁶⁰ The general rules for the allowance of punitive damages—requiring an intention to harm, together with close judicial review to control excessiveness—can hardly be said to impinge on the breathing space afforded speech under the first amendment. The punishment is attendant to the intention to harm rather than to the demonstrated falsity; there thus seems to be little room for the additional knowing or reckless falsity requirement of *Gertz*.

In short, effective simplification should not preclude the award of damages, nor should it impair continuation and general application in all defamation actions of the array of procedural rules that emerged from the constitutionalization process. The burden of *Sullivan* was to ensure that a plaintiff recovering damages met appropriate criteria and not directly to attenuate or modify the damage remedy itself. These criteria, broadly speaking, involved interpolation

257. See Anderson, *supra* note 213, at 756-64. Professor Anderson, however, would require that there be "proof of some harm to reputation in every case." *Id.* at 763 (emphasis added). As amplified in *Time, Inc. v. Firestone*, 424 U.S. 448 (1977), *Gertz* requires that there be "actual injury" caused by the defendant's act, but not that it necessarily be injury to reputation.

Under the standard American approach to proximate cause in negligence actions, the unforeseeability of the precise manner in which a foreseeable victim suffers a foreseeable type of harm will not preclude the defendant's liability, and the classification of the type of harm that is foreseeable is subject to broad interpretation. . . .

. . . .

. . . [A] distinction should be drawn between presumed harm to reputation and presumed damages. A presumption of harm to reputation supplies the injury element of the tort action of defamation, and brings defamation into the tort mainstream A presumption of damages, on the other hand, entitles the tort plaintiff to compensation even in the absence of any proof of actual loss. Although presumed damages permit a factfinder to make an award of damages with no proven factual basis, presumed harm to reputation does not necessarily have to be translated into any monetary recovery for the plaintiff.

LeBel, *supra* note 219, at 784-85.

258. Virtually all proposals for reform would abolish punitive damages. See, e.g., *Alternative*, *supra* note 206, at 813.

259. The Supreme Court recently has upheld the constitutionality of punitive damages in a tort action challenged as an "excessive fine" impermissible under the eighth amendment. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989). Although the Court expressed no opinion with respect to the constitutionality of punitive damages as a matter of due process, an issue that was not before it, the malice standards and close scrutiny employed in defamation cases would militate against a finding of due process infirmity. *Cf. id.* at 2923-24 (Brennan, J., concurring) (concurring with the understanding that the majority left open the issue whether due process protects a defendant in a civil action from unreasonably large punitive damages awards imposed by a jury that receives only "skeletal" instruction from a judge on how to compute punitive damages properly).

260. *But cf.* Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 793, 803-07 (1984) (arguing that it is illogical to provide punitive damages when "bad" motives underlie defendant's false speech, when no recovery is allowed for harmful true speech, regardless of defendant's motives).

of fault into the substantive cause of action²⁶¹ and the erection of a series of procedural hurdles in the way of recovery.²⁶² The procedural hurdles—shifting to the plaintiff the burden of proving fault and falsity clearly and convincingly,²⁶³ with close, independent appellate scrutiny of the fact finding process—appear to be the most clearly principled and readily workable way of accommodating the defamation cause of action to the first amendment.

Indeed, irrespective of one's view of the nature of speech to which the first amendment applies—whether public speech is more deserving of protection than private speech²⁶⁴—there is little reason to bifurcate the constitutional procedural rules for defamation. The inquiry into the nature of either the plaintiff, the defendant, or the defamatory utterance, which now causes so much of the complexity of the cause of action, need have no place in a claim to redress harm caused by false published speech. The plaintiff in all cases should be required to prove its falsity; so too, elevating the quantum of proof required to meet that burden seems to be an appropriate constitutional accommodation, and should not be a function of the nature of the speech, the speaker, or the subject. Moreover, a process of review in which the court serves as an independent check on the propriety of the jury's application of the procedural norms is essential in a system in which those norms are the paramount means of safeguarding first amendment interests.

A unitary algorithm for damages and procedure is desirable, but if we are to have simplified reform without an alternative noncompensatory system, the fault complex itself must be changed. A unitary system, applicable to all claims irrespective of the nature of the parties or of the utterance, is the sure way to remedy the epicyclic,²⁶⁵ unpredictable, and inordinately expensive present system.²⁶⁶ The need to determine the public or private nature of both the plaintiff and the utterance, and the application of an array of standards following

261. See *supra* notes 42-76 and accompanying text.

262. See *supra* notes 85-121 and accompanying text.

263. The convincing clarity requirement for falsity is not yet clearly established, see *supra* note 96, although the argument for it is compelling:

Because the demarcation between the truth and falsity of the statement is of constitutional dimension, imposition of a preponderance of the evidence standard on the plaintiff is inadequate. If the plaintiff must persuade the court with convincing clarity that the defendant was at fault, the court certainly should not use a less rigorous standard to determine whether the statement was false.

