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Dun & Bradstreet, Hepps, and Liberty Lobby: New Analytic Primer on the Future Course of Defamation

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I. INTRODUCTION

Perhaps you have heard the story of the surgeon, the engineer, and the lawyer, arguing over who among them was a member of the oldest profession. Prostitution, though often nominated for that title, was apparently not regarded by the quarrelers as a genuine profession. According to the surgeon, surgery was the oldest profession, for the Bible itself declares that God operated on Adam's rib to create Eve. The engineer quickly pointed to other Biblical authority, however, for the proposition that engineering antedated even surgery, for before creating Adam and Eve, God took chaos and created order, making the heavens and the earth. The lawyer then arose, stretched back mightily in his three-piece suit with thumbs crooked defiantly in his vest pockets, and roared, "I rest my case! Who do you think created the chaos?"[1]

If one requires proof beyond the book of Genesis to authenticate the lesson of this story, I know of no better nominee than the modern law of defamation. The law of defamation is dripping with contradictions and confusion and is vivid testimony to the sometimes perverse ingenuity of the legal mind. From its inception, the law of defamation has been singularly bent on establishing its reputation for quirky terminology and byzantine doctrine. Whereas the rest of the law of torts tended to strive for the earthy simplicity of such terms as "the ordinary reasonable person,"[2] the law of defamation developed a vocabulary all its own, replete with such queer sounding words packed with multiple meanings as "per se" and "per quod," "malice in law" and "actual malice," "inducement," "colloquium," and "innuendo."[3]

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1. This vignette is paraphrased from Professor William Van Alstyne of Duke. *See* Van Alstyne, *Straight Talk About the Law*, DUKE L. MAG., Summer 1983, at 5.

2. The ordinary reasonable person is the law of torts' democratic homage to the common man, once described as " 'the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves.' " Hall v. Brooklands Auto Racing Club, 1 K.B. 205, 224 (1933) (quoting an "American author"). To modern mass culture sensibilities, the mythical reasonable person is perhaps more the stuff of prime time comedy—Dr. Huxtable in *The Bill Cosby Show*, Andy Taylor in *The Andy Griffith Show*, Ward Cleaver in *Leave it to Beaver*, or Mary Richards in *The Mary Tyler Moore Show*.

3. On both sides of the Atlantic, the torts of libel and slander have long enjoyed a reputation

Reforming the law of defamation has become a prominent topic of national conversation,[4] as high visibility libel suits such as *Westmoreland v. CBS*,[5] *Sharon v. Time, Inc.*,[6] and *Tavoulareas v. Washington Post Co.*[7] pit

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considerably worse than that of the plaintiffs they seek to protect. Pollack wrote: "No branch of the law has been more fertile of litigation than this . . . nor has any been more perplexed with minute and barren distinctions." B. POLLOCK, LAW OF TORTS 243 (13th ed. 1929). Prosser was no less critical, saying that "there is a great deal of the law of defamation which makes no sense," criticizing its "anomalies and absurdities," and characterizing it as a "curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm." W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 111, at 771-72 (5th ed. 1984).

4. *See* R. SMOLLA, SUING THE PRESS: LIBEL, THE MEDIA, AND POWER 238-50, 255-56 (1986) (reviewing seven types of proposed reforms and reflecting on defamation law in media society).

5. 596 F. Supp. 1170 (S.D.N.Y. 1984) (decision denying summary judgment). General Westmoreland sued CBS in a case arising out of a CBS documentary, *CBS Reports—The Uncounted Enemy: A Vietnam Deception* (television broadcast Jan. 23, 1982), which accused Westmoreland of complicity in a conspiracy to doctor intelligence estimates on the strength of enemy forces in Vietnam. After extremely expensive and protracted litigation, the suit was dropped in the waning days of the trial. *See generally* R. SMOLLA, *supra* note 4, at 198-237 (reflection on Westmoreland's trial and the media's coverage of Vietnam); D. KOWETT, A MATTER OF HONOR (1984) (journalistic overview of significant pretrial events and issues); Adler, *Annals of Law (Libel Trials—Part I)*, THE NEW YORKER, June 16, 1986, at 42 (critical journalistic account of both *Westmoreland* and *Sharon* cases) [hereinafter Adler I]; Adler, *Annals of Law (Libel Trials—Part II)*, THE NEW YORKER, June 23, 1986, at 34 (same).

6. 599 F. Supp. 538 (S.D.N.Y. 1984). In the *Sharon* case, former Israeli Defense Minister General Ariel Sharon alleged that *Time* magazine libeled him in an article describing an Israeli commission report on the events surrounding the 1982 massacre of Palestinians at the Sabra and Shatilla refugee camps in West Beirut, Lebanon. *See generally* Malone, *The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations*, 1985 UTAH L. REV. 373 (scholarly inquiry into underlying events giving rise to *Sharon* litigation). After a long and often bitter trial, a New York federal jury held that Sharon had been libeled, but that *Time* had not acted with actual malice—knowledge of falsity or reckless disregard for the truth. *Time* and Sharon subsequently settled a parallel suit brought by Sharon in Israel. *See* R. SMOLLA, *supra* note 4, at 80-99 (characterizing trial as international forum to vindicate plaintiff); Adler I, *supra* note 5, at 78-80 (account of rendering of verdict).

7. No. 83-1605 (D.C. Cir. Mar. 13, 1987) (en banc). William Tavoulareas, the president of Mobil Oil, sued the *Washington Post* for a story claiming that Tavoulareas had used his influence to set up his son in a shipping concern that did business with Mobil. *Id.*, slip op. at 9, 12. Tavoulareas won a $2 million verdict, which was first reversed on a judgment notwithstanding the verdict by the district court, Tavoulareas v. Washington Post Co., 567 F. Supp. 651, 653-54 (D.D.C. 1983) (plaintiff failed to produce evidence of knowing lies or reckless disregard of truth), and then reinstated on appeal, Tavoulareas v. Piro, 759 F.2d 90, 137 (D.C. Cir. 1985) (finding trial court's judgment n.o.v. inappropriate; appellate court refused to reweigh evidence when evidence sufficient to support verdict). The reinstatement of the jury verdict was vacated by the full court. *See* Tavoulareas v. Piro, 763 F.2d 1472, 1480-81 (D.C. Cir. 1985) (en banc) (vacated despite a contemporaneous panel opinion denying petition for rehearing). The en banc appeals court finally affirmed the district court's judgment notwithstanding the verdict, Tavoulareas v. Washington Post Co., No. 83-1605, slip op. at 3 (D.C. Cir. Mar. 13, 1987) (en banc) (holding plaintiff to be limited purpose public figure who provided insufficient evidence to prove constitutional malice).

For further details concerning the case, see R. SMOLLA, *supra* note 4, at 182-97 (recounting jury's misperception of *New York Times* standard and the D.C. Circuit's concern for upholding jury's verdict). *See generally* W. TAVOULAREAS, FIGHTING BACK (1985) (plaintiff's account of events leading to trial and rendering of trial court verdict).

powerful public plaintiffs against powerful media outlets, leaving in their wake a flurry of commentary critical of the modern defamation system.[8] Because of the apparent lack of any coherent consensus on the Supreme Court as to what the first amendment rules for defamation ought to be,[9] and the proliferation of proposals for dramatic alterations in the law of torts,[10] the law structuring the procedure for providing legal redress for reputational injury is in a period of unprecedented flux.[11]

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8. *See* Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 774-78 (1984) (advocating requirement that plaintiff prove actual harm in libel case); LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 788-91 (1984) (advocating "remedy of repair" for plaintiffs whereby media defendants would spend equal resources used in defamation to counter libel); Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 623-25 (1983) (advocating bar to suit if plaintiff is prominent *and* issue is relevant to public affairs); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11-12 (1983) (explaining increase in libel actions and suggesting reformulation of public figure analysis). *See generally* Bezanson, Cranberg & Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215 (1985) (brief outline of empirical data on defamation litigation); Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795 (empirical data on and analysis of defamation litigation); Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455 (same).

For two recent compilations of views on the problems with libel litigation, see THE GANNETT CENTER FOR MEDIA STUDIES, CONFERENCE REPORT, THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS (1986) [hereinafter CONFERENCE REPORT] (collection of panel reports on topical defamation issues); *Rewriting Libel Law*, AM. LAW., July-Aug. 1985, at S1, col. 1 (special supplement containing responses of libel exerts to hypothetical litigation questions).

For a thoughtful essay on the evolution of modern libel litigation from one of the leading practitioners in the field, see B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 1-13 (1985) (recounting recent developments in libel litigation).

9. As Bruce Sanford has put it, the Court "has no coherent consensus on what American libel law ought to be." *News Notes*, 12 Media L. Rep. (BNA) 1256 (Nov. 19, 1985).

10. *See generally Critical Issues in Tort Law Reform: A Search for Principles*, 14 J. LEGAL STUD. 459 (1985) (symposium of viewpoints on tort reform from conference conducted by Yale Law School). On the liability crisis that has generated this debate, *see* Brill, *The Not-So-Simple Crisis*, AM. LAW., May 1986, at 1, 12, 14-17 (downplaying liability crisis and suggesting several tort reforms to generate more rational system).

11. The rethinking is powered by the twin engines of gargantuan jury awards and runaway litigation costs. *See, e.g.*, Lerman v. Flynt Distributing Co., 745 F.2d 123, 127 (2d Cir. 1974) (reversing $40 million verdict), *cert. denied*, 105 S. Ct. 2114 (1985); Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1982) (reversing $26 million award), *cert. denied*, 462 U.S. 1132 (1983).

As Henry Kaufman, Director of the New York based Libel Defense Resource Center, a clearinghouse for defense information on libel litigation, has stated: "The shouting in libel today is about the cost of litigating even the 90 percent or more of libel claims that the media win. And that cost is onerous and getting worse." CONFERENCE REPORT, *supra* note 8, at 2. Legal fees for defending libel suits may easily run to the hundreds of thousands, or even millions of dollars. The McClatchy Newspaper chain, recently involved in a libel suit brought by former Sen. Paul Laxalt against a McClatchy newspaper, *The Sacramento Bee*, has estimated its legal fees at over $1 million per year. Estimates for CBS's legal fees in *Westmoreland v. CBS* are reportedly between $5 and $10 million, and in *Herbert v. Lando*, 441 U.S. 153 (1979), between $3 and $4 million; in both cases CBS "won." *See* R. SMOLLA, *supra* note 4, at 75 (noting that lawyers, with their legal fees, often "win" too). The American Society of Newspaper Editors estimates the average cost of defending a libel case to be $95,000; some insurance carriers place the average at above $150,000 per case. CONFERENCE RE-

The Supreme Court's most recent contributions to this dialogue are particularly perplexing. In three recent decisions, *Philadelphia Newspapers, Inc. v. Hepps*,[12] *Anderson v. Liberty Lobby, Inc.*,[13] and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[14] the Court made significant alterations in the complex matrix of first amendment rules that have been gradually superimposed on the common law of libel and slander since *New York Times Co. v. Sullivan*.[15] The recent alterations in *Hepps*, *Liberty Lobby*, and *Dun & Bradstreet* were relatively small, and all three decisions are striking in their painstaking care to articulate as narrow a holding as possible.[16] The irony of this precision is that the very narrowness of the holdings, when juxtaposed with

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PORT, *supra* note 8, at 3. Legal fees make up 80% of the aggregate costs of defending suits against the press, with the remaining 20% representing actual payments for jury awards and settlements. R. SMOLLA, *supra* note 4, at 74-76.

The libel insurance market is precipitously collapsing because plaintiffs are extracting their pound of flesh in the form of staggering legal expenses. *See generally* Heavner, *Developments in Obtaining Insurance, Changing Terms, and Market Restrictions*, in MEDIA INSURANCE AND RISK MANAGEMENT 109, 119-26, 134-38 (J. Lankenau ed. 1985) (overview of the collapsing media insurance market and suggestions for reform).

12. 106 S. Ct. 1558 (1986).

13. 106 S. Ct. 2505 (1986).

14. 472 U.S. 749 (1985).

15. 376 U.S. 254 (1964). In *New York Times,* the Court held that in a libel suit brought by a public official, the first amendment requires the plaintiff to demonstrate with clear and convincing evidence that the defendant published the statement with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80, 285-86.

The literature on the *New York Times* holding is rich. *See, e.g.*, Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965) (analysis of *New York Times* holding and portent of dangers to come); Bertelsman, *The First Amendment and Protection of Reputation and Privacy*—New York Times Co. v. Sullivan *and How it Grew*, 56 KY. L.J. 718 (1967) (analysis of *New York Times* holding and significant defamation cases decided shortly thereafter); Bertelsman, *Libel and Public Men*, 52 A.B.A. J. 657 (1966) (brief analysis of widening scope of *New York Times* holding); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (discussion of *New York Times* holding and author's reflections on first amendment jurisprudence); Green, *The* New York Times *Rule: Judicial Overkill*, 12 VILL. L. REV. 730 (1967) (brief critical commentary on *New York Times* holding); Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (defense of *New York Times* holding and first amendment analysis of case); Lewis, *supra* note 8 (critical analysis of *New York Times* and breadth of its holding); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371 (1969) (critique of the breadth of the *New York Times* holding and its failure to protect reputational interests adequately); Nelson, *Newsmen and the* Times *Doctrine*, 12 VILL. L. REV. 738 (1967) (brief commentary on reporter's understanding of holding's impact on journalists); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964) (analysis of pre-*New York Times* defamation law, the holding, and its implications); *see also* Ottley, Bruce & Ottley, New York Times v. Sullivan: *A Retrospective Examination*, 33 DE PAUL L. REV. 741 (1984) (analysis of facts of case and origins in civil rights movement); Pierce, *The Anatomy of an Historic Decision*, New York Times Co. v. Sullivan, 43 N.C.L. REV. 315 (1965) (analysis of petitioner's and respondent's strategy at trial).

16. *See infra* text accompanying notes 25-30, 50-51, 85 (Court fastidiously limits holdings in each of the three cases).

the broad potential implications of the cases,[17] has thrown the already confused law of defamation into yet deeper levels of chaos.

In the last two years it has become increasingly difficult to discern exactly what the states are free to do with the torts of slander and libel. The Court has deconstitutionalized and returned to the common law some aspects of defamation,[18] and has constitutionalized and withdrawn from the common law other aspects.[19] In each case, however, the Court has left unclear how much it has given and how much it has taken away. At a time in which the law of defamation is so deeply dissatisfying to plaintiffs and to defendants, and calls for reform are gaining increasing support,[20] this doctrinal uncertainty is especially damaging, for it so clouds the picture that intelligent judgments about the future course of defamation become almost impossible to make.

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

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17. *See infra* text accompanying notes 32-37, 55-76, 105-09 (discussing several possible implications of Court's complicated defamation jurisprudence).

18. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-61 (1985) (first amendment protection less stringent for purely private speech); *infra* text accompanying notes 77-95 (summarizing *Dun & Bradstreet*'s holding). Libel attorney John McCrory has stated that the "net effect" of *Dun & Bradstreet* was "that the Court 'had the potential to strike the final death blow to the common law cause of action for libel' and failed to do so." *News Notes, supra* note 9, at 1256.

19. *See* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1564-65 (1986) (Court held plaintiff bears burden of proof of actual malice against media defendant if issue in controversy is of public concern); *infra* text accompanying notes 24-28 (summarizing holding of case).

20. Some interesting reform proposals have begun to surface from a wide variety of quarters. A proposal by Professor Marc Franklin, who has long been one of the preeminent scholarly voices on the law of defamation, would create incentives for the litigants to lay their cards on the table and to avoid litigation altogether through a negotiated settlement. Plaintiff, as a condition to obtaining attorney's fees if he prevails, must in advance of filing the case present all his evidence to the defendant. A plaintiff who does not prevail must pay the defense's legal fees. A retraction published or broadcast prior to institution of the suit (presumably after the defendant has received the plaintiff's evidence) absolutely bars the litigation. A retraction published after the litigation begins also terminates the case, but the defendant pays the plaintiff's legal fees. Franklin would retain current statutory and common law privileges. *See* CONFERENCE REPORT, *supra* note 8, at 19.

Congressman Charles Schumer has proposed legislation that would permit the plaintiff to sue for a declaratory judgment and grant the defendant an absolute right to convert any suit for money damages into a suit for a declaratory judgment. A prevailing plaintiff is entitled to attorneys' fees, unless the defendant publishes a retraction within 10 days of the entry of judgment. Schumer would also bar punitive damages in a suit for damages and deny plaintiff's attorney's fees in a declaratory judgment action if the defendant demonstrates that reasonable attempts were made to ascertain the truth. *Id.*

New York Times correspondent Anthony Lewis has also entered the fray, proposing that suit be barred if the plaintiff is prominent *and* the issue is of public concern. Lewis, *supra* note 8, at 623-35.

A states' rights reflex appears to be at work. Because federal intervention through first amendment rules has benefited defendants, states tend to respond automatically with pro-plaintiff choices whenever those first amendment restrictions are cut loose. If defamation is increasingly to return to the common law, then it should be shaped to reflect evolving modern common law principles, which presumably ought to reflect social policies sensitive to valid interests of both plaintiffs and defendants. The rules for defamation should make sense in light of the overall structure of the tort system, they should be consistent with the developing mission of the law of torts, and they should be synchronized with both the broad theoretic structure of the tort system and with the operation of other specific torts.[21]

This article is a doctrinal analysis of the current law of defamation as modified by recent Supreme Court cases. Throughout the article the analysis progresses through three levels: (1) an explanation of current constitutional doctrine; (2) an analysis framed in terms of the tort system as a whole and how undeveloped areas of defamation ought to evolve; and (3) projections as to what doctrinal changes are most probable in the future.

Part II of this article describes the holdings in *Hepps*, *Liberty Lobby*, and *Dun & Bradstreet*, particularly noting aspects of defamation law that the Supreme Court is leaving to the states. Part III describes those areas of defamation law to which states may apply strict liability fault standards and argues against such application. Part IV examines the still open question of the media/nonmedia distinction. Finally, Part V predicts the future course of the law of defamation.

