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REPUTATION AND RISKTAKING

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REPUTATION

Living and dying alone on a desert island, incommunicado with the rest of the world, I can have no reputation, and hence no reputational injury. For the concept of reputation itself requires the existence of at least two persons: one who is the subject of the reputation and a second who regards the first.

Given the existence of this second person who regards me, I can enhance, diminish, or destroy my reputation by doing various things likely to precipitate adulation, disgust, or dismay. When I do these things —or, more generally, when I do anything at all or nothing at all—I can myself affect the reputation I hold. But there is a catch. My reputation, that is, the reputation that belongs to me in the sense that it is about me, is not something that I can hold onto at all. It is information about me, however good or bad it might be, that resides in the mind of someone else; indeed, no matter what I may myself think of myself, such information stored in my own mind cannot be reputation, by definition.

So, reputation, then, constitutes a curious sort of thing. It is information about a person that is typically not a fleeting thought but rather a more enduring one, and hence is a kind of capital asset—property of a sort.[1] Moreover, considered as a capital asset, it bears a subtle difference from tractors, stock options, plots of land, even from patents, which are also products of the mind. For my reputation is human capital, an asset like my health or education, that cannot, by a stroke of the pen, be given or sold to another, for whom it would then be her health, education, or reputation.[2]

Instead, my reputation is uniquely, nontransferrably mine, in the sense that it is about me; it is a capital asset that I can nurture or destroy; it may determine my livelihood, influence, pleasure or pain; it may be the key to power and wealth, to ecstasy or despair, perhaps even life or death—and it is totally in the custody of someone else.

REPUTATIONAL INJURY

If I want to improve my reputation there are probably things I can do about it; in an analogous fashion, if I want to shoot myself in the foot, literally or figuratively, I can do that, too. It is the way of things, however, that when it comes to reputational advance or diminishment, I do not hold a monopoly position: Others can do it to me, or for me, too; indeed, within some constellations of events, I may be quite powerless to stop them.

This, then, is reputational injury: it is a game that anyone can play, which only sounds disturbing when I come to realize that it is my reputation that is being played with. Others can do me in. Furthermore, as my reputation, my human capital, is being tossed about, I may be the monkey in the middle—unable to grasp my reputation to bring it aright again, unable to shield it from the winds of one person's destructive speech, and from the chill of another person's now-frostier regard.

What to do, when you appear to be injuring me as you speak about me? Were you targeting me with your automobile, I could swerve out of your way, drive more slowly, or venture out into the world only in my trusty armor-studded tank. In other words, when the injury isn't from words, there are things I can do to avoid it. Indeed, even if the injury emanates from truthful words, there may be things I can do to avoid that, too: I can live my life so that the truth, when known, protects me from the disapproval of others—as well as my trusty tank protects me from your automobile. That is, I can live my life in such a way that the reputation I have—if it is truthful information about me in the minds of others—is OK.[3] Even though information about me may be transmitted from you to others, if that information about me is truthful, it is the consequence of my own acts rather than the flights of your imagination which have led my reputation to plummet or to soar.[4]

Suppose I do something stupid, which you dutifully report, and which sends my reputation downward. What can I do to repair my reputation? I can do more that's better, and hope the additional news brightens the mental picture held of me by others, or even engage in interchange with those others in a more direct fashion.

Now suppose instead that the harm comes from a false statement about me: I have been slogging through life in my usual fashion, with only your tales of my wanderings, rather than my actual wanderings, haven taken a nasty twist. What can I do to repair my reputation, or must I just retreat to the sidelines and surrender in defeat? True, I can do those things that would have stood me in good stead had I been the cause of my own undoing, or I can run around trying to rehab my

reputation with the regarders, one by one.[5] But it will most likely take greater self-improvement to improve myself enough, and greater around-running to those who now think ill (or iller) of me than would have been the case had I pursued my reputational destruction on the do-it-yourself plan.

In other words, a set of questions to be asked and answered begins with, Who can avoid what sorts of injuries and at what cost? In order to pursue this inquiry, the paper develops a conceptual framework encompassing the processes of creation and injury to reputation and of injury avoidance. As illustrated in the preceding paragraphs, libel law is characterized by a triangular relationship between the speaker, the hearer, and the subject which makes the processes of reputational change potentially complex. Whether one focuses on the creation, the maintenance, or the destruction of one's reputation, the resulting effect must occur, by definition, in the mind of someone else; this complicates the problem of injury-avoidance, as well as the legal rules and remedies that may come into play.

REPUTATIONAL INVESTMENT AND INJURY: SPEAKER, HEARER, AND SUBJECT

To advance her reputation, a person will do certain things and forbear from doing others. She does this in the belief that today's sacrifice will yield tomorrow's benefit—whether the future benefit be in the form of a greater personal esteem in the eyes of others, broader patronage of a business or purchase of its products, willingness of prospective employees to accept employment with her, or whatever. Whether the result be called "reputation," "goodwill," or another term, it is something of an enduring nature (for better or worse) and therefore a kind of capital asset.[6]

Although the person who so "invests" in reputation is indeed relying on the expectation of future benefit, she is casting her lot with an asset rather different in form from many others. For if the "investment" is successful, it may well be successful because of speech,[7] such as word-of-mouth advertising for services or a product or, perhaps, other less task oriented words of mouth. Moreover, unlike a stamping-press installed in a manufacturing plant, this asset cannot be controlled at the will of its owner nor be limited in its activity to the shop floor on which it is placed.

Instead, the seeker of a good reputation often must depend on the speech of some people, and on the listening and subsequent actions of

others. For example, by doing kindly deeds, one develops a reputation resulting in friendships and contacts in the community; these favorable relationships lead in turn to others, and to invitations, community office-holding, enhanced esteem, and other desirable things. Or, having done something extra to produce a high quality service or product, she must wait for happy clients to speak its praises, and after that, for their acquaintances to come and buy.[8]

Once having made such an investment, however, a person has this asset, a reputation, which is by definition totally in the mind of someone else. Consequently, the maintenance and the protection of an existing reputation will generally depend on the actions of others at least as much as did the initial process of reputation creation. One way to influence the course of one's reputational investment is to do praiseworthy things which the reputation would then reflect, particularly in a world where trees are known by their fruit, where fruits are attached to trees, or whatever. So long as speakers speak truly and later actors base decisions only on what is true, one's reputation will rest in the hands of its investor or subject, even if various intermediaries must act in order to bring about this result.[9]

Where speakers speak falsely, however, this characterization no longer holds: what the subject has herself done or said is not what is transmitted, so that the resulting effect on reputation is less easily causally attributed to her. Moreover, actors who hear the falsity but behave in reasonable ways, assuming it to be true, may not be the persons to whom the reputational effect should be attributed.[10] This attribution problem may arise even though it is the steps taken by these "hearers" rather than by, say, a gossiper, that most immediately precipitate the injury at stake: If the hearer no longer buys a piece of real-estate when otherwise he would, or no longer patronizes the subject's business, nor invites her to his party, nor nominates her to a prestigious post, the hearer may be blameless (as, indeed, if the statements had been true); yet the subject is injured in a way that, but for falsity, would not have occurred.[11]

What is different here is falsity, not just the occurrence of injury: for alternatively, the gossiper might not have responded at all to the subject's activities, or might have gossiped to fewer friends. The subject who "invests" in reputation may have no right to a specific favorable result, but has a special basis for dissatisfaction when an intermediary injects falsity into process and result. Although the subject of the reputation has in some sense "signed up" for particular risks, as other investors do,[12] the risk of injury from falsity was probably not one of the risks on that list.[13] Ironically, it is the person, the speaker, whose intermediary role is often essential to the formation of reputation—

whose acts can lead also to reputational decline. And it is this critical change in function, from reacting to and speaking about what is true to the injecting of information which is false, that may change the speaker's causal role as well.[14]

But the speaker isn't the end of the story. Quite literally it requires a "hearer" or "regarder" too.[15] Were not the hearer influenced by the gossiper's tale, for example, then perhaps neither the efforts of reputational investment nor, alternatively, the introduction of false information would make any difference. Moreover, were the hearer to have (or even believe he had) complete and accurate information beforehand, then additional information, true or false, might be disregarded and injury circumvented once again.[16] Finally, a skeptical, distrustful hearer could conceivably check further before choosing to act.

