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DEFAMATION AND THE FIRST AMENDMENT: NEW PERSPECTIVES: THE PLAINTIFF'S BURDEN IN DEFAMATION: AWARENESS AND FALSITY

NAME: MARC A. FRANKLIN * and DANIEL J. BUSSEL **

BIO:

* Frederick I. Richman Professor of Law, Stanford Law School. A.B. 1953, LL.B. 1956, Cornell University.

** Class of 1985, Stanford Law School. B.A. 1981, University of Pennsylvania.

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LEXISNEXIS SUMMARY:

... Although twenty years have passed since the United States Supreme Court revolutionized the common law of defamation with its decision in *New York Times Co. v. Sullivan*, many implications of that revolution have not been appreciated fully. ... We will concentrate in this Article on two of the many elements that a plaintiff must establish in making out a prima facie case of defamation: whether the defendant must be aware of the defamatory meaning of his statement; and whether the plaintiff must establish that the defamatory statement is false. ... If a court were to impose a duty upon a speaker to use due care to search for hidden ambiguities, special characteristics of the proposed audience, or significant extrinsic facts, would the same standard apply to media and nonmedia defendants? The United States Supreme Court has implied that in cases involving media defendants, negligence would be sufficient to impose liability, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" ... With time, however, the burden of proof on the issue of the statement's truth or falsity shifted to the plaintiff, so that now a statement is not actionable unless it can be proven false. ... At best, this passage is no more than an anticipatory restatement of the related issues *Gertz* did settle by demanding falsity and shifting to the plaintiff the burden of proving falsity in a private plaintiff case. ...

TEXT:

[*825] I. INTRODUCTION

Although twenty years have passed since the United States Supreme Court revolutionized the common law of defamation with its decision in *New York Times Co. v. Sullivan*, many implications of that revolution have not been appreciated fully. The revolution was both extended and consolidated in a second landmark, *Gertz v. Robert Welch*,

Inc. n2 In this Article, we will focus on two implications of these decisions. The first is that the fault requirements defined by the Supreme Court in terms of the falsity element necessarily must extend to other elements of a defamation suit. The second is that the plaintiff must establish the existence of a disprovable defamatory statement and must prove the falsity of that statement with convincing clarity. Some of the points raised in this Article may seem hardly disputable, but the fact remains that on every point some courts have erred or have reached correct results only through indefensible paths. Although other points presented in this Article may not be as clearly undeniable, these points also seem to flow necessarily from constitutional principles.

By constitutionalizing the common law of defamation, the [*826] United States Supreme Court dramatically reshaped the elements of the plaintiff's prima facie case. Until 1964, a plaintiff usually had to show only that the defendant intentionally or negligently published a remark that defamed the plaintiff in the minds of the recipients. Although the plaintiff had to allege falsity, the defendant generally had to justify his statement by proving its truth. n3 Upon the plaintiff's showing that the statement was defamatory, liability and damages were presumed. n4 The defendant, of course, had a considerable number of potential defenses, n5 but these defenses were generally burdensome to establish or defeasible, or both. n6 Thus, the defendant bore the burden of proof on the crucial issues.

With the Supreme Court's constitutionalization of this area of the law, however, the plaintiff has lost his favored position. Even leaving aside the often critical questions pertaining to special and actual injury damages, n7 the plaintiff's prima facie case has become more complex and more difficult to establish because he now bears the burden of proof on the issues of falsity and fact. Moreover, in some cases, the courts have required the plaintiff to establish the [*827] element of fault with clear and convincing proof. n8 The shoe is indeed on the other foot. In light of the plaintiff's now disfavored position, it is not surprising that plaintiffs win less than ten percent of the litigated defamation suits. n9

We will concentrate in this Article on two of the many elements that a plaintiff must establish in making out a prima facie case of defamation: n10 whether the defendant must be aware of the defamatory meaning of his statement; and whether the plaintiff must establish that the defamatory statement is false. Although commentators have given significant attention to both of these elements, they generally have given greater attention to the public-private distinction and the choice of proper fault levels. n11

[*828] II. DEFAMATORY STATEMENT

The *Restatement (Second) of Torts* indicates that "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." n12 This standard, which is obviously broad, is not all-inclusive. Merely vituperative or pejorative comments are not in themselves actionable n13 under this standard because a statement, even if abusive or unpleasant, is defamatory only if it injures the plaintiff's reputation.

Historically, defamation has been a recipient-centered concept. Because the recipients' reaction to the speaker's words establishes the harm to be redressed, the first step in analyzing the defamatory nature of a statement is determining whether the recipients reasonably could interpret those words in a defamatory sense, and whether they did so. Because of the various subtleties associated with any language, this task can be quite complex. The recipient's interpretation of a given statement is highly variable, depending upon the words themselves, the context in which those words are spoken, and the recipients' values, n14 background, and knowledge. n15

[*829] In an effort to cope with the unruly nature of words, the courts [*830] have developed various techniques to help determine meanings. The most important of these techniques, aside from examining the words themselves, is analyzing the context in which the words were spoken. n16 Context can convert a seemingly innocuous statement into a defamatory one and vice versa. n17 Context includes the circumstances in which the communication was made, non-verbal elements of the communication, such as winks or pointed fingers, and facts known by the recipients that are extrinsic to the communication.

The role of context, which is mandated by logic and was developed [*831] by the common law, was elevated to constitutional stature in *Greenbelt Cooperative Publishing Association v. Bresler*. n18 In *Greenbelt*, the plaintiff, a real estate developer, sought a zoning variance from the city council at a time when the council was seeking to acquire a different tract of land that the developer owned. A newspaper reported that some persons at a public meeting had characterized the plaintiff's behavior as "blackmail."

The plaintiff claimed that the newspaper's use of the term "blackmail", when it knew that the plaintiff had not committed such a crime, constituted the knowing use of falsehood. The United States Supreme Court rejected this

claim, however, holding that, "as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported" n19 by the newspaper. The Court reasoned:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. n20

The Court observed that if the article "had been truncated or distorted in such a way as to extract the word 'blackmail' from the context in which it was used at the public meetings, this would be a different case." n21

Justice White, concurring on other grounds, rejected the majority's analysis. He indicated that he could not agree with the [*832] Court's decision if the holding was intended to suggest that there was "no evidence to support a judgment that the charge of blackmail would be understood by the average reader to import criminal conduct. . . ." n22 Justice White maintained that:

[t]he very fact that the word is conceded to have a double meaning in normal usage is itself some evidence; and without challenging the reading of the jury's verdict by the Maryland Court of Appeals, I cannot join the majority claim of superior insight with respect to how the word "blackmail" would be understood by the ordinary reader in Greenbelt, Maryland. n23

Justice White recognized, however, that protection from surprise liability for defamation was justified in order to avoid the danger of self-censorship:

But it is quite a different thing, not involving the same danger of self-censorship, to immunize professional communicators from liability for their use of ambiguous language and their failure to guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the eyes of the average reader. I see no reason why the members of a skilled calling should not be held to the standard of their craft and assume the risk of being misunderstood -- if they are -- by the ordinary reader of their publications. n24

Even if context is taken into account, complex language often does not lend itself to a single interpretation. Three related fact situations raise this problem of multiple meanings. The first situation involves the inherently ambiguous statement, in which a statement on its face may have several meanings. An example of an inherently ambiguous statement can be found in *Fong v. Merena*, n25 in which the defendant placed a sign on his lawn, stating:

Ushijima/Fong
Voted "Yes"
Pension/Pay Raise

[*833] Even if one knows that Ushijima and Fong are members of the state legislature and that the pension and legislative pay raise bills were highly controversial bills, the meaning is not clear. The defendant contended that the sign was meant to convey the idea that Representative Ushijima voted for the pension bill and that Representative Fong voted for the pay raise bill, and that both representatives should be voted out of office in the forthcoming election because of their votes. The defendant testified that he had not realized that people might interpret the sign to mean that each representative had voted in favor of both bills. n26 In situations such as this, where the statement remained ambiguous even when viewed in its context, the common law imposed liability upon the speaker for that which the recipients understood, without regard to the speaker's intent. n27

A second situation raising the problem of multiple meanings derives from a fragmentation of the recipient audience, rather than from any inherent ambiguity in the speaker's words. This type of situation is more likely to occur with media, rather than nonmedia, speakers because of the size and diversity of media audiences. Perhaps the best reported example of this type of ambiguity is found in *Rudin v. Dow Jones & Co.* n28 In *Rudin*, *Barron's* printed a headline referring to the attorney-plaintiff as a "mouthpiece" for Frank Sinatra. The plaintiff established that among attorneys the term "mouthpiece" has a distinctly defamatory meaning -- namely, that the person is an unscrupulous Mafia lawyer. n29 The defendant, on the other hand, showed that, among most readers of the publication, "mouthpiece" is little more than a slang term for lawyer, much as "sawbones" is used for members of the medical profession. n30 Thus, differences in the education, background, and experiences of members of the audience may cause them to attribute different mean-

ings and constructions to the same words spoken in the same context. Here too, a recipient-centered standard of defamation raises the possibility that a court will hold a defendant liable [*834] for something he did not mean to convey.

The final situation involving the problem of multiple meanings may be the most difficult for defendants to avoid. This situation arises when an otherwise innocent statement becomes defamatory because some or all of the audience know an extrinsic fact. The classic example of this type of situation involves the publication of an engagement notice about a man who is already married. Those who know this unstated fact may think either that the man is lying to his alleged fiancée, or that the woman they considered to be his wife is in fact not legally married to him. n31 At common law, the speaker was liable for such a statement, although he may not have known or had reason to have known the extrinsic fact giving rise to the statement's defamatory meaning. n32

This brief look reveals the inherent problem with the common law's exclusive focus on the recipients' interpretation of the statement. In the next section, we explain in greater detail why the exclusive focus on the recipient is no longer acceptable and why any confusion regarding the meaning of the statement should be resolved in favor of the defendant who has acted in good faith.

III. AWARENESS OF MEANING

A. *Public Plaintiffs*

Requiring the plaintiff to prove that the publisher of a defamation was aware of, or recklessly blinded himself to, the defamatory import of his words logically stems from the United States Supreme Court's decision in *New York Times Co. v. Sullivan*. n33 *New* [*835] *York Times* involved a political advertisement that criticized the civil rights record of certain Alabama officials. Although some facts stated in the advertisement concededly were inaccurate, the Court barred the state from imposing liability on the defendant.

The Court held that the imposition of strict liability for defamatory falsehood was impermissible if the defamation concerned the public conduct of a public official. The Court reasoned that, if strict liability were imposed, critics of the government might refrain from comment out of fear of liability for a completely innocent error. The Court recognized that an "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" n34

The Court then proceeded to consider whether false or defamatory speech would permit the imposition of liability, despite the need to protect free speech. Having concluded that neither false nor defamatory speech alone would be sufficient to warrant liability, the Court next considered whether liability should be imposed for a statement containing both types of speech. The majority concluded that, "[i]f neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798. . . ." n35 The Court thus determined that the Alabama rule allowing truth as a defense was inadequate:

[*836] Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. n36

This line of reasoning thus brought the Court to its holding:

The constitutional guarantees [of the first and fourteenth amendments] require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. n37

New York Times thus introduced the element of fault into defamation suits. In defamation suits involving media defendants, the plaintiff now must establish, in various gradations, n38 some fault on the part of the defendant with regard to the false statement. n39

The important implication of the *New York Times* decision, for our purposes, is that the plaintiff also must show fault when establishing other elements of his defamation suit. To ensure that liability [*837] is not imposed upon a faultless defendant, courts must require the plaintiff to establish with convincing clarity that the defendant was aware of, or blinded himself to, the allegedly defamatory meaning of the statement that he was making. n40 The Supreme Court's

concern with self-censorship cannot justifiably protect a defendant who utters a statement that he knows will hurt another's reputation, yet fail to protect a person who does not realize that his statement can be interpreted to damage another's reputation.

Although some have seen a "chilling effect" in the absence of an awareness requirement, n41 a general argument that individuals will remain silent rather than run the risk of surprise liability when they do not suspect that they might be defaming may seem implausible. On the other hand, media organizations may recognize some correlation between articles on certain subjects, and the likelihood of surprise defamations. We prefer to rely, however, on broader notions of first amendment analysis to justify the awareness test than on this untested empirical assumption.

One does not need to accept the entire self-fulfillment approach to freedom of expression to reject a system that might produce self-censorship out of a fear that a statement may be inadvertently [*838] defamatory. n42 Those who find support in the marketplace of ideas approach or the self-governance approach to the first amendment also would reject any system that threatens speakers with strict liability for surprise defamations. n43

The Supreme Court of Hawaii sensed this problem in *Fong v. Merena*. n44 In the face of the plaintiff's assertion that Merena knew that Fong had not voted for the pension bill, the court countered by noting that Merena did not intend that his message be read in that manner. The fact that the sign could have been construed as Fong asserted was not "sufficient to prove that Merena acted with actual malice." n45 The Court reasoned that "[i]t has not been clearly and convincingly shown that in making the publication, Merena believed that it was false." n46 The Court therefore set aside the trial judge's finding to the contrary.

A more elaborate discussion of the issue occurred in *Good Government Group of Seal Beach v. Superior Court*, n47 in which a bitter and protracted municipal dispute resulted in an attempt by the defendants to recall, among others, the plaintiff councilman. During the recall campaign, the defendants circulated a flyer accusing [*839] the plaintiff of using "blackmail and extortion" against the R & B Development Company. The flyer referred to a settlement between the city and the company under which the city had agreed to accept \$ 100,000 from the company in exchange for waiving certain environmental objections to one of R & B's construction projects.

The California Supreme Court first concluded that, viewed in its context, the flyer was ambiguous and that reasonable readers could have interpreted the statement as an accusation that the plaintiff had committed the criminal offense of blackmail. The defendants conceded that they knew that the plaintiff was not guilty of the crime of blackmail. In remanding the case for trial, the court observed:

It is clear that honest belief of the defendant is the touchstone of the privilege enunciated in *New York Times*, and that a statement is entitled to constitutional protection if the words used are ambiguous but the defendant honestly and without recklessness believes that they constitute an opinion or idea. We hold, therefore, that in order to find the requisite malice from the publication of ambiguous words which could constitute either fact or opinion, the jury must find not only that the words were reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his words in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact. n48

The court recognized that anything less protective "would render a defendant liable for a defamatory statement negligently made and would create precisely the chilling effect on speech which the *New York Times* rule was designed to avoid." n49 The result "would be a hobbling of free speech by the continuing fear of liability for the use of inexact semantics." n50

A similar result would follow from the imposition of liability on defendants who are not aware of, and who did not blind themselves [*840] to, extrinsic facts that render an otherwise innocent statement defamatory. n51 Requiring a comparable showing of deliberate or reckless behavior on the part of the defendant at the "meaning" stage of the analysis would avoid the inconsistency of holding defendants to a higher standard of conduct when their fault involves the meaning of their statement, rather than the statement's falsity. n52 Moreover, in *New York Times*, the United States Supreme Court required the plaintiff to establish the defendant's knowledge of the statement's falsity or the defendant's reckless disregard of the truth with "convincing clarity." n53 The Supreme Court demonstrated its concern about improper impositions of liability when it held that a preponderance of the evidence standard was inadequate to protect the defendant. To surround the fault determination with such protections while leaving the defendant with less protection on the question of the statement's meaning would be perverse. No evidence exists to suggest that the Supreme Court intended such a result.

One could argue, however, as perhaps Justice White implied in his concurrence in *Greenbelt*, n54 that "awareness of meaning" might be required for nonmedia, but not media, defendants. It is true that one of our arguments favoring the awareness of meaning standard is based on concern for the average citizen, as in *Fong*, who should not require expert advice or reasonable intelligence before taking part in discussions. The use of a reasonable person standard by the courts for determining the meaning of a statement would [*841] expose those who are less well-educated, less well-advised, less adept with language, or simply less intelligent, to the risk of liability for meanings that they never contemplated.

Although the use of the negligence principle in many personal injury situations reflects society's willingness to put negligent actors at a legal risk, two factors should lead the courts to reject the use of a negligence standard for meaning. One factor is the nature of the harm suffered. Although serious harm to an individual's reputation may occur in a libel case, n55 defamation does not present the same need for compensation as does a personal injury with its attendant medical bills and lost wages. Moreover, that initial harm may be mitigated by such devices as the plaintiff's reply or the defendant's retraction. A second factor militating against the use of a negligence standard in defamation cases emerges from the deference that our society accords to freedom of expression. Nothing in the personal injury area cuts as strongly as freedom of expression against the casual imposition of liability, especially by unsympathetic juries. n56

Despite these special concerns regarding nonmedia defendants, the awareness standard should protect both media and nonmedia defendants. As we have already shown, n57 the full protection of the *New York Times* test will be undermined if a plaintiff can establish other elements of liability on showings of lesser fault. Moreover, the courts need to be wary of discouraging vigorous media coverage, especially by smaller media organizations. n58

Applying the same awareness standard to media and nonmedia defendants may, in fact, produce different results. Because the factfinder does not have to accept the defendant's assertion that he was not aware of the statement's defamatory meaning, n59 one might reasonably expect a factfinder to reject an urban newspaper's contention that its editors did not realize that a particular word or phrase was ambiguous, but to accept a similar contention from a nonmedia defendant. Although the awareness standard applies to [*842] all cases involving public plaintiffs, results may differ for media and nonmedia defendants according to their actual knowledge. n60 An inference may arise for both media and nonmedia defendants that the meaning that the recipient reasonably derived from the statement was the meaning that the speaker intended to convey, but this is at most an inference, and not the rule of law created by the common law.

