Chapter 3

DEFAMATION

A. TRADITIONAL RULES AND CONSTITUTIONAL TRANSFORMATION

A Matter of Honor. There may be a few topics in tort law to which people are indifferent, but defamation is certainly not one of them. People intuitively know what it means to be defamed, and they react just as viscerally as when they are defrauded. Indeed, the average person's emotional reaction to defamation may be even stronger and more heated than the typical response to fraud. Fraud is disgusting, but it usually involves only money. Defamation, in contrast, is generally a matter of honor. The natural inclination of one whose character and good name have been attacked is to want to hire a lawyer, file a lawsuit, and win vindication in court. So, it is not surprising that there are more news reports about suits for defamation (which encompasses the torts of libel and slander[1]) than about any other subject in the expansive field of torts.

Difficult to Win. The fact that there are many defamation claims does not mean that it is easy for a plaintiff to win. In fact, the reality is quite the contrary. All things considered, it is extremely hard to prevail in an action for libel or slander. Dozens of rules conspire to favor defamation defendants. For society as a whole, perhaps this is a good thing. The difficulty of winning a defamation claim tends to ensure that speech and press are legally unfettered to a very large extent. However, it also means that victims of false and defamatory statements are often left without effective remedies. Suits against the media are particularly challenging. Media outlets are repeat players in this area of the law. They have a vested interest in ensuring that adverse precedent is not established and in resisting settlement demands. Such cases are especially hard-fought because media defendants are typically represented by experienced counsel who have defended many defamation claims.

Frustrated Plaintiffs. Not only do defamation plaintiffs typically not win enforceable money judgments, they also usually get nothing close to a judicial declaration that the offensive statements were false. Moreover, the cumbersome path of litigation may prolong the victim's mental agony for years through round after endless round of pleadings, discovery requests, meetings with counsel, and depositions. If a case makes it to trial, the plaintiff is often then subjected to grueling cross-examination, sometimes intended to show that the plaintiff had such a bad reputation that, even if an actionably false statement was made, it caused no damage. Of course, litigation sometimes attracts the attention of the press, and the present configuration of defamation law means that the media, with relative impunity, may repeat and circulate even more widely the original defamatory charges or related embarrassing information. Moreover, in cases where a defamatory statement is posted on the Internet, it is often actually or virtually impossible to expunge those libelous assertions.

Claims by Victims of Truth. In some cases, defamation plaintiffs win. For example, a judge who was defamed by false charges that he told a rape victim to

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[1] Generally speaking, "libel" is written defamation and "slander" is oral defamation. These topics are discussed in greater detail in Part B of this chapter.

"get over it," was awarded more than $2 million.[2] Nevertheless, the overall statistics are sobering for anyone thinking of filing suit. Of course, a libel or slander claim sometimes has settlement value, even if the true prospects of prevailing in litigation are dim. It should be remembered that not all defamation plaintiffs are innocent victims of maliciously uttered falsehoods; some are the casualties of truth. Defamation law is often a refuge for underperformers, such as employees who are let go because of lack of productivity, poor skills, or for other legitimate reasons. Terminated employees frequently allege that they lost their jobs because supervisors and co-workers defamed them. Crafting business practices to anticipate the likelihood of defamation claims by unhappy present or former employees is now a major aspect of good preventative lawyering for all types of institutions. This includes not only entities in the profit-making sector, but also nonprofit enterprises, such as private colleges and universities.

The Struggle Over What Is Actionable. The difficulty of prevailing in a defamation lawsuit does not mean that suits for libel and slander are going away anytime soon. Persons who believe that they have been wronged by attacks on their character want justice. In the United States, that often means going to court. Anglo-American law and its precursors have grappled with the questions of when and how to compensate victims of defamatory statements at least since the time of the Roman Empire. Indeed, within the last fifty years, the entire corpus of American defamation law has been transformed by dedicated efforts to reconcile common law principles (which often favored plaintiffs) with the demands of the First Amendment (which often favors defendants). There is no reason to think that the struggle to "re-form" defamation law will cease in the near future. Indeed, with the ability to electronically transmit defamatory statements to ever wider audiences, one might expect an increase in defamation litigation and related tort jurisprudence.

Reformation by Constitutional Litigation, Not Tort Reform. The type of "tort reform" legislation which in recent decades has reshaped many areas of tort law, such as medical malpractice law, rarely addresses the topics of libel and slander. This is due in part to the fact that many of the requirements of defamation law are constitutionally mandated by the United States Supreme Court's interpretation of the Federal Constitution. The law of defamation has been radically restructured in the past half century, but virtually all of the major developments have come from the marble temple that architect Cass Gilbert built at One First Street, N.E., in Washington, DC, not from state capitols, such as Albany, Harrisburg, Austin, or Sacramento.

An Immensely Complex and Challenging Field. Today, the American law of libel and slander is immensely complex. Anyone who likes triple-layered legal analysis, fraught with razor-edge distinctions, unanswered critical questions, and legal standards that can be interpreted in a half dozen ways, will be comfortable in this area of the law. On the other hand, the lawyers who only occasionally "dabble" in defamation law should be sure to keep their legal malpractice premiums paid. Of course, many good lawyers who have taken the time to master the law of libel and slander regard the principles of defamation law as an intellectually challenging

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[2] *See Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007).

labyrinth that calls into action their best lawyering skills. Some of these lawyers have become recognized as champions of First Amendment principles, particularly as they apply to the media or the Internet.

The Elements of a Defamation Claim. It makes sense to begin the study of libel and slander with a quick sketch of the elements of a *prima facie* case for defamation. As will soon become apparent, the complexity starts here because the requirements of a defamation suit are a variable (and occasionally uncertain) mixture of traditional common law principles and more recently ascendant constitutional rules.

In general, there must be a (1) defamatory statement of fact, (2) culpably published by the defendant, (3) who (in many cases) acted with fault as to the falsity of the statement that (4) caused damages to the plaintiff (which sometimes the plaintiff must prove and in other cases are "presumed").[3]

Three Categories. The third and fourth elements of a defamation claim vary in their requirements according to the status of the plaintiff and whether the statement in question relates to a "matter of public concern" or a "matter of private concern." Under the United States Supreme Court's present expression of constitutional principles, there are ultimately three categories.

(a) Public Officials and Public Figures. First, "public officials" and "public figures" who are suing with regard to a statement relating to a matter of public concern, such as their conduct or fitness, have the heaviest burden of proof and must show that the defendant acted with "actual malice," meaning knowledge of the falsity of the defamatory statement or reckless disregard for the truth. It is often extremely difficult to prove actual malice. If that standard is satisfied, plaintiffs in this category may recover "presumed damages" and punitive damages in certain kinds of cases.

(b) Private Persons Suing with Regard to Matters of Public Concern. Second, "private persons" suing with regard to a matter of public concern must, as a constitutional requirement, prove at least that the defendant acted negligently as to the falsity of the statement, although states are free to set the standard of culpability higher. In the absence of proof of actual malice, presumed damages and punitive damages may not be recovered, and compensation may be awarded only for proven actual losses.

(c) Matters of Private Concern. Third, any person suing in regard to a matter of private concern stands in the most favored category. The Supreme Court has not yet decided whether these plaintiffs must prove that the defendant was at least negligent as to the falsity of the defamatory statement — although many states recognize that requirement. At least so far as constitutional restrictions are concerned, plaintiffs in the "private concern" category may recover presumed damages in certain kinds of defamation cases without proof of actual loss.

Proving Falsity, as Well as Fault as to Falsity. Generally speaking, if a plaintiff must prove that the defendant acted with fault as to the falsity of the defamatory statement (*i.e.*, negligence or actual malice), the plaintiff must also prove that the

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[3] *Cf.* Restatement (Second) of Torts § 558 (1977) (listing four elements).

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statement was false. Falsity is not presumed. However, there are still some unanswered questions about whether the old rule — that truth is an affirmative defense to be pleaded and proved by the defendant — has been entirely jettisoned.

B. LIBEL AND SLANDER

Libel and Slander Distinguished. In general, written defamation is "libel" and oral defamation is "slander."[4] This distinction is important for two reasons. First, lawyers and judges use the terms precisely, rather than interchangeably. They do not speak of a "slanderous article" in the newspaper or a "libelous speech" at a public meeting. Second, and more importantly, libel and slander are treated differently with respect to the issue of damages.

At common law, libel was regarded as much more serious than slander. This was probably due to the fact that the rules emerged at a time when few persons could read or write. Written defamation was regarded as having special potency with respect to causing harm. A written defamatory statement was potentially permanent and it could be handed from person to person in the exact same form. Slander, in contrast, was evanescent. Presumably, oral defamation would someday be forgotten. Even before that point was reached, it was likely that any extensive repetition of oral statements would so transform them that they would become unrecognizable, or at least undependable. To that extent, it was harder for a recipient to place credence in repeated oral assertions, and therefore there was less justification for holding the original speaker accountable.

Libel Per Se and Presumed Damages. At common law, all libel was actionable *per se*, which means without proof of damages.[5] Damages were presumed to result from written defamation. A jury could simply look to the nastiness of the defamatory falsehood and the extent of its dissemination and award a substantial amount in compensation for presumed losses. If this seems odd, or perhaps even breath-taking, it is. Nowhere else in all of tort law are presumed compensatory damages awarded. Plaintiffs must always prove their losses, except in the few cases in which a nominal award is made to vindicate the plaintiff's technical right.

Note that some states limited the rule that libel was actionable *per se* only to cases in which the libel, on its face, was defamatory *of the plaintiff* or to certain types of libelous statements.

Slander Per Se and Presumed Damages. Traditionally, slander was actionable "*per se*," that is, without proof of damages, only if the statement accused the plaintiff of:

(1) Committing a serious crime;

(2) Having a "loathsome disease";

(3) Being incompetent or dishonest in practicing a business, trade, or profession; or

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[4] *See id.* § 568.

[5] *See id.* § 569.

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(4) Being an unchaste woman.[6]

The "loathsome disease" category was always the slander *per se* category least litigated. It covered things such as accusation of leprosy or a venereal disease, and might today include HIV or AIDS. According to the *Restatement*, the disease must be of a lingering or chronic variety to permit an award of presumed damages.[7] Thus, the exception never applied to smallpox, which quickly ran its course.

The other three slander *per se* categories generated considerable litigation. The incompetence category is particularly broad when one considers the many varieties of vocational deficiency, such as lack of knowledge, inadequate skills, poor judgment, deficient experience, and ignorance of, or disregard for, business or professional ethics. Today, false charges of sexual harassment in the workplace are defamatory *per se*,[8] presumably because they fall within this category. In one case that settled for a large amount, the defendant accused the plaintiff beer distributorship of selling repackaged, out-of-date beer.[9] This was a charge of dishonesty in business.

The *Restatement* now says that the unchastity category of slander *per se* covers "serious sexual misconduct" by a plaintiff of either sex.[10] State statutes sometimes take the same position. For example, an Illinois statute provides that false charges of fornication or adultery are actionable.[11]

Policy Basis of Presumed Damages. "The rationale for presuming damages in certain defamation actions was that requiring proof of actual reputational harm would be unfair because 'the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed.' "[12]

Broadcast Defamation in a YouTube World. There is certainly reason to question whether written defamation is more damaging today than oral statements. Which is more harmful, a YouTube video that goes viral, or a written entry on a blog? The *Restatement* allows the possibility that libel includes not only a written or printed defamatory statement but "its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words."[13] In addition, the *Restatement* takes the position that "[b]roadcasting of defamatory matter by means of radio or television is libel,

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[6] *See* Lisa R. Pruitt, "*On the Chastity of Women All Property in the World Depends": Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965 (2003).

[7] RESTATEMENT (SECOND) OF TORTS § 572 cmt. c (1977).

[8] *See Fox v. Parker*, 98 S.W.3d 713, 726 (Tex. App. 2003).

[9] *See Anheuser-Busch, Maris Family Settle for $120M*, NAT'L L.J., Aug. 29, 2005, at 16.

[10] RESTATEMENT (SECOND) OF TORTS § 574 (1977).

[11] *See* 740 ILL. COMP. STAT. 145/1 (LEXIS 2009).

[12] Kevin P. Allen, *The Oddity and Odyssey of "Presumed Damages" in Defamation Actions under Pennsylvania Law*, 42 DUQ. L. REV. 495, 496 (2004) (citing RESTATEMENT (FIRST) OF TORTS § 621 cmt. a (1938)).

[13] RESTATEMENT (SECOND) OF TORTS § 568(1) (1977).

whether or not it is read from a manuscript."[14] However, some states classify broadcast defamation as slander by statute, presumably as a result of lobbying on behalf of radio and television networks and stations.[15] It remains to be seen whether the law will treat videos on the Internet as libel or slander. The comments posted on YouTube are presumably libel.

Presumed Damages Today. As discussed later, the Constitution prohibits an award of presumed damages in a case involving a matter of public concern absent proof of "actual malice." There are no constitutional restrictions on presumed damages in cases involving matters of private concern,[16] but some states have departed from the traditional common law rules.

The "Special Damages" Requirement. In cases where libel or slander was not actionable *per se* (without proof of damages), it was necessary for the plaintiff to prove that the defamation caused special damages of a pecuniary or economic nature.[17] Notably, "special damages" did not include emotional distress. For example, in an old New York case, *Terwilliger v. Wands*,[18] the plaintiff was orally accused of beating a path to the neighbor-lady's house for the purpose of engaging in sex with her while her husband was in prison. The only injury the plaintiff proved was that he was so upset that he could not attend to business; there was no evidence that anyone had treated him differently. The court affirmed a judgment for the defendant because the slander did not fall within the four *per se* categories and there was no proof of special damages. If the suit had been brought by a woman, or if the accusation had been made in writing, there would have been no need to prove special damages.

Although cases still say that a plaintiff must prove that a statement that is not actionable *per se* caused damage, modern constitutional precedent recognizes that states are free to allow compensation for emotional distress as a variety of actual loss.

C. WHAT STATEMENTS ARE DEFAMATORY?

1. Disgrace Is Essential

Defamation Defined. Defamation is defined largely by reference to how others will act in response to a statement. A statement is defamatory if it tends to harm the plaintiff's reputation and diminish the respect, goodwill, confidence, or esteem in which the plaintiff is held by members of the community or deter others from associating or dealing with the plaintiff.[19] According to a much-repeated definition, a defamatory utterance is one which holds the plaintiff up to scorn, hatred, ridicule, or contempt. Thus, if a law book publisher identifies two law professors as the

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[14] *Id.* § 568A.

[15] *See* Rodney A. Smolla, 1 Law of Defamation § 1:14 (2008).

[16] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

[17] Restatement (Second) of Torts § 575 cmt. b (1977).

[18] 17 N.Y. 54 (1858).

[19] *See* Restatement (Second) of Torts § 559 (1977).

authors of a poorly researched update to their treatise, they may sue for defamation.[20] The same is true if the plaintiff is falsely accused of "being a thief and distributing cocaine"[21] or if the wife of a former congressman is accused of verbally attacking her husband's intern.[22]

Disgrace or Discredit. It is essential that the allegedly defamatory statement carry with it the sting of disgrace or discredit. Saying that a judge accepts bribes is defamatory; saying that the judge is overly-intellectual is not. An article calling a Democrat a Republican is not actionable, but one asserting that a Democrat is a member of Al-Qaeda can form the basis for a libel lawsuit.

Judge and Jury. It is for the judge to determine in the first instance whether a statement could be understood as defamatory. Then, if reasonable minds could differ, it is for the jury to determine whether the plaintiff was in fact defamed.

In *Damon v. Moore*,[23] a serviceman, who was seriously injured in Iraq and lost parts of both arms, was pictured for sixteen seconds in an anti-war documentary by producer Michael Moore. The serviceman alleged that the documentary was an attack on the integrity of the Commander-in-Chief and that the serviceman's unwitting appearance in the film defamed him by portraying him as sharing, adopting, and endorsing the filmmaker's views. The First Circuit held that the district court properly dismissed the complaint because no one could possibly have viewed the plaintiff as being disloyal to the United States. The court noted that in the sixteen-second segment the plaintiff spoke exclusively about the pain he was suffering and the efficacy of his pain treatment, and that the plaintiff was only one of "approximately fifty individuals whose interviews were taken out of their original packaging and inserted into the documentary in order to further Moore's message."[24] Many of those persons, including the President, Vice-President, and Secretary of Defense, presumably, disagreed with the film's message.

Homosexuality. In *Stern v. Cosby*,[25] a federal court in New York held that calling someone a homosexual is not defamation *per se* (meaning, in this context, defamatory as a matter of law). As stated by the court:

> The New York Court of Appeals . . . has never held that a statement imputing homosexuality constitutes defamation *per se*. Accordingly, this Court must predict what New York's highest court would do were the issue before it. . . .
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> . . . [W]hether a statement is defamatory *per se* can evolve from one generation to the next.[26]

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[20] *See Rudovsky v. West Publ'g Corp.*, 2009 U.S. Dist. LEXIS 47352 (E.D. Pa. 2009).

[21] *Integrated Sec. Solutions, LLC v. Sec. Tech. Sys., LLC*, 2007 Conn. Super. LEXIS 2397 (Conn. Super. Ct. 2007).

[22] *See Condit v. Nat'l Enquirer, Inc.*, 248 F. Supp. 2d 945, 948 (E.D. Cal. 2002).

[23] 520 F.3d 98 (1st Cir. 2008).

[24] *Id.* at 106.

[25] 2009 U.S. Dist. LEXIS 70912 (S.D.N.Y. 2009).

[26] [n.8] It is, for example, unlikely that the New York Court of Appeals would today hold that it is libelous *per se* to state that a white man is "colored" or a "negro," but that is precisely what the Court

The question . . . is whether the New York Court of Appeals, in 2009, would hold that a statement imputing homosexuality connotes the same degree of "shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace," . . . as statements accusing someone of serious criminal conduct, impugning a person in his or her trade or profession, implying that a person has a "loathsome disease," or imputing unchastity to a woman. I conclude that it would not.

The past few decades have seen a veritable sea change in social attitudes about homosexuality. First, and perhaps most importantly, in 2003 the United States Supreme Court, in a sweeping decision, invalidated laws criminalizing intimate homosexual conduct, holding that such laws violate the Fourteenth Amendment's Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Thus, to the extent that courts previously relied on the criminality of homosexual conduct in holding that a statement imputing homosexuality subjects a person to contempt and ridicule, . . . *Lawrence* has foreclosed such reliance.

Second, in 2009, the "current of contemporary public opinion" does not support the notion that New Yorkers view gays and lesbians as shameful or odious. A movement is currently afoot in the state to legalize gay marriage, . . . and according to a recent opinion poll from Quinnipiac University . . . New York State residents support gay marriage 51 to 41 percent, with 8 percent undecided. . . . The same poll found that New York State residents support civil unions 68 to 25 percent. . . .

Finally, the New York Court of Appeals has not, in its most recent opinion touching on social attitudes toward homosexuality, given any indication that it perceives widespread disapproval of homosexuality in New York. In *Hernandez v. Robles*, a majority of the Court of Appeals rejected the argument that the New York Constitution compels recognition of same-sex marriage. 7 N.Y.3d 338, 356 (2006). The plurality opinion clearly recognized, however, that social attitudes toward gay and lesbian New Yorkers had changed dramatically in the past few years, . . . and that the New York legislature could permit same-sex marriage if it chose to. . . . The Court of Appeals' opinion in *Hernandez* is simply inconsistent with the notion that gays and lesbians are the subject of scorn and disgrace.

Judge McMahon, in 2008, considered this issue and reached the opposite conclusion. *See Gallo v. Alitalia-Linee Aeree Italiane-Societa Per Azioni*, 585 F. Supp. 2d 520, 549–50 (S.D.N.Y. 2008). Her carefully-considered decision was based largely on the fact that prejudice still exists against gays and lesbians in our society. . . . While I certainly agree that gays and lesbians continue to face prejudice, I respectfully disagree that the existence of this continued prejudice leads to the conclusion that there is a widespread view of gays and lesbians as contemptible and disgraceful. . . .

Thus, I hold that Statements 1 and 2 are not defamatory *per se* merely because they impute homosexuality to Stern. They are, however, nonethe-

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held in 1926. *See Sydney v. MacFadden Newspaper Publ'g Corp.*, 242 N.Y. 208, 213–14 (1926).

> less susceptible to a defamatory meaning. Therefore, a jury will decide whether they are defamatory.
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> Statement 1 alleges that Stern engaged in a sexual act with Birkhead at a party. . . . A reasonable jury could find that engaging in oral sex at a party is shameful or contemptible, and the fact that this conduct may not be illegal does not alter this conclusion. . . . Moreover, it also appears from the record that, at the time this alleged incident took place in 2005 . . . , Smith was dating Birkhead and/or still involved in a relationship with Stern. . . . Thus, to the extent that the Statement implies that Stern was unfaithful to Smith, this would be further reason for a jury to find that the Statement is defamatory.
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> Statement 2 alleges that Stern made a sex tape with Birkhead. This allegation would expose Stern to contempt among most people — even if, arguably, not among the social circles in which he and Smith traveled. . . .
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> . . . . Accordingly, Stern will have to prove special damages as to each of these Statements.[27]

2. Defamatory in Whose Eyes?

In *Damon v. Moore, supra*, the plaintiff argued that, in determining whether his depiction in the documentary was defamatory, the facts had to be viewed not from the perspective of a reasonable person, but through the eyes of his military brethren. The court did not find this point critical for it concluded that "there . . . [was] no reason to believe that a reasonable member of the military or veteran community would conclude that Damon's appearance in the documentary conveyed a defamatory meaning."[28] Nevertheless, the underlying point is important. In whose eyes must the plaintiff be defamed? The eyes of "right-thinking" people? "Reasonable" people? A majority of people?

Any Considerable and Respectable Segment of the Community. In *Grant v. Reader's Digest Association*,[29] Judge Learned Hand addressed this question. In that case, the defendant had published a statement implying that the plaintiff was a Communist sympathizer. An action was stated because some persons, not clearly irresponsibly, would have thought less of the plaintiff as a result of the statement. In an opinion for the Second Circuit, Judge Hand wrote:

> A man may value his reputation even among those who do not embrace the prevailing moral standards; and it would seem that the jury should be allowed to appraise how far he should be indemnified for the disesteem of such persons. . . . That is the usual rule. *Peck v. Tribune Co.*, . . . [214 U.S. 185 (1909)]; *Restatement of Torts*, § 559. . . . [T]he opinions at times seem to make it a condition that to be actionable the words must be such as would so affect "right-thinking people" . . . and it is fairly plain that there must come a point where that is true. As was said in *Mawe v. Piggot*,

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[27] 2009 U.S. Dist. LEXIS 70912, at *9-12 (S.D.N.Y.).

[28] 520 F.3d at 108.

[29] 151 F.2d 733 (2d Cir. 1945).

> Irish Rep. 4 Comm. Law, 54, 62, among those "who were themselves criminal or sympathized with crime," it would expose one "to great odium to represent him as an informer or prosecutor or otherwise aiding in the detection of crime"; yet certainly the words would not be actionable. Be that as it may, in New York if the exception covers more than such a case, it does not go far enough to excuse the utterance at bar. *Katapodis v. Brooklyn Spectator, Inc.*, . . . [38 N.E.2d 112 (N.Y. 1941)], held that the imputation of extreme poverty might be actionable; although certainly "right-thinking" people ought not shun, or despise, or otherwise condemn one because he is poor. . . . We do not believe, therefore, that we need say whether "right-thinking" people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means. It is enough if there be some, as there certainly are, who would feel so, even though they would be "wrong-thinking" people if they did. . . ."[30]

Suits Based on Literally True Statements. Note that in *Grant*, the statement at issue was literally true: the lawyer has served as a legislative agent for the Communist party. What was allegedly false and defamatory was the implied innuendo that the lawyer was a Communist sympathizer. Actions for libel and slander can be based on literally true statements. However, it is often hard to convince a jury that there was an implied defamatory assertion that meets all of the requirements of a cause of action.

3. Rules of Construction

Courts invoke various rules of construction in determining whether a particular statement is or is not defamatory.

The "Whole Publication" Rule. It is often said that a defamatory writing must be read as a whole and that a particular phrase will not be viewed in isolation. Sometimes this means that a statement, which by itself might seem to be defamatory, is not actionable. For example, in *James v. Gannett Co., Inc.*,[31] the New York Court of Appeals held that a statement that a belly dancer sold her time to lonely old men was not libelous in light of other statements that she did so just to sit with them, to be nice to them, and to talk. Similarly, in *Treutler v. Meredith Corp.*, the Eighth Circuit found that a statement that a political candidate's company was charged with selling obscene books was not actionable because other statements explained that the charges were false.[32]

Conversely, sometimes an apparently innocent statement takes on a defamatory connotation in light of other parts of the text or conversation. Thus, in *LaBozzo v. Brooks Bros., Inc.*,[33] a New York trial court wrote:

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[30] *Id*. at 734–35.

[31] 353 N.E.2d 834 (N.Y. 1976).

[32] 455 F.2d 255 (8th Cir. 1972).

[33] 2002 NY Slip Op 40222U, 1 (N.Y. Sup. Ct. 2002).

> [S]tatements to the effect that the plaintiff was incompetent and unprofessional might, if taken alone, be protected as pure [nonactionable] opinion. However, in the context of his charges that plaintiff had been billing Brooks for hours during which she was either not working at all or was working for other clients, they are tantamount to an accusation that plaintiff was stealing from her employer.[34]

Headlines and Illustrations. There is an important question as to how attention-grabbing parts of an article, such as headlines and illustrations, should be treated.[35] Some courts have gone to great lengths to ensure that the whole publication is considered in determining whether the plaintiff has been defamed. For example, in *Ross v. Columbia Newspapers, Inc.*,[36] the South Carolina Supreme Court found that an erroneous headline, which asserted that the plaintiff was a suspect in the death of his wife, was rendered innocuous by the last sentence of the article which said that the wife was in serious condition in the hospital.

A more practical approach is to say that bold face type deserves greater weight than fine print in determining whether someone has been defamed. Many persons read only the headlines and never consider every part of an article.

For example, *Kaelin v. Globe Communications Corp.*[37] was a case related to the saga of former sports star O.J. Simpson. After Simpson was acquitted of the murder of his wife, a tabloid ran a story saying that the police were considering charging Kato Kaelin, a witness in the trial, with perjury. The headline screamed "Cops Think Kato Did It!"; a clarifying article was buried on page 17. The court held that Kaelin's defamation claim could go forward. As the court explained, "headlines are not . . . liability-free zones."[38] There was evidence that the publisher had acted with "actual malice" because an editor admitted at a deposition that he was concerned that the headline "did not accurately reflect the content of the article."[39]

"Mitior Sensus" and the Innocent Construction Rule. In an effort to cope with an avalanche of slander lawsuits in the sixteenth and seventeenth centuries, English courts adopted the doctrine of "*mitior sensus*," under which statements were to be construed in the more lenient sense. Thus, calling someone a forger was not actionable because the term could simply mean that the plaintiff was a metalworker. This doctrine effectively closed the courthouse doors to a wide range of cases.

The doctrine of *mitior sensus* is now rejected in England, and never had much impact in the United States. However, there are some decisions that seem to be jurisprudentially related. For example, in *Liberty Mutual Fire Insurance Co. v.*

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[34] *Id.* at *10–11.

[35] *See generally* Joseph H. King, Jr., *Defining the Internal Context for Communications Containing Allegedly Defamatory Headline Language*, 71 U. Cin. L. Rev. 863 (2003).

[36] 221 S.E.2d 770 (S.C. 1976).

[37] 162 F.3d 1036 (9th Cir. 1998).

[38] *Id.* at 1040.

[39] *Id.* at 1037.

O'Keefe,[40] an attorney representing a client in a suit against an insurance company placed an advertisement for evidence which stated: "If anyone has any information regarding Liberty Mutual Fire Insurance Company's delay or failure to pay claims or losses, please contact the undersigned." The Wisconsin Court of Appeals held that the ad was not defamatory as a matter of law because "there are many legitimate reasons why an insurance company would not immediately pay all claims."[41]

More importantly, Illinois sometimes follows what is called the "innocent construction rule," with respect to which there is a great deal of precedent. Under this rule, "words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law."[42] For example, in *Rasky v. Columbia Broadcasting System, Inc.*,[43] the Illinois Appellate Court used dictionary definitions of "landlord" and "slum" to hold that calling someone a "slumlord" might have meant only that he was the landlord of a building located in a part of town that is a slum, and was therefore not actionable.

In *Lott v. Levitt*,[44] an author sued for defamation based on a statement in the best-selling book *Freakonomics*, which asserted that other scholars had been unable to replicate the results of his crime study. The author argued that the statement implied that he had falsified his results. After a detailed consideration of the word "replicate," the court dismissed the claim. It found that "the far more reasonable construction of the disputed sentence . . . is an innocent one, that other scholars — using separate data, statistical analyses, and research — have attempted to arrive at the same results as Lott, but have come to different conclusions," and that the sentence in question was "reasonably capable of several innocent, nondefamatory constructions."[45]

Some cases say that the Illinois innocent construction rule does not apply to cases where "a plaintiff not only must allege extrinsic facts to prove the defamatory nature of the statement but also must plead and must prove special damages."[46] However, a detailed exploration of the Illinois innocent construction rule is beyond the scope of this book. Two things must be remembered. First, if one is litigating a defamation case to which Illinois law applies, it is essential to research the current interpretation of this special doctrine which differs greatly from principles applicable under the law of most other states. Second, care needs to be exercised in citing Illinois defamation precedent dealing with the issue of how potentially defamatory language should be construed.

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[40] 556 N.W.2d 133, 134 (Wis. Ct. App. 1996).

[41] *Id.* at 135.

[42] *John v. Tribune Co.*, 181 N.E.2d 105 (Ill. 1962).

[43] 431 N.E.2d 1055 (Ill. App. Ct. 1981).

[44] 469 F. Supp. 2d 575 (N.D. Ill. 2007).

[45] *Id.* at 583.

[46] *Fedders Corp. v. Elite Classics*, 279 F. Supp. 2d 965, 970 (S.D. Ill. 2003).

4. Pleading Extrinsic Facts to Prove Defamation

Libel Per Se Versus Libel Per Quod. If a written statement, by it own terms, clearly defames the plaintiff, it is sometimes called libel *per se*. For example, an article charging that "John Smith stole money from the cash register" is libelous *per se*.

(Note that this is the third way in which the term *per se* has been used in this chapter. Sometimes *per se* means that a defamatory statement is actionable without proof of special damages and that presumed damages may be recovered. Sometimes *per se* means that there is no doubt that a statement is defamatory and that the question is decided by the court as a matter of law and not by the jury as a matter of fact. And sometimes *per se* means that a statement clearly refers to and defames the plaintiff. Thus, whenever someone says that something is defamatory *per se*, it is important to analyze or inquire into the meaning of the term *per se*.)

Colloquium, Inducement, and Innuendo. If it is necessary to plead additional facts to show that a written statement defames the plaintiff, it is libelous *per quod*. Thus, it may be necessary to plead facts establishing "colloquium" (that the statement referred to the plaintiff), "inducement" (the predicate for the defamatory meaning), or "innuendo" (the defamatory charge). Consider the words "He's dating Alexandra." On its face, the statement might seem to be innocent. However, if "he" refers to Claudius (colloquium), and if Claudius is a Roman Catholic priest (inducement), the statement implies that Claudius is a religious hypocrite (innuendo).

State law typically imposes strict pleading requirements on a plaintiff's suing with respect to statements that are not defamatory on their face.

Problem 3-1: The Teenage Sex Epidemic

Gerard and Nanette Pasteur were shocked with disbelief when they opened the Sunday magazine section of their newspaper and found that a picture of their daughter Claudette had been used to illustrate an article on "The Teenage Sex Epidemic."

The cover of the magazine section included a reference to the article. It said "Wild and Sexually Loose Teens at Edgewood High. Page 8."

The article, which ran from pages 8 to 13, began with a double-page spread. The initial page of the article was entirely taken up by a photo of two girls and three boys. One the girls was Claudette. The photo showed the teens dressed in formal attire. It must have been taken at the high school's spring dance. Claudette was standing closest to the camera, so she was the largest figure in the picture. She was clearly visible and identifiable, although neither she nor any of the other students were named.

On the facing page (page 9), there were two headlines, both in large font. The largest headline said "Teens 'Hook Up' Frequently." The second headline read "They May Know More About Sex Than Their Parents." Below the headlines, which dominated the page, were two paragraphs of text. At the bottom of the page was the author's byline. And below that, in font smaller than the fonts used for the

article's text or the byline, were two more sentences which read:

> The photos on these pages were taken by award-winning photojournalist Amadeo Carette as part of a documentary project on "Contemporary Teens," which will be aired on PBS this coming winter. The individuals pictured are unrelated to the people or events described in the story.

The remaining pages of the article laid out anecdotal and statistical evidence indicating that teens today are much more sexually active than even a decade ago. The article explained that "hook up" is a flexible term that could refer to kissing or any of several kinds of sex. The article suggested that one of the most significant reasons that teens today are more sexually active is that parents, especially in two-income families, devote insufficient time to supervision of their children.

Upon being questioned by her parents, Claudette denied having had sex with the other students pictured in the article or anyone else for that matter.

Gerard and Nanette Pasteur and their daughter have asked whether you will represent them in a defamation suit against the newspaper. They believe that the article has caused serious harm to Claudette's reputation, and that it has also defamed her parents, both of whom are working professionals who are well-known in the community. Please prepare an analysis of whether the article constitutes a defamatory statement about each of the three potential plaintiffs. Also identify other issues that you anticipate being significant factors if a lawsuit is filed.

D. FALSITY REQUIREMENT

1. Assertion of Fact

A statement is not actionable under the law of libel or slander unless it includes a provably false assertion of defamatory fact. The landmark case is *Milkovich v. Lorain Journal Co.*[47]

a. *Milkovich v. Lorain Journal Co.*

Alleged Lies About a Wrestling Match. Describing the facts of the *Milkovich* dispute, Chief Justice William H. Rehnquist wrote:

> . . . . Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High School. . . . [H]is team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year. . . . Thereafter, several parents and wrestlers sued OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA's ruling. . . . Both Milkovich and

[47] 497 U.S. 1 (1990).

Scott testified in that proceeding. The court overturned OHSAA's probation and ineligibility orders on due process grounds.

The day after the court rendered its decision, respondent Diadiun's column appeared in the News-Herald. . . . The column bore the heading "Maple beat the law with the 'big lie,' " beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced ". . . Diadiun says Maple told a lie." The column contained the following passages:

> . . . a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
>
> A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> It is simply this: If you get in a jam, lie your way out.
>
> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> . . . .
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it.
>
> Is that the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> I think not . . .[48]. . . . [49]

The Rulings of the Ohio Courts. Milkovich commenced a defamation action against respondents in the county court, alleging that the column accused him of committing the crime of perjury, damaged him in his occupation of teacher and coach, and constituted libel *per se*. Ultimately, the trial court granted summary judgment for respondents. The Ohio Court of Appeals affirmed, considering itself bound by the state Supreme Court's determination in Superintendent Scott's separate action against respondents that, as a matter law, the article was a

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[48] [n.2] [The entire text of the article was set forth. The article included this passage:]

> . . . .
>
> I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.
>
> Any resemblance between the two occurrences is purely coincidental.
>
> . . . .

[49] 497 U.S. at 3–5.

constitutionally protected expression of opinion.

> The *Scott* court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the D.C. Circuit in *Ollman v. Evans*, [750 F.2d 970 (1984)]. . . . Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared.". . . . The court found that application of the first two factors to the column militated in favor of deeming the challenged passages actionable assertions of fact. . . . That potential outcome was trumped, however, by the court's consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that "the large caption 'TD Says' . . . would indicate to even the most gullible reader that the article was, in fact, opinion.". . . . As for the fourth factor, the "broader context," the court reasoned that because the article appeared on a sports page — "a traditional haven for cajoling, invective, and hyperbole" — the article would probably be construed as opinion. . . . [50]

Defamatory Opinions at Common Law and Fair Comment. Turning to the development of the common law of defamation, Chief Justice Rehnquist explained:

> Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. . . . As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. . . . The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. . . .
>
> However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.". . . . As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. . . . Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress

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[50] *Id.* at 8–9.

injury to citizens wrought by invidious or irresponsible speech.[51]

Constitutional Protection of Hyperbole and Satire. Rehnquist then turned to the Supreme Court's earlier decisions in defamation cases. He discussed its holdings in *New York Times Co. v. Sullivan*,[52] *Curtis Publishing Co. v. Butts*,[53] *Rosenbloom v. Metromedia, Inc.*,[54] and *Gertz v. Robert Welch, Inc.*,[55] which, as discussed later in this chapter, preclude the imposition of strict liability for false defamatory statements in a wide range of contexts.

> Still later, in *Philadelphia Newspapers, Inc. v. Hepps*, . . . [475 U.S. 767 (1986)], we held 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.". . . . In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.". . . .
>
> We have also recognized constitutional limits on the type of speech which may be the subject of state defamation actions. In *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, . . . [398 U.S. 6 (1970)], a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, we held that "the imposition of liability on such a basis was constitutionally impermissible — that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review.". . . . Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable.". . . . *See also Hustler Magazine, Inc. v. Falwell*, . . . [485 U.S. 46, 50 (1988)] (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers v. Austin*, . . . [418 U.S. 264, 284–286 (1974)] (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

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[51] *Id.* at 12–14.

[52] 376 U.S. 254 (1964).

[53] 388 U.S. 130 (1967).

[54] 403 U.S. 29 (1971).

[55] 418 U.S. 323 (1974).

> The Court has also determined "that in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' ". . . .
>
> Respondents would have us recognize, in addition to the established safeguards discussed above, still another First Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For this proposition they rely principally on the following dictum from our opinion in *Gertz*:
>
> > Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . .
>
> Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (CA2 1980). . . .
>
> . . . [W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion.". . . . Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.[56]

No Special Protection for Opinions That Imply False Facts. Rehnquist then explored the subject of implicit statements of fact:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' ". . . .
>
> . . . . [Appellants] contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is

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[56] 497 U.S. at 16–18.

which. But we think the "breathing space" which "freedoms of expression require in order to survive," . . . is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.[57]

Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. . . . This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. . . .

The *New York Times-Butts-Gertz* culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open.". . . . Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*. . . .

We are not persuaded that . . . an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. . . . [58]

An Implied Assertion That the Coach Perjured Himself. Turning back to the facts of *Milkovich* dispute, Rehnquist explained:

The dispositive question . . . then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed: "the clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.' ". . . . This is not the sort of loose, figurative or hyperbolic language which would negate the impres-

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[57] [n.7] We note that the issue of falsity relates to the *defamatory* facts implied by a statement. . . .

[58] 497 U.S. at 18–21.

> sion that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.
>
> We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination of whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the *Scott* court noted regarding the plaintiff in that case: "Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event.". . . . So too with petitioner Milkovich.[59]

The judgment of the Ohio Court of Appeals was reversed and the case remanded for further proceedings. Chief Justice Rehnquist's opinion was joined by six other justices (White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy, JJ.).

Brennan and Marshall Dissent. Justice Thurgood Marshall joined the dissenting opinion of Justice William J. Brennan, Jr., which stated:

> Diadiun's assumption that Milkovich must have lied at the court hearing is patently conjecture. The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding. I disagree. Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact. . . . [60]

b. Applying *Milkovich*

Triable Issues of Fact. Statements of opinion have been found to raise triable issues with respect to whether they implied false facts in cases where the host of a call-in talk show repeatedly accused a judge of being "corrupt";[61] a professional organization's directory described an attorney as an "ambulance chaser";[62] a supervisor stated that "he had reason to believe" that the plaintiff had sabotaged a computer;[63] and a work labeled "fiction" characterized the plaintiff as a "slut."[64]

In *Williams v. Garraghty*,[65] an employee alleged that a prison warden was

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[59] *Id.* at 21–22.

