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ARTICLE: **PUBLIC FIGURE LIBEL: THE PREMIUM ON IGNORANCE AND THE RACE TO THE BOTTOM**

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LEXISNEXIS SUMMARY:
... The primary cause of this failure is the United States Supreme Court's present emphasis on the subjective beliefs of defendant publishers in the Court's "actual malice" standard. ... In conclusion, under the present-day actual malice standard a public figure plaintiff must prove by clear and convincing evidence that the defendant published false statements of fact while in fact entertaining at least serious doubts as to the truth of those statements. ... In an attempt to prevent censorship of "valuable speech" (opinions, as well as true statements of fact), the actual malice standard has afforded publishers protection even when they carelessly publish false statements of fact. ... The "Actual Malice" Standard Falls Short Because It Gives Publishers an Incentive Not to Investigate the Truth of Their Statements of Fact Before Publishing. ... Thus, the actual malice standard falls short because it protects careless publishers of false statements of fact by not holding these publishers liable for defamation when they publish falsities without proper investigation. ... Under the actual malice standard, however, too many false statements of fact are allowed to enter the marketplace of ideas. ... Thus, the actual malice standard does not adequately protect consumers of information because it encourages publishers to allow too many false statements of fact to enter the marketplace of ideas. ...

TEXT:
[*253] [*254]

I. INTRODUCTION

Present day public figure [n1] libel law is "a failure." [n2] It is a failure because it gives too much protection to grossly irresponsible publishers [n3] of false statements of fact, while providing too little protection for **[*255]** victims of libel, consumers of information, and publishers who carefully investigate the truth of their factual statements prior to publication.

The primary cause of this failure [n4] is the United States Supreme Court's present emphasis on the subjective beliefs of defendant publishers in the Court's "actual malice" standard. [n5] This emphasis on the publisher's subjective belief creates two problems. First, it places a "premium on ignorance," [n6] encouraging publishers not to investigate the truth of their statements before publication. Second, it assigns too low a value to the reputation of victims of libelous statements. This disincentive to investigate and undervaluation of reputation in turn encourage a "**race to the bottom,**"

[n7] in which publishers carelessly rush to print outrageous stories about public figures in an effort to "scoop" other publishers and earn money or benefits from the shock of their publications.

Since many of these poorly-substantiated publications turn out to be untrue, this "race" leads to three important harms to society. First, large numbers of innocent persons are horribly libeled with no chance at either financial compensation or a re-establishment of their reputation. [n8] Second, the marketplace of ideas becomes so diluted with factually false information that consumers of information don't know what to believe. [n9] Third, publishers who carefully investigate the truth of their information cannot compete financially with the careless publishers of false information. [n10]

The proper solution to the problems caused by the subjective "actual malice" test is an objective gross negligence libel standard. Under this standard, a publisher would owe the subject of his story a duty at least to investigate the truthfulness of the story to a level that is not grossly out of proportion to the harm the story might do to the **[*256]** subject's reputation. [n11] This standard would benefit both libel victims and the marketplace of ideas by slowing the "**race to the bottom.**" In addition, the standard would not improperly chill the freedom of speech nor substantially increase the costs of litigation.

The following sections shall discuss the history and application of the "actual malice" standard (Part II); the failures of the actual malice standard (Part III); the proposed gross negligence solution and its benefits (Part IV); and the defense of the proposed gross negligence standard against various policy concerns (Part V). Part VI will conclude the article.

II. THE HISTORY AND APPLICATION OF THE "ACTUAL MALICE" STANDARD

A. A Brief History of Libel Law

At common law, libel was a strict liability tort. "A defendant could be held liable for publishing a false and defamatory statement [about the plaintiff] absent any evidence that the defendant suspected the statement's falsity or even its defamatory potential, and despite the fact that the defendant used reasonable care in attempting to ascertain the truth." [n12]

Since 1964, however, a libel plaintiff's burden of proof has grown significantly more weighty. That year, in New York Times v. Sullivan, [n13] the United States Supreme Court abolished the strict liability standard for public official plaintiffs, holding that these plaintiffs would henceforth have to prove that the defendant published the false statement with "actual malice." [n14] "Actual malice," the Court said, consisted of "knowledge that [the statement] was false, or ... reckless disregard of whether it was false or not." [n15] This standard placed a significantly heavier burden of proof on a libel plaintiff than he had had under strict liability. In fact, the new standard made it harder for public official libel victims to recover than either a negligence or a gross negligence standard would have. [n16] Instead of merely proving **[*257]** that a false statement was published about them, or that the defendant was careless, these libel plaintiffs now needed to show that the defendant "in fact entertained serious doubts as to the truth of his publication" [n17] in order to recover.

The Court made this change because an "erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space they need to survive." [n18] In other words, since "debate on public issues should be uninhibited, robust, and wide-open," [n19] and since "fear of large verdicts in damage suits for innocent or mere negligent misstatement, even fear of the expense involved in their defense," may cause publishers to overly censor themselves, [n20] the Court "protects some falsehood in order to protect speech that matters." [n21]

In 1967, the Court extended the actual malice standard to cover "public figure" plaintiffs as well as public officials, [n22] thus subjecting anyone who is famous enough to have public influence [n23] to the burden of proving reckless

disregard. The Court stopped short of applying the actual malice standard to "private figure" plaintiffs, [n24] however. Instead, in 1974, in Gertz v. Robert Welch, Inc., [n25] the Court left the standard of liability to a private figure in the hands of the states, with the caveat that they could not return to a strict liability standard. [n26] This allowed the states to impose standards of negligence [n27] and gross negligence, [n28] as well as actual malice, [n29] for private figures. **[*258]**

The Supreme Court limited the actual malice standard to public figures because the "standard administers an extremely powerful antidote to the inducement to media self-censorship ... and it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test." [n30]

Since "public officials and public figures usually enjoy significantly greater access" to the media, and thus can respond to criticism more easily than private figures, [n31] "public figure" plaintiffs also can be said to have assumed the risk of libelous comment, [n32] and they are given less protection from false statements than private figures.

Ten years later, the Court announced that public figures would officially have the additional burden of proving the defendant's actual malice by "clear and convincing evidence." [n33] This is a more difficult standard than the normal "preponderance of the evidence" standard used in most tort cases, but is presumably not as weighty as the proof "beyond a reasonable doubt" standard used in criminal law. [n34]

B. The Demarcation of "Actual Malice"

During the thirty years since New York Times, the Court has also focused in on creating a working definition of "actual malice." Outside of the obvious case in which a defendant publishes something he knows is false, it has been unclear what "reckless disregard" for the falsity of a statement really entails. As the Supreme Court said, "the meaning of such terms as "actual malice' - and, more particularly, **[*259]** "reckless disregard' - ... is not readily captured in "one infallible definition.' " [n35] Thus, the definition of these terms "will be marked out through case-by-case adjudication." n36 Several of the cases which have most influenced the definition of actual malice will be presented here.

1. New York Times v. Sullivan

As noted above, the New York Times [n37] case established the actual malice standard. The Court also applied the standard to a situation in which a city commissioner sued a widely circulating newspaper (the New York Times) for printing a paid advertisement which contained false statements of fact. The commissioner claimed that false statements were made about him, and that under the tort of defamation, the newspaper was strictly liable to him. [n38]

The United States Supreme Court held that the newspaper was not liable because it did not publish the advertisement with actual malice. [n39] "Actual malice," the Court said, consisted of "knowledge that [the statement] was false, or ... reckless disregard of whether it was false or not." [n40] The Court gave two major reasons for holding that the newspaper was not liable under this test: (1) the evidence showed that the newspaper's Secretary held a good faith belief that the advertisement was substantially true; [n41] and (2) the people in the advertising department of the Times "relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from [a man] known to them as a responsible individual, certifying that the use of the names was authorized." [n42]

The fact that "the Times published the advertisement without checking its accuracy against the news stories in the Times' own files" [n43] did not establish actual malice, the Court said, since the people **[*260]** in the advertising department were never made aware of these news stories. [n44]

Thus, the Court concluded that the Times could not be held liable for publishing the false statements because its advertising department published the statements with a good faith belief that the statements were true. The fact that the advertising department did not investigate the newspaper's own files to verify the truth of the statements was irrelevant.

2. St. Amant v. Thompson

In St. Amant v. Thompson, [n45] the Supreme Court held that actual malice is a subjective standard, which "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." [n46] Instead, the plaintiff must prove by clear and convincing evidence [n47] that the defendant "in fact entertained serious doubts as to the truth of his publication," [n48] or that the defendant made the false publication "with a high degree of awareness of ... probable falsity." [n49]

The St. Amant case concerned a candidate for public office (St. Amant) who, during a televised speech, falsely charged a state deputy sheriff (Thompson) with criminal conduct in relation to a labor union officer. [n50] St. Amant made his false charge even though he (1) "had no personal knowledge of Thompson's activities;" (2) "relied solely on the affidavit" of a third party, J.D. Albin, who was a member of the local chapter of the labor union, but "had no reputation for veracity;" (3) "failed to verify the information with those in the union office who might have known the facts;" [n51] and (4) failed to contact Thompson to ask him if Albin's allegations were true. [n52] **[*261]**

The Court held that St. Amant was not liable for his statements because Thompson was unable to prove that St. Amant "in fact entertained serious doubts as to the truth" of his statements. [n53] The fact that St. Amant had completely failed to investigate Albin's charges before broadcasting them was unimportant. As the Court said: "failure to investigate does not in itself establish bad faith," [n54] and it is only this bad faith - or subjective "awareness of probable falsity" - that is important in the actual malice standard.

