

1983

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Repository Citation

Malone, Linda A. and Smolla, Rodney A., "The Future of Defamation in Illinois After Colson v. Steig and Chapski v. Copley Press, Inc." (1983). *Faculty Publications*. 584.
<https://scholarship.law.wm.edu/facpubs/584>

THE FUTURE OF DEFAMATION IN ILLINOIS AFTER *COLSON V. STIEG* AND *CHAPSKI V. COPLEY PRESS, INC.*

Linda A. Malone*
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I. INTRODUCTION

In William Shakespeare's *Othello*, the character Iago describes the sanctity of reputation in words that have become almost platitudinous to the modern ear:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash;
'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.¹

As often as these famous lines are heralded as evidence of the high regard for reputational values that runs through Anglo-American cultural tradition, other far less famous words, also spoken in *Othello* by Shakespeare's Iago, usually are ignored:

As I am an honest man, I thought you had received some bodily wound;
there is more sense in that than in reputation.
Reputation is an idle and most false imposition;
oft got without merit and lost without deserving:
you have lost no reputation at all,
unless you repute yourself such a loser.²

Iago, of course, is a duplicitous character without compunction for uttering contradictory sentiments in the same play. But the two conflicting views that Iago voices about the importance of reputation are more than the mere self-incongruities of a fickle Shakespearean antagonist; they reflect a deeper dissonance in Anglo-American culture concerning the value of reputation, a dissonance that has in turn manifested itself in sharp contradictions within the common law.³ Like Iago, the common law has frequently been of two

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1. Shakespeare, *The Tragedy of Othello, The Moor of Venice*, act 3, scene 3, lines 60-67.

2. *Id.* act 2, scene 3, lines 260-67.

3. For a general discussion of the common law origins of defamation, see Donnelly, *History of Reputation*, 1949 Wis. L. Rev. 99; Leflar, *Legal Liability for the Exercise of Free Speech*,

minds in its willingness to lend legal protection to reputation—at times permitting harsh penalties for defamatory speech well out of proportion to the harm of the words or the culpability of the speaker,⁴ and at times permitting obviously damaging speech uttered with transparently dark motives to be spoken with complete impunity.⁵ In recent years the opposing forces long extant in the common law have been elevated to conflicts of constitutional status, as the social desire to elicit state protection of an individual's good name has directly confronted society's first amendment interest in the "uninhibited, robust, and wide-open"⁶ exchange of comment on matters of public importance.⁷

In the evolution of common law and constitutional law principles governing defamation, Illinois has been a particularly lively jurisdiction, and significant contradictions in the law of defamation abound in this state. The inherent conflict in the desire to protect reputational interests, and at the same time preserve a robust, invigorating marketplace of free speech, has always presented itself with special dramatic relief in Illinois. From the frontier journalism of the first Illinois newspaper⁸ to the powerful corporate media interests that dominate the state's radio, television, and newspaper markets in the 1980s, Illinois has enjoyed the luxury of an energetic, dynamic press. Moreover, from the debates of Lincoln and Douglas to the often bizarre machinations of modern statewide and local politics, the Illinois press has always had tumultuous public events about which to broadcast and write. On a less visible plane, Illinois is also a state in which average citizens, im-

10 ARK. L. REV. 155 (1956); Lovell, *The Reception of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916); Sheintag, *From Seditious Libel to Freedom of the Press*, 11 BROOKLYN L. REV. 125 (1942); Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

4. The Court of the Star Chamber vigorously punished the crime of seditious libel, to which truth could be an aggravating rather than a mitigating factor, to suppress allegedly seditious publications. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 111, at 738 (4th ed. 1972) [hereinafter cited as PROSSER].

5. Doctrines of absolute privilege, for example, shield the speaker from liability altogether without regard to injury or fault. See RESTATEMENT (SECOND) OF TORTS §§ 585-592A (1979).

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

7. For analyses of the conflict between privacy and reputational interests and the interest in allowing uninhibited comment on important public issues, see L. ELDREDGE, *THE LAW OF DEFAMATION* 242-97 (1978); Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Pedrick, *Freedom of the Press and the Law of Libel*, 49 CORNELL L. REV. 581 (1964); Pierce, *The Anatomy of an Historic Decision*, *New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1964). For two recent expositions on the tensions within the Supreme Court's current first amendment jurisprudence, see Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811; Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1 (1980).

8. The first Illinois newspaper was the *Illinois Herald*, published in Kaskaskia in 1814. H. STONECIPHER & R. TRAGER, *THE MASS MEDIA AND THE LAW IN ILLINOIS* xi (1976).

bued with a certain straightforward Midwestern solidity, are accustomed to speaking their minds frankly, particularly in those focal points of daily life in which "free speech" is probably most essential: workplaces, churches, schools, clubs, organizations, and neighborhoods. More than in any other American jurisdiction, the law of defamation in Illinois has taken unique and sometimes mysterious turns in response to the tension between the state's desire to protect reputation and its desire to nurture its tradition of wide-open, free expression. Lawyers and newspeople familiar with the law of defamation know, for example, that Illinois has been virtually unique in the common law world in its adherence to the "innocent construction rule," a principle that ostensibly requires that allegedly defamatory words that are capable of being read innocently must be so read.⁹ Originally formulated as a crude doctrinal device to reduce the number of defamation actions brought in Illinois, the innocent construction rule was refitted for the state's modern jurisprudence as a threshold defense designed to enhance free expression values.¹⁰ Illinois is virtually the only jurisdiction that attempts to use the innocent construction concept to effectuate first amendment principles.¹¹

Illinois also has been innovative in adjusting the balance between reputation and free expression by periodically updating and transforming common law privileges to defamation suits. Since the United States Supreme Court's watershed decision in *New York Times v. Sullivan*¹² first "constitutional-

9. See, e.g., *John v. Tribune Co.*, 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108 (1962) (newspaper story identifying arrested woman by listing her aliases and address not "of and concerning" plaintiff with the same address and name of one alias); *Lowther v. North Central College*, 60 Ill. App. 3d 902, 377 N.E.2d 357 (2d Dist. 1978) (college administration's statement that tenured professor was "forced" to resign not actionable); *Homestead Realty Co. v. Stack*, 57 Ill. App. 3d 575, 373 N.E.2d 429 (1st Dist. 1978) (statement that realty company appeared to engage in "racial steering" capable of innocent, nondefamatory construction); *Bruck v. Cincinnati*, 56 Ill. App. 3d 260, 371 N.E.2d 874 (1st Dist. 1978) (newspaper article that referred to plaintiff as "rip-off speculator" not libelous per se).

10. See *infra* note 428 and accompanying text.

11. By 1966, Illinois was apparently the only state still adhering to the innocent construction rule in its strict form. See Stonecipher & Trager, *The Impact of Gertz on the Law of Libel in Illinois*, 1979 S. ILL. L. REV. 73, 83 n.64 [hereinafter cited as Stonecipher & Trager]; Note, *The Illinois Doctrine of Innocent Construction: A Minority of One*, 30 U. CHI. L. REV. 524 (1963). The impact of the innocent construction rule has been verified empirically by Professor Marc Franklin. A recent comprehensive study conducted by Professor Franklin revealed that Illinois media defendants won 93% of all appellate decisions. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795, 828. This 93% defense success rate is higher than in any other state with a large number of appeals. In New York, for example, the success rate for media defendants is 69%, and in California, the success rate is 55%. *Id.* Professor Franklin attributes the "startlingly high" success rate for the media in Illinois to the "existence in that state, and only in that state, of the innocent construction rule." *Id.* at 828-29.

12. 376 U.S. 254 (1964). The *New York Times* decision held that the first amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his or her official conduct unless the official proves that the statement was made with "actual malice," that is, with "knowledge that it was false or with reckless disregard of whether it

ized" a major segment of the law of defamation, Illinois frequently has been among a handful of states that have led the nation in the intricate and sometimes baffling task of reconciling the complex, sometimes arcane twists of the common law of libel and slander with the first amendment jurisprudence of *New York Times* and its progeny.¹³

In 1982, the Illinois Supreme Court rendered two decisions that will affect dramatically the ongoing efforts of Illinois courts to define the appropriate balance between reputational and free speech interests. In *Colson v. Stieg*,¹⁴ the court drew on the most liberal strains of first amendment thought to support its decision to require that a "private figure" plaintiff meet the *New York Times*' "knowledge of falsity or reckless disregard for the truth" standard in order to recover against a private, non-media defendant. The *Colson* opinion, through a confusing intertwining of first amendment and common law principles, substantially broadens the protection that Illinois law provides for speech about matters of public importance.¹⁵ In its second important 1982 decision concerning defamation, *Chapski v. Copley Press, Inc.*,¹⁶ the Illinois Supreme Court reconsidered and modified the innocent construction rule. Although *Chapski* may be heralded by some as the demise of the innocent construction rule, in fact *Chapski* is more significant for those aspects of the rule that it left unaltered.

This article analyzes the *Colson* and *Chapski* opinions and assesses their impact on the law of defamation in Illinois. The article concludes that, in combination, *Colson* and *Chapski* place Illinois in the forefront among those few states that have decidedly tipped the balance between reputational and free expression values in favor of free expression. *Colson* is permeated with a regard for free expression that extends far beyond the requirements of the first amendment as construed by the Burger Court. After *Colson*, Illinois' common law privileges provide more protection to defamation defendants than does the federal constitution as interpreted by the United States Supreme Court since *New York Times*. Similarly, under the innocent construction rule as redefined in the *Chapski* decision, defamation defendants in Illinois continue to enjoy appreciably greater protection from the vicissitudes of juries than do defamation defendants in other states.

II. *COLSON v. STIEG*: THE RADICAL EXPANSION OF COMMON LAW PRIVILEGES TO DEFAMATION

A. *The Facts of Colson*

In *Colson v. Stieg*,¹⁷ John Calvin Colson, an assistant professor in the

was false or not." *Id.* at 279-80. The "knowing or reckless disregard" formula is commonly referred to as the "actual malice" or "*New York Times*" standard.

13. See *infra* note 30 and accompanying text.

14. 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

15. See *infra* notes 39-46 and accompanying text.

16. 92 Ill. 2d 344, 442 N.E.2d 195 (1982).

17. 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

Department of Library Science at Northern Illinois University, brought suit against Lewis Stieg, the chairman of Northern Illinois' Library Science Department. Colson, who was appointed an assistant professor at Northern Illinois in 1975, alleged that Stieg had uttered a defamatory statement against him during a meeting of the Department of Library Science Personnel Committee, a meeting at which Colson's performance as an assistant professor and his application for tenure and promotion were evaluated. At that meeting, Stieg allegedly stated, "I have information I cannot divulge which reflects adversely on John's performance as a teacher."¹⁸ Colson further claimed that Stieg had made a second defamatory statement before the University Council Personnel Committee, a university-wide committee that considered Colson's appeal from the adverse determination made regarding Colson by the Department of Library Science Personnel Committee. Colson alleged that at the meeting of the University Council Personnel Committee Stieg stated, "I have counseled John many times about his teaching and the documents which would prove the counseling are missing from the department files under suspicious circumstances."¹⁹ Colson claimed that these statements led to his denial of tenure and termination from Northern Illinois' faculty. Colson also alleged that the statements interfered with his ability to secure future employment, thereby causing him "extensive mental and physical anguish and financial loss."²⁰ The Circuit Court of DeKalb County granted Stieg's motion to dismiss Colson's complaint for failure to state a cause of action. The Illinois Appellate Court for the Third District reversed the trial court in part and remanded for further proceedings, holding that the first statement allegedly made by Stieg was slanderous per se,²¹ and was incapable of an innocent construction.²² The appellate court affirmed the dismissal of those aspects of the complaint based on Stieg's second statement, reasoning that the innocent construction rule rendered the statement nonactionable because it was reasonably capable of conveying a nondefamatory meaning.²³

18. *Id.* at 208, 433 N.E.2d at 247.

19. *Id.*

20. *Id.* at 215, 433 N.E.2d at 250.

21. If an oral or written statement is slanderous or libelous per se, damages are presumed; if not actionable per se, the statements are "actionable only upon a proper averment of special damages." *Catalano v. Pechous*, 69 Ill. App. 3d 797, 805, 387 N.E.2d 714, 721 (1st Dist. 1978) (citing *Mitchell v. Tribune Co.*, 343 Ill. App. 446, 447, 99 N.E.2d 397, 398 (1st Dist. 1951), *cert. denied*, 342 U.S. 919 (1952)). Generally, four classes of statements are actionable per se:

- (1) those imputing the commission of a criminal offense;
- (2) those imputing infection with a communicable disease of any kind which, if true, would tend to exclude one from society;
- (3) those imputing the inability to perform or want of integrity in the discharge of duties of office or employment; and
- (4) those prejudicing a particular party in his profession or trade.

Id. (citing *Coursey v. Greater Niles Township Publishing Corp.*, 82 Ill. App. 2d 76, 81-82, 227 N.E.2d 164, 167 (1st Dist. 1967), *aff'd*, 40 Ill. 2d 257, 239 N.E.2d 837 (1968)).

22. 86 Ill. App. 3d 993, 408 N.E.2d 431 (2d Dist. 1980).

23. *Id.* at 996-97, 408 N.E.2d at 434.

Stieg appealed to the Illinois Supreme Court, challenging only the lower court's ruling that the first statement was actionable.²⁴ Upon affirming the lower court, the Illinois Supreme Court held that Stieg's remark was covered by a qualified, rather than an absolute privilege,²⁵ and that "actual malice," a standard first enunciated in *New York Times v. Sullivan*,²⁶ must be alleged to overcome this qualified privilege.²⁷ Because Colson had properly (though inartfully)²⁸ alleged actual malice, his complaint stated a cause of action.

*B. The Colson Court's Analysis: Intertwining the
Constitution and the Common Law*

The Illinois Supreme Court was faced in *Colson* with the difficult task of resolving tensions between the federal constitutional standards that have evolved in the aftermath of *New York Times* and the array of common law defenses and privileges that have continued to develop in Illinois on sometimes parallel, sometimes intersecting, and sometimes diverging tracks. The *Colson* decision is extremely important to Illinois lawyers involved in the defamation area, because it appears to adopt a much broader application of the *New York Times* standard than the United States Supreme Court decisions require.²⁹ Moreover, *Colson* reflects a creative use of common law privilege doctrines; the decision moves Illinois law toward a flexible "public interest" approach in applying the *New York Times* actual malice standard.

Casebooks, digests, and casenotes inevitably will cite *Colson v. Stieg* as an opinion that places Illinois within that small group of states which have selected the "high option plan" of *Gertz v. Robert Welch, Inc.*,³⁰ and have chosen to apply the *New York Times* actual malice standard to defamation

24. 89 Ill. 2d at 209, 433 N.E.2d at 247.

25. For a discussion of privileges applied in defamation law, see *infra* notes 177-97 and accompanying text.

26. 376 U.S. 254, 279-80 (1964); see *supra* note 12.

27. *Colson*, 89 Ill. 2d 205, 212, 433 N.E.2d 246, 249 (1982).

28. Colson's allegations in his complaint concerning Stieg's statement, "I have information I cannot divulge which reflects adversely on John's performance as a teacher," read:

Said statement was made by Defendant knowing it to be false, without reasonable grounds for believing it to be true, maliciously, wilfully, intentionally and without reasonable justification or excuse with the intention of destroying Plaintiff's personal and professional reputation, causing Plaintiff to be denied tenure, to be terminated from employment with Northern Illinois University effective May, 1979 and interfering with his ability to be suitably employed in the future. Said statement caused Plaintiff extensive mental and physical anguish and financial loss.

Id. at 215, 433 N.E.2d at 250. Although the court noted that these allegations did not comply "strictly" with the pleading rules of the Illinois Civil Practice Act, the allegations sufficiently included the requisite scienter elements under the *New York Times* actual malice test. *Id.* at 215-16, 433 N.E.2d at 250-51.

29. For an analysis of the broadening of the *New York Times* standard by the *Colson* court, see *infra* notes 34-49 and accompanying text.

30. 418 U.S. 323 (1974).

suits brought by private figures whenever the subject matter of the defamatory speech involves a matter of "general or public interest."³¹ Citations to *Colson* will be appropriate, but may fail to capture much of the decision's substance, because *Colson* is an opinion which illustrates the tension between free expression and reputational values inherent in the United States Supreme Court decisions since *New York Times*.

The *Colson* opinion is a mix of federal constitutional law and Illinois common law; indeed, its language varies between that of constitutional law and common law. Although the court's use of first amendment values to shape Illinois' common law on defamation is both laudatory and inevitable, the court's unwillingness to delineate more carefully the common law from the constitutional law underpinnings of its decision is disappointing. The court's impatience with the establishment of a more precise boundary line between first amendment requirements and Illinois' own prudential additions to those requirements is evidenced by its statement at the beginning of its analysis, that "*the classification of the privilege is of little help* in determining whether or not the defendant's statement is actionable or whether the allegations of the complaint state a cause of action."³² To generations of lawyers taught to understand that classification of the privilege is among the most important things a lawyer does in determining the viability of a potential libel action, the *Colson* statement may be disquieting. Uneasiness about the scope of *Colson*, however, is unnecessary. The decision is not a license for Illinois courts to roam at large across the landscape of defamation, applying the

31. Since *Gertz*, and prior to *Colson*, less than a handful of state courts chose to adopt the actual malice standard in suits brought by non-public figures. See, e.g., *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (en banc) ("actual malice" standard applied where plaintiff not public official or public figure and contested remarks concerned matter of public or general interest), cert. denied, 423 U.S. 1025 (1975); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974) ("actual malice" standard applied when statements concern an issue of general and public concern), cert. denied, 424 U.S. 913 (1976); cf. *Chapadeau v. Utica Observer Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (utilizing a "grossly irresponsible" standard).

Most state court decisions have applied the minimum standard of negligence to defamation suits brought by non-public figures. See, e.g., *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977) (en banc); *Corbett v. Register Publishing Co.*, 33 Conn. Supp. 4, 356 A.2d 472 (1975); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 543 P.2d 1356 (1975); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *General Motors Corp. v. Piskor*, 277 Md. 165, 351 A.2d 810 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), cert. denied, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Foster v. Loreda Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976). Prior to *Colson*, many would probably have placed Illinois in this latter category, relying on *Troman v. Wood*, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 299 (1975) (negligence is basis of liability regardless of public interest in issue). For a discussion of *Troman* and its relation to *Colson*, see *infra* notes 105-44 and accompanying text.

32. *Colson*, 89 Ill. 2d at 209, 433 N.E.2d at 247 (emphasis added).

New York Times standard indiscriminately. Although the opinion is regrettable for its ambiguous intertwining of common law and constitutional law concepts, to paraphrase Judge Friendly, what the court did in the case makes better sense than what it said.³³

The court's analytical methodology in *Colson* was to treat the first amendment principles enunciated in *New York Times* as subsuming the common law privileges while ignoring the more conservative limitations that the United States Supreme Court has placed on those first amendment requirements in the wake of the public figure/private figure dichotomy created by *Gertz*.³⁴ In many ways, *Colson* is a doctrinal throwback to the Warren Court era, a decision that cuts against the grain of post-*Gertz* United States Supreme Court precedent. In effect, *Colson* is a pre-*Gertz* decision in a post-*Gertz* world.

The court began its analysis of John Colson's defamation claim by noting that since *New York Times v. Sullivan*, most common law privileges have been altered by "first amendment constitutional considerations."³⁵ Due to these first amendment "considerations," the court stated that "the scope of the privileges has been broadened beyond that within which they had previously been recognized."³⁶ The court then asserted that the *New York Times* decision "essentially replaced" the common law qualified privilege of "fair comment."³⁷ The fair comment privilege, the court emphasized,

33. The phrase is from Judge Friendly's famous opinion on proximate cause, *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964). In that case, Judge Friendly stated, "what courts do in such cases makes better sense than what they, or others, say." *Id.* at 725.

34. The commentary on *Gertz* is extensive, with much of it centering on the public figure/private figure distinction. See generally Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) (discussing *Gertz*'s perpetuation of the *New York Times* "actual malice" and minimum of negligence standards and problems inherent in the *Gertz* approach); Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271 (1976) (arguing that *Gertz* will lead to press self-censorship); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L. REV. 777 (1975) (discussing development of constitutional protection of libelous and defamatory statements and contrasting this precedent with *Gertz*) [hereinafter cited as Brosnahan]; Eaton, *American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975) (extensive analysis of the changes that recent Supreme Court decisions have made in the common law of defamation) [hereinafter cited as Eaton]; Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L. REV. 471 (1975) (discussing the law of defamation in light of *Gertz* and suggesting weaknesses in, and alternatives to, the Court's reasoning in *Gertz*); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976) (arguing that *Gertz* has commendably reemphasized the individual privacy interest while maintaining constitutional protection for media, rather than private, defendants).

35. 89 Ill. 2d at 209, 433 N.E.2d at 247-48 (citing Schaefer, *Defamation and the First Amendment*, 52 U. COLO. L. REV. 1 (1980)) (discussion of the law of defamation as it contrasts with the Court's treatment of other first amendment problems).

36. *Id.* at 209, 433 N.E.2d at 248.

37. *Id.* at 209-10, 433 N.E.2d at 248. For a discussion of the common law privilege of fair comment, see *infra* notes 195-97 and accompanying text.

“was not limited to public discussion of public officials or figures, but also extended to the discussion of matters of public concern.”³⁸ The court then noted with approval Dean Prosser’s observation—an observation made several years before the Supreme Court’s decision in *Gertz*—“that there is no reason the constitutional privilege of *New York Times* should not be extended to all matters of public concern.”³⁹

In these preliminary remarks, the court worked a clever bit of lawyering, because the deliberate intermingling of the *New York Times* decision and the history of the fair comment privilege layed the groundwork for the court’s ultimate conclusion that Stieg’s statements were protected by the *New York Times* privilege. The court hitched the common law privilege of fair comment, which it was ostensibly interpreting, to the engine of the constitutional privilege established in *New York Times*, and then subtly broke loose from that engine to generate an even more aggressive common law privilege when the engine of *New York Times* began to slow down. Although the court was correct in stating that the *New York Times* decision obviated much of what had previously been encompassed by the common law fair comment privilege, the court was mistaken in its effort to distill from the United States Supreme Court’s current jurisprudence the principle that the actual malice standard of *New York Times* should apply whenever the subject of the defamatory speech is a matter of public interest or concern. The United States Supreme Court has emphatically rejected the public interest test as the touchstone for the application of first amendment privileges;⁴⁰ the Illinois Supreme Court’s reincarnation of that test in effect mischaracterized federal constitutional law in the process of recreating Illinois common law.

The *Colson* opinion heavily emphasized the importance of avoiding self-censorship on controversial subjects. In order to provide the “breathing space essential to the exercise of constitutional freedoms,” the court observed that the actual malice standard of *New York Times* is imposed so as to interdict the threat that a speaker will forego constitutionally protected speech rather than run the risk of liability when, in the cold light of hindsight, his or her assessment of a given set of facts is proven wrong.⁴¹ In order to balance the competing concerns of the first amendment and Illinois’ interest in protecting reputation, the *Colson* court held that “the challenged statement must be assessed in the context in which it was published.”⁴² This evaluation of the speech “in context” involves two primary considerations: the extent of the publication, and the nature of the publication’s recipients.⁴³ Rather than focus, as did the United States Supreme Court in its landmark redefinition of the *New York Times* line of cases in *Gertz v. Robert Welch*,

38. 89 Ill. 2d at 210, 433 N.E.2d at 248.

39. *Id.* (citing PROSSER, *supra* note 4, § 118, at 823).

40. See *infra* text accompanying notes 199-216.

41. 89 Ill. 2d at 211, 433 N.E.2d at 248-49.

42. *Id.* at 212, 433 N.E.2d at 249.

43. *Id.*

on the "public" or "private" status of the person defamed,⁴⁴ the focus of the *Colson* court's analysis was on the speaker, the audience, and the functional relationship between the two. Thus, the court emphasized that "whether or not one is defamed depends upon the effect the publication had upon those who received it,"⁴⁵ and that "[t]he focus therefore must be upon the statement and its predictable effect upon those who received the publication."⁴⁶

The *Colson* court's functional relationship analysis easily led to the invocation of a *New York Times*-style privilege. The publication of Stieg's comments concerning Colson was not made to the general public; rather, the audience, apparently consisting of four people,⁴⁷ were state employees charged with the duty of evaluating the academic performance of another state employee. The Department of Library Science Personnel Committee was thus involved in a matter of central importance to the mission of Northern Illinois University, a public institution. It is certainly understandable that the Illinois Supreme Court would treat speech concerning the teaching ability of a professor at a state university as a matter important enough to require breathing space for free and uninhibited discussion. In the court's words, "[t]he need for the free flow of information and for vigorous and uninhibited discussion in a situation [involving tenure and promotion decisions] is such that the first amendment privilege defined in *New York Times* must apply to the publication of statements to this committee."⁴⁸ Whether or not one accepts the first amendment pedigree of these concerns, intuitively, the court's worries about self-censorship ring true. Most of us are not heroic. Without some degree of enhanced protection, frank appraisals of teachers would not be forwarded to personnel committees; people are more likely to run the institutional risk of allowing persons they deem unqualified to be promoted than to run the personal risk of a suit for defamation if a statement they make later proves false.