[60] *Id.* at 28.

[61] *See Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002).

[62] *See Flamm v. American Ass'n of Univ. Women*, 201 F.3d 144 (2d Cir. 2000).

[63] *See Staples v. Bangor Hydro-Elec. Co.*, 629 A.2d 601 (Me. 1993).

[64] *See Bryson v. News Am. Pubs., Inc.*, 672 N.E.2d 1207 (Ill. 1996).

[65] 455 S.E.2d 209, 215 (Va. 1995).

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guilty of sexual harassment. Rejecting the argument that the statements were constitutionally protected expressions of opinion, the Virginia Supreme Court found that supporting statements in the memorandum, relating to an alleged incident at the plaintiff's house and certain "derogatory notes," were clearly factual in nature, and therefore could serve as the basis for a defamation lawsuit.

Opinions Incapable of Implying False Facts. Opinions which have been found to be incapable of implying false facts include statements calling a union's attorney "a very poor lawyer";[66] a scholar a "crank" for having taken a "wrongheaded" position;[67] and the chairman of an election board a "lying asshole."[68]

In *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*,[69] a defamation dispute between competing retailers arising from an advertisement, the Supreme Court of Illinois wrote:

> The gist of the ad, taken as a whole, is simply this: plaintiffs copied Cosmo's "3 for 1" sale idea, plaintiffs were wrong to do so and should stop, and while most customers realize the difference between the companies offering the sales, those who might not should not be deceived — you get more for your money in Cosmo's 3 for 1 sale. To be sure, the language Cosmo's used to convey these concepts was unflattering. The ad employed terms such as "rags," "flea market style warehouse," "dried cream cheese," "low rent," and "a hooker's come on." It also likened plaintiffs to the Iraqi Information Minister and claimed they "inflate prices and compromise quality." In our view, however, these are merely subjective characterizations lacking precise and readily understood meaning. In the context of discount clothing sales, no reasonable person would regard them as anything other than colorful hyperbole aimed at capturing the reader's interest and attention.[70]

Unverifiable Assertions. Some opinions are found to be nonactionable because they imply nothing that could be verified. For example, in *Seelig v. Infinity Broadcasting Corp.*,[71] the California Court of Appeal held that the terms "chicken butt," "local loser," and "big shank" were too vague to be capable of being proven true or false. Similar conclusions have been reached with respect to nonspecific allegations that a person was "cheating the city"[72] or a "crook."[73]

In *Jefferson County School District v. Moody's Investor's Services, Inc.*,[74] a school district's bond offering did well at first, but then turned sour after Moody's published an article saying that the outlook on the district's obligation debt was "negative" and that the district was under "ongoing financial pressures" because of

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[66] *See Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998).

[67] *See Dilworth v. Dudley*, 75 F.3d 307, 311 (7th Cir. 1996).

[68] *See Greenhalgh v. Casey*, 67 F.3d 299 (6th Cir. 1995).

[69] 882 N.E.2d 1011 (Ill. 2008).

[70] *Id.* at 1023–24.

[71] 119 Cal. Rptr. 2d 108 (Ct. App. 2002).

[72] *See Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 699 (Ill. App. Ct. 2002).

[73] *See Dubinsky v. United Airlines Master Exec. Coun.*, 708 N.E.2d 441 (Ill. App. Ct. 1999).

[74] 175 F.3d 848 (10th Cir. 1999).

state underfunding. Consequently, the district was forced to re-offer the bonds at a higher interest rate, which caused a significant financial loss. The Tenth Circuit held that the vagueness of the phrases "negative outlook" and "ongoing financial pressures" rendered them protected expressions of opinion.

In *Palestine Herald-Press Co. v. Zimmer*,[75] the Texas Court of Appeals held that a sports editor's statement that a coach made an obscene gesture was not actionable. The court explained:

> Tyler's statement that the gesture Zimmer made with his arms was "obscene," without further description, is subjective and indefinite. The answer to the question of whether something is "obscene" varies from state to state, from community to community, and from person to person. . . . It is an individual judgment that rests solely in the eye of the beholder and, as such, is not an objectively verifiable statement of fact. . . .[76]

Postings on Internet Bulletin Boards. In *Mathis v. Cannon*,[77] the Supreme Court of Georgia found that three inflammatory messages posted on an Internet bulletin board fell short of the constitutional fact requirement that is a prerequisite to a defamation cause of action. One of the messages read:

> cannon a crook
>
> by: duelly41
>
> > hey cannon why u got fired from calton company? ? ? ? why does cannon and lt governor mark taylor think that crisp county needs to be dumping ground of the south? ? ? u be busted man crawl under a rock and hide cannon and poole!!! if u deal with cannon u a crook too!!!!!!! so stay out of crisp county and we thank u for it[78]

Disposing of the claim, the court wrote:

> Although the messages accused Cannon of being a crook and a thief and asked why he had been fired from a specific company, these accusations were made as part of the ongoing debate about the garbage disposal dispute in Crisp County. . . . [A]ny person reading the postings on the message board — written entirely in lower case replete with question marks, exclamation points, misspellings, abbreviations, and dashes — could not reasonably interpret the incoherent messages as stating actual facts about Cannon, but would interpret them as the late night rhetorical outbursts of an angry and frustrated person opposed to the company's hauling of other people's garbage into the county.[79]

While such electronic venting is sometimes not actionable, that does not prevent

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[75] 257 S.W.3d 504 (Tex. App. 2008).

[76] *Id.* at 512.

[77] 573 S.E.2d 376 (Ga. 2002).

[78] *Id.* at 379.

[79] *Id.* at 383.

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lawsuits from being filed. *National Law Journal* reported that a Chicago woman's Tweet ("Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's OK"), triggered a $50,000 claim for defamation of business reputation.[80]

Attempted Humor and the Importance of Context. In *Knievel v. ESPN*,[81] the Ninth Circuit held that statements made in an attempt at humor were not actionable. Describing the facts, the court wrote:

> Famed motorcycle stuntman Evel Knievel and his wife Krystal were photographed when they attended ESPN's Action Sports and Music Awards in 2001. The photograph depicted Evel, who was wearing a motorcycle jacket and rose-tinted sunglasses, with his right arm around Krystal and his left arm around another young woman. ESPN published the photograph on its "extreme sports" website with a caption that read "Evel Knievel proves that you're never too old to be a pimp." The Knievels brought suit against ESPN . . . contending that the photograph and caption were defamatory because they accused Evel of soliciting prostitution and implied that Krystal was a prostitute.[82]

In affirming dismissal of the action, the court stated:

> ESPN argued . . . that viewers accessing the website could not help but to see at least some of the surrounding web pages in order to view the photograph and caption that the Knievels allege to be defamatory. . . . [W]e found that in order to access the photograph, one must first view, at minimum, the nine photographs that precede it and the EXPN.com home page. . . .
>
> Our first inquiry is into the "broad context" of the statement, which includes "the general tenor of the entire work, the subject of the statements, the setting, and the format of the work.". . . . The district court found, and we agree, that the content of the EXPN.com main page is lighthearted, jocular, and intended for a youthful audience. . . . The page directs the viewer to "[c]heck out what the rockstars and prom queens were wearing," and offers a "behind the scenes look at all the cool kids, EXPN-style." Most importantly, however, we observe that the page features slang phrases such as "[d]udes rollin' deep" and "[k]ickin' it with much flavor," neither of which is susceptible to a literal interpretation. . . .
>
> Next, we examine the "specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation.". . . . The web pages immediately preceding and following the Knievel photo use slang words such as "hardcore" and "scoping," and slang phrases such as "throwing down a pose," "put a few back," and "hottie of the year," none of which is intended to be interpreted literally. . . .

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[80] Tresa Baldas, *Putting the "Twit" in Twitter*, NAT'L L.J., Aug. 17, 2009, at 3.

[81] 393 F.3d 1068 (9th Cir. 2005).

[82] *Id.* at 1070.

0027 [ST: 149] [ED: 10000] [REL: 1] **Composed:** Thu Apr 29 08:21:00 EDT 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3281 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:29 Mar 10 11:02**][MX-SECNDARY:** 21 Apr 10 06:58**][TT-:** 24 Mar 10 08:33 loc=usa unit=03281-ch0003**]** **0**

> . . . [E]ven if a viewer had interpreted the word "pimp" literally, he or she would have certainly interpreted the photograph and caption, in the context in which they were published, as an attempt at humor. . . . [N]o reasonable reader would interpret the photograph of the Knievels as a serious allegation of criminal wrongdoing.
>
> We acknowledge . . . that taken in isolation and given a literal interpretation, ESPN's suggestion that Evel is a pimp is "sufficiently factual to be susceptible of being proved true or false.". . . . But we assess the meaning of the word in the context in which it was used. Because the caption cannot reasonably be interpreted literally in this context, the fact that its literal interpretation could be proven true or false is immaterial.
>
> The Knievels correctly point out that the fact that a statement is an attempt at humor does not immunize the speaker against liability for defamation. . . .
>
> . . . . Read in the context of the satirical, risque, and sophomoric slang found on the rest of the site, the word "pimp" cannot be reasonably interpreted as a criminal accusation.[83]

Application to Torts Other Than Libel and Slander. The excerpts from *Milkovich* set forth above in the text briefly mention *Hustler Magazine v. Falwell*.[84] *Falwell* stands for the proposition that it is not possible to circumvent the false fact requirement of a defamation action by framing the claim as a suit for intentional infliction of emotional distress. In *Falwell*, an obscene parody, which was presented as fiction, depicted the plaintiff, a well-known minister, as engaging in an incestuous rendezvous in an out-house. The idea was so outlandish that few readers could have believed that it had actually taken place. A jury denied recovery on the plaintiff's libel claim, finding that the parody could not be taken as describing facts, but it awarded him damages for intentional infliction of emotional distress. Relying on defamation precedent, the Supreme Court reversed. It ruled that the First Amendment interest in uninhibited debate on public issues precludes a public figure from recovering against a publisher for intentional infliction of emotional distress, unless the publication contained a false statement of fact made with knowledge of its falsity or reckless disregard for its truth.

Problem 3-2: The Ex-Governor's Divorce

In August 2009, numerous news sources reported that Sarah and Todd Palin were getting a divorce. A few days earlier, Sarah Palin, the 2008 Republican vice presidential candidate, had resigned the governorship of Alaska. According to an article in *Alaska Report*, Palin's lawyer threatened to sue the owner of the "highly trafficked 'ImmoralMinority' blog" unless he removed an offending article about the supposed divorce and posted a retraction. According to the article, the plan was to serve libel action papers on the blog owner at a kindergarten. Is saying that someone is getting a divorce actionable under the law of defamation?

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[83] *Id*. at 1076–79.

[84] 485 U.S. 46 (1988).

2. Defamation Based on Conduct

Some defamation suits are based on conduct, rather than on written or spoken words. For example, in *Tyler v. Macks Stores of S.C., Inc.*,[85] the South Carolina Supreme Court found that a cause of action was stated where the defendant allegedly discharged an employee immediately following a polygraph test. Likewise, in *Morrison v. National Broadcasting Co.*,[86] the New York Court of Appeals allowed an action where an unwitting plaintiff had been duped into being a contestant on a rigged television game show.

Difficulty in Ascertaining the Factual Assertion. Certain courts have declined to recognize a suit for libel or slander based solely on conduct. For example, in *Bolton v. Department of Human Services*,[87] a former employee brought an action for defamation based on his former supervisor's accompanying the employee to the exit door, without a spoken word, immediately following the employee's discharge. The Minnesota Supreme Court concluded, as a matter of law, that the plaintiff had not been defamed, stating that:

> In most other states that have allowed an action for defamation by conduct, the behavior has tended to rise to the level of "dramatic pantomime": that is, an interplay of words and conduct that provide a clearly discernible account of the making of a false statement about the aggrieved to a third party.[88]

The *Bolton* court appears to have been influenced by the fact that even in a defamation suit based on conduct, it is necessary to prove a false statement of fact. The court noted the heightened difficulty in a defamatory conduct case of applying applicable legal tests in a suit based on a communication "that can be interpreted by the declarant to have one meaning but to have quite a different one to the recipient."[89]

3. Substantial Truth

An action will not lie if an allegedly defamatory statement is true or substantially true. For example, in the movie *Bowling for Columbine*, producer Michael Moore said that "Terry and James [Nichols] were both arrested in connection to the bombing"[90] of the Oklahoma City federal building. In fact, James was neither charged nor arrested regarding the Oklahoma City bombing. Although he was later indicted for possession of unregistered firearms, he "was arrested only days after the bombing and his arrest was brought about by the FBI's investigation into Timothy McVeigh's and Terry Nichols's roles in the bombing."[91]

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[85] 272 S.E.2d 633 (S.C. 1980).

[86] 227 N.E.2d 572 (N.Y. 1967).

[87] 540 N.W.2d 523, 525–26 (Minn. 1995).

[88] *Id.* at 525.

[89] *Id.*

[90] *Nichols v. Moore*, 477 F.3d 396, 398 (6th Cir. 2007).

[91] *Id.* at 401.

Nevertheless, in *Nichols v. Moore*, the Sixth Circuit concluded that a defamation action by James was barred because Moore's statement was substantially true.[92]

Similarly, in *Alleman v. Vermilion Publishing Corp.*,[93] a "letter to the editor" charged that the plaintiff doctor had refused to see the defendants' child because the child was the patient of another doctor. In fact, the doctor might have said that he refused to provide treatment because another doctor had been called and was on his way to the hospital. No one could remember exactly what was said. The court held that the published statement was a substantially accurate reflection of the events which took place — namely that the doctor had refused to provide services to an injured child — and that therefore no action would lie.

Other cases have reached essentially the same conclusion without using the term "substantial truth." Thus, in *Sykes v. Hengel*,[94] the board of managers of a limited liability corporation issued a memorandum detailing why the corporation was in bad shape financially and indicating that the chief executive officer had been replaced. The memorandum stated in part that "[t]his action . . . was deemed necessary because of a series of key operational and management deficiencies that have occurred over the course of the last 12 to 15 months."[95] A federal court in Iowa ruled that the dismissed CEO failed to state a cause of action for defamation. Observing that the facts about the corporation's financial plight were true, the court wrote:

> Stripped of innuendo, the Memorandum does not state anything defamatory about Sykes. . . . While a businessperson may feel bruised by statements suggesting business failure on his watch, accurate statements of the condition of the company during that period do not support a cause of action on this theory of liability.[96]

The "Gist" of the Statement. Whether a statement is "substantially true" depends upon whether the "gist" of the statement is accurate. For example, in *Gustafson v. City of Austin*,[97] the Texas Court of Appeals held that an e-mailed statement was not actionable. The gist of what was said (namely, that a CPR teacher was no longer a valid heart association CPR instructor and his instructor status had been officially revoked by the association) was not substantially worse than the literal truth (namely, that the teacher was no longer a valid heart association CPR instructor, and while he could still teach CPR courses, the courses were not sanctioned by the heart association).

Greater Opprobrium or Sting. In assessing substantial truth, some courts ask whether the truth would have carried less sting or less opprobrium than the false statement. Under this standard, saying that the plaintiff, while drunk, hit and killed

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[92] *Id.* at 402.

[93] 316 So. 2d 837 (La. Ct. App. 1975).

[94] 394 F. Supp. 2d 1062 (S.D. Iowa 2005).

[95] *Id.* at 1068.

[96] *Id.* at 1075.

[97] 110 S.W.3d 652 (Tex. App. 2003).

a pedestrian is probably not actionable if the plaintiff, while drunk, struck and killed a motorist.

In *UTV of San Antonio, Inc. v. Ardmore, Inc.*,[98] the Texas Court of Appeals held that a statement that an inspector had found roaches at a daycare center during a follow-up inspection was not more damaging than would have been true of an accurate statement that the inspector had noted allegations by staff members of roaches on a cup, a crockpot, and a counter, but that no roaches were found on the day of a specific inspection.

Minor Details. Minor details are often irrelevant. It is probably not actionable to say inaccurately that a person stole a red purse, rather than a blue one, or that the person swindled a customer on the sale of a new Ford, rather than on the sale of a new Chevy. In the former case, the gist of the statement is that the actor stole a purse, and the color of the purse has nothing to do with how the person is viewed by others. In the latter case, the gist of the statement is that a customer was swindled while purchasing a new car. The truth about the make of the car is probably irrelevant to the sting or opprobrium that attaches to the statement.

Note, however, that a different result might be reached if the plaintiff is falsely charged with stealing something last week, when the theft actually occurred ten years earlier. Recent misconduct often carries a higher degree of opprobrium than a relatively ancient infraction of the same nature.

Specific Allegations Versus General Allegations. Some charges are specific and others are general. If specific allegations are made, then the focus of the substantial truth inquiry is clear. The question is whether the person did what was charged or something very similar. If the answer to those questions is no, it makes little difference that the person committed other bad acts on different occasions.

A speaker who alleges that a teacher accepted a bribe from a student in exchange for a passing grade does not establish substantial truth by proving that the teacher submitted fraudulent invoices to the school for reimbursement of travel expenses. However, proof of other bad acts may be allowed into evidence as bearing upon the plaintiff's reputation and how much it has been damaged by the defendant's false allegations.

Guccione v. Hustler Magazine, Inc.[99] involved a charge that was general, rather than specific. The plaintiff was accused of participating in an ongoing adulterous relationship. In fact, the plaintiff had lived in adultery for thirteen of the preceding seventeen years, but the adultery had ceased when his wife divorced him. The court held that the statement could not be read to mean that the marriage and the cohabitation had existed simultaneously for only a moment or brief interval prior to the publication. Rather, the only reasonable construction of the statement was that the marriage and cohabitation had existed simultaneously throughout an undefined span of time that included the period immediately prior to publication. The facts showed this to be substantially true, because the plaintiff's adultery had continued over the course of many years. Because the published statement would not have had

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[98] 82 S.W.3d 609 (Tex. App. 2002).

[99] 800 F.2d 298 (2d Cir. 1986).

a worse effect on the mind of the reader than the truth pertinent to the allegation, the complaint failed to state a claim as a matter of law.

Excusing Inaccuracies. Some cases have been generous in excusing inaccuracies. For example, in *Steele v. Spokesman-Review*,[100] the Idaho Supreme Court held that statements in an article, which alleged that an attorney had relocated from California to Idaho at about the same time as members of a white supremacist group, were substantially true, even though two years separated their moves. In *Swindall v. Cox Enterprises, Inc.*,[101] the Georgia Court of Appeals found that an editorial's assertion that a former Congressman had "lied about drug-money laundering" was substantially true, even though he had only been convicted of concealing from a grand jury his involvement in discussions about money laundering. And, in *Provencio v. Paradigm Media, Inc.*,[102] the Texas Court of Appeals held that a postcard identifying the plaintiff as a registered sex offender was substantially true, even though the card bore a misleading return address implying that it had been sent by the government rather than by a news organization.

Technically Inaccurate Terminology. Courts routinely make allowances for the use of technically inaccurate lay terminology.[103] In *Rouch v. Enquirer & News of Battle Creek, Michigan*,[104] the Supreme Court of Michigan found that an article using the word "charge" to describe an arrest and booking was not defamatory, even though no formal arraignment had occurred. In *Rosen v. Capital City Press*,[105] the Louisiana Court of Appeal excused the incorrect use of term "narcotics" to encompass depressants and stimulants.

E. COLLOQUIUM REQUIREMENT: "OF AND CONCERNING THE PLAINTIFF"

A plaintiff can sue for libel or slander only if the allegedly defamatory statement refers to the plaintiff. Thus, cases often say that the defamation must be "of and concerning the plaintiff."

In *Prince v. Out Publishing Inc.*,[106] a magazine published an article which referred to illegal drug use and unsafe sex and included photographs of the plaintiff and others at "circuit parties." The court held that the plaintiff failed to satisfy the "of and concerning" requirement, reasoning:

> The photographs published in the Article establish that there were many people at the party. In addition, the text refers to parties attended by thousands of people. There is nothing in the text of the Article to suggest

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[100] 61 P.3d 606 (Idaho 2002).

[101] 558 S.E.2d 788 (Ga. Ct. App. 2002).

[102] 44 S.W.3d 677 (Tex. App. 2001).

[103] *See* RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977).

[104] 487 N.W.2d 205 (Mich. 1992).

[105] 314 So. 2d 511 (La. Ct. App. 1975).

[106] 2002 Cal. App. Unpub. LEXIS 5189.

that the general statements about illegal drug use and unsafe sex apply to plaintiff.[107]

1. Group Defamation

Does a defamatory statement referring to a group (*e.g.*, doctors, Democrats, or alumni of a university) defame some or all of the individuals associated with the group? In many instances, the answer is no, for there is little reason to think that the defamatory innuendo harmed particular individuals. Thus, an assertion that members of Congress cheat on their taxes does not entitle every member of the House of Representatives to sue.

Size of Group, Inclusiveness of Language, Special Circumstances. It is impossible to state a definite rule for group defamation. In each case, it is important to consider the circumstances surrounding the statement, such as the size of the group, the inclusiveness of the language (*e.g.*, "one," "some," "many," "most," "all," "every single one"), and special circumstances (*e.g.*, whether the plaintiff was the only member of the defamed group who was present or whether the defendant looked directly at the plaintiff while making the statement). Naturally, the smaller the group, the more inclusive the language, and the more focused the charge, the easier it is to allow a member of the group to state a cause of action. Defamation of a group with more than twenty-five members has rarely been found to be actionable by members of the group. However, there is no magic to that number.

In *Neiman-Marcus v. Lait*,[108] defamatory statements were made charging that: (1) "some" of the models at a particular store were call girls; (2) "the salesgirls" were less expensive and "not as snooty as the models"; and (3) "[m]ost of" the male sales staff were homosexuals. The plaintiffs in the suit were all nine of the store's models, 15 of its 25 salesmen, and 30 of its 382 saleswomen. The plaintiffs who were models and salesmen belonged to relatively small groups. Despite the fact that the language referring to them was not all-inclusive, the statements reflected upon them sufficiently that each model and salesman was permitted to sue. None of the salesgirls stated a cause of action because they belonged to a very large group and there were no special circumstances singling out members of that group.

In *Diaz v. NBC Universal, Inc.*,[109] the Second Circuit addressed similar issues relating to group defamation. The court wrote:

> Appellants filed the complaint on behalf of . . . approximately 400 present and former special agents of the federal DEA who were employed . . . during the period from 1973 through 1985. They alleged . . . that a legend . . . appearing at the end of the feature film *American Gangster* . . . which both describes itself as based on a true story and as a fictionalized version of events, defamed Diaz, Korniloff, and Toal, and all members of their putative class. The legend . . . stated that the "collabo-

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[107] *Id.* at *20.

[108] 13 F.R.D. 311 (S.D.N.Y. 1952).

[109] 2009 U.S. App. LEXIS 15653 (2d Cir.).

> ration" of Richard Roberts, a New Jersey police officer, and Frank Lucas, a major narcotics trafficker in the New York City area, "led to the convictions of three quarters of New York City's Drug Enforcement Agency."
>
> . . . . Under the group libel doctrine, a plaintiff's claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group, unless the plaintiff can show that the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the plaintiff. . . .
>
> Appellants cannot make this showing. . . . [W]e first note that the "group" defined by the Legend is New York City's DEA in its entirety. . . . In view of the large size of this group (consisting of 400 individuals, or even potentially 233, as appellants characterized the group post-complaint), and that the Legend makes reference only to three-quarters of the group, *i.e.*, "some" of its members, appellants' claim is incapable of supporting a jury's finding that the allegedly libelous statements refer to them as individuals. . . . And the storyline of the Film only strengthens this conclusion since several scenes, vignettes, and voiceovers describe the corrupt officers portrayed as members of the Special Investigations Unit (the "SIU"), which the Film indicates . . . is a unit of the New York City Police Department (the "NYPD"), a non-federal entity.[110]

In *Harvest House Publishers v. Local Church*,[111] the Texas Court of Appeals wrote:

> Under the group libel doctrine, a plaintiff has no cause of action for a defamatory statement directed to some or less than all of the group when there is nothing to single out the plaintiff. . . . *Wright v. Rosenbaum*, 344 S.W.2d 228, 231–33 (Tex. Civ. App. — Houston 1961, no writ) (holding that statement that "one of the four ladies" stole dress, but not naming guilty person, was not slanderous of any particular person); *Bull v. Collins*, 54 S.W.2d 870, 871–72 (Tex. Civ. App. — Eastland 1932, no writ) (holding that statement that either A or B stole the money, without specifying guilty party, not slanderous); *Harris v. Santa Fe Townsite Co.*, 58 Tex. Civ. App. 506, 125 S.W. 77, 80 (1910, writ ref'd) (holding that statement that an unnamed "band of nine women" from South Silsbee cut a fence was not libelous because 15 women lived in South Silsbee).[112]

The *Harvest House Publishers* suit was based on a book which included the plaintiff church in a list of 50 "cults." The court rejected the plaintiff's defamation claim stating:

> [W]e cannot conclude that a reasonable reader could believe that all groups named in the book participate in the criminal activities that plaintiffs claim as the basis of their libel action. No reasonable reader could conclude that

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[110] *Id.* at *2–4.

[111] 190 S.W.3d 204 (Tex. App. 2006).

[112] *Id.* at 213.

the book accuses the church, and, in fact, every other church named in the book, of rape, murder, child molestation, drug smuggling, etc. As such, the allegedly libelous statements in the Introduction are not "of and concerning the church" and are not actionable.[113]

2. Fictional Portrayals

Plaintiffs sometimes argue that they were the basis of a fictionalized portrayal which defamed them. In these kinds of cases, the question is simply whether the defamatory depiction could reasonably be understood as referring to the plaintiff. Labeling something as "fiction" does not necessarily mean that it is not actionable.

For example, in *Muzikowski v. Paramount Pictures Corp.*,[114] the Seventh Circuit held that a Little League baseball coach stated a claim for defamation based on the movie "Hardball" starring Keanu Reeves. Although the character had a different name, there were many similarities. Unlike the plaintiff, the character committed theft and lied about being a licensed securities broker.

Similarly, in *Bindrim v. Mitchell*,[115] a psychologist who conducted nude group therapy sessions claimed that he was the basis for a character in a novel who conducted the same type of sessions, and that he was defamed by the unflattering rendering of that character. Because the evidence conflicted on the question of whether the plaintiff and the character were the same person, the California Court of Appeal held that the issue was properly for the jury. An award to the plaintiff was upheld, perhaps because the evidence showed that the author of the novel had been a participant in the plaintiff's sessions.

Unbelievable Fiction. What saves many fiction writers from liability for defamation is the false-fact requirement (*see* Part D of this chapter). If the demeaning portrayal is so fantastic that it would not be believed, it may be impossible to establish that there was a provably false assertion of fact.

In *Pring v. Penthouse International, Ltd.*,[116] a real Miss Wyoming brought a suit based on a story about a fictional Miss Wyoming which described certain sexual activities. The court reversed a multi-million-dollar award to the plaintiff on the ground that the work, which described unbelievable events (*e.g.*, oral sex resulting in levitation), was a complete fantasy and could not possibly be understood as a statement of fact.

3. Institutional Plaintiffs

Business Reputation. A corporation or other business enterprise can be defamed with respect to its institutional characteristics, such as credit worthiness, efficiency, honesty, or fairness to customers. Thus, a manufacturer's allegations

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[113] *Id.* at 214.

[114] 322 F.3d 918 (7th Cir. 2003).

[115] 155 Cal. Rptr. 29 (Ct. App. 1979).

[116] 695 F.2d 438 (10th Cir. 1982).

that a competitor pirated its designs may give the competitor a claim for defamation.[117] So, too, it is actionable to state falsely that a business has filed for bankruptcy.[118]

Direct Defamatory Innuendo. To be actionable, a statement must directly reflect on the institutional character of the plaintiff. Thus, in *Fairyland Amusement Co. v. Metromedia, Inc.*,[119] a federal court in Missouri held that a news report that there were increasing numbers of rapes in certain neighborhoods, did not defame an amusement park located in one of those areas. The court explained:

> A mere report of immoral or illegal activities "in and around" the premises cannot be fairly interpreted to mean that the business either negligently or purposefully encourages or acquiesces in such conduct. . . . [The report] did not cast any aspersion on the integrity or manner in which the corporate plaintiffs conduct their business. It did not suggest, for example, that they were insolvent, . . . that they were cheating their customers, . . . or that they were guilty of racial discrimination.[120]

Indirect Defamatory Innuendo. Statements about persons sometimes reflect adversely on the entities with which they are associated, and vice versa. In general, "words written about a corporate officer give no right of action to the corporation unless spoken or written in direct relation to the trade or business of the corporation."[121] Similarly, statements about an institutional entity do not defame its officers, directors, or employees, unless there is reason to conclude that the defamatory innuendo directly reflects on the performance and competence of such persons.

Yale University was sued for $50 million in a federal court in Connecticut by Dongguk University of Korea. Apparently, Yale had erroneously confirmed that a job applicant at Dongguk had a degree from Yale, then revoked that assurance when the Korean applicant became the center of a huge public scandal in Korea. Dongguk alleged that as a result of the initial false statement, it was publicly humiliated and deeply shamed based on its involvement with the person at the center of the scandal.[122] In this kind of case, one might logically ask whether the action should fail because there was no statement "of and concerning" the plaintiff (Dongguk University), but only a statement about someone else.

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[117] *See Fedders Corp. v. Elite Classics*, 279 F. Supp. 2d 965, 970–71 (S.D. Ill. 2003).

[118] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

[119] 413 F. Supp. 1290, 1295 (W.D. Mo. 1976).

[120] *Id.* at 1294–95.

[121] *Palm Springs Tennis Club v. Rangel*, 86 Cal. Rptr. 2d 73, 77 (Cal. Ct. App. 1999).

[122] *See* Kang Shin-who, *Dongguk Files Suit Against Yale*, Korea Times, Mar. 26, 2008.

4. Criticism of Ideas

It is difficult to prove that criticism of an idea amounts to defamation of a person who holds or advocates the idea. For example, in *Ezrailson v. Rohrich*,[123] the Texas Court of Appeals held that a medical research article, which criticized the creative research ideas behind a test relating to breast implant leakage, was not capable of a defamatory meaning as a matter of law. The court further explained that the author of the criticized article could not maintain a libel action because the defendant's article discussed the medical research test in question, rather than the plaintiff personally.

Of course, imputing an idea to a person may be defamatory, if subscription to the idea carries with it the sting of disgrace. Labeling someone a Holocaust-denier might be actionable; stating that a person is an environmentalist is not actionable.

5. Defamation of the Dead

Defamation of the dead does not allow the decedent's estate to sue for libel or slander. Moreover, courts are reluctant to find that statements about deceased family members say something defamatory about the character of survivors.

For example, in *Rose v. Daily Mirror, Inc.*,[124] a newspaper article stated erroneously that the decedent, the father or husband of the plaintiffs, was "Baldy Jack Rose," a "self-confessed murderer who had 'lived in constant fear that emissaries of the underworld . . . would catch up with him and execute gang vengeance.' "[125] The plaintiffs were named by the article as the decedent's survivors, but nothing else was said about them. The New York Court of Appeals rejected the plaintiffs' claims for libel because "a libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation."[126]

6. Unintended Reference to the Plaintiff

There are some cases which hold that unintended reference to the plaintiff is sufficient to satisfy the colloquium requirement. For example, in *Allied Marketing Group, Inc. v. Paramount Pictures Corp.*,[127] the television program aired a segment about a sweepstakes scam. According to the opinion of the Texas Court of Appeals:

> Paramount intended to use a fictional company name in connection with the . . . segment and thought that "Sweepstakes Clearing House" was a fictional name. However, unknown to Paramount, Allied had been using the name "Sweepstakes Clearinghouse" since 1984 in connection with a direct mail offer business. . . .

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[123] 65 S.W.3d 373 (Tex. App. 2001).

[124] 31 N.E.2d 182 (N.Y. 1940).

[125] *Id.* at 182.

[126] *Id.*

[127] 111 S.W.3d 168 (Tex. App. 2003).

The court found that the program's segment on sweepstakes scams, which was not an obvious work of fiction, was "of and concerning" the sweepstakes company for purposes of a defamation action. Persons who knew the plaintiff could have concluded that the defamatory matter referred to the plaintiff. The show's fictional company name was identical to that of the real company, which was actually in the business of conducting sweepstakes contests. Moreover, one of the plaintiff's contests was very similar to the show's "scam" sweepstakes. The program segment did not indicate to viewers that the show's fictional company did not exist. The court concluded that "[b]ecause the test is based on the reasonable understanding of the viewer of the publication, it is not necessary for the plaintiff to prove that the defendant intended to refer to the plaintiff." Note, however, that while the court found that the colloquium requirement was satisfied, a plaintiff in this type of action may have difficulty establishing that the defendant acted with the requisite degree of fault as to the falsity of the defamatory statement. See Part G of this chapter.

Problem 3-3: The Poor Bar Pass Rate

The graduates of William Howard Taft School of Law have had trouble passing the state bar examination for many years. Despite the best efforts of the dean and law faculty, the school's passing rate for first-time test takers has hovered at roughly 40%, far behind the typical statewide average of 82%. Dean Alf Tilden, now in his fourth year as head of the school, has made improving bar passage the primary goal of his administration. All of the resources of the law school have been mobilized for the purpose of ensuring that graduates of Taft pass the bar on the first attempt in numbers exceeding the statewide average. By outlining a persuasive ten-point plan, Dean Tilden convinced many of the school's alumni to support his efforts with donations to a scholarship fund that help to ensure that students can focus on their studies and have the money they need to enroll in bar review courses between graduation and taking the bar.

When the results of the July bar examination were released, they showed that Taft graduates had made progress. The 100 first-time test takers from Taft passed the bar examination at a rate of 49%. The test results were not great, but they were a step in the right direction. However, when the local newspaper published an article about the bar results, it got some of the numbers wrong. The article said that 89% of all test takers had passed; in fact, the number was 82%. The article also said that only 34% of Taft graduates had passed the examination, rather than 49%. Who, if anyone, has been defamed by the erroneous report of the July bar results?

F. PUBLICATION

Communication to One Person Who Understands. In the law of defamation, "publication" is a legal term of art. It has nothing in particular to do with rolling the printing presses or preparing a manuscript for sale at Borders or Barnes & Noble. Rather, it simply denotes communication of defamatory matter to a third person (other than the plaintiff) who understands. Thus, whispering in the ear of a friend, sending a text message, or posting a note on a public bulletin board can legally constitute publication.

There is a quaint old case that nicely illustrates what publication means. In *Economopoulos v. A. G. Pollard Co.*,[128] when one clerk accused the plaintiff in English of stealing a handkerchief, no one was present. When a second clerk made a similar accusation in Greek, the persons present (other than the plaintiff) did not understand Greek. The Supreme Judicial Court of Massachusetts held that no cause of action for defamation was stated because of lack of publication.

Communication solely to the plaintiff does not constitute an actionable publication because libel and slander are mainly concerned with the loss of esteem and regard in the eyes of others. However, in extreme cases, other torts, such as an action for intentional infliction of emotional distress, may provide relief for false statements uttered only to the plaintiff.

Culpability Required. To be actionable, publication must be attributable to fault on the part of the defendant. There is no strict liability for defamatory information that is communicated when someone unforeseeably overhears a conversation or reads a private letter. The defendant must have intended to publish the information to the recipient or have done so carelessly (*i.e.*, negligently or recklessly).

Disclosure by the Plaintiff with Knowledge of the Defamatory Content. In some cases, it is foreseeable to the originator of a written defamatory statement that the recipient will communicate the statement to a third person. Whether the originator will be held liable for the publication generally depends upon whether the recipient was aware of the libelous nature of the statement. If the recipient is *unaware* of what the statement says, and if transmission of the statement is foreseeable to the originator, the originator may be found to have published the statement to the third person. The *Restatement*, for example, offers illustrations of a letter sent to a blind person who gives it to a family member to read to the blind person,[129] and of a letter written in a foreign language which is given to a translator.[130] In these kinds of cases, it is fair to hold the originator liable for the third person's awareness of the defamatory content of the written communication.

In contrast, if the recipient is *aware* of the defamatory content of originator's statement, but repeats it or shows it to another person, the recipient is deemed to be responsible for the communication and originator is not the publisher.[131] This is true even if the originator can foresee the plaintiff's repetition or transmission of the defamatory material.

1. "Compelled" Self-Publication

Occasional decisions have recognized a theory of "compelled" self-publication. These cases have usually reasoned that an employee was "compelled" to publish a defamatory statement by a former employer to a prospective employer under circumstances where such a communication was foreseeable. For example, in

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[128] 105 N.E. 896 (Mass. 1914).

[129] Restatement (Second) of Torts § 577 illus. 10 (1977).

[130] *Id.* illus. 11 (1977).

[131] *Id.* cmt. m (1977).

Kuechle v. Life's Companion P.C.A., Inc.,[132] the Minnesota Court of Appeals held that because a nurse was told that her former employer had reported her alleged misconduct to the Nurse's Board, the nurse had no reasonable means to avoid self-publishing the statement to a new employer, even though she was not asked about the reasons for her termination. Quoting an earlier decision of the Minnesota Supreme Court, the intermediate tribunal explained:

> The concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement where the originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages. . . . [133]

Generally Rejected. Many courts have rejected the concept of "compelled" self-publication[134] or expressed hostility to it. For example, in *White v. Blue Cross and Blue Shield of Massachusetts, Inc.*,[135] the Supreme Judicial Court of Massachusetts noted that the highest courts of four states (Iowa, Minnesota, Missouri, and North Carolina) had recognized the doctrine, but found support for this theory of publication was far from unanimous. In an opinion rejecting the concept of "compelled" self-publication, the Chief Justice Margaret H. Marshall wrote:

> We recognize the conundrum faced by discharged employees who are required by prospective employers to explain the circumstances of their discharge. But as the leading authority on defamation has explained, compelled self-publication defamation in the employment context is "troubling conceptually." [1 *R.D. Sack, Libel, Slander, and Related Problems* § 2.5.2, at 2-84 (3d ed. 1994 & Supp. 2003).] "It is the termination and the reasons for it, not the communication, about which the plaintiff is actually complaining. . . ." . . . Any harm arising from the employee's discharge is more appropriately dealt with under principles of employment law, and not under the law of libel and slander. . . . [136]

In *Olivieri v. Rodriguez*,[137] a federal constitutional action involving a probationary police officer, the Seventh Circuit wrote:

> The [plaintiff's] position resembles the largely discredited doctrine of "compelled republication" or (more vividly) "self-defamation," which allows the victim of a defamation to satisfy the requirement of publication by publishing it himself, for example to prospective employers as in the present case. . . . The doctrine is inconsistent with the fundamental principle of mitigation of damages. . . . The principle of self-defamation, applied in a case such as this, would encourage Olivieri to apply for a job to every police force in the nation, in order to magnify his damages; and to

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[132] 653 N.W.2d 214, 219–20 (Minn. App. 2002).

[133] *Id.* at 219 (*quoting Lewis v. Equitable Life Assur. Soc'y*, 389 N.W.2d 876, 886 (Minn. 1986)).

[134] *See, e.g., Gonsalves v. Nissan Motor Corp.*, 58 P.3d 1196 (Haw. 2002).

[135] 809 N.E.2d 1034 (Mass. 2004).

[136] *Id.* at 1037.

[137] 122 F.3d 406 (7th Cir. 1997).

> blurt out to each of them the ground of his discharge in the most lurid terms, to the same end. Most states . . . reject self-defamation as a basis for a tort claim, and it would be odd for federal constitutional law to embrace this questionable doctrine.