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21. There is, of course, sharp disagreement over the essential mission of tort law, and I do not mean to imply that any generally accepted theoretic structure, in its simplistic sense, exists. Without invoking the extraordinarily fertile debate carried on by such provocative scholars as Guido Calebresi, Richard Epstein, George Fletcher, Richard Posner, and many others as to how tort rules *ought* to evolve, it may still be possible to distill from the history of the law of torts some relatively solid descriptive judgments about the basic structure of the system, such as the division of labor between strict liability and negligence, or varying approaches to compensation for tangible and intangible injuries. *See generally* G. CALABRESI, THE COST OF ACCIDENTS (1979) (exploring question of how to allocate accident costs and arguing that economic theory standing alone is not sufficient to answer question); R. POSNER, ECONOMIC ANALYSIS OF LAW § 6.11, at 104-13 (2d ed. 1977) (analyzing economic legal rules and arguing for superior efficiency of negligence as dominant rule in tort); G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 211-43 (1980) (noting 1970s trend in tort scholarship to strive for conceptual theories of tort law); Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973) (analyzing economic effects of liability rules and fashioning efficient liability rules); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (critical evaluation of strict liability and suggestions for reform); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (analysis and review of comprehensive theory of strict liability); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (evaluating tort law from fairness perspective); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (discussing revolution in tort law and identifying origins of enterprise liability).

II. THE SUPREME COURT'S MOST RECENT CONTRIBUTIONS

A. *HEPPS*

In *Philadelphia Newspapers, Inc. v. Hepps*,[22] the *Philadelphia Inquirer* ran a series of stories purporting to link the plaintiffs to organized crime. The articles further claimed that the plaintiffs exploited those crime links to influence Pennsylvania's legislative and governmental processes. The issue in the case, as it reached the Supreme Court, was whether Pennsylvania's adherence to the common law rule that defendants have the burden of proving the truth of the allegedly defamatory charges leveled at the plaintiff was inconsistent with the first amendment.[23] In a significant victory for the press, one that may well have caught many Court watchers by surprise, the Court held that the Constitution required the burden of proof of truth or falsity to be placed on the plaintiff.[24]

The holding in *Hepps* is limited. The Court's opinion began with carefully chosen words narrowing the precise question being addressed.[25] The plaintiffs were private figures, but the speech involved was an issue of public concern.[26] In a footnote later in the opinion, the Court tuned the precision of its holding, stating that it had no occasion to consider the quantity of proof of falsity that a private figure plaintiff must present to recover damages.[27] In a final caveat, the Court emphasized that the *Inquirer* was a media defendant, and that it expressed no view as to whether the same rule would apply in the nonmedia context.[28] This fastidious concern for delimiting the scope of its ruling stands in marked contrast to the style and method of the Court's opinion twelve years earlier in *Gertz v. Robert Welch, Inc.*,[29] in which the Court went well beyond the facts of the case to announce a whole matrix of new constitutional rules.[30]

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22. 106 S. Ct. 1558, 1560 (1986).

23. Pennsylvania followed "the common law's presumption that an individual's reputation is a good one." *Id.*

24. *Id.* at 1564-65.

25. *Id.* at 1559.

26. *Id.* at 1559-60.

27. *Id.* at 1565 n.4.

28. *Id.* (citing Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979)).

29. 418 U.S. 323 (1974).

30. *Gertz* rejected the *Rosenbloom* approach and divided the law of defamation between public and private plaintiffs. Public officials and public figures were required to meet the *New York Times* actual malice standard. States were free to establish their own standards for actual damages recovery for private figure plaintiffs in suits against media defendants, as long as they did not establish liability without fault. *Id.* at 347-48.

In private figure cases tried under the negligence standard, *Gertz* further required that actual injury be demonstrated, though a broad range of injuries remained compensable and proof requirements were not rigorous. *Id.* at 358. However, the Court held that even a private figure plaintiff was required to show actual malice to recover presumed or punitive damages. *Id.* at 348-50.

For commentary on *Gertz*, see R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS §§ I.2.5,

The holding in *Hepps* leaves a number of important burden of proof questions unresolved. In emphasizing the media status of the defendant, the Court left open the burden of proof rule when nonmedia defendants are involved. Presumably, public officials would bear the burden of proof as plaintiffs in media and nonmedia cases alike. *New York Times Co. v. Sullivan*,[31] it should be remembered, was both a media and a nonmedia case; Commissioner Sullivan sued not only the *Times* but also four individual black ministers who had signed the advertisement.[32] The burden of proof in the remaining types of nonmedia cases, involving public figure and private figure plaintiffs, however, remains somewhat problematic.[33]

Hepps also fails to establish the burden of proof when the subject matter of the speech does not involve an issue of public concern. If the preoccupation with the "issue of public concern" exhibited in both *Hepps* and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[34] evolves into the dominant analytic principle of the modern law of defamation, then the burden of proof, even in public official and public figure cases, could conceivably be placed on defendants when the speech involves private issues. Again, because it is unclear

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V.3 (1980) (summarizing *Gertz* facts and reasoning); Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271 (1976) (defending Court's decisions as minimizing restraints on press); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) (describing how deficiencies in *Gertz* promote greater self-censorship); Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977) (arguing that preferential treatment given to private plaintiffs is unjustifiable and protection to press illusory); Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811 (advocating that Court adopt uniform standard in defamation actions and abandon distinction between public and private figures); Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976) (arguing Court's decisions give too much discretion to judge in prescribing largely subjective determinations of who is public figure and what is noteworthy); Frakt, *Defamation Since* Gertz v. Robert Welch, Inc.: *The Emerging Common Law*, 10 RUT.-CAM. L.J. 519 (1979) (observing how state common law developments after *Gertz* reduce media protection); LaRue, *Living with* Gertz: *A Practical Look at Constitutional Libel Standards*, 67 VA. L. REV. 287 (1981) (arguing that when credibility of reporter's testimony is central issue in libel case, distinction between recklessness and negligence is irrelevant); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976) (defending *Gertz* as sensible compromise between conflict of first amendment values and citizen's privacy interest); Rosen, *Media Lament—The Rise and Fall of Involuntary Public Figures*, 54 ST. JOHN'S L. REV. 487 (1980) (arguing that *Gertz* and progeny promote media self-censorship); Smolla, *supra* note 8 (noting that *Gertz* standard does not account for increase in litigation); Watkins & Schwartz, Gertz *and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823 (1984) (examining common law in light of *Gertz*'s elimination of strict liability for suits involving nonmedia defendants).

31. 376 U.S. 254 (1964).

32. *Id.* at 256 (action brought against four clergymen and *New York Times*).

33. The *New York Times* holding precluded a public official's recovery of damages for defamation relating to his official conduct absent a clear and convincing showing of actual malice. *Id.* at 279-80, 285-86. The Court did not address the conduct or burden of proof standards that apply to cases in which public figures or private figures sue media or nonmedia defendants.

34. 472 U.S. 749 (1985).

whether the "issue of public concern" test is to be the gatekeeper for *any* first amendment protection, this area remains unresolved.

Hepps is, however, an important victory for the press, a victory that was by no means foreordained. Many Americans equate defamatory charges made by the media as at least symbolically equivalent to criminal charges instituted by the state, and from that equation conclude that the victim (the "accused") should be deemed innocent until proven guilty. Something is grossly amiss, this line of reasoning goes, when the defendant is given license to drag someone through the mud and then force the hapless victim to clear himself if he can.[35]

That the Court resisted the substantial emotional pull of this argument was, from the media's perspective, grounds for a sigh of relief. Justice O'Connor's opinion went for the jugular on this conflict with refreshing clarity. There will always be cases in which the crucible of litigation fails to melt away the lies convincingly and leave a dispositive core of truth about the events giving rise to the lawsuit. Any arbitrary assignment of victory to one side or the other when the evidence is in equipoise will result in cases "wrongly decided," in the sense that we are statistically certain that the outcome will vary from what the outcome would be if the triers of fact were omniscient. Justice O'Connor resolved the unavoidable dilemma in favor of free expression values:

> In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.[36]

Under *Hepps*, therefore, ties go to the press. This resolution extracts a substantial cost. *Hepps* is only meaningful in cases in which the media has misbehaved. By hypothesis, the power of *Hepps* lies in its protection of stories concerning matters of public interest that were negligently, recklessly, or intentionally prepared, since the fault requirements of *Gertz* and *New York Times* must be satisfied at the threshold in cases involving public plaintiffs or

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35. For pre-*Hepps* decisions adhering to the common law rule placing the burden on the defendant, see Martin v. Griffin Television, Inc., 549 P.2d 85, 93-94 (Okla. 1976) (lower court did not err in instructing jury that defendant bore burden of proof); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 420 (Tenn. 1978) (defendant may rebut presumption of falsity by proving truth); Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 623-25 (Tex. Ct. App. 1984) (*Gertz* does not hold that private defamation plaintiff must prove falsity), *cert. denied*, 472 U.S. 1009 (1985); Denny v. Mertz, 106 Wis. 2d 636, 656-58, 318 N.W.2d 141, 150-51 (plaintiff need only prove media defendant negligent), *cert. denied*, 459 U.S. 883 (1982).

36. 106 S. Ct. at 1564.

private plaintiffs and public speech.[37]

In theory, *Hepps* invites the unscrupulous publisher who does not believe in the truth of the story but is confident that at any trial the truth would ultimately prove unknowable, to go ahead and publish. Even assuming that some publishers are sufficiently amoral and brazen to make this calculation, however, there are many other practical disincentives to publishing such a story. If litigation does ensue, it will be costly whether won or lost, and the uncertainties of trials are such that the niceties of the burden of proof allocation may give way to the vengeance of the outraged jury. Realistically, however, *Hepps* does provide safe harbor for at least some sloppy, unprofessional journalism. The powerful message of the majority opinion is that this social subsidy must be paid to give breathing space to good journalism, journalism that is aggressive, insistent, conscientious, but sometimes wrong. For defenders of the press, *Hepps*, for all its limitations and wrinkles, is a crucial victory.

In summary, *Hepps* indicates that plaintiff bears the burden of proof on the issue of truth or falsity in the following types of cases:

(1) Media defendant cases involving public officials or public figures and issues of public concern.[38]

(2) Media defendant cases involving private figures and issues of public concern.[39]

Hepps leaves the burden of proof issue open in the following cases:

(3) Media defendant cases involving public officials or public figures and issues of private concern.

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37. This point lies at the heart of Justice Stevens' dissent in *Hepps*. *Id.* at 1566. Justice Stevens' argument that the only publishers who benefit from *Hepps* are those who act negligently or recklessly is technically correct, but it may overly dramatize the practical impact of *Hepps*. The probability is that a plaintiff able to meet the burden of proving negligence or recklessness usually will also be able to meet the burden of proving falsity. Falsity is an issue that is typically either intertwined with fault, or is resolved as an issue antecedent to fault. Evidence of fault is not marshaled and presented in a vacuum. It is difficult to imagine a plaintiff who can establish actual malice or negligence in a case but is unable to prove that he or she was lied about. *See* RESTATEMENT (SECOND) OF TORTS § 613 comment j (1977) (proof of fault generally requires plaintiff to prove falsity of communication).

Nevertheless, there may at times be cases in which reckless or negligent journalistic behavior is well demonstrated, despite a hopelessly clouded ultimate judgment on truth or falsity. For example, a reporter may employ egregiously sloppy verification procedures (and thus be negligent) or even subjectively doubt the story but publish anyway (and thus be reckless), and yet in both cases benefit from the burden of proof rule when later litigation by both sides reveals that the underlying truth or falsity of the story is impossible to determine objectively. In such a case, Justice Stevens' observation would be accurate.

38. *Id.* at 1563 (constitutionally clearly required).

39. *Id.* at 1559 (*Hepps* holding that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false").

(4) Media defendant cases involving private figures and issues of private concern.

(5) Nonmedia defendant cases involving public officials or public figures and issues of public concern.

(6) Nonmedia defendant cases involving private figures and issues of public concern.

(7) Nonmedia defendant cases involving public officials or public figures and issues of private concern.

(8) Nonmedia defendant cases involving private figures and issues of private concern.

The wisest choice in those cases left open by *Hepps* (cases three through eight) is to place the burden of proof on the plaintiff, creating one uniform rule for all defamation cases. The two easiest cases to decide are cases five and six, both of which involve issues of public concern. The only distinguishing element between those cases and *Hepps* is the nonmedia status of the defendant. Whatever the wisdom of engaging in a media/nonmedia distinction on fault issues,[40] it seems perverse in the context of litigating truth or falsity. If anything, we should be stricter with media defendants than with nonmedia defendants, because media defendants have greater capacity to cause harm by lying, and because media defendants are more likely to profit financially from lies. If the general policy judgment of *Hepps* as to the importance of not penalizing speech on matters of public concern protects media defendants, then it is hard to see how the same speech is less worthy of protection because of the amateur status of the defendant.

Cases three, four, seven, and eight present a tougher problem, for all involve speech on issues that are not of public concern. Even in private speech cases, however, plaintiffs should bear the burden of proof. The only significant rationale for adherence to the old common law rule placing the burden of proof on the defendant is the theory that a person's reputation is presumed to be good, and therefore the falsity of the injurious statement is presumed until the defendant demonstrates otherwise.[41] That presumption, however, is purely a legal fiction. One's first reaction upon hearing derogatory information about another is not necessarily, "I believe it, I thought as much." What we in fact do when we receive defamatory information about another is to filter that information through our own internal judgments of credibility and plausibility as colored by our individual predilections. The common law presumption is not a common sense presumption because there is no universal common sense to be had on the subject. Rather, the common law presumption reflects two normative judgments. First, it reflects the judgment that

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40. *See infra* text accompanying notes 177-91 (discussion of media/nonmedia distinction).

41. Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1560 (1986).

those who bear bad tales should have the facts to back them up, and second, that a person accused of wrongdoing should be deemed innocent until proven guilty.

These are not frivolous concerns. There may well be a sort of internal psychological burden of proof at work in the common law rule, a burden that demands that those who make accusations really should be able to put up or shut up, and if they cannot, then a defamation suit is what they have coming. And to the extent that the speaker of the defamatory speech is the original aggressor in the dispute, and the accused victim is the person against whom that aggression was targeted, there is a certain appeal to the notion that the victim should not be forced to defend at his or her peril, but should have the option of remaining dignified and mute, "innocent until proven guilty."

Hepps itself answers most of these arguments. Justice O'Connor did not borrow her defamation model from the criminal law, where the awesome power of the official accuser is pitted against an individual defendant, but rather from the model of a vigorous and open marketplace, where different versions of the truth vie for acceptance. To encourage the free trade of information in that market the burden is placed on plaintiffs, so that in all "unknowable truth" situations the law imposes no sanctions, leaving judgments on truth to the marketplace of public opinion.[42] The pursuit of truth is valued so highly that victims must fight back rather than stand silent.

These judgments in *Hepps* have only slightly diminished force when the speech is not about issues of public concern. Private truth is as valuable as public truth; for most of us the private facts of our family lives, workplaces, schools, churches, and neighborhoods are as vital as the more public facts of politics, art, and science.[43]

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42. *Id.* at 1564-65 (Justice O'Connor's model).

43. *See* Smolla, *supra* note 8, at 68-71 (explaining how some courts define public figure in context of arena of controversy).

An excellent example of how libel litigation chills valuable private speech, creating a substantial practical social detriment, is the growing number of libel suits filed by employees who have been fired by their companies. The *Wall Street Journal* recently noted that an estimated one-third of all defamation suits arise from cases filed by discharged employees against their former employers. Stricharchuk, *Fired Employees Turn the Reason for Dismissal into a Legal Weapon*, Wall St. J., Oct. 2, 1986, at 33, col. 4. This litigation has become extraordinarily expensive to defend, to the point where many major corporations are refusing to release information concerning an employee's job performance or the reasons for termination. Some companies are not even explaining the reasons for discharge to the employees themselves. The social costs here are obvious. First, the flow of information about employees decreases, resulting in less-informed hiring decisions and increased turnover. *Id.* Second, libel rules exact a toll from other values that the legal system may wish to protect in the workplace, such as procedural due process for public employees and more generalized fairness and good faith considerations for private employers. To the extent that treating employees with fairness and dignity should result in an explanation of personnel decisions, libel litigation may in the long run work at cross-purposes with these values. Though this sort of chilling effect has nothing to do with the media, it is a considerable drag on the economy and a vivid example of why

More significantly, the "innocent until proven guilty" aphorism should actually operate to place the burden on the plaintiff and not the defendant if we intend defamation rules to be consistent with the rest of the law of torts. The traditional tort rule in every area except defamation is that because the plaintiff is invoking the heavy machinery of state power against a fellow citizen, the plaintiff bears the burden. The defendant is deemed innocent of tortious activity until proven guilty. Defamation has survived in some jurisdictions as an exception to this rule only because of the psychological transposition of roles that defamation suits invite. The plaintiff is thought of as the accused rather than the accuser, for it is the plaintiff's reputation at stake. But this logic does not justify the exception, because tort law routinely places the burden of proof on plaintiffs when interests every bit as precious as reputation are being litigated. The common law exception for defamation simply cannot withstand logical scrutiny.

B. *LIBERTY LOBBY*

In *Anderson v. Liberty Lobby, Inc.*,[44] the Supreme Court addressed the question whether the standard in *New York Times Co. v. Sullivan*,[45] which requires a plaintiff to demonstrate actual malice with clear and convincing evidence,[46] must be considered by a trial court when it rules on a motion for summary judgment under rule 56 of the Federal Rules of Civil Procedure.[47] The Court ruled, in a six to three decision, that when determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind "the actual quantum and quality of proof necessary to support liability under *New York Times*."[48] The Court held that there is no genuine issue if the evidence brought forward in the opposing affidavits is "of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence."[49]

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libel litigation in all contexts, public and private, should at least adhere to the normal rules of civil litigation.

44. 106 S. Ct. 2505 (1986).

45. 376 U.S. 254 (1964).

46. *Id.* at 285-86. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (*New York Times* requires "clear and convincing proof" that defamation made with knowledge of falsity or reckless disregard of truth).

47. *Liberty Lobby*, 106 S. Ct. at 2508. There was a division of authority on the issue prior to *Liberty Lobby*. *Compare* Anderson v. Liberty Lobby, Inc., 746 F.2d 1563, 1570 (D.C. Cir. 1984) (judge must find reasonable jury could find actual malice; clear and convincing evidence unnecessary), *rev'd*, 106 S. Ct. 2505 (1986) *with* Rebozo v. Washington Post Co., 637 F.2d 375, 381 (5th Cir.) (clear and convincing evidence proper standard in ruling on summary judgment), *cert. denied*, 454 U.S. 964 (1981) *and* Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 940 (2d Cir.) (same), *cert. denied*, 449 U.S. 839 (1980) *and* Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976) (same).

48. 106 S. Ct. at 2513.