With that in mind, the evidence that the Court found most crucial to the issue of St. Amant's liability was the fact that St. Amant appeared to believe Albin, who "swore to his answers," and said he was "prepared to substantiate his charges" if need be. [n55] Thus, since St. Amant believed Albin, St. Amant could not be held liable for his defamation of Thompson. This was despite St. Amant's complete failures in investigation, as well as the fact that he "gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words." [n56]

To conclude, under the actual malice standard St. Amant's ignorant reliance on one man's words immunized St. Amant from liability for his libel of Thompson. This result was sharply criticized in Justice Fortas' dissent, [n57] and even the majority admitted that "it may be said **[*262]** that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." [n58]

3. Harte-Hanks, Inc. v. Connaughton

The Supreme Court indirectly responded to some of the problems with the St. Amant case twenty-two years later when it held in Harte-Hanks, Inc v. Connaughton [n59] that clear and convincing evidence of "purposeful avoidance of the truth" is sufficient to establish the mental state necessary in actual malice, even if evidence of a "failure to investigate" is not. [n60]

In Harte-Hanks, an informant told a newspaper reporter that a candidate for judgeship had attempted to bribe the informant and her sister into blackmailing the incumbent judge. [n61] The reporter published these statements after discussing their truth or falsity with five witnesses to the alleged bribery (all of whom denied the existence of a bribe), but not with the one witness who both sides agreed would be the most reliable. The Supreme Court held that the reporter was liable for actual malice, even though the reporter testified that she believed the information given to her by the informant. [n62] The Court reached its conclusion based on its belief that there was so much circumstantial evidence [n63] that the reporter at least "purposefully avoided" the truth, that in effect she "must have entertained serious doubts as to the truth of [her] publication." [n64]

The circumstantial evidence on which the Court relied included: (1) the denial of the informant's allegations by the candidate and five other witnesses to the alleged bribe before the article was published; [n65] (2) the fact that the

newspaper was aware of, but "chose" not to interview, the one witness that both the informant and the candidate claimed would verify their conflicting accounts of the relevant **[*263]** events - the informant's sister; [n66] (3) the fact that the newspaper "decided" not to listen to tape recordings that had been made available to it by the candidate which might have raised additional doubts concerning the informant's veracity; [n67] (4) the defendant's publication on the day before the defamatory article ran of an editorial predicting that information concerning the integrity of the candidates might surface in the last few days of the campaign; [n68] (5) the discrepancies in the testimony of the newspaper employees that might have given the impression that the newspaper's failure to conduct a complete investigation involved a deliberate effort to avoid the truth; [n69] and (6) the tone of the informant's answers to various leading questions asked by the reporter in a tape recorded interview, which the Court felt raised obvious doubts about the informant's veracity. [n70]

This evidence, the Court said, showed that the "newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of its statements. The Court held that this "purposeful avoidance of the truth" was thus sufficient to show the mental state necessary for reckless disregard. [n71]

4. Conclusion: Present-Day Actual Malice

In conclusion, under the present-day actual malice standard a public figure plaintiff must prove by clear and convincing evidence that the defendant published false statements of fact while in fact entertaining at least serious doubts as to the truth of those statements. If the plaintiff does not have direct proof of the defendant's serious doubts, the plaintiff may use circumstantial evidence to show that the defendant purposefully avoided the truth - and thus must have entertained serious doubts as to the truth of the statements. The circumstantial evidence can include the defendant's failure to investigate the **[*264]** truth of the statement, [n72] but this failure alone is not enough to prove the subjective bad faith necessary for actual malice. [n73]

III. THE COSTS AND BENEFITS OF THE "ACTUAL MALICE" STANDARD

A. The Benefits - "Uninhibited" Speech and Plenty of "Breathing Space"

As the cases in Part II might indicate, the Supreme Court accomplished its goal of "uninhibited, robust, and wide-open" debate [n74] by turning to the actual malice standard in New York Times v. Sullivan. At present, empirical evidence suggests that publishers rarely, if ever, censor themselves for "fear of large verdicts in damage suits for innocent or mere negligent misstatement," or even for "fear of the expense involved in their defense." [n75] In fact, in their recent article in the Louisiana Law Review, Professors Russell L. Weaver and Geoffrey Bennett quote one prominent news publisher as having no fear whatsoever of defamation liability. [n76]

For their article, Professors Weaver and Bennett interviewed thirteen publishers and attorneys for publishers across America. [n77] They **[*265]** also interviewed persons at two libel defense organizations. [n78] What the professors discovered was that despite the fact that there had been several incidents more than fifteen years ago in which publishers were reported as having canceled stories because of fear of libel suits, [n79] fear of libel plays a "minimal" role in present-day publishing. [n80] NBC Nightly News Producer Stephen Friedman, for example, "flatly stated that defamation law has very little effect on what he airs. Indeed, he spends less than three hours a month doing prepublication review of broadcasts for defamatory material." [n81]

In addition, publishers are rarely sued, [n82] and even some of those who are sued complain not about fear of suit, but rather about the amount of irresponsible journalism that is still permitted under the actual malice standard. [n83] Similarly, the number of publishers who complained about "journalists who felt they could publish anything" far outweighed the number who complained of "being lawyered to death." [n84] The only publishers who did seem concerned with defamation suits were those whose information was published in a foreign country where the laws were stricter. [n85] Weaver and Bennett thus concluded that

the actual malice standard may have its drawbacks, but it does not impose an undue burden on the media. There is no evidence of a serious "chilling" effect. U.S. editors do consult defamation attorneys from time to time, and they do alter some articles to minimize the possibility of being sued. But this chilling effect is minimal and may in fact be healthy. n86

[*266]

Weaver and Bennett's article indicates that the actual malice standard has indeed provided plenty of "breathing space" for publishers. Present-day American publishers do not fear libel suits, and speech is "uninhibited, robust, and wide-open." The benefits of this wide "breathing space" must be weighed against its costs, however.

B. The Costs - Too Little Protection for Victims of Libel, Consumers of Information, and Careful Publishers

As noted in Part A, the actual malice standard falls short because it gives too much "breathing space" to publishers. In an attempt to prevent censorship of "valuable speech" (opinions, as well as true statements of fact), the actual malice standard has afforded publishers protection even when they carelessly publish false statements of fact. [n87] These carelessly published false statements do not independently deserve protection because they have "no constitutional value." [n88] As the Supreme Court said in Gertz v. Robert G. Welch, Inc.,

neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open debate on public issues." New York Times Co. v. Sullivan, 376 U.S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). [n89]

1. The "Actual Malice" Standard Falls Short Because It Gives Publishers an Incentive Not to Investigate the Truth of Their Statements of Fact Before Publishing.

The actual malice standard's emphasis on the publisher's subjective belief of the truth or falsity of his publication in essence places a "premium on [the publisher's] ignorance." [n90] As the Supreme Court said, "failure to investigate does not in itself establish bad faith." [n91] Thus, the actual malice standard gives publishers the incentive not to investigate their stories for fear that any investigation might lead to **[*267]** subjective awareness of the probable falsity of the story. [n92] A publisher who never investigates the truth of his publication cannot be held liable for defamation because he never developed "serious doubts as to the truth of his publication." [n93]

In St. Amant v. Thompson, [n94] for example, the Supreme Court held that the candidate making the televised speech believed the false information given to him by his source, and thus the Court did not hold the candidate liable for his defamatory publication of that false information. The actual malice standard gave the candidate no incentive to check the accuracy of his informant's information, because any such check might have alerted him that his information was probably false. Thus alerted, the candidate would have either had to avoid using the information in his speech, or face liability for defamation. Since publication of the information was politically valuable to the candidate, the candidate was better off having not investigated the information than he would have been if he had.

The fact that the Supreme Court ruled in Harte-Hanks v. Connaughton [n95] that a showing of "purposeful avoidance of the truth" is enough to prove actual malice, does not substantially affect the incentive on publishers not to investigate. This is true for two reasons. First, Harte-Hanks does not overrule St. Amant. Thus, in the common situation

where a news reporter first receives information about a public figure from an informant, the reporter's incentive is still to rush to print the story - not to investigate it. This is particularly true when the reporter is faced with a deadline (as reporters almost always are). As long as the reporter has not yet been told that the informant is not credible, or that there are witnesses or tape recordings which would contradict the informant's allegations, the reporter has not "purposefully avoided" anything by publishing. All he has done is meet his deadline. There is little evidence from which a court could infer that the reporter had serious doubts about the story. [n96] Thus, the reporter's **[*268]** own testimony of belief should be enough to prevent liability, just as the candidate's testimony was in St. Amant.

The second reason that the ruling in Harte-Hanks does not provide enough incentive for a reporter to investigate his story is that it still appears that the quantity of circumstantial evidence that is sufficient to prove clearly and convincingly that a reporter purposefully avoided the truth is extremely high. For example, in Dickey v. CBS Inc. [n97] the Third Circuit held that CBS television was not liable for broadcasting a videotaped debate in which a Congressman falsely stated that a non-participant in the debate, Sam Dickey, had accepted bribes. [n98] Dickey was on the Delaware County Republican Board of Supervisors - the Board which backed the Congressman's opponent, District Attorney Stephen McEwen. The court based this decision primarily on the fact that the CBS reporter told his boss that he believed "there was a good probability that [the Congressman] was telling the truth," [n99] and that the Congressman's four terms gave him "a great deal of credibility." [n100] **[*269]**

In Dickey, the court additionally found that the following evidence was not sufficient to clearly and convincingly prove that CBS had "in fact entertained serious doubts as to the truth" of its publication: [n101] (1) CBS had several days to investigate the Congressman's story before it was scheduled to air (and could have further postponed the airing); [n102] (2) District Attorney McEwen, a credible source who had been the District Attorney for eight years, immediately denied the allegation and explained that it could not be true because the "Sprague Report," on which the Congressman said he primarily based his statement, did not yet exist; [n103] (3) Dickey, through his attorney, denied the allegation, and requested that the airing of the debate be "postponed pending further investigation of the truth or falsity of the statements;" [n104] (4) the Congressman could be seen as a biased source, since his statement was to his political benefit; [n105] (5) the Congressman refused to allow CBS reporters to look at his copy of the "Sprague Report;" [n106] (6) the Congressman "refused to give [the reporters] the names of the informants" who allegedly provided him with the information that formed the basis of his charges; [n107] and (7) the reporters "made no effort whatever to contact Sprague." [n108]

Decisions like Dickey make a sham out of any pretense that the threat of liability for "purposeful avoidance" of the truth is enough to provide publishers with an incentive to investigate their stories before publishing. Thus, the actual malice standard falls short because it protects careless publishers of false statements of fact by not holding **[*270]** these publishers liable for defamation when they publish falsities without proper investigation.