Legislative Barriers. Some states have legislatively rejected "compelled" self-publication. Thus, a Colorado statute provides:

> No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.[138]

Minnesota has not legislatively rejected the "compelled" self-publication theory which has been recognized by Minnesota courts. However, the legislature has passed a law which addresses the issue of grounds for termination. The statute provides:

Subdivision 1. Notice required.

> An employee who has been involuntarily terminated may, within fifteen working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within ten working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reason for the termination.

Subdivision 2. Defamation action prohibited.

> No communication of the statement furnished by the employer to the employee under subdivision 1 may be made the subject of any action for libel, slander, or defamation by the employee against the employer.[139]

It is hard to see how this law, which has rarely been cited by courts, does anything more than say that one cannot bring a defamation action based on truth. However, one decision seemed to suggest that whatever was said in response to a request for truthful termination reasons was absolutely privileged.[140] Another Minnesota law limits the use of the "compelled" self-publication theory in defamation actions involving communications obtained by an employee based on review of the employee's personnel records.[141]

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[138] COLO. REV. STAT. ANN. § 13-25-125.5 (LEXIS 2009).

[139] MINN. STAT. ANN. § 181.933 (LEXIS 2009).

[140] *Huthwaite v. H.B. Fuller Co.*, 1992 Minn. App. LEXIS 460, *5 (1992).

[141] MINN. STAT. ANN. § 181.962 Subd. 2 (LEXIS 2009).

0041 [ST: 149] [ED: 10000] [REL: 1] **Composed:** Thu Apr 29 08:21:04 EDT 2010
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VER: [LS000000-Local:29 Mar 10 11:02]**[MX-SECNDARY:** 21 Apr 10 06:58]**[TT-:** 24 Mar 10 08:33 loc=usa unit=03281-ch0003] **0**

2. Distributors of Defamatory Publications

Mere Conduits of Information. With good motives, the law has drawn a distinction between "distributors" and "publishers." Conduits of information, such as libraries, bookstores, printers, and newspaper deliverers, who are unaware of the defamatory content of the materials they disseminate, are often termed mere "distributors." On that ground, they are not subject to liability for defamation. Of course, there is nothing magic about the term "distributor." A distributor (information conduit) who purveys materials that the distributor knows to be false and defamatory can be sued and held responsible for resulting harm.

"Distributor" as the Term Relates to "Fault as to Falsity." The term "distributor" is essentially a shorthand reference to the third requirement of a defamation action, fault as to falsity, which is discussed later in this chapter. In the vast range of cases (and perhaps all cases, although the Supreme Court has not definitively ruled about issues of private concern), it is necessary for a libel or slander plaintiff to prove fault on the part of the defendant regarding the falsity of the defamatory statement. Typically, it will be difficult or impossible to show that a distributor who is unaware of the content of defamatory material acted with fault as to falsity. It might be argued, of course, that a distributor who did not know nevertheless should have known, because a reasonable person would have known. Thus, some cases have said that a distributor "may not be held liable if it neither knew nor had reason to know of the allegedly defamatory . . . statements."[142] However, this is a weak argument because negligence as to falsity is not sufficient to establish liability in cases involving public figures and public officials (who must prove actual malice), and no one reasonably expects information conduits such as bookstores to read all of their volumes to determine if any contain false defamatory statements. Practically speaking, the only way to show fault as to falsity in most cases is to prove that the distributor was aware of the false contents.

Editorial Control. Publishers of newspapers and magazines exercise editorial control over the content of their publications. Therefore, they do not qualify as mere distributors and are subject to liability. For example, in *Flowers v. Carville*,[143] a federal court in Nevada held that the plaintiff stated a cause of action against a publisher who allegedly knew that a book contained false and defamatory statements about the plaintiff's alleged affair with a former President.

3. Statements on the Internet

Not a "Publisher." The Communications Decency Act insulates various potential defendants from liability by addressing the issue of "publication." Under the Act, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[144] The Communications Decency Act is discussed in Part I-1 of this chapter.

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[142] *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

[143] 266 F. Supp. 2d 1245 (D. Nev. 2003).

[144] 47 U.S.C.S. § 230(c)(1) (LEXIS 2009).

4. Intra-Entity and Fellow Agent Communications

Some states hold that communications between constituents of the same entity (*e.g.*, between officers or employees of a corporation)[145] or between agents of the same principal (*e.g.*, between a client's lawyer and accountant) are not "publications" for the purposes of the law of defamation. Under this view, the corporation or principal is merely communicating with itself, not with a third party.

The *Restatement*[146] and many states[147] take the contrary position. They reason that a corporation's constituent members (*e.g.*, officers, directors, and employees) and a principal's co-agents are individuals distinct from the entity or principal, and those individuals have personal views which may be affected by the intra-entity or co-agent communications of defamatory matter. Thus, in *Bals v. Verduzco*,[148] the Indiana Supreme Court labeled the no-publication view an "unacceptable legal fiction."

The better view is to treat intra-entity or co-agent communications as publications, but recognize that a cause of action may be barred under a qualified privilege which holds that the publication was appropriate. (Qualified privileges are discussed in Part I-4 of this chapter.) In *Staples v. Bangor Hydro-Elec. Co.*,[149] the Supreme Judicial Court of Maine endorsed this approach, noting that "damage to one's reputation within the corporate community may be as devastating as that outside" and that "the defense of qualified privilege provides adequate protection."

Problem 3-4: The Botched Cover Letter

Seeking to find a better position as an executive corporate assistant, Carolyn Mason hired an Internet-based job search firm, Talent Ltd., to assist her in locating the right potential employer. For $1500, Talent Ltd. promised to revise Mason's resume into a letter format and then mail the resume to 500 "key decision-makers" in large corporations who were likely to know of, and have the authority to fill, non-advertised employment opportunities.

After Talent Ltd. prepared the letter, Mason approved its text. The first sentence of the letter read: "Currently seeking new challenges as a corporate executive assistant, I am a detail-oriented professional possessing 20 years of related leadership experience."

Following the mailing of the letter to 500 prospective employers, Mason was given a CD. A cover letter said that the disk contained files with all of the the merge-printed correspondence, as well as an Excel spreadsheet with the employers' names. Mason could use the spreadsheet to keep track of acknowledgment correspondence and other follow-up contacts.

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[145] *See Starr v. Pearle Vision, Inc.*, 54 F.3d 1548 (10th Cir. 1995) (Oklahoma law).

[146] *See* Restatement (Second) of Torts § 577 cmt. i (1977).

[147] *See Popko v. Continental Cas. Co.*, 823 N.E.2d 184 (Ill. App. Ct. 2005); *Simpson v. Mars, Inc.*, 929 P.2d 966 (Nev. 1997).

[148] 600 N.E.2d 1353, 1356 (Ind. 1992).

[149] 629 A.2d 601, 604 (Me. 1993).

Mason did not examine the CD immediately. However, after three weeks had passed and she had not heard from any potential employer, she opened the files on the CD. She found that every letter contained a serious typographical error. The first sentence of each letter read, "Currently seeking new challenges as a 70 E.S1 B,EWI.5391 position, I am a detail-oriented professional possessing 20 years of related leadership experience." That was not the text she had approved.

Mason believes that she has been defamed to 500 excellent prospective employers and that her career prospects have been seriously harmed. Please prepare an analysis of the issues Mason will face in a libel suit against Talent Ltd.

G. FAULT AS TO FALSITY UNDER CONSTITUTIONAL PRINCIPLES

The term "fault as to falsity" relates to the purported falsity of the defamatory statement. "Fault as to falsity" comes in at least three varieties. The most culpable variety is knowledge of falsity. The next variety — reckless disregard for the truth — is treated as just as bad as knowledge of falsity, at least if "reckless" means that the defendant acted with subjective awareness of the defamatory statement's probable falsity. The least blameworthy variety of fault as to falsity is negligence. Whether fault as to falsity must be proved in a libel or slander action, and if so, to what degree, depends on the way that the case is categorized.

As alluded to earlier in this chapter, the current configuration of constitutional precedent indicates that there are three types of defamation cases: (1) cases where public officials or public figures are suing with respect to matters of public concern; (2) cases where private persons are suing with respect to matters of public concern; and (3) cases when anyone is suing with respect to matter of private concern.

1. Category I: Public Officials and Public Figures Suing with Respect to Matters of Public Concern

Anyone who plays a large role in the life of the community is likely to be required to meet what is commonly referred to as the *New York Times* "actual malice" standard when bringing a suit for libel or slander. The evolution of this standard and its application are considered below.

a. Strict Liability at Common Law

At common law, it was unnecessary to show that the defendant knew or should have known that a statement was false. Moreover, the defendant did not even have to be aware that the statement referred to the plaintiff or that it was defamatory. For example, in an English case, *Cassidy v. Daily Mirror Newspapers, Ltd.*,[150] a newspaper article said that a Mr. Cassidy was engaged to a woman pictured in the paper. Both had consented to allow the paper to announce their engagement. The newspaper did not know that Cassidy was already married. In a subsequent defamation suit by Cassidy's wife, the court held that she had been libeled by the

[150] 2 K.B. 331 (1929).

newspaper. Her acquaintances testified that they inferred from the article that Mrs. Cassidy was not in fact married to Cassidy, with whom she was living — which at the time was thought to cause serious harm to her reputation.

Thus, under traditional rules, libel and slander did not require proof of fault on the part of a defendant who published defamatory information. It was accurate to say that "[a]t common law, libel was a strict liability tort that did not require proof of falsity, fault, or actual damages."[151] This is no longer true. The rules began to change in 1964 in *New York Times Co. v. Sullivan*.[152]

b. *New York Times v. Sullivan*

By any fair standard, the United States Supreme Court's decision in *New York Times Co. v. Sullivan*[153] is a true landmark. It began the process of reconciling traditional defamation law with the constitutional demands of the First Amendment. So powerful has been the force of *New York Times Co. v. Sullivan* that the decision and its progeny have utterly transformed the law of defamation. It is impossible to think about any libel or slander claim in a complete way without positioning the facts within the matrix of principles that have evolved from *New York Times Co. v. Sullivan* and later decisions. Those cases today exert a dominant force on the analysis of whether and to what extent the plaintiff must prove that the defendant was at fault with respect to the falsity of the defamatory statement and whether damages may be presumed rather than proved.

An Advertisement in Support of the Civil Rights Movement. Justice William J. Brennan, Jr. delivered the opinion of the court in *New York Times Co. v. Sullivan*.[154] As he explained the suit, he said that the Court was required "to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[155] Turning to the facts of the lawsuit, Justice Brennan wrote:

> Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. [His duties included supervision of the Police Department.]. . . . He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes . . . a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. . . .
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> Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement . . . [relating to the civil rights movement for

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[151] *Mathis v. Cannon*, 573 S.E.2d 376, 380 (Ga. 2002).

[152] 376 U.S. 254 (1964).

[153] *Id.* at 254.

[154] *Id.*

[155] *Id.* at 256.

racial equality.]. . . .

> The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. . . .
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> Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. . . .
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> . . . .
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> It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. . . . Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.
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> [Respondent was not mentioned by name.] On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. . . . [156]

Traditional Libel Law. Turning, then, to the proceedings in the Alabama courts, Justice Brennan explained:

> The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous *per se*" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. . . .
>
> Under Alabama law as applied in this case . . . [o]nce "libel *per se*" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. . . . [157]

"Uninhibited, Robust and Wide-Open." Justice Brennan then began to lay the intellectual foundations on which the modern of law defamation would be built. He stated:

> The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.". . . . Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, [274 U.S. 357 (1927)], gave the principle its classic formulation:

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[156] *Id.* at 256–59.

[157] *Id.* at 262–67.

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.
>
> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.
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> . . . . As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.". . . . In *Cantwell v. Connecticut*, 310 U.S. 296, the Court declared:
>
> > In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> [The] erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive". . . .[158]

The Defense of Truth is Not Sufficient. Justice Brennan then turned to the question of what these principles of free expression mean to the law of defamation, writing:

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[158] *Id.* at 270–73.

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Presumably a person charged with violation of [a criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case — without the need for any proof of actual pecuniary loss — was one thousand times greater than the maximum fine provided by the Alabama criminal statute. . . . And since there is no double jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. . . .
>
> The state rule of law is not saved by its allowance of the defense of truth. . . . A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.[159]

The "Actual Malice" Standard. Justice Brennan's opinion for the court then laid down the rule for which *New York Times Co. v. Sullivan* has become famous:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts, is found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). . . . On appeal the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows:
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> > [I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance

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[159] *Id.* at 277–79.

> the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.
>
> . . . .
>
> We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. . . . [160]

Failure to Meet the Standard. The court then returned to the facts of the pending case to measure them against the constitutional standard:

> . . . [W]e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.
>
> As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement. . . ." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct" — although respondent's own proofs tend to show that it was — that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point — a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction

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[160] *Id.* at 279–83.

drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that it is required for a finding of actual malice. . . .

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. . . . There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements . . . did not even concern the police. . . . The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they do not on their face make even an oblique reference to respondent as an individual. . . .

. . . . The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. . . . We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official respon-

sible for those operations. . . . [161]

The Vote: 9-0. Five justices (Warren, C.J., and Clark, Harlan, Stewart, and White, JJ.) joined Justice Brennan's opinion, which reversed the judgment of the Alabama Supreme Court and remanded the case for further proceedings. Justices Hugo Black and Arthur Goldberg filed concurring opinions, each of which would have categorically denied any action for defamation to a public official based on public conduct. Justice William O. Douglas joined in both of the concurring opinions.

c. Who Is a Public Official?

"Public Official" Versus "Public Employee." The "actual malice" requirement does not apply to every defamation plaintiff who is on the government payroll. Thus, not every "public employee" is a "public official." For example, in *Anaya v. CBS Broadcasting Inc.*,[162] a federal court in New Mexico held that a procurement agent employed by a government-run defense lab was not a public official.

The Test for Defining "Public Official." "It is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[163] Thus, the term may apply to the executive director of a housing authority[164] or a lottery.[165]

Ultimately, the test is whether the "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees."[166]

Courts have often interpreted the public official category expansively. For example, police officers of all varieties are routinely classified as public officials.[167] Depending on the facts, lower echelon employees, such as a county surveyor,[168] a teacher who is also the school's athletic director,[169] a state university's director of the Office of Community Standards,[170] or a child protective services specialist,[171] may all be deemed to be public officials.

Former Public Officials. A former public official is subject to the actual malice

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[161] *Id.* at 285–92.

[162] 626 F. Supp. 2d 1158 (D.N.M. 2009).

[163] *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

[164] *See Ortego v. Hickerson*, 989 So.2dSo. 2d 777 (La. Ct. App. 2008).

[165] *See Cloud v. McKinney*, 228 S.W.3d 326 (Tex. App. 2007).

[166] *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

[167] *See Smith v. Huntsville Times Co., Inc.*, 888 So.2dSo. 2d 492 (Ala. 2004); *Tomkiewicz v. Detroit News, Inc.*, 635 N.W.2d 36 (Mich. Ct. App. 2001).

[168] *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 814 (Tex. 1976).

[169] *See Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182, 186–87 (Tex. App. 1993).

[170] *See Fiacco v. Sigma Alpha Epsilon Fraternity*, 528 F.3d 94 (1st Cir. 2008).

[171] *See Villarreal v. Harte-Hanks Communications, Inc.*, 787 S.W.2d 131, 133–35 (Tex. App. 1990).

requirement if the allegedly defamatory statement relates to his or her performance while in office.[172]

Relationship to Public Performance. The actual malice rule applies to public officials only if the defamatory statement relates to the official's qualifications. "[A] statement that the governor drinks himself into a drunken stupor at home every night much more clearly affects his qualifications than a statement that a tax assessor keeps a secret collection of pornographic pictures."[173]

d. Treating Public Figures the Same as Public Officials

Soon after *New York Times Co. v. Sullivan* was decided, the actual malice rule was expanded to cover not only "public officials," but also "public figures." As recounted in *Mathis v. Cannon*[174] by the Supreme Court of Georgia:

> [I]n *Curtis Publishing Co. v. Butts*, [388 U.S. 130 (1967)] a majority of the Court applied the *New York Times* rule on actual malice to criticism of "public figures," defined as individuals who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." The Court found that Wally Butts, the University of Georgia athletic director, had attained his status as a public figure by his position alone; the second plaintiff, a retired army officer, had achieved public figure status "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy," the racial integration of the University of Mississippi. The rationale for extending the constitutional privilege to protect criticism of public figures was the increasingly blurred distinctions between the governmental and private sectors: "In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government."[175]

Problem 3-5: The Law Clerk at the State Supreme Court

Jordan Kelly thought that he had landed a great job when he was offered a clerkship by a justice of the state supreme court. The pay was low, about one-third of what a top law school graduate could make at a big law firm. But the prestige was high.

Clerking for a supreme court justice meant assisting the justice with research and writing in the cases that came before the court, and recommending how disputed issues should be decided. A top-flight judicial clerkship was the best credential anyone could earn right out of law school. A clerkship at the state high court had long-term cachet. And after the one year of economic sacrifice while

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[172] *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

[173] Restatement (Second) of Torts § 580A cmt. b (1977).

[174] 573 S.E.2d 376, 381 (Ga. 2002).

[175] *Id.* at 381.

clerking, clerks who accepted offers from big firms were phased in at second-year associate salaries and sometimes were paid handsome "signing bonuses." That was a great plus, but it is also where the problem started.

Kelly started working at the court the Tuesday after Labor Day. During the first week, he never came close to thinking about a pending case. The entire four days were taken up with an "orientation" program for the fourteen new clerks who would work for the seven justices on the supreme court. The program focused on judicial ethics, online legal research, judicial writing styles, data security, and court protocol.

The following day (Saturday), a story broke in the state's leading newspaper, The Capital Bulletin, which claimed that several supreme court clerks had accepted obscenely large signing bonuses from large law firms that had cases pending before the state supreme court. It was not clear whether the clerks who were involved were members of the last clerkship "class" (who had just finished their clerkship year) or members of the new clerkship class (who were just starting). The paper did not name names, but it quoted anonymous "reliable sources." The story quickly triggered a weekend blizzard of criticism that ended up being directed mainly at the justices of the state supreme court, although the justices' clerks were condemned, too.

Bloggers and talk show hosts had a field day. Kelly received an endless stream of calls and text messages from former classmates wanting to know what was going on. He said that he did not know who was involved, or even whether there was any truth to the allegations.

On Monday, Kelly found his picture and photos of the other thirteen new law clerks on the front page of The Capital Bulletin. Apparently the names of the clerks had been assembled from a press release the court had issued about the diversity of the new clerkship class. The photos seemed to have been gathered from Facebook and MySpace, or perhaps from the "Entering Class" booklets that had been published at some of the law schools the clerks had attended. The Monday article stuck to its original story, but it still did not name names as to which clerks had accepted the enormous signing bonuses.

As a result of these events, Kelly's year at the supreme court started out with a fiasco. All of his former classmates and professors were speculating about whether he was involved in the scandal. Kelly has not yet lined up a post-clerkship job, and he now realizes that it will not be as easy as he thought it would be. Rather than the luster of an honorable supreme court clerkship, he will be tainted by association with a corruption scandal.

If Kelly sues the Bulletin for defamation, will he able to prove that its stories defamed him? And, if so, will he have to prove that the editors acted with actual malice?

e. Proving "Actual Malice"

(1) The Meaning of "Actual Malice"

Focus on the Defendant's Subjective State of Mind. Actual malice is a state of mind about the falsity of a defamatory statement. The only way to establish actual malice is to prove that the defendant knew that the statement was false or acted with reckless disregard for whether or not it was false. In either case, the test is subjective. "Knowledge" of falsity means that the defendant subjectively knew that the statement was false. It is not enough that a reasonably prudent person would have known, or should have known, that the statement was false. Likewise, recklessness in the context of actual malice is a subjective test. Only persons who publish defamation with subjective "awareness of probable falsity" are reckless.[176]

Erroneous Beliefs Honestly Held. The statement of an erroneous belief that is honestly held, which has some factual support, cannot ordinarily be found to have been uttered with actual malice. For example, in *Peter Scalamandre & Sons, Inc. v. Kaufman*,[177] the defendant asserted that the plaintiff conducted "an illegal haul and dump operation" and that the "people of Texas are being poisoned." Because statements were shown at trial to be the defendant's honest beliefs and were not so without basis as to constitute reckless disregard for the truth, the Fifth Circuit held that the plaintiff's cause of action failed.

Similarly, in *Sparks v. Peaster*,[178] the Georgia Court of Appeals held that a city manager did not act with actual malice when he said that a resident had a serious cocaine habit. The evidence showed that the plaintiff was confrontational and sometimes irrational, and that police officers had given the manager reason to believe that the plaintiff had a problem with drugs.

Inattention to the Truth. One consequence of focusing defamation litigation on the issue of actual malice is that attention shifts from whether the statement was true or false to what the defendant subjectively knew. This may make it impossible for the plaintiff to clear his or her name by obtaining a ruling on falsity.

Disruption of the Editorial Processes. In cases involving media defendants, litigation of the actual malice issue may be highly disruptive to editorial processes. The publisher's state of mind must normally be inferred from circumstantial evidence. Consequently, plaintiffs often seek discovery of information about such matters as communications between reporters and editors, facts known but not used in a story, the pressures under which the work was prepared, and the identity and credibility of the defendant's sources.

"Actual Malice," Not "Express" or "Common-Law" Malice. "Actual malice," as used in defamation cases, is a legal term of art which must be clearly distinguished from "express" or "common-law" malice. The fact that statements are uttered with spite, ill will, vindictiveness, or motives of revenge says nothing about whether those statements are true or false. Therefore, a showing that the

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[176] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

[177] 113 F.3d 556, 562 (5th Cir. 1997).

[178] 581 S.E.2d 579 (Ga. Ct. App. 2003).

defendant was actuated by bad motives (sometimes called "express malice" or "common-law malice") is not, by itself, sufficient to satisfy the actual-malice requirement.

Jury instructions may not permit a finding of actual malice to be based merely upon proof of hatred, enmity, desire to injure, or the like. As the United States Supreme Court observed in *Garrison v. State of Louisiana*,[179] a criminal defamation case:

> [T]he great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule . . . permitting a finding of [actual] malice based on an intent merely to inflict harm, rather than to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.". . . . Moreover, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives.". . . .
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> . . . [O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. . . . [The Constitution protects even] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[180]

Of course, in many instances, if evidence of express malice is coupled with facts showing that the defendant lacked an honest belief in the truth of the statements, there may be "actual malice" sufficient to support a finding of liability, as well as facts that encourage a jury to return a large judgment.

Lack of Thorough Investigation. Failing to thoroughly investigate a story may be negligence, but it does not, by itself, amount to actual malice. For example, in *St. Amant v. Thompson*,[181] the Supreme Court held that relying on a single, perhaps unreliable, source without attempting to verify the accuracy of statements was not "reckless" within the meaning of the "actual malice" standard. However, the *St. Amant* Court did acknowledge that:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in

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[179] 379 U.S. 64 (1964).

[180] *Id.* at 73–75.

[181] 390 U.S. 727 (1968).

> circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[182]

Failure to Consult the Plaintiff or Present an Objective View. There is ordinarily no obligation on the defendant to talk to the subject of the defamatory communication to obtain that person's version of the events described.[183] Nor is actual malice proved by the fact that the defendant failed to present an objective picture of events.[184]

Departure from Journalistic Standards. In *Harte-Hanks Communications, Inc. v. Connaughton*,[185] the Supreme Court explained that "a public figure plaintiff must prove more than an extreme departure from professional standards and . . . a newspaper's motive in publishing a story — whether to promote an opponent's candidacy or to increase its circulation — cannot provide a sufficient basis for finding actual malice."[186] Thus, it is not surprising that factual inaccuracies alone do not prove actual malice,[187] nor does evidence that the reporting behind an article was speculative or even sloppy.[188]

Anticipation of Financial Gain. The fact "[t]hat a defendant publishes statements anticipating financial gain [by itself] . . . fails to prove actual malice" for "a profit motive does not strip communications of constitutional protections."[189]

Failure to Retract. A defendant's subsequent conduct often does not establish the defendant's earlier state of mind. Thus, as the opinion in *New York Times* indicates, a failure to retract an allegedly defamatory statement may be insufficient to establish actual malice, particularly where it is dubious that the statement referred to the plaintiff. However, if a defendant who refuses to retract was aware at the time of the original publication that its assertions were wrong, an action will lie. For example, in *Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc.*,[190] an author's notes showed that she knew her article was incorrect.

Use of Recanted Statements. In *WJLA-TV v. Levin*,[191] an orthopedist was accused of sexually assaulting his female patients and using inappropriate medical procedures. The court held that the television station's use of the statements of a physician, which the station knew the physician had retracted, was sufficient to support a jury finding of actual malice. A $2 million award of presumed damages was upheld.

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[182] *Id.* at 732.

[183] *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

[184] *See New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

[185] 491 U.S. 657 (1989).

[186] *Id.* at 665.

[187] *See Time, Inc. v. Pape*, 401 U.S. 279 (1971).

[188] *See Oliver v. Village Voice, Inc.*, 417 F. Supp. 235, 238 (S.D.N.Y. 1976).

[189] *See Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 561 (5th Cir. 1997).

[190] 708 F.2d 944 (5th Cir. 1983).

[191] 564 S.E.2d 383 (Va. 2002).

0056 [ST: 149] [ED: 10000] [REL: 1] **Composed:** Thu Apr 29 08:21:06 EDT 2010
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(2) Standard of Proof and Judicial Review

Clear and Convincing Evidence of Actual Malice. Although other issues in a defamation action, such as proof of damages, are normally subject to a preponderance-of-the-evidence standard of proof,[192] actual malice must be established by clear and convincing evidence as matter of constitutional requirements.[193] This heightened standard of proof applies not only to jury determinations, but to preliminary rulings on motions for summary judgment.[194] Therefore, it is difficult for a plaintiff to survive a defendant's motion for summary disposition, for it is necessary to adduce evidence from which actual malice could be found by clear and convincing evidence.

Appellate Review of Actual Malice Findings. Whether the evidence supports a finding of actual malice is a question of law. In determining whether the constitutional standard is satisfied, the trial court, and every reviewing court, must consider the factual record in full to ascertain whether there is clear and convincing evidence.[195] Thus, a finding of actual malice is not entitled to the deference normally extended to findings of fact. This rule confers its substantial benefits exclusively on defendants because independent appellate review occurs only when the jury finds for the plaintiff. The no-deference rule, coupled with the clear-and-convincing-evidence standard, may do more to provide "breathing space" for free expression than the actual malice standard itself.

The independent review requirement does not extend to all elements of a defamation cause of action. For example, a jury's finding of falsity or substantial truth must be accepted if supported by substantial evidence.[196]

(3) Applying Supreme Court Principles

(a) Example: *Freedom Newspapers of Texas v. Cantu*

A typical state court decision applying United States Supreme Court principles is *Freedom Newspapers of Texas v. Cantu*.[197] *Cantu* nicely illustrates the challenges of proving actual malice in reporting. In that case, there was a debate between the candidates for sheriff in a predominantly Hispanic, south Texas county. The Democratic candidate (Cantu) was Hispanic and the Republican candidate (Vinson) was Anglo. The Democratic candidate urged during the debate that he was the best candidate, stating in part:

> Mr. Vinson is a nice man, but he is an instructor, he is not a sheriff. You have to have the right character to be a sheriff and you have to delegate authority and it does not stop there. You have to be bi-cultural to

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[192] *But see Hornberger v. Am. Broad. Companies, Inc.*, 799 A.2d 566, 578 (N.J. Super. Ct. App. Div. 2002).

[193] *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989).

[194] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–56 (1986).

[195] *See Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485 (1984).

[196] *See Lundell Mfg. Co., Inc. v. Am. Broad. Companies, Inc.*, 98 F.3d 351 (8th Cir. 1996).

[197] 168 S.W.3d 847 (Tex. 2005).

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> understand what is going on in our neighborhoods, where there is a lot of burglaries, how are you going to relate to these people — in Spanish — and make them understand that they need to stop or we are going to put a stop to it in their neighborhoods. . . . You have to be able to understand, you have to have grown up here to understand that.[198]

The Offending Headline. Afterwards, a newspaper article about the debate carried the following provocative headline:

> Cantu: No Anglo can be sheriff of Cameron County.[199]

Cantu took exception to the article and its headline because he had never used the word "Anglo." In response to his protest, the newspaper published a second article with a clarifying headline stating, "Sheriff candidate says racial issue wasn't the point."[200] After winning the election, Cantu sued the newspaper for defamation. Eventually, a unanimous Texas Supreme Court concluded that:

> The summary judgment record before us establishes as a matter of law that the Herald's reporter thought he was reporting the gist of what Cantu said. Accordingly, any error in the Herald's articles evidences at most negligence, not actual malice. We reverse the court of appeals' judgment and render judgment that Cantu take nothing.[201]

Words Never Used. In explaining its decision, the Texas Supreme Court first concluded, consistent with United States Supreme Court precedent, that the fact that the sheriff did not use the exact words attributed to him was not evidence of actual malice. The court wrote:

> From the day the articles appeared through oral arguments in this Court, Cantu's primary complaint is that he never used the words attributed to him by the Herald in its initial headline and first sentence. The Herald concedes this is true. The court of appeals concluded this was some evidence of malice, as "Pierce attended the debate and heard the candidate's comments, and knew that Cantu did not say that 'No Anglo can be sheriff of Cameron County.' "
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> But unlike the court of appeals, the Herald did not put this last phrase in quotation marks. While some of Cantu's statements at the debate were placed in quotation marks, this one was not. Cantu discounts this distinction, arguing the colon used in the headline is the "equivalent" of quotation marks.
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> In *Masson v. New Yorker Magazine, Inc.*,[202] the United States Supreme Court held that placing a reporter's words in a speaker's mouth may be evidence of malice in some circumstances. As the Court noted:

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198 *Id.* at 850.

199 *Id.*

200 *Id.* at 851.

201 *Id.* at 859.

202 [n.15] 501 U.S. 496, 519–20 (1991).

0058 [ST: 149] [ED: 10000] [REL: 1] **Composed:** Thu Apr 29 08:21:07 EDT 2010
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> In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author.
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> But the Court rejected the notion that every alteration of a speaker's words was some evidence of actual malice. The Court noted that reporters who rely on notes must often reconstruct a speaker's statements, and even those who rely on recordings can print statements verbatim "in only rare circumstances" due to space limitations and editorial judgments.
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> Instead, the Court held that an altered statement could constitute some evidence of actual malice if a reasonable reader could understand the passage as the speaker's actual words (not a paraphrase), and the alteration was material. . . .
>
> In this case, three rather apparent clues would lead a reasonable reader to conclude the Herald was interpreting Cantu's remarks rather than quoting them verbatim. First, such a reader would note that quotation marks were placed around eight of Cantu's statements in the first article, but not the one at issue.
>
> Second, a reasonable reader could not miss the pattern of the articles, in which a summary of what each candidate said appears in one paragraph . . . followed by one or two paragraphs of explicit quotations to support the summary. In this context, a reasonable reader would understand the first headline and sentence to be a paraphrase of Cantu's remarks, with his actual statements following in quotations.
>
> Finally, while both articles were allegedly defamatory, the Herald's second article reported Cantu's response that "I did not say that an Anglo could not be sheriff." Nothing in the follow-up article contradicts that claim. To the contrary, the report that "some observers believe" Cantu had made "discriminating remarks" at the debate clarified that the issue was the implicit rather than explicit meaning of what he said.
>
> Based on the entire context of the articles Cantu claims were defamatory, we hold that a reasonable reader would have understood the Herald's reports to be a paraphrase or interpretation of Cantu's remarks. Accordingly, proof that he did not make the exact remark attributed to him, standing alone, is no evidence of actual malice.[203]

Rational Interpretation of Ambiguities. Elaborating on the same theme, the Texas Supreme Court explained:

> Of course, deliberately attributing a statement to a public figure that the latter never made may be defamatory whether or not it is in quotation marks. . . .
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> Cantu argues that the Herald made a deliberate and material change in meaning when it converted his remarks about his bilingual and bicultural

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[203] 168 S.W.3d at 854–55.

attributes into remarks about racial and ethnic ones. For summary judgment purposes, we assume the truth of Cantu's assertion that he intended only the former. Further, we agree with Cantu that reasonable jurors could conclude from the Herald's report that he was accused of intending the latter, and that the difference between the two is material.

But evidence that the Herald's report was mistaken, even negligently so, is no evidence of actual malice. Cantu must present some evidence that the Herald misinterpreted his remarks on purpose, or in circumstances so improbable that only a reckless publisher would have made the mistake. "An understandable misinterpretation of ambiguous facts does not show actual malice."

In *Time, Inc. v. Pape*, the Supreme Court addressed a similar defamation claim in which the words of a source were undisputed but their meaning was ambiguous.[204] In that case, a report on police brutality by the U.S. Commission on Civil Rights cited allegations from a civil lawsuit asserting misconduct by Chicago police. In its article on the Commission's report, Time magazine stated the allegations as fact, omitting the word "alleged" that appeared in the report.

But while the Commission's report did list the incident as "alleged," in fact the report was "extravagantly ambiguous" about whether the allegations were true. The Commission summarized the contents of the report as "the alleged facts of 11 typical cases of police brutality," though of course none could be "typical cases" of brutality unless they were true. While the report stated that the truth of each incident was a matter for the courts, the Commission cited no other evidence of brutality to support the changes it recommended. In this context, the Supreme Court held that reporting the Chicago incident as factual was a rational interpretation of what the Commission's report impliedly said:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times.* To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.[205]

In this case, Cantu's remarks at the debate also "bristled with ambiguities." Cantu argues that his comments had nothing to do with race, as anyone can be both bilingual and bicultural. But the context here was a debate in which Cantu was distinguishing himself from his opponent. Cantu

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[204] [n.25] 401 U.S. 279 (1971).

[205] [n.31] *Id.* at 290.

> conceded at his deposition that he knew his opponent was not Hispanic, but did not know whether he spoke Spanish; at the least, this might suggest he was using "bilingual" to indicate the former rather than latter. And Cantu does not explain why his opponent was not "bicultural," despite claiming many more years of experience in law enforcement in the Rio Grande Valley than Cantu.
>
> . . . .
>
> While Cantu never used the explicit words stated in the Herald's initial article, the standard is whether that summary was a rational interpretation of what he said.[206] Pleas for ethnic solidarity or racial prejudice are not always made in explicit terms. As Justice Peeples noted in analyzing such a plea in the context of a jury argument, "[t]o permit the sophisticated ethnic plea while condemning those that are open and unabashed would simply reward counsel for ingenuity in packaging."[207] Similarly, holding that headlines like the one here are actionable unless candidates make an explicit ethnic plea would reward candidates who make implicit ones by punishing the press for reporting on it.
>
> . . . . The difference in the candidates' ethnic backgrounds were apparently obvious to those who attended the debate, and as we have noted the terms Cantu used to distinguish himself are similar to those sometimes used for ulterior purposes. Further, while the record does not reflect the composition of the audience at the debate, the wider audience is a matter of record — according to the U.S. Census taken in the year of the election, 84.3% of Cameron County residents were persons of Hispanic or Latino origin. If Cantu's only purpose was to emphasize his community ties, he could have chosen less ambiguous terms.
>
> . . . . Based on the entire context of the debate, we hold that the Herald's articles were a rational interpretation of Cantu's remarks at the debate. Accordingly, the articles standing alone were not evidence of actual malice.[208]

Evidence of Dislike for the Plaintiff. The Texas Supreme Court next concluded that out-of-court statements indicating that the officers of the newspaper disliked Cantu were not evidence of actual malice.

> . . . Cantu detailed several out-of-court statements by Herald reporters to the effect that the officers of the paper "don't like you" and "had it out" for him. Assuming the truth of this hearsay, it only establishes ill will, which is not proof of actual malice. Jurors cannot impose liability on the basis of a

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[206] [n.33] *Pape*, 401 U.S. at 290.

[207] [n.34] *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 862–63 (Tex.App. — San Antonio 1990, writ denied) (holding that argument by plaintiff's counsel that "by golly there comes a time when we have got to stick together as a community" was incurable when plaintiff and 11 members of jury had Spanish surnames).

[208] 168 S.W.3d at 855–57.

> defendant's "hatred, spite, ill will, or desire to injure."[209] "[E]vidence of pressure to produce stories from a particular point of view, even when they are hard-hitting or sensationalistic, is no evidence of actual malice." "[A]ctual malice concerns the defendant's attitude toward the truth, not toward the plaintiff." While a personal vendetta demonstrated by a history of false allegations may provide some evidence of malice, free-floating ill will does not.[210]

Rejection of Alternative Interpretation. The Texas Supreme Court also dismissed the idea that rejection of an alternative interpretation of the events is evidence of actual malice. The court explained:

> . . . [T]he court of appeals pointed to the second Herald article as proof that the paper changed nothing after learning of Cantu's objections and receiving an audiotape of the debate. "The mere fact that a defamation defendant knows that the public figure has denied harmful allegations or offered an alternative explanation of events is not evidence that the defendant doubted the allegations." In the world of politics, "such denials are so commonplace . . . they hardly alert the conscientious reporter to the likelihood of error."[211] The Herald's prompt follow-up article quoting Cantu's version of his remarks and the opinions of his supporters is evidence of the absence of actual malice, not the opposite. . . . [212]

Subsequent Events. The court next found that subsequent events had little significance to the issue of actual malice. It wrote:

> [The court of appeals] . . . pointed to the questions [that the newspaper editor] Cox raised after reading the first article as some evidence that the newspaper entertained doubts about its veracity. But "the focus of the actual-malice inquiry is the defendant's state of mind during the editorial process. Evidence concerning events after an article has been printed and distributed, has little, if any, bearing on that issue."[213]

Expert Opinions on Reporting Bias. Finally, the Texas Supreme Court concluded that expert opinions on whether reporting is biased are not useful. It explained:

> . . . [T]he court of appeals pointed to the opinions of an "expert journalist" criticizing the Herald's handling of the story and finding a consistent pattern of biased reporting regarding Cantu. But actual malice inquires only into the mental state of the defendant, and the expert claimed no particular expertise in that field. Nor was his opinion based on anything other than the articles themselves and the circumstantial evidence already

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[209] [n.39] *Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974).

[210] 168 S.W.3d at 857–58.

[211] [n.44] *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 n. 37 (1989).

[212] 168 S.W.3d at 858.

[213] *Id.*

discussed. Even assuming this evidence was competent, his opinions cannot show that the Herald knew its articles were not a rational interpretation of Cantu's remarks.[214]

The Role of the Press in the Internet Age. In summary, the Texas Supreme Court explained:

> "[P]erhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like." While an increasing number of such "doings" can be viewed in full by those with Internet access and sufficient time, most members of the public rely on the myriad of other news outlets — traditional and otherwise — to provide them with a summary. As a result, press reports generally must include not a transcript of what was said but a distillation and analysis of its implications.
>
> "Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices." Since the founding of the nation, political candidates have complained that those choices sometimes appear to adopt the most unflattering and controversial interpretation possible. But nothing in the Constitution requires the press to adopt favorable attitudes toward public figures.[215]

Problem 3-6: The Racial Profiling Story

The producers of a television "news magazine" decided to do a show on racial profiling. They hired three African-American teenagers to drive a new Lincoln Town Car after dark on the largely vacant downtown streets of a large city. The objective was to see if the teenagers would be stopped by police and how they would be dealt with.

When the Lincoln changed lanes without signaling, it was pulled over by two white police officers in a cruiser. Another police car with two more white officers soon arrived. The officers asked the teenagers for identification. Things were said by the officers and the teenagers. Ultimately, the teenagers were ordered out of the car and frisked. A search of the vehicle ensued, which included the opening of the trunk and of packages located in the backseat. No contraband was found. After that, the teenagers were released. Most of these events were captured by two cameras hidden in the Lincoln and by a third camera in a van which photographed the events at a distance.

