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Curbing the High Price of Loose Talk

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The proper functioning of the defamation rules established by the Supreme Court in New York Times Co. v. Sullivan *and* Gertz v. Robert Welch, Inc. *presupposes a clear understanding of what constitutes defamation. But in two major ways, that clarity is lacking. Little agreement exists as to what a "defamatory meaning" is, and courts are in disarray over how to distinguish "factual" communications, which can be a basis for a defamation suit, from "opinions," which cannot. This Article explores these problems and proposes a rule to resolve these unclear cases.*

INTRODUCTION

If human nature and the wealth of anecdotal materials are a sound guide, speaking ill of one's neighbors may well be the second most popular indoor sport. Of course, as with any sport, there are risks. Should the speech be inaccurate and also of a sort that lowers its victim in the

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eyes of her community, the victim may retaliate with an action for defamation.[1]

Defamation has a long history as a legal wrong in Western society. The bearing of false witness against another is prohibited by the Ten Commandments.[2] Roman law subjected defamers to a variety of possible civil and criminal actions.[3] Surviving reports of proceedings in the manorial courts of thirteenth century England record suits for false and injurious statements.[4] In modern times, the potential for the careless, or worse, the intentional falsehood to destroy livelihoods, disrupt families, and damage friendships has been viewed almost without exception by English and American judges as so serious a wrong that no judicial system would dare abandon a remedy for it.

Yet, historically, the availability of defamation actions has also exacted major social costs. In periods of high litigiousness, the number of defamation suits was perceived as overwhelming.[5] Many individuals who brought suit were unsympathetic victims. Suits protesting devastating assaults on reputation were tangled in with complaints over petty or imagined insults and with actions aimed more at silencing criticism

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[1] Two kinds of actions for defamation exist: generally speaking, an action for slander is available for oral defamation and an action for libel is available for written defamation. The distinction between the two branches of defamation law, whatever its historical justifications or lack of them, has become increasingly blurred by the advent of radio and television and the need to decide whether oral defamation via the mass media is more properly libel or slander. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 43-44 (1980). The dichotomy of treatment under the two branches of the tort is also heavily criticized; justifications for making it more difficult for a plaintiff to recover for slander than for libel are not especially compelling. *See, e.g.*, Reed v. Melnick, 81 N.M. 608, 610-12, 471 P.2d 178, 180-82 (1970) (ending legal distinctions between libel and slander); *see also* RESTATEMENT (SECOND) OF TORTS § 568 comment b, at 178 (1977) [hereafter RESTATEMENT]; PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 786-88 (W. Keeton 5th ed. 1984) [hereafter PROSSER AND KEETON]. Because the distinction between the two is confusing, possibly outdated, and most importantly because the United States Supreme Court in its opinions has so far not distinguished libel from slander in elaborating its constitutional limitations on the tort law in this area, this Article will refer to the tort law of defamation rather than to libel and slander. The premise is that, at least as to the issues discussed here, libel and slander should be subject to the same rules.

[2] *Exodus* 20:16 (King James).

[3] Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 563-64 (1903).

[4] *E.g.*, 2 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS 82, 95 (F.W. Maitland ed. 1889).

[5] 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 283-84 (1906); Lovell, *The "Reception" of Defamation By the Common Law*, 15 VAND. L. REV. 1051, 1064 (1962).

than at redressing wrongs.[6] To curb excessive litigation and insubstantial or damaging suits, the common-law courts over time hedged defamation with a hodgepodge of limitations and defenses, Byzantine in their complexity. The resulting tort recalls the anecdote about the design of the camel: it is the ungainly child of compromises — simultaneously honored and hobbled as a mode of reputational redress.

The most dramatic modern effort to strike anew the right note of compromise in the shape of defamation law — helping the deserving victim but hindering the harmful lawsuit — came in 1964 when the United States Supreme Court decided *New York Times Co. v. Sullivan*.[7] One relevant difference distinguished *Sullivan* from previous compromises: for the first time, the Court balanced the time-honored interest of individuals in their reputation against contemporary requirements of the first amendment. In the period immediately following *Sullivan*, some believed that constitutionalization of defamation law would, for better or worse, so circumscribe a plaintiff's ability to recover for reputational harm as to eliminate, de facto, the tort's importance.[8] Because the constitutional requirement of proving knowing falsehood or reckless disregard for truth seemed so difficult for plaintiffs to achieve, many speculated that the press[9] would in the future be free from the burden of defending defamation actions in any but those cases with the highest likelihood of egregious misbehavior.[10] They were

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[6] *See infra* text accompanying note 21; *see also* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 465 & n.3 (4th ed. 1948); T. STREET, *supra* note 5, at 284.

[7] 376 U.S. 254 (1964).

[8] *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 430 (1975).

[9] Thus far, all the defamation cases decided by the Supreme Court have involved defendants engaged in mass communications — usually thought of collectively as the press. The Court has yet to rule on the applicability of the constitutional limits on defamation to cases involving a nonmedia defendant. The Court recently ordered reargument in a case that may address some of these questions. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 143 Vt. 66, 461 A.2d 414, *cert. granted*, 104 S. Ct. 389 (1983). Since the Court traditionally treats the rights of the press and those of the individual as coextensive, one would predict that the same defamation rules ultimately will apply to both sorts of cases. This Article will, however, focus on the press because the vast majority of important cases are against media defendants.

[10] The *Sullivan* case is a good illustration of the principle that law affects behavior not so much through its actual rules as through its mythology.

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> [Editors] — and the public — somehow gained the impression that the Supreme Court had made it virtually impossible for public officials to win libel suits.

Anderson, *Presumed Harm: An Item for the Unfinished Agenda of* New York Times

wrong.

Twenty years later, defamation has not withered away. If anything, the tort in recent years appears to be in a period of rapid growth, marked not only by an increase in the number of cases filed, but also by a rash of multimillion dollar jury verdicts attracting widespread public attention.[11] To those who perceived the early Supreme Court defamation decisions as unfairly favorable to the press, this development is undoubtedly welcome. But it has caused intense concern in other quarters — not merely in the media, but among judges and civil libertarians who fear that the original compromise forged by *New York Times Co. v. Sullivan* is slowly being undermined. Excessive, costly litigation — often over surprisingly trivial or highly ambiguous insults — once again reminds us of this tort's potential to chill vigorous speech and dampen public debate on important social and political issues. For example, Judge Irving Kaufman, formerly Chief Judge of the United States Court of Appeals for the Second Circuit, in a sober review of the current state of defamation law concluded that the judicial "exercise in constitutional intervention has been a stunning, if well-intentioned, failure."[12]

Theories about the cause of the failure are many and prescriptions

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v. Sullivan, *in New York Times v. Sullivan:* THE NEXT TWENTY YEARS 465 (R. Winfield ed. 1984).

[11] Among recent cases notable for the size of their jury awards are: Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982) (jury awarded $1.5 million actual and $25 million punitive damages), *cert. denied*, 103 S. Ct. 3112 (1983); Tavoulareas v. Washington Post Co., 567 F. Supp. 651, 652 (D.C.D.C. 1983) (jury awarded $250,000 compensatory and $1.8 million punitive damages); Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 997, 193 Cal. Rptr. 206, 208 (1983) (jury awarded $300,000 general and $1.3 million punitive damages), *appeal dismissed*, 104 S. Ct. 1260 (1984). The verdict for Ms. Pring was ultimately reversed because the article lacked defamatory meaning. *Pring*, 695 F.2d at 443. Mr. Tavoulareas's verdict was set aside by the trial court because of a lack of evidence that the defendant knew the article to be false. *Tavoulareas*, 567 F. Supp. at 661. In Ms. Burnett's case, the court on a post-trial motion reduced the compensatory damages to $50,000 and the punitive to $750,000. *Burnett*, 144 Cal. App. 3d at 997, 193 Cal. Rptr. at 208. On appeal, the compensatory damages of $50,000 were confirmed, but plaintiff was given a choice of accepting a reduction of punitive damages to $150,000 or seeking a new trial. *Id.* at 1018-19, 193 Cal. Rptr. at 223. These jury verdicts are no longer unusual. In a single issue of the Libel Defense Resource Center's (LDRC) quarterly report, five new multimillion dollar jury verdicts in recent defamation actions were listed. LDRC BULL., Jan. 31, 1984, at 17-20. The LDRC compared jury verdicts in defamation with those in medical malpractice and products liability cases and found the average recovery in defamation cases to far exceed the averages in either of the other two categories. *Id.* at 28.

[12] Kaufman, *The Media and Juries*, N.Y. Times, Nov. 4, 1982, at A27, col. 2.

for repair equally numerous. This Article is designed neither to attack nor support the proposals offered by others. Its aim, rather, is to offer a different alternative that alone, or augmented by other suggested reforms, will remedy some serious failings of modern defamation law. Hopefully, these suggestions will point a way back to the intent of the Supreme Court when it first subjected defamation law to constitutional constraints. While these modifications would alter the current structure of defamation law, they are nevertheless consistent with the general approach of the Court, which has been, at least thus far, to try to balance the interests of plaintiffs and defendants in these actions and avoid giving absolute preference to speech values. These modifications might accurately be characterized merely as clarifications of principles already mandated by the purpose, the express language, and the rationale of the defamation decisions.

The approach proposed in this Article is born of pragmatism and of respect for the value of reputation. Although strong arguments could be made in favor of eliminating all or most actions for defamation, it seems neither practical nor timely to expect the Supreme Court to adopt a more absolutist first amendment approach to defamation.[13] Such hesitancy on the part of the Justices may well be appropriate; before so ancient and revered a body of law is relegated to the dustheap of history, it is important to experiment with more modest modifications that may preserve legal protection for reputation without incurring unacceptable costs to freedom of speech.

The proposed changes are designed to attack a major design flaw in the Court's defamation opinions: their failure to acknowledge and confront the central problem of vagueness. To put the matter plainly, no one — neither the courts nor the scholars — can explain exactly what

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[13] Some Justices, in fact, believe that the Court has already gone too far in reforming defamation and are unlikely to support more dramatic constrictions. *See, e.g.*, Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923, 925 (1982) (Rehnquist, J., joined by White, J., dissenting to denial of certiorari); Gertz v. Robert Welch, Inc., 418 U.S. 323, 389-90 (1974) (White, J., dissenting). The Court in general appears still to support the basic compromise it struck in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and has shown no interest since 1974 in any dramatic altering of that basic structure. Recent cases have focused on more narrow issues, such as defining with greater clarity who is a private figure for purposes of *Gertz*. *See, e.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165-69 (1979); Hutchinson v. Proxmire, 443 U.S. 111, 134-36 (1979). The majority, therefore, may be more sympathetic to changes that represent a retooling of the basic thinking behind *Sullivan* and *Gertz* than to a wholesale revision. For arguments that defamation law even as limited by the Court may be inconsistent with the first amendment, see *infra* note 16.

constitutes defamation.

A review of decided cases and the scholarly writings about the tort of defamation demonstrates that, despite the centuries of development of this body of law, the line between tortious and nontortious speech remains badly blurred, and little if any agreement exists about the sorts of statements that properly should be considered actionable. A sample of questions to which no real answer exists is illuminating: when, if ever, can opinions — which purport to represent the thinking of the communicator and not to represent observable fact — be defamatory? If opinion cannot be defamatory, how is it to be distinguished from a statement of fact, which can? And most fundamental, what characteristics must a communication possess — be it labeled fact or opinion — before we will say that it lowers its subject sufficiently in the view of the community to be considered defamatory at all? Because these questions cannot be answered with any certainty, the outcome of defamation litigation is unpredictable and the zone of "proscribed speech" hard to delineate in advance.

The Supreme Court since *Sullivan* has apparently presumed a degree of bright-line differentiation between the defamatory and the nondefamatory that does not exist and has treated that imaginary definitional sharpness as an essential element in obtaining the proper balance between first amendment values and private rights. What follows will be both a description of the morass into which modern courts have been thrown by the vagueness that exists and a tentative prescription for a badly needed cure.

I. Preliminary Observations on Reforming the Law of Defamation

Whenever reform of defamation law is discussed, someone will inevitably — whether in anger or simply in doubt — proffer some version of the following complaint: "Why discuss whether the Supreme Court ought to do more to limit defamation suits? Don't defendants already have too much protection?" The prevalence of that perception suggests that this Article might properly begin with a digression.

The belief that defamation is a serious wrong, as noted earlier, is so firmly rooted in Western society as to be almost beyond discussion — a cultural given. The unanimity of that belief largely explains why, for so long, courts and commentators were reluctant to be entirely forthright about the serious conflicts between freedom of speech and the sys-

tem used by the common law to redress reputational wrongs.[14] When the Supreme Court finally did acknowledge the conflict in *New York Times Co. v. Sullivan*[15] and successor cases, the deep-rooted historical belief in the importance of defamation, rather than considerations of theory,[16] may well have dictated the Court's decision that first amendment interests not totally destroy the private individual's right of action.

What should not be forgotten, however, is that serious concerns about the social costs of defamation actions as a means of obtaining reputational redress also have deep historical roots. They are not the recent creation of a paranoid press or of an overly protective Supreme Court. The tort rules currently governing defamation actions have developed in the common-law courts largely since the sixteenth century. For centuries prior to that, most defamation had been treated by the ecclesiastical courts.[17] When the secular courts began to offer the defamed the balm of damages instead of the sop of penance, judges soon "found themselves obliged to take measures to diminish the flood of

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[14] Several court decisions prior to *Sullivan* acknowledged that free speech considerations must be taken into account in defamation, but the courts did not say that state defamation law was constitutionally limited by the first amendment. *See, e.g.*, Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942); Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908). Instead, they used the common law privilege of fair comment, *see infra* text accompanying notes 140 & 158-65, to ameliorate the conflict. R. SACK, *supra* note 1, at 2-3; Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1207-16 (1949) [hereafter Note, *Fair Comment*]; Note, *Fact and Opinion After* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 RUTGERS L. REV. 81, 85-89 (1981) [hereafter Note, *Fact and Opinion*].

[15] 376 U.S. 254 (1964).

[16] From a theoretical perspective, the justification for the preservation of the tort of defamation is questionable. The Court's reliance in the defamation cases, *see, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), on a distinction between accurate speech, which is protected by the first amendment, and inaccurate speech, which is not, fails to be convincing. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 530-31 (1970); *cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 66 (1974) (Harlan, J., dissenting). Nor, in light of other precedent in the speech area, does reputational harm, as a general matter, rise to the level of clear substantiality that would justify permitting the state to offer a remedy for it that impedes first amendment rights. *Cf.* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104-06 (1979) (state lacked sufficiently substantial interest to justify making it a crime to publish names of juvenile offenders). When added to the fear of a chilling effect on willingness of speakers to engage in socially desirable speech — the concern that led to the decision in New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) — a great deal of intellectual merit can be found in a position that would virtually eliminate the tort law in this area. *See infra* text accompanying notes 272-74.

[17] For a description of the church courts in defamation, see Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 103-06; Veeder, *supra* note 3, at 550-53.

litigation which threatened to overwhelm them."[18] Among the courts' inventions to stem the flow was the doctrine of *mitior sensus*, under which no statement that could be twisted or tortured into an innocent meaning could support an action for defamation.[19] This and other limiting doctrines — some discarded and some surviving — turned the law of libel and slander into one of the most complex and difficult areas of tort law. Much criticism, largely justified, has been leveled by commentators against the judges responsible for the rococo structure.[20] But, in the process of criticizing, too little attention has been paid to the nature of the problem that generated this response. Not only were the courts in the sixteenth and seventeenth centuries confronted with a large docket of defamation litigation, but many of the suits also struck judges as trivial, foolish, and socially harmful. The comment of one early writer on defamation is enlightening:

> And it were to be wished . . . that the greatest part of [these actions] were suppressed, that words only of brangle heat and choler might not be so much as mentioned in those high and honourable courts of justice. For I profess for my part that I judge of them as a great dishonour to the law, and the professors thereof; especially when I consider that they are used only as instruments to promote the malices, and vent the spleen of private jars and discontents among men.[21]

This subterranean concern — that much putatively defamatory communication is in fact "harmless" or "unworthy of redress" or at worst a weapon of "extortion" — surfaces even among modern commentators otherwise sympathetic to the tort.[22] And many of the rules that limit defamation litigation persist not merely to control the number of suits, but to weed out unworthy ones. Examples include rules that require a statement to be more than merely insulting before it can be deemed actionable;[23] rules that distinguish libel per se from libel per quod;[24]

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[18] 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 335 (1926); *see also* Lovell, *supra* note 5, at 1064.

[19] For examples of how the courts strained to create a nondefamatory meaning, see W. HOLDSWORTH, *supra* note 18, at 353-56; Lovell, *supra* note 5, at 1065 n.43.

[20] *See generally* PROSSER AND KEETON, *supra* note 1, § 111, at 772.

[21] MARCH, ACTIONS FOR SLANDER 2-3 (1647), *quoted in* Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries II*, 40 LAW Q. REV. 397, 404 n.5 (1924).

[22] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 765 (4th ed. 1971).

[23] *See, e.g.*, RESTATEMENT, *supra* note 1, § 566 comment d, at 176. Lack of a defamatory meaning is a commonly used defense by litigants under common law.

[24] Historically, libel, in contrast to slander, was always actionable without proof of actual monetary loss, since the courts presumed from the nature of the communication that injury must have occurred. Hence, all libel was once "per se." Today, many jurisdictions allow only certain written defamations to be actionable without a showing of

and the short statutes of limitation that exist in many jurisdictions.[25] In a sense, defamation with all its traditional importance can also be seen as a "disfavored" tort.

Furthermore, as the law developed, even those plaintiffs who could comply with all the technical requirements and demonstrate sufficient reputational harm to satisfy ordinary standards of liability were, nonetheless, often deprived of their remedy at common law because courts preferred a wide variety of other social goods to the plaintiff's unsullied name.[26] As early as the seventeenth century, privileges developed that acted as powerful defenses to defamation actions. The earliest was an absolute privilege to defame during the course of a trial.[27] A similar privilege for legislative documents soon followed.[28] Today, numerous additional absolute and qualified privileges exist. Among the interests protected by these privileges are the need of employers to obtain information about prospective employees and that of the general public to learn about government proceedings.[29] A frequent explanation for the development of these privileges was that, without them, the threat of a defamation action would deter circulation of valuable and accurate in-

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pecuniary injury, either based on their subject matter or on whether the libel appears on the face of the statement. Such actions are referred to as libel per se, while those requiring a showing of monetary loss are termed libel per quod. *See* Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 287-90, 648 P.2d 321, 326-29 (1982); R. SACK, *supra* note 1, at 96.

[25] About half the states in the United States have one year statutes of limitation for defamation. R. SACK, *supra* note 1, at 587. There are other limiting rules as well, including strict pleading requirements. A modern federal court wrote recently: "[C]harges of libel and slander under former practice were considered largely vexatious and their litigation discouraged by requirements that such contentions be set forth in considerable detail." Geisler v. Petrocelli, 616 F.2d 636, 640 (2d Cir. 1980).

[26] *See* Coleman v. MacLennon, 78 Kan. 711, 724, 98 P. 281, 286 (1908) (explaining that society's interest in free debate is a value that outweighs plaintiff's reputational interest, even though "at times such injury may be great").

[27] Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries III*, 41 LAW Q. REV. 13, 28-29 (1925).

[28] *Id.*

[29] For examples of privileges in defamation, see PROSSER AND KEETON, *supra* note 1, § 114; RESTATEMENT, *supra* note 1, §§ 583-612. The qualified privileges could be lost if the communicator acted unreasonably or with an "improper" motive, thus giving courts some leeway to adjust the balance between individual reputational interests and competing social values. A modern example of the effect of social policy on the decision about when and whether to protect reputational interests may be found in the Supreme Court's decision in Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966). The Court refused to permit defamation recovery for statements published in the context of a labor dispute unless the plaintiff could prove knowing falsehood or reckless disregard of truth. *Id.* at 65-66.

formation, or would inhibit individuals in the performance of socially useful functions.[30] Thus, the history of defamation is replete with instances in which protection of reputation has been accorded less than preeminent value in part because it harbors a socially suspect underbelly.

In sum, courts and legislatures have provided defendants protection from defamation suits because competing social values, considerations of free speech, and the fear of oppressive litigation have demanded it. When the Supreme Court decided *Sullivan*, and for the first time posited a conflict between defamation law and the Constitution, it was merely continuing to perform the same task that the common-law courts of generations past undertook: attempting to rein in a potentially dangerous body of tort law.

In many ways, *Sullivan* was a classic example of the cases that traditionally troubled the common-law courts. At trial, the plaintiff had won a judgment against the *New York Times* for $500,000.[31] Yet his claim of injury was at best dubious. At issue was an advertisement, appealing for funds, which described as a "wave of terror" the response to the struggle by black students for their civil rights in the South.[32] Illustrations were drawn from events in Montgomery, Alabama. Only by a generous interpretation could the advertisement be construed as a personal attack on any individual[33] and considerable further extrapolation was needed to connect the events with the plaintiff, whose name was never used. Even more important, the errors about which Sullivan complained were trivial. In one place, the advertisement misidentified a

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[30] RESTATEMENT, *supra* note 1, ch. 25, topic 2, introductory note to Title B, at 243-44; *see also* 1 F. HARPER & F. JAMES, THE LAW OF TORTS 421, 436 (1956). Harper and James explained privilege as follows:

> If the interest which the defamer seeks to protect is of great value and the threat of invasion thereof is serious and if the particular defamatory publication, should it turn out to be false, is not likely to cause great harm, the occasion is privileged and such use thereof is proper.

Id. at 436. Interestingly, however, and contrary to the pronouncement of Harper and James, privileges were not defeated simply because of degree of harm to plaintiff's reputation. Rather, the court would look to see, in the case of partial privileges, if the defendant had abused the right to speak out. PROSSER AND KEETON, *supra* note 1, § 115, at 832. In cases of absolute privilege, neither harm to plaintiff nor abuse by defendant would be relevant. *Id.* § 114, at 815-16.

[31] 376 U.S. at 256.

[32] *Id.* at 256-57.

[33] *Id.* at 287 (Court deemed "not unreasonable" the failure of the *Times* to see the advertisement as a personal attack).

song sung by the students during a protest.[34] In another error, the students were described as refusing to register for school, when in fact they boycotted classes for a day.[35] Dr. Martin Luther King, Jr., was described as having been arrested seven rather than four times.[36] Most of the mistakes identified in the advertisement could in no way have been said, even by inference, to implicate Mr. Sullivan — and in no event could have been construed as harming his or anyone's reputation. If Sullivan or anyone else was harmed by the advertisement, the damage was probably done by the parts of it that were true. But he was able to use such errors as a basis for recovery in the state courts and, in addition, to bolster his claim of harm by showing that he was not commissioner of police when many of the events discussed in the newspaper occurred.[37] The case illustrates both how easy it could be to bring a successful defamation action at common law and how closely related that success could be to emotional and political currents in the community that in no way related to issues of individual reputation. The case was set in the heated atmosphere of the early 1960's, with emotions in the South running high over issues of race and the influence of "outside agitators." The temptation created by the availability of defamation actions like this one was that they could easily be used to punish unpopular ideas or speakers.[38] The Supreme Court may have been attracted to try its hand at limiting defamation by the inconsequentiality of the injury in *Sullivan*, coupled with the palpable threat posed by its remedy.

Although some Justices may be uncomfortable with further tampering in the area,[39] the historical need to control this tort makes it unlikely that the Court will ultimately retreat from the insights that led to the constitutionalizing of defamation. The Court intended to protect defendants by making defamation actions more difficult for plaintiffs to bring. If it becomes evident, as this author believes it has, that the constitutional rules governing defamation have not exerted the degree of control over the tort in this litigious era that the Court originally intended, the Justices can be expected eventually to reenter the defamation arena, however reluctantly, and to resume their experiment with new ways to achieve the desired balance of interests. Addressing the

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[34] *Id.* at 258-59.

[35] *Id.* at 259.

[36] *Id.*

[37] *Id.*

[38] Several other lawsuits, claiming combined damages of another $2.5 million, were pending against the *Times* for the same advertisement when *Sullivan* was decided. *Id.* at 278 n.18.

[39] *See supra* note 13.

issue of vagueness, the subject of part II, would be a logical way to begin again.

II. A Stroll Through the Spider's Web: Vagueness as a Constitutional Defect in the Law of Defamation

When the Supreme Court decided *Sullivan* in 1964, it chose not to tackle the constitutional defects of defamation law by a piecemeal remodeling of the bizarre shape and substance of the old common law; rather, the Justices enunciated a theory under which political speech received protection in all but a narrow category of particularly egregious cases. The standard of fault by which such egregious cases could be recognized allowed the Court, in effect, to bypass the technicalities of the common-law tort. The Court in *Sullivan* held that a public official could not recover for defamation unless she could demonstrate that the defendant either knowingly lied or acted with "reckless disregard" of whether the communication was true or false.[40] Over the succeeding decade and a half, the Court's attention was consumed first in extending and then in contracting the class of plaintiffs subject to the *Sullivan* rule. Between 1964 and 1971, the Court applied *Sullivan* to a succession of groups — public officials, public figures,[41] and finally private persons[42] — involved in matters of public concern. But after further deliberation, a majority of the Justices — seemingly uncertain over how broad a meaning to give the concept of political speech, and avowedly concerned that the *Sullivan* burden was so difficult for plaintiffs to bear — decided that *Sullivan* should apply only to cases involving plaintiffs who, by their positions in society and their voluntary actions, had placed themselves in situations where they could be said to have assumed the risk of attacks on their reputations.[43] In *Gertz v. Robert Welch, Inc.*, the Court retreated and created a second "status" track for defamation plaintiffs: private individuals, those who were

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[40] 376 U.S. at 279-80.

[41] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[42] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). The Court also suggested that people could become public figures involuntarily, but stressed that such cases would be "exceedingly rare." *Id.* at 345. Subsequent decisions, such as Hutchinson v. Proxmire, 443 U.S. 111 (1979), and Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), suggest that in practice the involuntary public figure category may be nonexistent.

[43] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974). In addition to its assumption of the risk rationale, the Court in *Gertz* also stated that public officials and public figures had better access than private persons to the communications media to counter defamatory untruths. *Id.* at 344.

neither pervasively famous nor had "voluntarily" injected themselves into a "public controversy," may be entitled to recover for false and defamatory statements if they could demonstrate the defendant's negligence and proof of actual injury.[44]

In the years following *Gertz*, the Court's opinions continued to be devoted largely to explorations of the status issue, in particular to emphasize that *Gertz* applies to virtually everyone who was not a public official or a highly visible and influential public personality.[45] The Court seemed to expect, however, that *Gertz*, despite its less onerous burden, would act as a substantial limitation on the plaintiff's right to recovery as it existed under common law.[46] Limits were imposed on damages; proof of actual injury and evidence of negligence were required for recovery. Although that expectation has not necessarily been fulfilled, one effect of Gertz is clear. It resurrected, in one fell swoop, what had been de facto interred by *Sullivan*: the common-law rules of defamation, in particular, rules about what constitutes a defamatory statement and what constitutes privileged commentary.