49. *Id.*

Liberty Lobby was an important press victory because aggressive summary practice has long been integral to the media's defensive strategy in libel litigation.[50] *Liberty Lobby* was cast by the Court as essentially a civil procedure ruling and not as a first amendment case. The Court went out of its way to avoid importing first amendment values into its procedural analysis, a trend visible in a number of recent procedural decisions involving defamation.[51] This trend toward procedural neutrality may often be as much a detriment as a benefit to defense interests.

To Supreme Court watchers, the alignment of the Court in *Liberty Lobby* is striking. The opinion was written by Justice White, who has seriously questioned *New York Times*.[52] The three dissenters consisted of the improbable coalition of former Chief Justice Burger and Justices Brennan and Rehnquist.[53] This alignment betrays the larger significance of *Liberty Lobby*, for the Court conceptualized the case as a civil procedure ruling rather than as a first amendment decision. The case turned on a subtle procedural problem—the extent to which a substantive law evidentiary standard concerning the quality of evidence necessary to state a prima facie case must be considered when determining whether a genuine issue of material fact exists on a summary judgment motion.[54] The first amendment played no role in the analysis of any of the Justices who authored opinions, other than the incidental fact that the first amendment happened to be the source of the particular substantive evidentiary rule at stake in the case.

Liberty Lobby is thus an interesting mixed bag from the media's perspective. It is a resounding victory on an issue of critical pragmatic importance. It resolves a conflict among lower courts in exactly the way the media bar hoped it would, making it easier for defendants to prevail on summary judgment motions.[55] However, *Liberty Lobby* also stands for a proposition less well received by media interests, a proposition that has been emerging in a number of recent cases in which first amendment principles and procedural rules intersect. That principle is one of procedural neutrality, which requires

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50. B. SANFORD, *supra* note 8, § 3.2.1, at 520-27.

51. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 790-91 (1984) (rejecting suggestion that first amendment concerns enter into minimum contacts analysis); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984) (analysis centering on due process—minimum contacts issue); Herbert v. Lando, 441 U.S. 153, 169-77 (1979) (rejecting evidentiary privileges in editorial process).

52. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 770-72 (1985) (White, J., concurring) (expressing doubts as to soundness of *New York Times*).

53. 106 S. Ct. at 2515 (Brennan, J., dissenting); *id.* at 2520 (Rehnquist, J., with Burger, C.J., dissenting).

54. *Id.* at 2509.

55. Summary judgment practice is more important than ever today, as rising litigation expenses in defamation cases make the effective preemptive strike through summary judgment a vital element in reducing the chilling effect on free speech that litigation itself poses. B. SANFORD, *supra* note 8, § 13.13, at 519-30.

that litigation rules in defamation cases be applied neutrally; that is, they are to be applied just as they would be in any other form of litigation, and first amendment values are not to give defendants any special advantages.

To live by the sword is to die by the sword, and neutrality is a sword that is double-edged. In *Liberty Lobby*, the Court stated that its holding was not meant to "denigrate the role of the jury" or "authorize trial on affidavits."[56] Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences remain the function of the jury, not the judge on summary judgment, and "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[57] The Court further seemed to admonish trial judges to deny summary judgment "where there is reason to believe that the better course would be to proceed to a full trial."[58]

This underlying neutrality message in *Liberty Lobby* is one the Court began to develop in *Hutchinson v. Proxmire*,[59] and that received its most dramatic formulations in *Keeton v. Hustler Magazine, Inc.*,[60] and *Calder v. Jones*.[61] Prior to 1984, courts were split as to whether first amendment considerations were relevant to jurisdictional analysis. A number of decisions took the position that the potential chill on free expression posed by the possibility of suit in distant forums where only a relatively small number of copies of a publication were circulated required a stronger showing of "minimum contacts" against media defendants.[62] Other decisions took the opposite view, holding that the first amendment was irrelevant to the minimum contacts assessment.[63]

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56. 106 S. Ct. at 2513.

57. *Id.* (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

58. *Id.* at 2514 (citing Kennedy v. Silas Mason Co., 334 U.S. 249 (1948)).

59. 443 U.S. 111 (1979).

60. 465 U.S. 770 (1984).

61. 465 U.S. 783 (1984).

62. *See* New York Times Co. v. Connor, 365 F.2d 567, 572 (5th Cir. 1966) ("First amendment considerations . . . require a greater showing of contact to satisfy the due process clause than is necessary in . . . other [tort law areas]."); Cox Enters. v. Holt, 678 F.2d 936, 937 (11th Cir.) (citing *Connor* with approval), *reh'g granted*, 691 F.2d 989 (11th Cir. 1982); Edwards v. Associated Press, 512 F.2d 258, 266 (5th Cir. 1975) (same); Margoles v. Johns, 333 F. Supp. 942, 946 (D.D.C. 1971) (same), *aff'd*, 483 F.2d 1212 (1973); *see also* McCabe v. Kevin Jenkins & Assoc., Inc., 531 F. Supp. 648, 654 (E.D. Pa. 1982) (first amendment concerns mandate subtly different due process analysis).

Some decisions have held that first amendment considerations should at least influence transfer or change of venue motions. *See* Buckley v. New York Post Corp., 373 F.2d 175, 183-84 (2d Cir. 1967) (first amendment could give *forum non conveniens* constitutional stature); Cordell v. Detective Publications, Inc., 307 F. Supp. 1212, 1216 (E.D. Tenn. 1968) (indicating *forum non conveniens* doctrine should be applied to reduce hardship on national publishers instead of *Connor* contact analysis), *aff'd*, 419 F.2d 989 (6th Cir. 1969).

63. *See* Church of Scientology v. Adams, 584 F.2d 893, 899 (9th Cir. 1978) (first amendment concerns more appropriate to substantive defense on the merits); Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir.) (first amendment not implicated in jurisdictional determination), *cert. denied*, 432 U.S. 911 (1977); David v. National Lampoon, Inc., 432 F. Supp. 1097, 1100 (D.S.C. 1977) (first amendment concerns adequately addressed at trial). If nothing else, the issue generated

In 1984, the Supreme Court resolved the lower court split by holding that first amendment considerations should not play a role in minimum contacts analysis. In *Calder v. Jones*,[64] actress Shirley Jones, a California resident, sued the *National Enquirer*, its president and editor, Ian Calder, its local distributing company, and the writer of the allegedly offensive article, John South, for libel, invasion of privacy, and intentional infliction of emotional distress, in a California court. The *Enquirer*'s circulation in California is over 600,000 and neither it nor its distributing company objected to jurisdiction in California. Calder and South, however, moved to dismiss for lack of personal jurisdiction. Calder was a Florida resident who had been to California only twice in his life, once on a pleasure trip and once as a witness in an unrelated trial. Calder had reviewed, edited, and approved the article. South, a Florida resident, had written most of the story in Florida, relying on telephone calls to contacts in California. South frequently traveled to California on business.

The Supreme Court "reject[ed] the suggestion that First Amendment concerns enter into the jurisdictional analysis,"[65] taking the position that "[t]he infusion of such considerations would needlessly complicate an already imprecise inquiry."[66] Whatever chill to protected first amendment activity is presented by defamation actions is already taken into account, the Court held, in the substantive rules set forth in *New York Times* and *Gertz*. "To reintroduce those concerns at the jurisdictional stage would be a form of double counting."[67] The Court unanimously upheld the assertion of jurisdiction over Calder and South in California.[68]

Similarly, in *Keeton v. Hustler Magazine, Inc.*,[69] the Court unanimously held that jurisdiction could be sustained in New Hampshire against *Hustler Magazine*, an Ohio corporation with its principal place of business in California, in a libel action brought by Kathy Keeton, a New York resident. New Hampshire, with its unusual six-year statute of limitations for libel, was the only state in which the limitations period on Keeton's action had not run. Less than one percent of Hustler's circulation was in New Hampshire, with a circulation estimated at somewhere between 10,000 to 15,000 copies each

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one of the better law review titles. *See* Comment, *Long Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967).

For background information, see Note, *Personal Jurisdiction Over Publishers in Defamation Actions: A Current Assessment*, 30 VILL. L. REV. 193, 220-26 (1985) (arguing *Calder* and *Keeton* define proper role of first amendment in long arm jurisdiction disputes).

64. 465 U.S. 783 (1984).

65. *Id.* at 790.

66. *Id.*

67. *Id.*

68. *Id.* at 788-91.

69. 465 U.S. 770 (1984).

month.[70] Once again the Court refused to allow first amendment considerations to influence the jurisdictional issue, stating: "[W]e reject categorically the suggestion that invisible radiations from the first amendment may defeat jurisdiction otherwise proper under the Due Process Clause."[71]

The principle of procedural neutrality serves the media inconsistently. While in *Liberty Lobby* the principle served press interests well, in *Calder* and *Keeton* it served to expand greatly the ability of plaintiffs to assert jurisdiction over media defendants in distant forums throughout the United States. Since many media outlets broadcast or circulate across the United States, and since tort standards for media related cases often vary dramatically, the media as an industry is acutely vulnerable to potentially abusive forum shopping.

The Court's steadfast rejection of the importation of special first amendment standards to procedural issues is grounded on the assumption that such an infusion would be double counting.[72] The Court has similarly rejected special first amendment standards for discovery in defamation cases,[73] and has intimated that no special standards should favor summary judgment motions.[74] These holdings might well lead to acceptance of an unwavering proposition that no special first amendment considerations should ever apply in procedural matters.

All procedural matters, however, are not the same. Some ostensibly procedural issues, such as the doctrine of independent appellate review, must by their very nature reflect fairness considerations that are intertwined with the substantive interests embodied in the constitutional law and tort issues being litigated.[75] In media related torts those substantive interests invariably pose trade-offs between reputational or privacy interests and free speech interests. It is one thing not to double count speech interests, and another not to count them at all.[76]

C. *DUN & BRADSTREET*

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[77] the credit report-

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70. *Id.* at 772, 779-81.

71. *Id.* at 780 n.12.

72. Calder v. Jones, 465 U.S. 783, 790 (1984).

73. *See* Herbert v. Lando, 441 U.S. 153, 170 (1979) (first amendment should not be construed to create evidentiary privilege).

74. *See* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (dictum) (proof of actual malice involves state of mind issues and is not readily decided on summary judgment).

75. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510 (1984) (appellate court must review record to determine convincing clarity of evidence to support actual malice standard).

76. R. SMOLLA, LAW OF DEFAMATION § 12.03[i][c]ii (1986).

77. 472 U.S. 749 (1985).

ing agency Dun & Bradstreet[78] issued an inaccurate credit report about Greenmoss Builders, stating that Greenmoss had recently filed a voluntary petition in bankruptcy. In fact, Greenmoss was in healthy financial condition and had filed no bankruptcy petition. Greenmoss' principal creditor received the inaccurate report.[79] In response to Greenmoss' complaint, Dun & Bradstreet issued a corrective notice to the five recipients of the report indicating the error and stating that Greenmoss "continued in business as usual." Greenmoss believed the correction implied that the initial mistake had been caused by Greenmoss, not Dun & Bradstreet, and ultimately commenced an action against Dun & Bradstreet for defamation.[80]

After a jury trial, a verdict was returned in favor of the plaintiff Greenmoss for $50,000 in compensatory and $300,000 in punitive damages.[81] The trial court realized that its instructions on liability and damages were inconsistent with the *Gertz v. Robert Welch, Inc.*[82] prohibition against awards of presumed or punitive damages in the absence of actual malice. The trial court accordingly granted the defendant's motion for new trial.[83] The Vermont Supreme Court reversed, holding that Dun & Bradstreet was not a member of the media, and that "as matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation

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78. Dun & Bradstreet sends factual and financial reports about individual business enterprises exclusively to paid subscribers to its service. Five subscribers received the erroneous Greenmoss report. *Id.* at 751.

79. *Id.* at 749.

80. *Id.* at 752. Dun & Bradstreet made the error because one of its employees, a seventeen-year-old high school student, who annually reviewed Vermont's bankruptcy petitions, inadvertently attributed a bankruptcy petition of a former Greenmoss employee to Greenmoss itself. Dun & Bradstreet's routine practice was first to check such a report's accuracy with the business itself prior to publication, but no one attempted prepublication verification in the Greenmoss episode. *Id.*

81. *Id.*

82. 418 U.S. 323 (1974).

83. 472 U.S. at 754. The trial court instructed the jury "that because the report was libelous *per se*, respondent was not required 'to prove actual damages . . . since damage and loss [are] conclusively presumed.'" *Id.* The trial court also instructed the jury to award punitive damages only if it found actual malice, but failed to define actual malice in the terms required by *New York Times* and its progeny. Instead, the court defined malice in common law terms that included such concepts as bad faith. *Id.* The trial court also stated that liability could not be established unless the plaintiff showed malice or lack of good faith on the part of the defendant. *Id.*

Until *Dun & Bradstreet*, *Gertz* was the primary governing case setting forth constitutional restraints on the law of defamation. Prior to *Gertz*, the Supreme Court had extended the actual malice standard beyond public officials, to include public figures as well. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 135-37, 146-55 (1967) (athletic director must prove actual malice regarding article accusing him of misconduct in office); Associated Press v. Walker, 388 U.S. 130, 140-43, 146-55 (1967) (leader of student protest must prove actual malice regarding story alleging he instigated violent riot). In a plurality opinion, the Court briefly flirted with extending the actual malice standard to any defamatory statement involving an issue of public interest, without regard to the public or private status of the plaintiff. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 42-45 (1971) (plurality opinion) (varying levels of constitutional protection depending on private or public status of plaintiff make no sense in context of first amendment, which protects debate on public issues).

actions."[84]

The United States Supreme Court affirmed in a five to four ruling, but on grounds other than the media/nonmedia distinction relied on by the Vermont Supreme Court. The Court's decision in *Dun & Bradstreet* is somewhat opaque, partly because the majority was formed by a plurality opinion written by Justice Powell, joined by Justices Rehnquist and O'Connor, and individual concurring opinions by Chief Justice Burger and Justice White. Furthermore, Justice Powell's opinion is relatively short, and in places seems almost purposefully ambiguous. Justice Powell framed the issue relatively narrowly:

> In *Gertz v. Robert Welch, Inc.*, . . . we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether the rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.[85]

After reviewing the history of constitutional developments from *New York Times* through *Gertz*, Justice Powell stated that the Court had "never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern."[86] In weighing the balance between the individual interest in reputation and free speech in the case before it, he emphasized the "enlightenment function" of the first amendment.[87] Writing

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84. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 75, 461 A.2d 414, 418 (1983), *aff'd on other grounds*, 472 U.S. 749 (1985).

85. 472 U.S. at 751.

86. *Id.* at 757.

87. *Id.* at 757-61. Discussion of the functions of the first amendment has often been divided into the purpose of vindicating the individual speaker's autonomy and dignity—the self-fulfillment function, and the purpose of societal advancement—the enlightenment function. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.6, at 835-37 (3d ed. 1986) (outlining justifications for self-fulfillment and enlightenment functions of first amendment); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (protection of free speech protects self-realization).

In his famous work, *Free Speech in the United States*, for example, Zechariah Chafee identified two distinct interests protected by the first amendment:

> There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.

Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1967). Chafee identified two quite different purposes for promoting freedom of speech, one concerned primarily with the speaker's own self-realization or self-fulfillment, the other concerned primarily with society's interest in enlightenment.

that "[w]e have long recognized that not all speech is of equal First Amendment importance,"[88] he stated "that speech 'on matters of public concern' . . . is at the heart of the First Amendment's protection."[89] However,

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The enlightenment function of free speech can in turn be subdivided into two different first amendment concepts: the first, and narrower, defining enlightenment in the limited sense of political self-governance; and the second, broader approach treating the enlightenment function as designed to explore truths across a much larger spectrum of ideas and topics, both political and nonpolitical. *Id.* at 33-35.

Both the enlightenment and the self-fulfillment functions have often been recognized by the Supreme Court. In a 1984 libel decision, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the Court stated that "the First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Id.* at 503-04. The Court has tended to emphasize the enlightenment function, however, such as in statements that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Citizen Publishing Co. v. United States, 394 U.S. 131, 139-40 (1969).

The self-fulfillment justification for the first amendment has been variously recognized. As the late Professor Melville Nimmer put it, "[t]he nature of man is such that he can realize the fulfillment of self only if he is able to speak without restraint." M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.03 (1984). In Justice Thurgood Marshall's words: "The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression." Procunier v. Martinez, 416 U.S. 393, 427 (1974) (concurring opinion).

This achievement of self-realization makes free expression valuable even when the speaker has no realistic hope that the audience will be persuaded to his or her viewpoint, for it nonetheless provides the speaker with an inner satisfaction and realization of self-identity essential to individual human autonomy and dignity. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) (freedom of expression affords the individual essential political dignity); T. EMERSON, THE SYSTEM OF SELF-EXPRESSION 6 (1970) (suppression of belief negates man's essential nature); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 578-79 (1978) (self-expression justification for freedom of speech warrants definition of speech).

In the context of the law of libel, as Professor Hill has noted, the value of the first amendment

> is not merely the cultivation of uninhibited expression with a view to the potential contribution of such expression to the common good, but more fundamentally the protection of the speaker from governmental restraint—a sense that the speaker has a right to be let alone in the absence of a compelling reason to the contrary.

Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1208 (1976); *see* Daniels, *Public Figures Revisited*, 25 WM. & MARY L. REV. 957, 965-67 (1984) (discussing self-fulfillment value of first amendment as justification for placing burden of proof of actual malice on plaintiff in public figure libel case).

88. 472 U.S. at 758.

89. *Id.* at 759 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978)). Justice Powell was correct in maintaining that certain types of speech, especially those types aimed at self-governance, have tended to be singled out for special first amendment protection.

The function of free speech as an aid to societal self-governance has been repeatedly emphasized by the Supreme Court and by first amendment theorists. Justice Brandeis stated that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion). Furthermore, the Court has stated, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978); *see* Brown v. Hartlage, 456 U.S. 45, 52 (1982) (political speech is

"speech on matters of purely private concern is of less First Amendment concern."[90] Justice Powell's opinion in *Dun & Bradstreet* thus rests squarely on a rather restricted interpretation of the purpose of the first amendment, a view dominated by the notion that the amendment protects the free expression of ideas to effect political change.[91]

Endorsing the common law rule of presumed damages,[92] Powell empha-

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"[a]t the core of the First Amendment"); In re Primus, 436 U.S. 412, 437-38 (1978) (state must regulate with "significantly greater precision" in the "context of political expression and association"); First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (where "the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling' ") (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)); Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs"); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

90. 472 U.S. at 759 (citing Connick v. Myers, 461 U.S. 138, 146-47 (1983)).

