

1987

Reforming the Tort of Defamation: An Accommodation of the Competing Interests within the Current Constitutional Framework

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Paul A. LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests within the Current Constitutional Framework*, 66 Neb. L. Rev. (1987)

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Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework

TABLE OF CONTENTS

I.	The Constitutional Framework: An Updated Primer on <i>New York Times v. Sullivan</i> and its Progeny	252
	A. The <i>Sullivan</i> Rules	254
	B. The <i>Gertz</i> Rules	264
	C. The Miscellaneous Procedural Rules	276
II.	Two Substantive Reform Proposals	287
	A. An Immunity for Speech About Government	288
	B. An Expansion of the Emotional Harm Component of the Defamation Claim	297
III.	Two Remedial Reform Proposals	304
	A. A Series of Options That Can Be Exercised to Reduce Exposure to Monetary Damages	305
	B. A Restriction on the Availability of Punitive Damages	316
IV.	Conclusion	318

As a result of a series of significant United States Supreme Court decisions over the last twenty-two years,¹ the law of defa-

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1. The United States Supreme Court first imposed constitutional restrictions on the state common law of defamation in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Solutions to the complicated problems resulting from that initial foray into the subject are still being worked out by the Court, as demonstrated in two decisions in the last term, *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986), and *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986).

mation has been wrenched from its common law moorings and cast adrift in search of a constitutional anchorage. Determining precisely what the contours of that First Amendment safe harbor are and what they should be, occupies the attention of courts, legal scholars, and media lawyers and their clients.² Only recently has there emerged in counterpoint to the constitutional debates a more frequently expressed view that the solutions to the problems created by a defamation/free speech conflict are more appropriately sought through attempting to achieve reform in the arena of tort law instead of through a manipulation of constitutional doctrines.³

The major premise of this Article is that a far more precise and flexible accommodation of the competing interests can be obtained in the context of tort analysis than is likely to result from a continuation of the constitutionalization/de-constitutionalization struggle currently under way.⁴ The law of torts consistently displays a capacity to produce a carefully tailored response to the important nuances of situations in which significant individual interests are adversely affected by socially worthwhile activities.⁵ Freed from the obligation of having to speak in the heavily freighted terms of constitutional adjudication, courts employing common law methods in developing and applying tort law concepts would be able to give careful attention to factors that might escape constitutional notice. To give one example, which will be discussed in some detail later in this Article,⁶ consider the current attitude of some members of the

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2. The main thread of the story of the recent developments in the law of libel is presented in a very entertaining fashion in R. SMOLLA, *SUING THE PRESS: LIBEL, THE MEDIA AND POWER* (1986), reviewed in LeBel, *The Good, The Bad, and The Press* (Book Review), 1986 DUKE L.J. 929. The Practising Law Institute courses in libel law and litigation also provide a comprehensive, though largely defense-oriented, survey of recent developments. The most recent course handbook is *LIBEL LITIGATION* 1986 (R. Winfield ed. 1986).
 3. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2948, 2952 (White, J., concurring in the judgment). A similar call for more careful attention to tort law principles in a constitutional tort context is found in Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53 (1986).
 4. See *id.* at 2947, n.7 (plurality opinion criticizing the dissenting opinion for its desire to "constitutionalize the entire common law of libel").
 5. Professor Marshall Shapo of Northwestern University has recently completed a comprehensive and thoughtful study of contemporary tort law as the Reporter for the American Bar Association Special Committee on the Tort Liability System. The report, surveying the full range of policies and principles served by tort law, has been published under the title, *AMERICAN BAR ASSOCIATION, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* (1984).
 6. See *infra* notes 39-60 and accompanying text.

Supreme Court that the first amendment does not permit the level of constitutional protection of defamatory communications to depend on a distinction between the media and the nonmedia status of different defamation defendants.⁷ One might initially suppose that the constitutional language itself would be capable of supporting such a distinction—the Court drawing on the press clause in the media case and the speech clause in the nonmedia case. Nevertheless, the significant point is that the distinction between media and nonmedia defendants is the kind of factor that fits well into tort law analyses that traditionally have been very concerned about such matters as why the defendant acted as it did, and what individual and social interests were being served by the defendant's conduct, even though that conduct produced injury to the plaintiff.⁸

The last example should illustrate that the suggested shift in focus to the tort law opportunities for a restructuring of the law of defamation is not legitimately subject to dismissal on the ground that it is part of an "anti-media" development.⁹ The kind of interest analysis that is a standard part of modern tort law may in fact produce a body of decisions that recognizes a greater level of protection, based on the media status of the defamation defendant, than is likely to be obtained under the first amendment analysis the Court is now using.¹⁰ The enhanced attention to the tort law considerations in defamation analysis may thus result in "pro-media" effects as readily as it results in what are perceived to be "anti-media" consequences.

The first section of this Article will lay out in some detail the current constitutional framework within which the designers of state tort law can operate freely to attempt a reconstruction of

7. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985), the Supreme Court rejected a state court rule of decision that determined the applicability of certain types of constitutional protection on the basis of a classification of the defendant as media or nonmedia. Even the dissenting opinion, arguing that the constitutional protections did apply to the case before the Court, stated that determining constitutional protections based on the distinction "is irreconcilable with the fundamental First Amendment principle" that the worth of speech does not depend on the identity of its source. *Id.* at 2957 (Brennan, J., dissenting).

8. See, e.g., RESTATEMENT (SECOND) OF TORTS § 828 (1977) (factors used in determining the utility of the defendant's conduct causing an interference with the plaintiff's use and enjoyment of land include "the social value that the law attaches to the primary purpose of the [defendant's] conduct").

9. For criticism of too free a use of the "anti-media" and "anti-first amendment" characterizations in discussions of defamation law, see LeBel, *supra* note 2.

10. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2958 (Brennan, J., dissenting) (the "solicitude" shown to the press on first amendment issues "implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection").

the law of defamation. Once the constitutional limits have been clearly defined, the way will be open for a consideration of a series of recommendations for restructuring some of the more troublesome nonconstitutional aspects of the defamation action. The restructuring may accomplish what has until now not been obtained, and may very well not be obtainable, while concentrating solely on the constitutional analysis. The adoption of the reform proposals offered in Parts II and III of this Article can produce a better accommodation of competing and conflicting interests, rather than the result that is too often achieved under current constitutional analysis, sacrificing one or another set of interests to some goal that is perceived to be overriding.

I. THE CONSTITUTIONAL FRAMEWORK: AN UPDATED PRIMER ON *NEW YORK TIMES V. SULLIVAN* AND ITS PROGENY

In the years since the decision in *New York Times v. Sullivan*,¹¹ the United States Supreme Court has decided nearly two dozen defamation cases¹² in what must sometimes seem to be a futile attempt by

11. 376 U.S. 254 (1964).

12. For purposes of this description of the constitutional framework regarding the common law development of a tort of defamation, the class of "defamation cases" includes those cases that are not, strictly speaking, defamation cases, like *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Although a product disparagement action, it was used by the Court as the vehicle for an important clarification of one of the constitutional rules regarding defamation litigation. See *infra* notes 49-61 and accompanying text, for discussion of *Sullivan* rule number three, regarding the scope of appellate review in defamation cases. The term does not include: (a) invasion of privacy cases, such as *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), in which the Court has drawn on the close analogies between some of the privacy actions and defamation cases to incorporate a number of the rules derived from its defamation analysis, but without using the application of defamation-derived constitutional restrictions on privacy actions to expand, in any significant way, on its previously developed defamation analysis; (b) defamation cases that turned on questions of statutory interpretation rather than constitutional analysis, such as *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), determining whether a state law defamation claim based on statements made during a union organizing campaign was barred by the National Labor Relations Act; (c) criminal defamation cases, such as *Garrison v. Louisiana*, 379 U.S. 64 (1964); or (d) due process cases, such as *Paul v. Davis*, 424 U.S. 693 (1976), involving claims for injury to reputation but which have not added to the analysis of constitutional restrictions on the state common law of defamation.

The title of this section of the Article refers to an "updated primer" on the constitutional rules applicable to defamation actions. Earlier articles covering the field as of the time of their publication include Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Eaton, *The Ameri-*

the Court to decide the nature and extent of constitutional protection of those sued for defamation. Proceeding on a case-by-case basis, sometimes sending messages that run at cross-purposes with prior statements,¹³ the Court has, nevertheless, managed to delineate a fairly succinct set of rules that place restraints on how states are permitted to structure a claim for relief from the harm caused by defamatory publications.

The best way to understand what the Court has decided, and equally important, what the Court has not decided, is to distinguish the *content* of a rule from its *scope* of application. The experience of the last two decades of defamation cases demonstrates that the Court often allows a considerable period of time to elapse between the enunciation of a rule and any clear statement of the range of situations in which the rule will apply.¹⁴ In order to lay out the constitutional framework as clearly as possible, this section of the Article will reduce the substantive constitutional rules of defamation to seven requirements, four of which will be referred to as *Sullivan*¹⁵ and three of which will be referred to as *Gertz*¹⁶ rules. A separate set of four procedural constitutional rules of primary significance in the pre-trial procedure and in the litigation of defamation suits will also be described. In connection with each of these rules, the current understanding of the scope of the rule's application will also be described. Neither an elaborate justification nor a critical evaluation of these

can Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 VA. L. REV. 1349 (1975); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L.J. 519 (1979); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471 (1975); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983).

13. Compare *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (suggesting that constitutional protection depends on the defamatory publication being a matter of public concern rather than on the defendant being a member of the media) with *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986) (adopting a rule that explicitly applies to media defendants, but expressing no opinion on the question whether the same rule would be applied to nonmedia defendants).
14. For example, the scope of the rules announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), regarding the recovery of presumed damages and punitive damages by plaintiffs who are neither public officials nor public figures was not settled until the decision more than ten years later in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).
15. For the sake of convenience, this Article will employ a convention of referring to the Supreme Court defamation cases by the name of the *plaintiff* in the original defamation claim.
16. These rules are derived from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). A fourth idea drawn from the *Gertz* opinion, which will be referred to in the subsequent discussion as a "pseudo-rule," will also be described. See *infra* notes 116-26 and accompanying text.

rules will be set out in this section of the Article. The focus here will simply be to decipher the messages the Court is actually sending, reserving for later sections or other articles any sustained commentary on how much sense those messages actually make.

A. The *Sullivan* Rules

Constitutional protection for those who cause injury to others through the publication of defamatory statements was introduced as a limiting factor on the state common law of defamation in *New York Times Co. v. Sullivan*.¹⁷ In the course of disapproving the content and application of the Alabama defamation rules used by the state courts in that case to impose a serious chilling effect on news reporting and public commentary on the civil rights struggle in the South,¹⁸ the Court devised a quartet of rules with which the defamation law of the states would be required to conform. Although there has recently been some expression of dissatisfaction with both the result and the reasoning of the *Sullivan* case,¹⁹ the opinion written by Justice Brennan for the Court in that case is more often presented as a model of constitutional analysis providing protection for the fundamental character of the American political structure.²⁰ That protection resulted from the four substantive constitutional rules adopted by the Court: (1) a requirement that the plaintiff must prove that the defendant published the defamatory communication with "actual malice," (2) a requirement that the proof of "actual malice" must be made with "clear and convincing" evidence, (3) a requirement that appellate courts must exercise independent judgment in reviewing a finding of "actual malice," and (4) a requirement that the defamatory communication must refer to, or be "of and concerning," the plaintiff.

SULLIVAN RULE NUMBER ONE: The "Actual Malice" Requirement

The heart of constitutional protection for defamatory speech lies in the heightened level of fault demanded by the Supreme Court in *New York Times v. Sullivan*. Drawing on a few state court cases,²¹ and

17. 376 U.S. 254 (1964).

18. For the background of the Supreme Court decision in *Sullivan*, see R. SMOLLA, *supra* note 2, at 26-52; Pierce, *The Anatomy of a Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1964).

19. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2948-54 (White, J., concurring in the judgment); Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

20. One of the more influential commentaries on *Sullivan* is Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, n.20 (1964).

employing the concept of "scienter,"²² the Court held that a prerequisite to establishing the liability of the defendants in *Sullivan* was a showing that they had acted with what has (unfortunately)²³ come to be called "*New York Times* actual malice," either knowledge that the published communication was false or a reckless disregard for the truth or falsity of the communication.²⁴ This fault-as-to-falsity requirement²⁵ is intended to serve as a buffer against what the Court perceived as an undesirable liability for the innocent or merely careless publication of defamatory falsehoods.²⁶

Determining the scope of this first *Sullivan* rule was the subject of much constitutional adjudication regarding defamation cases in the first decade after the *Sullivan* case was decided. The most important issue left open by *Sullivan* was under what circumstances a plaintiff would be required to establish *New York Times* actual malice. *Sullivan*, itself, involved a very significant, but nonetheless fairly limited

22. Scienter has had a long history of use in the context of the tort of fraudulent misrepresentation. See James & Gray, *Misrepresentation - Part I*, 37 MD. L. REV. 286, 296-300 (1977). The accurate but somewhat awkward term "New York Times scienter" is used in J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 927 (3d ed. 1986).

23. Use of the common law term "scienter" for the same concept that the Court expresses in the "actual malice" language would have avoided the confusion that almost inevitably results from an attempt to use a term that has a plain language meaning in a way that deviates substantially from that meaning. The confusion is heightened when the term is likely to become a necessary element in the decisionmaking process of a jury unfamiliar with the law. See R. SMOLLA, *supra* note 2, at 189 (discussing apparent distortion of jury instruction on "actual malice" issue). An arcane term like "scienter" may initially appear to be objectionable on the ground that it has no common meaning for the lay public. Precisely that feature of the language may, in fact, be an advantage in impressing upon a jury the understanding that the rules they are to apply have fairly precise legal meanings that call for careful application rather than simply deciding the case purely on common sense or an instinctive reaction.

24. *New York Times Co. v. Sullivan*, 376 U.S. 234, 280 (1964). The nature of the "reckless disregard" prong of the "actual malice" requirement has been described in *St. Amant v. Thompson*, 390 U.S. 727 (1968), as conduct that

is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the *defendant in fact entertained serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 731 (emphasis added).

25. The phrase "fault-as-to-falsity" is used to distinguish the "actual malice" type of fault required in *Sullivan* from another type of fault that focusses on the likelihood of the publication causing harm to the plaintiff. As will be discussed below, *infra* notes 79-81 and accompanying text, this latter type of fault is both conceptually and functionally different from the "actual malice" element which concentrates on the defendant's state of mind with regard to whether the communication was true or false.

26. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-83 (1964).

context, the criticism of government conduct in matters of the highest social concern.²⁷ Presented with an imposition of liability for a publication made in that context, the Supreme Court announced an initial application of the first *Sullivan* rule to plaintiffs who were in Sullivan's position, public officials suing for defamation based on statements made about their official performance.²⁸ Subsequent cases produced an extension of the "actual malice" requirement to defamation plaintiffs categorized as public figures.²⁹ Although a short-lived plurality opinion shifted the focus from the public official or public figure status of the plaintiff to the public interest nature of the communication,³⁰ the Court subsequently held, in one of its clearest pronouncements on the subject of defamation, that the applicability of this first *Sullivan* rule depends on the public person status of the plaintiff.³¹

One of the most recent Supreme Court defamation cases can be interpreted as containing a very strong implication that the public person status of the plaintiff is a necessary but not a sufficient condition for the application of the first *Sullivan* rule. In the process of deciding

27. *Id.* at 268. Professor Herbert Wechsler, who argued the *Sullivan* case in the United States Supreme Court on behalf of the New York Times, stated at a conference marking the twentieth anniversary of the decision that he had always regarded the case as a civil rights case as much as, if not more than, a defamation action. Remarks delivered at PRACTICING LAW INSTITUTE, *New York Times v. Sullivan: THE NEXT TWENTY YEARS* (1984).

28. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (public official suing for damages "for a defamatory falsehood relating to his official conduct"). In *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), the Court defined the "public official," who would be required to satisfy the *New York Times* actual malice showing, as someone who held "a position in government [that] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." An extensive and annotated list of authorities can be found in Shumadine & Mayo, *The Legal and Practical Problems Associated with the Determination of Plaintiff's Status as a Private Individual, Public Figure or Public Official*, in *LIBEL LITIGATION* 1986, *supra* note 2, at 148-60.

29. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Although the plurality opinion written by Justice Harlan substituted a slightly modified "highly unreasonable conduct" standard for the *New York Times* actual malice fault-as-to-falsity standard, *id.* at 155, a majority of the members of the Court approved a simple extension of the "actual malice" standard to cases brought by plaintiffs who were public figures.

30. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (*New York Times* actual malice standard applies to a case in which the defamatory communication involves "a matter [which] is a subject of public or general interest").

31. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). "The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. . . . [T]he state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." *Id.* at 342-43.

the scope of application of a separate set of constitutional rules to be discussed below,³² the plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*³³ stated that the Court had previously recognized constitutional restrictions on recovery for defamation only in cases that "involved expression on a matter of undoubted public concern."³⁴ Such a reading (arguably revisionist)³⁵ of the prior cases thus suggests that should there be a class of defamatory communications about a public official that do not involve matters of public concern,³⁶ the *Sullivan* requirement that the plaintiff establish "actual malice" would not apply. This would be true at least if there were no independent justification of such a requirement employing the balancing methodology that the Court now employs to determine the kind and degree of constitutional protection of defamatory speech.³⁷

A final ground of uncertainty regarding the scope of application of the first *Sullivan* rule concerns the relevant status of the defendant,

32. See *infra* notes 88-115 and accompanying text, for a discussion of the scope of application of the second and third *Gertz* rules regarding the award of presumed damages and punitive damages in a case in which the *Sullivan* rules did not apply because the plaintiff was neither a public official nor a public figure.

33. 105 S. Ct. 2939 (1985).

34. *Id.* at 2944.

35. One could argue that the public interest references in the prior cases in which constitutional protection had been recognized were *incidental* rather than essential to the reasoning that supported the results. The revisionism that is arguably present in *Greenmoss Builders* would, thus, consist of the Court going back over the range of defamation decisions of the previous two decades and moving one of the elements of those cases from the periphery to the core of the justification for the decisions. This would make the "public concern" nature of the defamatory communication a *sine qua non* of constitutional protection, or at least of the particular types of protection that have been recognized in the *Sullivan* and *Gertz* rules. See *infra* note 87 for discussion of what constitutional protection might apply in a case to which neither the *Sullivan* nor the *Gertz* rules apply.

36. The *Greenmoss Builders* opinion certainly leaves open the possibility that this category of defamatory expression exists as a matter of logic. Whether the practical likelihood of encountering such a communication is at all significant is a different matter. It would not take an overly creative argument to establish that virtually anything that could be published about a person who falls into the category of public official would be relevant to that person's qualifications for office, particularly in the case of an elective office. In the case of an alleged public figure plaintiff, the "public concern" factor seems to be at least one element that is used in the Court's method of analyzing whether the plaintiff is legitimately deemed to be a public figure for purposes of application of the first *Sullivan* rule. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) ("For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. . . . More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.") (emphasis added); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (rejecting the defendant's attempt "to equate 'public controversy' with all controversies of interest to the public").

37. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2943-46 (1985).

specifically, whether the rule applies only to defamation actions brought against media defendants. The actual strength of some recent suggestions that media defendants are in some way, or for some issues, to be treated in a way that is different from nonmedia defendants, is extremely difficult to pin down.³⁸ The strongest indication that the media status factor is relevant to the scope of application of the first *Sullivan* rule occurred in a footnote in former Chief Justice Burger's opinion for the Court in *Hutchinson v. Proxmire*.³⁹ Noting that neither of the lower courts which had decided the case had "considered whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant," the Chief Justice stated that "[t]his Court has never decided the question" and that it was "unnecessary to do so in this case."⁴⁰

The *Hutchinson* footnote's suggestion that the *Sullivan* requirement of proof of "actual malice" is limited in application to media defendant cases is difficult to square with the precedent against which *Hutchinson* was decided. A number of the early cases in which the Court had recognized the applicability of the requirement involved individual nonmedia defendants.⁴¹ Indeed, four of the defendants in the *Sullivan* case itself were nonmedia individuals.⁴² Perhaps the only way that the *Hutchinson* footnote's suggestion can be reconciled with precedent is by attaching some significance to the fact that the individual defendants in most of the earlier cases were utilizing a member of the media as the disseminating outlet of the defamatory communications.⁴³ However, a focus on that fact seems more properly to raise questions concerning media liability for republishing material generated by a nonmedia source than it does questions about the scope of the first *Sullivan* rule. The working proposition regarding the current status of this issue should, therefore, be that the first *Sullivan*

38. The media/nonmedia distinction is discussed more fully *infra* at notes 139-60 and accompanying text.

39. 443 U.S. 111, 133-34 n.16 (1979). The case involved a defamation action in which the defendants were a United States Senator and his legislative assistant.