Paradoxically, it is the receptiveness of the hearer to new information that creates for reputational investments the potential to pay off, but simultaneously permits the influence of false information that might be offered in its stead. Although some actions of hearers may be considered in themselves blameworthy,[17] their response to what a speaker says will often not be so readily set aside; instead their actions may function as the foreseeable results of the false statements to which they are exposed.[18]

In terms of reputational injury or avoidance, then, three candidates present themselves: the subject of the reputation, the speaker of false information, and the hearer who reacts to it. As suggested above, each of these actors potentially has an injury-or-avoidance role to play.

Judicial decisions, however, do not speak of the problem of libel in these terms. They talk instead about public officials and public figures as distinguished from private ones;[19] about fact as distinguished from opinion (if indeed that can be done);[20] about matters that are of public concern as distinguished from others that might not be;[21] and about other distinguishing features of a much different categorization of the world. Despite this different taxonomy, many aspects of libel law lend themselves to characterization in terms of the accident-or-avoidance conceptual framework, as illustrated in some examples below. Indeed, not only the changes in the law signaled by *New York Times v. Sullivan*[22] but also some of the anomalies and instabilities encountered in its wake can be analyzed within this conceptual scheme.

A. Public Officials, Public Figures, and Very Private Ones: The Subject of a Reputation as Possible Avoider of Injury

Police Commissioner Sullivan claimed he was injured by false statements made and published by others.[23] In a world of common law strict liability for libel, with its focus on "but for" causation and its implicit sense of

what was within whose control, the speaker was the obvious pressure point[24]—the person to whom the injury-or-avoidance decision could properly be put. Apparently on the theory that false speech could be costlessly omitted by a speaker who willed it so, courts permitted recovery once the requisite showing of false defamatory publication had been made.[25] In other words, avoidance of falsehood by a speaker was perceived not to be very costly, and the subject- or hearer-avoidance possibilities were hardly taken into account.[26]

With the Supreme Court decision in *New York Times v. Sullivan*,[27] however, several new and different factors appear to have come into play, which ultimately affect the relative desirability of the speaker as a pressure point in the avoidance of reputational injury. First, the "constitutionalization" of libel law, reversing its previous outcast status, meant that any restrictions on speech, false or true, were worthy of some special examination, even if the restrictions were in the end upheld; it was a constitutional right that was then at stake.[28]

Second, the *New York Times* concern with the costs of litigation suggested that if false speech were not totally costlessly separable from the rest, then litigation costs—which already added a deterrent bang to the compensation-paying buck—would be costs affecting other speech as well.[29] Third, the Court pointed out why total and costless separability could hardly be assumed for speech such as that at issue in the case.[30]

Fourth, where individuals are petitioning or criticizing government freely, "uninhibited, robust, and wide-open debate" was seen by the Court to be a likely and beneficial result.[31] Speakers and hearers engaged in such debate (as well as subjects) are doing something publicly valued; where a speaker who would otherwise make such debate possible is silenced, the public cost of his declining to speak is particularly steep. All of these considerations serve to raise the perceived cost of speaker avoidance, and hence affect the relative desirability of the speaker as the person on whom the injury-or-avoidance burden should fall.

As if these changes were not enough, the Court introduced, in *New York Times* and subsequent decisions, another change in the common law landscape: it addressed special consideration simultaneously to the identity of the subject of the reputation, a factor which could add a thumb to the scales in any ensuing measurement of relative speaker-avoidance costs.

The subject of the reputational injury, if a public official, can make the choice of running for or accepting office in light of the fact that caustic comments or occasional unpleasant falsity may come part and parcel with the job.[32] Taking into account not only a snapshot of the moment but

also the moving picture from which it was drawn, the Court has appeared willing to look backward in time to a moment when reputational injury to the subject could have been avoided simply by his choosing not to hold office at all.[33] Relevant to that decision, perhaps requisite to the office, was the proverbial thick skin that (to massacre the metaphors) allows otherwise hurtful speech to bounce off its subject without wounding.[34] Moreover, an office-holder who might be injured by false statements had some ability to "contradict the lie," or at least reduce its damage, as a consequence of the more regular access to the media that officeholding typically affords.[35]

All of these considerations serve to raise the perceived costs of speaker and hearer avoidance but lead subject-avoidance to be evaluated as being of lower cost. Once this is so, it should hardly be surprising if the "cheapest cost avoider"[36] were found not to be the speaker or hearer, but instead, the subject; and for many sets of circumstances—particularly those involving speech about public officials—such a result would seem to follow from *New York Times*.

But not always: When a speaker knows a statement to be falsehood, she would seemingly be better positioned to avoid falsity than she would be if such knowledge on her part did not exist. In contrast to her hearer, but also in contrast to the subject, she appears to have more control and hence greater ability to avoid injury than would otherwise be the case. Alternatively, if she speaks in a reckless disregard of truthfulness, the adoption of a bit more regard for such an issue seems to have been considered by the Court to entail relatively little cost.[37] Perhaps present also, but not articulated, is the idea that speech commenced on the basis of knowing falsehood or reckless disregard for truth would be of lesser public value in provoking uninhibited and robust debate.[38]

Consequently, it appears that the Supreme Court's reconceptualization of the process for production of speech and of the role of speech in the public life changed the relative desirability of speaker vis-à-vis others as avoiders of reputational harm. Moreover, where a public official is the subject of speech, the resulting recounting and reweighting of avoidance costs is particularly profound. With a public official plaintiff, a showing of a published defamatory falsehood constitutes but the beginning of a journey—the carrying of the plaintiff's burden—rather than its end. And what had before *New York Times* been a rule of strict liability is shrunken, for these plaintiffs, until a finding of liability at all becomes "the exception which makes the rule" of the more typical no-liability result.

For other plaintiffs, however, things might be different, as subsequent episodes of litigation came to suggest. While public figures might, for

reasons resembling those for the officials, be given a heavier burden to carry as in *Curtis v. Butts*,[39] private figures—particularly those not involved with public issues—were returned to a status closer to that of the generic plaintiff in the pre *New York Times* era.[40] The Court said, in *Gertz v. Robert Welch, Inc.*,[41] that so long as the strict liability were avoided, states could, for private figure libel cases, choose forms of fault-based liability and yet be consistent with the Court's constitutional resolves.[42]

Without a public-interest thumb on the scales the avoidance costs to speaker and hearer were shrunken; and where a subject had in the past made no choice in favor of exposure to such reputational risks, nor could in the present command access to media as an avenue for reply, the subject's ability to avoid or mitigate injury was substantially less than that of speaker or hearer. Consequently, in private-figure cases, the burden of injury-avoidance appears more likely to fall on speaker or hearer, and to shift somewhat away from the subject of the reputation, at least as compared with cases involving public official and public figure plaintiffs.

Between these two situations and their corresponding treatments of public and private persons, the problem of "public issue" has uncomfortably resided, sometimes shifting to one end of the spectrum, sometimes shifting back to the other end. In some ways this is not surprising, for where discussion about a private figure arises in the context of a public issue, the two competing sets of considerations simultaneously come into play. The state interest in protecting reputation (not to mention the subject's liberty or property interest in protecting it himself) pushes the "cheapest cost avoider" computation in the direction of the speaker; yet the public value of debate on public issues would push the evaluation toward the opposite result. And, unlike the public figure, who in his choice of profession has effectively accepted exposure to the public, the private figure has had control over neither the snapshot nor the moving picture in which alternative choices could seemingly have prevented the injury.