Finally, the courts in both *Fong* and *Seal Beach* treated the awareness of meaning requirement as part of the *New York Times* test when they concluded that a court could not apply that test to a defamatory meaning that the defendant did not intend to convey. Although difficulty does arise in applying the *New York Times* test of deliberate falsity or reckless disregard to a speaker who is unaware of the defamatory meaning, we prefer to make this a separate argument because it produces clearer analysis and because we reject the symmetry of that linkage in cases of private plaintiffs.

B. Private Plaintiffs

In the previous section, we contended that the protection accorded by the *New York Times* line of cases would be undermined if the courts do not use a comparable test in determining the defendant's awareness of the statement's meaning. Different arguments, however, must support an awareness test -- as opposed to a negligence test -- for determining the defendant's liability on the issue of the statement's meaning in defamation suits brought by private plaintiffs.

Those who disagree with the United States Supreme Court's acceptance of a negligence standard for falsity in *Gertz v. Robert Welch, Inc.* n61 surely would reject the use of a negligence standard for determining whether the defendant was aware of the statement's defamatory meaning. Even if the negligence standard is appropriate [*843] on the question of falsity, the use of the negligence standard in determining the defendant's awareness of meaning as well would seriously dilute the protection afforded to a speaker. A court's use of the negligence standard in both determinations would permit the imposition of liability when the speaker negligently failed to consider some extrinsic fact or some ambiguity in his remarks. If the court then judged the truth or falsity of the statement in terms of how the recipient actually understood that statement, the defendant would have to admit that he never believed the truth of the statement as it was understood by those recipients who knew the extrinsic fact or who understood an unintended meaning. The *Gertz* test would afford scant protection in such cases because it no longer would be applied to that which the speaker thought he was saying. Thus a speaker who was reasonably careful about the accuracy of what he thought he was saying nevertheless would be liable if the statement, because of his negligence, conveyed a different meaning.

Although telling a speaker to be careful to publish only the truth about a specific subject that he knowingly addresses may be acceptable, telling a speaker to be careful to convey precisely what he wishes to say is much more de-

manding. Imposing liability for a speaker's failure to meet an objective standard of care under which the speaker must convey only a single desired meaning and avoid any other possible meanings might discourage discussion, at least marginally, because the unfairness of liability on some might induce others to abstain from some speech. Thus, underlying first amendment concerns, independent of the issues raised in *New York Times*, support a universal application of the awareness test.

If a court were to impose a duty upon a speaker to use due care to search for hidden ambiguities, special characteristics of the proposed audience, or significant extrinsic facts, would the same standard apply to media and nonmedia defendants? The United States Supreme Court has implied that in cases involving media defendants, negligence would be sufficient to impose liability, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" n62 The case would be different, the Court reasoned, if a state sought to impose civil liability [*844] "on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." n63 It would be only too easy for a jury to conclude that *someone* at the newspaper should have known of the latent ambiguity or hidden fact. The only way to avoid such a result is to require the plaintiff to establish that the media defendant was aware of the defamatory meaning at the time the statement was uttered. Again, in appropriate cases, subject to the requirement of convincing clarity, n64 the trier of fact may choose to disbelieve the defendant's naked assertion to the contrary.

The argument for not invoking the public-private distinction when analyzing the meaning element is reflected in *Valentine v. C.B.S., Inc.*, n65 one of the few cases that addresses this problem in the context of a private plaintiff. In *Valentine*, the plaintiff, Patty Valentine, claimed that a Bob Dylan song portrayed her as a participant in a conspiracy to falsely convict Rubin "Hurricane" Carter of murder. Although the song describes Valentine's testimony against Carter, Dylan and his codefendants claimed that the lyrics did not portray Valentine as other than an innocent person taken in by the ballad's villains. The United States Court of Appeals for the Eleventh Circuit agreed with the defendants' contention and held that the lyrics were substantially true. The court further held that

[t]he facts indicate there is no triable issue as to whether the defendants took reasonable precautions to ensure the song's accuracy, particularly in view of their beliefs that Valentine was not part of the conspiracy and that the song did not depict her as being so. Several individuals, including two attorneys, repeatedly reviewed the lyrics. The plaintiff offered nothing to rebut defendant Dylan's deposition testimony that he believed the song did not depict Valentine as a participant in the alleged [*845] frame-up. All defendants shared this belief. Nothing in the record contradicts the district court's view in this regard. n66

Although the court's reasoning is not explicit, this passage does appear to conclude that the court could not find negligence on the part of the defendants with regard to whether they had taken reasonable steps to ensure the accuracy of the lyrics because of overwhelming proof that Dylan was never aware that the statement could be considered to defame the plaintiff.

C. "Awareness" Applied

Requiring both public and private plaintiffs to establish that the defendant was aware of the statement's defamatory meaning effectively solves several of the multiple meaning problems discussed earlier. In applying the "awareness" test before trial, the court first should consider whether the plaintiff can show that the relevant recipient group understood the statement in a defamatory way. If the court determines that a defamatory meaning exists or that a jury reasonably could find that such a meaning exists, the court then should ask whether the plaintiff can prove that the speaker was aware that his statement conveyed this meaning to the recipients, or blinded himself to that possibility.

The issue of inherent ambiguity was central in *Fong*, in which the defendant admitted that he knew that Representative Fong had not voted for the pension bill, but insisted that his sign did not convey that message. Indeed, the defendant testified that he had "considered it carefully and [he] reaffirmed in [his] own mind that [he] had constructed the sign correctly and the contents of the sign were correct." n67 The Supreme Court of Hawaii concluded that, although the trial judge had found that the defendant had acted with actual malice, the evidence did not show "clearly and convincingly" that in making the publication the defendant believed that it was false. Although a court should consider whether the defendant was aware of his statement's defamatory meaning apart from its consideration of whether the defendant knew the falsity of the statement, the court in *Fong* was on the right track.

[*846] Although the *Rudin* case, discussed earlier in connection with the problem of the fragmented audience, n68 required two separate published opinions on the issue of defamatory meaning, n69 the case properly boils down to one quite straightforward issue of fact: were the editors of *Barron's* aware that "mouthpiece" might be construed by a

substantial segment of its readership to mean an "underworld lawyer." n70 The judge explicitly referred to, but rejected, evidence relevant to this issue. n71

Focusing on the defendant's awareness of the statement's defamatory meaning also effectively addresses the problem created by extrinsic facts that convert an otherwise innocent statement into a defamatory one. Instead of applying the clumsy rules of libel per quod, which apparently had their origins in extrinsic fact situations, n72 the court should ask whether the defendant was aware of, or purposely blinded himself to, the extrinsic fact that transformed the innocent statement into a defamatory one. Basing liability upon the defendant's awareness of the meaning creates a rule that is clear and understandable and that also produces substantial justice between the parties in a society that places a high value on freedom of expression by requiring a very good reason to shift losses from the plaintiff to the defendant when the crucial behavior is speech. Yet such a rule does not protect the intentional lie or the recklessly false statement uttered with awareness that it would harm another's reputation. n73

[*847] Apart from the constitutional thrust of the argument, this approach to determining the relevant meaning is superior to the bizarre common law use of damage rules to control liability. The common law approach permits some malevolent defendants to escape liability because they phrased their defamations elliptically, while providing absolutely no protection for some innocent defendants whose inadvertent defamations happened to be slanderous per se. n74 Thus, the sounder approach, as embodied in the awareness standard, is simply to let the losses fall where they may unless the plaintiff can establish the defendant's awareness of the defamatory import of the statement.

The few courts and commentators who explicitly have addressed the issue generally have treated the requirement of awareness as a logical imperative, although restricting the requirement to suits brought by public plaintiffs. n75 Although courts in several other cases have adopted the *Seal Beach* and *Valentine* approaches n76 and the awareness requirement has been expressly rejected on occasion, n77 most courts probably do not discuss the requirement because the defendant's lawyer fails to raise the point.

D. A Curious Aberration

The common law of defamation saw no reason to distinguish between what a person explicitly said and what he conveyed by implication. n78 This [*848] common law position is essentially a corollary of the rule that a statement must be viewed in its context. The common law recognized the reality of human communication by looking to what a person reasonably implied by his statement, as well as by what he explicitly stated. Unfortunately, inferences and implications are tricky matters. A recipient may infer meanings that the speaker never intended to imply and, just as easily, may fail to draw an inference that the speaker intended or reasonably expected the recipient to draw.

The United States Supreme Court never has intimated that those who defame through implication should be immune from liability. n79 Despite the Supreme Court's silence on this issue, a number of lower courts that claim to be following a Supreme Court mandate have refused to impose liability for statements that are defamatory by implication. In *Mihalik v. Duprey*, n80 for example, the Massachusetts Appeals Court declined to impose liability on a defendant whose statements had been only implicitly defamatory. In *Mihalik*, the plaintiff was a member of the local school board, which was engaged in labor negotiations with the teachers' association. During the negotiations, the association's newspaper published an article asserting, among other things, that the plaintiff had furniture made at the district's trade school. By failing to note that any resident who furnished or paid for the necessary materials could have furniture made at the school, the newspaper undoubtedly meant to imply that, by having the furniture made, the plaintiff had abused his office. Considering the context in which the publication had been made, the jury concluded that the import of the statement was defamatory. On appeal, however, the court set aside the judgment on the ground that, under the *New York Times* standard, a defendant could not be held liable for a literally true [*849] statement, even if that statement had an "insinuating overtone." n81 Although earlier Massachusetts cases had recognized liability for what was "insinuated as well as for what [was] stated expressly," the court maintained that that case law was no longer valid in the light of the *New York Times* decision. The court also distinguished an earlier decision by the state's supreme court on the ground that that case had not involved a public official. n82

The Louisiana Supreme Court reached a similar result in *Schaefer v. Lynch*. n83 In that case, the defendant, a newspaper reporter, wrote a story about the director of the state retirement system, implying that the director had used his public office to influence commercial lenders to further a personal investment. Although the court recognized that previous cases had held that "truthful statements which carry a defamatory implication can be actionable," n84 the court maintained that, in the light of *New York Times*, that law was now applicable only to cases involving private plaintiffs and private affairs. The court reasoned that, because statements about public officials are privileged in the absence of constitutional malice, the result "surely follows that all truthful statements are also constitutionally protected. Even

though a false implication may be drawn by the public, there is no redress for its servant. Where public officers and public affairs are concerned, there can be no libel by innuendo." n85

The courts in these, as well as other, n86 cases are overreaching in [*850] their attempt to protect from liability the speaker who unknowingly defames. Although constitutionally these courts could grant an absolute privilege to speakers who deliberately seek to convey false impressions, these courts have not chosen to do so. Rather, these courts simply are attempting to follow the federal policy of not imposing liability on innocent defendants. In an effort to fulfill that policy, they have maintained that those who defame by implication must be protected. What these courts fail to realize, however, is that by basing liability on the defendant's awareness of the statement's defamatory meaning, a court could spare a defendant who unintentionally defamed another, while at the same time impose liability on a defendant who intentionally defamed through implication. As some courts have recognized, n87 no constitutional reason exists for differentiating between those who defame implicitly and those who defame explicitly.

One may argue, however, that by protecting implicit defamation, a court does not have to decide the issue of credibility, thereby promoting judicial economy. Whether judicial economy is actually served, however, is questionable. If the court did impose liability for implicit defamation, the issue of credibility probably would not be contested in enough cases to create docket congestion. Moreover, courts already try similar issues in *New York Times*-type cases and they have rejected absolute protection for deliberate lies. Finally, a rule that encourages evasive communication seems too great a price to pay to achieve judicial economy. n88

We hope the courts will become more sophisticated in their understanding of the constitutional concerns reshaping the law of [*851] defamation. As they do, the courts will realize that they can resolve several issues of meaning by simply requiring the plaintiff to show that the defendant was aware that the statement was defamatory. These problems are variations on a single theme.

IV. PLAINTIFF MUST PROVE FALSITY

In addition to establishing that the defendant was aware of his statement's defamatory meaning, the plaintiff also must show that the defamatory statement is false. The falsity requirement has evolved gradually through a two-step process. Initially, the courts recognized that truth was a defense in a defamation suit. With time, however, the burden of proof on the issue of the statement's truth or falsity shifted to the plaintiff, so that now a statement is not actionable unless it can be proven false. In this section of the Article, we will explore the two-step development of the falsity requirement.

A. "Truth Must Be A Defense" -- A Transitional Step

At common law, the unbroken rule in England was that truth alone was an absolute defense to a civil action for defamation. n89 The overwhelming majority of the states in this country adopted the English rule. But approximately a dozen states, apparently confusing civil with criminal libel, took the position that truth was an absolute defense only if the defendant had made the statement with "good motives," "justifiable ends," or both. n90 This minority position virtually has disappeared from the common law as a result of the recent constitutional developments in this area. n91

The reasons for the common law view are easy to understand. From a tort perspective, few policies support awarding damages to a person who has a good reputation solely because the public has not learned of the damaging information. Freedom of expression considerations also seem to warrant the protection of truthful [*852] statements. n92

Truthful statements have an affirmative value in society because they inform recipients about the state of affairs and provide the predicate upon which further discussion can take place. Because of the valuable function of truthful statements in our society, many commentators have contended that, although liability should be imposed for making false statements, one should not be liable for expressing truthful statements. John Stuart Mill, for example, observed that "[t]he same reasoning which provides that there should be perfect freedom of expressing opinions, proves also that there should be perfect freedom of expressing true facts. It is obviously upon facts, that all true opinions must be founded. . . ." n93

Beginning with its decision in *New York Times*, the United States Supreme Court has directed extensive attention to this issue. In *New York Times*, the Court held that a plaintiff who is a public official must prove "that the [defamatory] statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." n94

Later in that same year, the Court in *Garrison v. Louisiana* n95 removed any possibility that a state could impose liability for a truthful statement. In that case, which involved a criminal libel action, the defendant attacked a Louisiana statute that permitted a defense of truth only when the utterances were published "with good motives and for justifiable ends." n96 In reviewing the constitutionality of the statute, the Court considered whether such a limitation "should be incorporated into the *New York Times* rule as it applies to criminal libel statutes." n97 The Court observed that *New York Times* held that a public official is entitled to a civil remedy "only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." n98 The Court maintained that this same standard should be applied in criminal libel cases as well, asserting that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." n99

The Court was not confronted with the issue again until a decade later in *Gertz v. Robert Welch, Inc.* n100 In *Gertz*, the majority addressed the issue in the context of a private plaintiff, and implied that proof of the statement's falsity was an essential element of the action. n101 One year later, despite the Court's implication in *Gertz*, the majority in *Cox Broadcasting Corp. v. Cohn*, n102 asserted that the Court had "carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." n103 Justice Powell, who wrote the majority opinion in *Gertz*, attacked this contention in a concurring opinion. He asserted that the question that the majority maintained was left open in fact had been closed by the decision in *Gertz*:

The requirement that the state standard of liability be related to the defendant's failure to avoid publication of "defamatory [*854] falsehood" limits the grounds on which a normal action for defamation can be brought. It is fair to say that if the statements are true, the standard contemplated by *Gertz* cannot be satisfied. n104

The Court ultimately adopted Justice Powell's position in *Time, Inc. v. Firestone*. n105 In that case, *Time* asserted in its defense that the article at issue was true. The majority, citing Justice Powell's concurrence in *Cox Broadcasting*, observed that "[b]ecause demonstration that an article was true would seem to preclude finding the publisher at fault, . . . we have examined the predicate for petitioner's contention." n106

This line of Supreme Court cases clearly establishes that, as a matter of constitutional law, states must recognize truth as a defense in defamation cases. n107 The Supreme Court's position does not reflect a startling development, however, because its position accords with the majority view at common law. If the Court's view holds any significance whatsoever, that significance lies in the rationale behind the rule. The rationale apparently has expanded beyond the rationale underlying the tort view of defamation, which postulates that a civil action is inappropriate for those whose reputations are hurt by true statements, to embrace the broader constitutional view, which seeks to protect freedom of speech.