40. *Id.*

41. See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Henry v. Collins*, 380 U.S. 356 (1965).

42. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

43. This explanation would apply to *St. Amant v. Thompson*, 390 U.S. 727 (1968), in which the defamatory communication was contained in a televised address by the individual defendant, and to *Sullivan*, in which the individual defendants' names were listed as endorsing the message in the *New York Times* advertisement that contained the allegedly defamatory statements. However, even this somewhat charitable explanation of the former Chief Justice's grasp of what the Court had already decided would fail in the *Henry* case in which at least one basis for the defamation claims was a letter written by the individual defendant to a law enforcement official. See *Henry v. Collins*, 253 Miss. 34, 158 So. 2d 28 (1963); *Henry v. Pearson*, 253 Miss. 62, 158 So. 2d 695 (1963).

rule applies to nonmedia as well as to media defendants, at least until such time as the Court explicitly holds to the contrary.

*SULLIVAN RULE NUMBER TWO: The Standard
of Proof Requirement*

The Supreme Court in the *Sullivan* case introduced not just a heightened standard of fault but also a higher standard of proof for the plaintiff to meet, an important part of the effort to insulate the communicators of defamatory speech from the normal risks of loss in litigation. Not comfortable with the exposure to liability generated by the "preponderance of the evidence" standard of most civil litigation, the Court has imposed on defamation plaintiffs the requirement of making at least some showings with "convincing clarity."⁴⁴ This standard is now understood to be an explicit adoption of the "clear and convincing evidence" standard of proof⁴⁵ previously associated with a number of different elements found in some civil actions, including the scienter element in a fraud action.⁴⁶

The scope of application of this second *Sullivan* rule is a matter that is subject to some uncertainty. Without question, the rule applies to the "actual malice" requirement of the first *Sullivan* rule, at least when that requirement is used as a prerequisite to the liability of a publisher of a defamatory communication concerning a plaintiff who is a public official or a public figure.⁴⁷ However, as will be shown below, the fault-as-to-falsity standard of the first *Sullivan* rule operates not just as a *liability* element in public plaintiff defamation cases, but also as an element in the determination of the constitutionally permitted measure of *damages* in private plaintiff cases.⁴⁸ Whether the

44. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

45. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

The Supreme Court has never attempted to explain what the "clear and convincing" standard means in the defamation context. The best statement of the standard is probably that used by a Connecticut court: "The burden of persuasion, therefore, in those cases requiring a showing of clear and convincing proof is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are *highly probably* true, that the *probability* that they are true or exist is *substantially greater than* the probability that they are false or do not exist." *Dacey v. Connecticut Bar Ass'n*, 170 Conn. 520, 537, 368 A.2d 125, 134 (1976) (emphasis added). *See also Callahan v. Westinghouse Broadcasting Co.*, 372 Mass. 582, 363 N.E.2d 240 (1977).

46. MCCORMICK ON EVIDENCE 959-61 (3rd ed. 1984). The application of this heightened standard of proof to the scienter element of the fraud claim is significant because scienter is, as noted *supra* at notes 22-23 and accompanying text, the closest analogue to the fault-as-to-falsity element that the Court has described as "actual malice."

47. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

48. *See infra* notes 88-115 and accompanying text.

"clear and convincing evidence" requirement of this second *Sullivan* rule extends to the use of the standard embodied in the first *Sullivan* rule in this new context has not explicitly been decided by the Supreme Court. If the heightened standard of proof does apply to the showing of *New York Times* actual malice in whatever context the issue arises, the further question that would be posed is whether the Court would hold that *every* constitutional requirement in a defamation case must be established by "clear and convincing evidence."⁴⁹ The best working hypothesis for the scope of this *Sullivan* rule would link the clear and convincing evidence standard to any constitutionally required proof of *New York Times* actual malice.

*SULLIVAN RULE NUMBER THREE: The Scope of Appellate
Review Requirement*

Rules of law, even the most constitutionally protective of rules, are no more than verbal formulations of what legal decisionmakers are supposed to do when certain fact patterns appear in disputes that they are called upon to resolve. Because rules need to be applied in particular cases, the content of legal rules can promise protection that is not received in fact if the front-line decisionmakers, trial judges and juries, misunderstand or ignore the rule that is supposed to apply.⁵⁰ In order to reduce the chances of there being a substantial divergence between the content of the rules and the practice in the courts, the

49. As will be seen in the following subsections, there are a number of constitutional rules applicable to defamation cases that do not have a *Sullivan* grounding. The clearest example of a non-*Sullivan* rule that would be an unlikely candidate for a clear and convincing evidence requirement is the first *Gertz* rule that allows private plaintiffs to recover on a showing of fault less than the knowledge or reckless disregard of falsity standard of the first *Sullivan* rule. See *infra* notes 74-87. It would be unlikely that the Court would hold that a private plaintiff would be constitutionally required to prove negligence as to the falsity of the challenged communication by clear and convincing evidence.

50. The interviews with jurors in the Tavoulareas libel action against The Washington Post have served as the basis for a number of claims that jury misunderstanding prevented the proper application of the constitutional rules in that case. See, e.g., R. SMOLLA, *supra* note 2, at 188-97; Brill, *Inside the Jury Room at the Washington Post Libel Trial*, *The American Lawyer* (November 1982), reprinted in *LIBEL LITIGATION 1986*, *supra* note 2, at 661. For an account of recent libel litigation from the plaintiff's perspective, see U. DAN, *BLOOD LIBEL* (1987); W. TAVOULAREAS, *FIGHTING BACK* (1985). A recent book by a juror in William Westmoreland's libel action against CBS demonstrates a particularly obtuse lack of understanding of what the case was all about. See M. ROTH, *THE JUROR AND THE GENERAL* (1986). For example, at one point, the juror writes about her negative reaction to Dan Burt, plaintiff's lead counsel:

"I reminded myself not to be swayed by the personalities, especially not an attorney's." [So far, so good, one might observe.]

"Westmoreland was on trial here, not Burt." [The *plaintiff* is on trial!]

"As a matter of fact, Westmoreland really is not on trial [Ah, now she's got it

Supreme Court has, from the first, held that the application of the constitutionally protective fault-as-to-falsity rule in defamation cases was subject to an appellate scrutiny that was much less deferential to lower court decisionmakers than is normally the case in civil actions.⁵¹

The decision in the recent case of *Bose Corp. v. Consumers Union of United States, Inc.*⁵² clarified the point that the scope of appellate scrutiny in a case to which the first *Sullivan* rule applies is governed by constitutional considerations, rather than by the "clearly erroneous" standard of the Federal Rules of Civil Procedure.⁵³ The Court expressed skepticism about the wisdom of relying on the judgment of lower court fact finders in applying the rules that determine both the existence and scope of constitutional protection for marginal forms of speech.⁵⁴ It reiterated the position, which it had previously expressed in those kinds of cases, that appellate courts should "conduct an independent review of the evidence on the dispositive constitutional issue."⁵⁵ Such an independent review is less than a *de novo* review of the judgment entered by the trial court; it is instead "an independent assessment only of the evidence germane to the actual-malice determination."⁵⁶

This third *Sullivan* rule regarding the scope of appellate review, like the rule dealing with the heightened standard of proof,⁵⁷ is susceptible to broad, intermediate, and narrow views about the scope of its application. In the broadest plausible form,⁵⁸ the rule would be

right, the optimistic reader may suppose, only to have that optimism dashed by the juror's next observation.]-one portion of his life is." *Id.* at 147.

If this frustratingly misguided juror is correct that the trial "was a play of sorts," *id.*, she was apparently reading from a different script.

51. In *Sullivan*, the Supreme Court did not merely announce the constitutional standard that was to be applied. Instead, after setting out the requirement that knowledge or reckless disregard of falsity had to be established in order for the plaintiff to recover, the Court then conducted a review of the evidence "to determine whether it could constitutionally support a judgment for" the plaintiff. 376 U.S. 254, 284-85. The result of that review by the Supreme Court was a conclusion that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for [plaintiff] under the proper rule of law." *Id.* at 285-86.

52. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

53. FED. R. CIV. P. 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

54. *Bose Corp. v. Consumer Union of United States, Inc.*, 466 U.S. at 505.

55. *Id.* at 508.

56. *Id.* at 514 n.31.

57. See *supra* notes 44-49 and accompanying text.

58. The application of this rule of independent review to *every* fact in a defamation case was explicitly rejected by the Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 n.31 (1984) ("many findings of fact in a defamation case . . . are irrelevant to the constitutional standard of *New York Times*

applied any time a defamation case involved the resolution of an issue of "constitutional fact."⁵⁹ In contrast, the narrowest reading of the rule's application would restrict the independent appellate review to the issue of whether *New York Times* actual malice has been established by clear and convincing evidence when that finding is used as the prerequisite to liability in a defamation action brought by a public person plaintiff.⁶⁰ Somewhat less restrictive than that narrow application would be an intermediate interpretation that allowed an appellate court to exercise this independent appellate review whenever a *New York Times* actual malice finding was required in a defamation case. This would be true even if that finding were only used to determine the permissible measure of damages for a plaintiff who is not required to prove such a heightened level of fault in order to establish the liability of the defendant.⁶¹ This intermediate interpretation would be consistent with the working hypothesis offered for the scope of application of the clear and convincing evidence requirement of *Sullivan* rule number two.⁶²

Co. v. Sullivan . . . and to which the clearly-erroneous standard of Rule 52(a) is fully applicable").

59. The "constitutional fact" doctrine associated with such administrative action cases as *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), has been largely discredited. See, e.g., 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:23, at 441 (2d ed. 1984). As demonstrated in *Bose*, however, a category of what might be called "first amendment facts" continues to receive the heightened scrutiny of an independent appellate review previously used in the *Ben Avon* type of case.
60. This is, in fact, the interpretation that is most consistent with the language actually used in *Bose*. In its last statement of the holding, the opinion referred to "a case governed by *New York Times Co. v. Sullivan*," and held that an appellate court "in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984) (emphasis added). Because the use of the "actual malice" standard as an element in the determination of what damages are constitutionally permissible was introduced in *Gertz*, not *Sullivan*, see *infra* notes 88-115 and accompanying text, a case governed by *Sullivan* is a case in which only the liability issue depends on a showing of "actual malice." Accordingly, the application of the independent appellate review rule to "actual malice" findings used for purposes other than liability would not be directly supported by this language of the *Bose* opinion.
61. See *infra* notes 88-115 and accompanying text (discussion of requirement that presumed damages and punitive damages are not recoverable unless the plaintiff establishes that the defendant published the defamatory communication with "actual malice").
62. See *supra* notes 47-49 and accompanying text. This third *Sullivan* rule requiring independent appellate review also applies to the colloquium element in a defamation action brought by a public official. See *infra* notes 63-67 and accompanying text.

SULLIVAN RULE NUMBER FOUR: The Colloquium Requirement

The last of the *Sullivan* rules concerns the element of the common law action for defamation which required the plaintiff to plead and prove the *colloquium*—that the defamatory communication was “of and concerning” the plaintiff.⁶³ A particularly troubling aspect of the state court judgment in the *Sullivan* case was the tenuous link between the false statements contained in the advertisement published by the *New York Times* and the alleged wrongdoing by the plaintiff, a city commissioner and Commissioner of Public Safety.⁶⁴ With relative ease, statements that were ostensibly critical of the state and local public authorities in general could be transformed by artful pleading into statements that were false and defamatory with regard to a particular public official. The Supreme Court was struck by the analogy between the private common law action for defamation brought by a public official and the public action for seditious libel, an action that effectively stifles criticism of government.⁶⁵ The Court’s method of reducing the risk that the defamation action could be used for the same illegitimate purposes as a seditious libel action was to constitutionalize the colloquium element. As a result of this fourth *Sullivan* rule, the plaintiff is constitutionally required to prove that the defamatory statements referred to the plaintiff, and were not simply “an otherwise impersonal attack on governmental operations.”⁶⁶

By treating the colloquium element as a matter of constitutional significance, the Court may have intended to bring this element within the scope of the second and third *Sullivan* rules. If so, the public official plaintiff would be required to prove the colloquium element by clear and convincing evidence, and the appellate court would exercise an independent review of the evidence pertaining to this element.⁶⁷ Because of the limited scope of the seditious libel analogy on which this fourth *Sullivan* rule rests, the Court has not had occasion to determine whether the colloquium element is a matter of constitutional significance in defamation cases other than those which are brought by public officials and governed by the *Sullivan* rules. Ac-

63. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 111, at 783 (5th ed. 1984) [hereinafter PROSSER & KEETON].

64. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256-60 (1964).

65. *Id.* at 273-78, 288-92.

66. *Id.* at 292.

67. The *Sullivan* opinion is not clear about whether the colloquium element is subject to the “convincing clarity” test the Court had earlier applied to the “actual malice” element. The Court did, however, perform its own independent review of the evidence used to support the reference to the plaintiff, and held that “the evidence was constitutionally insufficient to support a finding that the statements referred to” the plaintiff. *Id.* Thus, the fourth *Sullivan* rule has been brought within the scope of the third *Sullivan* rule concerning independent appellate review.

cordingly, the Court has never held, but it may nevertheless be true, that *any* public person plaintiff suing for defamation, public figure as well as public official, must satisfy as a constitutional requirement the obligation of establishing that the defamatory communication was "of and concerning" the plaintiff.⁶⁸

B. The *Gertz* Rules

Along with the *Sullivan* rules for public official and public figure plaintiff defamation actions, the Court has developed a distinct set of rules for those cases to which the *Sullivan* rules do not apply. These rules place additional or alternative constitutional restrictions on what states are allowed to do in structuring a law of defamation. Because these rules were first announced by the Court in *Gertz v. Robert Welch, Inc.*,⁶⁹ they are conveniently referred to as the *Gertz* rules.

During the first ten years in which the Supreme Court issued decisions imposing constitutional restrictions on the common law of defamation, the principal focus was on the scope of application of the *Sullivan* rules outlined in the previous sections.⁷⁰ While the answers to those questions continued to require further refinement,⁷¹ the Court took the opportunity presented by the *Gertz* case to determine that the public person status of the defamation plaintiff was the primary trigger for the constitutional protection that had grown up around the *Sullivan* case.⁷² *Gertz* is thus a critically important case

68. The uncertainty about the scope of application of this fourth *Sullivan* rule is increased when one considers that even private plaintiffs, who are not subject to the *Sullivan* rules regarding "actual malice," could have to prove that the defamatory communications referred to them. Should the second and third *Sullivan* rules be determined to have application to constitutional elements other than the fault-as-to-falsity that must be established by public official and public figure plaintiffs as a prerequisite to liability, then this constitutional colloquium element would be a likely candidate for a similarly expanded application. If that were the case, the Court might hold that any defamation plaintiff who is required by the constitution to prove some level of fault-as-to-falsity is also constitutionally required to prove that the defamatory statements were "of and concerning" the plaintiff.

69. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

70. See *supra* notes 21-68 and accompanying text.

71. Even after *Gertz* was decided, the Court returned to the troublesome issue of what is sufficient to confer "public figure" status, in such cases as *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

72. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 342-46 (1974). The public status of the plaintiff is referred to as the *primary* trigger for application of the *Sullivan* rules because of the uncertainty about the scope of the *Greenmoss Builders* suggestion that the content standard—"matter of public concern"—is also a necessary but not sufficient requirement for application of constitutional protections, at least at the level of what are described below as the second and third of the *Gertz* rules. See *supra* notes 33-37 and accompanying text, and *infra* notes 88-115 and accompanying text.

for its *negative* proposition that the *Sullivan* rules do not apply to private plaintiffs.⁷³ This section of the Article surveys the *positive* contribution of the *Gertz* case—those constitutional rules that apply to a case not governed by the *Sullivan* rules. The most significant feature of these rules is that they achieved an extension of constitutional restrictions on the tort law of defamation into cases that are outside the scope of the *Sullivan* rules. The three *Gertz* rules provide that: (1) strict liability is not permitted in at least some defamation cases, (2) presumed damages may not be recovered unless the plaintiff proves that the defendant published the defamatory communication with *New York Times* actual malice, and (3) punitive damages may not be recovered unless the plaintiff proves that the defendant published the defamatory communication with *New York Times* actual malice. A fourth idea derived from the *Gertz* opinion, which will be referred to as a “pseudo-rule” of *Gertz*, is that liability for expressions of opinion is prohibited.

GERTZ RULE NUMBER ONE: *The Strict Liability Prohibition*

The central focus of the constitutional protection given to those who publish defamatory matter concerning public persons is directed to the fault that the defendant displayed about the falsity of the communication.⁷⁴ So too is fault-as-to-falsity a constitutionally mandated element of the defamation action brought by the private plaintiff who is subject to the *Gertz* rules. Rejecting the strict liability that had been a part of the common law of defamation for many centuries,⁷⁵ the Court in *Gertz* held that the freedom of the states to “define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual” was subject to the significant constraint expressed in the Court’s qualifying language, “so long as they do not impose liability without fault.”⁷⁶ The impact of the first *Gertz* rule is that states are free to set the level of fault-as-to-falsity that they wish to demand of private plaintiffs. However, no state may set the standard below the constitutional minimum of negligence with regard to the truth or falsity of the defamatory communication, a standard that might be referred to as “negligent disregard.”

The scope of application of the first *Gertz* rule has been the subject of a difference of opinion within the states and the lower federal courts addressing the issue,⁷⁷ and the most recent Supreme Court de-

73. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

74. See *supra* notes 21-26 and accompanying text.

75. See, e.g., L. ELDREDGE, *THE LAW OF DEFAMATION* 14-25 (1978).

76. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

77. The basic difference of opinion about the scope of application of the first *Gertz* rule concerned whether the rule was limited to those defamation actions that

cisions have done little to cure the ambiguity of the language used in the original opinion.⁷⁸ One of the possible limitations on the first *Gertz* rule relates not to fault-as-to-falsity but, rather, to a different kind of fault which might be best described as fault-as-to-defamatory-potential. Immediately after announcing the prohibition on strict liability, the Court stated that its "inquiry would involve considerations somewhat different . . . if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential."⁷⁹ Because such a case was not before it, the Court "intimated[d] no view as to its proper resolution."⁸⁰

If a communication that patently displays its defamatory potential is entitled to the protection of the *Gertz* rule prohibiting strict liability, it is difficult to believe that the Court would decide that *less* protection should be given to a communication that does *not* put the defendant on notice of its defamatory potential. In the patent display case, the defendant would be held liable for compounding fault-as-to-falsity with fault-as-to-defamatory-potential. In a case in which the defamatory potential of the communication was latent, allowing the plaintiff to recover without any showing of fault-as-to-falsity would mean that the defendant was liable on the basis of conduct which displayed reasonable care with regard to both of the critical fault elements. Perhaps the best interpretation of the caveat the Court raised in *Gertz* is that in the case in which there is *no* fault-as-to-defamatory-potential, the *Gertz* prohibition on strict liability is constitutionally *insufficient*, and, therefore, the defendant in such a case is entitled to the fuller protection of the *Sullivan* rules.⁸¹

The more troublesome ambiguity about the scope of application of the first *Gertz* rule has arisen as a result of the Court's references to

were brought against media defendants. A number of the courts considering the question held that the *Gertz* rule was *not* limited in this way and that the prohibition against strict liability applied to all defamation cases. See cases cited in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2942 n.1 (1985); McNulty, *The Gertz Fault Standard and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation*, 35 DRAKE L. REV. 51, 80 n.256 (1985).

78. See *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

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

80. *Id.*

81. The result suggested in the text would thus serve to raise the constitutional requirement of fault-as-to-falsity to its highest level in the case in which the publication itself does not put the publisher on notice of its defamatory potential. This would assure that the publisher whose conduct was at fault in only one of the relevant ways would be liable only when that fault was of the highest magnitude. See *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 105 S. Ct. 3513, 3528 (1985).