Given these competing considerations, judicial sensitivity to factual context and perhaps even vacillating judgments might be anticipated results and those have indeed occurred. The *Rosenbloom* plurality decisions[43] extending *New York Times* protections to discussion of public issues was cut back in *Gertz* to a more conservative result. Then in *Dun & Bradstreet v. Greenmoss Builders*,[44] matters of "public concern" resurfaced, but this time to free plaintiffs associated with nonpublic matters from even the few strictures *Gertz* would have imposed.[45]

B. The Role of the Hearer: Changed and Changing

Reputational advancement or decline will likely happen only when the hearer's mind is open to information about the subject, whether the information is of a flattering or a defamatory kind. Consequently, where the hearer is not so open-minded, a plaintiff is less likely to suffer severe reputational injury from falsehood and a speaker is less likely, at least in relative terms, to be designated a recipient of the blame.

The less-responsive or nonresponsive hearer might be someone having greater knowledge or expertise than a particular speaker, in which case a speaker could be deliberately ignored, or might be someone who simply exercises skepticism when certain topics or kinds of exchanges happen to arise. Under other circumstances, a hearer's acts will be proscribed or will be subject to special statutory provisions that, in effect, require skepticism or even correction of false statements by a hearer, as illustrated below.

A hearer might be signaled to be skeptical by the context in which speech occurs: the importance of context is so salient, yet so obvious, that we may fail to articulate it much or even most of the time. When a strikebreaker in a unionization campaign is angrily labeled a "traitor," for example, the epithet is "merely rhetorical hyperbole," the Supreme Court has said.[46] In fact when the subject of such a labeling did sue for libel, the Court found it "impossible to believe" that any reader of the newsletter in question would have understood it "to be charging the appellee with committing the criminal offense of treason," and declined even to invoke the two-tiered analysis of *New York Times* and *Gertz*.[47] Similarly, in a case preceding the labor one, *Greenbelt Cooperative Publishing Association v. Bresler*,[48] a landowner who was involved in tough bargaining with the City Council was denounced as engaging in "blackmail"; to his allegations of libel, the Court replied that the term "blackmail" is but "a vigorous epithet" with its context providing the critical interpretive clues.[49] Just as a readily visible flight of stairs may give its own sufficient notice of a danger to those who would pass its way, so the charged atmosphere of, say, a unionization drive or political campaign, or certain other settings gives its own notice for a hearer to be on her skeptical guard.[50] Where such signals to skepticism are offered, avoidance of reputational injury apparently rests with the hearer, and a plaintiff's attempt to recover from a speaker may be pursued in vain.

Indeed, during most eras of our history being a skeptical hearer was probably more common than seems to be the case today, at least where the speaker in question is the institutional press. Objectivity of report-

ing, as well as the idea of news reporting to all, are relatively recent innovations in American journalism: From the time of the Revolution until the 1830s the press tended to be merely an atomistic cottage industry, comprised of individuals whose papers were each sponsored by a political party or commercial interest; a range of conflicting views of the world was the cacophonic result.[51] Moreover, the papers were often too dear for all but the wealthy and commercial classes to buy: the era of the low-cost, wide-circulation paper in America—and the opportunity for false reports to be read by many more people—was yet to come.

Subsequent eras were hardly better, were objectivity the measure of success. From a political or personal propaganda device, the press was transformed in the 1830s to "the newspaper as personal statement."[52] There followed the period of yellow journalism and, only in the twentieth century, the adoption of objectivity as both a standard for reporting and an ideology of the press.[53]

Yet, even as the goal of objectivity conferred the benefits of greater accuracy in the press, it simultaneously permitted greater harm to flow from inadvertent errors or omissions. If accuracy and objectivity beget believability, then hearers are more likely to respond to certain statements with the diminished regard that is reputational injury and a given falsehood may therefore do more harm. As one scholar has pointed out, "Back in the heyday of yellow journalism reporting was surely much worse than it is today, but it was also less harmful, because there was no presumption, or pretension, of accuracy."[54]

Despite such considerations, the responses of hearers to falsity are not totally unrestrained by law, for particular responses by hearers may have their own "rewards." Hearers who relay false statements may be liable for doing so; for example, those who give out false credit or insurance information or themselves act on such information may be subject to provisions of the Federal Fair Credit Reporting Act as well as other laws.[55] Due process rights of public sector employees, as well as the contract rights of others may require an employer to inquire further rather than rely on information received that may itself be false.[56] The legendary false shout of fire that causes panic in a theater,[57] as well as false news of the death of a family member[58] may not leave the hearer who makes such cries unscathed. Under these and other conditions, the actions of hearers may be circumscribed. Yet, the hearer as the chosen "pressure point" may still prevent liability: for not only hearer skepticism but also hearer behavior, where skepticism is absent, may serve to reduce or avoid the incidence of reputational injury.[59]

C. The Speaker

Because hearers must respond to speakers before reputational injury from libel can occur, the hearers constitute a possible pressure point at which legal rules might affect the occurrence of such injury. But publication of falsehood is also necessary for libel, and in that process the hearer hears because a speaker speaks. The speaker, too, is a possible pressure point—indeed, in periods, all too obviously so, as the pre-*New York Times* state law and the early Sedition Act attest.[60]

Yet, as with other acts giving rest to liability, when speech runs afoul of law, a decision to compensate for harm is simultaneously a decision to deter like incidents from occurring again.[61] Were the effect of such a decision to be the deterrence of false speech alone, one kind of issue would be raised, namely: How do we value, in public-interest terms, the utterance of false speech? "[U]ntruthful speech . . . has never been protected for its own sake,[62] the Court might answer, as it has done on occasion before in the context of commercial speech. Others might respond, however, that false speech on its own may have public value, if, for example, its occurrence enlightens the public about the existence of particular viewpoints held by those in the population, or serves as a safety-valve when greater harm might otherwise occur.[63] If liability for falsehood deterred only false speech, these public benefits that may accrue from false speech would surely be lost as well. The strict liability that antedated *New York Times* as well as the strict liability that may yet recur,[64] suggest that such losses, as weighed in by state common-law makers, may not be assigned substantial weight.

In situations such as those the earlier common law had addressed, it is likely that its proponents would point to the speaker as the best avoider of reputational harm; for if the false speech is not valued itself, nor is its disappearance associated with any other sort of loss, then the cost of injury avoidance which is accomplished by avoiding speech must be lower than would otherwise be the case. Moreover, if the benefits of speech accrue only to the speaker, and to him in his private role alone, the cost of avoidance is a cost he can't take into overall account as well a widget manufacturer might do.[65] Indeed, given the character of libel as involving the triangular relationship of subject, speaker, and hearer, and the necessary alienation of the owner of a reputation from the asset she seeks to protect, the speaker holds peculiar power in connection with this asset that the other two cannot control. Perhaps the common law's response to the control-in-the-triangle problem is not too surprising for its time.

With *New York Times v. Sullivan,* however, the conception about the

independence of false and true speech changed, altering the injury-or-avoidance analysis in fundamental ways. As suggested earlier, *New York Times* characterized the occurrence of false speech not as an enterprise of its own, but as a byproduct on the way to the creation of something else: If the production of true speech cannot occur without some impurities, the deterrence of such impurities could deter the production of true speech as well.[66]

Consequently, the attempt to limit or compensate for speech that is false must be evaluated in the context of endangering speech that is true. If the latter were considered to be of no public value, the analysis might remain unchanged.[67] But if true speech has any public-interest value, then such benefits need to be taken into account, even if the eventual decision were that the particular benefit did not warrant the harm.