B. Plaintiff Must Disprove the Statement

At common law, statements that could not be proved true were actionable, unless they were privileged. Because the defense of truth generally was unavailable for such statements, the courts had to develop other defenses to protect statements that, although they could not be proved true, still might contribute to public discussion. n108 Such [*855] statements would include matters of taste and critical views on books, restaurants, and the behavior of prominent individuals. The need to encourage these statements led the courts to create the privilege of fair comment. n109

By requiring the plaintiff to prove that the statement is false, recent United States Supreme Court decisions have substantially bypassed the common law's qualified protections. Now, a wide range of statements that cannot be proved either true or false necessarily are absolutely protected. Although this section begins with a distinction between public and private plaintiffs, we conclude that no difference exists between these two types of plaintiffs with regard to the requirement of disproof. n110

1. United States Supreme Court Decisions on the Burden Shift

The argument that *New York Times* shifted the burden of proof on the issue of the statement's truth or falsity from the defendant to the plaintiff is relatively straightforward and derives from the holding of the case. The requirement that the plaintiff prove that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" n111 would seem to require the prior or simultaneous determination that the statement in question was false. Requiring the plaintiff to prove that the defendant was aware of the statement's falsity would make no sense if the statement was in fact true or could not be characterized as being either true or false. In fact, the courts that have considered the question have required public plaintiffs to bear the burden of proving both the falsity of the statement and the fault of the defendant. n112

[*856] Further support for the view that a plaintiff must establish the falsity of the statement derives from the Court's insistence in *New York Times* that the plaintiff prove the defendant's knowledge of the statement's falsity or his reckless disregard of the truth with "convincing clarity." n113 The requirement of convincing clarity reflects the Court's desire to protect defendants from being held liable on barely sufficient evidence and requires courts to resolve doubtful cases in favor of the defendants. Placing the risk of nonpersuasion on the defendant would be inconsistent with this protection, as well as with the Court's demonstrated desire to protect true speech. Indeed, some have argued that not only does the plaintiff bear the burden of proof on the issue of the statement's falsity, but he must satisfy that burden with "clear and convincing proof." n114 The Supreme Court has indicated in later cases that the burden of proof is on the plaintiff in public figure cases as well. n115

[*857] Whether the burden of proof falls on the plaintiff in cases involving private plaintiffs is less clear. The United States Supreme Court in *Gertz* observed only that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." n116 Fault as used by Justice Powell in this passage must mean fault with respect to the falsity of the alleged defamation; this has been the standard reading of *Gertz*. Because fault with respect to falsity is the constitutional rule, a showing of falsity in *Gertz* cases is the logical predicate to satisfying the constitutional test. n117

In *Wilson v. Scripps-Howard Broadcasting Co.*, n118 the United States Court of Appeals for the Sixth Circuit explicitly addressed the issue of who should bear the burden of proof in private plaintiff cases. In a diversity action brought by a private plaintiff, the trial judge instructed the jury that the defendant had "the burden of proving substantial truth by a preponderance of the evidence." n119 On appeal, the Sixth Circuit reversed a judgment for the plaintiff on the ground that the jury instruction was erroneous. Although the relevant state law applied the negligence standard permitted by *Gertz* and followed the common law rule of presuming the statement's falsity, the appellate court concluded that certain constitutional principles announced by the Supreme Court required that the burden of proof be placed on the plaintiff. In reaching this conclusion, the court contended that, in defamation suits involving private plaintiffs, the "two elements of carelessness and falsity are inevitably linked." n120 Viewing falsity as "an element of fault," n121 the court maintained:

In order for the jury to decide the issue of fault, it must weigh together and balance the facts concerning falsity and the facts concerning carelessness. The degree of uncertainty in the juror's mind on the issue of truth and the degree of uncertainty on the issue of carelessness must be taken into account at the same [*858] time in arriving at a conclusion on the issue of fault. n122

Why the court linked uncertainty on the issue of the statement's falsity with uncertainty on the issue of fault is not clear. One easily can imagine a situation in which the publication is clearly false but the negligence of the defendant is debatable. Indeed, the protection offered to a defendant under *Gertz* would be totally illusory if such a situation did not exist, for clear falsity would encourage ready determinations of negligence. n123 Similarly, one can imagine a situation in which the writer was careless in researching or writing the article, but the statement upon which the action was brought, nevertheless, was true.

The court in *Wilson* was correct, however, in its alternate argument that placing the burden of proof on the defendant would permit the imposition of liability without fault. The court observed that, under the state rule's presumption that the statement is false, a jury that was uncertain about the truth or falsity of the statement would have to find in the plaintiff's favor, even though the statement might well be true. The court, therefore, concluded that "[a] presumption of falsity . . . permits liability without fault in the close case, in which the jury is uncertain." n124

In addition to the considerations noted above, judicial administration also strongly supports requiring the plaintiff to prove that the statement is false. Some commentators already contend that jurors have difficulty comprehending all the issues in a defamation case. n125 Instructing jurors that the defendant bears the risk of nonpersuasion on the issue of falsity, although the plaintiff bears that risk on the issue of fault, may be more than jurors can manage. n126

[*859] 2. *Underlying Justifications*

Although constitutional principles appear to require this shift in the burden of proof, reason and justice also dictate that the plaintiff should bear the risk of nonpersuasion on the central issue of the statement's truth or falsity. The determination of who should bear the burden of proof is merely a "question of policy and fairness based on experience in the different situations." n127 In determining what would be fair in a given situation, the courts consider such factors n128

as who is making the allegation, who is more capable of proving that a particular fact is false, and what choice "experience" tends to favor. n129

The first of these factors obviously would not favor placing the burden of proof on the defendant because the courts long have required plaintiffs to plead that the statement is false. n130 The second factor likewise would not favor placing the burden of proof on the defendant because the plaintiff should be in a better position than the defendant to test the truth of a statement made about himself, at least when the charge is specific as to time or place. The only [*860] factor that arguably favors a general requirement that the defendant prove the truth of the statement, therefore, is tradition.

Courts and commentators throughout English and American history have sought to explain why courts in the past have required the defendant to prove the truth of the statement. n131 Some commentators attempt to explain this deviation from standard civil procedure by drawing an analogy to the criminal law's presumption of the defendant's innocence. Those commentators contend that the plaintiff is entitled to the presumption that his reputation is good and that the disparaging remarks, therefore, were false. n132 Those commentators fail to explain, however, why a concept meant to benefit a criminal defendant should be available to a civil plaintiff. Indeed, the sounder analogy in terms of guaranteeing free speech would be to give the civil defendant the benefit of a presumption that he spoke the truth.

The only plausible justification for imposing the burden of proof on the defendant is a procedural concern about the difficulty of proving a negative. n133 Trial lawyers often have complained about the unfairness of having to demonstrate that a derogatory statement is untrue. n134 Recognizing the difficulty of proving a negative, Roman law placed the burden of proof on the party who could prove the affirmative. n135 What Roman law and current trial lawyers fail to recognize, however, is that not all negatives are difficult to prove. n136 A detailed defamatory statement should be readily discreditable. In [*861] *Gertz*, for example, the plaintiff was able to establish that he was not a "member of the 'Marxist League for Industrial Democracy.'" n137 Similarly, in *Cianci v. New Time Publishing Co.*, n138 the plaintiff's burden of demonstrating that he did not rape at gunpoint a particular individual at a particular time does not seem unduly onerous. Modern discovery practices have also obviated much of the earlier concern about proving a negative. n139 Furthermore, courts long have required plaintiffs to prove negatives in many other areas of the law not involving the first amendment. n140

[*862] Finally, even before the United States Supreme Court's decision in *New York Times*, the majority rule at common law was that the invocation of a conditional privilege by the defendant automatically shifted the risk of nonpersuasion on the issue of the statement's [*863] truth or falsity to the plaintiff. n141 Even if the courts considered the course of past experience as the sole guide in determining who bears the burden of proof, that experience reveals that once a defendant has invoked a privilege, the plaintiff can overcome that privilege only by showing that the statement is false. The common law's recognition of this shift in the burden of proof indicates that the common law did not view the imposition of the burden on the plaintiff as being unbearable. n142

C. Falsity with Convincing Clarity

As noted earlier, n143 the United States Supreme Court requires that proof of constitutional malice be clear and convincing. The Court still has not decided whether similar clarity is required in cases involving private plaintiffs. n144 But all of the tests that the Supreme Court has developed for determining the defendant's fault are framed in terms of the falsity of the publication, and the protection that the Supreme Court has built into the fault element of the defamation action is designed to protect those defendants who have published incorrect statements. If the defendant admits that the publication was inaccurate, then he must base his defense on the contention that he was not at fault. If, on the other hand, the defendant denies the falsity of the statement, then he should be held liable only if the plaintiff can show both that the statement was false and that the defendant was at fault. In other words, a defendant denying the falsity of the statement has two defenses available to him. As one commentator has explained:

Although factual falsity may not be entitled to independent constitutional protection, the determination of truth or falsity in matters of fact now marks the interface between speech that is constitutionally protected and speech that is not. . . . The absence [*864] of factual falsity now constitutionally precludes the imposition of sanctions for defamation, and inquiries into factual truth or falsity have become matters of constitutional importance in determining whether a particular defamation judgment is consistent with freedom of the press. n145

Because the demarcation between the truth and falsity of the statement is of constitutional dimension, imposition of a preponderance of the evidence standard on the plaintiff is inadequate. n146 If the plaintiff must persuade the court with convincing clarity that the defendant was at fault, the court certainly should not use a less rigorous standard to determine whether the statement was false. Courts often have encountered difficulty in determining what is true and what

is false, and thus, precautions should be taken to ensure that a defendant is not held liable because of the court's misconstruction of the truth. Perhaps Justice Harlan best summarized this concern when he observed that "[a]ny nation which counts the *Scopes* trial as a part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity." n147

As discussed later in this Article, n148 courts should not even adjudicate libel suits in which the statements do not clearly lend themselves to being proved false. If the statement is capable of being disproved, the court should not characterize the statement as being false unless the plaintiff has shown through clear and convincing proof that it is false. Unless the courts require clear and convincing proof on the issue of the statement's falsity, a public plaintiff would be able to prevail in the case simply by creating sufficient doubt in the jurors' minds as to the truth of the statement and then by persuading those jurors to disbelieve the defendant's protestations about honest belief or lack of recklessness. In other words, courts should refrain from offering official determinations of what is true and what is false in all but the clearest cases n149 because [*865] an error in the court's judgment in favor of the plaintiff would produce a much greater cost in terms of the imposition of "official truth" and self-censorship than would a similar error in favor of the defendant.

D. Applications

The effects of placing the burden of proof on the plaintiff with regard to the issue of the statement's falsity are both pervasive and important. n150 One of the primary effects of this shift in the burden of proof is that the court can resolve many cases at an earlier stage of litigation than was possible at common law, n151 which will do much to reduce the excessive legal expenses that accompany defamation suits. n152 If the plaintiff's suit is based upon a statement that is not susceptible to being proved false, for example, the court should deny any discovery and dismiss the complaint. If the statement can be disproved, however, the court then should consider whether the plaintiff can supply the requisite proof. If after discovery -- which initially might be limited to the question of the statement's falsity n153 -- the court determines that the plaintiff will fail in [*866] his proof, the court should grant a motion for summary judgment. Thus, by placing the burden of proof on the plaintiff, many cases can be resolved in the preliminary stages of the judicial proceeding.

Another effect of this shift in the burden of proof is that the defendant cannot be held liable for the publication of statements that cannot be proved false. At least three types of statements are not susceptible to disproof and thus, the publication of those types of statements should be nonactionable as a matter of law.

1. Vague Statements

Our language contains many words that have various shades of meaning ranging from the defamatory to the innocent. Determining which shade of meaning the speaker intended to convey may be impossible, as the facts of *Buckley v. Littell* n154 suggest. In *Buckley*, the defendant characterized the well-known commentator, William F. Buckley, Jr., as a "fascist" and a "fellow traveler" of "fascism." The United States Court of Appeals for the Second Circuit correctly held that these words were not actionable, "among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate." n155 Although the court recognized that charges of membership in a specific party or group are "susceptible to proof or disproof of falsity," the court maintained that the words at issue were "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity." n156 The defendant prevailed because, as a matter of law, the plaintiff could not disprove the allegedly defamatory statement. n157

[*867] The difficulty of handling such vague terms in the judicial process is apparent when one considers how a plaintiff would go about proving the falsity of a statement that has a broad range of meanings. Context would not provide a guide in determining the meaning because, unlike the words with multiple meanings discussed earlier, n158 inherently vague terms lack any generally accepted discrete meanings. For better or worse, the law must take the English language as it finds it, for to do otherwise would be both elitist and repressive. n159

2. Illusion

The same analysis controls the odd situation in which a communication at first glance appears to be false and defamatory, but turns out on second glance to be an optical illusion. This type of situation is found in *Burton v. Crowell Publishing Co.* n160 In *Burton*, the defendant published a cigarette advertisement that appeared to show the plaintiff deliberately exposing his genitals, which appeared to be deformed. Closer examination of the advertisement, however, revealed that the effect had been produced by the way the girth hung from the saddle that the plaintiff was holding in front of his body. The United States Court of Appeals for the Second Circuit held that the advertisement was actionable

on the ground that defamation did not require that the publication be false. n161 This decision, however, was rendered before the United States Supreme Court's decision in *Gertz* and is clearly inconsistent with the *Gertz* requirement that the plaintiff establish the falsity [*868] of the publication. n162 Because such a publication cannot be proven false, a court should dismiss on the pleadings an action grounded upon this type of statement. n163

3. *Evaluative Statements* n164

The truth value of some statements depends entirely upon the extent to which the speaker's idiosyncratic preferences mirror those of the listener. Such statements are not susceptible to proof or disproof in court because the statement is by definition true from the viewpoint of the speaker. n165 As an ideological matter, in [*869] skeptical recognition of the fallibility of judges and jurors, or perhaps in deference to the idea of an inviolate zone of individual autonomy, both courts and commentators have concluded that these individual value systems should not be adjudged true or false. n166 "Goodness" and "badness" are simply not concepts that can be judicially characterized as being either true or false. n167

Statements regarding matters of taste also fall within this category of nondisprovable evaluative statements. Statements that suggest, for example, that a person's acting was "overly melodramatic" or that the meat in a restaurant was "tough" are not the kinds of statements that can be branded false by the judiciary. For that particular person, the meat *is* too tough. Thus, statements regarding right and wrong, good and bad -- in short, evaluative statements of taste and belief -- can never provide the basis for a defamation suit because such statements are incapable of being proved false.

E. Avoiding the "Fact-Opinion" Distinction

Perhaps the most important consequence of requiring the plaintiff to prove the falsity of the statement is that the courts now can discard permanently the spurious distinction between fact and opinion. In his treatise on evidence, Professor Wigmore powerfully [*870] states the deficiencies of the fact-opinion distinction:

[I]t is obvious (leaving history out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between "opinion" and "fact". . . . In the first place no such distinction is scientifically possible. . . . As soon as we come to analyze and define these terms for the purpose of that accuracy which is necessary in legal rulings, we find that the distinction vanishes. . . . If then our notion of the supposed firm distinction between "opinion" and "fact" is that the one is certain and sure, the other not, surely a just view of their psychological relations serves to demonstrate that in strict truth nothing is certain. Or if we prefer the suggestion of Sir. G. C. Lewis that the test is whether "doubt can reasonably exist," then certainly it must be perceived that the multiple doubts which ought to exist would exclude vast masses of indubitably admissible testimony. Or if we prefer the idea that "opinion" is inference and fact is "original perception," then it may be understood that no such distinction can scientifically be made, since the processes of knowledge and the sources of illusion are the same for both. n168

Tort scholars have joined Professor Wigmore in decrying the common law's adherence to the fact-opinion distinction in defamation law. n169 One commentator, for example, has asserted that "[t]he distinction, without more, primarily furnishes vague familiar terms into which one can pour whatever meaning is desired." n170 Another commentator has observed that "the distinction [in defamation [*871] law is] more often announced than defined." n171 Even staunch defenders n172 of the distinction have admitted that "[it] is somewhat nebulous, as a matter of pure logic." n173

1. General Analysis

Before one can understand why the shift in the burden of proof on the issue of the statement's falsity has undercut the fact-opinion determination, one must understand how the privilege of fair comment, which gave rise to the fact-opinion distinction, evolved. The common law considered all statements to be actionable, regardless of whether the statement could be disproved. n174 The courts simply presumed in all cases that the statement was false, leaving the defendant to rely upon the protection of the defense of truth -- or "justification" -- or upon a patchwork of absolute and conditional privileges.

Underlying the privilege of fair comment was the recognition by the courts that valuable discourse might be furthered by intuitive, evaluative statements that could not be proved either true or false by the rigorous deductive reasoning of the judicial process. The courts began to realize that those statements needed to be protected. n175 The common law, in its characteristic manner, tentatively started applying the privilege of fair comment to critical reviews. n176 Gradually, although with numerous qualifications and exclusions, n177 the privilege grew to embrace opinions generally. As [*872] one commentator wrote:

If the defense of fair comment did not exist, then when defamatory statements were made that could neither be proved true or false . . . nor be proved correct or incorrect . . . the conflict of interests would always be resolved in the plaintiff's favor, since the burden of justification is on the defendant. n178

The common law recognized that, when such statements were made in good faith about a matter of public concern, their contribution to the free exchange of ideas far outweighed the potential harm posed to an individual's reputation. n179

The first *Restatement of Torts* explicitly recognized the privilege of criticizing "another's activities . . . [that] are matters of public concern," so long as the criticism: was based on true or privileged facts stated at the time or known or available to the recipient as a member of the public; represented the author's actual opinion; and was not made solely to cause harm to the plaintiff. n180 The *Restatement* also recognized the relationship between truth and fair comment by protecting "reasonable" comment under both defenses. n181 But one does not need to go so far as to combine the [*873] two defenses to recognize the symbiotic relationship between them. Without the pressure created by those statements that could not be proved true or false, the privilege of fair comment might never have evolved.