91. *Id.* at 758-59. Perhaps the most famous exponent of the view that the primary purpose of free speech is political self-governance was Dr. Alexander Meiklejohn. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). In Meiklejohn's words, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." *Id.* at 25. The essential purpose of freedom of speech "is to give every voting member of the body politic the fullest possible participation in the understanding of these problems with which the citizens of a self-governing society must deal." *Id.* at 88. For Meiklejohn, it is the "mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed; the principle of the freedom of speech springs from the necessities of the program of self-government." *Id.* at 26.

In later writings, Meiklejohn departed from his original emphasis on the political function of free speech, acknowledging that free expression serves social interests in enlightenment that go beyond the purely political. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57. Although still giving primacy to political speech, he recognized that "there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." *Id.* at 256. Meiklejohn then listed four such forms of speech: (1) education, in all its phases; (2) achievements of philosophy and the sciences; (3) literature and the arts; and (4) public discussions of public issues. *Id.* at 257.

Although political speech is unquestionably within the core of the first amendment's protection, it is equally clear that the Supreme Court prior to *Dun & Bradstreet* squarely rejected the suggestion that the first amendment's protection is limited to speech related to self-government; nonpolitical speech covering an almost infinite variety of issues and topics was held well within the ambit of first amendment protection. *See* M. NIMMER, *supra* note 87, § 3.01, at 3-3 (analysis of framers' intent and Court's decisions reveals nonpolitical *and* political speech protected by first amendment). In important invasion of privacy cases decided under the *New York Times* standard, the Court has stated variously that "guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). The first amendment confers a "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 390 (1969). The free speech and free press guarantees "are not confined to any field of human interest," United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 223 (1967), and it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." NAACP v. Alabama, 357 U.S. 449, 460 (1958).

92. *See generally* Rowe v. Metz, 195 Colo. 424, 425-26, 579 P.2d 83, 84-85 (1978) (*Gertz* does not

sized the "judgment of history that 'proof of actual damages will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of the publication, it is all but certain that serious harm has resulted in fact.' "[93] Powell continued that permitting presumed damages furthers state goals in providing remedies and ensures effective redress for defamation.[94] He then announced the central holding of the case: "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.' "[95]

1. The Meaning of the "Matters of Public Concern" Standard Used in *Dun & Bradstreet*

The plurality opinion in *Dun & Bradstreet* did little to define the phrase "matters of public concern." The Court stated that " 'whether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' "[96] This standard, which essentially requires the court to weigh everything, is not very revealing.

In deciding that the Dun & Bradstreet credit report was not speech about a matter of public concern, however, Justice Powell appeared to concentrate quite heavily on the fact that the speech was "solely in the individual interest of the speaker and its specific business audience," and further noted that the report "was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further."[97] Thus, Justice Powell reasoned, the report did not involve any " 'strong interest in the free flow of commercial information.' "[98] He concluded that "[t]here is simply no credible argument that this type of credit reporting requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' "[99]

It is extremely important to keep the "matters of public concern" standard articulated in *Dun & Bradstreet* separate from the term of art "public contro-

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preclude personal damages in suit between private plaintiff and nonmedia defendant). *But see* Anderson, *supra* note 8, at 747-55 (discussing evils of personal harm rule in defamation).

93. 472 U.S. at 760 (quoting W. PROSSER, LAW OF TORTS § 112, at 765 (4th ed. 1971)).

94. *Id.* at 761 (presumed damages further "the state interest in providing remedies for defamation by ensuring that those remedies are effective").

95. *Id.*

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

97. *Id.* at 762.

98. *Id.* (quoting Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748, 764 (1964)).

99. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

versy" that is part of the "vortex public figure" *Gertz* test.[100] By definition, any private figure plaintiff has already failed to thrust himself voluntarily into a public controversy—had he done so, he would be deemed a public figure.[101] If anyone who did not fall into the public figure classification could automatically claim that the speech involved did not implicate matters of public concern, then the negligence standard in *Gertz* would never apply as a constitutional minimum because *Gertz* as reinterpreted by *Dun & Bradstreet* imposes the negligence requirement only in private figure/public speech cases.

Dun & Bradstreet clearly held no such thing; it did not establish an all or nothing regime. Rather, it segregated from the universe of cases involving private figures those containing defamatory speech about matters of public concern. This means that the "public concern" standard may include speech that is "public" even when the plaintiff is "private." Whereas the public controversy formulation is linked to the plaintiff's voluntary participation in the public arena, the public concern test looks primarily to the speech itself.

Ironically, the most logical point of reference to define "matters of public concern" is *Rosenbloom v. Metromedia, Inc.*, which employed essentially identical terminology.[102] *Rosenbloom*, prior to being overruled by *Gertz*, briefly elevated all libel involving a "matter of public or general interest" to the actual malice standard.[103] Justice Powell's *Dun & Bradstreet* opinion refitted *Rosenbloom* for a different purpose: to contract first amendment protection rather than expand it. Whereas *Rosenbloom* used the "public interest" test to trigger the application of actual malice, *Dun & Bradstreet* used it to delineate between the restrictive *Gertz* presumed and punitive damages rule, and the generous pro-plaintiff damages rule of the common law—and quite possibly the strict liability standard.

More significantly, the tenor of the "matters of public concern" discussion in *Dun & Bradstreet* seemed narrower than the comparable "public or general interest" phraseology in *Rosenbloom*.[104] Just as the bulk of the task of

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100. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

101. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 (1979); *cf.* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (public figures have thrown themselves to forefront of public controversy); Time, Inc. v. Firestone, 424 U.S. 448, 453-44 (1976) (public controversy definition is narrower than all controversies of interest to public).

102. 403 U.S. 29, 43-44 (1971).

103. *Id.* The phrase public or general interest was taken from the groundbreaking article by Warren and Brandeis, which is credited with launching the development of the invasion of privacy torts. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

104. The cold language of *Dun & Bradstreet* seemed virtually indistinguishable from the language in *Rosenbloom*—certainly it would be kneading too much from the language to attempt to draw any inferences from the choice of the phrase "matters of public concern" rather than "public or general interest." The suggestion that the plurality in *Dun & Bradstreet* may have had a narrower formulation in mind comes rather from the philosophical underpinnings of Justice Powell's

defining "public figure" has devolved on lower courts, however, so will the fleshing out of *Dun & Bradstreet* come to rest primarily in those courts. How they choose to define "public concern" will have a substantial effect on the future direction of the American law of defamation.

2. Meshing the "Public Concern" Standard with the Public Figure/Private Figure Dichotomy

Dun & Bradstreet was a private figure plaintiff case and arguably has no impact on cases involving public officials[105] and public figures. What constitutional standard now applies when the plaintiff is a public official or public figure but the speech involves a private matter bearing no connection to the public official's performance or fitness for duty, or no connection to the

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Dun & Bradstreet opinion. His opinion emphasized the relatively cramped political self-governance aspects of the enlightenment function of the first amendment, at the expense of the more expansive affirmation of free speech values represented by *Rosenbloom*. 472 U.S. at 758-59. *See supra* notes 87, 89 (discussing enlightenment function).

105. Limited purpose public figures will always by definition be linked to speech on matters of public concern, because only defamatory speech relating to the public controversy of which the limited public figure is a part will qualify for the actual malice standard. Public officials and all-purpose public figures, however, automatically qualify for the actual malice standard by virtue of their status. Theoretically, not all speech about persons of such status deserves actual malice protection, but prior to *Dun & Bradstreet*, plaintiffs had little or no success in narrowing the scope of the standard. The issue is whether, after *Dun & Bradstreet*, the nature of the speech will take on new importance in such cases.

An analogous process may begin to influence public official cases. In Hutchinson v. Proxmire, 443 U.S. 111 (1979), then-Chief Justice Burger stated that "[t]he Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." *Id.* at 119 n.8. Despite the Chief Justice's cautionary note, relatively few government related defamation plaintiffs have been held not to be public officials subject to the *New York Times* standard. Those government related plaintiffs held not to be public officials usually have a peripheral or transient connection to governmental activity, or are extremely low in the organizational hierarchy. *See, e.g.*, Jenoff v. Hearst Corp., 644 F.2d 1004, 1005 (4th Cir. 1981) (undercover police informant not public official); Franklin v. Lodge 1108, Benevolent & Protective Order of Elks, 97 Cal. App. 3d 915, 921, 159 Cal. Rptr. 131, 135 (1979) (teacher who had not actively sought to influence policy issues not public official); Steere v. Cupp, 226 Kan. 566, 572, 602 P.2d 1267, 1272 (1979) (court- appointed criminal defense lawyer paid with state funds not a public official); Madison v. Yunker, 180 Mont. 54, 66, 589 P.2d 126, 132-33 (1978) (court skeptical that state university print shop director qualified as public official); DeLuca v. New York News, Inc., 109 Misc. 2d 341, 348, 438 N.Y.S.2d 199, 204 (Sup. Ct. 1981) (teacher not public official for purposes of article on misappropriated health benefits); Zeck v. Spiro, 52 Misc. 2d 629, 631, 276 N.Y.S.2d 395, 398 (Sup. Ct. 1966) (attorney representing municipal sewer district not public official); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 813 (Tex. 1976) (consulting civil engineer acting as county surveyor not public official), *cert. denied*, 429 U.S. 1123 (1977).

Although it is true that "precise boundaries" for determining public official status do not exist, courts have actually had very little difficulty applying the public official concept, and have remarked that it is substantially easier to apply than the elusive public figure/private figure dichotomy. The definition of public official is one of the few areas of modern defamation law marked by relative stability and certainty. *See generally* Elder, *Defamation, Public Officialdom and the* Rosenblatt v. Baer *Criteria—A Proposal for Revivification: Two Decades After* New York Times Co. v. Sullivan, 33 BUFFALO L. REV. 579, 661-72 (1984) (guidelines for who should be considered public official).

plaintiff's public figure status?[106] This is arguably not a very significant

106. The definition of public official is not limited to those in policymaking roles at the very top of the governmental structure. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). *Rosenblatt* arose from an appeal from a verdict in favor of a former public recreation area supervisor against a columnist for a local New Hampshire newspaper. The Court indicated that "public official" would be defined by consitutional rather than state standards. *Id.* at 84. For cases identifying public officials under the *New York Times* standard, see Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (state court judges); Arnheiter v. Random House, Inc., 578 F.2d 804, 805 (9th Cir. 1978) (commander of United States Navy vessel), *cert. denied*, 444 U.S. 931 (1979); Grzelak v. Calumet Publishing Co., 543 F.2d 579, 582 (7th Cir. 1975) (secretary of city public works director and public patronage employee); Bellamy v. Arno Press, 8 Media L. Rep. (BNA) 1420, 1421 (E.D.N.C. 1982) (court clerk); Fadell v. Minneapolis Star & Tribune Co., 425 F. Supp. 1075, 1082-88 (N.D. Ind. 1976) (tax assessor), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); Klahr v. Winterble, 4 Ariz. App. 158, 163-70, 418 P.2d 404, 409-16 (1966) (student member of university senate); Weingarten v. Block, 102 Cal. App. 3d 129, 133-43, 162 Cal. Rptr. 701, 705-16 (city attorney and counsel to city's redevelopment agency), *cert. denied*, 449 U.S. 899 (1980); Tague v. Citizens for Law & Order, Inc., 75 Cal. App. 3d Supp. 16, 21-23, 142 Cal. Rptr. 689, 691-93 (1977) (assistant public defender); Manuel v. Fort Collins Newspapers, Inc., 42 Colo. App. 324, 326-27, 599 P.2d 931, 933 (1979) (county computer services director), *rev'd on other grounds*, 631 P.2d 1114 (Colo. 1981); Gadd v. News-Press Publishing Co., 10 Media L. Rep. (BNA) 2362, 2363 (Fla. Cir. Ct. 1984) (administrator of large public hospital); Walker v. Southeastern Newspapers Corp., 9 Media L. Rep. (BNA) 1516, 1517 (Ga. 1982) (executive director of State Human Relations Commission); Tagawa v. Maui Publishing Co., 49 Haw. 675, 679-88, 427 P.2d 79, 82-86 (1967) (member of county board of supervisors), *subsequent appeal*, 50 Haw. 648, 448 P.2d 337 (1968), *cert. denied*, 396 U.S. 822 (1969); Cooper v. Rockford Newspapers, Inc., 50 Ill. App. 3d 247, 248, 365 N.E.2d 744, 745 (1977) (chief deputy clerk of circuit court's office); Doctor's Convalescent Center, Inc. v. East Shore Newspapers, Inc., 104 Ill. App. 2d 271, 275-76, 244 N.E.2d 373, 377 (1968) (nursing home licensed and regulated by state); Guzzardo v. Adams, 411 So. 2d 1148, 1149-50 (La. App.) (parish personnel coordinator), *cert. denied*, 415 So. 2d 942 (La. 1982); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 1305, 397 N.Y.S.2d 943, 949 (state supreme court justice), *cert. denied*, 434 U.S. 969 (1977); Sibowitz v. Lipper, 32 A.D.2d 520, 520, 299 N.Y.S.2d 564, 566 (1969) (post office supervisor); Hall v. Piedmont Publishing Co., 46 N.C. App. 760, 762-63, 266 S.E.2d 397, 399-400 (1980) (medical examiner in mental commitment proceeding); Hodges v. Oklahoma Journal Publishing Co., 617 P.2d 191, 193-94 (Okla. 1980) (tag agent in vehicle licensing bureau); Press, Inc. v. Verran, 569 S.W.2d 435, 437-41 (Tenn. 1978) (union social worker in county office); Van Dyke v. KUTV, 663 P.2d 52, 54-56 (Utah 1983) (director of financial aid at state college); Clawson v. Longview Publishing Co., 91 Wash. 2d 408, 412-19, 589 P.2d 1223, 1225-29 (1979) (administrator of county motor pool); Rye v. Seattle Times, 7 Media L. Rep. (BNA) 2267, 2269 (Wash. App. 1981) (executive director of anti-poverty agency), *rev'd on other grounds*, 37 Wash. App. 45, 678 P.2d 1282, *cert. denied*, 469 U.S. 1087 (1984); Martonik v. Durkan, 23 Wash. App. 47, 51-55, 596 P.2d 1054, 1057-59 (1979) (clerk of state senate).

Law enforcement personnel are virtually always classified as public officials. *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) (deputy chief of detectives); St. Amant v. Thompson, 390 U.S. 727, 730 (1968) (deputy sheriff); Henry v. Collins, 380 U.S. 356, 357 (1965) (per curiam) (city police chief and county attorney); Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981) (policeman); Meiners v. Moriarity, 563 F.2d 343, 352 (7th Cir. 1970) (federal Drug Enforcement Agency agent); Ethridge v. North Miss. Communications, 460 F. Supp. 347, 351 (N.D. Miss. 1978) (undercover narcotics agent for city police department); Thuma v. Hearst Corp., 340 F. Supp. 867, 869 (D. Md. 1972) (police captain); Rosales v. City of Eloy, 122 Ariz. 134, 135, 593 P.2d 688, 689 (1979) (police sergeant); Willis v. Perry, 677 P.2d 961, 963 (Colo. App. 1983) (police officers); Moriarity v. Lippe, 162 Conn. 371, 377, 294 A.2d 326, 330 (1972) (patrolman); Bishop v. Wometco Enters., Inc., 235 So. 2d 759, 761 (Fla. Ct. App.) (city investigator), *cert. denied*, 240 So. 2d 813 (Fla. 1970); Hines v. Florida Publishing Co., 7 Media L. Rep. (BNA) 2605, 2605 (Fla. Cir. Ct. 1982) ("moonlighting"

problem, since defamatory speech about public officials or all-purpose public figures will almost always qualify as a matter of public concern. If, however, some topics remain private matters for public officials and all-purpose public figures and are therefore outside the ambit of the actual malice test, does *Dun & Bradstreet* authorize skipping over the negligence standard and imposing strict liability?[107] The answer could be yes. If the speech is outside the scope of comment on public officials or public figures for which the actual malice test applies, and the speech is not about a matter of public concern, the private figure standard—strict liability—might apply.[108]

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policeman); Whitfield v. Southeastern Newspapers Corp., 10 Media L. Rep. (BNA) 1771, 1772 (Ga. Super. 1984) (county sheriff); Coursey v. Greater Niles Township Publishing Corp., 40 Ill. 2d 257, 264-65, 239 N.E.2d 837, 841 (1968) (patrolman); McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 152, 155 (Iowa 1976) (police captain); Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 298-99, 543 P.2d 988, 992 (1975) (patrolman); Kidder v. Anderson, 354 So. 2d 1306, 1308 (La. 1978) (police chief); Roche v. Egan, 433 A.2d 757, 762 (Me. 1981) (all law enforcement personnel); La Rocca v. New York News, Inc., 156 N.J. Super. 59, 62, 383 A.2d 451, 453 (1978) (policeman); Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 253, 572 P.2d 1258, 1260 (Ct. App. 1977) (deputy sheriff), *cert. denied*, 436 U.S. 906 (1978); Orr v. Lynch, 60 A.D.2d 949, 950, 401 N.Y.S.2d 897, 899 (patrolman), *aff'd*, 45 N.Y.2d 903, 383 N.E.2d 562, 411 N.Y.S.2d 10 (1978); Graham v. New York News, Inc., 2 Media L. Rep. (BNA) 2356, 2358 (N.Y. Sup. Ct. 1977) (police lieutenant); Frankhouser v. Findlay Publishing Co., 4 Media L. Rep. (BNA) 2437, 2438 (Ohio Ct. C.P. 1979) (chief of police and police lieutenant); McNabb v. Oregonian Publishing Co., 69 Or. App. 136, 139, 685 P.2d 458, 460 (1984) (police officer); Colombo v. Times-Argus Ass'n, 135 Vt. 454, 455, 380 A.2d 80, 82 (1977) (police officer and detective).

107. For examples of the scope of the actual malice standard for all-purpose public figures, see Carson v. Allied News Co., 529 F.2d 206, 208-10 (7th Cir. 1976) (prominent entertainer and wife must prove statement regarding their relationship made with actual malice); Goldwater v. Ginzburg, 414 F.2d 324, 335 (2d Cir. 1969) (senator seeking presidency can only recover on proof that statement regarding his mental and physical health was made with actual malice), *cert. denied*, 396 U.S. 1049 (1970); Williams v. Pasma, 202 Mont. 66, 72-73, 656 P.2d 212, 213-14 (1982) (unsuccessful senatorial candidate must prove statement made with actual malice), *cert. denied*, 461 U.S. 945 (1983).

