Approved: January 27, 2003
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Vratil at 9:30 a.m. on January 22, 2003 in Room 123-S of the Capitol.

All members were present except: Senator Pugh (A)

Committee staff present: Mike Heim, Kansas Legislative Research Department
Jerry Ann Donaldson, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Murrel Bland, Editor/Publisher Wyandotte West
Nick Tomasic, Wyandotte County District Attorney
Jerry Palmer, Topeka Attorney
Chris Biggs, Geary County District Attorney
John Settle, Larned Publishing Co., and Pawnee County Attorney(written testimony only)

Others attending: see attached list

Chairman Vratil called the Committee's attention to a handout provided by staff upon Senator Oleen's request covering the Federalization of State Defamation Law as information. (Attachment 1)

The Chair called for bill introductions. Kathy Damron, representing Philip Morris, requested introduction of a bill concerning tobacco and relating to the master settlement agreement; appeal bonds in certain litigation. (Attachment 2) Senator Oleen moved to introduce the bill, seconded by Senator O'Connor, and the motion carried.

Senators Schmidt and Umbarger requested a bill to create in Kansas a crime of negligent homicide. Senator Schmidt moved to introduce the bill, seconded by Senator Umbarger, and the motion carried. (no attachment)

SB 3 - Repealing the criminal defamation statute, K.S.A. 21-4004

Chairman Vratil reopened the hearing on **SB 3** continued from the January 21 meeting. Conferee Bland testified in support of repealing **SB 3**. Mr. Bland said he had been a victim of defamation in Wyandotte County, but still supported the repeal of K.S.A. 21-4004 because it was a detriment to free speech and political expression.

Conferee Tomasic testified in opposition to **SB 3**. He agreed that freedom of speech was a valued constitutional right. Mr. Tomasic stated there had not been a groundswell of criminal cases filed on 21-4004, and that only one case had been filed in the entire state since 1995. He urged the Committee not to react to a jury decision that sends a message that for every action, there is a re-action, and that we will all answer for libelous conduct. (Attachment 3)

General questions and discussion followed regarding the very small number of defamation cases that actually are tried in court, whether District Court judges are protected from defamation, concern for citizens who do not have deep pockets to fight defamation in the court system, and that the case in Wyandotte County was going to be appealed. Question was asked Mr. Tomasic regarding conviction of criminal defamation, which is a Class A misdemeanor, how many people have been sentenced on a first time conviction to jail time. Mr. Tomasic responded that he did not know of any.

Conferee Palmer testified in opposition to **SB 3**, and presented an alternative view from the perspective of a citizen concerned about decriminalization of defamation. He encouraged the Committee to preserve the criminal defamation law, and suggested that it could be amended down to a Class B or C misdemeanor, but wanted it left in the statute books. Mr. Palmer stated in his written testimony that the responsibility of the Legislature was to protect its citizens' values through enactment of criminal laws, and if exceptions are to be carved out to protect other societal interests, then exceptions should be made rather than repeal

of a law which preserves such a fundamental value of the citizens in their reputations. (Attachment 4)

Conferee Biggs testified in opposition to repealing the criminal defamation statute. Mr. Biggs appealed to the Committee to let the courts address the Wyandotte case being appealed , let it work itself through the court system, and the court rule on it before action is taken by the Legislature to repeal the law. He said he did not feel this was intended for publishers. He urged the Committee on behalf of the Kansas County and District Attorneys Association to allow the courts to interpret and apply the statute within the constitutional framework. (Attachment 5)

Written testimony in opposition to **SB 3** was submitted by John Settle. (Attachment 6)

Following Committee discussion and questions, the Chair closed the hearing on **SB 3**.

The minutes for the meetings of January 14, 15, and 16 were approved on a motion by Senator O'Connor, seconded by Senator Donovan, and the motion carried.

The meeting was adjourned at 10:32 a.m. The next scheduled meeting is January 23, 2003.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Wedsv., Jan. 22, 2003

NAME	REPRESENTING
John Peterson	Ks Governmental Consulting
Elaine Mann	League of Women Voters of ToCo.
Avi Hyten	JUDICIAL BRANCH
Angela Kirley	KCSDV
Sandy Barnett	KCSDV
Zach Pahmahmie	Prairie Band Potawatomi
Melissa L. Ness	Connections (KPA)
Jeff Burkhead	Kansas Press Association
Bailey Mann	Heim Law Firm
LAMAR STORMAKER	BRSU
James P Parker	Jocand for Emergency Services
David Progen	Prairie Band Potawatomi Nation
Trista Curzydlo	KS Bar Assn.
Rep Becky Hutchins	50th DISTRICT
Virginia Starr	Jeckerin Consulting
Pat Johnson	KSBTP
ED JASKINIA	THE ASSOCIATED LANDLORDS OF KANSAS (TALK)
Katrina Osterhaus	Ks. Div of Post Audit
JK Mendina	Capital-Journal

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
TERRY J Scott	Prairie Band Potawatomi Police
STEVEN JONES	SAC AND FOX TRIBAL POLICE
DICK KLINE	JUVENILE JUSTICE AUTHORITY
Denise Everhart	Juv Justice Authority
Mickel White	KCDAA
Chris Biggs	KCDAA
Nick Tomasic	KCDAA
Scott Elrod	Iowa Tribe Ks & Ne Police
SCOTT SCHNEIDER	KBBA
Thomas L Conkle Jr	Kickapoo Tribal Police
Stuart Little	Ks. Community Corrections Assoc.

Federalization of State Defamation Law

I. Introduction
II. Defamation
  A. Libel and Slander Per Se
  B. Libel and Slander Per Quod
  C. Damages
  D. Privileges and Other Defenses
III. Application of the First Amendment
  A. Pre-New York Times
  B. New York Times v. Sullivan
  C. Post New York Times
  D. The Right of Reply and Retraction Statutes in Defamation Actions
IV. Conclusion

I. Introduction

Over ten years ago the Supreme Court held that state defamation law was subject to the scrutiny of the first amendment guarantees of free speech and press. Since that time the law of defamation has consistently become federalized on a case by case basis. It is the purpose of this article to examine the extent of this federal intervention and discuss the ramifications of it in the related areas of right of reply and retraction statutes in defamation actions. In order to fully understand the changes that have occurred the authors feel that a general analysis of defamation law is required.

II. Defamation

Spawned from the recognized interest in safeguarding an individual's reputation from false impairment, the common law conceived a cause of action sounding in tort, commonly denominated defamation. The gravamen of the action was a false[1] and malicious[2] communication tending "to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided."[3] Because reputation is the keynote of a defamation action, it is necessary there be a communication or, as often referred to, a "publication" to some third person or persons.[4] As a general rule, interpreting a communication's defamatory nature is a task within the court's province,[5] while determining if and by whom the defamation was disseminated is for the jury.[6]

1. Generally, to be actionable, the allegedly defamatory statement must be false. See Annot., 85 A.L.R.2d 460 (1962).

2. *See* Good v. Higgins, 99 Kan. 315, 161 Pac. 673 (1916), defining malice as "a wrongful act done intentionally without just cause or excuse."

3. W. PROSSER, LAW OF TORTS § 111 (4th ed. 1971). The definition was first recognized in Parmitor v. Coupland, 6 M. & W. 105, 151 Eng. Rep. 340 (1840). See also, Kemmerle v. New York Evening Journal, 262 N.Y. 99, 186 N.E. 217 (1962) and 50 AM. JUR. 2d *Libel & Slander* § 8 (1970).

4. *See* Mims v. Metropolitan Life Ins. Co., 200 F.2d 800 (5th Cir. 1952). In Lyon v. Lash, 74 Kan. 745, 88 P.2d 262 (1906), the defamatory material was communicated solely to the plaintiff who in turn communicated it to a third party, and the court found a legally reprehensible publication wanting. Similarly, the court in Richardson v. Gundy, 88 Kan. 47, 127 Pac. 533 (1912) stated the rule that the necessary publication does not exist when the plaintiff has procured or instigated the communication to establish a cause of action. The court went on to note an exception when inquiry is propounded to ascertain whether the defendant is disseminating evil reports so they might be counteracted.

5. Brinkley v. Fishbein, 134 Kan. 833, 8 P.2d 318 (1932).

6. Kennedy v. Mid-Continent Telecasting, Inc., 193 Kan. 544, 394 P.2d 400 (1964).

Owing to historical circumstance,[7] defamation law was dichotomized around the vehicle of communication. Defamatory communications transmitted by the spoken word were categorized as slander while printed or written defamation became recognized as libel.[8]

Civil defamation in Kansas emerged as a common law cause of action,[9] adhering to the patterned libel-slander dichotomy.[10] However, the Kansas legislature in fashioning a criminal proscription on defamation abrogated the common law distinctions.[11] There are indications that such an approach might well be extended to civil actions at some future date.[12]

In addition to the libel-slander dichotomy, defamation law historically recognized subdivisions designated "per se" and "per quod."[13] The motivating basis for this differentiation was evidentiary in nature.

A. Libel and Slander Per Se

Consistent with the customarily utilized definition, Kansas courts as a general rule have perceived as libelous per se those written or printed words which as a matter of law[14] and by their very nature, without innuendo or extrinsic proof, are so notoriously injurious in character[15] that general damages are conclusively presumed and malice is implied from their publication.[16] The effect is to allow recovery even when the plaintiff has failed to show specific harm or damage to his reputation. A more narrow definition of slander per se generally exists.