In addition to recognizing the privilege of fair comment, the common law further sought to protect certain nondisprovable statements by classifying these statements in terms of either "fact" or "opinion," and requiring the defendant to establish the truth of only those statements classified as "fact." The classification became crucial because different rules of law were applied to each category. Honest belief, for example, generally was a defense only with regard to statements classified as "opinion." Because of the inherent insubstantiality of the distinction, this classification process naturally led to unpredictable results. n182

Not all courts adopted this arbitrary classification system. In accord with the minority view at common law, which generally is identified with *Coleman v. MacLennan*, n183 some courts instead applied the same rule of law to all statements of public concern. For these courts, the vital distinction was whether a given statement was of public concern, not whether it was fact or opinion. n184

The United States Supreme Court adopted a modified version of [*874] the minority position as a matter of constitutional law in *New York Times*. n185 The *New York Times* sequence of cases eroded the utility of the fact-opinion distinction on two levels. First, by holding that a defendant could not be held liable for a publication that he honestly believed to be true, the decision forced the states to apply the same legal rule in the relevant class n186 of cases without determining whether the statement was of public concern. Second, by shifting the burden of proof on the issue of the statement's falsity to the plaintiff, n187 those statements that cannot be disproved and for which the privilege of fair comment was created became absolutely, rather than qualifiedly, protected. Because of the nature of the statement, the plaintiff never can satisfy his burden of proof on the issue of the statement's falsity. The court, therefore, never need reach the issues of whether the statement was made with actual malice or whether any true underlying fact supported the statement.

In this manner, *New York Times* completely immunized the defendant from liability for any nondisprovable statement regarding the official conduct of a public official. Later Supreme Court cases extended the protection given to nondisprovable statements. Thus, insofar as the "opinion" label was a mechanism by which the common law sought to give qualified protection to nondisprovable statements, the total protection offered under *New York Times* has superseded the common law protection. Insofar as "opinion" meant something else at common law it has become unnecessary because the *New York Times* line abrogated the practice of applying a different legal rule to opinion.

Gertz v. Robert Welch, Inc. n188 provided the United States Supreme Court with the opportunity to abolish the fact-opinion distinction. In *Gertz*, as in *New York Times*, the Court implied that the plaintiff must disprove the allegedly defamatory statement. n189 To the extent that "opinion" is used as a synonym for disprovability, n190 [*875] the fact-opinion distinction is as unnecessary in private plaintiff cases as it is in public plaintiff cases. To the extent that the doctrine of fair comment has been motivated by the desire to protect nondisprovable statements, n191 the defense has been overwhelmed. n192

[*876] Although *Gertz* partly superseded the doctrine of fair comment, the fact-opinion distinction, which grew from fair comment, has received new attention as the result of three sentences of dicta in *Gertz*: "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." n193 At best, this passage is no more than an anticipatory restatement of the related issues *Gertz* did settle by demanding falsity and shifting to the plaintiff the burden of proving falsity in a private plaintiff case. The passage recites

the conclusion that the defendant will prevail if the plaintiff cannot disprove the alleged defamation. "There is no such thing as a false idea" puts the label "idea" on those statements for which the plaintiff as a matter of law cannot satisfy his burden of proving falsity.

Unfortunately, the wording of the passage lends itself to a less salutary construction that many state courts have chosen to apply. Consider, for example, the comment of the Supreme Judicial Court of Massachusetts that "[t]he determination whether the allegedly defamatory statements constitute fact or opinion is critical," n194 or a Maryland Court of Appeals judge's assertion that "[s]tatements of opinion, rather than of fact, are treated differently for First Amendment purposes." n195

These comments are misleading. Whether something can be labeled "opinion" is irrelevant. Despite the lack of theoretical difference between fact and opinion, "[t]he words are treated as if they possessed some 'magical quality' of self elucidation." n196 Such statements [*877] obscure the crucial questions of whether the defamatory statement is susceptible to being characterized as false and, if so, whether the plaintiff can prove that the statement is false.

Even the Supreme Court still may be confused on this issue. In *Miskovsky v. Oklahoma Publishing Co.*, n197 the Court denied a petition for certiorari from a judgment of the Oklahoma Supreme Court that reversed a judgment for the plaintiff and dismissed the case. n198 The alleged defamation involved attacks by a newspaper on the behavior of a senatorial candidate who repeated allegations of homosexuality involving another candidate. One editorial stated that the plaintiff "has sunk to a new low in Oklahoma political rhetoric -- and for him that takes some doing." n199 The paper called his attack "despicable and stupid." n200 One article quoted a third party's description of the plaintiff as a "hatchet man." n201 In dismissing the case, the state court quoted the *Gertz* dicta, held that the phrases were opinion, and concluded that opinions were not actionable. n202

Justice Rehnquist, joined by Justice White, dissented from the denial of certiorari. n203 After concluding that the state court had relied upon the *Gertz* dicta in reaching its result, he noted:

A respected commentator on the subject has stated with respect to this quotation that "[t]he problem of defamatory opinion was not remotely an issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem."

. . . I am confident this Court did not intend to wipe out this "rich and complex history" with the two sentences of dicta in *Gertz* quoted above. . . . n204

If Justice Rehnquist means that "opinion" in its extended common-law [*878] sense has not been incorporated into a new constitutional privilege, we think he is correct. Justice Powell was using "opinion" in the context of nondisprovability to describe statements for which no action could be brought because of the falsity requirement. "Opinion" in *Gertz*, then, means no more than a nondisprovable statement; "opinion" in any broader sense is protected, if at all, by the common law of fair comment with its 'rich and complex' gloss. n205

Justice Rehnquist, however, may be challenging the holding of *Gertz* by denying that disprovability is central to an action for defamation. Although the Court's approach may have been unclear, n206 we believe the point is beyond challenge. Constitutional developments aside, disregarding disprovability would resurrect the fundamental contradiction in the common law of defamation. The common law made falsity the theoretical centerpiece of the action, and then made a large category of nonfalse statements actionable n207 unless [*879] the statement came within another defense.

Courts that use the fact-opinion distinction as a basis for dismissing what we would prefer to call nondisprovable statements have avoided much of the potential harm of the distinction. n208 Sometimes courts explicitly define "opinions" as statements that are nonverifiable. n209 Other courts list a number of factors that supposedly aid in determining what is fact and what is opinion; frequently verifiability is the controlling factor in such analyses. n210

Our criticism of the current analysis focuses less on results than on the imprecision of the courts' expressions of those results. The failure to equate "opinions" with nondisprovable assertions leads litigants to file groundless lawsuits because they believe the statements may fall outside the undefined rubric of "opinion." This failure also leads trial courts to deny motions to dismiss that should be granted because the judges are unsure of what constitutes "opinion." n211

Reliance on the concept of disprovability will never displace judgment in close cases. Statements fall along a continuum of greater or lesser susceptibility to disproof, n212 and the line between judicially disprovable and

nondisprovable statements is not self-defining. "Disprovability," however, at least focuses the courts' judgment on the correct issue in the same way that the catchall, undefined word, "opinion," obscures the issue. n213 A few courts have lost sight of the real question so completely that they have reached wrong results. n214 Explicit recognition of the role of falsity in defamation [*880] law would avoid such confusion.

2. *The Restatement Approach*

More troubling than the resurrection of the fact-opinion distinction and its unnecessary use as a confusing substitute for disprovability, however, is the view taken by the *Restatement (Second) of Torts*. Apparently in response to the *Gertz* dicta, n215 the American Law Institute preserved the spurious and vague fact-opinion distinction. Section 566 states: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. n216 The *Restatement* understood that before *Gertz*, opinions were actionable. This was true even though an opinion was something that could not "be objectively determined and truth is a complete defense to a suit for defamation." n217

The *Restatement* distinguishes between two kinds of opinions: "pure" and "mixed type." n218 The pure opinion is based on stated or readily available facts, and is said not to be actionable. n219 As noted earlier, n220 we find it confusing to use "opinion" to describe the constitutional concept of nondisprovability. Nevertheless, the absolute privilege for "pure" opinion is correct as far as it goes. n221 The *Restatement's* new category of mixed opinion is more troubling. n222

[*881] Apparently, the *Restatement* has created a distinct category of statements that are nondisprovable, yet despite *Gertz*, are actionable because of what the statements imply. n223 The critical comment states:

The requirement that a plaintiff prove that the defendant published a defamatory statement of fact about him that was false (see § 558) can be complied with by proving the publication of an expression of opinion of the mixed type, if the comment is reasonably understood as implying the assertion of the existence of undisclosed facts about the plaintiff that must be defamatory in character in order to justify the opinion. A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability. The defendant cannot insist that the undisclosed facts were not defamatory but that he unreasonably formed the derogatory opinion from them. This is like the case of a communication subject to more than one meaning. As stated in § 563, the meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express. n224

The *Restatement* never makes clear how one knows what facts to [*882] infer in a so-called "mixed" case. n225 The quoted comment appears to apply only when defamatory unstated facts "must" underlie a nondisprovable defamatory statement. But it is impossible to identify a single set of facts upon which the action is based. The facts could be either those introduced by the plaintiff, which will be defamatory and false, n226 or those introduced by the defendant, which will be nondefamatory or, if defamatory, will be true or privileged. Alternatively, the jury could choose a third set of facts on which to base the action.

As noted earlier, n227 meaning may be difficult to ascertain even when the speaker explicitly utters the words. The problems are more serious when the suit involves words never uttered, but deemed to underlie some disparaging statement. The "must have been based on undisclosed defamatory facts" language might save the situation if it were ever possible to read into a nondisprovable statement only one possible set of facts. This result seems so unlikely that the comment would be trivial if limited to such cases.

Consider the *Restatement's* example that plaintiff is "utterly devoid of moral principles." n228 The comment says that this phrase may imply assertion of behavior that warrants such a statement, but it is impossible to know what facts to infer. The statement is not subject to disproof. How the trial would proceed is difficult to conceive. We would bar the suit for lack of a disprovable statement. n229

The assertion "*P* is a thief," another *Restatement* example, [*883] lends itself to disproof if understood in context as an accusation of criminal behavior. n230 Charges of crime and of membership in groups are capable of disproof. These charges without more may form the basis for a defamation action. Supporting facts are not essential. The *Re-*

statement suggests that "*P* is a thief" is actionable only because the statement implies the existence of underlying facts. n231 On the contrary, the statement is actionable because it is, itself, disprovable.

The same analysis applies to the assertion that "I think he must be an alcoholic." n232 To the extent that alcoholism is understood to be an identifiable syndrome with specific symptoms, the charge probably would be sufficiently well defined to be disproved. The *Restatement* would allow the action to proceed because of what the statement implies. We maintain that, if the assertion is sufficiently concrete to permit disproof, the statement is actionable because of what it means.

The flaws in the *Restatement* approach multiply when one considers the implications for unreasonable opinions based on stated facts. The conclusion appears inescapable that, under the *Restatement* approach, any unreasonable opinion may imply facts other than those stated to support the opinion. To find that an opinion is unreasonable means that it is not a plausible inference from the stated facts. Under the *Restatement*, therefore, an inference arises that the speaker knows more than he is saying -- at least if he does not preclude the possibility by persuasively declaring that he is not relying on anything but the stated, or generally available, facts. Logically, the *Restatement* must permit liability for an unreasonable, although honestly held, opinion based on stated facts. Such a result is bizarre; the common law privilege of fair comment was intended to protect defendants in precisely this circumstance. n233

[*884] This is not the situation discussed earlier, which involved the assertion of underlying true facts that arguably carried with them a false defamatory implication. The critical difference is that when a speaker says that the plaintiff did A, B, and C, and then lets the recipient draw the implication of disprovable defamation, no constitutional principle protects the speaker if that implication is reasonable and the plaintiff can prove either that the speaker was aware that such a meaning would be inferred, or that the speaker was reckless as to that point. Of course, in such a case, the unspoken implication must be subject to disproof. Thus, true statements that *W*, a married woman, found her husband, *H*, in the home of *P*, another married woman, and that *W* shot at *P* and *H*, can reasonably be understood to imply that *P* and *H* were having an adulterous relationship and were caught by *W*. n234 If *P* can prove the other elements of the defamation action, just because the speaker combined a group of true statements in such a way as to create a false impression should not automatically provide constitutional protection for the speaker.

This second situation also is far different from the actionability of a nondisprovable conclusory statement. If the words spoken do [*885] not permit disproof, such as an assertion that "*P*'s latest book is awful" or that "*P* lacks any moral principles," a court should not permit suit on those words and should not permit the plaintiff to base a suit on assumed disprovable statements or on assumptions about the facts upon which the speaker might have relied. When the speaker asserts that several disprovable statements have led him to a nondisprovable conclusion, a court should allow suit only on the explicit disprovable statements.

This analysis of the implied conclusion depends on whether the unspoken conclusion would itself be disprovable under the framework created in the second part of this Article. n235 Specifically, if the speaker has made a series of true statements that he realizes will lead recipients to believe that the plaintiff has committed a crime, the courts are not required to protect that speaker simply because the defamation is implied. Because the final step that listeners in fact understand, an accusation of crime, is itself disprovable, the plaintiff should be permitted to try to disprove that unspoken conclusion, unless some privilege applies. n236

When a speaker builds an unstated conclusion on one or more disprovable statements, the unspoken conclusion itself is likely to be specific and disprovable. Listeners usually are not left with a vague, amorphous pejorative feeling. If that feeling, however, is all that the chain of true statements creates, then the action should be barred, based on the analysis developed in the second part of this Article. In the "mixed" statement example from the *Restatement*, on the other hand, a concrete disprovable statement cannot be inferred "backwards" from a conclusory statement that is itself too vague or amorphous to be disprovable. This "mixed" statement, therefore, also should not be actionable.

V. FAULT AND THE "FACT-OPINION" DISTINCTION

Although the two focal points of this Article, additional fault and the new burden of proof on falsity, can stand separately, they may be related. n237 In the first part of the Article, we argued that plaintiffs had to prove that defendants were aware that their words [*886] conveyed the defamatory meaning upon which the plaintiff was suing. In each example discussed, the defendant could have argued plausibly that he was unaware of an actionable defamatory meaning.

Although *Seal Beach* was discussed in that setting, n238 *Seal Beach* is arguably different because the case does not involve two different understandings of the facts involved. Rather, the ambiguity involved whether "an ordinary reader

would have understood the article as a factual assertion charging Hogard with crime, or whether the statements were generally understood as an opinion respecting his public conduct in regard to the development project." n239 Although the latter interpretation would have injured the plaintiff's reputation, the statement would not have been actionable because the court considered it to be "opinion." n240 The court was confronted with two defamatory meanings, only one of which was actionable, as opposed to *Fong*, in which both interpretations were apparently defamatory and actionable, but one was true. Because the *Seal Beach* court focused on how recipients would understand the statement, many of the considerations that lead to including fault at the meaning stage would apply. n241

Under the *Restatement's* approach to pure and mixed opinions, the issue is whether the statement would lead recipients to believe that the statement implied defamatory facts. If the resolution of that issue is unclear, the question should be reserved for the jury. This situation is analogous to the questions discussed earlier. n242 If courts continue to use such an analysis, they cannot merely determine what meaning the recipients inferred from the statement. The plaintiff also must show that the defendant was aware that the actionable meaning was likely to be inferred, as in *Seal Beach*.

[*887] The problem is more complex when the determination of actionability depends on the court's assessment of whether the statement, as understood, is susceptible to being disproved. This assessment does not depend on the perceptions of the recipient or on any other issue that might lend itself to resolution by a jury. Instead, the court must decide whether the available adjudicative mechanisms will permit a satisfactory determination of falsity.

The appropriate manner in which to protect such a speaker appears to involve judicial sensitivity to the danger of erroneous determinations of actionability. Because of the need to protect speech, a court must resolve doubt about disprovability in favor of the defendant. This approach would avoid expensive litigation, as well as assist the judiciary in avoiding trials on issues that do not clearly lend themselves to sound adjudication. Plaintiffs should be required to make a persuasive showing of disprovability before trial and a clear and convincing showing of disproof if the case goes to trial. n243

VI. CONCLUSION

In this Article, we have attempted to convince readers of several major propositions and some minor ones. First, the meaning element of defamation involves not only what recipients understand, but also whether the speaker is aware of the defamatory meaning at the time he disseminates the statement. This test should apply to all plaintiffs. A corollary to this major proposition is the denial of automatic constitutional protection to those who convey their meanings exclusively by implication.