"publishers and broadcasters" as the defendants in the type of cases to which the prohibition on strict liability applies.⁸² The most literal reading of that language limits the rule to cases in which the defendant is literally a "publisher" or a "broadcaster" in the sense that the defendant is a member of the communication media.⁸³ The adoption of a different interpretation, extending the first *Gertz* rule to all defamation cases other than those in which the first *Sullivan* rule imposes a *higher* standard of liability, would require a court either to ignore the explicit language of the *Gertz* opinion or to treat that language as a case-specific reference to the type of defendant actually before the Court, not as an expression of a limitation on the scope of the rule's application.

Choosing between (1) a universal application of the first *Gertz* rule and thus a complete abolition of strict liability for defamation, and (2) a limited application of the rule to cases brought by private plaintiffs against media defendants, is a task that the Supreme Court may still have to perform. Neither the *Greenmoss Builders* decision which appears to reject the status of the defendant as the criterion for application of constitutional protection of defamatory speech,⁸⁴ nor the *Hepps* decision which appears to reintroduce the media status of the defendant as a decisive factor,⁸⁵ involved a question of the application of the first *Gertz* rule.⁸⁶ Because of this uncertainty about the relevance of media status, the possibility has not been foreclosed that, consistent with the Constitution, strict liability may be imposed on a nonmedia defendant who has published defamatory matter about a private plaintiff.⁸⁷

82. *Gertz v. Robert Welch, Inc.*, 418 U.S. 373, 347 (1974).

83. *See, e.g., Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983); *rev'd*, 105 S. Ct. 2939 (1985).

84. As described *infra* at notes 100-08 and accompanying text, the *Greenmoss Builders* decision substitutes a focus on the content of the defamatory communication for the state court's distinction between media and nonmedia defendants.

85. The media status of the defendant is explicitly used as a factor in the scope of application of the *Hepps* rule concerning the burden of proving the falsity of the defamatory communication. *See infra* notes 134-66 and accompanying text.

86. Because the defendant's conduct could be deemed to be at least negligent, the issue of whether the defendant could be held strictly liable was not before either the state supreme court or the United States Supreme Court in *Greenmoss Builders*. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2941-42 (1985). Neither of the state courts in *Hepps* questioned the requirement that the plaintiff must prove that the defendant was at fault in publishing the defamatory communication. *See Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1560-61 (1986).

87. If the question should be presented squarely to the Supreme Court, the language of the *Greenmoss Builders* plurality opinion contains enough flexibility for the Court to be able to decide that this first rule of *Gertz* does apply to cases in which the other two *Gertz* rules did not apply, i.e., to cases in which the defamatory

*GERTZ RULE NUMBER TWO: The Restriction
on Presumed Damages*

Initially the Court decided that the level of fault required by the first *Sullivan* rule was not constitutionally mandated in a defamation action brought by a private plaintiff,⁸⁸ but, nevertheless, adopted as its first rule for cases not governed by *Sullivan* a weaker version of the fault-as-to-falsity standard that it had first announced ten years earlier. The major innovation in *Gertz* was a concern for the remedial consequences of a defamation action, when the Court considered what damages could constitutionally be recovered by a plaintiff establishing a defendant's liability on the lower fault showing permitted in a private plaintiff action.

The traditional common law rule of libel had entertained the presumption that defamatory material capable of injuring the reputation of the plaintiff actually did cause that injury.⁸⁹ Accordingly, even without proof of actual harm to reputation, or of any pecuniary loss actually attributable to that reputational harm, a libel plaintiff could recover what the common law referred to as *presumed damages*, more accurately described as damages intended to compensate for harm that the plaintiff had not proved was actually incurred. Finding an insufficient justification for an award of such damages in every defamation case,⁹⁰ the Supreme Court adopted as a second rule in *Gertz* the restriction that presumed damages could only be awarded on a showing

publication is about a matter of no public concern. The Court's balancing analysis in *Greenmoss Builders* focussed on the weight to be accorded to the state interest in providing presumed damages and punitive damages to a private defamation plaintiff; that analysis could very well produce a different result when applied to the separate issue of strict liability. For example, a state may be deemed to have a legitimate interest in fostering the compensatory aim of the defamation action by allowing the recovery of presumed damages. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2946 (1985). The Court could nevertheless hold that the state interest in providing a strict liability claim for relief is either illegitimate or not weighty enough to offset whatever constitutional interest opposes the imposition of strict liability.

Furthermore, when the plurality opinion stated that "speech on matters of purely private concern" is not totally unprotected by the first amendment, *id.* at 2946, the opinion's author might very well have had in mind the strict liability question that was not before it as the issue on which the "less stringent" protections of the first amendment would, nevertheless, call for a restriction on the state law of defamation. *But see id.* at 2953 (White, J., dissenting) ("Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.").

88. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

89. See L. ELDREDGE, *supra* note 75, at 93. This presumption operated in a more limited fashion when the defamatory communication was characterized as slander rather than libel. See *infra* note 98.

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

of fault-as-to-falsity that satisfied the first *Sullivan* rule, i.e., knowledge that the communication was false or reckless disregard of the truth or falsity of the communication.⁹¹

Before considering the recent developments that provide a basis for understanding the scope of this second *Gertz* rule, it is first necessary to consider carefully what the Court actually decided. The constitutional restriction on recovery of presumed damages did not entail two other measures that the Court might have adopted: first, recovery was not limited to compensation for reputational injury, and second, recovery was not limited to what the common law referred to as *special damages*.

The second rule adopted by the Court in *Gertz* permits recovery, on a showing of fault less than *New York Times* actual malice, of monetary damages for all harm to the plaintiff actually proved to have been caused by the defendant's publication of the defamatory communication. This harm is explicitly not limited to reputational injury.⁹² Instead, the Court has recognized that defamatory communications have as much potential for inflicting such personal injuries as emotional distress as they do for injuring the reputation of the plaintiff, and therefore, that plaintiffs deserve to be compensated for these non-reputational harms.⁹³

Although the absence of reputational harm may appear to remove the plaintiff's claim for relief from the realm of defamation, the ab-

91. *Id.* at 349.

92. The recovery does seem, however, to be limited to personal harm rather than to encompass harm to society. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), Justice Rehnquist, writing for a nearly unanimous Court, referred to the interest of a state in protecting its citizens from the effects of defamatory falsehoods introduced into the stream of communications distributed within the state. *Id.* at 776-77. To the extent that the imposition of liability for monetary damages would serve to further that state interest, the current law of defamation simply relies on an award of damages for harm to the plaintiff as the vehicle. Punitive damages, under the more restrictive rule proposed *infra* at notes 294-305 and accompanying text, would be a better means of fulfilling this function.

93. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, *personal humiliation*, and *mental anguish and suffering*") (emphasis added). This aspect of the *Gertz* decision was made even more explicit in the subsequent decision in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). The plaintiff in that case, held by the Supreme Court to be a private person to whom the *Gertz* rule as to fault would apply, had withdrawn her claim for damages to reputation prior to the start of trial. *Id.* at 460. The Court rejected the defendant's argument that the plaintiff was precluded from any recovery, and stated that the action was not transformed "into something other than an action for defamation *as that term is meant in Gertz*" by the failure to assert a claim for reputational harm. *Id.* (emphasis added). A decision "to forgo recovery for injury to her reputation" did not prevent the plaintiff "from obtaining compensation for such other damages that a defamatory falsehood may have caused her." *Id.*

sence of such harm is, in fact, perfectly consistent with both traditional and modern defamation theory.⁹⁴ The plaintiff who is unable to establish actual injury to reputation but who can establish other harm still has a claim for relief that sounds in defamation because of the *capacity* or the *potential* that the communication possesses for causing reputational injury. It is this *capacity for reputational harm* that is at the core of the defamation action⁹⁵ and constitutes the gravamen of the wrongful conduct of the defendant in publishing material that has this capacity. The fact that on the occasion of a particular publication the reputational injury was not suffered or, as is more likely, simply cannot be proved, does not relieve the defendant of the obligation to compensate the plaintiff for the other foreseeable types of harm that the publication actually did cause on that occasion.⁹⁶

The second *Gertz* rule, restricting the recovery of presumed damages, is also distinguishable from the common law rule that requires proof of special damages in certain circumstances. Special damages, in the context of the law of defamation, constitute a narrow category of recovery consisting of pecuniary losses directly attributable to the harm to reputation caused by the defamatory communication.⁹⁷ Typically, the common law required the plaintiff to prove the existence of this kind of harm in a slander case. In order to avoid the requirement of proof of special damages, the plaintiff's slander action had to fall into one of a number of standard categories of defamatory content which carried with it a strong likelihood that reputational harm did actually occur.⁹⁸

The importance of the distinction between the special damages rule of the common law and the second *Gertz* rule lies in the different

94. Recognizing that the assertion in the text is not free from controversy, offered below is a substantive reform that explicitly accomplishes what is asserted here as already a part of defamation law. See *infra* notes 237-62 and accompanying text. The reform that is proposed below is more sweeping than the present assertion since it would serve to bring within the scope of the current constitutional rules *all* the tort actions that attempt to evade those rules by artfully avoiding any claim for reputational injury.

95. See generally L. ELDREDGE, *supra* note 75, at 31-41 (discussing authorities on the "definition of defamatory").

96. But see Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984) (article offers the thesis that "compensating individuals for actual harm to reputation is the only legitimate purpose of defamation law today") (emphasis added). Comments of the author on Professor Anderson's proposal are in LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779 (1984). See also Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 793 (1984).

97. See, e.g., *Terwilliger v. Wands*, 17 N.Y. 54 (1858); L. ELDREDGE, *supra* note 75, at 199-200.

98. See generally L. ELDREDGE, *supra* note 75, at 94-150 (describing categories of "slander *per se*"); RESTATEMENT (SECOND) OF TORTS §§ 570-74 (1977).

answers those rules provide to the question of whether it is necessary for the plaintiff to be able to attribute the nonreputational harm that the plaintiff can actually prove to some reputational harm that was caused by the communication. Let the symbol ">" stand for the phrase "is a legal or proximate cause of." In a case involving the classic kind of special damages, the consequences of the defendant's conduct that must have occurred if the plaintiff was to recover could be displayed as:

Defamatory Publication	>	Reputational Injury	>	Pecuniary Loss
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Once the plaintiff had established each of the elements of this causal chain, the common law would permit a recovery of damages for any actual harm as well as presumed damages.⁹⁹

The kind of recovery that is constitutionally permitted under the second *Gertz* rule can be represented by a simpler causal chain:

Defamatory Publication	>	Actual Nonreputational Injury
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The middle element of the earlier example, reputational injury, is not required, nor is the harm for which recovery is allowed restricted by a preliminary requirement of proof of pecuniary loss.

A simple example will serve to illustrate the significance of this distinction. Assume that Sleazo Enterprises publishes a defamatory statement about Earl under circumstances in which a judicial fact finder would conclude that Sleazo had failed to exercise reasonable care in determining the truth or falsity of the communication. If Earl should lose his job, or even if he should lose the identifiable prospect of a job, because of the damage that the defamatory publication caused to his reputation, Earl would be able to establish the special damages that were sometimes required at common law. But suppose instead that Earl reacts to the publication in a way that demonstrates the occurrence of legitimate emotional distress which causes him to withdraw from normal contacts with society and thus to become less effective in his job. Each of those reactions constitutes actual harm attributable to the publication, with the latter probably even constituting a pecuniary loss, but neither reaction would be attributable to the harm to his reputation. Having failed to establish that additional causal nexus between the actual nonreputational harm and some actual injury to reputation, Earl would not be able to prove special damages. The *Gertz* rule restricting the recovery of presumed damages would keep Earl from recovering damages for any *unproven* harm that he claims to have suffered.¹⁰⁰ However, the *Gertz* rule does allow

99. See PROSSER & KEETON, *supra* note 63, § 122, at 794-95.

100. This assumes, of course, that the plaintiff is unable to prove the more aggravated levels of fault-as-to-falsity that constitute *New York Times* actual malice and that

him to recover for this actual harm on a showing of the existence of the simpler causal nexus between the actual harm and the defendant's publication of a statement capable of causing reputational injury.

The scope of application of the second *Gertz* rule was addressed in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁰¹ one of the Supreme Court's most recent defamation decisions. Affirming a state court judgment that allowed the recovery of presumed damages on a showing that the defendant's conduct consisted of negligence rather than *New York Times* actual malice,¹⁰² the Court held that the second *Gertz* rule did not apply to defamation actions brought by private plaintiffs unless the defamatory statements involved a matter of public concern.¹⁰³ Having introduced a newly critical factor into the con-

would therefore serve as the basis for a recovery of presumed damages under the second *Gertz* rule.

101. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

102. The state court judgment is reported in *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd*, 105 S. Ct. 2939 (1985). The state court judge before whom the case was tried instructed the jury that the defendant, Dun & Bradstreet, as a commercial credit rating agency, was entitled to a qualified privilege that could be lost through malice or bad faith in publishing the report. The term "malice" was given at least four distinct meanings in the instruction, including (a) an intent "to injure the Plaintiff in its business," (b) acting "in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff," (c) making the report about the plaintiff "with reckless disregard of the possible consequences," and (d) making the report "with the knowledge that it was false or with reckless disregard of its truth or falsity." Joint Appendix to Briefs for Petitioner and Respondent at 18-19, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985). The instruction, thus, provided the jury with a basis for deciding that the defendant's common law qualified privilege could have been defeated and the defendant held liable on any one of the stated grounds which ranged from a common law malice in the sense of ill will toward the plaintiff, which was option (a), all the way up to *New York Times* actual malice, which was option (d). Given the instruction that was delivered by the trial judge, a verdict for the plaintiff would necessarily rest on a finding of fault greater than "mere negligence," *id.* at 18, and, thus, the requirement of the first *Gertz* rule would have been satisfied in this case. See *supra* notes 74-87 and accompanying text. A general verdict for the plaintiff would, however, obscure the jury's choice between some form of common law malice (options a-c) and that portion of the instruction that incorporated the *New York Times* actual malice standard (option d). The trial judge's instruction further informed the jury that the communication was libelous *per se* because the report consisted of "words which tend to impute the insolvency of a business," Joint Appendix to Briefs for Petitioner and Respondent at 17, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) and that damage and loss were, therefore, conclusively presumed if the defendant was liable, with no obligation on the plaintiff to prove actual damages. *Id.* at 17, 19.

103. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2948 (1985) ("permitting recovery of presumed . . . damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern").

stitutional law affecting defamation actions,¹⁰⁴ the plurality opinion by Justice Powell provided little guidance for the determination of what is a matter of public concern. Borrowing from a prior decision from a situation other than defamation, the Powell opinion identified content, form, and context¹⁰⁵ as the factors used in deciding whether speech is a matter of public concern, and thus "at the heart of the First Amendment's protection."¹⁰⁶ If instead it is a matter of purely private concern, the speech is "not totally unprotected by the First Amendment," but it is given "protections [that] are less stringent."¹⁰⁷ In applying the three factors, the plurality opinion relied on such matters as (1) the lack of any public issue contained in the credit report publishing the defamatory falsehood about the plaintiff, (2) the fact that interest in the content of the credit report was limited to the defendant and its specific business audience, and (3) the profit motive for the defendant publishing the credit report, making the defendant's form of speech "hardy and unlikely to be deterred by incidental state regulation."¹⁰⁸ Defamatory speech determined in such a fashion to be outside "the heart of the First Amendment's protection" is, therefore, to be denied the protection of the second *Gertz* rule, allowing the plaintiff, about whom such statements are made, to recover presumed damages on a showing of fault-as-to-falsity less than *New York Times* actual malice.

*GERTZ RULE NUMBER THREE: The Restriction
on Punitive Damages*

Along with the restriction on presumed damages, the Supreme Court in *Gertz* also prohibited the recovery of punitive damages on a showing of fault-as-to-falsity not meeting the *New York Times* actual malice standard.¹⁰⁹ Although the Court has since routinely collapsed the second and third *Gertz* rules into a single rule regarding "presumed or punitive damages,"¹¹⁰ this third *Gertz* rule's restriction concerning punitive damages should be maintained separate from the second *Gertz* rule on presumed damages. The two items of damages have different meanings and different rationales, as the Supreme Court at least implicitly recognized in the *Gertz* case.¹¹¹ Presumed damages permit compensation for unproven harm, while punitive

104. See *supra* note 35.

105. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2947 (1985) (citing *Connick v. Myers*, 461 U.S. 138 (1983)).

106. *Id.* at 2945 (quoting *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 766 (1978)).

107. *Id.* at 2946.

108. *Id.* at 2947.

109. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

110. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1563 (1986).

111. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

damages lack any overt compensatory rationale.¹¹² The fact that the Supreme Court has chosen to impose the same constitutional restriction on their recovery should not lead to a routine failure to recognize their different nature and function.

The distinction between the two types of damages, at least from the perspective of the constitutional limitations on their recovery, was eroded by the *Greenmoss Builders* decision. The Court determined that recovery of such damages was constitutionally permitted as long as a private plaintiff had made a showing that the defendant acted negligently with regard to the falsity of a defamatory communication not involving a matter of public concern.¹¹³ Having made at least some effort to justify the state interest in favor of an award of presumed damages in a case that does not involve a matter of public concern,¹¹⁴ the plurality opinion by Justice Powell simply tacked on the punitive damages category as a remedy that was similarly available on a showing of less than the *New York Times* actual malice standard.¹¹⁵

*THE GERTZ PSEUDO-RULE: The Prohibition of Liability for
Expression of Opinion*

Liability for defamation at common law has traditionally been limited to false statements of fact.¹¹⁶ Drawing both on this common law tradition and on the "self-government" rationale expressed in the *Sullivan* opinion,¹¹⁷ the Supreme Court in *Gertz* stated as a matter of the Constitution's "common ground" that "[u]nder the First Amendment there is no such thing as a false idea."¹¹⁸ Even opinions that the Court labels "pernicious" are to be corrected not in a judicial forum but rather through "the competition of other ideas."¹¹⁹

The Supreme Court's dictum concerning this constitutional com-

112. The nature and function of presumed damages and punitive damages are discussed in more detail in the context of suggested reforms in the law governing the award of both types of remedies, *infra* notes 295-97 and accompanying text.

113. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2946 (1985). See *supra* notes 100-08 and accompanying text.

114. The opinion identified an effectiveness rationale for presumed damages, suggesting that a denial of recovery for unproven but, nevertheless, very likely harm would keep the defamation liability judgment from effectively serving a compensatory function. *Id.* at 2946.

115. The state interest justifying presumed damages was not explicitly extended into an explanation of why punitive damages should be allowed. Instead, the opinion moved directly from a cursory statement in support of presumed damages to a conclusion that *both* presumed damages and punitive damages should be allowed. *Id.*

116. See PROSSER & KEETON, *supra* note 63, at 813-15 (discussion of a taxonomy of opinion and how the different categories should be treated).

117. *New York Times Co. v. Sullivan*, 376 U.S. 254, 268-79 (1964).

118. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

119. *Id.* at 339-40.

mon ground has been inflated into a constitutional rule to the effect that the first amendment places an absolute prohibition on liability for expressions of opinion. This rule, built by lower courts on the foundation of the *Gertz* dictum¹²⁰ (and for that reason here referred to as a *Gertz* pseudo-rule), raises some substantial problems in application. Perhaps most troubling is the difficulty in drawing a line between fact and opinion as categories of speech.¹²¹ Even if that distinction should prove relatively easy to make in a particular circumstance,¹²² a further problem is created by the common law exception to the "no liability for opinion" rule which recognized that statements of opinion can appear to be based on facts known to the speaker but not to the audience.¹²³ When those apparent underlying facts are false, the same kind of defamatory communication can be produced by an ostensible expression of opinion as would have been produced by a more straightforward assertion of the unstated facts. The speaker should not be permitted to escape legal accountability for the adverse effects of the communication simply by an artful screening of the falsity of the factual basis for the opinion. If the first amendment is to be declared by the Supreme Court to be a bar to the imposition of liability for expressions of opinion, the question of the continued validity of this common law exception to the nonliability rule needs to be addressed carefully.