The *New York Times* case presented such questions in a peculiarly provocative way. Though the speech at issue was published in the form of an advertisement at a time that both libel and commercial speech were outside the First Amendment realm,[68] it concerned the conduct of public officials acting in their official roles: It thus implicated values that were simultaneously at the core[69] and beyond the reach of First Amendment protection of speech. If form or falsity were all that mattered, the costs of speaker avoidance would be only private ones, and the speaker might well be found to be the person best able to bear the costs of injury or its avoidance.

If, however, speech about the conduct of government officials were of value in itself, the relative avoidance-cost computation could well come out quite differently. And indeed, if the production of true speech were inextricably tied to the production of falsity, then the unprotected speech of libel could well fold in on the core.[70] True speech about the conduct of government could be had only at the risk of some falsity, perhaps false statements about those officials whose conduct was most important for the public to know. With commensurately high weight accorded to such political speech, the cost of speaker avoidance could well be deemed too high, in public-value terms. In terms of private costs, however, a speaker might well respond to the deterrence incentives if liability were forthcoming, with the result that not just false speech but true speech of special public value would be deterred.[71] This "chilling effect," while perhaps necessary as a practical matter for a speaker who would otherwise be liable, would constitute a compromise with what, in public-interest terms, should occur. The public interest in such speech therefore called for a high cost to be associated with speaker avoidance, and

the relative desirability of speaker as avoider experienced a corresponding decline.

Two additional factors associated with speaker avoidance arose—one directly, one less so—in the decision of the *Times*. First, the costs of litigation and the fear of unwarranted liability were recognized by the Court as costs of speaker avoidance—even in situations where, if one had a crystal ball, no liability would have ensued.[72] Even in cases not imposing costs of liability, the prospects of litigation and liability could nudge speakers in the direction of avoiding speech that in retrospect need not have been avoided even under common law standards had they applied.

Second, the means of preventing falsity—such as additional research on the truthfulness of statements, which would impose additional costs on a speaker—were apparently considered too costly by the Court because of public-interest losses in the delayed or deterred publication of what would otherwise have been considered news.[73] Ironically, or perhaps not so after all, the *New York Times* had itself reported on the events discussed by participants in the advertisement it later published; so it could, by delving into its own files, have corrected some of the factual assertions of the ad.[74] To do so for each advertisement placed by others, however, would substantially raise the cost and delay the publishing of what is true, and the Supreme Court decision did not require this.[75]

So the production metaphor extends not only to falsity which might be inevitable (at any cost) but also to falsity whose foreclosure would entail high costs. The costs of avoidance that *New York Times* speakers are not required to bear include, apparently, some costs in the literal sense: Although speaking with "knowing falsehood or reckless disregard" is different,[76] the Court said, the costs of speech below that threshold are not ones the speaker would be required to bear.

Gertz v. Robert Welch[77] did not, as it happened, appear to raise all these issues, particularly those associated with intertwined truth and falsity and the avoidance of falsity which could, with expense, be disentangled from the truth. In *Gertz*, a magazine had hired a free-lance writer whose error-proneness it knew;[78] and then, the editor had added a rather courageous introductory note despite his lack of familiarity with the subject matter.[79] Even within *New York Times/Curtis v. Butts* framework for public officials and public figures, the editor's liability might have been an understandable result. (Indeed, the outcome on retrial, where Gertz successfully showed "actual malice" by the defendant, is consistent with the assertion offered here.) Instead, perhaps for

its own reasons, the Court classed Gertz as a private figure and progressed to other things.[80]

Dun & Bradstreet v. Greenmoss Builders,[81] however, did entail issues associated with these kinds of avoidance costs, and thus might be viewed as the mirror image of *New York Times* in that regard. Moreover, *Dun & Bradstreet* offers a promising illustration of the applicability of the injury-or-avoidance framework to issues of reputational injury and speech. Indeed, given the Court's lack of sympathy for *Dun & Bradstreet* or its services,[82] it is surprising that greater analysis of the avoidance issues was not (in any terminology) pursued.

Dun & Bradstreet, a credit reporting agency, had issued a false report to five prospective creditors of a building company, and the company subsequently sued.[83] The agency, which would presumably be viewed as an expert and be held in negligence to the standard of its expertise, had hired a high school student to do important aspects of its work, at the impressive sum of $200 per year. From the perspective of injury avoidance, it is curious that a business which by its nature deals with reputations—else why would prospective business contacts purchase such information at all?—had entrusted the fate of its subjects to a seventeen-year-old for less than the price of a VCR. What this student employee did was not simple clerical work, but the analysis of state bankruptcy petitions, for which some additional education or training might seemingly have come in handy. When a mistake occurred, as well under such an arrangement it might, it seems hardly the sort of thing to be labeled a surprise. To the garden-variety negligence that probably was associated with the student's result[84] could be added negligent hiring and supervision, as well as other torts.[85]

But the facts might carry us farther, for the plaintiff's difficulties, and the defendant's contributions to them, did not end with the initial report. Although the builder learned of the false report of his company's bankruptcy on the day it was issued, and protested it immediately to Dun, the company did not issue its minimal "correction" notice until almost two weeks had passed.[86] Despite repeated requests from Greenmoss Builders, Dun refused to furnish the names of those to whom reports had been issued[87]—four firms beyond the one he knew. Finally, despite the furnishing of a specific form-statement which the builder suggested Dun use to reply to future inquiries, Dun continued to issue to other creditors a less than favorable report (though one without the false bankruptcy information). Negligence and perhaps intentional torts fell one after another upon the builder, even after the first report and his timely complaint to Dun.

Given the array of its decisions, and perhaps not-surprising accidents

caused by Dun and its employees, there would appear to have been more than ample room to avoid injury had the company been so inclined. By contrast, the builder's avoidance prospects appear to have been quite limited: Since he could not obtain the names of the businesses to which the erroneous credit report had been sent, and since Dun continued to send out less-than favorable reports even after, he could hardly have practiced the sort of behavior for injury-avoidance that a *Gertz* Court would recommend. "The first remedy of any victim is self-help," the Court said, "using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation."[88] Indeed to the extent that were possible, he had already done so in his appeals to Dun & Bradstreet. Since his avoidance ability appears close to zero, the cheapest cost avoider would more likely be the speaker or the hearer so the Court's analysis might have turned back to one of them.

Though hearers may sometimes offer natural skepticism, in *Dun & Bradstreet* that would hardly have been expected to occur. The service offered by Dun & Bradstreet could command a high price precisely because subscribers wished to save themselves the cost and inconvenience of making similar inquiries on their own; Dun could meet the request in the form of a single report. And, because they were dealing with a company regularly in the business, the subscribers might with reason have relied on its expertise. Although the subscriber's acts might in some cases be themselves restricted by various laws, crucial decisions affecting the fate of the builder would likely be discretionary in nature, would depend on a multiplicity of factors, and therefore be particularly difficult to attribute in casual terms to a false-but-corrected or not-entirely-favorable report. Avoidance of the injury by the hearer would therefore be unlikely; and, if such a subscriber were obligated to become itself a credit agency gathering on its own a duplicate set of data, hearer avoidance would become at best a very costly longer-run result. It would, in fact, be exactly the type of cost Congress sought to prevent in its adoption of a regulatory framework for credit agencies, together with rights and remedies for those whom they would rate.[89]

Hearers such as those to whom the Greenmoss reports were sent would appear therefore to have somewhat limited abilities to avoid reputational injury here. Moreover, the number of hearers called upon to do so would grow with the number of false or deprecatory reports issued—even as the profits of Dun might rise directly with the number of such reports it sent out. Consequently, the greater the activity of the speaker, the more challenging the collective avoidance problem for hearers or subjects or both.