Second, this Article traced the shift from "truth is a defense" to "plaintiff must show falsity with convincing clarity." As a result of [*888] this shift, several troublesome common law doctrines lose their bite, including those doctrines that allowed actions for statements that were not susceptible to disproof. This development should not be undercut by permitting lawsuits when defamatory facts reasonably might be inferred "backward" from an explicit nondisprovable statement.

Unfortunately, state supreme courts are awarding judgments for defendants often after needless discovery and litigation, on the basis of incorrect analysis. Courts find that the defendant's statement was only opinion; even if the statement was fact, it was true; and even if the fact was false, *New York Times* malice was lacking. n244 This type of appellate reasoning only encourages judges to send cases to trial. The unnecessary trials result in expensive and wasteful discovery proceedings and, even more unfortunate, verdicts and judgments for plaintiffs. On appeal, the majority of these judgments are reversed and the cases are dismissed, n245 but it is the rare trial judge who can predict the bases for these dismissals.

Finally, courts should not find a statement to be disprovable if serious doubt on the issue exists. The danger to free expression and the danger to the judiciary of trying to resolve the unresolvable both require that a court not undertake a search for falsity unless the statement clearly is susceptible to such a determination and the plaintiff's evidence on the question establishes the falsity clearly and convincingly.

Some of these arguments are undeniable. Others are not so obviously mandated by constitutional developments. The number of cases that will be decided differently if all our analyses are adopted is unknown. n246 Certainly, however, much confusion would be eliminated and the resolution of defamation cases would become much more efficient and predictable.

[*889] The law of defamation always has been complex. Any hope that constitutional change would streamline the common law has proved unfounded. Arguably, the confusion is worse today because the constitutional law has added another layer of complexity to an already confusing area.

The way to characterize this Article's approach to defamation begins with the recognition that the constitutional developments begun in *New York Times* addressed the level of fault the plaintiff must prove in defamation cases. The doctrine of *New York Times* and *Gertz* was built on cases of admitted or adjudicated falsity. Questions of what the defendant believed he was saying and whether the statement can be proved false are more fundamental to defamation theory than the concept of fault to be applied to falsity. Nevertheless, the introduction of fault requirements demands that we reconsider the very bases of defamation. JULY 1984

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Defamation Public Figures Torts Intentional Torts Defamation Procedure Torts Intentional Torts Defamation Public Figures Voluntary Public Figures

FOOTNOTES:

n1. *376 U.S. 254 (1964)*.

n2. *418 U.S. 323 (1974)*. We believe that all our points are required by either *New York Times* or *Gertz*, or both. Even if the sweep of federal constitutional law is deemed narrower, the states are free to adopt the views in this Article as a matter of state constitutional or common law.

n3. *See infra* note 130.

n4. *New York Times Co. v. Sullivan*, *376 U.S. 254, 262 (1964)* (observing that the Alabama rule, which was then the majority approach, "impl[ie]d legal injury from the bare fact of publication . . . [and presumed] falsity and malice . . . [and] general damages").

The common law requirement of establishing special damages in cases of slander, and, in some states, in cases of libel per quod as well, is not central to this Article. Throughout this Article, the common law distinctions between libel and slander will be considered only if critical to the discussion.

n5. *See, e.g.*, RESTATEMENT OF TORTS § 582 (1938) (truth); *id.* § 583 (consent); *id.* §§ 585-592 (absolute privilege); *id.* §§ 593-598 (conditional privilege); *id.* §§ 606-610 (fair comment); *id.* § 611 (fair report). Several procedural defenses, such as limitations, laches, lack of jurisdiction, and accord and satisfaction, also were available to a defendant.

n6. *New York Times* underscores the difficulty that a defendant faces in establishing the truth of an alleged libel in all of its factual particulars. *See 376 U.S. at 279*. In addition to the difficulty with regard to proof, an assertion in the pleadings that the statement was true may expose the defendant to further liability. If he should fail to prevail on that issue, the court may consider the pleading to be a republication of the libel. *See R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 142-43 (1980)*. The *New York Times* encountered similar difficulties in establishing the defense of fair comment because that defense also required the newspaper to show that the underlying facts upon which the criticism was based were in themselves true or privileged. *See RESTATEMENT OF TORTS § 606 (1938)*. Most of the remaining privileges were defeasible upon a showing of common law -- as opposed to constitutional -- malice, which required only proof of spite or ill will. *See R. SACK, supra*, at 329-31.

n7. *See Gertz v. Robert Welch, Inc.*, *418 U.S. 323, 349-50 (1974)*.

n8. See 376 U.S. at 285-86 (actual malice must be shown with convincing clarity). The Massachusetts Supreme Judicial Court has described clear and convincing proof as "a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt. . . . [It] must be 'strong, positive, and free from doubt.'" *Stone v. Essex County Newspapers*, 367 Mass. 849, 871, 330 N.E.2d 161, 175 (1975) (citations omitted).

n9. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455, 476.

n10. One commentator defines the defamation action in terms of nine elements. See Nelon, *Media Defamation in Oklahoma: A Modest Proposal and New Perspectives -- Part I*, 34 OKLA. L. REV. 478 (1981). Nelon contends that "[l]ibel is a false unprivileged publication of asserted fact concerning the plaintiff that is capable of being injurious to his reputation, published through the fault of the defendant proximately resulting in actual damage." *Id.* at 487-88. One author's listing of 23 "decision points, all crucial and all, if decided erroneously, capable of foreclosing the desired result," suggests the complexity of the tort. Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1233-35 (1976).

In this Article, we assume that the defendant intended to make a publication "of and concerning" the plaintiff. Although we do not address the "of and concerning" element of the plaintiff's case directly, we believe that the analysis developed in the first half of the Article might well be applied to problems that emerge with regard to that element.

We also leave aside the often critical questions of causation and damages, except to the extent that the distinction between libel per se and libel per quod is relevant to the discussion. See *infra* notes 72-74 and accompanying text.

n11. See, e.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Keeton, *supra* note 10; Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976); Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978).

n12. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

n13. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 742 n.73 (4th ed. 1971). We use "actionable" to mean that the alleged statement contains a disprovable defamatory statement, and that the complaint, therefore, can withstand a motion to dismiss on that ground.

n14. *Id.* at 743; Schauer, *supra* note 11, at 279 & n.64. The determination of the type of statements that lower an individual's reputation or expose him to hatred, contempt, and ridicule raise important questions about societal values. Thus, although it was unclear in the 1930's and late 1940's whether attacking someone as a communist damaged his reputation, such a statement was clearly defamatory during the Soviet Union's alliance with Nazi Germany and later during the Cold War years. See W. PROSSER, *supra* note 13, at 744. The determination is complicated because rarely is any particular course of conduct universally condemned or accepted. *Peck v. Tribune Co.*, 214 U.S. 185 (1909) (false depiction of plaintiff as person who recommended and used medicines containing alcohol).

The courts have developed what is essentially a two-fold response to this problem. If a broad and deep societal consensus exists concerning the defamatory nature of the statement, judges invariably will adopt the consensus value judgment. Thus, for example, little doubt exists about the defamatory nature of being called a murderer or a rapist. Moreover, with regard to such charges as lying, betrayal, hypocrisy, bigotry, fraud, and self-dealing, all courts recognize that a false accusation impugns a person's reputation. Conversely, unless hypocrisy or a similar flaw is being suggested, courts will not allow an action for defamation based on the false "accusa-

tion" that a man is a saint, a doctor, or a Republican, although perhaps all of these groups are held in contempt by some elements of society. *See, e.g., Frinzi v. Hanson, 30 Wis. 2d 271, 140 N.W.2d 259 (1966).*

The "values" problem becomes more acute, however, when no societal consensus has been reached on the moral issue. For example, is it defamatory to falsely call someone a proponent or an opponent of abortion? Either statement probably will generate contempt among some segments of society. And what of those issues about which the moral component may be unclear? Is it defamatory to mischaracterize a person's view on the MX missile system, defense spending, economic analysis of the law, or the theory of evolution?

The English judges approached this problem by demanding that the alleged defamation be one that hurt the plaintiff's reputation among society at large or in the eyes of the "reasonable man." *See W. PROSSER, supra* note 13, at 743. Thus, to say that an artisan favored a longer nine-hour workday would not defame him, although he was blacklisted by local contractors and suffered other special damages as a result, because many other members of society approved a nine-hour workday. *Miller v. David, 9 L.R.-C.P. 118 (1874)*. *See also Myroft v. Sleight, 90 L.J.K.B. (n.s.) 883 (1921)*; *Leetham v. Rank, 57 Sol. J. 111 (1912)* ("it is not enough to prove that the words spoken rendered the plaintiff obnoxious to a limited class"); *Mawe v. Pigott, 4 Ir. R.-C.L. 54 (1869)* (Irish priest accused of informing on criminal activities of Catholic insurgents). Thus, in England the action for defamation effectively was limited to those types of statements that the general public deemed defamatory.

In the United States, a different approach took hold, apparently as a result of the United States Supreme Court decision in *Peck v. Tribune Co., 214 U.S. 185 (1909)*. In *Peck*, the United States Court of Appeals for the Seventh Circuit had followed the English rule and affirmed a directed verdict. *154 F. 330 (7th Cir. 1907)*; *rev'd, 214 U.S. 185 (1909)*. The Seventh Circuit reasoned that, although some people would consider the use of whiskey "wrong" and although "there may be people among whom to be a nurse, is considered something less desirable than not to be a nurse," the "world has not yet arrived at a consensus of opinion on these matters, that to say these things of a person is, independently of all other consideration, to libel him." *154 F. at 333*.

The United States Supreme Court, however, reversed. Justice Holmes, writing for a majority of the Court, concluded that no general consensus need exist as to whether drinking whiskey or being a nurse is discreditable:

[I]t appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but while it is maintained it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm.

214 U.S. at 189-90. The defendant's recourse, Holmes maintained, was to convince the jury that the statements did not injure the plaintiff's standing in a considerable and respectable class within the community. *See id. at 190*. The states generally have adopted this approach. *See, e.g., RESTATEMENT (SECOND) OF TORTS § 559 comment e (1977)*.

The value question must be distinguished from the meaning question, which is treated extensively in the text of this Article. The fact that only a very small number of recipients understand the statement in its defamatory sense does not bar liability. *See, e.g., Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432 (1929)*. The defendant's only recourse with regard to the meaning question is to establish that he was unaware of the defamatory meaning of the statement.

If the dispute focuses on the values involved, rather than on the meaning of the statement, however, the defendant has a different array of defenses available. Theoretically, a defendant who deliberately wreaks harm on an individual may escape liability by showing that the statement was not defamatory in the eyes of any important and respectable group of society or, under the English view, in the eyes of a reasonable person. On the other hand, a defendant who was completely unaware of the potential defamatory nature of the statement because his values differ from those of some important, respectable minority could be held liable for harm emanating from that statement. The defendant could use an argument comparable to that advanced in *Good Government Group of Seal Beach v. Superior Court, 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978)*, *cert. denied, 441 U.S. 961 (1979)*, and in this Article's analytical framework, however, to argue that the plaintiff

should be required to show that the defendant knew that the statement might lower the plaintiff's standing with the requisite group, or that the defendant was reckless in making the statement. *See infra* text accompanying notes 47-53.

Perhaps a reconsideration of *Peck* is necessary. At the very least, its retention necessitates further constitutional protections. We think that a court following *Peck* also must require the plaintiff to show that the defendant was aware that his words would hurt the plaintiff's reputation in the eyes of an important and respectable group, albeit a minority. If a court adopted the English view instead, the need for such protections would be diminished because the inquiry would address the consensus values. Even in this event, such questions, if doubtful, should be resolved in the speaker's favor. *Cf. infra* text accompanying note 149.

n15. *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 167 N.E. 432 (1929).

n16. Of course, such matters as typography, paragraphing, and the use of quotation marks are important guides to the reasonable interpretation of the statement in question. For the suggestion that first amendment considerations may limit some of the common law approaches to these matters, see Schauer, *supra* note 11, at 287.

n17. *See, e.g.*, W. PROSSER, *supra* note 13, at 739; R. SACK, *supra* note 6, at 52-53. For an egregious refusal to permit a jury to consider the meaning of "murderer" as applied to the governor who refused to stay the executions of Sacco and Vanzetti, see *Commonwealth v. Canter*, 269 Mass. 359, 168 N.E. 790 (1929), which is discussed in Schauer, *supra* note 11, at 263-68.

n18. 398 U.S. 6 (1970).

n19. *Id.* at 13.

n20. *Id.* at 14.

n21. *Id.* at 13. Even the most casual attention to the role of context should have protected a man carrying a sign calling the governor of Massachusetts a "murderer" for refusing to spare the lives of Sacco and Vanzetti. *See Commonwealth v. Canter*, 269 Mass. 359, 168 N.E. 790 (1929); *see also* Schauer, *supra* note 11, at 263-68. For this purpose, no need exists to distinguish between criminal and civil libel.

n22. 398 U.S. at 22 (White, J., concurring).

n23. *Id.*

n24. *Id.* at 23.

n25. 655 P.2d 875, 876 (Hawaii 1982).

n26. The defendant sought to introduce testimony from a professor of linguistics that supported the defendant's interpretation of the sign. *Id.* at 877.

n27. *See* R. SACK, *supra* note 6, at 50-51.

n28. 557 F. Supp. 535 (S.D.N.Y. 1983).

n29. *Id.* at 537-40.

n30. *Id.* at 541-45.

n31. *See, e.g., Smith v. Smith*, 236 N.Y. 581, 142 N.E. 292 (1923); *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K.B. 331.

n32. W. PROSSER, *supra* note 13, at 748. Where the fragmentation of the audience occurs because of special values on the part of one group, a different analysis appears appropriate. *See supra* note 14.

A breakdown in communications also occurs when the speaker uses one set of words, but the recipient hears an entirely different set of words. This special interpersonal communication problem can occur, for example, with a recipient who is hard of hearing. This problem differs from those discussed in the text because these recipients are not hearing the same words as other recipients.

n33. 376 U.S. 254 (1964).

Those who sought to justify *New York Times* on a self-governance rationale found some early support in Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965), but later cases clearly have depended upon a broader rationale. *Butts* and *Walker* extended the *New York Times* rule to public figures; self-governance notions, of course, cannot be the rationale of these cases to the extent that they involve plaintiffs like Carol Burnett. *See Burnett v. National Enquirer*, 7 Media L. Rep. (BNA) 1321 (Cal. Super. Ct. 1981), modified, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed, 104 S. Ct. 1260 (1984). Nor could a self-governance rationale explain *Time, Inc. v. Hill*, 385 U.S. 374 (1967), in which the Court held that a story about a family held hostage in their home by convicts was protected by the *New York Times* rule. Finally, *Gertz*, necessarily relying on some rationale of the first amendment other than the idea that it facilitates the democratic process, extended constitutional protection to all media libels concerning private citizens. The sum of these cases, then, is that *New York Times* is not simply about the protection of the democratic process but about the protection of speech per se. As such it makes no sense to limit either prong of our argument -- requiring awareness of meaning or falsity -- to the public official case. *See also infra* text at notes 57-58.

n34. 376 U.S. at 271-72.

n36. *Id.* at 279.

n37. *Id.* at 279-80.

n38. Intermediate in rigor between constitutional malice and negligence is a standard developed by the New York Court of Appeals in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975):

[W]here the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

Id. at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. The passage, although addressed to private plaintiffs, probably was influenced by a similar standard Justice Harlan sought to establish for public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

n39. See *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 n.16 (1979). In the second part of this Article, the importance of protecting truthful speech will be discussed in light of the fault requirement. See *infra* text accompanying notes 89-236.

n40. A gross negligence or negligence standard would not be at all responsive to the Emersonian justification of the first amendment, which arguably plays an important part in the *New York Times* line of cases. See *supra* note 33. The careless and less intelligent segments of society have the same right to self-expression as the cautious elite. A subjective test of awareness puts all on an equal footing with respect to first amendment rights in a way that an objective standard cannot.

Some commentators have noted that even the subjective test of *New York Times* may afford too little protection to unpopular defendants insofar as juries are given free rein to disbelieve testimony offered by defendants. LaRue, *Living with Gertz: A Practical Look at Constitutional Libel Standards*, 67 VA. L. REV. 287, 291 (1981). Justice Black expressed a similar concern in *New York Times* itself: "This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas which in theory would protect the press." 376 U.S. at 295 (Black, J., concurring).

Importantly for the purposes of this analysis, all these problems are accentuated by objective standards of legal liability. Juries have traditionally had wide-ranging freedom to make findings of negligence or even gross negligence, and courts are extremely reluctant to review such determinations. For this reason as well, we prefer the subjective standard of *New York Times* at the meaning stage of the analysis. A lesser standard has little "bite" at the often critical stage of appellate review.

n41. See *infra* text at note 49.

n42. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-8 (1970).

