THE *GERTZ* FAULT STANDARD AND THE COMMON LAW OF DEFAMATION: AN ARGUMENT FOR PREDICTABILITY OF RESULT AND CERTAINTY OF EXPECTATION

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I. INTRODUCTION

The common law of defamation has long been recognized as an oddity of tort law. Characterized by minute and barren distinctions,[1] it has been

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1. *See* F. POLLOCK, THE LAW OF TORTS 237 (12th ed. 1923).

castigated as absurd and anomalous,[2] irrational and hairsplitting,[3] and more charitably, perplexing.[4] One commentator acidly portrayed the common law of libel and slander as the handiwork of ancient judges who believed in witches and who engaged in absurd paradoxes and artificial reasoning of a semi-barbarous age.[5] These denunciations were prompted in large part by the strict liability nature of defamation which placed the written and spoken word "in the same class with the use of explosives or the keeping of dangerous animals."[6] Simply stated, if a plaintiff could prove that a defamatory statement was communicated to a third party and that others could reasonably understand the statement to be defamatory and to refer to the plaintiff, the defendant was liable absent the assertion of the defenses of truth or privilege.[7] Falsity of the communication and damages were presumed.[8] Liability was imposed notwithstanding the moral blamelessness of the defendant's conduct and attitude.[9] For example, a defendant who published a false and defamatory statement on an unprivileged occasion could prove that he had made an investigation into the accuracy of the charge, that he honestly believed the statement to be true, that he had reasonable grounds to believe the communication to be true or that he was motivated only by justifiable purposes, all to no avail. Nor would proof by a defendant that he did not intend to defame, cause damage, convey a false meaning, or even refer to the plaintiff defeat a claim for defamation.[10] Before a court would determine that the defendant's conduct or motivation was appropriate, the defendant either had to prove the truth of the statement or establish that the occasion for the publication of the defamatory falsehood was privileged, that is, that the communication promoted some interest society deemed worthy of protection.[11] Even then, most privileges were conditional in nature and were defeated upon a showing by the plaintiff that the defendant was motivated

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2. Veeder, *The History and Theory of the Law of Defamation* 3 COLUM. L. REV. 546 (1903).

3. WINFIELD ON TORT 577 (T. Ellis Lewis 6th ed. 1963).

4. *See* F. POLLOCK, *supra* note 1, at 237.

5. Courtney, *Absurdities of the Law of Libel and Slander*, 36 AM. L. REV. 552, 552 (1902).

6. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 809 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984).

7. *See id.* Defamation, of course, is the invasion of one's reputation or good name. *Id.* § 111, at 771. A defamatory communication is generally defined as one which tends to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held. *Id.* at 773. *See also* RESTATEMENT (SECOND) OF TORTS § 559 (1977). To be defamatory, a communication need not prejudice the plaintiff in the eyes of a majority of the community or from the perspective of a reasonable man; it is sufficient that the communication tends to lower the esteem of the plaintiff in the eyes of a substantial and respectable minority of the community. *See* W. KEETON, *supra* note 6, § 111, at 777; RESTATEMENT (SECOND) OF TORTS § 559 comment e (1977).

8. W. KEETON, *supra* note 6, § 116, at 839; § 116A at 843.

9. *See generally* W. KEETON, *supra* note 6, § 116.

10. *See id.* § 113, at 808-09.

11. *Id.* at 809.

by an improper purpose.[12] A defendant's belief in the truth of the communication was merely a factor used in determining the defendant's purpose.[13]

It was not until 1974, when the United States Supreme Court decided *Gertz v. Robert Welch, Inc.*,[14] that a requirement of fault on the part of the defendant was imposed for all defamation actions involving media defendants.[15] Breaking new constitutional ground, the Supreme Court held that the first amendment requires a private individual, defamed and injured by a media publication, to prove that the publisher or broadcaster acted with fault by publishing the statement without first ascertaining its falsity.[16] The states were free to define the standard of liability so long as they did not impose liability without fault.[17] No longer could a private plaintiff rely on the presumption of falsity; some fault on the part of the defendant in failing to ensure the accuracy of the defamatory assertions was now constitutionally required. The Court did not elaborate whether the concept of fault would be applicable to other aspects of a defendant's conduct such as publication to a third party, reference to the plaintiff, or communication of a defamatory meaning. The *Gertz* Court, however, added a second level of protection for media defendants: actual injury now had to be proven, and presumed and punitive damages would not be recoverable unless a plaintiff could prove that the defendant knew the publication was false or acted recklessly in not anticipating its falsity.[18]

Although the decision in *Gertz* was intended to settle, in large part, the Supreme Court's struggle with accommodating competing concerns of the common law of defamation and the first amendment, it left numerous issues unresolved and unaddressed. For example, did the protections afforded media defendants in *Gertz* also apply to non-media defendants? Did they apply to speech about matters not of public concern? Did they protect speech which was not disseminated to the public at large? Resolution of these issues, in turn, leads to further questions: Is a showing of fault now required for each element of the defamation action? Do conditional privileges have any continued viability? Does the common law of defamation have any con-

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12. *See* Herbert v. Lando, 441 U.S. 153, 163-64 (1979); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.27, at 452 (1956); Hallen, *Character and Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865, 866-67 (1931).

13. F. HARPER & F. JAMES, *supra* note 12, § 5.27, at 452-54.

14. 418 U.S. 323 (1974).

15. *Id.* at 343.

16. *See id.* at 347-48.

17. *Id.* The Court intimated that the first amendment requires, at a minimum, that a defendant be negligent in not ascertaining the falsity of a defamatory statement. *See id.* at 350. Of course, nothing prevents a state from adopting a more rigorous fault standard than negligence such as actual malice (knowledge of or reckless disregard for the falsity of a statement) which public officials, New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) and public figures not involved in government, Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) must prove. *See* notes 206-21 *infra* and accompanying text.

18. Gertz v. Robert Welch, Inc., 418 U.S. at 349-50.

tinued viability? Until recently, only a few courts and commentators have addressed these issues or even generally discussed how the *Gertz* fault standard impacts the common law of defamation as a whole.[19]

The recent United States Supreme Court decision of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[20] answers several questions which were neither addressed nor resolved by the Court in *Gertz*. A strongly divided Court stopped the extension and development of *Gertz* in its tracks. Although a majority of the *Dun & Bradstreet* Court explicitly rejected any constitutional rule based on a distinction between media and nonmedia defendants,[21] a separate majority of the Court refused to extend the protections of *Gertz* to defendants who publish defamatory matters concerning a private individual which do not involve matters of public concern.[22] Accordingly, any defendant — whether media or nonmedia — who publishes a defamatory statement which he erroneously believes is a matter of public interest can be held strictly accountable for presumed damages and, if common law actual malice is shown, for punitive damages. In this situation, the common law, in all its regal strict liability splendors, governs.

Dun & Bradstreet is a step backward in first amendment jurisprudence. It stands the *Gertz* opinion on its head by forcing judges to decide on an ad hoc basis which publications are of general or public interest — an approach explicitly rejected by the Court in *Gertz*. Such decisionmaking can only

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19. *See, e.g.*, Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 458-69 (1975); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L. J. 519, 570-84 (1979); Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 *passim* (1984); W. Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1229-40 (1976); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 212-20, 242-50 (1976); Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L. J. 671, 698-706 (1977); Watkins & Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH. L. REV. 823 *passim* (1984); Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799, 820-23 (1978); Comment, *Liability and Damages in Libel and Slander Law*, 47 TENN. L. REV. 814, 836-44 (1980).

Most courts which have addressed the effect of *Gertz* on state defamation law have largely confined their discussion to the determination of what fault standard pertaining to a defendant's awareness of falsity should be adopted. *See, e.g.*, Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977) (negligence); AAFCO Heating & Air Conditioning Co. v. Northwest Publications Inc., 162 Ind. App. 671, 673-74, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976) (actual malice if the private plaintiff is involved in a matter of public interest); Gaeta v. New York News, Inc., 62 N.Y.2d 340, 350, 477 N.Y.S.2d 82, 85-86, 465 N.E.2d 802, 805-06 (1984) (gross negligence to the extent the communication is arguably within the sphere of legitimate public concern).

20. 105 S. Ct. 2939 (1985).

21. *Id.* at 2953 (White, J., concurring), 2957-59 (Brennan, J., dissenting).

22. *Id.* at 2946 (plurality opinion), 2948 (Burger, C.J., concurring), 2953-54 (White, J., concurring).

lead, in the words of the *Gertz* Court, to unpredictable results and uncertain expectations. The Court in *Dun & Bradstreet* missed a grand opportunity to lay down a broad rule of applicability where predictability of result and certainty of expectation could be achieved. This Article proposes such a rule of broad applicability which adequately balances the conflicting interests of reputation and freedom of speech. Specifically, this Article argues that the Court in *Dun & Bradstreet* misapplied first amendment doctrine in failing to extend the constitutional protections of *Gertz* to private speech.[23] Such protections, it is submitted, should apply to all speech.[24] The author suggests that a fault standard relating to a defendant's awareness of falsity replaces, and indeed renders obsolete, the role that common law conditional privileges play in accommodating the competing interests of reputation and freedom of expression.[25] Finally, it is argued that the concept of fault should be extended to all elements of the defamation tort action when at issue and not just the element of falsity.[26] These propositions are developed through a three-part analysis. First, the common law of defamation, its heritage, elements, and defenses is examined. Second, the Supreme Court's intervention in the field of defamation, particularly its decisions in *Gertz* and *Dun & Bradstreet,* are discussed. Finally, the ramifications of a fault standard for the common law of defamation are explored. Application of a fault standard to all defamation actions and to all elements of the defamation tort action, with the concomitant abrogation of the common law conditional privileges, the author submits, would eliminate many of the oddities and anomalies which have plagued the law of defamation.

II. The Defamation Action

A. *The Common Law of Defamation: Tort Action and Elements*

The law of defamation has chartered a tortuous course through centuries of English and American jurisprudence. It evolved according to no particular aim or plan; indeed, its twin torts, libel and slander, developed independently from each other.[27] Libel originated as a crime and as a form of sedition;[28] slander originated as a sin which the ecclesiastical or church

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23. *See infra* notes 259-314 and accompanying text.
24. *See infra* notes 289-314 and accompanying text.
25. *See infra* notes 315-41 and accompanying text.
26. *See infra* notes 342-99 and accompanying text. This is not to say that the proposals set forth herein will eliminate all inadequacies of the defamation tort action. A recent study has indicated that the primary interest of most libel plaintiffs is correction of falsity, not damages. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight,* 71 Iowa L. Rev. 226, 233 (1985). In this regard, the authors of the *Restatement (Second) of Torts* have proposed a declaratory judgment action on the issue of falsity. Restatement (Second) of Torts § 623 special note on remedies for defamation other than damages, at 327-28 (1977).
27. W. Keeton, *supra* note 6, § 111, at 772.
28. *Id.*

courts punished with penance.[29] An action for slander also could be maintained in local courts where a defamed party could seek vindication and damages.[30] For centuries common law courts refused to assume jurisdiction over defamation. It was not until the sixteenth century that the common law courts, then engaged in a struggle with the church courts for jurisdiction over defamation, recognized an action in tort for defamation, and then, it initially only recognized slander.[31] Libel was not recognized by the common law courts until the seventeenth century after the notorious Court of Star Chamber was abolished.[32] The current law of defamation still bears the scars of this aimless and haphazard development.[33] It is instructive, therefore, to conduct a brief examination of the heritage of each tort action.

The common law traditionally recognized three categories of oral accusations which were actionable without proof of special harm: 1) criminal conduct punishable by imprisonment or regarded as involving moral turpitude, 2) loathsome (venereal) diseases, and 3) charges tending to injure one in his business.[34] A fourth category has been added in modern times: the imputation of unchastity to a woman.[35] These categories are denominated slander per se. They were originally formulated by the common law courts in the mid-sixteenth century, not as a matter of principle or logic, but as practical expedients to extend the courts' jurisdiction over defamation actions at the expense of ecclesiastical courts.[36] Damages were presumed by the publication of a defamatory utterance which was slanderous per se.[37] As they extended their authority over slander actions, common law courts restricted the jurisdiction of ecclesiastical courts to matters spiritual in nature, that is, oral accusations which imputed an ecclesiastical offense.[38] By the

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29. Lovell, *The "Reception" of Defamation By The Common Law*, 15 VAND. L. REV. 1051, 1052, 1054-55 (1962).

30. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 102. Prior to the Norman Conquest in 1066, ecclesiastical and secular matters had been tried in the local courts. *See id.* at 100-03. Soon after the Conquest, William I established separate church courts to administer the canon law, thereby leaving local courts to deal only with matters of a temporal nature. *See id.* at 103-04.

31. *Id.* at 109-10. Prior to the sixteenth century, the common law courts had allowed, in rare and exceptional circumstances, an action for defamation by noblemen or magnates. *See id.* at 106; Veeder, *supra* note 2, at 556-57.

32. *See* W. KEETON, *supra* note 6, § 111, at 772.

33. *Id.*

34. W. KEETON, *supra* note 6, § 112, at 788-93.

35. The American Law Institute has modified this category slightly by stating that "one who publishes a slander that imputes serious sexual misconduct to another" is liable without proof of harm. RESTATEMENT (SECOND) OF TORTS § 574 (1977). The authors of the Second Restatement also indicated courts may extend this protection to men on the basis that the Constitution may require similar treatment. *See id.* comment c.

36. Donnelly, *supra* note 30, at 111.

37. *Id.*

38. *Id.* at 110. Once pecuniary loss is shown, damage for injury to reputation, humiliation, and future damages were recoverable. *See* W. KEETON, *supra* note 6, § 112 at 794.

end of the sixteenth century, however, common law tribunals had virtually extinguished the jurisdiction of the church courts by taking any case for defamation where the words caused special damage or temporal loss, irrespective of whether they also constituted a spiritual offense.[39] All other oral defamations not slanderous per se comprise a category of slander which requires proof of special harm or pecuniary damage before general reputational damage is allowed.[40]

Libelous recitations are of two classes: 1) those which are defamatory on their face (libel per se); and 2) those consisting of language which, while apparently innocent, are capable of bearing a defamatory meaning when certain extrinsic facts are known, or when the words are given a meaning not ordinarily accorded them (libel per quod).[41] The beginnings of libel can be traced to 1275 when Parliament enacted a statute prohibiting, on penalty of imprisonment, the dissemination of false news concerning high government officials.[42] The enforcement of this statute and its successor provisions fell to an ad hoc committee comprised of high dignitaries of church and state which became known as the Court of Star Chamber. The court virtually ignored oral defamations and, during the fifteenth and sixteenth centuries, undertook the task of punishing any written criticism of government.[43] The Court of Star Chamber later extended its jurisdiction to non-political libels, reasoning that such libels could produce disorder and breaches of the peace.[44] The court awarded monetary damages to the person defamed and imposed fines against the party responsible.[45] Truth was not a defense to libel for there could never be truthful criticism of the sovereign nor could the truthfulness of a private libel prevent the defamed from issuing a challenge and breaching the peace.[46] Likewise, publication to a third party was not essential because communication to the person defamed was considered

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39. Donnelly, *supra* note 30, at 112.

40. W. KEETON, *supra* note 6, § 112, at 793-94.

41. F. HARPER & F. JAMES, *supra* note 12, § 5.9, at 372-73.

42. Lovell, *supra* note 29, at 1059. The statute was known as *De Scandalum Magnatum*. It provides in pertinent part:

> [I]t is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale.