What is remarkable about the *Colson* opinion, however, is not its sound, common sense appraisal of the functional importance of Stieg's speech in relation to the personnel committee. Rather, it is the court's almost schizophrenic insistence that it was basing its opinion on the first amendment values expressed in *New York Times* and *Gertz*, while simultaneously rejecting the public figure/private figure distinction established in *Gertz*. Thus, although the *Colson* court repeatedly phrased its holding squarely in terms of the first amendment—stating, for example, that "we find that the first amendment privilege of *New York Times* must be applied to the statement

44. See Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976).

45. 89 Ill. 2d at 212, 433 N.E.2d at 249.

46. *Id.*

47. *Id.*

48. *Id.* at 213, 433 N.E.2d at 249.

made by the defendant"⁴⁹—the court also regarded itself as totally unencumbered by the *Gertz* matrix.

C. The Underpinnings of the Public Interest Approach

Under the public interest test defined in *Colson*, first amendment protection for speech does not depend upon the characterization of the status of the plaintiff, but instead, is triggered by the significance of the speech itself. The most important doctrinal influences on the *Colson* opinion's invocation of the public interest approach are *Farnsworth v. Tribune Co.*,⁵⁰ a 1969 Illinois Supreme Court decision heavily imbued with the public interest approach toward constitutional privilege, and *Rosenbloom v. Metromedia, Inc.*,⁵¹ a United States Supreme Court decision in which the Court flirted with the public interest concept at the federal constitutional level. The most important prior decisions cutting against the grain of the *Colson* public interest approach are *Gertz v. Robert Welch, Inc.*,⁵² the United States Supreme Court decision that did away with the "public interest" test as a matter of federal constitutional law, and *Troman v. Wood*,⁵³ an Illinois Supreme Court decision that not only followed *Gertz* but also appeared to reject the public interest approach as a matter of Illinois state law. To place *Colson* within its doctrinal context, it is necessary to see the extent to which the analysis of *Colson* is directly traceable to the influences of *Farnsworth* and *Rosenbloom*, and also the extent to which it is a repudiation of *Gertz* and *Troman*.

1. Farnsworth v. Chicago Tribune Co.

In *Farnsworth v. Chicago Tribune Co.*,⁵⁴ a *Chicago Tribune* article referred to an osteopathic physician as a "quack." The plaintiff, Myrtle Farnsworth, argued that the actual malice standard should not apply to her because she was neither a public official nor a public figure. Farnsworth argued that the jury should have been given an instruction based on the Illinois Constitution of 1870,⁵⁵ which stated that "[t]ruth is a defense in a libel action only when published with good motives and for justifiable ends."⁵⁶ If the actual malice standard applied, the court indicated that the rejection of the proffered instruction was correct as a matter of law.⁵⁷

The Illinois Supreme Court held that the *Chicago Tribune* was protected

49. *Id.*

50. 43 Ill. 2d at 286, 253 N.E.2d at 408 (1969).

51. 403 U.S. 29 (1971).

52. 418 U.S. 323 (1974).

53. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).

54. 43 Ill. 2d at 286, 253 N.E.2d at 408 (1969).

55. ILL. CONST. of 1870, art. II, § 4 (repealed 1970). The *Farnsworth* litigation preceded the adoption of the 1970 Illinois Constitution.

56. *Id.*

57. 43 Ill. 2d at 290, 253 N.E.2d at 410.

by the actual malice standard of the *New York Times* case and, thus, concluded that the trial court was correct in refusing to give the plaintiff's tendered instruction.⁵⁸ A careful reading of *Farnsworth* makes two things clear. First, the court was of the opinion that the *New York Times* standard was not tied to the status of the plaintiff, but rather was activated whenever the subject matter of the speech was of public interest or concern.⁵⁹ Second, the *Farnsworth* court did not perceive itself as merely interpreting and extending Illinois common law in reaching its decision that the *New York Times* standard was applicable; rather, the court clearly regarded the public interest test as a requirement compelled by federal constitutional law.⁶⁰

These two points are made obvious by the Illinois Supreme Court's treatment of the United States Supreme Court decisions interpreting *New York Times* that were extant as of the time *Farnsworth* was decided. The court observed that the Supreme Court, in *Garrison v. Louisiana*,⁶¹ held unconstitutional a Louisiana criminal libel statute that directed punishment for true statements regarding official conduct of public officials made with actual malice. Further, the court quoted approvingly the *Garrison* Court's statement that "[t]ruth may not be the subject of either civil or criminal sanctions where the *discussion of public affairs* is concerned."⁶² Then, the court relied heavily on *Curtis Publishing Co. v. Butts*,⁶³ a case involving a suit brought by football coach Wally Butts of the University of Georgia (though employed by a private corporation handling athletic affairs for the university rather than the state itself) against the publishers of the *Saturday Evening Post* for an article charging that Butts conspired with Coach Bear Bryant to fix a football game. Since Butts was not a public official, the case had usually been cited along with its companion decision, *Associated Press v. Walker*,⁶⁴ for the proposition that *New York Times* extended to "public figures" as well.⁶⁵ The *Farnsworth* court, however, saw broader implications in *Butts*, treating it as encompassing the public interest approach to the *New York Times* standard. Thus, the *Farnsworth* court stated that the issue before it, "[m]edical quackery,"⁶⁶ was "an area of *critical public concern* which clearly qualifies under the *Butts* test as a subject 'about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period.'"⁶⁷ The *Farnsworth* court explained that "the scope of the 'public figure' classification must be determined by an examination of the

58. *Id.* at 297, 253 N.E.2d at 414.

59. *Id.* at 290-92, 253 N.E.2d at 410-11.

60. *Id.* at 292, 253 N.E.2d at 411.

61. 379 U.S. 64 (1964).

62. *Farnsworth*, 43 Ill. 2d at 289, 253 N.E.2d at 410 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)) (emphasis added).

63. 388 U.S. 130 (1967).

64. *Id.*

65. *Farnsworth*, 43 Ill. 2d at 289, 253 N.E.2d at 410.

66. *Id.* at 291, 253 N.E.2d at 411.

67. *Id.* (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967)) (emphasis added).

underlying rationale of the first amendment protection involved.”⁶⁸ The cases, the court noted, “have seemed to establish that ‘the question is whether a public issue, not a public official [or public figure], is involved.’”⁶⁹

The *Farnsworth* court further stressed that its view of the “public interest” standard required by the first amendment was not limited to political or governmental questions, but rather it embraced an extremely broad definition of “public interest” that translated roughly into “anything the public is interested in.”⁷⁰ Drawing on *Time, Inc. v. Hill*,⁷¹ a decision that applied the *New York Times* standard in a false light invasion of privacy action, the *Farnsworth* court held that “constitutional protection is not limited to utterances that might enhance the resolution of political or governmental questions.”⁷² *Hill* had involved a magazine review of a Broadway play that portrayed the kidnapping of the Hill family by three escaped convicts. The *Hill* Court stated that there was no indication that this magazine review would contribute to the “resolution of any serious social or governmental problems, or advance the arts. Rather, the key seemed to be that it was a matter of public interest and that fact was sufficient to trigger at least the constitutional protections of *Butts*.”⁷³

Accordingly, the *Farnsworth* court held that the *New York Times* actual malice standard was constitutionally mandated in the case before it even though Myrtle Farnsworth was not a public figure. Medical quackery was a matter of public interest, the court stated, since the readers of the *Chicago Tribune* would be interested in it. Moreover, the *Tribune*’s zeal in uncovering and exposing quackery would be substantially diminished without the protection of the actual malice standard. In determining the subject’s importance, the court noted (in a statement that would become critical in the *Colson* court opinion thirteen years later),

we must consider not only the number of persons affected by the subject, but also the severity of its impact upon those so affected. Thus, the fact that plaintiff’s personal contacts were presumably with only a small portion of the public does not militate against immunity where the publica-

68. *Id.* at 290, 253 N.E.2d at 410.

69. *Id.* at 290, 253 N.E.2d at 411 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (Harlan, J., concurring)).

70. *Id.* The *Farnsworth* court’s expansive reading of the “public interest” approach typifies a tendency that may well be the “Achilles heel” of cases such as *Farnsworth*, *Rosenbloom*, and even *Colson*: their inexorable inclination to allow the defendant to bootstrap himself into the application of the *New York Times* standard by defining “public interest” as anything the media happens to focus its attention upon. Although the public interest test need not be so tautological, the threat that it will become so has certainly contributed to judicial criticism of the public interest test. In *Troman v. Wood*, for example, Justice Schaefer admonished that “[w]hether a matter is one of public interest . . . depends to some degree on whether the media themselves have chosen to make it one.” 62 Ill. 2d 184, 196, 340 N.E.2d 292, 297 (1975).

71. 385 U.S. 374 (1967).

72. 43 Ill. 2d at 291, 253 N.E.2d at 411.

73. *Id.*

tions concern a matter of such vital importance as the qualifications and practices of one who represents herself as qualified to treat human ills.⁷⁴

2. *Rosenbloom v. Metromedia, Inc.*

Rosenbloom v. Metromedia, Inc.,⁷⁵ involved a suit brought by George Rosenbloom, an alleged distributor of nudist magazines in the Philadelphia area, against the operators of radio station WIP in Philadelphia. Following Rosenbloom's arrest during a police crackdown on the distribution of allegedly obscene books and newspapers, WIP broadcast a series of news stories describing Rosenbloom's arrest and the seizure of pornographic books and magazines from his home and a local warehouse. Rosenbloom sued the radio station, predicated his action on certain factual errors in the broadcasts. The station claimed that it was entitled to invoke the *New York Times* actual malice standard as a defense. The judgment of the Supreme Court was announced in a plurality opinion written by Justice Brennan, who phrased the issue before the Court as

whether the *New York Times*' knowing-or-reckless-falsity standard applies in a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest.⁷⁶

Using precisely the same analysis that the Illinois Supreme Court had adopted in *Farnsworth*, the plurality opinion of Justice Brennan held that the *New York Times* standard applied to any defamatory speech involving matters of "public or general interest."⁷⁷ Justice Brennan's analysis, like the analysis of the Illinois court in *Farnsworth*, shifted the focus of the *New York Times* standard from the status of the defamation victim to the status of the speech itself. "If a matter is a subject of public or general interest," Justice Brennan wrote, "it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."⁷⁸ Rather, Brennan wrote, the public's primary interest is in the *event*; the public's natural attention is on the content, effect, context, and importance of the conduct and actions of the participants in newsworthy events, not the participants' prior anonymity, notoriety or fame. The Court thus extended the coverage of *New York Times* "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."⁷⁹

74. *Id.* at 292, 253 N.E.2d at 411.

75. 403 U.S. 29 (1971).

76. *Id.* at 31-32.

77. *Id.* at 52. This phraseology was derived from the famous Warren and Brandeis article on the right to privacy. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

78. *Rosenbloom*, 403 U.S. at 43.

79. *Id.* at 44.

3. *Gertz v. Robert Welch, Inc.*

Gertz v. Robert Welch, Inc.,⁸⁰ was the landmark United States Supreme Court decision involving Illinois law; its holding directly contradicted the *Colson* court's preoccupation with whether defamatory speech involved subjects of public interest and concern. Nevertheless, the *Colson* court seemed to acknowledge the existence of *Gertz* only grudgingly. *Gertz* concerned a libel action brought by Elmer Gertz, a well-known Chicago attorney and law professor,⁸¹ against Robert Welch, Inc., the publisher of the monthly magazine *American Opinion*, an organ of the John Birch Society.⁸² Gertz had been retained as co-counsel by the family of seventeen-year-old Ronald Nelson to pursue civil remedies against Richard Nuccio, a Chicago police officer who had killed Ronald.⁸³ Nuccio ultimately was convicted of Nelson's murder, but Gertz played no role in Nuccio's criminal prosecution and made no public statements or comments concerning the civil or criminal actions.⁸⁴ Shortly after Nuccio's conviction, an article appeared in *American Opinion* entitled "Frame-Up—Richard Nuccio and the War on Police."⁸⁵ The article alleged that Nuccio was being "railroaded" as part of a Communist conspiracy to undermine local police so as to pave the way for a national police force which would support and enforce a Communist dictatorship.⁸⁶ The article named Elmer Gertz as one of the members of this conspiracy. He was identified as the lawyer for the Nelson family and one of the leaders of the attack on Nuccio. Gertz was further described, among other things, as a "Communist-fronter," a "Leninist" and a "Marxist."⁸⁷ Virtually everything of significance in the *American Opinion* article was false.⁸⁸

80. 418 U.S. 323 (1974).

81. Ironically, Gertz had been the attorney of record on at least two important defamation cases litigated in the Illinois Supreme Court. See *Farnsworth v. Chicago Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969); *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 243 N.E.2d 217 (1968).

82. Early in the 1960's, *American Opinion* began to warn of a nationwide conspiracy to discredit local police forces and establish, in their stead, a national law enforcement agency capable of supporting a Communist dictatorship. *Gertz*, 418 U.S. at 325.

83. *Id.* at 326.

84. Gertz, in his capacity as counsel for the Nelson family in the civil litigation, attended the coroner's inquest into the Nelson boy's death, and initiated actions for damages. He neither discussed Officer Nuccio with the press nor played any part in the criminal proceedings against Nuccio. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Interestingly, in 1982, eight years after the historic Supreme Court decision in *Gertz*, the United States Court of Appeals for the Seventh Circuit decided the merits of the defendant's appeal from the district court decision on remand. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982). In that decision, Gertz was able to prove both negligence and actual malice, and the Seventh Circuit affirmed a jury award of compensatory damages in the amount of \$100,000 and punitive damages of \$300,000. In summarizing the defendant's behavior, the court noted, with regard to Scott Stanley, the managing editor of *American Opinion*, that Stanley conceived a story line; solicited Stang, a writer with a known and unreasonable propensity to label persons or organizations as Communist, to write

The defendant claimed that Gertz was a public figure and that Welch was thus entitled to the protection of the *New York Times* actual malice standard. In a pre-trial ruling, the district court held that the words published by Welch constituted libel per se.⁸⁹ Due to this ruling, injury was presumed under Illinois law, and only the issue of damages was submitted to the jury.⁹⁰ The district court, however, having second thoughts, granted judgment notwithstanding the verdict on the grounds that the subject matter of the article was of "public interest" and therefore required the plaintiff to prove actual malice as defined in *New York Times*.⁹¹ The decision was affirmed by the United States Court of Appeals for the Seventh Circuit,⁹² whereupon the Supreme Court granted certiorari and reversed.⁹³

In *Gertz*, the Supreme Court established a matrix of guidelines to govern the interplay between the first amendment principles articulated in *New York Times* and the traditional solicitude for interests in reputation evidenced by the common law. Thus, *Gertz* was a judicial compromise that attempted to accommodate the competing values of "uninhibited, robust, and wide-open" debate on public issues with society's need to protect reputation. The *Gertz* Court reiterated the unsuitability in a free society of the traditional rule of strict liability for defamation, since compelling a speaker to "guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."⁹⁴ The need to avoid self-censorship, however, was not the only societal value recognized by the Court; to give absolute protection to the news media would completely dissolve the competing social concerns underlying the law of defamation.⁹⁵

Gertz attempted to resolve the inherent friction between freedom of speech and protection of reputation by announcing a series of rules setting forth the minimum constitutional requirements for compensating injury to reputation. First, suits brought by public officials and public figures, at least against media defendants, must always meet the *New York Times* actual malice test.⁹⁶

the article; and after the article was submitted, made virtually no effort to check the validity of statements that were defamatory *per se* of Gertz, and in fact added further defamatory material based on Stang's "facts." There was more than enough evidence for the jury to conclude that this article was published with utter disregard for the truth or falsity of the statements contained in the article about Gertz.

Id. at 539.

89. 306 F. Supp. 310, 311 (N.D. Ill. 1969).

90. *Id.*

91. 322 F. Supp. 997, 1000 (N.D. Ill. 1970).

92. 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

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

94. *Id.* at 340.

95. *Id.* at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). The Court recognized the traditionally strong state interest in creating compensation for the harm caused by defamatory falsehood. The individual's right to protect his or her good name, the Court emphasized, "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Id.*

96. *Id.* at 343.

Second, all defamation suits, even those brought by private individuals concerning non-public issues, must, at the minimum, be based upon proof of negligence.⁹⁷ Third, "presumed damages" would no longer be permitted; damages could not be awarded without proof of injury, though the scope of injury and the nature of the evidence required remained broad.⁹⁸ Fourth, any award of punitive damages would always require a showing of actual malice.⁹⁹

Although the *Gertz* opinion stated that it was unwise for the Supreme Court itself to proceed on a case-by-case basis in attempting to balance the constitutional claims of the press against individual claims for compensation, the Court invited state courts to develop for themselves the proper standard of liability in suits brought by private plaintiffs. Thus, the Court stated that as long as the states did not dip below the negligence standard, they should "retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injuries to the reputation of a private individual."¹⁰⁰

The *Gertz* compromise was grounded on two rationales reflecting the Supreme Court's perceptions about the differences between public and private figures. Public officials and figures, the Court reasoned, are more likely to have effective opportunities for self-help when they are defamed. Given the fact that, generally, public officials and public figures enjoy significantly greater access to channels of effective communication, the Court assumed that, as a class, they have a more realistic opportunity to contradict the lie or correct the error than do private individuals.¹⁰¹ The second rationale of the Court was more normative, largely reflecting the homespun moral that one who seeks the public arena must accept the heat of the fire as part of the price for entering the kitchen. People who voluntarily attain public figure status often have assumed roles of special prominence in social affairs, and in all fairness they can be required to accept greater public scrutiny and greater exposure to defamation as part of the cost of such fame. Some public figures occupy positions of such great power and influence that they are public figures for all purposes.¹⁰² A president, a movie star, or a sports hero might be considered a "universal" public figure. Most public figures, however, are "limited public figures," persons who have "thrust themselves to the forefront of particular controversies in order to influence the resolu-

97. *Id.* at 347.

98. *Id.* at 349-50.

99. *Id.* at 350.

100. *Id.* at 345-46. For commentaries on how state courts have reacted to the options created for them by *Gertz*, see Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L.J. 519, 536-47 (1979); *Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1404-06 (1982) [hereinafter cited as *Developments in the Law*]; Note, *The Constitutional Law of Defamation—Recent Developments and Suggested State Court Responses*, 33 ME. L. REV. 371, 393-98 (1981).

101. 418 U.S. at 344.

102. *Id.* at 345.

tion of the issues involved."¹⁰³ Such limited public figures are subject to the *New York Times* standard when they are defamed in connection with issues about which they have invited attention, but in all other aspects of their lives they remain private figures, for whom states are free to create compensation on a lesser showing of simple negligence.¹⁰⁴

4. *Troman v. Wood*

*Troman v. Wood*¹⁰⁵ involved a defamation suit based on a *Chicago Sun-Times* article which reported on the criminal activities of a youth gang and actions taken by a local community group to combat the gang's activities. Residents of the neighborhood in which the gang operated were interviewed for the article. One resident was quoted as saying, "Ten years ago, I became very friendly with the family that moved into what became the gang headquarters."¹⁰⁶ A second resident was quoted as saying, "The gang stole us blind. One time after my husband had paid them for painting and stripping his basement, he returned home to find one TV set gone. You know where it was? It was in the basement of the gang house."¹⁰⁷ The paper printed a photograph of the home of Mrs. Mary Troman with the article. The caption beneath the picture read: "Home of Mrs. Mary Troman at 5832 N. Wayne. Thomas Troman testified he is a member of the gang."¹⁰⁸ Mary Troman filed suit against Field Enterprises, Inc., publisher of the *Sun-Times*, claiming that the photograph and article together implied that her home was the headquarters of the gang.

Troman's complaint was grounded upon a traditional theory of strict liability. The trial court granted the publisher's motion to dismiss, holding that even though Mary Troman was a private figure, it was necessary for her to allege actual malice to state a cause of action because the subject matter of the article involved an issue of public concern.¹⁰⁹ The Illinois Supreme Court took the case on a direct appeal. Although Troman had failed to allege actual malice, she had offered to amend her complaint to allege negligence, "gross negligence," and "journalistic malpractice."¹¹⁰ Consequently, the court, pursuant to stipulations, agreed to treat the complaint as sounding in those three variations on the negligence standard rather than on strict liability.¹¹¹ In a thoughtful opinion, Justice Schaefer first analyzed the line of United States Supreme Court decisions from *New York Times* through *Butts*, *Walker*, *Rosenbloom*, and finally *Gertz*. Justice Schaefer noted

103. *Id.*

104. *Id.* at 349.

105. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).

106. *Id.* at 188, 340 N.E.2d at 293.

107. *Id.*

108. *Id.*

109. *Id.* at 193, 340 N.E.2d at 296.

110. *Id.* at 194, 340 N.E.2d at 296.

111. *Id.* at 193-94, 340 N.E.2d at 296.

that the *Gertz* Court had retreated from the position taken by the plurality in *Rosenbloom*, and had rejected the proposition that actual malice must be proven even as to a defamatory falsehood about a private individual, if the statement related to matters of public or general interest.¹¹² Justice Schaefer then made it clear that the *Troman* court interpreted *Gertz* as allowing Illinois to adopt a mere negligence standard in cases involving private figure plaintiffs: "The defendant concedes that the Federal Constitution does not require Illinois to apply the *New York Times* standard. *Nevertheless the defendant urges that we should now adopt that standard as a matter of State policy.*"¹¹³ The *Troman* court's view, conceded by the defendant, was that, after *Gertz*, federal constitutional law had no bearing on the private figure standard beyond the floor level of negligence, and that any decision to enhance media protection above the negligence standard was purely a question of Illinois state law.¹¹⁴ Thus the court stated that its

function [was] not to make an independent reappraisal of the requirements of the first amendment, but rather to ascertain whether there is any basis in Illinois law which would prevent the application here of the general principle that a person is responsible for damage that he intentionally or negligently inflicts upon another.¹¹⁵

The *Troman* court then decided that under Illinois law no basis existed for extending *New York Times* protection to defendants who defame private figures, even if the defamatory speech involved matters of public interest.¹¹⁶ Therefore, the *Troman* court's analysis of Illinois law was flatly inconsistent with the underlying jurisprudential themes in both *Farnsworth* and *Colson*.¹¹⁷

The *Troman* court initially emphasized the substantial state policy of protecting reputation. Prior to *New York Times*, the court noted, it had been the policy of the state to impose strict liability for defamatory falsehood. In the Illinois Constitutions of 1818,¹¹⁸ 1848,¹¹⁹ 1870,¹²⁰ and 1970,¹²¹ the people of Illinois expressly endorsed the state policy of vindicating individual

112. *Id.* at 192, 340 N.E.2d at 296.

113. *Id.* at 194, 340 N.E.2d at 296 (emphasis added). This passage is extremely important in assessing the significance of the *Farnsworth-Troman-Colson* trilogy, because it establishes beyond peradventure that the *Troman* court was never confused about whether its refusal to elevate Illinois law to the *New York Times* standard for private figure plaintiffs implicated the federal constitutional law.

114. The defendant "concede[d] that the Federal Constitution [did] not require Illinois to apply the *New York Times* standard," but nevertheless urged the *Troman* court to "adopt that standard as a matter of State policy." *Id.*

115. *Id.* at 194, 340 N.E.2d at 297.

116. *Id.* at 198, 340 N.E.2d at 299.