"Chilling" usually refers to would-be speakers who consciously avoid making statements in areas they know to have unclear boundaries or in which they fear lawsuits or criminal prosecutions. But here almost any combination of words can expose the speaker to the risk of liability or the expense of litigation. The self-censorship concern in this situation builds from a public perception of unfairness. As noted shortly, see *infra* text accompanying note 55, those who are less well-educated and without legal advice will fall into legal traps of the sort that surprised Mr. Merena. Continued exposure to such risks must sooner or later poison the atmosphere in which public discourse occurs.

n43. For a discussion of the marketplace and self-governance theories of freedom of expression as applied to defamation law, see Schauer, *supra* note 11, at 268-73.

n44. 655 P.2d 875 (Hawaii 1982).

n45. *Id.* at 877.

n46. *Id.*

n47. 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978), cert. denied, 441 U.S. 961 (1979). We doubt that the case should have been submitted to the jury. *Seal Beach* involved a bitter political dispute in a small community. Yet, the court refused to apply the reasoning of *Greenbelt* because "the publication did not describe the background against which the remarks concerning the use of the terms 'blackmail' and 'extortion' were made." *Id.* at 683, 586 P.2d at 577, 150 Cal. Rptr. at 263. Everyone in the town, however, understood these details. We doubt that the protection offered by *Greenbelt* is limited only to those occasions in which the publica-

tion giving rise to the suit has noted every detail of the entire controversy. This issue is related to the requirements of "fair comment," discussed in *infra* text accompanying notes 174-81. See also *infra* note 192.

n48. 22 Cal. 3d at 684, 586 P.2d at 578, 150 Cal. Rptr. at 264. We address the "fact-opinion" distinction in *infra* text accompanying notes 168-236.

n49. *Id.*, 586 P.2d at 577-78, 150 Cal. Rptr. at 263.

n50. *Id.*, 586 P.2d at 578, 150 Cal. Rptr. at 264.

n51. See Murnaghan, *Ave Defamation, Atque Vale Libel and Slander*, 6 U. BALT. L. REV. 27 (1976).

n52. Although "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), intentional falsehoods do not always lose the constitutional protections imposed by *New York Times* and its "awareness of meaning" corollary. The peculiar nature and history of defamation makes the imposition of liability pursuant to its doctrines unconstitutional when the defendant, although a knowing misleader, is an unwitting defamer. Doctrines such as presumed damages and the virtual lack of a proximate cause safeguard, combined with the inherently speculative nature of reputational damage mean that being forced to respond in *defamation* can be itself enough of a "surprise" to justify a requirement of subjective awareness on the part of the defendant.

A state, without doing violence to this notion, may be able to impose liability without an awareness requirement for intentional falsehoods in some other tort context. See, e.g., *Keeton v. Hustler Magazine*, 104 S. Ct. 1473 (1984).

n53. 376 U.S. at 285-86.

n54. See *supra* text accompanying note 24.

n55. See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 25 (1983).

n56. See Franklin, *supra* note 9, at 473.

n58. Franklin, *supra* note 55, at 14-23.

n59. See *St. Amant v. Thompson*, 390 U.S. 727 (1968).

n60. Media defendants do not seem more likely than nonmedia defendants to know about obscure extrinsic facts because knowledge of such facts generally is not part of their expertise -- as opposed to "inherent ambiguity," for example.

n61. 418 U.S. 323 (1974). See Christie, *Underlying Contradictions in the Supreme Court's Classifications of Defamation*, 1981 DUKE L.J. 811; Franklin, *What Does "Negligence" Mean in Defamation?* 6 COMMENT L.J. 259 (1984).

n62. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974) (footnote omitted).

n63. *Id.* See *RESTATEMENT (SECOND) OF TORTS* § 580B comments b, d (1977) (suggesting that negligence should suffice in this situation).

n64. The argument in favor of requiring convincing clarity in defamation suits rests both on the arguments made earlier regarding the importance of the awareness element in all speech cases and on the idea that even in *Gertz* strong arguments can be made that a negligence showing should have such a basis. See Anderson, *supra* note 11, at 467-68. *But see infra* note 144.

n65. 698 F.2d 430 (11th Cir. 1983).

n66. *Id.* at 432.

n67. *Fong v. Merena*, 655 P.2d 875, 877 (Hawaii 1982).

n68. See *supra* text accompanying notes 28-30.

n69. See 557 F. Supp. 535 (S.D.N.Y. 1983); 510 F. Supp. 210 (S.D.N.Y. 1981).

n70. An assertion by the editors that they did not know that lawyers were among their reading audience would be incredible. Whether the editors knew that lawyers would view the term "mouthpiece" differently than other readers, however, is not so clear.

n71. The two editors testified that they did not intend to ridicule or disparage the plaintiff. Rather, they maintained that they chose the term "mouthpiece" because it was more colorful than the term "spokesman." Although the judge briefly summarized this testimony, he stated that the testimony "was not directly relevant to the question whether the caption was perceived by *Barron's* readers as defamatory." 557 F. Supp. at 543 n.6.

n72. See *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 343 P.2d 36 (1959).

n73. Of course, the states may decide to protect speakers who are aware of an unstated extrinsic fact because, for example, many plaintiffs are often hurt less when the defamation is not explicit.

In the case of the recipient who is hard of hearing, see *supra* note 32, the court should focus on whether the speaker knew of the recipient's affliction and, if so, whether he acted recklessly in light of this knowledge or intended the recipient to misunderstand the statement.

n74. See the "famous, bitter, and unproductive" debate between Professors Prosser and Eldredge, which is discussed in Anderson, *supra* note 11, at 422 n.5.

n75. David Anderson set forth a weaker version of this proposition when he wrote: "The problem of liability for statements not defamatory on their face should be handled by a two-step inquiry: (1) Did the defendant know or should he have known, that the statement was likely to cause injury to reputation? (2) If so, was the defendant negligent with respect to truth . . .?" Anderson, *supra* note 11, at 465. Although we disagree with Professor Anderson's contention that a negligence test is appropriate in determining the meaning of a statement, we agree that a strict liability standard is unacceptable.

n76. See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979); *Fong v. Merena*, 655 P.2d 875 (Hawaii 1982); *Miss America Pageant v. Penthouse, Ltd.*, 7 Media L. Rep. (BNA) 2177, 2182 (D.C.N.J. 1981); *Salomone v. MacMillan Publishing Co.*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980).

n77. *See, e.g., Richardson v. Signal Publishing*, 5 *Media L. Rep. (BNA)* 1593 (*Ohio Ct. App.* 1979). Although the court granted the defendant's motion for summary judgment on another point, the court refused to consider the defendant's affidavit that stated that the article was "meant to convey" a nondefamatory meaning.

n78. *RESTATEMENT (SECOND) OF TORTS* § 563 comment b (1977); W. PROSSER, *supra* note 13, at 746-51; R. SACK, *supra* note 6, at 50.

n79. *See supra* text accompanying notes 62-63. The only possible suggestion of immunity came from Justice Powell in *Gertz v. Robert Welch, Inc.*, 418 *U.S. at* 348 (1974), where he asserted that a defendant should be liable only if the possibility of harm to the plaintiff's reputation would have been "apparent" to a reasonably prudent editor. Our interpretation of this passage, though, is the narrower notion that the Court sought to protect only those speakers not subjectively aware of the defamatory nature of their statements.

n80. 11 *Mass. App.* 602, 417 *N.E.2d* 1238 (1981).

n81. *Id. at* 606, 417 *N.E.2d at* 1241.

n82. *Id.* (citing *Tropeano v. Atlantic Monthly Co.*, 379 *Mass.* 745, 400 *N.E.2d* 847 (1980)). Because the plaintiff in *Mihalik* was a public official and the defendant's statement arose during a period of labor negotiations, the result reached in that decision may be sound for other reasons. *See infra* note 192. *New York Times* does not dictate the refusal to consider implicit overtones.

n83. 406 *So. 2d* 185 (*La.* 1981).

n84. *Id. at* 188.

n85. *Id.* Because liability can be imposed under the *Gertz* standard only if the statement is untrue, no truthful statements about private persons can give rise to liability for defamation. In light of this reasoning, the vitality of the Louisiana rule as applied to private plaintiffs must be questioned. The Louisiana Supreme Court's focus on public officials, rather than on all public plaintiffs, however, suggests that the court believed that debate over the conduct of public officials should be freer from restraints than other types of discussion. Although the court's belief may be justifiable, *see infra* note 192, that result does not follow from any United States Supreme Court decision.

n86. *See Strada v. Connecticut Newspapers*, 8 *Media L. Rep. (BNA)* 2603 (*Conn. Super. Ct.* 1982); *Ferguson v. Dayton Newspapers*, 7 *Media L. Rep. (BNA)* 1396 (*Ohio C.P.* 1981).

n87. *See Burns v. McGraw-Hill Broadcasting Co.*, 659 *P.2d* 1351 (*Colo.* 1983); *Buratt v. Capital City Press Co.*, 399 *So. 2d* 687 (*La. Ct. App.* 1981), *cert. denied*, 416 *So. 2d* 116 (*La.* 1982).

n88. Protection of implicit defamation also does not serve society's concern with guaranteeing freedom of speech. Recall the Court's explicit refusal to protect deliberate lies even in public matters in *Garrison v. Louisiana*, 379 *U.S.* 64 (1964), as well as its assertion in *Gertz* that there "is no constitutional value in false statements of fact." 418 *U.S. at* 340. Some of these cases involve deliberate attempts by the defendants to mislead the public by encouraging them to take the apparently logical step that the facts appear to warrant, if not require. *See, e.g., Mihalik v. Duprey*, 11 *Mass. App.* 602, 607 n.3, 417 *N.E.2d* 1238, 1241 n.3 (1981) (writer knew that the negative implication he was seeking to convey about plaintiff was false). *See also Afro-American Publishing*

Co. v. Jaffe, 366 F.2d 649, 655 (D.C. Cir. 1966) (en banc) ("[P]artial truths are not necessarily even mitigating in this branch of the law, for the defamer may be the more successful when he baits the hook with truth.").

n89. Although the rule was different in criminal libel, England never wavered from the rule in civil cases. GATLEY ON LIBEL AND SLANDER § 351, at 152 (8th ed. 1981).

n90. R. SACK, *supra* note 6, at 130; Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964).

n91. *But see Welch v. Chicago Tribune Co.*, 34 Ill. App. 3d 1046, 340 N.E.2d 539 (1975).

n92. *See supra* notes 42-43; *see also* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521.

n93. J. S. MILL, *Law of Libel and Liberty of the Press*, in JOHN STUART MILL ON POLITICS AND SOCIETY 143, 160 (G. Williams ed. 1976). Mill considered, but rejected, the possibility that a true statement that is "without being of any advantage to the public," but "calculated to give annoyance to private individuals" might be the basis of civil liability. *Id.* at 160-61. Mill's conclusion raises the issue of whether a civil action can arise for the reporting of "private" facts, which is beyond the scope of this Article. For a detailed discussion of this issue, see Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

n94. 376 U.S. at 279-80.

n95. 379 U.S. 64 (1964).

n96. *Id.* at 70.

n97. *Id.* at 71.

n98. *Id.* at 74.

n99. *Id.*

n100. 418 U.S. 323 (1974). The Court continued to observe during that decade, however, that truth is a defense in a defamation suit. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967), in which the Supreme Court observed:

In the light of questions that counsel were asked to argue . . . it is particularly relevant that the Court of Appeals made crystal clear in the *Spahn* opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. . . . Constitutional questions which might arise if truth were not a defense are therefore of no concern.

Id. at 382-84.

n101. This implication follows from the Court's imposition of a fault requirement that necessarily is connected to the statement's falsity. *See 418 U.S. at 347.*

n102. 420 U.S. 469 (1975). *Cox Broadcasting* represents the Supreme Court's first opportunity to consider the ramifications of a suit by a private plaintiff seeking to recover for a true invasion of privacy.

n103. *Id.* at 490.

n104. *Id.* at 499.

n105. 424 U.S. 448 (1976).

n106. *Id.* at 458.

N107. A possible exception to this rule involves cases brought by private plaintiffs against nonmedia defendants. The Court in *Gertz* emphasized that its reasoning applied to "publishers and broadcasters." 418 U.S. at 343. The Court, therefore, might not require the plaintiff to show that the publication was false in those cases not involving media defendants.

By granting certiorari recently in a nonmedia case, the court has indicated that it may begin to address some of these questions. The truth issue was not raised in that case, however. See *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414, cert. granted, 104 S. Ct. 389 (1983).

n108. Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 414-15 (1910).

n109. *Id.*

n110. For an extended discussion about the requirement that the defamatory statement be capable of being proved true or false, see Schauer, *supra* note 11, at 278. Although Schauer speaks of this requirement in terms of verifiability, we prefer to think of it in terms of disproof, because the term "disproof" emphasizes that the burden is on the plaintiff in the litigation.

n111. 376 U.S. at 280.

n112. See, e.g., *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977); *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969); *Michaud v. Inhabitants of the Town of Livermore Falls*, 381 A.2d 1110 (Me. 1978); *Delia v. Berkey*, 41 Md. App. 47, 395 A.2d 1189 (1978), rev'd, 287 Md. 302, 413 A.2d 170 (1980).

A few courts have refused to shift the burden of proof in private figure cases. Compare *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), cert. dismissed, 454 U.S. 1130 (1981); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); and *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126 (1978), holding that even private plaintiffs must show falsity, with *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 377 A.2d 807 (1977), modified on other grounds, 164 N.J. Super. 465, 397 A.2d 334 (1979); and *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978), holding that the defendant must prove truth.

The *Restatement* asserts that "[a]s a practical matter, in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity, the plaintiff will necessarily find that he must show the falsity of the defamatory communication." RESTATEMENT (SECOND) OF TORTS § 508B comment j (1977).

n113. 376 U.S. at 285-86.

n114. *Firestone v. Time, Inc.*, 460 F.2d 712, 722 (5th Cir.) (Bell, J., concurring), cert. denied, 409 U.S. 875 (1972). Judge Bell maintained that, although the United States Supreme Court had not addressed the question,

such a standard of proof was "implicit" in *New York Times*. He therefore concluded "for the same constitutional reasons giving rise to this stringent proof requirement that the clear and convincing proof standard would also apply to proving that the statement was false in the first instance." 460 F.2d at 722-23.

n115. Two post-*New York Times* cases demonstrate that the Supreme Court intended to place the burden on the plaintiff. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court held that the "constitutional protections for speech and press preclude the application of the . . . statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of falsity or in reckless disregard of the truth." *Id.* at 387-88. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), Justice Harlan observed that under the *New York Times* standard, public officials could recover damages in a libel suit "only when they could prove that the publication was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity." *Id.* at 153 (Harlan, J.).

n116. 418 U.S. at 347.

n117. See *supra* text accompanying notes 111-12.

n118. 642 F.2d 371 (6th Cir.), cert. dismissed, 454 U.S. 1130 (1981).

n119. 642 F.2d at 373.

n120. *Id.* at 375.

n121. *Id.*

n122. *Id.*

n123. See Franklin, *supra* note 61.

n124. 642 F.2d at 375. In most civil cases "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). But an erroneous verdict in the defendant's favor does make a difference in libel cases because of the danger of liability without fault or falsity. An incorrect "determination may have the effect of improperly denying first amendment protection." Schauer, *supra* note 11, at 277.

n125. See Franklin, *supra* note 55, at 8.

n126. See Keeton, *supra* note 10, at 1236 ("If the plaintiff must prove, as a minimum, lack of a reasonable basis for believing the statement to be true, as a practical matter he would first have to establish the falsity of the statement. [To avoid] incongruity and confusion in the submission of a case to the jury, the burden of proof on falsity must be on the plaintiff."). Although unhappy with the result, Professor Eldredge has recognized that the burden of proof with regard to the issue of falsity has shifted to the plaintiff. See L. ELDREDGE, THE LAW OF DEFAMATION § 63 (1978). Cf. *supra* note 112 (citing cases in which courts have shifted or refused to shift the burden of proof).