Gertz and its progeny[47] markedly improved the odds of a plaintiff overcoming the constitutional barriers to bringing a defamation dispute before a jury.[48] As a result, defendants who formerly relied for protec-

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[44] *Id.* at 347-50. By the phrase "actual injury" the Court meant proof of harm, not the proof of pecuniary loss that was necessary at common law to obtain a remedy for most kinds of slander and some libels. *See supra* note 24; *infra* note 285. As a later case demonstrated, this requirement is easily met. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), a plaintiff was found to have satisfied the "actual injury" requirement by proving emotional distress alone. No evidence of damage to plaintiff's reputation was presented. *Id.* at 460-61.

[45] Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167-68 (1979); Hutchinson v Proxmire, 443 U.S. 111, 134-36 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976). The first case since *Gertz* not to focus on the public/private figure distinction is Herbert v. Lando, 441 U.S. 153 (1979), dealing with pre-trial discovery in a defamation action of a defendant's state of mind. In its most recent term, the Court also decided several cases that did not turn on the public/private figure issue. *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949 (1984) (appropriate standard for appellate review of factual findings in defamation action); Calder v. Jones, 104 S. Ct. 1482 (1984) (first amendment limitations on jurisdiction over out-of-state reporter).

[46] 418 U.S. at 340-41. The Court made clear that in adopting the *Gertz* rule, it was not abandoning its underlying concern that the media must be protected against self-censorship of protected speech. Rather, the Court apparently intended a fine tuning of that interest to permit greater sensitivity to the needs of defamed private persons. *Id.*

[47] *See supra* note 45.

[48] Franklin reported, in a study of defamation cases decided after *Gertz*, that while the media won virtually all cases decided under the actual malice standard, they won

tion on the difficulty of proving knowing falsehood or reckless disregard for truth now had to resort to the common-law rules and privileges to shield themselves from liability. What was less predictable, however, is that common-law defenses have also become more important today in those cases to which *Sullivan* applies. A review of recent defamation cases suggests that courts are now sending to the jury, on a theory of reckless disregard of truth or falsity, cases that a decade ago might have been disposed of on summary judgment. As a result, these defendants must also turn to the common law for auxiliary defenses. At least two possible reasons for this change can be suggested. First, courts may be more reluctant to use summary judgment in defamation cases since a footnote in a 1979 Supreme Court opinion questioned the practice.[49] Second, lower courts do not altogether agree about what is meant by "reckless disregard." Some view it as a form of extreme negligence rather than as strong circumstantial evidence of knowing falsity. Courts that take the extreme negligence view might well send more cases to trial.[50]

In the period between *Sullivan* and *Gertz*, courts could resolve most

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less than a third of those subjected to the *Gertz* negligence standard. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455, 498-99.

[49] Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). For courts expressing reluctance to use summary judgment on questions of actual malice, see, e.g., Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 670-72 (4th Cir. 1982); Cochran v. Piedmont Publishing Co., 62 N.C. App. 548, 552, 302 S.E.2d 903, 905, *petition denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 105 S. Ct. 83 (1984).

[50] The confusion results in part from an inconsistency in the discussion of "reckless disregard" in two Supreme Court cases. In the plurality opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-57 (1967), the Court seemed to contemplate a gross negligence concept by linking the amount of investigation required to defeat a finding of actual malice with the amount of time available to prepare the article at issue. In a subsequent case, St. Amant v. Thompson, 390 U.S. 727, 731 (1968), however, the Court shifted emphasis and suggested that reckless disregard meant sufficient objective evidence to support an inference of subjective knowledge of falsity. The comments to the *Restatement*, however, continue to say that sufficiency of investigation relative to the time available is a factor that may be considered in deciding whether reckless disregard exists. RESTATEMENT, *supra* note 1, § 580A comment d, at 218. For a recent case using this test, see Golden Bear Distrib. Sys. of Tex. v. Chase Revel, Inc., 708 F.2d 944, 950 (5th Cir. 1983). *See also* Lawrence v. Bauer Publishing & Printing, Ltd., 89 N.J. 451, 466-67, 446 A.2d 469, 476-77 (failure to investigate does not raise triable issue of fact regarding actual malice), *cert. denied*, 459 U.S. 999 (1982). *But see* Barger v. Playboy Enters., 564 F. Supp. 1151, 1156 (N.D. Cal. 1983); *see also* Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 671 (4th Cir. 1982) (failure to make adequate investigation relevant to proof of actual malice).

important defamation cases without paying close attention to the adequacy of the common-law rules. However, their reemergence to a place of prominence ultimately demands that the Supreme Court scrutinize them to test their conformity with the basic constitutional framework of limitations placed on defamation law. Whatever else such an examination reveals, it will surely expose a central weakness in the Court's entire approach to defamation: namely, the absence of a sufficiently concrete definition of what constitutes the tort.

An examination of the existing defamation opinions suggests that the Court was unaware, or at least unmindful, in charting its course in this area, of the inherent difficulty of separating defamatory speech from nontortious (if sometimes irritating and offensive) speech. Perhaps the centuries of defamation litigation preceding *Sullivan* fostered an illusion of clarity about the nature of defamation — an illusion that close examination of the decisions would have quickly shattered.[51] Whatever the case, there is much in the Supreme Court decisions of the past twenty years to suggest both what the Justices thought were the attributes of defamation law and what they should require them to be in the future.

A. When Is a Statement "Defamatory"?

The Court apparently assumed that defamation is a special class of speech, the nature of which is clearly understood. This may be one reason why the Court did not feel compelled to prohibit regulation of speech in this area: the Justices believed it was capable of being cordoned off. In both the public figure and private figure cases, the Court appears to presume that speakers can recognize potentially defamatory statements in advance. Thus, the duty to exercise at least some care in avoiding falsehood, whether under *Sullivan* or *Gertz* standards, would be limited to a discrete and narrowly defined category of speech and would not inhibit expression in other areas at all. For instance, in *Gertz*, the Court stated:

> Our inquiry would involve considerations somewhat different . . . if a State purported to condition civil liability on a factual misstatement whose

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[51] Many commentators have noted the great variability from region to region and over time as to what sorts of statements would be deemed defamatory. Lack of predictability is clearly recognized. *See, e.g.*, F. HARPER & F. JAMES, *supra* note 30, at 349-60; PROSSER AND KEETON, *supra* note 1, § 111, at 773-78; R. SACK, *supra* note 1, at 45-50. For an interesting recent discussion of the problem of defamatory meaning, see Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984).

> content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. . . . Such a case is not now before us, and we intimate no view as to its proper resolution.[52]

In a variety of circumstances, however, it can be difficult to be sure that the defendant could recognize the defamatory potential of what was communicated. The speech may be entirely innocent on its face, but be potentially defamatory if viewed in light of other known facts not mentioned in the communication; or the speech may be technically innocent, but susceptible of a reading that has defamatory implications. Finally, there may be real disagreement over whether the communication — however annoying to the plaintiff — is the type that harms reputation as opposed to feelings.

Whether the Court intended by the apparency language in *Gertz* to limit defamation actions in some or all of these situations is unclear. Nor does the Court explain the nature of the limit that it would impose. Justice White, in his dissent to *Gertz*, did intimate how he would resolve at least the second question: he would apply the malice standard of *Sullivan* to any statement the defamatory potential of which is not facially evident.[53] Although Justice White's solution has a surface plausibility,[54] the details of how he would apply *Sullivan* are not provided. Furthermore, his solution is potentially inconsistent with the plurality's position in another case in which the issue was discussed. In *Curtis Publishing Co. v. Butts*,[55] a four-Justice plurality stated that public figures should be unable to recover at all unless the falsehood is such as to make "substantial danger to reputation apparent" on its face.[56] This choice of language suggests that the Court was mindful of all three types of uncertainty. Although several members of the Court disagreed with the plurality opinion in other respects, none of the concurrences took issue either with the requirement of apparency or with the re-

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[52] 418 U.S. 323, 348 (1974).

[53] *Id.* at 389 n.27 (White, J., dissenting).

[54] Justice White may have had in mind only those cases when the defamatory meaning arises because the communication is interpreted in connection with other, unstated, facts. The *Restatement* apparently adopted this narrow interpretation; however, it would disagree with Justice White about proper treatment in such cases. The drafters of the *Restatement* would apply a negligence standard to decide whether a defendant should have explored further and uncovered the extrinsic facts. RESTATEMENT, *supra* note 1, § 580B comment d, at 224-25.

[55] 388 U.S. 130 (1967) (decided with *Associated Press v. Walker*). The plurality opinion was written by Justice Harlan who was joined by Justices Clark, Stewart, and Fortas.

[56] *Id.* at 155.

quirement that the danger to reputation be substantial.[57] Thus, the dicta in these cases suggest that the Court would severely limit the right to sue for statements that are not clearly defamatory — and possibly even suggest that there could be no recovery even when the defendant recognizes that the communication could be given a defamatory interpretation.[58]

What sorts of statements does the Court anticipate will warn speakers of a substantial risk to reputation? This question has never been answered in detail. On several occasions, the Supreme Court has overturned defamation verdicts because the defendant's language, although susceptible to several possible meanings, could not reasonably — despite jury findings to the contrary — have been interpreted in a way that would injure a plaintiff's reputation.[59] Unfortunately, the reasoning behind the holdings in these cases is not clearly enough articulated to give lower courts a foundation for testing the sufficiency of a claim of defamatory meaning prior to trial.

Nevertheless, it is possible to glean, by reading between the lines of the Supreme Court's decisions, a sense of what a majority of the Justices deemed to be a substantial danger to reputation. To begin with, the opinions convey an impression that the reason the Court found defamation law too important to eliminate, even when the attack fell upon

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[57] The remaining members of the Court, Chief Justice Warren, Justices Black, Brennan, Douglas, and White concurred with the plurality in reversing a jury verdict favoring plaintiff Walker; as to plaintiff Butts, however, Justices Black and Douglas would have reversed the judgment in his favor while Justices Brennan and White would have remanded for a new trial. *Id.* at 162 (Warren, C.J., concurring); *id.* at 170 (Black, J., concurring in part and dissenting in part). With regard to the constitutional importance of awareness of defamatory potential, see Franklin & Bussel, *supra* note 51, at 834-51. *See also infra* notes 126-30 and accompanying text.

[58] A case for false light invasion of privacy might exist, however. In the same year that *Butts* and *Walker* were decided, the Supreme Court also decided Time, Inc. v. Hill, 385 U.S. 374 (1967). *Hill* recognized as a cause of action a claim that plaintiff had been placed in a false light in the public eye by an inaccurate, but not necessarily defamatory, portrayal. To recover, according to the Court, plaintiff needed to show that the falsehood was knowing or reckless. *Id.* at 389-90. The Court's false light decisions (a second case was decided seven years later, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974)) are vulnerable to criticism on the ground that the Court has not fully considered the implications of permitting recovery merely for inaccuracy. Nevertheless, *Hill* and *Cantrell* may support Justice White's assumption that intentional or reckless falsehoods are actionable even when the statements give no facial warning of their defamatory potential.

[59] Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin, 418 U.S. 264, 284-87 (1974); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970); Rosenblatt v. Baer, 383 U.S. 75, 81-82 (1966).

public officials, was the desire to provide plaintiffs with a weapon to contend with the "big lie." The Justices seemed to share with the early common-law judges an assumption that defamation was a vehicle designed not to deal with the irritating untruth but with those injuries that segregated their victims from the normal benefits of social intercourse or threatened the stability of the public order.[60] That assumption is reflected in the decision by the *Gertz* majority to allow recovery for defamation only when a plaintiff could prove actual injury and to reject a continued reliance on presumed damages.[61] It also explains why clarity of the defamatory potential of a statement would be so important. Support for a requirement of major harm may also explain Justice Harlan's insistence in *Curtis Publishing Co. v. Butts* that actionable statements be ones evincing "substantial" risk to reputation.[62] One of the Court's earliest opinions in the defamation area, *Garrison v. Louisiana*,[63] explains that the Court decided not to protect calculated falsehoods — even when they were clearly political in nature — because it feared their use as tools of social disorder. The majority in *Garrison* described such deliberate untruths as "an effective political tool to unseat the public servant or even topple an administration."[64] Similarly, Justice Stewart, concurring in a later case, defended the retention of a remedy for at least some defamation by referring back to the 1950's in the United States for an example of how "the poisonous atmosphere of the easy lie can infect and degrade a whole society."[65]

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[60] *See supra* notes 21-25 and accompanying text.

[61] 418 U.S. 323, 349 (1974). The Court's handling of the issue of actual damages in a later case, however, casts substantial doubt on whether the limitation is a significant one. In Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976), the Court accepted as sufficient proof of actual injury evidence of emotional distress without corollary proof of injury to reputation. Justice Brennan in his dissent severely criticized this part of the opinion. *Id.* at 475 n.3.

[62] 388 U.S. 130, 155 (1967).

[63] 379 U.S. 64 (1964).

[64] *Id.* at 75. The *Garrison* opinion also cites approvingly to an early article by David Riesman that revolved largely around the use of defamatory propaganda by the Nazis and others as a mode of social destabilization. *Id.* (citing Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085 (1942)). The *Garrison* opinion makes clear that what the Court feared was use of lies to undermine "democratic government and . . . the orderly manner in which economic, social, or political change is to be effected." *Id.* at 75.

[65] Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) (Stewart, J., concurring); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 400 (1974) (White, J., dissenting) (recalling use of defamation by Nazis prior to and during World War II to destroy political opposition); St. Amant v. Thompson, 390 U.S. 727, 734 (1968) (Fortas, J., dissenting) (concerned about character assassination and severe harms, such as those arising from

While it is hazardous at best, and presumptuous at worst, to attribute unarticulated intentions to Supreme Court Justices, these and other references in the early cases are provocative hints of why the Court deemed defamation law to be worth preserving. Admittedly, the Court's suggestion that false statements of fact are unprotected by the first amendment places defamation a bit outside the ordinary frame of reference for analyzing speech protection. Nevertheless, a requirement that defamation be limited to cases of substantial harm is consistent with the Court's insistence in other areas on clear harm as a predicate for regulation of expression.[66] Also, the Court's "breathing room" rationale — protecting falsehoods to ensure that speakers do not engage in self-censorship of protected speech — cannot be effective unless the ambit for punishable falsehoods is carefully circumscribed; thus, the Court logically could be expected to permit recovery of damages only for defamation of the most serious kinds.

Unfortunately, by failing to articulate rules to segregate the "big lie" — the defamation that does serious and predictable harm to earning capacity, social, and familial relations — from the trivial, the Court leaves the lower courts to struggle with the distinction, armed solely with the questionable aid of the common law. As a result, many arguably insignificant cases survive motions to dismiss and motions for summary judgment and even go to trial. Although large numbers of these are ultimately ruled nondefamatory as a matter of law on a post-trial motion or on appeal,[67] vindication of first amendment rights only after

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being falsely represented to be a criminal).

[66] *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104-05 (1979) (state lacked sufficiently substantial interest to punish those who publish names of juvenile offenders); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978) (state lacked sufficient interest to warrant punishing newspaper that published information about judicial review panel).

[67] *See, e.g.*, Rudin v. Dow Jones & Co., 557 F. Supp. 535, 543 (S.D.N.Y. 1983) (use of word "mouthpiece" to describe lawyer ruled nondefamatory after nonjury trial); Casper v. Washington Post Co., 549 F. Supp. 376, 378 (E.D. Pa. 1982) (article on civil rights suit against police and others ruled nondefamatory after nonjury trial); Bucher v. Roberts, 198 Colo. 1, 5, 595 P.2d 239, 242 (1979) (language ruled nondefamatory by highest state court after jury verdict for plaintiff, post-trial ruling for defendant, reinstatement of verdict by intermediate appellate court); Silberman v. Georges, 91 A.D.2d 520, 521, 456 N.Y.S.2d 395, 397 (1982) (jury verdict arising from unflattering portrayal in painting set aside on appeal because not defamatory); Fairley v. Peekskill Star Corp., 83 A.D.2d 294, 295-97, 445 N.Y.S.2d 156, 162 (1981) (denial of summary judgment reversed on appeal because article in question had no defamatory meaning); *cf.* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1982) (in case involving fiction, appellate court set aside multimillion dollar verdict because material in an article that was obviously "complete fantasy" cannot have defamatory mean-

trial or appeal is a classic example of justice too late.[68] Such litigation is time consuming, expensive, and readily capable of use for intimidation of potential critics, dissenters, and gadflies.[69] Eliminating these cases at the earliest possible stage of litigation would not be a further, gratuitous weakening of state law protection for reputation, but frank recognition of an old truth: that many defamation cases are so trivial, technical, or strained that permitting plaintiffs their day in court is a disservice to policy as well as to constitutional goals.

Members of the Court may well have assumed that, with the benefit of centuries of experience to aid them, the common-law courts were already equipped with sound guidelines for identifying those statements that pose a "substantial risk" to reputation. The rhetoric of the common law certainly suggests this conclusion. Courts commonly state, for example, that by defamation they mean serious injury to reputation and not merely language insulting or abrasive or angering to the plaintiff.[70] Early in the history of common-law defamation, the rules governing what subject matters could be deemed defamatory were indeed restrictive.[71] As the tort evolved over time, however, this limited understand-

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ing), *cert. denied*, 103 S. Ct. 3112 (1983).

[68] As Justice Brennan noted in his plurality opinion in *Rosenbloom v. Metromedia, Inc.*:

> It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance. . . .

403 U.S. 29, 52-53 (1971).

[69] A recent Maine case exemplifies the potential chilling effect of defamation litigation. Maine Yankee Atomic Power Co. v. Maine Nuclear Referendum Comm., 9 MEDIA L. REP. (BNA) 1561 (Me. Super. Ct. Jan. 18, 1983), involved a suit by the power company over antinuclear power advertisements sponsored by a citizens' group prior to a referendum in the state on the issue. The major legal issue for the court in *Maine Yankee* was whether the statements complained of were fact or opinion (that is to say, whether they were statements capable of supporting an action for defamation), but a clear undercurrent of concern was whether an action of this type, by a powerful and knowledgeable plaintiff, could be used "to keep sensitive, embarrassing or adverse data out of the public eye." *Id.* at 1566. Perhaps indicative of that concern, the court decided the libel question in favor of defendants and refused to grant summary judgment to the plaintiffs on defendants' counterclaim for malicious prosecution. *Id.* at 1569.

[70] *See, e.g.*, Bucher v. Roberts, 198 Colo. 1, 4, 595 P.2d 239, 241 (1979); Hatjioannou v. Tribune Co., 8 MEDIA L. REP. (BNA) 2637, 2638 (Fla. Cir. Ct. Nov. 15, 1982), *aff'd*, 440 So. 2d 360 (Fla. Dist. Ct. App. 1983).

[71] Blackstone said that originally slander was actionable only if it "would endanger the life of the object of it." 2 W. BLACKSTONE, COMMENTARIES *124. Gradually, the category of actionable defamation broadened to include words that "may endanger a

ing of what was important enough to affect reputation was relaxed and replaced by an ad hoc approach, leaving the court and jury ample opportunity to exercise their best judgment under the particular circumstances.[72] The task at hand was to reach a "reasonable" result, one that seemed sufficiently protective of reputation without unduly hampering socially valuable communication. Courts remained interested in eliminating suits involving communication with no defamatory meaning out of a concern for judicial economy and a desire to protect the dignity of the court against misuse by plaintiffs with trivial complaints.[73] But errors in distinguishing injuries to reputation from those that merely were "unpleasant and offensive" to the plaintiff[74] would probably have been considered both tolerable and expected.[75]

The modern definition of defamation as phrased by the *Restatement (Second) of Torts* remains broad and extremely vague. It includes any speech that tends to "lower [the plaintiff] in the estimation of the community or to deter third persons from associating or dealing with him."[76] Prosser implicitly criticized this formulation by arguing for a more limited definition. Defamation, he said, "necessarily . . . involves the idea of disgrace" and not merely the arousal of negative or hostile feelings toward the plaintiff.[77] Disgrace is itself, however, a rather vague notion. Prosser's usage implies that defamatory statements are ones reflecting poorly on the character of the plaintiff.[78] But the word as defined in the dictionary and case law does not necessarily support that limiting notion. Essentially, "disgrace" entails being shamed, a state marked by the loss of esteem; it does not require that its object have performed in a dishonorable or disreputable fashion, or in any

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man by subjecting him to the penalties of the law, may exclude him from society, [or] may impair his trade." *Id.* According to Blackstone, these limitations applied also to civil actions for libel. *Id.* at *126. While these limitations are partially explicable based on a division of jurisdiction between civil and ecclesiastical courts, they seem also to reflect a fear on the part of the common law courts that without them the tort could get out of hand. T. PLUCKNETT, *supra* note 6, at 463-65.

[72] *See infra* notes 86-92 and accompanying text.

[73] "People are expected to be sufficiently hardy to withstand the occasional jibe or disparaging remark; if each such statement gave rise to a cause of action, courts would have time for nothing but defamation suits." R. SACK, *supra* note 1, at 46.

[74] PROSSER AND KEETON, *supra* note 1, § 111, at 773.

[75] "While the general idea of defamation is sufficiently well understood, the courts have not been altogether in harmony in dealing with it, so that very often a particular rule or holding is peculiar to a small number of jurisdictions." *Id.*

[76] RESTATEMENT, *supra* note 1, § 559, at 156.

[77] PROSSER AND KEETON, *supra* note 1, § 111, at 773.

[78] *Id.* at 774.

way by her behavior to have deserved disrepute.[79] A review of the cases reveals that imputation of character flaws is not required as a predicate for finding defamation. For example, a court has held it defamatory to say that a woman was raped — an act for which the victim is not responsible, but which for social and cultural reasons may cause the victim to be devalued or disgraced in the eyes of some persons.[80] Similarly, a false statement that the plaintiff had leprosy was defamatory because others would shun the victim.[81] But the reasons that plaintiff would be shunned in no way reflected poorly on her decency or worthiness as a person. Another common form of defamation action involves injury to business reputation; yet these cases often involve misstatements that carry no hint of infamy, shame, or wrongdoing.[82]

Clearly, defamation is not an easily defined concept,[83] and something more than the general language used by the courts and tort law experts is needed in practice to separate actionable from nonactionable speech. In his essay on defamation, Riesman argued that historically the legal definition of defamation was unimportant because a high level of consensus existed about which sorts of communications damaged a plain-

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[79] Among the standard definitions of disgrace are "to bring reproach or shame to" and "loss of grace, favor, or honor." The dictionary says that disgrace shares with such words as "dishonor," "ignominy," and "opprobrium" the meaning of "loss of esteem and good repute and the resulting denigration and contempt." WEBSTER'S NEW COLLEGIATE DICTIONARY (1981).

[80] Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., [1934] 50 T.L.R. 581 (C.A.) (case also appears in 99 A.L.R. 864 (1934)). Specific notice of the absence of blame attributable to plaintiff in this case appears in Tyson, *The Meaning of "Defamatory"*, 54 LAW INST. J. 40, 41 (1980).

[81] Lewis v. Hayes, 165 Cal. 527, 530, 132 P. 1022, 1023 (1913); Simpson v. Press Publishing Co., 33 Misc. 228, 229, 67 N.Y.S. 401, 402 (N.Y. Sup. Ct. 1900).

[82] *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984). In *Bose*, the statement at issue was a claim by Consumer Reports magazine that the sound of musical instruments, heard on Bose's stereo loudspeaker system, "tended to wander about the room." *Id.* at 192. While this evaluation may make the product undesirable to the consumer, and thereby injure the company's profits, there appeared to be no intimation of malfeasance on the part of the manufacturer. *Id.* at 193-94. Nevertheless, the language was found to have a defamatory meaning. *See* Tyson, *supra* note 80, at 41.

[83] One recent commentator implicitly recognized the ad hoc quality of determinations of defamatory meaning when he wrote:

> It will be apparent . . . that there is no single test which will necessarily meet the requirements of every case, and whether it be a matter of "hatred, ridicule and contempt" or of the plaintiff "being lowered in the estimation of right-thinking people generally" has to be determined.

Tyson, *supra* note 80, at 42.

tiff's good name:

> [C]ourts and juries were on relatively sure ground in the moderately homogeneous social order in which the law of defamation developed. They were fairly representative, and therefore fairly aware of community opinion. And by the same token, they could appreciate those normative standards which might modify their judgment as to prevailing *mores*. Thus an English court, in late Elizabethan or Jacobean days, did not need much investigation to determine that it was, and ought to be, defamatory to call a man a "Papist."[84]

But in a modern, heterogeneous society, how are such determinations to be made with reasonable certainty?[85] The plaintiff's reaction cannot be the arbiter since any individual can probably be stimulated to anger and shame by certain statements that might bemuse an outside observer who does not share the plaintiff's precise upbringing or life experiences.

In practice, the determination is generally made the same way it was in Jacobean and Elizabethan England — by a jury, using its collective "gut sense" of what constitutes reputational injury. Under ordinary principles of the applicable tort law, a claim may go to the jury if the communication could reasonably be given a defamatory reading. The difficulty, of course, is that today a shared set of informing values may not exist to tell juries what may "reasonably" be made of many fact patterns before them. The real business of defining "defamatory" is contained in the proviso that the standard for deciding whether the statement lowers plaintiff in the eyes of the community is the opinion of "right-thinking people."[86] This standard, as originally applied by the English courts, was useful because it enabled them to decide the question with reference to the group that established the prevailing social norms for the community. Thus, a plaintiff could not recover merely by demonstrating that a group of individuals, whose values and norms were disfavored by society, thought less of her as a result of the communication.[87]

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[84] Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1300-01 (1942).

[85] Riesman suggested that perhaps public opinion polls could be used to identify at least those "stereotypes" viewed by the modern community as the most damaging. *Id.* at 1304-06. Although the court did not go so far as to authorize a poll, in one recent federal case a lengthy proceeding, complete with expert witnesses on both sides, was held to determine if the offending word in the case could legitimately be deemed defamatory. Rudin v. Dow Jones & Co., 557 F. Supp. 535 (S.D.N.Y. 1983).

[86] F. HARPER & F. JAMES, *supra* note 30, at 350-51; PROSSER AND KEETON, *supra* note 1, § 111, at 777.