117. For an analysis of the judicial themes of *Farnsworth* and *Colson*, see *supra* notes 54-74 and accompanying text.

118. ILL. CONST. of 1818, art. VIII, § 12.

119. ILL. CONST. of 1848, art. XIII, § 12.

120. ILL. CONST. of 1870, art. II, § 4.

121. ILL. CONST. of 1970, art. I, § 4.

interests in reputation.¹²² The court then recognized that a libel suit is often the best form of "counterspeech" available to a defamed plaintiff.¹²³ The court stated that judicial process provides a safety valve that permits the injured private individual who is not part of the corporate mass media superstructure to strike back and obtain retribution through the lawful and orderly processes of society. The court thus recognized that the state has a strong interest in insuring that courts remain open as a vehicle for making a public and authoritative declaration that an injurious statement about a private individual was in fact false, and the state should be careful not to constrict this vital avenue of public vindication.¹²⁴

The *Troman* court finally turned to the heart of the public interest standard itself; its dissection of that standard is, more than any other aspect of the *Troman* opinion, the direct antithesis of the theoretical underpinnings of *Farnsworth* and *Colson*. The public interest standard, the court wrote, "as a matter of Illinois law, unduly subordinates the rights of the individual."¹²⁵ The court noted that the first problem with the public interest standard is that it is overly broad, and has a tendency to become a self-fulfilling prophecy.¹²⁶ For example, is an event a matter of "public interest" because it has some preexisting transcendental quality that automatically makes it so, or does an event graduate to the hallowed status of "public interest" simply because the public becomes interested in it? And in a society dominated by an ever-expanding network of print, broadcast and cable media hungry for stories, is there not a proclivity on the part of the media to self-define what the public fancies? The *Troman* court was troubled by this characteristic of the public interest concept, stating that "[w]hether a matter is one of public interest . . . depends to some degree on whether the media themselves have chosen to make it one."¹²⁷ Individual media personalities such as Dan Rather, Tom Brokaw and Peter Jennings become the arbiters of the *New York Times* actual malice test if any story that finds its way into the network evening news by definition qualifies as a matter of public interest. The *Troman* court refused to inculcate the fabric of Illinois tort law with such an inherently "bootstrapping" concept, arguing that it would eviscerate the central distinction of *Gertz* between private and public figure plaintiffs. The use of the public interest test would undercut the *Gertz* dichotomy by treating those persons whose connection with the matter of public interest at issue was involuntary, and perhaps peripheral,

122. *Troman*, 62 Ill. 2d at 195, 340 N.E.2d at 297.

123. *Id.* The news media may not choose to provide access to a private figure who claims he or she has been wronged in order to alleviate some of the damage done to the person's reputation, but the media may publicize the filing of a defamation action seeking sizeable damages, and will surely report the award of such a judgment should the plaintiff prevail.

124. *Id.* For a criticism of this balance struck in *Troman*, see Note, *Troman v. Wood—A Negligence Standard for Private Individuals in Defamation Actions*, 1977 U. ILL. L.F. 503, 512-23 [hereinafter cited as Note, *Troman v. Wood*].

125. 62 Ill. 2d at 195, 340 N.E.2d at 297.

126. *Id.* at 196, 340 N.E.2d at 297.

127. *Id.* (emphasis added).

as the equivalent of public figures.

The *Troman* court further rejected the defendant's suggestion that the court effectuate a compromise by placing liability at a level above negligence but below actual malice,¹²⁸ thereby employing an intermediate "gross negligence" or "journalistic malpractice" approach.¹²⁹ The court found the gross negligence suggestion flawed on grounds that the law is already too complex and would not profit by the importation of yet another ill-defined tier of fault.¹³⁰ Given the subsequent confusion in Illinois concerning the application of the negligence and actual malice standards,¹³¹ the *Troman* court's judgment on this point obviously was correct. With regard to the "journalistic malpractice" suggestion, the court again recharacterized the innovation as a problematic departure from straightforward negligence concepts. The court reasoned that the problem with the journalistic malpractice approach is that "it would make the prevailing newspaper practices in a community controlling,"¹³² thereby encouraging a progressive "Gresham's law" devaluation¹³³ in the standard of care. In fact, the court may have overstated

128. For examples of states employing the above negligence standard to defamation suits brought by private plaintiffs, see *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (adopting a modified *New York Times* gross negligence test applicable in those instances where the defamatory conduct is directed at a private plaintiff involved in an event of public or general concern); *AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974) (utilizing the "serious doubts as to the truth" standard as the formulation of an actual malice fault requirement); *Chapodeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1961) (applying a gross negligence test similar to that adopted in *Walker*).

129. 62 Ill. 2d at 197-98, 340 N.E.2d at 298-99. Within its analysis, the Illinois Supreme Court first defined "journalistic malpractice" as a "departure from the general standards of care set by publishers in the community." *Id.* at 197-98, 340 N.E.2d at 298. The court then compared this definition with the U.S. Supreme Court's definition in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. In refusing to apply the journalistic malpractice approach to determine liability, the court was of the opinion that such a standard would make the prevailing newspaper practices in a community controlling, whether those practices were adequate or not. For example, "[i]n a community having only a single newspaper, [the journalistic malpractice approach] would permit that paper to establish its own standards"; in a community having more than one newspaper, the journalistic malpractice standard might lead "toward[s] a progressive depreciation of the standard of care." 62 Ill. 2d at 198, 340 N.E.2d at 298-99.

130. *Id.* at 197, 340 N.E.2d at 298.

131. Compare, e.g., *Catalano v. Pechous*, 83 Ill. 2d 146, 419 N.E.2d 350 (1980) (applying actual malice standard) with *Newell v. Field Enters., Inc.*, 91 Ill. App. 3d 735, 415 N.E.2d 434 (1st Dist. 1980) (applying negligence standard).

132. 62 Ill. 2d at 198, 340 N.E.2d at 298.

133. "Gresham's Law" is an economic observation named after Sir Thomas Gresham, a 16th century English financier who posited that when two coins are equal in debt-paying value but unequal in intrinsic value, the one having the lower intrinsic value tends to remain in circulation while the other tends to be hoarded or exported as bullion. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 998 (4th ed. 1976). Similarly, when two or more accepted practices of journalism are present within the same community, the practice which affords the lower standard of care tends to be used as the standard in determining journalistic malpractice.

the case against the journalistic malpractice concept, because if it is understood simply as importing the traditional rules applicable in medical or legal malpractice cases into the journalism field, the custom followed in the community would not be absolutely controlling—courts and juries would have the power to declare an entire custom unreasonable.¹³⁴ The journalistic malpractice approach, however, would require the plaintiff to introduce testimony concerning customary journalistic practice in a particular area. That evidentiary burden could be severely crippling, since one would expect reporters and editors to be just as unwilling to testify that a colleague engaged in an unreasonably sloppy investigation of a story as doctors historically have been to testify that a colleague was unreasonably lax in investigating the cause of an illness. The familiar “conspiracy of silence” that pervades professional malpractice litigation¹³⁵ was precisely the sort of evidentiary impediment that the *Troman* court was resolved to eliminate.

Although the opinion in *Troman* was, on the whole, a systematic and logical treatment of Illinois law and policy in the aftermath of *Gertz*, its analysis had two significant failings, which in combination gave rise to the confusion that ultimately surfaced six years later in *Colson*. The first failing of the *Troman* opinion was that it nowhere discussed or even cited *Farnsworth v. Tribune Co.*,¹³⁶ the most important libel case involving standard of care ever decided by the court prior to *Troman*, and also a case that dealt heavily with the merits of the public interest test. *Troman*’s failure to overrule, distinguish, reconcile, or even discuss *Farnsworth* could only generate confusion in the future, because the underlying principles of *Farn-*

134. Custom is merely a factor to be taken into account in determining whether an actor’s conduct is negligent. It is not controlling where a reasonable person would not follow the custom. See RESTATEMENT (SECOND) OF TORTS § 295A (1965); PROSSER, *supra* note 4, at 167. The most well-known statement concerning the use of custom came from Judge Learned Hand in *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), *cert. denied sub. nom.* *Eastern Transp. Co. v. Northern Barge Corp.*, 287 U.S. 662 (1932). In that case, Judge Hand stated:

Indeed in most cases reasonable prudence is common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

60 F.2d at 740.

135. Given the incompetency of most jurors in passing judgment on questions of medical science or technique, most malpractice cases require expert testimony to support a finding of negligence. Unfortunately, most doctors are reluctant to testify against one another. This reluctance is commonly referred to as the “conspiracy of silence” and often deprives the injured party of an equitable remedy. For a more extensive discussion of the “conspiracy of silence,” see *Reynolds v. Struble*, 128 Cal. App. 716, 18 P.2d 690 (1933); *Morgan v. Rosenberg*, 370 S.W.2d 685 (Mo. Ct. App. 1963); *Simon v. Friedrich*, 163 Misc. 112, 296 N.Y.S. 367 (1937); *Coleman v. McCarthy*, 53 R.I. 266, 165 A. 900 (1933); *Halldin v. Peterson*, 39 Wisc. 2d 668, 159 N.W.2d 738 (1968). See generally Markus, *Conspiracy of Silence*, 14 CLEV.-MAR. L. REV. 520 (1965); Seidelson, *Medical Malpractice Cases and the Reluctant Expert*, 16 CATH. U.L. REV. 158 (1966).

136. 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

sworth and *Troman* clash like a polkadot tie on a plaid shirt.

The second failing of *Troman* was more fundamental; in announcing the negligence standard, the court wrote a single qualifying sentence that created a loophole which would allow *Farnsworth* and its public interest approach to subsume the negligence test that *Troman* purported to establish. After holding that "negligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest,"¹³⁷ the court stated, "[o]ur holding in the present case is, of course, *not intended to remove any of the qualified privileges which have heretofore been recognized in this State* to the extent that the facts may warrant their application."¹³⁸ This statement, when combined with the *Troman* court's failure to deal with the *Farnsworth* opinion, guaranteed that Illinois defamation law would remain unstable. It left an opening that would be exploited in *Colson*, because it allowed the *Colson* court to revive the public interest standard by technically treating it as a state-created common law privilege of the sort which had, in the *Troman* court's language, "heretofore been recognized in this state."¹³⁹ This critical qualifying language in *Troman* became a funnel through which the *Farnsworth* opinion was pulled intact for reuse in *Colson*.

These shortcomings in the *Troman* opinion are hardly unique, because in neither *Farnsworth*, *Troman*, nor *Colson* did the Illinois Supreme Court ever directly confront the underlying problem common to all: the proper relationship between the matrix of first amendment privileges set forth in the opinions of the United States Supreme Court and the continuing evolution of common law privileges that existed prior to *New York Times v. Farnsworth*, *Troman*, and *Colson* all failed to address the relationship between the common law privileges that antedated *New York Times* and the constitutional privileges that crystallized in its wake. For example, in *Colson*, the court stated, to the probable shock of Illinois lawyers familiar with *Gertz* and other United States Supreme Court decisions defining public and private figures:

[W]e need not in this case decide whether plaintiff was a public figure or official, because the facts justify following *Farnsworth* and holding that this case clearly qualifies under the *Butts* test as a subject about which information is needed or appropriate to enable the members of the committee to cope with the issues confronting them.¹⁴⁰

To the discerning, this last sentence contains an internal contradiction; it alone establishes the need to reshape the *Colson* decision along more precise doctrinal lines. If *Colson* is, as the court states repeatedly, a case in which

137. 62 Ill. 2d at 198, 340 N.E.2d at 299.

138. *Id.* (emphasis added).

139. *Id.*; see Note, *Troman v. Wood*, *supra* note 124, at 522 ("A broad definition [of the public figure concept] would reduce the size of the class of plaintiffs who would benefit from *Troman*.").

140. *Colson*, 89 Ill. 2d at 213, 433 N.E.2d at 249 (emphasis added).

"the first amendment privilege of *New York Times* must be applied,"¹⁴¹ then why did the court not decide whether Stieg was a public figure? If the answer is that the court was merely "following *Farnsworth*," does that mean that the decision is merely an interpretation of state law or does the "must be applied" phrase only mean "must" as a matter of Illinois common law? And in "following *Farnsworth*," is not the court following an outdated Illinois decision that erroneously treated the public interest test as constitutionally required in all cases—a view parallel to the one espoused in *Rosenbloom* and expressly rejected in *Gertz*? If the court was merely "following *Farnsworth*," what does the court mean by saying that the case "clearly qualifies under the *Butts* test as a subject about which information is needed?"¹⁴² *Butts* is a federal constitutional decision, a decision prior to *Gertz*, which, like *Farnsworth*, may well be undermined by *Gertz*.¹⁴³ Furthermore, even in *Butts* the United States Supreme Court was compelled to decide and did decide that the plaintiff was a public figure.¹⁴⁴

These are critical questions if the treatment of privileges in Illinois is going to avoid disarray. Fortunately, beneath the surface confusion in *Colson* lies a sound accommodation of conflicting values; if the language of the opinion reflecting that resolution can be sifted into a more coherent structure, the decision could generate a logical and well-balanced approach to the application of both common law and constitutional privileges.

D. Straightening Out the Colson Confusion: A Suggested Analysis

1. The Need to Escalate the Fault Standard for Common Law Privileges in the Aftermath of Gertz

The most important point to recognize in attempting to reconcile the ongoing development of common law privileges in Illinois with the constitutional scheme declared in *New York Times* and *Gertz* is that because *Gertz* proscribes liability for defamation without a showing of fault,¹⁴⁵ common law conditional privileges are meaningless unless they require conduct more egregious than negligence to overcome them. At least in the context of media defendants, *Gertz* eliminated strict liability for all defamation actions, requiring negligence as a minimum.¹⁴⁶ Prior to *New York Times* and *Gertz*,

141. *Id.* (emphasis added).

142. *Id.*

143. Although the *Butts* and *Walker* decisions technically do not rest on a public figure/private figure distinction, there is language in the *Butts* opinion that approaches a public interest standard. For example, the opinion talks of matters "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 388 U.S. at 147 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). This language obviously influenced the Illinois Supreme Court in *Farnsworth*. See 43 Ill. 2d at 291, 253 N.E.2d at 410.

144. *Butts*, 388 U.S. 130, 154 (1967). For a discussion of the confusing line-up of votes in the *Butts* and *Walker* decisions, see W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1031-32 n.4 (1982).

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

146. *Id.*

when strict liability remained the operative law in Illinois,¹⁴⁷ a common law conditional privilege that shielded a defendant from liability unless he was negligent made sense, since requiring proof of negligence added a burden to the plaintiff's case that would not otherwise exist.¹⁴⁸ If *Gertz* is understood

147. See Stonecipher and Trager, *supra* note 11, at 86-90.

148. This is the flaw in Justice Clark's analysis in his specially concurring opinion in *Colson*, where he advocates the use of a negligence standard whenever a defendant's speech would be covered by a common law qualified privilege. *Colson*, 89 Ill. 2d at 219, 433 N.E.2d at 252 (Clark, J., concurring). Justice Clark conceded that a qualified privilege should attach to Stieg's comments, but argued that such a privilege could be overcome by the plaintiff simply by showing "that the defendant did not believe the truth of the defamatory matter, or had no reasonable grounds to believe it true." *Id.* Since Justice Clark's formulation would permit recovery by the plaintiff merely on a showing that the defendant "had no reasonable grounds to believe [his statement] true," Justice Clark clearly believes that negligence alone should be sufficient to overcome a common law privilege. This is made even clearer by his statement:

[T]here is no Federal constitutional reason why a plaintiff cannot recover actual damages in a defamation suit upon a showing of the defendant's negligence. . . . Nor do I think we are required by any reason of State law or policy to extend the *New York Times* scienter standard to cases of purely private defamation.

Id. at 218, 433 N.E.2d at 252.

The problem with this analysis is that *Gertz* already requires negligence in all cases, so that a common law privilege that gives the defendant negligence-level protection gives the defendant nothing. Justice Clark correctly noted that negligence is the standard established by the Restatement of Torts for defamation not involving a public figure. RESTATEMENT (SECOND) OF TORTS §§ 580A, 580B (1977). Justice Clark also correctly asserted that prior Illinois cases had equated common law conditional privileges with the negligence standard. For instance, in *Zenfield v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 349, 243 N.E.2d 217, 221 (1968), the court declared:

A privileged communication is one which, except for the occasion on which or the circumstances under which it is made, might be defamatory and actionable. . . . Where circumstances exist, or are reasonably believed by the defendant to exist, from which he has an interest or duty . . . or in good faith believes he has an interest or duty, to make a certain communication to another person having a corresponding interest or duty, and the defendant is so situated that he believes, in the discharge of his interest or duty or in the interests of society, that he should make the communication, and if he makes the communication in good faith, under those circumstances, believing the communication to be true, even though it may not be true, then the communication is qualifiedly or conditionally privileged, even though the defendant's interest or duty be not necessarily a legal one but only moral or social and imperfect in character.

Id. (quoting *Judge v. Rockford Memorial Hosp.*, 17 Ill. App. 2d 365, 377, 150 N.E.2d 202, 207 (2d Dist. 1958)) (citation omitted); see also *Spencer v. Community Hosp. of Evanston*, 87 Ill. App. 3d 214, 408 N.E.2d 981 (1st Dist. 1981) (report concerning physician made at request of hospital conditionally privileged); *Myers v. Spohnholtz*, 11 Ill. App. 3d 560, 297 N.E.2d 183 (1st Dist. 1973) (union had conditional privilege to respond to other union's inquiry about former member).

The plain fact is, however, that all of this precedent is obsolete after *Gertz*, and should be discarded. Since Justice Clark does not dispute the essential point that common law conditional privileges should continue to exist in Illinois, he must concede that the privileges will need a level of culpability greater than negligence to separate them from the prima facie standards that all plaintiffs must meet in any event. A number of Illinois cases prior to *Colson* did properly apply the actual malice standard in common law conditional privilege situations. See, e.g., *Allen v. Ali*, 105 Ill. App. 3d 887, 435 N.E.2d 167 (1st Dist. 1982) (client's letter to bar association complaining of attorney's fee conditionally privileged absent proof of actual malice); *Ramsey v. Greenwald*, 91 Ill. App. 3d 855, 414 N.E.2d 1266 (2d Dist. 1980) (absent allegation of actual malice, former supervisor's memo to supervisor who fired plaintiff conditionally privileged); *Basarich v. Rodeghero*, 24 Ill. App. 3d

as requiring negligence in media cases as a matter of course, however, it does the media defendant no good to invoke a common law privilege if all that is necessary to overcome that privilege is proof of negligence, because negligence is required in any event. Furthermore, if the *Gertz* rules are understood as applying to media and non-media defendants alike, then negligence is a prerequisite to the maintenance of any defamation action.¹⁴⁹ The *Gertz* decision involved a newspaper article, and ever since *Gertz* there have been suggestions that the opinion might have been intended to apply only to media defendants.¹⁵⁰ The national consensus appears to be, however, that the *Gertz* Court did not intend to draw a distinction between media and non-media defendants.¹⁵¹

889, 321 N.E.2d 739 (3d Dist. 1974) (teachers and athletic coaches are public figures who must show actual malice to secure a favorable judgment).

149. One might argue that even though negligence is required as a minimum in all post-*Gertz* cases, common law privileges could still have force without automatically equating them with the actual malice standard by reverting back to the type of traditional "ill-will" malice required by the common law before *New York Times*. Some modern cases continue to invoke old-fashioned ill-will malice. See, e.g., *Nagib v. News-Sun*, 64 Ill. App. 3d 752, 381 N.E.2d 1014 (2d Dist. 1978) (intent to injure required); *Fopay v. Noverosko*, 31 Ill. App. 3d 182, 334 N.E.2d 79 (5th Dist. 1975) ("evil motive or ill-will toward plaintiff" required); *Bloomfield v. Retail Credit Corp.*, 14 Ill. App. 3d 158, 302 N.E.2d 88 (1st Dist. 1973) (defining "express malice" or "malice in fact" in terms of "ill-will, evil motive, [or] intention to injure without just cause or excuse"); *Van Norman v. Peoria Journal-Star, Inc.*, 31 Ill. App. 2d 314, 175 N.E.2d 805 (2d Dist. 1961) ("a wrongful act done intentionally"). The far better view, however, followed by a number of Illinois and federal decisions, is that traditional common law ill-will "malice in fact" should be discarded entirely. The decks should be cleared of all but two standards for all cases involving *either* constitutional or common law privileges: negligence, as the minimum for all cases, and "actual malice"—intentional or reckless disregard of the truth. For decisions rejecting the use of old-fashioned ill-will malice, see *Meiners v. Moriarty*, 563 F.2d 343 (7th Cir. 1977); *Suchomel v. Suburban Life Newspapers, Inc.*, 40 Ill. 2d 32, 240 N.E.2d 1 (1968); *Ramsey v. Greenwald*, 91 Ill. App. 3d 855, 414 N.E.2d 1266 (2d Dist. 1980); *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 321 N.E.2d 739 (3d Dist. 1974).

150. Justice Powell's cautiously worded opinion in *Gertz* literally referred only to media defendants; he used the terms "publisher or broadcaster" and "the news media" over 15 times. See Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non Media Defendants*, 95 HARV. L. REV. 1876, 1877 n.9 (1982) [hereinafter cited as Note, *Mediaocracy & Mistrust*]. Extrapolating from the *Gertz* language, some commentators have suggested that *Gertz* might be intended to provide special constitutional protection only for media speakers. See generally C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS 1118-20 (3d ed. 1977) (discussing possible interpretations of *Gertz*'s coverage) [hereinafter cited as GREGORY]; Brosnahan, *supra* note 34, at 792-93 (language of *Gertz* strongly suggests that only media defendants are affected by the decision); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978) (media defendants do, but should not, receive greater constitutional protection under *Gertz* than non-media defendants); Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (media defendants should receive greater constitutional protection from defamation liability than non-media defendants); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974) (non-media defendants should be held to a higher standard of care than the *New York Times* standard because media and non-media defendants have different options and responsibilities).

151. For decisions refusing to apply *Gertz* to non-media defendants, see *Rowe v. Metz*, 195

Several Illinois cases prior to *Colson* indicate that Illinois, like most other states, has implicitly accepted the applicability of *Gertz* to non-media defendants.¹⁵² *Colson* lays to rest any doubt on the point. The publication in *Colson* was completely unrelated to media channels; the defendant Stieg was simply a supervisory state employee communicating orally to a committee.¹⁵³ More importantly, the "context public figure concept"¹⁵⁴ presupposes the substantial functional importance of many communications within limited contexts, and even suggests that at times the media will have less protection than a private person because the media may spread the defamatory communication beyond the bounds of those who have a legitimate, special interest in the speech, thus relegating the defendant to the negligence minimum of *Gertz*.¹⁵⁵ Of prime importance, however, is the fact that because Illinois does not distinguish between media and non-media defendants in applying *Gertz*, conditional common law privileges anchored in negligence become meaningless across the entire spectrum of Illinois defamation law because they add nothing to the plaintiff's case that is not already there.¹⁵⁶

To the extent that *Colson* requires a level of culpability above negligence in order to overcome a common law privilege, its logic is sound, because

Colo. 424, 579 P.2d 83 (1978); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975). For decisions holding that *Gertz* standards do apply to non-media defendants, see *Mathew v. Tuscaloosa County*, 421 So. 2d 98 (Ala. 1982); *Bryan v. Brown*, 339 So. 2d 577 (Ala. 1976); *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 377 A.2d 807 (1977); *Ryder Truck Rentals v. Latham*, 593 S.W.2d 334 (Tex. Civ. App. 1979). Most states that have considered the question apply *Gertz* to non-media defendants. See Note, *Mediaocracy & Mistrust*, *supra* note 150, at 1878 n.12.

The leading discussion of the media/non-media defendant distinction is found in *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), where the court declared that it could not "discern any persuasive basis for distinguishing media and non-media cases." *Id.* at 592, 350 A.2d at 695. The court noted that "issues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, therefore, obtains in either case." *Id.*

152. See *Stonecipher and Trager*, *supra* note 11, at 81-82. But see *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 137-38, 334 N.E.2d 160, 164 (1975), where the court stated emphatically:

[C]ases involving claimed defamations by credit reporting agencies can be readily distinguished from those involving alleged defamations through so-called mass-media publication. In claimed libels involving, for example, magazines, books, newspapers, and radio and television programs, the publication has been for public attention and knowledge and the person commented on, if only in his role as a member of the public, has had access to such published information.

For a discussion of the special problems posed by credit reports, see *supra* note 188.

153. *Colson*, 89 Ill. 2d at 213-14, 433 N.E.2d 246, 249 (1982).

154. For a discussion of the "context public figure" concept, see *infra* text accompanying note 198.

155. For a thoughtful discussion on the importance of the functional relationship between the speaker, the audience to whom the speech is addressed, and the "target" of the speech (the person being discussed), see Note, *Mediaocracy & Mistrust*, *supra* note 150, at 1886-95.