We believe that the continued use of the phrase "truth is a defense" in summary judgment cases is the result of confusion. After discovery, the defendant seeks to avoid trial by demonstrating that no material issue exists with regard to the truth-falsity aspect of the case. In cases involving a public figure, the plaintiff clearly bears

the burden of establishing the falsity of the statement. Thus, in such cases, although the defendant may contend in his motion for summary judgment that he has shown the truth of the statement conclusively, the defendant actually is arguing that he has shown conclusively that the plaintiff cannot establish the required element of falsity. *See, e.g., Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977). The defendant may have seized the initiative on the issue in order to avoid the trial, but this tactic does not affect the underlying conclusion that the risk of nonpersuasion is on the plaintiff. conversely, in cases involving a private plaintiff, the defendant may claim to be establishing the truth of the statement in order to avoid the *Wilson* dispute, but the underlying point is that the plaintiff cannot hope to prove falsity. *See Wehling v. Columbia Broadcasting Sys.*, 721 F.2d 506 (5th Cir. 1983).

n127. 9 J. WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. ed. 1981).

n128. No single factor should determine who should bear the burden of proof on a disputed issue. *See id.*

n129. *Id.*

n130. 50 AM. JUR. 2d Libel and Slander § 416 (1970).

n131. *See* M. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 60-63 (1880).

n132. *See, e.g., Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907-08 (1971) (citing 53 C.J.S. Libel and Slander §§ 210, 217 (1948)).

n133. Some commentators argued that the truth or falsity of the statement is irrelevant to the primary legal question of whether the defendant's remark was defamatory. *See, e.g.,* 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 275 (1906). Those commentators argued that if the defendant could show that the remark was true, then the plaintiff no longer would have "clean hands," and the suit would be barred on quasi-equitable grounds. Similarly, some courts and commentators argued that a plaintiff should not recover for the loss of a reputation to which he was not entitled. *See, e.g., M'Pherson v. Daniels*, 109 Eng. Rep. 448 (1829). Under either analysis, the defendant must raise this equitable defense. But the premise of the argument -- that "actionable defamation" included both true and false statements -- is no longer acceptable.

n134. *See* Murnaghan, *supra* note 51, at 40-41.

n135. W. HUNTER, ROMAN LAW 898 (1876); *see also* M. DEVILLIERS, THE ROMAN AND ROMAN-DUTCH LAW OF INJURIES (1899).

n136. *See Keeton, supra* note 10, at 1236, in which the commentator contends: A plaintiff is in the best position to know the facts about his own life and activities that will establish falsity. A plaintiff's simple denial would perhaps be sufficient in the abnormal situation of a defendant who publishes statements that conclusively defame without providing some information that would indicate truth. If the defendant included information tending to indicate truth, however, the plaintiff, who has access to the facts of his life, can be expected to discharge the burden of overcoming the suspicious circumstances.

n137. 418 U.S. at 326.

n138. 639 F.2d 54 (2d Cir. 1980).

n139. *See Fowler v. Seaton*, 61 Cal. 2d 681, 694, 394 P.2d 697, 705, 39 Cal. Rptr. 881, 889 (1964) (Schauer, J., dissenting) (Justice Schauer maintained that the majority should not be so quick to invoke the doctrine of *res ipsa loquitur* if discovery rules would make necessary evidence available to the plaintiff); Murnaghan, *supra* note 51, at 40-41 n.49.

n140. Courts often require litigants to prove a negative. Although the following list, which is drawn largely from J. WIGMORE, *supra* note 127, at 288 n.2, and Holzman, *The Problem of Negative Proof*, 48 TAXES 14 (1970), is not exhaustive, the list does illustrate the range of legal areas in which the courts have required proof of a negative proposition.

A. Tort Law

1. In an action for slander of title or injurious falsehood, the plaintiff must show that the alleged slander was not true. *RESTATEMENT (SECOND) OF TORTS* § 651 (1977).

2. In a suit for misrepresentation, the plaintiff must show that the defendant's representations were not true. *Prentice v. Crane*, 234 Ill. 302, 84 N.E. 916 (1908).

3. Many states long required the plaintiff to show that he had not been contributorily negligent in a negligence suit. *See, e.g., West Chicago St. R.R. v. Liderman*, 187 Ill. 463, 58 N.E. 367 (1900).

B. Criminal Law

1. Most jurisdictions require the prosecution to prove that a criminal defendant did not act in self-defense. *See, e.g., State v. Millet*, 273 A.2d 504, 505-08 (Me. 1971).

2. The prosecution must prove that a murder defendant did not act in the heat of passion. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

3. Under most rape statutes, the government must prove that the victim was not the wife of the defendant. *See, e.g., CAL. PENAL CODE* § 261 (West. Supp. 1984).

4. New York's distinction between first and second degree robbery requires the defendant to show that the weapon used was not loaded in order to be guilty of the lesser offense. *Farrell v. Czarnetzky*, 566 F.2d 381 (2d Cir. 1977).

5. In a prosecution for operating an uninsured motor vehicle, the state must prove that the vehicle was in fact uninsured. *Commonwealth v. Munoz*, 384 Mass. 503, 426 N.E.2d 1161 (1981).

C. Tax Law

1. A taxpayer can deduct entertainment expenses only if he can show that his employer did not reimburse him for those expenses. *Johnson v. Commissioner*, 25 T.C.M. (CCH) 858 (1966).

2. A taxpayer claiming a loss on the sale of stock must establish that no repurchase agreement exists with regard to that stock. *Rand v. Helvering*, 77 F.2d 450 (8th Cir. 1935).

3. A taxpayer claiming a worthless stock deduction must show that the stock was not worthless at the beginning of the tax year. *Squier v. Commissioner*, 68 F.2d 25 (2d Cir. 1933).

4. The taxpayer must prove that travel expense deductions are not personal in nature. *Fred A. DeCain*, 10 T.C.M. (CCH) 581 (1951); *see also Tyne v. Commissioner*, 409 F.2d 485 (7th Cir. 1969).

5. "Collapsible corporations" carried the burden of showing that the purpose of their corporation was not the conversion of ordinary income into capital gains. *Rechner v. Commissioner*, 30 Tax. Ct. Rep. (CCH) 17 (1958).

6. Property given away by a decedent within three years of his death will be included in his estate unless the estate can show that the property was not given away in contemplation of death. *I.R.C.* § 2035(b) (1981).

D. Miscellaneous

1. The plaintiff must show the defendant's nonperformance of a contractual obligation in a suit for breach of contract. *RESTATEMENT (SECOND) OF CONTRACTS* § 235 (1981).

2. In land condemnation proceedings, the landowner had to prove that the condemnor did not intend to use the condemned land for his own purposes. *See Beckman v. Lincoln & N.W.R.*, 79 Neb. 89, 93-98, 112 N.W. 348, 350-51 (1907).

3. An insurance company must show that the insured has not complied with a condition precedent concerning notice to defend an action on the policy. *Harty v. Eagle Indem. Co.*, 108 Conn. 563, 566, 143 A. 847, 848 (1928).

4. The party challenging the validity of a second marriage bears the burden of showing that a divorce has not been obtained. *Aparking v. Industrial Comm'r*, 48 Ill. 2d 332, 336, 270 N.E.2d 411, 413 (1971).

5. In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court noted that earlier obscenity cases had required the prosecution "to prove a negative, *i.e.*, that the material was *utterly* without redeeming social value -- a burden virtually impossible to discharge under our criminal standards of proof." *Id.* at 22. Although rejecting this one negative, the Court went on to require the government to show another negative -- that the material "lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

n141. *See* R. SACK, *supra* note 6, at 134.

n142. Another argument in favor of placing the burden on the plaintiff is that if the burden is on the defendant, the jury may think that the defendant is trying to cover up its failure in reporting or that the defendant is still out to "get" the plaintiff. *See* Nelon, *supra* note 10, at 490.

n143. *See supra* text accompanying note 113.

n144. In his dissent in *Gertz*, Justice Brennan asserted that "the burden of proof for reasonable care will doubtless be the preponderance of the evidence." 418 U.S. at 366 (Brennan, J., dissenting). *But see supra* note 64.

n145. Schauer, *supra* note 11, at 274-75 (footnotes omitted).

n146. *But cf. Lego v. Twomey*, 404 U.S. 553 (1973) (the necessary evidentiary finding that a confession was voluntary could be based on "preponderance of the evidence" standard although ultimate guilt was based upon "beyond a reasonable doubt" standard).

n147. *Time, Inc. v. Hill*, 385 U.S. 374, 406 (Harlan, J., concurring and dissenting).

n148. *See infra* text accompanying notes 150-67.

n149. For a judicial suggestion that falsity must be shown with convincing clarity, see *supra* note 114.

n150. *Cf.* REPORT OF THE COMMITTEE ON DEFAMATION, CMD. 5909, at 36 (1975), which states:

Perhaps the most radical suggestion of all made to us was that the burden of proof should be shifted so that a defendant would have a defence unless the plaintiff could disprove the truth of the allegations. We are firmly opposed to this suggestion. We think that the principle requiring a publisher of defamatory words to prove their truth (subject of course to other defences like qualified privilege) is a sound principle. It tends to inculcate a spirit of caution in publishers of potentially actionable statements which we regard as salutary, and which might well be severely diminished if the burden of proof were shifted. Moreover such a shift would, we think severely upset the balance of the law of defamation against defamed persons.

n151. For a commentary suggesting that the *New York Times-Gertz* protection comes too late in the litigation, see Anderson, *supra* note 11. See also *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (questioning the propriety of summary judgment where actual malice must be shown).

n152. See Franklin, *supra* note 55, at 13-23.

n153. Some libel cases have indicated that the falsity of the publication should be discovered at the outset of the case, or at least before a court orders a reporter to reveal his confidential sources. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). See generally 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2040, at 286-89 (1970). The confidential source problem presents an especially strong case for prescribing the order of discovery, and greater judicial control over the sequence of discovery in libel cases also might help reduce the excessive legal expenses involved in these cases. See Franklin, *supra* note 55, at 13-23.

n154. 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

n155. 539 F.2d at 893 (footnote omitted).

n156. *Id.* at 894. The trial judge had "treated the alleged libel as if Buckley had been called a fellow traveler of the Fascisti, or the Nazis, or the Falangists, or a mythical Fascist Party of America, quite another case than the one we have." *Id.* at 893 n.11.

At least one commentator has recognized that editorial changes, such as adding capital letters to certain words in a publication can affect a word's meaning. See Schauer, *supra* note 11, at 284. In his commentary, Schauer expresses concern that "[t]oo often simply using a capital letter seems to convert a possibly subjective (descriptive) statement into an objective (identifying) one." *Id.* at 292. Schauer's concern here is the apparent willingness of the *Gertz* majority to treat "Leninist" as a verifiable charge. *Id.*

n157. Professor Hill analyzes *Buckley* as a fair comment case in which the underlying facts are widely known and the words in question are protected comment. Hill, *supra* note 11, at 1232 n.131 & 1242 n.168. We read the quoted passages from the opinion to indicate that the court did not rely on the existence of a body of writing by Mr. Buckley, although his public figure status apparently influenced the court to resolve any doubt by finding the passages not actionable. 539 F.2d at 890. See also *National Ass'n of Gov't Employees v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980).

n158. See *supra* text accompanying notes 25-32.

n159. See, e.g., *Gurda v. Orange County Publications*, 56 N.Y.2d 705, 436 N.E.2d 1326, 451 N.Y.S.2d 724 (1982), rev'g, 81 A.D.2d 120, 439 N.Y.S.2d 417 (1981) (a newspaper may use the terms "fraud" and "fine" in their layman's sense even though such use of the terms is technically inaccurate in the story).

n160. 82 F.2d 154 (2d Cir. 1936).

n161. *Id.* at 156.

n162. Accord R. SACK, *supra* note 6, at 64. But cf. Hill, *supra* note 11, at 1244 (it would be "difficult to argue, on the merits, that there should be no liability at all [in *Burton*].")

At one point, the court compares the case to "a verbal utterance which expressly declared that it was false." 82 F.2d at 155. We question this analogy because, in the case of a verbal utterance, the speaker apparently utters

a defamation and then immediately indicates that the statement was false. In such a case, the recipient may be in doubt as to the speaker's meaning, and may not believe the "retraction." In *Burton*, no such lingering uncertainty was possible.

n163. One can argue that under contemporary definitions of defamation, *see, e.g., RESTATEMENT (SECOND) OF TORTS* § 558 (1977), courts should dismiss *Burton*-type statements on the ground that such statements do not diminish reputation at all.

The court in *Burton* admitted that the statement "asserts nothing whatever about the plaintiff." *82 F.2d at 155*. The court nevertheless allowed the action to proceed on the theory that ridicule per se constituted defamation at common law. *Id.* Analytically, the harms occasioned by *Burton*-type publications probably would be handled better under a theory of intentional -- or, in some states, negligent -- infliction of emotional stress, even if falsity were not the hallmark of defamation. In any event, because falsity is now a central element of defamation, a statement that does not diminish reputation, such as the statement found in *Burton*, cannot be deemed libelous.

n164. This category derives its title from a commentary written by Page Keeton. *See Keeton, supra* note 10, at 1250-51.

n165. This discussion leaves aside the question of the "dishonestly held" opinion. Some commentators have puzzled over cases in which the facts are true but the evaluative comment is not held honestly. One example is a drama critic who pans a play solely because he dislikes the playwright. *See R. SACK, supra* note 6, at 176. Although clearly "no constitutional value [exists] in false statements of fact," *Gertz, 418 U.S. at 340*, particularly one that is deliberately false, this observation does not support the view that an insincerely held evaluation should give rise to an action for defamation. When one speaks of the truth or falsity of a defamatory statement, attention traditionally and properly is focused on the words used in the statement. Because a naked statement of dislike or lack of respect cannot be proved false, we would conclude that insincerely held views are not actionable as defamations. *Accord Keeton, supra* note 10, at 1257 (When the "only fact misrepresented is the publisher's state of mind regarding the nature and quality of the plaintiff's conduct and . . . those receiving the publication have an opportunity to make their own evaluation, the speech should be absolutely free. It is defamatory but not actionable.").

Although one may not agree with our conclusion, one nevertheless must recognize that allowing courts to inquire into the sincerity of the view in every case involving a nondisprovable utterance would greatly increase litigation involving comment and criticism. *See R. SACK, supra* note 6, at 175-76. Because a defendant would have difficulty presenting a conclusive showing of sincerity, courts might permit most of these cases to proceed to trial. The practical effect of this inquiry would seem sufficient to warrant a general rule against allowing courts to consider the sincerity of the statement giving rise to a defamation suit.

n166. *See Schauer, supra* note 11, at 267 n.13 ("skepticism as to belief is one of the fundamental tenets of the First Amendment") (citing *Abrams v. United States, 250 U.S. 616, 630 (1919)* (Holmes, J., dissenting), and *United States v. Dennis, 183 F.2d 201, 207 (2d Cir. 1950)* (L. Hand., J.), *aff'd, 341 U.S. 494 (1951)*).

n167. *Keeton, supra* note 10, at 1251 (absolutely protecting all statements representing value judgments); *see also id.* at 1235.

No doubt there is substantial disagreement among philosophers about the degree to which moral judgments can be rationally justified or verified. *See Moore, Moral Reality, 1982 WIS. L. REV. 1061, 1072, 1106*. This Article, however, is not aimed at resolving such philosophical disagreements. As noted by Schauer, *supra* note 11, "[A]ttempts to apply philosophical principles to legal problems too often lose sight of the particular goals that a legal system must serve and of the dynamics and limitations inherent in a system of laws administered to assist in the ordering of affairs of individuals." *Id.* at 266 n.12.

n168. 7 J. WIGMORE, *supra* note 127, § 1919, at 14-16.

n169. See, e.g., R. SACK, *supra* note 6, at 155 ("No task undertaken under the law of defamation is any more elusive than distinguishing between the two."); Titus, *Statement of Fact Versus Statement of Opinion -- A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962); see also W. PROSSER, HANDBOOK OF THE LAW OF TORTS 820 (4th ed. 1971) (the distinction in defamation "has proved to be a most unsatisfactory and unreliable one, difficult to draw in practice").

Schauer, *supra* note 11, at 276-81, discusses the matter at length, concluding that words and phrases lie along a continuum in terms of their verifiability:

The concept of verifiability, though useful in distinguishing statements of belief from statements of fact, has limited applicability. Verifiability is not a property that either does or does not obtain. Rather, it is a property that may be present in varying degrees. The more it exists, the more confident the determinations of truth.

Id. at 279.

n170. Titus, *supra* note 169, at 1205-06.

n171. Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1212 (1949).

n172. See 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.28, At 458 (1956).

n173. *Id.*

n174. This conclusion was not always so clear. Professor Christie argues that the first *Restatement of Torts* elevated a rather inconclusive line of authority on this point to an authoritative declaration of the law. Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621, 1625 (1977). The English view initially was contrary to that set forth in the first *Restatement*. See *Merivale v. Carson*, [1888] 20 Q.B.D. 275; *Campbell v. Spottiswood*, [1863] 26 Q.B. 769, 122 Eng. Rep. 288. By 1958, however, the English courts had adopted the position of the American *Restatement*. See *Grech v. Odhams Press Ltd.* [1958] 2 Q.B. 275, 281-82.

n175. See Titus, *supra* note 169, at 1209 (citing Note, *supra* note 171, at 1212-13); see also Boyer, *Fair Comment*, 15 OHIO ST. L.J. 280, 301 (1954); Keeton, *supra* note 10, at 1246-47.

n176. See, e.g., *Carr v. Hood*, 170 Eng. Rep. 983 (1808). For a discussion of other early cases that reached similar results, see J. TOWNSHEND, LIBEL AND SLANDER 450-56 (3D ED. 1877).

n177. See RESTATEMENT OF TORTS §§ 606-610 (1938).

n178. Note, *supra* note 171, at 1212-13.

n179. See *Tabart v. Tipper*, 170 Eng. Rep. 981 (1808). In *Tabart*, Lord Ellenborough contended that "[l]iberty of criticism must be allowed, or we should have neither purity of taste or of morals. Fair discussion is essentially necessary to the truth of history, and the advancement of science. That publication, therefore, I shall never consider as a libel. . . ." *Id.* at 982.

n180. RESTATEMENT OF TORTS § 606(1) (1938). In addition, the *Restatement* established that "[c]riticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or character affects his public conduct" was equally privileged but only if the criticism

was "one which a man of reasonable intelligence and judgment might make." *Id.* § 606(2). As to the "actual opinion" requirement, see *supra* note 165.

n181. See RESTATEMENT OF TORTS § 582 comment h, § 606(2) (1938). The actual common law support for this position is questionable. The explanatory notes to § 582 comment h cite only two English cases as support, *Morrison v. Harmer*, 3 Bing. (n.c.) 759, 132 Eng. Rep. 603 (1837); and *Walker v. Brogden*, 19 C.B. (n.s.) 65, 144 Eng. Rep. 710 (1865). See RESTATEMENT OF TORTS § 582 (Tent. Draft No. 13, 1936). *Morrison* held that the words "rascals" and "scamps" were only epithets and terms of general abuse, which added no defamatory meaning to the charge that the defendant had shown to be true. *Walker* similarly held that such terms should be viewed as "fair comment."

