1983

Intertwining the Constitution and the Common Law: Evolving Doctrines of Defamation in Arkansas

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ARKANSAS LAW NOTES

1983

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Ever since the Supreme Court constitutionalized much of the law of defamation in *New York Times v. Sullivan,*[1] Arkansas, in common with all other states, has been faced with the intricate and often baffling task of reconciling the many complex twists of the common law of libel and slander with the newly superimposed jurisprudence of the first amendment. This article examines recent developments in Arkansas' law of defamation, and its close cousin, false light invasion of privacy, with a special emphasis on difficulties created by the sometimes uneasy interplay between constitutional and common law doctrines.

I. Constitutional Privileges as Applied in Arkansas

A. *Opting for the Low-Option Plan Under Gertz*

In *Gertz v. Robert Welch, Inc.,*[2] the Supreme Court established a matrix of guidelines to govern the interplay between the first amendment principles first articulated in *New York Times* and the traditional solicitude for interests in reputation evidenced by the common law. *Gertz* was a judicial compromise that attempted to accommodate the competing values of "uninhibited, robust, and wide-open" debate on public issues with the protection of reputation. The *Gertz* decision reinterated the unsuitability in a free society of the traditional rule of strict liability for defamation, since compelling a speaker to guarantee the accuracy of his or her factual assertions may lead to intolerable self-censorship. But the need to avoid self-censorship, the Court stated, was not the only societal value at issue. To give absolute protection to the news media would be to dissolve totally the competing social concerns served by the law of defamation. States have a strong interest in creating compensation for the social harm caused by defamatory falsehood. The individual's right to the protection of his or her good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[3] And so *Gertz* attempted to resolve the inherent antithesis between freedom of speech and protection of reputation by announcing a series of rules setting forth the minimum constitutional requirements for any state system for compensating injury to reputation. First, suits brought by public officials and public figures, at least against media defendants, must always meet the *New York Times* actual malice test, which permits liability only if the defendant knew the publication was false or acted with "reckless disregard" for its truth or falsity. Second, all defamation suits against the media, even those brought by private individuals concerning non-public issues, must at the minimum be based upon proof of negligence. Third, "presumed damages" would no longer be permitted; at least in the absence of proof of actual malice, damages could no longer be awarded without evidence of injury, though the scope of injury and the nature of the evidence required remained broad. Fourth, any award of punitive damages would always require a showing of actual malice.[4]

Although the Court in *Gertz* stated that it did not believe it wise for the Supreme Court itself to proceed on a case-by-case basis in attempting to balance the constitutional claims of the press against individual claims for compensation, the Court invited state courts to proceed to evolve for themselves the proper standard of liability in suits brought by private plaintiffs. Thus the Court stated that as long as the states do not attempt to dip below the negligence standard, "[s]tates should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[5]

In the aftermath of *Gertz,* most states that have considered the issue have chosen the "low option" plan allowed by *Gertz,* refusing to extend the actual malice "knowing or reckless disregard for the truth" standard to actions brought by "pri-

vate figure" plaintiffs. Only a handful of states, including New York,[6] Illinois,[7] Colorado,[8] and Indiana,[9] have opted for the high option in *Gertz* by requiring more than negligence to sustain an action brought by a private figure.[10] In *Dodrill v. Arkansas Democrat Co.*,[11]* the Arkansas Supreme Court placed Arkansas among the overwhelming majority of states by holding that in the case of a private individual, the negligence standard shall measure the publisher's liability in libel actions.[12]

B. *The Arkansas Version of "Public Figure"*

Although there is a strong consensus among all but a handful of states that the actual malice test of *New York Times* should be reserved for public officials and public figures, there is substantially less unanimity in the application of the public figure/private figure dichotomy. Many states that accept the low option under *Gertz* at the same time evidence an uneasiness about treating the public figure doctrine as narrowly as the United States Supreme Court now does.

Arkansas decisions reflect this tension. In the *Dodrill* case, Louis Arthur Dodrill, a Little Rock lawyer, had been suspended from practice for 12 months. The Pulaski Circuit Court conditioned Dodrill's reinstatement upon his satisfactorily passing the regular Arkansas bar examination.[13] Dodrill took the exam in August of 1976 and passed. Not following customary practice in Dodrill's case, however, the Board of Bar Examiners did not release Dodrill's name as part of the list of applicants who had passed the exam, a list customarily published in the *Arkansas Democrat* and *Arkansas Gazette*. Dodrill was not listed by the Board because it considered his case unusual; it was continuing its investigation into his conduct during the period of his suspension to insure that he otherwise conformed to the Arkansas Supreme Court's requirements for admission to practice. Unhappily for Louis Dodrill, the *Arkansas Democrat* misinterpreted the absence of his name from the Board's list, and published an article erroneously stating that Dodrill had failed to pass the August bar examination. Unhappily for the *Democrat*, Dodrill sued.

From the perspective of the policies behind the public figure/private figure compromise struck in *Gertz*, the proper classification of Dodrill as either a public or private figure is far from intuitively obvious. Dodrill voluntarily entered the legal profession, a profession imbued with special standards of public trust, and he voluntarily undertook whatever activity first prompted the Supreme Court Committee on Professional Conduct to institute a complaint against him. The Pulaski Circuit Court's original order conditioning his reinstatement after one year on passing the exam was a matter of important public interest; the order was an official act of a public court of law concerning a breach of public trust in a uniquely public profession. Although Mr. Dodrill understandably would not welcome publicity about the disciplinary actions in his case, it seems well within the normative principles of *Gertz* to hold that attorneys must accept public scrutiny into matters of professional misconduct and discipline as part of the cost of entering the profession. The first amendment values at stake go well beyond meddlesome curiosity into the misfortunes of another; the media serves as a critical window on the legal profession's standards in keeping its own house in order—a matter vital in light of the prominent role lawyers play in self-government.