Id., (citing Statute of Westminster I, 3 Edw. 1, c. 34 (1275)).

43. Veeder, *supra* note 2, at 562. The Court of Star Chamber supplemented and indeed was more effective in some respects in regulating the content of written material than the crown's efforts at licensing and censorship of the press. *See id.* at 562-63. Formally viewed as a court of criminal equity, the Court of Star Chamber had virtually unlimited authority. *See id.* at 562. It disregarded forms and was not bound by any rules of evidence. *Id.* at 563.

44. Donnelly, *supra* note 30, at 118.

45. *Id.* Lovell, *supra* note 29, at 1062.

46. Lovell, *supra* note 29, at 1062.

as likely as publication to provoke a breach of peace.[47]

Soon after the demise of the Court of Star Chamber in 1640, the common law courts adopted a civil remedy for libel and ruled that damages would be recoverable without the necessity of pleading or proof.[48] Libel was actionable per se, it was reasoned, because written defamatory statements contained more malice then if the same words had been spoken.[49] To this date, libel per se is treated differently than slander per se in that it is not confined to the four classes of accusations which comprise slander per se.[50] Rather, a libelous publication is actionable per se if the plaintiff is degraded or exposed to ridicule and disgrace, contempt, or public hatred.[51] Libel per se is similar to slander per se, however, in that damages are presumed from publication.[52] Libel per quod is generally considered to be similar to slander in that it requires a plaintiff to plead and prove pecuniary loss as part of his cause of action.[53]

The gist of an action for defamation in the common law courts was damage to reputation.[54] As a result, the common law required publication to a third party and permitted a defense of truth since a true statement, no matter how defamatory, could not cause damage to reputation.[55] Both requirements represented a shift from the treatment given a libelous action by the Court of Star Chamber. To constitute publication, the defamatory statement had to be communicated either intentionally or negligently to someone other than the person defamed.[56] It was also necessary that the third person

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47. RESTATEMENT OF TORTS § 568 comment b (1938).

48. The leading case is King v. Sir Edward Lake, 145 Eng. Rep. 552 (Exch. Ch. 1670), authored by Chief Baron Hale.

The common law courts also continued the legacy of the Court of Star Chamber and punished criminally those false statements which were scandalous, but not necessarily defamatory, of the government and public and private persons. *See* Veeder, *supra* note 2, at 569.

49. King v. Sir Edward Lake, 145 Eng. Rep. 552, 553 (Exch. Ch. 1670). The thought here, evidently, was that libel involved some contemplation or premeditation before setting pen to paper unlike oral defamatory statements which were often spoken in the heat of the moment. *See* Veeder, *supra* note 2, at 572. The common law courts also attempted to justify this distinction between libel and slander on the basis that a libelous statement is more pervasive and reaches more people. *Id.*

50. F. HARPER & F. JAMES, *supra* note 12, § 5.9, at 372. As long ago as 1812, the wisdom of the distinction between the defamation torts had been questioned. *See* Thorley v. Lord Kerry, 128 Eng. Rep. 367 (Exch. Ch. 1812). In *Thorley* Lord Mansfield denounced the distinction between libel and slander as indefensible but too well established to be changed. *See id.* at 371. Lord Mansfield opined that if the matter were one of first impression he would hold that no action could be maintained for libel which also could not be maintained, without proof of harm, if the words had been spoken. *Id.*

51. F. HARPER & F. JAMES, *supra* note 12, § 5.9, at 372.

52. *See* National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763 (8th Cir. 1927).

53. *See id.*

54. Donnelly, *supra* note 30, at 115.

55. *Id.*

56. RESTATEMENT (SECOND) OF TORTS § 577 comment c (1977). The publisher is also liable

understand the defamatory significance of the published matter.[57]

The common law courts inherited the concept of malice from the ecclesiastical courts.[58] *Malatia,* or bad intent, was considered an essential element of defamation under ecclesiastical law without which there could be no sinful conduct.[59] As a matter of common experience, most defamatory imputations cognizable in the church courts were published with a malicious intent.[60] It was upon this presumption, although sometimes contrary to fact, that ecclesiastical jurisdiction was based.[61] This presumption was adopted at common law as the jurisdictional basis of the action.[62] As such, the common law courts originally required a plaintiff to plead and prove that the defendant was inspired by malice in the sense of improper motive or purpose.[63] That requirement, however, eventually became a formality.[64] By the middle of the nineteenth century, it was clear that malice was not an essential element of defamation which must be proved; rather, it was implied by law from the fact that a defamatory publication was made.[65] In this sense, malice is a legal fiction and means no more than want of legal excuse. The fact that a defendant harbored no spite toward plaintiff and honestly believed in the truth of the statement was considered irrelevant.

In summary, a plaintiff, to establish a prima facie case of defamation at common law, merely has to prove that the defendant intentionally or negligently published a defamatory statement which is reasonably understood to be defamatory of, and concerning, the plaintiff. A plaintiff need not prove any fault or intent on the part of the defendant except with respect to publication. A defendant is strictly liable, absent the defenses of truth or privilege, even though his conduct may be innocent or reasonable. Only in slander and libel per quod are proof of damages required. Falsity of the

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for the repetition of a defamatory statement by a third party where the repetition was authorized or intended or reasonably expected. *See id.* at § 576. In addition one who repeats or republishes a defamatory statement is subject to the same rules of liability as if he had originally published it. *Id.* at § 578.

57. *Id.* at § 577 comment c.

58. *See* Veeder, *supra* note 2, at 35.

59. *See id.* As indicated earlier, the church courts punished as sinful those statements published to a third person which lessened one's good name. The church courts were not concerned with any harm suffered by the defamed party but, rather, with the spiritual welfare of the defaming party's soul. *See id.* at 550-51; Lovell, *supra* note 22, at 1054-55. As his penance or absolution, the defaming party had to acknowledge his sin and beg forgiveness from both God and the person defamed. *See* Donnelly, *supra* note 30, at 104. The injured party, as a Christian, was bound to forgive. *See* Lovell, *supra* note 29, at 1055.

60. *See* Veeder, *supra* note 2, at 35.

61. *Id.*

62. *See id.* at 36.

63. *Id.* at 36-37.

64. *Id.* at 37.

65. *See, e.g.,* White v. Nichols, 44 U.S. (3 How.) 266, 286 (1845); Times Publishing Co. v. Carlisle Journal Co., 94 F. 762, 766-67 (8th Cir. 1899). *See also* R. SACK, LIBEL SLANDER AND RELATED PROBLEMS, at 42 (1980).

communication and malice are presumed. Notwithstanding the general movement of tort law in the late nineteenth century from a system based on strict liability to a system based on fault, the strict liability features of defamation remained unchanged until the United States Supreme Court's intervention in the mid-1960's.

The principles of defamation law did not escape, however, the critical wrath of the judicial pen. Perhaps no better illustration of judicial criticism can be found than in the 1908 case of *Colemann v. MacLennan.*[66] There the Kansas Supreme Court stated:

> Facts and the truth never have been much in favor in [defamation law] . . . Suppose a serious charge to be made. By a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are assumed as the consequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacreligious insult to this beautiful and symmetrical fabric of fiction.[67]

With respect to the doctrine of malice, the court added:

> It is however, in the field of malice . . . that truth and fact are most superfluous. In the first place, it is said that malice is the gist of the action for libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently, libels are published with the best of motives, or perhaps mistakenly or inadvertently, but without an utter absence of malice. The plaintiff recovers just the same. Therefore "the gist of the action" must be taken out of the case. This is done by another fiction . . . [that is] [that] malice does not mean the one thing known to fact or experience to which the term may apply, but is just a legal expression to denote want of legal excuse.[68]

The *Colemann* court described these processes of fiction as "courts . . . gravely ascending the hill for the purpose of descending, meanwhile filling the books with scholastic disquisitions, verbal subtleties, and refined distinctions . . . ."[69] However characterized, these fictions and presumptions of defamation law created a situation where truly one published at his peril.

B. *Defenses*

A defendant has two defenses to this perilous strict liability tort: truth

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66. 78 Kan. 711, 98 P. 281 (1908).
67. *Id.* at 740, 98 P. at 291.
68. *Id.*
69. *Id.* at 741, 98 P. at 291.

and privilege.[70] Truth is a complete defense in most jurisdictions in the United States.[71] Defendants often find, however, that the burden of rebutting the presumption of falsity is not easy. The truth of the statement is often difficult to prove[72] and a jury can easily discount the proof submitted and award damages as punishment for what it considers to be unwarranted or unpopular speech.[73] In addition, older cases held that if a defendant does not sustain the defense of truth, a jury is permitted to find that the defendant had defamed the plaintiff a second time and could consider that fact in awarding damages.[74] All these factors can deter the dissemination of speech which, although true, is the least bit defamatory. The situation is worse in those jurisdictions where, in addition to proving truth, a defendant also has to establish good motives and justifiable ends in the publication of the statement. Thus, the defense of truth is frequently illusory.

1. *Absolute Privilege*

Privileges moderate the harsh effects of the strict liability features of defamation. They represent a recognition that society's interest in potentially defamatory communications is sometimes greater than an individual's interest in reputation.[75] Privileges are either absolute or qualified. Absolute privileges are confined to a few situations — most typically participation in judicial or legislative proceedings and executive functions — where the policy in favor of freedom of expression outweighs an individual's interest in reputation no matter how outrageous the lie or malicious the motive.[76] Courts agree that judges, parties and attorneys involved in judicial proceedings, witnesses, legislators, and certain executive officials should be free to perform their duties without fear of being held personally liable.[77]

2. *Qualified Privileges*

Qualified privileges reflect a judicial policy that true information should be communicated whenever reasonably necessary to protect or advance le-

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70. *See* W. KEETON, *supra* note 6, §§ 114, 116.
71. *Id.* at § 116.
72. *Id.*
73. *Id.*
74. *Id.*
75. Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799, 800 (1978).
76. F. HARPER & F. JAMES, *supra* note 12, § 5.21, at 420-21. The United States Supreme Court recently rejected an argument that the petition clause of the first amendment — which guarantees "the right of the people . . . to petition the Government for a redress of grievances" — provides absolute immunity to defendants charged with expressing defamatory falsehoods in petitions to government officials. McDonald v. Smith, 105 S. Ct. 2787, 2790-91 (1985).
77. For a general discussion of absolute privilege, see W. KEETON, *supra* note 6, § 114, at 815-24.

gitimate interests of a speaker, third parties, or the public.[78] To ensure that such information be freely communicated, the courts afford a qualified immunity from liability for defamatory falsehoods published in an honest and reasonable effort to protect or advance the interest in question.[79] This qualified immunity protects defendants who otherwise may be deterred from speaking out for fear of being unable to establish the truth of the communication.[80] Although qualified privileges elude simple categorization or definition, they generally extend to communications made in good faith by a person in the discharge of a duty or on matters in which he has an interest.[81] The granting of a conditional privilege is ultimately a judicial policy judgment that certain duties or interests are legitimate and socially deserving of some protection.[82] The defendant has the burden of establishing that the occasion for the communication is conditionally privileged.[83] The determination of this issue is generally decided by the court as a question of law.[84] If the court finds that the occasion for the communication is privileged, the presumption of malice is removed, and the burden of proof shifts to the plaintiff to prove actual malice.[85] Actual malice is distinct from that malice implied when a defamatory publication is made.[86] Although not free from ambiguity, actual malice is generally defined as improper purpose or motive.[87] Thus, a defendant loses the protection of a conditional privilege if the plaintiff can prove that the defendant was motivated by a purpose other than that of furthering the duty or interest in question. In other words, the issue is not whether the defendant has published a defamatory falsehood as this fact is presumed. Instead the inquiry is whether the defendant has acted in good faith and with a proper purpose in communicating the statement.[88]

At least three sets of circumstances give rise to the application of a conditional privilege. First, a privileged occasion arises where a defendant publishes defamatory statements reasonably necessary for the protection or advancement of various "interests."[89] These interests include the self-interest of a publisher,[90] the interest of a third party,[91] the interest a publisher and

78. RESTATEMENT (SECOND) OF TORTS § 592A scope note, at 258 (1977).
79. *Id.*
80. *Id.*
81. *See* W. KEETON, *supra* note 6, § 115, at 825.
82. Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 155 (1977).
83. W. KEETON, *supra* note 6, § 115, at 835.
84. *Id.*
85. *Id. see also* F. HARPER & F. JAMES, *supra* note 12, § 5.27, at 451.
86. *See* F. HARPER & F. JAMES, *supra* note 10, § 5.27, at 451.
87. *See id.*, at 452; Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865, 866-67 (1931).
88. F. HARPER & F. JAMES, *supra* note 10, § 5.27, at 452.
89. *See infra* notes 97-124 and accompanying text.
90. *See infra* notes 97-105 and accompanying text.

recipient of a communication share in common,[92] and communications to those who can act in the public interest.[93] A second type of privilege protects the fair and accurate reporting of governmental proceedings.[94] Unlike other conditional privileges, the report of public proceedings has to be substantially accurate to warrant protection.[95] The third type of privilege is the privilege to comment fairly upon matters of public concern, and more specifically, the privilege to comment upon the official conduct of public officials and candidates for public office.[96] As the continued existence of these privileges have been thrown into doubt by *Gertz*, they are examined in some detail.

a. *Self-Interest.* Analogous to the right of self-defense, the self-interest privilege in defamation protects communications made in good faith for the protection of one's own interests.[97] Just as an individual has the right to use physical force to protect himself from an assault, so does an individual have the right to publish defamatory communications to protect his own reputation—including a statement that his accuser is a liar.[98] The interests protected by the self-interest privilege, however, are not limited to those of a dignitary nature. An individual may publish defamatory falsehoods to protect or advance his own legitimate business, professional, property, or pecuniary interests.[99] The self-interest privilege, as with all conditional privileges, protects only those defamatory communications which reasonably appear to protect the underlying interest of that particular privilege.[100] The fact that the statement may be unnecessary will not defeat the privilege.[101] For example, someone who sees a stranger about to drive away in a car identical to his, and mistakenly informs a policeman that his car is being stolen, cannot be held liable even though the stranger owns the car absent proof of actual malice.[102] The defamatory falsehood is protected because the circumstances were such that a reasonable person would believe that his own interest is at stake and that the defamatory publication is reasonably necessary for the protection of that interest.[103] Similarly, the self-interest privilege is not defeated merely because the recipient of the communication does not, in

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91. *See infra* notes 106-12 and accompanying text.
92. *See infra* notes 113-14 and accompanying text.
93. *See infra* notes 115-24 and accompanying text.
94. *See infra* notes 125-29 and accompanying text.
95. *See infra* note 127 and accompanying text.
96. *See infra* notes 130-140 and accompanying text.
97. W. KEETON, *supra* note 6, § 115, at 825.
98. *Id.*
99. *See* RESTATEMENT (SECOND) OF TORTS § 594 comment f (1977).
100. F. HARPER & F. JAMES, *supra* note 12, § 5.25, at 438.
101. *Id.*
102. RESTATEMENT (SECOND) OF TORTS § 594 comment h, Illustration 1 (1977).
103. *See id.* comment h.