Perhaps one best reads the *Gertz* dictum as part of the broader rationale for protecting false statements of fact. Such statements have no constitutional value but are nonetheless protected because of a fear that publishers and judicial fact finders will be unable to discern with any dependable regularity the location of the line between constitu-

120. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 974-75 (D.C. Cir. 1984), and the cases cited by that court at 974 n.6.

121. The *en banc* opinion in *Ollman* stated that in "distinguishing between assertions of fact and expressions of opinion," *id.* at 978, "courts should analyze the totality of the circumstances in which the statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion," *id.* at 979. The four factors to be considered "in assessing whether the average reader would view the statement as fact or, conversely, opinion," *id.*, include: (1) "the common usage or meaning of the allegedly defamatory words themselves," *id.* at 979-80, (2) "the degree to which the statements are verifiable," *id.* at 981, (3) "the context in which the statement occurs," *id.* at 982, and (4) "the broader social context into which the statement fits," *id.* at 983.

122. For the view that the fact-opinion distinction is "irrelevant" and should be avoided, see Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 869-87 (1984). See also *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, C.J., concurring) (asserting the inadequacy of a "rigid doctrinal framework [of an opinion/fact formula] to resolve the sometimes contradictory claims of the libel laws and the freedom of the press").

123. See, e.g., PROSSER & KEETON, *supra* note 63, at 814-15; RESTATEMENT (SECOND) OF TORTS § 566 (1977).

tionally valuable and valueless speech.¹²⁴ A sense of reliance on the "marketplace of ideas" image¹²⁵ could lead the Court to a conclusion that opinions, whether "pernicious" or not, are particularly susceptible to being countered by facts and by other opinions in ways that false statements of fact are not. When expressions of opinion are not functionally different from false statements of fact, as is likely to be the case when a speaker creates the impression of basing the opinion on undisclosed facts which are actually false and defamatory, the rationale of competition in the marketplace would leave room for a limited liability for such expressions of opinion.¹²⁶ This liability would serve to counteract the effects of the "unfair advantage" that this type of communication enjoys in the competition with opinions that are not based on false and defamatory unrevealed facts. Whether such flexibility will be displayed by the Supreme Court or whether the Court will instead explicitly adopt an absolute prohibition on any speech that can be labelled an expression of opinion remains to be seen. In any event, it appears to be desirable for the Court to take an opportunity to address the opinion issue in a context in which there will be a more authoritative statement than the dictum of the *Gertz* opinion provides.

C. The Miscellaneous Procedural Rules

The constitutional rules outlined above have transformed the defamation action from a strict liability tort, in which injury to reputation and damages were often presumed, into an action in which the major constitutional focus is usually on the degree of fault displayed by the defendant when publishing the allegedly defamatory material. Legal rules, even those of a constitutional nature, do not exist in a vacuum. They are meant to be applied in a trial and are designed to resolve the dispute between litigants with an actual grievance. While the constitutional rules of *Sullivan* and *Gertz* are addressed primarily to the substance of the action for defamation, the rules themselves and the underlying policies that led to the adoption of the rules have raised additional questions about the manner in which the defamation lawsuit can be permitted to be litigated.

At the same time that the Supreme Court has been wrestling with the issues regarding the fault and remedy elements of a constitutionally acceptable action for defamation, the Court has also been con-

124. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-41 (1975). See generally Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 705-14 (1978).

125. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1975). See also Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

126. The role of the "marketplace" idea is considered again, *infra* notes 220-22 and accompanying text.

cerned with some of the procedural implications of the substantive rules it has adopted. A number of these implications extend beyond the scope of mere trial strategy and involve constitutionally significant considerations. Accordingly, the Court has recognized certain constitutional rules that govern the litigation process of the defamation action. This subsection of the Article describes the nature and scope of four constitutional procedural rules that have been adopted by the Court in the course of developing a body of substantive constitutional defamation law: (1) the acceptability of a plaintiff's use of the discovery process to obtain information about the defendant's fault-as-to-falsity, (2) the necessity for the plaintiff to prove the falsity of the defamatory statements, (3) the availability of summary judgment for a defendant on the issue of whether the plaintiff has established *New York Times* actual malice by clear and convincing evidence, and (4) the applicability of state long-arm jurisdictional standards to defamation actions without those standards being affected by any special first amendment considerations.

THE HERBERT RULE: The Discovery Process

The most significant prerequisite of liability for defamation is proof of the fault of the defendant in failing to prevent the publication of false material capable of injuring the reputation of another. Both the *Sullivan* rule for public official and public figure plaintiffs¹²⁷ and the *Gertz* rule for private plaintiffs¹²⁸ insist that liability may not be imposed unless the plaintiff proves that the defendant's conduct displayed the relevant degree of fault-as-to-falsity. Fifteen years after the Supreme Court first interjected this fault element into the defamation action as an element of constitutional significance, the Court explicitly adopted, in *Herbert v. Lando*,¹²⁹ the logical corollary to the *New York Times* actual malice rule. The Court specified that a defamation plaintiff was permitted to use the civil litigation system's discovery process to determine whether the defendant's conduct displayed the knowledge of falsity or the reckless disregard of truth or falsity that the *Sullivan* case puts at the heart of a defamation claim asserted by a public official or a public figure plaintiff.

The *Herbert* rule follows logically from earlier decisions that recognized that the constitutional rules provide, at most, a qualified privilege to publish defamatory falsehoods about a plaintiff. If some level of fault-as-to-falsity is the criterion on which the defendant's constitutional protection can be lost, the only manner in which the existence of the criterion can be determined is through an investigation of the

127. See *supra* notes 21-43 and accompanying text.

128. See *supra* notes 74-87 and accompanying text.

129. *Herbert v. Lando*, 441 U.S. 153, 169-75 (1979).

process the defendant used to form a belief regarding the truth or falsity of the communication. Because the pre-litigation discovery process is intended to be a means of preventing surprise and developing relevant evidence to be used at trial,¹³⁰ a plaintiff's pretrial inquiry into the defendant's fault-as-to-falsity is obviously a proper matter for discovery. The inescapable conclusion about discovery concerning the issue of a defamation defendant's fault-as-to-falsity is that anything short of the rule announced in *Herbert* would have transformed a *de jure* qualified privilege into a *de facto* absolute privilege.

The logical necessity of the *Herbert* rule does not, by itself, provide a sufficient policy justification for the rule. One could argue that the greatest intrusion into the reporting and editorial process seems to occur in those cases that are at the heart of the *New York Times v. Sullivan* concern, i.e., published commentary about vitally important national issues involving allegations of government misconduct.¹³¹ These are, after all, the situations that are likely to evoke the kind of commitment of resources by defamation defendants who are news organizations with a high interest in protecting the confidentiality of their editorial processes. In these cases, the public official plaintiff is given the opportunity to use the pretrial discovery process to develop proof "that the defendant in fact entertained serious doubts as to the truth of his publication."¹³² The result might be viewed as a much less desirable scrutiny into media decisionmaking than would have been possible under a defamation action that removed the emphasis from the subjective fault-as-to-falsity displayed by the defendant.¹³³ More attention needs to be given to the wisdom of the discovery potential opened up by the *Herbert* rule and to the correction of possible abuses that such discovery can produce. The point that needs to be understood clearly in this review of the current state of the constitutional defamation rules is that any adverse consequences attributable to the

130. See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE 227-30 (3d ed. 1985).

131. *Herbert* was a case in which a public figure plaintiff sued a media defendant about a defamatory communication that involved a matter of public concern. The case, thus, falls squarely within the category of defamation actions in which the Court has recognized the most extensive constitutional protection of the defamatory speech. See *infra* notes 163-66 and accompanying text. It would be unlikely that the Court would decide that the discovery opportunities upheld by the *Herbert* rule were unavailable in a case in which less protection applied, for example, a private plaintiff case, or a case involving a defamatory communication that was not a matter of public concern.

132. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (describing the conduct that constitutes the reckless disregard of truth or falsity required by the first *Sullivan* rule).

133. Under the common law of defamation prior to the *Sullivan* case, inquiry into the fault of the defendant would usually have been relevant only if the defendant was relying on one of the qualified privileges that could be defeated by showing that the defendant published a defamatory communication knowing that it was false. See L. ELDREDGE, *supra* note 75, at 526-32.

Herbert rule are, in fact, simply the logical outgrowth of the *Sullivan* and *Gertz* rules—rules that attempted to protect defamation defendants by placing the issue of fault-as-to-falsity at the center of virtually every significant defamation case. Thus, the *Herbert* rule is itself in large measure a false target, and reform efforts are probably better directed at the *Sullivan* and *Gertz* rules themselves.

THE HEPPS RULE: The Burden of Proving Falsity

One of the most recent of the constitutional rules, adopted by the Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*,¹³⁴ addressed a procedural matter that had been left unresolved, or at least less than completely clear, through the previous two decades of the constitutionalization of the law of defamation. The precise issue is deceptively simple: which of the parties to a defamation action bears the burden of proof with regard to the truth or falsity of the defamatory publication. Is the plaintiff obliged to prove that the defamatory communication was false in order to establish liability, or, as was the case under the pre-*Sullivan* law of defamation,¹³⁵ is the defendant obliged to prove the truth of the defamatory publication in order to escape liability? The Supreme Court answered that question in the *Hepps* case in a way that seems to establish that a great many defamation plaintiffs must now prove, as a constitutionally-required element of their *prima facie* cases, that the defamatory publication was false.¹³⁶

The scope of the *Hepps* rule is not easy to discern. At least one significant application of the rule had been a plausible inference from the Court's decision in *Sullivan*. Thus, one could have argued that in those cases that were subject to the first *Sullivan* rule, requiring a public official or a public figure plaintiff to prove *New York Times* actual malice, the plaintiff also carried a burden to prove the falsity of the defamatory material.¹³⁷ Assume for purposes of this discussion

134. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986).

135. See generally L. ELDREDGE, *supra* note 75, at 323-38.

136. *Philadelphia Newspaper, Inc. v. Hepps*, 106 S. Ct. 1558, 1563 (1986) ("the common law's rule on falsity—that the defendant must bear the burden of proving truth—must . . . fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages").

137. The *Sullivan* opinion discussed the inadequacy of a state law of defamation that allows the defendant to escape liability if the defendant meets the burden of proving that the defamatory statements were true. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). The Court tied this rejection of the treatment of truth as a defense into its concern about the "self-censorship" that potential defendants would exercise, leading to the avoidance of publishing some true statements as to the truth of which the speaker is unwilling to bear the risk of nonpersuasion. *Id.* The *Sullivan* opinion is, nevertheless, subject to a reading under which it is clear that liability for true defamatory statements would be constitutionally impermissible, but under which it would also be possible that once a plaintiff has established that the defendant's conduct displayed reckless

that the only room for doubt about the applicability of a requirement that the plaintiff must prove falsity exists in connection with those cases to which the *Sullivan* rule does not apply.¹³⁸ It is still necessary to determine whether the *Hepps* rule is a blanket requirement that applies to all defamation cases or whether the rule applies to some narrower subset of non-*Sullivan* cases. It is with regard to this determination that the *Hepps* decision itself is particularly unhelpful.

Coming less than a year after the *Greenmoss Builders* decision,¹³⁹ the Court's decision in *Hepps* should have taken note of an apparent shift in the terms of analysis of the private plaintiff defamation action. The previous year's decision had apparently moved the "matter of public concern" criterion to the heart of constitutional protection, at least in private plaintiff defamation actions,¹⁴⁰ if not, indeed, in defamation actions brought by public persons as well.¹⁴¹ The focus on the media or nonmedia status of the defendant¹⁴² appeared to have been moved to the periphery, if not rendered completely irrelevant to the level of constitutional protection. However, in the *Hepps* decision, written by one of the three Justices comprising the *Greenmoss Builders* plurality,¹⁴³ the Court limited its ruling on the proof of falsity requirement to defamation cases in which a plaintiff sues a media defendant.¹⁴⁴ Because Justices Brennan and Blackmun, both of

disregard of the truth or falsity of the statements, the defendant would then either bear a burden of *production* of evidence of truth, or bear a burden of *persuasion* as to the truth of the statements.

138. This does seem to be the assumption under which Justice O'Connor operated in writing the decision for the Court in *Hepps*. See *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1563 (1986) ("a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation"). In his dissenting opinion, Justice Stevens disputes the contention that the Court had previously decided that question even as to public figure plaintiffs. See *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1570 n.10 (1986) (Stevens, J., dissenting).
139. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).
140. *Id.* at 2948 (Burger, C.J., concurring). See *supra* notes 102-10 and accompanying text.
141. The basis for this suggestion is the statement in Justice Powell's opinion that "every . . . case in which this Court has found constitutional limits to state defamation laws . . . involved expression on a matter of undoubted public concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2944 (1985) (emphasis added). The possibility, thus, exists that if the Court is presented with a public figure or public official case that does not involve expression on a matter of public concern, the Court would refuse to place a constitutional limit on the state defamation law. See *supra* notes 33-37 and accompanying text.
142. See *supra* notes 82-87 and accompanying text.
143. Justice O'Connor, who authored the opinion for the Court in *Hepps*, joined with Justices Rehnquist and Powell to form the plurality in *Greenmoss Builders*.
144. "[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Philadelphia Newspaper, Inc. v. Hepps*, 106 S. Ct. 1558, 1564 (1986) (emphasis ad-

whom dissented in *Greenmoss Builders* but concurred in *Hepps*, rejected any limitation on the scope of the proof of falsity rule to media defendants,¹⁴⁵ one is left with the following complicated and confusing line-up on the potentially critical question of the continued relevance of the defendant's media or nonmedia status in private plaintiff cases. Two of the Justices (Brennan and Blackmun) take the position that media status is not relevant either in *Greenmoss Builders*¹⁴⁶ or in *Hepps*.¹⁴⁷ Two of the Justices explicitly¹⁴⁸ (Stevens) or implicitly¹⁴⁹ (Rehnquist) took the position that media status was irrelevant in *Greenmoss Builders* and did not indicate the relevance of that factor in their *Hepps* dissent. Two of the Justices (Burger and White) concurred in the judgment in *Greenmoss Builders*,¹⁵⁰ and dissented in *Hepps*¹⁵¹ with no statement about media status. In his *Greenmoss Builders* opinion, Justice White did, however, express his agreement with Justice Brennan's position on the issue.¹⁵² The remaining three Justices have the most puzzling record on the issue. Justices Powell and O'Connor implicitly rejected the relevance of nonmedia status in *Greenmoss Builders*,¹⁵³ but reserved the question of the relevance of such status in *Hepps*.¹⁵⁴ Justice Marshall joined O'Connor and Powell in *Hepps*,¹⁵⁵ but had also joined Brennan's dissent in *Greenmoss Builders*¹⁵⁶ which explicitly declared the irrelevance of the media sta-

ded). The Court also noted that it was not necessary to "consider what standards would apply if the plaintiff sues a nonmedia defendant." *Id.* at 1565 n.4.

145. *Id.* at 1565-66 (Brennan, J., concurring) (adhering to the view expressed in *Greenmoss Builders* that the media/nonmedia status distinction is not supported by the first amendment).
146. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2957 (1985). Justices Brennan and Blackmun joined in the dissent.
147. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1565-66 (1986). Justices Brennan and Blackmun joined in a concurring opinion.
148. Justice Stevens joined the dissenting opinion written by Justice Brennan. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2957 (1985).
149. Justice Rehnquist joined the plurality opinion written by Justice Powell, in which the state supreme court's reliance on the nonmedia status of the defendant was rejected in favor of a test based on the "public concern" nature of the communication. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).
150. *Id.* at 2948 (Burger, J., concurring in judgment) (White, J., concurring in judgment).
151. Chief Justice Burger and Justice White joined the dissenting opinion written by Justice Stevens. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1566 (1986).
152. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2953 (1985).
153. *Id.* at 2942 (affirming the state court judgment on grounds other than the media/nonmedia status distinction upon which the state supreme court had relied). Justice O'Connor joined the plurality opinion written by Justice Powell.
154. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1565 n.4 (1986). Justice Powell joined the opinion for the Court written by Justice O'Connor.
155. *Id.* at 1559 (joining the opinion written by Justice O'Connor).
156. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2954 (1985).

tus factor. One tabulation of these positions might support the conclusion that the entire Court, or at least a majority of the Court, believes that media status is not relevant to the scope of the *Gertz* rules regarding presumed damages and punitive damages¹⁵⁷ and that a different majority believes that media status is not relevant to the scope of the *Hepps* rule on proof of falsity.¹⁵⁸ A different tabulation might, however, lead to the conclusion that although a majority of the Court has expressly identified the media status factor as irrelevant to the applicability of the second and third *Gertz* rules,¹⁵⁹ a majority would continue to reserve the option of employing that factor in the resolution of other questions about the scope of constitutional restrictions on defamation law.¹⁶⁰

A final note of uncertainty about the scope of the *Hepps* rule is sounded by the Court's reservation of the question whether the rule would apply in a case in which the plaintiff was unable to hold the defendant liable for damages.¹⁶¹ The suggestion that less constitutional protection is afforded to those who are exposed to liability other than monetary damages would seem to be unwarranted as a matter of sound policy.¹⁶² Nevertheless, despite its unpersuasiveness as a way of distinguishing among different types of defamation actions, perhaps this expression of doubt concerning the scope of constitutional protection from nonmonetary liability can be used to clear up some of the media/nonmedia confusion generated in the Court's opinions or, at least, to provide a greater understanding of the source of the confusion. One can draw from the cases to date the conclusion that the

157. The clearest majority that expressly stated the irrelevance of this factor in *Greenmoss Builders* would consist of Justices Brennan, Blackmun, Marshall, Stevens, and White. Justices Powell and O'Connor could be added to this majority as a result of the inferences to be drawn from their rejection of the grounds for the state court judgment.

158. The majority would consist of Justices Brennan and Blackmun, as a result of their express statements, and Justices Stevens, Rehnquist, White, and Chief Justice Burger, as a result of the implications of the dissenting opinion written by Justice Stevens.

159. See *supra* note 157.

160. Only Justice Marshall can be reliably associated with this split approach to the relevance of the distinction to the two different issues in *Greenmoss Builders* and *Hepps*. The majority hypothesized in the text could consist of the three members of the Court who explicitly stated their reservations in *Hepps* (Justices Powell, O'Connor and Marshall), as well as the four who joined the dissent written by Justice Stevens (Chief Justice Burger and Justices Stevens, Rehnquist and White). The resignation of Chief Justice Burger and his replacement by Justice Scalia introduce another wild card that must be considered when playing the future line-up prediction game.

161. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1565 n.4 (1986) ("We also have no occasion to consider . . . what standards would apply . . . if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages.")

162. See *infra* notes 263-69 and accompanying text.

greatest constitutional concern is being displayed for (1) media defendants, (2) held liable for damages, (3) for publishing matters of public concern,¹⁶³ and that a case presenting only one¹⁶⁴ or two¹⁶⁵ of these three factors calls for less constitutional intrusion into the state choice about how to structure the common law remedy. One of the drawbacks of a case-by-case development of the constitutional framework for defamation is the difficulty of discerning the relationship among such multiple variables when particular combinations have not yet been before the Court.¹⁶⁶

THE LIBERTY LOBBY RULE: The Availability of Summary Judgment for the Defendant

The ability to avoid the expense and risk involved in a trial on the merits of a defamation claim is a highly prized part of the constitutional protection package sought by defamation defendants since the *Sullivan* decision.¹⁶⁷ Doubts about the existence of constitutional reasons for granting summary judgment in defamation cases were created by a reference in the opinion of the Supreme Court in *Hutchinson v. Proxmire*.¹⁶⁸ Reversing a summary judgment for the defendants in that case, the Court noted that it was "constrained to express some doubt about the so-called 'rule'" favoring summary judgment¹⁶⁹ in cases to which the first *Sullivan* rule applied. Interpreting the first *Sullivan* rule as calling into question a defendant's "state of mind," the Court stated that such an issue "does not readily lend itself to summary disposition."¹⁷⁰ Because the lower courts had erred in the initial determination that the first *Sullivan* rule actually applied to the case,¹⁷¹ the Supreme Court was not faced with the question of "the propriety of dealing with such complex issues by summary

163. This category would include both the paradigm public official plaintiff case of *Sullivan* and the private plaintiff case such as *Gertz*.

164. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (apparent nonmedia defendant held liable for damages for publication of matter that was not of public concern).

165. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (action for damages against nonmedia defendants who published defamatory communication about a matter of public concern).

166. Thus, we are left with such provocative footnotes suggesting different treatment for a case presenting a different combination of variables as the one in *Hepps*, 106 S. Ct. 1558, 1565 n.4 (1986), see *supra* note 144, or the one in *Hutchinson*, 443 U.S. 111, 133 n.16 (1979), see *supra* notes 39-43 and accompanying text.

167. See, e.g., Abrams, *Summary Judgment in Libel Actions*, in *LIBEL LITIGATION 1986*, *supra* note 2, at 291; Kovner, *Motion for Summary Judgment*, in *NEW YORK TIMES V. SULLIVAN: THE NEXT TWENTY YEARS* 303 (R. Winfield ed. 1984).

168. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

169. *Id.*

170. *Id.*

171. *Id.* at 134-36.

judgment."¹⁷²

Any pall on the use of summary judgment cast by the *Hutchinson* footnote was at least partially lifted by the latest of the Supreme Court decisions on defamation, *Anderson v. Liberty Lobby, Inc.*¹⁷³ Ostensibly viewing the case as one calling for a fairly routine decision regarding procedural matters, rather than as a case that called for some special treatment because of its first amendment overtones,¹⁷⁴ the Court held that in ruling on a motion for summary judgment on the issue of "actual malice," a court must evaluate the plaintiff's evidence on that issue according to the clear and convincing evidence standard identified earlier as the second *Sullivan* rule.¹⁷⁵ The reservations that had earlier been expressed in the *Hutchinson* footnote about the propriety of granting summary judgment on a matter that involves a determination of the state of mind of the party moving for judgment¹⁷⁶ were cavalierly dismissed as "simply an acknowledgement of [a] general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.'"¹⁷⁷

The *Liberty Lobby* rule has a certain superficial logic to it. After all, one might argue, if the constitutionally required rules demand both a heightened standard of fault¹⁷⁸ and a heightened standard of proof,¹⁷⁹ then one can expect it to be unlikely that public official and public figure defamation plaintiffs would be able to overcome the obstacles to recovery. When the evidence fails to reveal a basis for concluding that a plaintiff has surmounted the constitutional barriers, the defendant and the legal system, as a whole, benefit from an early disposition of the case in a manner that relieves some of the expense and risk attached to litigation. The only possible complaint that a plaintiff might have, according to a somewhat more extreme version of this view, would be the elimination of the claim before the plaintiff has been able to achieve whatever nefarious "anti-media" goal that constituted the real reason for bringing the action. The protection of defamation defendants that is provided by the *Liberty Lobby* rule would

172. *Id.* at 120 n.9.

173. 106 S. Ct. 2505 (1986).

174. *See id.* at 2515 n.1 (Brennan, J., dissenting) ("The Court's holding today is not, of course, confined in its application to First Amendment cases. . . . Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is 'heightened,' i.e., those in which a plaintiff must prove his case by more than a mere preponderance of the evidence.").

175. *See supra* notes 44-49 and accompanying text.

176. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). *See supra* notes 168-72 and accompanying text.

177. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514 n.7 (1986).

178. *See supra* notes 22-43 and accompanying text.

179. *See supra* notes 44-49 and accompanying text.

thus fit squarely into the rationale underlying the *Sullivan* decision and its various progeny.

This fairly plausible account of the *Liberty Lobby* rule should not detract attention away from some serious concerns that ought to be raised by the decision. A rule giving some sort of sanction to a widespread use of summary judgment in defamation cases¹⁸⁰ may, in fact, be symptomatic of the larger problems created by the *Sullivan* decision as extended by later cases. One of the most significant of those problems is the difficulty lawyers and judges seem to have in understanding and explaining what are, after all, fairly simple legal concepts.¹⁸¹ The confusion over the meaning of "actual malice" and "clear and convincing evidence," for example, can be avoided, or at least kept out of the public view, if defamation cases are disposed of prior to any consideration by a jury. Rather than, or in addition to, seeing the *Liberty Lobby* rule as an expression of hostility or distrust directed at the jury in first amendment or defamation cases, the rule might instead be seen as a covert expression of despair at the ability of the legal system to translate the series of constitutional protections developed in *Sullivan* and its progeny into a workable body of rules. Viewed in this way, the problem might be seen to lie not so much in the operation of the system as it does in the content of the rules that the system is called upon to apply.¹⁸²

*THE KEETON/JONES RULES: Personal Jurisdiction
Over the Defendant*

Among the most technical procedural rules that can affect the course of ordinary litigation are the considerations that go into the assertion of jurisdiction over a defendant. The multistate operations and distribution of a good deal of contemporary publishing serve to place many defamation actions within the potential scope of the due process limitations developed over the last forty years regarding the

180. Surely, it is realistic to expect that the *Liberty Lobby* decision will be read as having special relevance to defamation claims rather than as a wholesale encouragement of summary judgment in all federal district court litigation.

181. See *supra* note 102.

182. This interpretation of the *Liberty Lobby* rule could be found to be in accord with the views expressed in Justice White's separate opinion in *Greenmoss Builders* suggesting that the Supreme Court had made an initial misstep in the *Sullivan* case. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2949-54 (1985). The congruence between those views and this critique of the *Liberty Lobby* case would have been easier to maintain if Justice White had not been the author of the *Liberty Lobby* opinion for the Court! The longer one studies the Supreme Court's tortured series of decisions on defamation, the more one is reminded of Casey Stengel's question, "Can't *anybody* play this here game?" R. CREAMER, *STENGEL: HIS LIFE AND TIMES* 299 (1984).

assertion of personal jurisdiction over nonresident defendants.¹⁸³ In two cases decided the same day in 1984,¹⁸⁴ the Supreme Court addressed some of the more troublesome jurisdictional issues that can arise in a defamation case. The Court concluded that the procedural concepts developed for use in normal litigation provided sufficient protection for defamation defendants, without a need for any special constitutional limitations other than the substantive rules already derived from the first amendment for such actions.

In *Keeton v. Hustler Magazine, Inc.*,¹⁸⁵ the lower federal courts dismissed an action, filed by a New York plaintiff in New Hampshire, on the basis of a lack of jurisdiction over the Ohio corporation defendant.¹⁸⁶ Reversing that judgment, the Supreme Court held that as long as sufficient contacts between the defendant and the forum state would support jurisdiction under the Due Process Clause, the plaintiff would be permitted to take advantage of the forum state's extended limitations period and maintain her defamation action in New Hampshire.¹⁸⁷ The factor that makes the decision so important is not so much the plaintiff's ability to sue in New Hampshire, a state with which both the plaintiff and the defendant apparently had very minimal contacts,¹⁸⁸ but rather the ability to assert a claim for all the harm that the defamatory publication had caused the plaintiff, both within and outside the forum state.¹⁸⁹ Stating that the application of such a "single publication" rule¹⁹⁰ was a matter of substantive law not before the Court on the jurisdictional appeal,¹⁹¹ the Court failed to pass on the constitutionality of such an extensive potential liability.¹⁹²

Calder v. Jones,¹⁹³ the other defamation jurisdiction case, involved a more straightforward application of standard "minimum contacts" analysis to a defamation action brought against Florida defendants in

183. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See generally J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 123-47 (1985).

184. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984).

185. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

186. *Id.* at 772.

187. *Id.* at 773-74.

188. The defendant corporation sold 10,000 to 15,000 copies of its magazine in New Hampshire each month. The plaintiff worked for a magazine that was also circulated in New Hampshire. *Id.* at 772.

189. *Id.* at 776-80.

190. See generally L. ELDREDGE, *supra* note 75, at 209-13; RESTATEMENT (SECOND) OF TORTS § 577A (1977) ("As to any single publication, . . . all damages suffered in all jurisdictions can be recovered in the one action").

191. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.9 (1984).

192. On remand, a federal jury awarded the plaintiff a verdict of two million dollars. See *Falwell Bests Flynt in Court Cases*, *The Washington Post*, Aug. 18, 1986, at C2, col. 3.

193. *Calder v. Jones*, 465 U.S. 783 (1984).

California by a California plaintiff.¹⁹⁴ Relying on findings that the defamatory publication had its largest circulation in California¹⁹⁵ and that the defendants had knowingly caused injury to California residents,¹⁹⁶ the Court refused to complicate the jurisdictional analysis any further by interjecting at the jurisdictional stage the first amendment concerns that play such an important role in the substantive law of defamation actions.¹⁹⁷

II. TWO SUBSTANTIVE REFORM PROPOSALS

The constitutional rules outlined above are not sufficiently comprehensive to be able to resolve all of the major issues that can affect the outcome of defamation litigation. Much of the contemporary law of defamation must still be fashioned by state courts and legislatures. The dual thesis of this portion of the Article is first, that rather than constantly relying on modification and extension of the constitutional framework of defamation law, attention should be given to the reform of the state tort law of defamation within the existing constitutional parameters outlined above. Second, tort reform along these lines can go far toward accommodating the diverse and potentially conflicting interests of defamation plaintiffs, defendants, and the public.

The reforms described in the remainder of this Article are constrained by the constitutional rules previously set forth. Such an approach to reform has both positive and negative implications. A disadvantage is that this approach accepts as a given some very questionable constitutional developments of the last two decades. One could easily conclude that greater attention ought to be given to challenging and changing the very constitutional rules that are taken as the background against which to offer the tort reform proposals. While basically sympathetic to that view, this Article's approach insists on recognizing that a call for reform of the constitutional rules regarding defamation is *not* what is being offered here. As a justification for this (temporary) "hands-off" approach to what are admittedly eminently criticizable constitutional rules, this Article would simply offer the suggestion that the reforms described below will be able to

194. Because the action was brought in the plaintiff's state of domicile, the problem that existed in the *Keeton* case, that the plaintiff would be asserting a claim for damages for harm that had occurred primarily somewhere other than the forum state, was not presented in *Jones*.

195. *Calder v. Jones*, 465 U.S. 783, 785 (1984).

196. *Id.* at 789-91.

197. *Id.* at 790 ("We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry. . . . Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits.").

be put into effect without any need to persuade a majority of the Supreme Court of the necessity either to undo what it has done or to do more than it has already done. These reform proposals, nonconstitutional in nature, can be implemented at once and free from constitutional considerations.¹⁹⁸

This section of the Article describes two significant and much needed reforms of the substantive law of defamation. The first proposal calls for an absolute privilege for defamatory communications concerning government, a position much more protective of speech and the press than is currently afforded by the constitutional law of defamation. The second proposal involves a restructuring of the *prima facie* defamation case in order to raise the emotional harm element to an equal footing with the reputational harm component that has traditionally been at the core of the defamation action. The adoption of this latter proposal has the distinct advantage of bringing within the scope of the currently recognized constitutional protections all of the various ostensibly non-defamation actions that might be asserted in an attempt to evade the constitutional rules that have been developed for the law of defamation. At the same time it acknowledges the occurrence of what has arguably been a major shift in the underlying social rationale for the defamation action.

A. An Immunity for Speech About Government

Under the current constitutional law of defamation, one who makes a defamatory criticism of government can be subject to liability if a public official plaintiff is able to establish that the defamatory statement was false,¹⁹⁹ was "of and concerning" the plaintiff,²⁰⁰ and was made with knowledge of falsity or reckless disregard of the truth

198. The critical views expressed by Justice White in his *Greenmoss Builders* concurring opinion point toward legislative action as the source of a remedy for some of the mistakes he perceives as having been made over the period in which the Supreme Court has been imposing constitutional restrictions on the law of defamation. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2953 (1985). Even his thoughts about reform seem, however, to depend on a relaxation or a reversal of some of the stands taken by the Court in *Sullivan* and *Gertz*. The reform proposals introduced here require no change in the constitutional rules previously described. Starting with the assumption that those rules are at least temporarily rather firmly in place, it is believed that the adoption of these reform proposals will complement the constitutional framework and provide a more comprehensive and more equitable structure for the law of defamation.

199. See *supra* notes 134-66 and accompanying text (discussion of the *Hepps* rule requiring the plaintiff to prove the falsity of the defamatory communication).

200. See *supra* notes 63-68 and accompanying text (discussion of the fourth *Sullivan* rule making the colloquim element a matter of constitutional concern in a defamation action brought by a public official for criticism of official conduct).

or falsity.²⁰¹ The rationale for this set of constitutional requirements is built on two related premises expressed or implied at various places in the body of Supreme Court decisions on the subject: first, false statements of fact have no constitutional value,²⁰² and second, the line separating true statements from false statements is extremely difficult to locate.²⁰³ The Supreme Court was dissatisfied with a common law of defamation that allowed the defendant to be held liable in a case in which the judicial fact finder determined nothing more than that the defamatory statement was on the falsehood side of the line.²⁰⁴ Therefore, the Court adopted a set of fault-as-to-falsity and burden of proof rules that shifted the focus of judicial inquiry away from locating the truth/falsity dividing line to discerning the defendant's state of mind regarding the truthfulness of the statement published.²⁰⁵

Implicit in the rules developed in *Sullivan* and the subsequent decisions is the assumption that the risk of error in making the determinations relevant to the new constitutional rules is lower than the risk of error in making the true/false determination under the common law rules.²⁰⁶ Operating from this premise, the Supreme Court has been able to persuade itself that the *Sullivan* rules create a "breathing space" for the publication of statements that, in fact, are on the true side of the dividing line, but which might not have been published if the defendant was threatened with liability should a fact finder err and decide that the statements were false.²⁰⁷

Correlative with this view of the world under the *Sullivan* rules should be a recognition that statements that are, in fact, false may *not* be deterred and that the "breathing space" extends over to an area on

201. See *supra* notes 21-43 and accompanying text (discussion of the first *Sullivan* rule requiring the public official plaintiff to prove *New York Times* actual malice).

202. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

203. *Id.* at 340-41; *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964). See also Schauer, *supra* note 124.

204. *New York Times Co. v. Sullivan*, 376 U.S. 254, 263-64 (1964).

205. See *supra* notes 21-43 and accompanying text (discussion of first *Sullivan* rule) and notes 74-87 and accompanying text (discussion of first *Gertz* rule). The location of the dividing line between truth and falsity is still a matter of some importance, given the requirement that the plaintiff must prove that the defamatory statements are false. See *supra* notes 134-66 and accompanying text (discussion of the *Hepps* rule).

206. The risks might be thought to be lower in two different senses. First, the *rate* of false positive errors, i.e., erroneous decision in favor of liability, might be lower for fault determinations than for true/false decisions. Second, the *consequences* of an erroneous decision on a fault issue might be considered less serious than an erroneous decision regarding truth or falsity. Both notions of risk reflect a view about the institutional competence of the judicial decisionmaking process that considers fault determinations as more properly within the mainstream of judicial forum activity than would be a judicial decision embodying what is, in effect, a governmental decree on truth or falsity.

207. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-83 (1964).

the false side of the line as well. The conclusion that must then follow, however reluctantly it might be expressed, is that publishers of these false statements, which have no constitutional value, may nevertheless successfully claim constitutional protection as long as their state of mind is subsequently determined to have constituted a lower level of fault-as-to-falsity than that required by the first *Sullivan* rule. This result, one is then told, is the price one pays in order to receive the benefit of a freer attitude toward publication of the now-undeterred true statements.²⁰⁸

A less satisfactory way of analyzing the problem and devising a solution would be hard to imagine. The *Sullivan* world view rests on premises of the most dubious validity and with the most dangerous implications. Against what standard, for example, is one to determine truth or falsity in any but the simplest instances of simple factual reportage? Why do falsehoods necessarily have no constitutional value?²⁰⁹ What business does the government have making official decisions through its judicial agencies about the truth or falsity of allegations about itself or its officials?²¹⁰ The time has come to cast aside reliance on this *Sullivan* world view as the sole or the major rationale on which to build a law of defamation, recognizing that it has failed to do the job it was meant to do²¹¹ and turn instead to a tort law solution that establishes an absolute immunity from civil litigation for speech about government.

One of the most disturbing aspects of the state court judgment entered for the plaintiff in the *Sullivan* case was the similarity between the tort action for defamation and the seditious libel prosecution for derogatory or critical speech about government.²¹² When government

208. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974).

209. One could argue that even deliberate falsehoods have a very real constitutional value by provoking critical inquiry and rebuttal of the allegations. Rather than seeing falsehoods as inevitably harmful pollutants in "the stream of information about public officials and public affairs," *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2951 (1985) (White, J., concurring in judgment), one might instead view falsehoods as catalyst agents triggering desirable or useful reactions from those who contribute to or draw from that "information stream."

210. The view that the soundest philosophical foundation for a concept of protection of freedom of speech can be built on an awareness of the risks attendant upon governmental decisionmaking in this area is expressed in F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

211. More extensive study needs to be given to the questions of (1) whether there has been a recent increase in the number of defamation actions brought by governmental officials of even the lower levels of government against their critics, and (2) whether the risk of liability and the expense of defending such claims acts as a deterrent to private citizen participation in, and criticism of, local governmental process. Should either or both of those inquiries produce a positive answer, one must recognize that the existing constitutional rules were intended to avoid precisely these problems.

212. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-78 (1964).

has the ability to employ its criminal system against its critics, speech critical of that government is undoubtedly deterred. Two aspects of the seditious libel analogy need to be acknowledged, however, as casting some doubt on the effectiveness of the constitutional rules the Supreme Court adopted to reduce the risk that defamation actions may deter speech critical of government. First, there is essentially nothing about *true* speech critical of government that makes it less harmful to the government or its officials than false speech.²¹³ Indeed, as was sometimes said about defamation, the truer the criticism, the *more* harmful the effect.²¹⁴ A defamation rule that relies on the analogy to rejecting seditious libel as a legitimate governmental response to critical speech would thus have no logical basis for discriminating between true and false statements contained in the critical commentary. The set of constitutional fault-as-to-falsity rules established by the Supreme Court would not appear to be very well attuned to the underlying problem of the risks of government taking legal action against critical speech. The fault-as-to-falsity rules seem to depend instead on a related but nonetheless distinct rationale, the desirability of a well-informed, i.e., accurately informed, citizenry.²¹⁵

The second observation that can be drawn from a consideration of the seditious libel analogy that underlies much of the concern for the implications of liability in the *Sullivan* context would point to the deeply conservative nature of the response embodied in the Supreme Court's rejection of seditious libel or its civil analogue as a legitimate tool of government. Perhaps the fragility of a government is too easily forgotten in this country since we have managed to escape the turbulence and unrest that causes governments to fall with predictable regularity in much of the rest of the world. It is certainly beyond the scope of this Article to attempt to offer explanations for the remarkable stability of the American governmental process. Nonetheless, it is at least possible that one of the techniques that is successfully used to diffuse the revolutionary spirit in this country is not only the removal of limits on what government can do *for* those who are most likely to be critical²¹⁶ but, also, the effect of the imposition of limits on what

213. The only President of the United States to resign his office was faced with a widespread publication of and public fascination with what were, after all, true statements about his conduct.

214. See L. ELDREDGE, *supra* note 75, § 64, at 324-25.

215. See, e.g., Justice White's *Greenmoss Builders* comments about pollution of the stream of information, *supra* note 209, and Justice Rehnquist's comments about the state interest in "discourag[ing] the deception of its citizens." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).

216. Perhaps the best example of this phenomenon is the institution of the "New Deal" relief measures at the beginning of the Franklin Roosevelt administration and the eventual breakdown of the Supreme Court's opposition to many of those measures.

government can do to its critics. Viewed from this perspective, *Sullivan* emerges as a decision that was at least as much protective of the fundamental stability of the existing government structures as it was of the free speech interests of the defamation defendants in that case. But viewed from this perspective, it is also true that the particular fault-as-to-falsity solution adopted by the Supreme Court is less than compelling as a way of implementing the protective rationale.²¹⁷

These observations lead to the conclusion that the *Sullivan* rules placing fault-as-to-falsity at the core of the defamation case are an inadequate response to the risk that government might use a defamation action as a means of deterring speech that is critical of government. In the first place, the critic of government who becomes a defamation defendant is still, under the *Sullivan* rules, subject to the risk of liability if the plaintiff is able to prove by clear and convincing evidence that the defendant knew the defamatory communication was false or published the communication with reckless disregard of its truth or falsity.²¹⁸ Furthermore, should the public official plaintiff be able to make that showing, the defendant is liable not only for damages that compensate for the actual harm that the plaintiff can prove but for presumed and punitive damages as well.²¹⁹ Even if the Court were to believe that the actual risk of liability under these circumstances was minimal, the risk is nevertheless real. The speech-deterrent effect of that risk is compounded by the potentially substantial cost that the defendant faces in order to resist the plaintiff's claim.²²⁰ Finally, the tension that is likely to be produced by an official stifling of criticism would not be relieved by the current constitutional rules that subject the critic to the risks of liability and the costs of defense that have just been described. Indeed, the frustration of being caught in a web of

217. It is difficult to conceive of the possibility that the difference between negligent and reckless publication of the false statements in the New York Times advertisement that was the basis of the *Sullivan* case is at all significant when deciding whether, and if so, to what extent, the advertisement made a legitimate contribution to the public awareness of the struggle for racial justice in the South.