2. Too Little Protection for the Reputation of the Libel Victims

The second failure of the actual malice standard is that it undervalues a person's interest in his reputation. As the Supreme Court said, "the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted upon them by defamatory falsehood." [n109] Also, as Justice Stewart said: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty." [n110]

Reputation "is not some lifeless abstraction, but the summation of all the possibilities for gainful interactions - economic, social, and political." [n111] This summation can be easily stripped away by false accusations from the media or other widely published and believed sources. These false accusations can ruin a person's career or social life.

In addition, once the false accusations are made, there is practically no turning back. Denials from the victim are

often disbelieved, never read, or published at a time which is too late to soften the impact of the defamer's words. [n112] Retractions by the defaming party are similarly ineffective. As Justice Brennan put it:

While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye ... the argument loses all its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on **[*271]** which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet undefined class of "public figures" involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction. [n113]

Thus, libel law needs to prevent the initial stripping away of reputation by giving publishers the proper incentive to be more careful when dealing with someone's reputation. The law needs to encourage publishers to take into account the cost of libel to a person's reputation when deciding how much to investigate before publishing a story about that person.

At present, the law offers little such encouragement. Under actual malice, a reporter's good faith belief that his story is true is the only factor that the courts take into account in their imposition of liability. The fact that a public figure plaintiff proves that a publisher proceeded with a story "heedless of the consequences" to the plaintiff's reputation is irrelevant. [n114] Thus, under actual malice, a publisher need not weigh the cost of further investigation against the potential injury to the plaintiff's reputation to avoid liability. This means that the only time a public figure libel plaintiff's reputation is taken into account is in the "marking out" [n115] of the actual malice standard itself. Since the Supreme Court has created a standard which makes it so difficult for public figures to recover for defamation, [n116] it appears that the Court has ruled that the reputation of these people is worth very little indeed.

It has been argued that by running for public office or thrusting oneself into the forefront of public controversies (and thus becoming a public figure) a person assumes the risk of damage to his reputation, since he knows that his actions will now be more frequently in the public spotlight. [n117] In his article, Is Libel Law Worth Reforming?, **[*272]** Professor Anderson has shown that this argument is "riddled with fallacies," [n118] three of which deserve mention here.

The first fallacy is that a person who is more frequently in the public spotlight must be left without a remedy for defamatory falsehoods. As Professor Anderson points out, "logic supports the opposite conclusion equally well: because the risk of close public scrutiny - and therefore defamation - is greater, the law should be more protective of the reputation interest." [n119]

The second fallacy is that all public figures became public figures by "thrusting" themselves into public controversies. In fact, many public figures would prefer to avoid public controversies altogether, but they cannot since their lives or careers are so interesting to the public that the public is drawn to them. Johnny Carson's wife, for instance, was held to be a public figure simply because she was married to Johnny. [n120] She did not choose to sacrifice reputation for power and influence. Rather, any power and influence she might have obtained was simply derived from her successful (or unsuccessful) marriage to Johnny. [n121]

The third fallacy [n122] stems from the fact that the assumption of risk argument is circular. "If those who seek public office or seek to influence the outcome of public controversies waive some portion of reputational protection by doing so, it is only because the law says so. It cannot explain why the law says so." [n123] As noted above, "public figures do not choose to forego remedies for defamation. True, they may know that they are more likely to be discussed and hence to be defamed, but ... that need not weaken their claim to the law's protection." [n124]

Thus, the actual malice standard does not adequately protect the reputations of public persons, since a publisher presently does not have to weigh the cost of further investigation against the potential injury to the plaintiff's reputation to avoid liability. **[*273]**

3. Too Little Protection for Consumers of Information

One major purpose of the First Amendment is to provide a "marketplace of ideas" from which people can draw in order to make decisions about their lives and their government. [n125] Under the actual malice standard, however, too many false statements of fact are allowed to enter the marketplace of ideas. This is because publishers have no incentive to investigate the truth of their factual statements before publishing. In fact, as noted above, [n126] publishers often have a strong financial incentive to publish scandalous statements, whether they are true or not. These untrue statements pollute the marketplace by providing consumers [n127] with information that outwardly appears to be objectively true fact, but which in reality is just a false statement based on the publisher's unverified belief or opinion.

The publication of these false statements of fact, without corresponding labels indicating that the information is merely "opinion," "editorial," or "news analysis," injures the consumer of the information in two ways. First, he is injured when he makes some decision in his life in reliance on these false facts. Perhaps he votes for a certain politician based on a newspaper's false statement that the politician's opponent was having an affair; or he fires his new attorney, after she's falsely said to have acted unprofessionally in a recent trial. [n128] If the consumer had known the truth in these cases he would not have acted **[*274]** as he did, and thus he is injured by acting in a way which did not benefit him.

The consumer's second injury comes when he learns that the information on which he relied was false. He is injured because he no longer knows what information to take as fact and what information to receive with skepticism. n129 The consumer loses faith in his source for information, [n130] but has no way to re-establish this faith. Unlike in many business situations, a consumer in the marketplace of ideas cannot obtain a warranty that the product he is receiving is flawless. [n131] He cannot send false statements of fact back to the manufacturer for a refund. In addition, since no news source offers such a warranty, any switch by the consumer to a different source is merely done in blind faith that the new source will be more reliable than the old one. With the apparently growing number of false statements of fact published even in the most reputable news sources, [n132] the consumer may come to the conclusion that none of the sources offered in the marketplace **[*275]** is any better than the unreliable one he already has. [n133] Since the consumer cannot spend the time to investigate all the statements of fact he receives to determine for himself whether they are actually true, he must be satisfied that he will never be able to obtain the true information he needs to run his life. This result injures the consumer because instead of re-establishing his faith in the marketplace it simply leaves him doubting everything he reads or hears. Did President Clinton really have an affair with Gennifer Flowers? Did Michael Jackson really molest the eleven-year-old boy? [n134] The consumer is put in the dangerous position of the man who has heard the boy cry wolf so often that the man doesn't believe it when the wolf finally comes.

Thus, the actual malice standard does not adequately protect consumers of information because it encourages publishers to allow too many false statements of fact to enter the marketplace of ideas. This pollution of the marketplace harms the consumers both by providing them with false information on which to base important decisions, and by preventing them from fully relying on information that is actually true.

4. Too Little Protection for Publishers Who Carefully Investigate the Truth of Their Statements Before Publishing

Publishers who carefully investigate the truth of their statements of fact before publishing them are valuable to the marketplace of ideas because they provide information upon which consumers of information can wholeheartedly rely when deciding how best to run their lives. [n135] Present-day libel law fails to protect these publishers because it allows their competitors to gain a financial edge. This edge is gained when the competitors carelessly publish false statements of **[*276]** fact about public figures without being held liable for damages in defamation. [n136] As discussed in Part III.B.3, publishers of information cannot warrant the truthfulness of their information. Thus, the only way in which a

publisher with high standards for truthfulness can separate himself from careless publishers is by establishing a reputation as a truthful source. To keep this reputation, however, the publisher must continue to carefully investigate the information he intends to publish in order to ensure its veracity. This investigation takes time, and a publisher that does a careful investigation risks having another publisher "scoop" him, or publish the same story before he does. The publisher who scoops a story is often financially well rewarded for his effort, [n137] and many publishers in today's market are even willing to pay large sums of money to sources for the right to be the first to publish their story. [n138]

In earlier times, there was a sizeable market for the careful news sources who took the time to investigate the truth of a statement before publishing it. Now their market is steadily dwindling. [n139] With the rise of cable television and other technological advances, [n140] consumers of information have grown to demand new information more and more rapidly. [n141] In addition, the public's interest in celebrity **[*277]** news has created a quickly expanding market for "gossipy" or scandalous stories about public figures. [n142] Since the actual malice standard places no incentive on publishers to check the truth of a story before publishing it, the law has helped create a "**race to the bottom.**" This is a race in which publishers rush to print the most outrageous story about famous people that can be minimally substantiated without a moment's thought that the story might be untrue. As they say in the tabloids, "it doesn't matter if it's true ... if you've got someone to say it's true, that's what matters." [n143]

Many formerly reliable publishers have joined in this race, [n144] but many others have not. Those publishers who are not racing have been hard pressed to convince consumers that they are still reliable, however. The consumers tend to "lump" all the media together, "as readers perceive the increasing desperation with which papers are now trying to get "down market' ..." [n145] Thus, the careful publishers have been forced to try acting as a watchdog on themselves in order to regain the public's trust. This phenomenon, called "meta-media," [n146] has been shown not to have worked particularly well, and perhaps even increases the consumers' general distrust of the media. Thus, the law must step in and offer careful publishers some financial protection. The law has failed to do that, however, [n147] because it does not **[*278]** impose liability for defamation when publishers fail to investigate the truth or falsity of their statements before publishing them. [n148]

IV. THE SOLUTION: A GROSS NEGLIGENCE STANDARD

A publisher should owe the subject of his story the duty to at least investigate the facts of the story to a level that is not grossly out of proportion to the harm the story might do to the subject's reputation.