fact, have the power to assist the publisher of a defamatory statement.[104] The publisher need only have a reasonable belief either that the recipient of the communication can render assistance or that his knowledge of the defamatory matter may be useful in the advancement of the interest.[105]

b. Interests of Others. Defamatory statements communicated for the interest or protection of the recipient of the communication or for third parties are also conditionally privileged.[106] This privilege is limited to situations in which there is a legal duty to communicate the defamatory matter or in which the communication is sanctioned by standards of decent conduct.[107] For example, inferior state officials, local officials, or those in a fiduciary capacity who publish defamatory statements relevant to the performance of their legal duties are protected by a conditional privilege.[108] Typical of those occasions where social standards have sanctioned the publication of defamatory statements for the interest or protection of others are credit ratings and job evaluations.[109] Thus, it is permissible for one to warn or advise an employer of the misconduct of an employee or to warn a creditor that his debtor is insolvent. It is unnecessary that the interest of a third party actually be in need of protection; it is sufficient that a publisher reasonably perceives the need.[110] Also, the defamatory statement need not be communicated to the person whose interest the publisher seeks to protect.[111] It is only necessary that the publisher reasonably believes that the party to whom he communicates the statement can be of service in the protection of the interest.[112]

c. Common Interest. Courts also recognize a conditional privilege where the publisher and recipient of a defamatory communication share a common interest and where the communication reasonably appears to further that interest.[113] This privilege covers the full range of concerns which may be common to two or more persons. For example, those who have business dealings with one another or who are members of professional, charitable, social, or religious organizations are protected by this privilege if they publish defamatory matter which is, or reasonably appears to be, of interest to the group.[114]

d. Public Interest. The public interest privilege protects communications made to individuals who may reasonably be expected to take official

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104. *Id.* comment i.
105. *Id.*
106. W. KEETON, *supra* note 6, § 115, at 826.
107. *Id.* at 827.
108. RESTATEMENT (SECOND) OF TORTS § 595 comment f (1977).
109. *See* W. KEETON, *supra* note 6, § 115, at 827.
110. RESTATEMENT (SECOND) OF TORTS § 595 comment c (1977).
111. *Id.* comment e.
112. *Id.*
113. W. KEETON, *supra* note 6, § 115, at 828.
114. *Id.* at 828, 830.

action of some kind for the protection of the public.[115] The *Restatement (Second) of Torts* calls attention to three occasions which typify the interest represented by this privilege: 1) the interest in the prevention of crime and the apprehension of criminals; 2) the interest in the honest discharge of duties by public officers; and 3) the interest in obtaining legislative relief from socially recognized evils.[116] Defamatory statements made by citizens in an honest and reasonable effort to further such interests are protected so long as they are not made with actual malice.[117] To invoke the public interest privilege, a defendant may not rely on the presence of an issue which is of public concern; rather, he must show that the defamatory statement was communicated to someone who could reasonably be expected to take some definitive action on behalf of the public.[118] Illustrative of this principle is *Brown v. First National Bank of Mason City*.[119] There the president of the bank had given a statement to a newspaper that an investigation had been commenced into a disappearance of funds at the bank and that certain employees had not been working because the bonding company had withdrawn their bonds.[120] Although not identified by name in the newspaper article, the plaintiff instituted a suit against the bank alleging that the news stories had accused her of embezzlement.[121] The bank contended that its president had a qualified privilege to convey information to the newspaper because of the public interest in the shortage of funds at the bank.[122] Acknowledging that the shortage may have been of public interest, the court nevertheless held that such a fact did not justify the publication of the statement regarding the plaintiff.[123] The court ruled that the bank could not rely on the public interest privilege because the communication could not reasonably be construed as being directed to one who could act in the public interest.[124]

e. Report of Public Proceedings. A second qualified privilege pertains to the reporting of government proceedings. This privilege is commonly exercised by newspapers and other media in the reporting of judicial, executive, and legislative proceedings at all levels of government.[125] This reportorial privilege is based on the idea that the public interest in a democratic society is served by disseminating information concerning public proceedings, par-

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115. *Id.* at 830.
116. RESTATEMENT (SECOND) OF TORTS § 598 comment d (1977).
117. *Id.* comment a.
118. *See* W. KEETON, *supra* note 6, § 115, at 830-31.
119. 193 N.W.2d 547 (Iowa 1972).
120. *Id.* at 550.
121. *Id.* at 551.
122. *Id.*
123. *Id.* at 552-53.
124. *Id.*
125. *See* RESTATEMENT (SECOND) OF TORTS § 611 comment c (1977). This privilege is not limited, however, to the media. Any person who makes an oral or written report on public proceedings is conditionally protected. *Id.*

ticularly since society as a whole cannot attend all such proceedings.[126] A report of governmental proceedings is protected even though the report may contain defamatory matter known to be false.[127] Unlike other conditional privileges, the report of public proceedings must be fair and accurate; reports that are inaccurate are not protected regardless of the defendant's good faith.[128] Evidence of inaccuracy is mistakenly considered by some courts to be synonymous with actual malice, mistaken because the defendant's purpose in publishing the statement is rarely at issue. Rather, the failure of a defendant to accurately report a public proceeding is most often due to an innocent or negligent mistake. Of course, after *Gertz*, some fault on the part of a media defendant must be found before liability can be imposed for an inaccurate report of a governmental proceeding.[129]

f. Fair Comment. The third and final type of qualified privilege protects criticism or commentary on matters of public concern and, more specifically, the official conduct of public officials and the fitness of candidates for public office.[130] Matters of public concern within the scope of the privilege include literary, artistic, and scientific productions; management of educational, charitable, and religious institutions; and the conduct of persons who offer their conduct to the public for approval.[131] Generally, criticism on matters of

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126. *See* Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799, 816 (1978). *See also* F. HARPER & F. JAMES, *supra* note 12, § 5.24, at 430-31.

With respect to judicial proceedings, there must be some official action taken by the judicial officer or body before the privilege attaches. Thus, the publication of the contents of preliminary pleadings such as a complaint or petition before any judicial action has been taken, is not protected by this privilege. *See* RESTATEMENT (SECOND) OF TORTS § 611 comment e (1977).

127. RESTATEMENT (SECOND) OF TORTS § 611 comment a (1977).

128. *Id.*

129. *See* Time, Inc. v. Firestone, 424 U.S. 448, 464 (1976) (plaintiff must show that defendant was at fault in erroneously publishing the grounds on which her divorce had been granted).

The Second Circuit Court of Appeals has fashioned a qualified privilege which is an extension of this fair reporting privilege. Based on the first amendment, this privilege protects the accurate and disinterested reporting of defamatory charges made by a responsible organization or person, irrespective of the press's belief in the truth of the statement. Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). The Third Circuit has declined, however, to accept the privilege adopted by the court in *Edwards*. *See* Dickey v. C.B.S. Inc., 583 F.2d 1221, 1225 (3d Cir. 1978). It remains to be seen whether this qualified privilege of "neutral reportage" will gain a foothold in the law of defamation — either as an extension of the common law or as a constitutionally compelled rule.

130. *See* RESTATEMENT OF TORTS § 606 comment a (1938).

131. *See id.*

One can hardly discuss the fair comment privilege without mentioning the case of Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901). *Cherry* has achieved a certain degree of prominence not only for its colorful facts but also for the court's indication that the fair comment privilege has constitutional footings. The following commentary of a Cherry Sisters' musical performance around the turn of the century was found to be conditionally privileged:

Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of

public concern is protected if it is based on facts truly stated or otherwise known.[132] Courts are split over the amount of protection a defendant has when discussing the official conduct of public officials and the fitness for office of public candidates. The majority of courts follow the general "fair comment" rule that only criticism based on true or privileged facts is protected.[133] In contrast, the minority of courts do not distinguish between fact and comment and are of the view that false and defamatory facts are privileged if in good faith they are believed to be true.[134] Thus, any comment based on those false but privileged facts is likewise privileged.

The privilege to comment on the official conduct of public officials and the fitness for office of public candidates was extended and modified as a constitutional principle in *New York Times Co. v. Sullivan*.[135] A public official or candidate for public office must now prove, as part of his case-in-chief, that a defendant published a defamatory communication concerning his public conduct knowing it to be false or acted recklessly in not ascertaining its falsity.[136] The court in *Gertz* explicitly re-affirmed the holding of *New York Times*.[137] Accordingly, *Gertz* did not affect this aspect of the common law "fair comment" privilege as modified by *New York Times*. The privilege to comment fairly on matters of public concern, as well as the other conditional privileges, however, have been affected by *Gertz*[138] and

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> the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the *danse du ventre* and fox trot, — strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle.

Id. at 299-300, 86 N.W. at 323.

The court held that a public performance may be discussed with the fullest freedom and may be subject to hostile criticism, provided the writer is not motivated by an evil or wicked purpose or is gratifying private spite. *Id.* at 304-05, 86 N.W. at 325. The court intimated that unless comment on facts of public concern were to be given some protection, the liberties of speech and press guaranteed by the constitution would be nothing more than a name. *See id.* at 305, 86 N.W. at 325. *But see* Morse v. Times-Republican Printing Co., 124 Iowa 707, 100 N.W. 867 (1904). In *Morse*, the Iowa Supreme Court rejected as without support in principle or precedent the newspaper's argument that the press is immunized from publishing the news of the day, albeit defamatory of a private citizen, so long as it conducts an investigation and exercises reasonable care. *Id.* at 723, 100 N.W. at 873. Obviously, the holding in *Morse* does not survive *Gertz* and *Dun & Bradstreet*.

132. W. Prosser, Law Of Torts § 118, at 819 (4th ed. 1971).

133. *See id.*

134. *See id.* at 820.

135. 376 U.S. 254 (1964).

136. *Id.* at 279-80. For a discussion of *New York Times*, see *infra* notes 206-14 and accompanying text.

137. Gertz v. Robert Welch, Inc., 418 U.S. at 343.

138. *Id.*

will be explored in a subsequent section of this article.[139]

All common law conditional privileges are defeasible upon a showing by plaintiff that the defendant published the defamatory statement with actual malice.[140] The concept of actual malice is discussed in the next sub-part.

g. Proof of Actual Malice. "Perhaps no word in the law is used more loosely than the word 'malice'."[141] This is certainly true of the concept of actual malice in defamation law.[142] Courts have strived for a precise definition of actual malice but confusion and contradiction remain, not only among the states, but also in reported decisions from the same state.[143] The use of actual malice by the Supreme Court of Iowa illustrates the imprecise manner in which the term has been employed and serves as a convenient vehicle for a discussion of the common law concept of actual malice.

The Supreme Court of Iowa has described actual malice in numerous fashions.[144] Although not free from doubt, an element common to each description is that the defendant's purpose in communicating the defamatory statement was something other than that of furthering the underlying interest protected by the qualified privilege. Elucidation by the court of what kind of attitude or state of mind constitutes improper purpose apparently gave rise to the various descriptions of actual malice.[145] These descriptions include ill-will, hatred, or desire to do another harm;[146] ill-will with a design to causelessly or wantonly injure the plaintiff;[147] personal spite, culpable recklessness or negligence;[148] reckless or wanton disregard of the rights of the plaintiff;[149] gratification of malice or indulgence of passions;[150] wicked or ulterior motive;[151] and bad faith.[152] In addition, some cases discuss actual malice not by defining what conduct constitutes actual malice but by describing what attitude a defendant must have to warrant the protection of a conditional privilege.[153] Typically, these opinions are phrased in terms of a

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139. *See infra* notes 316-41 and accompanying text.

140. F. HARPER & F. JAMES, *supra* note 12, § 5.27 at 455.

141. *Id.* at 450.

142. *See id.* at 450-52; Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865, 865-66 (1931).

143. Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799, 803 n.33 (1978).

144. *See infra* notes 146-55 and accompanying text.

145. *See infra* note 154 and accompanying text.

146. Vojak v. Jensen, 161 N.W.2d 100, 107 (Iowa 1968).

147. Nichols v. Eaton, 110 Iowa 509, 513, 81 N.W. 792, 793 (1900).

148. Cherry v. Des Moines Leader, 114 Iowa 298, 300, 86 N.W. 323, 323 (1901).

149. Vojak v. Jensen, 161 N.W.2d at 107.

150. Comfort v. Young, 100 Iowa 627, 629, 69 N.W. 1032, 1033 (1897).

151. *See* Robinson v. Home Fire & Marine Ins. Co., 244 Iowa 1084, 1096-97, 59 N.W.2d 776, 783 (1953).

152. *See* Simons v. Petersberger, 181 Iowa 770, 782, 165 N.W. 91, 95 (1917).

153. *See, e.g.*, Salinger v. Cowles, 195 Iowa 873, 890, 191 N.W. 167, 174 (1922); Children v.

defendant's good faith and proper purpose in communicating a defamatory statement.[154] A few cases, however, seem to hold that it is not the attitude of the defendant that is at issue, but rather his conduct in not reasonably ascertaining the truth or falsity of the statement.[155] Nevertheless, the Iowa Supreme Court's usual treatment of actual malice can be summarized as follows: a publication otherwise conditionally privileged will remain so if the defendant publishes the statement for the honest purpose of furthering the underlying interest; if, however, the communication is published to satisfy other motives or purposes, most often, to gratify a feeling of ill-will or personal spite toward the plaintiff, it will not be protected.[156]

A plaintiff can prove actual malice from the defamatory statement itself, from the defendant's actual knowledge of the falsity of the charge, or from other extrinsic circumstances bearing upon the defendant's objectives, purposes and motives.[157] Only where the defamatory language is strong or violent and is disproportionate to the underlying privileged occasion will the defamatory statement itself create an inference of actual malice.[158] For example, a newspaper's characterization of a town marshal as an ignorant ruffian, white trash and a repulsive specimen of humanity transgresses the limits of legitimate criticism concerning the conduct of a public official and can properly be viewed as evidence of actual malice.[159] Most often, however, a plaintiff would attempt to prove actual malice by establishing the facts and circumstances surrounding the publication.[160] Illustrative of this method of proving actual malice is the case of *Comfort v. Young*.[161] There the defendant had filed an information charging that the plaintiff was insane because the plaintiff had stated that he had received revelations from God, including one ordering that the town creamery be closed on Sunday.[162] This latter revelation had apparently prompted the plaintiff to complain to local authorities and cause criminal charges to be brought against the corporation which operated the creamery for violating the Sunday law.[163] The defendant apparently had a financial interest in the creamery.[164] The "board of insane

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Shinn, 168 Iowa 531, 549-50, 150 N.W. 864, 870 (1915); Mott v. Dawson, 46 Iowa 533, 537 (1877).

154. *See supra* note 153.

155. *See, e.g.*, Ott v. Murphy, 160 Iowa 730, 740-41, 141 N.W. 463, 468 (1913); Thompson v. Rake, 140 Iowa 232, 234-36, 118 N.W. 279, 280-81 (1908); Comfort v. Young, 100 Iowa at 629-30, 69 N.W. at 1033.

156. *See supra* notes 146-55.

157. Children v. Shinn, 168 Iowa at 549, 150 N.W. at 869-70.

158. *See* Robinson v. Home Fire & Marine Ins. Co., 244 Iowa at 1097, 59 N.W.2d at 784.

159. *See* Taylor v. Hungerford, 205 Iowa 1146, 1149, 217 N.W. 83, 84 (1927).

160. *See, e.g.*, Comfort v. Young, 100 Iowa 627, 69 N.W. 1032 (1897).