108. No Supreme Court decision has ever indicated that the scope of the actual malice standard for the purposes of public officials is unlimited. Nonetheless, just as the Court has been expansive in defining who is a public official, it has been expansive in defining the scope of comment to which the *New York Times* standard for public officials applies. In Garrison v. Louisiana, 379 U.S. 64 (1964), a case decided in the same year as *New York Times*, the Court held that statements about the racketeer influence on local judges and allegations of other abuses by local judges did not involve purely private defamation, but rather also concerned the judges' official conduct and thus their public reputation. Therefore, the statements were well within the *New York Times* actual malice protection. *Id.* at 76. The Court stated:

> The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Id. at 77 (footnote omitted). Similarly, it is well established that allegations concerning criminal misconduct on the part of an official in office or on the part of a candidate for office fall within the

A counterargument can be made, however, that *Dun & Bradstreet* should be limited to private figure cases on the theory that the Court's analysis of the case was never meant to, and simply does not fit into the public official/public figure framework. Remembering that *Gertz* described all-purpose public figures as plaintiffs who "occupy positions of such persuasive power and influence that they are deemed public figures *for all purposes*,"[109] there does not seem to be any room for carving out exceptions to the actual malice standard for such plaintiffs. And if the all-purpose public figure is always subject to the actual malice test, it does not seem logical that public officials would be subject to any less expansive coverage.

Nevertheless, the implications of *Dun & Bradstreet* have yet to be worked out; it seems at least possible that for certain purely private matters, defamatory speech involving public officials and all-purpose public figures could revert below the *Gertz* negligence standard all the way to strict liability. For the reasons discussed below, however, any move to strict liability should be rejected, whatever the configuration of speech and plaintiff.

III. FAULT STANDARDS

A. A NEUTRAL READING OF *DUN & BRADSTREET*, AND THE STRICT LIABILITY QUESTION

As Justice Powell was careful to emphasize in the opening paragraph of *Dun & Bradstreet*, only the *Gertz* presumed and punitive damages rules were technically before the Supreme Court. Thus, the question whether the *Gertz* fault rules are also swept away in cases not involving matters of public importance remains open. More specifically, *Dun & Bradstreet* fails to answer conclusively this question: May a state impose common law strict liability standards in cases involving private figure plaintiffs and defamatory speech not involving matters of public concern, or does the *Gertz* prohibition on liability without fault continue to apply to all private figure cases?[110]

Justice Brennan did point out in his *Dun & Bradstreet* dissent that the parties did not "question the requirement of *Gertz* that respondent [plaintiff]

New York Times actual malice standard. Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971). The question posed by *Dun & Bradstreet* is what standard will apply when the speech cannot be comfortably fit into those categories.

109. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (emphasis added). *See generally* Note, *General Public Figures Since* Gertz v. Robert Welch, Inc., 58 ST. JOHN'S L. REV. 355, 375-82 (1984) (critical analysis of *Gertz*'s all-purpose public figure designation).

110. As subsequently discussed, this question is not the only door to strict liability that *Dun & Bradstreet* leaves open—merely the door that is most likely to be walked through by at least some jurisdictions. *Dun & Bradstreet* conceivably raises an even more profound question on fault rules: Does the first amendment fault standard apply to any case not involving matters of public concern, without regard to the status of the plaintiff?

must show fault to obtain a judgment and actual damages."[111] It is equally clear that Justice White and former Chief Justice Burger would return to common law strict liability in such cases, and Justice White interpreted the plurality opinion as necessarily carrying that same implication, stating that "[a]lthough Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this."[112]

The plurality opinion contained a number of clues indicating that the Justices joining the opinion would probably not overturn a decision by a state to return to strict liability in private figure cases not involving speech of public concern. First, throughout the opinion, Justice Powell's language slipped from the narrow formulation of the issue before the Court to a broader phrasing of the question in terms of whether the *Gertz* rule was controlling.[113] This phraseology suggested that Powell would abandon all of *Gertz*, not just its damage rules, in such cases. Second, Justice Powell's opinion was an important signal because it quoted with approval language from the Oregon Supreme Court's decision in *Harley-Davidson Motorsports, Inc. v. Markley*,[114] the leading state court decision applying strict liability in a private figure nonmedia situation. The Court also cited with approval *Denny v. Mertz*,[115] a Wisconsin Supreme Court decision that held that all the *Gertz* protections were inapplicable when a private figure sued a nonmedia defendant.[116]

Finally, applying Justice Powell's analytic structure on the damages issues to the strict liability question, it is evident that he would permit strict liability in such cases. His methodology was simply to balance the importance of the type of speech involved against the state's interest in applying the common law rule. He strongly downgraded the constitutional significance of speech not involving matters of public concern. The only significant question was whether the state's interest in applying its common law strict liability rule

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111. 472 U.S. at 781 (Brennan, J., dissenting).

112. *Id.* at 773-74 (White, J., concurring).

113. *Id.* at 757 ("We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern.").

114. 279 Or. 361, 568 P.2d 1359 (1977). The *Markley* court wrote:

> There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling.

Id. at 366, 568 P.2d at 1363, *quoted in Dun & Bradstreet*, 472 U.S. at 760.

115. 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982).

116. The Court also cited with approval Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978), which held that *Gertz* did not bar presumed damages in a private figure nonmedia case.

was as strong as its interest in applying its common law presumed and punitive damages rules.[117]

Justice Powell did not discuss the state's interest in awarding punitive damages on a showing of something less than actual malice. He did, however, list two rationales for the common law presumed damages rule. First, the rule captured the "experience and judgment of history" that actual damage is often impossible to prove even though it is all but certain to exist.[118] Second, the rule "furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective."[119]

How does the state's interest in applying strict liability stack up to this analysis by comparison? The state's interest in the strict liability rule appears much stronger than the state's interest in awarding punitive damages on something less than actual malice. The strict liability principle goes to the essence of the tort at common law, representing the state's interest in protecting the defamed individual's dignity and easing the path to compensation. The punitive damages rule has only the purposes of punishment and deterrence to support it. From a plaintiff's perspective the strict liability standard is probably of greater aid in vindicating reputation than the common law punitive damages rule, which still requires proof of common law malice.

When comparing the state's interest in permitting presumed damages to its interest in applying strict liability, the analysis is somewhat more complex. Both rules clearly further the state's general interest in providing effective remedies for defamation.[120] The two rules complement each other at common law and work to facilitate a plaintiff's recovery.

The presumed damages rule, however, has an additional ground to support it that the strict liability rule does not: the difficulty of proof. Whereas there is some common sense to the notion that harm to reputation is often present but cannot be seen or proven, there is no comparable difficulty with proving the existence or nonexistence of negligence, a routine issue in tort cases.

This potential distinction may be regarded by many courts as too thin to justify any difference in the constitutional treatment of the two rules. On the one hand, given the already broad constitutional definition of "actual harm,"[121] the additional bonus given a plaintiff through the presumed harm rules may be overrated, since few plaintiffs have found the actual harm requirement a complete barrier to recovery, if it is a barrier at all.[122]

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117. *See* R. SMOLLA, *supra* note 76, § 3.02[3] (arguing that *Dun & Bradstreet* allows states to apply strict liability in private figure cases not involving public matters).

118. 472 U.S. at 760.

119. *Id.* at 761.

120. *Id.*

121. *See* Time, Inc. v. Firestone, 424 U.S. 448, 459-61 (1976) (permitting emotional harm standing alone, without proof of reputational injury, to suffice as actual harm).

122. *See* Anderson, *supra* note 8, at 763 (proposing requirement of proof of harm to recover

The requirement of proving negligence, however, may at times be a substantial impediment.[123] Defendants may often have a monopoly on the information necessary to establish fault, and a plaintiff's efforts to prove negligence may often be frustrating and costly. If one views *Dun & Bradstreet* as something of an exercise in federalism, returning to the states greater power to superintend state defamation law, then strict liability may well be seen as a powerful plaintiff's weapon that in many cases serves the state's interests as much or more than presumed harm rules. Viewed in these terms, a neutral reading of *Dun & Bradstreet* could legitimately treat the case as opening the door to a return by states, if they wish, to strict liability standards, at least in private figure cases not involving defamatory speech related to matters of public concern.

B. THE CASE AGAINST THE RETURN TO STRICT LIABILITY IN ANY AREA OF DEFAMATION

To concede that *Dun & Bradstreet* may permit states the freedom to return to strict liability in certain cases is not to concede that such a doctrinal regression is desirable. A return to strict liability in any aspect of the law of defamation would be a regrettable mistake; a number of powerful arguments counsel against such a move. The arguments against adoption of strict liability may be put to dual service. First, they provide rationales both for not interpreting *Dun & Bradstreet* as authorizing strict liability and for adopting one uniform national federal "floor" negligence rule in all defamation cases not subject to actual malice principles. Second, if one assumes the worst (from the media's perspective)—that *Dun & Bradstreet* frees states from federal constitutional compulsion with regard to liability rules in some circumstances, such as private figure/private speech cases—then the arguments discussed below may be marshaled to argue against a move to strict liability as a matter of state law.

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damages); Lewis, *supra* note 8, at 615 (proposing limiting recovery to compensation for proven injury).

123. Statistical data indicates that plaintiffs' success rate in cases tried under the negligence standard is considerably better than in cases tried under the actual malice standard. *See, e.g.*, Goodale, *Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs*, in MEDIA INSURANCE AND RISK MANAGEMENT, *supra* note 11, at 69, 73-74 (statistical analysis of litigation under actual malice standard). Jaded defense lawyers may at times feel that the negligence standard offers their clients virtually no protection. This perception, however, is colored by the relative disadvantages of trying a case under the negligence standard, and should not be confused with the comparison to a return to strict liability rules, which would certainly be dramatically worse from the defense perspective.

1. The Common Law Strict Liability Standard Was an Anomaly Even Prior to *New York Times*

The common law rule of strict liability for defamation was an anomaly within the overall structure of tort law even before *New York Times* began to constitutionalize defamation. Scholars disagree as to whether the primary liability rule prior to the coherent emergence of the body of law we now call "torts" was strict liability or negligence.[124] With the industrial revolution and the birth of the law of torts as an independent doctrinal system, the lines of demarcation became quite clear. The dominant liability rule in America was negligence.[125] The full intellectual weight of common law theorists from Holmes to Cardozo to Hand stood behind the proposition that the cumbersome machinery of the state should not transfer injury losses from the victim to the tortfeasor unless the victim could bear the burden of proof that the tortfeasor was at fault.[126]

The tort system did have limited areas in which strict liability displaced the negligence principle. Strict liability was principally reserved for activity that could be classified as ultrahazardous or abnormally dangerous.[127] Tests

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124. *See* M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES 23 (1983) (discussing historical debate whether strict liability or negligence was preindustrial standard); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 299-302 (1985) (discussing evolution of tort law in context of industrial revolution); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 67-108 (1977) (arguing that negligence doctrine became dominant only in nineteenth century); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 363-97 (1951) (discussing evolution of fault standard in cases involving unintended harm); Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) (challenging belief that strict liability was preindustrial standard). *Compare* Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850) (negligence standard) *with* The Case of the Thorns, Y.B. Mich. 6 Edw. 4, fol. 7, pl. 18 (1466) (strict liability).

125. *See* Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1720-27 (1981) (analyzing evolution of negligence standard). Prior to the industrial revolution, there was little systematic treatment of injury cases—the body of law we now call torts had only dimly begun to take shape. Lawrence Friedman observes that "the explosion of tort law, and negligence in particular, has to be attributed to the industrial revolution. . . . [M]odern tools and machines . . . have a marvelous capacity to cripple and maim their servants." L. FRIEDMAN, *supra* note 124, at 300.

126. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173-74 (2d Cir. 1947) (Hand, J.) (economic theory of negligence); Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 340, 162 N.E. 99, 100 (1928) (Cardozo, J.) (negligence standard in train platform accident); Adams v. Bullock, 227 N.Y. 208, 209-10, 125 N.E. 93, 93-94 (1919) (Cardozo, J.) (negligence standard in trolley wire mishap); O. W. HOLMES, THE COMMON LAW 94 (1881) ("The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune.").

127. Even the notion of strict liability for ultrahazardous activity had a haphazard start. It was applied with inconsistency because the strength of the fault principle had taken an enormously strong hold on late nineteenth century judicial consciousness. *Compare* Sullivan v. Dunham, 161 N.Y. 290, 300, 555 N.E. 923, 926 (1900) (persons injured by blasting near highway recover in trespass) *and* Hay v. Cohoes, 2 N.Y. 159, 163 (1849) (defendant strictly liable for blasting damage on adjoining property) *with* Booth v. Rome, W. & O.T.R.R., 140 N.Y. 267, 273-74, 35 N.E. 592,

for strict liability may have varied slightly in verbal formulation from state to state, but the essential requirements remained the same. The activity had to be uncommon, and it had to be an activity in which a high risk of harm could not be eliminated even through the observance of extraordinary care.[128]

In an analytic structure dominated by negligence, the strict liability standard for defamation stuck out like a sore thumb, existing purely because of the inertia of history. It was an island of strict liability in a sea of negligence, out of harmony with the rest of the landscape. None of the traditional justifications for strict liability applied to defamation law. Speech was not uncommon; quite to the contrary, it was as common as breathing, indistinguishable from the thousands of routine activities of social life to which the negligence rule applied. Nor was speech by any measure abnormally dangerous or ultrahazardous in the graphic and physical sense of other strict liability applications. There was no plausible analogy to dynamite blasting, keeping ferocious animals, or building reservoirs. Strict liability for defamation was never defended by anyone on these grounds since such an attempt would have been ridiculous.

For the most part, no genuine analytic defense of strict liability for defamation was made;[129] the practice among scholars and courts was to follow

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593 (1893) (defendant held to negligence standard in blasting accident) *and* Losee v. Buchanan, 51 N.Y. 476, 584-85 (1873) (negligence standard used in exploding steam boiler injury case).

For a wonderfully graceful essay reviewing this early doctrinal confusion, see Gregory, *supra* note 124, at 370-82 (tracing early origin of strict liability and noting doctrinal confusion of origins).

128. The first *Restatement of Torts* defined an activity as ultrahazardous if it:

> (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and
> (b) is not a matter of common usage.

RESTATEMENT OF TORTS § 520 (1939). *See* Luthringer v. Moore, 31 Cal. 2d 489, 496-500, 190 P.2d 1, 5-8 (1948) (strict liability is standard where activity is ultrahazardous). The second *Restatement* changed the name of the principle to "abnormally dangerous" and increased the number of factors to consider to six. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

Both changes have been for the worse. Ultrahazardous sounds so much more dangerous—perhaps the "ultra" and the "z" in hazardous do it—but it seems a more vivid term. Increasing the number of factors to six violates the maxim of sound common law interpretation that no legal test should have more than three factors (some say two) if it is to be intelligible and useful. As one court has observed, the *Restatement (Second)* has so many factors that it begins to resemble a negligence standard. *See* Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206, 1209-11 (Alaska 1978) (rejecting *Restatement's* approach as too close to negligence).

As a practical matter, the relative uncommonness of the activity and its intrinsic danger continue to dominate the analysis, whatever the technical niceties of the verbal test. *See, e.g.*, Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 795, 56 Cal. Rptr. 128, 137 (1967) (activity is ultrahazardous when it involves serious risk that cannot be eliminated by utmost care and is not a matter of common usage); Whitman Hotel Corp. v. Elliot & Watrous Eng'g Co., 137 Conn. 562, 567-70, 79 A.2d 591, 593-95 (1951) (exploding dynamite is subject to strict liability); Spano v. Perini Corp., 25 N.Y.2d 11, 15, 250 N.E.2d 31, 33-34, 302 N.Y.S.2d 527, 529-31 (1969) (injury from blasting covered by strict liability standard).

129. The classic example of this reflexive invocation of strict liability is Corrigan v. Bobbs-Merill

history, at times noting that history largely made no sense.[130] To the extent any effort was made, it was along predictable grounds—assertions of the strong state interest in protecting one's good name. That justification could not be made to fit within the liability rules for the rest of the tort law.

In determining the proper liability rule elsewhere, the law of torts did not look at how badly the victim was hurt, but rather at the nature of the risks surrounding the tortfeasor's activity. People could be killed, maimed, or ruined for life, yet unless the activity was ultrahazardous, the liability rule was still at least negligence. Singling out reputational injury for a special liability rule thus was illogical, for strict liability was not the dominant rule for most of the injuries compensable through the tort system, no matter how catastrophic.

2. The Analogy to Modern Products Liability Standards is Inappropriate

If strict liability for defamation cannot fit comfortably into the tort system's traditional classification of an ultrahazardous activity, it may nonetheless be compatible with a more modern manifestation of strict liability—products liability law. Perhaps the irony of defamation's peculiar place in the system has come full circle, so that a return to the past becomes a move back to the future, not anachronistic but avant-garde. Indeed, there are superficial similarities between defamatory falsehoods disseminated by media outlets and defective products produced by manufacturers.

Major media outlets are increasingly perceived by Americans as profit-conscious corporate empires operated by conglomerates more interested in the performance of the outlet reflected in Wall Street prices than in the annual contest for Pulitzer Prizes.[131] Many preeminent news outlets are undergoing internal identity crises as their entertaining and informing functions become increasingly blurred, and as the business of showing a profit appears

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Co., 228 N.Y. 58, 126 N.E. 260 (1920), in which a plaintiff named Corrigan successfully sued the publisher for libelous statements concerning a fictitional character in a novel named *Cornigan*. The names were spelled differently and the author had no idea that the real Corrigan existed. The only link between the plaintiff and the fictional character is that both were city magistrates. Invoking the rule of strict liability, the court upheld the claim, with the cavalier "analysis" that the question was "not so much who was aimed at as who was hit." 22 N.Y. at 64, 126 N.E. at 262. Note that this holding for defamation came at precisely the same historical period in which the law of torts outside of defamation was moving in exactly the opposite direction. The New York court in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), was employing essentially the reverse of the *Corrigan* statement—what mattered in *Palsgraf* was not "who was hit" but "who was aimed at." Nothing in *Corrigan*, in short, explained *why* strict liability rather than negligence should govern an injury to reputation.