[87] As one commentator put it: "[C]alling a prison inmate an informer is not defamatory because the inmate population in which the statement would adversely affect the

In England, appeal was to the community as a whole.[88] The American practice, however, has contributed to the uncertainty of defining defamation by accepting the notion that something can be defamatory if it has the requisite impact on any "respectable" segment of society, even a very tiny group.[89] Thus, the defendant often may have little realistic warning that she is about to publish potentially defamatory material, either because only a specialized audience would recognize the reputational significance of the statement,[90] or because only some but not most members of the community would find it offensive. The uncertainty is worsened because no clear definition exists of what constitutes a "respectable" group. Harper and James, in their tort law treatise, were sympathetic toward a rule that would defer to the judgment of any group not "totally irrational or lawless." Nevertheless, they conceded potential problems:

> It can be argued that . . . general application [of this principle] would lead to the novel, *if not necessarily undesirable*, result that any false statement about a man's politics could become defamatory. Thus while the vast number of the populace who are opposed to Communism would think less of a man for being a Communist, so would the Communists and their supporters presumably think less of a man if he were said to be anti-Communist. Thus it might even become defamatory to call a man a Republican, although it is difficult to imagine a court permitting such a result.[91]

The problem, of course, is that no standard existed then or now that would give a judge a principled basis for refusing to permit it. Obviously, in a pluralistic society, the valuation process by which a court decides that it is defamatory to say that someone is a member of one legal political party, but not another, is highly subjective.[92]

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plaintiff's reputation is not 'respectable.' " R. SACK, *supra* note 1, at 49.

[88] PROSSER AND KEETON, *supra* note 1, § 111, at 777.

[89] *Id.*

[90] *See, e.g.*, Kelly v. Loew's, Inc., 76 F. Supp. 473, 486-87 (D. Mass. 1948) (showing plaintiff as "gallant but impetuous" naval officer might suggest to fellow officers that he is undisciplined); Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 254-55, 167 N.E. 432, 433 (1929) (without expert knowledge of Palestine, readers would not recognize errors in article published over plaintiff's name). Particularly when a journalist is writing about a specialized field, she may not be sufficiently sophisticated to recognize in advance statements that could cause reputational harm to the defendant among other specialists. Yet the errors might have occurred with the requisite degree of fault to support liability under the rules in *Sullivan* or *Gertz*.

[91] F. HARPER & F. JAMES, *supra* note 30, at 352 (emphasis added).

[92] On this subject, Prosser stated: "[A]ccusation of membership in the Communist party, or of Communist affiliation or sympathy, which has led to varying conclusions over the last several decades, is at present all but universally regarded as clearly defam-

Since *Sullivan*, this sort of rough justice, however satisfactory it may have been as a matter of tort law, poses a dilemma of constitutional dimensions. A major premise of the Supreme Court defamation cases — on which both the requirement of fault and the goal of preventing self-censorship rest — is that the defendant must be able to recognize in advance which statements might give rise to liability should they be inaccurate.[93] The combination of diverse elements entering into a jury determination of defamatory meaning can easily render the "fair warning" aspect of *Gertz* a nullity. The inclusive, but not incisive, *Restatement* definition offers little help, and a review of recent cases presents no evidence that a better definition is emerging. Much confusion surrounds decisions about which communications are actionable. The problem arises in several guises. First are cases involving strong language in which the question is whether the insult is serious enough to damage reputation and not merely feelings.[94] The second group of cases involve definitional ambiguities arising from the defendant's use of words with two or more possible meanings. Finally, some cases involve innuendo,[95] in which the putative offense arises not from what is actu-

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atory." PROSSER AND KEETON, *supra* note 1, § 111, at 778 (footnotes omitted). American courts, of course, do on occasion take refuge in quantitative standards. New York, for example, is said to require that language appear defamatory to a "substantial portion of the community," and not merely to an "eccentric group." This may, however, merely be a way of saying that a "totally irrational or lawless group," *see supra* text accompanying note 91, will not be used as the touchstone for determining offensiveness. Fairley v. Peekskill Star Corp., 83 A.D.2d 294, 296, 445 N.Y.S.2d 156, 158 (1981).

[93] *See supra* text accompanying note 52.

[94] Injuries to the feelings of defamation victims are, of course, compensable. At common law, the plaintiff who could satisfy the requirement for showing harm to reputation, either by proving pecuniary injury or by showing that the type of defamation was per se injurious, could then go on to prove damages based on emotional distress. PROSSER AND KEETON, *supra* note 1, § 112, at 794. Although in cases covered by the rule in Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974), the Supreme Court held that plaintiffs were no longer entitled to rely on the doctrine of presumed damages in libel (one might speculate that the same rule would apply in cases of slander per se), subsequent events suggest that a plaintiff in defamation can now recover entirely based on proof of emotional distress. Time, Inc., v. Firestone, 424 U.S. 448, 460-61 (1976); *see supra* note 61.

[95] Innuendo is used in this Article in the sense of "implication." In the tort law of defamation, the word "innuendo" has a special technical meaning. When a statement is not libelous on its face, but only if considered in light of extrinsic facts, a plaintiff is required to plead both the extrinsic facts (the "inducement") and the meaning conveyed when both the extrinsic facts and the publication are considered together (the "innuendo"). R. SACK, *supra* note 1, at 98-99.

ally said, but from inferences that may or may not fairly be drawn from the speech. No clear touchstone exists for deciding when defamation has occurred in any of these three situations.

With regard to the issue of whether the injury is mere insult, or rises to the level of reputational harm, the cases may be described only as to outcome; standards for decision are difficult to discern. Two reasons are given for finding the use of vulgar language in describing a plaintiff to be nondefamatory: some courts say it is a species of "opinion";[96] others say that statements made in the heat of anger or strong emotion, and understood as such, are likely to be discounted by the audience and, therefore, do not injure plaintiff's reputation.[97] But neither explanation is a reliable guide to when mere insult or vulgarity will be found. For example, when abusive language is capable of bearing a literal meaning that could injure reputation, or when a court thinks that the cumulative effect of the abuse may create a demeaning impression of plaintiff in the minds of listeners, a court may also decide that vituperation is capable of defamatory meaning.[98]

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[96] *See infra* text accompanying notes 149, 151 & 202; *see also* Bucher v. Roberts, 198 Colo. 1, 4-5, 595 P.2d 239, 241-42 (1979).

[97] RESTATEMENT, *supra* note 1, § 566 comment e, at 176:

> A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face.

[98] In Bucher v. Roberts, 198 Colo. 1, 4, 595 P.2d 239, 241 (1979), plaintiff claimed that the abusive language hurled at him by defendant was "tantamount to a declaration that the plaintiff is incompetent" in his occupation. Similarly, in Brooks v. Stone, 170 Ga. App. 456, 317 S.E.2d 277 (1984), plaintiff argued that an insulting remark in the campus newspaper of the Medical College of Georgia had in essence accused her of promiscuity. In *Bucher*, the court concluded that name calling was all that had occurred. The *Brooks* trial court reached a similar conclusion, only to be reversed by the intermediate appellate court over a vigorous dissent. *Id.* The case was then appealed to the state Supreme Court, which affirmed the appellate court and ordered the issue of defamatory meaning to be submitted to the jury. 353 Ga. 565, 322 S.E.2d 728 (1984). Less plagued with doubt about the line between name calling and defamation, the New York Court of Appeals, faced with an open letter circulated in an election campaign, decided that use of the aphorism "Power tends to corrupt and absolute power corrupts absolutely" in connection with criticism of plaintiff could be interpreted as a literal accusation of criminal corruption. Silsdorf v. Levine, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 721, 462 N.Y.S.2d 822, 827, *cert. denied*, 104 S. Ct. 109 (1983). The precise factors

Of course, some cases in the "strong language" category do not involve "vituperation and abuse" at all, but rather arise because plaintiff has interpreted criticism, or a less-than-flattering description, as damaging to her good name. Some of these are decided on any easy-to-grasp theory: a claim of defamation will not be entertained because no reasonable person could be offended by the statement at issue. One example of a case decided on this principle involved a plaintiff who objected to a newspaper story because it was said that he describes himself as a social scientist.[99] Often, however, the line between the injurious and the trivial is less sharply drawn. In such cases, the decision whether to find something defamatory may hinge on variations in local mores, on the evaluation by the judge and jury of the worthiness of the respective parties, and by a host of other factors not captured by the standard definition of defamation.[100]

The reasons for the uncertainty in defamation about what is trivial and what is serious are many, including cultural and geographical heterogeneity, variations in sensitivity to criticism and unfavorable commentary, and perceptions that alter as a function of changed times and circumstances. For example, the common law accepted as fact that certain categories of falsehoods were so likely to be injurious that victims could recover for those slanders without needing to prove, as they normally would, that they had suffered monetary injury.[101] Presumably, these categories of slander per se, as they are called, reflected a high degree of consensus about what injures reputation and one might pre-

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that would serve to predict when a court will find "vituperation" and when it will find "defamation" are, thus, difficult to identify in advance. *See infra* note 213 and accompanying text. The degree of disagreement among judges in the same, as well as in different, states over the category into which a particular bit of speech fits illustrates the fundamental vagueness of the underlying concepts with which the courts are working. In *Bucher*, for example, the trial and highest state court found the language to be insult rather than defamation, but the intermediate appellate court saw it as defamation. 198 Colo. at 5, 595 P.2d at 242. In the *Silsdorf* case, the intermediate appellate court found the communication not defamatory; the highest state court reversed. 59 N.Y.2d at 12, 449 N.E.2d at 718, 462 N.Y.S.2d at 824.

[99] Fairley v. Peekskill Star Corp., 83 A.D.2d 294, 296, 445 N.Y.S.2d 156, 158 (1981) (New York requires a statement to be defamatory in eyes of substantial segment of community, not merely to an "eccentric" group).

[100] PROSSER AND KEETON, *supra* note 1, § 111, at 778; R. SACK, *supra* note 1, at 49. For an example of a recent case in which the court drew fine, and not easily explained, lines between what could and what could not possibly strike a jury as defamatory, see McBride v. Merrell Dow & Pharmaceuticals, Inc., 717 F.2d 1460, 1464-65 (D.C. Cir. 1983).

[101] *See* PROSSER AND KEETON, *supra* note 1, § 112, at 788.

dict that any communication of falsehoods in those subject areas would automatically be actionable. Yet even here, alteration of our perceptions over time, and other factors, raise questions and complicate outcomes. Take, for instance, the allegation that plaintiff suffers a loathsome disease. Two kinds of illnesses — venereal disease and leprosy — were singled out as loathsome, not because of their potential to disfigure the plaintiff, but because fear of contagion would lead the rest of society to shun the victim.[102] Since most cases of leprosy and many types of venereal diseases can now be successfully treated,[103] it is difficult to see how, based on the traditional rationale, a modern court could continue to treat these types of falsehoods as peculiarly pernicious or distinguish

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[102] *Id.* at 790. The inclusion of venereal disease as "loathsome" might be explained not merely by others' fears of contagion, but on the ground of moral repugnance — the presence of the illness suggesting illicit sexual behavior. But individuals did not perceive leprosy as the consequence of immorality, thus throwing into doubt this rationale for the role of moral repugnancy in leading some diseases to be deemed "loathsome." The *Restatement* suggests that other diseases might qualify for similar treatment on the ground that they are both chronic and viewed with repugnance, but agrees that the case law has in fact limited the category thus far only to venereal diseases and leprosy. RESTATEMENT, *supra* note 1, § 572 comments b, c, at 190-91.

[103] Currently, two important diseases transmitted by sexual contact are incurable. They are genital herpes and acquired immune deficiency syndrome (AIDS). AIDS fits most closely with the stated rationale for treating assertions that someone has a venereal disease as per se slanderous. It is both incurable and usually fatal. *See* 309 NEW ENG. J. MED. 740 (1983). Because it can be transmitted other than sexually — for example, by blood transfusions or contaminated needles, *id.* at 740-41 — and because of fears that it may be contagious by still other routes, AIDS victims reportedly experience forms of social shunning somewhat comparable to that experienced by leprosy victims of earlier times. *See, e.g.*, Gellman, *Public's Fears Over Mysterious Disease Also Victimize AIDS Patients*, Wash. Post, July 11, 1983, at A1, col. 1; Goodman, *'Leper'*, Wash. Post, July 12, 1983, at A17, col. 1; *Young Victims of AIDS Suffer Its Harsh Stigma*, N.Y. Times, June 17, 1984, at 22, col. 1; *The AIDS Hysteria*, NEWSWEEK, May 30, 1983, at 30. Thus, it is conceivable that allegations about AIDS might justify, under common-law theory, treatment as a loathsome disease. Less clear is the fit of genital herpes within the traditional category of loathsomeness. Although herpes is presently incurable, it is a far less horrific illness than AIDS, is rarely deadly, appears to be transmitted only sexually, and is not continually contagious. Thus, a person falsely alleged to have herpes will not necessarily be shunned even by potential sexual partners since contagion is often avoidable by abstaining from relations during the periods immediately before and during acute episodes of the illness. *See* Laskin, *The Herpes Syndrome*, N.Y. Times, Feb. 21, 1982, § 6 (Magazine), at 94. *But cf.* Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984) (defendant who negligently or intentionally claims to be free of venereal disease liable for transmission of genital herpes to sex partner who would have refused to have relations with defendant if she knew of disease). Social acquaintances and others would be unlikely to avoid the victim out of fear of the disease because they would not be at risk of catching it.

them legally from other false allegations of illness.

Another category of falsehoods long held to be especially injurious is allegations of unchastity in women.[104] The acceptance today, however, of greater sexual freedom in the society as a whole renders suspect an automatic assumption of peculiar harm from such communications.[105] Indeed, the fact that women are singled out as requiring special protection from accusations of sexual activity is itself offensive — implying as it does acceptance of a double standard for conduct of men and women. Furthermore, liberalization of behavioral norms makes it difficult in some cases to decide whether a lack of chastity is actually being implied. Should publication of a photograph of a woman nude be seen as suggesting libertinism? A few decades ago, common assumptions about the moral character of a woman who would pose unclothed might have supported such an inference. But a modern judge faced recently with such a case found all he could say with certainty about the implications of such a picture was that plaintiff "was supportive of avant garde photography."[106]

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[104] PROSSER & KEETON, *supra* note 1, § 112, at 792-93.

[105] Sociological studies conducted over the last 20 to 30 years have documented the prevalence in modern society of sexual involvements outside the confines of marriage. In 1953, Alfred Kinsey and colleagues reported that at least half of men and a quarter of women have one or more extramarital affairs in their lifetimes. A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 437 (1953). Researchers have also found that the majority of women who are separated, divorced, or widowed have sexual relations during the period after marriage. Gebhard, *Postmarital Coitus Among Widows and Divorcees, reprinted in* SEX AND SOCIETY 142, 153 (J. Edwards ed. 1972). Similarly, premarital sexual activity has become more common. *See, e.g.*, Clayton & Bokemeier, *Premarital Sex in the Seventies*, 42 J. MARRIAGE & FAM. 759, 761-64 (1980); Robinson & Jedlicka, *Change in Sexual Attitudes and Behavior of College Students from 1965 to 1980: A Research Note*, 44 J. MARRIAGE & FAM. 237, 238 (1982). For evidence that attitudes toward premarital sex are growing more permissive, see, e.g., Clayton & Bokemeier, *supra*, at 764; Glenn & Weaver, *Attitudes Toward Premarital, Extramarital, and Homosexual Relations in the U.S. in the 1970s*, 15 J. SEX RESEARCH 108, 117 (1979); Mahoney, *Gender and Social Class Differences in Changes in Attitudes Toward Premarital Coitus*, 62 SOCIOLOGY & SOC. RESEARCH 279, 285 (1978); Robinson & Jedlicka, *supra*, at 239. Differences in the behavioral and attitudinal postures of men and women toward premarital sex are also decreasing. *See, e.g.*, Clayton & Bokemeier, *supra*, at 764-65; Robinson & Jedlicka, *supra*, at 239-40. *See generally* Christensen & Gregg, *Changing Sex Norms in America and Scandinavia, reprinted in* SEX AND SOCIETY, *supra*, at 46.

[106] McCabe v. Village Voice, Inc., 550 F. Supp. 525, 528 (E.D. Pa. 1982). For a somewhat similar case, see Brooks v. Stone, 170 Ga. App. 456, 317 S.E.2d 277, *aff'd*, 253 Ga. 565, 322 S.E.2d 728 (1984) (plaintiff contended but trial court ultimately rejected, that sexual insult implies promiscuity on plaintiff's part; appellate court

The final example demonstrates not how attitudes change over time, but rather how difficult it is, even when the underlying attitudes are intact, for subject matter classifications to articulate a bright-line distinction between the actionable and the nontortious. A major category of speech held slanderous per se is disparagement of the plaintiff in her trade, business, profession, or office. Possibly because the connection between this sort of defamation and harm to economic well-being seems so concrete, the law has been especially ready to offer a remedy for untruths of this kind. An example is *Bose Corp. v. Consumers Union of United States, Inc.*[107] in which criticism of a company's product, which undoubtedly could reduce sales, was deemed defamatory. But even in these cases, courts are unwilling to treat as actionable every erroneous statement with the potential to reduce profits or trade — and the line between what is injurious to reputation and what is merely injurious to profits can turn on very subtle, even mysterious, distinctions.[108] For instance, a Florida newspaper article on law enforcement problems in Tampa-area bars mistakenly reported that the sheriff's office had received fifty (rather than the correct number, five) complaints about plaintiff's establishment in a single month. The court agreed that the article cast a negative light on plaintiff's business, but held it was not actionable because it did not accuse the lounge owners of "encouraging" crime.[109] If this case is compared, however, with *Bose*, the similarities are easier to discern than the differences. In neither case was moral turpitude on the part of the business alleged. The publications contained comparatively unfavorable information directly related to the businesses and made the products or services of each company less desirable to consumers. The point is not that one case or the other was wrongly decided, but rather that the line between culpability and innocence in defamation is often blurred.

The second category of problems with defamatory meaning involves

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reversed).

[107] 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984). The First Circuit reversed the verdict for the plaintiff in *Bose*, not because it disagreed that the communication was defamatory, but because it found insufficient evidence of actual malice to satisfy the *Sullivan* standard. The Supreme Court approved the scrutinizing on appeal of constitutional facts.

[108] Prosser gave as an example the case of an attorney who was said not to be defamed by a statement that he was a "bum in a gin mill." PROSSER AND KEETON, *supra* note 1, § 112, at 792 (citing Weidberg v. La Guardia, 170 Misc. 374, 10 N.Y.S.2d 445 (1939)).

[109] Hatjoiannou v. Tribune Co., 8 MEDIA L. REP. (BNA) 2637, 2638 (Fla. Cir. Ct. Nov. 15, 1982), *aff'd*, 440 So. 2d 360 (Fla. Dist. Ct. App. 1983).

linguistic ambiguities. When opinions differ about the sense in which a word is meant, or about its possible connotations, serious uncertainty exists as to when the communication will be deemed actionable.[110]

Two recent cases, and the complex routes followed in resolving them, demonstrate how the courts have struggled with this issue.[111] In the first, *Rudin v. Dow Jones & Co.*,[112] an attorney sued over a caption in *Barron's Business and Financial Weekly*, which referred to plaintiff as "Sinatra's Mouthpiece." Defendant moved to dismiss, claiming that the word "mouthpiece" was not defamatory, but the court denied the motion, holding that the word was "at least susceptible of the defamatory meaning [plaintiff] ascribe[d] to it."[113] The case went to trial without jury on the issue of whether "mouthpiece" was a clearly defamatory term. Expert witnesses — including a former judge, a newspaper editor, and an expert in psycholinguistics — testified for both parties. Two years after denying the motion to dismiss, the court issued a second opinion declaring the word to be "irreverent" but not "pejorative,"[114] and the case was finally dismissed.

The second case, which was tried to a jury, spent several years in the Colorado courts. *Burns v. McGraw-Hill Broadcasting Co.*[115] involved the use of the word "deserted" to describe the action of a wife and children when they left their husband and father. The plaintiffs were the former wife of a Denver police officer and their children; the breakup of the family occurred after the officer was severely injured dismantling a bomb. A jury concluded that the use once during a thirty-minute television program by the reporter of the word "deserted" to describe the plaintiffs' actions was defamatory. The intermediate ap-

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[110] Arguably, Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1979), was such a case. There, the Court concluded that a metaphorical, rather than a literal, meaning was the reasonable one to attribute to a word in the particular context at issue. *Id.* at 14. The Court did not expound on how this determination should be made, especially in a close case. *See also* Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 282-85, 289-90 (1978) (interesting discussion of linguistic ambiguities).

[111] For a third example of a recent case turning on the meaning of an ambiguous word, see Denny v. Mertz, 106 Wis. 2d 636, 662-63, 318 N.W.2d 141, 153-54, *cert. denied*, 459 U.S. 883 (1982) (whether use of word "terminate" to describe end of employment relationship suggests plaintiff was fired).

[112] 557 F. Supp. 535, 536 (S.D.N.Y. 1983).

[113] *Id.* at 537.

[114] *Id.* at 545. The judge noted that in some contexts, the word might be defamatory, but that it was not inherently so. *Id.*

[115] 659 P.2d 1351, 1352 (Colo. 1983).

pellate court reversed,[116] only to be reversed itself by the Colorado Supreme Court.[117] The highest state court partially relied on the dictionary for its holding that desertion means malignant abandonment and is thus defamatory; it also discussed an 1889 Michigan case that described desertion as an act of "the basest ingratitude . . . deserving the contempt of all right-minded people."[118] The majority opinion in turn prompted a vigorous dissent, which pointed out that "desert" also has nonderogatory dictionary meanings.[119] The dissent was especially critical of the majority's reliance on a century-old case. Its author argued that divorce in general does not carry the opprobrium it did in 1889; and that desertion has no technical meaning of fault today in Colorado because it has been eliminated as grounds for divorce.[120]

The difficulty the courts had deciding these two cases is illustrative of the overall problem posed when judges and juries are asked to make subtle linguistic distinctions and to choose among the fine shades of meaning that inhere in a single word. While such ambiguities enrich language and provide sustenance for literary critics and poets, they require factfinders to engage in ad hoc determinations that resist reasoned explanation and lack predictive power. Speakers would need to exercise exquisite care in their choice of words to avoid the potential liability posed by such linguistic ambiguities.

A serious additional risk of allowing litigation over close questions of meaning is the increased likelihood that defamation actions can be used by plaintiffs as a substitute mechanism to redress grievances, of which in themselves the law would not take cognizance. For example, one must be skeptical that the hurt complained of by Mrs. Burns and the Burns children was suffered because a reporter chose to use the verb "deserted" once in the course of a television program.[121] Had the reporter simply said that Burns's family "left" after his injury, would the result, from the plaintiffs' perspective, have been different? The proba-

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[116] 652 P.2d 280 (Colo. Ct. App. 1980).

[117] 659 P.2d 1351 (Colo. 1983).

[118] *Id.* at 1357. The Michigan case cited was Smith v. Smith, 73 Mich. 445, 446, 41 N.W. 499, 500 (1889).

[119] 659 P.2d at 1363 (Dubofsky, J., dissenting).

[120] *Id.* at 1363-64.

[121] The television program was not the only place in which the Burns case was reported. A story also appeared in the *Denver Post*, quoting Sergeant Burns as saying that Mrs. Burns had "deserted" him because "[s]he just couldn't live with a blind man." Mrs. Burns also sued the *Post*, but that case was decided against her on the ground that the statement was opinion and thus privileged. Burns v. Denver Post, Inc., 606 P.2d 1310, 1311 (Colo. Ct. App. 1979).

ble answer is no. An equally credible hypothesis is that many in the audience disapproved of their decisions not to continue to live with Sergeant Burns on the ground that once he was injured his family had a "duty" to ignore their personal preferences and to stay with him.[122] Burns's injuries were very severe and were received in the line of duty. He would thus seem a highly sympathetic — even heroic — figure, and the notion that some members of the audience would uncritically assume his family to be in the wrong is eminently believable. Thus, much of the plaintiffs' discomfort in this case probably arose from that part of the report about their family situation that was entirely accurate, but for which no direct redress would likely have been available.[123] By allowing the jury's decision to stand simply because some support could be found for its interpretation of one word, the *Burns* case blurs the distinction between reputational injury and those irritations we are required to tolerate as the price of free speech. The result is difficult to reconcile with the premises of *Sullivan* and *Gertz*.

The final class of cases in which defamatory meaning is a common issue involves words that are not themselves defamatory, but are alleged to become so either because of the inferences drawn from them, or because of facts that are known to the audience, but that are not part of the communication at issue.[124] Both of these sorts of cases have the potential to run afoul of the Supreme Court's caveat about the need for

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[122] The strength of the negative reaction reported by Mrs. Burns is difficult to attribute solely to the use of one allegedly improper word. She complained to the court that she received "obscene telephone calls, severe criticism, and a purported loss of business income." *Id.* at 281. Assuming the accuracy of the complaint, attribution of so much outrage to an acceptance by the audience of a single meaning for "desert," a word with several recognized shades of meaning, seems implausible. It is possible, however, that a jury — sympathetic with the plight of Mrs. Burns and the children and motivated by a sense that their privacy had been invaded — might well have found defamation a convenient surrogate for the real source of the injury.

[123] Although tort law does recognize a cause of action for invasions of privacy through the publication of private facts, RESTATEMENT, *supra* note 1, § 652D, plaintiffs rarely recover on these grounds. For one thing, this sort of claim can be defeated by a defense of newsworthiness, which tends to be interpreted by courts quite broadly. For another, many jurisdictions require the revelations to be highly offensive in order to be actionable. *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806, 809-10 (2d Cir. 1940). *See generally* Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

[124] An example of a statement made defamatory by extrinsic facts would be a report that a neighborhood butcher was offering a special sale price on hams and bacon, when the audience knows that the butcher shop is kosher. *See* PROSSER AND KEETON, *supra* note 1, § 111, at 778.

fair warning to the defendant from the face of the communication.[125] Cases involving defamatory implications appear to be the more common of the two.