The Arkansas Supreme Court, however, did not find that Dodrill qualified as a public figure. Relying on the United States Supreme Court's elaboration on *Gertz* in *Time, Inc. v. Firestone*,[14] the court reasoned that Dodrill had not thrust himself into the vortex of public controversy, and had not taken steps to attract public attention. His activities, the court stated, were limited to compliance with the lawful mandate of the Pulaski Circuit Court.

The *Dodrill* decision is certainly not at all out of line with prevailing Supreme Court jurisprudence. In *Gertz* itself Elmer Gertz was a relatively well-known Chicago lawyer, involved in a case that had received substantial public attention, yet Gertz was not by that fact held to have attained public figure status. In the *Firestone* case, which figured prominently in the *Dodrill* court's analysis, Mary Alice Firestone was involved in divorce litigation that had achieved *cause celebre* status—she even held press conferences during trial—but the Supreme Court found her status strictly private. And in two Supreme Court cases decided after *Firestone*, *Hutchinson v. Proxmire*[15] and *Wolston v. Readers Digest Ass'n Inc.*,[16] the Supreme Court interpreted the public figure formula in a manner that tracked the *Dodrill* reasoning perfectly.

C. *An Argument For More Flexibility in Applying the Public Figure Test*

The shortcomings of the *Dodrill* approach to the public figure/private figure dichotomy are

*11. 265 Ark. 628, 590 S.W.2d 840 (1979) (substituted opinion), *cert. denied*, 444 U.S. 1076 (1980). The Southwest Reporter printing of the *Dodrill* case, at 590 S.W.2d 840, is not the substituted opinion of the court, as that opinion appears in the Arkansas Reports at 265 Ark. 628, even though both printings of the opinions purport to have been issued on the same date. Certain language that appears in the Southwest Reporter at 590 S.W.2d 844, has been deleted from the substituted opinion as it appears in the Arkansas Reports. Because, as explained in notes 12 and 26, *infra*, the deleted language was significant, attorneys who regularly use the Southwest Reports should instead use the Arkansas Reporter for the *Dodrill* case.

the same shortcomings of *Firestone, Wolston* and *Proxmire*. The public figure inquiry threatens to become an analytic dead end if applied in a vacuum. Following the Supreme Court's own lead, many states, including Arkansas, sometimes appear willing to classify mechanically all but the most powerful and influential as private figures, without consideration of the total context within which the speech is communicated. But as noted before, there is less than perfect unanimity in the ranks. The *Dodrill* decision should be contrasted with an earlier Arkansas decision that evidenced a more subtle analysis of the public figure notion, a decision that grew out of a controversy surrounding the faculty at the School of Law in Fayetteville.

In 1972 the *Arkansas Gazette* acquired documents allegedly prepared by six members of the faculty that cast doubt upon the teaching and scholarship of then assistant dean James Gallman. The *Gazette* ran an article detailing the intra-faculty dispute, and Gallman sued. The Arkansas Supreme Court stated with "no hesitancy" that Gallman, as an assistant dean and professor at state law school, was a public official.[17] Among the slings and arrows of outrageous fortune that one accepts in becoming an administrator and teacher at a state university law school, the *Gallman* court apparently reasoned, is the risk of public debate concerning one's professional qualifications. Wide-open and robust communications relating to the qualifications of those who undertake to serve the state by educating its inchoate lawyers may often be unpleasant, but they serve the vital state interest of helping to insure Arkansas citizens that their attorneys have received (largely at the citizens' expense) a quality legal education. Assistant Dean Gallman would certainly not have been a public figure in any national sense; commentary on his teaching is hardly the stuff of the *CBS Evening News*. But within the limited context of an article in a statewide newspaper commenting on a controversy in the state university's law school, such commentary is of the utmost importance and deserves the special shelter of the *New York Times* standard.

The *Gallman* case was a pre-*Gertz* decision, and it was clearly influenced by the now discredited Supreme Court opinion in *Rosenbloom v. Metromedia, Inc.*,[18] in which the court briefly flirted with the extension of *New York Times* coverage to all matters of public or general concern. *Rosenbloom* was repudiated in *Gertz*, and it might be thought that to the extent that the *Gallman* case rests on *Rosenbloom*-style thinking, its precedential value is similarly undermined. Without question the decision in *Dodrill* evidences a substantially narrower conceptualization of the public figure concept than the more expansive language of *Gallman* would permit.

To treat *Dodrill* as superceding *Gallman*, however, makes matters simpler than they actually are. The *Dodrill* decision was extremely close—Justice Fogleman did not participate and three Justices dissented—and the vigor of the dissent indicates that the sort of analysis that prevailed in *Gallman* still enjoys considerable sympathy on the court.[19] Although Louis Dodrill was not found to be a public figure, the significance of his case should not be exaggerated. Both the common law of Arkansas and the present first amendment jurisprudence of the Burger Court remain sufficiently pliable to embrace a more flexible approach to the public figure/private figure dichotomy, an approach I describe under the rubric of "the context public figure."