For a statement to constitute slander per se, the general common law rule required it to be one of four types: an imputation of crime; an imputation of a loathsome disease; an imputation tending to prejudice a person in his trade or profession; or an imputation of unchastity in a woman.[17] Any such imputation, if false, was held actionable and, as with libel per se, special damages need not have been proved.[18]

B. Libel and Slander Per Quod

Generally, the rule developed that all defamatory statements communicated by the spoken word but not within the four categories were slander

7. *See* W. PROSSER, LAW OF TORTS § 111 (4th ed. 1971).
8. *See* 50 AM. JUR. 2d *Libel & Slander* § 4 (1970).
9. The Kansas civil code creates a statutory cause of action for neither libel nor slander.
10. *See* Bennett v. Seimiller, 175 Kan. 764, 267 P.2d 926 (1954).
11. *See* KAN. STAT. ANN. § 21-4004 (1974).
12. *See* PIK CIVIL 14.51, following what the authors believe to be the modern concept of ignoring the common law classifications of libel and slander.
13. *See* Chauffeurs Local 795 v. Kansans for the Right to Work, 189 Kan. 115, 368 P.2d 308 (1962); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959).
14. *See* Hatfield v. Printing Co., 103 Kan. 513, 175 Pac. 382 (1918), wherein the court recognizes that whether a particular communication constitutes libel per se is a question of law.
15. Little v. Allen, 149 Kan. 414, 87 P.2d 510 (1939).
16. Jerold v. Houston, 124 Kan. 657, 261 Pac. 851 (1927).
17. RESTATEMENT (SECOND) OF TORTS § 562 (1965).
18. Bennett v. Seimiller, 175 Kan. 764, 267 P.2d 926 (1954).

per quod. Consequently, actions based on such necessitated establishing special damages.

When written or printed words not otherwise libelous become so only in consequence of extrinsic facts, courts have denominated the particular calumnations as libel per quod. Despite prevalent accord in basic definition, jurisdictional discordance exists concerning the "special damage" requisite. What appears to be the minority of jurisdictions, Kansas being included therein, have required special damages to be shown to render all statements libelous per quod actionable.[19] The contrasting view and perhaps the majority position[20] has dispensed with any such requirement when the statement is susceptible to placement within one of the four slander categories.[21]

C. *Damages*

Two varieties of damage were recognized by the common law in defamation actions. In cases of defamation per se, "general damages" were an inference of law. Such damages were awardable by the jury without proof because presumptively they must naturally and necessarily arise from the publication of the defamatory matter.[22] The other recognized variety of damages is that denominated "special damages", recoverable if properly plead and proven. While the traditional proof of special damages was pecuniary loss to business or profession, contemporary decisions have held injury in the nature of anguish and disgrace likewise sufficient to fulfill any special damage requirement.[23] Traditionally, a plaintiff could also recover punitive damages for defamation, but only if he could prove express malice.[24]

D. *Privileges and Other Defenses*

What otherwise would have been a universal proscription was extensively circumscribed by the privileged communication doctrine. As a limited example, Kansas law will be utilized to exhibit the doctrine's basis and function.

The law recognizes two forms of privileged communications—those conditionally or qualifiedly privileged.[25] The Kansas courts have determined statements are conditionally privileged if made in good faith by a person with a legal, moral or social duty or interest in the subject matter to a person

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19. *See* Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (1966); Bernstein v. Dunn & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Henkle v. Alexander, 244 Or. 271, 417 P.2d 586 (1966). This view appears to at one time have been the majority position in the United States, but the courts began to abandon it with the decision of Walker v. Tribune Co., 29 Fed. 827 (N.D. Ill. 1887).
20. *See* W. PROSSER, LAW OF TORTS § 112 (4th ed. 1971).
21. *Id.*
22. *See* Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041 (1904).
23. Karrigan v. Valentine, 184 Kan. 783, 399 P.2d 52 (1959).
24. Good v. Higgins, 99 Kan. 315, 161 Pac. 673 (1916); Garvin v. Garvin, 87 Kan. 97, 123 Pac. 717 (1912).
25. Stice v. Beacon Newspaper Corp., 185 Kan. 61, 340 P.2d 396 (1959); Faber v. Byrle, 171 Kan. 38, 229 P.2d 718 (1951).

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with a corresponding interest or duty.[26] The law has further protected fair comment concerning open violations of the law[27] and statements concerning the public character of public officials and public figures[28] with a conditional privilege. In Kansas, despite falsity and the statement's otherwise defamatory nature, if the occasion thereof is one affording a qualified privilege, liability for defamation per se or per quod is precluded absent proof of malice.[29] To surmount this privilege, express as opposed to implied malice must be plead and proven.[30] The plaintiff has the burden of proving express malice,[31] which will generally require the utilization of extrinsic facts[32] to persuade the jury.[33]

In addition to truth,[34] certain circumstances will precipitate a complete defense to a defamation action. Statements made in these circumstances are said to be absolutely privileged.[35] Neither falsity nor actual malice will render statements encompassed by this privilege actionable. The privilege "is recognized as applying to cases in which the public service or the administration of justice requires complete immunity as in legislative, executive or judicial proceedings. . . ."[36] The effective discharge of the legislative and judicial functions demands total candor without the inhibitive fear of potential liability. The court has emphasized that public welfare and not individual protection precipitates this privilege.[37] The breadth of the absolute privilege is construed by the court as requiring only that the statement be one fairly and reasonably pertinent to the proceeding.[38]

Both privileges are a matter of affirmative defense requiring special pleading absent their existence appearing on the face of the petition.[39] As a general rule, defamatory statements are presumed false. A great deal of proof is not required to shift the burden to the plaintiff.[40] Whether in a particular circumstance a statement will be privileged is a question of law and is for the court's determination.[41] However, when the defense is a condi-

26. Sinogles v. Security Benefit Life Ins. Co., 217 Kan. 438, 536 P.2d 1358 (1975); Ebaugh v. Miller, 127 Kan. 464, 274 Pac. 251 (1959).
27. Stice v. Beacon Newspaper Corp., 185 Kan. 61, 340 P.2d 396 (1959).
28. Kennedy v. Mid-Continent Telecasting, Inc., 193 Kan. 544, 394 P.2d 400 (1964); Steenson v. Wallace, 144 Kan. 730, 62 P.2d 907 (1936); Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908).
29. Stice v. Beacon Newspaper Corp., 185 Kan. 61, 340 P.2d 396 (1959).
30. Carver v. Greason, 104 Kan. 96, 177 Pac. 539 (1919).
31. Senogles v. Security Benefit Life Ins. Co., 217 Kan. 438, 536 P.2d 1358 (1975).
32. Carver v. Greason, 104 Kan. 96, 177 Pac. 539 (1919).
33. Richardson v. Gunby, 88 Kan. 47, 127 Pac. 533 (1912) recognizing the existence of actual malice as a determination for the trier of fact.
34. *See* High v. Hardware Co., 115 Kan. 400, 223 Pac. 264 (1924).
35. Clear Water Truck Co., Inc. v. M. Bruenger & Co. Inc., 214 Kan. 139, 519 P.2d 682 (1974).
36. Stice v. Beacon Newspaper Corp., 185 Kan. 61, 64, 340 P.2d 396, 399 (1959).
37. Stice v. Beacon Newspaper Corp., 185 Kan. 61, 340 P.2d 396 (1959); Mickens v. Davis, 132 Kan. 49, 294 Pac. 896 (1931).
38. Stone v. Hutchinson Daily News, 125 Kan. 715, 266 Pac. 78 (1928); In Weil v. Lynds, 105 Kan. 440, 185 Pac. 51 (1910), the court stated as a rule of law that if a witness made a statement from the stand not in reply to a question it is absolutely privileged if pertinent to the issue being tried whereas if it is not pertinent it will enjoy only a qualified privilege.
39. Stice v. Beacon Newspaper Corp., 185 Kan. 61, 340 P.2d 396 (1959).
40. Sower v. Wells, 154 Kan. 134, 114 P.2d 828 (1941).
41. Munsell v. Ideal Food Stores, 208 Kan. 909, 494 P.2d 1063 (1972); Stone v. Hutchinson Daily News, 125 Kan. 715, 266 Pac. 78 (1928).

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tional privilege the jury must determine whether the communicator possessed a good faith belief in the statement's truth.[42]

In defamation cases, the only functional defense other than privilege is that the statement was true. Truth is recognized as an absolute defense to civil actions for libel and slander.[43]

Attempts by defendants, in defamation cases, at creating additional defenses have proven categorically unsuccessful. In Kansas, the anger of the disseminator at the time of publication will not provide a defense.[44] Allegations of honest mistake or that the defamatory statement was an expression of opinion have proved unsuccessful in thwarting recovery.[45] While the court has allowed an apology or a retraction to evidence a lack of malice in mitigation of damages, such actions provide no defense to liability in a defamation action.[46]

III. Application of the First Amendment

A. Pre-New York Times

Prior to *New York Times v. Sullivan*[47] the individual states were free to determine what defamatory communications were actionable. Unencumbered by any first amendment restraints[48] the state courts reached inconsistent results.[49] At the same time the state courts were at liberty to define the standard of conduct that would render a defendant liable. The majority view was to hold the publisher strictly liable for a libelous statement not otherwise privileged.[50] This sweeping approach was based on the rationale that a defamatory statement was capable of tremendous harm. It could affect all areas of the defendant's life, including social, political, economic, psy-

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42. Richardson v. Gunby, 88 Kan. 47, 127 Pac. 539 (1919).
43. High v. Hardward Co., 115 Kan. 400, 223 Pac. 264 (1924).
44. In Rohr v. Riedel, 112 Kan. 130, 210 Pac. 644 (1922), the court ruled that the anger or passion of the defendant at the time of the publication of the defamatory communication could not serve as justification or mitigation unless the anger was provoked by the plaintiff in which case it could be offered to mitigate damages.
45. Gregory v. Nelson, 103 Kan. 192, 173 Pac. 414 (1918); Hatfield v. Printing Co., 103 Kan. 513, 175 Pac. 382 (1918).
46. Sweany v. United Loan & Finance Co., 205 Kan. 66, 468 P.2d 124 (1970).
47. 376 U.S. 254 (1964).
48. *See*, cases cited note 62 *infra* and accompanying text.
49. *See*, cases cited notes 59-61 *infra* and accompanying text.
50. Peck v. Tribune, 214 U.S. 185 (1909). Writing the opinion for the Court, Justice Holmes stated:

> There was some suggestion that the defendant published the portrait by mistake and without knowledge that it was the plaintiff's portrait, or not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, 'whatever a man publishes he publishes at his peril.'