The Supreme Court's recognition that defamation by implication is problematic is hinted at in *Rosenblatt v. Baer*.[126] The *Rosenblatt* case arose over a column in the *Laconia [New Hampshire] Evening Citizen* that asked why a winter recreation area was producing more revenue in a poor snow year than it had in the four previous years. The former supervisor of the area, who had been dismissed, sued on the ground that the story implied he had embezzled money from, and mismanaged, the recreation area. To support his claim, he called witnesses who testified that they had drawn these conclusions from the column.[127] Although it was not the sole consideration that led the Court to rule against the plaintiff, the Justices were clearly dissatisfied with resting liability on such inferences. The opinion emphasizes that the column contained "no clearly actionable statement" on its face, and despite the testimony of the plaintiff's witnesses about their understanding of the article, seems to require a defamatory meaning that is considerably more explicit as a predicate for liability.[128] Thus far, only a handful of states has recognized the consequences, from a constitutional perspective, of allowing recovery for implications, and they have restricted the right to sue for defamation when it takes this form.[129] Their require-

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[125] The *Restatement of Torts* seems to interpret the language about fair warning, appearing in Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974), as if it applied solely to extrinsic fact cases. RESTATEMENT, *supra* note 1, § 580B comment d, at 224-25. As the ensuing discussion demonstrates, this limitation is unjustified. *See infra* text accompanying notes 126-30.

[126] 383 U.S. 75 (1966).

[127] *Id.* at 78-79.

[128] *Id.* at 79. The majority did not rule out defamation by implication altogether, but seems again to desire a relatively explicit connection between the way the communication is couched and the inferences to be drawn from it. *Id.* at 81. The other aspect of *Rosenblatt*, of course, is that it involved criticism of government operations, an area in which the Court is especially chary of allowing defamation to be used. *Id.* at 80. But dicta on fair notice to defendant in *Gertz*, 418 U.S. at 348, renders it unlikely that the Court will limit the requirement for reasonably explicit meaning solely to public figure cases.

[129] These states have ruled that so long as the facts given are correct, and the subject matter relates either to public figures or public affairs, a defamatory implication will not be grounds for a tort action. Strada v. Connecticut Newspapers, Inc., 8 MEDIA L. REP. (BNA) 2603, 2608 (Conn. Super. Ct. Sept. 23, 1982); Schaefer v. Lynch, 406 So. 2d 185, 188 (La. 1981); *cf.* Mihalik v. Duprey, 11 Mass. App. Ct. 602, 604-05, 417 N.E.2d 1238, 1240 (1981) (holding limited to defamation actions brought by public officials).

ment that defamatory content be clear on the face of the communication is consistent with the limited amount of Supreme Court precedent and also with the general sense that the Court has preserved this body of tort law as a remedy for serious injuries, rather than for tenuous or relatively uncertain slights.[130]

Nevertheless, numerous "implication" cases are litigated annually, and courts often feel compelled to permit recovery for — or at least to submit to the jury — claims based on interpretations quite unexpected by defendants. One troubling example is *Clark v. American Broadcasting Cos.*[131] ABC broadcast a documentary on street prostitution. A part of the program focused on the effects of this sexual activity on a residential neighborhood. While a narrator described the problem street prostitutes cause in such a neighborhood, several local women were shown walking down the sidewalks of a middle-class area of Detroit. One of them, a young black woman, sued on the ground that the juxtaposition of the narration and the pictures of her suggested that she was a prostitute. After careful consideration, the trial judge rejected the plaintiff's interpretation as unreasonable and granted summary judgment to ABC.[132] The Sixth Circuit reversed and ordered the case to trial on the ground that suits can be dismissed only when the communication is *incapable* of the plaintiff's interpretation.[133]

This standard, which is — at least in theory — the one ordinarily applied,[134] suggests that the issue of defamatory meaning in many juris-

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[130] *See supra* text accompanying notes 60-65. In Casper v. Washington Post Co., 549 F. Supp. 376 (E.D. Pa. 1982), the federal court refused to find defamatory an article that failed to mention acquittal of the plaintiffs on criminal charges. The court appeared to find the accurately described behavior of plaintiffs so offensive that it deemed the failure to include information about the acquittal irrelevant to the public's likely view of the parties. *Id.* at 378.

[131] 684 F.2d 1208, 1211-12 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1433 (1983).

[132] *Id.* at 1210.

[133] *Id.* at 1213.

[134] *See, e.g.*, McBride v. Merrell Dow & Pharmaceuticals, Inc., 717 F.2d 1460, 1465 (D.C. Cir. 1983); Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1354 (Colo. 1983). Surveys show, however, that numerous motions to dismiss are in fact granted on the ground that no defamatory meaning exists. The absence of clear standards by which this determination can be made suggests that judges may be relying on their individual common sense to decide when a claim is too trivial or too farfetched for submission to the jury. It is not possible to know to what extent sensitivity to the underlying free speech problems motivates judges to eliminate these cases, although a study by the Libel Defense Resource Center suggests that in a substantial number of defamation and common-law right of privacy cases courts specifically advert to first amendment implications in deciding to dismiss a case. LDRC BULL., Fall, 1983 at 6, 6-8. The same study revealed a 67% success rate on motions to dismiss for lack of a

dictions is almost entirely a matter for jury decision. Once before a jury, if the plaintiff can show that any reasonable group of witnesses ascertained the alleged implication — or if, as in *Burns v. McGraw-Hill Broadcasting Co.*,[135] plaintiff can show that the communication had a negative impact on her life — the plaintiff is likely to recover. Since no clear standards exist for setting aside a jury verdict on the issue of defamatory meaning, the decision may be in essence unreviewable. As one federal court recognized recently, this state of affairs leaves judges without adequate tools to prevent the free speech infringements caused by defamation actions "bordering on the frivolous."[136] In practice, many courts — apparently influenced by first amendment concerns — do dismiss cases as too trivial or too attenuated to justify further consideration. But the basis for such dismissals appears mostly to be the "sense of the court" and not a principled rule with any predictive qualities.[137] By failing to articulate a clear standard to resolve questionably defamatory cases — particularly those involving implication — the lower courts create a risk of destroying the utility of the Supreme Court's standards of care for potentially defamatory material. The defendant, however cautious, cannot exercise reasonable care to be accurate when reputation is at stake unless the defendant sees the implication — and even cautious review may not suggest it.

Indeed, unless a method can be devised to resolve questions of defamatory meaning in all its guises, defendants may face in many cases what looks strangely like a new variant of strict liability.[138] Since many words have highly plastic meanings, and many communications are rich with possible implications, a speaker attempting to communicate non-

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legally sufficient defamatory meaning. *Id.* at 13.

[135] 659 P.2d 1351 (Colo. 1983).

[136] McBride v. Merrell Dow & Pharmaceuticals, Inc., 717 F.2d 1460, 1466 (D.C. Cir. 1983). The opinion by the Court of Appeals of the District of Columbia makes it clear that the judges were convinced that plaintiff's claim of a defamatory implication arising from a possible error in reporting how much he was paid to testify at a hearing was weak, but that under existing law they could not grant a motion to dismiss. *Id.* at 1465.

[137] *See supra* note 134.

[138] At common law, defamation was a strict liability tort so that a defendant could not, by exercise of appropriate care, claim a defense against inadvertent defamation. As one court put it, "The question is not so much who was aimed at, as who was hit." Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63-64, 126 N.E. 260, 262 (1920). (Strict liability was eliminated in Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).) Similarly here, a defendant who reads or reviews communications with care cannot be assured of seeing all possible interpretations and may be held liable for failure to recognize that a jury could place an unintended construction on what was published.

defamatory information may never be able to ensure that the words, phrases, or modes of presentation selected are immunized from possible negative interpretations. The reporter in *Burns*, for example, testified that she used the word "deserted" to mean left alone, which is in fact an accepted meaning of the word.[139] Furthermore, if every case capable of defamatory meaning is entitled to be tried, defendants may be held liable, not because of fault in the sense of careless inaccuracies, but because of failure to recognize all the possible interpretations that could be made of their speech by some segment of the audience. The burden this places on defendants can be best envisioned by reference to the world of literary criticism. No critic and certainly no author is ever assumed to have mined a work of poetry, drama, or fiction for all its possible meanings. Generations of Shakespeare scholarship, for example, attest to the possibility that new interpretations and new meanings can be derived from a work even centuries after it was first completed. Although the documentary in *Clark* is unlikely to share the richness of implication that marks a Shakespearean drama, it seems entirely feasible that the reporters and producers involved in that production could have scrutinized the disputed segment carefully and still in good faith have missed the reading that Ms. Clark and her witnesses gave to it.

B. The Problem of Defining "Opinion"

1. The Sources of Legal Protection for Opinion

In addition to assuming that defamatory statements are so distinctive that they can be instantly recognized, the Court also makes other unwarranted assumptions about defamation. The apparent view of the Court is that defamation is a category of speech composed of false statements of fact and not of false opinions. This understanding is partially a result of the existence at common law of an important, if somewhat limited, protection for expressions of opinion called the privilege of "fair comment." The privilege was designed to give speakers enough freedom from defamation to encourage expression of important ideas. Although some jurisdictions were more liberal than others in their safeguarding of opinion from defamation actions, the general rule, as set out in the *Restatement (First) of Torts*,[140] established several limitations. The privilege protected opinion only if it related to a matter of public concern and was "based on" true or privileged facts set forth in the communication or otherwise available to the hearer. The privilege

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[139] 659 P.2d at 1363 n.3 (Dubofsky, J., dissenting).

[140] § 606(1), at 275 (1938).

could be defeated if it did not represent the actual opinion of the speaker, or if it was expressed with the sole purpose of injuring the plaintiff.

In *Gertz*, however, the Court strongly suggested an additional, overtly constitutional, basis for privileging opinion. Justice Powell, writing for the Court, said: "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[141] Despite the brevity of this dicta, and the failure of the Supreme Court to amplify its meaning in subsequent cases, many lower courts and commentators alike have used it to conclude that tort claims based on defamatory opinions are now unconstitutional.[142]

The degree of reliance currently placed on the *Gertz* dicta seems entirely reasonable. Protection of opinion in some fairly generous form is dictated by the entire thrust of first amendment law over the past half century. Although arguments are made that the first amendment can best be understood in terms of social or utilitarian goals, the Court has long recognized a core of speech protection existing purely to defend individual autonomy.[143] This core value is what inspired the famous language of the Court in *West Virginia State Board of Education v. Barnette* to the effect that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[144] The freedom to formulate and express opinion, rep-

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[141] 418 U.S. 323, 339-40 (1974) (footnote omitted).

[142] *See, e.g.*, Kotlikoff v. The Community News, 89 N.J. 62, 71, 444 A.2d 1086, 1089-90 (1982); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 291, 648 P.2d 321, 330 (N.M. Ct. App. 1982); Silsdorf v. Levine, 59 N.Y.2d 8, 13, 449 N.E.2d 716, 719, 462 N.Y.S.2d 822, 825, *cert. denied*, 104 S. Ct. 109 (1983); *see also* RESTATEMENT, *supra* note 1, § 566 comment c, at 172.

[143] One of the leading modern theoreticians to look to social utility as a source of understanding the first amendment was Alexander Meiklejohn, who argued that the Constitution protected political speech — that is, speech that contributes to the goal of individual participation in the process of governance. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 [hereafter Meiklejohn, *Absolute*]; *see also* Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 471-79 (1953). For other discussions of social policy justifications for the first amendment, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881-907 (1963); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979). The source of much modern thinking on freedom of speech is the writing of Utilitarian philosopher John Stuart Mill. J.S. MILL, *Of the Liberty of Thought and Discussion*, *in* ON LIBERTY 15 (1863).

[144] 319 U.S. 624, 642 (1943) (government cannot achieve social policy goals by forcing individuals to profess statements contrary to their beliefs); *see also* Stanley v.

resenting as it does the unfettered operation of the unique individual intellect, comes as close to the heart of Western concepts of liberty as the protection of the integrity of one's body. When the Court turned its attention to the threat that defamation law posed to freedom of speech, it is hardly surprising that the Justices would single out for particular concern the potential for defamation to penalize freedom of thought.

Unfortunately, however, the spareness of the *Gertz* dicta has given the constitutional privilege for opinion a somewhat delphic quality. Opinion is protected, but the Court has yet to define "opinion," or even to hint at those characteristics by which protected opinion can be recognized and separated from unprotected "false facts." At present, only two cases are generally cited as examples of the Court's application of the opinion privilege, and neither contains enough analytic detail to illuminate the Court's thinking on this privilege: they are *Greenbelt Cooperative Publishing Association v. Bresler*[145] and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin.*[146]

Greenbelt involved a newspaper account of several heated city council meetings in Greenbelt, Maryland. The reporter related that some speakers at the sessions characterized the plaintiff's negotiating posture in a real estate matter as "blackmail."[147] The Court reversed an award of damages to the plaintiff on the ground that no reasonable reader could have understood the word "blackmail," used in this context, to refer to criminal behavior. Rather, said the Court, the word was used to convey the idea that, in the view of some, plaintiff was behaving unfairly.[148] What the text of the decision leaves unclear is whether the Court at the time saw this case as having anything to do with protecting opinion. Conceivably, it could have viewed the word "blackmail" as ambiguous in the context in which it was used. If so, it may merely have concluded that an innocent (that is, noncriminal) meaning for the word also existed and that no reasonable listener could fail to understand it to have been used in that sense. On that supposition, the case would have turned on a lack of defamatory meaning. Alternatively, the

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Georgia, 394 U.S. 557, 565-66 (1969) (government control over an individual's choice of reading or viewing habits unacceptable). For general discussions of the personal autonomy justifications for protection of speech and association, see Emerson, *supra* note 143, at 879-81; Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY & PUB. AFF. 204, 215-17 (1972). For a discussion of constitutional protection for individual autonomy, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 886-990 (1978).

[145] 398 U.S. 6 (1970).

[146] 418 U.S. 264 (1974).

[147] 398 U.S. at 7.

[148] *Id.* at 14.

Court may have concluded that no reasonable listener would assume plaintiff literally to be a blackmailer because defendant's source was using the word in anger, as an expression of outrage over plaintiff's behavior. If that were the case, then the word, as an expression of the speaker's state of mind regarding the plaintiff, was protected as a variant of opinion.[149]

In the *Letter Carriers* case, the Court made clearer its intent to protect the speech at issue as an expression of an underlying state of mind. There, a union newsletter, attacking nonunion workers, published writer Jack London's definition of a scab. According to London, scabs are traitors to their countries, people of poor character, and worse principles.[150] Once again, the majority reversed a judgment for plaintiff on the ground that this language could not reasonably be given its literal meaning: "Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected."[151]

The Court in *Letter Carriers* thus made it clear that it would protect "rhetorical hyperbole," or metaphoric — that is, nonliteral — uses of language from being made the basis for a defamation action. Loose, figurative language, however, does not exhaust the realm of "opinion." Opinion, as the term is commonly used, also includes both the formation and articulation of subjective and normative judgments and of deductions from known data or personal observation. About these forms

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[149] The alternative explanations of the holding in *Greenbelt* demonstrate the potential for a great deal of possible analytic overlap between the two areas of vagueness discussed in this Article — opinion and defamatory meaning. Hence, clear distinctions between the two types of problems are sometimes difficult to make. Since virtually all language is connotative as well as denotative — with a capacity to convey both emotion and information simultaneously — word choices, with the possible exception of highly technical descriptive language, are capable simultaneously of being deemed to represent idea and fact. Exploration of this inherent complexity of language, and of the importance of word choice by the author to convey subtle variations in meaning, has been an especially important attribute of twentieth century literary criticism. While literature is greatly enriched by the capacity of words to bear several, sometimes contradictory, meanings or nuances, this capacity can make the courts' task extremely difficult when they attempt to classify words, phrases, or whole passages as fact or opinion for purposes of determining defamatory potential. For a discussion of linguistic complexity from the perspective of the literary critic, see W. EMPSON, SEVEN TYPES OF AMBIGUITY 234-56 (1953).

[150] 418 U.S. at 267-68.

[151] *Id.* at 284. The Court indicated that the speech is protected both on first amendment grounds and on statutory ones — under federal labor law. *Id.*

of mental operation the Court has said nothing. Furthermore, the Court concluded that the word usage in *Letter Carriers* was not literal, but it gave little hint how it so concluded. That this determination is not simple is suggested by the fact that three Justices argued vigorously in the dissent that the language complained of consisted of factual accusations, damaging to the character of the plaintiff and others.[152]

Many lower courts have assumed that the opinion privilege creates protection for the full range of expression of individual intellect and sensibility.[153] But the absence of a clear articulation of what "opinion" is for constitutional purposes, and how it can be differentiated from fact, has resulted in other courts applying the privilege only in limited situations,[154] so that considerable uncertainty and unevenness permeates the case law. The general requirements under the first amendment of specificity and clarity whenever the state undertakes the regulation of speech[155] strongly suggest that the vagueness currently surrounding the opinion privilege is unacceptable. This conclusion is reinforced by the premise on which both *Gertz* and *Sullivan* rest: in both cases the Court was concerned that without an adequate safety zone separating protected and unprotected speech, individuals would be reluctant, when in doubt, to speak at all. As the following sections amply demonstrate, failure to clarify the boundary between fact and protected opinion must inevitably result in precisely the sort of self-censorship that the Supreme Court intended to prevent.

2. The Problem of Separating Fact from Opinion

If we assume for the moment that the opinion privilege is broad enough to encompass the entire range of mental operations that would be considered "opinion" in ordinary usage,[156] an obvious problem of

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[152] 418 U.S. at 296-97 (Powell, J., joined by Burger, C.J., & Rehnquist, J., dissenting).

[153] *See, e.g.*, Church of Scientology of Cal. v. Cazares, 455 F. Supp. 420, 423-24 (M.D. Fla. 1978) (all opinion privileged), *aff'd*, 638 F.2d 1272 (5th Cir. 1981); Maine Yankee Atomic Power Co. v. Maine Nuclear Referendum Comm., 9 MEDIA L. REP. (BNA) 1561 (Me. Super. Ct. Jan. 18, 1983) (ideas absolutely protected).

[154] *See, e.g.*, Green v. Northern Publishing Co., 655 P.2d 736 (Alaska 1982) (opinion not privileged when implied factual predicate defamatory); Silsdorf v. Levine, 59 N.Y.2d 8, 49 N.E.2d 716, 462 N.Y.S.2d 822, (opinion as to criminal or illegal behavior not privileged), *cert. denied*, 104 S. Ct. 109 (1983).

[155] *See, e.g.*, Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 620 (1976); Smith v. Goguen, 415 U.S. 566, 573 (1974); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 871-72 (2d ed. 1983).

[156] *See supra* text accompanying note 152.

definition would still remain. How can a court or a jury decide whether a disputed statement purports to convey facts, or merely expresses the defendant's own ideas? Several recent cases in which the issue has been raised suggest that the answer is not easily reached. For example, a federal appeals court recently affirmed a lower court finding that a report on the performance qualities of certain stereo equipment was fact and not opinion; after an uncomfortable attempt to articulate the standard governing that determination, the court frankly admitted that the distinction "is difficult to make and [is] perhaps unreliable as a basis for decision."[157]

Although the constitutionalization of the opinion privilege has emphasized the significance of the problem, the distinction between fact and opinion has plagued the courts since the introduction of a qualified privilege for fair comment created some protection for ideas.[158] One pre-*Sullivan* commentator wrote on this issue:

> [T]he court decisions in this area make no attempt to lay down the standards by which one can decide whether a particular statement is one of "fact" or one of "opinion." Only a cursory glance at the authorities yields the startling realization that the "distinction is more often stated than defined," and if and when it is defined, that it is often stated in a manner as if the words were self-explanatory.[159]

This differentiation ultimately proved so difficult to make that a minority of courts, led by Kansas in 1908,[160] attempted to abandon the effort entirely in favor of a rule that held all statements on matters of public interest to be privileged as fair comment unless knowingly false or made with reckless disregard of truth or falsity.[161] Use of this standard — the actual malice rule adopted in *Sullivan* for application in cases brought by public officials — as a practical matter permitted the courts to avoid the fact/opinion dilemma in most cases.[162] It did not, of course, eliminate the possibility of liability for opinion in those cases

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[157] Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 194 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984).

[158] *See supra* note 14; *see also infra* text accompanying notes 159-65.

[159] Titus, *Statement of Fact Versus Statement of Opinion — A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1205 (1962) (quoting in part Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1212 (1949)) (footnote omitted).

[160] Coleman v. MacLennon, 78 Kan. 711, 98 P. 281 (1908).

[161] New York Times Co. v. Sullivan, 376 U.S. 254, 281 (1964); *see also* R. SACK, *supra* note 1, at 2-3; Carman, Hutchinson v. Proxmire *and the Neglected Fair Comment Defense: An Alternative to "Actual Malice"*, 30 DE PAUL L. REV. 1, 13-14 (1980).

[162] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 79-80 (1964) (Black, J., concurring).

when a court or jury was able to find proof of actual malice.[163]

In contrast, the majority of jurisdictions, which reserved "fair comment" only for opinion, were forced regularly to identify it, applying various tests: would a reasonable person ordinarily understand this statement to be fact or opinion? Or, is this proposition one capable of proof of truth or falsity?[164] While either test gave more or less satisfactory results in relatively simple cases, neither worked well when applied to the vast quantity of statements that might or might not represent solely the speaker's judgment.[165] But, as long as the decision when and whether to apply this privilege was a policy matter for the courts, and the adjustment of rights as between tort plaintiffs and defendants was subject only to a general sense of fairness and justice, unpredictable outcomes were tolerable.

Today, the same unsatisfactory tests are still applied, but the uncertainty of outcome, now judged against first amendment norms, is less tolerable. The resolution seized upon by many courts, sensitized to the constitutional problem, is, therefore, to "apply" the old common-law tests in a way that results in finding the vast majority of cases, as a matter of law,[166] to involve protected opinion.[167] When, however, courts

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[163] Although at first glance it might seem implausible to prove knowing falsehood about an idea, the discussion in the rest of this section on the difficulty of distinguishing fact and opinion on the basis of a capable-of-proof test demonstrates that such a result could easily occur. In fact, in England the "truth" of opinions is deemed subject to testing. Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1242-44 (1976).

[164] Note, *Fact and Opinion*, *supra* note 14, at 105.

[165] *See* Schauer, *supra* note 110, at 278-79.

[166] In virtually all jurisdictions, the distinction between fact and opinion is treated as a question of law for the court. California, however, has a different rule. The state's Supreme Court, over a vigorous dissent by Chief Justice Bird, ruled in Good Gov't Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 682, 150 Cal. Rptr. 258, 262, 586 P.2d 572, 576 (1978), *cert. denied*, 441 U.S. 961 (1979), that the fact/opinion distinction is a matter for the court only when the statement is "unambiguously" one or the other; if the answer is at all in doubt, the question becomes one of fact for the jury. The California approach, which vests a difficult decision, with constitutional dimensions, in the jury without giving it much usable guidance, is, to put it mildly, unlikely to contribute to principled, predictable resolution.

[167] The Libel Defense Resource Center (LDRC) studied motions to dismiss in defamation cases and found that in 80% of instances when opinion was raised as a defense, defendants won, often with express reliance by the trial court on the *Gertz* dicta. The LDRC concluded that "where the opinion issue is judged under *Gertz*, the Courts often refer to First Amendment considerations and this in turn seems to lead these Courts to a more favorable predisposition toward dismissal." LDRC BULL., Fall 1983, at 5; *see also* Chaney, *"Opinion" Dicta Now Law of Libel?*, 10 MEDIA L. NOTES, Feb. 1983,

actually try to analyze the fact/opinion distinction, and to use the common-law tests as an active method of discrimination, erratic and often troubling results follow.

An examination of the courts' use of these tests will illustrate their doubtful power to illuminate. For instance, the essence of the "proof of falsity" test, as expressed by the Massachusetts Supreme Judicial Court, is to ask whether the statement at issue is "imprecise and open to speculation" and whether it can be proved false.[168] The court claimed to apply this test in deciding whether statements that a reporter had a "history of bad reporting techniques," and was "sloppy and irresponsible," were libelous.[169] The answer, concluded the court, was no. But since both statements contain not merely elements of evaluative judgment but also of observation of concrete behavior, bad reporting techniques and professional irresponsibility could be deemed testable factual assertions. Therefore, whether the test applied aided the court in reaching its conclusion, merely served to label a conclusion reached intuitively, or represents a judgment about the appropriate handling of close cases in light of first amendment values is unknown.

The capable-of-proof test is undoubtedly of analytical use in some circumstances — for example, in classifying such statements as "this is an umbrella." As one commentator noted: "In their most basic form, factual propositions refer to some tangible object. Ideally, the object can be compared with the words to see if there actually is a correspondence between the object and the word used to describe it."[170] Although it describes an action rather than an object, a statement such as "he shot his brother" would normally also lend itself to comparison with events capable of observation or physical proof.

Unfortunately, however, many statements fail to lend themselves point-for-point to the sorts of proof presumed by this definition. For instance, how should the statement "he loves his brother" be understood? Is it a description of an emotional state readily recognizable from circumstantial evidence and direct statements by the party himself, or does it represent a combination on the part of the speaker of observation, interpretation, and a degree of projection? As the situation de-

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at 5, 8.

[168] Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 311, 435 N.E.2d 1021, 1027, *cert. denied*, 459 U.S. 1037 (1982). A similar test was approved as the most useful formulation for separating fact from opinion in Note, *Fair Comment*, *supra* note 14, at 1213. ***But see*** Keeton, *supra* note 163, at 1242-44 (in the English view, the "truth" of an opinion is inherently testable).

[169] *Cole*, 386 Mass. at 307, 435 N.E.2d at 1023.

[170] Schauer, *supra* note 110, at 277.

scribed becomes more complex, or as the language used becomes richer in nuance, what is conveyed, even about tangible objects, turns further away from the narrowly descriptive mode of scientific jargon and into a mixture of description and evaluation.[171] Many words are capable of simultaneously conveying both informational content and an attitude toward, or a subjective response to, that content. For a very simple example, consider a few of the ways in which an adolescent male could be described — to wit, as a boy, a young man, a stripling, a callow youth, a young blade. Each conveys a common core of information, but also conveys a distinctly different point of view toward the subject. In this complex mode of speaking, what has been said is simultaneously capable of and incapable of objective proof.

That these confusing possibilities can lead courts to discomfiting results is illustrated by *Buckley v. Littell.*[172] In *Buckley*, the Second Circuit, using the capable-of-proof test, found that the defendant's use of such language as fellow traveler of fascists and spreader of fascist propaganda to describe Buckley was language that is "imprecise and open to speculation."[173] But it then applied the same test and found susceptible of proof another statement, this one comparing Buckley with Westbrook Pegler. The court concluded that the comparison suggested that Buckley was a libeler — and then went on to find the implicit comparison to be an assertion of fact.[174] While the court's results are readily apparent, the subtleties of its reasoning are less accessible. In each instance, the words at issue were capable of bearing a range of meanings from literal to metaphoric; although differences in context can sometimes affect interpretation, all of these comments appeared in the general context of an attack on Buckley as a wasp-tongued ultraconservative. Thus, it is unclear why some of the language used to describe him was treated literally and some was not. All three statements seem of a piece: that is, all part of Littell's impassioned attempt to convey his unfavorable reaction to Buckley, based in part on his own experience with him. Viewed from that perspective, all of it could be deemed opinion. But from another point of view, each of these statements could in some sense be deemed capable of proof. The sorts of

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[171] *See, e.g., id.* at 279.