The "context public figure" concept is an attempt to extrapolate from the traditional common law privileges a notion that for most persons, speech concerning the neighborhoods, the workplaces, and other institutions in which they operate daily is more immediately vital to their lives than the speech that appears in the *CBS Evening News*, the *Washington Post*, or *Harper's Magazine*. There are national marketplaces of ideas and local marketplaces of ideas, and for most citizens most of the time the local marketplaces are where uninhibited discussion is most relevant. Though few people purposefully inject themselves into an arena of national attention, many people inject themselves into events and controversies in the neighborhoods in which they live, the schools at which their children learn, or the institutions in which they work. A professor at a law school is not likely to be a national public figure, and a *Time Magazine* article about that professor should probably not be covered by the actual malice standard, but within the law school community that professor **is** a "public figure." Statements in a student newspaper attacking the professor for poor teaching, bad scholarship, diffident public service, or arbitrary grading deserve the special protection of the actual malice standard, just as statements made within the faculty committee that reviews the professor's application for tenure and promotion deserve actual malice coverage. And when the law school is a state institution with a visibility and degree of public importance such as that of a school of law that has historically educated the majority of lawyers who serve the people of the state, commentary on the controversy by news media within the state also deserves actual malice protection.

The first rationale that the Supreme Court used to prop its decision in *Gertz*, and the rationale that came to be heavily re-emphasized in *Firestone, Wolston*, and *Proxmire*, was the normative judgment that he who seeks fame must accept the risks of fame; there is a certain symmetrical justice in forcing those who voluntarily enter the public arena to accept as a *quid pro quo* height-

ened public scrutiny and greater risk of reputational attack. The "context public figure" concept recognizes that few Americans inject themselves into the public arena on a national level, thereby inviting scrutiny by national media outlets. More Americans, however, inject themselves into local controversies of the sort that usually command the attention of the small town newspaper, or local television and radio stations. National political controversies are by no means the only significant issues in life. Neighborhoods, workplaces, schools and churches are among the myriad institutions in which disputes constantly arise, and the ordinary citizen is frequently involved quite voluntarily in expressing views involving both fact and opinion within the context of those institutions. The context public figure notion recognizes that robust exchanges of information are vital to the functioning of such institutions, and that it is equitable to force those who enter controversies in such institutions to be subject to enhanced risk of defamation by others within the context of that voluntary action (usually the institutional setting), as long as the "audience" to which the defamatory speech is aimed is also limited to the same contextual setting.

D. *The Media-Nonmedia Problem*

No Arkansas decision appears to have ever dealt explicitly with the question of whether the *Gertz* rules apply at all to cases involving non-media defendants. The Restatement of Torts suggests the possibility that since the *Gertz* holding, and all of the *Gertz* language, refers to the communications media, cases not involving the media remain unaffected by the *Gertz* rules.[20] If this is the case, Arkansas would be free to continue to impose strict liability principles in those cases involving non-media defendants.[21] Courts and commentators are split on this issue; there is no national consensus concerning the application of the *Gertz* negligence minimum to cases outside of the media context.[22]

In examining Arkansas cases after *Gertz*, it is possible to discern a tendency by Arkansas courts to ignore *Gertz* totally in cases that do not involve the media. In *Dillard Department Stores, Inc. v Felton*,[23] for example, the court dealt with a non-media claim without even mentioning *Gertz*, or any other first amendment case, and without ever explicitly articulating the standard of liability needed to state a prima facie case against a non-media defendant. Further, in discussing the type of malice needed to sustain an award of punitive damages, the court spoke of traditional ill-will malice, rather than the actual malice standard that the Court discussed in *Dodrill*, a media case decided under constitutional principles. Similarly Arkansas courts prior to *Gertz* followed the rule of presumed malice and presumed damages in libel per se cases.[24] Although *Gertz* outlawed presumed damages, Arkansas decisions continue to cite and rely on presumed malice and damages cases when non-media defendants are involved.[25] In the original opinion in the *Dodrill* case, in which the Arkansas Supreme Court explicated the *Gertz* rules, the language, like that of *Gertz* itself, seemed to be aimed at the media:

> Therefore, within the latitude accorded in *Gertz*, we hold that in the case of a private individual, the negligence standard shall measure the *publisher's* liability in libel actions. The *publisher of a libelous article* shall be liable to the defamed private individual for failure to exercise ordinary care prior to publication to determine the defamatory potential of its statements.[26*]

There is, therefore, at least some evidence of an unconscious tendency in Arkansas decisions to act as if *Gertz* is irrelevant outside the media context.

The proof that Arkansas does not apply *Gertz* to non-media cases, however, is extremely ambivalent. None of those cases involving the media, for example, have ever stated that they would not apply to non-media defendants as well, and the vocabulary used in those cases may reflect nothing more than the court's normal inclination to frame rules in terms of the identity of the parties before it. More importantly, the post-*Gertz* non-media cases have invariably involved the coverage of common law privileges, which raise the level of liability in any event. No reported case after *Gertz* has thus actually imposed judgment on a strict liability theory, nor has strict liability been discussed.

When an Arkansas court does finally face the question squarely, it should hold that the minimum standards imposed by *Gertz* do apply to non-media cases. First of all, as previously discussed with regard to the context public figure idea, there is a certain elitism to the notion that speech published by media outlets is more hallowed than speech published by ordinary persons and enterprises. For most people, the daily communication of workplaces, neighborhoods, schools, churches, clubs, restaurants, or even backyard fences is as important and vital as the speech that appears on the television news or the morning paper. Whether the speaker is a preacher on the pulpit or a bartender behind the beer spigot, criticism of others is as much a part of our first amendment tradition as the criticism that appears on the op-ed page of the Sunday paper. Even in cases involving private plaintiffs and private defendants, the *Gertz* requirements of

*26. 590 S.W.2d at 844 (emphasis added). As explained in notes 11 and 12 *supra*, this language was deleted in the substituted opinion, 265 Ark. 628. It thus has no precedential value at such, but may at least be useful as an insight into the possibility that the court regards these matters unsettled.

negligence and actual harm insure the proper breathing space for that routine speech that is critical to a free society.[27] Secondly, to establish a two-tiered law of defamation, with one set of rules for the media and another for the non-media, would ridiculously complicate an already bewilderingly complex area of the law. Finally, a double standard would force courts to make the difficult choice, fraught with first amendment peril, of deciding who qualifies for the preferred position of media status. Would the "media" encompass only the mainstream corporate press, or would it also include the underground radical flyer, the pamphlets of special interest groups, or the intermittently published student newspaper? Picking and choosing between publications worthy of *Gertz* protection would involve courts in an unseemly content-sensitive status game that is antithetical to the egalitarian marketplace of ideas that the first amendment contemplates.