Accord, Albi v. Street and S. Publications, 140 F.2d 310 (9th Cir. 1944); Oklahoma Publishing Co. v. Givens, 67 F.2d 62 (10th Cir. 1933); Stone v. Hutchinson Daily News, 125 Kan. 715, 266 Pac. 78 (1918); Hatfield v. Gazette Printing Co., 103 Kan. 513, 515 (1918); *see* W. PROSSER, LAW OF TORTS § 113 (4th ed. 1971); 50 AM. JUR. 2d, *Libel and Slander*, § 184 (1970). A minority of courts imposed liability on a newspaper only for a negligent publishing. Memphis Commercial Appeal, Inc. v. Johnson, 96 F.2d 672 (6th Cir. 1938); Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933); Summit Hotel Co. v. National Broadcasting Co., 8 A.2d 302, 336 Pa. 182 (1939).

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chological, and physical.[51] Another consideration was that an individual was powerless to protect himself from the harm of a defamatory communication; therefore society would prefer the one who publishes to bear the cost of the mistake.[52]

The state courts did not draw a distinction between the mass media and an individual. Both were held strictly accountable for their libelous communications.[53] However, a different standard of liability was established for mere disseminators of a defamatory statement such as news vendors, librarians and handbill distributors. In this situation the standard was not normally strict liability but whether the disseminator knew or should have known that the material distributed contained defamatory matter.[54]

The rule of strict liability could produce harsh results and there was a tendency by some courts to mitigate the rule in certain cases. A few held a broadcaster liable only for negligence when the communication was a defamatory ad-lib.[55] There was also the argument that strict liability did not apply to a communication not defamatory on its face.[56] The rationale was that a publisher should at least have a warning that the publication was potentially defamatory before being held liable. Also mitigating the rule of strict liability was the requirement that the defendant must have intended or reasonably foreseen the communciation would be published.[57] Thus a distinction was drawn between an innocent but intentionally published defamatory statement and an intentional defamatory statement accidentally published. The former would incur liability; the latter would not.

The rule of strict liability did not apply if the communication fell within one of the common law privileges.[58] The qualified privilege of fair comment on matters of public concern provided the private individual and the mass media with the greatest shield against strict liability. Although the existence of the privilege was undisputed, the state courts disagreed upon its scope. The majority view extended the privilege to opinions, criticisms and comments but not to false statements of fact.[59] The reason given was that if men who sought public office were subject to misrepresentations of fact, they

51. *See* Note, *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 902 (1956) [hereinafter cited as Developments].
52. *Id.* at 902.
53. W. PROSSER, LAW OF TORTS § 113 (4th ed. 1971); Developments, *supra* note 51, at 904.
54. Bowerman v. Detroit Free Press, 287 Mich. 443, 283 N.W. 642 (1930); 37 MICH. L. REV. 1335 (1939).
55. Joshephson v. Knickerbrocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942); *See* Leflar, *Radio and T.V. Defamation: "Fault" or Strict Liability*, 15 OHIO ST. L.J. 252, 264-66 (1954).
56. *See* Annot., 69 A.L.R. 720 (1930); Note, *How Far Fault is an Element*, 10 ORE. L. REV. 194 (1931).
57. Thus there would be no liability where the defendant sent a letter addressed to the plaintiff containing a defamatory matter, and the letter was unexpectedly opened and read by another. *See* Olson v. Molland, 181 Minn. 364, 232 N.W. 625 (1930); Weidman v. Ketcham, 278 N.Y. 129, 15 N.E.2d 426 (1938); Barnes v. Clayton House Motel, Tex. Civ. App., 435 S.W.2d 616 (1968).
58. *See* cases cited note 25 *supra* and accompanying text.
59. *E.g.*, Post Publishing Co. v. Hallam, 59 Fed. 530 (4th Cir. 1893); *see* Note, *Fair Comment*, 62 HARV. L. REV. 875 (1949); Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429 (1965).

would be deterred from seeking office and the public interest would suffer.[60] Kansas established the minority view by extending the privilege to include false statements of fact concerning matters of public interest so long as the statements were not maliciously made.[61] Proponents of this view felt it was necessary to promote full and free debate. If such was not the case, then those in the position to supply information about public servants would be discouraged from voicing their views for fear of a defamation suit. Public interest, the minority argued, demands the information be distributed.

Apart from these privileges and exceptions to the rule of strict liability, state courts had refused to afford any additional protection to the defendants in a defamation suit. (As well, the United States Supreme Court had declined to act.) The Court prior to the *New York Times* decision had fashioned several tests as to the scope of the first amendment, but had consistently held the first amendment guarantees of free speech and press did not apply to libelous statements.[62]

One of the early first amendment interpretations provided by the court was the "bad tendency" test. According to this view any expressions which had a tendency to lead to substantial evil could be prohibited. The court stated it in this way:[63]

> That a state in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.

The theory behind this test was that freedom of expression was subordinate to all other social objectives. Consequently this view was rejected in *Dennis v. United States*.[64]

Before its outright rejection in *Dennis*, however, the "bad tendency" test was superseded by the "clear and present danger" test. The principal author, Justice Holmes, defined it:[65]

> The question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

This approach provided some improvement over the "bad tendency" test in that it required a showing of present danger to society before the speech could be banned. This in theory would allow some interference with social objectives whereas the "bad tendency" test would not. The principal application of the "clear and present danger" test has been in cases involving

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60. W. PROSSER, LAW OF TORTS § 118 (4th ed. 1971).
61. Coleman v. MacLennon, 78 Kan. 711, 723 Pac. 281 (1908).
62. Konigsberg v. State Bar of Calif., 366 U.S. 36 (1961); Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 687 (1913).
63. Gitlow v. New York, 282 U.S. 652, 667 (1925). *See also*, Whitney v. California, 274 U.S. 357 (1927).
64. 341 U.S. 494, 507 (1951).
65. Schenck v. United States, 249 U.S. 47, 52 (1919). *See also*, Whitney v. California, 274 U.S. 357 (1927); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 878, 910 (1963) [hereinafter cited as Emerson]; McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1203-12 (1959).

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speech relating to subversive activities[66] and in decisions dealing with criminal contempt for publications critical of courts and judges.[67] In *Dennis v. United States*[68] the "clear and present" danger test was modified to some extent. It held that the courts "must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[69] In its modified form, it has been suggested that the "clear and present danger" test retains some vitality in the contempt of court cases but as a general test for the limits of the first amendment it has been abandoned.[70]

Another limiting test for the scope of the first amendment is the "redeeming social importance" test. This view provides protection under the first amendment for any idea having the slightest redeeming social value. Justice Brennan in *Roth v. United States*[71] stated that "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees [First Amendment] unless excludable because they encroach upon the limited area of more important interests."[72] This approach, although significantly modified in *Miller v. California*,[73] is still viable in obscenity cases.

Another limitation developed by the Court is the "ad hoc balancing" test. It has been most often proclaimed by Justice Harlan. Under this test "the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression."[74] This test has tended to be overbroad in its application. It does not refer to any ascertainable standards to guide police, prosecutors or the courts, nor does it give adequate notice of the individual's rights to be protected. Critics argue the test amounts to no more than a statement allowing the legislature to prohibit expression whenever it deems reasonable.[75] If the test is applied literally, it gives almost conclusive weight to the legislative determination. The Court is not allowed to question the judgment of the legislature unless it is "outside the pale of fair judgment."[76] Its validity as a test for first amendment guarantees is subject to question.

One view of the first amendment which has yet to receive a majority vote by the Supreme Court is the so-called "absolute view." This approach, advocated most recently by Justices Black and Douglas, adheres to the literal meaning of the first amendment. It is their view the language which reads

66. Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).
67. The Court has held that the first amendment prohibits punishment for criminal contempt in the absence of a showing of a clear and present danger of the obstruction of justice. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harvey, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946).
68. 341 U.S. 494 (1951).
69. *Id.* at 510.
70. Emerson, *supra* note 65, at 913.
71. 354 U.S. 476 (1957).
72. *Id.* at 484.
73. 413 U.S. 15 (1973).
74. Emerson, *supra* note 65 at 913. For a listing of cases applying this test see Emerson, *supra* note 65, at 912.
75. *Id.* at 913.
76. *Id.* at 914.

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"Congress shall make no law"[77] absolutely prohibits Congress and the states from enacting any law abridging the freedoms of speech and press. Justice Douglas in *Roth v. United States*[78] stated:[79]

> The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

It is important to note, however, that the proponents of this view believe that while the content of the speech is absolutely guaranteed, the government can regulate the how and where of the dissemination.[80] For example, an individual may have the absolute right to voice his views on a crowded street corner but to blare them over a loud speaker in the dead of night may subject him to liability.[81]

A variation of the absolutist approach is the novel view expressed by Alexander Meiklejohn.[82] His theory begins with the premise that "all constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic." Therefore the people are both "governors" and the "governed." Meiklejohn sees the first amendment as protecting the freedom of those activities of thought and communications by which the people "govern." That is, the people as the governing force have an absolute right to hear and be informed about governing activities. Congress cannot therefore "abridge the freedom of a citizen's speech, press, peaceable assembly or petition, whenever those activities are utilized for the governing of the nation."[83] To this point, Meiklejohn's position is similar to that of the absolutists. However, he did not view the first amendment as protecting an individual's freedom to speak on issues outside the governing process. This right is protected under the fifth amendment and therefore subject to the limitations of due process.

Meiklejohn was one of the first authors to suggest that the scope of the first amendment included defamation law. In an article published three years before the *Times* decision he stated:[84]

> The principle here at stake can be seen in our libel laws. In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages. But, in that case, the First Amendment gives no

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77. U.S. Const. amend. I.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

78. 354 U.S. 476, 514 (1957). Justice Douglas also expressed this view in Gertz v. Welch, 418 U.S. 323, 355 (1974) (dissenting).