[172] 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

[173] *Id.* at 890-93. The trial court found these statements to be defamatory facts. The three statements at issue in *Buckley* were charges that he was "a fellow traveler" of fascism, a "deceiver" who spreads materials from "openly fascist journals" as conservative literature, and a journalist whose attacks on others could be compared to those of Westbrook Pegler on Quentin Reynolds. *Id.* at 887.

[174] *Id.* at 895.

statements made about Buckley's political connections, as well as the comparison to Pegler, because they could be literally true as applied to some persons, might just as easily have been deemed under the test applied by the court to be "factual." This was in fact the conclusion of the trial court, and, indeed, ample precedent exists in earlier cases for finding language that describes individuals as fascist or politically connected to the Nazis to be defamatory.[175]

The propensity of the capable-of-proof standard to become a labeling device rather than a tool of analysis has led other courts to attempt to articulate some more precise set of standards. The Ninth Circuit, in *Information Control Corp. v. Genesis One Computer Corp.*,[176] proposed a three-part formula that has been widely adopted. First, words cannot be held defamatory standing alone, but only when, in context, they appear to be so.[177] Second, the kind of publication must be considered: is it one, which by its own nature, gives warning to its audience that it "may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole?"[178] Finally, does the publisher use language of "apparency" or otherwise use a format for the communication that is more likely to be understood as opinion than as fact?[179]

While the *Information Control* three-prong test seems more specific, it too has yielded unpredictable results. For one thing, even after application of the test, opinions can differ about what the context suggests. Furthermore, while a large number of jurisdictions have adopted the test, they have not all been entirely willing to give it dispositive weight.[180] Although many courts have relied almost exclusively upon either language of apparency or upon other contextual clues to decide whether opinion is intended, others will discount context if the content of the communication seems sufficiently offensive. Thus, a split in approaches has developed. For instance, many courts take the position that when a disparaging statement appears in a review, an editorial, or a column, the audience is sufficiently warned that a personalized, biased, or at least subjective view is being conveyed.[181] Although they

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[175] The *Buckley* opinion acknowledges this precedent. *Id.* at 893-94; *see also* R. SACK, *supra* note 1, at 164.

[176] 611 F.2d 781 (9th Cir. 1980).

[177] *Id.* at 783-84.

[178] *Id.* at 784 (quoting Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552 P.2d 425, 428, 131 Cal. Rptr. 641, 644 (1976)).

[179] *Id.*

[180] *See infra* note 184 and accompanying text.

[181] *See, e.g.*, Lane v. Arkansas Valley Publishing Co., 9 MEDIA L. REP. (BNA)

rarely articulate it as a formal rule, many of these courts treat such communications de facto as opinion. Thus a description, in a highly critical restaurant review, of the fare as "yellow death on duck" and "trout a la green plague" has been deemed nondefamatory, although it was highly unlikely that, after the review, any reader would be inspired to try the restaurant for herself.[182] Massachusetts has extended this protection to include critical comments by a reviewer about the personalities of, rather than the food served by, the proprietors of a well-known Boston restaurant.[183] But other courts, faced with cases bearing similar clear indicia of personal commentary, have nevertheless balked at applying the opinion privilege. Wisconsin, in a case decided for the defendant on other grounds, refused to treat his communications as privileged on the theory that the readers would be likely, because of his position, to treat the defendant's highly critical opinion as authoritative.[184]

A particularly strong case can be made for treating statements made in the heat of political campaigns or disputes as privileged opinion. Blanket application of the privilege to political commentary would be consistent with the *Information Control* test and is further justified by the close kinship between these settings and the fact patterns that inspired the Supreme Court decisions in *Greenbelt* and *Letter Carriers.*

1726 (Colo. Ct. App. May 5, 1983) (editorials and columns protected as opinion); Craig v. Moore, 48 Fla. Supp. 29, 4 MEDIA L. REP. (BNA) 1402 (Fla. Cir. Ct. 1978) (material in editorials beyond the reach of libel laws).

[182] Mashburn v. Collin, 355 So. 2d 879, 889 (La. 1977); *see also* Stuart v. Gambling Times, Inc., 534 F. Supp. 170 (D.N.J. 1982) (book review); Kuan Sing Enters. v. T.W. Wang, Inc., 86 A.D.2d 549, 446 N.Y.S.2d 76, *aff'd*, 58 N.Y.2d 708, 444 N.E.2d 1008, 458 N.Y.S.2d 544 (1982) (restaurant reviewer severely criticizes wrong restaurant); Golden v. Elmira Star Gazette, Inc., 9 MEDIA L. REP. (BNA) 1183 (N.Y. Sup. Ct. Feb. 9, 1983) (restaurant review); Greer v. Columbus Monthly Publishing Corp., 4 Ohio App. 3d 235, 448 N.E.2d 157 (1982) (restaurant review). *But see* Chow v. Jour Azur, Civ. No. 81-7408 (S.D.N.Y., Nov. 28, 1983) (jury awarded $20,000 in compensatory and $5 in punitive damages for a highly unflattering review in the *Guide Gault-Millau;* case on appeal).

[183] Pritsker v. Brudnoy, 389 Mass. 776, 780, 452 N.E.2d 227, 229 (1983). The reviewer, on a radio talk show, characterized the owners of the restaurant dodin-bouffant as "unconscionably rude and vulgar" and as "pigs," although he apparently did not know them. *Id.* at 780, 452 N.E.2d at 228. The court also relied in its discussion on the capable-of-proof test discussed *supra* text accompanying notes 168-75.

[184] Fields Found. v. Christensen, 103 Wis. 2d 465, 483-84, 309 N.W.2d 125, 134-35 (1981). In *Fields*, its former medical director had argued that an abortion clinic was a fraudulent nonprofit organization. *Id.* at 483, 309 N.W.2d at 134; *see also* Chow v. Jour Azur, Civ. No. 81-7408 (S.D.N.Y., Nov. 28, 1983) (food critics liable for vituperative restaurant review).

In fact, the entire reasoning of *New York Times Co. v. Sullivan*, with the Court's concern about eliminating the remnants of the law of seditious libel,[185] would seem to support an especially speech-protective approach in such cases.

But even in the political statement category, numerous cases demonstrate that clear contextual indicia of opinion may not result in application of the privilege — largely because some courts are convinced that the potential for harm from certain sharp expressions of opinion is indistinguishable from that caused by factual misstatements. In a recent case, with facts similar to those in *Greenbelt* and *Letter Carriers*, the California Supreme Court declined to rule that the statements at issue were opinion as a matter of law.[186] Instead, the court consigned to jury determination whether the words "blackmail" and "extortion," used in a citizens group newsletter during a heated recall campaign, were to be taken literally, or were "rhetorical hyperbole" in the *Greenbelt-Letter Carriers* mold.[187] The vigorous dissent demonstrates the deep split in perspectives on this question by arguing that disputes of this type should never be subjects for adjudication, but are entirely within the realm of protected speech.[188]

Another reason courts may be unwilling to provide absolute protection to any speech appearing in a review, column, or editorial is that these communications often contain a range of statements. Although many, if not most, are clearly expressions of the authors' beliefs and ideas, some may be entirely descriptive and factual. Judges may be understandably reluctant to exempt such statements, when untrue and damaging, from tort law coverage simply because they are packaged in a generally nonfactual format. Nevertheless, the cost of preserving discretion to distinguish fact from opinion in this setting is high, particu-

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[185] 376 U.S. 254, 269-77 (1964). A powerful argument in favor of treating political commentary as privileged opinion was made recently by Judge Bork, concurring in a judgment of the District of Columbia Court of Appeals. Ollman v. Evans, 750 F.2d 970, 993 (1984). Judge Bork considered the existence of political controversy as a key contextual factor pointing to a finding of opinion, *id.* at 1000; but he also clearly believed that a finding of opinion was justified as a way of limiting the damage that could be done by defamation cases to the central values of the first amendment, *id.* at 995.

[186] Good Gov't Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978), *cert. denied*, 441 U.S. 961 (1979).

[187] *Id.* at 680-83, 586 P.2d at 575-77, 150 Cal. Rptr. at 261-63; *see also* Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1016, 445 N.E.2d 13, 18 (1982); Silsdorf v. Levine, 59 N.Y.2d 8, 13, 449 N.E.2d 716, 719, 462 N.Y.S.2d 822, 825, *cert. denied*, 104 S. Ct. 109 (1983).

[188] 22 Cal. 3d at 687, 586 P.2d at 580, 150 Cal. Rptr. at 266 (Newman, J., dissenting).

larly when courts exercise it by making fine discriminations in debatable cases on the wide and fuzzy margin separating clear cases of fact and opinion.

Consider again the case of *Bose Corp. v. Consumers Union of United States, Inc.*[189] In *Bose*, both the trial and appellate courts struggled to decide whether a review by *Consumer Reports* of Bose's stereo speakers constituted fact or opinion. In the first place, the court of appeals was unwilling to treat the entire content of the evaluative report as opinion per se in the same way book or movie reviews have commonly been treated. Thus, it was left to wrestle with the proper interpretation of the isolated passage at issue in the case. The contextual tests of *Information Control* were of little help. In reality, the three *Information Control* tests are most helpful when the factors that will set the expectation of readers are reasonably clear. But when the clues are ambiguous, and it is doubtful how readers will interpret the communication, the test provides no guidance as how to resolve the uncertainty. The result, without more to get matters off dead center, is a stand-off, as can be appreciated from what the First Circuit went on to say about its decisional dilemma:

> Although CU's argument that the statement is an opinion is plausible, the seeming scientific nature of the article — indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" . . . would support the position that the statements are factual . . . . Similarly, . . . it is difficult to determine with confidence whether it is true or false . . . . Given the subjective nature of a listener's perceptions and the imprecise language employed in the CU article, we are not sure that the statement that instruments tended to wander about the room is false.[190]

Considering the quagmire in which the court found itself, its decision to affirm the lower court finding that the communication was factual and to rule instead for the defendant on failure to prove actual malice can be readily understood.[191]

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[189] 692 F.2d 189, 193-94 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984).

[190] *Id.* at 194 (citations omitted).

[191] *Id.* at 197. Another excellent example of the difficulties courts face in using the common-law tests to separate fact from opinion can be found by examining seven separate opinions issued by the District of Columbia Court of Appeals in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984). The case involved criticisms in a nationally syndicated column of the appointment of a Marxist to chair the Department of Government and Politics at the University of Maryland. The majority drew on all the tests discussed in this Article — the common understanding test, the capable-of-proof test, and the contextual test — to conclude that the challenged content was opinion. But others of the court used the same tests and arrived at different conclusions. *Id.* at 1032 (Wald, J.,

The point that these cases make so dramatically is that new rules, with some hope of rationalizing fact/opinion determinations must be found. Without them, whenever a case arises that mixes description with some measure of individual judgment, it will ultimately be resolved, whatever the courts say, based on such factors as the relative attractiveness of the parties, the judge's own beliefs about the proper weighing of reputational versus free speech values, and the nature of the subject matter at issue. Law governing speech that leaves this much discretion in the hands of courts must be inherently suspect under the first amendment.

3. Compounding the Confusion: The "Factual Predicate" Rule

The problem of vagueness besetting the opinion privilege is not merely a function of the difficult line drawing between fact and idea. It is also a result of the post-*Gertz* survival, and erratic application, of common-law rules that allow some communications bearing all the indicia of opinion nevertheless to be categorized as fact. Two such rules — what I will call the factual predicate rule and the subject matter rule — have contributed immeasurably to the unpredictable, ad hoc quality of a number of recent decisions. Because the factual predicate rule has application to a greater number of cases than the subject matter rule, it will be discussed first.

Prior to *Sullivan* and *Gertz*, the law of fair comment protected opinion, but only in a limited way. As it was generally applied,[192] the privilege protected only commentary that represented the speaker's actual opinion and was not designed solely to injure the subject. In addition, it only applied if the commentator supplied the factual basis for the opinion, or based it on facts that were "known or available to the recipient as a member of the public."[193] This factual predicate rule further required that the facts relied upon be either true or privileged for the resulting opinion to be protected by the fair comment doctrine. If the facts were not fully stated, and the court could reasonably infer from the opinion the existence of false defamatory "facts" to support the opinion, it could become the basis for a tort action. After *Sullivan*, and particularly after *Gertz*, a reasonable assumption might be made that these and similar limitations on the protection for opinion were invalid;

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dissenting in part); *id.* at 1035 (Edwards, J., concurring in part, dissenting in part). This disarray encouraged Judge Bork to question the utility of these tests in cases posing serious risks to freedom of speech. *Id.* at 994 (Bork, J., concurring).

[192] *See supra* text accompanying note 140.

[193] RESTATEMENT OF TORTS § 606(1), at 275 (1938).

an expression of an unflattering opinion would not seem to require an explanation or substantiation to be protected by the first amendment. But as subsequent cases have shown, the actual direction of the law has been more tortuous.

For one thing, many commentators[194] and courts[195] remain unconvinced that the *Gertz* dicta was actually intended to confer an exemption from the law of defamation for all opinion. They believe that opinion in the constitutional sense is a fairly narrow category of speech. Some have noted, for instance, the failure of the Justices to apply and thereby amplify the privilege for opinion in many cases when it seemed potentially applicable. Among the cases cited as ones in which an opinion privilege, if it were at all broad, would have been applied are *Gertz* itself and *Hutchinson v. Proxmire*.[196] For example, some of the charges about which plaintiff Gertz complained — specifically, that he was a "Leninist" and a "Communist-fronter" — could have been deemed opinion.[197] Similarly, the *Proxmire* case could be treated as involving Senator Proxmire's opinion that behavioral research of the type engaged in by Dr. Hutchinson was undeserving of government funds.[198] The failure of the Court to address this possibility in these cases led one federal judge recently, in a thoughtful opinion, to conclude that the protection described in the *Gertz* dicta is extremely narrow.[199]

Some members of the Supreme Court have also expressed skepticism about the reach of the opinion privilege. In their dissent to a recent denial of certiorari, for example, Justices Rehnquist and White argued that the lower courts have attached too much weight to the dicta. Justice Rehnquist wrote:

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

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[194] Several commentators have expressed hesitation over how much credence to give the dicta. *See, e.g.*, R. SACK, *supra* note 1, at 182; Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239-45 (1976).

[195] *See, e.g.*, Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980); Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 445 N.E.2d 13 (1982); Silsdorf v. Levine, 59 N.Y.2d 8, 49 N.E.2d 716, 462 N.Y.S.2d 822, *cert. denied*, 104 S. Ct. 109 (1983).

[196] 443 U.S. 111 (1979).

[197] Gertz v. Robert Welch, Inc., 418 U.S. 323, 326 (1974), *commented on in* Ollman v. Evans, 713 F.2d 838, 842-43 (D.C. Cir. 1983), *vacated and redecided en banc*, 750 F.2d 970 (D.C. Cir. 1984); *see also* Schauer, *supra* note 110, at 292.

[198] Chaney, *supra* note 167, at 5.

[199] *Ollman*, 713 F.2d at 840-50 (per Robinson, C.J.).

> law to deal with this problem." . . . I am confident this Court did not intend to wipe out this "rich and complex history" with two sentences of *dicta*. . . .[200]

What is not clear from the dissent, however, is when, if ever, Justices Rehnquist and White would protect opinion as a matter of constitutional law.

In the absence of firm direction by the Court, the drafters of the *Restatement* have attempted to stake out what they believe to be appropriate limitations on the constitutional privilege for opinion. In the *Restatement (Second) of Torts* they adopted a compromise position, attempting to accommodate the breadth of the *Gertz* dicta with the limitations inherent in the prior common law. To achieve this, they rewrote the fair comment privilege section in a way that offers endless new opportunities for confusion. Rather than extend the privilege to protect all opinion on issues of public concern, the *Restatement* attempts to segregate opinion into three classes and to establish different rules for each class.[201] If the opinion consists of "vituperation and abuse," it is totally protected by the first amendment.[202] But if it is opinion relating to facts — either deduction, or evaluation with a factual substrate— it will be wholly protected only if that factual predicate is widely known or is accurately presented by the speaker.[203] The *Restatement* justifies this fragmentation rather casually, by commenting as if it were self-evident that the "logic" of the *Gertz* dicta supports a privilege for these opinions only if their factual bases are given.[204]

The attempt to retain a large measure of potential liability for opinion is consistent with common-law practices and thus might appeal to those members of the Court concerned with the possible negative consequences of extensive meddling with established state law. Certainly, the common law had justifications for withholding the fair comment de-

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[200] Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923, 924 (1982) (Rehnquist, J., dissenting to denial of certiorari). *Miskovsky* involved a claim of defamation arising in part from an editorial and an editorial cartoon. The Oklahoma Supreme Court denied recovery to the plaintiff on the ground that the communication was privileged opinion. *Id.*

[201] The categories are: a) verbal abuse, RESTATEMENT, *supra* note 1, § 566 comment e, at 176; b) pure opinion, which occurs when the speaker either comments on facts already known to the audience or when the speaker gives the facts along with the commentary, *id.* comment b, at 171; and c) mixed opinion, when only the comment is given and the existence of supporting facts is inferred, *id.* at 172.

[202] *Id.* comment e, at 176.

[203] *Id.* comment c, at 176.

[204] *Id.* at 172-73.

fense from defendants whose opinion rested on a presumed body of unstated facts. According to some, courts were promoting a fairness principle — the harmful effect of denigrating comments would be ameliorated if the audience had the factual basis before it and could itself judge the fairness of the opinion.[205] It has also been said that the rule prevented unjustified "scurrility and vituperation in the press," thereby encouraging worthy citizens to seek public office.[206] Another justification was that opinions falsely implying that there are defamatory facts to support them really are factual statements in disguise and should be so treated.[207]

Despite these arguments, the constitutional validity of denying absolute privilege to what the *Restatement* calls "mixed opinion" cases is questionable on many grounds. To begin with, the tradition of the Court's protection for beliefs, value judgments, and intellectual freedom in other contexts is so strong that it would be surprising for it to deny broad protection for any mental operation that could reasonably be described as opinion, even when the commentary in question is highly disparaging of another person.[208]

In normal usage, the word "opinion" is applied to describe a range of frequently overlapping mental operations, ranging from expressions of emotion ("I hate you") to subjective reactions to external events or persons ("this soup tastes like dish detergent" or "people with red hair make me nervous") to conclusions or hypotheses derived by individuals from the evidence of their senses or from other sources of information ("I think that no other planet in the solar system sustains life"). Deductive and evaluative opinions — the conclusions we draw about the world and people around us, based on our personal perspectives and on what is often necessarily incomplete data — are the stuff of intellectual or academic freedom.[209] The decision to limit the constitutional protec-

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[205] *See, e.g.*, Hill, *supra* note 194, at 1229.

[206] Note, *Fair Comment*, *supra* note 14, at 1211-12.

[207] Commentators have also asserted that opinions on matters "at least theoretically capable of verification" are indistinguishable from factual statements and should be dealt with as fact. Note, *Fact and Opinion*, *supra* note 14, at 108-09; *see also* Hill, *supra* note 194, at 1231.

[208] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 79-80 (1964) (Black, J., joined by Douglas, J., concurring) (would dispose of case dealing with disparagement of judges as "opinion").

[209] Several Supreme Court decisions have extended protection to ideas that are at least partially grounded on a factual predicate to safeguard intellectual or academic freedom. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 868 (1982); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511-14 (1969); Epperson v. Arkansas, 393 U.S. 97, 104

tion granted to this class of ideas surely does not arise because they occupy some less favored position in the hierarchy of protected speech. A few classic examples from history make the point. Galileo, relying on his astronomical observations, concluded that the earth moved around the sun, and not the other way around. Because this hypothesis undercut the prevailing dogma of his day, he was persecuted for his ideas.[210] It is difficult to imagine, were that controversy raging in the United States today, that any policy justification could be asserted that would convince the Supreme Court to allow the state to require Galileo to retract his hypothesis and adhere, at least in his public utterances, to the more respectable view. The Court would likely say that he was protected in his right to form and articulate his own opinion about the facts concerned. Presumably, the same considerations would apply if the opinion at issue were not about the physical universe, but about the nature, character, or behavior of other human beings — for example, Darwin's right to express his belief that human beings evolved from lower animal forms,[211] or Sir Thomas More's to conclude that the re-

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(1968); *see also* Emerson, *supra* note 143, at 919-20; *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1065-77, 1128-34 (1968); Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176, 1182-85 (1973).

[210] Galileo Galilei was attracted as a young man to the theories of his predecessor, Nicolaus Copernicus, who, based on mathematical models, suggested that the earth might actually move around the sun. Using a telescope to make actual observations of the planets, sun, and stars, Galileo accumulated visual evidence to supplement mathematical theory on the heliocentricity of the solar system and to argue that the heavens were not a fixed, unchanging entity. Because his arguments contradicted both Greek classical scholarship and the orthodox Christian theology of the day, they were considered extremely dangerous. In 1632, Galileo published in the vernacular his *Dialogue on the Great World Systems*. He was promptly summoned by the Inquisition. Galileo had been warned not to promote his ideas earlier, but this time he was required to disavow them publicly and was placed under permanent house arrest. The *Dialogue* was banned. For accounts of Galileo's work and of its ultimate suppression, see C. RONAN, GALILEO (1974); G. DE SANTILLANA, THE CRIME OF GALILEO (1955). *See also* D. BOORSTIN, THE DISCOVERERS 312-27 (1983).

[211] For a description of Charles Darwin's ideas on evolution and their impact on the religious and scientific world view of Western society in the nineteenth century, see generally W. IRVINE, APES, ANGELS, AND VICTORIANS (1955); M. RUSE, THE DARWINIAN REVOLUTION (1979). *See also* D. BOORSTIN, *supra* note 210, at 464-76. Although Darwin — unlike Galileo, *supra* note 210, or More, *infra* note 212, was not persecuted for his unpopular ideas, evolution has remained a subject of great controversy. In the 1920's, some states passed statutes prohibiting the teaching of Darwinian theories in public schools. Such a statute was upheld in Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). In Arkansas, a similar statute remained in effect until the United States Supreme Court held that it violated the establishment clause of the first amend-

marriage of his king was a violation of temporal and spiritual law.[212] Nor would the Court be likely to condition protection for such opinions on their meeting some standard, set by the courts, of adequate support and justification — if for no other reason than the risk that placing this power in the hands of the state would result in censorship. Thus, nothing inherent in the nature of deductive and evaluative opinions with a factual substrate leads, as a matter of course, to the conclusion that they ought to be less protected than abusive name calling, even though they may be disparaging toward another person. They are not misrepresentations of facts, but representations of an individual's thought processes, values, and judgment.

Additional objections exist to withholding constitutional protection from unpleasant commentary simply because its factual basis is not given. To begin with, this approach requires courts to distinguish "vituperation and abuse" and other kinds of purely subjective opinions from those based on a factual predicate. Not surprisingly, this task can often be troublesome.[213] In addition to this line drawing problem is the

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ment in 1968. Epperson v. Arkansas, 393 U.S. 97 (1968). The issue has recently reappeared in a modified form — statutes requiring that alternate theories of creation be taught if Darwinian evolution is included in the curriculum. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (state statute unconstitutional); *see also* Broad, *Louisiana Puts God into Biology Lessons*, 213 SCIENCE 628 (1981).

[212] A description of Sir Thomas More's role in opposing the desire of Henry VIII of England to dissolve his marriage to Catharine of Aragon in order to marry Anne Boleyn may be found in J. GUY, THE PUBLIC CAREER OF SIR THOMAS MORE 97-203 (1980) and T. MAYNARD, HUMANIST AS HERO 154-253 (1947). More was ultimately convicted of treason and executed in 1635 for refusing to acknowledge the legitimacy of any issue born to Henry and Anne. D. WILSON, ENGLAND IN THE AGE OF THOMAS MORE 186-89 (1978).

[213] The difficulty facing judges in separating "vituperation" from "opinion based on undisclosed facts" is illustrated in Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977). The author of the book, *Hemingway in Spain,* characterized the plaintiff as a hypocrite, a manipulator, and an untrustworthy person. *Id.* at 912. All of these, the court said, were clearly statements of opinion, representing defendant's emotional response to the plaintiff. *Id.* at 913. As such, they could be compared to the unflattering language in *Greenbelt*, 398 U.S. 6, 7 (1970), and *Letter Carriers*, 418 U.S. 264, 268 (1974), and, as insults, be privileged even if unaccompanied by a factual predicate. So the court seemed to treat them. But, it went on to add, "If an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact." 551 F.2d at 913. Under those circumstances the court said that the opinion would not be privileged. This formulation is difficult to understand, but at the least it suggests that judges have considerable latitude in deciding how to use the *Restatement*'s scheme to classify various expressions of opinion. *See also* Kotlikoff v. The Community News, 89 N.J. 62, 72, 444 A.2d 1086, 1091

additional question of whether the law can require, as a condition for enjoying a first amendment privilege, that the defendant engage in mandatory speech. If the sole issue were one of social policy so that the matter fell within the discretion of the courts, the requirement that the speaker articulate the facts informing an opinion might appear fairly reasonable. Certainly, the fuller the context, the easier recipients will find it to distinguish "commentary" from factual assertions.[214] Furthermore, when the facts are supplied, the audience is better able to evaluate the reasonableness of the opinion expressed.

But the Constitution does not require speakers to engage in ideal forms of communication. Thus, when the *Restatement* position is tested against free speech norms, the tort principles look suspect. Requiring that a factual predicate be provided would assuredly be inconsistent with first amendment cases in areas other than defamation. Normally, decisions about what to say and what to omit are the prerogative of the speaker. In *Miami Herald Publishing Co. v. Tornillo*,[215] for example, the Court struck down a state statute requiring newspapers, when they attacked political candidates, to offer the candidate space to reply in the publication. The only area in which the Court has countenanced "mandatory speech" has been broadcasting, based on peculiarities of the medium — scarcity of frequencies on the spectrum, public ownership of the airwaves, and the notion that the public as well as the broadcasters have free speech rights in the use of those airwaves.[216] Even in these cases, the amount of additional materials required to be broadcast has been narrowly limited,[217] and in no case has the broadcaster been required to do more than make air time available so that someone else may speak. The broadcaster has not been required to do the speaking herself.[218]

(1982) (deciding without explanation that charges of conspiracy and coverup are rhetorical hyperbole).

[214] R. SACK, *supra* note 1, at 158-60.