156. See *supra* note 148 and accompanying text.

in the absence of some enhanced degree of fault beyond negligence, common law privileges lose all relevance after *Gertz*. *Colson* is also completely defensible in its selection of the actual malice formulation—"knowledge of falsity or reckless disregard for the truth or falsity"—as the appropriate standard for modern common law privileges. All of the other possibilities—gross negligence, professional malpractice, or old-fashioned common law "ill-will" malice-in-fact—merely create confusion.¹⁵⁷

Where *Colson* flounders, however, is in the court's assumption that the actual malice standard of fault is somehow inextricably linked to the *New York Times* decision and the first amendment. It is not. "Actual malice" is merely shorthand for a level of "knowing or reckless" fault that predated *New York Times* and is familiar across the tort landscape.¹⁵⁸ Illinois is free to adopt the actual malice test as the appropriate standard for common law privileges without purporting to rest that adoption on federal constitutional requirements. As a corollary to that freedom, Illinois is also at liberty to borrow from the first amendment theory espoused in *Rosenbloom v. Metromedia, Inc.*, and later rejected in *Gertz*, without treating that theory as first amendment law.

2. *The Need to Differentiate Between Constitutional and Common Law Holdings*

In borrowing from pre-*Gertz* first amendment theory, the Illinois Supreme Court should have made it clear that it was acting solely in its capacity as the final arbiter of the common law of Illinois, and *not* resting its decision on the dictates of federal constitutional law as enunciated in *Gertz*. The significance of this state law basis is that if *Colson* is regarded by the Illinois Supreme Court as a decision compelled by the federal constitution and grounded in the binding requirements of the first amendment, the decision is constitutionally erroneous, and could be reversed (if followed in a subsequent case) by the United States Supreme Court. If, however, *Colson* merely is grounded in theory borrowed from *Rosenbloom* and *Farnsworth* in an attempt to interpret Illinois state law, it is insulated from evisceration by subsequent United States Supreme Court decisions.

The most significant recent example of the perils of confusing state common law and federal constitutional law in the context of *New York Times* and its progeny came in the "human cannonball case," *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁵⁹ *Zacchini* involved an entertainment act in which Hugo Zacchini was shot from a cannon into a net two hundred feet away.

157. See *supra* text accompanying notes 130-34.

158. In *New York Times*, the Supreme Court borrowed the knowing or reckless disregard standard from a 1908 Kansas decision, *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). Prior to *New York Times*, all common law courts recognized some form of qualified privilege, defeasible only by proof of malice, to criticize public officials in their public roles. See GREGORY, *supra* note 150, at 1097 n.1. Some states extended the privilege to misstatements of fact as well as opinion. See Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 886-87 (1949).

159. 433 U.S. 562 (1977).

Zacchini's act was filmed by a free-lance reporter after Zacchini had explicitly asked him not to do so. The film clip, lasting fifteen seconds and including a favorable commentary, was broadcast on the local eleven o'clock news that evening. The Ohio Supreme Court held that Ohio state tort law recognized a "right of publicity" that protected the commercial value of Zacchini's performance.¹⁶⁰ This state-created right, resembling an intellectual property interest, gave Zacchini the right to prevent his name, likeness, or performance from being appropriated without his consent.¹⁶¹ The methodology employed by the court and the results of that approach provide strong lessons about the perils of the intrinsic ambiguities within the *Colson* decision.

As in *Colson*, the Ohio court's holding intertwined first amendment and common law concepts. The Ohio court placed its principal reliance on United States Supreme Court opinions after *New York Times*, primarily *Time, Inc. v. Hill*.¹⁶² The Ohio court stated:

[S]ince the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether *First Amendment principles* require that the right of privacy give way to the right to be informed of matters of public interest and concern, the concept of privilege seems the more useful and appropriate one.¹⁶³

Moreover, like the *Colson* court, the Ohio Supreme Court held that there is "a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private."¹⁶⁴ Yet, the United States Supreme Court granted certiorari and reversed.¹⁶⁵

Had the Ohio Supreme Court rested its decision explicitly on both state and federal grounds, either of which would have been dispositive, the United States Supreme Court would have had no jurisdiction to review the decision.¹⁶⁶ The "independent and adequate state ground" doctrine precludes Supreme Court review of a state court judgment, even if that state court judgment erroneously interprets federal law, whenever the significance of the error concerning federal law is obviated by a state law precept which independently supports the judgment.¹⁶⁷ This lack of federal jurisdiction when

160. *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 231-33, 351 N.E.2d 454, 459-60 (1976).

161. *Id.* The court refused, however, to grant Zacchini any relief from the television station.

162. 385 U.S. 374 (1967). For a discussion of *Colson's* reference to *Time, Inc. v. Hill*, see *supra* notes 71-73 and accompanying text.

163. *Zacchini*, 47 Ohio St. 2d at 234 n.5, 351 N.E.2d at 461 n.5 (emphasis added).

164. *Id.* at 234, 351 N.E.2d at 461. For a similar statement by the Illinois Supreme Court, see *Colson*, 89 Ill. 2d at 212, 433 N.E.2d at 249.

165. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

166. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117 (1945) (federal court review of state court decision barred because an "independent and adequate state ground" existed to support the state court's holding, regardless of whether or not the federal claim was erroneously decided).

167. See *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958); *Herb v. Pitcairn*, 324 U.S. 117, 126-28 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 165-66 (1917); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875).

an independent and adequate state ground exists stems from the Article III principle that federal courts may not render "advisory opinions";¹⁶⁸ if "the same judgment would be rendered by the state court after [the Supreme Court] corrected its views of federal laws, [the] review could amount to nothing more than an advisory opinion."¹⁶⁹

In reviewing the Ohio court decision, the United States Supreme Court discussed the independent and adequate state ground issue and conceded that there was "no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law."¹⁷⁰ The Court further admitted that the "source of [the] privilege [on which the Ohio court relied] was not identified."¹⁷¹ Nevertheless, the Court was convinced that a careful reading of the state supreme court's opinion indicated that the decision rested on the Ohio court's perceptions of federal constitutional law, and not on an interpretation of Ohio law. The Court noted that the Ohio court's opinion was phrased in terms of first amendment principles, cited first amendment cases, and failed to mention the Ohio Constitution.¹⁷² Far more critical to the fate of *Colson*, however, is the following statement made in *Zacchini*:

Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, *it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did.*¹⁷³

Due to its reliance on federal constitutional mandates, the Court held that it had jurisdiction to decide the federal issue.¹⁷⁴ Consequently, the United States Supreme Court reversed the Ohio Supreme Court in *Zacchini*, as surely as it also could have reversed the Illinois Supreme Court in *Colson*. Because the liberal jurisprudence that influenced *Colson* is not synchronized with the Burger Court's current retraction of first amendment defenses to defamation,¹⁷⁵ it is imperative in light of *Zacchini* that decisions such as

168. *Herb v. Pitcairn*, 324 U.S. at 126 (1945).

169. *Zacchini*, 433 U.S. at 566 (quoting *Herb v. Pitcairn*, 324 U.S. at 125-26).

170. *Id.*

171. *Id.* at 568.

172. *Id.* "That the Ohio Court might have, but did not, invoke state law does not foreclose jurisdiction." *Id.* For cases applying this principle, see *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 197 n.1 (1944); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).

173. *Zacchini*, 433 U.S. at 568 (emphasis added).

174. *Id.*

175. Until its decision in *Gertz*, the Supreme Court substantially extended the *New York Times* standard beyond its original application to public officials. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967) (actual malice standard applicable to suits brought by public figures). *Gertz* represented a definitive retraction of *New York Times*'s extension with its holding that private plaintiffs need only prove some degree of fault in order to recover from the alleged defamer. Because *New York Times* was immersed in first amendment considerations, the rejection of its standard beyond public officials/public figure plaintiffs evinces a restriction of first amendment considerations. The Court's holding in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), solidified the Burger Court's commitment to delimit first amendment prin-

Colson clearly be grounded on state law bases.

3. *Supplying Colson with a Theory: The "Context Public Figure"*

a. Sharpening the Focus of the *Colson* Holding Through the Lens of Common Law Conditional Privileges

Once the federal/state relationship within *Colson* is clarified, the ultimate question still remains: even if it is recognized that it is proper to utilize actual malice as the governing standard for common law privileges, why should a common law privilege be extended to cover statements made about a private individual concerning matters of public interest? Although *Troman v. Wood* did not foreclose such an extension, its rationale is antithetical to it. Can *Colson's* implicit rejection of the *Troman* thesis and its return to the "spirit" of *Farnsworth* be defended on the merits? The answer may depend on whether the holding in *Colson* is construed narrowly or broadly. If the holding in *Colson* is construed as limited to the particular facts involved in that case, *Colson* easily can be defended. The court's extension of conditional protection to the comments made by a superior while evaluating a subordinate's performance, is consistent with a number of the mainstream conditional privileges that exist in the common law. These privileges fit easily into the theory that undergirds *Colson*. They were created prior to *New York Times* out of the common law's developing recognition that in certain recurring factual situations, free and open communication should transcend concern for reputation.¹⁷⁶ These traditional privileges, discussed below, are the vehicles that Illinois courts should revitalize in implementing the *Colson* mandate.

1. *Self-Interest of the Speaker*.—A conditional privilege exists to make statements for the protection of one's own legitimate interests, such as statements made to defend one's reputation in response to attack by another, or statements made in connection with the retrieval of stolen property or in the course of collecting a bona fide debt.¹⁷⁷ The privilege is roughly analogous to the common law privilege of self-defense from physical attack, and the privilege to defend property.¹⁷⁸ Like these common law privileges, the conditional defamation privilege to defend legitimate self-interest is traditionally regarded as lost if the speaker says more than is reasonably necessary to defend his or her interest, or if the speaker publishes the speech beyond

ciples in defamation law, because the Court went to great lengths to classify Mrs. Firestone as a private plaintiff, and thus to avoid the application of the actual malice standard. For an analysis of *Firestone*, see *infra* notes 199-216 and accompanying text. The Court has subsequently reaffirmed its retraction of *New York Times* in decisions which narrowly construed the public figure concept. See *Wolston v. Reader's Digest Assoc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). The *Wolston* and *Hutchinson* cases are reviewed at *infra* notes 217-54 and accompanying text. See also Note, *Whither the Limited-Purpose Public Figure?*, 8 HOFSTRA L. REV. 403, 423 (1980) ("[S]ince *Gertz* the Supreme Court has enhanced the protection of individual reputation by continually refining the public-figure category").

176. See Eaton, *supra* note 34, at 1359-64.

177. See PROSSER, *supra* note 4, § 115, at 786-87.

178. See RESTATEMENT (SECOND) OF TORTS, §§ 63, 68, 77-86 (1975).

the circle of persons to whom the self-defensive action would be relevant.¹⁷⁹ For example, the privilege is lost if one complains to another that a third party will not pay a debt, when the listener is in no position to render legitimate assistance in obtaining payment.¹⁸⁰ Again, the analogy to the self-defense and defense of property privileges is apt, because excessive publication is an exact parallel to the use of excessive force in self-defense of person and property.

2. *Statements Made to Protect the Legitimate Interests of Others.*—A conditional privilege exists to make statements for the protection of the legitimate interests of another, particularly when the party whose interests are being protected occupies such a close relationship to the speaker that the speaker has a moral or legal obligation to render protection.¹⁸¹ This privilege finds a parallel in the common law privilege to use force to protect the safety of another.¹⁸² A wide variety of statements are covered by the privilege including: a warning given to a woman that a prospective fiancé is an ex-convict;¹⁸³ a doctor's statements to protect a patient;¹⁸⁴ an attorney's statements made on behalf of a client;¹⁸⁵ an answer to a prospective employer's inquiry concerning a person's fitness for employment;¹⁸⁶ statements to a landlord that a tenant is undesirable;¹⁸⁷ or answers to a potential creditor's inquiry about a person's credit standing.¹⁸⁸ As in the case of the

179. PROSSER, *supra* note 4, § 115, at 787.

180. *Id.*

181. *See, e.g.,* Schlaf v. State Farm Mut. Auto Ins. Co., 15 Ill. App. 2d 195, 199, 145 N.E.2d 791, 793 (1st Dist. 1957) (a statement regarding the character of a former employee made to a representative of the bonding company to which the former employee applied for a fidelity bond, is made under a qualified privilege); Wuttke v. Ladanyi, 226 Ill. App. 402, 405 (2d Dist. 1922) (a statement made by an employer to a discharged employee and his representative in answer to the employee's demand for an explanation of the cause of his discharge, is a qualified privilege); Ritchie v. Arnold, 79 Ill. App. 406, 408 (3d Dist. 1898) (a statement made by a banker to a mercantile house regarding the solvency of a customer of the house, whose promissory note had been sent to the banker for collection, is privileged); *see also* Eaton, *supra* note 34, at 1361.

182. A privilege to defend another exists whenever defense of another is called for, or sanctioned. The standard used in determining whether the defense of another is sanctioned is the commonly accepted standard of decent conduct. This privilege extends to the use of all reasonable force which is necessary for such defenses, but does not extend to situations where unnecessary force is used. Furthermore, the defender may do whatever the person attacked might do to protect himself. PROSSER, *supra* note 4, § 20, at 112-13.

183. *Id.* § 115, at 787.

184. *Id.* at 788.

185. *Id.*

186. Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 349, 243 N.E.2d 217, 221 (1968).

187. PROSSER, *supra* note 4, § 115, at 788.

188. There has long been division over the issue of whether credit reporting agencies deserve a conditional privilege for credit report statements. *See id.* § 115, at 790; Smith, *Conditional Privilege for Mercantile Agencies*, 14 COLUM. L. REV. 187 (1914); Note, *Defamation and the Mercantile Agency*, 2 DEPAUL L. REV. 69 (1953); Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1050-51 nn.85, 86 & 87 (1971). Both a Seventh Circuit decision applying Illinois law and an Illinois Supreme Court decision have refused to apply an actual malice standard to a credit report. Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381, 1382-84 (7th Cir. 1972);

conditional self-interest privilege, the conditional privilege to protect another's interests is lost if the publication extends beyond that which is necessary to effectuate the defense.¹⁸⁹

3. *Common Interest Privilege.*—A conditional privilege exists when the speaker and recipient have common legitimate interests in a particular subject matter and the communication is made in furtherance of those interests.¹⁹⁰ The privilege is rooted in cases where there is a legal obligation to speak, such as communications by officers or directors of a corporation to stockholders.¹⁹¹ It has been expanded to encompass a broad range of situations in which persons with common interests in organizations or enterprises exchange information relevant to the conduct of that activity.¹⁹² Discussion

Tom Olesker's *Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 137-38, 334 N.E.2d 160, 164 (1975). In each of these cases, Dun & Bradstreet argued that the constitutional protection of *New York Times* should apply, and in both instances the argument was rejected. Under the analysis employed in this article, the pertinent question after *Colson* is whether the "intentional or reckless disregard" standard now should be applied to credit reports as a matter of state law. If such credit reports are to have a conditional privilege that is at all beneficial to the agencies, then the actual malice standard must be applied in order to distinguish these from the general run of defamation cases. It does not follow, however, that every conditional privilege recognized by the common law before *Gertz* must continue to be recognized after *Gertz*. If, as a matter of state policy, it is decided that a negligence standard is the desirable standard for credit reports, then credit reports should be treated the same as all other non-privileged speech after *Gertz*, and the "conditional privilege" that formerly attached to them should be dropped. This places credit reports in precisely the same position in which they have always been: under a negligence standard. It drops, however, the now superfluous conditional privilege label. The *Olesker Fashion* case is strong evidence that this is what Illinois intends to do, because the court in that case flatly refused to apply the actual malice test to a credit report on grounds that such reports are not sufficiently imbued with public interest attributes to require it. *Id.* at 138, 334 N.E.2d at 164. The important lesson to be drawn from the credit reporting cases is that the mere fact that a common law conditional privilege after *Gertz* must have some level of culpability greater than negligence to give it any significance does not mean that all pre-*Gertz* conditional privileges deserve elevation to the actual malice level. For an example of a post-*Colson* decision in which the court refused to so "elevate" a qualified privilege, see *American Pet Motels v. Chicago Vet. Med. Ass'n*, 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1982).

189. *Cook v. East Shore Newspapers, Inc.*, 327 Ill. App. 559, 64 N.E.2d 751 (4th Dist. 1945); PROSSER, *supra* note 4, § 115, at 789.

190. *Judge v. Rockford Memorial Hosp.*, 17 Ill. App. 2d 365, 376-77, 150 N.E.2d 202, 208 (2d Dist. 1958); *Cook v. East Shore Newspapers, Inc.*, 327 Ill. App. 559, 577-80, 64 N.E.2d 751, 759-60 (4th Dist. 1945); *Anderson v. Malm*, 198 Ill. App. 58, 62-63 (1st Dist. 1917); *Everett v. DeLong*, 144 Ill. App. 496, 500-01 (1st Dist. 1908).

191. *Eaton*, *supra* note 34, at 1361.

192. *E.g.*, *Jamison v. Reberson*, 21 Ill. App. 2d 364, 158 N.E.2d 82 (1st Dist. 1959) (local union officers had qualified privilege to notify executive board of the international organization of charges of improper advances brought by female union members against plaintiff union organizer); *Judge v. Rockford Memorial Hosp.*, 17 Ill. App. 2d 365, 150 N.E.2d 202 (2d Dist. 1958) (letter written by hospital official notifying nurse's professional registry that hospital no longer wished to employ plaintiff nurse because of disappearance of narcotics while plaintiff was on duty was privileged communication); PROSSER, *supra* note 4, § 115, at 789-91 (conditional privilege recognized where publisher and recipient have common interest and communication is of type reasonably calculated to protect or further that interest if the matter communicated pertains to the interest of the group).

before a university personnel committee about the merits or demerits of a candidate before the committee, as in *Colson*, falls squarely within the ambit of this privilege.

4. *Communication to Those Who Act in the Public Interest.*—The common law has long recognized a conditional privilege to communicate information to public officials relevant to the discharge of their official duties.¹⁹³ Complaints made to school boards about the fitness of teachers are among the types of situations to which this privilege is applicable;¹⁹⁴ thus, statements such as those made by Stieg would surely qualify under this privilege as protected communication.

5. *Fair Comment Privilege.*—The “fair comment” privilege in its original form insulated “opinion” rather than misstatements of fact, and was technically not a privilege but rather a threshold means of classifying pure opinion as beyond the pale of defamatory speech altogether.¹⁹⁵ Chairman Stieg’s statements about Colson are on the periphery of “opinion”; although a genuinely subjective evaluation of a colleague’s teaching ability would always qualify as mere “comment,” Stieg may have gone beyond its coverage by claiming the possession of information he could not divulge,¹⁹⁶ a statement that, if not true, would be a misstatement of fact rather than an opinion.

In sum, if *Colson* is read narrowly and treated simply as an obtuse application of traditional common law conditional privileges, the application of the actual malice standard in the case makes perfect sense, since, after *Gertz*, common law privileges lose their force without a standard of fault above negligence to sustain them. It is somewhat disingenuous to read *Col-*

193. *E.g.*, *Foltz v. Moore-McCormack Lines, Inc.*, 189 F.2d 537 (2d Cir. 1951) (defendant’s defamatory communication to FBI, causing plaintiff federal administrative officer to be discharged, would not be privileged if statement were made with actual malice); *Pecue v. West*, 233 N.Y. 316, 135 N.E. 515 (1922) (civil league superintendant’s defamatory statement made to district attorney regarding plaintiff’s alleged “disorderly” house was made under qualified privilege absent proof of actual malice).

194. *E.g.*, *Segall v. Piazza*, 46 Misc. 2d 700, 260 N.Y.S.2d 543 (1965) (letter to school principal written by parent complaining of teacher’s alleged physical mistreatment of student was privileged); *PROSSER, supra* note 4, § 115, at 792 (complaints made to school administration regarding character, conduct, or competence of teachers are qualifiedly privileged); *cf.* *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir. 1974) (applying absolute privilege to statements made about fitness of a school teacher during an open public executive session of a school board meeting), *clarified*, 527 F.2d 611 (7th Cir. 1975); *Johnson v. Board of Junior College Dist. No. 508*, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1st Dist. 1975) (applying constitutional actual malice standard to speech concerning teacher conduct on theory that teachers are public figures within the school).

195. *See* *Eaton, supra* note 34, at 1363. The protection of pure opinion is not only nonactionable at common law, it is directly at the core of the *New York Times-Gertz* first amendment jurisprudence. As Justice Powell stated in *Gertz*, “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” 418 U.S. at 339-40.

196. *Colson*, 89 Ill. 2d at 208, 433 N.E.2d at 249.

son so narrowly, however, because the language of the opinion clearly conveys an inclination to do far more than apply common law privileges. If *Colson*'s holding is stretched out to the broader parameters that the language of the opinion itself suggests—that is, if it is understood as extending a common law conditional privilege to *any* statement made by *anyone* so long as the statement implicates matters of public or general concern—defense of the decision becomes more problematic. Such an extension would entail substantial widening of the classic common law conditional privileges. It would enlarge the “fair comment” privilege to encompass misstatements of fact rather than of mere opinion. Additionally, it would simultaneously enlarge the universe of subjects covered by the various “interest oriented” privileges¹⁹⁷ to such a degree that a far more general privilege to speak at large about issues of “public or general importance” would effectively be created.

b. *Colson* and the Idea of the “Context Public Figure”

An honest reading of the language of *Colson* indicates that the Illinois Supreme Court is advocating adoption of some form of the second, broader reading of the conditional common law privilege concept. Although this contemplated enlargement on common law privileges is sure to be controversial, we defend the general direction in which the Illinois Supreme Court is moving. The task, however, is to construct a doctrinal basis for giving this capacious new privilege more precise definition and shape. We suggest a concept that we have labeled “the context public figure” as a device for sharpening analysis concerning the scope of the expanded common law conditional privilege.

The “context public figure” idea proceeds on the notion that, for most persons, speech concerning the neighborhoods, the workplaces, and other institutions in which they operate daily is more immediately vital to their lives than the speech that appears on the *CBS Evening News*, in the *Washington Post*, or in *Harper's Magazine*. There are national marketplaces of ideas and local marketplaces of ideas, and for most citizens, most of the time, the local marketplaces are where “uninhibited, robust, and wide-open” discussion is most relevant. Though few people purposefully inject themselves into the arena of national attention, many people inject themselves into events and controversies in the neighborhoods in which they live, the schools their children attend, or the institutions in which they work. An assistant professor at a law school is not likely to be a public figure as defined in *Gertz*, and a *Time* magazine article about that assistant professor probably should not be covered by the actual malice standard, but within the law school community that assistant professor *is* a “public

197. For example, privileges that shield misstatements of fact in communications made to protect one's own interest, the interests of another, a common interest, or statements made to public officials about matters of public concern are interest oriented privileges.

figure."¹⁹⁸ Statements in a student newspaper attacking the professor for poor teaching, bad scholarship, diffident public service, or arbitrary grading deserve the special protection of the actual malice standard, just as statements made within the faculty committee that reviews the assistant professor's application for tenure and promotion deserve actual malice coverage. Although articulated in vague and confusing terms, *Colson* seems to espouse this notion of examination of speech "in context." If that notion can be clarified as grounded in state rather than federal constitutional law, *Colson* can become the basis for a coherent, well-balanced reconciliation between free speech and reputational interests in Illinois. The first step in attempting such a construction, however, is to describe in greater detail the United States Supreme Court's own refinements of the term "public figure" in the aftermath of *Gertz*.