79. Cox v. Louisiana, 379 U.S. 559, 578 (1964) (dissenting opinion).

80. Beard v. City of Alexandria, 341 U.S. 622 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949).

81. *Id.*

82. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME COURT REVIEW 245, 253 (Kurland ed.); *See also* Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966).

83. *Id.* at 256.

84. *Id.* at 259.

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> protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. And the same principle holds good if a citizen attacks, by words of disapproval and condemnation, the policies of the government, or even the structure of the Constitution. These are 'public issues' concerning which, under our form of government, he has authority, and is assumed to have competence to judge. Though private libel is subject to legislative control, political or seditious libel is not.

B. New York Times v. Sullivan

In *New York Times v. Sullivan*[85] the Supreme Court finally invaded the sovereignty of the states and held for the first time defamation actions were subject to the scrutiny of the first amendment. In this decision the New York Times published an advertisement containing a description of alleged activities by police against black demonstrators. Plaintiff, L. B. Sullivan, was the elected Commissioner of Public Affairs of Montgomery and was responsible for supervising the police department. He filed a civil action for libel and was awarded a $500,000 jury verdict. The United States Supreme Court reversed, holding that the first amendment guarantees of free speech and press require a public official to prove actual malice in order to recover for a defamatory falsehood concerning his official conduct.[86] Actual malice was defined as publishing matter "with knowledge that it was false or with reckless disregard of whether it was false or not."[87]

The major premise of the decision was that in order to effect a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open"[88] state libel law must be restricted. The scope of the first amendment guarantees was broadened to include defamation actions in order to assure "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[89] The Court felt the limited protection of the common law privileges and the sole defense of truth were inadequate to guarantee an individual's first amendment rights. The burden of requiring a critic to prove the truthfulness of his statements was regarded as a step towards self-censorship. Such a rule, the Court indicated, would be inconsistent with the first and fourteenth amendments.

Although the Court was unanimous on the point that the first amendment applied to defamation actions, they were unable to establish

85. 376 U.S. 254 (1964).
86. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See* 96 A.L.R. 2d 1450 (1964).
87. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
88. *Id.* at 270.
89. *Id.* at 278.

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a consistent theoretical foundation upon which to base their decision.[90] The holding of *New York Times* could have been supported by the "clear and present danger," "redeeming social value," or "balancing tests"; however the majority of the Court did not specifically mention any of these in support of their holding.[91] Instead they adopted, at least in part, Meiklejohn's thesis. This becomes evident in the Court's discussion of the controversy surrounding the Sedition Act of 1798. Although the Supreme Court had never ruled on its validity, they held the act would have been unconstitutional because of the "restraint it imposed upon criticism of government and public officials."[92] In the same discussion the Court refers to Madison's statement that "[t]he censorial power is in the people over the government and not the Government over the people."[93] Apparently the Court is following Meiklejohn's view that the people when acting as a "governing" body have the right to be informed on all issues of "governing" importance. However, the Court did depart from Meiklejohn by allowing a plaintiff to recover if actual malice is shown. Meiklejohn argues that absolutely all utterances of "governing" importance are protected, whereas the actual malice is contrary to such a position. Creation of the exception appears to be derived more from a "redeeming social value" approach. In *Garrison v. Louisiana*[94] the Court stated:

> *Calculated falsehood* falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight *social value* as to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' [emphasis supplied.]

C. *Post New York Times*

The Supreme Court in later decisions has more precisely delineated the standards established in *New York Times*. In *St. Amant v. Thompson*[95] the Court amplified its definition of "actual malice." The Court found an award of damages improper because the defendant did not have an awareness of the probable falsity of the statement. The Court held:[96]

> [R]eckless conduct is not measured by whether a reasonable prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication.

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90. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REVIEW 191 (Kurland ed.).
91. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 15 (1965) [hereinafter cited as Brennan]; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REVIEW 191, 213-18 (Kurland ed.).
92. New York Times Co. v. Sullivan, *supra* note at 276.
93. *Id.* at 275.
94. 379 U.S. 64, 75 (1964).
95. 390 U.S. 727 (1968). *See also* Time v. Pape, 401 U.S. 297 (1971); Henry v. Collins, 380 U.S. 356 (1965).
96. St. Amant v. Thompson, 390 U.S. 227, 731 (1968). For a collection of cases interpreting the actual malice standard see Annot., 20 A.L.R.3rd 988 (1968).

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In *Rosenblatt v. Baer*[97] the minimal perimeter of the public official classification was outlined. In determining that plaintiff was a public official within the scope of *New York Times*, the Court stated:[98]

> The public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

The *New York Times* standard has been extended to other classifications besides public officials. In *Curtis Publishing Co. v. Butts*[99] the Supreme Court found that public figures were also required to prove actual malice before they could recover for a defamatory falsehood. A public figure was defined as one who because of status or conduct is subject to continuing and substantial public interest independent of the publication at issue.

A public official's unofficial conduct also fell within the bounds of *New York Times* in *Ocala Star-Banner v. Damron*.[100] Plaintiff was a candidate for public office when defendant printed a story to the effect plaintiff had been charged in federal court with perjury. Plaintiff sued for libel alleging the statement did not relate to official conduct and therefore was not constitutionally privileged. This argument was rejected, the Court holding: "A charge of criminal activity against an official or candidate no matter how remote is always relevant to his fitness for office for the purpose of applying the New York Times rule . . . ."[101]

As expected[102] in *Rosenbloom v. Metromedia*[103] the actual malice standard was extended to encompass private individuals involved in events of a general or public interest. The event rather than the individual became the focal point; a public event would receive constitutional protection, a private event would not. *Rosenbloom* could only muster a plurality opinion, and its holding left the balance between the first amendment and defamation law uncertain. Justice Brennan writing for the plurality held the first amendment required a "robust debate" on all public issues and therefore any communication involving a public concern, regardless of its source, should be protected under the *New York Times* rule.[104] The three dissenting Justices

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97. 383 U.S. 75 (1966).
98. *Id.* at 85. For a collection of cases defining a public official see Annot., 19 A.L.R.3d 1361 (1968).
99. 388 U.S. 130 (1966).
100. 401 U.S. 295 (1971). *See also* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).
101. Ocala Star-Banner v. Damron, 401 U.S. 295, 300 (1971). In Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971), the Court held that the standard for assessing whether a publication concerning a candidate is constitutionally privileged is whether that publication asserts "anything which might touch on an official's fitness for office."
102. *See* Bon Air Hotel v. Time, Inc., 246 F.2d 858 (5th Cir. 1970); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., 404 F.2d 706 (9th Cir. 1968); All Diet Foods Distributors, Inc. v. Time, Inc., 56 Misc. 2d 821, 290 N.Y.S.2d 445 (Sup. Ct. 1967); Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A. L. REV. 371 (1971).
103. 403 U.S. 29 (1971). Rosenbloom was a distributor of nudist magazines and was arrested for selling allegedly obscene matter. A local radio station characterized the raid as a crackdown on "smut merchants." Rosenbloom was acquitted of the obscenity charge and sued the radio station for libel.
104. *Id.* at 43-44.

argued that a negligence standard rather than the actual malice standard should be applied in the case of a private individual.[105] They did disagree on the propriety of presumed and punitive damages.[106]

The *Rosenbloom* plurality was rejected in *Gertz v. Welch*.[107] Gertz was an attorney representing, in a civil action, the family of a youth who had been killed by a police officer. Defendant Welch published a magazine article stating Gertz had "framed" the officer. The article also implied Gertz had a criminal record and referred to him as "a Communist-Fronter" and "Leninist."[108] The charges were false.[109] The Seventh Circuit, affirming the trial court, held the article concerned a public event and plaintiff had failed to prove actual malice.[110] In a 5-4 decision written by Justice Powell, the Supreme Court reversed, holding that the actual malice standard which applies to public officials and figures is inapplicable to private individuals. A new standard was developed by the Court holding: "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."[111] In addition, the Court prohibits presumed damages and punitive damages unless plaintiff proves knowledge of falsity or reckless disregard for the truth.[112] In cases where reckless disregard is not shown the states are limited to allowing only actual damages.[113] Finally, the Court restricted its holding to a defamation apparent on its face.[114]

The Court in *Gertz* is attempting to construct an accommodation between the competing concerns of the first amendment and the interest in protecting an individual's good name. In this attempt the court tips the balance in favor of the private individual by limiting the expansion of the actual malice standard to public officials and figures. The majority's reasoning rests in part on two specific considerations supporting a higher level of protection for private individuals. First, public officials and figures have greater access to the media. Thus they are better able to refute false statements. Since a private individual's access is comparatively limited, he is more vulnerable to injury, and the state's interest in protecting him becomes correspondingly greater.[115] Second, the Court recognizes public persons voluntarily expose themselves to defamatory statements by participating in a public activity.[116]

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105. *Id.* at 64, 84-85.
106. *Id.* at 72-77, 85-87.
107. 418 U.S. 323 (1974).
108. *Id.* The article also stated that Gertz had been an officer of the National Lawyers Guild, an organization which the article claimed was a communist front.
109. *Id.*
110. 471 F.2d 801 (7th Cir. 1972).
111. 418 U.S. 323 (1974).
112. Gertz v. Welch, 418 U.S. 323, 349 (1974).
113. *Id.* at 350.
114. *Id.* at 323.
115. *Id.* at 344. In Rosenbloom v. Metromedia, 403 U.S. 29 (1971), the plurality did not feel this contention had merit. The Court indicated that the official would be in no better position than the private individual.
116. Gertz v. Welch, 418 U.S. 323, 345 (1974). This view was also rejected by Justice Brennan in Rosenbloom v. Metromedia, 403 U.S. 29, 48 (1971).