Dun & Bradstreet would therefore appear not simply as the party best able to accomplish injury-avoidance but would seem to be the only party in the triangle with much of a chance at all. If acting as the cheapest cost avoider, it would be best able to weigh the costs of reputational injury when such injury happens against the increased costs of preventing its occurrence altogether. Under such circumstances, the company could, for example, choose to hire an adult, whose sense of the import of the work might automatically draw forth greater care—and preferably someone with the background it takes to properly understand bankruptcy petitions. Dun might also find it worthwhile to double check that information in its files had already been double-checked; although stating that Dun's practice was to do so, no checking of the bankruptcy report had occurred for the Greenmoss file.[90] What would it cost Dun to have avoided the Greenmoss injury? A modicum of money, some supervisory time, and perhaps (though not necessarily) some delay in its reporting of credit information.

Although Dun argued its claim with reference to the First Amendment,[91] the relation if its speech to the considerations motivating the *Times, Curtis,* and *Gertz* decisions appears somewhat attenuated (particularly if compared in terms of its content as political speech). The inextricability of truth and falsehood seems more difficult to argue for *Dun:* since one is unlikely to find a bankruptcy petition without there being a bankrupt petitioner who goes with it, the Greenmoss type of problem could readily arise only in the presence of clerical errors or errors of comprehension—exactly what occurred with the young Dun & Bradstreet employee. Errors of the sort that occurred are more likely attributable to, and avoidable by, steps that also incur greater costs. So the second branch of *New York Times* would have to be the basis of a favorable appeal. Yet that too would be difficult to support in the *Dun* context. In *New York Times* the effort to extricate false information from true would have been costly in time as well as money, affecting the time at which news which was otherwise forthcoming would appear. In *Dun & Bradstreet,* the information would not otherwise have been forthcoming (certainly not without a hefty fee that would surely have covered costs) because the main thing the company had to sell was information that would not otherwise be available. Rather than publication, nonpublication was the essence of its business profitability, so the public interest costs borne by would-be readers and debaters of public issues would figure less prominently in its costs. Although there are publicly valued benefits associated with individual benefits of speech—self-expression being an example—such benefits were not the ones on which the Court had focused in *New York Times* or its progeny. In any

event, such benefits are probably the only noneconomic costs to which Dun could have pointed; hence in the inquiry about relative ability to avoid injury, the credit agency would likely still have been termed the cheapest cost avoider.

In other words, given the framework supplied by *New York Times* and extended in subsequent cases, *Dun & Bradstreet* would appear to present a relatively strong case for speaker avoidance—perhaps even an easy case for some members of the Court.

Moreover, while litigation involving loss of personal reputation may be difficult when it comes to proof of actual damages, the business consequences of a firm like Greenmoss would generally be easier to assess. The inability of Greenmoss to present proof of its injuries, unlike the problem often facing individual subjects, arose precisely because of Dun's refusal to disclose where it had sent reports, and was thus a proof problem that was precisely of Dun's own making. A more limited decision in keeping with the framework built upon *New York Times* could readily have resolved critical issues in *Dun.*

The Court did in *Dun & Bradstreet* designate the speaker as avoider, but for reasons quite different from those suggested above. Instead of analyzing the case within the framework of *New York Times* and *Gertz,* the Court's plurality created a new below-*Gertz* category into which *Dun & Bradstreet* then fell. For cases in this category, not only would presumed and punitive damages be possible without proof of "actual malice" as *Gertz* would have required—and as the builder in *Dun & Bradstreet* very likely could have shown—but also the perceived lack of public concern with the speech at issue drew *Dun* out from under the *Gertz* analysis altogether.

The *Dun & Bradstreet* opinion thus expanded the framework of analysis founded upon *New York Times:* previously the strictures of *New York Times* libel recovery had applied to a limited set of persons, with the *Gertz* limitations seemingly applicable to all others. Rather than "slotting" *Dun* into one of these two categories, the court instead created a third one, applicable to situations in which the public "concern" was so little that even the *Gertz* limitations for private figure libel recovery should not apply.

Motivating the Court's plurality, I suggest, are two considerations which the injury-or-avoidance framework could readily have taken into account. First, the injury to the plaintiff was readily avoidable at minimal additional cost—or at least at a cost those justices thought such a business ought to bear. Seen perhaps more readily here than in other settings, the increased expenditure on employee service appeared to be a reasonable cost of injury avoidance. Second, because the purpose of

the credit report was exchange of information in a business context, with neither the identity of the parties nor the substance of the transaction provoking special concern by the Court about the public value associated with freedom of speech, it was a relatively easier setting in which to permit an outcome that would make speech more costly.

In an injury-or-avoidance framework, however, these financial costs could have been taken into account explicitly, without need for further expansion of the taxonomy of *New York Times* tradition. Moreover, the nonfinancial costs which the opinion in *Dun & Bradstreet* found so untroublesome might be of greater concern in other cases, such as one involving core political speech; these "costs"—that is, the lost speech and the chilling effect—could instead be taken into account as the thumb on the scales, as discussed previously in this paper.

CONCLUSION

Reputation as a form of human capital can exist only in the mind of someone other than its "owner": no matter what I myself think of myself, that cannot be my reputation. It has to reside in the mind of someone else. Yet, when the injury of libel occurs, it is injury that happens to me—not to the person in whose mind the reputation exists, and whose change of heart or mind toward me constitutes the injury itself. And such injury typically occurs because of a statement by yet someone else. So the reputational injury of libel occurs in connection with a triangular relationship of subject, speaker, and hearer, just as the original reputational investment often does.

Who can avoid the reputational injury and at what cost is potentially rather tricky. The subject may not know that injury is about to occur; or even after the fact, that it has occurred until some later crisis appears. Moreover, because hearers respond to speakers, it can be the case that the speech itself causes no injury as it is spoken, but does so only when the hearer—in her mind or by particular acts—reacts to the speech. When she does so, *her* acts may be blameless, given the information on which she acted. In such situations, it would take cooperation by the speaker in order for the hearer to avoid the injury; at other times, it would take the speaker plus the subject; and in still other circumstances, each alone can do it.

The judicial decisions, of course, do not speak in these terms. Instead, in cases setting forth the reach of the First Amendment, they distinguish public officials and public figures from private figures; they talk about

fact versus opinion; and occasionally counsel that politicians and judges should have a "hide that tough" and so forth.

Collectively, however, these decisions constitute a framework which is perhaps more readily explainable in terms of injury and avoidance: In debate about the conduct of government, its public officials, those subjects whose reputations are at risk, have already made certain choices (to accept appointment or run for office, to embark on a controversial policy perhaps); they have greater access to the media, thus reducing or preventing injury; and they may benefit from the public (hearer) skepticism that politics and political debate engender.

One alternative avoider is the speaker, deterrence of whose speech may, however, not only prevent falsity but prevent speaking altogether. Another avoider would be the hearer, with reliance on his avoidance possibly raising issues of the rights to know or to participate in self-government. But speaker avoidance, with its possible chilling affect, and hearer avoidance are both particularly costly. For a large range of such circumstances, it is possible that subjects are the persons best able to avoid or bear injury (at least, given the heavy costs associated with compromising freedom of speech). Yet, where the speaker knows a statement to be false or has reckless disregard for its truthfulness, *New York Times* says the speaker may be the injury-avoider of choice, even with a public official plaintiff. By contrast, for private figures, who have not thrust themselves into the "vortex " of a public debate or otherwise signed up for such added risks of reputational injury, and apparently considered less able to avoid or reduce injury, there is a lesser burden to be carried in shifting the injury costs to a speaker.

A speaker will not be held liable, however, where hearers bear special responsibility or are expected to act in particular ways. Referring to strikebreakers as "traitors" in the context of an acrimonious labor dispute, for example, does not precipitate speaker liability; hearers are not expected to believe that the subject actually engaged in acts compromising the security of the United States. In other circumstances, often set out by statute, hearers are restricted in the acts they can take in response. Sometimes liability for injury, or its avoidance, apparently falls on them.