218. See *supra* notes 21-49 and accompanying text (discussion of first and second *Sullivan* rules).

219. See *supra* notes 88-115 and accompanying text (discussion of second and third *Gertz* rules). The combination of these two sets of rules provides that every public official plaintiff who establishes the basis for the liability of a defendant automatically establishes the constitutional acceptability of the potentially unlimited recovery possible under the guise of presumed damages and punitive damages. Any limitation of damages would therefore have to be a matter of state tort law.

220. Although the *Liberty Lobby* decision may make summary judgment easier to obtain in public plaintiff defamation cases, see *supra* notes 167-82 and accompanying text, the extent of the savings for defendants and for potential defendants remains to be seen. This skepticism is the result of a somewhat jaundiced view of the legal profession that suspects that if an advantage is to be gained from delay and from running up expenses, some means of doing so will be found regardless of the substantive and procedural reforms that are enacted.

constitutional litigation rules that can be portrayed as arbitrary or ineffective may inject a further element of cynicism into the attitude displayed by the critic of government who becomes a defamation defendant.

The alternative rationale of the fault-as-to-falsity rules, the idea that the citizenry is not well-served by false statements of fact introduced into the public discourse,²²¹ not only fails to rescue the *Sullivan* rules from the objections outlined above but also introduces some adverse consequences of its own. Rather than having the legitimacy and value of statements about government officials tested in the "marketplace of ideas," the *Sullivan* rules transfer the test to a judicial forum. If all that were at issue in a case of this sort was the fault of the defendant in failing to prevent the publication of the challenged statements, an observer might conclude that, however flawed it is, the judicial forum is still the best mechanism we have for determining fault. But the *Sullivan* rules, particularly as supplemented with the *Hepps* rule,²²² place into the judicial arena a contest between truth and falsity, possibly resulting in the branding of a statement of fact as false. Perhaps even more unsatisfactory would be another likely conclusion to the effect that the person about whom the statement was made has been unable to sustain the burden of proving that the statement was false. If one is to take seriously the image of the marketplace of ideas, one is entitled to be extremely skeptical about the claims of the judiciary to be competent to act as some sort of Consumer Product Safety Commission for that marketplace. This skepticism is particularly well placed when it is a branch of that same government that is putting itself into a definitive position to label as false a statement about government.

The risk of government using defamation actions to suppress criticism may not be the most pressing social issue in today's society, but one ought to remember that less than a quarter-century ago this risk threatened to impede the progress of the most important social movement in this country's history.²²³ Whether offered as a means of avoiding the abuses of seditious libel or as a filter for constitutionally valueless falsehoods, the current panoply of constitutional rules offers insufficient protection for the critic of government.

The only truly adequate protection for criticism of government is an absolute privilege to say whatever one wishes about government without being called to account in any governmental forum. This privilege would consist of an absolute immunity from tort liability of any sort, whether asserted in an action for damages or in an action that seeks some other kind of non-monetary relief, and whether asserted

221. See *supra* note 215.

222. See *supra* notes 134-66 and accompanying text.

223. See R. SMOLLA, *supra* note 2, at 26-52.

in the context of a defamation claim or under the guise of some other tort such as invasion of privacy or the infliction of emotional distress.

This solution is simple, but it is not cost-free. The proposed immunity does provide a shield from behind which blatant falsehoods can be injected into the body politic. Nevertheless, even while recognizing that possibility, it can be argued that the immunity is still a valuable reform of the current state of affairs, and that its benefits do outweigh its costs. Political discourse may become more robust²²⁴ if the participants know in advance that the test of truth or falsity is really going to be administered in the public forum where individual citizens will make up their own minds, rather than being posed in some judicial setting, where an official winner and loser will be declared. In addition, perhaps there is reason to suspect that the body politic will become more resistant to falsehoods if the responsibility for reaching, and for acting on, judgments about the truth or falsity of claims rests squarely upon individual citizens.²²⁵

What seems to be fairly clear from the survey of the current constitutional framework is that the proposed immunity faces a strong uphill fight if it is offered as a matter that is compelled by the constitutional guaranties of speech and press freedom.²²⁶ As stated earlier, however, there is no need to resort to the constitution to implement this reform, nor is there any need to persuade the Supreme Court to modify any of the existing constitutional rules developed over the last twenty-two years. The foundation upon which this reform can be built currently exists in the tort law of most of the states and is easily adopted as a matter of state law.

Virtually every state currently recognizes a set of common law privileges that attach to certain governmental offices.²²⁷ These common law privileges differ from the constitutional privileges derived from the *Sullivan* case in the way that they focus on the status of the defendant. While the *Sullivan* rules are most clearly attached to the public official status of the *plaintiff*, the common law privilege that is relevant to this reform proposal is triggered by the public official status of the *defendant*. Some of these privileges have even been held to

224. Such discourse is identified by Justice Brennan in *Sullivan* as the subject of "a profound national commitment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

225. To extend Justice White's "pollutants" image, *supra* note 211, one might suspect that those who are situated downstream in the flow of information could develop filtration devices and would acquire an immunity to the harmful effects of the false statements.

226. Justice Black made the unsuccessful argument for such a constitutional absolute privilege in the *Sullivan* case. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 293-97 (1964) (Black, J., concurring).

227. See generally L. ELDREDGE, *supra* note 75, §§ 72-75, at 340-416; RESTATEMENT (SECOND) OF TORTS §§ 585-91 (1977).

be matters of federal constitutional significance.²²⁸ According to these privileges, a federal official acting within the scope of his official duties is absolutely privileged to make statements without being subjected to suit for defamation arising out of those statements. The more important the office and the more critical the immunity is to the unfettered functioning of the officeholder, the more likely it is that the privilege will be absolute rather than conditional or qualified.²²⁹

The reform that this Article proposes can be accomplished by the simple process of introducing *a principle of symmetry of application* into these privileges attached to governmental offices.²³⁰ Such a principle would operate in the following way. Suppose that a private citizen named Doreen makes a statement about a county commissioner named Phil, accusing Phil of a conflict of interest in a sale of a certain parcel of his property that was subsequently the subject of county commission action making the property less valuable than it was prior to the sale. As a result of his inside knowledge, Phil was able to sell at a higher price than if the buyer had known of the upcoming commission action. Under the current constitutional regime, Phil can sue Doreen for defamation, and can hold Doreen liable for what may be unlimited presumed damages and punitive damages if the commissioner is able to (1) prove that the statement is false, and (2) prove by clear and convincing evidence that Doreen knew that the statement was false or acted with reckless disregard as to the truth or falsity of the statement.²³¹ However, suppose that Phil had made a comparable statement of wrongdoing about Doreen. In this case, if Doreen should sue Phil for defamation, the situation would be quite different because Phil would be entitled to a privilege by virtue of the governmental office he holds.²³² This current state of affairs is thus *asymmetrical*.

When we introduce the principle of symmetry of application to this hypothetical, our initial focus is directed to the status of the plaintiff. In this way, the initial step seems to be reminiscent of the current constitutional regime.²³³ However, our inquiry concerning the plaintiff's status is not the constitutional question about public or private status, it is instead a counterfactual inquiry into the existence and degree of any privilege that the plaintiff would have enjoyed *had the plaintiff made comparable statements about the defendant*. Once it is determined that the plaintiff-as-defendant would have enjoyed a privi-

228. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (1959).

229. *Id.*

230. Justice Black's alternative method of deciding the *Sullivan* case, *supra* note 226, could be viewed as a constitutional version of the principle proposed in this Article.

231. See *supra* notes 218-19 and accompanying text.

232. See RESTATEMENT (SECOND) OF TORTS § 590 (1977).

233. See *supra* notes 28-31 and accompanying text.

lege, the principle of symmetry of application simply calls for an extension of that same privilege to the defendant.

The principle offered here is both easy to apply and fair in the results it produces. Further consideration of the Phil versus Doreen hypothetical will illustrate the virtues of this principle. Let us suppose that the state tort law in the jurisdiction in which the hypothetical arises currently recognizes an absolute privilege for officials in Phil's position. Upon a determination of that fact, the defamation lawsuit against Doreen is dismissed with prejudice. This dismissal occurs at the earliest possible stage and occurs as a result of a decision of a question of law, the existence of the privilege that attaches to the commissioner's office.²³⁴ The defendant faces none of the potentially overwhelming (and thus potentially speech-detering) costs associated with a defense of a defamation action under the current constitutional regime, nor does she run a risk that the plaintiff will successfully overcome the burdens of production and persuasion that are placed in his path by the present constitutional rules. Also significant is the fact that an innate sense of fairness is invoked by a disposition of the case in a manner and under a rule that treats the two parties as equal players in the game of political discourse: because the commissioner's statements about a citizen are privileged, the citizen's statements about the commissioner are likewise privileged.

The benefits attached to this reform proposal are further illustrated by a consideration of what happens when we introduce into political discourse the kind of statements that constitute what might be deemed noise rather than valuable contributions. Suppose that the statement about the county commissioner concerns not some abuse of office but rather that he engages in bestiality. This statement would appear to have absolutely nothing to do with the conduct of the office of county commissioner. The principle of symmetry in application provides an efficient, fair, and common-sense solution in this case as well. If Phil had made such a statement about the defendant, then the statement would have been outside the privilege that the commissioner enjoys as a result of his office.²³⁵ In such a case, then, our ini-

234. RESTATEMENT (SECOND) OF TORTS § 619(1) (1977) ("The court determines whether the occasion upon which the defendant published the defamatory matter gives rise to a privilege.").

235. The privilege typically arises upon the occasion of the government official performing some task related to the official position. See generally *id.* at §§ 585-91. Accordingly, a defamatory statement on a purely private matter outside of the performance of an official function would be beyond the scope of the absolute privilege granted to the public official defendant.

Note, also, that this reform proposal is not accurately characterized as providing that no public official may ever sue for defamation. The determinative inquiry is much more carefully tailored to the specific ends being promoted than would be the case if such a wide-sweeping prohibition were put into place.

tial inquiry into the status of the plaintiff results in a determination that the plaintiff-as-defendant would not have enjoyed a privilege on the occasion of this type of remark, and thus no such privilege would be extended to the defendant *as a result of the principle of symmetry of application*. That is not to say that the defendant is necessarily going to be held liable for the statement. Any number of common law or constitutional privileges may come into play.²³⁶ But what is significant about the proposal offered is that the principle of symmetry in application filters out of the judicial system all defamation actions for those statements that involve criticism of government, while leaving for routine litigation under the usual rules those cases that, although they might involve persons who are public officials, do not involve criticism of the government. In this way, speech about government is much more fully protected than it is under the current constitutional rules alone.

B. An Expansion of the Emotional Harm Component of the Defamation Claim

The historical function of a defamation action has been to vindicate and compensate for injury to the plaintiff's reputation.²³⁷ By raising the cost of conduct that poses a threat to reputation, the defamation action also deters the publication of harmful communications and forces the publisher to internalize the costs of the harm inflicted on the victim.²³⁸ It has probably always been realized that the emotional distress produced by the defamatory communication was an element of recovery to which a successful plaintiff was entitled.²³⁹ However, much of the contemporary literature on defamation either assumes or argues that the emotional harm component occupies a subsidiary or

236. See, e.g., *id.* at §§ 593-98 (occasions on which a conditional privilege may arise as a result of the interest served by making the defamatory communication). Both the common law conditional privileges and the constitutional privilege embodied in the fault-as-to-falsity rules of *Sullivan* and *Gertz* differ from the absolute privilege attached to government officials. The protection derived from the conditional privileges can be lost if the plaintiff satisfies the burden of proof on the relevant issue, such as an abuse of privilege, see *id.* at §§ 599-605A, or the requisite level of fault-as-to-falsity. Absolute privileges, on the other hand, protect the privilege holder "not only from civil liability but also from the danger of even an unsuccessful civil action." *Id.* at ch. 25, tit. B, Introductory Note. A defendant who does not qualify for an absolute privilege on a particular occasion may still attempt to claim a conditional privilege. If the plaintiff fails to overcome that privilege, or if the plaintiff fails to prove the constitutionally required fault-as-to-falsity that applies to the action, the defendant will have escaped liability but will not have escaped litigation in the way that is possible if an absolute privilege had been applied to the defamation claim.

237. L. ELDREDGE, *supra* note 75, § 3, at 4-6.

238. *Id.* at 6.

239. *Id.* § 4, at 10-13.

tangential place in the concept of defamation.²⁴⁰ It is that assumption which will be challenged in this section of the Article, on the basis that the assumption (1) is insufficiently protective of the victims of defamation, and (2) allows too great an opportunity for plaintiffs to characterize the claims they are asserting in ways that could place the defendants outside of the constitutional protections that have grown up around the defamation action. To overcome both of these shortcomings, a preferable alternative concept of defamation is one that recognizes that emotional harm should be placed on an equal footing with reputational injury.

The first perspective from which to demonstrate the inadequacy of an exclusive or primary focus on reputational injury is that of the person about whom defamatory statements are published. Assume that on a particular morning, you open your newspaper and read an article that includes statements about you that are false and that portray you in a way that is likely to make other people think less well of you. Whatever one might think about the historical roots of the defamation action and the advantages of adhering to ancient concepts of actionable wrongs, one ought nevertheless to recognize that the predominant initial response to that article is going to be *personal* reaction by the person about whom the statements are made, rather than a *reputation-injuring* reaction by other people who read the article or are subsequently told about its contents. The personal reaction may run a gamut of emotions, including anger, embarrassment, and helplessness. The intensity of the reaction may also vary, from minor annoyance to disabling withdrawal from contact with others.²⁴¹

A number of observations need to be made about this personal reaction. First, as the scenario illustrates, the plaintiff's reaction is not dependent on actual reputational injury. The personal reaction can occur before the victim is aware of what sort of response by others the defamatory publication has produced. Even if people whom the victim knows have a generally supportive response to the victim after they become aware of the publication, the initial personal reaction of the victim can be quite intense and may be aggravated by a concern about future responses to the publication.²⁴² It may be reasonable to assume

240. See Anderson, *supra* note 96.

241. The author of this Article has previously described a classification of injuries attributable to defamatory publications in terms of harms that are (1) personal, (2) relational, (3) direct, and (4) indirect. See LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOKLYN L. REV. 281, 311-16 (1985). See also W. TAVOULAREAS, *supra* note 50 (describing the personal reaction of the plaintiff in a recent defamation action).

242. One of the major elements of harm claimed by the plaintiff in the *Firestone* case was emotional distress about the possibility that the plaintiff's son would be adversely affected by the defamatory publication when he grew older. *Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1976).

that there is a fairly close link between the intensity of some personal reaction and the reputational harm that is likely to be actually inflicted. However, a careful consideration of the distinct nature of the two types of harm reveals that there is no logical necessity that reputational harm occur in order for there to be a legitimate claim for the kind of personal reaction that can be characterized as emotional distress.²⁴³

Second, the plaintiff's reaction is causally linked to conduct by the defendant that may be deemed wrongful. This is a crucial factor in light of the similarity between the reactions that the victim of a defamatory communication might suffer and the emotional reactions that a person might have to a wide variety of experiences that have absolutely nothing to do with defamation. Dismissing claims of emotional distress with an argument that the victim has to "learn to be tougher" or that "we can't provide a legal remedy every time a person gets upset" is much less compelling once the causal link between the harm and wrongful conduct by the defendant is recognized. What distinguishes the emotional distress caused by the defendant's wrongful conduct from other similar types of emotional distress is precisely the factor of the defendant's having exploited the plaintiff for some gain, pecuniary or otherwise, to the defendant. At the very least, a society is entitled to insist that such exploitation be very persuasively justified or that the gain be offset or neutralized by the transfer of compensatory damages from the defendant to the victim.²⁴⁴

Third, the plaintiff's reaction is one that the legal system has always treated as a matter suitable for compensation²⁴⁵ and more recently has even treated as the basis of an independent claim for relief.²⁴⁶ The elements of an emotional distress claim may resemble some or all of the types of harm for which compensatory damages have traditionally been awarded in the case of intentional torts.²⁴⁷ In

243. *Firestone* establishes the very important proposition that there is no constitutional necessity for such an underlying claim of reputational harm. *Id.* at 460-61. See *supra* note 93.

244. The fact of this exploitation could be used to establish that the plaintiff has suffered an injury as a result of the defendant's creation of a non-reciprocal risk of harm to the plaintiff and should, therefore, be required to justify the conduct that produced the harm. See Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

245. Recovery for such emotional distress was traditionally treated as parasitic to the establishment of some other basis of liability. See PROSSER & KEETON, *supra* note 63, at 54-56.

246. RESTATEMENT (SECOND) OF TORTS § 46 (1965) (Outrageous Conduct Causing Severe Emotional Distress).

247. In intentional tort claims, such as assault, false imprisonment, and the form of battery which consists of offensive rather than harmful contact, the plaintiff is entitled to recover damages despite the lack of physical injury. Although recoveries of this sort may be classified as compensatory damages, the absence of physi-

the last few decades, roughly paralleling the emergence of constitutional restrictions on defamation claims, courts have been recognizing that the infliction of emotional distress, without a finding of a more traditional tort category on which to append the emotional distress recovery, is conduct on which liability may be based.²⁴⁸ The publication of statements that have the potential for causing injury to the reputation of the victim is simply another, and highly foreseeable, way in which a defendant can be expected to cause harm of the emotional distress type.²⁴⁹

Viewed from the perspective of the victim of defamatory communications, a focus on reputational injury is unreasonably narrow in its protection of, and compensation for injury to, legitimate personal interests. Recognition of an expanded role for the emotional harm component of the defamation claim would, therefore, appear to have as a likely effect an expansion of the damages for which defamation defendants might be liable. Such an effect is, however, *not* a probable result of the proposed reform. In the first place, once a plaintiff successfully surmounts the obstacles to establishing liability for defamation, the recovery that is allowed under the current set of legal rules almost certainly will include an opportunity for an award of substantial damages for what would be recognized as emotional harm.²⁵⁰ Second, the only cases in which the proposed reform offers relief to someone who would otherwise be barred from any recovery at all would be those instances in which proof of actual reputational injury is a prerequisite to liability for defamation. While it is true that there are such cases,²⁵¹ and thus that the proposed reform would increase the incidence of liability, it is also likely that a substantial percentage of the plaintiffs who would be unable to prove actual injury to reputation would be able to base their claim for relief in different terms that do not require proof of injury of that sort.²⁵² Thus, while the incidence of liability for defamation may undergo some marginal increase as a result of this reform, that increase may not be greater than the current incidence of liability for defamation and those similar tort

cal injury demonstrates that the compensation is actually being made for the non-physical, or emotional, harm caused by the defendant's conduct.

248. See generally PROSSER & KEETON, *supra* note 63, at 54-66, 359-67.

249. The intentional infliction of emotional distress action recognized by the RESTATEMENT, see *supra* note 246, requires the plaintiff to prove that the defendant's conduct could be characterized as "extreme and outrageous" and that the plaintiff's emotional distress be "severe."

250. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

251. A number of jurisdictions have taken the position that such a prerequisite exists as a matter of state law. See Anderson, *supra* note 96, at 758-59.

252. The actions most likely to be used to accomplish this result are the intentional infliction of emotional distress and the invasion of privacy by placing the plaintiff before the public in a false light. The false light privacy action is recognized in RESTATEMENT (SECOND) OF TORTS § 652E (1977).

claims that are now not subject to the full range of liability-limiting rules regarding defamation. The most likely outcome of the adoption of the proposed reform, from the perspective of the victim, is a more forthright recognition of the type of harm that the defendant's publication actually caused. At the same time, the proposed reform is unlikely to produce any significant increase in the amount or the extent of liability that defendants currently face.