Franklin & Bussel, *supra* note 153, at 864.

264. See Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 773-74 (1986).

265. See *supra* note 125.

266. Professor Christie accurately described the need for a single fault standard:

The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it. The underlying reason for these difficulties is likely traced to the fundamental assumption in *Sullivan* that it is possible to have different standards of liability depending on who is involved or . . . what is involved. . . . The result has been to put tremendous pressure on the fact-finding process, which is asked to make largely subjective determinations, such as who is a public figure and what is newsworthy. . . . The system is simply incapable of making these determinations in a consistent and intellectually satisfying manner.

Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 63-64 (1976).

from those determinations, taxes not only the resources of the parties but also the capability of the judicial system.²⁶⁷ Return to common-law strict liability and undifferentiated damage rules is, of course, one way of realizing a unitary system not based on these troublesome distinctions. Application of the *Sullivan* fault standard and the related procedural rules to all defamation actions also would create such a system, as would modification of *Sullivan* to impose upon all claims a lesser, but still effective, fault standard²⁶⁸ coupled with the uniform damages and procedural standards discussed above.²⁶⁹

The risk to first amendment values—elimination of the breathing space for innocent error and indifference to the prospect of serious press self-censorship—attendant to the complete abandonment of the constitutional requirement of fault precludes serious consideration of a return to strict liability as the basis for a coherent model for defamation.²⁷⁰ Conversely, if unitary fault means extension of the *Sullivan* actual malice standard,²⁷¹ the resulting simplification also would entail an unnecessary sacrifice of the interest in reputation, while in no way mitigating the enormous litigation costs attendant to an action under that standard.²⁷² The actual malice standard essentially has served to undercompensate the injured victim of defamation while unduly burdening the entire litigation process. It has produced “grossly perverse results.”²⁷³

To the extent that one does not contemplate a significant change in the

267. *Id.* at 49, 55-56.

268. “The most feasible options are either to apply the *Sullivan* criteria to all types of defamation or to apply the *Gertz* requirements of fault, in the form of mere negligence and actual damages, to all types of defamation.” *Id.* at 64.

269. *See supra* text accompanying notes 259-64.

270. *But cf.* Epstein, *supra* note 9, at 786-92 (questioning the wisdom of *Sullivan*'s departure from the common law).

271. The imposition of more stringent fault standards on a defamation plaintiff by the states is, of course, constitutionally permissible and a number of states have established requirements more onerous than those set by the Supreme Court. *See, e.g.,* Comment, *Journalistic Malpractice: The Need for a Professional Standard of Care in Defamation Cases*, 72 MARQ. L. REV. 63, 71-72 (1988) [hereinafter *Journalistic Malpractice*]; Comment, *Attacking the Negligence Rule in Defamation of Private Plaintiffs: Embers Supper Club v. Scripps Howard Broadcasting Co.*, 47 OHIO ST. L.J. 503, 508-12 (1986) [hereinafter *Negligence Rule*]. Although the issue of what states may do, have done, and should do with respect to the constitutional minima is beyond the scope of this Article, it may indeed be the major focus of activity if significant constitutional change is not possible. As Professor Smolla has noted:

One of the worst by-products of the confusion in constitutional defamation law is that it distracts attention from thoughtful management of the tort side of the system. So much legal ingenuity and energy is consumed in determining what states are constitutionally free to do, that the question of what states *ought* to do with the freedom they have tends to get lost in the shuffle.

Smolla, *supra* note 76, at 1523.

272. *See supra* notes 24-40 and accompanying text.

273. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring).

The *New York Times* rule . . . countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Id. (White, J., concurring).

constitutional fault criteria,²⁷⁴ reform is limited either to readjustment with respect to damages and the application of the procedural requirements, as previously discussed,²⁷⁵ or to the development of parallel systems which *per force* must limit the injured plaintiff even more severely. Thus, the compromise proposals that trade fault for damages seek to stay strictly within the presently enunciated constitutional doctrine²⁷⁶ and produce an alternative structure whose virtue of simplification does not offset its grave implications for the individual's interest in reputation. If one must accept either the proposition that only a draconian fault standard can avoid the chilling effect of press self-censorship born of fear or the proposition that the *Sullivan* test is immutable,²⁷⁷ then the price of meaningful reform becomes too high for the injured individual.