1. *Time, Inc. v. Firestone*.—If *Gertz* curtailed the public interest test "explosion" that was proceeding apace after *Rosenbloom*, it was *Time, Inc. v. Firestone*,¹⁹⁹ the first case that elaborated on the definition of *Gertz*'s public figure/private figure dichotomy, that brought the explosion to a halt. *Firestone* involved a defamation action brought by Mary Alice Firestone, wife of Russell Firestone, a scion of the wealthy Firestone family. In 1964 the Firestones became embroiled in a vigorously contested divorce proceeding

198. See, e.g., *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (former professional basketball player did not lose public figure status upon retiring from professional basketball and working as a college basketball coach); *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973) (treating assistant dean and professor at a law school as public figure); *Reaves v. Foster*, 200 So.2d 453 (Miss. 1967) (school principal dubbed "Uncle Tom" by community club pamphlet required to prove actual malice to recover); *Grayson v. Curtis Publishing Co.*, 72 Wash. 2d 999, 436 P.2d 756 (1967) (college basketball coach considered public figure and could not recover damages for false statement regarding his public conduct absent proof of actual malice). A number of Illinois cases prior to *Colson* appeared to adopt such a "context public figure" approach. See, e.g., *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 456 (1969) (no relief allowed to doctor called a "quack" by newspaper because public official status includes those whose qualifications for administering to health needs are a matter of public interest); *Andreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 769 (1st Dist. 1980) (real estate developers accused of greed in publication's letter to editor section could not recover absent proof of actual malice because they need not actively seek publicity in order to be considered in the "public eye"); *Cassidy v. American Broadcasting Co.*, 60 Ill. App. 3d 831, 377 N.E.2d 126 (1st Dist. 1978) (undercover policeman unknowingly filmed during an on-duty investigation of massage parlor not permitted recovery since he was acting in his official capacity); *Korbar v. Hite*, 43 Ill. App. 3d 636, 357 N.E.2d 135 (1st Dist. 1976) (conditional privilege applied against credit union president as public figure because the article, published in a union newspaper by a member of the credit union, concerned a matter of general interest to members of the union); *Johnson v. Board of Junior College Dist. No. 508*, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1st Dist. 1975) (junior college professors prominent in controversy concerning books to be used in classes were public figures within college community, thereby precluding recovery from college newspaper absent proof of actual malice); *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 321 N.E.2d 739 (3d Dist. 1974) (high school coaches and teachers held to *New York Times* standard because of their special prominence in the school community). For a further discussion of these Illinois cases, see *infra* notes 282-99 and accompanying text.

199. 424 U.S. 448 (1976).

in Palm Beach County, Florida. Mary Alice Firestone had filed a complaint seeking separate maintenance, and Russell Firestone had counterclaimed for divorce, on grounds of "extreme cruelty and adultery."²⁰⁰ The circuit court granted the divorce, and included, in the final judgment, the following language:

According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida. . . .

In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved. The premises considered, it is thereupon ORDERED AND ADJUDGED as follows:

1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

4. That the defendant shall pay unto the plaintiff the sum of \$3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff. . . .²⁰¹

Time's editorial staff, headquartered in New York, was alerted to the fact that a judgment had been rendered in the Firestone divorce proceeding by a wire service report and an account in a New York newspaper.²⁰² The staff subsequently received further information regarding the Florida decision from *Time's* Miami bureau chief and from a "stringer" working on a special assignment basis in the Palm Beach area.²⁰³ On the basis of these four sources, *Time's* staff composed the following item, which appeared in the magazine's "Milestones" section the following week:

DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."²⁰⁴

Mary Alice Firestone sued *Time* for defamation and won a jury verdict of \$100,000, a decision that ultimately was affirmed by the Florida Supreme

200. *Id.* at 450.

201. *Id.* at 450-51.

202. *Id.* at 448, 451.

203. *Id.*

204. *Id.* at 452.

Court.²⁰⁵ On appeal to the United States Supreme Court, *Time* argued that the actual malice standard should have applied because the Firestone divorce was a "cause célèbre," and Mary Alice Firestone was a "limited public figure" with regard to the divorce proceedings.²⁰⁶

The United States Supreme Court held that Mrs. Firestone was not a public figure and that the defendant was not entitled to the protection of the *New York Times* standard with regard to her claim. Mary Alice Firestone's prominence in what Justice Marshall depicted as "the sporting set" did not qualify her as a person of "especial prominence in the affairs of society."²⁰⁷ Even though Mrs. Firestone initiated litigation in a public court of law, the Court held that her action was hardly a purposeful insertion into a matter of public controversy, since state law *compelled* her to resort to legal process in order to obtain lawful release from the bonds of matrimony.²⁰⁸ Furthermore, the Court refused to extend *New York Times* protection to all reports of judicial proceedings; even if narrowed to reports of what actually transpires in a courtroom, application of the *New York Times* privilege would sweep too broadly, because "the details of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues"²⁰⁹ Although the Court conceded that some participants in some litigation may be legitimate public figures, either generally or for the limited purpose of press coverage concerning the litigation,²¹⁰ the majority will resemble hapless Mary Alice Firestone, "drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others."²¹¹

The *Firestone* decision was not only a particularly dramatic narrowing of the public figure concept, but it was also a severe dilution of the negligence concept in *Gertz*, because the alleged libel of which *Time* was guilty involved at best a trifling legalistic error. The trial judge had in fact stated that there was testimony that both Firestones had engaged in frequent extramarital sex, and that some of Mary Alice Firestone's alleged activity "would have made Dr. Freud's hair curl."²¹² The only "falsehood" in the brief two-sentence article was that the grounds of the divorce were "extreme cruelty and adultery."²¹³ The trial court actually made no formal finding of adultery,

205. *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1974).

206. *Time* emphasized that Mrs. Firestone subscribed to a press clipping service that chronicled her media exposure and that she held several press conferences during the divorce proceeding in which she answered questions regarding the case. This evidence was offered to show that Mrs. Firestone voluntarily injected herself into a matter of public interest, thereby making her a limited public figure with regard to any statement on her divorce proceeding. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 n.3 (1976).

207. *Id.* at 453.

208. *Id.* at 454.

209. *Id.* at 457.

210. *Id.*

211. *Id.*

212. See *supra* text accompanying note 201.

213. 424 U.S. at 450.

even though adultery had been alleged in Russell Firestone's pleadings. Rather, the trial court made no finding at all as to the grounds for the decree.²¹⁴ The Florida Supreme Court concluded that the basis of the judgment was actually "lack of domestication of the parties," a ground *not pleaded and not theretofore recognized by Florida law*.²¹⁵

What, then, could possibly have been negligent about *Time's* assumption, an assumption that most qualified Florida lawyers probably would have made, that the only pleaded grounds recognized by Florida law at the time of the judgment—extreme cruelty and adultery—were in fact pleaded in the *Firestone* case? The answer offered by the Florida Supreme Court, which the United States Supreme Court was prepared to accept, was that *Time* had engaged in "flagrant" "journalistic negligence" because it had not realized that adultery could not possibly have been the basis of the decree, since Florida law prohibited an award of alimony to a wife found guilty of adultery, and Mary Alice Firestone had been awarded alimony.²¹⁶ Not only is this a hyper-legalistic view of negligence, it is duplicitous; *Time* was found guilty of negligence for not realizing that its interpretation of the judgment was inconsistent with then-existing Florida law, yet at the same moment *Time* was not permitted to defend itself on grounds that any alternate interpretation of the decree's basis (for example, "lack of domestication") *also* was inconsistent with then-existing Florida law. If one has any sense of fairness, this double standard view of negligence can also make hair curl.

From the perspective of Illinois law, the *Firestone* decision dramatically illustrates the divergent views taken by the United States Supreme Court and the Illinois Supreme Court. If one combines *Colson* with its doctrinal predecessor, *Farnsworth*, there is little room for doubt that if a married couple, as famous in Illinois as were the Firestones in south Florida, became involved in a bitter divorce in the Circuit Court of Cook County, resulting in a legally ambiguous judgment, the *Chicago Tribune* or *Chicago Sun-Times* could expect that as a matter of Illinois law an actual malice standard would apply to news reports concerning the grounds for the judgment.

2. *Wolston v. Reader's Digest*.—*Wolston v. Reader's Digest Association, Inc.*,²¹⁷ involved a book written by John Barron and published by the Reader's Digest Corporation entitled *KGB, The Secret Work of Soviet Agents*. The book described Soviet espionage efforts since World War II. One segment chronicled a 1957-58 New York City grand jury investigation into Soviet intelligence activities in the United States. *Wolston* was subpoenaed by the grand jury after his aunt and uncle pled guilty to charges of

214. See *supra* note 201 and accompanying text.

215. Lack of domestication was not one of the nine grounds for divorce under the Florida divorce law governing this suit. "To grant a divorce on the ground of lack of domestication would in effect create a tenth ground for divorce under Florida law and would be an improper invasion of the legislative province." *Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972).

216. 305 So. 2d at 178.

217. 443 U.S. 157 (1979).

espionage.²¹⁸ After appearing before the grand jury on several occasions, Wolston ignored a subpoena requiring him to appear before the grand jury on July 1, 1958 and subsequently pled guilty to a charge of criminal contempt.²¹⁹ Wolston's episode with the grand jury investigation and his subsequent conviction for criminal contempt resulted in fifteen newspaper articles in New York and Washington, D.C.²²⁰ Furthermore, Wolston was mentioned in two publications concerning Soviet espionage activities prior to the *KGB* book. In *My Ten Years as a Counterspy*, a former confederate of Wolston's convicted uncle wrote that the uncle had identified Wolston as a Soviet intelligence agent.²²¹ Also, Wolston was classified in an external FBI report as among those "the F.B.I. investigation resulted in identifying as Soviet intelligence agents."²²²

Sixteen years after the grand jury probe into Soviet intelligence activities, Mr. Barron's book was published by the defendant. The *KGB* book listed the plaintiff as being among a group of "Soviet agents identified in the United States," and further stated that those in the list were "Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution."²²³ Wolston sued Reader's Digest Corporation, claiming that the charges made in the *KGB* book were false and defamatory. The trial court, in a decision affirmed by the Court of Appeals for the District of Columbia, held that Wolston was a "public figure"²²⁴ and that the actual malice standard of *New York Times* therefore applied.²²⁵ The trial court found that although the book erroneously implied that Wolston had been indicted for espionage, there was nonetheless "no genuine issue with respect

218. *Id.* at 161-62.

219. *Id.* at 162-63.

220. *Id.* at 163.

221. *Id.* at 163 n.6.

222. *Id.* (quoting S. Doc. No. 114, 86th Cong., 2d Sess., 24, 26-27 (1960)).

223. *Id.* at 159.

224. 578 F.2d 427, 429-31 (D.C. Cir. 1978). The district court found that Wolston was "a public figure for the limited purpose of comment on his connection with, or involvement in [Soviet] espionage in the 1940's and 1950's." 429 F. Supp. 167, 176 (D.D.C. 1977). In affirming this finding of law, the appellate court declared:

By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. . . . The reference to him in *KGB* related strictly to those issues, without intruding into his personal life or affairs.

578 F.2d at 431.

The court went on to note that although *KGB* was published 16 years after the grand jury investigation into Soviet espionage, the issue of public impact raised by that investigation "continue[d] to be a legitimate topic of debate today . . . [because] [t]he mere lapse of time is not decisive." *Id.*

225. *Id.* at 429.

to the existence of actual malice" on the part of the defendants.²²⁶

The United States Supreme Court reversed, holding that Wolston was not a public figure within the meaning of *Gertz* and that it was therefore wrong to apply the actual malice standard to Wolston's claim.²²⁷ Wolston, the Court noted, was clearly not a "general public figure" under *Gertz*, because he had achieved no general fame or notoriety and had assumed no role of special prominence in the affairs of society as a result of his contempt citation or his connection with the grand jury investigation into Soviet spy activity.²²⁸ Moreover, the Supreme Court explicitly rejected the lower courts' holdings that Wolston was a "limited public figure,"²²⁹ a concept articulated in *Gertz*,²³⁰ to whom the *New York Times* test would apply for the limited purpose of comment on his connection to or involvement with the Soviet espionage activities that precipitated the New York federal grand jury inquiry.²³¹ Since Barron's book dealt only with Wolston's link to the Soviet espionage world, why should the actual malice test not shield Barron from liability when that same linkage already had resulted in Wolston's mention in fifteen newspaper articles, one other book, and an official public FBI report?²³² At the very least, it seems that Wolston's refusal to appear before the grand jury, and his subsequent plea of guilty to contempt charges, qualified him as having involved himself purposefully in a matter of

226. In making his allegedly defamatory statements about Wolston, Barron relied upon an FBI report. As the district court observed, Barron was justified in relying upon the FBI report for several reasons. First, since the FBI is one of the best investigative agencies in the world, its investigative skill and resources far exceed any that could possibly have been available to Barron. Secondly, proof of the report's reliability and validity manifested itself when eight of the ten individuals identified in the report as Soviet intelligence agents pled guilty and were convicted of espionage, while the ninth was declared *persona non grata* and left the country. Finally, the court noted that the research done by Barron while writing his book never revealed any evidence that Wolston objected to the statements made about him in the FBI report. *Id.* at 434.

227. 443 U.S. at 163-69.

228. *Id.* at 165.

229. *Id.* at 166.

230. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974). For a further discussion of the limited public figure concept, see generally Comment, *The Constitutional Law of Defamation—Recent Developments and Suggested State Court Responses*, 33 ME. L. REV. 371 (1981); Note, *Whither the Limited Purpose Public Figure?*, 8 HOFSTRA L. REV. 403 (1980); Note, *Libel-Creation and Resurrection of a Limited Purpose Public Figure as a Prerequisite to the Application of the New York Times Actual Malice Standard*, 8 N. KY. L. REV. 647 (1981); Note, *Libel Becomes Viable: The Narrow Application of Limited Public Figure Status in Current Defamation Law*, 7 OHIO N.U.L. REV. 125 (1980).

231. In the district court's opinion, *Gertz* developed two principal considerations that determine whether a person qualifies as a limited-issue public figure. First, the plaintiff must have become involved in a public controversy. If he or she has not done so, the first amendment interest at stake is insubstantial. Second, the plaintiff's involvement in the controversy must have been in some sense voluntary as well as significant. 429 F. Supp. 167, 175 (D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. 1978), *rev'd*, 443 U.S. 157 (1979).

232. See *supra* notes 217-20 and accompanying text.

legitimate public interest, thereby inviting attention and comment regarding the espionage investigation.

The Supreme Court's refusal to accept this argument demonstrates its drastically "limited" view of the "limited public figure." The Court heavily emphasized the fact that Wolston had been "dragged unwillingly" into the controversy surrounding the KBG's presence in the United States, rather than having "voluntarily thrust" or "injected himself into the forefront" of public attention.²³³ There was no "controversy" about espionage into which Wolston could have thrust himself, the Court noted, "because all responsible United States citizens understandably were and are opposed to [espionage]."²³⁴ This is a facially spurious argument, because it would limit public figures to persons involved in public *disputes*, as opposed to persons involved in significant or dramatic public events. John Hinckley, Jr., for example, would not qualify as a public figure merely for having shot President Ronald Reagan, because the assassination attempt was not a matter of "public controversy," since "all responsible United States citizens understandably were and are opposed to" presidential assassination. John Hinckley, Jr., would become a public figure, however, after his acquittal on attempted murder charges by reason of insanity, since the insanity defense is an issue over which Americans are divided. This distinction is ludicrous. It rests on a hypertechnical construction of the term "controversy" and only treats *debate* as a matter of first amendment concern, thereby eliminating a plethora of issues and events such as crime and violence that are subjects of profound concern and for which full first amendment protection is vital—whether or not "all responsible United States citizens" are opposed to them.

The Supreme Court's decision that Wolston's involvement in the controversy (assuming one did exist) over Soviet espionage was totally "involuntary" is similarly flawed in its restrictiveness. It is true, of course, that Wolston did not intentionally invite the FBI and the grand jury to investigate his connection with serious criminal activity. No one ever does. But how can the fact that Wolston did not "voluntarily thrust himself" before the grand jury be a legitimate factor in the analysis? The whole point of Barron's book, of the newspaper stories about Wolston, and of the grand jury investigation, was that Wolston and others like him were in some way implicated in spying against the United States on behalf of the Soviet Union. Spies are supposed to be secretive and not invite attention to their surreptitious activity—that is what makes them spies. Under the *Wolston* Court's analysis, a good Soviet agent is entitled to better protection from media investigation than a bad one, because the good agent has not been caught. Even when the official authority of the United States is brought to bear on an alleged agent, that agent is entitled to private figure status in any

233. *Wolston*, 443 U.S. at 166.

234. *Id.* at 166 n.8.

media reports concerning the arrest or investigation because, prior to being investigated, he or she (like any self-respecting spy) led a "private life." The *Wolston* Court, however, specifically rejected the view that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."²³⁵ That rejection is wrong and short-sighted, since it equates, in the context of crime, the *Gertz* requirement of "voluntariness" for limited public figures as voluntariness *in being caught and convicted* rather than voluntariness in committing the crime itself. Furthermore, Wolston voluntarily refused to appear before an extremely important and obviously "public" body—a special federal grand jury—and he voluntarily pled guilty and was sentenced for that failure in a court of law, another obviously public institution.²³⁶ That Wolston did not wish these unhappy events upon himself and did not seek media attention from them does not vitiate their substantial social importance, nor does it undercut the critical need for first amendment breathing space in response to them.

What seemed to bother the Supreme Court in *Wolston* was the fact that Barron's book charged Wolston with being an "indicted" Soviet agent, when in fact Wolston was a relatively minor figure in the 1957-58 Soviet espionage investigation who was never indicted for the crime of espionage itself.²³⁷ As much as the author and the publisher emphasized the critical importance of Soviet espionage as a public issue, the Supreme Court rejoined that it was not the *issue* but the *person* that was dispositive,²³⁸ and Wolston was only a small player in the public events that transpired. Wolston was, in the Court's view, plainly sympathetic—a person only tangentially related to an investigation into Soviet espionage and an individual whose worst known crime was contempt of court. The Court seemed to be moved by a notion that the libel was disproportionate to "the crime." In effect, *Wolston* is the Court's message that when an author embarks on a subject that can be seriously defamatory (such as espionage), and "innocent" persons are erroneously accused, the *New York Times* standard will not apply unless the person defamed plays a major role in the subject matter and virtually

235. *Id.* at 168.

236. The Court was, however, consistent with its decision in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), in which it held that most litigants are "drawn into a public forum largely against their will in order to obtain the only redress available to them or to defend themselves against actions brought by the State or by others." 424 U.S. at 457. For an analysis and critique of the *Firestone* decision, see *supra* notes 199-216 and accompanying text.

237. 429 F. Supp. 167, 179 (1977). Although Barron's claim that Wolston was an indicted Soviet spy was inaccurate, the district court concluded that Barron's reliance on an FBI report for the source of the information was acceptable; he did not have to check the FBI's source(s) for their accuracy.

238. The Court reiterated its rejection of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), a case that implied that the actual malice standard should extend to defamatory falsehoods directed to *any* person if the statements relate to the issue of public importance. See *Wolston*, 443 U.S. at 167-68.

"mounts a rostrum" to proclaim that role *prior* to drawing initial media attention.²³⁹ This message unfortunately puts the cart before the horse, because it confuses the questions of ultimate liability under *New York Times*—how "false" was the publication and was its falsity intended or was it the product of recklessness—with the question of whether *New York Times* should apply in the first instance. The Court's proportionality concept, however, is sensible; in assessing the issue of recklessness (or negligence), it is perfectly proper to require a greater burden of care as the gravity of the harm increases.²⁴⁰ The worse the accusation, the less cavalier the reasonable person should be in making it. To insure that an accusation will not be considered reckless, greater diligence in investigation may be required

239. See *Wolston*, 443 U.S. at 169-70 (Blackmun, J., concurring). Justice Blackmun, although agreeing with the majority that *Wolston* was not a public figure within the context of the immediate dispute, criticized the Court's construction of the "limited-issue public figure" class of plaintiffs. Rather, Justice Blackmun asserted that "I believe that the lapse of the intervening 16 years renders consideration of the petitioner's original public-figure status unnecessary. . . ." *Id.* at 170.

240. Under Judge Learned Hand's familiar *Carroll Towing* algebra, liability depends on whether the burden sustained by the defendant in protecting against possible injury is less than the potential injury caused by the defendant's action multiplied by the probability of the injury occurring. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Whatever standard one adopts on the continuum of fault—from negligence to recklessness to intentional misconduct—ultimately some comparison of the gravity of the harm, discounted by its probability, to the burden of further precaution must be made. In the defamation context, an assessment of the publisher's burden of precaution should include the actual "cost" of further investigation about the truth of the allegations, as well as the "cost" of delaying the speech. For example, some news items may be so "hot" that almost immediate publication without careful verification is perfectly reasonable. In assessing the other side of the equation, the injury multiplied by its probability are factors that will be influenced heavily by the harmfulness and the inherent plausibility of the accusation. There is a greater duty to investigate (thus increasing the burden) as the accusation becomes more damaging, and also, as the likelihood of its truth decreases. The Supreme Court has held, however, that in applying the "recklessness" half of the *New York Times* standard, the mere failure to investigate a story before publishing it when a reasonably prudent publisher would have so investigated it is not recklessness for first amendment purposes. *St. Amant v. Thompson*, 390 U.S. 727 (1968). Instead, there must "be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. Yet, the *St. Amant* standard does not preclude traditional *Carroll Towing*-type assessments of fault in *New York Times* cases. Rather, it utilizes precisely those traditional tort law variables that Judge Hand identified. *St. Amant* simply made it clear that there must be a substantial imbalance in the fault equation against the defendant publisher before his or her conduct will be labeled "constitutionally reckless." Thus, the *St. Amant* Court noted that mere protestations by the defendant that he or she subjectively believed a story was true do not insulate the defendant from liability; the trier of fact must still find the protestations believable. *Id.* at 732. The Court noted that professions of good faith will not be persuasive when the story is fabricated by the defendant, is a product of his imagination, or is based wholly on an unverified, anonymous telephone call. *Id.* More importantly, the Court recognized that claims of subjective innocence will not be convincing "when the publisher's allegations are so *inherently improbable* that only a reckless man would have put them in circulation . . . [or] where there are obvious reasons to doubt the veracity of the informant on the accuracy of his reports." *Id.* (emphasis added).

before accusing someone of spying for a foreign power, rather than of being cruel to his cat. In applying the proportionality concept, however, the status of the plaintiff as either a private person or a public figure must be divorced from the calculation of fault; the *Wolston* Court's transparent skipping ahead to peek at the merits is indefensible.

Again, it is striking to contrast the United States Supreme Court and Illinois Supreme Court approaches. Certainly Doctor Farnsworth did not invite public scrutiny resulting in the newspaper investigation into her medical practice; the fact that the muckraking efforts that led to the *Chicago Tribune* article about her were unsolicited did not deter the Illinois Supreme Court from deciding that an actual malice standard should apply.²⁴¹ Similarly, "medical quackery" is not an issue about which reasonable Illinoisans differ—everyone is against it—but that did not dissuade the Illinois court from holding, and rightly so, that the exposure of dubious medical practices is a matter of legitimate public interest.²⁴²

3. *Hutchinson v. Proxmire*.—*Hutchinson v. Proxmire*²⁴³ involved a suit brought by Ronald Hutchinson, an adjunct professor at Western Michigan University and the Director of Research at Kalamazoo State Mental Hospital in Michigan, against William Proxmire, a United States senator from Wisconsin, and Proxmire's legislative aide. In 1975, Proxmire invented a mock prize that he termed the "Golden Fleece of the Month Award." Acting as a sort of self-appointed vigilante against wasteful federal spending, Proxmire awarded the "Golden Fleece" to persons or agencies that he perceived as being implicated in egregious episodes of wasteful or frivolous governmental spending.²⁴⁴ In April, 1975, the Golden Fleece was awarded jointly to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research for spending over \$500,000 during a seven-year period to fund Dr. Hutchinson's research.²⁴⁵ Hutchinson's research involved the study of patterns of emotional behavior of certain animals, such as the clenching of jaws by primates when exposed to irritating or stressful stimuli. Proxmire ridiculed federal spending on such research in a speech and press release that belittled Hutchinson's work:

The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaws. It seems to me it is outrageous.

Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

It is time for the Federal Government to get out of this "monkey business." In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time

241. *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 291, 253 N.E.2d 408, 411 (1969).

242. *Id.* at 291-92, 253 N.E.2d at 411.

243. 443 U.S. 111 (1979).

244. *Id.* at 114.