161. *Id.*

162. *Id.* at 628, 69 N.W. at 1033.

163. *Id.* at 630, 69 N.W. at 1033.

164. *Id.*

commissioners" (since disbanded) pronounced the plaintiff perfectly sane.[165] Plaintiff then sued for libel.[166] Although the trial court held that the occasion for defendant's publication was in the public interest and therefore conditionally privileged, the jury found for the plaintiff.[167] The Supreme Court affirmed, holding that the record contained sufficient evidence that the defendant had filed the information for the improper purpose of forcing the plaintiff to retract his testimony in the criminal proceeding.[168]

Another way a plaintiff can show actual malice with extrinsic facts is by proving that the defendant published a defamatory statement to someone whom he knew, or should have known, could not take any action on the statement or who was not otherwise "interested."[169] This is known as excessive publication. It is to be distinguished from defendant's initial burden of establishing that the circumstances under which the communication was published justified a reasonable belief that publication was made to the proper person. If the court holds that the circumstances were such as to justify a reasonable belief by the publisher that the recipient of the communication had the ability to assist the publisher, then the plaintiff must prove that the defendant did not, in fact, have such a reasonable belief.[170]

Brown v. First National Bank of Mason City,[171] discussed above, illustrates this distinction. In *Brown* the dissemination of information to the newspaper by the bank president concerning the plaintiff's purported involvement with missing bank funds could not be justified on the basis that the president reasonably believed he was communicating to one who could act in the public interest.[172] Thus, the occasion for the defamatory publication was not conditionally privileged.[173] In contrast, if the bank president had communicated this information to those whom he believed, albeit mistakenly, were government officials who could take appropriate action, the occasion for the communication would have been conditionally privileged.[174] The plaintiff would then have had the burden of proving that the president, in fact, did not reasonably believe that the recipients of the communication could take any action within the scope of the public interest privilege. Lack of such reasonable belief is evidence of actual malice or improper purpose.[175]

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165. *Id.* at 628, 69 N.W. at 1033.

166. *Id.*

167. *Id.* at 629, 69 N.W. at 1033.

168. *Id.* at 630, 69 N.W. at 1033.

169. *See* Robinson v. Home Fire & Marine Ins. Co., 242 Iowa at 1133, 49 N.W.2d at 528. *See generally* W. KEETON, *supra* note 6, § 115, at 832.

170. *See* Robinson v. Home Fire & Marine Ins. Co., 242 Iowa at 1133, 49 N.W.2d at 528; RESTATEMENT (SECOND) OF TORTS § 605 comment e (1977).

171. 193 N.W.2d 547 (Iowa 1972).

172. *See id.* at 552-53.

173. *See id.* at 553.

174. *See supra* note 118 and accompanying text.

175. *See* RESTATEMENT (SECOND) OF TORTS § 604 comment 6 (1977).

The fact that a communication is incidentally read or overheard by a person to whom there is no privilege to publish it, however, will not result in liability if the means of publication is appropriate under the circumstances.[176] For example, a defamatory business letter which is opened by a clerk or secretary is not an abuse of privilege since it is an appropriate business custom for clerks and secretaries to open mail.[177]

A principle similar to excessive publication exists where a defendant, on an occasion giving rise to a conditional privilege, publishes a defamatory statement which he does not reasonably believe furthers or advances the underlying interest of the privilege.[178] As an illustration, a defendant, who is otherwise protected in reporting to the police that the plaintiff has committed a criminal offense, abuses the privilege if he demeans the plaintiff's moral character in particulars which have no relevance to the criminal offense.[179] This is known as excessive statement. The defendant has the burden of establishing that the circumstances were such as to justify a reasonable belief that the defamatory statement was necessary to protect the underlying interest of the privilege.[180] If the court so holds, the plaintiff must then prove that the defendant knew, or should have reasonably known, that the defamatory statement would not further the purpose of the privilege.[181] As with excessive publication, lack of such reasonable belief constitutes evidence of actual malice or improper purpose.[182]

Yet another way that a plaintiff can establish actual malice in Iowa, and in most other jurisdictions, is by proving that the defendant did not honestly believe in the truth of the publication.[183] The standard in determining a lack of honest belief is whether the defendant personally believed the

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176. W. KEETON, *supra* note 6, § 115, at 833. If, however, defendant publishes a communication to those who can properly act on the statement as well as to those who cannot, he may attempt to sever the harm done by each. *See* RESTATEMENT (SECOND) OF TORTS § 604 comment c (1977). If successful, the defendant is liable only for the harm caused by the unprotected publication. *See id.*

177. *See* RESTATEMENT (SECOND) OF TORTS § 604 comment b (1977).

178. Nichols v. Eaton, 110 Iowa at 512-14, 81 N.W. at 793-94. *See also* RESTATEMENT (SECOND) OF TORTS § 605 (1977).

179. RESTATEMENT (SECOND) OF TORTS § 605 comment a (1977).

180. *See id.* § 605 comment b.

181. *See id.* If a defendant publishes two statements — one which he reasonably believes to be necessary to accomplish the purpose of the privilege but the other he does not — he can attempt to sever the harm done by each. *See* RESTATEMENT (SECOND) OF TORTS § 605A comment a (1977). If the harm is divisible, the defendant is liable only for that harm which is due to the unprivileged matter. *See id.* This same principle is also applicable to the more direct and conventional manner of proving improper purpose or motive. *See id.* If damage from a defamatory statement published with an improper purpose can be severed from damage from a defamatory statement published with a proper purpose, a defendant is liable only for the former. *Id.*

182. F. HARPER & F. JAMES, *supra* note 12, § 5.27 at 454.

183. *See, e.g.*, Children v. Shinn, 168 Iowa at 549, 150 N.W. at 870; Ott v. Murphy, 160 Iowa at 741-42, 141 N.W. at 468; Comfort v. Young, 100 Iowa at 629-30, 69 N.W. at 1033 (1897); F. HARPER & F. JAMES, *supra* note 10, § 5.27, at 452.

statement to be true.[184] To satisfy this standard, a plaintiff, as a practical matter, must prove that the defendant published the defamatory statement knowing it to be false; negligence is insufficient.[185] Implicit in the use of the "knowing falsity" standard is that a defendant who possesses such awareness publishes the statement out of an improper motive or purpose.[186] Several Iowa cases, including the ones which employed the "lack-of-honest-belief" standard for actual malice appear to permit, however, a less stringent standard of proof than a lack of honest belief to defeat a conditional privilege.[187] With no recognition of the difference between a lack of honest belief and a lack of reasonable or probable cause, these cases hold that a defendant's lack of reasonable or probable cause in the truth of a defamatory statement constitutes evidence of actual malice.[188] The "lack-of-reasonable-cause" test was utilized notwithstanding its rejection by the Supreme Court of Iowa in 1882.[189] Lack of reasonable cause introduces an element of negligence into defamation law in that the plaintiff must show that the defendant did not act as an ordinary and prudent person under the circumstances in ascertaining the falsity of a communication.[190] It is readily apparent that this standard closely approximates the minimum quantum of fault a plaintiff must now prove under *Gertz*.[191] It is not clear whether the Supreme Court of Iowa intended to treat lack of reasonable cause as a method by which a plaintiff could prove improper purpose or as a distinct and separate test of actual malice. Most cases, however, appear to indicate the former, that is, that a defendant's lack of reasonable cause is one of the facts and circumstances a jury can consider in determining whether the defendant acted with an improper purpose; it is not a separate descriptive standard for actual malice.[192] Yet, lack of reasonable cause and improper purpose are not necessarily interrelated. A defendant who does not have a reasonable basis for believing the truth of a communication may, nevertheless, honestly believe in the truth of the statement and publish it in good faith for the purpose of furthering the underlying interest of the qualified privilege.[193] The

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184. Bays v. Hunt, 60 Iowa 251, 255, 14 N.W. 785, 787 (1882).

185. *See* Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865, 868 (1931).

186. *See* Robinson v. Home Fire & Marine Ins. Co., 244 Iowa 1084, 1096, 59 N.W.2d 776, 783 (1953). *See also* F. HARPER & F. JAMES, *supra* note 10, § 5.27, at 452-53.

187. *See* Ott v. Murphy, 160 Iowa at 741-42, 141 N.W. at 468; Thompson v. Rake, 140 Iowa 232, 234-35, 118 N.W. 279, 280 (1908); Cherry v. Des Moines Leader, 114 Iowa at 304, 86 N.W. at 325; Comfort v. Young, 100 Iowa at 629-30, 69 N.W. at 1033.

188. *See supra* note 187.

189. *See* Bays v. Hunt, 60 Iowa 251, 255-56, 14 N.W. 785, 787 (1882).

190. *See* Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865, 868 (1931).

191. *See supra* note 17 and accompanying text.

192. *See, e.g.*, Ott v. Murphy, 160 Iowa at 741-42, 141 N.W. at 468; Thompson v. Rake, 140 Iowa at 234, 118 N.W. at 280.

193. *See* Hallen, *Character of Belief Necessary for the Conditional Privileges In Defa-*

Supreme Court of Iowa, as with the majority of other jurisdictions, appeared to add the lack of reasonable cause requirement as one way of showing actual malice with no apparent recognition of an inconsistency with the more traditional description of actual malice as improper purpose.[194] An explanation for the confusion surrounding the definition of actual malice may be found in the diverse treatment accorded it in England and in the United States. In England, the gravaman of actual malice was improper motive.[195] In contrast, many courts in the United States followed the lead of *White v. Nichols*,[196] an 1845 United States Supreme Court decision, and defined actual malice as lack of probable cause in the truth of a communication.[197]

As indicated at the outset of this section, conditional privileges are an outgrowth of the strict liability nature of defamation and the fictions and presumptions which inhere therein. Applied in those situations where courts believe society's interest in the publication outweighs the individual's interest in reputation, conditional privileges rebut the presumption of malice.[198] The plaintiff then has to prove that the defendant was motivated by an improper purpose in publishing the communication.[199] Such proof may or may not relate to a defendant's awareness of the falsity of the communication.[200] The author believes the courts have erroneously emphasized the attitude of the defendant instead of evaluating the reasonableness of the defendant's conduct in ascertaining the truth or falsity of the statement. The emphasis of the common law action of defamation is damage to reputation caused by publication of a false and defamatory statement.[201] There is no such damage if the statement is true.[202] Falsity of the statement is, therefore, the *sine qua non* of the defamation action. Accordingly, a defendant's liability should be adjudged by the care he took in ensuring the accuracy of the publication. As will be explained in the next section, the *Gertz* Court has emphasized the conduct of the defendant in ascertaining the truth or falsity of the communication and in doing so, made a long overdue correction of an anomaly extant in the law of defamation.[203]

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mation, 25 ILL. L. REV. 865, 868 (1931).

194. *See id.*

195. Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 157-58 (1977).

196. 44 U.S. (3 How.) 266 (1845).

197. *See* Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 158-59 (1977). In *White* the United States Supreme Court analogized to the malicious prosecution tort action in adopting the probable cause test for conditionally privileged situations in defamation law. *See* 44 U.S. at 289-91.

198. *See supra* notes 78-129 and accompanying text.

199. *See supra* notes 85-88 and accompanying text.

200. *See supra* notes 156-57 and accompanying text.

201. *See supra* note 54 and accompanying text.

202. *See supra* note 55 and accompanying text.

203. *See infra* notes 226-54 and accompanying text.

III. Constitutional Revolution In Defamation

Before 1964 the common law of defamation did not present any constitutional problems.[204] Defamatory speech was not among the classes of speech which was protected by the first amendment.[205] In *New York Times Co. v. Sullivan*,[206] however, the United States Supreme Court struck new ground holding that the first amendment requires that a public official can recover damages for defamatory falsehoods concerning official conduct only on a clear and convincing showing of actual malice; that is, that the defendant published the falsehoods with knowledge of, or reckless disregard for, their falsity.[207] The Court's use of the term "actual malice" in defining this new constitutional rule was unfortunate. Actual malice as defined by the Court is not the same as actual malice as defined by the common law. Whereas the common law had generally defined actual malice in terms of improper purpose,[208] which may or may not relate to a defendant's awareness of the truth or falsity of a communication, the constitutional rule formulated in *New York Times* pertains only to the defendant's awareness of the truth or falsity of a communication.[209] (To avoid confusion, the *New York Times*' definition of actual malice will hereinafter be referred to as *New York Times* malice.) The Court, however, clearly borrowed from the common law in structuring this new constitutional rule. Indeed, the *New York Times* standard can be viewed as an extension and modification of the minority "fair comment" conditional privilege.[210] Like the minority rule, the Court rejected the distinction between fact and comment and accorded protection to honest misstatements of fact as well as honest expressions of opinion based on those facts.[211] By re-defining the concept of actual malice and by placing the burden of proof on the public official in his case-in-chief, however, the *New York Times* Court revolutionized the common law of defamation. Since only "knowing or reckless falsity" was actionable, defendants no longer had the onerous burden of establishing the truth of the communication. Error and falsity had to be tolerated, the Court stated, in order to protect freedom of expression on matters of public importance and to pro-

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204. *See infra* note 206 and accompanying text.

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

206. 376 U.S. 254 (1964).

207. *Id.* at 279-80. The Court reversed a $500,000 judgment against the New York Times and four individual defendants which had been affirmed by the Alabama Supreme Court. *See id.* at 256, 264. Sullivan, a Montgomery, Alabama, city official, had brought suit alleging that an inaccurate advertisement appearing in the *Times* stating that the city of Montgomery had responded to civil rights demonstrations with a wave of terror had defamed him. *Id.* at 256-57. Since the evidence regarding the defendants' awareness of falsity did not measure up to the new constitutional rule of actual malice, the judgment was reversed. *Id.* at 264.

208. *See supra* notes 85-88 and accompanying text.

209. *See supra* text accompanying note 207.

210. *See supra* text accompanying notes 132-34.

211. New York Times Co. v. Sullivan, 376 U.S. at 292 n.30.

vide adequate breathing space for speakers and publishers.[212] No longer would a public official's evidence of improper purpose be sufficient for recovery. The Court also made clear that the mere failure of a publisher to investigate the accuracy of a defamatory imputation was not evidence of reckless disregard.[213] De novo appellate review, which ensures that *New York Times* malice is proven by clear and convincing evidence, added yet another level of protection to disseminators of information concerning the official conduct of public officials.[214]

In *Garrison v. Louisiana*,[215] decided eight months after *New York Times*, the Court made clear that evidence of improper purpose, ill-will, or the like is not the standard by which a defendant's defamatory statements about the official conduct of a public official is to be judged.[216] Rather, "only those false statements made with [a] high degree of awareness of their probable falsity" would satisfy the *New York Times* malice standard.[217] The Supreme Court has consistently held that improper purpose or ill-will is constitutionally infirm to establish actual malice under the *New York Times* test.[218]

In 1967 the Court, in *Curtis Publishing Co. v. Butts*,[219] extended the *New York Times* rule to public figures not involved in government.[220] For a plaintiff to be classified as a public figure, he had to participate in a matter of public controversy either by way of influence or resolution.[221] In 1971, a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*[222] broke away from the status-of-the-plaintiff test and held that the *New York Times* malice standard would apply to all communications involving matters of public concern without regard to whether the plaintiff was famous or anony-

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212. *See id.* at 271-72.