Change in the *Sullivan* rule to accommodate the unanticipated reality need not alter its essential, vital components, however. As Justice White suggested,²⁷⁸ *Sullivan* must be reexamined in light of experience. Indeed, Chief Justice Rehnquist's reaffirmation of the continuing force of *Sullivan*²⁷⁹ is directed to its fundamental concepts and does not preclude an examination either of its subsidiary ideas or of the more tenuous doctrine that emerged from the subsequent decisions. In short, just as it is foolish to fix something that "ain't broke," it is equally essential to try to fix something that patently doesn't work. Without impairing the axiom that a speech tort must implicate the first amendment, effective solutions may require the conceit of assuming that a different perspective on *Sullivan* can produce a somewhat different system, that our constitutional tools are flexible enough both to honor that proposition and to admit of error and change.

In this connection, what has become significant about *Sullivan*, irrespective of both the civil rights and the Sedition Act concerns that underlay the opinion,²⁸⁰ is the constitutional grounding of a defamation action on both falsity and

274. See, e.g., LeBel, *supra* note 219, at 784 ("the existing parameters of constitutional protection of speech and the press in defamation cases are, and should remain, well entrenched").

275. See *supra* text accompanying notes 255-64. Even here, since I suggest the permissibility of punitive damages so long as common-law malice is established, some change in the *Gertz* minimum would be necessary.

276. It is assumed that a no-fault declaratory judgment action, even one which awards counsel fees, would not be constitutionally suspect under *Sullivan* and *Gertz*. These constitutional implications are beyond the scope of this Article. Whether or not the declaratory judgment approach passes constitutional muster, I certainly cannot assume that the suggestions which follow could survive attack without a rethinking of *Sullivan* and a substantial overruling of *Gertz* and the rationale of *Greenmoss*.

277. Professor Epstein critically describes the *Sullivan* "actual malice" compromise as both constitutionally unnecessary and pernicious and advocates return to absolute, no fault liability. Epstein, *supra* note 9, at 801-14; see also Shapiro, *Libel Regulatory Analysis*, 74 CALIF. L. REV. 883, 884-86 (1986) (suggesting that both the individual and the media are better served by a "performance standard of truth" than by a "process standard of reckless disregard").

278. See *supra* note 224.

279. *Hustler Magazine v. Falwell*, 485 U.S. 46, —, 108 S. Ct. at 876, 882-83 (1988).

280. See *supra* notes 10 & 22-23 and accompanying text.

The source of many of the modern problems with the law of defamation is that the *New York Times* decision was influenced too heavily by the dramatic facts of the underlying dispute that gave the doctrine its birth. In consequence the decision has not stood the test of time well when applied to the more mundane cases of defamation

Epstein, *supra* note 9, at 787.

fault. Toleration of innocent falsity provides the necessary breathing room for exercise of the first amendment. After twenty-five years, it is the change from absolute to fault-based liability, rather than choice of a particular degree of fault, that is the essence of *Sullivan* and the source of its enduring value. That bedrock concept need not and should not be altered. The proposals to eliminate fault by eliminating damages stray too far from the heart of the *Sullivan* accommodation. On the other hand, the *Sullivan* application of the fault principle, the adoption of the constitutional malice standard, has served only to place an enormous burden on the injured plaintiff while radically escalating the costs of litigation for all parties and providing the basis for a status-based jurisprudence of defamation.²⁸¹ Therefore, a single, uniform fault standard, predicated on the defendant's *behavior* rather than knowledge, would remove most of the complicating ornamentation from the structure while providing both fairness to the injured plaintiff and protection for the innocent, albeit erroneous, defendant.

Specifically, fault as we generally understand it in terms of negligence, albeit in a heightened form, could serve for all defamation actions, public or private.²⁸² The negligence standard proposed is that of "professional negligence," conduct conforming to the normal, usual, and reasonable standards of one situated as is the defendant.²⁸³ This is the standard suggested in the *Restatement* for private plaintiffs.²⁸⁴ Thus, a professional disseminator of news would be held to the standards of his or her profession while a different defendant would be required to act reasonably under the circumstances applicable to that defendant. For the press, being held to its own professional standards would seem to

281. As the progression of cases, with changing and shaky majorities, from *Curtis* to *Greenmoss* suggests, there was an inertial quality to the process: the issue was regularly seen as how far to extend the precise *Sullivan* standard rather than to examine the standard itself. See *supra* notes 42-76 and accompanying text.