The footage relating to the stop comprised about nine minutes of the 22-minute segment of the televised program which dealt with racial profiling. The segment was called "Driving While African-American." While the video of the stop was shown on the program, it was narrated by the program host, Benjamin Franklin Bernstein, an "investigative journalist" who had gained a reputation for "over the top" reporting and use of inflammatory language. As the footage was shown, a

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[214] *Id.* at 858–59.

[215] *Id.* at 859.

professor from Joseph Story School of Law discussed the action. The comments were recorded sometime after the actual police stop but before the show was televised. The professor had seen only part of the footage related to the stop. On the program segment that was aired, the professor said that the search of the car was illegal under the Fourth Amendment and that the footage appeared to be a casebook example of racial profiling. Bernstein likewise opined, "police target African-Americans when they are driving simply because they are black." Viewers were told about how the producers had hired the teenagers to drive the Lincoln as an "experiment" to see how the police would react.

The material about the stop and search of the Lincoln was sandwiched between two other segments of the program which offered egregious examples of racial profiling. In the one instance, an African-American teenager was killed during a traffic stop. In the other case, police shot an African-American husband when they were called to a home to investigate domestic violence that was in progress.

After the program aired, it was widely discussed on the web and in the press. Many experts took the position that the Lincoln was stopped and investigated lawfully. Other experts asserted that the police officers had acted unconstitutionally and that a car full of white teenagers would not have been stopped for changing lanes without signaling.

The four officers involved in the search of the Lincoln were not named on the program, although the city and the police department to which the officers belonged were named. The images of the search were sufficiently clear that the officers could be identified by persons who knew them.

After the program aired, the police department conducted an investigation of the stop. That action caused the officers considerable distress and embarrassment. Although no disciplinary action was taken against the officers, it seems clear that their connection to the racial profiling story has hurt their careers.

As a result of their fathers' roles in the events in question, children of three of the four officers have been subjected to abuse by other students at schools where they are enrolled.

The officers have consulted you about whether they can bring a suit for fraud or defamation against the producers of the news magazine or persons associated with that production. Please prepare a preliminary analysis of the issues.

2. Category II: Private Persons Suing with Respect to Matters of Public Concern

After the *New York Times* actual-malice requirement was extended to public figures, a plurality of the court voted to go even further. *Rosenbloom v. Metromedia, Inc.*[216] held that actual malice had to be proved in any case involving a "matter of public concern." However, *Rosenbloom* was soon repudiated in *Gertz v. Robert Welch, Inc.*[217]

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[216] 403 U.S. 29 (1971).

[217] 418 U.S. 323 (1974).

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a. *Gertz v. Robert Welch, Inc.*

A Lawyer Defamed as a "Communist-Fronter." In *Gertz*, a youth (Nelson) was shot and killed by a police officer (Nuccio), who was later convicted of homicide. The youth's family retained attorney Elmer Gertz (later the "petitioner") to represent them in civil litigation arising from the death. In this capacity, Gertz attended the coroner's inquest into the boy's death and initiated actions for damages. However, he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding.

Notwithstanding Gertz's minor connection with the criminal prosecution of Nuccio, an article in respondent's magazine (American Opinion) portrayed him as an architect of a plan to "frame" the police officer. American Opinion was an outlet for the views of the anti-communist John Birch Society.

The article contained serious inaccuracies. The implication that petitioner had a criminal record was false. There was no evidence that he or an organization to which he belonged had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." Moreover, he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society." The managing editor of American Opinion had made no effort to verify or substantiate the charges against petitioner, but had nevertheless appended an editorial introduction stating that the author had "conducted extensive research into the Richard Nuccio Case."

The District Court denied the defendant's motion to dismiss petitioner's libel action. After the evidence was presented, it "ruled in effect that petitioner was neither a public official nor a public figure," and it submitted the issue of damages to the jury, which awarded $50,000. On further reflection, the District Court concluded that the *New York Times* standard applied and entered judgment for defendant notwithstanding the jury verdict. This action was affirmed by the Court of Appeals for the Seventh Circuit, on the basis of *Rosenbloom v. Metromedia, Inc.*[218]

The Standard for Public Persons. Justice Lewis F. Powell, Jr. delivered the opinion for the Court. The opinion charted a new direction for an important range of cases in defamation law. Justice Powell wrote:

> The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. . . .
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name "reflects no more than our basic concept

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[218] 403 U.S. 29 (1971).

> of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. . . ."
>
> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . .
>
> The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classified as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. . . . We think that these decisions are correct- . . . . For reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.[219]

Reasons for Treating Private Persons Differently. Justice Powell then explained why private persons stand on different footing than public persons:

> The first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> More important . . . , there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . .
>
> Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no

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[219] 418 U.S. at 332–43.

> purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society.". . . . He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.
>
> For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. . . . [220]

Rejection of Rosenbloom. Justice Powell then explained why the Court's decision in *Rosenbloom* had erred.

> The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest [in compensating harm to reputation] to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not — to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government.". . . . We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems

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[220] *Id.* at 344–46.

> unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.[221]

New Rule for Private Persons Suing with Respect to Matters of Public Concern. Justice Powell then set the standards for what have become known as *Gertz*-type cases, defamation suits involving private persons and matters of public concern:

> [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. . . . .
>
> . . . [W]e endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.
>
> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. . . . [S]tates have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.
>
> . . . . We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. . . . [T]here need be no evidence which assigns an actual dollar value to the injury.
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> . . . . Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-

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[221] *Id.* at 346.

> censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.[222]

Application to the Facts in Gertz. Justice Powell then turned to an analysis of the facts in *Gertz* under the new rules:

> [R]espondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "*de facto* public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.
>
> Respondent's characterization of petitioner as a public figure raises a different question. . . .
>
> Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.
>
> In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to

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[222] *Id.* at 346–50.

characterize petitioner as a public figure for the purpose of this litigation.

> We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.[223]

A Bare Majority That Reconfigured the Law Nationally. Justice Powell's opinion was joined by Potter Stewart, Thurgood Marshall, Harry Blackmun and William Rehnquist, JJ. Justice Blackmun stated in a concurrence that he found some difficulties with the majority opinion, but that he joined in it to attain a "definitive ruling." Chief Justice Warren Burger dissented in an opinion which indicated that he disapproved of the requirement of negligence for private defamation. Justice William O. Douglas dissented on the basis of his absolute-privilege theory, and would have at least retained the *Rosenbloom* rule. Justice William J. Brennan, Jr. dissented and would have retained the *Rosenbloom* rule. Justice Byron White dissented and would have retained strict liability for private defamation.

b. Applying the *Gertz* standards

Actual Malice Versus Negligence in Gertz-type Cases. The great majority of jurisdictions have accepted *Gertz*'s invitation to require only a showing of negligence in cases brought by private persons suing with respect to matters of public concern. For example, in *Rudloe v. Karl*,[224] Florida State University was sued for publishing in the "Alumni Notes" section of its magazine material submitted by one alumnus which insinuated that another alumnus had stolen a priceless aquatic specimen from a professor and had later offered it for sale. In reversing dismissal of the claim, the Florida District Court of Appeal wrote:

> Sovereign immunity [under Florida law] is no bar to appellants' negligent defamation claim. "First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct.". . . . Here, because of the common law duty publishers owe non-public figures, the . . . complaint adequately stated a claim for relief against FSU in alleging that FSU negligently published defamatory material about Mr. Rudloe and Gulf Specimen.[225]

However, occasional decisions have mandated a greater showing of fault as to falsity. For example, there is authority that in Indiana a *Gertz*-type plaintiff must prove actual malice.[226]

The New York Variation of the Culpability Requirement. New York has

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[223] *Id.* at 351–52.

[224] 899 So.2dSo. 2d 1161 (Fla. Dist. Ct. App. 2005).

[225] *Id.* at 1164.

[226] *See Poyser v. Peerless*, 775 N.E.2d 1101 (Ind. Ct. App. 2002).

articulated the culpability requirement for *Gertz*-type cases in unusual terms. "Thus, when the claimed defamation arguably involves a matter of public concern, a private plaintiff must prove that the media defendant 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.' "[227]

Equating Negligent Reference to the Plaintiff with Negligence as to Falsity. Some cases take the position that negligent reference to the plaintiff is the same as negligence as to the falsity of the allegedly defamatory statement. For example, in *Stanton v. Metro Corp.*,[228] an article gave the allegedly false impression that a teenage girl (Stanton), who was pictured in a photograph, was sexually promiscuous. In holding that the girl stated a cause of action for defamation because the article could be understood to defame her, the court wrote:

> [Defendant] Metro argues that Stanton's amended complaint should have been dismissed because she failed to "allege any facts that, if true, would demonstrate that Metro acted with negligent disregard for the truth by juxtaposing the photograph and the article." We disagree. "[P]rivate persons . . . may recover compensation (assuming proof of all other elements of a claim for defamation) on proof that the defendant was negligent in publishing defamatory words which reasonably could be interpreted to refer to the plaintiff." [*New England Tractor-Trailer Training, Inc. v. Globe Newspaper Co.*, 395 Mass. 471, 477, 480 N.E.2d 1005, 1009 (Mass. 1985)]; *see also Restatement (Second) of Torts* §§ 564 cmt. f & 580B cmt. b(5) (1977). Furthermore, " '[i]f the recipient reasonably understood the communication to be made concerning the plaintiff, it may be inferred that the defamer was negligent in failing to realize that the communication would be so understood,' " provided the plaintiff can " 'prove that a reasonable understanding on the part of the recipient that the communication referred to the plaintiff was one that the defamer was negligent in failing to anticipate.' ". . . .[229]

Public Figure Status is a Question of Law. Whether the plaintiff is a public figure is a question of law for the court to decide. Although *Gertz* makes clear that some persons may be public figures for all purposes, the relevant issue is normally whether the plaintiff is a limited-purpose public figure, which means a public figure with respect to the subject matter of the defamatory statement.

Time, Inc. v. Firestone. In *Time, Inc. v. Firestone*,[230] a weekly magazine had inaccurately reported that a wealthy couple had been granted a divorce because of the plaintiff's adultery and cruelty. In fact, the basis for the ruling was "lack of domestication" on the part of both spouses. In addressing the issue of whether the former wife (the "respondent") was a public figure, then-Justice William H. Rehnquist wrote for a majority of the Court:

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[227] *Huggins v. Moore*, 726 N.E.2d 456, 460 (N.Y. 1999) (quoting *Chapadeau v. Utica Observer Dispatch*, 341 N.E.2d 569, 571 (N.Y. 1975)).

[228] 438 F.3d 119 (1st Cir. 2006).

[229] *Id.* at 131–32.

[230] 424 U.S. 448 (1976).

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> Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.
>
> Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause célèbre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz*, however, the Court repudiated this position. . . .
>
> Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. . . . [231] We hold respondent was not a "public figure" for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce.[232]

Examples of Public Figures. Courts have classified as public figures: a politically active city resident;[233] a public restaurant;[234] a Holocaust survivor who authorized a biography;[235] a security guard who granted interviews before he became a suspect;[236] a professional football player;[237] a former U.S. Senate candidate;[238] a Playboy playmate who posed for a photograph;[239] a research scientist and bioterrorism expert who was a frequent commentator on anthrax mailings that killed five persons;[240] and a college dean.[241]

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[231] [n.3] Nor do we think the fact that respondent may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters converts her into a "public figure." Such interviews should have no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial, and we do not think it can be assumed that any such purpose was intended. Moreover, there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution. . . .

[232] 424 U.S. at 453–55.

[233] *See Sparks v. Peaster*, 581 S.E.2d 579 (Ga. Ct. App. 2003).

[234] *See Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82 (Nev. 2002).

[235] *See Thomas v. L.A. Times Comm'ns*, 45 F. App'x. 801 (9th Cir. 2002).

[236] *See Atlanta-Journal Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001).

[237] *See Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979).

[238] *See Williams v. Pasma*, 656 P.2d 212, 216 (Mont. 1982).

[239] *See Vitale v. National Lampoon, Inc.*, 449 F. Supp. 442 (E.D. Pa. 1978).

[240] *See Hatfill v. New York Times Co.*, 532 F.3d 312 (4th Cir. 2008).

Narrow Definition of Public Figure. Some decisions, often quite sensibly, have construed the "public figure" category narrowly. For example, in *Franklin Prescriptions, Inc. v. New York Times Co.*,[242] a federal court in Pennsylvania held that a pharmacy, which used the Internet for informational purposes only and did not take orders over the Internet, was not a limited-purpose public figure in the context of a public controversy about online pharmacies making expensive drugs more accessible.

In *Lundell Manufacturing Co. v. American Broadcasting Companies*,[243] the Eighth Circuit held that a manufacturer of a garbage recycling machine was not a public figure. Although garbage disposal was a matter of public concern, the manufacturer's entry into a contract for the mere sale of the machine to a county was not the injection of the manufacturer into a controversy for the purpose of influencing a public issue. Moreover, the defendant network's conduct in televising the issue did not render the manufacturer a public figure.

In *Bochetto v. Gibson*,[244] a well-known attorney (Bochetto), who had once run for mayor of Philadelphia, alleged that he had been defamed by another attorney, who had filed a legal malpractice complaint against Bochetto and faxed a copy of the complaint to a reporter who wrote a story. The complaint asserted that Bochetto had committed malpractice by failing to disclose an adverse report to a client who was defending two real property quiet-title actions. In discussing whether the faxing of the complaint to the reporter was protected by a qualified privilege, the Pennsylvania Court of Common Pleas wrote:

> [T]he particular controversy giving rise to the defamation claim was a private lawsuit brought against Bochetto by his former client. That Malpractice Action does "not involve a matter of public controversy with foreseeable and substantial ramifications for the members of the general public.". . . . Since the Malpractice Action against Bochetto does not rise to the level of a public controversy, it does not implicate Bochetto as a public figure, and he is a private person for purposes of this litigation.[245]

Involuntary Public Figures. Courts have employed such a bewildering array of tests in grappling with the elusive idea of "involuntary public figure" status that it is difficult to say anything useful about this category. Law professor Joseph H. King, Jr. of the University of Tennessee argues that:

> Rather than continue along a desultory path of trying to reconcile the dissonant drags of status and content in defining the scope of constitutional limitations on state defamation law, . . . [t]he Supreme Court should extend the constitutionally mandated requirement of proof of knowledge or reckless disregard, falsity, and a provably false statement suggesting actual facts to all defamation plaintiffs in all cases without regard to either the

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[241] *See Byers v. Southeastern Newspaper Corp.* 288 S.E.2d 698 (Ga. Ct. App. 1982).

[242] 267 F. Supp. 2d 425 (E.D. Pa. 2003).

[243] 98 F.3d 351 (8th Cir. 1996).

[244] 2006 Phila. Ct. Com. Pl. LEXIS 310 (Pa. C.P. 2006).

[245] *Id.* at *14.

status of the plaintiff or the nature of the content of the defendant's communication.[246]

Private Enterprisers Who Assist or Disrupt the Government. In *Mathis v. Cannon*,[247] the Georgia Supreme Court considered the rules relating to limited-purpose public figures. Addressing the facts before it, the court wrote:

> The [Georgia] court of appeals has adopted a three-part analysis used in federal cases to determine whether an individual is a limited-purpose public figure. Under this analysis, a court "must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff's participation in the controversy."
>
> Applying this analysis, we conclude that Cannon [the majority owner and president of TransWaste Services, Inc., a private entity] is a limited-purpose public figure in the controversy surrounding the recycling facility and landfill in Crisp County. The public controversy concerns the Solid Waste Management Authority of Crisp County's financially unsuccessful operation of its solid waste recovery facility and resulting strain on the county's resources and its taxpayers. After 18 months of operation, the plant was not able to process the solid waste or produce the recyclable materials and commercial compost as projected. As a result, a large amount of solid waste that was collected from other locations for processing at the authority's plant was instead being diverted to the county landfill. The county commission voted to raise property taxes to deal with the costs related to disposing of the county's own waste and expand the county-owned landfill to accommodate the additional solid waste that TransWaste was bringing into the county under its contract with the authority.
>
> In reviewing Cannon's role, we find that he was involved in the public controversy in Crisp County in at least three ways. First, he was a crucial actor in helping the authority obtain the commitments from other county and city governments in south Georgia to provide solid waste for the authority's facility. Without these early commitments, the authority would not have been able to obtain the construction loans necessary to go forward with the project.
>
> Second, Cannon represented the authority in a variety of ways that far exceeded the terms of TransWaste's contract to collect and haul solid waste to Crisp County. As he explained in his deposition, the authority in 1996 was still "just a shell of an authority developing a concept," with no funding, lines of credit, or buildings. "TransWaste would step in to try to help the Authority in whatever way they could, and there are many, many instances of that." Although he described his position as an independent contractor who functioned as "the garbage man of the deal," it is difficult to distinguish between his efforts on behalf of the public authority and his efforts on

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[246] *See* Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of* New York Times v. Sullivan: *Applying the Times for All Seasons*, 95 Ky. L.J. 649, 713 (2007).

[247] 573 S.E.2d 376 (Ga. 2002).

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behalf of his private company. Using his personal contacts with city and county officials developed from selling them heavy-duty equipment, Cannon solicited business for the authority; this solicitation helped generate business for TransWaste as the authority's exclusive hauler. He negotiated the authority's contracts with local governments who provided waste, borrowed money through TransWaste and wrote a check directly to the City of Warner Robins for equipment that the authority had agreed to purchase, wrote and signed correspondence on authority letterhead in his capacity as its solid waste hauler, and participated in some of the authority's executive sessions.

Third, Cannon precipitated the financial crisis in November 1999 by filing a lawsuit against the authority and then temporarily halting deliveries to the solid waste recovery plant. TransWaste's actions in stopping deliveries forced the authority to address its financial and legal problems. Moreover, Cannon knew, or should have known, that suing the authority for payment for services rendered would affect the county as the other major participant in the project.

Based on Cannon's role in developing the project, representing the authority, and accelerating the crisis, we conclude that he voluntarily injected himself into the controversy or, at a minimum, became drawn into the public controversy over the operation of the authority's facility and county's landfill. . . . Having blurred the distinction between his work for his private business and his more public efforts in helping develop the quasi-governmental project, he should not be able to erect a barrier to public criticism of his role once the project failed to perform as planned.

. . . [W]e conclude that the nature and extent of Cannon's participation in the local controversy concerning solid waste disposal has made him a limited-purpose public figure. . . . [248]

c. Defamation in Politics

Candidates, political action committees, and others sometime disseminate extreme characterizations of the records or proposals of political opponents. These statements are not exempt from the law of defamation. A candidate for public office is a current public official or an aspiring public figure who must prove actual malice in order to prevail in suit for libel or slander. That is a formidable obstacle which may take years to surmount, but sometimes the standard can be met.

In *Boyce & Isley, PLLC v. Cooper*,[249] the person who was elected state attorney general had run a commercial alleging that his opponent's law firm had "sued the state" and had charged the taxpayers an hourly rate of $28,000, "more than a police officer's salary for each hour's work." In fact, the fee had been pursued not by the plaintiff, but by the plaintiff's father, in a contingent-fee class action before the plaintiff ever joined the law firm. The statements, which implied unethical billing

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[248] *Id.* at 381–83.

[249] 568 S.E.2d 893 (N.C. Ct. App. 2002).

practices, were found to be libelous *per se*. Moreover, claims were stated by all four members of the opponent's law firm and by the firm itself. The plaintiffs were able to prove actual malice, in part because the successful candidate had refused to pull the ad after demands for its discontinuance.

In *Flowers v. Carville*,[250] the Ninth Circuit held that a claim was stated against former presidential advisors based on their repetition of CNN news reports stating that tape recordings made by the plaintiff had been "doctored" or "selectively edited." The court acknowledged that the plaintiff might not be able to prove actual malice, noting that "[o]ne who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted recklessly."[251] However, the "[d]efendants were not uninvolved third parties who clearly lacked access to the facts behind the published reports."[252]

Problem 3-7: The Defamed Telemarketer

AmeriTel Marketers, Inc. is a telemarketer of a wide range of business products and services. At any given time, it serves hundreds or thousands of clients. Annually, its representatives (or its machines) make several million phone calls.

AmeriTel was hired by Midland Ventures, an oil and gas company, to market investments in oil and gas exploration to persons in middle and upper income categories. It was not difficult for AmeriTel to target the right prospective purchasers because its databases contained the names of millions of individuals, along with direct or indirect information about the assets, earnings, and investments of many of those persons.

Ultimately, Midland was disappointed by AmeriTel's services and terminated their contract. Many purchasers complained to Midland that they had been misled by statements made by AmeriTel representatives. Subsequently, a Midland employee posted unflattering comments about AmeriTel on an online business rating website. Those statements related to the types of deceptive sales pitches that AmeriTel representatives employed in talking to prospective customers.

Despite demands from AmeriTel, Midland has refused to remove the allegedly defamatory statements from the website. Corporate counsel for AmeriTel needs to advise company executives on the prospects for success if a defamation action is filed against Midland. The first question is whether AmeriTel will have to prove actual malice. You are a law clerk in the office of corporate counsel. Please prepare an analysis of the factors that will bear upon judicial resolution of that issue and the likely result.

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[250] 310 F.3d 1118 (9th Cir. 2002).

[251] *Id.* at 1130.

[252] *Id.*

3. Category III: Anyone Suing with Respect to Matters of Private Concern

The development of the constitutional principles applicable to actions for libel and slander took an unexpected turn with the 1985 ruling in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[253]

a. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*

In *Dun & Bradstreet*,[254] a credit report erroneously stated that a business had declared bankruptcy. The United States Supreme Court, noting the limited circulation of the report to only a small number of subscribers, concluded that the defamatory statement did not involve a matter of "public concern." Because that was the case, the Court found that state libel law, which allowed the plaintiff to recover presumed and punitive damages without proof of actual malice, did not violate the First Amendment.

A Surprising Distinction. It was surprising that the court drew a distinction between matters of public concern and matters of private concern. In 1971, *Rosenbloom v. Metromedia, Inc.*[255] had embraced that distinction in deciding how far to extend the actual-malice standard. However, just three years later, *Gertz v. Robert Welch, Inc.*[256] repudiated *Rosenbloom* on the ground that judges should not be called upon to decide what is or is not a matter of public concern. That reasoning was no longer found to be persuasive in *Dun & Bradstreet*, and the distinction between public and private matters has endured ever since.

Not All Speech is Equally Important. In his plurality opinion in *Dun & Bradstreet* (which Justices William H. Rehnquist and Sandra Day O'Connor joined), Justice Lewis F. Powell explained the basis for distinguishing between private and public matters. He wrote:

> We have long recognized that not all speech is of equal First Amendment importance. It is speech on " 'matters of public concern' " that is "at the heart of the First Amendment's protection.". . . .
>
> . . . . In contrast, speech on matters of purely private concern is of less First Amendment concern. . . . As a number of state courts . . . have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,
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> > "[t]here 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. . . .". . . .

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253 472 U.S. 749 (1985).

254 *Id.*

255 403 U.S. 29 (1971).

256 418 U.S. 323 (1974).

> While such speech is not totally unprotected by the First Amendment, . . . its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. . . . This interest, however, is "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common-law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.". . . . As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. *Restatement of Torts* § 568, Comment b, p. 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of "actual malice."[257]

The Unresolved Issue: Fault as to Falsity in "Private Matter" Cases. Justice Powell's opinion in *Dun & Bradstreet* was silent on whether a plaintiff, in a defamation suit involving a private matter, must prove that the defendant was at least negligent as to the falsity of the statement. Chief Justice Warren Burger, in a separate concurrence, asserted that the rules announced in *Gertz* were limited to cases involving matters of public concern. Justice Byron White, in another concurrence, opined that *Dun & Bradstreet* had rejected the *Gertz* rule that liability cannot be imposed without fault, as well as *Gertz's* holding that awards of presumed or punitive damages require actual malice. In contrast, Justice William J. Brennan, speaking in dissent for himself and three other justices (Marshall, Blackmun, and Stevens, JJ.), argued that the holding in *Dun & Bradstreet* was narrow and that the parties did not question the requirement of fault as a prerequisite to obtaining a judgment and actual damages.

Subsequent federal and state court decisions "run the gamut from assertions that *Dun & Bradstreet* swept away all First Amendment requirements in private-private suits to unequivocal declarations that the case affected nothing but the fault requirement for presumed and punitive damages."[258] At least one U.S. Court of Appeals (the Fifth Circuit), three federal district courts, and four states' appellate courts have interpreted *Dun & Bradstreet* as eliminating constitutional restrictions in cases involving private persons suing with respect to matters of private concern.[259] For example, in *Imperial Apparel, Ltd. v. Cosmo's Designer Direct,*

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[257] 472 U.S. at 758–61.

[258] Ruth Walden & Derigan Silver, *Deciphering Dun & Bradsttreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases*, 14 Comm. L. & Pol'y 1, 15-16 (2009).

[259] *Id.* at 16–21.

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Inc.,[260] a defamation suit involving competing retailers, the Supreme Court of Illinois wrote:

> [N]o claim has been made that the statements made in the disputed advertisement addressed a matter of public concern. . . . [Therefore], the special standards for fault, falsity, and punitive damages imposed by the first amendment in defamation actions therefore have no application to the claims asserted by Imperial and the Rosengartens against Cosmo's. Those claims are subject to the normal common law fault, falsity and punitive damage principles followed in Illinois in defamation cases. Because it is a media defendant, the Sun-Times is protected by the special first amendment standard requiring a showing of fault, but because Illinois does not impose liability without fault in defamation cases and thus comports with that standard, the standard has no effect on resolution of this litigation.[261]

b. Distinguishing Private Concern from Public Concern

Dun & Bradstreet provides little guidance for distinguishing matters of private concern from matters of public concern. Indeed, the Court's application of the law to the facts then before it seems counter-intuitive and erroneous. The defendant's credit report said that a corporation had voluntarily declared bankruptcy. It could certainly be argued that whether a business has failed financially is a matter of public concern, if the business employs numerous workers, has many creditors, and pays taxes.

Limited Dissemination. Justice Powell's opinion placed weight on the fact that the erroneous credit report was given limited dissemination and that the five subscribers who received the report were contractually precluded from further disseminating its contents. The Court also suggested that the reporting of "objectively verifiable information" deserved less constitutional protection than other kinds of speech, and that market forces gave credit-reporting agencies an incentive to be accurate, "since false credit reporting is of no use to creditors."[262] Summarizing the conclusion that the report was a matter of private concern, Justice Powell wrote:

> [The credit report] was speech solely in the individual interest of the speaker and its specific business audience. . . . This particular interest warrants no special protection when — as in this case — the speech is wholly false and clearly damaging to the victim's business reputation. . . . Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information.". . . . There is simply no credible argument that this type of credit reporting requires special

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[260] 882 N.E.2d 1011 (Ill. 2008).

[261] *Id.* at 1021.

[262] 472 U.S. at 762–63.

protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open."[263]

Deference to the Media. In *Huggins v. Moore*,[264] the New York Court of Appeals wrote that "publications directed only to a limited, private audience are 'matters of purely private concern,' " but that the fact that an article "has been published in a newspaper is not conclusive that its subject matter warrants public exposition." Nevertheless, in *Moore*, statements contained in a gossip column about an acrimonious celebrity divorce were found to be matters of genuine social concern. The opinion for an unanimous court stated:

> Plaintiff Charles Huggins is the former husband of Melba Moore, a popular actress. . . . Plaintiff brought this defamation action as a result of three articles written by defendant Linda Stasi and published in the "Hot Copy" column of defendant Daily News. . . . The articles concerned Moore's allegations of plaintiff's betrayal of trust in their personal and financial relationships during the dissolution of their marriage. The series reported how Moore began to speak out as a self-described victim of "economic spousal abuse," because she believed her husband had cheated her out of her interest in the entertainment management company they had built together, leaving her destitute.
>
> . . . [T]he articles themselves show the greater significance of Moore's personal story, a tragic downfall from a position of stardom and wealth. Moore was given a platform for speaking out as a victim of an allegedly pervasive modern phenomenon of economic spousal abuse. Manifestly, what Stasi [the author of the articles] identified as the "important social issue" of "economic spousal abuse" was at least arguably within the sphere of legitimate public concern. . . .
>
> . . . [W]e will not second-guess Stasi's editorial determination that Moore's "personal saga" was reasonably related to this matter of social concern to the community. . . . [A]lthough "not conclusive," the editorial determination of newsworthiness of the subject "may be powerful evidence of the hold those subjects have on the public's attention". . . . In this case, the evidence was powerful indeed. The record establishes that Moore's downfall, and her claim of plaintiff's betrayal, was reported nationwide across the entire spectrum of print and broadcast media.
>
> In ruling to the contrary, the Appellate Division did not accord the deference to editorial judgment our decisions require. That the "core" of the dispute between Moore and plaintiff was a divorce is not conclusive. The articles also portrayed Moore's alleged victimization by her financial as well as marital partner to the point of economic and career ruination. It is this episode of human interest that reflected a matter of genuine social concern. . . . [T]he allegedly defamatory text here was not so remote from

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[263] *Id.* at 762.

[264] 726 N.E.2d 456, 460 (N.Y. 1999).

> the matter of public concern as to constitute an abuse of editorial discretion. . . . [265]

Allegations of Fraud. In *Senna v. Florimont*,[266] an arcade game barker used a public address system to tell boardwalk walkers that a competitor was "dishonest" and "a crook," and to say that he "ran away and screwed all of his customers in Seaside" and would do it all again. Finding that the resulting defamation action only required proof of negligence as to falsity, the Supreme Court of New Jersey wrote:

> Defendants would have us conclude that whenever one business tars its competitor with the canard of consumer fraud, the accusation, even if false, involves a matter of public concern. However, this was not a case of disinterested investigative reporting by a newspaper, using a variety of sources, to demonstrate that customers were being defrauded by a service-oriented business, as was true in [*Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417 (N.J. 1995)]. Defendants' employees were basically scaring customers away from plaintiff. Their accusations were not more highly valued speech because they charged their rival with consumer fraud rather than a peccadillo. It cannot be that, in the competition of the marketplace, the bigger the lie the more free speech protection for the publisher of the lie. Businesses have an obligation to act with due care before calling the services rendered by a rival crooked or fraudulent.[267]

The Significance of Being Regulated by the Government. The *Senna* court then addressed whether being regulated by the government makes an entity's activities a matter of public concern:

> Defendants also claim that Fascination parlors are highly regulated businesses and therefore their employees' false and disparaging broadcasts about their competitor do not render them liable, even if they were negligent, because they fall within the safe harbor of the actual-malice standard. Defendants unmoor the term "highly regulated industry" from its conceptual settings. . . . There is a difference between a newspaper publishing an investigative report about the questionable loan practices of a bank, which is part of a highly regulated industry, and a highly regulated Fascination parlor using its public address system in an attempt to put out of business its competitor's highly regulated Fascination parlor. . . .
>
> The invocation of the term "highly regulated industry" is not talismanic, giving every speaker immunity for his negligent, false, and harmful speech. In New Jersey, not just banks and arcade games, but professions (*e.g.*, law, medicine, and accountancy), trades, and many other businesses are highly regulated by the government. The critical inquiry in determining whether speech involves a matter of public interest is the content, form, and context of the speech. For example, when one accountant wrongly and falsely

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[265] *Id.* at 458–62.

[266] 958 A.2d 427 (N.J. 2008).

[267] *Id.* at 445.

> accuses another accountant of overcharging clients, and disseminates those accusations to clients, the public interest is not served by shielding the speaker from the consequences of his negligence. The same holds true for Fascination parlors.
>
> So long as one business tells the truth about another, or does not publish a falsehood negligently, that business will not be exposed to liability. . . . The speech in this case no more involves the public interest than the false credit report in *Dun & Bradstreet*. . . . In balancing the respective interests at stake here, including plaintiff's right to enjoy his reputation free of unfair and false aspersions, the negligence standard adequately protects defendants' free speech rights.[268]

(1) Example: *Quigley v. Rosenthal*

In *Quigley v. Rosenthal*,[269] the Tenth Circuit struggled with the task of distinguishing matters of public concern from matters of private concern. In *Quigley*, homeowners (the Quigleys) sued a civil rights group (the Anti-Defamation League) and its attorney (Rosenthal) on defamation and other theories of liability based on statements the defendants had made relating to allegedly anti-Semitic behavior on the part of the homeowners against their Jewish neighbors (the Aronsons). Discussing the defamation claim, the court wrote:

> Consistent with *Gertz*, the Colorado Supreme Court has extended the . . . "actual malice" standard of liability to cases where "a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved is of public or general concern."[270]. . . .
>
> Defendants do not dispute that the Quigleys [the plaintiffs] were private individuals at the time the alleged defamatory statements were made. Instead, defendants assert that the statements involved matters of public or general concern since they concerned a civil lawsuit alleging "that the Quigleys had conspired with others to deprive [their neighbors] the Aronsons of their constitutional rights on the basis of their religion and race.". . . . The district court rejected defendants' arguments, concluding that defendants' statements did not relate to a matter of public or general concern:
>
> > [T]he bulk of the allegedly defamatory statements were based on excerpts of private telephone conversations between the Quigleys and other third parties which the Aronsons surreptitiously intercepted. In this regard, the Quigleys' position contrasts to that of the plaintiffs in . . . [*Diversified Mgmt., Inc. v. The Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982)], in which the court found that alleged widespread and

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[268] *Id.* at 445–46.

[269] 327 F.3d 1044 (10th Cir. 2003).

[270] [n.4] Under Colorado law, if a private individual is involved and the matter is not one of "public or general concern," the plaintiff merely needs to establish fault amounting to negligence on the part of the defendant. . . .

> ongoing land-development schemes of questionable propriety constituted a matter of public concern strictly because the matter still had the potential to affect future buyers of lots which were yet-unsold. Similarly, in . . . [*Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118 (Colo. Ct. App. 1992)], the court found a matter of public interest existed in part because the plaintiff filed a civil lawsuit to "protest[ ] racially motivated policies of a large retail establishment which allegedly had been directed against her." Thus, in *Lewis*, in addition to the fact that the plaintiff had essentially thrust herself into a public debate through her lawyer's public commentary at a local meeting, the court relied on the fact that resolution of the issues could have an [effect] on other patrons of a commercial entity.
>
> At the time of the allegedly defamatory statements in this case, Rosenthal [the civil rights group's attorney] had received merely one unsolicited request from the press based on the filing of the [civil] lawsuit, as compared to the "immediate and widespread publicity from the various media organizations" which the filing of the underlying lawsuit in *Lewis* prompted. It was defendants' decision (arguably along with the Aronsons'), not the Quigleys', to amplify the matter by calling a press conference under the ADL name. Because, at the time of the press conference . . . [the original publication of the allegedly defamatory statements] the dispute between the Aronsons and the Quigleys was still essentially private, I conclude that . . . Rosenthal's statements about them are, accordingly, not subject to the higher [actual malice] standard [of fault].[271]

Striking the Balance in Favor of Private Matter. The *Quigley* court suggested that, at least in Colorado, there is a preference for classifying matters as "private" rather than "public," for that tends to permit redress of defamatory harm. The Tenth Circuit wrote:

> Unfortunately, Colorado law provides no clear set of guidelines for determining whether a matter is of "public concern.". . . . At best, the Colorado courts have indicated that "a matter is of public concern whenever 'it embraces an issue about which information is needed or is appropriate,' or when 'the public may reasonably be expected to have a legitimate interest in what is being published.' ". . . . Further, the Colorado courts have indicated that "the balance should be struck in favor of a private plaintiff if his or her reputation has been injured by a non-media defendant in a purely private context.". . . .
>
> Applying these general standards to the facts presented here, it is apparent that the statements were made by a non-media defendant (Rosenthal) and concerned private plaintiffs (the Quigleys), rather than public officials or public figures. To that extent, the balance would seem to

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[271] 327 F.3d at 1058–59.

tip in favor of concluding that the matter was of private, rather than public, concern.[272]

Civil Litigation: Content is the Critical Factor. Addressing the relevance of pending civil litigation, the Tenth Circuit wrote:

> [D]efendants note that Rosenthal was discussing allegations made in a civil lawsuit filed against the Quigleys. . . . it appears that defendants are suggesting that civil litigation is always a matter of public concern.
>
> . . . [I]t is far from certain that all civil litigation is considered to be a matter of public concern under Colorado law. Perhaps the most analogous Colorado case is *Lewis*, where private plaintiffs sued media defendants for falsely reporting during a newscast that one of the plaintiffs previously had been arrested for obstruction of justice, indecent exposure, and prostitution. The Colorado Court of Appeals concluded that the incorrect statements "involved a subject matter of . . . public concern.". . . . In reaching this conclusion, the court noted "that the newscast emerged in the context of a persistent and concededly public controversy over [a major retailer's] policies towards minorities, a controversy triggered by publicity surrounding plaintiffs' $15 million lawsuit and their allegations of racially discriminatory policies by [the retailer].". . . . Although the existence of a civil lawsuit was a relevant factor in *Lewis*, nothing in the court's opinion suggests that the mere filing of a civil lawsuit, by itself, is sufficient to trigger "public concern." Rather, it appears clear that the content of the lawsuit is the critical factor. . . . [273]

The Impermissible Discrimination Factor. The court next addressed whether allegations of discrimination are always a matter of public concern.

> According to defendants, any type of discrimination, including religious and ethnic discrimination, is necessarily a matter of public concern.
>
> . . . . The defendants appear to be on stronger ground here. In *Connick v. Myers*, 461 U.S. 138, 148 n.8, (1983), the Court stated that "racial discrimination," at least in the context of public-employment, is "a matter inherently of public concern.". . . .
>
> Notwithstanding this case law, two factors unique to this case weigh against the conclusion that the allegations in the Aronsons' lawsuit were a matter of public concern. First, unlike the cases cited above, the allegations of discrimination asserted in the Aronsons' lawsuit were not asserted against a public employer, nor were they asserted against any entity or person with which the general public had contact (*e.g.*, the major retailer in *Lewis*). Thus, there was no concern that the public's tax dollars were supporting discrimination (*e.g.*, as in the instance of a public employer charged with discrimination), nor was there a concern that members of the public were likely to be harmed or discriminated against (*e.g.*, as in the

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[272] *Id.* at 1059–60.

[273] *Id.* at 1060.

> instance of a major retailer charged with discrimination). *See Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993) (concluding that employee's complaints of sex discrimination did not implicate matters of public concern because they did not implicate "system-wide discrimination" and instead "were motivated by and dealt with her individual employment situation"); *cf.* [*Williams v. Continental Airlines, Inc.*, 943 P.2d 10, 18 (Colo. Ct. App. 1996)] (concluding public concern was not implicated where there was "no claim or evidence that plaintiff [was] an unsafe or less skilled pilot because he allegedly raped or attempted to rape women during off-duty hours," nor any evidence "that members of the flying public [we]re in danger of being sexually assaulted by plaintiff").[274]

The Baseless Allegations Factor. Finally, the court found it significant that the underlying controversy was known by the defendants to lack merit. The Tenth Circuit wrote:

> [I]mportantly, Rosenthal and the ADL were intimately familiar with the Aronsons and their allegations, having talked and met with the Aronsons . . . on numerous occasions. . . . Unlike a third-party (*e.g.*, newspaper reporter) unfamiliar with the parties to a lawsuit or its underlying facts, Rosenthal and the ADL were in a position to know, and indeed knew or should have known, that the allegations in the Aronsons' lawsuit were baseless. Accordingly, we are unable to conclude that Rosenthal's comments at the press conference and on the radio show involved matters of "public concern" since Rosenthal and the ADL knew or should have known that the Aronsons' allegations of racial discrimination/harassment were not colorable. *See Kemp v. State Bd. of Agric.*, 803 P.2d 498, 504 (Colo. 1990) ("When an employee alleges a *colorable claim* that a university is guilty of racial discrimination, it is a matter of public concern.") (emphasis added); *see generally . . . Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1330 (5th Cir. 1993) ("A speaker cannot turn his speech into a matter of public concern simply by issuing a press release."). We agree with the district court that the statements made by Rosenthal at the press conference and during the radio show did not involve matters of public concern.[275]

c. Doubts About Presumed Damages Today

It is useful to remember that, when it was decided in 1974, the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*[276] appeared to hold that presumed damages were not available in *any case* absent actual malice. Thus, the *Restatement (Second) of Torts*, in 1977, embraced a general rule requiring proof of actual harm resulting from defamation.[277] Eleven years later, in 1985, the Supreme Court made clear, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[278] that the

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[274] *Id.* at 1060–61.