In comparison, the Court finds a private individual "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."[117] Thus, the Court feels a private individual is more deserving of recovery.

Gertz does not eliminate the first amendment guarantees in defamation actions. In order to balance the concessions to the private individual, the Court finds the common law rules of strict liability and presumed damages inadequate to protect the media. The Court gives no precise reason for abolishing strict liability and replacing it with a fault standard. The only rationale offered is that a fault standard "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation."[118] The theory for eliminating presumed damages and requiring actual damages is to prevent juries from punishing unpopular opinions and thus awarding damages where no injury occurs.[119] This accords with the state's interest in the matter, which is compensation for actual injury.

The *Gertz* decision also redefines a public figure.[120] The Court recognizes two instances in which an individual may acquire such a status. One, the individual may derive such recognition that he becomes a public figure "for all purposes and in all contexts."[121] Two, the individual may voluntarily enter or be pulled into a public dispute and become a public figure for that limited issue.[122] In either event, before one will be deemed a public figure within the *New York Times* rule, there must be "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society."[123] As a result, while *Gertz* was a prominent attorney and had been active in community affairs, he was not considered a public figure because he lacked general fame within the community.[124] Four Justices dissented in the *Gertz* decision. Justice Burger would prefer to allow this area of the law to develop as it has until now, rather than formulating new rules which have no basis in the common law.[125] Justice Douglas expressed his familiar view that the first amendment is absolute and bars any type of libel law.[126] It was his view that the majority's opinion would cause self-censorship of the press. Justice Brennan adhered to his position expressed in *Rosenbloom* that a private individual involved in an event of public interest should be subjected to the actual malice standard.[127] Justice White criticized the majority for their sweeping federalization of state defamation law. Un-

117. Gertz v. Welch, 418 U.S. 323, 345 (1974).
118. *Id.* at 348.
119. *Id.* at 349.
120. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
121. Gertz v. Welch, 418 U.S. 323, 351 (1974).
122. *Id.* at 351.
123. *Id.* at 352.
124. *Id.* at 351-52.
125. *Id.* at 355.
126. *Id.* at 356.
127. *Id.* at 361.

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able to discover or envision media inhibition due to fear of libel suits by private citizens, he found eliminating the established common law per se theory unjustified. Justice White favors the traditional doctrine of allowing nominal damages to insure a vehicle for judicially declaring a communication false.[128] Further, he expressed a divergent view concerning any first amendment mandate on defamation law. He stated a belief that the first amendment should only exempt from the state police power defamation of government and public officials. He could find no justification for believing the first amendment was ever intended to deprive the private citizen his historic recourse for communications falsely damaging his reputation.[129]

It is clear that within the area of the first amendment and defamation the Court is sharply divided. The only consistent view of the Court concerning the first amendment is that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the first amendment."[130] It is equally clear that the majority of the Court has taken a step back from the first amendment thesis suggested by Alexander Meiklejohn. The Court's final analysis is to draw a distinction between two forms of first amendment protection. Public officials and figures will have to prove actual malice, while a private individual involved in a public event must only prove negligence.

The overall effect of *Gertz* is difficult to ascertain at this point. It is clear that a potential defamed plaintiff will face the formidable obstacle of proving actual damages. Injury to reputation is difficult to measure and even more difficult to prove.[131] However, this effect is offset somewhat by the Court's definition of "actual injury." This term is not limited to out of pocket loss but includes "mental anguish and suffering."[132] Therefore juries will still have wide discretion in assessing the plaintiff's injuries.

Some question has arisen concerning the exact scope of the *Gertz* holdings. It is not clear whether the Court's new rules apply only to the "mass media" or to all publications irrespective of their source. The majority seems to restrict its holding to "publishers or broadcasters,"[133] the "press and broadcast media,"[134] "prudent editor or broadcaster,"[135] and the "communications media."[136] Yet Justice White in his dissent referred to the majority's opinion as applying to "each and every defamation action."[137] If the majority's opinion is limited to a broadcaster or publisher, then it would still be

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128. *Id.* at 326.
129. *Id.* at 332.
130. New York Times v. Sullivan, 376 U.S. 254 (1964).
131. *See* HARPER & JAMES, THE LAW OF TORTS § 530 (3d ed. 1956):
> Libel and slander work their evil in ways that are invidious and subtle. The door of opportunity may be closed to the victim without his knowledge, his business or professional career limited by the operation of forces which he cannot identify but which, nevertheless, were set in motion by the defamatory statements.

132. Gertz v. Welch, 418 U.S. 323, 350 (1974).
133. *Id.* at 347.
134. *Id.* at 348.
135. *Id.*
136. *Id.* at 341.
137. *Id.* at 323.

possible to apply strict liability in a situation where the publication is by a private individual. This would hold true irrespective of the publication's subject matter.

The states are split in their interpretation of *Gertz*. In a recent decision, the highest court of Maryland felt the *Gertz* holdings established three possible alternatives: "(1) They applied to all defamations; (2) they applied only to defamations involving matters of public or general interest, thus excluding *purely private defamations;* and (3) they applied only to defamations in which the media were the means of the defamatory injury."[138] The Maryland court adopted the second position.[139] This stance was also assumed by the highest Wisconsin court.[140] There also appears to be authority for the first position, that *Gertz* applies to all defamations of whatever nature.[141] Undoubtedly the most unique interpretation of *Gertz* appeared in a recent Pennsylvania case. A Pennsylvania statute provided that slander and libel actions lapsed upon the death of the defendant. The Pennsylvania court ruled that *Gertz*, in requiring the plaintiff to prove falsity and the necessary elements of fault, so dramatically changed the existing burden of proof as to remove the special burdens of defending such actions and negate the statute's justification.[142]

The Court in *Gertz* left to the individual states, within stated limits, the task of establishing what standard of fault would precipitate liability when plaintiff is not a public official or figure. It would appear the contemplated standard was to be one of negligence.[143] Some state courts which have addressed the issue have followed the Supreme Court's urging.[144] Kansas has joined this group by holding a publisher's negligence will be measured by the conduct of a reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances.[145] Other state courts have taken the position that *Gertz* only invited the states to establish lesser standards and have opted to adhere to the more rigorous actual malice standard established in *Rosenbloom*.[146]

Gertz also leaves unanswered the question of what standard of conduct will be required under the fault principle. The Court did not give any indication as to the amount of time and expense that would be required in verifying publications before a publisher could show he was not negligent. This determination could be made by the courts requiring expert testimony as to customary journalistic practices and the feasibility of verification. Further,

138. General Motors Corp. v. Piskor, 27 Md. App. 95, 101, 340 A.2d 767, 773 (1975).
139. General Motors Corp. v. Piskor, 27 Md. App. 95, 340 A.2d 767 (1975); Sinderf v. Jacron Sale Co., Inc., 27 Md. App. 53, 341 A.2d 856 (1975).
140. Calro v. Del Chemical Corp., 68 Wisc. Repts. 2d 487, 228 N.W.2d 737 (1975).
141. Davis v. Schuchat, 510 F.2d 731, 734 n.3 (D.C. Cir. 1973).
142. Moyer v. Phillips, — Pa. —, 341 A.2d 441 (1975).
143. *See* Barbetta Agency, Inc. v. Evening News Publication Co., Inc., 135 N.J. Super. 214, 343 A.2d 105 (1975).
144. Stone v. Essex County Newspaper, Inc., 330 N.E.2d 161 (Mass. 1975); *see* Basarich v. Rodeghero, 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974).
145. Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975).
146. Aafco Heating & Air Conditioning Co. v. Northwest Publishing, Inc., 321 N.E. 2d 580 (Ind. Ct. App. 1974); Barbetta Agency, Inc. v. Evening News Publishing Co., Inc., 135 N.J. Super. 214, 343 A.2d 105 (1975); Safarets, Inc. v. Gannet Co., 80 Misc. 2d 109, 361 N.Y.S.2d 276 (1974).

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the scope of *Gertz* is limited to a defamation apparent on its face.[147] The Court specifically withheld from consideration a "factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential."[148] Thus the Court is limiting its new fault and damage rules to a defamation per se. It would appear that if the fault standard were applied to a defamation per quod, a publisher would be liable only if he knew or had reason to know extrinsic facts which would give warning of the defamatory potential.

The most obvious effect of *Gertz* is its proscription on the state common law defamation per se actions wherein fault was not an element of plaintiff's case. Some state courts accept *Gertz* as abolishing all such common law per se actions[149] while others restrict their holdings to defaming newspapers and broadcasters, avoiding mention of other potential defendants.[150]

The Supreme Court has, in its most recent decision, further defined the meaning of a public figure.[151] Respondent, a prominent member of the "Palm Beach Society" sought separate maintenance from her wealthy husband. He counterclaimed for divorce on grounds of extreme cruelty and adultery. The circuit court granted the divorce requested by the respondent's husband but discounted the testimony indicating acts of adultery.[152] Petitioner published an article stating the divorce had been granted on grounds of extreme cruelty and adultery. Respondent sued alleging defamation and collected a $100,000 judgment. The Supreme Court remanded the case for a determination of whether petitioner had published the article negligently. Of importance was the Court's holding that respondent was not a public figure as defined in *Gertz*.[153] The Court stated:[154]

> Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.

The Court also rejected respondent's argument that the *New York Times* privilege should extend to all reports of judicial proceedings. The Court held the fault standard established in *Gertz* applicable to reports involving judicial proceedings.[155] This result is in conformity with the Kansas case *Gobin v. Globe Publishing Co.*[156]

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147. Gertz v. Welch, 418 U.S. 323 (1974).
148. *Id.* at 310.
149. Koren v. Capital-Gazette Newspapers, 22 Md. App. 576, 325 A.2d 140 (1974); Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974).
150. Wilson v. Capital City Press, 315 So.2d 393 (La. 1975); Firestone v. Time, Inc., 305 So.2d 172 (Fla. 1974).
151. Time, Inc. v. Firestone, — U.S. —, 96 S. Ct. 958 (1976).
152. The Court did indicate that the testimony regarding the respondent's extramarital escapades would have made "Dr. Freud's hair curl."
153. Time, Inc. v. Firestone, — U.S. —, 96 S. Ct. 958 (1976).
154. *Id.* at —, 96 S. Ct. at 965.
155. *Id.* at —, 96 S. Ct. at 966.
156. 216 Kan. 223, 531 P.2d 76 (1975). *See* Comment, 15 WASHBURN L.J. 144 (1976); Comment, 14 WASHBURN L.J. 645, 648 (1975).