A. The Terms of the Proposed Gross Negligence Standard

Public figures and public officials should be able to recover for libel by showing with clear and convincing evidence that the defendant acted in a highly unreasonable manner in investigating the truth or falsity of his communication before publishing it. [n149]

The factors which the court or jury should weigh in deciding whether the defendant's actions were "highly unreasonable" are:

(1) the magnitude of the potential harm to the plaintiff's reputation if the communication is published,

(2) the likelihood of that harm,

(3) the cost of further investigation, and

(4) the general value of uninhibited speech.

1. No Factor Valuing the Defendant's Communication

The proposed standard specifically does not include a factor for valuing the defendant's communication, except to the extent that free speech in general should be valued. That is because the judiciary should not be placed in the position of having to determine ad hoc **[*279]** whether one speaker's message is of greater value than another's. [n150] Professor Smolla has argued that this process is inevitable, however, noting that "the traditional formula for determining negligence liability cannot be meaningfully employed in an action for defamation without plugging in some measure of social utility of the subject matter of the defamatory communication." [n151]

Professor Bloom's opposing argument is the better one, however. He said that "although the value of uninhibited speech must be considered, a comparative evaluation of the subject matter of the article in issue is not required necessarily." [n152] As Professor Bloom points out:

presumably the court will provide the primary line of protection for first amendment values by factoring in the potential impact on free communication in determining whether a sufficient case of [gross] negligence has been presented for submission to the jury. If a plaintiff has presented a prima facie case, however, defense counsel may argue, and the court may instruct the jury, that, in assessing the cost and practicality of requiring further precautions, consideration should be given to the potential impact that such a requirement might have on free communication. [n153]

2. Ordinary Versus Professional Standard of Care

The proposed gross negligence standard uses the ordinary person's standard of care, instead of the professional journalist's standard. The professional journalist's standard, as articulated by Justice Harlan in the gross negligence libel standard he employed in Curtis Publishing Co. v. Butts, would hold the defendant liable for "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by **[*280]** responsible publishers." [n154] There are two reasons for this rejection of the professional standard. First, the professional standards test improperly allows journalists to control their own destiny. [n155] As discussed above, the present incentive is for the journalist not to investigate information - so that he will never know that it is false. [n156] A professional standard of care will maintain and encourage that incentive by allowing journalists to measure themselves solely against other journalists. If journalists only need to worry about each other, there will be nothing to stop the "**race to the bottom,**" because journalists will only have to compare themselves to other scandal-hungry journalists rushing to print income-producing stories. An ordinary person's standard of care will put a stop to this race, however, because the journalists will have to consider whether a jury of potential libel victims would consider the journalists' actions to be grossly negligent.

Second, the professional standards test doesn't value reputation highly enough. Journalists today do not seem to care about the damage they might do to a person's reputation before reporting a story. [n157] A professional standard of care would allow journalists to continue to undervalue a person's reputation, as long as other ordinary journalists would do so as well. This puts an improper incentive on journalists to devalue reputation. In contrast, a standard that requires journalists to consider the ordinary person's expectations would encourage journalists to place a premium on reputation. Journalists would now be required to align their practices with the public's expectations of veracity and integrity in order to avoid liability.

Professor Bloom argues against the ordinary person standard of care because of the "peculiar demands of journalism, the existence of a body of professional standards and the need [by the publisher] for predictability." [n158] His argument concerning "peculiar demands of journalism" is not clearly presented, but it appears to be primarily based on the fact that news publishers must often rush to write or broadcast "hot news" before it grows cold. [n159] Professor Bloom seems **[*281]** to argue that only a professional standard would take into account the fact that many news publishers cannot be as careful as ordinary persons would like because the publishers must rush to publish before a deadline. One of the major problems with the news media today, however, is precisely that they are not careful enough

when faced with a deadline. [n160] Every person has deadlines which they attempt to meet. Most of these deadlines are not in any way absolute, however. They are just imposed because the meeting of that deadline will provide for an advantage - financial or otherwise. An ordinary person standard is appropriate for public figure libel law because the media's desire to meet a deadline and "scoop" another news source for financial gain is no different from any other person's desire to meet a deadline.

Professor Bloom's second argument for a professional standard of care is that a body of professional standards exists for the news media. This argument carries little weight because it still allows the media as an industry to undervalue the reputation of libel victims. In addition, the condition of the news industry today [n161] suggests that a significant portion of the news media may not follow these standards.

Professor Bloom's final argument for a professional standard of care in media defendant cases is that publishers need to be able to predict how the law will treat them when they make decisions on whether to investigate. While there clearly is a need for predictability in the law, this does not compel a need for a professional standard of care. As in other areas of both constitutional and tort law, courts will make decisions which will gradually mark out the boundaries of appropriate conduct. Responsible publishers (or their lawyers) will keep abreast of these decisions, and thus will be able to predict how to act.

B. How the Proposed Gross Negligence Standard Will Solve the Problems of Today's Public Figure LibelLaw

1. The Objective Standard Gives Publishers an Incentive to Investigate

The most important aspect of the proposed gross negligence standard is that it is objective, not subjective. In other words, by looking **[*282]** to how much a reasonable person would have investigated in certain circumstances, the proposed gross negligence standard eliminates the necessity for plaintiffs to prove what was going on in the defendant's mind. Publishers will no longer be able to defend themselves by showing that they acted in good faith, and did not in fact entertain serious doubts as to the truth of their false publications. [n162] If a public figure plaintiff can prove by clear and convincing evidence that the defendant published a false statement of fact, and can show that the risk of seriously injuring the plaintiff's reputation was so high that a reasonable person would have made a gross mistake by not further investigating the truth of the statement, then the plaintiff will recover. The defendant's subjective awareness of the falsity of the statement or the need to further investigate is irrelevant.

This standard is specifically aimed at holding publishers liable for publishing false statements after rushing to publish before checking the truth of their statements. Under "actual malice" these publishers had an incentive not to investigate their stories for fear that they would find out that the stories were not true. [n163] Under the proposed gross negligence standard, however, this incentive will be eliminated because the publishers will be liable for breaching a duty to the plaintiff by not investigating when ordinary persons would find it grossly irresponsible not to do so. [n164]

2. The Gross Negligence Standard Would Continue to Provide the Benefit of Sufficient "Breathing Space" for Valuable Speech

As discussed in Part II.A and Part III.A, supra, the primary benefit of the actual malice standard is that it ensures that "valuable" speech, such as opinions and true statements of fact, [n165] will be freely published. The standard does this by allowing publishers to publish **[*283]** anything that they subjectively believe to be true, without fear of liability if the statement turns out to be false. [n166] This "breathing space" prevents publishers from self-censorship, and thus promotes "uninhibited, robust, and wide-open" speech. [n167]

The proposed gross negligence standard would continue to ensure the liberal publication of valuable speech by providing publishers with a substantial amount of room for error. Under the proposed standard, publishers would not be held strictly liable for erroneously publishing false statements of fact, [n168] nor would they be held liable for simple

negligence. For example, in Gaeta v. New York News, Inc., [n169] the New York Court of Appeals granted a motion for summary judgment under a gross negligence standard to a defendant journalist whom the lower courts said "could be found negligent for not having made further inquiry into the circumstances." [n170] The New York Court of Appeals, although not explicitly stating whether the defendant had in fact acted negligently, held that the reporter had - as a matter of law - done a sufficient investigation so as not to be grossly negligent. [n171]

In Gaeta, the defendant, Marcia Kramer, had been writing a series of investigative articles in the New York Daily News about the transfers of patients from State mental hospitals to nursing homes. In one of those articles she wrote, "when he was 41, George Nies, a Queens construction worker, suffered a nervous breakdown that psychiatrists said was precipitated by a messy divorce and the fact that his son killed himself because his mother dated other men." [n172]

The plaintiff, Catherine Gaeta, the former wife of Nies, claimed that this paragraph was false and defamed her. She asserted that

Nies did not suffer a nervous breakdown but that his hospital admission was precipitated by chronic alcoholism; that the divorce was **[*284]** not "messy," but was on consent; that their son did not commit suicide but died as a consequence of drug abuse long after his father's initial hospitalization; that she did not date other men as alleged; and that none of the statements were made by psychiatrists. [n173]

The court held that even if Ms. Gaeta's claims were true, the reporter had done sufficient investigation to avoid gross negligence. This is because the reporter had: (1) spent approximately two months gathering information for the series; (2) been told of Nies' treatment and above-mentioned psychiatric evaluation by Nies' sister, Sorrentino, whom the reporter believed to be Nies' legal guardian; (3) been told by the office of Nursing Home's Special Prosecutor that Sorrentino had proven to be a reliable source regarding Nies; (4) twice contacted psychiatrists at Creedmoor State Hospital, where Nies had previously been hospitalized (they refused to discuss his history on the basis of patient-physician confidentiality, and suggested the reporter contact Nies' family or legal guardian); and (5) in an undercover capacity visited the Elmhurst Manor Home for Adults, and observed conditions there firsthand, which confirmed the information about the home she had received from Sorrentino. [n174]

Thus, the Gaeta case demonstrates how a publisher who does even a moderately careful investigation of the facts in his story before publishing would not be held liable for defamation under the proposed standard, [n175] even if his investigation was insufficient under a simple negligence theory. This leaves publishers with plenty of "breathing space" under the proposed standard, and should avoid any undue "chilling" of their speech for fear of liability.