[275] *Id.* at 1061.

[276] 418 U.S. 323 (1974).

[277] Restatement (Second) of Torts § 621 and caveat (1977).

[278] 472 U.S. 749 (1985).

Constitution does not preclude an award of presumed damages without proof of actual malice in a case involving a private matter. However, during the period between the decisions in *Gertz* and *Dun & Bradstreet*, the original interpretation of *Gertz* influenced the development of the law at the state level. For example, decisions in Pennsylvania greatly restricted the availability of presumed damages.[279] Today, "continued availability of presumed damages . . . [is] in serious doubt under Pennsylvania law."[280] Similar precedent (unnecessarily) limiting the common law rules on presumed damages exists in other jurisdictions, notwithstanding the fact that *Dun & Bradstreet* retreated from the original interpretation of *Gertz*.

Problem 3-8: The Fired Professor

Two stories aired on a local radio station last week. The story on Monday reported that:

> A lawsuit filed by a former Nathanael Greene University law professor could set a precedent. George Redeck was fired after he received tenure, in so many words, a job for life. His attorney, Linda Wong, says the university sees tenure as something that's conditional. Wong says that if she wins the case, it will mean that professors like Redeck will have job security when granted tenure. She says tenured professors like Redeck could only be fired for just cause. Wong said: "Several professors were dismissed with George Redeck, all of whom happen to be Anglo and male."

On Tuesday, the second story stated:

> According to Robert Garza, attorney for Nathanael Greene University, "George Redeck was never granted tenure by the university. The dean of the law school voted against granting him tenure. The other deans as a body voted against granting him tenure. And on these recommendations, the president of the university denied him tenure. In the spring of last year, the university notified professor Redeck that his application for tenure was denied and that his contract to teach at the university would not be renewed. Redeck's contract has since expired." Garza further stated: "George Redeck is not the only professor who has been denied tenure at the university in recent years. Contrary to the assertion made on this station on Monday that all of the other professors denied tenure 'happen to be Anglo and male,' two of the most recent disappointed applicants are female."

Ever since the stories aired, the university president has been besieged by phone calls from angry alumni because Redeck was a popular professor. Some of the alumni have accused the university of incompetence and discrimination in firing Redeck. Many alums have threatened to terminate their contributions to the university's annual fund. As assistant university counsel, please prepare an analysis

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[279] *See Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 474 (Pa. Super. Ct. 1984).

[280] Kevin P. Allen, *The Oddity and Odyssey of "Presumed Damages" in Defamation Actions under Pennsylvania Law*, 42 Duq. L. Rev. 495, 495 (2004). *See also Manno v. Am. Gen. Fin. Co.*, 439 F. Supp. 2d 418, 434 (E.D. Pa. 2006).

of whether the university can state a cause of action for defamation against the radio station, Wong, or Redeck.

H. DAMAGES

1. Emotional Distress

A defamation plaintiff may wish to avoid litigating the issue of damage to reputation, in order to avoid potentially brutal discovery requests, cross-examination, and testimony by others on that issue. In that case, the plaintiff may waive damages to reputation and seek compensation only for emotional distress. For example, in *Time, Inc. v. Firestone*,[281] a libel action arising from an erroneous report about a divorce, then-Justice William H. Rehnquist wrote:

> Petitioner has argued that because respondent withdrew her claim for damages to reputation on the eve of trial, there could be no recovery consistent with *Gertz* . . . [However, in *Gertz*] we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.
>
> . . . . Several witnesses testified to the extent of respondent's anxiety and concern over Time's inaccurately reporting that she had been found guilty of adultery, and she herself took the stand to elaborate on her fears that her young son would be adversely affected by this falsehood when he grew older. The jury decided these injuries should be compensated by an award of $100,000. We have no warrant for re-examining this determination. . . . [282]

Establishing the Extent of Emotional Loss. Of course, a plaintiff seeking to recover emotional distress damages must always prove with reasonable certainty the extent of those losses. In *El-Khoury v. Kheir*,[283] a suit between two residents of a village in Lebanon, the plaintiff proved the defendant defamed him by accusing him of not paying a debt relating to the transfer of an interest in a car dealership business with two locations in Houston. The jury awarded no damages for harm to reputation, $25,000 for emotional distress, and $147,000 in punitive damages. On appeal, the Texas Court of Appeals wrote:

> It is axiomatic that Kheir could not prevail unless he also proved that he suffered actual damages as a result of the alleged defamation. . . . In this case, the jury awarded nothing for the following elements of claimed

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[281] 424 U.S. 448 (1976).

[282] *Id.* at 460–61.

[283] 241 S.W.3d 82 (Tex. App. 2007).

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damages: lost profits; harm to Kheir's "good name and character among his . . . friends, neighbors, or acquaintances"; his "good standing in the community"; or his "personal humiliation." The only damages awarded were for Kheir's "mental anguish and suffering," which the jury assessed at $25,000. . . . El-Khoury contends that the evidence is legally insufficient to support the jury's $25,000 award. . . . [284]

Mental anguish damages are recoverable in a defamation case. *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002) (*Bentley I*). In *Bentley I*, the supreme court applied the legal-sufficiency test to mental anguish damages awarded as compensation for injuries and mental strain arising from damage to reputation and good name stemming from accusations of corruption by a media defendant. . . . Though a majority of the court agreed that Bentley had provided legally sufficient evidence of some amount of mental anguish, . . . a four-judge plurality concluded there was legally insufficient evidence to support $7 million in mental anguish damages. . . . On remand to consider that award, the Tyler Court of Appeals concluded that the $7 million mental anguish award was "unsupported by the evidence" and "so large as to be contrary to reason"; determined from the trial record that $150,000 would be "reasonable compensation"; and suggested a $6,850,000 remittitur. . . .

In addressing the remitted award in *Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004) (*Bentley II*), the supreme court concluded that legally sufficient evidence supported awarding $150,000 to Bentley as compensatory damages for his mental anguish. . . . Citing *Bentley I*, the court noted that "the ordeal" of his defamation had cost Bentley time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school. . . . Moreover, evidence from Bentley's friends showed that he had become depressed, that his honor and integrity had been impugned, and that his family's related suffering added to his own distress; in short, "he would never be the same.". . . . In Bentley's own words, the experience of being accused of corruption was "the worst of his life.". . . .

Both *Bentley* decisions reflect the concerns initially expressed by the supreme court in *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607 (Tex. 1996), and *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), that legally sufficient proof support mental anguish awards in order to "ensure" that recovery for such non-economic damages constitute compensation for actual injuries to the plaintiff rather than "a disguised disapproval of the defendant.". . . .

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[284] Kheir contended on appeal that, because El-Khoury's statements constituted slander *per se*, he was not required to prove his damages. However, the court found that Kheir waived that argument by failing to object to certain questions submitted to the jury. *Query*: would the plaintiff's lawyer be subject to liability for malpractice based on failure to timely assert that the statement was actionable without proof of actual losses? That argument seems plausible. See Chapter 2 of Susan Saab Fortney & Vincent R. Johnson, Legal Malpractice Law: Problems and Prevention (2008) (discussing lawyers' liability for negligence).

According to the definition derived from *Parkway*, mental anguish

> implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation.

. . . . Recognizing the "somewhat unwieldy" nature of the definition, the supreme court acknowledged that the definition nonetheless requires the jury to distinguish between "lesser" reactions and degrees of emotions, for example, disappointment, embarrassment, and anger, for which there is no compensation, and more extreme degrees of emotions, for example, severe disappointment, wounded pride, and indignation, which may be compensable in a proper case . . . on a further showing that these emotions substantially disrupted the plaintiff's daily routine. . . .

Evidence of "adequate details" to assess mental anguish may derive from the claimant's own testimony, the testimony of third parties, or testimony by expert witnesses. . . .

In addition to evidence of compensable mental anguish, under the standards just stated, some evidence must justify the amount awarded as compensation. . . . Consistent with the language of the standard jury charge used in this case, juries may not "simply pick a number and put it in the blank," but must determine an amount that "fairly and reasonably" compensates for mental anguish "that causes 'substantial disruption in . . . daily routine' or a 'high degree of mental pain and distress.' ". . . .

. . . [W]e agree with El-Khoury that the evidence in this case is not legally sufficient to support the jury's awarding Kheir $25,000 as "fair" and "reasonable" compensation for mental anguish and suffering from allegedly defamatory statements by El-Khoury. . . .

Kheir and his wife provided the only testimony concerning his claim of mental anguish. There was no testimony by third parties and no expert testimony. Kheir generally attested to "stress" and "anxiety," and also stated that he lost weight, experienced headaches, and had difficulty sleeping that sometimes required him to take a sleeping pill. Though Kheir's wife stated that he was "half the man he was," the only specifics she provided were that he was "very stressed" and had difficulty sleeping. Neither Kheir nor his wife described a "high degree" of pain or distress that "substantially" disrupted Kheir's daily routine. . . . In addition, neither Kheir nor his wife attempted to establish a causal connection between the defamatory statements allegedly made by El-Khoury and Kheir's stress and anxiety.

To the contrary, Kheir's testimony consistently linked his stress to damage to his reputation or lack of respect among the 3,000 to 4,000 people in the Lebanese village where he lived and had his business. Yet, the jury rejected any amount of damages, either for harm, if any, to Kheir's "good name and character among his . . . friends, neighbors, and acquaintances,"

> or harm, if any, to his "good standing in the community.". . . .
>
> Kheir also referred to his inability to obtain credit for a planned expansion of his business and stated that vendors and suppliers discontinued their previous practice of permitting him to pay accumulated invoices at the end of a season. But, the record establishes that Kheir's credit problems resulted from a lien that was automatically imposed on some of Kheir's property after El-Khoury filed suit in Lebanon to enforce the agreement to transfer. As the record further demonstrates, news of lawsuits appears in newspapers in Lebanon. Yet, Kheir bases his claims in this lawsuit on El-Khoury's allegedly defamatory statements to others, rather than on allegations in his lawsuit, which would be privileged regardless and, thus, not actionable. . . .
>
> Finally, the record lacks any evidence from which the jury might have derived the $25,000 amount awarded to Kheir as fair and reasonable compensation for his claimed mental anguish. . . .
>
> . . . . [W]e hold that the evidence from the trial of this case would not enable reasonable and fair-minded people to arrive at the verdict reached by the jury here in awarding Kheir $25,000 for mental anguish and suffering. . . .
>
> . . . .
>
> Well-settled law [in Texas, but not in all states] holds that a party may not recover punitive, or exemplary, damages unless the party recovers actual damages. . . . Having concluded that Kheir may not recover the only actual damages awarded by the jury, we are compelled to hold that Kheir may not recover punitive damages. . . . [285]

The court remanded the case for a new trial on both liability and damages.

2. Limitations on Punitive Damages

First Amendment Limitations. As discussed above, under the First Amendment, punitive damages are available in cases involving matters of public concern only if the plaintiff proves actual malice. That requirement does not apply to matters of purely private concern.

Due Process and State Limitations. However, any punitive damages award must comply with limitations imposed by state law and with the Due Process requirements of the Fourteenth Amendment. Those restrictions, including the constitutional limitations recognized in *State Farm Mutual Automobile Insurance Co. v. Campbell*[286] and related cases, are discussed in Chapter 2 Part A-5-e.

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[285] 241 S.W.3d at 85–89.

[286] 538 U.S. 408 (2003).

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Problem 3-9: The Alumni Magazine

North American University endeavors to maintain the fond regard of its 97,000 alumni by publishing a quarterly magazine. The magazine contains news about the university and its graduates, including a "Class Notes" section with short entries about university alumni, arranged by class year. The entries listed in Class Notes, which are never more than a paragraph long, are typically based on information that alumni submit to the magazine about their professional accomplishments and family developments. Some entries are composed from stories found in news-wire services, press releases, and newspapers.

The spring issue of the alumni magazine contained the following information in the Class Notes section:

> Ross Lamont, BS 2001, was named chief operating officer of the Gay Rights League, a non-profit organization which lobbies for legal recognition of gay and lesbian rights. He married his life-partner, Brett Rile, BA 2002, on June 11, 2009, in Boston. Lamont and Rile are both employed at Citibank in Manhattan and live in Greenwich Village.

You are assistant counsel to North American University. Lamont and Rile have each threatened to sue. They are not gay, not married, not employed at Citibank, and do not live in Greenwich Village. The Gay Rights League is a nonexistent entity.

The university Alumni Affairs Office, which compiles the Class Notes section of the magazine, has no record of the source of the information for the Lamont/Rile entry. The director of the office has acknowledged that the office has no standardized fact-checking process for verifying Class Notes entries. The director emphasized, however, that nothing like this has ever happened before at the university.

Prepare to advise the university president on the legal risks posed by the threatened suit and to recommend a course of action.

I. DEFENSES AND OBSTACLES TO RECOVERY

1. The Communications Decency Act of 1996

Cases against Internet service providers (ISPs) originally focused on whether an ISP exercised editorial control. In an early, much-noted case, *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[287] the court wrote:

> First, Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, Prodigy implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste," for example, Prodigy is clearly making decisions as to content . . . and such decisions

[287] 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct.).

> constitute editorial control. . . . [T]his Court is compelled to conclude that for the purposes of plaintiffs' claims in this action, Prodigy is a publisher rather than a distributor.[288]

Some persons feared that decisions like *Stratton Oakmont* would inhibit the growth and use of the Internet. In response to those concerns, Congress passed the Communications Decency Act of 1996, which now greatly limits the liability of ISPs and many other potential defendants.

a. The Congressional Language

Under the Communications Decency Act, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[289] Because a clear understanding of the reach of this language is crucial in a wide range of tort litigation, it is useful to look at this provision in its legislative context, including the Act's statements of purpose and definitions. The relevant provision is 47 U.S.C. § 230, which states in full:

> *(a) Findings*
>
> The Congress finds the following:
>
> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
>
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
>
> *(b) Policy*
>
> It is the policy of the United States —
>
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

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[288] *Id.* at *10–11.

[289] 47 U.S.C.S. § 230(c)(1) (LEXIS 2009).

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "good samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of —

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on Communications Privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

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(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.[290]

b. Internet Service Providers and Distributor Liability

Section 230 of the Communications Decency Act has been broadly interpreted as banning defamation and other claims against Internet services. For example, in *Blumenthal v. Drudge*,[291] a federal court for the District of Columbia found that an Internet service provider was immune from defamation liability based on a gossip column, even though the provider paid the columnist, promoted the column as a new source of unverified instant gossip, and had certain editorial rights.

In *Barrett v. Rosenthal*,[292] the Supreme Court of California recounted the decision of the Fourth Circuit in *Zeran v. America Online, Inc.*,[293] which rejected the theory of distributor liability as applied to defamation on the Internet. *Barrett* agreed with *Zeran* that Congress did not intend to create such an exception to the immunity conferred by § 230 of the Communications Decency Act of 1996. The *Barrett* court wrote:

> Kenneth Zeran was bombarded with angry and derogatory telephone calls, including death threats, after an unidentified person posted a message on an America Online, Inc. (AOL) bulletin board. The message advertised t-shirts with offensive slogans referring to the Oklahoma City bombing of the Alfred P. Murrah Federal Building, and instructed prospective purchasers to call Zeran's home telephone number. Zeran notified AOL of the problem, and the posting was eventually removed. However, similar postings appeared, and an Oklahoma radio announcer aired the contents of the first message. Zeran was again inundated with threatening phone calls. He sued AOL for unreasonable delay in removing the defamatory messages, refusing to post retractions, and failing to screen for similar postings.
>
> AOL successfully moved for judgment on the pleadings. . . . The Fourth Circuit Court of Appeals affirmed, holding that the plain language of section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred.". . . .
>
> . . . . While original posters of defamatory speech do not escape accountability, Congress "made a policy choice . . . not to deter harmful online speech [by] imposing tort liability on companies that serve as

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[290] 47 U.S.C.S. § 230 (LEXIS 2009).

[291] 992 F. Supp. 44 (D.D.C. 1998).

[292] 146 P.3d 510 (Cal. 2006).

[293] 129 F.3d 327 (4th Cir. 1997).

intermediaries for other parties' potentially injurious messages.". . . . This policy reflects a concern that if service providers faced tort liability for republished messages on the Internet, they "might choose to severely restrict the number and type of messages posted.". . . .

Zeran made the same argument adopted by the Court of Appeal here: that Congress intended to distinguish between "publishers" and "distributors," immunizing publishers but leaving distributors exposed to liability. . . . Zeran contended that because Congress mentioned only the term "publisher" in section 230, it intended to leave "distributors" unprotected. He claimed that once he gave AOL notice that it was posting defamatory statements on its bulletin board, AOL became liable as a "distributor.". . . .

The *Zeran* court held that the publisher/distributor distinction makes no difference for purposes of section 230 immunity. Publication is a necessary element of all defamation claims, and includes every repetition and distribution of a defamatory statement. . . . Although "distributors" become liable only upon notice, they are nevertheless included in "the larger publisher category.". . . . "Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability- . . . . [O]nce a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability — the publisher role.". . . .

Subjecting service providers to notice liability would defeat "the dual purposes" of section 230, by encouraging providers to restrict speech and abstain from self-regulation. . . . A provider would be at risk for liability each time it received notice of a potentially defamatory statement in any Internet message, requiring an investigation of the circumstances, a legal judgment about the defamatory character of the information, and an editorial decision on whether to continue the publication. "Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.". . . .

"More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply 'notify' the relevant service provider, claiming the information to be legally defamatory. . . . Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.". . . .

The *Zeran* court's views have been broadly accepted, in both federal and state courts. Before the Court of Appeal issued its opinion below, two other

> California Courts of Appeal had followed *Zeran*. In *Kathleen R. v. City of Livermore* (2001) 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772, a taxpayer sued after her son obtained sexually explicit photographs through an Internet connection at a public library. She sought injunctive relief on various theories of liability. . . . The *Kathleen R.* court held that the state law causes of action were barred by section 230. . . .
>
> In *Gentry v. eBay, Inc.* (2002) 99 Cal. App. 4th 816, 121 Cal. Rptr.2d 703, the plaintiffs used eBay's on-line marketing services to purchase sports memorabilia. Claiming the items bore forged autographs, they sued eBay for negligence, unfair trade practices, and violation of Civil Code section 1739.7, which regulates the sale of such collectibles. . . . The *Gentry* court ruled that section 230 immunized eBay from liability on all the plaintiffs' claims. It . . . reasoned that the plaintiffs were trying to hold eBay responsible for disseminating information provided by the individual sellers who used its service. . . . [294]

The *Barrett* court agreed with *Zeran* that § 230 provides immunity to distributors as well as other publishers.

c. Website Operators

In many cases, protection under the Act extends to website operators. Thus, in *Doe v. Friendfinder Network, Inc.*,[295] a federal court in New Hampshire held that the operator of a "sex and swinger" website was immune from various state law tort claims even though "certain features of the AdultFriendFinder service facilitated the submission of false or unauthorized profiles." And in *Schneider v. Amazon.com, Inc.*[296] the Washington Court of Appeals concluded that an online bookseller was not liable for defamatory comments posted about an author's books. Immunity is not lost simply because the website operator exercises the option to edit or delete some of the information that has been posted.[297] Thus, in *Batzel v. Smith*,[298] the Ninth Circuit ruled that the operator of an anti-art-theft website, who posted an allegedly defamatory e-mail authored by a third party, and who did no more than select and make minor alterations to the e-mail, could not be considered a content provider subject to liability under the CDA.

d. Individual "Users" of the Internet

Barrett v. Rosenthal[299] appears to have been "the first published case in which section 230 immunity . . . [was] invoked by an individual who had no supervisory role in the operation of the Internet site where allegedly defamatory material

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[294] 146 P.3d at 515–18.

[295] 540 F. Supp. 2d 288, 294–95 (D.N.H. 2008).

[296] 31 P.3d 37 (Wash. Ct. App. 2001).

[297] *See Ben Ezra, Weinstein, and Company, Inc. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000).

[298] 333 F.3d 1018 (9th Cir. 2003).

[299] 146 P.3d 510 (Cal. 2006).

appeared."[300] As the facts were described by the Supreme Court of California:

> Plaintiffs, Dr. Stephen J. Barrett and Dr. Terry Polevoy, operated Web sites devoted to exposing health frauds. Defendant Ilena Rosenthal directed the Humantics Foundation for Women and operated an Internet discussion group. Plaintiffs alleged that Rosenthal and others committed libel by maliciously distributing defamatory statements in e-mails and Internet postings, impugning plaintiffs' character and competence and disparaging their efforts to combat fraud. They alleged that Rosenthal republished various messages even after Dr. Barrett warned her they contained false and defamatory information.
>
> . . . . The [trial] court determined that the only actionable statement appeared in an article Rosenthal received via e-mail from her codefendant Tim Bolen. This article, subtitled "Opinion by Tim Bolen," accused Dr. Polevoy of stalking a Canadian radio producer. Rosenthal posted a copy of this article on the Web sites of two newsgroups devoted to alternative health issues. . . . [301]

Turning to the issue of whether Rosenthal's republication of the Bolen article was immune from suit, the court considered the question of "user" liability. It wrote:

> Individual Internet "users" like Rosenthal, . . . are situated differently from institutional service providers with regard to some of the principal policy considerations discussed by the *Zeran* court and reflected in the Congressional Record. In particular, individuals do not face the massive volume of third-party postings that providers encounter. Self-regulation is a far less challenging enterprise for them. Furthermore, service providers, no matter how active or passive a role they take in screening the content posted by users of their services, typically bear less responsibility for that content than do the users. Users are more likely than service providers to actively engage in malicious propagation of defamatory or other offensive material. These considerations bring into question the scope of the term "user" in section 230, and whether it matters if a user is engaged in active or passive conduct for purposes of the statutory immunity.
>
> "User" is not defined in the statute, and the limited legislative record does not indicate why Congress included users as well as service providers under the umbrella of immunity granted by section 230(c)(1). The standard rules of statutory construction, however, yield an unambiguous result. We must begin with the language employed by Congress and the assumption that its ordinary meaning expresses the legislative purpose. . . . "User" plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service.
>
> Section 230(c)(1) refers directly to the "user of an interactive computer service." Section 230(f)(2) defines "interactive computer service" as "any

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[300] *Id.* at 515.

[301] *Id.* at 513–14.

information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet. . . ." Section 230(a)(2) notes that such services "offer users a great degree of control over the information that they receive," and section 230(b)(3) expresses Congress's intent "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services." Thus, Congress consistently referred to "users" of interactive computer services, specifically including "individuals" in section 230(b)(3).

There is no reason to suppose that Congress attached a different meaning to the term "user" in section 230(c)(1). . . . Rosenthal used the Internet to gain access to newsgroups where she posted Bolen's article about Polevoy. She was therefore a "user" under the CDA, as the parties conceded below. Nor is there any basis for concluding that Congress intended to treat service providers and users differently when it declared that "[n]o provider or user of an interactive computer service shall be treated as [a] publisher or speaker. . . ." (§ 230(c)(1).) We cannot construe the statute so as to render the term "user" inoperative. . . .

Polevoy urges us to distinguish between "active" and "passive" Internet use, and to restrict the statutory term "user" to those who engage in passive use. He notes that subdivisions (a)(2) and (b)(3) of section 230 refer to information "received" by users. He also observes that the caption of subdivision (c) is "Protection for 'good samaritan' blocking and screening of offensive material." From these premises, Polevoy reasons that the term "user" must be construed to refer only to those who receive offensive information, and those who screen and remove such information from an Internet site. He argues that those who actively post or republish information on the Internet are "information content providers" unprotected by the statutory immunity. "Information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. . . ." (§ 230(f)(3).)

Polevoy's view fails to account for the statutory provision at the center of our inquiry: the prohibition in section 230(c)(1) against treating any "user" as "the publisher or speaker of any information provided by another information content provider." A user who merely receives information on a computer without making it available to anyone else would be neither a "publisher" nor a "speaker." Congress obviously had a broader meaning in mind. Nor is it clear how a user who removes a posting may be deemed "passive" while one who merely allows a posting to remain online is "active." Furthermore, Congress plainly did not intend to deprive all "information content providers" of immunity, because the reference to "another" such provider in section 230(c)(1) presumes that the immunized publisher or

> speaker is also an information content provider. . . . [302]
>
> We conclude there is no basis for deriving a special meaning for the term "user" in section 230(c)(1), or any operative distinction between "active" and "passive" Internet use. By declaring that no "user" may be treated as a "publisher" of third party content, Congress has comprehensively immunized republication by individual Internet users.
>
> . . . .
>
> We share the concerns of those who have expressed reservations about the *Zeran* court's broad interpretation of section 230 immunity. The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. . . .
>
> Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await congressional action.[303]

e. Anonymous Postings on the Internet

Subpoenas to Disclose Identities. Because providers of defamatory content can be held liable for defamation posted on the Internet, it often becomes critical for a plaintiff to discover the identity of the author of anonymously posted statements.

(1) Example: *Krinsky v. Doe No. 6*

In *Krinsky v. Doe 6*,[304] a corporate officer allegedly defamed on the Internet sued ten "Doe" defendants and served a subpoena on Yahoo!, Inc., a message-board host, seeking information on the identities about the pseudonymous posters. Doe No. 6 unsuccessfully moved to quash the subpoena. On appeal, Doe No. 6 argued that the trial court had erred because there is a constitutional right to speak anonymously on the Internet.

Constitutional Right to Speak Anonymously. Addressing the right to speak anonymously in *Krinsky*, the California Court of Appeal wrote:

> The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of any economic, political, or social status to be heard without

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[302] [n.19] At some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source. Because Rosenthal made no changes in the article she republished on the newsgroups, we need not consider when that line is crossed. We note, however, that many courts have reasoned that participation going no further than the traditional editorial functions of a publisher cannot deprive a defendant of section 230 immunity. . . .

[303] 146 P.3d at 526–29.

[304] 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008).

> suppression or other intervention by the media or more powerful figures in the field.
>
> Yet no one is truly anonymous on the Internet, even with the use of a pseudonym. Yahoo! warns users of its message boards that their identities can be traced, and that it will reveal their identifying information when legally compelled to do so. . . .
>
> When vigorous criticism descends into defamation, however, constitutional protection is no longer available. "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.". . . .
>
> Corporate and individual targets of . . . online aspersions may seek redress by filing suit against their unknown detractors. Once notified of a lawsuit by the website host or ISP, a defendant may then assert his or her First Amendment right to speak anonymously through an application for a protective order or, as here, a motion to quash the subpoena. The present action for defamation and interference with business relationships is but one example of such confrontations.[305]

Tests to Determine Whether a Subpoena Will Be Enforced. The *Krinsky* court then turned to the question of what test should be used to determine whether the interests of the person allegedly harmed by improper communications should take precedence over the interest of the anonymous speaker. The court discussed four options: (1) a "good faith" test; (2) balancing the plaintiff's *prima facie* case against the defendant's First Amendment rights; (3) whether there are facts sufficient to defeat a motion for summary judgment or a motion to dismiss; and (4) simply whether the plaintiff has stated a *prima facie* case.

Option #1: The Good Faith Test. Addressing the first option, the *Krinsky* court wrote:

> Federal and state courts have made valiant efforts to devise a fair standard by which to balance the interests of the parties involved in disputes over Internet speech. The most deferential to plaintiffs are those applying a "good faith" standard. (*See, e.g., In re Subpoena Duces Tecum to America Online, Inc.* (2000) 52 Va. Cir. 26, 37, 2000 WL 1210372 [ISP required to disclose Doe identities upon corporate plaintiff's "legitimate, good faith basis" for alleging actionable conduct and the necessity of the information to advance the claim].) Plaintiff does not urge us to adopt such

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[305] *Id.* at 237–39.

> a low threshold for disclosure, nor would we do so; it offers no practical, reliable way to determine the plaintiff's good faith and leaves the speaker with little protection.[306]

Option #2: Balancing Prima Facie Case Against First Amendment Rights. Turning to the second option, the court explained:

> Other courts have exercised greater scrutiny of the plaintiff's cause of action before allowing the speaker to be identified. In *Dendrite International Inc. v. John Doe No. 3* (2001) 342 N.J. Super. 134, 775 A.2d 756, for example, a corporation alleged defamation by multiple Doe defendants on a Yahoo! message board and then sought expedited discovery in order to learn their identities. The New Jersey appellate court set forth a four-part test, to ensure that plaintiffs do not use discovery to "harass, intimidate or silence critics in the public forum opportunities presented by the Internet.". . . . First, the plaintiff must make an effort to notify the anonymous poster that he or she is the subject of a subpoena or application for a disclosure order, giving a reasonable time for the poster to file opposition. The plaintiff must also set forth the specific statements that are alleged to be actionable. Third, the plaintiff must produce sufficient evidence to state a *prima facie* cause of action. If this showing is made, then the final step should be undertaken: to balance the strength of that *prima facie* case against the defendant's First Amendment right to speak anonymously. . . . In *Dendrite*, the appellate court affirmed the trial court's denial of the discovery application, as the corporate plaintiff had failed to produce evidence that any decline in its stock price had been caused by the offensive messages.[307]

Option #3: Facts Sufficient to Defeat Summary Judgment or Dismissal. The court then explained but rejected the third option:

> Neither party advocates a third line of analysis set forth in *Doe v. Cahill*, [884 A.2d 451 (Del. 2005)], a case involving political speech about a public figure. In *Cahill* the Doe defendant was sued for defamation after criticizing a town councilman on an Internet blog. . . .
>
> . . . . The *Cahill* court . . . adopted a standard applicable to a plaintiff opposing summary judgment. Thus, the plaintiff "must support his defamation claim with facts sufficient to defeat a summary judgment motion.". . . . [308]. . . .
>
> *Cahill* was followed by trial courts in various jurisdictions. . . . In *Lassa v. Rongstad* (2006) 294 Wis.2d 187 [718 N.W.2d 673], however, the Wisconsin Supreme Court rejected the Delaware court's summary judgment standard in favor of a motion-to-dismiss standard. The "silly or trivial libel claims" that would survive a motion to dismiss in a notice-pleading

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[306] *Id.* at 241.

[307] *Id.*

[308] [n.9] The court made an exception for the element of malice in a case involving a public figure, a showing that depends on whether the defendant had knowledge that his or her statement was false or made it with reckless disregard as to its truth. . . .

> state such as Delaware would be adequately tested on a motion to dismiss in Wisconsin, where the statement constituting libel must be set forth in the complaint. The majority opinion did not, however, explain how (or if) a motion to dismiss would incorporate a balancing of the parties' competing interests.
>
> Other courts have utilized a motion-to-dismiss standard in weighing the need of injured parties to discover the identity of libelous Doe defendants against the rights of those defendants to speak anonymously. . . .
>
> We find it unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet. California subpoenas in Internet libel cases may relate to actions filed in other jurisdictions, which may have different standards governing pleading and motions. . . .
>
> We agree with the Delaware Supreme Court that . . . [requiring the plaintiff to attempt to notify the defendant] does not appear to be unduly burdensome. . . . We recognize, however, that an Internet Web site, chat room, or message board may no longer exist or be active by the time the plaintiff brings suit; consequently, it would be unrealistic and unprofitable to insist, as did the *Cahill* court, that a plaintiff "post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted.". . . . Moreover, when ISPs and message-board sponsors (such as Yahoo!) themselves notify the defendant that disclosure of his or her identity is sought, notification by the plaintiff should not be necessary. And in the procedural posture presented here, where the defendant is moving to quash the subpoena, the notification requirement benefits no one. Obviously Doe 6 has already learned of the subpoena or he would not be seeking protection.[309]

Option #4: The Prima Facie Showing Test. The California Court of Appeal then explained why it was adopting the fourth option:

> Common to most courts considering the issue is the necessity that the plaintiff make a *prima facie* showing that a case for defamation exists. Requiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism. . . .
>
> Plaintiff objects to the requirement of a *prima facie* showing. She contends that it infringes a party's due process right because it does not include a reasonable opportunity to obtain evidence a plaintiff would need to establish a *prima facie* case. She does not, however, explain why she would necessarily be deprived of such an opportunity in the context of a motion to quash. . . . In an Internet libel case, that burden should not be insurmountable; here, for example, plaintiff knows the statement that was

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[309] 72 Cal. Rptr. 3d at 242–44.

made and produced evidence of its falsity and the effect it had on her.

> We therefore agree with those courts that have compelled the plaintiff to make a *prima facie* showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity. Where it is clear to the court that discovery of the defendant's identity is necessary to pursue the plaintiff's claim, the court may refuse to quash a third-party subpoena if the plaintiff succeeds in setting forth evidence that a libelous statement has been made.[310] When there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment. . . . Accordingly, a further balancing of interests should not be necessary to overcome the defendant's constitutional right to speak anonymously.[311]

Turning to the facts of the case, the *Krinsky* court concluded that the subpoena to discover Doe No. 6's identity should have been quashed because his Internet postings, which fell into the category of crude, satirical hyperbole, compelled the conclusion that they were not actionable.

Problem 3-10: The SBA Survey

Charles Evans Hughes School of Law was not a happy place. Students fiercely disagreed with many of the law school's policies, including class attendance rules, the grading curve, and the large number of required courses. The law school administration was widely perceived as insensitive to student concerns. As a means of documenting student discontent for the purpose of effecting "change," the Student Bar Association conducted an online survey. To do this, the SBA used Survey Monkey,[312] a service which distributed the survey to law students by e-mail, compiled the results in anonymous form, and then returned the results to the SBA.

The narrative answers to the free-style question about "other concerns" ranged from "disgruntled" to "angry" and "rabid." A number of charges were levied against Dean Priscilla Klink, including accusations that she had been publicly intoxicated at the school's law journal banquet a few months earlier and had recently spent law school funds on landscaping and maintenance of her home, ten miles from campus.

As he had promised, when the survey results arrived in PDF format, the SBA president, Dennis Calmer, with the help of other SBA officers, e-mailed copies of the results to the students who had participated in the survey. The officers also made extra copies of the survey available in the SBA office on campus.

Calmer delivered a hard copy of the survey in a sealed envelope to the dean's secretary, Carolyn Cason, with a request for a meeting with the dean at her earliest convenience. Cason opened the survey envelope, because she opened all of

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[310] [n.14] "*Prima facie* evidence is that which will support a ruling in favor of its proponent if no controverting evidence is presented. . . . It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences. . . .". . . .

[311] 72 Cal. Rptr. 3d at 244–46.

[312] http://www.surveymonkey.com.

the dean's mail, stamped the contents of each envelope with a "received" date, and delivered the contents to Dean Klink's office. The staff at the law school had heard rumors about an SBA survey. When Cason saw that the contents of the envelope dealt with the survey, she read the results. Cason did not believe what the survey said, but she knew that Dean Klink would be angry.

"Angry" did not begin to describe the dean's reaction. She was furious. She called the SBA officers into her office and she read them the "riot act." She told them that they had libeled her and that such conduct was not befitting persons seeking admission to the bar. Dean Klink told the officers that she was reporting each of them to the Character and Fitness Committee of the State Board of Law Examiners, and that they could expect to be called upon to explain why they had published false and defamatory statements about her and why that was not evidence of bad character.

Dean Klink also said that she would do everything possible to discover the identities of the students who had anonymously submitted the false and defamatory comments about her to Survey Monkey. And, the dean promised, those persons would be dealt with appropriately.

SBA president Calmer has recognized that he is in big trouble and has hired you to assist him with legal difficulties that may arise in the bar admissions process. In the meantime, Calmer cannot sleep because he is not even sure whether he did anything wrong, and he is afraid that he has gotten some of his classmates in trouble. Calmer does not know if the facts make him or anyone else liable for defamation. Please prepare a legal analysis of the facts so that you can explain to Calmer where he stands.

f. Exceptions to Communications Decency Act Immunity

Fraud and Negligent Misrepresentation. Courts sometimes find narrow exceptions to the Communications Decency Act (CDA). For example, in *Anthony v. Yahoo! Inc.*,[313] the plaintiff alleged that the operator of an online dating service created false user profiles to trick new members into joining and to stop current members from leaving. A federal court in California found that claims for fraud and negligent misrepresentation were not barred by the CDA's publisher-immunity provision.

(1) Example: *Barnes v. Yahoo! Inc.*

In *Barnes v. Yahoo! Inc.*,[314] the Ninth Circuit addressed "whether the Communications Decency Act of 1996 protects an Internet service provider from suit where it undertook to remove from its website material harmful to the plaintiff but failed to do so."[315] Describing the facts of the case, the court wrote:

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[313] 421 F. Supp. 2d 1257 (N. D. Cal. 2006).

[314] 570 F.3d 1096 (9th Cir. 2009).

[315] *Id.* at 1098.

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> . . . Cecilia Barnes broke off a lengthy relationship with her boyfriend . . . [H]e responded by posting profiles of Barnes on a website run by Yahoo!, Inc. ("Yahoo"). . . .
>
> . . . . The profiles contained nude photographs of Barnes and her boyfriend, taken without her knowledge, and some kind of open solicitation . . . to engage in sexual intercourse. The ex-boyfriend then conducted discussions in Yahoo's online "chat rooms," posing as Barnes and directing male correspondents to the fraudulent profiles he had created. . . . Before long, men whom Barnes did not know were peppering her office with emails, phone calls, and personal visits, all in the expectation of sex.
>
> In accordance with Yahoo policy, Barnes mailed Yahoo a copy of her photo ID and a signed statement denying her involvement with the profiles and requesting their removal. One month later . . . Barnes again asked Yahoo by mail to remove the profiles. Nothing happened. The following month, Barnes sent Yahoo two more mailings. During the same period, a local news program was preparing to broadcast a report on the incident. A day before the initial air date of the broadcast, Yahoo broke its silence; its Director of Communications, a Ms. Osako, called Barnes and asked her to fax directly the previous statements she had mailed. Ms. Osako told Barnes that she would "personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it." Barnes claims to have relied on this statement and took no further action regarding the profiles and the trouble they had caused. Approximately two months passed without word from Yahoo, at which point Barnes filed this lawsuit against Yahoo in Oregon state court. Shortly thereafter, the profiles disappeared from Yahoo's website, apparently never to return.[316]

Turning to the dispute before it, the Ninth Circuit summarized the case:

> Barnes' complaint against Yahoo . . . appears to allege two causes of action. . . . First, the complaint suggests a tort for the negligent provision or non-provision of services which Yahoo undertook to provide. . . . Oregon has adopted section 323 of the *Restatement (Second) of Torts* (1965), which describes the elements of this claim. . . . Barnes also refers in her complaint and in her briefs to Yahoo's "promise" to remove the indecent profiles and her reliance thereon to her detriment. We construe such references to allege a cause of action under section 90 of the *Restatement (Second) of Contracts* (1981).
>
> . . . . Yahoo contended that section 230(c)(1) of the Communications Decency Act ("the Act") renders it immune from liability in this case. *See* 47 U.S.C. § 230(c)(1). The district court granted the motion to dismiss. . . . [317]

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[316] *Id.* at 1098–99.