282. This suggestion builds on a proposal made in 1976 by Professor Christie, calling for a unitary simple negligence standard. Christie, *supra* note 266, at 66 ("The only way to accommodate all the conflicting interests in a manner that is socially acceptable . . . will be to generalize the *Gertz* negligence and actual damage solution."). While noting "the personal attractiveness of applying the *Sullivan* criteria to all situations[, he anticipated] that the across-the-board application of the *Gertz* standards is more likely." *Id.* at 64.

283. The "professional negligence" standard is considered more onerous for the plaintiff than ordinary negligence. Thus, in an action by a private plaintiff, constitutionally subject to the *Gertz* negligence standard, the Ohio Supreme Court, although it raised the burden of proof from preponderance of the evidence to clear and convincing evidence, refused to raise the threshold to one of "professional negligence." *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St. 3d 176, 179-80, 512 N.E.2d 979, 983-84 (1987); see also *Journalistic Malpractice*, *supra* note 271 (discussing the experience of those states that have adopted such a standard for the private plaintiff and advocating such adoption).

284. See RESTATEMENT (SECOND) OF TORTS § 580B, comment g (1977). Section 580B proposes the professional negligence standard in those cases in which the constitutional malice standard is not applicable. Comment g provides, in part:

Putting the question in terms of conduct is to ask whether the defendant acted reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it.

The defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession. . . . Customs and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself, though a custom is not controlling.

be sufficient protection,²⁸⁵ particularly in the context of a simplified litigation system with the constitutional procedural burdens on the plaintiff and better guidance for a jury both in determining fault and in assessing damages.

There is a tendency to dismiss negligence as a workable standard for defamation liability, fearing that it would bring "strict liability back into the libel area through the back door because it is simply too easy for plaintiffs to prove."²⁸⁶ This too readily ignores the fact that negligence has served as the paradigmatic fault standard; in contexts other than defamation the ideas of fault and negligence are synonymous. The *Gertz* majority certainly did not feel that a negligence test was equivalent to absolute liability or an undue burden on a free press.²⁸⁷ The *Gertz* dissenters were divided between those who urged that a negligence fault standard was too harsh on the press and those who found it too harsh on the injured plaintiff.²⁸⁸ Why then is there the assumption that, for constitutional purposes, a negligence standard is no standard?²⁸⁹ Once again, our assumptions may be less grounded in the legal propositions themselves than in a distrust of the jury in defamation actions, a fear that the jury may seek more to punish an overbearing press than truly to compensate one injured through the fault of another. The answer to such possible abuses is not to assume an incompatibility between the jury system and the constitution. Neither reform nor effective protection of a free press need be at the expense of the jury. Hostility to and distrust of juries, fueled by a number of well publicized and highly visible examples of outrageously punitive damage awards,²⁹⁰ has characterized much of the constitutionalization process.²⁹¹ Apart from problems arising from perceived excesses of the press, the jury's difficulties in grappling with the issues

285. See *Journalistic Malpractice*, *supra* note 271, at 77-81 (advocating such a standard at least where the *Gertz* negligence standard is applicable). Although opposed to the *Gertz* standard for private plaintiffs, Professor Anderson has urged that, in that context, the professional negligence test would be more fruitful:

A more fruitful approach involves adapting existing tort principles. The basic rule would require publishers and broadcasters to exercise the skill and knowledge normally exercised by members of their profession and would allow defendants to be judged by the standards of their own medium and school of journalism Thus, magazines would be evaluated according to the standards of the magazine publishing industry, not those of the broadcasting industry, and the "alternative" press would be measured by its own standards rather than those of the established media.

Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 466-67 (1975).

286. *Alternative*, *supra* note 206, at 823; see Anderson, *supra* note 285, at 428-29; *Negligence Rule*, *supra* note 271, at 516-17.

287. See *supra* notes 59-64 and accompanying text.

288. See *supra* notes 66-69 and accompanying text.

289. Cf. Ashdown, *Of Public Figures and Public Interest—The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937, 955-56 (1984) ("some courts [have adopted] a negligence standard for defamatory publications about private individuals without solicitude for first amendment values" (footnote omitted)).