[215] 418 U.S. 241, 255 (1974).

[216] CBS, Inc. v. FCC, 453 U.S. 367, 395-97 (1981); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-401 (1969).

[217] In the *CBS* case, for example, the Court stressed that it had never, and did not in the instant case, approve "a *general* right of access to the media." 453 U.S. at 396 (emphasis in original).

[218] The Court in *Red Lion* approved a personal attack rule, requiring broadcasters to give individuals whose "honesty, character, integrity or like personal qualities" were impugned "during the presentation of views on a controversial issue of public importance" airtime in which to respond. 395 U.S. at 373 (quoting 47 C.F.R. § 73.123, now codified at 47 C.F.R. § 73.1920 (1982)). In *CBS*, the Court upheld a statue that allows " 'legally qualified' candidates for federal elective office" reasonable access for political

Furthermore, the rule provides no standards for deciding how much must be said to satisfy the requirement that the factual predicate be fully presented. The problem has both practical and theoretical aspects. On the practical side, broadcasters and writers (as well as public speakers) may lack the space, time, or audience interest needed to provide a complete statement of the facts on which each piece of commentary rests.[219] From a theoretical perspective, the rule is even worse. If we operate on the assumption that the first amendment protects opinion whether or not it is reasonable,[220] then an individual's opinion supported with no facts or on irrelevant and insufficient data should be protected. But a court, called upon to decide whether the "basis" for the opinion has been articulated, is invited to focus not on what the speaker had in mind, but on what a listener might reasonably assume formed the basis of the opinion.[221] Thus, a defendant can be bootstrapped into liability by a series of inferences that in effect negate her right to be foolish or ill-advised in her opinions. De facto, the common-law rule preserved by the *Restatement* and applied by numerous courts, although it purports not to require opinions to be reasonable, does so.[222]

Two recent cases, one from Illinois and one from Alaska, illustrate other aspects of the problem. In *Costello v. Capital Cities Media, Inc.*,[223] an appellate court reversed the dismissal of a suit against the *Belleville News Democrat* over an editorial attacking the chairperson of the County Board. The editorial, after pointing out that the chairperson had broken a campaign promise at the first board meeting he chaired, labeled Mr. Costello a "liar" and lamented that the voters had to endure two more years of "the Costello brand of lying leadership."[224] The court rejected the newspaper's claim that its statements were opinion, the basis of which had been fully set out in its editorial. Instead, the court ruled that the defendant implied a set of derogatory facts in

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advertisements once the campaign has begun. 453 U.S. at 387 (describing 47 U.S.C. § 312(a)(7) (1976)). *But cf. In re* Patsy Mink, 59 F.C.C.2d 987 (1976) (failure to program on strip mining issue violated fairness doctrine).

[219] For some insight into a journalist's view of how a strict requirement that the factual predicate be set out would impact on the press, see Denniston, *The Press & the Law: Legal Matter of Opinion*, 5 WASH. J. REV., Dec. 1983, at 15.

[220] *See* Hill, *supra* note 194, at 1232-35.

[221] Questions of defamatory meaning, including whether defamatory implications exist in a facially innocent statement, are also decided with reference to what others understood from the communication, not from what the speaker meant. *See infra* notes 291-95 and accompanying text.

[222] *See generally* Hill, *supra* note 194, at 1227-36.

[223] 111 Ill. App. 3d 1009, 445 N.E.2d 13 (1982).

[224] *Id.* at 1010-11, 445 N.E.2d at 14-15.

addition to what was stated in the editorial. These were, according to the court, that Mr. Costello lied deliberately and that he did so for "politically motivated reasons."[225] Since the issue in defamation is how the communication was understood, and since unflattering opinions conceivably could rest on numerous alternative explanations, the judge is essentially left to her unfettered discretion in deciding whether to treat the predicate as fully stated, or instead to infer other, unstated defamatory foundations.

The same issue arose in another recent case, but in an even more complex setting. In *Green v. Northern Publishing Co.*,[226] the plaintiff's contract to provide medical services for five Anchorage-area jails was terminated when Selberg, a mentally ill inmate, died in prison of collapsed lungs.[227] The *Anchorage Daily News* published an editorial terming the dismissal of Dr. Green and other steps taken by the state's Commissioner of Health and Social Services "constructive, if overdue."[228] In reviewing the editorial, a majority of the Alaska Supreme Court found that the editorial, by its endorsement of the Commissioner's action, impliedly asserted that Dr. Green was at least partially responsible for Mr. Selberg's death, a defamatory untruth. The majority was heavily influenced by the existence of a coroner's report concluding that the cause of death was unrelated to the inmate's mental disorder.

A close look at the circumstances surrounding the *Green* case raises important questions about the validity of the majority opinion. First, arguably the newspaper fully satisfied the factual predicate rule. The rule is quite flexible about how the facts that underlie an opinion can be made known to the public. The position of the *Restatement* is that a communication can be treated as privileged if its factual basis is available to the listener from other sources — either because the facts have already been publicly reported or are otherwise "notorious."[229] While the editorial in *Green* did not itself fully recapitulate the events on which it was commenting, the newspaper apparently had reported ex-

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[225] *Id.* at 1016, 445 N.E.2d at 18.

[226] 655 P.2d 736 (Alaska 1982), *cert. denied*, 103 S. Ct. 3539 (1983). The *Green* case involved a young pipeline worker, arrested for disorderly conduct. Although seriously disoriented, he remained in jail for nine days without a psychiatric examination, usually naked and refusing to eat. He died in his cell the night before a court-ordered psychiatric examination was to have taken place. During his incarceration, Selberg was not in a padded cell, nor was he restrained in any way. *Id.* at 737-38.

[227] *Id.* at 737.

[228] *Id.* at 739.

[229] RESTATEMENT, *supra* note 1, § 566 comment b, at 171.

tensively on all the events surrounding the prisoner's death, including the coroner's report. If, by the requirement of a full statement of the facts, the court was requiring familiarity with the events that preceded the Commissioner's action, it is difficult to argue that the rule was not satisfied.

The problem in *Green* is actually more subtle and troubling. The majority held that the editorial implied a "false fact" — namely that there was some responsibility on the part of Dr. Green for the death. But is that implication factual, or is it really opinion? The answer depends upon what one asserts to be the "facts" at issue. The majority treats the coroner's report, absolving Dr. Green of fault in Selberg's death, as objectively establishing Green's lack of culpability. But was the report's conclusion properly treated as a "fact"? As the dissent points out, while the young man died of natural causes — perforation of the lungs — much genuine dispute existed over the adequacy of his treatment prior to death.[230] Members of the coroner's jury publicly expressed concern that failure to expedite hospitalization of the inmate, who evidenced serious mental disturbance, might in some undetermined way have contributed to his death.[231] Dr. Green's superior, in press interviews, also suggested a possible relationship between the young man's untreated mental state and the cause of death.[232] Even Dr. Green had speculated that a fall in his cell might have led to the collapse of the young man's lungs.[233] Since it was impossible to know for sure why the pulmonary perforation occurred, any conclusion about fault or lack of fault on the part of the prison physician, including that of the coroner's jury, could at best be speculation — that is, opinion. As the dissenting justices pointed out: "[T]he editor did not have a duty to believe that Selberg's death was not related to his confinement . . . . It is not heresy to lack faith in an opinion expressed in a medical report."[234] To further complicate the analysis, the newspaper, in supporting Dr. Green's dismissal, did not necessarily entertain any belief about the cause of Selberg's death. The paper could easily have rested its conclusion solely on Green's failure to insist on psychiatric treatment for Selberg.

As the *Costello* and *Green* cases amply demonstrate, an opinion privilege limited by a factual predicate rule invites courts to wade into a

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[230] 655 P.2d at 746-47 (Matthews, J., dissenting).

[231] *Id.* at 746.

[232] *Id.* at 746-47.

[233] *Id.* at 747.

[234] *Id.*

quagmire. Judges, if they so choose, will usually be able, in the face of unflattering opinion or commentary, to find that the full facts have not been stated, and that defamatory facts are implied. Whether or not they do so must inevitably reflect to some extent their own biases and subjective responses to the opinion expressed.[235] As one judge recently noted, if the factual predicate rule were to be strictly enforced, the privilege for opinion would be available only in "the perfect case."[236] Since

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[235] Often courts avoid application of the factual predicate rule, largely because the judge is convinced of the underlying merits or justification for the communication. For example, in Maine Yankee Atomic Power Co. v. Maine Nuclear Referendum Comm., 9 MEDIA L. REP. (BNA) 1561 (Me. Super. Ct. Jan. 18, 1983), the suit involved a series of radio and television advertisements opposing nuclear power plants. The sponsor, a citizens' group, argued that the plants endanger health, citing for support the finding by a statistician that leukemia had increased by 53% in southern Maine since the Maine Yankee plant went into operation. The ads, however omitted mention of other reputable studies that cast considerable doubt on the conclusion that Maine Yankee was in some way connected with the rising incidence of leukemia. *Id.* at 1562-63. Had the court wished to invoke the factual predicate rule, it might have decided that failure to give all the data, because it denied the listener the information necessary to evaluate the conclusion of the Committee, removed the ads from the protection of the opinion privilege. Instead, the court granted summary judgment to the defendants. One important reason for the court's decision appears to be its belief in the importance of the speech involved in the case. The court stated:

> Statistical analysis methods are ideas, and those ideas are absolutely protected in the course of debate . . . . If methods of analyzing fixed numbers, be it observed leukemia cases, unemployment claims or batting averages were subject to defamation actions by those who disagree with the analysis; [sic] sports writers, economists and others who provide the statistical debates upon which this country thrives would be quickly silenced. Defamation actions are designed to provide redress where facts are stated falsely, not where people reasonably disagree in analyzing facts which are not disputed.

Id. at 1568. Courts in other jurisdictions have also declared in certain factual settings that they will presume disputed communications to be protected opinion. Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 602-03, 552 P.2d 425, 428-29, 131 Cal. Rptr. 641, 644-45 (1976) (presumption of opinion regarding statements made in the course of labor or political disputes); *see also* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 270-73 (1974); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 60-63 (1966) (labor disputes); *cf.* Haas v. Painter, 62 Or. App. 719, 722, 662 P.2d 768, 770-71 (1983) ("[C]ourts have gone to considerable lengths to characterize what appear to be statements of fact as statements of opinion when made in the course of disputing matters of public interest."). In several Florida cases, the factual predicate rule has been ignored altogether. Church of Scientology of Cal. v. Cazares, 455 F. Supp. 420, 424 (M.D. Fla. 1978), *aff'd*, 638 F.2d 1272 (5th Cir. 1981); Craig v. Moore, 48 Fla. Supp. 29, 4 MEDIA L. REP. (BNA) 1402, 1406 (Fla. Cir. Ct. 1978).

[236] Ollman v. Evans, 713 F.2d 838, 847-48 (D.C. Cir. 1983) (per Robinson, C.J.),

few cases are perfect, the opportunity for discreet, even unconscious, censorship is created.

The effort to solve this problem in a principled way recently led members of the Court of Appeals for the District of Columbia into an interesting division of approaches. The case was *Ollman v. Evans*, in which a professor of political science argued that he had been libeled in a column by Rowland Evans and Robert Novak critical of his nomination to become head of the Department of Government and Political Science at the University of Maryland.[237] The case was heard first by a panel of the court, which issued three separate opinions. One judge wanted to make the privilege for evaluative opinion available only if the communication met a rigorous standard for full exposition of the facts[238] — that is, virtually never. A second preferred abandoning the factual predicate rule in favor of some other, unspecified method of separating opinion from fact on the ground that deciding "whether the author has backed a . . . statement with a 'full and accurate account of the material background facts' . . . sounds too much like an exercise of editorial judgment."[239] The third member of the panel, Judge MacKinnon, urged avoidance of the distinction altogether whenever possible — but he would proceed by treating as opinion in its entirety any communication that an audience would expect to express opinion, including editorials and columns appearing on the "op-ed" page.[240] Judge MacKinnon was apparently influenced in his opinion by the belief that time and space limitations often make the factual predicate rule impossible for journalists to meet.[241] The three agreed only to the

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vacated and redecided en banc, 750 F.2d 970 (D.C. Cir. 1984). Judge Robinson believes that the opinion privilege in *Gertz* was designed primarily to shield expressions of personal taste or subjective reaction and unflattering epithets; interpretations based on facts, in part because of their propensity to do harm, should receive first amendment protection in his view only when all the facts are set forth to support it. *Id.* at 849-50.

[237] 750 F.2d at 971-73. Ollman alleged that several passages in the column were defamatory. The column described Ollman as a proponent of political Marxism and raised the issue of whether he intended to use his position to indoctrinate students in his beliefs. An unnamed critic at another university was quoted to the effect that Ollman was without status as a scholar.

[238] 713 F.2d at 848-49 (per Robinson, C.J.).

[239] *Id.* at 855 (Wald, J., concurring). Judge Wald apparently agrees with Judge Robinson that, rigorously applied, the factual predicate rule would immunize only a small number of deductive opinions anyway. *Id.*

[240] *Id.* (MacKinnon, J., concurring).

[241] *Id.* (noting limited space for syndicated writers). An example of the practical difficulties that troubled Judge MacKinnon can be seen in the facts of a recent Pennsylvania case. In Braig v. Field Communications, 310 Pa. Super. 569, 456 A.2d

solution: a remand to the district court for further examination of the opinion issue. The court then agreed to rehear the case en banc, and ultimately affirmed the judgment of the trial court that the disputed language expressed opinion.[242] This time, seven opinions were filed, with five members of the panel disagreeing at least in part with the majority decision. Interestingly, only two judges favored the factual predicate rule; the majority opinion declined to use it on the ground that, once a statement is classified as opinion by means of the common-law tests, further inquiry into its factual implication is "superfluous."[243] Judge Bork, in a thoughtful concurrence, eschewed both the common-law test and the factual predicate rule. He expressed concern that forcing the facts of a case like *Ollman* into "four-factor frameworks, three-pronged tests, and two-tiered analyses"[244] was more likely to result in "mechanical jurisprudence"[245] than in a result that met the demands of the first amendment. He suggested instead a contextual analysis that focuses not on whether the expression is "opinion," but rather that privileges critical commentary about persons who have voluntarily entered the political arena or some area of public controversy.

This sampling of recent cases demonstrates the unpredictability and often the impracticality of applying the factual predicate rule. From one point of view, virtually no opinions, except those expressed by name calling, are privileged. From another, what is or is not privileged

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1366 (1983), *cert. denied*, 104 S. Ct. 2341 (1984), panelists on a public affairs television program were discussing allegations of police misconduct in the death of a 19-year-old youth. At one point, the program touched briefly on a judge who dismissed the case against one police officer for misconduct on the part of an assistant district attorney. The chief of the police brutality unit in the District Attorney's office commented, "Judge Braig is no friend of the police brutality unit. I don't care who we sent in to try that case, in my opinion, that case was going to get blown out." *Id.* at 1368-69. At trial, the statement was held to be protected opinion, but the superior court reversed for failure to set forth its factual basis. *Id.* at 1373. Yet the circumstances made it almost impossible for the defendant to avoid liability. The colloquy took only 30 seconds and occurred at the close of the program, just as the host was prepared to end with the summary. *Id.* at 1369. Thus, the attorney would have had to recognize instantly the possibility that defamatory inferences could be drawn from what he said, and have interrupted the moderator to interject all the facts he could fit into the remaining half a minute.

[242] 750 F.2d at 992.

[243] In favor of the factual predicate rule were Chief Judge Robinson and Judge Wright. *Id.* at 1016 (Robinson, C.J., joined by Wright, J., dissenting in part). The objections of the majority to the rule are stated at *id.* at 977-98.

[244] *Id.* at 994 (Bork, J., concurring).

[245] *Id.*

opinion depends largely on the discretion of the courts. If we assume, as I believe from the totality of first amendment law we must, that our judgments about the events and individuals around us are an aspect of individual autonomy that the Constitution protects, a rule like the factual predicate requirement is difficult to defend. If it cannot be applied in a predictable way — or, due to its theoretical and practical deficiencies, ever be completely satisfied — it renders the concept of protection for the vast majority of opinions essentially a nullity. The Supreme Court should clarify the nature of opinion, and if it is wise, should do so without the aid of the factual predicate rule.

4. When Is an Opinion Not an Opinion? When It Isn't Very Nice

The second common-law survival that confuses the issue of what constitutes opinion can be called the "subject matter rule." Although it has been revived in fewer cases than the factual predicate rule, it is, if anything, a more troublesome rule, viewed within a framework of constitutional protections for freedom of speech. Under this rule, courts are able to find certain kinds of opinion per se factual, even though the basis for the opinion is carefully set out. Historically, many jurisdictions refused to apply the privilege for fair comment to opinions on certain subjects, particularly those dealing with the character and private lives of plaintiffs.[246] This exclusion from the privilege was justified in a number of ways. Most frequently the courts said that fair comment applied only to matters of public interest and that opinions on issues of this sort were not of "public interest." Other courts, however, chose to explain the exclusion by terming such comments "factual."[247]

After *Gertz*, though, the validity of excluding certain opinions from protection because of their content was seriously questioned. The concept of intellectual freedom on which the opinion privilege appears to rest seems broad enough to support the right to "think" virtually any thought, and to give those thoughts verbal expression, even when those opinions are unpleasant or are socially harmful.[248] The drafters of the

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[246] W. PROSSER, *supra* note 22, § 118, at 829. Prosser gave as examples of the sorts of comment that were not privileged accusations of plagarism or speculation that a Congressman's vote was motivated by "treason and sinister influences." *See also* R. SACK, *supra* note 1, at 163-64.

[247] Note, *Fair Comment*, *supra* note 14, at 1209-10.

[248] *See* RESTATEMENT, *supra* note 1, § 566 comment c, at 172-73; *supra* notes 143-44 and accompanying text. One of the Supreme Court's most explicit statements about freedom to give voice to even highly offensive ideas can be found in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), in which the Court held that, absent immi-

Restatement (Second) of Torts, in responding to *Gertz*, therefore, took the position that tort liability for defamatory opinions could not rest on subject matter but only on the violation of the factual predicate rule.[249]

Post-*Gertz* case law, however, has been more reluctant than the *Restatement* to scuttle the subject matter limitations on the opinion privilege. The New York Court of Appeals was one of the first courts to consider the issue, and in *Rinaldi v. Holt, Rinehart & Winston, Inc.*,[250] it decided that, "[a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected."[251] It made no attempt to justify this conclusion by discussing any of the principles behind the opinion dicta in *Gertz*. Rather, it treated the proposition as self-evident: "While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test."[252] *Rinaldi* in turn influenced a decision by the Second Circuit, venturing onto even shakier ground. In

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nent likelihood that speech would incite illegal action, the viciousness and antisocial content of the communication did not justify imposition of criminal penalties. *Id.* at 447.

[249] RESTATEMENT, *supra* note 1, § 566 comment c, at 173. While the *Restatement* drafters acknowledged that the Supreme Court might ultimately rule that "private communications on private matters" be treated differently, they expressed the belief that "the logic of constitutional principle would appear to apply to all expressions of opinion." *Id.* Some support for the position that the opinion privilege applies both to public and private subject matter may be found in Garrison v. Louisiana, 379 U.S. 64, 77 (1964). There the Supreme Court rejected a distinction that would classify attacks on a judge's performance as public, and on his character as private. *Id.* at 76. This is precisely the sort of distinction that could have been recognized under the common-law privilege for fair comment. The *Restatement* also takes the position that even opinions about guilt with respect to serious crimes could not form the basis for a defamation action so long as the factual predicate was given. RESTATEMENT, *supra* note 1, § 566 comment c, illustration 5, at 174.

[250] 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977).

[251] *Id.* at 382, 366 N.E.2d at 1307, 397 N.Y.S.2d at 951.

[252] *Id.*; *see also* Silsdorf v. Levine, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 720, 462 N.Y.S.2d 822, 826, *cert. denied*, 104 S. Ct. 109 (1983) (applying *Rinaldi* rule in context of charges exchanged in the heat of a political campaign). The New York Court of Appeals used dicta appearing in a California case decided the previous year to support its assertion that opinion of this kind is unprotected. In that case, an action arising out of a labor dispute, the California Supreme Court stated as an aside that "accusations that an individual has committed a crime or is personally dishonest" are not protected by the first amendment. Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 604, 552 P.2d 425, 430, 131 Cal. Rptr. 641, 646 (1976). All but one of the cases cited by the California court for this proposition, however, were decided before 1974 and relied on common law rules governing fair comment.

1980, the federal appeals court ruled that Vincent Cianci, mayor of Providence, Rhode Island, was permitted — despite the opinion defense — to sue over a story in *New Times* that *implied* (although it did not actually say) that the publication believed Cianci, while a law student, had been guilty of rape.[253] Under the *Cianci* rule, a publication is vulnerable to a defamation suit if it presents facts accurately and without comment — if a court believes that it can infer from those facts the opinion that the subject is guilty of a crime. The combined effect of *Rinaldi* and *Cianci*, if widely adopted, would be to make extremely perilous the effort to raise publicly important questions about possible criminal conduct prior to an actual conviction.[254]

The desire to preserve subject matter limitations on the opinion defense may also account for the outcome of the Second Circuit's decision in *Buckley v. Littell*.[255] By his criticism of William Buckley in the book *Wild Tongues*, the author was found by the court to have impliedly accused Buckley of being a libeler. Although the *Buckley* opinion itself seemed to rest on the conclusion that a false defamatory fact was involved, the court in *Cianci* provided a different explanation for the outcome. The court said that in *Buckley* the comparison of the plaintiff to Westbrook Pegler was clearly an expression of Littell's opinion, but that the opinion was not privileged because of its content.[256] The court further stated that, in its view, *Gertz*, *Greenbelt*, and *Letter Carriers* protect "generally derogatory remark[s],"[257] but not opinions "laden with factual content."[258] Specifically, they do not protect opinion in the form of "a charge which could reasonably be understood as imputing specific criminal or other wrongful acts."[259] By this interpretation, the Second Circuit carried intact across the barrier of the constitutional defamation cases one of the key limitations to the fair comment privilege prior to *Sullivan*. The receptivity to this subject matter limitation on the opinion privilege appears slowly to be growing.[260] Interestingly, in

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[253] Cianci v. New Times Publishing Co., 639 F.2d 54, 56, 64 (2d Cir., 1980).

[254] The *Cianci* rule was recently applied by a federal district court in Illinois. Cantrell v. American Broadcasting Cos., 529 F. Supp. 746, 755 (N.D. Ill. 1981).

[255] 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

[256] 639 F.2d at 64.

[257] *Id.* at 63.

[258] *Id.*

[259] *Id.* at 64. At least a hint of this reasoning appears in *Buckley* itself. Judge Oakes, writing for the court, distinguished between calling a journalist a liar, and attacking his political beliefs; he implied that a less lenient approach was appropriate for the former because it went to the plaintiff's professional reputation. 539 F.2d at 896-97.

[260] *See, e.g.*, Westmoreland v. CBS, Inc., 596 F. Supp. 1170 (S.D.N.Y. 1984) (rely-

one recent opinion that rejected the *Buckley-Cianci* approach when a publication suggested that the plaintiff was personally dishonest and guilty of professionally shoddy behavior, the court seemed more influenced by its belief that the plaintiff was unworthy than by any conclusion that the Second Circuit rule was invalid.[261]

By this exception to the *Gertz* dicta, the courts have made speculation in certain areas impossibly risky, regardless of how careful a speaker is in explaining the reasons for her conclusions.[262] Furthermore, by treating as "facts-in-disguise" not only charges of serious crimes but also attacks on character, these courts have increased the unpredictability about precisely which subject matters are off limits for discussion.

The justification for preserving this aspect of the old fair comment privilege seems to rest on the courts' view of the peculiar harmfulness of such opinion, although a number of efforts to articulate alternate explanations have been made. Judge Friendly, for example, has at-

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ing on *Cianci* to reject opinion defense regarding charges of deceiving President Johnson about number of enemy troops in Vietnam); Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1015-16, 445 N.E.2d 13, 18 (1982) (relying on *Buckley-Cianci* rule to find nonprivileged an editorial accusing a public official of being a liar); Silsdorf v. Levine, 59 N.Y.2d 8, 16, 449 N.E.2d 716, 720, 462 N.Y.S.2d 822, 826, *cert. denied*, 104 S. Ct. 109 (1983) (accusations of illegal or criminal behavior in the form of opinion not protected by first amendment). The court in Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 604, 552 P.2d 425, 430, 131 Cal. Rptr. 641, 646 (1976), in dictum, stated that no first amendment protection exists for attacks on personal honesty or accusations of criminal behavior, even in the form of opinion. This dictum, derived from pre-*Gertz* case law, was accepted by New York in Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951, *cert. denied*, 434 U.S. 969 (1977), as an accurate statement of post-*Gertz* law. *Cf.* Fields Found. v. Christensen, 103 Wis. 2d 465, 483, 309 N.W.2d 125, 134 (1981). *Fields* does not cite *Buckley* and *Cianci* in rejecting defendant's opinion defense. But the opinion stresses that charges of "dishonorable, unethical or unprofessional conduct" are clearly defamatory, and that the fact that the communication is couched as opinion is irrelevant. *Id.* Whether Wisconsin would always treat such allegations as "factual" is unclear, however, because the court added that a special factor exists in this case: the speaker's expertise, which would lead readers to treat his opinion as "authoritative." *Id.* at 482-84, 309 N.W.2d at 134-35.

[261] Lewis v. Time, Inc., 710 F.2d 549, 554-56 (9th Cir. 1983) (lawyer with two law suits decided against him cited by *Time* magazine as an example of bar's failure to rid itself of shoddy practitioners); *cf.* Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 927-28 (C.D. Cal. 1982) (rejecting *Buckley*-type exception to privilege for opinion when plaintiff has bad reputation).

[262] This problem was also recognized by at least some commentators in relation to the common-law fair comment privilege. *See, e.g.*, Note, *Fair Comment*, *supra* note 14, at 1209-10.

tempted to explain the rule in a manner reminiscent of those earlier opinions that excluded certain kinds of opinion on the ground that they were really factual assertions after all. In the *Cianci* case, he wrote:

> Almost any charge of crime, unless made by an observer and sometimes even by him . . . is by necessity a statement of opinion. It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words "I think."[263]

While this argument has a surface plausibility, it applies with equal force to virtually any observation or evaluation based on external objects and events. Philosophers have argued for centuries over whether external reality is ever knowable, and, if it is, whether what we call facts are ever more than widely shared hypotheses based on incomplete observations.[264] Judge Friendly's argument, therefore, might support a claim that all fact-based opinion should be treated as fact, or conversely that all fact be treated as fact-based opinion, but it does not explain why some of this opinion — but not all — should be treated as fact.