[317] *Id.* at 1099.

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Addressing the merits of the appeal, the Ninth Circuit then began its analysis of the federal law in question.

> Section 230 of the Act [quoted earlier in this chapter], also known as the Cox-Wyden Amendment ("the Amendment"), protects certain internet-based actors from certain kinds of lawsuits. . . .
>
> . . . . The operative section of the Amendment is section 230(c) ["Protection for 'good samaritan' blocking and screening of offensive material."]. . . .
>
> Section 230(c) has two parts. . . . Looking at the text, it appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content, as Yahoo argues it does. "Subsection (c)(1) does not mention 'immunity' or any synonym.". . . .
>
> . . . [O]ne notices that subsection (c)(1), which after all is captioned "Treatment of publisher or speaker," precludes liability only by means of a definition. "No provider or user of an interactive computer service," it says, "*shall be treated* as the publisher or speaker of any information provided by another information content provider.". . . . Subsection 230(e)(3) makes explicit the relevance of this definition, for it cautions that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Bringing these two subsections together, it appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.
>
> . . . . The flashpoint in this case is the meaning of the "publisher or speaker" part of subsection (c)(1). . . .
>
> The cause of action most frequently associated with the cases on section 230 is defamation. . . .
>
> But . . . the language of the statute does not limit its application to defamation cases. Indeed, many causes of action might be premised on the publication or speaking of what one might call "information content." A provider of information services might get sued for violating anti-discrimination laws . . . ; for fraud, negligent misrepresentation, and ordinary negligence . . . ; for false light [invasion of privacy] . . . ; or even for negligent publication of advertisements that cause harm to third parties. . . . Thus, what matters is not the name of the cause of action — defamation versus negligence versus intentional infliction of emotional distress — what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another. . . .
>
> We have indicated [in a prior case] that publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication

third-party content. . . . [318]

Negligent Performance of an Undertaking. The court then rejected the plaintiff's tort cause of action for negligent performance of an undertaking. The court wrote:

> The Oregon law tort that Barnes claims Yahoo committed derives from section 323 of the *Restatement (Second) of Torts*, which states:
>
> > One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.
>
> Barnes argues that this tort claim would not treat Yahoo as a publisher. She points to her complaint, which acknowledges that although Yahoo "may have had no initial responsibility to act, once [Yahoo,] through its agent, undertook to act, [it] must do so reasonably." According to Barnes, this makes the undertaking, not the publishing or failure to withdraw from publication, the source of liability. . . .
>
> We are not persuaded. . . . The word "undertaking," after all, is meaningless without the following verb. That is, one does not merely undertake; one undertakes *to do* something. And what is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo's website. But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove. . . . [319]

Defamation Liability Based on Failure to Remove. The Ninth Circuit reinforced its conclusion that negligent performance of an undertaking was not actionable under the CDA because a person can sometimes become liable as a publisher of defamatory content based on failure to remove a libelous statement from the person's premises:

> . . . [W]e note that Yahoo could be liable for defamation for precisely the conduct of which Barnes accuses it. Defamation law sometimes imposes "an affirmative duty to remove a publication made by another." *Prosser and Keaton on Torts* § 113, at 803. Courts have applied this principle, including in a case that reads like a low-tech version of the situation before us. In *Hellar v. Bianco*, 244 P.2d 757, 758 (Cal. Ct. App. 1952), a woman received a phone call from a man who sought to arrange an unconventional, but apparently amorous, liaison. . . . After being rebuffed, the man informed the woman that her phone number appeared on the bathroom wall of a local

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[318] *Id.* at 1099–1102.

[319] *Id.* at 1102–03.

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> bar along with writing indicating that she "was an unchaste woman who indulged in illicit amatory ventures.". . . . The woman's husband promptly called the bartender and demanded he remove the defamatory graffito, which the bartender said he would do when he got around to it- . . . . Shortly thereafter, the husband marched to the bar . . . and discovered the offending scrawl still gracing the wall. . . . He defended his wife's honor by suing the bar's owner.
>
> The California Court of Appeal held that it was "a question for the jury whether, after knowledge of its existence, [the bar owner] negligently allowed the defamatory matter to remain for so long a time as to be chargeable with its republication.". . . .
>
> . . . [W]e hold that section 230(c)(1) bars Barnes' claim, under Oregon law, for negligent provision of services that Yahoo undertook to provide. . . . [320]

Promissory Estoppel. The court then turned to the plaintiff's contract law claim based on promissory estoppel.

> [W]e [must] inquire whether Barnes' theory of recovery under promissory estoppel would treat Yahoo as a "publisher or speaker" under the Act.
>
> . . . In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract — an enforceable promise — not from any non-contractual conduct or capacity of the defendant. . . . Barnes does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached.
>
> How does this analysis differ from our discussion of liability for the tort of negligent undertaking?. . . . To undertake a thing, within the meaning of the tort, *is* to do it.
>
> Promising is different because it is not synonymous with the performance of the action promised. That is, whereas one cannot undertake to do something without simultaneously doing it, one can, and often does, promise to do something without actually doing it at the same time. Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. . . .
>
> Furthermore, a court cannot simply infer a promise from an attempt to de-publish of the sort that might support tort liability under section 323 of the *Restatement (Second) of Torts*. For, as a matter of contract law, the promise must "be as clear and well defined as a promise that could serve as an offer, or that otherwise might be sufficient to give rise to a traditional contract supported by consideration.". . . . "The formation of a contract,"

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[320] *Id.* at 1103–05.

> indeed, "requires a meeting of the minds of the parties, a standard that is measured by the objective manifestations of intent by both parties to bind themselves to an agreement.". . . . Thus a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for contract liability. This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound. . . .
>
> One might also approach this question from the perspective of waiver. The objective intention to be bound by a promise . . . also signifies the waiver of certain defenses. . . . [O]nce a court concludes a promise is legally enforceable according to contract law, it has implicitly concluded that the promisor has manifestly intended that the court enforce his promise. By so intending, he has agreed to depart from the baseline rules (usually derived from tort or statute) that govern the mine-run of relationships between strangers. Subsection 230(c)(1) creates a baseline rule: no liability for publishing or speaking the content of other information service providers. Insofar as Yahoo made a promise with the constructive intent that it be enforceable, it has implicitly agreed to an alteration in such baseline.
>
> Therefore, we conclude that, insofar as Barnes alleges a breach of contract claim under the theory of promissory estoppel, subsection 230(c)(1) of the Act does not preclude her cause of action. Because we have only reviewed the affirmative defense that Yahoo raised in this appeal, we do not reach the question whether Barnes has a viable contract claim or whether Yahoo has an affirmative defense under subsection 230(c)(2) of the Act.
>
> . . . [W]e affirm in part, reverse in part, and remand for further proceedings. . . . [321]

Barnes' holding that a tort claim based on voluntary undertaking was barred by the terms of the Communications Decency Act is very much in accord with other precedent which has construed the Act broadly. Whether the *Barnes* decision, to allow the plaintiff's promissory estoppel claim to proceed, will withstand the test of time is open to question. (The court's brief discussion of whether Yahoo! waived its rights under the Act is probably the most persuasive rationale for permitting the contract claim to stand.) Nevertheless, *Barnes* nicely illustrates the issues with which courts must grapple relating to defamation on the Internet.

g. Internet Publications and Foreign Libel Laws

It is essential to remember that in a globally connected world, publications on the Internet may give rise to defamation lawsuits in countries where protection of free expression is much less robust than in the United States. For example, British libel law is very different from corresponding American principles. To take just one example, the falsity of a defamatory statement is presumed under British law.

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[321] *Id.* at 1106–09.

Anti-Enforcement of British Libel Judgments. Global distribution of publications, such as newspapers, can be used as a justification for filing suit in another country. According to some courses, "London has gained a reputation as the libel capital of the world."[322] At least two states — New York and Illinois — have passed laws to prevent enforcement of British libel judgments. The New York law provides:

> § 5304. Grounds for Non-Recognition
>
> (a) No recognition. A foreign country judgment is not conclusive if:
>
> . . . .
>
> 8. the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.[323]

Of course, American publishers with operations in Britain are particularly vulnerable to efforts to enforce a British libel judgment.

2. Retraction Statutes

Effect on Punitive Damages. Some states have passed retraction statutes which bear on the issue of punitive damages. For example, in Georgia, statutory provisions provide that any plaintiff who did not ask for a retraction is generally not entitled to punitive damages.[324]

Occasionally, retraction statutes antedate important Supreme Court decisions. It is therefore important to ask what (if anything) they add to the considerable constitutional protections that have already been recognized by the Supreme Court. For example, a Mississippi statute, adopted in 1962 (two years before *New York Times Co. v. Sullivan*), provides as follows:

> (1) Before any civil action is brought for publication, in a newspaper domiciled and published in this state or authorized to do business in Mississippi so as to be subject to the jurisdiction of the courts of this state, of a libel, or against any radio or television station domiciled in this state, the plaintiff shall, at least ten (10) days before instituting any such action, serve notice in writing on the defendant at its regular place of business, specifying the article, broadcast or telecast, and the statements therein, which he alleges to be false and defamatory.

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[322] *See* Eric Pfanner, *A Fight to Protect Americans from British Libel Law*, N.Y. Times, May 25, 2009, at B3 (online edition).

[323] N.Y. Civ. Prac. Law & Rules § 5304 (LEXIS 2009).

[324] *See Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002).

(2) If it appears upon the trial that said article was published, broadcast or telecast in good faith, that its falsity was due to an honest mistake of the facts, and there were reasonable grounds for believing that the statements in said article, broadcast or telecast were true, and that within ten (10) days after the service of said notice a full and fair correction, apology and retraction was published in the same edition or corresponding issues of the newspaper in which said article appeared, and in as conspicuous place and type as was said original article, or was broadcast or telecast under like conditions correcting an honest mistake, and if the jury shall so find, the plaintiff in such case shall recover only actual damages. The burden of proof of the foregoing facts shall be affirmative defenses of the defendant and pled as such.

(3) This section shall not apply to any publication concerning a candidate for public office made within ten (10) days of any primary, general or special election in which such candidate's candidacy for or election to public office is to be determined, and this section shall not apply to any editorial or to any regularly published column in which matters of opinions are expressed.[325]

Problem 3-11: The Dangerous School Teacher

On a website named "Dangerous Teachers," there was a link to a document (the "Document") about Sam McGlynn, a shop class teacher at Chestnut Ridge High School. The Document appeared to be an official reprimand of McGlynn, who had been found guilty of making improper use of the Internet to access pornographic materials via school computers.

A comment (the "Comment") posted by a reader under the website's link for the McGlynn Document stated: "What did you expect of a burned out teacher married to a woman who spent five years in a mental institution?"

Soon after the postings appeared on the "Dangerous Teachers" website, local radio talk show hosts began discussing the allegations made in both the Document and the Comment. The local television then ran a story which repeated the substance of the Document posted on the web, but said nothing about the Comment. The television reporter in the televised segment said that both Chestnut Ridge High School and Sam McGlynn had been asked to respond to the allegations, but that both refused to discuss the matter.

The Document posted on the web about McGlynn was fabricated. There is no truth to the allegations in the Document or the Comment.

Sam McGlynn and his wife, Nancy McGlynn, have hired a lawyer, Grace Hammerstein. Hammerstein has explained that under the Communications Decency Act there is little chance of recovering tort damages from the operator of the "Dangerous Teachers" website if the operator did not originate the posted material. However, Hammerstein said that it may be possible to recover damages from persons who posted the Document and Comment on the website and from the

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[325] Miss. Code Ann. § 95-1-5 (LEXIS 2009).

radio and television stations whose broadcasts discussed the allegations.

If defamation actions against the broadcasters are governed by a retraction statute identical to the Mississippi retraction statute quoted above, must Hammerstein request a retraction before commencing litigation against the potential defendants? In addition, if a retraction is made by a defendant, what effect will that have on the McGlynns' defamation claims?

3. Absolute Privileges

"Absolute" privileges are absolute. If an absolute privilege applies, it generally makes no difference what the defendant knew or should have known, or why the defendant uttered the defamatory statement. In contrast, "qualified" or "conditional" privileges (discussed later in this chapter) may be negated by various forms of improper conduct by a defendant.

a. Judicial Proceedings Privilege

The "judicial proceedings privilege" is sometimes called the "litigation privilege." Pursuant to this rule, statements made by judges, lawyers, parties, witnesses, or jurors in connection with pending or contemplated litigation are absolutely privileged.[326]

Bars Defamation and Other Claims. In *Jones v. Coward*,[327] the defendant attorney asked a potential witness "Did you hear that [plaintiff] got run out of town for drugs?" or stated, "[Plaintiff] got run out of town for drugs."[328] The North Carolina Court of Appeals held "that an attorney's statement or question to a potential witness regarding a suit in which that attorney is involved, whether preliminary to trial, or at trial, is privileged and immune from civil action for defamation," unless it is "palpably irrelevant" to the case.[329] The court further held that the judicial proceedings privilege also barred an action for intentional infliction of emotional distress based on the same facts, because otherwise "the privilege . . . would be eviscerated, and the public policy providing advocates the security to zealously pursue cases on behalf of their clients would be completely undermined."[330]

In *Atkinson v. Affronti*,[331] a union attorney sent a letter to a general contractor alleging that its superintendent had stabbed a large, inflatable rat used by union picketers, and that the union intended to hold the general contractor responsible. In finding that a defamation claim by the supervisor against the union attorney was barred by the judicial proceedings privilege, the Appellate Court of Illinois noted that the privilege "affords complete immunity, irrespective of the attorney's

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[326] *See* Restatement (Second) of Torts §§ 585–589 (1977).

[327] 666 S.E.2d 877 (N.C. Ct. App. 2008).

[328] *Id.* at 878.

[329] *Id.* at 880.

[330] *Id.*

[331] 861 N.E.2d 251 (Ill. App. Ct. 2006).

knowledge of the statement's falsity or the attorney's motives in publishing the defamatory matter."[332]

Advertising for Clients or Evidence. In *Simpson Strong-Tie Co., Inc. v. Stewart, Estes & Donnell*,[333] an attorney ran a newspaper ad and a website announcement. The newspaper ad said:

> *Attention: Wood Deck Owners*
>
> If your deck was built after January 1, 2004 with galvanized screws manufactured by Phillips Fastener Products, Simpson Strong-Tie or Grip-Rite, you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck. Please call if you would like an attorney to investigate whether you have a potential claim. . . .[334]

The announcement on the law firm's website read:

> *Class Action Investigations*
>
> Phillips Screws and Fasteners and/or Simpson's Screws and Fasteners — We are investigating the accelerated corrosion due to defectively manufactured screws and fasteners caused by pressure treated wood.[335]

In addressing the question of whether the litigation privilege "encompasses an attorney's solicitous statements made prior to the filing of a lawsuit," the Supreme Court of Tennessee rejected the plaintiff's argument that recognition of such a privilege would give "attorneys 'unfettered license . . . to troll for clients via . . . indiscriminate advertising portraying possible defendants in any defamatory light advantageous to securing new' business for the attorney."[336] The court wrote:

> We are persuaded that the litigation privilege applies to attorney solicitations published prior to the start of litigation. Specifically, the communication at issue is protected by the privilege if (1) the communication was made by an attorney acting in the capacity of counsel, (2) the communication was related to the subject matter of the proposed litigation, (3) the proposed proceeding must be under serious consideration by the attorney acting in good faith, and (4) the attorney must have a client or identifiable prospective client at the time the communication is published. The privilege will not apply unless each of these elements is satisfied.[337]

Quoting the *Restatement*, the court cautioned that the "bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for

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[332] *Id.* at 256.

[333] 232 S.W.3d 18 (Tenn. 2007).

[334] *Id.* at 20.

[335] *Id.* at 21.

[336] *Id.* at 23–24.

[337] *Id.* at 24.

defamation when the possibility is not seriously considered."[338] Nevertheless, the court broadly framed the rule, which it found to be supported by cases in other jurisdictions. The court wrote:

> . . . The plaintiff argues that the privilege should not apply to circumstances such as those presented here because rather than limiting the defamatory communications to persons having a potential claim against the plaintiff, the defendant "indiscriminately circulated them to the entire world." According to the plaintiff, the defendant had not consulted with a client or potential client about any claim against the plaintiff but broadly scattered its defamatory statements to everyone with access to the Tennessean newspaper and the Internet. Relying upon cases finding that a defamatory communication is protected only if it is published to persons with an interest in the proposed litigation, *see, e.g., Andrews v. Elliot*, 109 N.C. App. 271, 426 S.E.2d 430, 433 (N.C. Ct. App. 1993), the plaintiff maintains that untargeted communications by an attorney should fall outside the permissible scope of the privilege to safeguard against abuse.
>
> . . . .
>
> While we are not unsympathetic with the plaintiff's position, limiting the privilege in the manner suggested by the plaintiff could, in our view, inhibit potential parties or witnesses from coming forward and impede the investigatory ability of litigants or potential litigants, thereby undermining the reasons for the privilege. In some situations, attorneys may have no practical means of discerning in advance whether the recipients of the communication have an interest in the proposed proceeding. In that event, the attorney can only communicate with those having the ability and desire to join the proposed litigation by publishing the statement to a wider audience, which may include unconnected individuals. When the prerequisites of the privilege are satisfied, the privilege should not be lost based on this fact alone. We note, however, that unnecessary defamatory publications to recipients unconnected with the proposed proceeding would not be privileged. . . . For example, if the attorney has a feasible way of discerning which recipients have an interest in the case, but nevertheless publishes the defamatory communication to those having no interest in the case, the privilege would not apply.
>
> . . . .
>
> We also observe that, even if the requirements of the privilege are satisfied, an attorney who exceeds the bounds of permissible conduct may face collateral consequences. For example, an attorney who makes false and defamatory statements which result in a baseless lawsuit may face a malpractice action by the client or a malicious prosecution action by the party defamed, or both. . . . An attorney who institutes meritless litigation or files suit for an improper purpose may also face sanctions imposed by the courts under Rule 11 of the Tennessee Rules of Civil Procedure. In addition, an attorney may be disciplined by the Board of Professional

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[338] *Id.* at 24 (quoting RESTATEMENT (SECOND) OF TORTS § 586 cmt. e (1977)).

> Responsibility for violating ethical requirements which prohibit the filing of frivolous claims or soliciting employment by means of fraud or false or misleading statements. . . . These alternative remedies for attorney misconduct present "the risk of punishment for the errant lawyer . . . real enough to require that lawyer to beware.". . . . In light of these alternative remedies, coupled with the limitations we have placed on the privilege itself, we are satisfied that the privilege cannot be exploited as an opportunity to defame with impunity.[339]

(1) Example: *Cassuto v. Shulick*

The breadth of the judicial proceedings privilege is illustrated by a recent case which should give great comfort to lawyers who mistakenly hit the "reply all" button when sending e-mail. *Cassuto v. Shulick*[340] involved a fee dispute between a Pennsylvania attorney (Shulick), who was lead counsel for a client (Stone), and a New York attorney (Cassuto), who was hired to serve as local counsel for the client, but had been dismissed. Describing the facts, a federal court in New York wrote:

> Cassuto emailed many of the parties involved in the Stone matter notifying them of his charging lien and demanding that his name be included on any and all settlement documents "as attorney," and on the settlement check. Among the parties copied on this email were Shulick, Eric Kades, a named plaintiff in the *Stone* matter, and Craig Miller, the CEO of Stone Commercial Brokerage, and the attorneys who represented the defendant in the *Stone* matter. . . .
>
> In response, Shulick hit "reply all" and wrote the following sentence . . . [implying that Cassuto's claim] ". . . evidenc[ed] that he is still, apparently, as . . . previously suspected, under the influence of substances that caused him to act so irratically [sic] previously [sic] — the reason for his termination." Cassuto claims this statement constitutes libel *per se*. . . . [341]

Pertinence, Broadly Defined, is a Question of Law. Addressing the merits of the defamation claim, the court wrote:

> The judicial proceedings privilege is an absolute bar to defamation suits arising out of statements pertinent to judicial proceedings made by any party related to those proceedings. Whether statements of an allegedly defamatory nature are pertinent for purposes of the judicial proceedings privilege is a question of law for the court to decide.
>
> In determining whether a statement is pertinent to judicial proceedings for purposes of the privilege, courts apply an "extremely liberal" test, asking whether the statement is "at all pertinent to the litigation." The measure of a statement's pertinence to judicial proceedings is whatever a reasonable person would think is "connected" to the case. Thus, any doubts

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[339] *Id.* at 25–27.

[340] 2007 U.S. Dist. LEXIS 42638 (S.D.N.Y. 2007).

[341] *Id.* at *3–5.

0116 [ST: 149] [ED: 10000] [REL: 1] **Composed:** Thu Apr 29 08:21:29 EDT 2010
XPP 8.1C.1 Patch #6 LS000000 nllp 3281 [PW=540pt PD=720pt TW=360pt TD=580pt]
VER: [LS000000-Local:29 Mar 10 11:02**][MX-SECNDARY:** 21 Apr 10 06:58**][TT-:** 24 Mar 10 08:33 loc=usa unit=03281-ch0003**]** **0**

are to be resolved in favor of finding a statement to be pertinent to a judicial proceeding. "The barest rationality, divorced from any palpable or pragmatic degree of probability, suffices to establish the offending statement's pertinence to the litigation." The privilege embraces anything that may possibly be pertinent, including disputes over legal fees between attorneys. Additionally, a statement made during the course of judicial proceedings is only actionable where the statement is "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame."[342]

Wholly Unrelated Statements. The *Cassuto* court further explained:

> While the privilege does not extend to statements made by persons "wholly unrelated" to the relevant litigation, "no strained or close construction will be indulged in to exempt a [person] from the protection of privilege." The privilege is not destroyed simply because a participant to the judicial proceedings no longer represents a party. The privilege is only inapplicable where the statement is made by someone who has no involvement whatsoever in the pending litigation or was never involved in the proceedings. Moreover, it is irrelevant for purposes of applying the privilege that third parties inadvertently heard or read an allegedly defamatory statement.[343]

Pertinence is Evaluated in Context. The court continued:

> In determining whether a statement is pertinent to a judicial proceeding, the statement must be read in context. Here, Cassuto initiated the discussion in issue. Cassuto entitled his initial email to Shulick "SETTLEMENT-*Stone Commercial Brokerage, Inc. v. Organic, Inc. et al.*" As evidenced by the subject line, the email pertained to the *Stone* lawsuit. Nonetheless, Cassuto contends the email is not pertinent to a judicial proceeding because it related to the Fee Agreement, not to the lawsuit. Cassuto is simply wrong. The statement related to the lawsuit as it arose from Cassuto's representation in the *Stone* matter. In response to Cassuto's request for fees, Shulick sent an email rejecting Cassuto's claim, stating that "he would be happy to litigate the fees."
>
> Frustrated with his failing efforts to obtain payment from Shulick, Cassuto filed a lien against any *Stone* settlement. While Cassuto contends the fee dispute was not pertinent to the *Stone* litigation, his decision to file a lien against the settlement proceeds and to alert all parties and counsel of that decision proves the contrary.
>
> . . . .
>
> Cassuto contends that his status as former counsel should preclude any application of the judicial proceedings privilege. But when former counsel to litigation continue to involve themselves in actual proceedings, the

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[342] *Id.* at *8–9.

[343] Id. at *10.

> privilege still applies. As discussed above, Cassuto sent an email to opposing counsel in *Stone* demanding his name be included on settlement papers with the designation "as attorney.". . . .
>
> Cassuto relies on *Silverman v. Clark* [822 N.Y.S.2d 9 (App. Div. 2006)] in which the privilege did not apply to an attorney formerly involved in litigation. But this case is inapposite. The attorney in *Silverman* merely contacted his former client to suggest that she proceed with her new attorney cautiously, or alternatively, return to his firm. The attorney made no statement pertinent to a pending litigation as was the case here.
>
> Finally, Cassuto contends that the immunity should not apply because Shulick copied his secretary and paralegal on subsequent emails, including the string of emails containing the allegedly defamatory statements. However, as noted earlier, the privilege is not extinguished simply because third parties have been exposed to the allegedly defamatory statements.[344]

The Second Circuit affirmed the district court's ruling in *Cassuto*, in a summary order which stated simply, "For substantially the reasons stated by the District Court, we agree that the e-mail was privileged. We have considered all of Cassuto's arguments and find them to be without merit."[345]

(2) Quasi-Judicial Proceedings

Statements relating to a *quasi-judicial* proceeding are often absolutely privileged. For example, in *Sullivan v. Smith*,[346] the Alabama Court of Civil Appeals held that the statements of a crime victim's parents to the state Board of Pardons and Paroles could not form the basis for a slander action.

Quasi-judicial proceedings come in many varieties. In *Craig v. Stafford Const., Inc.*,[347] the Supreme Court of Connecticut held that an investigation conducted by a police department's internal affairs division constituted a quasi-judicial proceeding. Therefore, a defamation action, based on a complaint to the division about a police officer's alleged racial bias, was barred by an absolute privilege. The court noted that, in determining whether a proceeding is quasi-judicial in nature, it is appropriate to consider the following factors: "whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties."[348]

Complaints to Government Agencies. In *5-State Helicopters, Inc. v. Cox*,[349] a defamation claim arose from two letters of complaint sent to the Federal Aviation

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[344] *Id.* at *11–15.

[345] 313 Fed. Appx. 448 (2d Cir. 2009).

[346] 925 So. 2d 972 (Ala. Civ. App. 2005).

[347] 856 A.2d 372 (Conn. 2004).

[348] *Id.* at 377 (quoting *Kelley v. Bonney*, 606 A.2d 693, 704 (1992)).

[349] 146 S.W.3d 254 (Tex. App. 2004).

Administration (FAA). In holding that the suit was barred by an absolute privilege, Chief Justice John Cayce wrote for the Texas Court of Appeals:

> A proceeding is quasi-judicial in nature if it is conducted by a governmental executive officer, board, or commission that has the authority to hear and decide the matters coming before it or to redress the grievances of which it takes cognizance. . . .
>
> . . . [T]he rationale for extending the absolute privilege to statements made during quasi-judicial proceedings rests in the public policy that every citizen should have the unqualified right to appeal to governmental agencies for redress "without the fear of being called to answer in damages" and that the administration of justice will be better served if witnesses are not deterred by the threat of lawsuits. . . . The absolute privilege is intended to protect the integrity of the process and ensure that the quasi-judicial decision-making body gets the information it needs. . . .
>
> Whether an alleged defamatory statement is related to a proposed or existing judicial or quasi-judicial proceeding, and is therefore absolutely privileged, is a question of law. . . .
>
> In this case, FAA's quasi-judicial status is not in dispute. The FAA Administrator may reinspect and reexamine any civil aircraft at any time to ensure that the aircraft is in compliance with federal air safety laws. . . . If it appears that a person may be in violation of federal aviation statutes or regulations, the FAA is authorized to initiate an investigation and decide whether any violations have occurred. . . . The FAA may, among other things, hold administrative hearings, issue orders of compliance, assess civil penalties, seize noncompliant aircraft, or bring a civil enforcement action in federal district court. . . . If . . . as a result of the investigation, the FAA determines that a violation has occurred that does not require legal enforcement action, an appropriate official in the FAA field office responsible for processing the enforcement case "may take administrative action in disposition of the case.". . . . Such administrative actions include issuing a warning notice to the alleged violator.[350]

Quasi-Judicial Status Depends on Authority, Not Adjudication. The court emphasized that a governmental entity's status depends on the entity's authority:

> The mere fact that the FAA's investigation did not culminate in a full-blown administrative hearing or a "formal adjudication" did not alter its quasi-judicial nature. It is undisputed that the FAA had the authority to conduct such a hearing and adjudication if it had determined that such measures were necessary. A proceeding's quasi-judicial status depends on whether the governmental entity has the authority to investigate and decide the matters at issue, not on the length, complexity, or outcome of the proceeding. . . .
>
> . . . [T]o adopt the narrow view of quasi-judicial proceedings that appellees urge would result in a rule that private citizens' communications

[350] *Id.* at 257–58.

> to a quasi-judicial body about a matter that the entity was authorized to investigate and resolve would not be privileged unless and until the proceeding reached the administrative hearing stage. Such a rule would have a chilling effect on the free flow of information and deter rather than aid the decision-making body's efforts to obtain necessary information. . . . [351]

Attorney Discipline and Related Matters. In many states, persons reporting alleged attorney misconduct to disciplinary authorities enjoy an absolute privilege.[352] In some jurisdictions, the privilege is an extension of the judicial proceedings privilege to attorney disciplinary hearings, which are quasi-judicial in nature.

In *Sobol v. Alarcon*,[353] the court concluded that an absolute privilege barred a defamation action by a certified legal document preparer. In that case, an attorney sent a letter to the State Bar accusing a certified legal document preparer of the unauthorized practice of law. Thereafter, the State Bar forwarded the letter to the Board of Legal Document Preparers. In disposing of a suit against the attorney who made the report, the Arizona Court of Appeals wrote:

> This court has afforded absolute immunity to individuals who have filed complaints with the State Bar against attorneys accusing them of unethical conduct. . . . We have done so to encourage the public to report alleged unethical lawyer behavior without fear of reprisal and free from the threat of civil litigation. Application of the privilege also ensures the State Bar, as the entity authorized by the Supreme Court of Arizona to regulate attorney conduct, receives the information it needs to accomplish its disciplinary role. . . .
>
> In Arizona, a [certified] legal document preparer . . . may perform specified legal services without being supervised by an attorney in good standing with the State Bar. In light of the role now permissibly played by certified legal document preparers in working with the public and providing the public with certain legal services, just as with the legal profession, public policy demands that absolute immunity be extended to members of the public who report alleged unethical behavior by certified legal document preparers. We can conceive of no reason why a person who reports allegedly unethical conduct by a lawyer should be protected by absolute immunity while a person who reports allegedly unethical conduct by a certified legal document preparer should be subjected to the risk of civil liability. Given the public's need for access to legal services and the importance of regulating those who provide such services, there should be no distinction. . . . [354]

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[351] *Id.* at 258–59.

[352] *See* Tex. Gov't Code Ann. T.2, Subt. G, App. A-1 § 15.8 (LEXIS 2009).

[353] 131 P.3d 487 (Ariz. Ct. App. 2006).

[354] *Id.* at 490.

University Sexual Harassment Procedures. In *Hartman v. Keri*,[355] the Supreme Court of Indiana held that statements charging a university professor with sexual harassment were absolutely privileged. The court explained its reasoning as follows:

> [Anti-harassment policies] . . . similar to Purdue's are commonly found in institutions of higher education. At least three states [New York, California, and Maryland] have held that communications to school authorities raising complaints against educators enjoy the same absolute privilege the law accords to statements in judicial proceedings. . . . In reaching this conclusion courts have described the processes of the educational institutions as quasi-judicial. . . . This view of the issue, adopted by Justice Rucker's separate opinion, invokes a body of law that analyzes the availability of the privilege in terms of the degree to which court-like procedures are available. Thus, courts have examined whether proceedings are under oath, whether there is subpoena power, whether discovery is available, and the like. . . . Purdue's processes do not establish such a formal apparatus. But to the extent Keri has a complaint about the adequacy or fullness of the process, it is a complaint with Purdue, not Hartman and Swinehart [the complainants]. That complaint has been asserted in federal court and has been resolved there adversely to Keri. At least in the context of educational institutions, as long as the process is reasonably transparent and fair and affords the subject an opportunity to respond, we think the ultimate issue focuses less on the particular process and more on the recognition of the institution's interest in assuring a proper educational environment.
>
> Hartman and Swinehart acted under the procedure Purdue established. Protecting their complaints with anything less than an absolute privilege could chill some legitimate complaints for fear of retaliatory litigation. . . . A university should be given the latitude to tailor its processes to the educational environment without degrading the protection the law gives to complaints of misconduct in the educational setting. . . .
>
> Citizens reporting suspected criminal activity to law enforcement enjoy only a qualified privilege, which subjects them to the risk of retaliatory civil litigation for malicious or unfounded charges. *E.g., Holcomb v. Walter's Dimmick Petrol., Inc.*, 858 N.E.2d 103, 106 (Ind. 2006) (*citing Conn v. Paul Harris Stores, Inc.*, 439 N.E.2d 195, 200 (Ind. Ct. App. 1982)). At first blush it may seem anomalous to grant a higher degree of protection to complaints made in the educational setting. But a current student is subject to academic discipline for abuse of the process. In practical terms this is a substantial deterrent to false reporting. Moreover, the need for protection is greater in the educational setting because the subject of the complaint — the educator — is in a position of authority over the student, so fear of retaliation presents a potential obstacle to open airing of grievances. . . .

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[355] 883 N.E.2d 774 (Ind. 2008).

> Finally, we think it is relevant that the Indiana General Assembly has given state higher educational institutions the power to govern conduct on institution property and to "prevent unlawful or objectionable acts," of the institution's students, faculty, and employees "wherever the conduct might occur." Ind. Code Ann. §§ 21-39-2-2 to -3 (West 2008). This includes the power to "dismiss, suspend, or otherwise punish any student, faculty member, or employee of the state educational institution who violates the institution's rules or standards of conduct, after determination of guilt by lawful proceedings.". . . . These statutes authorize educational institutions to construct their own disciplinary procedures in a way that protects the needs of the participants and also serves the educational goals of the institution. Although Purdue's procedure may lack the trappings of a traditional court proceeding, it is orderly and reasonably fair, requires "appropriate discipline" for those who file knowingly false or malicious complaints, and promises reasonable efforts to restore the reputation of anyone charged with discrimination or harassment that proves unsubstantiated. If Keri has been unfairly treated, his complaint is against Purdue University as the architect and implementer of the policy and procedures, not the students who invoked the process.[356]

(3) Limits of the Judicial Proceedings Privilege

Publication to the Press or Other Audiences of Statements Related to Litigation. Occasionally courts find that statements connected to litigation are not protected by the absolute judicial proceedings privilege. One such case was *Bochetto v. Gibson*.[357] In that case, an attorney (Bochetto) was sued for legal malpractice based on conduct which allegedly occurred in connection with the defense of a client in quiet-title actions. In the legal malpractice action, the client was represented by a new attorney (Gibson). The legal malpractice complaint alleged that Bochetto had breached his fiduciary obligations by failing to disclose important information (an expert report) to the client and by other misconduct related to the procurement of a substitute expert report. After filing the legal malpractice complaint for the client, Gibson faxed a copy to a reporter with the Legal Intelligencer (Dudick), which resulted in a story which Bochetto claimed was false and defamatory. In a defamation suit by Bochetto against Gibson and his firm, the defendants argued that the claim was barred by the judicial proceedings privilege. In addressing that issue, the Supreme Court of Pennsylvania wrote:

> Pursuant to the judicial privilege, a person is entitled to absolute immunity for "communications which are issued *in the regular course of judicial proceedings* and which are *pertinent and material to the redress or relief sought*." *Post v. Mendel*, 510 Pa. 213, 507 A.2d 351, 355 (1986) (emphasis in original). . . .
>
> In *Post*, this Court was asked to decide whether the judicial privilege protected an attorney from liability for statements he made in a letter

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[356] *Id.* at 777–79.

[357] 860 A.2d 67 (Pa. 2004).

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> detailing alleged acts of misconduct by his opposing attorney, which was not only sent to the opposing attorney, but was also sent as copies to the judge trying the case, the Disciplinary Board of this Court, and the attorney's client. Although we found that the letter had been issued during the course of the trial and referred to matters that occurred during the trial, we nevertheless concluded that it was not: (1) issued as a matter of regular course of the proceedings; or (2) pertinent and material to the proceedings.[358] Accordingly, . . . we held that . . . [the letter] was not "within the sphere of [communications] which judicial immunity was designed to protect" and that the attorney was not absolutely immune from liability for his statements in the letter. . . .
>
> In . . . the instant case, we initially note that Gibson's publication of the complaint to the trial court was clearly protected by the privilege. . . . However, the fact that the privilege protects this first publication does not necessarily mean that it also protects Gibson's later act of republishing the complaint to Dudick. *See Pawlowski v. Smorto*, 403 Pa. Super. 71, 588 A.2d 36, 41 n. 3 (1991) ("[E]ven an absolute privilege may be lost through overpublication. . . . In the case of the judicial privilege, overpublication may be found where a statement initially privileged because made in the regular course of judicial proceedings is later republished to another audience outside of the proceedings."); *Barto v. Felix*, 250 Pa. Super. 262, 378 A.2d 927, 930 (1977) (although allegations in attorney's brief were protected by judicial privilege, attorney's remarks concerning contents of brief during press conference were not likewise protected by privilege). Indeed, this later act may only be protected by the judicial privilege if it meets the two elements that we held in *Post* are critical for the privilege to apply, *i.e.*, (1) it was issued during the regular course of the judicial proceedings; and (2) it was pertinent and material to those proceedings. As Gibson's act of sending the complaint to Dudick was an extrajudicial act that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to those proceedings, it is plain that it was not protected by the judicial privilege.[359]

The court noted in a footnote that while Gibson is not absolutely immune from liability for faxing the complaint to the reporter, he might nevertheless be entitled to a qualified privilege. As discussed later in the chapter, qualified privileges are "abused," and therefore afford no protection, if the defendant acts with knowledge

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[358] [n.13] In finding that the letter did not satisfy these two criteria, we explained as follows:

> The letter did not state or argue any legal position, and it did not request any ruling or action by the court. Nor did the communication request that anything contained in it should even be considered by the court. The letter was clearly not a part of the judicial proceedings to which it made reference, and merely forwarding a copy of the letter to the court did not make it a part of those proceedings. Likewise, forwarding copies of the letter to plaintiff's alleged client . . . and to the Disciplinary Board . . . did not render the letter a part of the trial proceedings, and transmittal of those copies would not logically have been expected to affect the course of trial.

Post, 507 A.2d at 356.

[359] 860 A.2d at 71–73.

of a statement's falsity or for improper motives, such as spite, ill-will, or vindictiveness.

Problem 3-12: The Accused Caterer

Soon after the City of St. Loyal (the City) adopted a new ethics code (the Code), a complaint was filed with the Ethics Review Board (the Board) by Raphael's Catering (Raphael's). The complaint related to the City's solicitation of bids for a lucrative, five-year, exclusive-rights catering contract at the Convention Center.

Raphael's had submitted a bid for the contract. One of the competing bids was submitted by Raphael's old nemesis, Child's Comestibles (Child's). In the complaint to the Board, Raphael's alleged that the owners of Child's had made improper campaign contributions to certain members of City Council, and was therefore ineligible to bid on the Convention Center catering contract.

The new Code provided that neither the filing of a complaint nor any official action relating to a complaint would be public information unless and until the Board made a finding that the complaint had merit. Unfortunately, because the provisions of the Code were new and city officials were unfamiliar with them, the complaint filed by Raphael's against Child's was erroneously distributed to the press in response to an open records request.

The resulting news stories attracted great public attention. Reporters researching the story were able to document a history of "bad blood" and animosity between Raphael's and Child's. Media scrutiny also focused on whether members of City Council were in compliance with campaign finance laws.

The Board, which consisted of eleven members approved by City Council, offered Child's the opportunity to present a defense to the charges stated in Raphael's complaint. Applicable provisions in the Code prohibited *ex parte* communications with members of the Board. The Code also required all witnesses to be sworn and provided that all questioning of witnesses was to be conducted by the members of the Board. Under the Code, a person charged with unethical conduct had a right to attend a hearing and to present witnesses, but no right to be accompanied by legal counsel. No standard of proof was stated in the Code.

The Board had the power to make a finding that the Code had been violated and to recommend to City Council what sanction should be imposed. However, the Board's findings and recommendations were not binding on City Council, which had plenary power to review any finding of fact *de novo* and to disregard any recommendation of the Board.