245. *Id.*

we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer.²⁴⁶

If monkeys could study humans they might find the events fomented by Proxmire's speech more interesting than anything human scientists have yet learned about monkeys; the pompous pontifications and narrow-minded puns of the senator were exceeded only by the lack of humor and thin skin of the senator's victim. Legitimate doubts can be raised as to whether the law of defamation was ever intended to facilitate the expenditure of substantial social resources in the resolution of such an inane and petty dispute; the case, nonetheless, reached the Supreme Court. Most of the Supreme Court's opinion involved the determination that Proxmire was not absolutely shielded from liability under the speech or debate clause of the United States Constitution,²⁴⁷ and is of no concern in understanding the implications of the recent Illinois decisions on defamation law. The Supreme Court did, however, deal secondarily with Proxmire's argument that he was entitled to the benefit of the *New York Times* actual malice standard because Hutchinson was a "limited public figure" for the purpose of commentary on his publicly funded research.²⁴⁸ Hutchinson, after all, had voluntarily applied for federal funds, and reports of his successes in obtaining federal grants appeared in local newspapers and scientific journals.²⁴⁹ Furthermore, Hutchinson was not without access to the media; some newspapers and wire services reported Hutchinson's response to the Golden Fleece Award.²⁵⁰

The Supreme Court found, however, that Hutchinson was not a public figure within the narrowed meaning of that term after *Firestone* and *Wolston*. Repeating the familiar bootstrap argument,²⁵¹ the Court noted that Proxmire could not turn Hutchinson into a public figure by virtue of Proxmire's own allegations, because that would permit a defendant to create a public figure defense through the defendant's own conduct.²⁵² Pointing to *Wolston's* emphasis on the term "public controversy" as limited to matters of public debate, the Court noted that Hutchinson did not thrust himself into the public eye "to influence others."²⁵³ General concern about public expenditures, even large ones, was not enough, in the Court's view, to activate the *New York Times* test, because that would implicate the taboo of *subject matter* classification, and ignore the public figure/private figure compromise struck in *Gertz*.²⁵⁴ *Hutchinson's* significance lies in the decision's reaffirmation of the Court's restricted interpretation of the public figure classification. As such,

246. 121 CONG. REC. 10,803 (1975) (quoted in *Hutchinson v. Proxmire*, 433 U.S. at 116).

247. U.S. CONST. art. I, § 6, cl. 1; see 443 U.S. at 123-33.

248. See *Hutchinson*, 433 U.S. at 133-36.

249. *Id.* at 115 n.119.

250. *Id.* at 134.

251. For a discussion of the bootstrap argument, see *supra* notes 66-70 and accompanying text.

252. 433 U.S. at 135-36.

253. *Id.*

254. *Id.*

it represents a departure from the Illinois Supreme Court's liberal construction of what constitutes a public figure deserving of higher protection from defamation plaintiffs.

c. Transforming the Public Figure Concept in Illinois

The orthodoxy after *New York Times* was that many of the rules formerly applied to conditional (or qualified) privileges under the common law had been preempted by the constitutional privilege recognized in *New York Times*,²⁵⁵ thereby rendering the conditional common law privilege doctrines largely obsolete.²⁵⁶ This orthodox vision, however, grew out of a period in which the Supreme Court's jurisprudence was characterized by an expansion of first amendment protection for defamatory utterances at the expense of reputational interests. Consequently, the perceived obsolescence of common law privileges was the product of a conviction that the *New York Times* decision would inevitably expand privilege concepts beyond what the common law had ever contemplated. Constitutional privilege was regarded as the animated sphere of defamation law; it would be through the progressive evolution of a public interest approach to the constitutional privilege that free speech values would achieve fruition. In an almost nostalgic way, the Illinois Supreme Court in *Colson* pays tribute to that once lively vision of the *New York Times* case, noting that "[s]ince . . . *New York Times* . . . a large area of the law concerning privileges has been taken over and altered by first amendment constitutional considerations."²⁵⁷ Apparently oblivious to cases such as *Gertz*, *Firestone*, *Wolston*, and *Proxmire*, the *Colson* court proclaimed that "[a]s a result, the scope of the privileges in the law of defamation has been broadened beyond that within which they had previously been recognized."²⁵⁸ It is telling that the court's authority for treating the *New York Times* case as the harbinger of a new era of public interest privileges was Dean Prosser's 1971 textbook, *Handbook on the Law of Torts*,²⁵⁹ a text written in the *Rosenbloom* era—well before the United States Supreme Court rejected any public interest approach to defamation law in *Gertz*, *Firestone*, *Wolston* and *Proxmire*.

When the United States Supreme Court was "progressive" in emphasizing first amendment values over reputational values, it was true that the constitutional jurisprudence spawned by *New York Times* had a liberalizing effect on state defamation law.²⁶⁰ Today, however, the Supreme Court is

255. For a discussion on the constitutional privilege enunciated in *New York Times*, see *supra* note 12 and accompanying text.

256. See PROSSER, *supra* note 4, § 118, at 819.

257. *Colson v. Stieg*, 89 Ill. 2d 205, 209, 433 N.E.2d 195, 247-48 (1982).

258. *Id.* at 209, 433 N.E.2d at 248.

259. PROSSER, *supra* note 4, § 118, at 819.

260. One manifestation of this liberalizing effect was the application of actual malice or gross negligence standards to private figure plaintiffs when the subject of the allegedly defamatory statement is one of public concern. See, e.g., *Walker v. Colorado Springs Sun, Inc.*, 188 Colo.

actively opposed to the enhancement of first amendment principles at the expense of protection of reputation; indeed, the Court reacts against to any hint of *Rosenbloom's* public interest concept in lower court opinions.²⁶¹ Nothing seems to hurt a defendant more in Supreme Court litigation than an allusion to the fact that the allegedly defamatory speech involved a matter of "public interest"; the very mention of the phrase seems to conjure up horrible memories of the heretical *Rosenbloom* era. Like a red flag gyrating before a bull, the public interest theory provokes a head-long charge by the Court to eliminate the applicability of the actual malice standard in the case before it.²⁶²

In response to the Court's recent defamation jurisprudence, several state supreme courts, including the Illinois Supreme Court, are more solicitous of free speech values than the Burger Court. They are more sensitive to the recognition that valid assessments of a plaintiff's status as public or private must necessarily take into consideration the context in which the speech was uttered.²⁶³ In an ironic turn of legal and cultural history, the progeny of *New York Times* now acts as a stultifying force on the natural evolution of the common law of defamation. As the Supreme Court becomes even more niggardly in its constriction of the term "public figure," it threatens to contract the scope of common law privileges below the level at which they existed before the law of defamation became constitutionalized. For those states that never cared much for the *New York Times* decision in the first place, this retrogression is welcome; many state supreme courts will be content to let their common law privileges implode in a sort of lockstep movement with the Burger Court's constriction of the public figure test created in *Gertz*. Illinois, however, is clearly not about to become a participant in this rearward march. *Colson* is therefore best understood as a confused and ambiguous, but nonetheless determined, effort by the Illinois Supreme Court to allow Illinois law to progress toward enhanced free speech values in contradistinction to the *Firestone*, *Wolston* and *Proxmire* line of federal Supreme Court decisions.

What is critically important, however, is that both bench and bar in Illinois realize that this new movement is exclusively a movement of state law; it may borrow from first amendment thinking of the *Rosenbloom* variety, but it is independent of that line of thought. In short, it is a return to the use of a case-by-case evolution of common law privileges, an evolution that

86, 96, 538 P.2d 450, 457 (1975) (actual malice); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 679, 321 N.E.2d 580, 586 (1975) (actual malice); *LeBoeuf v. Times Picayune Publishing Corp.*, 327 So. 2d 430, 431 (La. Ct. App. 1976) (actual malice); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (gross negligence).

261. For instance, in *Wolston* the wrath of the Supreme Court fell upon the lower courts' public interest analysis. For a discussion of the Supreme Court's complete rejection in *Wolston* of a public interest analysis for defamation law, see *supra* notes 227-32 and accompanying text.

262. See *supra* text accompanying notes 207-11, 227-34, and 243-54.

263. See *Developments in the Law*, *supra* note 100, at 1404-06.

had stopped in the interlude between *New York Times* and *Gertz*, but is once again appropriate. If *Colson* is not so understood, whatever offspring it spawns will be subject to the type of reversal that occurred in Ohio in the *Zacchini* decision.²⁶⁴ Therefore, contrary to what was said in *Colson* about the relationship between the common law and the first amendment,²⁶⁵ today, at least in Illinois, it is the common law privilege concepts that supply the leading edge, leaving the United States Supreme Court's post-*Gertz*, first amendment cases largely irrelevant.

The Illinois Supreme Court's rethinking of the public figure concept in *Colson* entailed two elaborations on ideas contained in *Gertz*, one involving a normative judgment about the types of persons who may be properly held to have assumed the risk of heightened public scrutiny, and the other a more pragmatic judgment concerning the types of persons best equipped to counter defamatory statements through their own rebuttals. *Colson* transformed these two concepts in a manner that made them more applicable to the communications of everyday life.

The first rationale that the United States Supreme Court utilized to support its decision in *Gertz*, and the rationale that was reemphasized in *Firestone*, *Wolston*, and *Proxmire*, was the normative judgment that he who seeks fame must accept some of its slings and arrows.²⁶⁶ There is a certain traditional justice to forcing those who voluntarily enter the public arena to accept heightened public scrutiny and the greater risk of reputational attack as *quid pro quo*.²⁶⁷ National or local political controversies are by no means the only significant arenas in life, however, and most Americans constantly inject themselves into controversies that intimately affect their daily lives. Workplaces, schools and churches are among the myriad institutions in which disputes constantly arise, and the ordinary citizen is frequently involved voluntarily in expressing views involving both fact and opinion within the context of those institutions. Consequently, *Colson* implicitly recognizes that robust exchanges of information are vital to the functioning of such institutions, and that it is equitable to force those who participate in such institutional controversies to be subject to the enhanced risk of defamation by others within the context of that voluntary action—as long as the “audience” to which the defamatory speech is aimed also is limited to the same contextual setting.²⁶⁸ This is the essence of *Colson*'s “context public figure” concept.

264. For an analysis of the Supreme Court's reversal of the Ohio Supreme Court's decision in *Zacchini* on grounds that the federal constitution was not violated by the televising of *Zacchini*'s act, see *supra* notes 170-75 and accompanying text.

265. See *supra* notes 29-49 and accompanying text.

266. As the Court stated in *Gertz*, “the communications media is entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

267. Cf. *Gertz, id.* at 344 (“An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.”).

268. See *supra* notes 42-46 and accompanying text.

The second of the two primary analytical props for *Gertz* was the supposition that public officials and public figures enjoy a greater access to channels of communication than do ordinary citizens.²⁶⁹ Because public officials and public figures have a more realistic opportunity to parlay their fame into media access, they are more likely to be able to engage in "self-help" by countering the defamatory speech with their own speech, published through the same media channels as the original falsehood.²⁷⁰ The "context public figure" concept as developed in *Colson* accepts this analytical prop of *Gertz*, but adjusts it to fit the realities of a more localized information market. Assistant Professor Colson, the court noted, had ample opportunity to present his own case before the very persons to whom the allegedly defamatory remarks were spoken.²⁷¹ Whatever effect Stieg's remarks may have had on those charged with evaluating Colson's career, the remarks were not made in a vacuum; Colson could offer his own counterspeech as well as appeal the initial decision of the department's personnel committee to a university-wide forum.²⁷²

There is an unspoken interplay in *Colson* between Colson's opportunity to meet the impact of the allegedly defamatory remarks and the doctrines of procedural due process that constrain the decision of a state university not to grant an assistant professor tenure and promotion. Under the Supreme Court's landmark decisions in *Board of Regents v. Roth*²⁷³ and *Perry v. Sinderman*,²⁷⁴ a nontenured professor at a state university is not entitled to any federal due process protection by university tenure and promotion committees unless the professor can demonstrate a state-created entitlement to continued employment.²⁷⁵ Without engaging in an elaborate review of the

269. *Gertz*, 418 U.S. at 344. Ironically, the *Gertz* Court noted that "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Id.* at 344 n.9.

270. *Id.* at 344.

271. *Colson v. Stieg*, 89 Ill. 2d at 205, 214, 433 N.E.2d 195, 249 (1982).

272. *Id.*; cf. *American Pet Motels v. Chicago Vet. Medical Ass'n*, 106 Ill. App. 3d 626, 435 N.E.2d 1297 (1st Dist. 1982). In an action by a pet boarding service and one of its officers against a veterinarian and a veterinary clinic for libel and slander, the defendants were protected by a qualified privilege because they had a legitimate interest in the allegations of unauthorized veterinary practices; it was their duty to report such unauthorized veterinary practices; the statements were made to a limited group of recipients; and good faith was shown.

273. 408 U.S. 564 (1972).

274. 408 U.S. 593 (1972).

275. *Roth*, 408 U.S. at 576; see also *Perry*, 408 U.S. at 593; cf. *Leis v. Flynt*, 439 U.S. 438 (1979) (attorneys deprived of no liberty or property interest when not permitted to represent defendants in an Ohio criminal prosecution, since there was no state or federal law establishing such an interest); *Montanye v. Haymes*, 427 U.S. 236 (1976) (due process clause did not require hearing regarding prisoner's transfer to another institution since prisoner had no justifiable expectation that he would not be transferred unless found guilty of misconduct); *Bishop v. Wood*, 426 U.S. 341 (1976) (police officer not deprived of a property or liberty interest when denied pretermination hearing and explanation for discharge); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (federal employee deprived of no property or liberty interest although denied full adversary hearing before his dismissal).

gloss that *Board of Regents v. Roth* has assumed,²⁷⁶ one can safely say that the state of Illinois provided Colson with all (and probably more) of the procedural due process to which he was entitled under the United States Supreme Court's decision in *Roth* and its progeny.²⁷⁷ Since the heart of Colson's *defamation* claim was that he was injured professionally by Stieg's remarks, it would be anomalous if Colson could force Northern Illinois University, through a defamation action, to abide by a higher standard of accuracy in reaching personnel decisions about nontenured faculty than the university would otherwise be subject to under mainstream doctrines of constitutional and administrative law.²⁷⁸ Doctrines of procedural due process and defamation would be working at cross-purposes if a state university's supervisory personnel could be in full compliance with state and federal procedural due process dictates in evaluating teachers for tenure and yet still be subject to a tort suit for defamation arising from the same conduct, without the benefit of any conditional privilege in the tort suit. *Colson*, therefore, embodies a sort of first amendment due process concept engrafted onto the common law of Illinois; it treats the conditional privilege concept as triggered, to a large degree, by the existence of built-in channels for counterspeech within the context of the environment that spawned the defamatory statements.²⁷⁹

Intimately tied into this counterspeech, self-help notion in *Colson* is the caveat that its conditional privilege is itself conditioned on restraining the publication of the speech to the "localized market" within which the speech is of vital interest. Thus, the *Colson* court indicated that "[i]f the defendant in our case would have published the statement in question to the public in general, it is possible that the plaintiff would not have had sufficient ac-

276. For a detailed review of *Roth* and its implications, see Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1983) [hereinafter cited as Smolla].

277. For a discussion of procedural due process in a *Roth*-type context, see 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 350-51 (1979); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 480-97 (1978); Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978); Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS, NOMOS XVIII 182 (J. Pennock & J. Chapman eds. 1977); Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS, NOMOS XVIII 126 (J. Pennock & J. Chapman eds. 1977); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Pincoffs, *Due Process, Fraternity, and the Kantian Injunction*, in DUE PROCESS, NOMOS XVIII 172 (J. Pennock & J. Chapman eds. 1977); Smolla, *supra* note 276; Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

278. For a discussion of the relationship between the existence of state tort remedies and federal due process requirements, see Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Co.*, 1982 U. ILL. L. REV. 831 (1983).

279. This aspect of *Colson* was emphasized heavily in an early appellate court decision applying *Colson*. See *American Pet Motels v. Chicago Vet. Medical Ass'n*, 106 Ill. App. 3d 626, 631-32, 435 N.E.2d 1297, 1301 (1st Dist. 1982).

cess to the channels of communication to overcome or offset the damaging effect of defendant's statement."²⁸⁰ Although the court did not state explicitly that such an excessive publication would constitute sufficient abuse of the qualified privilege, it strongly intimated that such would be the case.²⁸¹

This context public figure approach taken in *Colson* is not a concept unique to that decision alone. In addition to the obvious influences of *Farnsworth*,²⁸² a number of prior state appellate court decisions had interpreted Illinois common law in a manner consistent with *Colson*. For example, in *Korbar v. Hite*,²⁸³ the defendant wrote an article published in the *Aluminum Workers News* that implied that the plaintiff, president of the Employees' Credit Union, was incompetent and proclaimed that "he could care less" about the steel and aluminum workers' problems.²⁸⁴ The court held that the statements were protected by the *New York Times* actual malice standard because within the contours of the credit union's activities, the plaintiff was a public figure. Looking to the nature and extent of the plaintiff's involvement in the controversy that gave rise to the alleged defamation, the court noted that the plaintiff had thrust himself into the forefront of the dispute by virtue of running for and being elected president of the credit union.²⁸⁵ In so doing, the court found that he invited attention and comment within the institutional parameters in which the credit union operated.²⁸⁶ Consequently, the court held that the plaintiff must prove that the defendant acted with actual malice in writing the allegedly defamatory article.

Korbar is a sound opinion, because it is grounded in the common sense notion that proper conduct by the president of the workers' credit union is probably more critical to the average aluminum worker's daily livelihood and happiness than is proper conduct by the president of the United States. Just as importantly, the *Aluminum Workers News* is likely to be a far more significant informational source and forum for debate to that aluminum worker than is the *New York Times*. Unless the actual malice standard is intended to be an elitist standard shielding only the national corporate press, it seems obvious that to many hardworking people, localized trade or labor

280. 89 Ill. 2d at 214, 433 N.E.2d at 250.

281. The *Colson* court stated:

We make no assessment of the propriety of the use of the *New York Times* privilege [when the statement's publication is excessive] in such a situation. However, given the narrow extent of the publication in this case and the fact that the plaintiff had an opportunity for input to the committee and through appeal to have its decision reviewed by the University Council Personnel Committee, the reasoning of *Gertz*, *Wolston* and *Hutchinson* does not preclude applying the *New York Times* privilege in this case.

Id.

282. *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969); see *supra* notes 53-74 and accompanying text.

283. 43 Ill. App. 3d 636, 357 N.E.2d 135 (1st Dist. 1976).

284. *Id.* at 638, 357 N.E.2d at 136-37.

285. *Id.* at 641-42, 357 N.E.2d at 138-39.

286. *Id.* at 642, 357 N.E.2d at 139.

publications have just as strong a claim to first amendment protection as the *Wall Street Journal* or the *Washington Post*. "Uninhibited, robust, and wide-open" debate concerning mismanagement of a small town credit union is as important to most Americans as debate about mismanagement of the Federal Reserve Board. There are many people who voluntarily enter arenas of prominence in local communities and institutions—and those who enter them legitimately can be asked to accept the consequences of the attention they invite. Those who enter such decentralized "mini-public arenas" and thereby achieve some special prominence should be deemed public figures as long as the criticizing speech is limited to the boundaries of the arena.

Another Illinois appellate decision prior to *Colson* that employed a context public figure approach is *Johnson v. Board of Junior College District No. 508*.²⁸⁷ In *Johnson*, the defendants had allowed some students to publish a document that accused two teachers of breaking a booklist agreement entered into between the students and the teachers. The teachers sued the Board of Education, its members, and certain administrators and teachers of the college as publishers responsible for the alleged defamation.²⁸⁸ The appellate court affirmed the dismissal of the complaint, holding that the plaintiffs were public figures subject to the *New York Times* actual malice privilege.²⁸⁹ Though the teachers obviously were not public figures for all purposes, the court held that they had become public figures within the junior college community by their active participation in the controversy concerning the books to be used in university classes.²⁹⁰

The public interest concept has also permeated false light, invasion of privacy actions in Illinois.²⁹¹ In *Adreani v. Hansen*,²⁹² a municipality's park

287. 31 Ill. App. 3d 270, 334 N.E.2d 442 (1st Dist. 1975).

288. *Id.* at 276, 334 N.E.2d at 447.

289. 31 Ill. App. 3d 270, 334 N.E.2d 442.

290. A case similar to *Johnson* is *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 321 N.E.2d 739 (3d Dist. 1974), in which the plaintiffs were public high school teachers and athletic coaches. The court held that the plaintiffs were public figures when considered within the context of the high school and the surrounding community. "Public school teachers and coaches, and the conduct of such teachers and coaches and their policies," the court stated, "are of as much concern to the community as are other 'public officials' and 'public figures.'" *Id.* at 892-93, 321 N.E.2d at 742.

291. Illinois courts recognize invasion of privacy as a legitimate cause of action under the state's common law. See *Leopold v. Levin*, 45 Ill. 2d 434, 440, 259 N.E.2d 250, 254 (1970); *Eick v. Park Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1st Dist. 1952). Prosser classified invasion of privacy actions into a now classic four-part scheme: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) placing another in a false light in the public eye. PROSSER, *supra* note 4, § 117, at 804-14. For cases recognizing Prosser's classification of privacy actions under Illinois law, see *Cantrell v. American Broadcasting Companies, Inc.*, 529 F. Supp. 746, 756 (N.D. Ill. 1981); *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 133, 339 N.E.2d 274, 277 (1st Dist. 1975).

False light invasion of privacy is the most nebulous form of invasion of privacy. According to the Restatement (Second) of Torts, it consists of placing someone in a "false light" before the public in a manner that "would be highly offensive to a reasonable person." RESTATEMENT

district sought to acquire land from certain real estate developers. No agreement could be reached on the fair market value of the property, so condemnation proceedings were instituted. A letter, published in the editorial section of the local newspaper, expressed disgrace at seeing the village go to court on account of the developers' greed.²⁹³ The real estate developers sued the writer, alleging that the article invaded their right of privacy.²⁹⁴ In affirm-

(SECOND) OF TORTS § 652E (1977). Since its inception, the false light theory has had an uneasy relation to the tort of defamation. As Prosser points out, since by definition all actionable (untrue) defamatory speech puts plaintiffs in a "false light," the false light tort is arguably "capable of swallowing up and engulfing the whole law of defamation." PROSSER, *supra* note 4, § 117, at 813; *see also* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962) (discussing the relationship between false light invasion of privacy and defamation).

The only analytical difference between false light and defamation is that false light speech need not be defamatory—that is, injurious to reputation—in order to be actionable. To establish the tort of false light, the plaintiff only has to establish that the speech is "highly offensive." For instance, the speech might include praiseworthy, but nonetheless false, statements about someone; therefore, the speech may be objectionable to a reasonable person and therefore actionable under the false light theory. (In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the only false light case to reach the United States Supreme Court, members of the Hill family, who were held hostage in their own home, were depicted by a magazine article as more heroic and aggressive than they were in fact.) The relationship between false light and defamation is explained more fully in a comment to the Restatement (Second) of Torts:

Relation to defamation. The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity. It is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.

RESTATEMENT (SECOND) OF TORTS, § 652E comment b (1975). Due to the fact that false light and defamation are often duplicative, it is extremely important that in cases in which the two causes of action are interchangeable, plaintiffs not be permitted to avoid the matrix of constitutional and common law defenses that circumscribe defamation actions merely by labeling the action "false light." For example, the full range of constitutional and common law defenses now applicable to defamation actions in Illinois under the twin mandates of *Gertz* and *Colson* should apply to false light actions with undiminished force. Thus far, Illinois courts have been aware of this problem and generally have applied the type of public interest approach used in *Colson* to invasion of privacy actions. *See, e.g.,* *Adreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1st Dist. 1980); *Eick v. Park Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1st Dist. 1952); *see also* *Cantrell v. American Broadcasting Companies, Inc.*, 529 F. Supp. 746, 758 (N.D. Ill. 1981) (applying *Gertz* to false light action).

292. 80 Ill. App. 3d 726, 400 N.E.2d 679 (1st Dist. 1980).

293. *Id.* at 727, 400 N.E.2d at 681.

294. The plaintiffs claimed that, in addition to being defamatory, the article falsely depicted them as "ruthless businessmen who were attempting to secure undue sums of money from

ing the trial court's dismissal of the false light count, the appellate court found that the defendants had no cognizable privacy interest relative to matters concerning the condemnation dispute.²⁹⁵ The court stated that although the developers did not seek publicity actively, their negotiations with the park district and the local notoriety that those negotiations assumed made the developers public figures for the purpose of comment on the land acquisition dispute.²⁹⁶

Another case that seems to demonstrate adherence to the public interest concept in privacy actions is *Cassidy v. American Broadcasting Co.*,²⁹⁷ which involved a suit brought by an undercover policeman who was surreptitiously filmed while in a massage parlor by Channel Seven News in Chicago. In affirming the grant of summary judgment in favor of the defendants, the court held that the broadcasters were entitled to the actual malice standard because the policeman was discharging a public duty.²⁹⁸ The court held that while engaged in gathering and disseminating news concerning an official's discharge of his public duties, the press is protected under *New York Times* from privacy actions as well as libel actions.²⁹⁹

It must be emphasized that the context public figure concept should not be limited to speech within specific communities or institutions, but instead should be defined as extending to any definable specialized forum for discus-

the public." *Id.* at 730, 400 N.E.2d at 683. Thus, the plaintiffs alleged that this false light unduly invaded their privacy interests.

295. *Id.*

296. *Id.* at 726, 400 N.E.2d 679.

297. 60 Ill. App. 3d 831, 377 N.E.2d 126 (1979).