130. For examples of early statements decrying the nonsensical nature of defamation law, see *supra* note 3.

131. *See* Smolla, *Why Has the Media Become a Litigation Target and What's to Be Done?*, in MEDIA INSURANCE AND RISK MANAGEMENT, *supra* note 11, at 20-22 (discussing changes in corporate media structure and effects on litigation).

to dominate the profession of reporting the news.[132] Internecine corporate battles within CBS recently became a struggle for the "soul of the network," with the journalistic independence of CBS News symbolically on the line.[133] Recent years have witnessed the purchase or change of financial control of the three major networks, ABC, CBS, and NBC, and traditionally independent newspapers such as the *Des Moines Register*.[134] To the extent that the news business appears indistinguishable from any other business, and to the extent that "news" looks like any other "product" which, when defective, causes injury, there is pressure on the tort system to establish an equivalency in liability standards.[135]

The analogy may be extended beyond physical imagery. One of the conventional rationales for modern strict products liability is that manufacturers impose upon consumers intermittent risks that haphazardly cause catastrophic injuries to individuals.[136] The risk level for the entire consumer population remains generally constant and for most manufacturers is acceptable in the narrow economic sense that technologic cost barriers make further reduction of the aggregate risk more costly than the sum of the injuries themselves. Since some defective products will inevitably reach the market despite the observance of reasonable care by manufacturers, and since the incidence of injury from such inevitable failures is to some degree statistically predictable, there is a powerful social interest in shifting the occasional disastrous losses that are randomly visited upon individual consumers to the consumer population as a whole.[137] The manufacturer is best suited to spread these risks by incrementally increasing the cost of each product and bearing sole responsibility for the injuries caused. Assignment of responsibility to the manufacturer serves the additional goal of placing liability on the most knowledgeable and cheapest cost avoider. Manufacturers are better able than consumers to calculate efficient ways of reducing accident costs by improving their products, and the assignment of strict liability to manufacturers

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132. R. SMOLLA, *supra* note 4, at 14 (discussing corporate takeovers of media outlets).

133. *See Civil War at CBS*, NEWSWEEK, Sept. 15, 1986, at 46 (discussing battle for control of CBS).

134. *See* Jones, *Newspaper Editors on Business Role*, N.Y. Times, Apr. 14, 1985, at A11, col. 1; Jones, *And Now, The Media Mega-Merger*, N.Y. Times, Mar. 24, 1985, § 3, at 1, col. 2.

135. R. SMOLLA, *supra* note 4, at 13-14 (noting popular perception of media outlets and juries' willingness to vindicate plaintiffs).

136. Perhaps the earliest judicial recognition of this rationale came in 1944 from California Supreme Court Justice Roger Traynor. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring) (arguing for strict liability in exploding bottle cap case); *see* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (Traynor, J.) (manufacturer of power tool held to strict liability standard); Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) (detailing history of strict liability).

137. Professor George Priest recently authored a provocative and lucid intellectual history of this movement. *See* Priest, *supra* note 21, at 496-521 (discussing evolution of tort law as deterrent to products liability injuries).

creates an ever pressing incentive for them to improve.[138]

Since this theoretical structure works for Ford, DuPont, and Johns-Manville, the argument goes, why shouldn't it work equally well for NBC, owned by General Electric, or the *Washington Post*, or the *National Enquirer*, or *Penthouse?*[139] Certainly to the victims of defective journalism the injury is every bit as profound as many of the other injuries protected under modern products liability rules. These injuries go, in Justice Stewart's increasingly quoted words, to the essence of the individual:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of a human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.[140]

However, the superficial attractiveness of drawing a parallel between defamation and products liability dissolves on closer analysis.

Distinguishing Tangible from Intangible Injury. The most obvious distinction between products liability and defamation is that products cases produce realistically measurable tangible injury.[141] The bulk of injury to reputation is utterly nonquantifiable; the jury turns it into dollars and cents through its own mystical alchemy. As Henry Kaufman, director of the New York based Libel Defense Resource Center puts it:

> In a products liability case a manufacturer may be upset as all dickens that a plaintiff who might have been clumsy or careless with his product had injured himself. But there is real injury; it can be assessed and a dollar value placed on that injury. In the area of libel almost every case threatens a million-dollar verdict.[142]

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138. *See* Calabresi & Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 614-21 (1985) (discussing theoretically possible no-fault liability rules along with traditional fault liability); Calabresi & Hirschoff, *supra* note 21, at 1056-69 (arguing for strict liability standard when manufacturers are better risk assessors and harm preventers).

139. *See* Buckley v. New York Post Corp., 373 F.2d 175, 179-80 (2d Cir. 1967) (holding publisher liable when single issue resulted in out-of-state libel); Weiler, *Defamation, Enterprise Liability, and Freedom of Speech*, 17 U. TORONTO L.J. 278, 293-310 (1967) (enterprise liability model for defamation exacts cost on freedom of speech).

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

141. There is no inconsistency between the observation that in earlier divisions between negligence and strict liability the nature of the injury was not the controlling factor, and the observation that to the extent that modern tort rules have expanded strict liability into new reaches through products liability theory, the expansion has been aimed at compensation for serious physical injury.

142. CONFERENCE REPORT, *supra* note 8, at 2.

A look at the broad expanse of tort rules in areas other than defamation indicates that the use of strict liability for defamation would run directly contrary to the following rough and ready theorem for all tort law: the less tangible the injury, the higher the level of fault required to state a prima facie case. The rules for cases involving injuries other than physical harm to persons and property, such as emotional and economic harm, almost invariably require conduct more egregious than mere negligence.

For economic torts involving fraud, deceit, and misrepresentation, scienter is traditionally required.[143] Tortious interference with a contract traditionally requires some form of intentional wrongful intervention, though the precise standard for this tort has been confusingly defined.[144] Tortious interference with prospective economic advantage is usually stated as requiring a deliberate intent to injure, without any business motive of one's own.[145] Malice is an element in trade libel and product disparagement cases.[146] The emerging new tort of "bad faith," an action for improper refusal of an insurance company to pay a claim, requires some affirmative act of bad faith, fraud, or oppression to support it.[147] Even when purely economic injuries

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143. Though often controversial, the scienter requirement has long been the touchstone of the American action for misrepresentation. *See, e.g.,* Sovereign Pocohantas Co. v. Bond, 120 F.2d 39, 40 (D.C. Cir. 1941) (fraud actionable where scienter present); Wishnick v. Frye, 111 Cal. App. 2d 926, 930-31, 245 P.2d 532, 535 (1952) (scienter required to prove fraud); Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 405-06, 18 N.E. 168, 169-70 (1888) (fraudulent misrepresentation found by lessee of mine even though he felt fraudulent statement to be true); W. PROSSER & W. KEETON, *supra* note 3, § 107, at 740-44 (advocating scienter as basis of responsibility); RESTATEMENT (SECOND) OF TORTS § 526 (1976) (scienter required as condition to misrepresentation).

144. *See, e.g.,* Alyeska Pipeline Servs. Co. v. Aurora Air Servs., Inc., 604 P.2d 1090, 1093 (Alaska 1979) (requires malicious motive; however, proper purpose with ill will may excuse liability); Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 35, 112 P.2d 631, 632 (1941) (requires unlawful means of breach); Top Servs. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 209-10, 582 P.2d 1365, 1371 (1978) (requires interference which is "wrongful by some measure beyond the fact of the interference"); Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 64-69, 97-128 (1982) (discusses absence of coherent doctrine and proposes unlawful means test); *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 960 (1964) (requires unprivileged affirmative intentional act that causes contract's breach or renders it more difficult to perform).

145. *See, e.g.,* Katz v. Kapper, 7 Cal. App. 2d 1, 6, 44 P.2d 1060, 1062 (1935) (threats to undersell plaintiff not unlawful and do not trigger liability); Tutile v. Buck, 107 Minn. 145, 151, 119 N.W. 946, 948 (1909) (diverting rival's customers to ruin rival's business without regard to personal loss is actionable); Beardsley v. Kilmer, 236 N.Y. 80, 83, 140 N.E. 203, 204-05 (1923) (no liability where defendant's acts lawful and motivated by self-preservation).

146. *See, e.g.,* System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140-41 (3d Cir. 1977) (action for slander of title or product disparagement requires proof of malice); R. SACK, *supra* note 30, § IX.8.6.2, at 456-58 (various definitions of malice); Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425, 428 (1959) (action for slander of title or product disparagement requires proof of malice).

147. *See, e.g.,* Morgan v. American Family Life Assurance Co., 559 F. Supp. 474, 481 (W.D. Va. 1983) (liability requires intentional or reckless and "outrageous and intolerable" conduct); Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1, 5 (Ala. 1981) (liability exists when insurer

are recoverable under straightforward negligence theories, courts tend to circumscribe recovery by carefully adhering to relatively narrow formulations of foreseeability and proximate cause.[148] Some purely economic loss *is* recoverable in strict liability situations, such as in a products liability case, but when permitted it is almost invariably an adjunct to recovery for traumatic physical injury to persons and property.[149]

When noneconomic intangible losses are at stake, a very similar pattern emerges. Recovery for false imprisonment and assault requires intent.[150] The newer tort of intentional infliction of emotional distress requires "ex-

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intentionally or wrongfully refuses to settle claim); Noble v. National Am. Ins. Co., 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981) (liability requires intentional refusal, without reasonable basis, to pay claim); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 460-61, 521 P.2d 1103, 1108-09, 113 Cal. Rptr. 711, 716-17 (1974) (liability requires violation of insurers' duty of good faith and fair dealing); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 573-75, 510 P.2d 1032, 1037-38, 108 Cal. Rptr. 480, 485-86 (1973) (same); Bender v. Time Ins. Co., 286 N.W.2d 489, 492-93 (N.D. 1980) (same); Hoskins v. Aetna Ins. Co., 6 Ohio St. 3d 270, 275, 452 N.E.2d 1315, 1319 (1983) (same). *See generally* Bess & Doherty, *Survey of Bad Faith Claims in First Party and Industrial Proceedings*, 49 INS. COUNS. J. 368 (1982) (outlining requirements of tort and surveying jurisdictions recognizing tort).

148. *See* Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 248-50 (1969) (much narrower limitation of liability in pecuniary loss cases than in cases of intentional deceit or physical harm). Professor Perlman has observed:

> In cases of physical injury to persons or property, the task of defining liability limits is eased, but not eliminated, by the operation of the laws of physics. Friction and gravity dictate that physical objects eventually come to rest. The amount of physical damage that can be inflicted by a speeding automobile or a thrown fist has a self-defining limit. Even in chain reaction cases, intervening forces generally are necessary to restore the velocity of the harm-creating object. These intervening forces offer a natural limit to liability.
>
> The laws of physics do not provide the same restraints for economic loss. Economic relationships are intertwined so intimately that disruption of one may have far-reaching consequences. Furthermore, the chain reaction of economic harm flows from one person to another without the intervention of other forces. Courts facing a case of pure economic loss thus confront the potential for liability of enormous scope, with no easily marked intermediate points and no ready recourse to traditional liability-limiting devices such as intervening cause.

Perlman, *supra* note 144, at 71-72 (footnotes omitted).

149. The majority view is that economic loss standing alone is not recoverable in a strict products liability situation. The leading case is Justice Traynor's opinion in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). A small number of states have followed the New Jersey approach and permitted recovery for pure economic loss in strict products liability situations. *See* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64-66, 207 A.2d 305, 311-12 (1965) (product manufacturer is strictly liable to consumer for defects). However, the position rejecting pure economic loss recovery is far and away the majority. *See, e.g.*, Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1246 (5th Cir. 1980) (strict liability not applicable to loss resulting from damage to product's reputation, reducing its salability), *cert. denied*, 450 U.S. 920 (1981); Northern Power & Eng'g. Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329-30 (Alaska 1981) (solely economic loss is not recoverable under strict products liability); Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 81, 435 N.E.2d 443, 448 (1982) (same).

150. *See generally* W. PROSSER & W. KEETON, *supra* note 3, § 8, at 33-39 (defining "intent" for intentional torts).

treme and outrageous conduct."[151] Although courts do permit recovery for the negligent infliction of emotional distress—such as when a mother witnesses the accidental death of her child—they impose extremely severe proximate cause limitations on recovery, limiting it to those in the physical zone of danger or to family members who witness the accident through contemporaneous sensory observation.[152]

The privacy torts of intrusion,[153] appropriation of one's name or likeness, right of publicity,[154] and publication of embarrassing private facts,[155] which generally involve emotional damage at least as palpable as reputational harm, are not strict liability actions.[156] Defamation's closest cousin, false light in-

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151. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965) ("one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress"); *see also* Boyle v. Wenk, 378 Mass. 592, 594-95, 392 N.E.2d 1053, 1055 (1979) (liability requires "extreme and outrageous conduct"); Hall v. May Dep't. Stores Co., 292 Or. 131, 135-38, 637 P.2d 126, 129-30 (1981) (liability requires intent to do harm and infliction of serious and severe mental or emotional distress); Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 46 (1982) (tort of intentional infliction of emotional distress contains four elements: (1) defendant must act intentionally or recklessly; (2) conduct must be extreme and outrageous; (3) it must be the cause; (4) of severe emotional distress).

152. *Compare* Justus v. Atchison, 19 Cal. 3d 564, 582-85, 565 P.2d 122, 134-36, 139 Cal. Rptr. 97, 109-11 (1977) (plaintiff must suffer shock from witnessing accident, not merely from hearing report of accident) *and* Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (court must consider whether plaintiff was present at accident, whether shock resulted from viewing or hearing of accident, and whether plaintiff was related to victim) *with* Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972) (plaintiff can recover only if defendant's act threatened her with harm or placed her within zone of danger).

153. *See* Froelich v. Adair, 213 Kan. 357, 359, 516 P.2d 993, 995 (1973) (liability exists where intentional intrusion on solitude of another would affect reasonable man); Nader v. General Motors Corp., 25 N.Y.2d 560, 567, 255 N.E.2d 765, 769, 307 N.Y.S.2d 647, 652-53 (1970) (privacy invaded only where information sought is confidential and defendant's conduct unreasonably intrusive).

154. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 (1977) (use of another's likeness for own benefit, whether commercial or private, is illegal); Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People in the Media*, 88 YALE L.J. 1577, 1589-90 (1977) (right of publicity encompasses use of name, likeness, and personal characteristics; right's limits unclear).

155. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (liability for publicizing details of another's private life that would be highly offensive to reasonable person without legitimate public concern).

156. All three torts involve intentional action in the literal sense—an intentional invasion of solitude, appropriation of likeness, or publication of embarrassing facts. The gravamen of each tort, however, is obviously the invasion of the plaintiff's interests and for intrusion and publication of embarrassing facts more than trivial interests must be at stake. *See generally* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 410-21 (1960) (privacy rights may be limited if person is public figure involved in matter of public interest or has given consent). Theoretically, defamation involves interference with the relational interest one has with others, whereas privacy protects the interest in being left alone. *See* Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983) (injury in false light privacy cases is mental distress from exposure to public view; injury in defamation is to reputation); Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 128 n.19, 448 A.2d 1317, 1329 n.19 (1982) (injury in false light privacy cases is from exposure to public view; injury in defamation is to reputation); Froelich v. Adair, 213 Kan. 357, 360, 516 P.2d 993, 996 (1973) (same); Themo v. New Eng-

vasion of privacy, has tended to follow the public figure/private figure division between actual malice and negligence,[157] though in some jurisdictions actual malice is always required.[158] In addition, false light liability usually requires that the publication be objectionable to a reasonable person.[159]

An unmistakable sermon emerges in this pattern: the law of torts tends to treat claims for compensation for intangible injury with a healthy dose of suspicion and generally does not grant that compensation unless relatively high thresholds of fault are established. Strict liability for defamation runs directly contrary to this sensible pattern.

The Flaw in the "Defective Product/Unreasonably Dangerous" Analogy. Equating defamation with strict products liability is inappropriate because the central operative standard in products cases, the notion of a defect unreasonably dangerous to the user or consumer,[160] is not strict liability in any

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land Newspaper Publishing Co., 306 Mass. 54, 57, 27 N.E.2d 753, 755 (1940) ("the fundamental difference between a right to privacy and right to freedom from defamation is that the former directly concerns one's peace of mind, while the latter concerns primarily one's reputation"); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 83 (W. Va. 1983) (defamation actions protect reputation in outside world; privacy actions protect inner self); W. PROSSER & W. KEETON, *supra* note 3, § 117, at 864 (defamation protects reputational interest; invasion of privacy protects right to be left alone); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1094 (1962) (defamation protects reputation; right of privacy protects peace of mind). The distinction is often blurred in the rough and tumble of litigation, however, and juries in defamation cases certainly include emotional distress damages as part of their calculations in defamation cases, particularly in the increasing number of "mega verdict" cases. *See* SMOLLA, *supra* note 4, at 20-21 (noting juries' sympathy for reputational loss in "me generation").

157. In Time, Inc. v. Hill, 385 U.S. 374 (1967), a pre-*Gertz* case involving private figure plaintiffs, the Supreme Court required the plaintiff to establish actual malice to state a false light claim. *Id.* at 387-91. Subsequently, in Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), the Court treated as an open question whether the private figure negligence standard permitted by *Gertz* should also be permitted in false light cases. *Id.* at 250-51. Courts and commentators have so found, treating *Hill* as modified by *Gertz*. *See, e.g.*, Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 89 (W. Va. 1983) (*Gertz* rule supersedes *Hill* in false light privacy cases); *see also* Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543, 593-94 (1976) (*Gertz* may supersede *Hill* in privacy cases); Phillips, *Defamation, Invasion of Privacy, and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77, 99 (1975) (continued vitality of *Hill* in doubt after *Gertz*).

158. *See* Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 633, 590 S.W.2d 840, 845 (1979) (plaintiff must prove actual malice to recover for invasion of privacy), *cert. denied*, 444 U.S. 1076 (1980); Goodrich v. Waterbury Republican-Am., Inc., 188 Conn. 107, 129-31, 448 A.2d 1317, 1329-30 (1982) (same); McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 888 (Ky. 1981) (same), *cert. denied*, 456 U.S. 975 (1982); *cf.* RESTATEMENT (SECOND) OF TORTS § 652E (1977) (takes no position on whether circumstances exist in which recovery may be obtained on showing of fault less than actual malice).

159. *See* RESTATEMENT (SECOND) OF TORTS at § 652E (1977) (invasion must be highly offensive to reasonable person).