E. The *Special Status of False Light Invasion of Privacy*

Arkansas, like most states, has been heavily influenced by William Prosser's four-prong classification for invasion of privacy.[28] That classification, as codified in the Restatement, subdivided the law of privacy into: (1) an unreasonable intrusion on the seclusion of another; (2) unreasonable publicity about private facts; (3) publicity that places another in a false light in the public eye; and (4) appropriation of another's name or likeness.[29] Arkansas first recognized invasion of privacy in *Olan Mills v. Dodd,*[30] a case that involved the fourth prong of privacy listed above.[31]

In *Dodrill v. Arkansas Democrat,*[32] the Arkansas Supreme Court accepted the four part division of privacy set forth in the Restatement, and then went on to consider the specific rules governing false light invasion of privacy, the form of privacy that is a close cousin to a conventional action for defamation. Since the court in *Dodrill* had already decided that the plaintiff Dodrill was a private figure as defined in *Gertz*, the question before the court with regard to Dodrill's privacy claim was whether the negligence standard that the court had approved for the defamation side of his action against the *Democrat* would also apply to his false light invasion of privacy claim. The Court held that it would not, instead establishing the higher requirement of *New York Times* knowing or reckless falsity for false light cases, even if the plaintiff is a private figure. The *Dodrill* court interpreted extant constitutional law as requiring the higher standard in false light cases. In *Time, Inc. v. Hill,*[33] the Supreme Court held that the actual malice test of *New York Times* was required in a false light case brought by members of a family who had been involuntarily thrust into the public eye because they were victims of a dramatic crime in which they were held as hostages in their own home. The *Hill* case was arguably undermined by the subsequent *Gertz* decision; in an interesting aside in *Cantrell v. Forest City Publishing Co.,*[34] the Supreme Court consciously abstained from reevaluating the status of *Hill* in light of *Gertz*. The *Dodrill* court reasoned that since the Supreme Court has thus far left *Hill* untouched, it remains binding.

There are strong reasons why false light claims should be linked to a higher fault standard than negligence, and Arkansas should continue to require the actual malice showing even if the Supreme Court were to overrule *Hill* and leave states free to adopt a mere negligence test in false light cases brought by private figures. The false light tort is significantly different from defamation in only one respect: whereas defamation requires that the publication be **injurious** to reputation, the false light theory allows recovery for statements that are false but **not** injurious.[35] In *Hill,* for example, members of the Hill family were depicted as more courageous and heroic than they actually were.[36] Thus, reputation-enhancing speech is actionable in a false light case, if the publicity is such that "it would be highly offensive to a reasonable person."[37] This greater breadth of the false light theory poses a severe threat to the integrity of the rules that surround the law of defamation; the false light tort is "capable of swallowing up and engulfing the whole law of defamation."[38]

It is critical that this swallowing up be avoided, for false light claims are inherently less socially important than defamation claims. Speech that is false and damaging to reputation is more reprehensible than speech that is false but reputation-enhancing. Although some protection against non-defamatory but false speech is warranted, the need to protect what amounts to an interest in modesty is obviously less compelling, and it should be limited to those occasions in which the depiction is highly offensive and committed either intentionally or recklessly.

As the *Dodrill* court noted, although a cause of action for both false light and defamation can be joined in one action, "there can be but one recovery for any particular publication."[39] Since *New York Times* malice is now required in Arkansas in false light cases, this means that the utility of joining a false light claim to a defamation claim is quite limited. The false light claim gives the plaintiff the advantage of not having to show reputational injury, but that advantage is offset by having to show that the speech was "highly offensive" to a reasonable person. In a case involving a private figure plaintiff, the offset is even more severe, for the false light case carries the additional burden of actual malice, a burden the private plaintiff need not undertake in the defamation claim. Thus, false light cases in

Arkansas today have two practical uses. In a situation involving a private figure plaintiff who cannot credibly assert injury to reputation, the false light theory provides a more difficult but still potentially feasible route to recovery. And in a case involving a public figure, in which actual malice is required in any event, the false light option obviates the need to demonstrate reputational injury, substituting instead the "highly offensive" requirement. As a final point, it is probable that defamation actions, when proof of injury to reputation is available, are strategically superior to false light claims, for the simple reason that the existence of injury is more intuitively plausible, and the prospect of substantial damages more likely. In the parlance of Marshall McCluhan, libel is a "hot," easily personalized cause of action, false light is more "cool" and impersonal.[40]

III. Refitting the Common Law to Post-*Gertz* Realities

A. *Escalating Fault Standards for Common-Law Privileges*

The most important point to recognize in attempting to reconcile the ongoing development of common law privileges in Arkansas with the constitutional scheme declared in *New York Times* and *Gertz* is that *Gertz* outlaws liability for defamation without fault. Thus common law conditional privileges are meaningless in cases encompased by *Gertz* unless they require conduct more egregious than negligence to overcome them. Prior to *New York Times* and *Gertz*, when strict liability remained the operative law in Arkansas, a common law conditional privilege that shielded a defendant from liability unless the defendant was negligent made sense, since requiring proof of negligence added a burden to the plaintiff's case that would not otherwise be there. But if *Gertz* is understood as requiring negligence as a matter of course, it does the defendant no earthly good to invoke a common law privilege if all that it takes to overcome that privilege is proof of negligence—since negligence is required already in any event.