In addition, a publisher who wants to publish, but is unsure whether his statement is true, would still be able to publish the statement as a clearly marked "opinion." [n176] This would avoid liability if **[*285]** the statement is false, and would have the additional benefit of alerting the consumers of the information that the publisher is uncertain whether the publication is true. Thus, the proposed gross negligence standard would retain the benefits of the actual malice standard - freely published valuable speech - despite the standard's emphasis on more careful investigation of allegations before publication.

3. The Proposed Standard Would Have the Additional Benefit of Increasing the Protection for Victims of Libel, Consumers of Information, and Careful Publishers.

As discussed in Part III.B, supra, the benefits of the actual malice standard are outweighed by its numerous costs. The gross negligence standard would lessen each of those costs. First, in terms of the reputation of the victim, [n177] the proposed standard would provide publishers with an incentive to investigate the truth of statements of fact before publishing. This is because failure to investigate could lead to liability, no matter what the subjective beliefs of the

publisher are as to the statement's truth. More careful investigation before publishing should lead to a reduction in the number of false statements of fact that are published, and thus should lessen the chance of harm to an innocent person's reputation.

Since the publishers would be more careful before they publish, the number of false statements of fact in the marketplace of ideas should also be reduced. This would lessen the second problem - that consumers of information are not able to rely properly on the marketplace of ideas in order to make important decisions. [n178] As the number of false statements of fact that are not marked as "opinion" are reduced, the consumers should be able to trust more and more in the "straight" news, and thus should be able to make decisions based on that news with less skepticism.

The third problem with the actual malice standard, that it fails to adequately protect publishers who take the time to investigate the truth of statements of fact before publishing, would also be reduced by a gross negligence standard. Under the actual malice standard, careful reporters are being "scooped" out of stories and profits by their less careful competitors who rush to publish stories before checking the facts. [n179] The proposed gross negligence standard would **[*286]** impose liability on those grossly careless publishers whose publications turned out to be false. This would either make the grossly negligent publishers suffer the consequences of their haste by paying large judgments or higher libel insurance premiums, [n180] or force the hasty publishers to become more careful and thus less likely to "scoop" other publishers. Either way, the publisher that could produce the fastest accurate story would now be rewarded - as opposed to just the fastest.

V. POTENTIAL PROBLEMS WITH THE PROPOSED GROSS NEGLIGENCE STANDARD

A. The Standard May Increase Litigation

Professor Anderson and others have remarked on the potential chilling effect that the threat of litigation may have on speech. [n181] Publishers who are sued for libel may have to pay such exorbitant litigation costs just to defend the suits against them that even if they win they may be chilled when considering publishing a controversial story in the future. [n182] The proposed gross negligence standard arguably would further improperly chill speech by both opening the floodgates of litigation, and making it easier for plaintiffs to recover.

There are several important responses to this argument. First, the proposed standard may in fact decrease litigation by reducing the number of persons libeled. If publishers have an incentive to be more careful during their investigations, then fewer false statements of fact should be published - since the publishers would be able to expose and eliminate them during the investigations.

Second, the proposed standard may reduce litigation costs by ending more cases at the dismissal or summary judgment stage. For example, the court in Gaeta v. New York News, Inc. [n183] granted summary judgment for a defendant newspaper reporter under an objective gross negligence standard. The court stated that summary judgment was more appropriate under an objective standard than under the subjective actual malice standard because the objective **[*287]** standard did not involve an investigation into the defendant's state of mind. [n184]

Third, since the gross negligence standard would be based more on objective factors than on the defendant's state of mind, discovery should be much simpler and less expensive. [n185] Also, there would be less need for expensive expert witnesses to testify about the mental state of the defendant. [n186]

Fourth, there is no empirical evidence to indicate that an increase in litigation chills speech. Although it seems likely that increased litigation would have this effect, Professors Smolla and Weaver have already found an increase in libel litigation over the past fifteen years, [n187] and yet Professor Weaver did not discover any indication in his study that speech is actually being chilled. [n188] In fact, even the publishers who have been sued seem to complain more about irresponsible journalism than about fear of suit. [n189]

Fifth, and finally, an increase in litigation may be beneficial, not harmful. There may exist public figures who deserve to recover for libel, [n190] but have been "chilled" from suing by the cost and difficulty of recovery under the present "actual malice" standard. [n191] Under the **[*288]** proposed gross negligence standard these victims of libel might finally receive the compensation they deserve.

B. Legislation May Be the Proper Answer

As Professor Kalven points out, the legislature may be the proper source of change for libel law: "If policies are to be weighed on scales this exquisite, surely it is the function of the legislature to do the weighing. Is the difference between reckless disregard [and] gross negligence ... really a constitutional difference?" [n192]

Professor Kalven may be right. Several libel reform bills have in fact been considered. [n193] However, as of yet, none of these bills has passed into law. One reason for the failure of these bills is opposition by the media bar. [n194] Another potential reason is that even if legislatures pass the bills, the Supreme Court would have to find them constitutional. It is unclear after New York Times v. Sullivan [n195] and Gertz v. Robert Welch, Inc. [n196] what level of scrutiny would be used in libel cases. [n197] Thus, it is possible that the proposed libel reform bills would not pass Supreme Court review because they improperly chilled speech. A better approach would be to modify the Supreme Court's stance as to what level of protection is necessary. That is particularly true since it was the Supreme Court that adopted the actual malice test over the common law strict liability test in the first place. **[*289]**

VI. CONCLUSION

The "actual malice" standard is a failure because it does not properly balance society's interests in free speech, reputation, and access to reliable information.

The standard goes too far to protect freedom of speech by allowing grossly irresponsible publishers to make false statements of fact without incurring liability. Published speech does not need such a great margin for error to prevent the "chilling" of ideas and true statements of fact.

The First Amendment is not so fragile that it requires us to minimize this kind of reckless, destructive invasion of life. ... The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate... If [the public official] is needlessly, heedlessly, falsely accused ... he should have a remedy in law. [n198]

The proposed gross negligence standard would provide sufficient protection for valuable speech. In addition, since it is an objective standard, it would remove the present incentive for publishers to avoid knowing the truth or falsity of their information. A premium on ignorance should not prevail over a premium on truth.

In contrast, the "actual malice" standard does not go far enough to protect society's interest in a person's reputation. As Justice Stewart said: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty." [n199]

The "actual malice" standard allows publishers who fail to do any investigation whatsoever to publish false factual information about public figures without fear of liability. [n200] This means that many public figures will be unnecessarily defamed without the compensation they deserve. **[*290]**

The proposed gross negligence standard would make it easier for these libel victims to recover, since they would no longer have to prove the defendant's subjective state of mind. In addition, the proposed standard should reduce the publication of libelous statements in the first place by giving publishers more of an incentive to investigate the truth of

their information before publishing.

Finally, the actual malice standard is a failure because it does not adequately ensure the reliability of factual information entering the marketplace of ideas. This is because the standard does not provide publishers with an incentive to investigate the truth of their factual statements before publishing. The standard in fact gives the opposite incentive - it places a premium on ignorant publishers. The failure of the actual malice standard to adequately ensure reliable factual information harms two groups of persons, in addition to the victims of libel. First, it harms the "consumers" of information. The consumers either detrimentally rely on false statements of fact, or they grow to doubt all statements of fact - like the people who did not heed the cry of the boy the day the wolf actually came. Second, by creating the premium on ignorant publishers, the failure to adequately ensure reliable factual information harms careful publishers. These careful publishers cannot warrant the truth of their factual statements, [n201] and thus are either driven out of business by the irresponsible publishers who rush to "scoop" them, or are forced to join those publishers in the "**race to the bottom.**"

The proposed gross negligence standard would help both the consumers of information and the careful publishers. This is because the objective nature of the proposed standard would make publishers investigate the truth of their publications - for fear of liability for grossly inadequate investigation. Consumers of information would thus benefit because the standard would make publication of unreliable statements of fact less likely. More thorough investigation should lead to more reliable publications. The careful publishers would benefit because they would gain a financial advantage over grossly irresponsible publishers - the irresponsible publishers would have to "pay the freight" for their gross carelessness [n202] with higher insurance and judgment costs. The incentive for publishers to remain unaware of the truth or falsity of their publications would be eliminated. **[*291]**

The proposed gross negligence standard would thus provide the proper balance of free speech, reputation, and access to reliable information.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewTortsIntentional TortsDefamationPublic FiguresGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

FOOTNOTES:

n1. Unless otherwise noted, for the purposes of this article, the term "public figure" is intended to include both "public figures," as defined by the United States Supreme Court in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and "public officials," as defined by the Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964).

n2. David A. Anderson, Is Libel Law Worth Reforming?, 140 U. Pa. L. Rev. 487, 550 (1991).

n3. I will usually refer to potential libel defendants in this paper as "publishers." By "publishers" I mean to include persons involved in both the print and broadcast media. These persons include writers, reporters, editors, photographers, cameramen, television producers and anyone else involved in using print, writing, pictures or signs to publish information.

n4. Judges and scholars have given numerous, often opposing reasons for the failure of libel law. For a list of some of the cases and law review articles discussing this topic, see Anderson, supra note 2, at 488 nn.2-3.

n5. See New York Times v. Sullivan, 376 U.S. 254 (1964).

n6. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

n7. This is a term I borrowed from corporation law. See Fischel, The "**Race to the Bottom**" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 Nw. U. L. Rev. 913 (1982). To my knowledge, it has not been previously used in connection with libel law.

n8. See discussion infra Part III.B.2.

n9. See discussion infra Part III.B.3.