213. *See id.* at 287-88. In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court applied the public official designation to all "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85 (footnote omitted). In Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971), the Court applied the *New York Times* privilege to candidates for public office. *Id.* at 271.

214. *See* New York Times Co. v. Sullivan, 376 U.S. at 285. The Court presently has under consideration the issue of whether the clear and convincing requirement can be disregarded in deciding defendant's motion for summary judgment. Anderson v. Liberty Lobby, Inc., 746 F.2d 1563, 1570-71 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 2672-73 (1985).

215. 379 U.S. 64 (1964).

216. *See id.* at 78-79.

217. *Id.* at 74. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Court held that a defendant must in fact have entertained serious doubts regarding the accuracy of a publication to warrant a finding of actual malice. *Id.* at 731.

218. *See* Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler, 398 U.S. 6, 10 (1970); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Henry v. Collins, 380 U.S. 356, 357 (1965).

219. 388 U.S. 130 (1967).

220. *Id.* at 155.

221. *Id.*

222. 403 U.S. 29 (1971).

mous.[223] Whether a defamatory communication involved a matter of public interest was to be decided as a question of law.[224] After *Rosenbloom,* all defamation plaintiffs involved in a matter of public concern would be required to prove actual malice as defined in *New York Times.*[225]Three years after *Rosenbloom* was decided, the Court in *Gertz v. Robert Welch, Inc.,*[226] rejected the plurality's content-based test for protected speech.[227] The Court held that the states were free to define the standard of liability to be used against "a publisher or broadcaster of defamatory falsehoods injurious to private individual[s]" so long as they required the private individual to prove some fault on the part of the defendant in not anticipating the falsity of the defamatory statement.[228] The *Gertz* Court re-affirmed the application of the *New York Times* malice standard to public officials, candidates for public office, and public figures.[229] The Court made it clear that an individual's mere involvement in an issue of public concern would not make him a public figure.[230] If an individual neither thrusts himself into the vortex of a public issue nor attempts to engage the public's attention in an attempt to influence its outcome, he is classified as a private plaintiff and does not necessarily have to prove actual malice.[231]

In the view of the *Gertz* Court, the *Rosenbloom* public interest test for determining the applicability of the *New York Times* standard where the plaintiff is neither a public official nor a public figure inadequately protected the reputational rights of such a plaintiff for two reasons: First, private individuals do not have access to the media to counteract falsehoods as do pub-

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223. *Id.* at 43-44.

224. *Id.*

225. The Court had previously applied the *New York Times* malice standard to false light privacy actions. Time, Inc. v. Hill, 385 U.S. 374 (1967). In *Hill* the Court held that publications of newsworthy information which places a plaintiff in a false light are not actionable absent a showing that the defendant communicated the information knowing it to be false or acted recklessly in not ascertaining its falsity. *Id.* at 387-88.

226. 418 U.S. 323 (1974).

227. *Id.* at 346.

228. *Id.* at 347. Gertz, a reputable Chicago attorney, had received a $50,000 jury verdict against defendant who had falsely charged that he was part of a communist conspiracy designed to harass Chicago police. *Id.* at 325-26, 329. The trial court had ruled that Gertz was neither a public official nor a public figure. *Id.* at 329. The lower court, however, anticipating the plurality opinion in *Rosenbloom,* entered a judgment notwithstanding the verdict for defendant on the grounds Gertz had failed to prove *New York Times* malice, a necessary element where the defendant was reporting on matters of public concern. *Id.*

229. *Id.* at 342-43.

230. *See id.* at 345.

231. *See id.* The Supreme Court agreed with the trial court that Gertz was not a public figure. *Id.* at 328. Since the Court concluded that the *New York Times* standard was inapplicable, the Court reversed the judgment. *Id.* at 352. On re-trial Gertz was awarded $100,000 in compensatory damages and $300,000 in punitive damages. Gertz v. Robert Welch, Inc., 680 F.2d 527, 531 (7th Cir. 1982), *cert. denied,* 459 U.S. 1226 (1983).

lic officials and public figures;[232] and second, they do not voluntarily assume the risk of greater press exposure by entering the public arena.[233] Likewise, the Court believed that the press was not adequately protected by the *Rosenbloom-New York Times* rule that if a defamatory publication was deemed not to be of public interest, the defendant could be held liable regardless of the steps taken to ensure the accuracy of the statements.[234] The *Gertz* Court expressed that judicial second-guessing of the press did not adequately protect first amendment rights.[235] Thus, in reaching a proper accomodation between a private citizen's reputational rights and a publisher or broadcaster's free speech rights, the Court gave the states latitude to define the standard of liability for defamatory falsehoods injurious to private individuals as long as liability was not imposed without fault.[236] After *Gertz*, a private individual can recover damages for injury to reputation on a minimum showing of negligence should the state determine that to be the appropriate standard.[237]

In contrast to the express holding of *New York Times*,[238] the Court in *Gertz* did not address the issue of what burden of proof a private plaintiff has in proving a defendant's fault in not anticipating the falsity of a communication. Some commentators have argued that a clear and convincing standard should govern proof of negligence.[239] Others have contended that a preponderance of evidence is sufficient.[240] Negligence, of course, has traditionally been proven by a preponderance of the evidence.[241] In those

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232. Gertz v. Robert Welch, Inc., 418 U.S. at 344. The Court also acknowledged that the self-help remedy, as a practical matter, may be inadequate even for public plaintiffs. *See id.* n.9.

233. *Id.* at 345. The plurality in *Rosenbloom* had rejected this same argument. Rosenbloom v. Metromedia, Inc., 403 U.S. at 43.

234. Gertz v. Robert Welch, Inc., 418 U.S. at 346.

235. *See id.* By necessity, however, the *Gertz* test requires an initial determination of whether a plaintiff is involved in a public controversy. *See* Time, Inc. v. Firestone, 424 U.S. 448, 453-54 (1976) (dissolution proceeding is not a public controversy under the *Gertz* test).

236. Gertz v. Robert Welch, Inc., 418 U.S. at 347.

237. There should be no established or automatic rules of liability. For example, failure to verify the accuracy of a publication should not, in and of itself, constitute fault. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 465-66 (1975). The pressures of time or the nature and source of the information may all warrant the publication of a defamatory statement without verification. Expert testimony may often be useful or necessary in evaluating the propriety of a media defendant's conduct.

238. *See supra* note 207 and accompanying text.

239. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. at 467-68.

240. RESTATEMENT (SECOND) OF TORTS § 580B comment j (1977); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 248-49 (1976). Several courts have opted for the preponderance standard. *E.g.*, Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977); Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 597, 350 A.2d 688, 698 (1976); Memphis Publ. Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978).

241. W. KEETON, *supra* note 6, § 38, at 239.

states which have adopted a negligence standard in response to *Gertz*, a preponderance standard would be the most obvious choice. A clear and convincing standard, if joined with negligence, may have the effect, in the eyes of the jury, of raising the plaintiff's burden of proving fault from negligence to gross negligence or reckless disregard.[242] When coupled with the requirement of de novo review, a preponderance standard is constitutionally sufficient where "negligent falsity" is the rule.[243]

Some uncertainty exists as to whether a defamation plaintiff, after *New York Times* and *Gertz*, bears the burden of proving falsity. Some courts and commentators believe that the constitutional rules of *New York Times* and *Gertz* do not necessarily impose a requirement that a plaintiff must prove the falsity of a defamatory publication.[244] They argue that the constitutional requirement of fault does not encompass proof of actual falsity but, rather, merely proof that the defendant acted negligently or recklessly in publishing the statement on the basis of information that was available to him at the time of publication.[245] The better view, however, is that a plaintiff must prove some falsity. By imposing a requirement of fault with respect to the falsity of a publication, the Supreme Court contemplated a prior or simultaneous determination that the statement in question was in fact false.[246] In other words, a plaintiff must prove the falsity of the defamatory communication if he is to meet the constitutional obligation of proving the defendant's fault as to the falsity of the statement.[247] Moreover, a rule which places the burden of proving truth on the defendant may permit the imposition of liability without fault. For instance, a jury which is uncertain about the truth or falsity of a statement has to render its decision against the party having the burden of proof — in this case, the defendant — even though the statement may be true.[248] Such a rule runs counter to the spirit and intent of *New York Times* and *Gertz*. Accordingly, the plaintiff and not the defendant should bear the risk of failing to convince a jury on the issue of falsity. The possibility of jury confusion is also lessened if the plaintiff has the burden of proving falsity. As two commentators have noted: "Instructing

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242. *See* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. at 248.

243. *See id.*

244. *See* Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, _, 485 A.2d 374, 385-87 (1984), *prob. juris. noted*, 105 S. Ct. 3496 (1985); Denny v. Mertz, 106 Wis. 2d 636, 660-61 n.35, 318 N.W.2d 141, 153 n.35, *cert. denied*, 459 U.S. 883 (1982); W. KEETON, *supra* note 6, § 116, at 839-40; Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corporation v. Consumers Union*, 8 HAMLINE L. REV. 105, 106 n.5 (1985).

245. *See* W. KEETON, *supra* note 6, § 116, at 839. *See also* Bezanson, *supra* note 26, at 229 n.5.

246. Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 855 (1984).

247. *See* RESTATEMENT (SECOND) OF TORTS § 580B comment j (1977).

248. Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 375 (6th Cir.), *cert. denied*, 454 U.S. 1130 (1981).

jurors that the defendant bears the risk of non-persuasion on the issue of falsity, although the plaintiff bears that risk on the issue of fault, may be more than jurors can manage."[249] It appears likely that public plaintiffs would be required to prove falsity by clear and convincing evidence whereas a preponderance standard would appear constitutionally sufficient for private figures.[250]

The Court in *Gertz* also held that actual injury or damage must be proven by defamation plaintiffs unless *New York Times* malice can be shown.[251] Damages which were formerly presumed in slander per se and libel per se now must be proven.[252] Likewise, the *Gertz* Court held that states may not permit recovery of punitive damages by any plaintiff unless *New York Times* malice is proven.[253] Such a rule was needed, the Court reasoned, because jury discretion to award punitive damages under common law unnecessarily exacerbates the danger of self-censorship and because punitive damages are "wholly irrelevant" to the state interest of compensating injured reputations of private individuals.[254]

With the adoption of new constitutional rules on fault and damages, the *Gertz* Court made bold strides in its attempt to achieve predictability of result and certainty of expectation in the law of defamation. As we shall see in the next section, however, *Gertz* was not to be the final word in the continuing judicial struggle to balance the interests of reputation and freedom of speech.

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249. Franklin & Bussel, *supra* note 174, at 858. The confusion over who has the burden of proof on falsity, particularly in cases involving private figures, should be resolved this term by the United States Supreme Court. The Court noted probable jurisdiction on this question last term in the case of Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 485 A.2d 374 (1984), *prob. juris. noted*, 105 S. Ct. 3496 (1985).

250. *See supra* notes 246-49 and accompanying text.

251. Gertz v. Robert Welch, Inc., 418 U.S. at 349.

252. *See id.* at 350. These damages are not limited to pecuniary or out-of-pocket loss but include harm for impairment of reputation, personal humiliation, and mental anguish. *Id.*

In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the plaintiff withdrew her claim for damage to impairment of reputation just before trial and sought to recover damages only for mental anguish as a result of the false news report that her husband had been granted a divorce on the grounds of adultery. The jury awarded her $100,000, a result which was affirmed by the Supreme Court of Florida. Although vacated and remanded on other grounds, the Court found no error in the fact that the claim for damage to reputation had been withdrawn. *See id.* at 460-61. In the Court's view, the plaintiff was not constitutionally precluded from obtaining other provable damages that the defamatory falsehood may have caused. *See id.* at 460.

253. Gertz v. Robert Welch, Inc., 418 U.S. at 349.

254. *Id.* at 350. The *Gertz* Court appeared to restrict all of its holdings to media defendants. As will be discussed in the next section, the Court has rejected the proposition that the press is afforded greater rights of speech under the first amendment than individuals. *See infra* text accompanying notes 281-85.

IV. The *Dun & Bradstreet* Decision

After ten years of struggle to define the proper accommodation between the law of defamation and the first amendment guarantee of freedom of speech, the Court's decision in *Gertz* marked a watershed. By holding that private individuals must prove some fault on the part of a defendant as well as actual injury and by requiring greater culpability on the part of a defendant to warrant a recovery of presumed and punitive damages, the Court in *Gertz* sought to remove the strict liability features and presumptions of the common law of defamation. The requirement of fault was particularly novel. After *Gertz* a private plaintiff had to prove, at a minimum, and irrespective of the presence of a conditional privilege, that a media defendant did not take reasonable steps in ensuring the accuracy of a defamatory publication. When coupled with the rejection of the *Rosenbloom* content-based test for protected speech, the Court's conclusions in *Gertz* cast doubt on the continued existence of conditional privileges, and indeed, on the viability of the common law of defamation. Few courts and commentators, however, have addressed these issues. The question most courts faced was the quantum of fault vis-à-vis falsity a private individual had to prove.[255] A conflict eventually arose among state courts as to whether the *Gertz* protections apply to nonmedia defendants.[256] In 1983 the United States Supreme Court granted certiorari in a case from Vermont, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[257] purportedly to resolve this conflict.[258] In an ironic and unforeseen development, five members of the Court resurrected the specter of

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255. For a list of representative cases, *see supra* note 19.

256. *Compare* Schomer v. Smidt, 113 Cal. App. 3d 828, 834, 170 Cal. Rptr. 662, 665 (1980); Rowe v. Metz, 195 Colo. 424, 426, 579 P.2d 83, 84-85 (1978); Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 118 (Iowa 1984); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 369-71, 568 P.2d 1359, 1364-65 (1977); Denny v. Mertz, 106 Wis. 2d 636, 660-61, 318 N.W.2d 141, 152-53, *cert. denied*, 459 U.S. 967 (1982) (*Gertz* protections are not applicable to nonmedia defendants) *with* Mead Corporation v. Hicks, 448 So. 2d 308, 312 (Ala. 1983); Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 592-94, 350 A.2d 688, 695-96 (1976); Ryder Truck Rentals v. Latham, 593 S.W.2d 334, 338 (Tex. Civ. App. 1979) (*Gertz* protections are applicable to nonmedia defendants).

Professor Franklin reports that, of the 369 defamation cases involving nonmedia defendants that he studied between 1976 and June 1979, only 50 (or 14 per cent) raised a *New York Times* or *Gertz* privilege. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 A.B.F.R.J. 455, 491.

257. 143 Vt. 66, 461 A.2d 414, *cert. granted*, 104 S. Ct. 389 (1983), *aff'd*, 105 S. Ct. 2939 (1985).

258. The specific question presented for review was whether the first amendment's limitations on an award of presumed and punitive damages for libel enunciated in *Gertz* apply to nonmedia defendants. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 52 U.S.L.W. 3148 (1983). The Supreme Court heard arguments on this case during the October 1983 term but did not render a decision. Instead, the Court scheduled it for reargument and posed an additional question to the parties: whether the *Gertz* rule on presumed and punitive damages should apply where the nonmedia defendant publishes speech of a commercial or economic nature. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 104 S. Ct. at 3583.

Rosenbloom and concluded that the protections of *Gertz* apply only when the defamatory communication pertains to a matter of public concern.[259] *Dun & Bradstreet* stands the Court's decision in *Gertz* on its head and compels courts to once again engage in ad hoc decisionmaking about what matters are of public interest. In short, *Dun & Bradstreet* is a troubling development in first amendment defamation law. To fully understand the impact of the *Dun & Bradstreet* Court's decision, it is first necessary to set forth the facts giving rise to the litigation.