Having downplayed the adverse consequences of this reform proposal on the defendants, the proposal may appear to be offering a reform that is only cosmetic or aesthetic in nature. The proposed reform may be criticized, that is, on the ground that it is simply a way of bringing what one *says* about the defamation action into a closer correspondence to what courts actually *do*. It is true that one should not denigrate that aspect of any reform; such an increased congruity between theory and practice is likely to be a healthy phenomenon. Nevertheless, the expansion of the emotional harm component of the defamation claim can be seen as a substantial reform proposal when viewed from the perspective of a legal system that offers a variety of pigeonholes in which to place claims for relief and then attaches significant consequences to the pigeonhole that is selected as appropriate. From this perspective, the reform proposal serves as a curative measure for a very real potential abuse of the current tort system in the area of liability for speech which causes harm.

Publication of false statements about the plaintiff can lead to at least three separate theories of recovery: defamation, an invasion of privacy that consists of placing the plaintiff before the public in a false light, and an intentional or negligent infliction of mental or emotional distress. Each of these separate theories of recovery has at its core some particular interest that is sought to be protected from invasion by the defendant's conduct. As described earlier, the interest in reputation is at the core of the defamation action. For the false light privacy action, the reputational interest gives way to the somewhat more ambiguous interest in autonomy or in not being used by a defendant in a way that represents the plaintiff to the public as something other than what the plaintiff is.²⁵³ The infliction of emotional distress tort is, as its rather unimaginative label suggests, intended to protect the interest in, if not mental or emotional tranquility or stability, at least some undisturbed mental state, an emotional *status quo*.

These three theories of recovery display some differences in the formulation of key elements. For example, publication in the sense of communication to at least one person other than the plaintiff is sufficient to establish a claim for defamation.²⁵⁴ A more widespread com-

253. See *id.* at comment b; PROSSER & KEETON, *supra* note 63, at 864-65.

254. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

munication that could be labelled "publicity" is required for the false light invasion of privacy.²⁵⁵ Furthermore, while a particular level of fault-as-to-falsity is required for recovery in many defamation cases and most false light privacy cases,²⁵⁶ the intentional infliction of emotional distress action has instead an essential element requiring that the defendant's conduct be capable of supporting a characterization as "extreme and outrageous."²⁵⁷

Despite these differences in both their protected interests and their technical elements, a particular occurrence may serve as the basis for a claim under all three theories. The ability to characterize a particular set of facts in terms of multiple legal theories is normally neither unusual nor alarming. A standard physical contact case, for example, may very well be characterized as a battery, an assault, a false imprisonment, or even an intentional infliction of emotional distress. Such multiple characterization of a single set of facts may be considered simply a result of a tort system that developed out of the categorical focus of a common law form-of-action pleading regime. As long as the multiple characterization of the claims for relief that can arise out of a single set of facts does not also produce multiple recoveries for what are essentially the same elements of harm, the phenomenon may be considered more inelegant than troubling.

A mere disapproval of inelegance gives way to a much more serious concern about the elimination of important constitutional protections when the multiple theories of recovery for harmful speech are considered. As the first half of this Article shows, the most significant development in the defamation field has been nearly a quarter-century history of identifying constitutional restrictions on the nature and extent of liability for defamation. The particular risk that multiple characterization of a set of facts presents in the defamation context is that different theories of liability will carry with them either different levels of constitutional protection or possibly no constitutional protection whatsoever. As with any circumstance in which the legal system attaches different consequences to essentially the same conduct, a publisher in this situation may choose to adopt the safest course of conduct and anticipate potential liability under the least protective set of legal rules. To the extent that the "self-censorship" rationale of

255. See *id.* at § 652D, comment a.

256. The latest Supreme Court decision directly to address the question held that a plaintiff suing for false light invasion of privacy was required to prove *New York Times* actual malice if the action was based on "false reports of matters of public interest." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

257. Whether *New York Times* actual malice and "extreme and outrageous conduct" are functional equivalents remains an open question. The two concepts are treated separately in the recent decision in *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986).

Sullivan has validity,²⁵⁸ the greatest threat under that rationale may well be posed by the possibility that characterization of a tort action as something other than a defamation action will leave a speaker subject to liability under a common law structure that is free from constitutional restraints.

Once again, the solution is both simple and capable of being adopted within the realm of tort law. All that is needed to avoid the possible evasion of constitutional protection by an attempt to engage in a clever characterization of what the plaintiff is complaining about is a recognition that the essence of the defamation action is the *production of harm by the wrongful publication of falsehood*. By raising the emotional harm component to a status equal with the reputational injury element, this reform proposal assures that whatever constitutional protections have been or will be developed in the context of defamation will be extended to a claim for relief under any other label or legal theory.

Two concluding points about this reform may lend further support to its adoption. First, the reform suggested here has been accomplished in another troublesome area of tort law. Faced with a plethora of theories of liability for product-related injuries, a number of states have acted to replace the multiple theories with a single "product liability action."²⁵⁹ Indeed, the move from common law and code pleading to modern rule pleading²⁶⁰ can be seen as a similar type of reform on a broader scale. While neither of these examples were prompted by the constitutional considerations in the defamation context, the presence of such considerations should serve to highlight the importance of adopting the reform proposal.

Second, the reform will have the incidental effect of removing the confusion generated by separate tracks of developing constitutional restrictions on different tort actions. At the same time that the Supreme Court was working out the basic distinctions that were to be crucial to the determination of constitutional protection for defamatory speech, a different set of criteria was being applied to the false light invasion of privacy action.²⁶¹ Although one might speculate that the false light action should be analyzed in terms of contemporary constitutional standards developed for defamation rather than in the terms used by the Court fifteen or twenty years ago, it is still true that the latest Supreme Court words on false light privacy present a different constitutional picture than is operative in the defamation context.²⁶² By treating the false light privacy action as simply another

258. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1963).

259. See, e.g., ALA. CODE § 6-5-501(2) (Supp. 1986).

260. FED. R. CIV. P. 2 (there shall be one form of action known as "civil action").

261. See *supra* note 256.

262. The public/private plaintiff distinction in the law of defamation, see *supra* notes

label to attach to the expanded defamation tort, which would be viewed as the production of harm by the wrongful publication of falsehood, the dual or multiple track development that might otherwise create unnecessary confusion is eliminated.

III. TWO REMEDIAL REFORM PROPOSALS

Many of the most adverse consequences of the current blend of the common law and the constitutional rules for defamation arise not so much from the fact of liability being established as from the effect of an actual or potential award of monetary damages in substantial, if not staggering, amounts. A great deal of attention is currently being given to the question of the proper remedies to award in a defamation action,²⁶³ with much of the reform effort being directed at either the drastic reduction or the complete elimination of monetary relief.²⁶⁴ While reform is almost unquestionably needed in the way that the legal system attaches consequences to the fact that a party is found liable for defamation, a more complex response is required than is found in the proposals currently in vogue.

This section of the Article offers specific reform proposals concerning presumed damages and punitive damages, the two elements of monetary relief that pose the greatest threat to a workable accommodation of the competing interests in the law of defamation. These proposals derive in part from the premise that the previously described constitutional limitations on these two elements of damages²⁶⁵ are not only inadequate but may, in fact, be almost pernicious in their effects. For example, because the recovery of presumed damages is so closely

29-31, has not yet been extended to the false light privacy action, nor has a prohibition of strict liability similar to the first *Gertz* rule been incorporated to govern false light privacy actions to which the "actual malice" standard does not apply.

263. See, e.g., R. SMOLLA, *supra* note 2, at 236-55.

264. See, e.g., Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847 (1986); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CALIF. L. REV. 809 (1986); Franklin, *Good Names and Bad Law: A Critique of Libel and a Proposal*, 18 U.S.F. L. REV. 1 (1983); H.R. 2846, 99th Cong., 1st Sess. (1985).

H.R. 2846, introduced by Representative Schumer, establishes a declaratory judgment action for public officials and public figures to obtain a declaration that a media publication or broadcast was false and defamatory. No damages would be available in such an action, and an award of plaintiff's attorney's fees would be prohibited if the defendant was not at least negligent with regard to the false and defamatory character of the communication. If a plaintiff failed to exercise the option of bringing the declaratory judgment action, any media defendant could elect to designate the action as one for declaratory judgment and, thus, preclude both any recovery of monetary damages and any other claim arising out of that communication.

265. See *supra* notes 88-115 and accompanying text (discussion of second and third *Gertz* rules).

linked to proof of *New York Times* actual malice,²⁶⁶ defamation plaintiffs have an apparent incentive to introduce the "actual malice" issue into cases in which a finding for the plaintiff on that issue would not otherwise be a prerequisite to liability. These cases are brought by private plaintiffs based on defamatory communications about matters of public concern.²⁶⁷ As noted earlier, critics of the current body of law often point to the "actual malice" issue as one that is extraordinarily difficult for juries, and perhaps even judges, to grasp.²⁶⁸ If this is true, a requirement that interjects the issue into a case solely for the purpose of determining what types of remedies are appropriate would make it more difficult to present the defamation claim in a posture that lends itself to accurate and reliable decisionmaking in a judicial forum. Furthermore, evidence introduced regarding the aggravated wrongdoing of the defendant in order to establish the constitutional prerequisite for presumed damages may lead a fact finder to be more inclined to raise the level of damages awarded to a plaintiff. For a number of reasons, then, the parties and the judicial system might be better served by keeping proof of "actual malice" out of cases into which the constitutional rules permit or invite, but do not require, its introduction. Nevertheless, in keeping with the intent of this Article to outline a set of reforms that can be put into place within the current constitutional framework,²⁶⁹ the *Gertz* rules on presumed damages and punitive damages will be taken as a given, and the reform proposals offered here will operate in conjunction with those rules in an attempt to provide a better accommodation of the competing interests that are at stake in a defamation action.

This section describes two major reforms of the remedial aspects of the law of defamation. First, the ready availability of presumed damages is curtailed by the introduction of a scheme of fairly simple rules that transfer to the parties, themselves, the responsibility for determining the level of monetary damages exposure that will be attached to a judgment of liability for defamation. Second, the remedy of punitive damages is restricted to a subset of cases that is narrower than the set of fault-as-to-falsity cases in which the Constitution is currently held to permit recovery of such damages.

A. A Series of Options That Can Be Exercised to Reduce Exposure to Monetary Damages

Under the current regime of constitutional rules for defamation,

266. See *infra* notes 270-71.

267. These are cases to which the first *Sullivan* rule does not apply. See *supra* notes 28-37 and accompanying text.

268. See *supra* note 50. See also Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247 (1985); McNulty, *supra* note 77.

269. See *supra* note 198 and accompanying text.

any public official or public figure plaintiff who establishes the liability of the defendant is entitled to recover presumed damages.²⁷⁰ Furthermore, any private plaintiff who can prove the level of fault-as-to-falsity that constitutes *New York Times* actual malice is entitled to recover presumed damages.²⁷¹ Finally, any private plaintiff who can prove that the defamatory communication was not about a matter of public concern can recover presumed damages without the "actual malice" showing.²⁷²

Consideration of this current state of affairs provokes two initial observations, one a matter of speculation about what is happening and the other a matter of judgment about what should be allowed to happen. The speculation is that a high percentage of those people who actually sue for defamation, as opposed to those who have some complaint about their portrayal in the media but do not sue, have a pretty good chance of establishing the constitutional basis for presumed damages.²⁷³ The value judgment with which this Article looks at this state of affairs is that, although presumed damages do have an important role to play in an action for defamation,²⁷⁴ the ease with which presumed damages can currently be recovered creates a possibility that such damages will be awarded too frequently and in amounts that are too large.

There is, however, another value judgment that this Article brings to this examination of the remedial consequences of liability for defamation, one that leads to a rejection of the proposals offered by some commentators that the ability to obtain monetary relief be eliminated.²⁷⁵ This other basic hypothesis is that liability for monetary

270. A public official or a public figure plaintiff must prove *New York Times* actual malice in order to establish the constitutional basis for liability under the first *Sullivan* rule. See *supra* notes 21-43 and accompanying text. Satisfying this constitutional burden automatically serves to carry the plaintiff over the only constitutional barrier which the Supreme Court has placed in front of a plaintiff seeking to recover presumed damages. See *supra* notes 88-108 and accompanying text. The ability to recover presumed damages is, thus, a natural area in which to suggest that reform of the common law tort rules will be a beneficial adjunct to the existing constitutional rules.

271. See *supra* notes 88-108 and accompanying text (discussion of the second *Gertz* rule).

272. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

273. The author suspects that the inability to come up with any evidence that is remotely likely to satisfy the requirements of the first and second *Sullivan* rules for clear and convincing evidence of *New York Times* actual malice would keep a number of people from litigating. Determination of who does *not* sue and why they do not pursue litigation would be difficult to accomplish, for reasons that are obvious.

274. It is on this point that the author disagrees with such prominent critics of the current law of defamation as Professor Anderson, *supra* note 96, and Professor Ashdown, *supra* note 12.

275. See *supra* note 264.

damages for defamation both legitimately compensates for real harm and reasonably deters the kind of conduct that produces such harm. Whether one is pleased with the reality or not, it seems inherently undeniable that the threat of monetary liability is what keeps the defamation action operating as a constraint on the unjustified production of harm. If those who publish defamatory communications were freed from that threat, the only checks on abuse would be internal restraints, professional standards (in the case of the press), and the deterrent effect produced by whatever nonmonetary relief scheme was put into place. Given the almost total failure of the first two of those alternatives to produce a satisfactory level of claims and litigation,²⁷⁶ one should be extremely skeptical about the ability of the third option to serve as an effective means of keeping the harm caused by the publication of falsehood to a socially acceptable level. The premises with which this Article begins a suggested remedial reform thus include the beliefs (1) that money damages drive the tort system to the extent that socially unacceptable conduct is deterred and (2) that liability for such damages should, therefore, not be totally eliminated.

Having made a case for monetary relief, however, one can still react negatively to the prospect of a virtually unrestrained award of presumed damages in those cases in which a plaintiff establishes whichever of the prerequisites to recovering such damages is applicable.²⁷⁷ The proposal that is offered here, which is a modified and extended version of an idea the author has previously sketched out,²⁷⁸ would reduce the financial impact of a judgment of liability for defamation *provided that the parties exercise a series of options to promote as fully as possible an accommodation of the various interests that have come into conflict.*

OPTION NUMBER ONE: *The Attempt to Secure Private Redress*

A fundamental premise of much of today's tort litigation assigns a higher degree of desirability to the private settlement of disputes than to the costly and often protracted resort to the legal system.²⁷⁹ Drawing on that premise, the first option in this reform proposal seeks to channel disputes about the publication of defamatory falsehoods into a

276. The media are unable to agree on national standards of conduct or on a body to develop and enforce such standards. Within some media enterprises, there currently exists a practice of deliberately *not* developing standards, apparently out of some warped notion that the mere existence of such standards makes the enterprise more vulnerable in the event of litigation, given the ease with which it can be proved that the standards were violated.

277. The prerequisites are: (1) proof of *New York Times* actual malice, or (2) proof that the defamatory statements do not involve a matter of public concern. See *supra* notes 88-108 and accompanying text.

278. See LeBel, *supra* note 96, at 788-90; LeBel, *supra* note 241, at 330-31.

279. See AMERICAN BAR ASSOCIATION, *supra* note 6, at 4-209 to -213.

private resolution that is at least minimally satisfactory to the relevant parties. Because the initiative for seeking such a private redress of the grievance more likely than not rests on the person who claims to have been injured by the publication, the first option in this reform proposal lies with the potential plaintiff. As an initial option, then, the plaintiff should be required within a very short time of learning about the communication, first, to *notify* the publisher of the allegedly false and defamatory character of the publication, *and* second, to *request an opportunity to discuss* the matter with someone who has the authority to decide to retract or correct the communication.

No more elaborate requirement than this dual responsibility is placed on the plaintiff at this stage of the dispute because of what are perceived to be serious disadvantages that flow from imposing substantial burdens on the plaintiff at this preliminary, immediate post-publication point. The most likely candidate for an additional requirement to impose on the plaintiff at this stage would have been an obligation to come forward with evidence of the falsity of the published communication. This requirement at this stage would, however, have the undesirable consequence of turning the initial contact into an adversary confrontation over the accuracy of the publication. While such a confrontation will likely develop at some point and play an important role in the settlement process,²⁸⁰ it could easily be considered unfair to the plaintiff to introduce that element of the dispute at a stage in which the option is to be exercised by the plaintiff who was, after all, not responsible for introducing the defamatory publication into the public forum. Requiring the plaintiff to produce evidence of falsity at this stage might also serve to delay the initial contact between the parties beyond a point at which the harm could easily and effectively be reduced or eliminated. Postponing a confrontation over the accuracy of the publication may also put the parties in a better emotional condition to work out some agreement over future steps. Requiring the plaintiff at this initial contact to prove the communication false may trigger both a defensive attitude on the part of the publisher and a hostile attitude on the part of the potential plaintiff, turning this preliminary stage into little more than a name-calling or threat-issuing session.

The key to the design of this initial option is thus the simplicity of the demand upon the plaintiff. Even in this minimal state, the first option can be expected to produce some beneficial effects, especially in the case in which the defamatory communication is published by a media enterprise. First, the complaint about the publication will be registered at a time when some corrective measures may be effective. Such

280. This is true if for no other reason than that the plaintiff will eventually have to sustain a burden of proving the falsity of the defamatory statements. See *supra* notes 134-66 and accompanying text (discussion of the *Hepps* rule).

corrective measures serve not only the interest of the injured party but, also, the public interest in keeping the channels of communication free from defamatory falsehoods. Second, the request to discuss the matter with someone in authority will raise the level of initial contact from the reporter or low-level editor to the supervisory staff of media enterprises. It is at least possible that whatever naturally defensive or rationalizing response one might expect from the author of the defamatory piece could be avoided or reduced if the initial direct discussion between the parties bypasses the author, who might be unwilling to admit that some correction is warranted. Third, the initial contact option should encourage media enterprises to adopt an institutional process for receiving and handling complaints. The haphazard responses that complainants may routinely receive now could be replaced by a procedure in which people with some skill in dealing with other people are put in the position of representing the publisher in dealings with initial complaints about defamatory communications.

The practical consequences of this option may for these reasons be viewed as desirable, but in order to understand how the plaintiff could be encouraged to take the simple steps required to complete this option, it is necessary to decide what legal consequences would follow from the plaintiff's failure to exercise this option. It should be noted that this option is different from what a number of states have imposed as a prerequisite to litigation or to the recovery of certain kinds of damages, which is a request for retraction.²⁸¹ While those demands for retraction may serve some of the same purposes as this uncomplicated notification and request for discussion option, the proposal being offered here would not have the effect of acting as a barrier that must be crossed before an aggrieved party is allowed to go to court. Under the tort reform proposed here, the plaintiff's exercise of this option would not in any way act as a prerequisite to filing or maintaining a defamation action against the defendant. The request for a retraction differs from this initial option in the sense that a retraction demand may in practice be nothing more than a preliminary notice of intent to sue,²⁸² rather than an attempt to open a channel of communication to resolve the dispute. The retraction demand may be served on the defendant a considerable period of time after the publication,²⁸³ rather than as soon as possible after the publication of the defamatory communication.²⁸⁴ The retraction demand may actually entrench the parties more firmly in their adversary positions, rather than act to open

281. See, e.g., ALA. CODE §§ 6-5-184 to -186 (1975).

282. See *id.* at § 6-5-186 (in order to preserve a claim for punitive damages, plaintiff must make a written demand for public retraction five days before the commencement of the action).

283. *Id.*

284. *Id.* at § 6-5-185 (in order to limit plaintiff's claim to actual damages, defendant must publish retraction within ten days of date of publication).

up communication that could lead to some nonlitigation resolution of the dispute. Because the reform proposals being offered here are intended to be adopted as part of the tort law of a state, this first option to notify and request a discussion with the defendant can be put into place either along with a retraction demand requirement or as an alternative to such a requirement. In either situation, the desirable consequences outlined above would more likely be obtained through an adoption of this tort reform proposal than through the standard type of demand for retraction statute that many states currently have in place.