One recent Arkansas decision, *Dillard Department Stores, Inc. v. Felton*,[41] demonstrates the doctrinal confusion that is possible if one does not take into account the *Gertz* negligence minimum in applying common law privileges. *Dillard* involved a defamation action brought by an employee of Dillard Department Stores who alleged that he was wrongfully accused of stealing merchandise. The Arkansas Supreme Court held that a qualified common law privilege extended to statements made at a closed door meeting of the store's supervisory personnel, to statements made by store employees to the employee's wife, and to statements made by the store's employees to the state's Employment Security Division. All of these statements, the court held, fell within the Restatement of Torts' framework of conditional privileges for information that advances important interests of the recipient, the publisher, or both, or information that the publisher is under a legal duty to provide.[42] The court also held, however, that no conditional privilege attached to statements made by a store supervisor to other employees that their former co-worker "was fired because he was caught stealing," when in fact he was only under investigation for having allegedly stolen merchandise, and had quit rather than been fired.

The Supreme Court's analysis of the proper scope of the qualified privilege doctrines was perfectly sound, but its statements concerning the level of conduct that would suffice to overcome the privileges were somewhat confusing. The court quoted the following passage from a 1947 case, *Arkansas Associated Telephone Company v. Blankenship*:[43]

> The protection of the privilege may be lost by the manner of its exercise, although the belief in the truth of the charge exists. The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the party making it must be careful to go no farther than his interests or his duties require. Where a party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected, and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith.[44]

This passage, which essentially tracks the orthodoxy of the Restatement, was a sensible explication of the law prior to the intervention of *Gertz*, but in the aftermath of *Gertz'* negligence requirement it undervalues the conditional privilege defense. The language employed by the passage is the language of negligence; the operative principle is that the party making the communication "must be careful to go no farther than his interest or his duties require." Because liability without fault is banned by *Gertz*, however, plaintiffs must already prove lack of "due care" as a prerequisite to stating a prima facie case. A privilege that is lost when the speech is made without due care is in reality no privilege at all.

The better reasoning in updating Arkansas' common law conditional privileges in light of *Gertz* is to treat speech protected by such privileges as actionable only upon a showing of malice. Requiring the plaintiff to allege and prove malice in cases subject to the coverage of qualified privileges would make such privileges meaningful again, restoring the hierarchy of specially protected types of speech that the common law has traditionally contemplated.

But if malice should be required to defeat a common law conditional privilege, should it be the "express malice" of personal ill-will toward the victim, or the "actual malice" used in constitutional cases, the familiar "knowing or reckless disregard of the truth" standard of *New York Times*?[45] One could plausibly argue that the ill-will or spite form of malice, the form of malice that the common law traditionally required in cases in which malice was not presumed, is the more appropriate standard, on the reasoning that the common law's ill-will malice should be used for common law privileges, while the constitutional "actual malice" standard is used for constitutional privileges. The ostensible symmetry of this view, however, is spurious; the law of defamation in Arkansas will evolve much more coherently if the old fashioned ill-will form of malice is discarded altogether, and the knowing or reckless disregard of the truth standard is used for all conditional privileges, whether their pedigree is common law, constitutional, or both.

There are at least two grounds to support this unified standard. First, since the purpose of a common law privilege is to protect speech that furthers interests to which the law attaches special importance,[46] it should not matter whether the speaker acts out of ill will in the furtherance of those interests, as long as the speaker does not know his or her statements are false, or recklessly disregard indications of their falsity. For example, the common law makes a call to a police station reporting that a neighbor has committed a crime conditionally privileged, because the law favors the reporting of crime.[47] As long as the speaker does not act with knowledge of falsity or reckless disregard for the truth, the social interest in the report, even if it turns out to be false, requires that it not be actionable. The social interest is only diminished if the speaker is knowingly or recklessly lying to the police. If the caller is not intentionally or recklessly fabricating the report, the social interest is not lessened at all merely because the caller happens to hate the neighbor, or because the caller makes the report with a perverse relish.

In constitutional privilege cases, ill-will malice is not enough to defeat the qualified privilege of *New York Times*, precisely because of this reasoning.[48] The editor of a newspaper may hate the politician lambasted by the newspaper with the darkest of hearts, but that alone does not subtract from the first amendment value that the speech may have, and unless the editor is knowingly or recklessly defaming the politician, no liability exists. This is not to say that **evidence** of ill will is inadmissable, for it may be highly probative of whether the speaker knew the communication was false or was so blinded by spite as to act recklessly. But the ultimate fact to be proved should be knowledge of falsity or reckless disregard for the truth.

The second reason for unifying constitutional and common law malice standards is simplicity. Constitutional and common law privileges often co-exist in the same case, and the existence of more than one definition of malice can only bewilder juries (if not also the judges and lawyers who try to explain the differences to them). Rather than proliferate multiple tiers of diverging doctrine in the half-constitutional, half-common law field of defamation, the effort should be to streamline whenever possible, so that neither plaintiffs nor defendants can unfairly exploit ambiguity and confusion.