Another approach to defending the *Cianci* rule also attempts to show that accusations of criminal behavior are factual and not opinion. This theory holds that such accusations, even when expressed as surmise, are "factual" because they are "capable of direct verification."[265] This explanation suffers from the same disadvantages as the capable-of-proof test. In addition, it shares with Judge Friendly's rationale the disadvantage of overinclusiveness.

While some courts and commentators may feel comfortable with lim-

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[263] 639 F.2d 54, 64 (2d Cir. 1980).

[264] For an overview of how various philosophers have approached the possibility of and nature of sensory knowledge of the external world, see F. TILLMAN, B. BEROFSKY & J. O'CONNOR, INTRODUCTORY PHILOSOPHY 429-527 (1967). *See generally* A. AYER, THE FOUNDATIONS OF EMPIRICAL KNOWLEDGE (1940); B. RUSSELL, OUR KNOWLEDGE OF THE EXTERNAL WORLD 70-105 (5th imprint 1969) (noting in the course of an argument in support of the existence of external material reality, the subtle to significant differences in individual perception of "knowing" of the same event or object); BRITISH EMPIRICAL PHILOSOPHERS: LOCKE, BERKELEY, HUME, REID, AND J.S. MILL (A. Ayers & R. Winch eds. 1952).

[265] *See* Note, *Fact and Opinion*, *supra* note 14, at 108-09. A related, but more limited, argument for finding some deductive opinions to be actionable is that they are unreasonable, given the factual basis for them. This analysis might allow a court to treat as privileged the implied opinion in *Cianci*, and possibly the express opinion in *Rinaldi*, on the ground that they are reasonable, but allow the court to withhold the privilege when the accusation rests on an irrational basis. *See* Hill, *supra* note 194, at 1236-37; Keeton, *supra* note 163, at 1251. This effort also seems flawed because applying a reasonableness test to mental operations is so out of keeping with our tradition of protecting intellectual freedom under the first amendment. *See supra* notes 143-44 & 248 and accompanying text.

iting the opinion privilege solely to "rhetorical hyperbole" and expressions of personal sentiment,[266] courts like the Second Circuit and the New York Court of Appeals do not believe that all opinions based on observable phenomena should be unprotected by the first amendment.[267] They are actually searching for a narrower neutral principle to exclude only those opinions, such as expressions of belief that the plaintiff has committed a crime or is a liar, that are egregiously damaging or offensive.[268] The difficulty with resting the distinction between protected and unprotected opinion on offensiveness, however, is two-fold. First, courts will vary in what they consider sufficiently offensive. While they may agree about accusations of serious crimes, they may differ significantly over the proper treatment of an opinion that an acerbic writer is a libeler or that a politician lies to the electorate. The result may be intolerable uncertainty about which opinions are and are not safe to express. Second, exclusion of certain types of opinion based on offensiveness directly contradicts the *Gertz* dictum, which states that the protection of the first amendment extends even to the most "pernicious" of opinions.[269]

Although it is easy to sympathize with the concerns of the courts and writers who want to preserve some protection against attacks on character in the form of opinion, contrary considerations, in addition to those already mentioned, argue against doing so. If the purpose of the first amendment is to protect the information necessary to foster debate on public questions, that purpose will be undercut by such rules; they discourage placing before the public information that expressly or by inference suggests that an individual may have committed a crime or is otherwise dishonest or unprofessional because the speaker cannot prove that she is correct.[270] Opinion functions to fill gaps in evidence; if the

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[266] *See supra* notes 194-95.

[267] *See, e.g.*, Keeton, *supra* note 163, at 1251. Keeton admits that if he were not worried about the potential for deductive opinion to harm reputation in a way he believes "evaluative" opinions do not, he would favor blanket protection for all forms of opinion.

[268] *Id.*; *see also* Note, *Fact and Opinion*, *supra* note 14, at 114-16.

[269] 418 U.S. 323, 339 (1974).

[270] *See, e.g.*, Meiklejohn, *Absolute*, *supra* note 143, at 258-59. Relevant to the argument of public importance is the identity of the plaintiffs in the recent cases denying protection for comments on character and criminality: the mayor of Providence, R.I., Cianci v. New Times Publishing Co., 639 F.2d 54, 55-56 (2d Cir. 1980); a nationally prominent writer and editor, Buckley v. Littell, 539 F.2d 882, 885-86 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); the elected chair of a county board, Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1010, 445 N.E.2d 13, 14 (1982); the former mayor of Ocean Beach, N.Y., Silsdorf v. Levine, 59 N.Y.2d 8, 10-11, 449

gaps are too great and the opinion therefore lacks credibility, a judgment to that effect is hypothesized under our theory of freedom of speech to be better made by the listeners than by judges and juries. While the results of this system are sometimes harsh in their effect on individuals, acceptance of such harshness as necessary for the enjoyment of political and personal liberty permeates the Supreme Court's compromise in *Sullivan* and *Gertz*. Redress of reputational harm was not perceived by the Court in either case as a value per se superior to the interest in open exchange of ideas and information. Nothing in the Court's opinions at present supports the argument that jurisdictions ought to have the latitude to disfavor the expression of certain ideas simply because some people, to the detriment of others, may agree with them.

Absent an effort by the Court to articulate more precisely the definition of protected opinion in defamation cases, the lower courts will continue to define opinion in considerably different ways and to impose liability according to their various insights as to desirable social policy. Furthermore, the devices presently available to the courts — the power to treat certain disfavored opinions as "facts" and to find, or fail to find, a full factual predicate — allow them to exercise considerable discretion in individual cases about whether to prefer speech or reputation. The argument that certain opinions because of their subjects are "facts" is inconsistent with the argument in favor of protecting intellectual freedom under the first amendment. Furthermore, the discretion these rules give to courts in deciding which opinions to protect reintroduces the precise uncertainty about the boundaries between protected and unprotected speech that *Sullivan* and *Gertz* sought to eliminate.

III. Untangling the Web: A Possible Approach Toward Greater Clarity in Defamation

As a general matter, problems of achieving clarity of definition in the regulation of speech have been so intractable that an observer may well question whether any approach to line drawing can really produce principled, predictable results.[271] As the cases discussed in this Article

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N.E.2d 716, 718, 462 N.Y.S.2d 822, 824, *cert. denied*, 104 S. Ct. 109 (1983); and a state trial judge, Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 372, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 945, *cert. denied*, 434 U.S. 969 (1977).

[271] A classic example, of course, is the Court's attempt to distinguish between protected erotic communications and obscenity. After years of trying to draw such a line, the Court ultimately gave up, defined the type of subject matter at issue, and left to the mercy of community standards the problem of fine distinctions at the margin. *See*

demonstrate, line drawing in defamation has been no exception; a reader may thus question whether, in the long run, efforts to preserve this body of law are not doomed to defeat by attrition — the narrowing of the law to the point of extinction. Admitting the difficulty, however, does not necessarily negate the value of searching for better ways to realize the apparent vision of *Sullivan* and *Gertz*. Defamation has been an integral part of our common law for centuries; the importance of reputation, even if not always well thought through, is a notion deeply imbedded in judicial consciousness. Little likelihood exists, therefore, that the Supreme Court or any state court would abandon this tort altogether, even if it were convinced, intellectually, that no rule would inexorably lead to predictable results in every case.

As a practical matter, the only question is how the courts could improve their protection of free speech without abandoning the important reputational interests that inspired the compromise of *Sullivan* and *Gertz*. The remainder of this Article will attempt to set forth a method that might achieve this end: it would allow courts to screen out at an early stage cases whose ambiguity or doubtful effect on reputation pose a danger to the free exchange of ideas that is not currently met by the rules set out in *Sullivan* and *Gertz*. Before doing so, however, a brief discussion of some recent proposals for defamation reform and an explanation why they do not, standing alone, provide complete answers is appropriate. Hopefully, this sampling of other reforms already being debated will place into perspective the nature of and justification for yet another proposal.

The most sweeping plan for reform is one espoused by the American Civil Liberties Union (ACLU). The ACLU, concerned that *Sullivan* and *Gertz* have not dampened the repressive potential of defamation litigation, has proposed that the courts abandon current doctrine and simply prohibit any defamation action arising from speech "on a subject of public concern" — broadly defined as any speech "having an impact on the social or political system or climate."[272] The ACLU approach would permit a right of action for reputational injury only from speech about matters without public significance. In so proposing, the ACLU draws close to the position of the late Justices Black and Douglas, who were deeply skeptical about the viability of any compro-

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Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Miller v. California, 413 U.S. 15, 33-34 (1973).

[272] ACLU BD. OF DIRECTORS, POLICY ON LIBEL (adopted Oct. 9, 1982) (copy on file with *U.C. Davis Law Review*).

mise between defamation law and first amendment protections.[273]

Experience suggests, however, that the line between speech about public and private matters is difficult to define, and that a practical effect of the ACLU approach could well be the virtual elimination of the tort law of defamation.[274] The deep roots of defamation in our legal system, as previously discussed, suggest that this approach will probably not win adherents easily. Many who share the ACLU's concern over the current course of defamation litigation nevertheless fear that the elimination of essentially all defamation will leave grievously injured plaintiffs without recourse and will destroy the fragile inducement that such a body of law provides for the press and other speakers to exercise a reasonable level of care in their criticisms and commentaries on the actions of others.

Most suggested reforms, therefore, have had a narrower focus. Judge Irving Kaufman of the Second Circuit Court of Appeals, for example, has identified as an area of concern the delicate problem of entrusting juries with major responsibility for deciding and remedying defamation cases. Ever since Chief Justice Burger, in a footnote to the opinion of the Court in *Hutchinson v. Proxmire*,[275] expressed doubt about the appropriateness of regular use of summary judgment motions to decide defamation cases, some observers have begun to suspect that many more cases are now being submitted to the jury for decision.[276] Judge

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[273] *See Gertz*, 418 U.S. at 355-57 (Douglas, J., dissenting); Rosenblatt v. Baer, 383 U.S. 75, 94-96 (1966) (Black, J., concurring in part, dissenting in part). The decision by the ACLU to argue against defamation actions when issues of public concern are involved represents an about-face for this organization, which previously had supported the continued availability of the tort. *See* Cranberg, *ACLU: Second Thoughts on Libel*, 21 COLUM. JOURN. REV., Jan.-Feb. 1983, at 42, 43.

[274] The Supreme Court case law in the defamation area presumes that cases dealing with information of no public interest exist, but the Court has never decided one. In reality, members of the Court have expressed some skepticism that any information could be completely without public significance, or at least that courts could reliably and in a principled manner distinguish between the two. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79-80 (1971) (Marshall, J., dissenting). Doubts of this sort figured prominently in the decision by the Court three years after *Rosenbloom* to discard the rule that the actual malice standard applied to all cases dealing with matters of public concern and to devise instead a new fault standard to apply in defamation cases brought by private persons. *Gertz*, 418 U.S. at 339. This problem has been encountered in cases dealing with the tort of invasion of privacy, as well, and has shown itself in that setting to be essentially intractable. *See, e.g.*, Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336-38 (1966); Zimmerman, *supra* note 123, at 344-62.

[275] 443 U.S. 111, 120 n.9 (1979).

[276] *See, e.g.*, Garbus, *New Challenge to Press Freedom*, N.Y. Times, Jan. 29, 1984,

Kaufman argues persuasively that juries are, at best, unable to understand and apply the constitutional standards set out in *Sullivan* and *Gertz*. "At worst, a jury will permit its verdict to reflect its disapproval of the views espoused by the defendant or its frustration with the state of world or national affairs reported by the media generally."[277] Thus, increased controls and limits over jury decisionmaking in the defamation area could offer some relief.

Others, convinced by Justice Marshall's dissent in *Rosenbloom v. Metromedia, Inc.*,[278] have argued that the Court should put more stringent limitations on damages. In *Rosenbloom*, Justice Marshall urged his colleagues on the Court to balance the interests of plaintiffs against the free speech rights of defendants by eliminating punitive damage recoveries in defamation, rather than by making it more difficult for private persons to sue for reputational harm.[279] Arguments have been made for more stringent limitations on compensatory damages as well.[280]

Many of the suggested remedies, while useful, do not go far enough. Tinkering with damages, for example, is unlikely to cure all of what is wrong with modern defamation law. Take, for instance, the suggestion that punitive damages be eliminated in defamation.[281] If damages were limited to harm actually suffered, this argument goes, then defendants would pay for the actual consequences of their misbehavior, but would

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§ 6 (Magazine), at 34, 40. Garbus, who handles defamation cases in his legal practice, wrote that "some legal authorities believe that the number of summary judgment motions sought and the number of libel cases dismissed before trial have decreased dramatically." *Id.* The major statistical studies involving defamation litigation have not yet provided sufficient data to support or refute this observation. *See, e.g.*, Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795. However, a recent study of summary judgment motions from 1980-82 suggests only a small drop (3 to 5%) in the number of motions granted, and a similarly small drop in the success rate of such motions after appeal. LDRC BULL., Oct. 15, 1982, pt. 2, at 2. A clear picture may take further time to emerge.

[277] Kaufman, *The Media and Juries*, N.Y. Times, Nov. 4, 1982, at A27, col. 2.

[278] 403 U.S. 29, 82-87 (1971) (Marshall, J., dissenting).

[279] *Id.* at 84. Justice Marshall also recommended that presumed damages — damages for which no proof of harm need be proffered — be eliminated. *Id.* at 86. This idea was adopted by the Court in *Gertz*, 418 U.S. at 349-50, as to defamation actions when proof of actual malice was absent. *See generally* Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

[280] *See generally* Anderson, *supra* note 279; Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603 (1983); *see also infra* notes 283-85 and accompanying text.

[281] The most prominent advocate of this solution is Justice Marshall. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82-87 (1971) (Marshall, J., dissenting).

not be unduly intimidated about speaking because of a risk of unpredictable amounts of additional damages imposed solely as punishment. Although this argument has much to recommend it, it ignores the fact that juries can still reach verdicts that are both intimidating *and* punitive simply by increasing the amounts they award for such elements as emotional harm. Compensatory damages could also be controlled, but experience demonstrates that judges do not have well-calibrated yardsticks for deciding when and how much to reduce jury awards of this kind.[282]

Thus, other critics have suggested that the Court would better control defamation by limiting plaintiffs' recovery to out-of-pocket losses.[283] Presumably, this expedient would help eliminate doubtful and trivial cases. Unfortunately, it also weeds out clearly meritorious claims. Not all serious reputational injuries result in direct dollar losses, which is one reason why the common law resorted to presumed damages in those categories of cases believed by the courts to present the greatest potential for harm.[284] Although many victims of defamation, such as

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[282] Ordinarily, courts will not tamper with verdicts unless they are clearly excessive or inadequate. *See, e.g.*, Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1355-56 (Colo. 1983); 14 N.Y. JUR. *Damages* § 196, at 62-63 (rev. ed. 1969). In *Burns* the trial court reduced the jury verdict of general damages to Mrs. Burns and her children from $175,000 to $45,000 on the ground that the original award was inappropriate given the evidence. 659 P.2d at 1354. Presumably, mental distress was the major ingredient of the injury being compensated. The court was ordered on appeal to reconsider its decision and reinstate the full amount unless it found the verdict either to be a product of "passion or prejudice" or "manifestly excessive." *Id.* at 1356. In *Pring v. Penthouse Int'l, Ltd.*, the trial court reduced punitive damages by half, but left standing the award of $1.5 million in compensation. The entire award was ultimately overturned on appeal because the appellate court found the article nondefamatory. 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983). Even when damages are reduced, an appropriate compensation, particularly for emotional distress, is difficult to quantify. *See, e.g.*, Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 1016, 193 Cal. Rptr. 206, 222 (1983) (affirming reduction of compensatory damages from $300,000 to $50,000 but failing to explain why $50,000 appropriate), *appeal dismissed*, 104 S. Ct. 1260 (1984).

[283] Lewis, *supra* note 280, at 615-17.

[284] At common law, victims of libel were always presumed to have suffered sufficient injury to warrant damages. Harper and James explained that the result rests on the following bases: "[T]he fact that the communication is recorded with some degree of permanence, the area of dissemination, and probably the premeditation on the part of the defamer." F. HARPER & F. JAMES, *supra* note 30, at 375. Today, many states require plaintiffs in certain kinds of libel cases to prove out-of-pocket losses before they will be entitled to damages; proof of such losses were generally required for slander unless the subject matter of the communication fell into one of four categories: allegations of criminal conduct; allegations injurious to the victim in her profession, trade,

those caught in the Communist witch hunts of the 1950's, may lose business or be barred from employment and thus might be able to meet the dollar loss requirement, victims of lies that result, rather, in loss of family affection or of friends might be left without remedy. This possibility — which is similar to the problem presented by the common-law requirement of special damages[285] — may well render this solution unpalatable to the Court as a remedy for the failure of *Sullivan* and *Gertz*.

Furthermore, reliance solely on regulation of damages — a palliative applied at the end of litigation rather than at its outset — does not necessarily deal with the chilling effect that arises simply from the money and time consumed by litigation itself.[286] For these reasons, a reworking of some structural aspects of defamation law is necessary — that is, development of a rule that would allow courts to weed out at an early stage those cases that, because they involve opinion, or are not clearly damaging to reputation, or both, do not constitute a serious enough claim of injury to justify even the indirect penalty on freedom of speech imposed by discovery and going to trial.

It seems time, therefore, to look in another direction. Arguably, *Sullivan* and *Gertz* have failed, not because they are deeply flawed rules, but because the basic tort they purport to limit and control is so poorly defined and so hazily understood that the rules cannot perform their proper function of accommodating between serious individual injury to the plaintiff and the defendant's right to free speech.

To recapitulate briefly, under the existing law, neither judges, jurors,

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business, or office; allegations that the victim suffered from a loathsome disease (primarily leprosy or venereal diseases); or imputations of sexual misconduct (including unchastity in a woman). R. SACK, *supra* note 1, at 95-96.

[285] One commentator would allow a nominal recovery for any loss not evidenced by financial injury. Lewis, *supra* note 280, at 615-17. To this extent, his suggestion is both more liberal and less liberal than the special damages requirement of common law. At common law, a plaintiff required to prove special — or out-of-pocket — losses could then recover for emotional injury and other nonmonetary harms as well. On the other hand, if pecuniary damages were not shown, no other injury could be compensated. *See* R. SACK, *supra* note 1, at 94.

[286] According to Federal Appeals Judge Irving Kaufman, one libel defendant spent $7 million in legal fees on one case. Kaufman, *The Media and Juries*, N.Y. Times, Nov. 4, 1982, at A27, col. 2. Defamation litigation is also expensive for plaintiffs. William Tavoulareas, president of Mobil Oil Corp., reportedly spent about $2 million in legal fees trying his suit against the *Washington Post* for defamation, *see A Chilling Verdict*, NEWSWEEK, Aug. 9, 1982, at 44, only to have the judgment in his favor set aside on a post-trial motion. Tavoulareas v. Washington Post Co., 567 F. Supp. 651, 661 (D.C.D.C. 1983).

nor potential defendants have a very clear grasp of what is the proper subject matter for a defamation action. Because the law of defamation, unfettered, is so serious a threat to fundamental values of free speech, the tort should be preserved only for injuries that are very substantial, concrete, and well-understood. In reality, what the case law reveals is confusion and disarray within which injuries that seem alarmingly trivial may be treated as indistinguishable from serious harms. Courts divide bitterly over whether the alleged untruth really conveys the meaning plaintiff says it does, whether it harms reputation under any circumstances, and finally, whether any party to whom it is communicated would likely treat it as fact or would recognize it as the speaker's opinion. One suspects that the luster of history rather than the light shed by actual practices gives modern defamation law the appearance of settled doctrine and much of what passes as "reputational" its air of significance.

What steps can be taken to clarify the law and begin giving content to our notion of reputational injury? There are several, including a rigorous effort to define clearly the nature of defamation and the development of a rule to eliminate uncertain outcomes when ambiguous speech is at issue. Before reaching those issues, however, one simple first step should be taken: the designation of the appropriate decisionmaker for making these baseline determinations. Primary responsibility for deciding whether actionable defamation has occurred should be in the hands of the courts and not a matter for jury discretion.[287] Most jurisdictions — with the notable exception of California[288] — do in fact treat the fact/opinion determination as an initial question of law for the court.[289] The rule as to determination of defamatory meaning, however, is that, once the court decides that the communication is *capa-*

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[287] The Supreme Court in *New York Times Co. v. Sullivan* asserted that appellate courts reviewing cases such as defamation must carefully scrutinize the entire evidentiary record to ensure that the governing constitutional principles were properly applied. 376 U.S. 254, 285 (1964). This principle was recently reaffirmed in Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949 (1984). Had the Court decided to hold appellate review of factfinding in defamation to the same deferential standard applied in nonconstitutional cases, rather than permitting the appellate courts to engage in close scrutiny, preliminary sifting of complaints by trial judges for constitutional sufficiency would have become even more critical.

[288] Good Gov't Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 682, 586 P.2d 572, 576, 150 Cal. Rptr. 258, 262 (1978), *cert. denied*, 441 U.S. 961 (1979); *see supra* text accompanying notes 186-88.

[289] *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984); Rensley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); Orr v. Argue-Press Co., 586 F.2d 1108, 1114 (8th Cir.), *cert. denied*, 440 U.S. 960 (1979).

ble of bearing the meaning alleged by the plaintiff, the jury is entitled to decide. The existence in numerous recent cases of major controversy over defamatory meaning suggests that lower courts, even if they have not articulated the reasons for their concern, do sense the important speech-protective issues lurking beneath the surface. They apparently are not entirely comfortable with leaving this determination to the essentially unreviewable discretion of juries and do often dismiss or reverse when the complaint appears insubstantial.[290] Their concern is well-placed. The implications of *Sullivan* and *Gertz* are that actionable defamation should be both substantial and recognizable; for those factors to be properly taken into account, preliminary testing of the constitutional sufficiency of the claim by a court is a necessity.

Second, the standard applied by the courts should reduce as much as possible the ad hoc quality that now pervades these determinations. Unfortunately, this task probably cannot be achieved solely by redefining and more sharply honing the definition of defamation. As the previous discussion has demonstrated, the common law of defamation, for all its antiquity, has never succeeded in arriving at a clear and discriminating description of its subject matter and — given the range of variables — is unlikely ever to do so successfully. The definition of defamation is so broad that almost anything offensive could conceivably be defamatory.

But, because this outcome seems both to violate the intent of the common-law cases and the constitutional policy of protecting freedom of speech, some way of factoring in substantiality of effect on social and economic relations — that is, of delineating what is truly destructive of reputation — must be found. An infallible test for this situation is hard to devise, in part because, as mentioned earlier, a pluralistic, even anomic, society does not foster homogeneous systems of values.[291] Among regions, and again among social groups within a region, people

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[290] For much of the history of the tort of defamation, the question of defamatory meaning has been primarily a question of law. Early judges applied the doctrine of *mitior sensus* to eliminate many cases of purported defamation, and for a considerable time, courts also relied on previous case law for the bulk of such determinations. According to Holdsworth:

> [I]t was not till modern times that [reliance on precedent to decide if words were defamatory] was eliminated, by the application to words and writings, which were the subjects of actions for defamation, of the rule that the meaning of all words and documents is a question of fact to be deduced from the words and the documents themselves.

W. HOLDSWORTH, *supra* note 18, at 359.

[291] *See supra* notes 83-92 and accompanying text.

will often respond differently to the same criticism or allegation. This variability in response should not excuse idiosyncratic definitions of defamatory matter, judged by the standards of narrow or unusual audiences.[292] Substantial areas of common agreement do exist and are a sounder basis on which to rest liability for so delicate an offender as speech. For example, a false statement that plaintiff has committed, or has been convicted of, a serious crime is widely recognized as damaging in a fundamental way to her social and economic well-being; similarly, falsehoods that portray the plaintiff as scandalously incompetent or seriously immoral — particularly in relation to work or public office — would normally be seen as defamatory. The rules pertaining to categories of speech actionable as slander per se, although they are suggestive of areas generally agreed to be reputational in significance, are only

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[292] The standard suggested here for defining defamation obviously presents difficulties with regard to the plaintiff who is injured by a falsehood that places her in disrepute only with a small, but important, segment of the community. For example, a member of a fundamentalist Protestant congregation might suffer serious injury in her relations with other church members if it were falsely stated that she did not believe in God. Yet failure to believe in a Supreme Being is unlikely to be deemed by the community as a whole to be an allegation that affects reputation. It is highly unlikely, therefore, that a negligent publisher of such misinformation would be aware beforehand that an error on this subject would be defamatory. Since Supreme Court jurisprudence in this area relies importantly upon predictability about the zone of danger, the fact of injury alone ought not to be sufficient to allow recovery. The policies underlying *Sullivan* and *Gertz* do not justify treating even a knowing falsehood about a matter that the speaker reasonably believes to be nondefamatory as a defamation simply because harm ensues. To do so would expand the tort uncomfortably beyond the margins of a manageably defined wrong. Such a case might, of course, arise instead as a false light privacy action. RESTATEMENT, *supra* note 1, § 652E. A discussion of the first amendment difficulties of this alternative are beyond the scope of this Article. Some argument could be made, however, for permitting recovery when the defendant knew that the information at issue — even though not normally defamatory — would in this particular instance harm its target with a group of people important to the plaintiff's standing in the community or field of endeavor. On balance, two problems suggest to this author, at least, that an exception designed to take account of such a situation would be inappropriate. First, it would reintroduce into the tort law the old problem of eccentric communities. It remains doubtful, for example, whether it is appropriate for courts to recognize as an actionable wrong the injury caused to a plaintiff by a false allegation in a politically conservative community that she is a liberal Democrat. *See supra* notes 91-92 and accompanying text. Second, complex problems of proof are often created when subjective states of mind are involved, and these in turn, can lead to protracted discovery and litigation. In this way, such an exception could revive the litigation process itself as a weapon for the chilling of speech and could undercut significantly the benefits that might otherwise flow from firmer rules governing the nature of a permissible defamation claim.

moderately useful guides in formulating a test for substantiality because they are too broad to capture perfectly the areas of shared agreement and are now in some cases hopelessly outdated.[293] Courts should be extremely wary of finding potentially defamatory any allegation other than one of serious illegality, profound immorality, or substantial unfitness in work or business without highly compelling evidence that the particular type of statement is similar in magnitude and in likely effect to the general categories already noted.