In keeping with the present focus on remedies rather than on substantive rights and responsibilities, the proposed reform provides that the effect of not making this initial contact with the defendant would serve to deprive the plaintiff of an opportunity to recover certain kinds or amounts of damages. If the plaintiff does not contact the defendant with this initial notification and request for discussion, any recovery by the plaintiff in a subsequent tort action would first be *reduced* by any damages for emotional distress suffered more than one week after the date when the plaintiff had an opportunity to exercise the option. This somewhat arbitrary time limit represents enough time for the plaintiff to learn of the publication and to make the initial contact with the publisher.²⁸⁵

This reform proposal would prevent a plaintiff from obtaining a recovery of damages, even for emotional distress that was actually suffered, after the date on which the option should have been exercised. In this respect, then, the reform proposal is different from a simple restriction of recovery to damages for actual harm suffered by the plaintiff. The rationale for this reduction in compensation for emotional distress rests on the idea that the emotional distress element of damages may be the type of harm that is most controllable by the plaintiff. One major component of this element of harm, which is the sense of helplessness at having false statements about oneself put before the public, is likely to be substantially reduced if the plaintiff is able promptly to engage the publisher in a discussion designed to lead to some satisfactory resolution of the dispute. Eliminating recovery

285. The date when the plaintiff had an opportunity to exercise the option will normally be the date of publication. The phrasing suggested in the text retains the flexibility needed to deal with the situation in which the plaintiff, through no fault of his or her own, fails to learn of the publication until some later date. The closest analogy to the proposed language would be a "discovery rule" for interpretation of personal injury statutes of limitation, under which the limitations period typically begins to run when the plaintiff knew or should have known of the critical event, such as injury. *See, e.g.,* Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977). In the defamation case, the option would be triggered when the plaintiff knew or should have known about the defendant's publication of the defamatory falsehood.

for that component of emotional distress still leaves the plaintiff able to recover for the emotional distress actually suffered at the time of learning about the false and defamatory publication.

A second consequence of the plaintiff's failure to exercise the notification and request for discussion option is the *elimination* of a recovery of damages for any injury to reputation that the plaintiff does not prove was actually suffered. This consequence, an elimination of the recovery of damages for presumed rather than proven reputational harm even though such presumed damages may be constitutionally permissible, should take a major share of the windfall element out of the defamation recovery. It will also reduce the uncertainty about the amount of potential liability that defendants face when presented with the prospect of defamation litigation. The elimination of damages for presumed harm to reputation is also a major part of the rationale for the second option, described below, which is an option to be exercised by the defendant. The reason for attaching this elimination of an element of damages as a consequence of the plaintiff's failure to exercise the first option is to encourage the plaintiff to make the early notification that could give the defendant the opportunity to take advantage of the second option. If the plaintiff does fail to exercise the first option, then the major benefit that the defendant obtains from the defendant's exercise of the second option would automatically occur.

To summarize this first option, then, within a week of having an opportunity to learn that the defendant has published a defamatory falsehood about the plaintiff, the plaintiff must (1) notify the defendant of the plaintiff's objection to the published material and (2) request an opportunity to discuss the matter with someone who has the authority to take corrective measures. If the plaintiff fails to exercise this option, then the plaintiff's recovery in any defamation action will be reduced by (1) any damages for emotional distress suffered after the date when the option should have been exercised and (2) any damages for harm to reputation that has not been proved.

*OPTION NUMBER TWO: The Defendant's Attempt
to Repair the Damage*

Assuming that the plaintiff exercises the first option and makes the initial contact with the defendant, the discussion just concluded reveals that the first option places a relatively minimal burden on the plaintiff. It requires an obligation simply to notify the defendant that the plaintiff objects to statements that the plaintiff considers false and defamatory and to request a discussion of the matter with someone who is authorized to take steps to satisfy the complaining party. At this point in the scenario, the dynamics of the settlement process shift the focus to the defendant, the party who has just been notified of an allegation that a publication was considered by the plaintiff to be false

and defamatory. A major goal of the second option proposed here is the creation of an incentive for the defendant to treat the complaint received through the plaintiff's exercise of the first option as a matter to be considered seriously, and to view the dispute as something to be resolved early and inexpensively if it is possible to do so. Accordingly, the second option imposes an obligation on the defendant, first, to *justify* the publication, and second, when it cannot be justified, to *repair* the harm that the publication might have caused.

Justification, as the term is used here, simply means satisfying the complaining party that the defendant had a substantial basis for proceeding with the publication of the allegedly false and defamatory communication. The plaintiff is not required to establish that the publication was false, a burden the plaintiff will bear if the matter proceeds to litigation.²⁸⁶ The justification portion of this second option proceeds from the premise that if the defendant has published something defamatory about the plaintiff, the defendant ought to be required to undertake some effort to satisfy the plaintiff that the communication was true.²⁸⁷

If the justification effort by the defendant reveals that the defendant had a reasonable basis for believing that the defamatory statements about the plaintiff were true, it is unlikely that the plaintiff would be able to establish that the defendant was even negligent with regard to the truth or falsity of the communication. A convincing justification of the defamatory material may, therefore, persuade the potential plaintiff that the chances of proving the constitutionally required level of fault-as-to-falsity in the event of litigation are so slim that the matter might as well be dropped at this preliminary stage. In

286. See *supra* notes 134-66 and accompanying text (discussion of the *Hepps* rule).

287. An idea of what is contemplated by the justification effort being proposed here can be derived from a consideration of a Virginia mitigation of damages statute that provides in pertinent part:

In any civil action against the publisher, owner, editor, reporter or employee of any newspaper, magazine or periodical . . . for libel or defamation, . . . the defendant . . . may introduce in evidence in mitigation of general and punitive damages . . . but not of actual pecuniary damages, *all the circumstances of the publication, including the source of the information, its character as affording reasonable ground of reliance, any prior publication elsewhere of similar purport, the lack of negligence or malice on the part of the defendant, the good faith of the defendant in such publication, or that apology or retraction, if any, was made with reasonable promptness and fairness . . .*

VA. CODE § 8.01-48 (Repl. Vol. 1984) (emphasis added).

The reform proposed in this Article accelerates the production of this kind of evidence from the trial to the time of the defendant's response to the initial complaint registered by the plaintiff, with the idea that a trial might thereby be avoided. A version of this kind of reform proposal has recently been offered by Ronald Dworkin. See Dworkin, *The Press on Trial*, N.Y. Rev. of Books, Feb. 26, 1987 at 27, 36-37.

this way, some defamation claims may be screened out before they have a chance to proceed to litigation.

Should the plaintiff *not* be deterred from litigating, even after the defendant's effort at justification, the court before which the claim is pending should entertain at an early stage the defendant's motion for summary judgment on the constitutional fault-as-to-falsity issue. The recent *Liberty Lobby* decision, apparently favoring summary judgment in defamation cases, depended on a conjunction of the aggravated level of fault and the higher standard of proof required in public person plaintiff cases subject to the first and second *Sullivan* rules.²⁸⁸ As a matter of tort law, states could decide to have their courts give early and careful attention to the evidence offered by way of justification in any case in which the Constitution was held to require some level of fault-as-to-falsity. A ruling in a defendant's favor on this issue would serve to remove the claim from the litigation system at a preliminary stage. A ruling against the defendant would not mean that the defendant was automatically liable, but by indicating the sufficiency of the evidence to proceed to trial on what may be the critical constitutional issue, the preliminary ruling for the plaintiff would be likely to make it easier to achieve a settlement between the parties.

If the defendant's effort at justification fails to demonstrate a legitimate basis for publication of the defamatory communication about the plaintiff, the second part of this option would require the defendant to attempt to repair the harm that has been, or might be, caused by the publication.²⁸⁹ In some circumstances, a simple retraction may be sufficient to repair the actual and potential harm,²⁹⁰ but the repair attempt portion of this option has a different conceptual basis than a retraction requirement. The repair attempt option recognizes that the publication has a capacity to inflict both reputational and emotional

288. See *supra* notes 167-82 and accompanying text (discussion of the *Liberty Lobby* rule).

289. The major thrust of the repair effort would logically be directed at the reputational harm caused by the publication. As the text indicates, the repair effort should contemplate both past and future reputational injury as harm that can be addressed by the defendant.

290. This would be particularly true in the simple cases of misidentification, in which a prompt and prominently displayed clarification should prevent any harm to the reputation of the plaintiff. One would expect potential defendants routinely to issue satisfactory corrections of blatant errors, but for one reason or another, that does not always occur. Indeed, it is sometimes the case that the defendant's conduct after being informed of the clearly erroneous publication aggravates the problem. Inexplicable behavior of this sort occurred in the *Greenmoss Builders* case, in which the credit reporting agency not only refused to identify for the plaintiff those subscribers who had been the recipients of the erroneous report but then continued to issue subsequent reports that were arguably just as damaging to the plaintiff as the initial erroneous report. See Larsen, *For Their Eyes Only*, MANHATTAN, INC., Oct., 1984, at 44.

injury. While a prompt retraction may be a satisfactory way of alleviating both past and future reputational injury, the retraction by itself may do nothing to compensate for the emotional harm inflicted on the plaintiff prior to the publication of the retraction. Just as significant, however, is the fact that the repair attempt option also recognizes that the publication more likely than not has the capacity of providing some benefit to the defendant. In the case of media publications, the defamatory material would have been subject to some prior favorable editorial judgment on its news or entertainment value. The defamatory potential of the material may even have made the material a more attractive item to publish. For purely private communications, it is more plausible to assume that the speaker had *some* notion of obtaining a benefit from the publication than it is to believe that the defendant lacked any motive of deriving a benefit.

Building on these premises about the likely consequences of the publication, the repair option combines a requirement that the defendant be prepared to give up what might be seen as unjust enrichment at the plaintiff's expense in exchange for the protection of a new tort rule that makes the plaintiff forego recovery of damages for two elements of harm that might have been caused by the publication. The defendant's exercise of the option will deprive the plaintiff of the opportunity to recover damages, first, for unproven reputational harm, and second, for emotional harm alleged to have been suffered after the date on which a satisfactory repair effort has been completed.

The elimination of the unjust enrichment element of the publication of defamatory material provides the basis for deciding what the defendant should have to do in order to complete the repair portion of this option. A satisfactory repair would be one in which the defendant devotes to the correction of the defamatory potential created by the publication an amount of resources roughly equivalent to the resources used to publish the defamatory communication. Viewed in conjunction with the first part of this second option,²⁹¹ an expenditure of resources by the defendant in accordance with this option would serve to raise the cost of engaging in the unjustified publication of defamatory material.

If the defendant exercises this second option in a satisfactory manner, the tort reform being proposed here would give the defendant the benefit of precluding any recovery of damages for presumed harm to reputation, as well as any compensatory damages for emotional harm suffered after the time at which the corrective measures are taken. The plaintiff would still be permitted to recover damages, first, for actual injury to reputation that has not been eliminated by the repair

291. See *supra* notes 287-88 and accompanying text (discussion of the justification prong of this second opinion).

effort undertaken by the defendant, and second, for emotional distress suffered from the time of publication until the time of correction. If those two elements of damages are sufficiently large to induce the plaintiff to undergo the ordeal of litigation, this reform proposal will, admittedly, not keep the defendant from being subject to a defamation action. However, it is plausible that the repair effort will satisfy a substantial share of potential plaintiffs, who will thus not pursue any further legal remedy. As for the plaintiffs who are not thereby deterred from litigation, they are permitted to recover damages only for the harm proved to be caused by the defendant's wrongful conduct and not subsequently alleviated.

The primary advantage of this option to the defendant is the elimination of unpredictable and virtually unlimited liability associated with both presumed damages and estimates of future emotional distress. Failure to exercise the option in a satisfactory manner would not only leave the defendant subject to liability for presumed damages,²⁹² but also may aggravate the emotional harm for which the plaintiff could assert a claim for relief.²⁹³

To summarize this second option, upon receipt of the notification and request as a result of the plaintiff's exercise of the first option, the defendant must produce sufficient evidence upon which it could be determined that the defendant was justified in believing the truth of the published defamatory material. If the defendant does so, such evidence should serve as the basis of a summary judgment for the defendant if the plaintiff actually sues. If the plaintiff's publication is not justified in this way, the defendant must attempt to repair the harm caused by its publication by devoting an amount of resources similar to those used in publishing the defamatory material. Should the defendant satisfactorily perform the repair, the plaintiff may not recover either damages for unproven harm to reputation or damages for emotional harm suffered after the date on which repair has been completed.

Together, these two options are designed to get the parties talking to each other promptly and working out an arrangement that can avoid litigation. There is no legal compulsion for either party to exercise its option. The effect of a plaintiff's failure to exercise the first option is the inability to recover certain items of damages that might otherwise be available. The effect of the defendant's failure to exercise the second option is the continued exposure to items of damages that could be avoided by taking the option. One might expect the adoption of this reform proposal to avoid at least some of the harm that might be caused by defamatory publications, to reduce the finan-

292. This is assuming that the constitutionally required predicate for such damages can be established by the plaintiff. *See supra* note 277.

293. *See supra* note 290.

cial risks attached to a judgment of liability for defamation, and to foster the social interest in a non-judicial resolution of disputes when it is possible to satisfy the parties without resorting to litigation.

B. A Restriction on the Availability of Punitive Damages

Along with presumed damages, punitive damages constitute a source of substantial uncertainty with regard to defamation liability. This uncertainty could cause the accompanying risk of self-censorship to rise even higher than it might otherwise.²⁹⁴ Although presumed damages and punitive damages have been lumped together in terms of the constitutional restrictions placed on their recovery,²⁹⁵ the two types of damages have different functions and should be subject to different tort rules governing their availability. Presumed damages, at least in theory, are intended to serve a pure compensatory function for reputational harm that the plaintiff has not and perhaps cannot prove was actually suffered. Presumed damages are thus the compensatory remedy for harm that is likely to have been suffered but that, for whatever reason, the plaintiff has not been required to prove. Presumed damages compensate for presumed harm, and as demonstrated in the preceding section, the presumption that unproven harm has occurred can be negated in a way that eliminates the theoretical underpinnings of an award of presumed damages.

Punitive damages play a different, noncompensatory role.²⁹⁶ Such damages are intended to punish the party against whom they are assessed for socially unacceptable conduct and to deter that party and others similarly situated from engaging in that conduct in the future.²⁹⁷ In the context of defamation, this remedy raises the question of whether the current constitutional restrictions on the recovery of punitive damages²⁹⁸ are sufficient to serve as the guideline for an award of these noncompensatory damages. For a number of reasons, the constitutional restrictions should be considered inadequate as the sole means of deciding on the appropriateness of an award of punitive damages. The final reform proposal offered here attempts to complement those constitutional restrictions with a set of tort law limitations on the recovery of such damages that are more carefully tailored to the circumstances encountered in a case of harm caused by the publication of false and defamatory statements.

Under the current law of defamation, any plaintiff who established that the defendant published false and defamatory statements with knowledge of the falsity of the statements or reckless disregard of the

294. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-79 (1964).

295. See *supra* notes 109-10 and accompanying text.

296. K. REDDEN, PUNITIVE DAMAGES 23 (1984).

297. *Id.* at 23-24.

298. See *supra* notes 109-15 and accompanying text (discussion of the third *Gertz* rule).

truth or falsity is constitutionally permitted to recover punitive damages.²⁹⁹ It is possible that the requirement of proving *New York Times* actual malice operates more as a deterrent to bringing suit than it does as an effective bar to recovery for many plaintiffs who are not deterred.³⁰⁰ Furthermore, in at least some cases plaintiffs are permitted to recover punitive damages without even having to prove *New York Times* actual malice.³⁰¹ Under these assumptions, the potential scope of recovery of punitive damages is nowhere near as narrow as an initial glance at the constitutional protections might lead one to believe. In order to restrict the scope of such damages, the following reforms should be enacted as a matter of tort law, that is, regardless of either the desirability or the practicability of obtaining further constitutional limitations on punitive damages.

First, punitive damages ought to be unavailable to anyone who meets the current constitutional definition of a public official.³⁰² Any punishment of citizens through a civil action should be considered to be inconsistent with the official status of such a plaintiff. To the extent that punitive damages enable a public official to accomplish what the government would otherwise have to try to accomplish through a criminal prosecution,³⁰³ such damages should be eliminated and the punishment function left to the operation of the criminal law.

Second, and most important, punitive damages should be awarded only on a combined showing of (a) an objectively reasonable ability of the defendant to have anticipated the capacity of the published material to inflict harm on the plaintiff, i.e., apparent defamatory potential, (b) an objectively reasonable basis for a conclusion that, at the time of publication, the defendant had an insufficient basis on which to conclude that the published material was true, i.e., fault-as-to-falsity that at least rises to the level of negligence, and (c) a subjectively wrongful state of mind that consisted of either (i) intent to cause harm to the plaintiff or (ii) a reckless indifference to the high likelihood of harm to the plaintiff. Without proof of all three of these elements, defamatory potential, fault-as-to-falsity, and deliberate or reckless disregard of the plaintiff's interest in freedom from reputational and emotional harm, a plaintiff should not be permitted to recover punitive damages, regardless of the constitutional acceptability of such recovery.

These prerequisites constituting the heart of this last tort reform proposal differ from the *New York Times* actual malice requirement,

299. *Id.*

300. *See supra* note 273.

301. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) (private plaintiff can recover punitive damages on a showing of less than "actual malice" if the defamatory statements do not involve a matter of public concern).

302. *See supra* note 28.

303. *See supra* note 294.

the threshold to the recovery of punitive damages in cases of public plaintiffs and those private plaintiffs about whom defamatory matters of public concern are published.³⁰⁴ The "actual malice" element of contemporary constitutional defamation law consists of a state of mind regarding only the truth or falsity of the published communication. In contrast, the additional requirements imposed by this reform proposal bring the focus around to what is surely a sounder basis for deciding whether punitive damages are appropriate, namely, the defendant's decision to publish material without taking anywhere near adequate measures to protect the plaintiff from the risk of harm.

Punitive damages are generally intended to inflict harm on the defendant who acts in socially unacceptable ways and to act as a deterrent to conduct of that sort. The suggested prerequisite accomplishes a shift in focus from the fairly nebulous and somewhat dangerous criterion of truth or falsity³⁰⁵ to the proposed combination of elements that places concern for the possibility of causing harm to the plaintiff at the center of the inquiry. This shift ought to promote the legitimate functions of punitive damages more effectively without producing the adverse consequences that can accompany either the threat or the actual award of such damages in situations in which socially acceptable or even socially desirable conduct is contemplated.

IV. CONCLUSION

Picture, if you will, a television set whose badly distorted picture is undecipherable to its owner, who calls in a number of repair personnel. One group of experts looks at the screen and says, "We need to have a different method of transmission of signals. Besides, radio is better." Another group of experts says, "We could get the flesh tones a little more realistic with a twenty degree turn of the tint knob." One would probably be sympathetic to the set owner who curtly dismissed both groups of experts.

A careful survey of contemporary defamation cases might support the proposition that the law of defamation as it stands at present is analogous to that television set. The constitutional battle will, and should, continue, but that does not mean that reforms on other levels or in other arenas should be postponed. Fine tuning of the law of defamation also will, and should, continue. But to return to the television set image, it is necessary to stabilize the picture before we care very much about the color.

This Article does not pretend to be a complete program of reform of the law of defamation, nor is its author so pretentious as to presume that even the reforms offered here would not benefit from careful

304. *See supra* note 298.

305. *See supra* note 210.

consideration by those who are concerned about the state of this body of law. The claim that the author does make for the Article is that it offers practicable and fair solutions to four major problems in the current law of defamation: first, the ability to criticize government is secured by an absolute immunity for speech about government; second, the flourishing of new theories of liability in order to avoid constitutional protections is arrested by the elevation of the emotional harm component to an equal footing with the traditional element of reputational injury; third, the susceptibility to presumed damages is placed under the control of the parties through a series of options designed to reduce harm and to resolve the dispute without litigation; and fourth, the use of punitive damages is curbed by a prohibition against their award to public official plaintiffs and by a more restrictive tort standard that must be satisfied in any case in which they are sought. Furthermore, the proposals are structured in a fashion that permits those reforms to be enacted consistent with but nevertheless separate from the evolving and awkward body of constitutional rules on the subject.