B. *The Confusing Problems of Actual and Special Harm, and the Categories of Per Se and Per Quod*

In *Gertz* the Supreme Court held that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[49] In a recent non-media case, *Partin v. Meyer*,[50] however, the Arkansas Supreme Court, relying on pre-*Gertz* Arkansas decisions, approved the following jury instruction:

> You are instructed that falsely accusing one of a crime constitutes what the law calls slander per se. In such cases, a person slandered is entitled to compensatory damages as a matter of law and such plaintiff is not required to introduce evidence of actual damages in order to recover compensatory damages.[51]

If *Gertz* applies to non-media cases, the court's approval of this instruction was erroneous, for the unequivocal holding in *Gertz* in that compensatory damages are unconstitutional without proof of actual loss. *Partin* might be understood as an implicit holding that *Gertz* is inapplicable to non-media cases, but as with all other recent Arkansas decisions involving non-media cases, the issue is nowhere mentioned in the opinion.

If it is assumed that the Arkansas Supreme Court actually does intend that *Gertz* standards apply to non-media cases, it should be noted that this does not mean that the terms libel per se and slander per se are obsolete. First, without regard to the issue of damages at all, the term "per se" will continue to be relevant in one of its traditional uses: that the words are defamatory on their face and do not require introduction of extrinsic evidence to make them defamatory.[52] Secondly, the term "per se" retains its meaning after *Gertz* when used to designate those categories of defamation that are actionable without proof of "special harm."[53] The term special harm is a term of art designating a subset of the "actual harm" required by *Gertz*. The Court in *Gertz* stated that "actual injury is not limited to out-of-pocket loss," and includes "impairment of reputation and standing in the community, personal

humiliation, and mental anguish and suffering."[54] "Special harm," however, is a narrower term that when properly used is limited to harm which does have an "actual dollar value."[55] Prior to *Gertz* evidence of specific out of pocket loss was not required in actions classified as slander per se, but was for actions classified as slander per quod. With regard to libel, two confusing lines of precedent existed, with some decisions requiring proof of special harm for libel per quod, and other decisions holding that proof of special harm is never required in a libel case.[56] The basic distinction between cases requiring special harm and cases not requiring it remains viable after *Gertz*, however, as long as it is understood that all actions require proof of at least "actual harm" in the absence of a showing of malice—damages are never "presumed," whether the slander or libel is per se or per quod. If the defamation is per quod, the state remains free to require the additional evidentiary safeguard of proof of special harm if it wants to, though at least with regard to libel, the overwhelming weight of scholarly opinion is against such an additional imposition. When viewed against the backdrop of these rules, the *Partin* case may be best explained as simply an example of a confusion in terminology, with the court transposing the general term "actual harm," which is required across the board, for the more narrow term "special harm."

C. *The Republication Question*

The initiator of a defamatory statement may publish it to a relatively limited number of people, who then republish the statement to a larger audience, increasing the injury it causes. The traditional rule is that every repetition of a defamatory statement is a new and separate publication and every repeater is subject to liability for it,[57] under the quaint logic that "talebearers are as bad as talemakers."[58] Curiously, however, the traditional common law rule did not impose liability on the original creator of a defamatory statement for damage caused by the republication.[59] Although the modern viability of these two aspects of the republication problem is still a matter of doubt, the better reasoning would be to flip-flop the results of the two rules. After *Gertz*, strict liability for republication should give way to a negligence standard; one who republishes defamatory matter should not be liable unless he or she knew or should have known of its defamatory character.[60] Conversely, the rule exonerating the instigator of a libel or slander from the damage done by republication should fall in favor of a doctrine that imposes liability for damage inflicted through any republication that is reasonably foreseeable. In *Dun & Bradstreet, Inc. v. Robinson*,[61] the Arkansas Supreme Court specifically refused to decide whether Arkansas law permitted recovery for unauthorized republications. In *Luster v. Retail Credit Co.*,[62] however, the Eighth Circuit, applying its best *Erie* guess as to what the Arkansas courts would do if they faced the issue, held that damage caused by reasonably foreseeable republication is actionable. The *Luster* result is commendable, for it brings defamation into line with the proximate cause doctrines that apply in other branches of tort law. There is no logic in exonerating, for example, a person who generates a false and damaging rumor about a well known figure by leaking false information to a newsreporter, foreseeing full well that the reporter will cause the information to be widely disseminated throughout the media. That the real damage was done by the media should not insulate the original propagator because he or she was clever enough to filter the information through the intermediary; under normal proximate cause principles the foreseeable risk of republication should be enough to impose liability.

FOOTNOTES

1. 376 U.S. 254 (1964).

2. 418 U.S. 323 (1974).

3. *Id.* at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

4. The *Gertz* compromise was grounded in two rationales reflecting the Supreme Court's perceptions about the differences between public and private figures. Public officials and figures, the Court reasoned, are more likely to have effective opportunities for self-help when they are defamed. Public officials and public figures, the Court assumed, enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to contradict the lie or correct the error than private individuals enjoy. The second rationale of the Court was more normative, largely reflecting the homespun moral that an individual who seeks the public arena must accept the heat of the fire as part of the price for entering the kitchen. People who voluntarily obtain public figure status have assumed roles of special prominence in social affairs, and they can fairly be forced to accept greater public scrutiny and greater exposure to defamation as part of the cost of fame. Some public officials occupy positions of such power and influence that they are public figures for all purposes; but such "universal" public figures are rare. Most are "limited public figures," persons who have "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." 418 U.S. at 345. Such limited public figures are subject to the *New York Times* standard when they are defamed in connection with issues about which they have invited attention, but in all other aspects of their lives they remain private figures, for whom states are free to create compensation on a lesser showing of simple negligence.

5. 418 U.S. at 345-46.

6. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (using a "grossly irresponsible" standard.)