The proceedings relating to the complaint against Child's were closed to the public. Ultimately, the Board found that there was no violation and recommended that City Council take no further action. City Council followed that recommendation.

After the Convention Center catering contract was awarded to a bidder unrelated to the ethics complaint, Child's filed suit against Raphael's alleging that the statements made in the complaint to the Board were false and defamatory, without any factual basis, and maliciously intended to cause Child's not to be

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awarded the catering contract. Raphael's has moved to dismiss the defamation complaint on the ground that its ethics complaint to the Board was absolutely privileged. No prior case or legislative enactment has addressed this question. How should the court rule?

b. Legislative and Executive Branch Absolute Privileges

Legislative Proceedings. It is not at all surprising that, in a country with a three-branch government, the judicial proceedings privilege is paralleled by privileges relating to the legislative and executive branches. Thus, as a matter of common law, utterances by legislators and legislative witnesses, if published in connection with legislative functions, are immune from suit.[360]

In *Riddle v. Perry*,[361] the Supreme Court of Utah held that the statement of a legislative witness, which implied that the sponsor of a bill had been bribed, was related to the hearing and therefore absolutely privileged. This was true even though both the committee parliamentarian and the legislative witness both acknowledged that the statement was out of order.

Executive Branch Communications. Statements by high level executive branch officials in the federal or state government are absolutely privileged, under common law principles, if made in connection with the performance of official duties.[362] At the state level, the absolute privilege for executive branch communications extends at least to high level officials, such as the governor, attorney general, and heads of state departments. Whether lesser state officials enjoy a qualified, rather than absolute, privilege depends on state law.[363]

Statements in Search Warrants. In *Smith v. Danielczyk*,[364] the Maryland Court of Appeals held that police officers were entitled to only qualified immunity with respect to defamatory statements contained in a search warrant application. Interestingly, the court also noted that the judicial proceedings privilege was not applicable to the facts, which involved a search of the lockers of fellow police officers. The court wrote:

> An application for a search warrant may be said to be in the nature of a judicial proceeding because the application must be made to a judge and because the issuance of a warrant is a judicial act. On the other hand, . . . an application for search warrant, at least in the ordinary case, is not made in the course of an existing judicial proceeding and does not inaugurate or necessarily lead to one. . . . Moreover, the presentation of a search warrant application is almost always *ex parte*, often occurring at the judge's home during the evening hours, with little or no ability to test the accuracy of the affiant's averments. Absent some knowledge to the contrary, the judge necessarily assumes good faith and truthfulness on the part of the

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[360] *See* Restatement (Second) of Torts §§ 590 & 590A (1977).

[361] 40 P.3d 1128 (Utah 2002).

[362] *See* Restatement (Second) of Torts § 591 (1977).

[363] *See id.* § 591 cmt. e.

[364] 928 A.2d 795 (Md. 2007).

> affiant and looks to see only whether those averments, assuming them to be true, suffice to establish probable cause to believe that incriminating evidence will be found at the place or on the person to be searched. . . .
>
> The normal trappings of . . . [an adversarial] judicial proceeding are thus lacking. In that regard, the presentation of an application for search warrant may be more akin to an investigatory proceeding rather than a judicial one. . . .
>
> A critical underpinning to allowing an absolute privilege for statements made in the course of a judicial proceeding is that, because such a proceeding is normally adversarial in nature, there is usually the ability to test the veracity of those statements and to publicly rebut them. Witnesses can be cross-examined; contradictory evidence can be presented. A neutral fact-finder, after examining all of the evidence presented, can decide what is believable and what is not. . . . Even in sub-proceedings that may themselves be *ex parte* in nature, such as requests for temporary restraining orders, the opportunity exists later in the case to expose and sanction false statements. . . .
>
> That counterweight simply does not exist with respect to search warrant applications. . . .
>
> The rationale for being cautious about extending an absolute privilege to an *ex parte* search warrant proceeding was well-stated in *Franks v. Delaware*, [438 U.S. 154, 168 (1978)]: "[t]he requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile."[365]

Rights Under the Petition Clause. Persons communicating with executive branch officers do not enjoy an absolute privilege that would defeat a defamation action. The guarantees of the Petition Clause of the Federal Constitution have been found to be coextensive with those articulated in *New York Times Co. v. Sullivan*[366] and its progeny. Thus, in *McDonald v. Smith*,[367] the United States Supreme Court held that letters addressed to the President, concerning the plaintiff's qualifications to become a United States Attorney, could give rise to liability if actual malice was proved.

Similarly, in *Clark v. Jenkins*,[368] the Texas Court of Appeals held that a civil rights group and its president were not absolutely immune from a defamation suit based on the group's distribution of a memorandum to the Justice Department and a Congressman requesting certain action. The memorandum stated that a member of city council was a convicted felon who had served time for prostitution and drug-related offenses. A jury verdict was upheld because there was clear and

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[365] *Id.* at 811–13.

[366] 376 U.S. 254 (1964).

[367] 472 U.S. 479 (1985).

[368] 248 S.W.3d 418 (Tex. App. 2008).

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convincing evidence that the defendants acted with actual malice.

State Constitutional Protections. State law sometimes provides greater protection than the Federal Constitution. In *Kashian v. Harriman*,[369] the California Court of Appeal held that the state statutory absolute privilege for statements made in connection with an "official proceeding," defeated a defamation claim based on a letter urging a division of the Office of the Attorney General to institute an investigation of the tax-exempt status being claimed by a certain health care provider.

c. Westfall Act and Federal Officers and Employees

Any reference to the application of judicial, legislative, or executive branch absolute privileges at the federal level is incomplete without some discussion of the protections afforded to federal employees under the Westfall Act. In *Wuterich v. Murtha*,[370] a U.S. Marine sued a Congressman for defamation based on the Congressman's statements to the press. The D.C. Circuit wrote:

> This case involves an important question concerning the scope of absolute immunity under the Westfall Act. *See* 28 U.S.C. § 2679. The Westfall Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). . . . "When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.' Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee.". . . .
>
> In this case, U.S. Marine Frank D. Wuterich sued Congressman John Murtha, alleging that the Congressman made false and defamatory statements to the press about the role of Wuterich's squad in the deaths of civilians in Haditha, Iraq in 2005. Congressman Murtha invoked the protections of the Westfall Act and the Attorney General's designee certified that the Congressman was acting within the scope of his employment at the time he uttered the contested statements. . . . Congressman Murtha and the United States now appeal the District Court's denial of the Attorney General's certification.[371]

Addressing the framework of the Westfall Act, the court explained:

> [Once] the federal employee is dismissed from the case and the United States is substituted as the defendant in place of the employee . . . the suit is governed by the Federal Tort Claims Act ("FTCA") and is subject to all of the FTCA's exceptions for actions in which the Government has not waived sovereign immunity. . . . When one of these exceptions applies,

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[369] 120 Cal. Rptr. 2d 576 (Cal. Ct. App. 2002).

[370] 562 F.3d 375 (D.C. Cir. 2009).

[371] *Id.* at 377–78.

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> the Attorney General's certification converts the tort suit into a FTCA action over which the federal court lacks subject matter jurisdiction and has the effect of altogether barring plaintiff's case.[372]

The FTCA bars an action against the federal government for many types of intentional torts, including liable and slander.[373] Thus, the viability of the plaintiff's claim hinged upon whether the Congressman's statements were within the scope of his office or employment. If so, the Congressman was immune and sovereign immunity precluded the plaintiff from suing the federal government. Addressing the key issue, the D.C. Circuit wrote:

> The *Restatement* provides:
>
> > Conduct of a servant is within the scope of employment if, but only if:
> >
> > (a) it is of the kind he is employed to perform;
> >
> > (b) it occurs substantially within the authorized time and space limits;
> >
> > (c) it is actuated, at least in part, by a purpose to serve the master, and
> >
> > (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> *Restatement (Second) of Agency* § 228(1). . . .
>
> Wuterich argues that Congressman Murtha's statements to the media fell outside the scope of his employment because they were neither conduct "of the kind he is employed to perform," . . . nor were they "actuated, at least in part, by a purpose to serve the master,". . . . Wuterich alleged in his complaint that Congressman Murtha's "comments were made outside of the scope of his employment as a U.S. Congressman and [were] intended to serve his own private purposes and interests.". . . . Wuterich additionally maintained at the motion hearing before the District Court that Congressman Murtha's comments fell outside the scope of his official duties because they were intended to embarrass Defense Secretary Rumsfeld. Taken together and generously construed under the liberal pleading standard of Rule 8(a), Wuterich has failed to allege facts that, taken as true, establish that Congressman Murtha's actions exceeded the scope of his employment.
>
> The analysis of Wuterich's allegations is controlled by this court's decision in *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659 (D.C. Cir. 2006). In that case, the Council on American-Islamic Relations sued Congressman Cass Ballenger for defamation and slander after Congressman Ballenger remarked that the organization was the "fund-raising arm for Hezbollah" during a conversation with a reporter about his separation from his wife. . . . The District Court upheld the Government's Westfall Act certification and dismissed the case. . . . In affirming the District Court, this court explained that the proper test under *Restatement* § 228(1)(a) is whether the "[underlying conduct] — not the

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[372] *Id.* at 380.

[373] *See* 28 U.S.C. 2680(h) (LEXIS 2009).

allegedly defamatory sentence — was the kind of conduct Ballenger was employed to perform.". . . .

Applying this test, the court in *Ballenger* held that the Congressman's conduct was of the kind he was employed to perform, because "[s]peaking to the press during regular work hours in response to a reporter's inquiry falls within the scope of a congressman's 'authorized duties.' ". . . . Further, the court was quite clear in stating that, even though the allegedly defamatory statement was made in the course of a conversation about Congressman Ballenger's marital difficulties, his "conduct was motivated — at least in part — by a legitimate desire to discharge his duty as a congressman" within the meaning of *Restatement* § 228(1)(c). . . . This was so, the court explained, because a congressman's "ability to do his job as a legislator effectively is tied, as in this case, to the Member's relationship with the public and in particular his constituents and colleagues in the Congress.". . . .

. . . [I]t is clear that Wuterich has not alleged any facts that even remotely suggest that Congressman Murtha was acting outside the scope of his employment when he spoke about the Haditha incident. . . . [T]he underlying conduct — interviews with the media about the pressures on American troops in the ongoing Iraq war — is unquestionably of the kind that Congressman Murtha was employed to perform as a Member of Congress. This is especially true in the case of Congressman Murtha, who was the Ranking Member of the Appropriations Committee's Subcommittee on Defense and had introduced legislation to withdraw American troops from Iraq. . . .

. . . Wuterich's claim that Congressman Murtha desired to "embarrass" Defense Secretary Rumsfeld, even if true, surely would not take his actions outside the scope of his employment.

As this court emphasized in *Ballenger*, "The *Restatement*'s text reveals that even a partial desire to serve the master is sufficient.". . . . Attacking the credibility of Defense Secretary Rumsfeld, the man who was the public face of the war in Iraq, was . . . part and parcel of Congressman Murtha's job as a legislator charged with overseeing military affairs and of his efforts to serve his constituents by advancing legislation to bring home American troops stationed in Iraq.

. . . .

. . . [W]e hereby vacate the District Court's order. . . . Wuterich's case is barred by sovereign immunity. . . . [374]

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[374] *Wuterich*, 562 F.3d at 383–87.

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d. Other Absolute Privileges

Spousal Communications. The publication of defamatory material between a husband and wife is absolutely privileged.[375]

Consent by the Plaintiff. The maxim *volenti non fit injuria* applies as readily to libel and slander actions as in other areas of tort law. To one who is willing, no harm is done. If the plaintiff consents to the defendant's publication of defamatory material, the plaintiff cannot complain.[376]

Publications Required by Law. A statement uttered under legal compulsion generally is not actionable. Thus, if a broadcaster is required to afford a political candidate an equal chance to be heard, and has no right of censorship, the broadcaster cannot be held liable for dissemination of defamatory statements by the candidate that are broadcast in compliance with that legal obligation.[377]

Various statutes expressly create this type of privilege. For example, a section in the Texas Finance Code entitled "Reports of Apparent Crime," provides that:

> A state trust company that is . . . [the] victim of an apparent or suspected misapplication of its corporate or fiduciary funds or property in any amount by a director, manager, managing participant, officer, or employee shall . . . [make a report] to the banking commissioner within 48 hours. . . . The state trust company or a director, manager, managing participant, officer, employee, or agent is not subject to liability for defamation or another charge resulting from information supplied in the report.[378]

The California Child Abuse and Neglect Reporting Act provides that "[n]o mandated reporter shall be civilly or criminally liable for any report required or authorized by this article."[379]

Reports of Criminal Activity to the Police. In *Hagberg v. California Federal Bank FSB*,[380] the California Supreme Court, relying on a state statute that immunizes statements in official proceedings, held that "when a citizen contacts law enforcement personnel to report suspected criminal activity and to instigate law enforcement personnel to respond, the communication . . . enjoys an unqualified privilege." The privilege defeated the plaintiff's claims alleging slander and other theories of tort liability. The plaintiff in *Hagberg* had argued that the only explanation for her treatment was racial or ethnic prejudice based on the fact that she was Hispanic. In response, the court wrote:

> Because our review of the record raises a serious question whether the evidence . . . was sufficient even to raise a triable issue of fact on the

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375 *See* Restatement (Second) of Torts § 592 (1977).

376 *See id.* § 583.

377 *See id.* § 592A cmt. a..

378 Tex. Finance Code § 183.113(a) (LEXIS 2009).

379 Cal. Penal Code § 11172 (LEXIS 2009).

380 81 P.3d 244 (Cal. 2004).

> question whether Cal Fed or its employees were motivated by racial or ethnic prejudice in their treatment of plaintiff or followed a policy of singling out persons of certain races or ethnic backgrounds for discriminatory treatment, we have concluded that this is not an appropriate case in which to resolve the broad legal question whether proof that a business establishment has called for police assistance (or has a policy of calling for police assistance) based on racial or ethnic prejudice could give rise to liability under the Unruh Civil Rights Act notwithstanding the provisions of section 47(b) [the statutory official proceedings privilege]. . . . [381]

Suspected Child Abuse. Some states hold that reports relating to suspected child abuse are absolutely privileged. For example, California law imposes on certain persons a duty to report evidence of suspected child abuse, then further provides:

> No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article. . . . Any other person reporting a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any person who makes a report of child abuse or neglect known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused. . . . [382]

There are many statutory variations in other jurisdictions relating to reports of suspected child abuse.[383]

Problem 3-13: The Bar Admission Applicant

When Kayla Quince applied for admission to practice after graduating from law school, she found that the process required a lot of paperwork. Among other things, she had to furnish the bar examiners with the names and contact information of all of her supervisors at every place she had ever worked.

After her first year of law school, Quince had interned at the law firm of Sorenson & Porter, where she was supervised by Andy Clark. Quince therefore listed Clark on her application materials. She also signed the "Authorization and Release" form that she had received from the State Bar. The form, after she filled in her name, stated in relevant part:

> I, Kayla Quince, hereby give my consent to the Board of Law Examiners to conduct an investigation as to my moral character and fitness and to make inquiries and request such information from third parties as, in the sole discretion of the Board, is necessary to such investigation. . . .

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[381] *Id.* at 260.

[382] Cal. Penal Code § 11172(a) (LEXIS 2009).

[383] *See, e.g.*, Colo. Rev. Stat. Ann. § 19-3-309 (LEXIS 2009).

> I authorize every person having opinions about me or knowledge or control of information pertaining to me to reveal, furnish, and release to the Board of Law Examiners any such opinions, knowledge, information, documents, records, or other data. . . .
>
> I hereby release, discharge, and hold harmless the Board of Law Examiners and any person, firm, company, corporation, employer, or other third-party, and their agents, from any and all liability of every nature and kind arising out of the furnishing, inspection, and use of such opinions, knowledge, documents, or other data. . . .

The statement was signed by Quince before a Notary Public and notarized.

When Quince worked at Sorenson & Porter, she had made some mistakes. However, she thought that Clark would give her a positive report if he was contacted by the bar examiners. Quince was seriously wrong.

Some of the errors that Quince had made at the law firm had seriously embarrassed Clark and had potentially subjected the firm to malpractice liability. When Clark was contacted by the bar examiners, he was provided with a copy of the Authorization and Release Form. In response to the inquiry about Quince, Clark provided a full and unflattering account of Quince's errors at the firm. In fact, what Clark wrote was even worse than the truth because Clark confused Quince with Karen Curren, another intern who worked for the law firm the same summer. Andy Clark's letter to the Board of Law Examiners attributed some of Curren's errors and unprofessional conduct to Quince.

As a result of Clark's letter, the Board of Law Examiners conducted a full investigation into the matter, which delayed Quince's admission to the bar for six months. During that period, the firm by which Quince was hired for a job after graduation paid her at the same agreed salary that she continued to receive after becoming fully licensed. Please evaluate whether Quince has a viable defamation claim against Clark and his law firm.

4. Qualified Privileges

Legal issues relating to "conditional" or "qualified" privileges fall into two basic categories. The first concerns when such privileges arise, and the second relates to the circumstances under which such privileges are lost.[384]

Types of Interests Protected. In general, a qualified privilege may arise in any situation in which there is good reason for the law to encourage or permit a person to speak or write about a potential defamation plaintiff, even though the speaker is not certain about the accuracy of the information relayed. Thus, the *Restatement* contains specific qualified privilege rules relating to protection of: (1) the publisher's own interests;[385] (2) the interests of the recipient of a communication or a third party;[386] (3) a common interest of the publisher and recipient;[387] (4) the

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[384] *See* Restatement (Second) of Torts § 593 (1977).

[385] *Id.* § 594.

[386] *Id.* § 595.

interests of family members;[388] and (5) the public interest (including communications with public officials or peace officers[389] and communications by inferior state officers who are not entitled to an absolute privilege[390]).

In general, a communication is more likely to be qualifiedly privileged than would otherwise be the case: if there is a relationship between the publisher and the recipient; if the communication concerns a risk to the interests of the publisher, the recipient, or others that could be avoided through reliance on the information provided; if the statement was solicited, rather than volunteered; and if the allegedly defamed person previously engaged in some form of related wrongful conduct.

In *Havlik v. Johnson & Wales University*,[391] the First Circuit held that a university, which reasonably but erroneously believed that it was required by federal law to issue a crime report about one student's assault on another, was protected by a qualified privilege for a defamation suit based on the contents the report. Moreover, the fact that a university vice president had "accused the plaintiff of prevarication" relating to the underlying events and "may have harbored some hostility toward the plaintiff" was irrelevant for purposes of determining whether the report was privileged.[392] This was true because there was no evidence that the vice president played any part in the preparation of that document.

Credit Reporting Agencies. Credit reporting agencies are usually thought to have a qualified privilege with respect to communications to their subscribers.

a. Privileges of Employers and Employees

Current Employers. "[A]n employer has a conditional or qualified privilege that attaches to communications made in the course of an investigation following a report of employee wrongdoing."[393]

Co-Employees. Comments by one employee about another employee may enjoy a qualified privilege, for example, if they are made at a board of directors' corporate grievance hearing[394] or are published to management with respect to another's job performance.[395] Thus, in *Bals v. Verduzco*,[396] the Indiana Supreme Court held that an action by a current employee based upon a supervisor's allegedly defamatory evaluation was barred by a qualified privilege. Likewise, in

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[387] *Id.* § 596.

[388] *Id.* § 597.

[389] *Id.* § 598..

[390] *Id.* § 598A.

[391] 509 F.3d 25 (1st Cir. 2007).

[392] *Id.* at 34.

[393] *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

[394] *See Hagebak v. Stone*, 61 P.3d 201 (N.M. Ct. App. 2002).

[395] *See Sheehan v. Anderson*, 263 F.3d 159 (3d Cir. 2001).

[396] 600 N.E.2d 1353 (Ind. 1992).

DeNardo v. Bax,[397] the Supreme Court of Alaska found that an employee's statements that she was being stalked by a co-worker were qualifiedly privileged because they expressed legitimate concern for personal safety.

Former Employers. A former employer's statements, made in good faith about a former employee to a state workforce commission, are qualifiedly privileged because the speaker and the recipient have a common interest.[398] Likewise, if the plaintiff's former employer is asked about the plaintiff's job performance by a prospective new employer, most jurisdictions would say that the former employer has a qualified privilege.

Nevertheless, the former employee may sue the former employer, arguing that any qualified privilege was abused. This risk has caused some former employers to refuse to give prospective employers any information about their former employees other than job titles and dates of employment. Such a practice has a number of bad consequences. Able employees, who would get good references if employers could comment freely, may not get the praise they deserve. New employers are deprived of the use of pertinent information in making hiring decisions. And, occasionally, even third parties may be harmed, as when a former employer, fearing litigation, does not disclose a job applicant's history of actual or threatened violence.

Some states have enacted legislation to make it harder for former employees to bring defamation actions. Thus, a Kansas statute provides:

> (a) Unless otherwise provided by law, an employer, or an employer's designee, who discloses information about a current or former employee to a prospective employer of the employee shall be qualifiedly immune from civil liability.
>
> (b) Unless otherwise provided by law, an employer who discloses information about a current or former employee to a prospective employer of the employee shall be absolutely immune from civil liability. The immunity applies only to disclosure of the following: (1) date of employment; (2) pay level; (3) job description and duties; (4) wage history.
>
> (c) Unless otherwise provided by law, an employer who responds in writing to a written request concerning a current or former employee from a prospective employer of that employee shall be absolutely immune from civil liability for disclosure of the following information to which an employee may have access:
>
> (1) written employee evaluations which were conducted prior to the employee's separation from the employer and to which an employee shall be given a copy upon request; and
>
> (2) whether the employee was voluntarily or involuntarily released from service and the reasons for the separation. . . . [399]

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[397] 147 P.3d 672 (Ak. 2006).

[398] *See Patrick v. McGowan*, 104 S.W.3d 219 (Tex. App. 2003).

[399] KAN. STAT. ANN. Ch. 44, Art. 1, § 44-119a (LEXIS 2009).

Note that the Kansas statute covers only information furnished to a prospective employer.

b. Fair Comment

The qualified privilege of fair comment once played a major role in libel and slander litigation. Pursuant to the privilege, a person who accurately reported the facts could offer an opinion about a related subject of public interest without risk of liability. However, the privilege was lost if the facts were erroneously stated, unless the statement itself was privileged.

The constitutionalization of the law of defamation, which began with *New York Times v. Sullivan*,[400] has in many respects eclipsed the privilege of fair comment because in numerous situations a false statement of fact, or even a negligently false statement of fact, will not give rise to liability. However, courts occasionally still invoke the privilege of fair comment.

For example, in *Magnusson v. New York Times Co.*,[401] a plastic surgeon, who was the subject of unflattering "In Your Corner" consumer report on television, sued the broadcasting station and reporter. The court held that a common law fair comment privilege could be asserted as a defense. The Oklahoma Supreme Court wrote:

> Under the common law defense of fair comment, a statement is generally privileged when it: 1) deals with a matter of public concern; 2) is based on true or privileged facts; and 3) represents the actual opinion of the speaker, but is not made for the sole purpose of causing harm. In making the privilege determination, courts look to the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a consideration of whether the statement implies the existence of undisclosed facts.
>
> First, there is no question that the opinions expressed in the broadcasts involved a matter of public concern. Public health is clearly a matter of public consonance. Furthermore, the availability and skills of surgeons constitute matters relating to a community's public health.
>
> Second, Magnusson does not allege that the stories were false in the sense that they did not accurately report the patients' complaints. . . . Here, all the patients interviewed by Edwards and included in the KFOR broadcasts were clearly basing their statements about the doctor's professionalism . . . on their individual experiences and the opinions or conclusions they developed therefrom.
>
> Third, it is for the court to determine whether a statement is one of fact or opinion. The statements here cannot reasonably be interpreted as stating actual facts about the doctor. Rather, they are in the nature of nonactionable "judgmental statements", opinionative but not factual in

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[400] 376 U.S. 254 (1964).

[401] 98 P.3d 1070 (Okla. 2004).

> nature. Furthermore, where the tone of the broadcast is pointed, exaggerated and heavily laden with emotional rhetoric and moral outrage, listeners are put on notice to expect speculation and personal judgment. References to "botched" surgeries and "devastating" scars clearly fall within this category rather than being statements which could reasonably be interpreted as stating actual facts.
>
> Finally, the reports were presented as part of the "In Your Corner" series — clearly identified as investigations into claims by patients in which both negative and positive disclosures were made about Magnusson and to which the doctor was given the opportunity to respond. There was nothing about the broadcasts indicating that facts were being withheld. . . .
>
> . . . . Applying the standards of the common law fair comment privilege and considering the statements' phrasing, their context, the medium through which they were presented, the circumstances surrounding their publication, and a determination of whether the statements imply the existence of undisclosed facts, we have little difficulty determining that the broadcasts here, both of which were focused on alleged complications arising from plastic surgery and the conditions associated therewith, meet the requirements for application of the common law fair comment privilege.[402]

c. Abuse of Qualified Privileges

A qualified privilege is defeasible in the sense that the law *does care about* what the defendant knew, who the defendant told, and why the defendant made the statement. Thus, a qualified privilege may be lost or "abused" in a variety of ways, such as by excessive publication, improper motives (such as spite, ill will, or vindictiveness), or fault on the part of the defendant as to the falsity of the communication.

Excessive Publication. Excessive publication occurs when a person with good reasons to communicate potentially defamatory information tells other recipients who do not need to know. This amounts to an abuse of privilege, and the excessive publication is actionable.

Of course, whether the defendant has engaged in excessive publication is usually a question of fact. In *McCoy v. Neiman Marcus Group, Inc.*,[403] a federal court in Texas held that a company did not abuse its qualified privilege by holding a department meeting to explain to remaining employees that the plaintiff was terminated for fraud and that systems were in place to detect such fraud.

Lack of Good Faith and Disregard for the Plaintiff's Rights. Some courts say that, in order to be qualifiedly privileged, a statement must be made in good faith. For example, in *Kuechle v. Life's Companion P.C.A., Inc.*,[404] the Minnesota Court of Appeals held that an employer, who said that an employee had been discharged

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[402] *Id.* at 1076–77.

[403] 1997 U.S. Dist. LEXIS 2136 (N.D. Tex.).

[404] 653 N.W.2d 214 (Minn. Ct. App. 2002).

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for allegedly violating a direct order, did not have qualified privilege because the employer had made only a cursory investigation of the underlying facts, failed to interview the plaintiff, and ignored a supervisor's statement that she had made a request of the plaintiff, rather than given a direct order.

In *Popko v. Continental Cas. Co.*,[405] a suit by a former employee relating to the reasons for his termination, the Appellate Court of Illinois articulated the abuse of privilege issue in slightly different terms. The court wrote:

> A corporation has an unquestionable interest in investigating and correcting a situation where one of its employees may be engaged in suspicious conduct within the company. . . . Thus, a qualified privilege exists for communications made concerning such investigation.
>
> However, even on such occasion, the communication may still be actionable if the privilege is abused, *i.e.*, if there is a direct intention to injure the plaintiff or a reckless disregard of the plaintiff's rights. . . .[406]

Negligence or Actual Malice. Traditionally, in many states, negligence with respect to the falsity of a defamatory statement destroyed a qualified privilege. Obviously, continued adherence to this rule, in light of *New York Times Co. v. Sullivan* and its progeny, would have meant that the concept of qualified privilege would have virtually vanished from American defamation law in those jurisdictions. Not surprisingly, the second *Restatement* endorsed the view, long followed in some states, that only actual malice, not negligence, destroys a qualified privilege. Thus qualified privileges continue to play a role in cases not involving public officials and public figures.

It was not surprising that in *Wiggins v. Mallard*,[407] the Supreme Court of Alabama ruled that "a private-party-defamation plaintiff may overcome a qualified-immunity defense with testimony indicating that the defendant intentionally lied about the plaintiff." Intentional lying constitutes actual malice.

However, in *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*,[408] the Supreme Court of Pennsylvania refused to endorse the view that only fault amounting to actual malice, not negligence, destroys a qualified privilege. The court appeared to conclude, perhaps appropriately, that because it is easy to raise an issue of conditional privilege, private plaintiffs would often be required to prove actual malice to prevail in a defamation action.

The Limited Value of Qualified Privileges. The fact that a qualified privilege may be lost by abuse limits the potency of qualified privileges. It is easy to raise a fact issue as to whether abuse of a qualified privilege occurred. Therefore, summary judgment is often denied to a defendant asserting a qualified privilege.

For example, *Gray v. HEB Food Store No. 4*[409] involved these facts:

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[405] 823 N.E.2d 184 (Ill. App. Ct. 2005).

[406] *Id.* at 180–81.

[407] 905 So. 2d 776, 788 (Ala. 2004).

[408] 923 A.2d 389 (Pa. 2007).

[409] 941 S.W.2d 327 (Tex. App. 1997).

> Betty Gray was grocery shopping at appellee's store. Upon completing her shopping, she went to pay for her groceries at a check-out operated by HEB checker Esmi Cantu. As this occurred, Yvette Rodriguez, an assistant service manager, approached the check-out counter and made several statements directed to Cantu and appellant. Gray alleged that Rodriguez asked Cantu, "What are you giving this lady free?" Gray further alleged that Rodriguez then turned to Gray and asked Gray, "Ma'am, what are you getting free today?" According to Gray, Rodriguez repeated these questions several times.[410]

The grocery store argued that it had a qualified privilege to make inquiries to investigate alleged theft from the store. However, the grocery store was denied summary judgment on the defamation claim because the store's evidence was insufficient to show that the statement was made without malice.

Problem 3-14: The Suspected Plagiarist

Anca Engles and Kevin Stensley had been academic competitors in their engineering program for several semesters. In terms of grade point average, Kevin was number one in the class, outranking Anca every semester by a mere fraction of a point. When word quietly spread throughout the class that Kevin had submitted for course credit a research paper that he had purchased online, Anca was secretly delighted. The only thing she could think of was that she would finally rank number one, *if* the news reached the school administrators and *if* they took action. However, neither of those conditions was certain to occur.

Feigning concern for academic standards and the reputation of the school, Anca discussed with her husband, John Hatch, and her best friend, Marcie Reusch, whether she had a duty to report what she knew to the dean or associate dean of the engineering program. John cautioned her not to do anything because she really had no "facts." Marcie said that the widespread rumor was a "fact" and that she should report it, but do so anonymously.

Anca delivered an unsigned letter to the office of the associate dean, by sliding it under the door after hours. The associate dean would normally have ignored an anonymous complaint, but these charges concerned the top student in the class. The associate dean decided that he had to raise the issue with the dean, in order to get directions on whether it was necessary to make some kind of inquiry.

The dean told the associate dean that the school could be greatly embarrassed if a story came out establishing that the best student had been given credit for a "plagiarized" paper, purchased on the Internet, after the administration knew of that risk. The dean instructed the associate dean not to convene an honor court hearing but instead to make a confidential inquiry to see if Kevin would admit or deny wrongdoing if confronted with the anonymous report.

The associate dean located a cell phone number for Kevin and called him. Kevin did not answer, but a recording of Kevin's voice said to leave a message. Thinking that only Kevin would pick up messages on Kevin's cell phone, the associate dean

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[410] *Id.* at 328.

said, "Kevin, I have very bad news. There is a rumor circulating on campus that you submitted a plagiarized research paper. I need to talk to you as soon as possible."

Unfortunately, the message was picked up by Kevin's roommate, Riley West, who had borrowed Kevin's cell phone and had been expecting a call. Riley had already heard about the rumor on campus. He did not know if it was true and had not discussed the rumor with Kevin. Listening to the associate dean's message impressed Riley with the gravity of the situation. With embarrassment, West relayed the message to Kevin.

Kevin immediately called the associate dean, who was not available. Distraught and unwilling to wait until he could reach the associate dean, Kevin called the dean. He told the dean what the associate dean had said on the message, and denied that he had purchased a research paper online or submitted anything other than his own work in fulfillment of course requirements.

Although the rumor was wholly unfounded, it caused serious harm to Kevin's reputation, at least on campus. If Kevin can prove all of the above facts, can he prevail in a defamation action against any of the persons who repeated the false charges?

5. Fair Report Privilege

Reports of Official Actions and Proceedings. The "fair report" privilege (sometimes called the "reporter's privilege") is neither "absolute" nor "qualified" as those terms are used to describe other defamation privileges. The fair report privilege hinges on the subject matter, fairness, and accuracy of the report. A fair and accurate report about official actions or proceedings, or about a meeting open to the public on matters of public concern, is privileged even if the person making the report knows that the report contains false defamatory information.[411]

Thus, a newspaper can accurately quote what a police department press release says about an arrest without any obligation to investigate the facts. In *Goss v. Houston Community Newspapers*,[412] the defendants were sued for defamation based on publication of a newspaper article:

> The story, entitled "Drag racers arrested by deputy," stated that Goss and another man had been arrested after a Harris County Sheriff's Deputy observed that their vehicles appeared to be racing. The story further reported that appellant was placed into custody for possession of a controlled substance while the other man was charged with racing on a highway.[413]

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[411] *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977). New Jersey, to the contrary, holds that actual malice defeats the privilege. *See Ricciardi v. Weber*, 795 A.2d 914, 924 (N.J. Super. Ct. App. Div. 2002).

[412] 252 S.W.3d 652 (Tex. App. 2008).

[413] *Id.* at 654.

In fact, "Goss was never charged with drag racing, and the controlled substance charge was later dismissed."[414] Nevertheless, a libel claim was barred by the fair report privilege because the Texas Court of Appeals found that, although some of the information was arranged in a different order, the story quoted nearly verbatim large portions of the sheriff's department's news release and fairly summarized other portions.

Privilege Hinges on "Substantial" Fairness and Accuracy, Not Absence of Abuse. In *Alpine Industries Computers, Inc. v. Cowles Pub. Co.*,[415] a retailer (Alpine) brought a defamation action against a newspaper publisher (Cowles) based on an article asserting that Alpine sold counterfeit software. Alpine contended that the reporter's privilege did not apply to the story or that, if it did, the privilege was abused. Addressing the dispute, the Washington State Court of Appeals wrote:

> Washington has long afforded news media defendants a privilege for reporting on official actions and proceedings. . . .
>
> . . . [T]he more recent Washington opinions discussing the fair reporting privilege rely to some degree on Section 611 of *Restatement (Second) of Torts* . . . [which states]:
>
> > The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.
> >
> > . . . .
>
> The purpose of the fair reporting privilege is to serve the public's interest in obtaining information as to what transpires in official proceedings and public meetings. . . . "The privilege is not intended as merely a convenient method of shielding the press from tort liability, but instead is intended to ensure that information is made available to the public concerning what occurs in official proceedings.". . . .
>
> Significantly, the fair reporting privilege is "somewhat broader in its scope" than the conditional privileges set forth in Sections 594 through 598A of [the] *Restatement (Second) of Torts*. . . . The fair reporting privilege may protect the publisher even if the publisher does not believe defamatory statements contained in the official report to be true or even knows the defamatory statements to be false. . . .
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> . . . [T]he fair reporting privilege is not subject to the same abuse analysis as conditional privileges. . . .
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> . . . [T]he fair reporting privilege extends to reports of official actions, including actions arising from judicial proceedings. . . . Here, the challenged statements are easily traceable to the District Court's proceedings as reflected by Microsoft's complaint [against Alpine], the court order

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[414] *Id.*

[415] 57 P.3d 1178 (Wash. Ct. App. 2002), *amended* 64 P.3d 49 (Wash. Ct. App. 2003).

> signed by Mr. Le [the owner of Alpine] and reported in the story, and the District Court's memorandum decision. Given the record, we conclude as a matter of law that the challenged statements are attributable to an official proceeding. . . .
>
> For a report to be a fair abridgment of an official proceeding, surgical precision is not required so long as the report is substantially accurate and fair. *Restatement, supra*, § 611 cmt. f. "It is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting." *Id.* "It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." *Id.* . . . .
>
> . . . . Under this standard, the publisher must not edit and delete an otherwise accurate report so as to misrepresent the proceeding and thus mislead the reader. *Restatement, supra*, § 611 cmt. f. And the publisher must not add material so as to cast a person in a defamatory light. . . . To determine the fairness of the report, we must read the article as a whole. . . .
>
> Here, a passage in the . . . story states the District Court ordered Alpine to pay damages for the sales of both Office Pro and Windows 95 counterfeit software after December 1998. The passage is partially inaccurate; the sales at issue were of Windows 95 counterfeit software alone. But if the story is read in its entirety, the error is not substantial. The story contained two references to Mr. Le's claim that he stopped selling Office Pro after the cease and desist letter from Microsoft. Moreover, the story contains a direct quote from the District Court order regarding " 'Le's decision to continue buying Windows 95. . . .' " Viewed in context with the entire story, the challenged passage is substantially accurate and fair as a matter of law.[416]

Press Releases and On-the -Record Comments by Public Officials. The fair report privilege sometimes extends to reports about informal comments by public officials. In *Hudak v. Times Pub. Co., Inc.*,[417] a federal court in Pennsylvania wrote:

> . . . Pennsylvania courts give a somewhat broad interpretation to the concept of "reports of an official action or proceeding," as set forth in the *Second Restatement*. We conclude that the reported remarks of Mr. Foulk, which Plaintiff challenges in this case, should likewise be viewed as a "report" of "official action" giving rise to a privileged occasion. Here, it is undisputed that, following Plaintiff's formal arrest on criminal charges, Defendant Thompson went to the District Attorney's office in her capacity as a reporter for the Times for the express purpose of eliciting an official comment on the charges. . . . She met with Mr. Foulk, face-to-face, in his office, asked him to officially comment on the case for purposes of publication, and recorded his statement directly. . . . Mr. Foulk, as Dis-

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[416] *Id.* at 1185–87.

[417] 534 F. Supp. 2d 546 (W.D. Pa. 2008).

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> trict Attorney of Erie County, is the chief law enforcement officer of the county. . . . While his on-the-record comments were made in the context of an informal, one-on-one meeting with Ms. Thompson, they served the same purpose as a press release or press conference. Accordingly, Defendant Thompson's report of Mr. Foulk's comments constitute a "report of an official action or proceeding" for purposes of the fair report privilege. . . .
>
> Finally, our conclusion that the fair report privilege conditionally applies to the reported comments of Mr. Foulk is supported by case law from other jurisdictions. . . . *See, e.g.*, . . . *Alsop v. The Cincinnati Post*, 24 Fed. Appx. 296, 297–98, 2001 WL 1450784 at *1 (6th Cir. 2001) (privilege applied to newspaper's statement that plaintiff sold crack cocaine to informants at his store, where challenged statement was based on information obtained from U.S. Attorney's press release); . . . *Thomas v. Telegraph Pub. Co.*, 155 N.H. 314, 929 A.2d 993, 1010 (2007) (suggesting that the privilege would not automatically protect reports of all private conversations between police officers and reporters but would protect reports that bear sufficient indicia of accuracy and that are based upon press conferences, interviews with a police chief, or other types of official conversations). . . .
>
> . . . . The touchstone of the fair report privilege seems to be whether there exist sufficient indicia of "officialdom" in the reported communication. The record here supports but one conclusion: though Mr. Foulk's remarks to Ms. Thompson occurred in a casual setting, they constituted an official, on-the-record report concerning governmental action undertaken within the scope of Mr. Foulk's office.[418]

Government Informants and Unofficial Sources. Information obtained from government informants is not protected by the fair report privilege because the information is not obtained as the result of an official act or proceeding.[419] As the Tennessee Court of Appeals explained:

> The prevailing view is that the fair report privilege should not be extended to apply to the "myriad types of informal reports and official and unofficial investigations, contacts, and communications of law enforcement personnel at all levels of the state and federal bureaucracy with local, regional, and national media.". . . . It should be applied only to reports of official actions or proceedings involving responsible, authoritative decision-makers who assume legal and political responsibility for their actions. . . . Unofficial, off-the-record statements, especially when the source remains confidential, lack the dignity and authoritative weight of official actions and proceedings and, therefore, reports of these statements should not be protected by the fair report privilege. . . .
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> The American Law Institute has addressed how far the scope of "official action" extends into the domain of arrests and the underlying facts associated with the arrests by differentiating between reports of an arrest

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[418] *Id.* at 572–73.