n10. See discussion infra Part III.B.4.

n11. For simplicity's sake, the masculine pronoun will be used throughout the paper unless the context requires the feminine.

n12. Lackland H. Bloom, Proof of Fault in Media Defamation Litigation, 38 Vand. L. Rev. 247, 249 (1985) (citing W. Page Keeton et al., Prosser and Keeton on Torts 113, at 804 (5th ed. 1984)).

n13. 376 U.S. 254 (1964).

n14. Id. at 278-280.

n15. Id. at 280.

n16. Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657, 663-64 (1989).

n17. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

n18. New York Times, 376 U.S. at 271-72.

n19. Id. at 270.

n20. Harry Kalven, Jr., The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267, 304 (1967) (citing Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)); see also, New York Times, 376 U.S. at 279 (a rule compelling the critic of official conduct to guarantee the truth of all of his statements leads to a comparable self-censorship).

n21. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

n22. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155, 162 (1967) (the four-Justice plurality and Justice Warren agreed on this point).

n23. Anderson, supra note 2, at 500.

n24. Throughout this article the term "private figures" shall refer to libel plaintiffs who are neither public officials nor public figures.

n25. 418 U.S. 323 (1974).

n26. Id. at 347 (The Court held that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

n27. See Gazette, Inc. v. Harris, 325 S.E.2d 713, 726 n.3 (Va. 1985) (compilation of the states opting for a negligence standard).

n28. See, e.g., Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (1975) (adopting a gross negligence test for matters of public concern).

n29. See, e.g., Diversified Management v. Denver Post, 653 P.2d 1103, 1106 (Colo. 1982) (adopting an actual malice standard for public plaintiffs in matters of public interest).

n30. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

n31. Id. at 344.

n32. Id. at 345 ("Hypothetically it may be possible for someone to become a public figure through no purposeful action of his own ... [but] more commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies ... [and thus] invited attention and comment.").

n33. Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 511 (1984). In fact, this "clear and convincing" standard, although not clearly articulated, may have been in use since the New York Times case in 1964, since the Court in that case said that actual malice had to be proven with "convincing clarity." See New York Times, 376 U.S. at 285-86.

n34. Bloom, supra note 12, at 255.

n35. Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657, 686 (1989) (citing St. Amant v. Thompson, 390 U.S. 727, 730 (1968)).

n36. St. Amant, 390 U.S. at 730.

n37. 376 U.S. 254 (1964).

n38. Id. at 256.

n39. The implication in New York Times that the publisher of a paid advertisement should have a duty to prevent any statements in the advertisement - even those that he knows are false - from being printed, seems ludicrous. If the advertisement is clearly marked as an advertisement then the only entity that should be liable for its defamatory statements is its author.

n40. New York Times, 376 U.S. at 280-81.

n41. Id. at 286.

n42. Id. at 287.

n43. Id.

n44. Id. ("The state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.").

n45. 390 U.S. 727 (1968).

n46. Id. at 731.

n47. See supra note 33.

n48. St. Amant, 390 U.S. at 731.

n49. Id. at 731 (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

n50. St. Amant, 390 U.S. at 728.

n51. Id. at 730.

n52. This is not specifically in the record, but it can be shown by items (2) and (3).

n53. St. Amant, 390 U.S. at 731.

n54. Id. at 733.

n55. Id. Note that Albin was evidently unable to substantiate his charges, or else St. Amant would have been able to use the truth of the statements as a defense.

n56. Id. at 730.

n57. Justice Fortas first suggested that the actual malice standard be interpreted as a gross negligence standard, as the plurality interpreted it in Curtis Publishing. He then added that

the First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race... If [the public official] is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. New York Times does not preclude this minimal standard of civilized living.

Petitioner had a duty here to check the reliability of the libelous statement about respondent. If he had made a good-faith check, I would agree that he should be protected even if the statement were false, because the interest of public officials in their reputation must endure this degree of assault. But since he made no check, I [would allow] recovery.

Id. at 734-35 (Fortas, J., dissenting).

n58. Id. at 731.

n59. 491 U.S. 657 (1989).

n60. Id. at 692.

n61. Id. at 670, 674 n.21.

n62. Id. at 690.

n63. See, e.g., Herbert v. Lando, 441 U.S. 153, 160 (1979) ("proof of the [defendant's] necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred...").

n64. Harte-Hanks, 491 U.S. at 667.

n65. Id. at 682-83.

n66. Id.

n67. Id. at 683-84.

n68. Id. at 684.

n69. Id. at 684-85.

n70. Id. at 691.

n71. Id. at 692. The Harte-Hanks court also cites Curtis Publishing as using a similar standard.

n72. See Bloom, supra note 12, at 247-48. In this article, Professor Bloom has compiled a list of factors that the courts have used to infer that a publisher subjectively entertained serious doubts as to the truth of his publication. The factors are: (1) ill will; (2) failure to investigate or verify; (3) reliance on inherently ambiguous source; (4) tone, style, editorial slant and language; (5) balance and selectivity; (6) editorial process; (7) reliance on counsel; and (8) retraction.

n73. Id. at 331 (none of these factors alone appear to be enough to prove actual malice, but all carry a certain amount of weight, depending on the circumstances).

In addition, Professor Bloom has divided a news media investigation into the factors that courts have considered relevant in their determination that a mere "failure to investigate" was in fact a "purposeful avoidance of the truth." The factors are: (1) lead time, (2) seriousness of the charge, (3) inherent improbability, (4) awareness of inconsistent information, (5) no source, (6) obvious reason to doubt source, (7) failure to consult an obvious source, (8) failure to consult an expert, and (9) no further verification following denial. Id. at 247.

n74. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

n75. See Russell L. Weaver & Geoffrey Bennett, Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective, 53 La. L. Rev. 1153, 1182-89 (1993) (professor interviews publishers at thirteen major news sources).

n76. Id. at 1182-83 n.166 (Bob Edwards, Host, National Public Radio's Morning Edition said fear of defamation had "zip" impact on his broadcasting).

n77. Id. at 1183-87. Professors Weaver and Bennett interviewed the following individuals on the corresponding dates: (1) Bob Edwards, Host, National Public Radio's Morning Edition, on July 23, 1992; (2) David Gelber, Executive Producer, 60 Minutes, on Oct. 13, 1992; (3) Stephen Friedman, Executive Producer, NBC Nightly News with Tom Brokaw, on Sept. 22, 1992; (4) Jim Mitchell, News Anchor, WDRB Television, on July 8, 1992; (5) Walter Porges, Vice President for News Practices, CBS, on Sept. 22, 1992; (6) John Zucker, Staff Counsel, CBS, on Oct. 12, 1992; (7) Hunt Hale, Louisville Courier-Journal, on July 1, 1992; (8) Mary Ann Werner, Assistant Counsel, Washington Post, on July 6, 1992; (9) George Freeman, Senior Counsel, New York Times, on July 7, 1992; (10) Theodora Brown, Assistant General Counsel for National Public Radio, on July 23, 1992; (11) Jennifer Weiss, Staff Counsel, Cable News Network (CNN), on July 9, 1992; (12) Brian Ross, Correspondent, NBC, on Oct. 9, 1992; and (13) Carl Stern, Reporter, NBC News, on Oct. 2, 1992.

n78. Id. at 1187. Professors Weaver and Bennett interviewed the following individuals on the corresponding dates: (1) Jane Kirtley, Executive Director of The Reporters Committee for Freedom of the Press, on Sept. 29, 1992; and (2) Linda Friedman, Libel Resource Defense Center, on Oct. 9, 1992.

n79. Id. at 1181 n.162.

n80. Id. at 1185. Note, this may only be for prominent news sources.

n81. Id. at 1187.

n82. Id. at 1183.

n83. Id. at 1187 n.216.

n84. Id. at 1188 ("Being lawyered to death" means having to undergo onerous prepublication checks with lawyers before publishing.).

n85. Id. at 1188-89 ("Because CNN broadcasts constantly to all parts of the globe, it is more cautious about the threat of defamation suits. In addition, CNN is much more likely to have lawyers routinely engage in prepublication review of its broadcasts.").

n86. Id.

n87. See, e.g., St. Amant v. Thompson, 390 U.S. 727, 731 (1968), and discussion supra part II.B.2.

n88. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

n89. Id..

n90. St. Amant, 390 U.S. at 731.

n91. Id. at 733 (citing New York Times v. Sullivan, 376 U.S. 254, 287-88 (1964)).

n92. There are of course other incentives for verification and accuracy, such as professional pride and reputation. These incentives may be insufficient to stop grossly negligent reporting, however, when a publisher must regularly "scoop" other publishers or face financial extinction. See discussion infra, part III.B.4.

n93. St. Amant, 390 U.S. at 731.

n94. See supra part II.B.2.

n95. 491 U.S. 657 (1989).

n96. The Supreme Court noted in dicta in St. Amant that proof that the "story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous phone call" might be enough to prove that the defendant had serious doubts as to the truth of his publication. St. Amant, 390 U.S. at 732. While this may be true, none of these scenarios is presented here.

n97. 583 F.2d 1221 (3d Cir. 1978). Dickey is admittedly not a Supreme Court case, but is still a case with a certain amount of authority, which was decided on the same grounds as the Supreme Court cases.

n98. The debate was a videotaped program by CBS. The tape was made on May 1, 1974 with the intent that it be aired on May 5, 1974. The Congressman made his allegations while being videotaped on May 1, and Mr. Dickey, who was not present at the taping, responded through his lawyer by telephone on May 2, and by letter on May 3. In his response, Mr. Dickey stated that the allegations were "completely false" and requested that CBS "withhold the showing of this program pending an investigation." CBS aired the program as scheduled on May 5, and Mr. Dickey sued. Id. at 1222-23.

n99. Id. at 1224. As the informant did in St. Amant, the Congressman also told the reporter that he "would stake his reputation on [the statement's] accuracy." Id.