7. Colson v. Steig, 89 Ill. 2d 205, 433 N.E.2d 246 (1982) (applying actual malice standard in suit brought by an untenured state university professor against a departmental supervisor).

8. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P 2d 450 (*en banc*), *cert. denied*, 423 U.S. 1025 (1975).

9. AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976).

10. Most state court decisions have declined the option to

rise above the negligence minimum set by *Gertz* for non-public figures. *See e.g.*, Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977) (*en banc*); Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (Conn. Super. Ct. 1975); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 537, 543 P.2d 1356, 1366 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); General Motors Corp. v. Piskor, 277 Md. 165, 171, 351 A.2d 810, 814-15 (1976); Jacron Sales Co. v. Sindorf, 276 Md. 580, 596, 350 A.2d 688, 697 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 858, 30 N.E.2d 161, 168 (1975); Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 110, 334 N.E.2d 494, 498 (1974), *cert denied*, 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85, 92 (Okla. 1976); Foster v. Loredo Newspapers, Inc. 541 S.W.2d 809, 819-20 (Tex. 1976), *cert denied*, 429 U.S. 1123 (1977); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976).

12. The language that appears in the Southwest Reporter, but that was deleted in the substituted opinion, would have provided a detailed roadmap for the application of the *Gertz* rules in Arkansas. That language reads:

> For the guidance of the court below in any further proceedings, the limitations of *Gertz* must be observed. Recovery must be limited to actual damages. Punitive damages are precluded except for the showing of knowledge of falsity or a reckless disregard for the truth, and there cannot be liability without fault. Therefore, within the latitude accorded in *Gertz*, we hold that in the case of a private individual, the negligence standard shall measure the publisher's liability in libel actions. The publisher of a libelous article shall be liable to the defamed private individual for failure to exercise ordinary care prior to publication to determine the defamatory potential of its statements.

590 S.W.2d at 844. As indicated *infra* in note 28, and the accompanying text, there are implications in this language for the application of *Gertz* to non-media cases; its deletion may indicate that the court's views are as yet unsettled, or that it prefers to treat such doctrinal developments in a more cautious case-by-case basis.

13. The Arkansas Supreme Court dismissed a petition challenging the circuit court's power to take this action. *In re Dodrill*, 260 Ark. 223, 538 S.W.2d 549 (1976).

14. 424 U.S. 448 (1976). *Firestone* involved a suit brought by Mary Alice Firestone, the former wife of one of the country's wealthiest industrialists. The suit arose out of relatively minor and technical inaccuracies in *Time's* reportage of the grounds of a divorce judgment, inaccuracies largely caused by remarks made by the trial judge at the conclusion of the vitriolic divorce proceeding, concerning testimony about alleged sexual escapades.

15. 443 U.S. 111 (1979).

16. 443 U.S. 157 (1979).

17. Gallman v. Carnes, 254 Ark. 987, 497 S.W.2d 47 (1973).

18. 403 U.S. 29 (1971).

19. One very persuasive point raised in Justice Hickman's dissent in *Dodrill* is that the majority opinion smacks of lawyers protecting their own. Justice Hickman asked rhetorically whether a similar case involving the license suspension of a physician or a druggist, the court would be so protective against inquiry by the media. 265 Ark. at 641, 590 S.W.2d at 846 (Hickman, J., dissenting). For a case vindicating Justice Hickman's thesis, see Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 456 (1969) (holding doctor to be a public figure in a suit arising out of investigative reporter's article about doctor's competency). *See*, for another example of continuing sympathy on the court for a broader view of public figure status, Wortham v. Little Rock Newspapers, Inc., 273 Ark. 179, 183, 618 S.W.2d 156, 157 (1981) (Dudley, J., dissenting).

20. *See* RESTATEMENT (SECOND) of TORTS § 580B Comment e (1977) ("[T]he precise holding of the case, therefore, does not extend beyond a statement published by the communications media"). Ultimately, however, the comment to the RESTATEMENT takes the view that the language of *Gertz* notwithstanding, the common law should be construed to required negligence in all cases. Justice Powell's cautiously worded opinion in *Gertz* literally referred only to media defendants; he used the terms "publisher or broadcaster" and "the news media" over fifteen times. *See* Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non Media Defendants*, 95 HARV. L. REV. 1876, 1877 n.9 (1982).

21. *See* RESTATEMENT (SECOND) of TORTS § 613 (comment j) (1977) ("If there are situations where fault is not required, the States will be free to apply their own rules, and they may or may not continue to apply the traditional common law rules."). For a post-*Gertz* decision employing strict liability in a non-media case, see Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359 (Ore. 1977).

22. Extrapolating from the *Gertz* language, some commentators have thus suggested that *Gertz* might be intended to provide special constitutional protection only for media speakers. *See generally* C. GREGORY, H. KALVEN and R. EPSTEIN, CASES AND MATERIALS ON TORTS 1118-20 (1977); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777 (1975); Shriffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978); Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974). On the other hand, most states that have considered the question do apply *Gertz* to non-media defendants. *See* Note, *supra* note 20, at 1878 n.12; Developments in the Law, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1326, 1404-06 (1982). *But see* Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359 (Ore. 1977); Calero v. Del Chemical Co., 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

23. 276 Ark. 304, 634 S.W.2d 135 (1982).

24. *See, e.g.*, Braman v. Walthall, 215 Ark. 582, 225 S.W.2d 342 (1949); Gaines v. Belding, 56 Ark. 100, 19 S.W. 236 (1892).

25. *See, e.g.*, Luster v. Retail Credit Co., 575 F.2d 609, 618-19 (8th Cir.1978) (applying Arkansas law), Portin v. Meyer, 277 Ark. 54, 639 S.W.2d 342 (1982).