While this formulation is itself afflicted with vagueness, it does at least begin to cage and confine the amorphous phrase "defamatory meaning." If the allegation is not clearly one that imputes a high degree of illegality, immorality, or incompetence,[294] then it is presumptively not defamatory unless the plaintiff can supply highly credible evidence that the allegation about which she complains charges her with violation of a substantial, widely shared norm. Furthermore, once norms begin to erode — as, for example, in the *Burns* case where changing attitudes toward divorce have weakened the social proscriptions against spouse leaving spouse — the presumption against defamatory meaning would militate against finding such a misstatement reputationally harmful.[295] While this approach does not guarantee that defendants will always be able to predict potentially defamatory areas in advance, it at least has the advantage of allowing courts to dismiss trivial or questionable cases at an early stage. If, in harder cases, courts were forced to define what they mean by reputationally harmful communications instead of turning the cases over to juries for ad hoc resolution of this question, a body of precedent might eventually emerge that would further describe and limit the areas of speech that are potentially actionable.

Coupled with a better definition of subject matter categories, how-

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[293] *See supra* notes 101-06 and accompanying text.

[294] Even these lines are not easy to draw. Many technically criminal acts today are violations so minor that they are not deemed to affect an individual's reputation. Courts recognize that fact, but have had difficulty formulating a sufficiently precise verbal test to take account of the difference. The issue arises in deciding which misstatements to treat as slanderous per se. PROSSER AND KEETON, *supra* note 1, § 112, at 788-90. This sort of vagueness is not desirable, but it is probably less injurious to free speech values than the vagueness that separates, for example, fact and opinion. Even if defendants cannot predict which allegations of crime are defamatory, they can recognize which behaviors are criminal and can therefore better predict when special care must be exercised in reporting facts. For further discussion of the per se categories in slander, see *supra* notes 101-09 and accompanying text.

[295] Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1364 (1983) (Dubofsky, J., dissenting); *see supra* notes 115-20 and accompanying text.

ever, must be new techniques for dealing with ambiguity. The law would not be advanced if courts defined the subject areas clearly but then were permitted to award damages in the face of substantial doubt about whether the communication can be understood to allege conduct that falls within such areas. In a few states, this issue has been addressed by rules of construction that resolve ambiguous cases of defamatory meaning in favor of the defendant.[296] The strictest of these rules was the innocent construction rule followed until recently in Illinois. Under this doctrine, courts faced with communications capable of both defamatory and nondefamatory meanings were required to find for the defendant, even if the more convincing interpretation was one damaging to the reputation.[297] The rule is a descendant of the sixteenth and seventeenth century doctrine of *mitior sensus*, often ridiculed by commentators because it permitted courts to torture language into its most improbable meanings to avoid finding actionable defamation.[298] The modern adaptation has also had its critics. The Illinois rule, for example, is said to have resulted in some cases being dismissed when, in context and under the total circumstances, a nondefamatory reading was the least reasonable interpretation available.[299] Responding to the criticism that this rule of construction was unduly harsh toward plaintiffs, the Illinois Supreme Court recently modified it to apply only when a "statement may reasonably be innocently interpreted."[300]

Although the Illinois Supreme Court apparently had sound reasons for modifying its innocent construction rule, its explanation for doing so

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[296] *See infra* note 300.

[297] John v. Tribune Co., 24 Ill. 2d 437, 442-43, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962).

[298] *See supra* note 19 and accompanying text.

[299] Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, 1014-15, 445 N.E.2d 13, 17 (1982).

[300] Chapski v. Copley Press, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982). The court cited numerous law review articles critical of the innocent construction rule. *Id.* at 349, 442 N.E.2d at 197. Other states may also use some version of an innocent construction rule, but references to it occur largely in older cases; they are: Missouri — Walker v. Kansas City Star Co., 406 S.W.2d 44, 51 (Mo. 1966); Montana — Steffes v. Crawford, 143 Mont. 43, 47-48, 386 P.2d 842, 844 (1963); Ohio — Becker v. Toulmin, 165 Ohio 549, 554, 138 N.E.2d 391, 395 (1956); Oklahoma — Tulsa Tribune Co. v. Kight, 174 Okla. 359, 362, 50 P.2d 350, 353 (1935). New Mexico applies an "innocent meaning" rule, first adopted in 1932 in Dillard v. Shattuck, 36 N.M. 202, 204, 11 P.2d 543, 545 (1932). Under this rule, no statements can be claimed to be defamatory per se unless they are susceptible only to a defamatory meaning. If the meaning is ambiguous, then, generally, the plaintiff must plead special damages. For a thorough discussion of the New Mexico rule, see Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 287-90, 648 P.2d 321, 326-29 (N.M. Ct. App. 1982).

seems somewhat infelicitous. The stringent innocent construction rule, the court said, was justified in the era predating *Gertz* because it helped offset the harshness of strict liability in defamation and because it "encourage[d] the robust discussion of daily affairs."[301] But since *Gertz*, the court reasoned, the balance has shifted. Defendants are no longer subject to strict liability, and they are protected by a combination of constitutional and common-law privileges. Thus, the innocent construction rule can be modified to favor plaintiffs without serious infringement on free speech rights. This explanation for deciding to relax the protection for defendants is unfortunate insofar as it could be read to imply that everything necessary to protect "robust discussion" has been provided by *Sullivan* and *Gertz*. Second, it may suggest that the innocent construction rule, although retained in Illinois, is at most an embellishment now to the law of defamation, to be kept or jettisoned as the future needs of plaintiffs dictate.[302] The facts do not support either implication, as the recent case law demonstrates. To begin with, the combined force of *Sullivan* and *Gertz* has not limited defamation actions to cases with a high probability of harm and substantial showing of fault. Ambiguous language and arguably marginal criticisms continue in a sizable number of cases to result in costly and complex litigation. As to the implication that the innocent construction rule is no longer as important a method of protecting free speech values, a strong contrary argument could be made that it is actually an essential component if the reforms of *Sullivan* and *Gertz* are to be effective.

The formulation of the rule that seems best able to adapt itself fairly to the needs of seriously injured plaintiffs while at the same time introducing some higher degree of predictability into cases of verbal ambiguity and implication is as follows: A statement may be deemed defamatory only when no reasonable nondefamatory reading of the communication exists.[303] This rule avoids the extremes that troubled Illinois,[304] but nevertheless sifts out and eliminates any cases in which

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[301] 92 Ill. 2d at 350, 442 N.E.2d at 198.

[302] *See infra* note 304.

[303] This presumption would be in the spirit of the "convincing clarity" standard of proof required at least in cases subject to *Sullivan*, 376 U.S. at 284-86. *See also* Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (applies *Sullivan* standard of proof to question of whether statement in defamation action is fact or opinion).

[304] How the new Illinois version of the innocent construction rule will ultimately be interpreted is presently unclear. Evidence from the lower courts suggests that they may view the formulation as a substantial weakening of the standard. A recent study of motions to dismiss revealed that Illinois courts since *Chapski* have been less likely than

reasonable people could honestly disagree about what the defendant meant.

An obvious objection to such a rule, of course, is that it will shield the defendant who intends to harm her victim's reputation, but is either clever enough or lucky enough to cloak the attack in a sufficient amount of ambiguity. On balance, however, this result seems the lesser of the available evils. For one thing, no matter how the question of defamatory meaning is decided, courts and juries do not look at the defendant's intent. The question is what the communication could reasonably convey to its audience.[305] As a result, even without an innocent construction rule, the evil-minded may well go free. More importantly, however, the ordinary approach of leaving the question to the discretion of the jury leads to results that are unavoidably ad hoc, and, therefore, unavoidably capricious. The impact of capriciousness on freedom of speech is well-recognized. But nonconstitutional objections can also be raised. Arguably, the current ad hoc approach is unduly harsh toward those defendants who stumble entirely unwittingly into the trap of ambiguity.

If the innocent construction rule proposed in this Article were adopted, it would alter or simplify the resolution of many cases discussed earlier. Under such a rule, for example, the question of defamatory meaning in *Clark v. American Broadcasting Cos.*, would not be left to a jury simply because it was at least possible that some might agree with Ms. Clark that the documentary implied she was a prostitute.[306] Similarly, the dispute in the *Burns* case over the meaning of the word "desert"[307] and in *Rudin v. Dow Jones & Co.* over connotations of the word "mouthpiece"[308] could have been settled far more simply and inexpensively. The existence of a contextually plausible nondefamatory interpretation would dictate dismissal of the case. To prevent subversion of this presumption, the courts should also be required to use the understanding of the reasonable person in the community as their norm, and not permit recovery simply because a narrow segment of the

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courts in other states to dismiss cases for lack of a defamatory meaning. LDRC BULL., Fall, 1983, at 5. Thus, the rule stated here, which is meant to require courts to dismiss unclear cases, may well be different from and stricter than the similar sounding Illinois version.

[305] *See, e.g.*, Brooks v. Stone, 170 Ga. App. 457, 460, 317 S.E.2d 277, 279, *aff'd*, 253 Ga. 565, 322 S.E.2d 728 (1984).

[306] 684 F.2d 1208, 1214 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). The case is discussed *supra* text accompanying notes 131-33.

[307] Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1354 (Colo. 1983).

[308] 557 F. Supp. 535, 537 (S.D.N.Y. 1983).

community would give the communication a defamatory reading.

This standard is, admittedly, an imperfect device. On the margins, there will be communications about which doubt will remain. Because the test does not provide courts with a bright line answer for every case, some manipulation can occur over whether a reasonable, nondefamatory meaning can be found. Unfortunately, virtually all regulation of speech presents this problem of residual vagueness.[309] On the other hand, this test does provide a firmer basis than any other currently available for sorting through the many complaints dealing with verbal ambiguities and with innuendo because its application does not turn on semantics; rather, it is a decisional rule dictating a solution in the face of genuine uncertainty.

Use of an innocent construction rule to create a presumption in favor of opinion may also significantly improve the performance of courts in resolving fact/opinion disputes.[310] Since the majority of cases decided after *Gertz* have favored a finding of "opinion" in questionable cases anyway, use of such a presumption in ambiguous cases would not result in a dramatic change in outcome for plaintiffs. It would merely make the outcome more readily predictable in individual cases.[311] Unless it would be unreasonable to interpret a disputed communication as anything but factual, an innocent construction rule would require it to be privileged as opinion. This approach would require courts to consider the same contextual and linguistic factors they now do, but to resolve questionable cases in favor of opinion. It would not, on the other hand, demand that courts simply accede to defendant's characterization of a work as opinion. An example of the sort of case that would properly be treated as factual under the proposed rule is *McManus v.*

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[309] A demonstration of this problem may be found in the obscenity cases, where efforts to articulate a rule distinguishing protected speech from obscenity have been unsatisfactory. For a discussion of the problem, see generally Paris Adult Theatre I. v. Slaton, 413 U.S. 49, 73-114 (1973) (Brennan, J., dissenting). *See supra* note 271.

[310] Illinois, for example, applies its innocent construction rule to fact/opinion disputes. Chapski v. Copley Press, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982); *cf.* Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976) (applies standard of proof with "convincing clarity" to claim that factual assertion, rather than opinion, has been made by defendant about a public figure), *cert. denied*, 429 U.S. 1062 (1977). For a commentator critical of the application of such a test to the fact/opinion determination, see Note, *Fact and Opinion*, *supra* note 14, at 106.

[311] An Oregon appellate court recently commented that "[c]ourts have gone to considerable lengths to characterize what appear to be statements of fact as statements of opinion when made in the course of disputing matters of public interest." Haas v. Painter, 62 Or. App. 719, 723, 662 P.2d 768, 770-71 (1983) (footnote omitted). Some statistics support this observation. *See supra* note 167.

Doubleday & Co.[312] In *McManus*, the plaintiff argued he had been defamed by the statement — in a section of a book dealing with the violence of the Irish Republican Army — that his file in the Irish embassy described him as having "homicidal tendencies." In a thoughtful opinion, Judge Weinfeld concluded that the statement was factual after noting the absence of any language indicating opinion; the use of quotation marks around "homicidal tendencies," suggesting it was a direct quote; and the fact that the chapter as a whole was devoted to descriptions of actual violence.[313] Under the circumstances, it would be difficult to find any reasonable basis for treating this passage as opinion.

On the other hand, the language in *Bose Corp. v. Consumers Union of United States, Inc.* would be treated as privileged opinion as a matter of law.[314] In *Bose*, the First Circuit identified factors that tended to support the reading of the article as opinion — the tentative nature of the language and the evaluatory nature of the article as a whole (the *Consumer Reports* piece was compared to a review of a book or a restaurant). It then reviewed the support for the argument that the writing was factual. The court concluded that "plausible" arguments existed on both sides, and therefore declined to overturn the ruling of the trial court in favor of the factual reading.[315] Under the suggested test, the existence of a "plausible" argument in favor of opinion would dictate dismissal of the case. Similarly, one suspects that *Buckley v. Littell* would have been decided in favor of the defendant if the issue on which the court focused had been whether, in the context of an impassioned criticism of William Buckley, it was plausible to consider the comparison of Buckley to Westbrook Pegler as opinion.[316]

In applying the innocent construction rule to cases of purported opinion, further clarification would be helpful on a number of subsidiary issues. For example, in considering the context as a clue to inter-

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[312] 513 F. Supp. 1383 (S.D.N.Y. 1981).

[313] *Id.* at 1385-86.

[314] 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984).

[315] *Id.* at 193-95.

[316] 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The conclusion that *Buckley* would have been decided differently under the proposed test could be thrown into some doubt by the fact that the court of appeal purported to be applying a standard of proof " 'with convincing clarity.' " *Id.* at 895. Nevertheless, a careful reading of the opinion fails to reveal a compelling distinction between those statements ultimately ruled to be opinion and the one comparing Buckley with Pegler that was found to assert a fact. Furthermore, a later case out of the Second Circuit on the fact/opinion distinction specifically rejected the stated reasoning in *Buckley* and asserted flatly that "surely this was a statement of Littell's opinion." Cianci v. New Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980).

pretation, the form of the communication should carry great weight. When the objectionable statement appears in a review, a column, an editorial, or some other vehicle ordinarily devoted to the expression of opinions, evaluations, and ideas, only exceptional circumstances should overcome the strong presumption that opinion is involved.[317] If the form of the communication is ignored, as it was by the majority of the Alaska Supreme Court in *Green v. Northern Publishing Co.*,[318] or given only modest weight, the court is failing to take into account what might be called the cultural common sense of the ordinary listener or reader. Audiences for newspaper editorials, columns, or restaurant reviews can reasonably be assumed to approach these publications with an evaluatory eye or ear. They do not anticipate raw factual data, but information impressed by the prejudices, beliefs, and special interests of the communicator.[319]

In addition, a firm rule should be developed on whether comment about certain subject matters can be treated as factual per se. The current law on opinion continues to be influenced by the outlines of the fair comment privilege as it existed pre-*Sullivan*. Even after *Gertz*, which has influenced the vast majority of courts to be very protective of

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[317] *See supra* notes 181-88 and accompanying text. When, in setting out an opinion, its author also discloses erroneous supporting material, a finding of defamatory fact may be justified. If, however, any significant question exists about the propriety of reading the communication as factual, for example, when the author might instead be explaining what she "thinks" rather than "knows" the facts to be, then doubts should be resolved in favor of the opinion privilege.

[318] 655 P.2d 736 (Alaska 1982), *cert. denied*, 103 S. Ct. 3539 (1983). For a discussion of *Green*, see *supra* notes 226-34 and accompanying text.

[319] Judge MacKinnon, concurring in the original appellate decision in *Ollman v. Evans*, appears to take a similar position in favor of treating as opinion most of what appears in editorials and similar communication forms:

> If, as I suspect and as is customary, the article appeared on the opinion-editorial page, generally known . . . as the op-ed page, that circumstance would be *very* relevant to the . . . court's determination. Newspaper readers are likely to assume that articles appearing on the op-ed page . . . are intended to express specific opinions.

713 F.2d 838, 855 (D.C. Cir. 1983) (MacKinnon, J., concurring) (emphasis in original). In *Ollman*, the issue was whether columnists Evans and Novak were communicating fact or opinion when they discussed a history professor nominated to chair a department at the University of Maryland. They wrote that he used his classroom to win adherents to Marxism and would exclude all but other Marxists from the department if he became its head. *Id.* at 839-40. The panel's opinion was vacated, and the court of appeals, sitting en banc, ultimately affirmed the district court's grant of summary judgment to the defendants on the ground that the disputed statements were opinion. 750 F.2d 970 (D.C. Cir. 1984). *See supra* notes 237-45 and accompanying text.

opinion, a few jurisdictions continue to apply the old common law and to treat as factual per se opinions about such topics as criminality and dishonesty.[320] These exceptions to the general immunity for opinion are without justification. The protection for opinion under the first amendment really protects each individual's right to autonomy — the freedom to think, feel, and judge both the external universe and the actions of other people, unburdened by state regulation. However unpleasant, unfair, or offensive certain of these opinions are to other people, no principled basis suggests itself that would allow the protection of the Constitution on that account to be withdrawn from them.

Unquestionably, false statements of fact that plaintiff has committed a serious crime are potentially more damaging to reputation than most misrepresentations. Because of their similarity in content, expressions of opinion about criminality may also be more harmful than the opinion that the plaintiff is a rude and noisy lout. Alert to this possibility of enhanced harm, many judges and commentators have been wary of immunizing such statements merely because they are preceded or modified by the words "I think."[321] Two contrary considerations, however, ought to be taken into account. First of all, when opinion is involved, the credibility of the speaker will automatically be weighed by the audience with a skepticism that may be absent when a purportedly factual representation is made; whether the opinion is believed, rejected, or acknowledged with skepticism depends on a variety of circumstances, including the speaker's reputation and the presence or absence of factual support. Some element of doubt, in any case, is likely to remain. Second, opinion is protected as an expression of the autonomous being; it is not protected because it is assumed to be harmless. The *Gertz* Court took note of the fact that opinion could on occasion be "pernicious,"[322] but argued that it was protected anyway. By preserving the right to treat opinions on particular subject matters as defamatory, courts ignore a basic purpose of first amendment law.

Even if one were to conclude, however, that the inroads of defamation into personal autonomy were less serious than the effects of unfair

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[320] *See supra* text accompanying notes 246-70.

[321] For cases, see *supra* notes 250-70. Several scholars have expressed concern about the impact on plaintiffs of allowing accusations of crime couched in the form of opinion to be privileged. Some have suggested, therefore, that courts should evaluate the reasonableness of the defendant's conclusion as a basis for liability. Hill, *supra* note 14, at 1237; Keeton, *supra* note 163, at 1251. Others have supported the decision by some courts always to treat these statements as factual. *See, e.g.*, Note, *Fact and Opinion*, *supra* note 14, at 114-16.

[322] 418 U.S. 323, 339 (1974).

or baseless accusations of crime couched as opinions, a few important subsidiary issues ought nevertheless to be resolved. First, any such exceptions to total immunity should be narrowly confined — in fact, limited to accusations of serious criminal behavior. If courts expand the class of "factual opinions," as they have begun to, to include accusations of moral turpitude, dishonesty, or bad motives, the rationale for the opinion privilege, and the predictability of its application, will be fatally undermined.[323] These sorts of exceptions may have been tolerable when fair comment was a common-law expression of the policy assessments of individual jurisdictions, but they are unacceptable ad hoc erosions of a privilege rooted in the Constitution.

Furthermore, to be tortious, the opinion that plaintiff is accused of a crime should be clear on the face of the communication. In *Cianci v. New Times Publishing Co.*,[324] the magazine never stated any express opinion that the plaintiff was likely to have been guilty of rape; it reported that such a charge had been made; it quoted from interviews with a number of the people who had been associated with the events that occurred in 1966. The court said the magazine's opinion could fairly be inferred from the headline and from the way it marshalled and presented the facts.[325] Defamation by inference is in general an area fraught with peril because of its special capacity to induce self-censorship. When the intuited defamation takes the form of opinion — a type of expression jealously guarded by the first amendment — guilt by inference stretches the law too far. After *Cianci*, it would be difficult for a defendant to report about suspicious circumstances pointing to a possible crime without risking a defamation action unless the facts either tended to clear the plaintiff's name or were rigorously neutral in their implications.[326] Faced with this possibility, the speaker would avoid potential liability either by ignoring the story entirely or by reporting it in a way that achieves neutrality even if the facts are thereby

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[323] *See supra* text accompanying notes 262-70.

[324] 639 F.2d 54 (2d Cir. 1980).

[325] The court based its conclusion in *Cianci* on the organization of the article and on the headline, "Buddy We Hardly Knew Ya." *Id.* at 60-61; *see also* Green v. Northern Publishing Co., 655 P.2d 736, 739-40 (Alaska 1982), *cert. denied*, 103 S. Ct. 3539 (1983) (court also inferred a defamatory opinion from facts plus the defendant's approval of disciplinary action against plaintiff).

[326] As soon as the preponderance of the evidence presented points toward guilt on plaintiff's part, defendant could have such an opinion attributed to her. Of course, the issue of truth or falsity of these "facts" would still need to be determined, but when the facts are admittedly unclear, a defendant cannot count on a jury finding that the allegations at issue are true.

distorted.[327]

One final, crucial reform in the area of opinion would be the elimination of the factual predicate rule. It is unconstitutional on a number of important grounds. In the first place, the rule suggests, de facto, that no one is entitled to an unreasonable or off-the-cuff opinion.[328] When an opinion is unflattering and based on a paucity of facts or on facts that do not necessarily suggest to others a similar conclusion, the court has considerable latitude. It may imply a different set of facts that would, in its view, better support such an opinion, decide those facts to be defamatory, and uphold liability — simply because the defendant has failed to comply with the court's standard of reasonable mentation.[329]

Even when the reasonableness of the opinion is not a serious issue, the power to imply factual predicates leaves to the court much discretion and flexibility. First, the judge must determine whether the rule applies to the kind of opinion involved in the case. Since the line between purely subjective opinions and those based wholly or in part on facts is often a shadowy one,[330] the outcome is innately unpredictable. Furthermore, if the opinion is interpreted as "fact laden," the judge then has the choice of deciding if the facts are fully set out, and if not, which ones are implied; because no standards for making this determination exist, the judge must inevitably be influenced at some level by the sympathy she feels with the opinion itself or with the parties disputing over it. Furthermore, defendants are in a poor position to protect themselves against liability because they are often constrained from giving a full exposition of the facts by limitations of time or space, and in addition cannot predict the level of exposition any given court would deem sufficient. Depending on how rigorously a court applies this rule,

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[327] It should be pointed out that objectivity in reporting is not the same thing as neutrality. An article can be objective, in that it is not designed to support preconceived notions of the communicator and nevertheless strongly point to a conclusion about the ultimate facts at issue. An article presenting both sides of an argument can actually be highly biased if the support on each side is presented as of equal weight when in reality only a small group takes the contrary position. For example, a report on cigarette smoking that devotes as much space to arguments that no health hazards have been proved as it does to data on the relationship between smoking and cancer or heart disease may appear to be neutral but severely distort the amount of authority on each side of the dispute.

[328] *See supra* notes 220-22 and accompanying text.

[329] An interesting discussion recognizing this problem may be found in Hill, *supra* note 194, at 1229-35.

[330] *See* Keeton, *supra* note 163, at 1258.

we could be left either with a privilege that privileges nothing,[331] or one that enables courts freely to exercise their editorial judgments. Neither alternative seems consistent with first amendment principles.

CONCLUSION

Unquestionably, applying an innocent construction rule to the fact/opinion and defamatory meaning problems weights the scale heavily in favor of the defamation defendant. It means that when reasonable people could disagree about the meaning or the damaging nature of a communication, an action for defamation will not lie, and plaintiffs would not be entitled to bring their claims of injury before a jury. Despite this apparent harshness, the result seems precisely that demanded by the logic of both *Sullivan* and *Gertz*.

When the Supreme Court decided *New York Times Co. v. Sullivan*, it clearly contemplated not merely that plaintiffs would have a harder time proving a case, but that many legitimately defamed plaintiffs would no longer have any legal remedy available to them. The sacrifice of plaintiffs' interest in their good names was made to protect an even more fragile and important value: freedom of speech. While *Gertz* represents a softening of the Court's stern stance in defamation, it does not repudiate *Sullivan*. A private person — who, the Court asserts, neither assumed the risk of defamation nor has access to the extra-legal channels of rectification — can recover more easily than a public personality. But the plaintiff is still limited by the existence of important first amendment concerns. She cannot recover, for example, unless able to prove both actual injury and sufficient fault on the part of the defendant. Thus, private individuals are also required to accept the existence of some risks to their reputation for which legal recompense will not exist.

In sketching out this set of rules, the Court focused almost entirely upon the status of the plaintiffs and the tolerable level of benefits and risks attached to that status. It only glanced at other crucial issues, such as the nature of the harm involved in defamation or the technical quirks and uncertainties of the common law. Perhaps as a consequence, the Court apparently assumed a universe that never was — one of important reputational claims, clearly defined terms and well-recognized ground rules. In this universe, defendants were forewarned when to proceed with caution and plaintiffs required to bear the risk of harms that reasonable caution could not prevent.

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[331] *See supra* notes 235-38 and accompanying text.

Defamation litigation, ten years after *Gertz* and twenty after *Sullivan*, is a landscape that does not match the intimations from those great cases. An unfortunate percentage of modern cases are fought out at great expense under unclear rules over questionable harms and with uncertain outcomes.

If such cases could be eliminated as a matter of law at an early stage, first amendment values would receive maximum protection. At the same time, plaintiffs who have been subjected to clear harm would preserve their rights to legal vindication. This result moves the law closer to the intent of *Sullivan* and *Gertz*. Although it cannot be proved, the Court was probably reluctant to eliminate defamation twenty years ago because it feared the big lie. Had defamation only protected against irritating misstatements or even unjust criticism, I question whether the Court would have been inclined to preserve the limitations on speech that were designed to restrain these offenses. Serious defamation — the falsehoods that isolate people from their friends, destroy their livelihoods and ability to participate in public affairs, and injure their families — are what courts and commentators focus on when they insist upon legal remedies for reputation. Ironically, these sorts of wrongs are often, when they occur, not subjects of tort litigation. Defamation law, for example, was not the source of relief from one of the most dramatic modern examples of the big lie — the Communist witch hunt of the 1950's.[332] Still, the cultural roots of the tort law of defamation are deep; a strong social consensus remains that the law ought both to offer some important deterrence against serious reputational injury and some vindication when it occurs. The courts will not — and perhaps should not — lightly give it up. At the same time, we are once again at a point, as we often have been before in the history of defamation, where the cost of the remedy is grossly disproportionate to the extent of the underlying wrong. Once more, limits need to be reset. Hopefully, the modifications suggested here will advance the cause of separating the chaff from the wheat.

[332] *See* Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) (Stewart, J., concurring).