D. The Right of Reply and Retraction Statutes in Defamation Actions

In the aftermath of *New York Times*,[157] *Butts*,[158] *Rosenblatt*,[159] and *Rosenbloom*,[160] the Supreme Court has attempted to answer the questions and ambiguities arising from those cases. In *Gertz v. Welch*, and *Miami Herald Publishing Co. v. Tornillo*,[161] the Court has dealt with the related areas of right of reply and retraction statutes. These alternative remedies to a libel action became extremely important as a result of *New York Times, et seq.* After those decisions, it would be difficult for the average person to prove his case against the media. The libel suit remedy was narrowed by the Court, thus placing more of the burden on retraction and reply as an effective remedy. The *Times et seq.* cases, therefore, actually strengthened the argument for these possible alternatives to a libel action.[162]

The basic arguments in support of reply and retraction statutes have been that the cost of monetary damages resulting from a libel suit would be much greater than the cost of providing the reply or retraction.[163] Similarly, these remedies, which are designed to repair damaged reputations, would be more consistent with the basic theory of protecting an individual's reputation than would monetary damages.[164] These remedies enable the defamed individuals to clear their reputation in the same manner as it was tarnished, and also provide the media with a way to mitigate damages should a libel action be filed.[165] It has also been argued that reply and retraction statutes not only make the press more accurate dispensers of information, but also promote the media's role in informing the populace as to matters of importance by "adding information to the marketplace."[166]

The *Gertz* decision, however, had a dampening effect upon the use of these remedies.[167] The Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[168] By these limitations placed on punitive damages, much of the impact of reply and retraction statutes has been lost since the threat of most retraction stat-

157. New York Times Co. v. Sullivan, 376 U.S. 234 (1964).
158. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
159. Rosenblatt v. Baer, 383 U.S. 75 (1966).
160. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1970).
161. Gertz v. Welch, 418 U.S. 323 (1974); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
162. *See* Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 47 (1965); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 605-08 (1964); Pierce, *The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1965).
163. *See* Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1742 (1967).
164. *See, e.g.*, Pedrick, FREEDOM OF THE PRESS AND THE LAW OF LIBEL: THE MODERN REVISED TRANSLATION, 49 CORNELL L.Q. 581, 582 (1964).
165. *See* Pierce, *The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315, 346 (1965).
166. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also, Reply and Retraction in Actions Against the Press for Defamation: The Effect of Tornillo and Gertz*, 43 FORDHAM L. REV. 223, 227 (1975) [hereinafter cited as *The Effect of Tornillo and Gertz*].
167. *The Effect of Tornillo and Gertz, supra* note 166, at 232.
168. 418 U.S. at 349 (1974).

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utes has been their use of punitive damages to encourage the press to print retractions.[169]

Along the same line, the acceptance by the Court of the distinction between the "public" and "private" individuals makes reply or retraction no longer as important a remedy.[170] This is because of the ability of the "public" people to gain access to the media.[171] "Public" people are those who are in the limelight or in the eyes of the public due to the attention given them by the media. Because of this attention the "public" figure is in a better position to reply to any statements made by the media than would a private individual. However, while weakening the arguments in favor of these remedies on their face, the explicit recognition in *Gertz* of the access problem confronting "private" individuals could make the Court more receptive to a solution through retraction in the future.[172]

In a decision handed down the same day as *Gertz*, the Court in *Miami Herald Publishing Co. v. Tornillo*[173] struck down as unconstitutional a Florida right of reply statute that had been enacted in 1913.[174] This case was only the second time that the statute had been challenged in court.[175] The Justices recognized the fact that, as a result of the monopolization of the means of communication, "the public has lost any ability to respond or to contribute in a meaningful way" to the information in the marketplace.[176] They refused, however, to use this as a rationale for government control of the press.[177] The Court notes in the opinion that:[178]

> However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right to access necessarily calls for some mechanization, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

The majority reasoned that the Florida statute operated in the same sense as a statute or regulation forbidding the press to publish a specified matter. Such a statute had already been recognized as a violation of the first amendment.[179] The States cannot do through legislation that which the Constitution is prohibited from mandating.[180] The Court regarded Florida's

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169. *See* Note, *The Death of Retraction Statutes*, 36 U. PITT. L. REV. 756, 761 (1975).
170. 418 U.S. at 344-345 (1974); *see The Effect of Tornillo and Gertz*, *supra* note 166, at 232.
171. Gertz v. Welch, 418 U.S. 323, 344 (1974); "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."
172. *The Effect of Tornillo and Gertz*, *supra* note 166, at 237.
173. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
174. FLORIDA STATUTES § 104.38 (1973).
175. State v. News-Journal Corp., 36 Fla. Supp. 164 (1972). In neither *Miami* nor the 1972 action has the Florida Attorney General defined the statute's constitutionality.
176. 418 U.S. at 250 (1974).
177. *Id.* at 258.
178. *Id.* at 254.
179. *Id.* at 256, *see, e.g.*, Associated Press v. U.S., 326 U.S. 1, 20 (1945).
180. *Id.* at 256. "A responsible press is an undoubtedly desirable goal, but press re-

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statute as creating a penalty which had an inhibiting effect on a newspaper's exercise of editorial judgment.[181] Justice White in his concurring opinion explained the encroachment upon editorial judgment by stating: [t]his law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which it chooses to leave on the newsroom floor.[182] It is evident that editorial judgment is a crucial process of publication and that the Court in *Miami Herald* was not convinced that the government could in some way or another regulate this process without violating first amendment guarantees.[183]

It seems then that, while not usurping an area of recognized state control to the extent of *New York Times* or *Gertz*, the decision in *Miami Herald* is one step closer to an accepted "absolutist" view of the first amendment. The concurring opinion by Justice White notes in this regard that "the First Amendment erects a virtually insurmountable barrier between government and the print media," so far as regulation of the editorial process is concerned.[184] He further notes that because of this barrier, the society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed.[185] "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs," and the states cannot hamper this role.[186]

The true effect of *Miami Herald* must be measured in conjunction with *Gertz*. The Court in these two decisions, rendered the same day, goes far toward "eviscerating the effectiveness of the ordinary libel action" and thereby frustrates any response that private individuals had when libeled by the press.[187] It is the view of Justice White that "the Court trivializes and denigrates the interest in reputation by removing virtually all the protection the law has always afforded."[188]

An important fact to note, however, is that the opinion in *Miami Herald* reviewed only the right of reply statutes and, thereby, did not address itself to the constitutionality of retraction statutes.[189] The case did not deal with compulsory retractions in any form, much less in the context of defamatory publication.[190] The retraction statutes to date have allowed voluntary retractions to be pleaded in mitigation of damages,[191] have provided that a failure

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sponsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."

181. *Id.* at 257.
182. *Id.* at 261.
183. *Id.* at 258. "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees as they have evolved to this time."
184. 418 U.S. 259 (1974).
185. *Id.* at 260.
186. *Id.*
187. *Id.* at 262 (White, J., concurring).
188. *Id.* at 262.
189. Justice Brennan points out in a separate opinion that, "I join the Court's opinion which, as I understand it, addresses only 'right of reply' statutes, and implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction." *Id.* at 258.
190. *The Effect of Tornillo and Gertz, supra* note 166, at 237.
191. *See* Webb v. Call Publishing Co., 173 Wis. 45, 180 N.W. 263 (1920).

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to retract on demand may be offered as evidence of ill will,[192] and have held also that a failure to demand a retraction may preclude a plaintiff punitive or general damages.[193] There are currently no retraction statutes in force in the United States which give an individual a right to compel a published retraction of satisfactorily proven falsehoods.[194] This is an important distinction between the right of reply statute invalidated in *Miami Herald* and the remedy of retraction. There is some question though of whether the desired effect of a retraction remedy will be attained without being able to compel it. Another distinction which might support the use of a compulsory retraction of defamatory statements *adequately proven false* is that it would not evoke the same scope and resultant fears of government coercion that was occasioned by the unconstitutional right of reply.[195]

If retraction statutes are swept aside with those of right of reply, the issue would remain whether the price of insuring the maintenance of a free press is worth the sacrifice of private citizens' ability to protect their reputation.[196]

IV. Conclusion

In the past the Supreme Court has not spoken to the application of the first amendment to defamation law of the states. The states were free to determine not only what communications were defamatory but also what standard of conduct would render a defendant liable.

Today, however, after the decisions of the Court discussed in this note, the law of defamation has unquestionably been federalized. The states may no longer determine the law in areas which they once controlled. The Court seems to follow Professor Meiklejohn's view that "speech which serves the public's governing purposes and is of general or public concern deserves a higher order of constitutional protection than speech which serves solely as an aspect of individual liberty and a form of self-fulfillment."[197]

The question remains, though, to what extent this federalization will proceed.

Randall J. Forbes
Lance A. Pool
John F. Thompson

192. *See* Reid v. Nichols, 166 Ky. 423, 179 S.W. 440 (1915).
193. *E.g.*, CAL. CIV. CODE § 48a (West 1954).
194. *The Effect of Tornillo and Gertz, supra* note 166, at 235.
195. *Id.* at 238.
196. *See generally*, Note, *The Death of Retraction Statutes*, 36 U. PITT. L. REV. 756 (1975).
197. *See* Bloustein, *The First Amendment and Privacy: The Supreme Court Justice And The Philosopher*, 28 RUTGERS L. REV. 41 (1975).