All together, these features of the configuration of libel law seem to make sense within a framework in which the cost of injury is compared to the cost of its avoidance. Not only that, but the tensions and instabilities seem to make sense, too: for example, in *Rosenbloom v. Metromedia* only a plurality of the Court was willing to treat persons linked to "issues of public interest" with the severity accorded to public officials, and by the time of *Gertz v. Robert Welch,* even that tide had seemingly

declined—only to resurge in a roundabout way in *Dun & Bradstreet,* when a plurality once again distinguished matters of "public concern." Given the relative avoidance and injury-bearing ability of subject vis-a-vis speaker—a closer contest where private figures are associated with public issues—it would seem to be a harder sort of choice, at least for those in the middle of the Court.

Although this inquiry has suggested some applications to libel law of the more familiar framework for analysis of tort law, taking into consideration both the costs of injury and the costs of its avoidance, what has been presented here is intended not as an end to the journey but rather its beginning—as a suggestion of a different approach to thinking about the public and private interests in reputation and those in freedom of speech.

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NOTES

1. See, e.g., Warren & Brandeis, "The Right to Privacy," 5 *Harv. L. Rev.* 193, 205 (1890): "In [the right to be defamed] there inheres the quality of being owned or possessed —and (as that is the distinguishing attribute of property) there may be some propriety in speaking of these rights as property." Moreover, other interests in reputation may be implicated as well. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (where individual's "good name, reputation, honor, or integrity is at stake," liberty interest is implicated, and state officials must therefore satisfy procedural due process requirements); cf. Reich, "The New Property," 73 *Yale L.J.* 733 (1964).

2. The concept of reputation as a capital asset is one of current interest in economics, although the focus has been primarily on the reputation of a firm as employer, e.g., Hart, "Optimal Labour Contracts Under Asymmetric Information: An Introduction," 50 *Rev. Econ. Stud.* 3 (1983) or on the reputation of particular products the firm sells to consumers, e.g., Rogerson, "Reputation and Product Quality," 14 *Bell J. Econ.* 508 (1983). On the decision to invest in such capital (though not in human capital) see, e.g., Shapiro, "Premiums for High Quality Products as Returns to Reputations," *Q. J. Econ.* 659 (1983). *Cf.* "Goodwill," in *Black's Law Dictionary,* note *supra* (goodwill means "every advantage,

every positive advantage, that has been acquired by a proprietor in carrying on his business"). *See generally* G. Becker, *Human Capital* (1964).

3. Nothing is, of course, guaranteed, including happiness with one's own reputation, even when truthful. Moreover, it is possible that what one does will affect not only the substance of reputation, but its extent or visibility as well. *See*, e.g., Gertz v. Robert Welch, 418 U.S. 323, 345 (1974). ("commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies . . . [and thereby] invite attention and comment").

4. Actually, the causal aspects may be more complex, for example, where my reputation founders as a result of the publication of truthful but embarrassing facts. Such scenarios, however, would take us into the realm of privacy law, which is beyond the scope of this article.

5. Gertz v. Robert Welch, 418 U.S. 323, 344 (1974). ("The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation"); *cf.* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J.) ("If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech").

6. Like other capital assets such as buildings or equipment, the acquisition of reputation requires investment in an earlier period in order to receive the returns to that investment in later ones. The decision to make such an investment may be analyzed in a fashion similar to that of other investments, and indeed for some sorts of reputational investment, economists have done so. *See*, e.g., Shapiro, *supra* note 2.

7. Of course, reputation can often be enhanced or diminished in a situation involving only two rather than three parties. For example, the reader of this article may form opinions about its author without need of a third party's speech. Such a situation may be viewed as a special case of the analysis presented in the text in which the reader plays the roles of both speaker and hearer. Alternatively, it would be possible that the subject and speaker roles are both played by one person.

For libel to occur, however, there must be three or more persons, for by definition libel entails the publication of false information (*see* W. Prosser and W. Keeton, *Prosser and Keeton on the Law of Torts*, 795–97 (5th ed. 1984). Libel would not have occurred, for example, by means only of a letter of reply from a nonsubject to subject unless the letter had been shown to another. An opinion formed by the reader of this article, but not expressed to a third party, would fail to satisfy the publication criterion. *See*, e.g. New York Times v. Sullivan, 376 U.S. 254, 261 (1964) (individual libel defendants claimed that since they had not authorized use of their names in advertisement, they had not published the allegedly libelous statements in the ad).

8. *See*, e.g., Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," 84 *Q. J. Econ.* 488 (1970) 14 *Bell J. Econ.* 508 (1983); Shapiro, "Premiums for High Quality Products as Returns to Reputation," 98 *Q. J. Econ.* 659 (1983); Satterthwaite, "Consumer Information Equilibrium, Industry Price, and the Number of Sellers," 10 *Bell J. Econ.* 483 (1979); Nelson, "Information and Consumer Behavior," 78 *J. Polit. Econ.* 311 (1970); Shapiro, "Consumer Information, Product Quality, and Seller Reputation," 13 *Bell J. Econ.* 20 (1982).

9. *See generally* H. Hart & A. Honore, *Causation in the Law* (2d ed., 1959); Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," 43 *U. Chi. L. Rev.* 69 (1975); Epstein, "A Theory of Strict Liability," 2 *J. Legal Stud.* 151, 160-89 (1973); Lachman, "A Theory of Causation in the Context of Speech-Related Harm, or, When Does Speech Cause Harm?" (unpublished ms. 1985).

10. This might be the case, for example, for hearers as members of the crowd in the

theater where Justice Holmes' speaker falsely shouts fire. Schenck. v. United States, 249 U.S. 47, 52 (1919). Loss of profits to the theater-owner might more properly be attributed to the shouter than to the crowd.

11. *See*, e.g., Time, Inc. v. Hill, 385 U.S. 374 (1967) (plaintiff, his wife, and 10-year-old daughter were ostracized from their respective friends and from the community at large as a result of the news magazine's story portraying plaintiff in a "false light"); *cf.* Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc. 143 Vt. 66, 461 A2d 414 (1984), *aff'd* 472 U.S. 749 (1985), (even after correction of defendant's false credit report, plaintiff building company was refused loans by bank to whom false report had previously been issued).

12. Indeed, those investing in human capital also sign up for risks that other investors don't, since special risks and vulnerability attend investments in capital in human form. *See*, e.g., Razin, "Lifetime Uncertainty, Human Capital and Physical Capital," 14 *Econ. Inquiry* 439 (1976) (human capital, which can be lost by premature death, yields higher return than investment in nonhuman capital, consistent with the relative riskiness of these assets).

13. Although people in general may not sign up for such risks, politicians and public figures have been characterized by the Court as people who do in varying degrees sign up for them. *See*, e.g., New York Times v. Sullivan, 376 U.S. 254, 270 (1964): "debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *See also* Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967) (public figures, persons who "thrust [their] personalit[ies] into the 'vortex of public controversy' come under the *Times* rule requiring showing of "actual malice" for recovery in libel) Harlan, J., (plurality opinion); Gertz v. Robert Welch, 418 U.S. 323, 345 (1974) (same). Paradoxically (or inconsistently) the Court has held that a wealthy and eminent socialite who holds a press conference to discuss her divorce has not signed up for the risks that had Wally Butts, the football coach in *Butts*. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

14. *See* Lachman, *supra* note 9 at 19–20 (panicking by crowd after shout of "fire" in theater would likely be attributed to shouter who has cried out falsely; but if true, it would be attributed to the fire itself, to faulty electrical maintenance, or to an arsonist if fire had truly occurred.

15. It is possible that speaker and hearer are one person; this is a special case (though not a case of libel, since that would require publication to a third person). *See supra* note 6.

16. *See* New York Times v. Sullivan, 376 U.S. 254, 260 (1964) (no proof adduced at trial of case that plaintiff's witnesses actually believed statements in *Times'* political advertisement to be true).

17. *See* examples at *infra* note 59.