Apparently Professor Hill has accepted the *Restatement* view as an accurate statement of the common law of defamation. See *Hill*, *supra* note 11, at 1236. We believe that the issue is moot, given the effect of the constitutional requirement of disproving the defamation.

In addition, of course, the privilege of fair comment was intended to protect unreasonable opinions on stated or available facts.

If the public is to be aided in forming its judgment upon matters of public interest by a free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged. The fact that the criticism is fantastic is immaterial, and the extravagant form of its expression is unimportant. It is necessary, however, that the comment have some relation to the facts upon which it is made. If it has not, it may well be taken to imply the existence of other undisclosed defamatory facts. . . .

RESTATEMENT OF TORTS § 606 comment c (1938).

n182. For an extended discussion of the confusion before *New York Times*, see Titus, *supra* note 169, at 1215-22.

n183. 78 Kan. 711, 98 P. 281 (1908). Other courts following the Kansas rule included: *Salinger v. Cowles*, 195 Iowa 873, 191 N.W. 167 (1922); *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N.W. 264 (1938); and *Lafferty v. Houlihan*, 81 N.H. 67, 121 A. 92 (1923).

n184. See Titus, *supra* note 169, at 1204 ("[t]he primary difference then between the majority and the minority views is that the latter does not make any distinction between statements on the basis of 'fact' and 'opinion'"). Later in his commentary, Titus argues that courts do not need to adopt the minority position in order to achieve a complete excision of the "spurious [fact-opinion] rule" from the law of defamation. *Id.* at 1222. The Supreme Court mooted the issue, however, in *New York Times*.

n185. 376 U.S. 254 (1964).

n186. The Court originally limited the protection offered by *New York Times* to public officials. *Id.* at 279. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended the *New York Times* rule to public figures.

n187. See *supra* text accompanying notes 111-12.

n188. 418 U.S. 323 (1974).

n189. See *supra* text accompanying notes 116-26.

n190. We do not mean to suggest that all disprovable statements should be actionable. See *infra* note 192.

n191. *See supra* text accompanying notes 174-90.

n192. On that view, the American Law Institute eliminated from the *Restatement* all sections dealing with fair comment. *See RESTATEMENT (SECOND) OF TORTS* §§ 566, 606-610 (1977).

As Sack has noted, summary deletion of the fair comment sections may have been precipitous. "Even if the constitutional protection is broader than, and entirely encompasses, the common law privilege, there is no reason why a state court cannot dismiss a lawsuit on the common law ground without ever reaching the constitutional question." R. SACK, *supra* note 6, at 182-83 (footnote omitted). More importantly, given the chaos of pre-*New York Times* law, it is impossible to say that fair comment has been used only to protect nondisprovable statements. *See* Titus, *supra* note 169, at 1215-22.

"Fair comment" may retain a continuing role insofar as state law protects some disprovable statements under the rubric "opinion." This seems to have been common for statements made in the heat of political campaigns, which often are classified as opinion despite their apparently disprovable nature. *See, e.g., Desert Sun Publishing Co. v. Superior Court*, 97 Cal. App. 3d 49, 158 Cal. Rptr. 519 (1979); *Marchiondo v. New Mexico State Tribune Co.*, 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981). We would prefer that courts explicitly describe the reason for, and extent of, the privilege. To describe such statements simply as "opinion" without more seems disingenuous. Insofar as "opinion" is divorced from the notion of verifiability, it has no discernible content at all. The tendency to offer super-protection for statements uttered in political discourse can be traced far beyond *New York Times* and *Gertz*. A substantial minority of states adhered to the "public official rule" at common law, under which most defamatory statements about public officials were not actionable. *See Cotalla v. Kerr*, 74 Tex. 89, 94, 11 S.W. 1058, 1059 (1889); *Tanzer v. Crowley Publishing Corp.* 240 A.D. 203, 268 N.Y.S. 620 (1934). *See generally*, Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 901-02 (1949).

A similar situation appears to exist in connection with labor disputes. *See, e.g., Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976). Similarly, courts may wish to avoid disputes that involve religious questions although they are subject to disproof. *See, e.g., Korn v. Rabbinical Council*, 148 Cal. App. 3d 491, 195 Cal. Rptr. 910 (1983).

At common law, therefore, "opinion" has meant all things to all people. Perhaps this is the basis for the commonly asserted notion that opinion is that which "ordinary persons . . . would be likely to understand as an expression of the speaker's or writer's opinion." 1 F. HARPER & F. JAMES, *supra* note 172, § 5.28, at 458. On its face, such a statement is tautological at best -- it can be shortened to read "opinion is what people think opinion is." Nevertheless, there may be a grain of reason in this "definition" of opinion. To the extent that courts invoke the term "opinion" to dismiss cases involving facially defamatory statements that are readily disprovable, there is a very real sense in which an "opinion" privilege is operating in the states that is substantially broader than the constitutional notion of disprovability. We believe such protection is worth preserving as a matter of state law, although we doubt that *Gertz* interprets the first amendment to require this protection.

The common law of the several states, although inconsistent with each other in this regard, *see* Titus *supra* note 169, at 1215-22, may independently give sufficient content to "opinion" to make it a workable concept outside of the constitutional domain. Of course, states need not abandon doctrines that are more solicitous of free speech values than is mandated by the federal constitution.

n193. 418 U.S. at 339-40 (footnote omitted).

n194. *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 308, 435 N.E.2d 1021, 1025, cert. denied, 459 U.S. 1021 (1982). For a clearer approach by the same court, see *Fleming v. Benzaquin*, 390 Mass. 175, 454 N.E.2d 95 (1983).

n195. *Berkey v. Delia*, 287 Md. 302, 338 n.2, 413 A.2d 170, 188 n.2 (1980) (Eldridge, J., dissenting).

n196. *See* Titus, *supra* note 169, at 1205.

n197. 459 U.S. 923 (1982).

n198. *Miskovsky v. Oklahoma Publishing Co.*, 654 P.2d 587 (Okla.), *cert. denied*, 459 U.S. 923 (1982).

n199. 654 P.2d at 594.

n200. *Id.*

n201. *Id.* at 593.

n202. *Id.* at 596.

n203. 459 U.S. at 923.

n204. *Id.* at 925 (quoting *Hill*, *supra* note 11).

n205. *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 65-66 (2d Cir. 1980). *See supra* note 192.

n206. The language contained in some Supreme Court decisions may provide a basis for the opposite argument. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), for example, the Court stated that because it had decided the case on the ground that the statute failed to provide for truth as a defense, it did not have to decide "whether a State may provide any remedy, civil or criminal, if defamatory comment alone, however vituperative, is directed at public officials." *Id.* at 76 n.10. Of course, *Garrison* predated *Gertz*. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court went only so far as to recognize that truth could not be actionable.

Arguments also may be drawn from what the Court has not said. The Court in *Gertz*, for example, appeared to accept the idea that the terms "Leninist" and "Communist-fronter" were actionable. Similarly, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court appeared to treat as actionable the defendant's assertion that the plaintiff's scientific research was "nonsense" that did not deserve government funding. In neither case did the defendant devote much attention to the point of nondisprovability. These cases are discussed at length in *Ollman v. Evans*, 713 F.2d 838, 842-43 (D.C. Cir.) (Robinson, C.J., concurring), *reh'g granted*, 713 F.2d 838 (D.C. Cir. 1983).

On the other hand, in a labor case, *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), the Court held that the union's use of Jack London's famous definition of a "scab" as being a "traitor" was not actionable because it was "merely rhetorical hyperbole." *Id.* at 284-86. Citing *Gertz*, the Court observed that "[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact." *Id.* at 284. The Court in *Letter Carriers* also characterized *Greenbelt*, *see supra* text accompanying notes 18-24, as a case in which the accusation of being a hard bargainer was not deemed actionable. 418 U.S. at 284-85.

n207. Professor Christie believes that the *Restatement's* confusion stems from an internal inconsistency in the first *Restatement*. Under section 558 of the first *Restatement*, a statement was deemed defamatory only if it contained "false and defamatory matter." Under sections 566 and 567, however, liability could be imposed for the expression of opinions. *See* Christie, *supra* note 174, at 1625-28.

n208. *See, e.g., Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 435 N.E.2d 1021, *cert. denied*, 459 U.S. 1021 (1982).

n209. See *McHale v. Lake Charles Am. Press*, 390 So. 2d 556 (La. Ct. App. 1980); Schauer, *supra* note 11; see also *supra* note 208.

n210. See, e.g., *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982).

n211. For other explanations of the behavior of trial judges, see Franklin, *supra* note 55, at 13.

n212. Schauer, *supra* note 11, at 276-81, discusses the concept of this continuum at length. See also *supra* note 169.

n213. See Schauer, *supra* note 11, at 277; see also *supra* note 192.

n214. See, e.g., *Barbarita v. Gannett*, 8 media L. Rep. (BNA) 1050, 1052, *aff'd*, 92 A.D.2d 599, 460 N.Y.S.2d 279 (1983) ("It is firmly established that opinions, even if they may be false, are constitutionally protected. . .").

n215. *RESTATEMENT (SECOND) OF TORTS* § 566 comment c (1977).

n216. *Id.* § 566.

N217. *Id.* comment a.

n218. *Id.* comment b.

n219. *Id.*

n220. See *supra* note 192.

n221. The problem with the *Restatement's* approach is its insistence that facts be stated or readily available before the language is called a "pure" opinion. As we have argued, see *supra* notes 185-92, if the statement itself cannot be shown false, it is not actionable.

n222. On the continuum between the disprovable and the nondisprovable, there is a category of statements for which the determination is difficult. If this is what the *Restatement* means by mixed opinion, we view these statements as the hard cases, the resolution of which depends upon the sound judgment of courts. Some statements will be held to be actionable and some will not. A court that cannot decide whether a statement is disprovable should err on the side of nonactionability. The court should defer to the overriding importance of the first amendment and considerations of judicial administration, such as recognizing what a trial in such a close case would involve in terms of time, social costs, and confidence in the determination. But this is clearly not what the *Restatement* means by mixed opinion.

n223. The *Restatement (Second) of Torts* observes that "[i]t makes no difference whether this is explained by holding that there was thus a publication of false defamatory facts . . . or that an expression of a mixed opinion can itself be a defamatory communication." *Id.* comment c. Either approach suggested by the *Restatement* is untenable. Identifying "facts" upon which a trial can be conducted is hopeless in many situations, as the illustra-

tions in the *Restatement* indicate. Moreover, to allow the action to proceed on the "opinion" itself offends the *Gertz* requirement that defamatory statements must be proven false.

n224. *Id.*

n225. Comment c asserts that "[t]he defendant cannot insist that the undisclosed facts were not defamatory but that he unreasonably formed the derogatory opinion from them." *RESTATEMENT (SECOND) OF TORTS* § 566 comment c (1977). The comment suggests either that this defense is not open to the defendant or that a jury may reject it. Even if the comment is meant to suggest the latter, a jury could base liability on the unreasonableness of the nondisprovable statement. The goal of the section, however, appears to be to avoid this result.

n226. As shown above, *see supra* notes 33-88 and accompanying text, the plaintiff also would have to prove that the defendant was aware of the statement's defamatory meaning.

n227. *See supra* text accompanying notes 25-32.

n228. *RESTATEMENT (SECOND) OF TORTS* § 566 comment c (1977).

n229. The nature of the statement disqualifies it from being actionable. The fact that the speaker is alleged to have disbelieved what he was saying would not change the analysis. For the reasons set forth in *supra* note 165, we think it unwise to permit lawsuits to go behind an otherwise nonactionable statement whenever the plaintiff alleges something about the speaker's motivation.

n230. *See Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980) (charges of criminal conduct are too specific to be protected as "opinion," even if prefaced by "I think").

n231. *RESTATEMENT (SECOND) OF TORTS* § 566 comment c (1977).

n232. *Id.*, illustration 3.

n233. We do not mean to suggest that the American Law Institute, in its formulation of the *Restatement (Second) of Torts*, actually meant to impose liability in this circumstance. We suggest only that this appears to be the inevitable result of the analysis.

Ironically, § 566 has been attacked for being insufficiently demanding of defendants. In *Ollman v. Evans*, 713 F.2d 838 (D.C. Cir.), *reh'g granted*, 713 F.2d 838 (D.C. Cir. 1983), for example, Chief Judge Robinson asserted that writers who stated in their article the facts upon which they based their conclusion nevertheless could have their article judged as a "mixed" opinion, unless they provide a "full and accurate account of the material background facts" including those that tended to favor the plaintiff. *Id.* at 849-50. Apparently, the common law never insisted that the fair comment privilege required the writer to reveal all of the material facts upon which he based his article, including those that may have undermined his argument.

Judge Wald concurred in the result reached by Chief Judge Robinson because she believed that the statements in question were "properly classified as factual statements, not opinions." *Id.* at 855. She rejected Chief Judge Robinson's demand for a "full and accurate account" by the writer, however, because such a requirement "sound[ed] too much like an exercise of editorial judgment." *Id.* Judge Wald asserted that "making hard judgments in each case as to whether a statement is opinion or fact will in the long run make the law of libel easier to understand and comply with." *Id.*

Judge MacKinnon took still another approach to the problem. He contended that the statements in question were "privileged opinion." *Id.* at 855. The case is being reheard en banc.

n234. This fact pattern is drawn from *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978). See R. SACK, *supra* note 6, at 50-51 (contending that a statement suggesting that a man and a woman, each married to other people, "spent a night together in a hotel room, will be interpreted as an assertion that the pair engaged in sexual activities, because the average reader will assume that 'they saith not a *pater noster* there.'" (footnote omitted)).

n235. See *supra* notes 108-49 and accompanying text.

n236. See, e.g., *supra* note 192.

n237. At the end of the preceding section we discussed a "negative link" by distinguishing two types of cases in which unstated matter was crucial. See *supra* text accompanying notes 234-36.

n238. See *supra* text accompanying notes 47-50.

n239. 22 Cal. 3d at 682, 586 P.2d at 576, 150 Cal. Rptr. at 262.

n240. *Id.* at 680, 586 P.2d at 575-76, 150 Cal. Rptr. at 261.

n241. Those arguments based on the defendant's surprise at having impugned the plaintiff's reputation, however, will not apply in this context.

n242. See *supra* text accompanying notes 25-32. The comment to § 566 asserts that the question of whether recipients will understand that undisclosed facts support the offered conclusion is the same as asking which of two meanings recipients will give to an ambiguous statement, so that § 563 should apply. See *supra* text accompanying note 221.

n243. Recall the passage from Justice Harlan's opinion in *Time*, which is quoted *supra* in the text accompanying note 147.

One pattern involves the assertion of disprovable statements A, B, and C, from which the speaker purports to draw the nondisprovable conclusion E. In such a case, we would permit libel actions for statements A, B, and C, unless those statements fall within the scope of some privilege. We would not permit a libel action to proceed on the basis of statement E.

Suppose instead, though, that the plaintiff alleges that, upon learning of statements A, B, and C, which he acknowledges to be true, reasonable recipients naturally drew the defamatory and disprovable conclusion of D. We believe that this case can be properly analyzed as one of implied conclusion, even though the speaker already has offered the explicit conclusion of E.

n244. See, e.g., *Miskovsky v. Tulsa Tribune Co.*, 678 P.2d 242 (Okla. 1983), *cert. denied*, 104 S. Ct. 1000 (1984); *National Ass'n of Gov't Employees v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980).

n245. See Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795, 806; Franklin, *supra* note 9, at 474-75.

n246. We suspect that the problem of the incorrect party prevailing does not arise very often with regard to the cases considered in the first part of this Article. *See supra* notes 33-88 and accompanying text. Although no systematic study on this problem exists, we believe that in cases similar to those covered in the second part of this Article, *see supra* notes 89-236 and accompanying text, the right party usually wins -- sooner or later.