298. *Id.* at 838, 377 N.E.2d at 131. The court reasoned that the public has a legitimate interest in monitoring the conduct of a policeman while on duty because law enforcement is a primary function of local government. *Id.* Since an on-duty policeman is not a private citizen but rather a public official discharging a public duty, no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning the discharge of those public duties. *Id.* at 837-39, 377 N.E.2d at 131-32. For similar reasoning, see *Coursey v. Greater Niles Township Publishing Corp.*, 40 Ill. 2d 257, 264-65, 239 N.E.2d 837, 841 (1968).

299. 60 Ill. App. 3d at 837-38, 377 N.E.2d at 130-31. *Cassidy* is an interesting Illinois counterpoint to the Supreme Court's *Wolston* decision, in which alleged involvement in surreptitious anti-social behavior (spying for a foreign power), which was reported by a newsman, did not trigger the *New York Times* rule. In combination, the two decisions create the anomalous possibility that a person engaged in secretive illegal activity—a mafia figure, drug smuggler, or Soviet spy—only would have to prove negligence in an action for defamation or false light invasion of privacy, while the undercover government agent working in secret opposition to that person would have to prove *New York Times* malice. The following hypothetical illustrates the potentially absurd results of this approach. A concealed "action news mini-cam" films what appears to be a cocaine sale on a streetcorner, and the film is shown with commentary accusing the two principals of criminal activity. Unbeknownst to the broadcaster, the would-be seller is actually an undercover DEA agent trying to penetrate the higher levels of cocaine trafficking, and the other party is an underworld drug dealer. If the story ultimately turned out to be false and possibly defamatory (perhaps there was no drug deal actually made or discussed on that day), the underworld figure would have a much stronger privacy or defamation action than the agent, who would be encumbered by the *New York Times* barrier.

sion or debate about particular activities or issues.³⁰⁰ Just as antitrust cases often involve localized markets and submarkets for the purpose of determining anti-competitive effects, the public figure defense should involve a definition of the "marketplace of ideas" within which a particular person may validly be labeled a public figure. For example, when a context public figure approach was utilized by the United States Court of Appeals for the Fourth Circuit in *Time, Inc. v. Johnston*,³⁰¹ the sport of professional basketball formed the relevant "marketplace of ideas." *Sports Illustrated* published an article which quoted Boston Celtic coach Red Auerbach as saying that his star center, Bill Russell, had "destroyed" the career of Neil Johnston with his great ability to block opponents' shots.³⁰² In a libel action brought by Johnston, the court held that, despite the fact that Johnston had retired from professional basketball nine years prior to the publication of Auerbach's interview, he was a public figure for the limited purpose of ongoing discussion of his life as a professional basketball player.³⁰³ The court stated that the "mere passage of time will not necessarily insulate from the application of *New York Times v. Sullivan* publication[s] relating to the past public conduct of a then 'public figure' " if legitimate public interest still existed concerning his prior public life.³⁰⁴ Johnston's public figure status for the purposes of comment on his career as a professional basketball player remained undiminished.³⁰⁵

In sum, *Colson v. Stieg* represents the possible beginnings of a flexible approach toward determining the public figure status of a defamation plaintiff in Illinois. Rather than examine the societal status of the plaintiff in the abstract, *Colson* invites a more finely tuned assessment of the functional relationship between the speaker, the listener, the person allegedly defamed, and the content of the speech itself. If understood as an injection of liberal first amendment jurisprudence into the ongoing development of Illinois state law, *Colson's* context public figure approach is a sensible accommodation of reputational and free expression interests.

III. *CHAPSKI V. COPLEY PRESS*: REJECTION OR REAFFIRMATION OF THE INNOCENT CONSTRUCTION RULE?

A. *The Development of the Innocent Construction Rule in Illinois*

In *Chapski v. Copley Press, Inc.*,³⁰⁶ the Illinois Supreme Court purportedly "modified" the innocent construction rule,³⁰⁷ a rule of interpretation that

300. See *supra* notes 217-42 and accompanying text.

301. 448 F.2d 378 (4th Cir. 1971).

302. *Id.* at 379. Johnston was an exceptional professional basketball player who played for the Philadelphia Warriors. After he retired, he accepted a position as an assistant basketball coach at Wake Forest University in North Carolina. *Id.*

303. *Id.* at 380-81.

304. *Id.* at 381-82.

305. *Id.* at 382-85.

306. 92 Ill. 2d 344, 442 N.E.2d 195 (1982).

307. *Id.* at 351-52, 442 N.E.2d at 198-99.

defines defamatory language in a given situation. The rule had been the object of judicial confusion³⁰⁸ and repeated criticism.³⁰⁹ In order to assess the impact of *Chapski* on the innocent construction rule, a review of the development of the rule in Illinois prior to *Chapski* is essential.

1. John v. Tribune Co.

The innocent construction rule originated as obiter dictum in *John v. Tribune Co.*³¹⁰ In *John*, Eve Spiro John brought a libel suit against the Tribune Company predicated on a newspaper article that reported the results of a police raid in her apartment building. The article stated that Dorothy Clark, also known as "Dolores Reising, 57, alias Eve Spiro and Eve John," a former girlfriend of the notorious gangster Tony Accardo, had been arrested for "being keeper of a disorderly house and selling liquor without a license."³¹¹ The plaintiff, Eve John, whose maiden name was Eve Spiro, lived in an apartment below that of the woman who had in fact been ar-

308. See, e.g., *Rasky v. CBS, Inc.*, 103 Ill. App. 3d 577, 431 N.E.2d 1055 (1st Dist. 1981) (suit dismissed because reference to plaintiff as "slumlord" was capable of innocent construction and did not impugn plaintiff's professional fitness as lawyer and real estate operator); *Newell v. Field Enters., Inc.*, 91 Ill. App. 3d 735, 415 N.E.2d 434 (1st Dist. 1980) (newspaper article stating that the plaintiff chose to save a parrot rather than a woman from a fire lowered community respect for plaintiff and hence was not subject to an innocent interpretation); *Garber Pierre Food Prods., Inc. v. Crooks*, 78 Ill. App. 3d 356, 397 N.E.2d 211 (1st Dist. 1979) (attorney's letter accusing nursing home food supplier of "blackmail" and "extortion" not libelous per se because language could be construed as merely a criticism of supplier's policy decision regarding prices and delivery of goods to nursing home); *Makis v. Area Publication Corp.*, 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1st Dist. 1979) (newspaper article stating that the closing of a sky sailing school could have been attributed to accident, argument, or crime could be innocently construed because crime was only one of three given possibilities and therefore did not amount to libel per se regarding plaintiff's business reputation); *Bruck v. Cincotta*, 56 Ill. App. 3d 260, 371 N.E.2d 874 (1st Dist. 1977) (article suggesting that plaintiffs made building alterations without permit did not imply that plaintiffs committed a crime because failure to obtain permit was not an indictable offense); *Moricoli v. Schwartz*, 46 Ill. App. 3d 481, 361 N.E.2d 74 (1st Dist. 1977) (plaintiff nightclub singer had cause of action against defendants for calling him "fag," but plaintiff was required to prove actual damages); *Watson v. Southwest Messenger Press, Inc.*, 12 Ill. App. 3d 968, 299 N.E.2d 409 (1st Dist. 1973) (statement in article which referred to village mayor's ticket "fixing" could be innocently construed); *Delis v. Sepsis*, 9 Ill. App. 3d 217, 292 N.E.2d 138 (1st Dist. 1972) (letter describing plaintiff as a "liar," "dishonorable," and "deluded" was construed as mere name-calling and therefore could not damage plaintiff's reputation); *Lorillard v. Field Enters., Inc.*, 65 Ill. App. 2d 65, 213 N.E.2d 1 (1st Dist. 1965) (statement in newspaper article that plaintiff's former wife had initiated bigamy suit falsely implied plaintiff had committed a crime and thus was not susceptible of innocent construction) (cited in *Chapski v. Copley Press, Inc.*, 92 Ill. 2d at 348, 442 N.E.2d at 197 (1982)).

309. See, e.g., Polelle, *The Guilt of the "Innocent Construction Rule" in Illinois Defamation Law*, 1 N.I.U.L. REV. 181 (1981) [hereinafter cited as Polelle]; Symposium, *Libel and Slander in Illinois*, 43 CHI.-J.KENT L. REV. 1 (1966). Professor Polelle's article is the most comprehensive review of the innocent construction rule in Illinois to date.

310. 24 Ill. 2d 437, 181 N.E.2d 105, cert. denied, 371 U.S. 877 (1962).

311. *Id.* at 439-40, 181 N.E.2d at 106.

rested. The plaintiff alleged that both articles were "of and concerning her" because her name was Eve Spiro John.³¹²

The Illinois Supreme Court held that the Tribune Company had not defamed the plaintiff. In so doing, the court found that the aliases could not be read as referring to the plaintiff and, therefore, the plaintiff had failed to establish colloquium³¹³ as a matter of law.³¹⁴ The court went on to construe the parameters of the innocent construction rule as follows:

We further believe the language in defendant's articles is not libelous of plaintiff when the innocent construction rule is consulted. That rule holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law. Although this court has not heretofore expressed the rule, it has been adopted and applied by our Appellate Courts and by Federal Courts sitting in Illinois. Since both of the publications here are capable of being construed as referring only to Dorothy Clark-Dolores Reising as the keeper of the disorderly house, they are innocent publications as to the plaintiff.³¹⁵

From this inauspicious beginning in the Illinois Supreme Court, the innocent construction rule became a virtually insurmountable barrier to recovery by a plaintiff whenever an allegedly defamatory statement was susceptible to an innocent interpretation.

As conceded in *John*, the innocent construction rule had not theretofore been embraced explicitly by the court.³¹⁶ Arguably, the court previously adopted the *reasonable* construction rule; in determining the defamatory nature of words, allegedly defamatory statements are to be taken in their usual context and, if ambiguous, such statements are to be sent to the jury for determination of whether they were in fact understood as defamatory.³¹⁷ Whether the court was correct in asserting that the innocent construction rule had been adopted by the state appellate courts and the federal courts

312. *Id.* at 440-41, 181 N.E.2d at 106-07.

313. "Colloquium" is one of the usual parts of a complaint for defamation; it is an averment that the words complained of were "spoken of and concerning the plaintiff." BLACK'S LAW DICTIONARY 240 (5th ed. 1979).

314. 24 Ill. 2d at 442, 181 N.E.2d at 107-08.

315. *Id.* at 442-43, 181 N.E.2d at 108 (citations omitted).

316. *Id.* at 442, 181 N.E.2d at 108.

317. See, e.g., *Schmisser v. Kreilich*, 92 Ill. 347 (1879) (defendant's statement that plaintiff "had acted the whore" was reasonably equivalent to charging that plaintiff had been guilty of fornication or adultery and was actionable without colloquium or innuendo); *Barnes v. Hamon*, 71 Ill. 609 (1874) (defendant's statement that plaintiff had burned defendant's house could reasonably be construed as having charged plaintiff with committing arson and therefore was actionable); *Nelson v. Borchanius*, 52 Ill. 236 (1869) (defendant's statement that plaintiff trader was a "villain," "rascal," and "cheater," while not actionable per se, might be actionable when referring to a person in plaintiff's business) (cited in *Polelle*, *supra* note 309, at 186-200). This article does not purport to examine the wisdom or validity of the *John* decision based on prior precedent, or express any opinion on the approach adopted by precedent prior to *John*. For such a discussion, see *Polelle*, *supra* note 309, at 200-12.

applying Illinois law is uncertain.³¹⁸ In any event, *John* has since been viewed by the Illinois judiciary as precedent not only for applying the innocent construction rule to the issue of colloquium,³¹⁹ but also as precedent for ascertaining whether the words themselves are defamatory³²⁰ and whether the alleged libel or slander is actionable per se.³²¹

Despite its varying interpretations and applications, the overall impact of the innocent construction rule is to remove from the jury's consideration statements which are susceptible of an innocent as well as a defamatory interpretation—regardless of how unlikely or unreasonable the innocent interpretation might be.³²² If, according to the *John* court, allegedly defamatory words "that are capable of being read innocently must be so read and declared nonactionable as a matter of law," such words will never reach the jury's consideration.³²³

The primary flaw in the innocent construction rule is its illogical method for determining which statements are to be nonactionable as a matter of law and which are to be sent to a jury. Under the rule as applied in *John*, allegedly defamatory words capable of being read innocently must be so read and declared nonactionable by the judge as a matter of law. Therefore, only those statements which the court determines are incapable of any innocent construction are to be sent to the jury for a determination of whether they were understood to be defamatory. Under this procedure, however, if a judge determines that no innocent construction exists, there is nothing left for the jury to determine. In theory, though apparently not in actual practice, the plaintiff should then be entitled to judgment as a matter of law. Alternatively, the judge should be compelled to enter a directed judgment or judgment notwithstanding the verdict if the issue is submitted to the jury and the jury determines otherwise.³²⁴

318. See Polelle, *supra* note 309, at 205-10.

319. *Bravo Realty, Inc. v. CBS, Inc.*, 84 Ill. App. 3d 862, 406 N.E.2d 61 (1st Dist. 1980); *Belmonte v. Rubin*, 68 Ill. App. 3d 700, 386 N.E.2d 904 (1st Dist. 1979).

320. *Valentine v. North American Co.*, 60 Ill. 2d 168, 328 N.E.2d 265 (1974); *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 243 N.E.2d 217 (1968); *Wexler v. Chicago Tribune Co.*, 69 Ill. App. 3d 610, 387 N.E.2d 892 (1st Dist. 1979); *Kirk v. Village of Hillcrest*, 31 Ill. App. 3d 1063, 335 N.E.2d 535 (2d Dist. 1975).

321. *Makis v. Area Publications Corp.*, 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1st Dist. 1979).

322. See *supra* cases cited at note 308.

323. 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108; PROSSER, *supra* note 4, § 111, at 747-48. On the other hand, under the reasonable construction rule purportedly adopted in many pre-*John* cases, the court first determines whether the words reasonably may be understood to be defamatory; if so, the jury then determines whether the words were in fact defamatory to the plaintiff. If the words are susceptible only of a defamatory interpretation or only of a nondefamatory interpretation, the plaintiff or defendant, respectively, is entitled to prevail as a matter of law. See also *Beeson v. Gossard Co.*, 167 Ill. App. 561 (1912) (defendant's statement that plaintiff was an innocent "model" for corsets when plaintiff was lecturing on medical benefits of wearing a corset was capable of only one construction: statement was libelous per se and evidence of defendant's innocent intent was inadmissible).

324. See Polelle, *supra* note 309, at 214.

2. *Troman v. Wood*

Prior to the recent *Chapski* decision, two Illinois Supreme Court decisions intimated the court's possible discomfort with the doctrine it had cavalierly espoused in *John*. In *Troman v. Wood*,³²⁵ plaintiff Mary Troman brought a libel suit based upon the inclusion of a photograph of her house in an article on gang activities.³²⁶ The plaintiff alleged that the article and the picture, taken together, were understood by readers to mean that the plaintiff's home served as headquarters for the gang and that the plaintiff was somehow associated with the gang.³²⁷ In a quixotic attempt to distinguish *John*, the court reasoned:

In our opinion the reference to the plaintiff by name and the photograph of a house identified as her residence compel the rejection of defendant's contention. Unlike *John*, . . . no question arises here as to the identity of the person referred to by the article. Whether the article was in fact understood by readers to refer to the plaintiff might ultimately be a question for the jury, should there be controversy on that matter. But the preliminary determination whether the article is capable of being so understood is a question of law which must, upon the motion to dismiss in this case, be resolved in favor of the plaintiff. . . . We reach the same conclusion with respect to defendant's claim that the article is not defamatory of the plaintiff. If the article were read as meaning that the plaintiff allowed her house to be used as a headquarters for persons engaging in criminal acts or for storage of stolen goods, it can hardly be doubted that her reputation would be injured. Whether the article was in fact so understood is a question which must await the presentation of evidence.³²⁸

For analytical purposes, it is significant that the *Troman* court concluded that, for purposes of evaluating a motion to dismiss the complaint, the article *could* be understood as referring to the plaintiff only, obviating any further inquiry into the appropriate rule of interpretation. The court then remarked that should a "controversy" arise on whether the article was in fact understood as referring to the plaintiff, the issue "might" be left for the jury.³²⁹ Under either the reasonable construction rule or the innocent construction rule, the court would have been compelled to reverse the grant-

325. 62 Ill. 2d 184, 340 N.E.2d 292 (1976).

326. *Id.* at 188, 340 N.E.2d at 294.

327. *Id.*

328. *Id.* at 189, 340 N.E.2d at 294.

329. *Id.* Based on this section of the opinion, Professor Polelle has concluded that *Troman* distinguished *John* on the basis that the colloquium issue in *Troman* "presented a reasonable question of fact for the jury whether or not the plaintiff in that case was referred to by the allegedly libelous article, whereas the connection in the *John* case between the defamation and the plaintiff was too attenuated to be made by any reasonable jury." Polelle, *supra* note 309, at 203. More precisely, *Troman* distinguished *John* on the ground that while the colloquium issue in *Troman* was a question of law that had to be resolved in favor of the plaintiff on the motion to dismiss, the issue *might* present a question of fact for the jury if subsequently there should be "controversy" whether it was in fact understood as referring to the plaintiff. 62 Ill. 2d at 189, 340 N.E.2d at 294 (emphasis added).

ing of the defendant's motion to dismiss, given its finding that there was "no question" that the article referred to the plaintiff. Mere "controversy" or ambiguity, however, is not sufficient to put the issue of colloquium to the jury under *John*; ambiguous words must be given their innocent meaning and declared nonactionable as a matter of law. On the other hand, the issue "might" be left for the jury under the innocent construction rule if a "controversy" were to arise as well, the only difference being if the outcome of the controversy was that the statement could not be interpreted as referring to someone other than the plaintiff. At the least, it cannot be ascertained decisively from this portion of the court's language whether it had chosen to apply the innocent construction rule or some other test.

In reiterating that the "preliminary determination whether the article is capable of being so understood is a question of law which must, upon the motion to dismiss . . . be resolved in favor of the plaintiff,"³³⁰ the court relied on *Ogren v. Rockford Star Printing Co.*³³¹ and a comment to the Restatement of Torts³³² as indirect support³³³ for its conclusion.³³⁴ The relevant portion of the comment to the Restatement states that the plaintiff must prove that a statement was published "of and concerning him, that is, he must satisfy the court that it was understandable as intended to refer to himself, and must convince the jury that it was so understood."³³⁵ This portion of the comment does not directly reflect the innocent construction rule, because under that rule a court must be satisfied not merely that the statement is understandable as referring to the plaintiff, but also that it is not understandable as referring to someone else.³³⁶ In not specifying how to show that the article was understandable as referring to the plaintiff, however, the court may have found the comment to be sufficiently ambiguous to connote no particular test in and of itself. Yet, by stating the proof requirement as only mandating that the plaintiff establish that it was understandable as referring to him, the comment logically does evoke the reasonable construction rule.

Similarly, the portion of *Ogren* cited in *Troman* utilized the reasonable construction standard in determining whether the words spoken concerned the plaintiff.³³⁷ *Ogren's* apparent adoption of the reasonable construction

330. 62 Ill. 2d at 189, 340 N.E.2d at 294.

331. 288 Ill. 405, 123 N.E. 587 (1919).

332. RESTATEMENT (SECOND) OF TORTS 613(1)(c) comment d (Tent. Draft No. 21, 1975).

333. *Troman*, 62 Ill. 2d at 189, 340 N.E.2d at 294. The court uses a "cf." signal to introduce the citations. "Cf." indicates that the cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. UNIF. SYS. CITATION 9 (13th ed. 1981). In effect the *Troman* court cites two authorities presenting somewhat ambiguous propositions as lending analogous support to the ambiguous proposition posited by the court. In light of this, it is wishful thinking to view *Troman* as clearly adopting one rule or another on the issue of colloquium.

334. 62 Ill. 2d at 189, 340 N.E.2d at 294.

335. RESTATEMENT (SECOND) OF TORTS § 613(1)(c) comment d (Tent. Draft No. 21, 1975).

336. *Id.*

337. The *Ogren* court stated:

rule is contained on the first of the two pages cited by the *Troman* court.³³⁸ On the second of these pages, the *Ogren* court evaluated the plaintiff-appellant's objection to the lower court's refusal to permit evidence that the article concerned the plaintiff. The court concluded that the plaintiff should be permitted to present evidence on the issue of colloquium only after the defendant has disputed the advanced colloquium and offered evidence to refute the purported reference to the plaintiff.³³⁹ The court noted that there was little or no doubt that the defamation referred to the plaintiff and that defendant had failed to offer evidence to rebut this reference.³⁴⁰

Had *Troman* cited only this page in the *Ogren* opinion, its reliance on *Ogren* might have been limited to its determination that the defamation referred to the plaintiff. However, the citation to *Ogren* which incorporated the reasonable construction rule cannot be ignored. Its inclusion, had it been cited as direct support, could be used to construe *Troman* as adopting the reasonable construction rule conclusively. Unfortunately, *Troman*'s reliance on *Ogren* and the Restatement's comment as merely indirect support for its conclusion sufficiently obscures the framework upon which the court based its decision. Hence, no conclusive rejection of *John* on the issue of colloquium can be inferred from *Troman*. Those who would construe *Troman* as an explicit overruling of *John* on the issue of colloquium may have given *Troman* a significance which the court deliberately attempted to avoid. Of course, since the *John* legitimization of the innocent construction rule was merely obiter dicta, the *Troman* court had no need to overrule *John* on that issue even if it did intend to adopt a reasonable construction rule. Nevertheless, the *Troman* court's citation to two sources arguably incorporating a reasonable construction standard must be evaluated in light of the court's use of these sources as indirect support and its own explicit attempt to

Where the words are ambiguous or equivocal in meaning, the question of the meaning to be ascribed to them is for the jury, although the question as to whether or not any particular meaning is libelous is for the court. Where there is a controversy as to whether or not words were spoken of and concerning the plaintiff, the question whether they were so spoken of and concerning the plaintiff is for the jury. In this case the defendant by its special pleas denies that certain portions of the articles were spoken of plaintiff, a defense which is admissible under the general issue. Plaintiff offered witnesses to prove that by the language of the articles they understood the words in question to be spoken of and concerning plaintiff, but on objection the court refused to admit the evidence. We think the better rule is, that where the language is clear and unambiguous, as it is in this case, and such as there can be little or no doubt of its being spoken of and concerning plaintiff, no such evidence is admissible for plaintiff in the first instance, but if the defendant disputes the fact and offers evidence to prove it, where, as here, the evidence also refers to another person or object, then it would be proper for the plaintiff to offer proof on the question in rebuttal. No such evidence was given for the defendant, and we hold the court did not err in this particular.

288 Ill. at 413, 123 N.E. at 590 (cited in *Troman*, 62 Ill. 2d at 187, 340 N.E.2d at 294).

338. *Ogren*, 288 Ill. at 413, 123 N.E. at 590.

339. *Id.* at 413, 123 N.E.2d at 590-91.

340. *Id.*

distinguish *John*. Although evidencing a reluctance to extend *John* beyond its original parameters on the issue of colloquium, the court's opinion may not be taken on its face as a rejection of *John*'s dicta or even of its viability as a rule of construction on the issue of colloquium.

On the other hand, the *Troman* court's unwillingness to apply *John* in determining the defamatory nature of the words is clear. In evaluating this aspect, without reference to *John*, the court apparently found that as a matter of law, the words reasonably could be construed as defamatory.³⁴¹ The court then considered the issue of whether the article was in fact so understood to be a question for the jury to determine.³⁴² In so doing, the court implicitly followed the traditional reasonable construction rule of not requiring a determination of whether an innocent construction was possible before denying the defendant's motion for dismissal.³⁴³ Had the court applied the innocent construction rule, such a determination would have been necessary before the court could conclude that the defendant was not entitled to dismissal.³⁴⁴

3. Catalano v. Pechous

The second case foreshadowing the court's decision in *Chapski* is *Catalano v. Pechous*.³⁴⁵ The plaintiffs in *Catalano* were seven aldermen from the Berwyn city council who voted to approve a controversial bid for a garbage collection contract with the city.³⁴⁶ The aldermen sued the city clerk, Pechous, and others responsible for the publication in a local newspaper of a statement allegedly made by Pechous at a council meeting and repeated by him to a newspaper reporter.³⁴⁷ In connection with the council's approval of the controversial garbage bid, Pechous allegedly alluded to the price paid to Judas for his betrayal of Christ,³⁴⁸ and said that "two hundred forty pieces of silver changed hands—thirty for each alderman."³⁴⁹ The appellate court reversed the circuit court's grant of Pechous's motion for summary judgment and its denial of the plaintiff's motion for summary judgment.³⁵⁰

In its opinion, the Illinois Supreme Court addressed four issues: (1) whether Pechous's statement charged that the plaintiffs were paid a bribe for award-

341. *Troman*, 62 Ill. 2d at 187, 340 N.E.2d at 294.