18. *See*, e.g., Greenmoss Builders, Inc., v. Dun & Bradstreet, Inc. 143 Vt. 66, 461 A2d 414 (1984) (building company denied loan following false report of applicant's credit status, and even after subsequent notice of correction), *aff'd* 472 U.S. 749; Ocala v. Star-Banner Co. v. Damron, 401 U.S. 295 (1971) (candidate for tax assessor lost election after newspaper reported that he had been indicted for perjury, when indictment was actually of his brother).

19. *See*, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964) (public officials); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) (public figures); Gertz v. Robert Welch, 418 U.S. 323 (1974) (private figures).

20. *See*, e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (statement

that plaintiff has "no status" in his academic field is opinion rather than fact, so recovery for libel is not possible), *cert. denied*, 471 U.S. 1127 (1985).

21. *See*, e.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion) (matters of "public interest" plaintiff must show "actual malice" in order to recover for injury from false statements); Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 472 U.S. 749 (1985) (where defamatory statements "involve no issue of public concern," state law may permit awards of presumed or punitive damages without showing of actual malice).

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

23. *Id.* at 257–60.

24. *See* Calabresi, *supra* note 9 (concept of pressure points). New York Times v. Sullivan, 376 U.S. 267 (1964) (strict liability for statements libelous per se); Gertz v. Robert Welch, 418 U.S. 323, 371 (1974) (White, J. dissenting) (reviewing common law of libel before *New York Times*).

25. Indeed, given the believed difficulty of showing the specific damage from the statement, a presumption of damage to reputation was allowed. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc. 472 U.S. 749, 765 (1985) (White, J. concurring); W. Prosser and W. Keeton *supra* note 7 at 795–797.

26. *See* New York Times v. Sullivan, 144 So.2d 25 (Ala. 1962), *rev'd* 376 U.S. 254 (1964).

27. 376 U.S. 254 (1964).

28. *Id.* at 271.

29. *Id.* at 279. *See* Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect,' " 58 *B.U.L. Rev.* 685 (1978) (characterizing effect as one of "excess deterrence").

30. New York Times, 376 U.S. at 271–72, 278–79. *See also Gertz*, 418 U.S. at 340; text accompany *infra* notes 65–68 (discussing separability of false from true speech in terms of production metaphor).

31. *New York Times*, 376 U.S. at 270.

32. *See, e.g., New York Times*, 376 U.S. at 268 (" 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right as well as the duty, of criticism must not be stifled' ") (quoting Beauharnais v. Illinois, 343 U.S. 250, 263–64 & n.18 (1952)). *See also* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (candidates for office within *New York Times* rule); *cf.* Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985):

> Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments. Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments. . . . [b]ut that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate.

33. *Gertz*, 418 U.S. at 344.

34. *See, e.g., New York Times*, 376 U.S. at 273:

> If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," *Craig v. Harney*, . . . 331 U.S., at 376, surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official

conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

35. *Gertz*, 418 U.S. at 344.

36. Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *Yale L.J.* 1055 (1972); G. *Calabresi, The Costs of Accidents* 135 (1970). The cheapest cost avoider, the candidate for strict liability suggested by Calabresi, is the party who "is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." Calabresi & Hirschoff, *Strict Liability*, note 13, *supra*.

37. *Cf.* Schauer, *"Public Figures,"* 25 *Wm. & Mary L. Rev.* 905, 911 (1984):

> The behavioral lesson of *New York Times* could have been taken one step further, for only by eliminating all remedies for defamatory statements can the law completely maximize the dissemination of truth. Yet, the fact that this step was not taken, even with respect to comment on the official conduct of public officials, demonstrates that maximizing the dissemination of truth does not enjoy a lexical priority over all other societal values. (footnotes omitted)

38. With respect to determining who is a public official or a public figure, *see* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (public officials include "at the very least . . . 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") (footnote omitted); Gertz v. Robert Welch, Inc. 418 U.S. 323, 351–51 (1974) (public figures include those who have achieved "general fame or notoriety in the community"). *cf.* Hutchinson v. Proxmire, 443. U.S. 157 (1979) (mental hospital researcher who was state employee and recipient of federal research funding, was private figure).

39. 388 U.S. 130 (1967).

40. *See* W. Prosser and W. Keeton *supra* note 7 (presenting rationales for varying plaintiff burdens and relations of standards to one another).

41. 418 U.S. 323 (1974).

42. *Id.* at 347 (for private figure plaintiffs, states may "define for themselves" the appropriate standard of liability "so long as they do not impose liability without fault") (Powell, J.) (opinion of Court). *Cf. id.* at 350 (in later discussion about punitive damages, opinion mentions a "negligence standard" for private defamation actions). Dun & Bradstreet v. Greenmoss Builders, 105 S.Ct. 2939 600 (Powell, J.) (characterizing *Gertz* as having adopted a negligence rule for this class of private figure plaintiffs, rather than simply the "caveat against strict liability," *Gertz* 418 U.S. at 377 n. 10). But *cf.* Guilford v. Yale 128 Conn. 449, 23 A.2d 917 (1942) (defendant's duty to plaintiff, ranging from slight care to negligence to high degree of care, depends on relative gains to be had by each party).

43. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

44. Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).

45. *Dun & Bradstreet* not only permitted the awarding of presumed and punitive damages to a private plaintiff—as had previously seemed largely foreclosed—but also presented the curious though unanswered question whether strict liability might once again be acceptable state law for such private person/private issue cases. *See id.* at 772, 773 (White, J. concurring in judgment).

46. Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 285–86 (1974).

47. *Id.* at 268.

48. 398 U.S. 6 (1970).

49. *Id.* at 14; *cf.* Chaplinski v. New Hampshire 315 U.S. 568 (1942) (words which by their very utterance inflicted injury would not have done so had speaker offered a "disarming smile").

50. *See* e.g., Ollman v. Evans, 750 F.2d 970, 1010 (D.C. Cir. 1984) (en banc) (Bork, J. concurring):

> It is significant . . . that the column appeared on the Op-Ed pages of newspapers. These are pages reserved for the expression of opinion, much of it highly controversial. . . . [that alerts] the reader that he is in the context of controversy and politics, and that what he reads does not even purport to be as balanced, objective, and fair-minded as he has a right to hope to be the case with what is contained in the news columns of the paper. The Op-Ed pages are known to be a forum for controversy, often heated controversy, analogous in many respects to the context of a labor dispute. . . .
>
> . . . By the time the reader comes to the [allegedly libelous assertion] he is most unlikely to regard that assertion as to be trusted automatically. It is an assertion of a kind of fact, it is true, but a hyperbolic "fact" so thoroughly embedded in opinions and tendentiousness that it takes on their qualities.

51. M. Schudson, *Discovering the News* (1978); J. Tebbel, *The Compact History of the American Newspaper* (1969). Moreover, before the advent of the regular reporting by professional reporters, publishers relied heavily on letters from traveling friends (correspondents, quite literally) and republished news from other publications. The resulting product was of varying quality and predictability. For example, *The New York Gazette and Mercury* reported that *The Hartford Post* reported "That he saw a Gentleman in Springfield, who informed him that he (the Gentleman) saw a letter from an Officer in Gen. Howe's Army to another in Gen. Burgoyne's, giving him to understand, war was declared on the sides of France and Spain against the MIGHTY kingdom of Britain." As the skeptical reader might expect, or at least wonder, this particular "news" wasn't true!

52. J. Tebbel, *supra* note 51. Moreover, "Americans understood that the newspapers of William Randolph Hearst were largely an extension of his personality, and so they took that into account. Why believe the *New York World* when it might be flatly contradicted by the *Herald-Tribune?* R. Smolla, *Suing the Press: Libel, the Media, & Power* 11 (1986).

53. M. Schudson *supra* note 51 at 61–106. "Indeed, the concept of reporting itself, as contrasted with writing what one can without stirring from the office, is only a late-nineteenth-century invention; and when it came to such things as White House press conferences, President Wilson in 1912 was clearly the first one on his block to have one." *Id.* at 139.