In addition, the court noted that (1) the Congressman's statements were not made off the cuff; (2) the Congressman "waved papers" while he was speaking, indicating that he had a copy of the Sprague Report; (3) since the Congressman had previously been backed by the Board for many years, "it was reasonable to believe he knew whereof he spoke"; (4) "the Sprague Report's release was indeed anticipated," and "what Sprague said carried weight"; (5) the Congressman's charges were "not generalized, but specific, naming names and amounts, indicating real knowledge, not wild charges; (6) the charges were consistent with on-going news stories alleging corruption on the part of the Board and Dickey. Id..

n100. The Dickey court specifically rejected the "neutral reportage" theory offered by the defendant. Id. at 1225. This theory, first recognized in Edwards v. National Audubon Society, 556 F.2d 113 (2d Cir.), cert. denied, 434 U.S. 1002 (1977), creates an "absolute privilege for accurate and disinterested reporting of defamatory accusations made by responsible organizations. Where recognized, this privilege protects the media even when they know the charges they are reporting are false, or when they seriously doubt their truth." Anderson, supra note 2, at 503.

The Dickey court rejected the neutral reportage theory because it is contrary to the Supreme Court's ruling in St. Amant that "publishing with "serious doubts' as to the truth of the publication shows reckless disregard ... and demonstrates actual malice." Dickey, 583 F.2d at 1225 (citing St. Amant, 390 U.S. at 731). In addition, the Supreme Court noted in the St. Amant case that the defendant in that case "mistakenly believed he had no responsibility for the broadcast because he was merely quoting [the source's] words" (emphasis added). St. Amant, 390 U.S. at 730.

While the Supreme Court has never directly ruled on the issue of neutral reportage, several other courts have explicitly rejected it. Among the courts rejecting the theory are: the highest courts in Kentucky, New York and South Dakota, as well as the Michigan Court of Appeals. Anderson, supra note 2, at 503 n.70.

n101. Dickey, 583 F.2d at 1227 (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

n102. Id. at 1223.

n103. Id. at 1222-23.

n104. Id. at 1223.

n105. Id. at 1224.

n106. Id. at 1223.

n107. Id.

n108. Id. at 1225.

n109. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

n110. Anderson, supra note 2, at 525 (citing Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

n111. Richard A. Epstein, Was New York Times v. Sullivan Wrong?, 53 U. Chi. L. Rev. 782, 798 (1986).

n112. See, e.g., Gertz, 418 U.S. at 344 n.9 ("Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie.").

n113. Anderson, supra note 2, at 526 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46-47 (1971) (plurality opinion by Brennan, J.)).

n114. See, e.g., St. Amant v. Thompson, 390 U.S. 727, 733 (1968) (that the defendant "failed to realize the import of what he broadcast - and was thus heedless of the consequences for [the plaintiff] - is colorless").

n115. See St. Amant, 390 U.S. at 730.

n116. See supra Part II.

n117. Anderson, supra note 2, at 527; Epstein, supra note 111, at 797-98.

n118. Anderson, supra note 2, at 527 (he terms the argument "waiver" not "assumption of risk").

n119. Id.

n120. Id. at 528 (citing Carson v. Allied News Co., 529 F.2d 206, 209-10 (7th Cir. 1976)).

n121. Anderson, supra note 2, at 528.

n122. Professor Anderson lists a fourth fallacy, as well, which concerns public-official classification. Id. at 527-28. It will not be discussed here.

n123. Id. at 528.

n124. Id. at 528.

n125. Geoffrey R. Stone et al., Constitutional Law 1017-19 (2nd ed. 1991). In fact, the "marketplace of ideas" and "self-governance" are considered two separate justifications for the freedom of speech provided by the First Amendment. The basic principle of the "marketplace of ideas" justification is that people can only determine if an opinion is true by testing it against all other opinions. See id. at 1017 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The basic principle of the "self-governance" justification is that voters must be made as wise as possible in order to discuss and decide matters of public policy. See Stone, supra, at 1019 (citing Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 15-16, 24-27, 30 (1948)). These two justifications are combined in this article because they are similarly founded on the idea that people need as much information as possible in order to decide how best to run their lives.

n126. See supra Part III.B.1. See also, discussion infra note 137.

n127. " Consumer" refers to anyone who reads or listens to information provided in the marketplace of ideas.

n128. For example, the Los Angeles Times reported that Jill Lansing, the attorney for alleged murderer Lyle Menendez, burst into tears at the conclusion of her closing argument in Menendez's highly publicized first trial. Alan Abrahamson, Defense Urges Leniency for Lyle

Menendez, L.A. Times, Dec. 10, 1993, at B1. The Times has a reputation as a truthful newspaper. It is neither a tabloid, nor a comedy publication. It published this information in a "straight" news story, not an editorial. The story was false. In fact, Lansing did not burst into tears, and she maintained her professional composure throughout her argument. See For the Record: The Menendez Trial, L.A. Times, Jan. 4, 1994, at B1. A client of Lansing's could easily have relied on the Times article in deciding to fire her in his own case.

n129. Admittedly, all information should be received with a certain level of skepticism. This is due to the bias inherent in any angle an author takes in composing his story. Still, some types of stories are consistently received with a larger amount of skepticism than others. Statements in an editorial, for example, are usually read more skeptically than statements in "straight" news stories.

n130. As Van Gordon Sauter, president of Fox News, and former president of CBS News put it:

[the news media is] no longer as trustworthy as we used to be; we're no longer as credible as we used to be; we're no longer as committed to the viewer or reader as we used to be. There is a repository of trust and goodwill, but it's very much on loan, and I think some people are really beginning to doubt the value of that loan.

David Shaw, Poll Delivers Bad News to the Media, L.A. Times, Mar. 31, 1993, at A16.

n131. See Epstein, supra note 111, at 811-13.

n132. Although this is nearly impossible to prove, there are several indicators that show it is likely. They are: first, a 1989 Gallup survey found that 44% of the 1,507 Americans surveyed viewed press coverage as "inaccurate," as compared to only 34% in 1985. Thomas B. Rosenstiel, Public Confidence in Press Dips Sharply, Surveys Find, L.A. Times, Nov. 16, 1989, at A1, A18.

Second, the number of copy desk editors - "the editors who read every story before publication to check for accuracy, fairness, consistency, tone, language usage and style" - has declined at "newspapers all around the country" due to the recession and declining audiences, says Maxwell King, executive editor of the Philadelphia Inquirer. The Inquirer, which has won more Pulitzer Prizes since 1985 than any other paper, has had to let go over 10% of its copy editors, as has the Los Angeles Times. Id. at A18. With this cutback, "we're not able to do quite as careful and fair a job as we did before," said Maxwell. Id.

Third, a March, 1993, Los Angeles Times poll found that 56% of the 1,703 adults surveyed thought that "incidents such as the one in which NBC News doctored the truck explosion without informing its audience" are "common" (this refers to the incident in which NBC News rigged a General Motors pickup truck to explode during a staged crash test in 1993). Id.

Fourth, Jeff Wald, news director of KCOP Channel 13 in Los Angeles, said that television's "first reports are often unreliable and inaccurate; by "going live for the sake of going live,' he says, television frequently passes along information that misinforms the public and undermines the media's credibility." Id. at A17-A18.

Fifth, the combination of difficult economic times, an increasing number of news sources, a diminishing number of people willing to pay for news that is not also scandalous entertainment, and the "actual malice" standard's incentive not to investigate also contribute to the likelihood of an increased number of false statements in the marketplace of ideas. See infra Part III.B.4.

n133. Additionally, the other sources may not provide the type or quantity of factual information which interests the consumer. Television, for example, often doesn't provide as much detail about an incident as a newspaper does. On the other hand, a newspaper doesn't provide as up-to-the-minute reporting as television does.

n134. These are stories that many people originally doubted, but which now seem to be true. Both stories began in the tabloids and then were picked up by the more established newspapers, magazines, and television stations. See e.g., Cathleen McGuigan et al., Michael's World, Newsweek, Sept., 6, 1993, at 34; Michael Kramer, Moment of Truth, Time, Feb. 3, 1992, at 12.

n135. See discussion supra Part III.B.3.

n136. See supra Part II.