[419] *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270 (Tenn. Ct. App. 2007).

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> and statements regarding the underlying facts that precipitated the arrest. The *Restatement (Second) of Torts* states that "[a]n arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest" is within the fair report privilege; however, "statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself" are not. . . . [420]

Policy Basis: Agency, Public Supervision, and Public Interest. The fair report privilege, as formulated by the *Restatement*, is so well established that it is difficult to find a detailed exploration of the policy basis of the rule. Addressing those concerns, in *Medico v. Time, Inc.*,[421] the Third Circuit explained:

> Three policies underlie the fair report privilege. . . . Initially, an agency theory was offered to rationalize a privilege of fair report: one who reports what happens in a public, official proceeding acts as an agent for persons who had a right to attend, and informs them of what they might have seen for themselves. The agency rationale, however, cannot explain application of the privilege to proceedings or reports not open to public inspection.
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> A theory of public supervision also informs the fair report privilege. Justice Holmes, applying the privilege to accounts of courtroom proceedings, gave the classic formulation of this principle:
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> > (The privilege is justified by) the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.
>
> *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). . . .
>
> A third rationale for the fair report privilege rests, somewhat tautologically, on the public's interest in learning of important matters. [However,]. . . . "mere curiosity in the private affairs of others is of insufficient importance to warrant granting the privilege,". . . .
>
> Some jurisdictions rely on the informational rationale to extend the privilege to accounts of the proceedings of public meetings of private, nongovernmental organizations, as long as the meeting deals with matters of concern to the public. . . .
>
> Care must be taken, of course, to ensure that the supervisory and informational rationales not expand into justifications for reporting any

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[420] *Id.* at 286–87.

[421] 643 F.2d 134 (3d Cir. 1981).

defamatory matter maintained in any government file. . . . [422]

The Reliability Rationale and Reports About Actions of Foreign Governments. Some cases invoke reliability as one of the policy foundations of the fair report privilege.

In *OAO Alfa Bank v. Center for Public Integrity*,[423] two Russian businessmen sued a public interest organization and its reporters for publishing defamatory statements linking the plaintiffs to organized crime and narcotics trafficking. In deciding the case in favor of the defendants, a federal court in the District of Columbia held that the fair report privilege did not apply to reports about the actions of a foreign government. The reasoning of the court suggests that the supposed reliability or unreliability of official information may sometimes play a role in the application of the doctrine. The court wrote:

> The Fourth Circuit . . . in *Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir. 1988), . . . refused to extend the privilege to a United States news agency report of a South Korean government press release. Reasoning that "[w]e are familiar with the workings of our government and consider it to be open and reliable," while "[f]oreign governments, like nongovernmental sources of information, are not necessarily familiar, open, reliable, or accountable," the Fourth Circuit declined to "provide a blanket privilege to those who report the activities of foreign governments.". . . . The court then held that applying "the privilege in a piecemeal fashion would be extremely difficult," placing the court in the untenable position of attempting to determine whether a foreign state exhibits the "openness and reliability that warrant an extension of the privilege.". . . . The court therefore concluded that the privilege should not apply to reports on the acts of foreign governments.
>
> This Court agrees. . . . Indeed, the *Restatement* adopts the same approach, explicitly limiting the compass of the privilege to reports of the proceedings or actions of "the government of the United States, or of any State or of any of its subdivisions," *Restatement (Second) of Torts* § 611 cmt. d (1977). . . . [E]ven if the better course would be to assess the application of the privilege to a foreign state on a case-by-case basis, the defendants in this case allege that Russia during this period [the 1990s] was a "corrupt system run by crony capitalists," . . . hardly the showing of "openness and reliability" one would presumably look for in extending the privilege.[424]

Inaccurate Reports. In *Myers v. The Telegraph*,[425] the Illinois Appellate Court found that a news report was substantially inaccurate and therefore not protected by the fair report privilege. Newspaper accounts had reported that a criminal had pled guilty to a felony and was placed on probation. However, according to official

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[422] *Id.* at 140–42.

[423] 387 F. Supp. 2d 20 (D.D.C. 2005).

[424] *Id.* at 41–42.

[425] 773 N.E.2d 192 (Ill. App. Ct. 2002).

reports, the felony charges that were initially brought against the criminal were dismissed, and he pled guilty only to a misdemeanor and was given a conditional discharge.

Similarly, in *Edwards v. Paddock Publications, Inc.*,[426] the fair report privilege was found not to apply because, while the defendants accurately reported that Christopher Edwards had been arrested, they published an accompanying photograph of another Christopher Edwards, a high school football star, who had no connection to the arrest.

Embellishments. In some cases, embellishment of a report with other facts or expressions of the speaker's opinion means that the speaker is not protected by the fair report privilege. In *Quigley v. Rosenthal*,[427] the Tenth Circuit found that the fair report privilege did not apply to the defamation claim before it. The court wrote:

> [I]t is clear that [defendant] Rosenthal's statements at the press conference and on the Greg Dobbs Show went well beyond merely reporting the allegations in the Aronsons' complaint [in a lawsuit against their neighbors]. . . . It is apparent from Rosenthal's statements that he was asserting, as a matter of fact, that the allegations in the Aronsons' complaint were true, and that he, the . . . [Anti-Defamation League], and the Aronsons had substantial evidence to support those allegations. Further, on several occasions, Rosenthal's comments went well beyond the allegations of the complaint.[428]

Problem 3-15: The Employer Who Suborned Perjury

Olympus is a small town where news travels fast. When Sally Tarnett, a former employee of Seguin Valley Farm (the Farm), filed a petition seeking a protective order against the Farm's manager, Steven Klapp, people were soon talking. They did not know the details of the request for an injunction, but they remembered all of the high points in the turbulent relationship between Tarnett and Klapp.

For almost a decade, Tarnett and Klapp had dated on and off, with periods of romantic bliss punctuated by several spectacular break-ups. Sometimes passionate, sometimes vengeful, the relationship played out, more or less, in full public view. There was no shortage of melodrama. It was just another episode in the saga when Tarnett quit her job at the Farm and then named Klapp in the petition for a protective order.

In the petition, Tarnett alleged that Klapp had attempted to induce her to commit perjury in a lawsuit brought by the Farm against one of its business partners. According to the petition, Klapp sent certain key employees at the Farm two letters. Attachments to the petition purported to be true and correct photocopies of those letters. The first letter described the pending lawsuit filed on behalf of the Farm. The letter stated that employees had to decide, before lawyers

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[426] 763 N.E.2d 328, 336 (Ill. App. Ct. 2001).

[427] 327 F.3d 1044 (10th Cir. 2003).

[428] *Id.* at 1062.

came to talk to them, "whether you consider yourself part of the Farm or whether you think you can find a better employer and more generous pay, benefits, perks, flexibility, and working conditions somewhere else in the valley." The second letter contained the following passage:

> You needn't concern yourself about whether what you say is accurate or may subsequently be proved false; you are asked only to testify to what you believe to the best of your knowledge is true. . . . If we find that you are equivocal or unwilling to become involved on behalf of Seguin Valley Farm, and that damages the case our legal team has worked hard to build, then I will have to make the determination whether it is workable for me to run the Farm with only the staff members who can be counted on when the Farm really needs them.

The petition seeking a protective order alleged that, after Tarnett received the letters, Klapp threatened to physically harm her if she refused to cooperate.

Peter Woodward, a reporter for the Valley Tribune, a local newspaper, read the court pleadings with wide-eyes. He knew that a story about Tarnett and Klapp would sell papers. However, Woodward was unable to confirm that any other employee at the Farm had received either of the letters which, according to the petition, had been delivered not just to Tarnett, but to several other key employees. This disturbed him because Woodward also remembered that, only a year earlier, Tarnett had sued Klapp for assault. However, she had dismissed the action soon after Klapp received a dose of bad publicity.

While he was trying to check out the facts alleged in Tarnett's petition, Woodward heard a more detailed version of the story. From at least two sources he learned that Klapp had threatened to harm not just Tarnett, but also her ten-month-old son. Many persons in Olympus thought that Klapp was the father of the boy.

An article was soon published in the Tribune under Woodward's byline. It reported that Tarnett had sought a protective order against Klapp after he had allegedly threatened her and her son with violence unless she committed perjury. The article quoted the language in the second letter which stated: "You needn't concern yourself about whether what you say is accurate or may subsequently be proved false." However, it omitted the part that said, "you are asked only to testify to what you believe to the best of your knowledge is true."

At a hearing held after publication of the article, the judge refused to issue a protective order because he found that the facts asserted by the petitioner were not credible. Tarnett did not appeal that ruling.

Klapp has sued Woodward and the Tribune for defamation. Please prepare an analysis of how the Tribune can defend against the claim.

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6. Neutral-Reportage Privilege

As presently configured, the neutral-reportage privilege is a minor tributary of the river of defamation law. In *Edwards v. National Audubon Soc'y, Inc.*,[429] the New York Times reported that a publication by a prominent conservation group had criticized certain scientists as "paid liars" because of their support of the chemical industry in a controversy over a pesticide. In finding for the newspaper, Chief Judge Irving Kaufman said that even if actual malice had been established (which it was not), a constitutional privilege of neutral republication protected the Times. Thus, the court ruled that the public interest in being informed about ongoing controversies justified creating a privilege to republish allegations made by a responsible organization against a public figure, if the republication is done accurately and neutrally in the context of an existing controversy.

Some courts have rejected the neutral-reportage privilege.[430] A few have endorsed it.[431] The Supreme Court has not ruled on whether such privilege is constitutionally mandated.

Professor David Anderson of the University of Texas has written that:

> If the President of the United States baselessly accused the Vice President of plotting to assassinate him . . . most courts surely would hold that the media could safely report the President's accusation even if they seriously doubted its truth.[432]

7. SLAPP Laws (Strategic Lawsuits Against Public Participation)

Suits for libel or slander are often filed not to win, but to silence critics who may be coerced to back down rather than face the expenses and risks of litigation. Not surprisingly, many legislatures have sought to curb such abuses, at least insofar as they threaten to diminish discussion of public issues. These states have passed what are called "SLAPP" laws, so named because they apply to Strategic Lawsuits Against Public Participation.

In *Dove Audio Inc. v. Rosenfeld, Meyer & Susman*,[433] the son of the late actress Audrey Hepburn asked lawyers to look into why one of his mother's charities had received so little in the way of royalties from one of her audio recordings. The lawyers contacted other celebrities who had participated in the recordings and their charities, informing them of the problem and stating an intention to file a complaint with the Attorney General. Dove Audio then sued the law firm for defamation and tortious interference. (Tortious interference is discussed in

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[429] 556 F.2d 113 (2d Cir. 1977).

[430] *See Hogan v. Herald Co.*, 444 N.E.2d 1002 (N.Y. 1982); *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004); *see also Khawar v. Globe Int'l Inc.*, 965 P.2d 696 (Cal. 1998) (declining to apply the privilege to the case of a *private* person accused of killing Robert Kennedy).

[431] *See April v. Reflector-Herald, Inc.*, 546 N.E.2d 466, 469 (Ohio Ct. App. 1988).

[432] David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 504 (1991).

[433] 54 Cal. Rptr. 2d 830 (Cal. App. 1996).

Chapter 5.) Finding that the law firm was immune under both the absolute litigation privilege and the SLAPP statute, the California Court of Appeal wrote:

> In general terms, a SLAPP suit is "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.". . . . Under [Code Civ. Proc.] section 425.16, subdivision (b), "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."
>
> Subdivision (e) provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."
>
> . . . .
>
> RM & S's communication raised a question of public interest: whether money designated for charities was being received by those charities. The communication was made in connection with an official proceeding authorized by law, a proposed complaint to the Attorney General seeking an investigation. . . . .
>
> . . . . Once the party moving to strike the complaint makes that threshold showing, the burden shifts to the responding plaintiff to establish a probability of prevailing at trial. Appellant did not, and cannot do so. . . . RM & S's communications were absolutely privileged under Civil Code section 47, subdivision (b). That privilege is applicable to both causes of action alleged by appellant, defamation and interference with economic relationship. . . . The trial court did not err in granting RM & S's special motion to strike under section 425.16.

Lack of a Public Issue. In some cases, dismissal pursuant to a SLAPP law is denied because there is no pending public issue. For example, in *Hariri v. Amper*,[434] an environmental group was sued for defamation by a landowner who wanted to operate an airport on his property. The New York Appellate Division held that the group was not entitled to relief under the state SLAPP law because the landowner had never formally requested a zoning variance and was therefore not a "public applicant or permittee."

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[434] 854 N.Y.S.2d 126 (App. Div. 2008).

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8. Statutes of Limitations

Short Period for Filing. Actions for defamation are typically subject to a short statute of limitations. For example, the Illinois statute provides:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.[435]

The decision in *Serrano v. Ryan's Crossing Apartments*[436] illustrates the operation of a similar statute. In *Serrano*, the Texas Court of Appeals wrote:

> A "slander claim accrues on the date of the communication or publication and not on the date of the consequences or *sequelae*.". . . .
>
> . . . Serrano has not articulated with specificity the particular slanderous comments in issue. We construe her argument to be that Ryan's Crossing slandered her name by falsely filing an affidavit which ultimately resulted in her criminal prosecution for theft by check. The affidavit, dated February 5, 2003, alleged that Serrano wrote a rent check for $670 which was not paid due to insufficient funds. Serrano filed suit for slander on December 15, 2004, well past the one-year statute of limitations- . . . . Summary judgment was properly granted [to defendant Ryan's Crossing] on the slander claims.[437]

Public Entities and Employees. In some states, defamation actions against a public entity or public employee are governed by a special statute of limitations, not by the one that usually applies to defamation actions.[438] That type of statute of limitations may also be short.

The Discovery Rule and "Inherently Secretive" Publications. In some cases, the running of the statute of limitations on a libel or slander claim is tolled pursuant to a discovery rule. For example, in *Manguso v. Oceanside Unified School District*,[439] the California Court of Appeal held that a claim filed 16 years after the defendant placed an allegedly defamatory letter in the plaintiff's personnel file was not too late, because the plaintiff could not reasonably have been expected to discover the basis for her cause of action before then. However, in a later case, *Hebrew Academy of San Francisco v. Goldman*,[440] the California Supreme Court made clear that discovery rules may be applied only to a narrow range of cases. The court stated that:

> [C]ourts uniformly have rejected the application of the discovery rule to libels published in books, magazines, and newspapers, stating that although application of the discovery rule may be justified when the defamation was

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[435] 735 ILL. COMP. STAT. ANN. 5/13-201 (LEXIS 2009).

[436] 241 S.W.3d 560 (Tex. App. 2007).

[437] *Id.* at 563.

[438] *See, e.g., Dube v. Likins*, 167 P.3d 93, 103 (Ariz. Ct. App. 2007).

[439] 152 Cal. Rptr. 27 (Cal. Ct. App. 1979).

[440] 173 P.3d 1004 (Cal. 2007).

> communicated in confidence, that is, in an inherently secretive manner, the justification does not apply when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. . . . [441]

Extending that line of precedent to the limit, the *Hebrew Academy* decision ruled that the discovery rule did not apply in a case involving a transcript of an oral history that had an extremely limited circulation of less than ten copies distributed to religious libraries, because the book was not published in an "inherently secretive manner."[442]

a. The Single-Publication Rule

Defamation defendants sometimes escape liability by arguing that a claim was filed too late under the terms of the single-publication rule. That rule, which is reflected in § 577A of the *Restatement (Second) of Torts*, provides that any one edition of a book or newspaper, or any one radio or television broadcast, is a single publication, with respect to which only one action may be brought for all damages resulting from the publication. According to the California Supreme Court in *Shively v. Bozanich*,[443] a publication generally is said to occur on the "first general distribution of the publication to the public." Thus, a plaintiff may not bring an action every time a book is sold, and in every jurisdiction in which a sale takes place. The single-publication rule addresses the concern that, if every sale or reading of a book were a publication, there would be no effective statute of limitations in libel cases. The rule also helps plaintiffs by allowing the collection of all damages in a single litigation.

Under the single-publication rule, suppose that this book was published in 2010, purchased in 2011, read by a student in 2012, and sold second-hand to another student in 2013. Absent tolling pursuant to a discovery rule, the period of limitations applicable to a person defamed in the book began to run in 2010. However, if a paperback edition of this book is published in 2014, that event is a separate publication which starts the running of the statute of limitations anew.

(1) Application to Internet Publications

There is an important question as to how the statute of limitations applies to defamatory statements on the Internet. For example, does every change to a website constitute a republication of defamatory material on the website? In addition, what about transmission at different times of the same statement via the Internet, as where the same report is sent to different subscribers?

Selective Limited Dissemination. In *Pendergrass v. ChoicePoint, Inc.*,[444] a federal court in Pennsylvania considered some of these issues. In that case, when the plaintiff was dismissed from employment with Rite Aid, Rite Aid submitted a

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[441] *Id.* at 1009 (quotation marks and citations omitted).

[442] *Id.* at 1010.

[443] 80 P.3d 676 (Cal. 2003) (quoting *Belli v. Roberts Bros. Furs*, 49 Cal. Rptr. 625, 629 (Cal. Ct. App. 1966).

[444] 2008 U.S. Dist. LEXIS 99767 (E.D. Pa. 2008).

report to a ChoicePoint service called Esteem, an employment screening database. According to the court:

> After his termination, Plaintiff interviewed with CVS Pharmacy and Walgreens Pharmacy for permanent full-time positions. . . . Although he was approved for hiring at both CVS and Walgreens, he was told on or about November 30, 2006 that a "bad report" in his employment history prevented his hiring. . . . According to Plaintiff, the "bad report" was the report Rite Aid submitted to the Esteem database describing the January 11, 2006 incident at Rite Aid as "Cash Register Fraud and Theft of Merchandise," with a total theft amount of $ 7,313.00. . . . On July 25, 2007, after unsuccessfully attempting to correct the inaccurate Esteem report with ChoicePoint, Plaintiff received a letter from the retail chain Target that denied his employment application based on a copy of the Esteem report. . . .
>
> Plaintiff alleges . . . that ChoicePoint "did in fact republish the defamatory report, repeatedly, to its other Esteem subscribers, including but not limited to the said communications to CVS, Walgreens and Target.". . . . As a result, "Plaintiff has been branded a thief in the eyes of almost every potential employer in his field" and has experienced difficulty finding full-time employment. . . . [445]

On January 10, 2008, Plaintiff sued Rite Aid alleging defamation and other claims. Rite Aid moved to dismiss the defamation count based on failure to file within the one-year statute of limitations. Addressing that issue, the court wrote:

> Rite Aid argues that Plaintiff's defamation claim arises from the publication of the allegedly false theft report to ChoicePoint, which Plaintiff discovered on or about November 30, 2006 when he received the letter from Walgreens. . . . Even assuming that the one-year statute of limitations period did not begin until Plaintiff discovered the existence of the publication on or about November 30, 2006, Rite Aid argues that the Complaint is barred because it was filed in January 2008, well beyond the one-year statute of limitations period. . . .
>
> . . . Plaintiff argues that each viewing of the defamatory report in the Esteem database constitutes a separate tort, each with its own statute of limitations. Because the original defamer may be held liable for repetition of the defamatory statement if the repetition was authorized or expected, *see Restatement (Second) of Torts § 576* (1977), Plaintiff contends that Rite Aid is liable for the foreseeable repetition of the incident report by ChoicePoint. Thus, according to Plaintiff, Rite Aid is liable for each "republication" of the Esteem report, including the July 2007 viewing by Target and any other republications occurring within the statutory limitations period. Therefore, Plaintiff contends, only the portion of his defamation claim that stems from any publication or republication occurring prior

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[445] *Id.* at *3–4.

> to January 10, 2007 is subject to dismissal on statute of limitations grounds.[446]

The court then turned to the question of whether the single-publication rule was applicable to the case, noting that:

> Pennsylvania has adopted the Uniform Single Publication Act by statute. *See* 42 Pa. Cons. Stat. § 8341(b) ("No person shall have more than one cause of action for damages for libel or slander, or invasion of privacy, or any other tort founded upon any single publication, or exhibition, or utterance, such as any one edition of a newspaper, or book, or magazine, or any one presentation to an audience, or any one broadcast over radio or television, or any one exhibition of a motion picture.").[447]

Material Not Available to the Public. The *Pendergrass* court then elaborated on application of the rule:

> Courts considering the single publication rule in internet-based defamation cases generally have found it applicable to postings made on websites accessible to the general public. As the New York Court of Appeals has explained, "[c]ommunications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time. Thus, a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants." *Firth v. State*, 98 N.Y.2d 365, 775 N.E.2d 463, 466, 747 N.Y.S.2d 69 (N.Y. 2002); *see also Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1131 (9th Cir. 2006). . . .
>
> In cases where, as here, the allegedly defamatory electronic report was not made available to the public but only to subscribing members of a database, the risks of an infinite limitations period and multiple suits are reduced significantly. . . . In [*Swafford v. Memphis Individual Practice Ass'n*, 1998 Tenn. App. LEXIS 361, at *23 (Tenn. Ct. App. 1998)], the Tennessee Court of Appeals found that the single publication rule did not apply to allegedly defamatory information that the defendants supplied to a national medical practitioner database that was later accessed by database subscribers. . . . Because the database was not accessible to the general public, the court found it "unlikely that more than a handful of individuals or entities would gain access to information stored in the data base," and therefore, the defendants' report was not an "aggregate publication" justifying the single publication rule. . . .
>
> Numerous courts have rejected the theory that providing allegedly defamatory or inaccurate information to a consumer reporting agency is equivalent to a mass publication of that information. . . . These courts have concluded, therefore, that each transmission of the defamatory information is a separate republication of that material, giving rise to a new

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[446] *Id.* at *5–6.

[447] *Id.* at *8–9 n.2.

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> cause of action. . . . The Court finds these cases persuasive, as Rite Aid did not circulate the report to a wide audience; instead, it transmitted it to ChoicePoint with the knowledge that it would be made available to subscribing Esteem customers upon request.
>
> . . . . Unlike a single publication that reaches many viewers through circulation of the original material, information in the Esteem database is viewed on separate, distinct occasions by subscribing members. . . . The risks of an infinite statute of limitations resulting from widespread circulation of a single publication are not present in the instant case. . . . Because the risks justifying the rule are not present, the Court finds that Pennsylvania courts would not apply the single publication rule to the facts of this case.[448]

The court therefore rejected Rite Aid's statute of limitations defense.

Updating Websites. Observing that "communications accessible over a public Web site resemble those contained in traditional mass media, only on a far grander scale," the New York Court of Appeals held, in *Firth v. State*,[449] that the single-publication rule applies to publications on the Internet. It found that updating a website usually does not constitute a new publication of defamatory material contained on the website:

> The mere addition of unrelated information to a Web site cannot be equated with the repetition of defamatory matter in a separately published edition of a book or newspaper . . . for it is not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier and separate defamatory information to a new audience.
>
> . . . [M]any Web sites are in a constant state of change, with information posted sequentially on a frequent basis. . . . A rule applying the republication exception . . . [to unrelated changes] would either discourage the placement of information on the Internet or slow the exchange of such information. . . . These policy concerns militate against a holding that any modification to a Web site constitutes a republication of the defamatory communication itself.[450]

Problem 3-16: The Newspaper's Online Archive

The Afternoon News ran an article in its daily newspaper on December 18, 2009, with the headline "Former Valley Mayor Reaches Plea Agreement." The Associated Press ("AP") then picked up and altered the Afternoon News article by changing its title to "Former Valley Mayor Guilty of Illegally Importing Elephant Tusks." The Afternoon News website then automatically incorporated the text of the AP article into the website, so that both the original article and the AP article appeared on the Afternoon News website.

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[448] *Id.* at *9-16.

[449] 747 N.Y.S.2d 69, 71 (N.Y. 2002).

[450] *Id.* at 72–73.

After protests by the former mayor, Bob Raub, the Afternoon News ran a retraction on February 2, 2010, in the print version of the newspaper. The retraction stated the original story misidentified the party who pled guilty. Legal action had been taken against a company of which Raub was the president, not against Raub personally, for illegal importation of elephant tusks. All charges against Raub had been dismissed. The company, not Raub, had pled guilty.

The retraction never appeared on the Afternoon News website. Sometime in November 2010, the original and AP versions of the online story were removed from the "free" portion of the Afternoon News website. Both articles then continued to be available in the website's "archive" for a fee. It is impossible to establish whether anyone accessed the articles between November 2010 and October 2011 because a computer virus destroyed both the archive and the relevant billing files at the Afternoon News main office.

The online "archive" (but not the billing files) had been backed up at a remote location and could be re-created. However, because the pay-per-view arrangement for viewing the archive had not been financially successful, future charges for specific articles were eliminated. Beginning in October 2011, all previously "archived" materials were available free of charge to the 38,000 subscribers of the printed version of the Afternoon News. In November 2011, the subject matter of the original article became an issue in Valley politics, and Raub, who continued to be politically active, was accused by a candidate for mayor of having been previously convicted of illegally importing parts of animals that were gathered from endangered species.

In January 2012, former mayor Raub consulted you to determine whether it is too late to sue the Afternoon News for defamation. If it is not too late, Raub wants to know whether he can prevail. The applicable statute of limitations is two years. Please advise.

9. The Libel-Proof Plaintiff Doctrine

The libel-proof plaintiff doctrine has extremely limited application. According to the doctrine, some plaintiffs have such a bad reputation that they cannot be damaged by false statements, and therefore they should not be permitted to sue for defamation. It makes sense that an infamous dictator or terrorist, such as Aldolf Hitler, Saddam Hussein, or Osama bin Laden, should not be permitted to waste the time of the courts (not to mention opposing parties) litigating a claim for defamation. However, in cases not so extreme, courts are likely to reject this defense to liability.

In *Stern v. Cosby*,[451] plaintiff Howard K. Stern, the former lawyer for and companion of the late Anna Nicole Smith, sued the author and publisher of a best-selling book. Stern contended that the defendants defamed him by falsely stating or suggesting, among other things, that "he had engaged in sex with the father of Smith's child, 'pimped' Smith to as many as fifty men a year, and played a role in

[451] 2009 U.S. Dist. LEXIS 70912 (S.D.N.Y. 2009).

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Smith's death."[452] The defendants argued that Stern was "libel-proof." A federal court in New York rejected this argument, stating:

> The libel-proof doctrine is predicated on the notion that "a plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject.". . . . While the doctrine is most often applied to plaintiffs with criminal convictions, it is not limited to plaintiffs with criminal records. . . .
>
> The Second Circuit has cautioned that the libel-proof plaintiff doctrine is to be sparingly applied, as it is unlikely that many plaintiffs will have such tarnished reputations that their reputations cannot sustain further damage. . . .
>
> There is some question, as the parties acknowledge, as to whether the libel-proof plaintiff doctrine is valid in the wake of the Supreme Court's decision in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991), where the Court held that the incremental harm doctrine — the "cousin" of the libel-proof doctrine — is not properly grounded in the First Amendment, and therefore not valid under federal law. . . .
>
> Whether a plaintiff is libel-proof is a question of law for the Court to decide. . . .
>
> . . . . I conclude that it does not bar Stern's suit.
>
> First, Stern should not be precluded from seeking damages for being defamed by the Book merely because he was the subject of critical discussion on tabloid television and in celebrity gossip magazines. Even assuming, for example, that Geraldo Rivera and other celebrity journalists and talk show hosts suggested that Stern had a hand in Smith's death, Stern denies these accusations. If indeed the accusations are false, the fact that Stern might have been falsely accused before does not mean that he could not be further injured if he was falsely accused again. . . . Moreover, there is a qualitative difference between comments made on a tabloid television show and written statements in a book purporting to be the product of legitimate "investigative journalism," written by — as appears on the cover of the Book — an "Emmy-Award Winning Journalist.". . . .
>
> Second, much of the conduct detailed in the Book is fundamentally different from the conduct that was the subject of the allegations swirling in the tabloid media. None of the media reports prior to the publication of the Book referenced Stern engaging in oral sex with Birkhead or making a video of himself and Birkhead doing so. The general thrust of the media reports prior to publication of the Book was that Stern was a member of Smith's bizarre inner circle who exploited Smith for money and fame. This is different in kind from many of the allegations in the Book, and thus Stern's reputation could sustain further damage. . . . As then-Judge Scalia aptly put it, "[i]t is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make

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[452] *Id.* at *1.

> that charge while knowing its falsity with impunity." *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986). So, too, here.
>
> Similarly, the criminal complaint filed against Stern in California does not alter this conclusion. While it undoubtedly does some damage to Stern's reputation, it is only an accusation and he is obviously presumed innocent in the matter. Moreover, the subject matter of the criminal complaint is different from most of the Statements at issue in this case. The criminal complaint charges Stern with playing a role in obtaining prescription drugs for Smith. It says nothing about promiscuous homosexual sex, "pimping," or any of the other Statements at issue here.
>
> Finally, the fact that Stern was seen on certain episodes of The Anna Nicole Show in a negative light likewise does not render him libel-proof. Although the show was a "reality show," Stern contends that much of it was staged, and many viewers undoubtedly watched the show with some skepticism. More importantly, the allegations in the Statements are significantly different and much more serious than the conduct Stern engaged in on the show.[453]

10. The Employment-at-Will Doctrine

Some states adhere to an employment-at-will doctrine under which an employee can be terminated for any reason or no reason at all. Because many defamation claims arise from job termination, questions logically arise as to whether remedies under the law of defamation are limited in any way by the employment-at-will doctrine.

In *Exxon Mobil Corp. v. Hines*,[454] two employees (plaintiffs/appellees) were terminated based on conduct relating to a charitable contribution matching plan. In a subsequent defamation action, the jury awarded the former employees damages for emotional distress, harm to reputation, and, in each case, $100,000 in past and future lost income and lost unemployment benefits. Addressing the last element of the damages awards, the Texas Court of Appeals wrote:

> Under the at-will employment doctrine, an employer may generally terminate an at-will employee without fear of legal repercussions for a good reason, a bad reason, or no reason at all. . . . Additionally, as a corollary to the doctrine, Texas does not recognize a cause of action for "negligent investigation" in the employment context. . . . Based on these two principles, Exxon argues that appellee's economic damages are barred because they resulted from the employment terminations and not directly from the defamation. . . . [455]

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[453] *Id.* at *6–8.

[454] 252 S.W.3d 496 (Tex. App. 2008).

[455] [n.4] Based on their defamation finding, the jury awarded economic damages to appellees for lost income and lost employment benefits suffered in the past and likely to be sustained in the future-

> We begin by noting that appellees do not allege, and there is no evidence to suggest, that Exxon ever communicated the substance of the September 23 and October 23 presentations to anyone outside the company. Consequently, under appellees' theory, the internal communication of the reason for the terminations (*i.e.*, the alleged defamation) enables them to recover the damages caused by the terminations. This would clearly violate the at-will employment doctrine — and its general prohibition against wrongful termination claims by at-will employees — by creating liability where at law none may exist (*i.e.*, by allowing monetary recovery when the employer terminates the employee for a "bad reason").[456]. . . . We reject appellees' argument and hold that a terminated employee may not recover damages resulting from employment termination simply because the reason for the termination (even if defamatory) may have been internally communicated within the employing company.
>
> Our holding should not be construed as suggesting that an employer can never defame an employee in Texas or that an employee can never recover defamation damages from his or her employer (whether the defamation was communicated only internally or also externally); it merely means that an employee cannot recover as defamation damages those damages caused by employment termination. . . . [457]

11. Separation of Church and State

In *Harvest House Publishers v. Local Church*,[458] a church had been listed as a cult in a book. The Texas Court of Appeals held that "being labeled a 'cult' is not actionable because the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law."[459]

Problem 3-17: The Erroneously Disbarred Attorney

All of the lawyers in the state are required to belong to the State Bar. One of the benefits that members receive in exchange for their dues is a monthly magazine called "Lawyers." A regular feature in the magazine is a section devoted to disciplinary actions. Any lawyers who have been disbarred, suspended from practice, or otherwise publicly disciplined because of misconduct are listed in that section, along with a brief description of the basis on which discipline was imposed.

. . . . [T]here is no evidence in the record to suggest that these damages were caused by any Exxon conduct other than the termination of appellees.

[456] [n.6] Thus, the situation before us is distinctly different from cases wherein a plaintiff alleges two alternative but not legally prohibited causes of action such as design defect and breach of warranty in the products liability context. In that situation, a plaintiff can recover under one cause of action (assuming he or she can muster the requisite proof) without violating a prohibition against the other claim. Here, recovery of lost wages and employment benefits due to termination violates the at-will employment doctrine.

[457] 252 S.W.3d at 502–03.

[458] 190 S.W.3d 204 (Tex. App. 2006).

[459] *Id.* at 212.

The August issue of Lawyers carried an entry in the disciplinary action section which read as follows:

> *Correction*
>
> An article provided by the Board of Disciplinary Appeals for "Disciplinary Actions" in the July issue of Lawyers was inaccurate:
>
> Page 730: The board entered an interlocutory order of suspension against Bernard Dolze (#5372625); it did not disbar him as indicated. Dolze was convicted in United States District Court of 12 counts of mail fraud and of aiding and abetting an intentional crime. He was sentenced to 90 months in prison. Upon release, Dolze will be placed on supervised release for three additional years. He was ordered to make immediate restitution in the amount of $1,008,316. Dolze has appealed his conviction. In the event that the conviction becames final, Dolze will be disbarred.

Can Dolze state a viable claim for defamation against anyone involved in the publication of the erroneous report in the July issue of Lawyers?

J. REVIEW

Recall the excerpt in the "review" section of Chapter 2, discussing whether economic harm caused by erroneous scoring of standardized tests might be actionable under the law of deceit or negligent misrepresentation. Does the law of defamation offer an additional remedy or a better alternative?

> A statement is not defamatory unless it carries with it the sting of disgrace. To be actionable as libel or slander, an utterance must adversely reflect on the personal character of the plaintiff, such as by subjecting the plaintiff to "hatred, ridicule or contempt." A defamatory statement must so tend to "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Communications falling short of this standard will not support a libel or slander claim.
>
> Many standardized test score errors are of a minor magnitude. A report understating a test-taker's performance by twenty-five, or perhaps even fifty, points on the 2400-point SAT, is so unlikely to subject the test-taker to the opprobrium of the community that a court should not entertain a resulting defamation claim. *De minimis non curat lex*. Defamation actions seeking to redress a minor scoring error may be dismissed under the substantial-truth rule, which bars recovery based on statements that, though literally false, are substantially correct.
>
> A scoring error of greater magnitude will warrant more extensive judicial consideration, such as test results on the 2400-point SAT that are understated by, say, 200, 300, or 400 points. At some juncture, the magnitude of the error will be so great as to disgrace the test-taker and cause others to think less of him or her. Statements that impute incompetence in business, trade, or profession are readily actionable as libel and slander. Mis-scoring plaintiffs may be able to invoke successfully this type

of precedent to mount defamation claims in cases involving sizeable scoring errors. This line of reasoning will be particularly appealing where an erroneous score precipitates clear harm, such as causing a student to be denied a diploma, degree, or essential professional credential. In such cases, a defendant testing agency publishes to those to whom it disseminates test scores false facts purporting to show that the test-taker is not "competent."

The "publication" requirement for libel and slander is satisfied by intentional or negligent communication of the false statement to a third person who understands the defamatory utterance. This standard is satisfied where a testing agency provides test results directly to a person other than the test-taker. It is even possible that a testing agency may be held liable for republication of an erroneous score by the test-taker. While the originator of a defamatory statement is generally not responsible for its republication by the subject of the false and defamatory statement, that is because the subject is normally aware of the defamatory content, and has a duty to avoid or mitigate damages. However, retransmission by the plaintiff of a known falsehood should be distinguished from cases of unwitting transmission of a defamatory message whose falsehood is unknown. "If the defamed person's transmission of the communication to the third person was made without an awareness of the [false and] defamatory nature of the matter, and if the circumstances indicated that communication to a third party would be likely, a publication may properly be held to have occurred."

. . . .

Whether a defamation suit by a test-taker whose score is seriously understated is treated as involving a private person suing with respect to a matter of public concern (a *Gertz* case), or simply a person suing with respect to a matter of private concern (a *Dun & Bradstreet* case), has important implications not only with respect to culpability, but whether damages must be proved. At common law, all libel (generally written defamation) was actionable *per se*, as were four categories of slander (generally oral defamation, including statements imputing incompetence in business, trade or profession). This meant that a jury could award "presumed damages," without proof of actual losses. Under the rule of presumed damages — which was a great departure from the usual standards of tort liability — the jury could look to the nastiness of the statement, and the degree of its dissemination, and presume an amount of damages that would fairly compensate the plaintiff. Thus, many sizeable awards were made without any precise proof of what losses actually occurred. During the process of reconciling the ancient law of libel and slander with the demands of the First Amendment, . . . [the] Supreme Court held that a *Gertz*-type plaintiff (a private person suing with regard to a matter of public concern) could not recover presumed damages without proof of actual malice. In contrast, a *Dun & Bradstreet*-type plaintiff (a person suing with respect to a matter of purely private concern) was still allowed to recover presumed damages under the traditional rules, even in

the absence of actual malice. Consequently, damages issues relating to a defamation claim in standardized test mis-scoring cases may be greatly affected by whether the false statement is viewed as a matter of purely private concern, rather than a matter of public concern. In that situation, proof of actual losses will frequently not be required.

What qualifies as a matter of private concern is often unclear, and many persons doubt whether courts can or should attempt to define what matters are legitimately of concern to the public. In *Dun & Bradstreet*, the Supreme Court re-embraced the public concern/private concern dichotomy that it had rejected just a few years earlier, and surprisingly held that an erroneous statement about whether a major employer in the community was going bankrupt was a matter of private concern because the statement was contained in a credit report that was distributed to a very limited number of subscribers. In light of that ruling, standardized test results reported confidentially to a small number of private schools — in contrast to standardized testing results in the public education, which are often publicly available — might fall within that "private concern" category. . . .

As yet, there is little guidance from courts directly addressing defamation . . . claims based on standardized test scoring errors, although a recent case declined to hold as a matter of law that "misreported test scores can never give rise to a claim for defamation." One of the unresolved questions is whether a claim for libel or slander against a testing agency can be defeated by a qualified privilege. Regardless of the attacks on standardized testing, many would argue that such evaluative instruments serve a useful purpose, and therefore a testing agency's good faith communication of test scores — even if erroneous — should be qualifiedly privileged. A qualified privilege is lost when the privilege is abused. One form of abuse is dissemination of a statement with knowledge of its falsity or with reckless disregard for its truth. This means that qualified privileges will play no role in cases alleging defamation or false-light against testing agencies, if the plaintiff must prove actual malice. That is, proof of the plaintiff's *prima facie* case would, by necessity, destroy a qualified privilege. However, as explained above, it is likely that in many libel or slander mis-scoring suits the plaintiff will qualify as a "private" person, and will therefore only need to prove that the defendant testing agency acted with negligence as to the falsity of the report. In such cases, it may be possible for a qualified privilege to defeat the plaintiff's proof of a *prima facie* case.[460]

[460] Vincent R. Johnson, *Standardized Tests, Erroneous, Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 698–708 (2007).