54. R. Smolla *supra* note 52 at 11. Largely a postwar invention, objectivity as ideology for the press (and as a standard of performance expected by the readers) has conferred the benefits of more accurate reporting of certain events, even as it has brought with it a greater potential for harm. M. Schudson *supra* note 51. If accuracy and objectivity beget believability, then hearers are more likely to manifest the diminished regard that is reputational injury, and a given falsehood may do more harm. "Back in the heyday of yellow journalism, reporting was surely much worse than it is today, but it was also less harmful, because there was no presumption, or pretension, or accuracy." R. Smolla *supra* note 52 at all.

55. Fair Credit Reporting Act of 1970, 15 U.S.C. §1681 *et seq.* Specifically, *see* §1681i (any inaccurate information must be promptly deleted from the records of the consumer

reporting agency), §1681n (civil liability for noncompliance), and §1681o (civil liability for negligent compliance).

56. Example of public employees' termination based on false information; (Roth) Green for first dissent; Union contracts, employment at will.

57. Schenk v. United States, 249 U.S. 47, 52 (1919).

58. *See* e.g., Johnson v. New York 37 N.Y. 2d58, 334 N.E.2d 590, 372, NYS.2d 63 (1975) (daughter of state mental hospital patient, after being negligently misinformed that her mother had died, recovered for emotional distress and costs of funeral and wake conducted before error was discovered).

59. There are a variety of laws limiting disclosure by hearers of information, whether it be true or false. *See* e.g., Freedom of Information Act Pub. L. 89–487, 80 Stat. 250, 251 (1966) (as amended and codified in 5 U.S.C. §552((7) (c)) (privacy exception); Higher Education Act of 1968, U.S.C. §1232g (Buckley Amendment, limiting disclosure of records maintained by educational institutions *cf.* S. Milson, *Historical Foundations of the Common Law* 341 (1969) (under Star Chamber's developing law of defamation, "[r]epetition was punishable, but mere listening was not").

For criticism of the extension of the *New York Times* rule to all public figures, see Schauer, *supra* note 34; Blasi, "The Checking Value in First Amendment Theory," 1977 *Am. B. Found. Res. J.* 521, 581–82 ("checking value" of First Amendment supports *New York Times* standard as applied to public officials but not as applied to public figures).

60. Sedition Act of July 14, 1798, 1 Stat. 596; the Act expired by its own terms in 1801, *id.*, but not before a series of indictments and convictions. *See* L. Levy, *Emergence of a Free Press (1985);* L. tribe, *American Constitutional Law* 632 (1978); *see also* Gertz v. Robert Welch, Inc. 418 U.S. at 369 (White, J. dissenting) (reviewing libel law).

It is noteworthy that the distinction between libel and slander, of medieval origin, arose from the Crown's desire to have an avenue for easier recovery in libel against those who criticized it, particularly by means of the newly invented printing press. Veeder, "The History and Theory of the Law of Defamation," 3 *Colum. L. Rev.* 546, 559–61 (1903).

Previous to the invention of the printing press, such comments had apparently not been so troublesome, if only because making written copies was a more labor intensive process of relatively less influence when few could read, and spoken criticism was apparently less enduring. Defamation, an action on the case for words, could be either spoken or written utterance and was one of the most common torts in the courts of the middle ages. *Id.* at 558; Donnelly, "History of Defamation," 1949 *Wisc. L. Rev.* 99, 100–101. Responding to a perceived litigation crisis the common law judges had cut back on the ability of libel plaintiffs to obtain recovery. *Id.* at 113–15. When the Crown chose to seek redress from the increase in offensive statements the printing press made possible, it was necessary to take an approach different from that of the common law courts. As the Star Chamber came to assume jurisdiction over defamation actions and also to enforce statutes against defamation, the distinction between written and spoken defamation became, first, a *statistical* one. S. Milson, *supra* note 59, at 342. This "emphatic" statistical linkage later became a rule. *Id.; see also* Veeder, *supra,* at 566–69 (attributing greater weight to rule of 1609 case *De Libellus Famosis* which borrowed from the Roman criminal law).

61. *See* Calabresi, "'Some Thoughts on Risk Distribution and the Law of Torts," 70 *Yale L.J.* 499 (1961) (discussing goals and their achievement in tort law, including compensation, deterrence, wealth, distribution, and loss spreading.

62. Virginia State Board of Pharmacy v. Va. Citizens Consumers Council, 425 U.S. 748, 771 (1976).

63. J. S. Mill, *On Liberty* 15 (1947) (false statement brings to public debate a "clearer perception and livelier impression of truth, produced by its collison with error"); R.

Nimmer, *Freedom of Speech* (1984) at 3–16, 3–17 (false speech may serve functions of enlightenment, self-fulfillment, and as a safety valve. *Cf.* Emery & Emery *supra* note 51 at 83 (mob stormed printer's shop in reaction to story of President Washington, published in 1776).

64. Dun & Bradstreet Inc. v. Greenmoss Builders, 472 U.S. 749 (1985).

65. *See* e.g., Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944) (Traynor, J. concurring) (setting forth theory of enterprise liability).

66. *New York Times,* 376 U.S. at 279.

67. My own reading of *Dun & Bradstreet* suggests a position by the plurality that comes surprisingly close to this position. See Dun & Bradstreet Inc. v. Greenmoss Builders, 472 U.S. 749, 762, 763 (Powell, J.); *cf. id.* at 771, 772 (White, J. concurring); *id.* at 775 (Brennan, J., dissenting).

68. Chaplinski v. New Hampshire, 315 U.S. 568 (1942); Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial speech).

69. See R. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J.* 1 (1971); A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 18–27 (1948).

70. *See* Kalven, "the Reasonable Man and the First Amendment," in *Free Speech and Association* 207, 234 (P. Kurland, ed. 1975)) ("one might develop a free-speech theory on the premise that we must overprotect speech in order to protect the speech that matters").

71. *See* Kalven, "The New York Times Case: A Note on the 'Central Meaning of the First Amendment,' " 1964 *Supreme Ct. Rev.* 1919; Schauer, "Public Figures," 25 *William and Mary L. Rev.* 905, 909 (1984) (characterizing *New York Times* approach as "strategic, immunizing some falsity from the reach of the law to encourage the dissemination of the maximum amount of truth" (footnote omitted).

72. *New York Times,* 376 U.S. at 279.

73. *Id.* at 271, 279.

74. *Id.* at 261, 263, 287.

75. *Id.* at 287–88.

76. *Id.* at 280. *See also* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("the lie, knowlingly and deliberately published about a public official" is not constitutionally protected).

77. 418 U.S. 323 (1974).

78. *Id.* at 329.

79. *Id.* 327.

80. *Id.* at 352.

81. 472 U.S. at 749.

82. *Id.* at 605.

83. *Dun & Bradstreet* 472 U.S. at 751.

84. Here, I am assuming that a reasonably prudent adult would not make the mistake of attributing an individual's bankruptcy to the person's former employer instead. Whether a reasonable 17-year-old would do so would seemingly not be relevant so long as the youth was engaged in an adult activity. *See,* e.g., Hill Transp. Co. v. Everett, 145 F.2d 746 (1st Cir. 1944) (even where lower standard of care would otherwise apply because of youthfulness of actor, it could not be invoked so as to shield employer from liability in *respondent superior*); Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961) (overruling standard of care geared to age of actor, where actor engaged in adult activities.

85. *See generally* W. Prosser and W. Keeton, *supra* note 7.

86. *Dun & Bradstreet,* 472 U.S. at 751, 752.

87. *Id.* at 752.
88. *Gertz*, 418 U.S. 323, 344 (1974).
89. Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681 *et seq.*
90. *Dun & Bradstreet*, 472 U.S. at 752.
91. *Id.* at 752, 753.