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SENATE BILL NO. ____

By

AN ACT concerning tobacco; relating to the master settlement agreement; appeal bonds in certain litigation.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) The appeal bond that an appellant in civil litigation under any legal theory, involving a signatory or a successor to a signatory of the master settlement agreement, as defined in K.S.A. 2002 Supp. 50-6a02, and amendments thereto, may be required to post to stay execution on a judgment during an appeal or discretionary review shall be set in accordance with existing law and court rules, except that in no case shall an appeal bond exceed $25,000,000, regardless of the total value of the judgment.

(b) If it is proved by a preponderance of the evidence that the appellant for whom the bond has been limited pursuant to this section is intentionally dissipating or diverting assets outside of the ordinary course of its business for the purpose of avoiding payment of the judgment, the court shall enter such orders as are necessary to prevent the dissipation or diversion of assets.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.

Office of The
DISTRICT ATTORNEY
Of The 29th Judicial District of Kansas
Wyandotte County Justice Complex
710 N. 7th - Kansas City, Kansas 66101
(913) 573-2851
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DISTRICT ATTORNEY
Nick A. Tomasic

In 1995 House Bill 2586 was introduced to correct the Criminal defamation statue to add actual malice. This bill was amended into House Bill 2223 which passed without dissent, many current members voted for the bill in 1995.

This is what the Legislature passed:

"Sec 14. K.S.A. 1994 Supp. 21-4004 is hereby amended to read as follows: 21-4004. (a) Criminal Defamation is ~~maliciously~~ communicating to a person orally, in writing, or by any means, ~~false~~ information, *knowing the information to be false and with actual malice,* tending to expose another living person to public hatred, contempt or ridicule, *tending* to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.

(b) In all prosecutions under this section the truth of information communicated shall be admitted as evidence. It shall be a defense to a charge of criminal defamation if it found that such matter was true.

(c) Criminal defamation is a class A nonperson misdemeanor."

What happened since 1995 until the present that caused this bill to be introduced?

There has not been a groundswell of criminal cases filed on 21-4004.

Just the opposite –there has been only "**one**" case filed in the entire state since then.

There is no public outcry to change the law. No –only those who feel they have a right to say anything and not be punished are apparently pushing to change the law

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Special Interest did not decide the outcome of the **"one"** case that was filed. 12 citizens heard the evidence and made their decision.

The FEDERAL Court in 1995, in the case of Phelps v. Hamilton, 59 F. 3rd 1058, 1070, held that the statute is constitutional, not overbroad.

"Freedom of speech and of the press, which are secured against abridgment by these Constitutions, are among the most fundamental personal rights and liberties of the people. *New York Times Co. v. Sullivan,* 376 U.S. 254, 11L. Ed.2d686, 84S.Ct 710 (1964). These constitutional provisions do not confer an absolute right to speak or publish without responsibility for whatever one may choose to communicate. *Branzburg v. Hayes,* 408 U.S> 665, 683, 33L.Ed.2d 626, 92 S. Ct. 2646 (1972). These provisions in our Constitutions have never prohibited punishment of those who abuse the freedoms guarantee thereunder. *Stromberg v. California,* 283 U.S.359, 369, 75 L.Ed. 1117, 51 S. Ct. 532 (1931). A person's constitutional right to freedom of speech guaranteed by the Constitutions of the United States and of the State of Kansas is no less by reason of having received a license and privilege to practice law. *In re Gorsuch,* 76 S.D. 191, 75 N.W. 2d 644 (1956), 57 A.L.R.2d 1355(1958). The principle that the right of freedom of speech is not absolute was expressed most clearly by Justice Oliver Wendell Holmes when he said that no person has a right to cry "fire" in a crowded theatre. *State v. Russell* 227K97"

Truth as a Defense

Following New York Times Co., the Restatement (Second) of Torts s 580A defined the term Defamation of Public Official or Public Figure as follows:

"One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he

"(a) knows that the statement is false and that defames the other person, or

"(b) acts in reckless disregard of those matters."

For there to be liability for defamation, there must be a publication of matter that is both defamatory and false. One who publishes a defamatory statement is not subject to liability if the statement is true. See Restatement (Second) of Torts s 581A; Steere v. Cupp, 226 Kan. 566, 602 Mundy v. Wright, 26 Kan. 173 (1881); Castle v. Houston, 19 Kan. 417 (1877). In Steere, we held that where the published statements are substantially true, there is no malice and, hence, no liability. In comment (f) to s 581A of Restatement (Second) of Torts, it is stated:

"It is not necessary to establish the literal truth or the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."

In Schulze v. Coykendall, 218 Kan. 653, it was stated:

"Proof of actual malice in defamation actions when a conditional privilege is found to exist requires a plaintiff to prove that the publication was made with knowledge that the defamatory statement was false or with reckless disregard of whether it was false or not."

Why Not Repeal All False Rumor Laws

Name – Reputation - Business Goodwill are all properties

"Intangible Property"

Property that lacks a physical existence.

21-4005 – " Maliciously circulating false rumors concerning financial status."
With intent to injure the financial standing or reputation of any bank financial institution, business institution or the financial standing of any individual the state.

21-4006 – Maliciously exposing a paroled or discharged person.
Communicating – that a person has been charged or convicted with intent to interfere with employment or business of a person.

THEFT—Why not repeal this also --- and just sue in civil court. Its just property—physical property.

Is it any different than intangible property?

.

Deep Pockets

If you feel that a legitimate paper or media has libeled or slandered you.

YOUR OPTION –

SUE ---

Can you afford to.

There must be consequences for actions—If you do something wrong you should expect to suffer the consequences.

DON'T REACT TO A JURY DECISION THAT SENDS A MESSAGE THAT FOR EVERY ACTION, THERE IS A RE-ACTION, THAT WE WILL ALL ANSWER FOR LIABELOUS CONDUCT.

TO: Senator John Vratil and Members of the Senate Judiciary Committee

FROM: Jerry R. Palmer

DATE: January 21, 2003

RE: Opposition to SB 3 Repeal of the Criminal Defamation Statute (K.S.A. 21-4004)

Thank you for the opportunity to present testimony on this bill. I am Jerry Palmer, I am a lawyer and I have been prosecuting and defending civil cases in Kansas for 36 years, and among those cases have been some for civil defamation. This testimony is to present an alternative view from the perspective of a citizen concerned about decriminalization of defamation.

The Issue And The Timing:

Clearly the triggering event for consideration of this bill at this time is the Wyandotte County jury conviction in the case of *State v. Powers and Carson*. That case has not yet been argued in its first level of appeal. How the statute might be construed in the light of those facts which involve complaining witnesses who were public figures with defendants who were critical of those public figures is completely unknown. It may well be that the statute will be limited in its application to those kinds of situations, and the greatest voiced concerns to this committee will be moot.

The Arguments For Decriminalization Of Defamation:

The testimony that was given on January 21, 2003 focused on a circumstance where government uses as a political weapon criminal defamation statutes to prosecute publishers who criticize public officials or their policies. The sponsor of the bill even mentioned that he thought it was appropriate that Kansas had a statute (K.S.A. 21-4005) which punishes malicious circulation of false rumors concerning financial status

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with essentially the same elements as the criminal defamation statute but limited to "injure the financial standing or reputation of any bank, financial or business institution or the financial standing of any individual in this state." He indicated that that was "commercial speech" and commercial speech could be limited constitutionally. What really is at the heart of 4005 versus 4004 is that the state protects the interests of corporate entities (banks, financial or business institutions) and that segment of the citizens' reputation which is financial in character.

K.S.A. 21-4004 (as to living individuals) punishes persons knowing information to be false AND who with actual malice publish information which tends to expose another living person to "public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance."

A simple test of what is more valuable to an individual's reputation would be to pose the question this way:

"Rank, the harm that would be done to you if someone lied about you and other people believed that you were either (a) bankrupt; (b) a pedophile; (c) an adulterer; (d) a child pornographer; (e) a rapist; (f) a murderer; (g) a robber; (h) an embezzler."

My interest in talking to you today is about the 95% of the people that are not involved in the conflicts that were discussed yesterday (political figures asserting their power to influence prosecution because of disagreements with the press over criticism of the public official or criticism of their political positions). Until there is a separate evaluation of that type of concern from the concerns of other private persons over their reputations which are harmed either by the press or by other private persons then there will be no way to appreciate what would be lost if this statute was simply repealed. The

latter consideration affects these interests of the 95% of the citizens who are not involved in the first type of dispute.

Values:

Everyone would agree that it ought to be a crime for someone to deface or damage your property, even if it is a minor offense such as a vandal scraping a key down the side of your care or someone who smashes your window to get to some valuable item inside the car. Moreover, every citizen would place a higher value on their reputation for honesty, integrity and non-criminal behavior and have greater fear of the damage to that part of their reputation than would be the damage to their vehicle. They can insure against damage to the vehicle, they can't insure against the damage to their reputation because that can cause them a loss of a job, the loss of a spouse, the loss of friends, the loss of public confidence.

On July 11, 1803 a framer of the Constitution and the Chief Architect of the Federalist Papers was killed because of a dispute over the reputation of another man. Aaron Burr called Alexander Hamilton out to engage in a dual because he believed that Hamilton had lied about him and those lies had cost him first the presidency of the United States and then the governorship of the State of New York. Such was Burr's anger that he was willing to either kill or be killed to vindicate his honor because of the defamation.

Several years ago an admiral who was accused of wearing medals to which he was not entitled took his own life. Probably all of you are familiar with someone who has taken their life because of an injury to reputation. Obviously most injuries to reputations are self-inflicted. The anecdotes are only used, though, to establish what we

all intuitively know and that is that our reputations which we are urged from childhood to build and protect have value.