160. *See, e.g.*, Stang v. Hertz Corp., 83 N.M. 730, 731-32, 497 P.2d 732, 733-34 (1972) (strict products liability requires defect to be unreasonably dangerous to user); Kirkland v. General Motors Corp., 521 P.2d 1353, 1362-63 (Okla. 1974) (same); RESTATEMENT (SECOND) OF TORTS

pure sense, and is not equivalent to strict liability when used in the defamation context. Tort theorists, practicing attorneys, and judges have for a long time recognized that to some degree the term "strict liability" in products law is a misnomer. In the fast lanes of products litigation, involving alleged design defects and failure to warn theories, strict liability principles and negligence principles merge to form a hybrid standard that includes fault principles.[161]

If there is any arguable parallel between defamation and products cases it must be to the design defect branch of products law, and not to simple mismanufacture cases—the news story that contains a defamatory falsehood is not "broken"; rather, it is improperly designed.[162] Despite the cliché that negligence looks to the conduct of the manufacturer while strict liability looks to the product itself,[163] the fact remains that products do not design themselves. To win a design defect case the plaintiff must establish that the product was defectively designed and unreasonably dangerous, a litigation

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§ 402A (1964) (seller of unreasonably dangerous product is liable to user or consumer for physical damage to person or property).

161. In design cases, the notion of a "defect" that is "unreasonably dangerous" is substantially more complex than in simple mismanufacture cases. *See* Phillips v. Kimwood Mach. Co., 269 Or. 485, 491-94, 525 P.2d 1033, 1035-37 (1974) (mismanufacture can be found by comparing product in question with others of its kind; in design defect cases all products are the same). Among the most popular approaches is to define an unreasonably dangerous design defect in terms centering on the manufacturer's knowledge. In *Phillips,* for example, the court stated that "[a] dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character.*" *Id.* at 492, 525 P.2d at 1036 (emphasis in original). Thus, *Phillips* retroactively imputes knowledge of the risk to the manufacturer—in effect imposing constructive knowledge—and then applies a reasonableness calculus to the design decision. *Id.* at 493-95, 525 P.2d at 1036-38; *see also* Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30, 38 (1973) (defendant's conduct measured by whether "a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed") (emphasis in original). This is a hybrid form of liability, with strict liability principles imposing constructive knowledge, and negligence principles governing the design calculations that should have been made.

In a growing majority of design defect cases, however, retroactive knowledge of risks is not imposed on manufacturers. Rather, manufacturers are responsible only for those risks known in the industry at the time of marketing. *See, e.g.,* Singer v. Sterling Drug, Inc., 461 F.2d 288, 290 (7th Cir. 1972) (experimental drugs for which user has been advised there is no knowledge of risk fall under exception to strict liability), *cert. denied,* 409 U.S. 878 (1972); Woodill v. Parke-Davis & Co., 79 Ill. 2d 26, 33-34, 402 N.E.2d 194, 198 (1980) (plaintiff must plead and prove that defendant knew or should have known of danger that caused injury); Bristol-Myers Co. v. Gonzales, 561 S.W.2d 801, 804 (Tex. 1978) (manufacturers who know or should know of drug's potential harm must give adequate warning); *cf.* Henderson, *Coping with the Time Dimension in Products Liability,* 69 CALIF. L. REV. 919 (1981) (examining adequacy of traditional assumption that manufacturers are responsible only for risks known at time of original distribution).

162. News is not, of course, supposed to be "manufactured." To speak of it at all in terms analogous to products liability thus stretches normal usage conventions. If any parallel is appropriate, however, it must be to design cases, where decisions concerning product design may be loosely analogized to decisions within the editorial process.

163. Woodill v. Parke-Davis & Co., 79 Ill. 2d 26, 34, 402 N.E.2d 194, 198 (1980).

process that may only be intelligently conducted through discussion of alternative designs, assessment of risks, technologic capabilities of the industry, and cost/benefit judgments.[164]

Contrast this complex inquiry into the process of design and manufacture with the simplistic operation of strict liability in a defamation case. The only issue to litigate in a defamation suit tried under a strict liability standard is whether the statement is false.[165] This is like making the only issue in a products design case the question of whether some other design would have prevented the accident. In design cases, however, the plaintiff must do more, at a minimum positing an alternative demonstrated to be technologically feasible and financially cost effective in reducing accident costs.[166] The proper analogy to products liability is thus to force the plaintiff in a defamation case to demonstrate not only that the "alternative design"—the truth—existed, but that the defendant acted unreasonably in not discovering it.

The Product/Service Distinction. Products liability cases involving the product/service distinction further upset the parallel between strict products liability rules and defamation. Strict products liability has been limited to the sale of "products," or tangible goods, and has not been applied to the performance of "services."[167] Dentists, doctors, lawyers, and engineers may all use products as incidents to their services, but strict liability does not apply to the injuries caused by mistakes in those professions.[168] Journalism at its most mundane is a service industry; at its most elevated, a profession; but it is never a smokestack industry. A defamation suit is in effect a suit for

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164. *See* Roach v. Kononen, 269 Or. 457, 464, 525 P.2d 125, 128-29 (1974) (listing factors to be considered in balancing utility of product against magnitude of risk).

165. If a state were to interpret *Dun & Bradstreet* to permit strict liability in private figure/private speech cases, and were further to construe *Hepps* to permit continued adherence to the common law burden of proof rules in such cases, then the cause of action would assume the super-strict liability characteristics of the common law cause of action: liability would be without fault, and both falsity and damages would be presumed. Defamation would be returned to its anomalous common law position as the most power-packed pro-plaintiff action in all of tort law.

166. *See, e.g.*, Phillips v. Kimwood Mach. Co., 269 Or. 485, 495-96, 525 P.2d 1033, 1038 (1974) (if danger-avoiding design alteration is too expensive or impairs utility of product then liability will not attach); Keeton, *supra* note 161, at 37-38 (product is unreasonably dangerous if magnitude of danger outweighs benefits of design); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973) (same). As previously discussed, this second half of the modern design defect analysis is, as a practical matter, an inquiry into the reasonableness of design choices and largely indistinguishable from negligence thinking.

167. *See, e.g.*, Magrine v. Krasnica, 94 N.J. Super. 228, 238-42, 227 A.2d 539, 546-47 (Law Div. 1967) (those who sell services are not liable in absence of negligence or intentional misconduct), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969); Hoven v. Kelble, 79 Wis. 2d 444, 463-64, 256 N.W.2d 379, 388-89 (1977) (strict liability not applied to performance of medical services).

168. *See Hoven*, 79 Wis. 2d at 463, 256 N.W.2d at 388 (when professional services are involved, cases uniformly require showing of negligence).

journalistic malpractice.[169] Journalism is not an industry that sells a product in the concrete sense of products liability law, unless the word *product* is meant in the broader sense of work product, labor, or service, a sense that products liability law has deliberately avoided. Unless we are willing to include the practice of medicine, law, or architecture within the definition of *product*, neither should the practice of journalism be included.

The Irony of the Analogy in Nonmedia Cases. Strict products liability rules have generally been applied only to entities within the chain of commercial distribution of new products.[170] Remote manufacturers, primary manufacturers, distributors, wholesalers, and retailers have all been trapped in the net of strict liability rules.[171] Generally speaking, however, the private market for products (for instance, the sale of used lawnmowers and automobiles in local want ads) has not been subject to strict products liability.[172] Legal recourse for the injured victim in private transactions is normally limited to whatever the law of contracts or fault related tort rules (fraud, for example) provides.

To the extent that a state attempts to impose strict liability on nonmedia speakers but not on media speakers, an occasional pre-*Dun & Bradstreet* choice[173] and a very possible post-*Dun & Bradstreet* option, the state actually reverses its normal pattern. Imposing strict liability on nonmedia speakers but not on media speakers is like excusing General Motors for a defect in a new Chevrolet while holding strictly liable the private seller who sells it through the newspapers a year later. This inequity, of course, may be corrected in two ways: by ignoring the media/nonmedia distinction and imposing strict liability in all cases in which it is otherwise permissible, or by

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169. In making this point I do not mean to invoke the debate about to whether an "industry standard" or a "reasonable person standard" should govern the negligence inquiry. *Compare* Gobin v. Globe Publishing Co., 216 Kan. 223, 233, 531 P.2d 76, 84 (1975) (negligence standard is that of reasonably careful publisher in community) *with* Troman v. Wood, 62 Ill. 2d 184, 198-99, 340 N.E.2d 292, 299 (1975) (reasonable person negligence standard). However the negligence standard is formulated, the focus of the suit can only be on the conduct of the journalist, not on the journalist's work product in some abstract sense.

170. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (strict liability for seller of product).

171. *See* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262-63, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964) (imposing strict liability on manufacturer and retailer affords maximum protection to plaintiffs).

172. *See* Lemley v. J & B Tire Co., 426 F. Supp. 1376, 1377 (W.D. Pa. 1977) (no strict liability when car sold by private individuals not in commercial business of selling cars); Tillman v. Vance Equip. Co., 286 Or. 747, 755-56, 596 P.2d 1299, 1303-04 (1979) (no strict liability for used products).

173. *See* Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257-58 (Minn. 1980) (actual malice standard allows media to function without fear of defamation liability); Denny v. Mertz, 106 Wis. 2d 636, 657, 318 N.W.2d 141, 148 (negligence standard applies to media defendants for first amendment reasons), *cert. denied*, 459 U.S. 883 (1982).

ignoring the media/nonmedia distinction and imposing strict liability in none of these cases. For the reasons expressed in this section, the more logically consistent choice is *never* to impose strict liability.

Self-Censorship as the Cost Avoidance Response. The final reason for rejecting the analogy to strict products liability applies primarily to the media, and goes to the unique nature of the industry. The press faces different market incentives and disincentives than do most other industries, because of factors unique to the dissemination of information. Manufacturers of tangible products respond to the imposition of strict liability rules by accepting the liability as a cost of doing business, and if necessary by increasing the costs of their products. Strict products liability may force manufacturers to internalize costs, but it normally should not cause manufacturers to drop product lines altogether.[174] The media, however, may respond to strict liability in a manner not at all socially desirable—by avoiding all controversy and selling a watered down product.[175] As Professor David Anderson puts it:

> The flaw in this [products liability] analogy is that the other enterprises mentioned have no choice but to accept the additional risk of liability if they are to continue their profit-making activities, while most broadcasters and publishers can avoid liability, without discontinuing their activities or reducing their profits, by ceasing to carry material that creates the risk of liability—i.e., by increasing their self-censorship.[176]

IV. A FINAL SUBJECT OF DOCTRINAL CONFUSION—THE MEDIA/NONMEDIA DISTINCTION

In the aftermath of *Gertz* there was considerable debate over whether the holding ought to be applied to media and nonmedia speakers alike.[177] Sev-

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174. There may be some products that cannot be safely manufactured at a feasible cost. Some products may also be unavoidably dangerous. Consistent with general strict liability theory, such products, precisely because they meet the abnormally dangerous criteria, should trigger strict liability. Yet in an apparent concession to the lingering influence of fault principles, the *Restatement* advises against strict liability in such cases. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) (giving as example dangerous Pasteur treatment for rabies).

175. Some have already discerned such a trend. *See* Carter, *The Media, How Responsible, How Free*, 39 ARK. L. REV. 297, 301-05 (1985) (discussing diluted journalism of large corporations and superficial packaging of news); Smolla, *"Where Have You Gone, Walter Cronkite?" The First Amendment and the End of Innocence*, 39 ARK. L. REV. 311, 315-16 (1985) (predicting institutional control of press through tort system).

176. Anderson, *Libel and Press Self-Censorship*, *supra* note 30, at 432 n.52.

177. *See generally* Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 787-95 (1975) (analyzing *Gertz*'s deviations from *New York Times*); Christie, *supra* note 30, at 48-52 (discussing potential difficulties engendered by *Gertz*); Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 649 (1975) (arguing *Gertz* standards apply only to media);

eral states specifically held *Gertz* inapplicable to nonmedia defendants when the plaintiff was a private figure.[178] When the plaintiff was a public official or public figure, however, decisions generally held that the actual malice standard governed even against nonmedia defendants.[179]

Rejecting the media/nonmedia distinction altogether, some decisions found *Gertz* applicable even to cases involving private figure plaintiffs and nonmedia defendants.[180] The Supreme Court, in *Hutchinson v. Proxmire*,[181]

Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 82-83 (1975) (critiquing Nimmer's analysis); Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1268 (1983) (defending *Gertz* balance as expression of John Stuart Mill's nineteenth century philosophy); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 923-26 (1978) (discussing *Gertz* limitations on *New York Times*); Smolla, *supra* note 8, at 29-33 (advocating *Gertz* standards should apply to nonmedia defendants); Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 632 (1975) (discussing and implicitly endorsing *New York Times*); Watkins & Schwartz, *supra* note 30, at 831-63 (discussing impact of *Gertz* on states); Note, *Mediaocracy and Mistrust: Extending* New York Times *Defamation Protection to Non-Media Defendants*, 95 HARV. L. REV. 1876, 1877 n.9 (1982) (advocating context-oriented approach to protection of nonmedia speakers); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902, 938-41 (1974) (urging restrictive use of constitutional privilege as libel defense for nonmedia speakers).

178. *See, e.g.*, Rowe v. Metz, 195 Colo. 424, 426, 579 P.2d 83, 84 (1978) (common law presumption of damages remains in suits against nonmedia defendants); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257-59 (Minn. 1980) (actual malice standard inapplicable against nonmedia defendants); Wheeler v. Green, 286 Or. 99, 109-10, 593 P.2d 777, 783 (1979) (*Gertz* applicable only to media defendants); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 363-69, 568 P.2d 1359, 1363-66 (1977) (*Gertz* inapplicable when defendant is nonmedia entity); Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 73-74, 461 A.2d 414, 418 (1983) (*Gertz* media protections inapplicable to private defendants), *aff'd on other grounds*, 472 U.S. 749 (1985); Denny v. Mertz, 106 Wis. 2d 636, 660-61, 318 N.W.2d 141, 148-49, (*Gertz* inapplicable to nonmedia defendants), *cert. denied*, 459 U.S. 883 (1982); Calero v. Del Chemical Corp., 68 Wis. 2d 487, 504-05, 228 N.W.2d 737, 747 (1975) (plaintiffs must prove "express malice" by a preponderance of the evidence against nonmedia defendants).

179. *See* Avins v. White, 627 F.2d 637, 649 (3d Cir.) (actual malice governs with private figure plaintiff and nonmedia defendant), *cert. denied*, 449 U.S. 982 (1980); Davis v. Schuchat, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975) (comments about public figures should be equally protected whether made in public or private); Woy v. Turner, 533 F. Supp. 102, 104 (N.D. Ga. 1981) (*New York Times* rights accorded nonmedia defendant); Antwerp Diamond Exch. v. Better Business Bureau, 130 Ariz. 523, 527, 637 P.2d 733, 737 (1981) (actual malice standard applies for public figure plaintiff); Rodriguez v. Nishiki, 653 P.2d 1145, 1150-51 (Haw. 1982) (actual malice standard applies against nonmedia defendant); Anderson v. Low Rent Hous. Comm'n, 304 N.W.2d 239, 247 (Iowa) (*New York Times* rights attach to nonmedia defendants), *cert. denied*, 454 U.S. 1986 (1981); Michaud v. Inhabitants of Livermore Falls, 381 A.2d 1110, 1113 (Me. 1978) (public figure plaintiff must prove actual malice against nonmedia defendant); Williams v. Pasma, 656 P.2d 212, 215-16 (Mont. 1982) (actual malice standard applies against nonmedia defendant), *cert. denied*, 461 U.S. 945 (1983); DeCarvalho v. daSilva, 414 A.2d 806, 813 (R.I. 1980) (*New York Times* standard applies to nonmedia defendants).

180. The lead case on the issue is Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976). *Sindorf* involved a defamation action arising in the employment context. After reviewing the history of consitutional rules from *New York Times* through *Gertz*, the Court of Appeals of Maryland held that those rules should apply to media and nonmedia defendants alike. The court was particu-

stated in a footnote that the applicability of the actual malice standard of *New York Times* in the nonmedia context remained an open issue.[182]

For a fleeting moment, *Dun & Bradstreet* seemed to have ended the debate. Arguably, a majority of the Justices in *Dun & Bradstreet* either explicitly or implicitly rejected the media/nonmedia distinction. The plurality opinion of Justice Powell rested on the "public concern" test rather than the media/nonmedia distinction, and at one point Justice Powell stated that the *Gertz* protections "were not 'justified solely by reference to the interest of the press and broadcast media in immunity from liability.' "[183] Although the issue was not specifically addressed, it appeared that Justice Powell, joined by Justices Rehnquist and O'Connor, had eschewed the media/nonmedia approach. Then-Chief Justice Burger similarly failed to mention the media/nonmedia distinction by name. He evidently would have overruled *Gertz* entirely, but until that happened would follow Justice Powell's public interest approach.[184] Justice Scalia has replaced Burger, and his perspective on this precise issue is unknown.[185]

Justice White in *Dun & Bradstreet* was more direct, arguing that the plurality had wisely avoided the media/nonmedia distinction, and that no such distinction should ever be accepted.[186] Similarly, Justice Brennan, joined by

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larly influenced by what it perceived as the greater simplicity in a uniform rule, by concerns that it was unwise to elevate the institutional press alone for specialized favorable treatment, and by the judgment that the common law strict liability standard was an anomaly. *Id.* at 590-94, 350 A.2d at 694-96; *see* Maheu v. Hughes Tool Co., 569 F.2d 459, 478-79 (9th Cir. 1977) (punitive damages available to public figure if actual malice standard met); Rimmer v. Colt Indus. Operating Corp., 495 F. Supp. 1217, 1223 (W.D. Mo. 1980) (*Gertz* burden of proof standards applicable to all actions based on allegedly false statements), *rev'd on other grounds*, 656 F.2d 323 (8th Cir. 1981); Handley v. May, 588 S.W.2d 772, 776 (Tenn. App. 1979) (plaintiffs limited to actual injury awards absent showing of express malice); Ryder Truck Rentals, Inc. v. Latham, 593 S.W.2d 334, 339-40 (Tex. Civ. App. 1979) (*Gertz* standard applicable to nonmedia defendants); Fleming v. Moore, 221 Va. 884, 892-93, 275 S.E.2d 632, 638 (1981) (*Gertz* applicable with nonmedia defendant and private plaintiff).

181. 443 U.S. 111 (1979).

182. *Id.* at 133 n.16.

183. 472 U.S. at 756 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974)).

184. *Id.* at 764 (Burger, C.J., concurring).