Dun & Bradstreet, a credit reporting agency, erroneously reported to five subscribers of its service that Greenmoss Builders, Inc., a construction contractor, had filed a voluntary petition for bankruptcy.[260] Under the terms of the agreement between Dun & Bradstreet and its subscribers (in this case, creditors of Greenmoss), all information contained in a credit report is confidential.[261] On the same day the credit report was published the president of Greenmoss Builders had been discussing the possibility of future financing with the company's bank.[262] He was informed that the bank had received the report.[263] The president of Greenmoss immediately asked Dun & Bradstreet for a correction as well as the identity of those firms who had received the false report so that he could assure them the company was solvent.[264] Dun & Bradstreet issued a correction notice within a week but refused to reveal the names of those who had received the report.[265] The error had been caused by a teenage student-employee of Dun & Bradstreet who had attributed to Greenmoss a bankruptcy petition filed by one of Greenmoss's former employees.[266] The error was not discovered because Dun & Bradstreet had failed to follow its usual practice of checking with the business itself before issuing the report.[267]

Greenmoss Builders brought a suit for defamation in Vermont state court.[268] A jury returned a verdict for $50,000 in compensatory damages and $300,000 in punitive damages.[269] The jury was not instructed on *Gertz*.[270] The trial court granted a new trial on the basis that plaintiff should have been required to prove actual injury for compensatory damages and *New*

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259. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2946 (1985) (plurality opinion); *Id.* at 2948 (Burger, C.J., concurring); *Id.* at 2948 (White, J., concurring).
260. *Id.* at 2941.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 2942.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*

York Times malice for punitive damages.[271] The Vermont Supreme Court reversed and reinstituted the jury verdict holding that the protections of *Gertz* do not apply to nonmedia defendants such as Dun & Bradstreet.[272]

The United States Supreme Court granted certiorari on the question of whether the first amendment limitation on presumed and punitive damages articulated in *Gertz* applies to nonmedia defendants.[273] The Court affirmed, but on different grounds.[274] Although a majority opinion was not issued, five members of the Court agreed that the *Gertz* rule on damages should be restricted only to those defamation actions which involve a communication of public interest or concern.[275] The communication at issue was not deemed to be of public interest by these five justices.[276] Justice Powell, the author of *Gertz*, could only muster two votes — Justices Rehnquist and O'Connor — in support of his plurality opinion.[277] Chief Justice Burger and Justice White concurred in the judgment, but would go further and have private defamation actions governed by the common law.[278] Justice Brennan, joined by Justices Marshall, Stevens, and Blackmun, dissented.[279] They would extend the protections of *Gertz* to all defamation actions brought by private individuals regardless of whether the underlying defamatory communication was public or private.[280]

Before analyzing the various opinions, it is important to first note that the plurality refused to rest its decision, as had the Vermont Supreme Court and several other courts, on the basis that the media enjoys greater constitutional protection from defamation actions than do nonmedia defendants. Indeed, a majority of the Court — comprised of the dissenters, Chief Justice Burger and Justice White — explicitly and correctly rejected such a distinction.[281] As Justice Brennan remarked in his dissent, the line between media

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271. *Id.*

272. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 143 Vt. 66, 75, 461 A.2d 414, 418 (1983), *aff'd*, 105 S. Ct. 2939 (1985). Interestingly, the Vermont Supreme Court after Dun & Bradstreet had filed a petition for certiorari, held in another case that *Gertz* does apply to nonmedia defendants insofar as proof of actual injury is required. Lent v. Huntoon, 143 Vt. 539, 549, 470 A.2d 1162, 1170 (1983). The court in *Lent* disavowed the broad language in *Greenmoss Builders* that *Gertz* does not apply to nonmedia defendants as a matter of federal constitutional law. *Id.* at _, 470 A.2d at 1170. The Vermont high court, however, chose not to extend to nonmedia defendants the protection of *Gertz* that punitive damages are recoverable only upon a showing of constitutional malice. *Id.* at _, 470 A.2d at 1171 n.4. None of the four opinions in *Dun & Bradstreet* make any reference to the *Lent* decision.

273. *See supra* note 258.

274. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. at 2942.

275. *Id.* at 2946.

276. *Id.* at 2947.

277. *Id.* at 2940.

278. *Id.* at 2948, 2953.

279. *Id.* at 2954.

280. *Id.* at 2962.

281. *See id.* at 2953 (White, J., concurring); *Id.* at 2957-59 (Brennan, J., dissenting).

and nonmedia is too obscure to form the basis of a constitutional principle.[282] Confusion and conflicting decision could only result — something the defamation tort action does not need.[283] More importantly, all who write or speak should have the same constitutional protection. As the Court has observed in another context, freedom of speech is just as much the right of the lonely pamphleteer as it is the metropolitan publisher.[284] The first amendment goals of self-expression and contribution to the democratic dialogue are equally realized among nonmedia speakers as is debate in the mass media.[285] Individuals should be spared from the rigors of the common law of defamation just as the media is spared.

Although the *Dun & Bradstreet* Court's conclusion is couched only in terms of the inapplicability of the *Gertz* rule regarding presumed and punitive damages to private defamatory communications, the scope and impact of the Court's decision is much greater. It necessarily follows that the *Gertz* requirement of fault is equally inapplicable to any defamation action where the publication is not deemed to be of public interest.[286] It would be inconsistent for the Court to adopt the *Gertz* requirement of fault for all defamation actions irrespective of the presence of a public issue but not the *Gertz* rule on damages. Both rules were formulated out of the same judicial concern: the protection of defamation defendants from the rigors of strict liability for defamation.[287] The impact, then, of *Dun & Bradstreet* is unambiguous; the *Gertz* protections do not apply to private speech.[288]

Justice Powell's reasoning in *Dun & Bradstreet* on why *Gertz* only applies to matters involving public concern does not withstand close analysis. The foundation of Justice Powell's opinion — that the *Gertz* protections are limited to issues of public concern — flies in the face of his own rationale for the Court in *Gertz*. Doubts about the wisdom of allowing judges to decide what speech is of public concern was the precise reason why the *Gertz* Court

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282. *See id.* at 2957-58 n.6 (Brennan, J., dissenting).

283. *See* Brief for Petitioner at 21, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).

284. *See* Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

285. *See* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 933 (1978).

286. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. at 2953 (White, J., concurring). It is ironic that Justice White, although concurring in the judgment, thought that *Gertz* was intended to govern all defamation actions, whether the statement was made privately or publicly and whether it concerned a public or private issue. *See id.* at 2952-53 (White, J., concurring). Thus, five justices (Justice White and the four dissenters) were of the belief that *Gertz* was intended to reach all defamation cases. This ironic juxtaposition gives further weight to the argument that Justice Powell simply ignored the rationale of his own majority opinion in *Gertz* in concluding that defamatory communications which are not of public concern are not entitled to the *Gertz* protections. *See infra* text accompanying notes 287-91.

287. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 340, 346.

288. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. at 2946 (plurality opinion); *Id.* at 2948 (Burger, C.J., concurring); *Id.* at 2948 (White, J., concurring).

rejected the *Rosenbloom* plurality approach.[289] The *Gertz* Court left no doubt that it did not want the judiciary to become involved in determining what publications may or may not be in the public interest. It felt that the consequences of a *Rosenbloom* determination that certain speech is not of public concern were too profound; namely, that a defendant who had taken every reasonable precaution in ensuring the accuracy of a publication would be held strictly liable under the common law for damages.[290] The clear effect of *Gertz* is that communications which have nothing to do with self-government or matters of public concern fall within the protection of the first amendment. Justice Powell simply ignored the rationale of *Gertz* in fashioning a constitutional rule of public and private speech. Surely, the difficulty of forcing judges to decide on an ad hoc basis which publication is of public interest applies no less in the context of determining the standard of fault for presumed and punitive damages than it does in determining whether *New York Times* malice should be the appropriate liability standard.[291] Judicial second-guessing of all defamation defendants — media or nonmedia — and the resulting self-censorship are sure to occur. A sword of Damocles which the Court sought to avoid hanging over the head of speakers and publishers in *Gertz* is now firmly in place.

Illustrative of the unworkability of the constitutional distinction between speech of a public import and private speech is the defamatory communication at issue in *Dun & Bradstreet*.[292] The factors the plurality enumerates as determinative of whether speech is of public concern are content, form, and context.[293] The plurality offers little analysis, however, regarding why the speech at issue is not of public concern. It merely concludes that the speech is "solely in the individual interest of the speaker and its specific business audience."[294] Of particular significance to the plurality is that the "credit report was made available to only five subscribers who, under the terms of the subscription agreement, could not disseminate it to anyone."[295] Therefore, the plurality reasoned, "interest in the free flow of commercial information was" not affected.[296] Finally, the plurality intimated that be-

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289. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 346.

290. *See id.* The Court's analysis in *Gertz* was based in large part on Justice Harlan's dissenting opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62-78 (1971). Interestingly, Justice Harlan was of the view that the first amendment requires plaintiffs in purely private defamation actions to prove some fault to warrant recovery for compensatory damages and to prove *New York Times* malice to recover punitive damages. *See id.* at 69, 73 (Harlan, J., dissenting).

291. Gertz v. Robert Welch, Inc., 418 U.S. at 346.

292. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. at 2944-45.

293. *Id.* at 2947 (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

294. *Id.* Chief Justice Burger and Justice White did not offer any guidance in their concurring opinions as to what constitutes a matter of public concern.

295. *Id.*

296. *Id.*

cause credit reporting is similar to advertising, and is solely motivated by the desire for profit, it is a force less likely to be deterred than other forms of speech.[297] This analysis misapplies first amendment doctrine. The fact that the credit report is commercial speech and that it was disseminated to only five subscribers does not necessarily lead to the conclusion that it is not of public concern. Speech does not forfeit constitutional protection merely because it concerns economic matters and is circulated with the hopes of making a profit.[298] As Justice Brennan observes in dissent, "an announcement of the bankruptcy of a local company is information of potentially great concern to the residents of the community where the company is located."[299] How can a bankruptcy not be of public concern when federal law requires that the process of bankruptcy be effectuated in the courts as a matter of public record?[300]

The fact that the credit report at issue had only limited circulation and that it was confidential does not save the *Dun & Bradstreet* plurality's analysis that the report is not of public interest. The plurality seems to be saying that in order for the public interest to be implicated there must be a public disclosure. The extent of circulation has no logical bearing or relationship to whether the subject matter of the communication is of public interest. In fact, and contrary to the plurality's conclusion that the report does not involve the strong interest of the free flow of commercial information, it cannot be denied that the Court's result can, and most likely will, deter Dun & Bradstreet and others in providing commercial information to the public.[301]

Irrespective of the problems courts will incur in trying to distinguish between matters of public concern and private speech, the Court in *Dun & Bradstreet* erroneously concluded that speech of a private nature is not entitled to the full panoply of constitutional protections of *Gertz*. In determining the measure of constitutional protection for private speech, the plurality utilized the same approach as the Court in *Gertz*, namely, balancing the interest of the state in compensating private individuals for injury to reputation against the first amendment interest in protecting speech.[302] Relying in large part on *Connick v. Myers*,[303] a case involving a public employee's right to comment on public issues, the plurality concluded that speech on matters of purely private concern is deserving of less first amendment pro-

297. *Id.*

298. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976).

299. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. at 2961 (Brennan, J., dissenting).

300. *Id.* at 2962 (Brennan, J., dissenting).

301. *Id.* at 2965 n.18 (Brennan, J., dissenting).

302. *Id.* at 2944-45.

303. 103 S. Ct. 1684 (1983).

tection than public speech.[304] Of less first amendment concern, the plurality silently holds, to warrant no constitutional protection. The clear effect of the Court's decision is that in all cases where courts find that the defamatory speech is private in nature, the common law of defamation is applicable.

Connick is inapplicable to a defamation action. Of the three factors *Connick* enumerates as bearing on whether a particular communication is of public interest — form, context and content[305] — only content has any relevance to the defamation action. Moreover, the definition of "public issues" in a government employment situation seems narrower than in a defamation context because of the wide latitude the Court gives government officials in managing their offices.[306] No such latitude should be given to the state's interest in compensating the reputation of private individuals. All defendants should have the necessary "breathing space" to comment on matters that touch their lives.

The plurality also quotes from an Oregon Supreme Court case to justify its conclusion that private speech occupies a lower position on the first amendment scale of values:

> [In speech of private concern] there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.[307]

The plurality, as well as Chief Justice Burger and Justice White, ignore the fact that communications by family, social, and peer groups on matters a court may deem to be of private concern play just as an important role in forming and influencing social, literary, economic, and political attitudes and beliefs as do speech on public issues.[308] Moreover, meaningful dialogue on issues of self-government is not the only interest the first amendment protects.[309] The Court has recognized that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[310] Individual self-expression and cathartic release — two interests that are unrelated to the content of speech which the first amendment fosters — are just as constitutionally important as contributions to the democratic dialogue.[311] In light of these first amendment interests in

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304. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. at 2946.

305. *See* Connick v. Myers, 103 S. Ct. at 1690-91.

306. *Id.*

307. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. at 2946 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977)).

308. *See* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 933 (1978).

309. *See generally id.* at 930-35.

310. Associated Press v. United States, 326 U.S. 1, 20 (1945).

311. *See* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*,

private speech, the state's interest in compensating private individuals for reputational injury does not warrant application of the strict liability rules of the common law. Employment of the common law rules in this situation is broader than necessary to serve the state's interests and will deter the publication of constitutionally protected private speech. The state's interest would not be hampered in the least if a requirement of fault, proof of actual injury, and proof of *New York Times* malice for presumed and punitive damages, requirements not unlike other common law tort actions, were imposed for all defamation actions.

V. Fault And The Common Law Of Defamation

The test of *Dun & Bradstreet* for constitutionally protected speech can only lead to what the *Gertz* Court labelled as unpredictable results and uncertain expectations. For the reason asserted in Part III, *supra,* and notwithstanding the decision in *Dun & Bradstreet,* the *Gertz* holdings on fault and damages should be extended, as a matter of state constitutional or common law, to all defamation actions irrespective of the presence of a public issue. If this were accomplished, along with the abrogation of common law conditional privileges and a requirement that a plaintiff prove that the defendant acted with fault with respect to all elements of the defamation tort, the modernization of defamation law begun by the Supreme Court in *New York Times* in 1964 would be complete. Such an approach would greatly simplify the law of defamation, add much needed uniformity, and strike the appropriate balance between freedom of speech and protection of reputation.

A. *The Effect of Gertz on Conditional Privileges*

Perhaps the most striking and apparent impact of a fault standard related to the defendant's awareness of falsity on the common law of defamation is the continued viability of conditional privileges. The privileges, originally created by the courts to militate against the harsh effects of the strict liability nature of defamation, are defeasible by the plaintiff upon a showing that the defendant acted with actual malice.[312] To the extent that common law actual malice denotes a lack of reasonable belief in the truth of a communication it is virtually identical to negligence. Under this analysis, the conditional privilege/actual malice system of the common law is assimilated by the employment of a fault standard and loses any independent significance.[313] Lack of reasonable belief in the accuracy of a communication, how-

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25 UCLA L. Rev. 915, 933 (1978).