27. *See, e.g.*, Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) (court could not "discern any persuasive basis for distinguishing media and non-media cases.")

28. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 117, at 804-14; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

29. RESTATEMENT (SECOND) OF TORTS §§ 652A (1977).

30. 234 Ark. 495, 353 S.W.2d 22 (1962). *See also* Note, *Torts—Invasion of Privacy by Publication of a Photograph*, 3 ARK. L. REV. 105 (1948-49); Comment, *The Right of Privacy*, 6 ARK. L. REV. 459 (1958); Comment, *Privacy: The Polygraph in Employment*, 30 ARK. L. REV. 35 (1976).

31. The appropriation of likeness side of privacy law has since come to be recognized as not merely a privacy concept, but a form of common law protection for the "property" interest that persons enjoy in their name or likeness, particularly when their fame has increased the exploitative value of that interest.

32. 265 Ark. 628, 590 S.W.2d 840 (1979). *See supra* text following note 11, for a discussion of the defamation aspects of this case.

33. 385 U.S. 374 (1967).

34. 419 U.S. 245, 250-51 (1974).

35. This relationship between false light and defamation is explained succinctly by a comment to the RESTATEMENT:

> **Relation to defamation.** The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated

here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.

It is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.

RESTATEMENT (SECOND) OF TORTS § 652E comment B (1977).

36. 385 U.S. at 377-78.

37. Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 638, 590 S.W.2d 840, 845 (1979), *cert. denied*, 444 U.S. 1076 (1980) (*quoting* RESTATEMENT (SECOND) OF TORTS § 652E (1977)).

38. W. PROSSER, *supra* note 28, at 813.

39. 265 Ark. at 638, 590 S.W.2d at 845.

40. A similar McCluhanesque comparison has been made between negligence and strict liability theories in defective products cases. *See* Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531 (1974).

41. 276 Ark. 304, 634 S.W.2d 135 (1982).

42. RESTATEMENT (SECOND) OF TORTS § 595 (1981).

43. 211 Ark. 645, 201 S.W.2d 1019 (1947).

44. *Id.* at 651, 201 S.W.2d at 1022.

45. Both types of malice continue to be discussed in Arkansas decisions. For example, in Lancaster v. Daily Banner-News Publishing Co., Inc., 274 Ark. 145, 622 S.W.2d 671 (1981), the Arkansas Supreme Court made it absolutely clear that "ill will is irrelevant when constitutional standards are applied." *Id.* at 153, 622 S.W.2d at 675. Under the knowing or reckless disregard for the truth standard encompassed by the term actual malice, "[i]t is immaterial that the writer is biased against the official, has ill will towards him, or intended to inflict harm upon him." *Id.*

The meaning of the actual malice standard was further explained in Pritchard v. Times Southwest Broadcasting, 277 Ark. 458. 642 S.W.2d 877, (1983), in which the court reemphasized that subjective serious doubt about the truth of the information must be harbored by the publisher. A mere failure to investigate is not enough. *See also* Saxton v. Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (1978). But as previously discussed, Arkansas opinions dealing with common law privileges speak of malice in terms of spite or ill-will. *See, e.g.*, Luster v. Retail Credit Co., 575 F.2d 609, 618-19 (8th Cir. 1978) (applying Arkansas law); McClain v. Anderson, 246 Ark. 638, 439 S.W.2d 296 (1969); Braman v. Walthall, 215 Ark. 582, 225 S.W.2d 342 (1949).

46. *See* W. PROSSER, *supra* note 28, at 785-92.

47. For example, in Baker v. Mann, 276 Ark. 304, 634 S.W.2d 125, 116 (1982), the court found that a letter sent by a mayor to a prosecuting attorney concerning possible police misconduct was conditionally privileged.

48. *See e.g.*, Pritchard v. Times Southwest Broadcasting, 277 Ark. 458, 642 S.W.2d 877 (1983). *See also* St. Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).

49. 418 U.S. at 349.

50. 277 Ark. 54, 639 S.W.2d 342 (1982).

51. 639 S.W.2d at 344.

52. W. PROSSER, *supra* note 28, at 763.

53. L. ELDREDGE, THE LAW OF DEFAMATION § 16, at 92 (1978).

54. 418 U.S. at 350.

55. RESTATEMENT (SECOND) OF TORTS § 575 comment g (1977); L. ELDREDGE, *supra* note 53, at 92.

56. *See* Rachels v. Deener, 182 Ark. 931, 33 S.W.2d 39 (1930); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HAR. L. REV. 733 (1966); Prosser, *More Libel Per Quod*, 79 HAR. L. REV. 1629 (1966); Murnaghan, *From Figment to Fiction to Philosophy — The Requirements of Proof of Damages in Libel*, 22 CATH. U. L. REV. 1 (1972).

57. L. ELDREDGE, *supra* note 53, at 233 (1978); RESTATEMENT (SECOND) OF TORTS § 578 (1977); Painter, *Republication Problems in the Law of Defamation*, 47 VA. L. REV. 1131, 1148 (1961).

58. Harris v. Minvielle, 48 La. App. 908, 915, 19 So. 925, 928 (1896).

59. The principle originated in Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (1806), and was known as the "last human wrongdoer" doctrine. *See* L. ELDREDGE, *supra* note 53, at 239.

60. The assumption of this statement, of course, is that the negligence floor of *Gertz* applies to both media and non-media cases. *See supra* text accompanying notes 20-27.

61. 233 Ark. 168, 345 S.W.2d 34 (1961).

62. 575 F.2d 609, 613-14 (8th Cir. 1978).