290. See Barrett, *supra* note 81, at 856-61 (collecting specific examples of well-publicized damages figures).

291. For example, Judge Bork asserted that: "The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury." *Ollman v. Evans*, 750 F.2d 970, 997 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985). See generally Schauer, *supra* note 264 (focusing on the role of the jury in defamation actions).

may be a function of their unnecessary complexity.²⁹²

With or without the constitutional requirements as to burden and quantum of proof and review of jury determinations, the courts are able to control the overzealously punitive award.²⁹³ Admittedly, there is a lack of efficiency in a system contemplating an appellate check on the factfinder, but efficiency is not a basis for a preclusive constitutional doctrine. Moreover, if the jury were operating in the context of a simpler and generally less expensive system, the burden on efficiency would be greatly ameliorated: acceptable jury action would be more likely and the cost of obtaining both jury action and any necessary redress would be lessened. In short, there would appear to be sufficient protections in the totality of a constitutionalized defamation action, whose focus would be on compensation for the actual injury suffered by the plaintiff through the clearly and convincingly established fault of the defendant, arguably to support even a simple negligence standard. By heightening that standard to one of professional negligence, the remaining first amendment concerns should be obviated.

The inquiry under such a standard is not a general search for reasonableness, nor is it directed to the truly elusive determinations of state of mind that our present standards require. Rather, the issue is the more specific, objective one of behavior under existing and peer-recognized professional standards. For the press, the analogue is to the fault standards applicable to medical or legal malpractice claims—claims whose resolution certainly have far-reaching consequences for the defendants, transcending simply money damages. To make clear that liability will attach to the demonstrated departure from standards that exist as criteria of professional conduct is not leaving first amendment protection only to the responsible journalist; it is asking, just as we ask our doctors and lawyers, that one who purports to be a professional behave professionally.²⁹⁴

Thus, as suggested earlier,²⁹⁵ for the threshold question of whether an utterance is defamatory, the constitutional protection for opinion need not require abandoning the established reasonable construction rule, with its concomitant role for the jury, in favor of complex, conflicting and unworkable tests. So too, in a structure that avowedly seeks to provide redress for falsity produced by fault, a simpler fault algorithm could serve to allow the jury to focus on redress and compensation rather than retribution and punishment. All the legitimate first amendment concerns are met by a workable and comprehensible schema of liability for the infliction of harm by defamatory speech when that harm is the product of a clearly and convincingly proven failure to adhere to the reasonable standards of the publisher's profession. Only the most hypersensitive of reportorial skins could feel a chill from such a system.

292. "In part, the number and sophistication of the distinctions drawn by the substantive law depend on the decision to require or to deny a jury trial because the notion that a jury can make practical use of theoretical distinctions is simply a fallacy." Keeton, *supra* note 153, at 1224.

293. See, e.g., *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 244 N.Y.S.2d 259 (1963), *aff'd*, 14 N.Y.2d 899, 200 N.E.2d 778, 252 N.Y.S.2d 95 (1964), *cert. denied*, 380 U.S. 916 (1965).

294. The Supreme Court's recent reaffirmation of the applicability of the constitutional malice standard to public figures, see *supra* note 52, avoiding further fragmentation of the standards, would not preclude overall reconsideration of an appropriate unitary standard.

295. See *supra* text accompanying notes 202-05.

V. CONCLUSION

The *Sullivan* compromise was an attempt to accommodate the interest in reputation to the exigencies of the first amendment by conditioning liability on a demonstration of fault and falsity under a more inhibitory set of procedural rules than existed at common law. The ideals of *Sullivan* can be realized without either punishing innocent error or leaving the victims of defamation helpless. To do so requires a reexamination of the specific implementation of these broad ideals and adoption of a unitary approach to a constitutionalized law of defamation in place of the multilayered status-based system that has evolved. Such an approach must be predicated on a realistic and professionally appropriate fault standard, not encumbered with matrices of liability and damages revolving around the status of the parties or the nature of the utterance.

The law of defamation, rooted initially in concerns for the soul of the maligning sinner,²⁹⁶ has, over a long period of development, become the mechanism providing legal substance to our professed concern for individual reputation. The collision of that concern with our societal concern for the free dissemination of ideas and criticism, the breathing space necessary to an effective freedom of speech, produced, first, the beacon lit by *Sullivan* and then, over the next quarter century, the tortuous twists, combinations, and permutations that mark the generally unsatisfying picture that emerges from that light. It is time indeed to continue to affirm the heart of *Sullivan* but also to reexamine and refashion that which has proven to be counter to the greater underlying principles. Just as Ptolemy's unwieldy heliocentric circular epicycles²⁹⁷ gave way to the Copernican comprehensible and simpler geocentric elliptical cosmology, so too, the "center" of the constitutionalized law of defamation must shift so that the reputational and constitutional balance can work.

296. See Anderson, *supra* note 213, at 774 ("Compensating harm to reputation was not the original purpose of slander and libel actions. The ecclesiastical courts took cognizance of slander to protect the soul of the slanderer. . . . Libel actions were created primarily as a means of protecting government from the power of the printing press.").

297. See *supra* note 125.