312. *See supra* notes 85-88 and accompanying text.

313. Restatement (Second) of Torts § 592A special note on conditional privileges and the constitutional requirement of fault, at 259-61 (1977); Anderson, *Libel and Press Self-Censorship,* 53 Tex. L. Rev. 422, 443, n.97 (1975); W. Keeton, *Defamation and Freedom of the*

ever, is not the touchstone of actual malice under the common law; improper purpose is.[314] In the sense of improper purpose, common law actual malice focuses on what prompts or motivates a defendant to publish a defamatory publication. It does not necessarily pertain to the defendant's belief in the truth or falsity of the communication. On at least four occasions, the United States Supreme Court has held that evidence of improper motive, such as ill-will, hostility, or spite, is constitutionally inadequate to establish actual malice as defined in *New York Times*.[315] In the Court's words, common law actual malice or improper purpose focuses on a defendant's attitude while *New York Times* malice focuses on a defendant's conduct toward the truth or falsity of the published material.[316] The same rule should apply with respect to any fault standard a state adopts. Defamatory statements which are reasonably believed to be accurate contribute to the free interchange of ideas and the ascertainment of truth irrespective of the defendant's motive.[317] A defendant who takes all reasonable precautions to ensure the accuracy of his statements should not be held liable just because he was motivated to speak or publish out of hostility or spite.[318] Evidence of the attitude of a defendant toward a plaintiff would allow juries the freedom to punish unpopular speech and unpopular defendants, consequently deterring freedom of speech. Therefore, proof of improper purpose, whether it be from the character of the defamatory words used by the defendant, from extrinsic facts or circumstances, or from excessive publication or statement, has no place in the law of defamation.[319] By adopting a constitutionally-

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Press, 54 TEX. L. REV. 1221, 1238 (1976); Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671, 703 (1977); Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 173-74 (1977).

314. *See supra* text accompanying notes 143-57 and 187-194.

315. Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 10 (1970); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Henry v. Collins, 380 U.S. 356, 357 (1965); Garrison v. Louisiana, 379 U.S. 64, 77-78 (1964).

316. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 252 (1974).

317. Garrison v. Louisiana, 379 U.S. 64, 73 (1964).

318. *See* Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799, 805 (1978).

319. The holding of Herbert v. Lando, 441 U.S. 153 (1979), does not change this proposition. In *Herbert*, the Court stated that a plaintiff could inquire into a defendant's state of mind relative to the truth or falsity of a defamatory statement. *Id.* at 169. The inquiry, the Court said, properly included questions pertaining to the editorial process and decisions to include or exclude material. *Id.* at 172. The Court concluded that a reporter's belief about the accuracy of material he has gathered is relevant to the issue of *New York Times* malice and does not intolerably chill or stifle editorial decision-making. *Id.* at 171. The Court based its holding, in part, on the heritage of the common law and the role actual malice (improper purpose) played. *See id.* at 161-65. The Court's reliance on the role of improper purpose in the common law of defamation is misplaced and, in any event, unnecessary to its holding. Nevertheless, some commentators have argued that a defendant's attitude toward the plaintiff should be taken into account in passing judgment on the defendant's conduct toward the falsity of the publication. *See*

based fault standard grounded on the defendant's awareness of falsity, the Supreme Court in *Gertz* has altered the common law emphasis on malice and has struck a new balance between the interests of reputation and freedom of expression. The states should follow this course for all defamation actions.

Some commentators have hypothesized that states could adopt a fault standard and also retain conditional privileges which would be defeasible upon a showing of improper purpose.[320] The issue of the existence of a conditional privilege would only be reached if the plaintiff could first establish fault.[321] This approach should not be adopted. The conditional privilege/improper purpose system is a part of the strict liability heritage of the common law of defamation which a system based on fault effectively replaces.[322] Conditional privileges, therefore, lose their reason for existence. Their utility is somewhat limited in any event. Although they were created to ease the harsh effects of strict liability and to provide some breathing space on matters deemed worthy of dissemination, conditional privileges are defeasible upon a showing of a wrongful attitude notwithstanding that an underlying social interest may be furthered.[323] A fault standard related to falsity more effectively balances the competing interests of reputation and freedom of speech. Conduct of the defendant in ascertaining the accuracy of a communication, not the purpose of the communication, is the yardstick by which

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Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 698-700 (1979); Comment, *The Constitutionality of Punitive Damages and the Present Role of "Common Law Malice" in the Modern Law of Libel and Slander*, 10 CUM. L. REV. 487 *passim* (1979). These authors overlook the possibility that unpopular defendants and unpopular speech will be punished which, in turn, will inhibit the flow of information.

On a similar note, Professor Hill argues that the constitutional inroads made by the Supreme Court in *Gertz* do not affect the common law concept of excessive publication. *See* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1248-50 (1976). He intimates that a false but reasonably-founded accusation communicated to someone who has no interest in the defamatory statement or who can take no action thereon is actionable notwithstanding *Gertz*. *See id.* at 1250. Professor Hill's argument is misplaced. The fault of the defendant in this instance does not relate to the truth of the publication but to the extent of the communication. The rationale of *Gertz* clearly precludes the imposition of liability in this situation for if *Gertz* means anything, it means that a defendant, who is not at fault in anticipating the falsity of a defamatory statement, cannot be held liable consistent with the first amendment guarantee of freedom of speech.

320. Watkins & Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823, 881-82 (1984); Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799, 820-21 (1978); Note, *Iowa Libel Law and the First Amendment: Defamation Displaced*, 62 IOWA L. REV. 1067, 1092, 1098 (1977).

321. Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. at 820-21.

322. *See generally* W. KEETON, *supra* note 6, § 115.

323. *See supra* notes 87-88 and accompanying text.

liability should be measured. Whether society has a legitimate interest in protecting the expression of speech, be it that of public officials, public figures, or private citizens, depends not on the motive of the speaker or publisher but rather on the persuasive character and content of speech.[324] Moreover, the adoption of a fault standard to all defamation actions and the abrogation of conditional privileges would lend much needed uniformity and simplicity to defamation law. Fault is a conventional tort concept with which courts are well-acquainted; therefore, there should be no problem applying it in a defamation context. The possibility of jury confusion is also lessened if the jury only passes on the issue of fault as opposed to both the issues of fault and the attitude of the defendant.[325] In short, a *Gertz* fault standard should apply to all defamatory statements irrespective of whether they would be conditionally privileged under the common law. Courts would no longer be required to determine whether a statement is published on a privileged occasion. There would be no shifting burdens of proof; a private plaintiff would have the sole burden of proof to establish that the defendant was culpable in not anticipating the falsity of a defamatory statement.

Although questioning the continued existence of conditional privileges in light of *Gertz*, the authors of the *Restatement (Second) of Torts* decided, nevertheless, to retain them for private citizens but on a slightly different basis.[326] The authors propose that conditional privileges be subject to defeasance upon a showing of *New York Times* malice — that is, knowing or reckless disregard of the falsity of a publication.[327] Thus, if a private plaintiff makes a *prima facie* showing of negligence or some fault less than *New York Times* malice, the defendant can then force the plaintiff to prove knowing or reckless falsity if he can convince the court that the occasion for the publication is conditionally privileged under the common law. At least one state has adopted this approach.[328] Such a rule would be of particular

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324. Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc. and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. at 805.

325. If conditional privileges were retained, juries could feasibly have to decipher instructions on three separate issues relating to a defendant's conduct or attitude: 1) fault under *Gertz*, 2) improper purpose under the common law, and 3) actual malice under *New York Times* for punitive damages.

Common law absolute privileges, however, should be retained. The relationship between freedom of speech and reputation in those few situations is best balanced by the total immunity from liability.

326. *See infra* note 330 and accompanying text.

327. RESTATEMENT (SECOND) OF TORTS § 600 (1977). *See* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 79-81 (1983). "Knowing falsity" is, of course, one of the ways a plaintiff could prove actual malice at common law. *See supra* text accompanying notes 183-85.

328. Marchesi v. Franchino, 283 Md. 131, 138-39, 387 A.2d 1129, 1133 (1978). Other courts, without specifically discussing *Gertz*, have also heid that knowing or reckless falsity must be shown before a conditional privilege is defeated. *See, e.g.*, Schultz v. Newsweek, Inc., 668 F.2d 911, 918 (6th Cir. 1982) (applying Michigan law); Snodgrass v. Headco Indus., Inc.,

benefit to media defendants in those situations which are protected by the privilege to comment on matters of public concern.[329] Though negligent, a media defendant could require a private plaintiff to prove a greater degree of culpability if the defendant can establish that the defamatory statement concerns a matter of public concern. This *Restatement* approach, however, is ill-conceived, much like the Court's conclusion in *Dun & Bradstreet*. Conditional privileges place the judiciary in the position of judging the relative social worth or value of particular communications. The fair comment privilege, in particular, requires a threshold finding that the matter published is of public concern.[330] States should be reluctant to adopt any rule which necessitates making such judicial value judgments.

Moreover, the authors of the *Restatement* did not offer any reasons why qualified privileges should be conditioned upon a showing of fault greater than that which a state court may establish as a minimal constitutional requirement. The authors only state that if a court feels that a defendant should be held liable if he is merely negligent, as distinguished from reckless, then it should hold that a conditional privilege does not exist in the particular situation.[331] Amorphous feelings of the judiciary have no place in balancing the interests of reputation and freedom of speech. The balance to be struck can be accomplished by placing the burden of proof on the plaintiff to prove fault as part of his case-in-chief; it is not necessary to shift burdens of proof and raise the level of fault. The states are free, of course, to adopt a fault standard ranging from simple negligence to *New York Times* malice.[332] The *Restatement* approach is an unnecessary two-step procedure which serves merely to complicate the issues and confuse the jury. As stated previously, conditional privileges were developed by courts to militate against the strict liability nature of the defamation tort.[333] With the application of a *Gertz* fault standard to all defamation actions, a concept of which the *Restatement* authors approve,[334] defamation is no longer a strict liability tort.[335] No purpose would be served, therefore, by retaining the conditional privileges. Indeed, the *Restatement* authors recognize that conditional privi-

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640 S.W.2d 147, 154-55 (Mo. Ct. App. 1982).

329. *See supra* notes 130-34 and accompanying text.

330. *See supra* note 130 and accompanying text. In any event, the *Gertz* Court, in dictum, appeared to circumscribe the actionability of defamatory opinions. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). The authors of the *Restatement (Second) of Torts* picked up on that dictum and opined that a pure expression of opinion, not based on false and defamatory facts, is no longer actionable. *See* RESTATEMENT (SECOND) OF TORTS § 566 comments b and c (1977). Only expressions of opinion which are based on or imply defamatory statements of fact give rise to a claim. *See id.*

331. RESTATEMENT (SECOND) OF TORTS § 592A special note on conditional privileges and the constitutional requirement of fault, at 260 (1977).

332. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

333. *See supra* notes 79-80 and accompanying text.

334. *Id.* § 580B comment e.

335. *See id.*

leges are probably superfluous and irrelevant in view of *Gertz*.[336] The imprudence of the *Restatement* rule is further compounded by the fact that the authors also retained the common law definition of actual malice — improper purpose — as another ground for defeating a conditional privilege.[337] In short, the self-described "felicitious" proposal of the *Restatement* to give some meaning to the conditional privilege/actual malice system of the common law is, in application, cumbersome and not reflective of a proper balance between the competing values of reputation and speech. It should be rejected outright.

In summary, a fault standard for all defamation actions should be adopted irrespective of whether the communication would be conditionally privileged under the common law. In the words of Professor W. Page Keeton:

> *If, as a prerequisite to recovery in any case, the law had required some kind of fault with respect to the truth or falsity of the intentional defamation communicated, then there would have been little pressure or need to create the many defenses in order to get a proper balance in furthering the two opposing legitimate state interests of protecting reputation and free speech.*[338]

The *Gertz* Court's emphasis on the care a defendant exhibits in ascertaining the truth or falsity of a communication replaces malice as the foundation of the defamation tort action, makes consideration of the motive of the speaker irrelevant, and better protects the free discussion of ideas. By eliminating conditional privileges and common law actual malice, states would remove from the law of defamation two doctrines which have contributed to the fog of fictions and anomalies which have afflicted the law of defamation.

B. *The Applicability of a Fault Standard to All Elements of the Defamation Tort Action*

In most defamation cases after *Gertz*, the key issues for determination will be whether the plaintiff's status is public or private and whether the defendant was at fault in anticipating the falsity of the defamatory publication if indeed the publication is false.[339] There will be occasions, however, when other aspects of the defendant's conduct will be at issue. For example, a defendant may publish a defamatory communication which an individual

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336. *Id.* § 592A special note on conditional privileges and the constitutional requirement of fault, at 260.

337. *Id.* § 603.

338. W. Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1232 (1976) (emphasis in original).

339. Of course, *Dun & Bradstreet* adds another issue: whether an issue of public interest or concern is present. If, however, a court applies the *Gertz* protections on fault and damages to all defamation actions, this issue is not reached.

claims refers to himself when, in fact, the defendant did not intend such reference. The Court in *Gertz*, or for that matter in *Dun & Bradstreet*, was careful not to intimate any view on the resolution of whether a showing of fault would be constitutionally required for any other aspects of a defendant's conduct when at issue. The *Restatement (Second) of Torts* lists four instances, in addition to awareness of truth or falsity, in which the fault of the publisher may be at issue: 1) in communicating or publishing the statement to a third party; 2) in making the statement; 3) in referring to the plaintiff; and 4) in failing to recognize the defamatory character or potential of the communication.[340] The common law always required proof of fault with respect to the publication element.[341] States need not make any changes, therefore, regarding the publication requirement. With respect to the other aspects of a defendant's conduct, however, the common law did not compel proof of fault.[342] Strict liability was the rule.[343] All of these other elements of the defamation tort action pertain to one relevant issue: whether danger to the reputation of plaintiff is or should be evident.[344]

The *Gertz* Court specifically reserved comment on whether the concept of fault would be applicable to a statement which, on its face, did not alert a speaker or publisher of any risk to a person's reputation.[345] The Court stated that such an inquiry would involve considerations different than those underlying the employment of a fault standard relating to a defendant's awareness of the truth or falsity of a statement defamatory on its face.[346] Those considerations, no doubt, revolve around the issues of foreseeability and under what circumstances, if any, a state may fasten liability on a factual misstatement which in substance did not alert a speaker or publisher of its defamatory potential.[347] There are at least three ways in which such statements can be treated.[348] First, a court could hold that the constitution precludes any liability for statements which do not alert a speaker or publisher to the potential danger to reputation.[349] Second, a court could require a plaintiff to prove *New York Times* malice with respect to a defendant's awareness of the falsity of a statement innocent on its face but not require any proof of fault that the defendant knew, or should have known, that the plaintiff's reputation was at risk.[350] Finally, a court could require proof of fault with respect to both falsity and danger to reputa-

340. *See* RESTATEMENT (SECOND) OF TORTS § 580B comment b (1977).
341. *See supra* note 56 and accompanying text.
342. *See supra* notes 6-10 and accompanying text.
343. *See supra* notes 6-10 and accompanying text.
344. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 465 (1975).
345. Gertz v. Robert Welch, Inc., 418 U.S. at 348.
346. *Id.*
347. *See id.*
348. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. at 463.
349. *Id.*
350. *Id.*

tion.[351] This would involve some showing by the plaintiff that the defendant knew or should have anticipated certain matters which potentially would endanger reputation.[352]

Professor W. Page Keeton has argued that the first amendment does not require a publisher or speaker to determine if there are any matters extrinsic to the publication which would make known its defamatory potential to the plaintiff.[353] He would constitutionally restrict the tort of defamation to those statements which appear defamatory on their face. He characterizes as nonintentional or accidental those occasions where matters such as extrinsic facts or a nonintentional meaning make otherwise innocent false statements defamatory.[354] Arguing that relational interests such as reputation should only be protected against intentional invasions, Professor Keeton concludes that accidental invasions such as libel per quod should not give rise to a cause of action.[355] This approach seems to go too far in balancing the interests of reputation and freedom of expression. In a similar context involving the false light privacy tort the Supreme Court did not suggest that the tort action was unconstitutional.[356] Rather, the Court fashioned a rule, based on the first amendment, which holds a publisher of information liable, under some circumstances, for false but non-defamatory statements.[357] The fact that a statement is not defamatory on its face should not be determinative of whether it is actionable; rather, it should be relevant to determining the degree of care the publisher should exhibit under the circumstances.[358]

Although the second alternative noted above, that *New York Times* malice is required where danger to reputation is not facially evident, has been espoused by some,[359] it is contrary to the reasoning of *Gertz*.[360] To raise the quantum of fault on the issue of a defendant's awareness of falsity where the defendant could not have discerned the defamatory character of the statement is to impose liability without fault and to ignore the import of

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351. *Id.*

352. *See id.*

353. W. Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1230-31 (1976).

354. *Id.* at 1231.