185. See *infra* text accompanying note 199 for Justice Scalia's first amendment views.

186. Justice White wrote:

> Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn. It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is to be distinguished from this case, on the ground that it applies only where the allegedly false publication deals with a matter of general or public

Justices Marshall, Blackmun, and Stevens, explicitly rejected the media/nonmedia dichotomy.[187] Justice Brennan noted the extreme difficulty in determining what is and is not media speech,[188] and stated that the first amendment case law emanating from *New York Times* "implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection."[189]

Hepps threw the apparent resolution of *Dun & Bradstreet* into disarray. As previously noted, the majority opinion by Justice O'Connor expressly treated the issue as open, and conspicuously framed the issue before the Court as a case involving a private figure plaintiff, public speech, and a media defendant.[190] Only Justice Brennan, in a brief concurrence joined by Justice Blackmun, pressed the point, arguing as he had in *Dun & Bradstreet* that the maintenance of a media/nonmedia distinction is irreconcilable with the first amendment principle that the value of speech does not depend on the identity of the speaker.[191]

The best educated guess, however, is that the Court will ultimately reject the media/nonmedia distinction. *Dun & Bradstreet*, which superimposes the "matters of public concern" analysis upon the public figure/private figure dichotomy, seems to have been the Court's substitute for a media/nonmedia distinction. To add a media/nonmedia distinction would complicate matters beyond all manageability. Significantly, the distinction has several vocal and vigorous opponents on the Court, but no openly professed defenders—at most a majority seem disinclined to face the issue.

V. WHAT DOES THE FUTURE PORTEND?

Yogi Berra once said, in his estimable wisdom, "If you don't know where you're goin', you're gonna wind up somewhere else." The Supreme Court does not know quite where to go with the first amendment rules governing the law of defamation. The Court appears to lack a consensus as to where it

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> importance, then where the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a nonmedia individual publishing privately.

472 U.S. at 773 (White, J., concurring) (footnote omitted).

187. Justice Brennan stated that "[s]uch a distinction is irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source whether corporation, association, union or individual'." *Id.* at 781 (Brennan, J., dissenting) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)).

188. 472 U.S. at 782 n.7.

189. *Id.* at 783.

190. 106 S. Ct. at 1559; *see supra* text accompanying notes 25-28.

191. 106 S. Ct. at 1565-66 (Brennan, J. & Blackmun, J., concurring).

has been, let alone where it is going, and it may well wind up "somewhere else."

Certain members of the Court, in fact, seem weary of the whole business of libel and the first amendment, acting as if they wish *New York Times* had never been decided, and that its progeny would just go away.[192] Chief Justice Rehnquist, for example, during oral argument last Term (in his pre-Chief Justice days) in *Anderson v. Liberty Lobby, Inc.*,[193] embarked on a suggestive dialogue with the plaintiff's attorney, Mark Lane. Lane attacked the notion that libel suits have a chilling effect on the media by stating that he had seen enough of the media's "giant conglomerates" to know that they are "sufficiently arrogant" to be able to "go through an Ice Age without having their body temperature lowered."[194] One had also to take into account, Lane said, the chilling effect on *plaintiffs* of first amendment rules favoring the media.[195] To all of this, Justice Rehnquist rejoined that after reading the record in the case "one might truthfully say a chill on both your houses."[196]

Similarly, in a concurring opinion in *Dun & Bradstreet*, former Chief Justice Burger wrote in a cavalier throw away line at the end of his concurring opinion that *New York Times* should be "reexamined."[197] In his view, "[c]onsideration of these issues inevitably recalls the aphorism of journalism attributed to the late Roy Howard that, 'too much checking on the facts has ruined many a good news story.' "[198] It is too early to assess with much confidence the first amendment jurisprudence of the Court's newest nominee, Justice Anthony Kennedy. The Court's second most junior Justice, Antonin Scalia, is, to put it gently, not enthusiastic about constitutional protections for the press. While on the District of Columbia Court of Appeals he wrote:

> But then again, perhaps those are right who discern a distressing tendency for our political commentary to descend from discussion of public issues to destruction of private reputations; who believe that, by putting some brake upon that tendency, defamation liability under existing standards not only does not impair but fosters the type of discussion the first amendment is most concerned to protect; and who view high libel judgments as no more than an accurate reflection of the vastly expanded damage that can be caused by media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards commensurate with

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192. Justice White has strenuously questioned the holding of *New York Times;* see, for example, his concurrence in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985).

193. 106 S. Ct. 2505 (1986).

194. *News Notes*, 12 Media L. Rep. (BNA) 1344 (Dec. 10, 1985).

195. *Id.*

196. *Id.*

197. *Dun & Bradstreet*, 472 U.S. at 764 (Burger, C.J., concurring).

198. *Id.*

that power.[199]

The Court's recent personnel changes do not, if one is simply counting votes,[200] portend the immediate demise of all constitutional protection for defamatory speech. The changes *do*, however, portend a period of continued flux, particularly in light of the resignation of Justice Lewis Powell. Chief Justice Rehnquist will still be Rehnquist, and Justice Scalia's ominous potential for a crimped reading of the first amendment is a more or less even trade for the defamation jurisprudence of the departing Chief Justice Burger. Indeed, if one chooses to count recent wins and losses, the press has done well enough in the last two Terms, ostensibly winning outright two decisions in *Hepps* and *Liberty Lobby*. Nevertheless, the media defense bar is visibly anxious about the Court's future direction. In three of the most important decisions of the last several years—*Dun & Bradstreet*, *Hepps*, and *Bose v. Consumers Union*—retired Justice Lewis Powell was in the five to four majority. If the issues in those three important cases were to appear before the Court as presently constituted, the votes would apparently be split four to four, with the newest Supreme Court nominee, Anthony Kennedy, holding the balance. One feels in the air a fidgeting unease among lawyers who defend journalists, a sense of pensive disquiet drawn not so much from the Court's personnel shifts or its recent holdings as from the flavor and tone of the recent opinions of several Justices, and from the growing fear that the mood of hostility toward *New York Times* among what is now a minority of Justices may at some time in the future graduate to a majority consensus in favor of overruling or severely limiting the *New York Times* holding. Spread among media lawyers, editors, and journalists are many different shades of pessimism, from mild disquiet to predictions of imminently pending doom, but everyone seems at least moderately insecure about the direction in which the Court is heading, troubled by a sense that many of the hard fought victories in the two decades since *New York Times* may be about to unravel.

Perhaps the media industry is merely paranoid. Paranoia would certainly fit the popular perception of the press, fitting nicely next to the other media bashing adjectives that circulate freely as popular currency: elite, insensitive, oracular, arrogant.[201] If in American popular consciousness the press is perceived as brazenly willing to trod on the reputations and privacy of individuals just to make a sensationalist buck, then it is certainly also perceived as excessively paranoid whenever anyone dares raise the possibility that the press acted recklessly in a given case, or what is worse, that the whole regime

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199. Ollman v. Evans, 750 F.2d 970, 1039 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), *cert. denied*, 471 U.S. 1127 (1985).

200. *See infra* appendix for "box score" tally of votes.

201. *See* R. SMOLLA, *supra* note 4, at 7, 9-15 (noting public lack of confidence in press and citing Gallup polls).

of first amendment protections for the press ought to be reconsidered.[202] One element of the fallout from many of the recent highly publicized libel suits is the observation that the press does not respond well to criticism and does not generally see the doctrines emerging from *New York Times* as subjects for compromise.[203] Perhaps those are the reflexive jerks of the knee of an industry paranoid that its enemies are everywhere, paranoid because of its guilty knowledge of just how many enemies it has made.

There is a distinction, however, between destructive paranoia and constructive vigilance. The press is not paranoid in its current alarm about defamation, at least not above the levels normally judged safe and acceptable in American life. To the extent that the fear is grounded in the worry that more membership changes on an aging Supreme Court are inevitable, the fear of the media should be no more acute than the fears of many other interests in American society for whom prevailing constitutional doctines hang by tenuous five to four vote threads. The right replacement on the Court might well turn upside down much of constitutional law as we now know it, from abortion[204] to affirmative action[205] to states' rights under the tenth amendment.[206] Freedom of speech issues, in short, are not by any means the only profound questions that may be up for reexamination as the new epoch of the Rehnquist Court unfolds.

The legitimacy of the media's fear for the future, however, does not rest solely upon the actuarial probabilities for further openings on the Court, but upon widening cracks in the analytic infrastructure supporting *New York Times* and its progeny, cracks visible in the jurispurdence of many of the opinions in *Dun & Bradstreet* and *Hepps*. There are movements afoot for legislative reforms, and surely they deserve thoughtful, open-minded consideration within evolving constitutional law limits.[207] As to what those future limits will be, the future course of constitutional case-by-case evolution appears likely to develop along the following lines:

(1) *Public Official Cases*: Up to now the case law has been overwhelmingly inclined to treat all public figure defamation cases alike: they have been

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202. *Id.*

203. *Id.*

204. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2190-91 (1986) (Burger, C.J., dissenting); *id.* at 2192-93 (White, J., with Rehnquist, J., dissenting) (three of four dissenting Justices questioned underlying validity of Roe v. Wade, 410 U.S. 115 (1973)).

205. *See* Wygant v. Jackson Bd. of Education, 106 S. Ct. 1842 (1986) (a five to four decision striking down a lay-off policy that occasionally required nonminorities with more senority to be laid off before less-senior minorities).

206. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (five to four decision in which Justice Blackmun cast deciding vote to overrule prior decision in which he was in majority; no regulation immunity for traditional state functions).

207. *See supra* notes 8, 20 (articles proposing reform).

almost uniformly subject to the actual malice standard. In theory, the caveat that the defamatory speech must be related to performance or fitness for office has always existed.[208] In practice, virtually any subject matter has been deemed arguably relevant to fitness for office, and the limitation has been essentially meaningless. In theory, the actual malice standard has also been applied in a latitudinarian fashion to more high-ranking officials. Again, however, in practice the cases have tended to apply indiscriminately a liberal actual malice standard even to officials in the lower echelons of government. A change may be in the wind. Two separate divisions may well evolve in the public official category. Courts will begin to take seriously the notion that some matters remain private even for public officials, and not subject to the actual malice standard. A type of pyramid analysis will probably be applied, with public officials at the high end of the policymaking hierarchy receiving only a narrow area of reserved privacy, but officials at the low end of the hierarchy enjoying a substantial degree of what will essentially be private figure status.

What standard will apply in public official cases involving issues deemed not a matter of public concern? The question is problematic, with no clear answer in any decided Supreme Court case. The Court may impose a negligence standard in such a case, or even leave states free to establish their own liability standards without constitutional restrictions—paving the way for a return to strict liability in such cases.

(2) *Public Figure Cases:* Public figure cases are a doctrinal morass at present, due to the inherent tensions created by the Court's shotgun marriage of two largely incompatible classification systems, one based on the status of the plaintiff, the other on the status of the speech. The possibility certainly exists that the Court may contract the constitutional protections for defamation all the way back to pre-*Gertz* days, removing public figure cases entirely from first amendment protection, and adhering to the *New York Times* standard only when public officials are involved. The seeds of this development are perhaps latent in the niggardly interpretation of the public interest standard in *Dun & Bradstreet*, which seemed heavily weighted toward recognizing only the political self-governance function of the first amendment.

Even short of such a dramatic shift, however, a strong likelihood exists that the Court will give even narrower compass to the actual malice standard in private figure cases. In cases involving all-purpose or universal public figures, *Gertz* established that the actual malice standard applies. This classification may well dissolve, for the same reasons that a narrower scope of coverage for actual malice is likely in public official cases. Suits involving

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208. *See supra* note 105 (indicating Court's expansive view of speech relevant to public official's performance in office).

celebrities such as Carol Burnett or Johnny Carson will no longer be automatically subject to the actual malice standard. Instead, courts will scrutinize the nature of the speech and will be increasingly willing to classify more and more topics concerning celebrities as private and outside of first amendment protection. Under such an approach, for example, the cause of action in *Burnett v. National Enquirer*[209] could well have been governed by a negligence, or even a strict liability standard. If this development occurs, strict liability may again be permitted in a growing class of celebrity cases for those states that choose it.

For limited-purpose public figures, future evolution will be more subtle. The probability is that there will be a spillover effect from *Dun & Bradstreet* in which the conservative definition of "matters of public concern" will lead also to a growing conservatism about what qualifies as a public controversy. Similarly, the application of the limited public figure status will be restricted by greater emphasis on the plaintiff's voluntary entry into the controversy, and by a requirement of a strong nexus between the plaintiff's involvement and the subject of the defamatory speech. All but hard core public figures will be put outside the actual malice standard; more peripheral actors in public controversies will be increasingly classified as private figures.

(3) *Private Figure Cases:* When the case involves a private figure but public speech, the negligence standard prescribed in *Gertz* remains good law. Strangely this is the *only* situation in which negligence, still the prevailing workhorse for the law of torts, applies. This rule will probably hold, for precisely that reason. It represents a compromise fashioned in *Gertz* and not undermined by *Dun & Bradstreet* or *Hepps*, both of which seemed inclined to preserve the sanctity of at least minimal levels of protection when matters of public concern are involved. In private figure cases involving issues of private concern, however, the negligence standard cannot hold, and the pressure of the analysis in *Dun & Bradstreet* will probably eliminate any first amendment fault requirements in such cases.

(4) *Media/Nonmedia Distinction:* Despite the Court's almost teasing reluctance in *Hepps* to put this issue to rest, a look at where the Justices stand is enough to create a reasonable measure of confidence that the distinction will be rejected. On this issue it is significant that Justice Brennan and Justice White agree, despite their positions at opposite poles of the spectrum on all other issues involving defamation. Their agreement makes some amount of sense, of course: Justice Brennan would give generous first amendment

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209. 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983). The *National Enquirer* in the Carol Burnett litigation was found to have acted with knowing or reckless disregard for the truth. If the type of reportage involved in the Burnett case comes to be regarded as outside the "matters of public concern" standard, such cases would be tried under a negligence rule.

protection to all defamation defendants, Justice White to none, so distinctions among defendants are quite beside the point.

VI. CONCLUSION

If it is true that the Supreme Court is gradually allowing the states to govern more and more aspects of defamation through common law, then it is also true that states should consider the overall common law system of which defamation is a part in making doctrinal choices concerning its development. If defamation is to become, once again, more a part of the family of torts than the family of constitutional law, then it should be made to live in harmony with the rest of the tort family.

APPENDIX

THE FINAL SCORES

Harry Kalven, Jr., in the aftermath of the splintered *Butts* and *Walker* decisions, wrote that "You Can't Tell the Players without a Score Card."[210] Harry hadn't seen anything—the game has become considerably more complicated. As a tribute to his enormous contributions, get your pencils and score cards ready. Table 1 breaks down *Dun & Bradstreet* and *Hepps* by voting patterns.

Table 1

Justice	Hold for libel plaintiff (P) or defendant(D)?		Accept or reject media/nonmedia distinction?		Favor or disfavor eliminating or severely limiting constitutional protections for libel defendants?
	Dun & Bradstreet	Hepps	Dun & Bradstreet	Hepps	
Rehnquist	P	P	No comment	No comment	Probably favors at least some further limitations
Brennan	D	D	Reject	Reject	Strongly disfavors elimination
White	P	P	Reject	No comment	Strongly favors elimination
Marshall	D	D	Probably reject (joined Brennan opinion)	Probably considers open (joined O'Connor)	Disfavors elimination
Blackmun	D	D	Probably reject (joined Brennan opinion)	Reject (joined Brennan opinion)	Disfavors elimination
Powell (now retired; Anthony Kennedy nominee)	P	D	No comment	Probably considers open (joined O'Connor)	Probably favors slight further limitations
Stevens	D	P	Probably reject (joined Brennan opinion)	No comment	Inscrutable
O'Connor	P	D	No comment	Considers open	Probably favors slight further limitations
Burger (now replaced by Scalia)	P	P	No comment	No comment	Burger favored elimination; Scalia probably same
Total	5-4 for plaintiff (with Powell's retirement vote 4-4)	5-4 for defendant (with Powell's retirement vote 4-4)	For both cases combined: clear rejection: 3 probably would reject: 2 no comment or considers open: 4 clearly accepts: 0		No discernable consensus, but at least 5 votes for mild further limitations

210. Kalven, *The Reasonable Man and the First Amendment*: Hill, Butts *and* Walker, 1967 SUP. CT. REV. 267, 275.

Table 2 contains a breakdown of current constitutional fault minimums and rules on the burden of proof on truth, according to the public or private status of the plaintiff, the public or private status of the speech, and the media or nonmedia status of the defendant.

Table 2

Status of Plaintiff	Status of Speech	Status of Defendant	Burden of proof on Truth Issue	Minimum Constitutional Fault Standard
Public official or public figure	Public concern	Media	Burden on plaintiff	Actual malice
Public official or public figure	Public concern	Nonmedia	Burden on plaintiff if media/nonmedia distinction rejected; could be on defendant	Actual malice unless media/nonmedia distinction were to strip nonmedia cases of all protection
Public official or public figure	Private concern	Media	No clear direction from Court; category could expand in future	Category could expand in future
Public official or public figure	Private concern	Nonmedia	No clear direction from Court	No clear direction from Court
Private figure	Public concern	Media	Burden on plaintiff	Negligence
Private figure	Public concern	Nonmedia	No clear direction from Court	Negligence if media/nonmedia distinction rejected; could be strict liability if distinction accepted
Private figure	Private concern	Media	No clear direction from Court	No clear direction from Court
Private figure	Private concern	Nonmedia	Common law burden on defendant permissible	Common law rule of strict liability permissible

Finally, table 3 gives the score on damages, calibrated according to status of the plaintiff, status of the speech, and the level of fault demonstrated. (The media/nonmedia distinction is not incorporated into this chart. If the Court were to hold that nonmedia speakers did not benefit from first amendment protections in some or all plaintiff and speech contexts, then presumed and punitive damages would apparently be available without regard to proof of fault in such cases.)

Table 3

Status of Plaintiff and Status of Speech	Level of Fault Demonstrated	Types of Damages Permitted by First Amendment
Public official/public figure; speech of public concern	Plaintiff required to prove actual malice	Actual, presumed, punitive
Public official/public figure; speech of private concern	Requirements unclear; could be less than actual malice	Presumed and punitive may be permitted even if no actual malice proved
Private figure/speech of public concern	Plaintiff proves actual malice (optional)	Actual, presumed, punitive
Private figure/speech of public concern	Plaintiff required to prove negligence	Actual
Private figure/speech not involving matters of public concern	Plaintiff may not be required to prove any fault after *Dun & Bradstreet*	Actual, presumed, punitive

When all is said and done, of course, all projections about the future course of defamation law must be tempered by old Yogi's wisdom, and the humble acknowledgment that it is all too possible that we're "gonna wind up somewhere else."