N137. For example, the National Enquirer sold approximately five million copies the week it "scooped" the other news sources and published the first photos of then presidential candidate Gary Hart with girlfriend Donna Rice. Beth Ann Krier, When the National Enquirer Pounces, Sales Jump - and So Do Its Critics, L.A. Times, June 11, 1987, pt. V, at 1, 12.

n138. Kramer, supra, note 134, at 13 (Star magazine bought Gennifer Flowers' story for an undisclosed sum, which President Clinton says was $ 50,000); David Shaw, Obsessed with Flash and Trash, L.A. Times, Feb. 16, 1994, at A1, A13 ("the tabloid TV shows compete frantically to be first, often paying people for their exclusive stories - which reputable newspapers don't - and this drives prices up and standards down"); Star, Jan. 23, 1996, at 8 ("HAVE YOU GOT A STAR STORY? If you have a hot story on a star, phone Star. It could earn you a lot of money.").

n139. " The audience for traditional media outlets has been declining steadily... The number of people who read a newspaper every day has dropped from 73% of the American public to 51% over the past 25 years. [And o]ver the same period, ... the percentage of people who watch the evening network news shows has dropped from 56% to 31%." David Shaw, Trust in Media Is on Decline, L.A. Times, Mar. 31, 1995, A1, at A18; see also, Thomas J. Maier, Hey You!; Read All About How Papers Will Do, Newsday, Mar. 17, 1991, at 96 ("The usually robust Washington Post, for example, reported an 18 percent drop in net income for the final quarter of 1990.").

n140. Shaw, Trust in Media Is on Decline, supra note 139, at A17-A18 ("technological innovations - computers, fax machines, minicams, cable television, satellite dishes - have greatly increased the speed with which the media can report the news").

n141. Id.

n142. Shaw, supra note 138, at A1.

n143. Howard Rosenberg, How TV News Spiraled into "Tabloidgate" L.A. Times, Feb. 14, 1994, at F1, F12.

n144. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130, 158 (1967) ("The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking,' and the pressure to produce a successful expose might have induced a stretching of standards [of journalistic care]... "); Shaw, supra note 137, at A13 (discussing the tabloid TV shows' willingness to pay sources for exclusive stories); Shaw, supra note 130, at A16 (discussing how NBC news rigged a pickup truck to explode during its televised crash test).

n145. Bill Moyers, For Democracy's Sake, We Must Recapture the Mind of America, St. Petersburg Times, Mar. 29, 1992, at 1D.

n146. " An epidemic of self-reference has transformed the worlds of journalism, advertising and politics... Gennifer Flowers was not a story for Responsible Journalists, no sir. But a sleazy tabloid's decision to run a story about Gennifer Flowers, well, that was a story crying out for Responsible Journalists to write analyses of the tabloid's shoddy journalistic decision ...." Michael Grunwald, Meta-morphosis, Boston Globe, Aug. 8, 1993, (Magazine) at 12. See also, Thomas B. Rosenstiel, Reporters Putting Their Own Spin on News Events, L.A. Times, Nov. 25, 1993, at A1 (discussing the Los Angeles Times' own shoddy journalistic tendencies).

n147. In fact, in a March, 1993 nationwide poll taken by the Los Angeles Times, 27 percent of the people surveyed said that they thought that the "courts should make it easier for the news media to be sued for libel" - up from 21 percent in the 1985 poll. Shaw, Poll Delivers Bad News to the Media, supra note 130, at A16.

n148. St. Amant v. Thompson, 390 U.S. 727, 733 (1968) ("failure to investigate does not in itself establish [liability]").

n149. This standard is an adaptation of the negligence standard used in the Restatement: "whether the defendant acted reasonably in checking on the truth or falsity ... of the communication before publishing it." Bloom, supra note 12, at 341, (citing Restatement (Second) of Torts 580B cmt. g (1976)).

It is a similar standard to the gross negligence libel standard Justice Harlan proposed in his plurality opinion in Curtis Publishing, although Justice Harlan's standard was based on the professional journalist's standard of care - as opposed to the average reasonable person's standard. See discussion infra Part IV.A.2.

n150. The United States Supreme Court takes a similar position. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

n151. Rodney A. Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 1-4 (1983).

n152. Bloom, supra note 12, at 340.

n153. Bloom, supra note 12, at 341. Professor Bloom also notes that

obviously a jury would not be equipped to measure potential chilling effect with any precision considering that neither scholars, attorneys, nor media have been able to do so yet. The first amendment interest, however, could be factored in the decision in at least a rough, common sense manner. More significantly, the potential threat to free press values can, and presumably will, be considered more analytically on a motion for summary judgment, a motion for directed verdict, a motion for judgment notwithstanding the verdict or an appeal.

Id.

n154. Curtis Publishing Co. v. Butts, 388 U.S. 130, 158 (1967) (emphasis added).

n155. As Professor Bloom noted, several jurisdictions have rejected the professional standard in private figure defamation cases because "it unfairly would permit the defendant class to prescribe its own standard of care." Bloom, supra note 12, at 343 (citing cases from Illinois, Kentucky, Massachusetts, Oregon and Tennessee).

n156. See discussion supra Part III.B.1.

n157. See supra Part III.B.2.

n158. Bloom, supra note 12, at 343 (arguing for a professional standard in media defendant defamation cases).

n159. Bloom, supra note 12, at 340 n.331.

n160. See supra Part III.B.

n161. See supra Part III.B.4.

n162. See St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

n163. See supra part III.A.

n164. For example, when the defendant makes little or no effort to investigate the truth of a serious charge, his action would likely be grossly irresponsible. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130, 158-59 (1967) (A plurality of four Justices held that publication of allegations of fixing a football game made by a single source "without substantial independent support" was grossly negligent. A fifth Justice held that the publication was with reckless disregard as well.); Meadows v. Taft Broadcasting Co., 470 N.Y.S.2d 205, 208 (1983) (finding sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when reporter made serious charges with "little or no effort" to authenticate their veracity).

n165. See discussion supra Part III.B.

n166. See supra Part II.

n167. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

n168. Some authors argue that a simple negligence standard is essentially the same as strict liability in libel law. This is due to the belief that a jury who is faced with a defendant who made a false statement of fact will assume that the defendant must have been negligent or the statement would not have been made. See, e.g., Smolla, supra note 151, at 33.

n169. 62 N.Y.2d 340 (1984).

n170. Id. at 347. The lower courts had improperly used a simple negligence standard instead of a gross negligence standard to deny summary judgment. Under New York law, private plaintiffs who sue for libel in "matters of public concern" must prove gross negligence, not merely simple negligence. Chapadeau v. Utica Observer-Dispatch, 341 N.E.2d 569, 571 (1975).

n171. Gaeta, 62 N.Y.2d at 346-47.

n172. Id. at 346.

n173. Id.

n174. Id. at 347-48.

n175. The proposed standard would employ an average reasonable person test to determine gross negligence, as opposed to the professional journalist standard. It is unclear which standard is used in New York, although it appears to be a reasonable person standard. See, e.g., Gaeta, 62 N.Y.2d at 351 (plaintiff must show that defendants "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by reasonable parties").

n176. Of course, this publication would have to be clearly a statement of opinion, which is not probably false and cannot be reasonably interpreted as stating actual facts about the plaintiff. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

Although this standard arguably provides too little protection for statements of opinion, the standard will not be discussed in this article.

n177. See discussion supra Part III.B.2.

n178. See discussion supra Part III.B.3.

n179. See discussion supra Part III.B.4.

n180. As the Supreme Court said, "newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service ... they must pay the freight." Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (citations omitted).

n181. Anderson, supra note 2, at 541-46.

n182. Id. at 541.

n183. 62 N.E.2d 340 (1984); see discussion supra at Part IV.B.2.

n184. Gaeta, 62 N.Y.2d at 350-51 ("While it may be argued that libel suits involving public figures are inappropriate for summary judgment because the plaintiff must demonstrate the subjective state of mind of the defendant, which does not readily lend itself to summary disposition (see, e.g., Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979)), here the standard may be satisfied by wholly objective proof.").

n185. Admittedly, most plaintiffs will still request punitive damages as well, and these would involve calculations of the mental state of the defendant. However, these damages could either be capped or awarded only for a showing of extreme ill will, such as in the case of an intentional lie. The first solution would make expensive litigation less palatable because the cost to do the investigation might outweigh the reward for success. The second solution would end many investigations at the settlement, dismissal, or summary judgment stage when no case for an intentional lie appeared to be forthcoming.

n186. This is also an argument against the "professional standards" version of the gross negligence standard. Under a professional standards test, both sides would have to produce experts to argue whether the professional standards had been followed.

n187. Smolla, supra note 150, at 4-5 (noting the "increase in the number and prominence of libel suits" based on several studies done in the late 1970's and early 1980's); Weaver & Bennett, supra note 74, at 1154 (citing "recent" studies).

n188. See discussion supra Part III.A.

n189. See discussion supra note 83.

n190. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) ("Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test").

n191. Professor Smolla cites a study by Professor Marc Franklin as saying that "plaintiffs won judgments after appeal in only twelve percent of [recent libel] cases. In suits brought against media defendants, plaintiffs received winning judgments in only five percent of the appeals." Smolla, supra note 151, at 4-5.

n192. Kalven, supra note 20, at 299.

n193. See, e.g., Marc Franklin, New Perspectives in the Law of Defamation: A Declaratory Judgment Alternative to Libel Law, 74 Cal. L. Rev. 809, 812, 832 (1986) (reprinting the full text of H.R. 2846, the bill introduced to the United States Congress by Representative Charles Schumer on June 24, 1985 (the "Schumer" bill), and Professor Franklin's own proposal, the Plaintiff's Option Libel Reform Act (POLRA)); Anderson, supra note 2, at 490-91 (listing several libel reform bills and discussing the Uniform Defamation Act).

n194. Anderson, supra note 2, at 491.

n195. 376 U.S. 254 (1964).

n196. 418 U.S. 323 (1974).

n197. Libel initially received no constitutional protection since it was "low-value" speech. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (libelous speech belongs to that category of utterances that are "no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality"); see also Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel of groups is also not protected by the First Amendment).

After New York Times and Gertz, however, there are constitutional limitations on the restriction of libelous speech. See supra Part II.A. For instance, states cannot enact laws making publishers strictly liable for defamation. Gertz, 418 U.S. at 347. Thus, it is unclear what level of scrutiny would be applied to a new national libel statute.

n198. St. Amant v. Thompson, 390 U.S. 727, 734-35 (1968) (Fortas, J., dissenting. Justice Fortas added that "the First Amendment does not require that we license shotgun attacks on public officials in virtually open season. The occupation of public officeholder does not forfeit one's membership in the human race."). See also supra note 57 and surrounding discussion.

n199. Anderson, supra note 2, at 525 (citing Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

n200. St. Amant, 390 U.S. at 733 (failure to investigate alone does not establish actual malice).

n201. See supra part III.B.4.

n202. Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (citations omitted).