355. *See id.*

356. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

357. *Id.* at 387-88. The Court held that a plaintiff involved in a matter of public interest must prove that the defendant published the report with *New York Times* malice, that is, knowing or reckless falsity. *Id.*

358. *Cf. id.* at 409 (Harlan, J. dissenting).

359. *See* Nelon, *Media Defamation in Oklahoma: A Modest Proposal and New Perspectives Part II*, 34 OKLA. L. REV. 737, 751 n.303 (1981); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc., and Beyond*, 6 RUT.-CAM. L. J. 471, 505-06 (1975).

360. *See supra* notes 226-37 and accompanying text.

Gertz.[361] The holding of *Gertz* is premised on the traditional tort concept of forseeability as it relates to a defendant's awareness of falsity.[362] The *Gertz* Court assumed that if a defendant were aware of the defamatory potential of a communication, he could take the necessary steps to ensure the accuracy of that communication.[363] Where substantial danger to a plaintiff's reputation is not apparent from the face of a communication, the defendant obviously cannot forsee any reputational injury to the plaintiff from that statement alone. Thus, for example, increasing the measure of fault on a defendant's awareness of the falsity of an innocent statement does not bear upon and has no logical relationship to whether the defendant should have forseen the defamatory potential of the innocent statement.[364] Such a rule would hold a defendant strictly liable as to his awareness of whether a publication posed a danger to the plaintiff's reputation. In other words, liability would be imposed even though the defendant may not have reasonably forseen that the plaintiff's reputation could be affected.[365]

This problem should not be addressed by raising the standard of care on the separate issue of falsity; rather, it should be solved by applying the concept of forseeability to the determination of whether the defendant was or should have been aware of the defamatory potential of a communication.[366] Accordingly, a defendant, in addition to having the duty to determine whether a statement is true, would also have the duty to ascertain whether danger to the reputation of a particular person is or should be evident from the statement or from extrinsic circumstances.[367] This latter duty encompasses those elements of the defamation tort action other than falsity and publication; namely the fact the statement was made, reference to the plaintiff, and the defamatory character of the statement. The following two-step inquiry results from these rules: 1) Did the defendant know, or should he have known, that the statement was likely to cause reputational injury and, if so, 2) did the defendant know, or should he have known, that the statement was false?[368] The inquiry with respect to falsity is answered last for there is no duty to use reasonable care to avoid injury to reputation unless there is reason to believe that there is danger of injury.[369] As a practi-

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361. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. at 464.

362. *Id.* at 464-65.

363. *See id.*

364. *See id.*

365. *See id.* If, on the other hand, the defendant knew or should have known of the danger to reputation, he should not be entitled to the protection of the tougher *New York Times* standard on the issue of truth or falsity. *Id.*

366. *Id.* at 465.

367. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. at 245.

368. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. at 465. A court may want to consider special verdicts for each of these issues when both are in dispute.

369. *Id.*

cal matter, most cases will involve only a determination of the defendant's awareness of the truth or the falsity of a defamatory publication. The other aspects of a defendant's conduct will not often be at issue. If they are at issue, a threshold inquiry of whether danger to reputation was or should have been evident is necessary.[370]

There is little question that the duty to determine whether danger to reputation is or should be evident is of constitutional magnitude. Thus, a showing of fault is constitutionally required for those elements of the defamation tort, when at issue, whether the plaintiff is a public person or a private citizen.[371] Even before *Gertz,* the United States Supreme Court had made it clear that aspects of a defendant's conduct other than awareness of falsity were of constitutional dimension.[372] In *New York Times Co. v. Sullivan,*[373] the Court held that the evidence was constitutionally "incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' the [plaintiff]."[374] Additionally, in *Greenbelt Cooperative Publishing Association v. Bresler,*[375] the Court found "as a matter of constitutional law" that the word "blackmail" in the circumstances of that case "was not slander when spoken, and not libel when reported" by the newspaper.[376]

If appellate review of the adequacy of evidence for each element of the defamation tort is necessary to enhance the "breathing space" of speakers and publishers and to deter self-censorship, it follows that a finding of fault for other elements is likewise essential to fulfill both goals. Indeed, it would appear that *Gertz* does not make any sense and is rendered meaningless if it is to be confined to a defendant's awareness of falsity. Unlike fault in the conventional tort action for personal injury or property damage, fault in a defamation context has constitutional implications.[377] Simply stated, the requirement of fault would ensure a minimum area of "breathing space" and therefore insulate a speaker or publisher from liability for innocent conduct.[378] The question here is not whether fault is constitutionally mandated; rather, it is what quantum of fault should be required.

All plaintiffs, public or private, should be required to prove that a defendant knew of the potential danger to the plaintiff's reputation or that he acted recklessly in not anticipating the danger. Mere negligent failure to anticipate danger to reputation is constitutionally insufficient.[379] The argu-

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370. *Id.*
371. *See* RESTATEMENT (SECOND) OF TORTS § 580B comment d (1977).
372. New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964).
373. 376 U.S. 254 (1964).
374. *Id.* at 288.
375. 398 U.S. 6 (1970).
376. *Id.* at 13.
377. *See* Anderson, *Libel and Press Self-Censorship,* 53 TEX. L. REV. at 424.
378. *Id.* at 460.
379. *Cf.* New York Times Co. v. Sullivan, 376 U.S. at 283.

ment is that if a court judged the accuracy of a statement in terms of how the recipients actually understood it, the defendant would have to admit "he never believed the truth of the statement" as understood by those recipients.[380] Neither the *New York Times* malice test nor the *Gertz* test would afford a great deal of protection because those tests would not be applied to that which the speaker or publisher thought he was communicating or about whom he was communicating.[381] A defendant could exercise extreme care in verifying the truthfulness of what he thought he was communicating only to be held liable, for example, because he negligently conveyed a different meaning or was negligently unaware of an extrinsic fact.[382] The ease of establishing fault under *Gertz* in such a situation demands that the plaintiff show a greater degree of culpability on the part of the defendant in failing to anticipate the potential danger to the plaintiff's reputation.[383] To impose a duty of due care upon a speaker or publisher to search for hidden ambiguities or significant extrinsic facts would not be compatible with the free exchange of ideas which rests at the core of first amendment rights.[384] Proof by clear and convincing evidence of the defendant's actual knowledge or reckless disregard of probable deleterious effects upon the reputation of a plaintiff should be required for all defamation actions.[385] *New York Times* and *Greenbelt Cooperative* provide further protection in the form of de novo or independent appellate review.[386] The application of this standard to each element is briefly discussed below.

Whether the defendant intended to make the statement as published is at issue only in instances where mistakes such as a typographical error have been made, a slip of the tongue has occurred, or where the words used have more than one meaning.[387] If, for example, words have more than one meaning, a defamatory one and a non-defamatory one, liability should not be imposed unless: 1) the context of the communication reasonably supports a defamatory construction; and 2) the defendant knew or recklessly failed to

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380. Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. at 843.

381. *Id.*

382. *See id.*

383. *See id.*

384. *Id.*

385. *Id.* at 844. *See also* RESTATEMENT (SECOND) OF TORTS § 580A comments d and f, § 580B comments d and i (1977).

386. In *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984), the Court intimated in dicta that the only issue in a defamation action subject to independent review is *New York Times* malice; factual findings on other elements can be reversed only on errors of law. *Id.* at 1967 n.31. This dicta is clearly inconsistent with the holdings of *New York Times* and *Greenbelt Cooperative* in which the Court clearly substituted its judgment for that of the lower courts on issues other than *New York Times* malice. *See supra* text accompanying notes 376-79.

387. RESTATEMENT (SECOND) OF TORTS § 580B comment b (1977).

recognize the defamatory potential of the words used in that context.[388] Thus, if a defendant calls plaintiff "duplicitous," the context of the communication should first be examined to determine if a reasonable person could understand the reference as defamatory and, if so, whether the defendant knew or recklessly failed to recognize the defamatory meaning.

At common law liability was imposed even though the defendant may inadvertently defame someone of whom he has no knowledge as illustrated by the famous case of *Jones v. Hulton & Co.*[389] In *Jones*, the defendant newspaper had published a story containing "defamatory statements" regarding Artemus Jones, who was a figment of the writer's imagination.[390] A "real" Artemus Jones then appeared on the scene and claimed that the story defamed him since it had been understood by his neighbors to refer to him.[391] The House of Lords affirmed a judgment in Jones's favor.[392] Jones should not be allowed to recover damages today unless he can offer proof that the defendant knew or recklessly refused to acknowledge that recipients of the publication would reasonably understand it to refer to him. This situation may arise today in a fictional work where a character bears some similarity to one who has been involuntarily thrust into the public eye because of the published work. Readers of this fiction may perceive the similarity. If that private plaintiff brings suit he should have no problem proving fault under the *Gertz* standard since the fictional work was obviously not intended to be true. A plaintiff must prove that the publisher knew or recklessly disregarded the fact that readers may interpret the publication to concern actual events "of and concerning" the plaintiff.[393]

The final instance where a publisher's fault may be at issue is the failure to recognize that facts extrinsic to the publication make an otherwise innocent statement defamatory. This issue is prominent in libel per quod where the defamatory character of the communication is not apparent on the face of the communication.[394] The classic example of libel per quod most cited is the case in which the defendant's newspaper published a false report that plaintiff had given birth to twins when certain readers knew that she had been married only a month.[395] If the mores of our time would permit a claim to be stated on these facts today, the plaintiff should be required to prove that the defendant was aware of, or recklessly disregarded, the fact of

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388. *See* Wade, *The Communicative Torts and the First Amendment*, 48 Miss. L. J. 671, 701-02 (1977).

389. [1909] 2 K.B. 444, *aff'd*, [1910] A.C. 20.

390. *Id.*

391. *Id.*

392. [1910] A.C. at 24.

393. *See* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 844-45 (1984). *See also* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 87-88 (1983).

394. *See supra* note 41 and accompanying text.

395. Morrison v. Ritchie & Co., [1902] Fr. Sess. Cas. 645.

her month-long marriage.

The impact of *Gertz* on the common law of defamation is truly far-reaching. To summarize, most defamation actions will only involve the issue of the defendant's awareness of falsity. Proof of negligence by a preponderance of the evidence is sufficient for this element which is subject to independent appellate review. When at issue, the aspects of a defendant's conduct which involve awareness of the defamatory character of the publication as applied to the plaintiff also require a showing of fault.[396] Specifically, all plaintiffs must prove by clear and convincing evidence that the defendant knew that a particular communication may involve harm to the plaintiff's reputation or that the defendant acted recklessly in not anticipating that such harm would be involved. Independent appellate review is likewise constitutionally compelled for these other elements.

C. *The Impact of Gertz on Proof of Damages*

Notwithstanding *Dun & Bradstreet*, the holdings of *Gertz* that actual injury must be proven and that punitive damages are recoverable only upon a showing of *New York Times* malice should be extended to all defamation actions. The presence of a public issue should have no bearing upon what proof a plaintiff must adduce regarding damages. In addition, it should be noted that the requirement of actual injury, combined with the requirement of fault, eliminates the distinction between libel per se and libel per quod.[397] Special or pecuniary damages were required in many jurisdictions for libel per quod because the defamatory potential was not evident on the face of the publication.[398] Now, all libels, whether they be apparent from the face of the publication or not, should involve proof of fault and actual injury. Similarly, the requirements of fault and actual injury eliminate any need for the distinction between slander and slander per se, as in the case of libel per quod; the common law had required a plaintiff to prove special harm or pecuniary damage to recover for slander.[399]

VI. Conclusion

The *Gertz* Court's adoption of a fault standard regarding a defendant's awareness of the falsity of a defamatory communication and *its* adoption of a rule requiring proof of actual injury foreshadowed the demise of the com-

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396. *See supra* notes 343-98 and accompanying text.

397. *See* Restatement (Second) of Torts § 569 comment b (1977).

398. *See supra* notes 50-53 and accompanying text.

399. Nevertheless, the authors of the *Restatement (Second) of Torts* decided that both slander actions should be retained, and that proof of pecuniary damage is a necessary element for slander. If it was too late in 1812 for Lord Mansfield to void the arachaic distinction between libel and slander, Thorley v. Lord Kerry, 128 Eng. Rer. 367, 371 (Exch. Ch. 1812), *see supra*, note 51, it was evidently too late in 1977 for the American Law Institute to recommend a change.

mon law of defamation. The holdings of *Gertz* were long overdue; the fiction of implied malice and the role of actual malice or improper purpose, two aspects of the strict liability system, often gave too much weight to reputation at the expense of freedom of expression. The purpose-oriented conditional privileges are no longer necessary after *Gertz*. Conduct vis-a-vis the truth of a communication, not the defendant's attitude toward the plaintiff, is now the fulcrum on which the competing interests of reputation and freedom of speech are balanced. It is unfortunate that the Court in *Dun & Bradstreet* did not extend the protections of *Gertz*, as a matter of federal constitutional law, to those defamatory publications which concern matters of public interest. No justification exists, however, to retain the strict liability system even where no public issue is present. The state's interest in protecting the reputations of its citizens through the tort action of defamation deserves no greater protection than other tort actions, particularly where freedom of speech can be affected. Fault, therefore, should be the rule for defamation.

The extension of the fault requirement to other aspects of a defendant's conduct, when at issue, would complete the modernization of the law of defamation. The tort action would be based, as most other torts are, on the concepts of fault and forseeability which form the cornerstone of the modern tort system. No longer would scholastic disquisitions on malice be necessary; no longer would burdens of proof shift back and forth; no longer would judicial value judgments on what constitutes a matter of public concern be necessary; no longer would speakers and publishers publish at their peril. Instead, there would be a rule of broad applicability and, concomitantly, predictability of result and certainty of expectation. The fog and fictions which have enveloped the law of defamation will be lifted, if not dissipated.