The Role Of Criminal Law And Origins:

The criminal law is meant first to deter and then to punish. Deterrence is that once we know there is a statute and we believe there are penalties attached to the violation of the statute that we will regulate our conduct in such a way as to avoid prosecution. We stop at stop signs, not because it is good or bad, but because if we don't we are liable to be punished. When a mugger has us at gunpoint we hope he remembers that if he kills us he faces life imprisonment or death, and that this will regulate his behavior.

The "value" of not lying about others is at least as ancient as the Ten Commandments and are recognized by Christians, Jews and Muslims as fundamental principles (Thou Shalt Not Bear False Witness Against Thy Neighbor). Even predating the Exodus by 1,000 or 2,000 years on the tombs in Egypt, the Egyptian Book Of The Dead goes through the 14 negative declarations that the deceased must make to Osiris before he can begin the journey through the underworld to the life everlasting and the now mummified deceased declares, among other things, that he has not borne false witness against his neighbor. Earlier than that we don't have written history.

The role of criminal law is to protect our values upon which we agree from those who would deprive us of valuable things – our life, our liberty or our property.

Civil Lawsuits:

Virtually every crime has a corollary in the civil law. For murder there is wrongful death; for theft there is conversion; and for a drunk driver who injures another

there is an action for negligence. However, no one would seriously argue that we should decriminalize murder, theft or driving while intoxicated because there is a civil remedy.

Civil lawsuits are not an adequate substitute remedy for criminal defamation. Several years ago I did a civil defamation case and had to review the body of law that had developed since *New York Times v. Sullivan* in Kansas. It is primarily found in a series of cases called *Gobin v. Globe I, II, III.* (Imagine taking one case to the Supreme Court of Kansas three times to try to get a civil remedy!) Basically the law requires proof of actual damage; previously in the law of defamation and libel there were certain things that were libel per se' from which damages were presumed. When I advise a client on a defamation case I tell them they are going to have to prove that some person heard it or read it, believed it, and then because of it, stopped doing business with them. That is a proof almost impossible to make.

When I further tell my clients that the research shows that of the cases that get to trial (and that excludes cases that were already knocked out on summary judgment) that either at the trial level or at the appellate level 92% of those cases are won by the defense.

Realistically no lawyer in Kansas who was aware of these statistics is going to take such a case on a contingency fee or if it is done at all would be done so rarely. Thus, the only people who can afford to prosecute a civil action with those long odds are the people who can afford to spend more than they are going to get. The primary function of civil cases is to get "compensation." From a purely business standpoint and investment in a defamation lawsuit is usually a bad deal because the odds of winning are low and the proof of damages is extremely difficult.

What I also found was that there is no plaintiff's defamation bar either in this state or any other state (a group of individuals who do plaintiff side defamation cases), but there is a substantial defense bar funded by the media with foundational support for individual cases.

Not only does it not make sense in general to decriminalize something because there is a civil remedy, but in this case there is not realistically a remedy available to individual citizens unless they are quite wealthy and can afford to vindicate their honor through payment of attorneys to sue people, and even if they collect, will probably collect less than it cost to prosecute the case.

The Fundamental Question:

Why should the Legislature protect a liar who intended maliciously to harm the reputation of a citizen? That is a very hard question to answer affirmatively. If the question is re-asked in terms of public figures wielding political power to persecute critics, then a different answer is probably reached. But, the responsibility of the Legislature is to protect its citizens' values through enactment of criminal laws, and if exceptions are to be carved out to protect other societal interests (like free expression in political disputes or with political figures), then exceptions should be made rather than repeal of a law which preserves such a fundamental value of the citizens in their reputations.

Respectfully submitted,

JERRY R. PALMER

Testimony of Chris Biggs
Legislative Chair
Kansas County and District Attorneys Association
Before Senate Judiciary
in opposition to Senate Bill 3

I will be succinct. Some statutes are there for the exception, not the rule. They are seldom used, but necessary. The First Amendment applies to and protects political speech. It does not and should not protect against non-political, intentional, malicious lies, perpetrated for the sole intended purpose of harming another's reputation. Such is an act of violence.

Proponents of this bill would have you believe that it is unconstitutional. Let the courts rule. The Kansas Supreme Court has construed statutes to be constitutional by limiting their application. to avoid political speech. For example, K.S.A. 21-4101, disorderly conduct, was upheld and construed to apply only to fighting words, which are not constitutionally protected. ***State v. Huffman,*** 228 Kan. 186 (1980). A similar fate may await this statute as the Wyandotte County case works its way through the system. {an extensive constitutional analysis of our statute may be found in ***Phelps v. Hamilton***, 59 F.3d 1058 (1995)} Balancing is what courts do. Proponents want a wholesale blank check on what people say under any circumstance.

Proponent fallacious arguments:

1. *Civil suits can stop malicious acts.* In truth civil suits are expensive and damages only obtainable if your adversary has money. It is not a remedy in many cases.

2. *The maliciously circulating false rumors statute, K.S.A. 21-4005, is a sufficient safeguard for society.* Actually, the statute only applies to false rumors about financial standing. Why protect that versus reputation in general?

Hypothetical: A man has a dispute with his neighbor. As a result the neighbor makes up a story that the man has sex with his own daughter and prints thousands of copies which are sent throughout the neighborhood. As a result, the man does not get job he has applied for. He and his family are subjected to constant ridicule. The neighbor admits the statement was false but claims victory. He has destroyed his opponent who has no job or ability to hire a lawyer. Because the neighbor has little money, the man cannot get an attorney to take a civil case on a contingency fee. The neighbor promises future such acts. The man takes the case to the local prosecutor who says, "If he spit on you, I could prosecute it. If he trespassed, I could present your cause. If he called you on the phone to harass you, I could request a warrant. Thanks to the 2003 legislature there is nothing I can do."

K.S.A.. 21-4004 requires the State to prove that the information is false, that the perpetrator knew it was false, and that the act was done with actual malice. All this must be proved beyond a reasonable doubt. I urge the legislature on behalf of the KCDAA to allow the courts to interpret and apply the statute within the constitutional framework.

Thank You

Chris Biggs
KCDAA

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Kansas County & District Attorneys Association

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My name is John M. Settle. I am owner of Larned Publishing Company, a small Kansas publishing company. My company publishes the daily newspaper "The Larned Tiller and Toiler" and the weekly newspaper "The Ellinwood Leader". I have also been Pawnee County Attorney since 1995 and am currently serving as the President of the Kansas County and District Attorney's Association. I have been involved with my family's newspapers since 1975 and first became a prosecutor in 1979. My thoughts on Senate Bill 3 are based on my experiences as not only a newspaperman or a prosecutor, but also as a small business owner.

I am proud I am a newspaperman, just as I am proud I am a prosecutor. Both newspapermen/women and prosecutors are entrusted with the responsibility to perform the tasks required of them in a manner that will promote the interests of our society.

Senate Bill 3 has resulted from the conviction of a "publisher" and an "editor" of a publication for repeatedly printing and distributing a lie about two Kansas citizens, to the detriment of those citizens. The two defendants in that case were found guilty of knowingly and maliciously committing those acts by a jury of their peers, at the conclusion of a public trial.

The jury in that case found the defendants used their publication to distribute a false statement with the malicious intent to harm the victims they had targeted. The fact that those victims may have been political figures has no relevance to the application of the statute. They could just have easily been small business owners victimized by a disgruntled employee or customer.

As a member of the Kansas Press Association I was disappointed to learn the association was supporting Senate Bill 3. In my correspondence to the association I posed the following hypothetical. The subject of the hypothetical is a small newspaper but it could just as easily apply to any small Kansas business and therefore merits this committee's consideration.

This type of situation would be a nightmare for any small publisher...

> "A local newspaper has to fire a long-time employee for any reason.
>
> The employee is angry and bitter because they fired him. To retaliate against the newspaper the employee begins making false statements about the business of the newspaper with the intent to cause the newspaper to lose advertising sales.
>
> The former employee goes to several prominent advertising customers of the newspaper and tells those advertisers that the newspaper has been falsely reporting its circulation figures and not actually delivering all of the advertiser's circulars as promised."

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This type of situation could cause great harm to the business of the newspaper, not just directly through advertising sales losses but to the reputation of the newspaper. The former employee probably doesn't have any real assets, so there is no way they can recoup the potential losses they can suffer from this type of "speech".

The majority of the newspapers of Kansas are small, family owned newspapers that do not have the financial resources to deal with such an attack through civil court. Even if they did have the resources, it is very unlikely they would ever recover their loss, which would take years at the least if they did recover anything.

Fortunately, the false statements described above can be punished/deterred because of K.S.A. 21-4005. K.S.A. 21-4005 punishes the same type of criminal act as K.S.A. 21-4004 does. The only difference is, 4005 requires the crime to be business related and the 4004 doesn't.

There is no history to support a claim that statutes such as K.S.A. 21-4004 create a "chill" upon any person's or organization's right to free speech. This statute punishes only "knowing, malicious communication" which has never fallen within the definition of "free speech". A lie, is a lie, is a lie; why a lie may rise to the level of a crime is determined by the liar's intent to do harm and the type of harm suffered. These statutes punish only a malicious act committed with the intent to harm another.

The claim that this type of law has historically been used by oppressive regimes is simply baseless rhetoric. This law is no different than any law that has been passed by the legislature of any state of the union. It is subject to constitutional scrutiny and before any person can be punished under the statute, a person will have to be charged, tried and convicted BEYOND A REASONABLE DOUBT BY A JURY OF HIS PEERS. Hardly the actions of a "repressive regime". Instead, the law will protect the innocent individual and small business owner as well as any person who may be seeking public office, from the harm caused by malicious lies.

K.S.A. 21-4004 will not result in the imprisonment of any journalist. In the Wyandotte County case it may result in the punishment of two individuals that purport to be journalists, but I don't know of any true journalist that would condone printing and distributing intentional lies about any person or subject.

K.S.A. 21-4004 has its place and it should not be repealed.

Sincerely,

John M. Settle,
Larned Publishing Company;
Pawnee County Attorney and
President,
Kansas County and District Attorney's Association