342. *Id.* at 189, 340 N.E.2d at 294.

343. For discussions of the reasonable construction rule, see *supra* notes 317, 320, & 337, and accompanying text.

344. 62 Ill. 2d at 189, 340 N.E.2d at 294. Therefore we cannot agree with Professor Polelle's conclusion that "[t]he *Troman* Illinois Supreme Court approach apparently limits the innocent construction rule to the meaning of the words used and does not extend it to the issue of colloquium. . . ." Polelle, *supra* note 309, at 204.

345. 83 Ill. 2d 146, 419 N.E.2d 350 (1980).

346. *Id.* at 149, 419 N.E.2d at 352.

347. *Id.*

348. *Id.* at 157, 419 N.E.2d at 355.

349. *Id.* at 151, 419 N.E.2d at 353.

350. *Id.* at 149-50, 419 N.E.2d at 352.

ing the contract; (2) whether Pechous's statement was defamatory; (3) whether the statement was capable of an alternative construction that would render it nondefamatory; and (4) whether the statement was a statement of fact or a constitutionally protected expression of opinion.³⁵¹ On the first question, the court concluded, contrary to defendants' claim that the words used merely referred to political motivation, that "the allusion of Judas' betrayal of Christ was intended to convey the thought that the plaintiffs received something of value in exchange for voting to award the contract to Clearing, and had thereby betrayed the public trust."³⁵² In holding that the language was actionable per se,³⁵³ the court found "not important" the fact that the criminal offenses of bribery and official misconduct were imprecisely charged since the plaintiffs "were accused of venality, and such a charge would be hurtful to them."³⁵⁴

The *Catalano* court's analysis to this point is more significant for what it does not say than for what it does. The court, in its preliminary determination that the language was actionable per se, did so without reference to the innocent construction rule. If the *Catalano* court had applied the innocent construction rule in determining whether the words were defamatory per se, it is unlikely that the court would have reached the result it did, since it would have been a simple matter to find that the words were susceptible of an interpretation that did not charge a crime. Although it is difficult to draw a line between the application of the innocent construction rule first to determine if words are defamatory and, second, to ascertain

351. *Id.* at 164, 419 N.E.2d at 359.

352. *Id.* at 157, 419 N.E.2d at 355.

353. Recent cases in Illinois have taken the position that libel per se ordinarily is restricted to what would constitute slander per se. See *Richardson v. Dunbar*, 95 Ill. App. 3d 254, 259, 419 N.E.2d 1205, 1210 (3d Dist. 1981); *Coursey v. Greater Niles Township Publishing Corp.*, 82 Ill. App. 2d 76, 81, 227 N.E.2d 164, 167 (1st Dist. 1967), *aff'd*, 40 Ill. 2d 257, 239 N.E.2d 837 (1968). The four classes of words which constitute slander per se under Illinois common law are words imputing infection with a communicable disease, words imputing the commission of a criminal offense, words imputing inability to perform the duties of an office or employment or want of integrity in the performance thereof, and words prejudicing a person in that person's profession or trade. *Coursey*, 82 Ill. App. 2d at 81-82, 227 N.E.2d at 167. All other slander is per quod and requires allegation and proof of special damages. *Id.*

354. 83 Ill. 2d at 157, 419 N.E.2d at 355-56 (citing *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill. 2d 345, 348, 243 N.E.2d 217, 220 (1968)). For support of its position that a crime need not be charged with the particularity of an indictment, the court cited its opinion in *Zeinfeld v. Hayes Freight Lines, Inc.*, in which the court's analysis began by giving the allegedly defamatory statement its most innocent construction. 41 Ill. 2d at 348, 243 N.E.2d at 220. Nevertheless, the court found that the most innocent construction possible was defamatory per se, although it did not charge specifically the commission of a crime. *Id.* *Zeinfeld*, then, would appear to have applied the innocent construction rule to the determination of defamatory meaning, but not to the determination of whether language is actionable per se without proof of special damages. Thus, the method used in *Zeinfeld*, was first to give the most innocent construction possible to the words, and then to determine whether that construction was defamatory per se without regard to the innocent construction rule.

if they are defamatory per se, *Catalano* does not appear to have extended the rule to the latter determination.³⁵⁵

The *Catalano* opinion proceeds to formulate what might be the forerunner of *Chapski*'s "reasonable innocent construction rule." The defendants argued that Pechous's statement meant nothing more than that the plaintiffs were politically motivated in awarding the contract to a company for which a political ally had recently gone to work.³⁵⁶ The court, however, found the argument not a "plausible" or "fair reading" of the words because the political ally referred to by the plaintiffs went to work for the company after Pechous made his statement in the council meeting.³⁵⁷ The court then found that Pechous's statement was reasonably susceptible of a defamatory meaning but not reasonably susceptible of an innocent meaning.³⁵⁸ Under the reasonable construction rule, the plaintiffs would have been entitled to judgment as a matter of law, which is consistent with the court's holding that Pechous was liable for the words he used. Under an innocent construction rule in which the innocent construction must be reasonable, however, the defendants *also* would have been entitled, in theory, to judgment as a matter of law, though in practice Illinois courts send such cases to the jury.³⁵⁹ Since the court determined that the statement was not reasonably susceptible of a nondefamatory meaning and, therefore, the plaintiffs arguably were entitled to summary judgment under either rule, it cannot be said with cer-

355. It is significant to note that in remarking that the innocent construction rule *had* been extended to the determination of whether language is actionable per se, the *Chapski* court only cited the appellate court decision of *Makis v. Area Publications Corp.*, 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979), and did not allude to *Catalano*. *Chapski*, 92 Ill. 2d at 349, 442 N.E.2d at 197.

356. *Catalano*, 83 Ill. 2d at 158, 419 N.E.2d at 356.

357. *Id.*

358. *Id.* at 157-58, 419 N.E.2d at 356. Professor Polelle finds *Catalano* to be somewhat more ambiguous on whether the statement was susceptible of an innocent meaning:

By alternately finding that an innocent meaning was not "plausible," then not a "fair reading" of the words, and finally "not capable" of an innocent meaning, the Illinois Supreme Court obscured its methodology. Was it saying that no reasonable person would believe the innocent meaning? If so, this same result could have more naturally been achieved with an unambiguous expression of the reasonable construction rule. Or was it saying that no innocent construction was even thinkable?

If so, then it is still following the classic innocent construction rule even though Justice Clark found an innocent construction quite thinkable under the circumstances.

Polelle, *supra* note 309, at 223 (footnotes omitted).

We would take issue with several points in Professor Polelle's discussion. First, the *Catalano* court said that Pechous's statement was "not capable of an alternative reading which would render it nondefamatory." 83 Ill. 2d at 164, 419 N.E.2d at 359. In context with the court's previous discussion, this signifies that the statement was not capable of a reasonable, innocent construction. The court did not conclude that the statement was not capable of an innocent meaning, because it acknowledged the innocent meaning suggested by the defendants but rejected it as unreasonable. *Id.* at 157, 419 N.E.2d at 356. Second, holding in favor of the plaintiff based on a finding that "no reasonable person would believe the innocent meaning" is

tainty which rule the court applied. In essence, the court did not accept or reject the applicability of the innocent construction rule; it merely refused to accept an innocent construction that it found to be implausible. Nevertheless, given the court's failure to reject the innocent construction rule despite several opportunities to do so, it could be argued that the court was indeed modifying the innocent construction rule while assuming its applicability.

Catalano has to be taken as a modification of the innocent construction rule because, apart from the question of whether the alternative construction in that case was indeed implausible, plausibility rarely, if ever, had been a prerequisite to a finding of an innocent construction in the lower courts.³⁶⁰ The *John* court did declare that a statement must be read as a whole and that the words used be given "their natural and obvious meaning."³⁶¹ Yet, *John* also required that words "capable of being read innocently must be so read."³⁶² *Catalano's* possible plausibility overlay on the innocent construction rule may be said to be true to this dual nature of the *John* rule since it requires that the innocent construction be a reasonable interpretation of the allegedly defamatory statement. In this sense, *Catalano's* possible "reasonable innocent construction" rule was a return to the rule stated in *John*. In its departure from the direction in which the appellate courts had taken *John*,³⁶³ *Catalano* suggested a limit on how far the courts should reach to construct a nondefamatory interpretation of a purportedly defamatory statement. This schizophrenic approach to the rule may have been the source of Justice Clark's dissatisfaction with the court's opinion. Comparing the court's opinions which apply the rule with those which ignore the rule (including *Troman*),³⁶⁴ Justice Clark remarked that it was "surely . . . intolerable to have the innocent construction rule consistently applied in the circuit courts and the appellate courts while it is ignored in this court."³⁶⁵

The *Catalano* court had one additional innocent construction rule hurdle to confront in its opinion. Two of the defendants argued that if Pechous's statement could be construed either as a statement of fact or as a nonactionable expression of opinion, the rule of innocent construction required

not tantamount to adoption of the reasonable construction rule because such a holding could result from application of either the innocent construction rule or the reasonable construction rule. Finally, the court could not be saying that "no innocent construction was even thinkable," because it acknowledged that the defendants had proposed one. *Id.* For these reasons, we do not find, as Polelle suggests, that the court was unclear on whether an innocent construction was possible or reasonable.

359. See Polelle, *supra* note 309, at 214.

360. See *id.* at 182-86, nn.2-19.

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

362. *Id.*

363. See notes 319-21 and accompanying text.

364. *Catalano*, 83 Ill. 2d at 184, 419 N.E.2d at 368-69 (Clark, J., concurring in part and dissenting in part).

365. *Id.* at 184, 419 N.E.2d at 369. The *Catalano* court applied its reasonableness require-

that the statement be considered a nonactionable expression of opinion.³⁶⁶ The court, without specifically addressing the applicability of the innocent construction rule, concluded that "[t]o charge that the approval of the contract was procured by a bribe cannot *fairly* be transmitted into a criticism of the merits of the award of the contract."³⁶⁷ The court proceeded to find that an accusation of crime is a statement of fact, not an expression of an opinion.³⁶⁸

If "fairly" in the above-quoted portion of the court's opinion is read as "reasonably,"³⁶⁹ then the court concluded that Pechous's statement could not *reasonably* be read as an expression of opinion. Thus, the court rejected the defendant's argument that the innocent construction rule required a communication to be construed as an expression of opinion, if it could be so interpreted,³⁷⁰ without regard to the reasonableness of the interpretation.

In sum, *Catalano* may be read to suggest an interpretation of the innocent construction rule which requires that the innocent construction be a reasonable one, whether it is a nondefamatory construction or a construction as an opinion.³⁷¹ Having concluded that Pechous's statements could not reasonably be construed as opinions or as nondefamatory statements, the court held that the plaintiffs were entitled to judgment in their favor as a matter of law.³⁷² As noted above, it cannot be determined conclusively from the outcome of the case whether the *Catalano* court was adopting a reasonable construction rule or modifying the innocent construction rule; the court did not need to determine whether the defendants would have been entitled to summary judgment had Pechous's statements been reasonably susceptible of a defamatory interpretation or of an interpretation as an expression of opinion.

Catalano and *Troman* are essential to an understanding of what the Illinois Supreme Court attempted to do in *Chapski* and, perhaps more impor-

ment strictly. It was far from clear that the defendants' alternative construction was implausible. As Justice Clark pointed out, the ambiguity surrounding the date of Pechous's first statement made it uncertain, for purposes of evaluating the summary judgment motions, whether the statement was made before the political ally had been hired. *Id.* at 183, 419 N.E.2d at 368. Even if the statement had been made before the hiring, a reasonable assumption could have been made that the contract was awarded with the knowledge that the hiring would take place.

366. *Id.* at 158, 419 N.E.2d at 356.

367. *Id.* (emphasis added).

368. *Id.* at 159-63, 419 N.E.2d at 357-59.

369. Such a reading is consistent with the above analysis on the issue of defamatory meaning. See *supra* notes 357-59 and accompanying text.

370. See *supra* note 366 and accompanying text.

371. Professor Polelle concludes that *Catalano* "rebuffed" the extension of the innocent construction rule to a fact/opinion determination. Polelle, *supra* note 309, at 222. It would appear, however, that the court only found that the statement could not reasonably be construed as an opinion.

372. *Catalano*, 83 Ill. 2d at 164, 167, 419 N.E.2d at 359, 360.

tantly, what it arguably did not do. *Chapski*, in all likelihood, will be heralded as the death knell of the innocent construction rule in Illinois. Yet, to use the court's own language, the decision is a "modification" of the innocent construction rule.³⁷³ The question then becomes whether the *Chapski* court in fact has adopted the reasonable construction rule of interpretation or chosen to reaffirm, but clarify, the rule of innocent construction as originally articulated in *John*.

B. Inside Chapski

Plaintiff Robert Chapski, an attorney, filed a libel action against the Copley Press, a reporter, an executive editor, and the publisher of a newspaper published by the Copley Press.³⁷⁴ The action was predicated on a series of newspaper articles tracing the history of judicial proceedings for custody of a child prior to her death.³⁷⁵ The boyfriend of the child's mother subsequently was convicted of the involuntary manslaughter of the child.³⁷⁶ Chapski had represented the mother in her successful attempt to obtain custody of the child.³⁷⁷ The ten newspaper articles examining the plaintiff's role in the juvenile and divorce proceedings contained references to "unscheduled" hearings between the plaintiff and the judge, inquiries into Chapski's moral obligation to have provided further information to the judge, and a report of the proceedings before the Attorney Registration and Disciplinary Commission regarding the plaintiff's conduct.³⁷⁸

The trial court granted the defendants' motion to dismiss the complaint based on the innocent construction rule, a decision which the appellate court affirmed.³⁷⁹ The trial and appellate courts determined that either the language itself could be construed innocently or the articles as a whole could be read as referring to the legal system in general rather than to the plaintiff in particular.³⁸⁰ Chapski argued before the Illinois Supreme Court that an innocent interpretation of the articles was "strained,"³⁸¹ and he supported his argument by referring to one of the articles in which his name was alleged to have appeared in bold black type twenty times.³⁸²

The Illinois Supreme Court's opinion focused primarily on the history and development of the innocent construction rule in Illinois.³⁸³ A review of this

373. *Chapski v. Copley Press, Inc.*, 92 Ill. 2d 344, 351, 442 N.E.2d 195, 198 (1982).

374. *Id.* at 345, 442 N.E.2d at 195.

375. *Id.*

376. *Id.* at 346, 442 N.E.2d at 196.

377. *Id.* at 346, 442 N.E.2d at 195.

378. *Id.* at 346, 442 N.E.2d at 196.

379. 100 Ill. App. 3d 1012, 427 N.E.2d 638 (2d Dist. 1981).

380. 92 Ill. 2d at 347, 442 N.E.2d at 196.

381. *Id.*

382. *Id.*

383. *Id.* at 347-51, 442 N.E.2d at 196-98.

portion of the court's opinion is crucial to an understanding of what the court perceived to be the flaws in the rule and, by extension, what aspects of the rule the court saw fit to "modify."³⁸⁴

1. Chapski's *Historical Sketch of the Innocent Construction Rule*

The court's history of the rule began, appropriately enough, with its decision in *John*.³⁸⁵ The court first noted that the innocent construction rule in Illinois arose from the obiter dictum previously quoted from *John*;³⁸⁶ the court further noted that, since *John*, the rule had been applied by the appellate courts "in something less than a completely uniform fashion . . . and often over vigorous objections concerning its application or whether it continues to be a fair statement of the law. . . ."³⁸⁷ After remarking that the rule had been extended to "slander as well as libel to determine whether the words themselves are defamatory, to the determination of whether the language is actionable per se, and to the issue of colloquium,"³⁸⁸ the court conceded that its own application of the rule had not been consistent, citing *John* and *Troman* for comparison.³⁸⁹

The court proceeded to examine a predecessor of the innocent construction rule, the *mitior sensus* doctrine.³⁹⁰ This doctrine required that words be interpreted in their best possible sense and that the plaintiff negate any possible nondefamatory meaning.³⁹¹ The court termed the innocent construction rule in *John* as "similar," but "less arbitrary" than the *mitior sensus* doctrine.³⁹² The court observed that the principal criticism of the innocent construction rule was that under the rule, as under the doctrine of *mitior sensus*, courts "strain to find unnatural but possibly innocent meanings of words where such a construction is clearly unreasonable and a defamatory meaning is far more probable."³⁹³ The court declared that such an approach is "itself incompatible"³⁹⁴ with the rule's requirement that words be given

384. *Id.* at 351-52, 442 N.E.2d at 199.

385. *Id.* at 347, 442 N.E.2d at 196.

386. *Id.* at 347-48, 442 N.E.2d at 196; see *supra* text accompanying note 315.

387. 92 Ill. 2d at 348, 442 N.E.2d at 196.

388. *Id.* at 348-49, 442 N.E.2d at 196-97 (citations omitted).

389. *Id.*

390. *Id.*

391. *Id.* at 349-50, 442 N.E.2d at 197-98. *Mitior sensus* was an old common law doctrine which required that words be interpreted, if possible, in a nondefamatory meaning. The doctrine's relation to the innocent construction rule is evident. For further elaboration on the doctrine of *mitior sensus*, see PROSSER, *supra* note 4, at 747; Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 LAW Q. 302, 405-08 (1924) (cited in *Chapski*, 92 Ill. 2d at 350, 442 N.E.2d at 198). See also GREGORY, *supra* note 150, at 994-96 (historical overview of *mitior sensus* doctrine).

392. *Chapski*, 92 Ill. 2d at 350-51, 442 N.E.2d at 198; see Symposium, *Libel and Slander in Illinois*, 43 CHI.-[]KENT L. REV. 1 (1966).

393. *Chapski*, 92 Ill. 2d at 350-51, 442 N.E.2d at 198.

394. *Id.* at 351, 442 N.E.2d at 198.

their "natural and obvious meaning."³⁹⁵ The court found that the "inherent conflict [was] contained in the definition itself";³⁹⁶ that is, the two-part definition of the rule in *John*³⁹⁷ was resolved in some cases "by construing the words innocently as a matter of law only where the words are *reasonably* susceptible of such a construction or the allegedly defamatory language is ambiguous."³⁹⁸

The impact of this portion of the court's analysis is not the basis for a rejection of the innocent construction rule, but rather a rejection of the rule as it previously had been applied. The court did acknowledge the "inherent conflict"³⁹⁹ in *John*'s definition of the rule. Yet, the court resolved this conflict by stating that an innocent construction is appropriate only when the words were reasonably susceptible of an innocent construction.⁴⁰⁰ The court diminished the criticism of the innocent construction rule to the previously mentioned "principal" objection that courts strain to find innocent meanings despite their improbability.⁴⁰¹ This unsatisfactory aspect of the rule, according to the court, is a misapplication of *John* and inconsistent with the second requirement of *John*: that words be given their "natural and obvious meaning."⁴⁰² Consequently, the court appeared to be of the opinion that the principal criticism of the rule is predicated on the misapplication of the *John* version of the rule, and that any conflict in *John*'s statement of the rule was soluble.

395. *Id.* (quoting *John v. Tribune Co.*, 24 Ill. 2d at 442, 181 N.E.2d at 108).

396. *Id.*

397. *See John*, 24 Ill. 2d at 442, 181 N.E.2d at 108.

398. *Chapski*, 92 Ill. 2d at 351, 442 N.E.2d at 198 (emphasis in original). Professor Pollele apparently disagrees, asserting the following:

The linguistic absurdity of the innocent construction rule is perhaps alleviated, but not eliminated, by the suggestion that if words are given an innocent interpretation only when reasonably susceptible of it, then this part of the rule can be reconciled with the corollary requirement that the words be given their natural and obvious meaning. But if the plaintiff had been called "gay" at the business meeting described in *Moricoli v. Schwartz*, 46 Ill. App. 3d 481, 361 N.E.2d 74 (1977), a jury question would still have been presented even if some would have reasonably thought that defendant was referring to the cheerful disposition of the plaintiff. The fact remains that as long as others may have also reasonably interpreted the remarks to refer to plaintiff's alleged homosexuality it makes no sense to say words are being given their natural and obvious meaning when the innocent meaning must automatically be taken even though the defamatory meaning is equally plausible or even more so.

Pollele, *supra* note 309, at 221-22 (footnotes omitted).

399. *Chapski*, 92 Ill. 2d at 351, 442 N.E.2d at 198.

400. *Id.* at 352, 442 N.E.2d at 199.

401. *Id.* at 350-51, 442 N.E.2d at 198.

402. *Id.* at 351, 442 N.E.2d at 198, (quoting *John v. Tribune Co.*, 24 Ill. 2d at 442, 181 N.E.2d at 108).

2. Chapski's Modification of the Innocent Construction Rule

The crucial paragraph containing the court's "modification" of the innocent construction rule followed from the court's criticism of the rule as applied by the Illinois courts.⁴⁰³ Predicated on the "inconsistencies, inequities and confusion"⁴⁰⁴ resulting from the "rule as originally announced in *John*, and the broader protections that now exist to protect first amendment interests . . . together with the availability of the various privileges,"⁴⁰⁵ the court determined that a "modification"⁴⁰⁶ of the innocent construction rule would better serve the values inherent in the first amendment and the individual's interest in reputation:

We therefore hold that a written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved in the first instance; whether the publication was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury should the initial determination be resolved in favor of the plaintiff.⁴⁰⁷

This modification may be taken as rejection of the innocent construction rule in favor of the reasonable construction rule, *or* as a reinterpretation and affirmation of the innocent construction rule enunciated in *John*. The first clause of the foregoing quote is merely a paraphrase of *John*'s first requirement. It sheds no light on whether the court is affirming or rejecting *John*, however, because courts that have adopted the reasonable construction rule use similar language.⁴⁰⁸ (It is unlikely that any modern American court would require that words be considered out of context or be given unnatural meanings.)

The confusion in the new standard stems, as is often the case in defamation actions, from the court's use of the term "per se."⁴⁰⁹ The court held that if a statement may "reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*."⁴¹⁰ The court failed, however, to clarify whether it was holding that the statement was not "actionable per se" because: (1) it was not actionable as a matter of law; (2) it was not defamatory on its face as a matter of law; (3) it was not actionable per se as falling within one

403. *Id.*

404. *Id.*

405. *Id.* The court specifically noted the *Colson* decision. *Id.*

406. *Id.*

407. *Id.* at 352, 442 N.E.2d at 199 (citations omitted).

408. See PROSSER, *supra* note 4, § 111, at 747.

409. *Chapski*, 92 Ill. 2d at 352, 442 N.E.2d at 199.

410. *Id.*

of the special categories of defamation for which special damages need not be alleged and proven; or (4) it was not actionable per se without proof of special damages or defamatory on its face as a matter of law *at that point in the proceedings*. If the court was holding either (1), (2), or (3), then it simply added a new gloss to the *John* rule. Following this interpretation, the court obviated the strained efforts of the lower courts to find innocent interpretation of allegedly defamatory statements by requiring that the innocent interpretation be reasonable, but retained the rule that a statement subject to an innocent meaning may not be presented to the jury for its evaluation of the statement's actual meaning. If the court's statement is read as referring to that point in the proceedings when the court is making only a preliminary determination and, assuming that the statement is reasonably susceptible to a defamatory interpretation as well, it would suggest that the issue should be left for the jury to resolve, as would be the case under the reasonable construction rule.

The final clause in the quoted portion of the court's opinion assists in clarifying the ambiguity. The court stated that "whether the publication was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury should the *initial determination be resolved in favor of the plaintiff*."⁴¹¹ This statement utterly fails to clarify what is required by the court for the issue to go to the jury. Does the trial court merely determine that the statement may not be reasonably interpreted as having an innocent meaning or as referring to the plaintiff—just as under the innocent construction rule? That would appear to be the court's intent, since the "initial determination" refers to the determination of whether the statement is reasonably susceptible of an innocent interpretation or as referring to someone other than the plaintiff.⁴¹²

Unfortunately, the court's citation to *Troman* on both the colloquium and interpretation issues adds to the confusion of the court's modification of the innocent construction rule. As discussed above, the *Troman* court distinguished *John* on the issue of colloquium by finding that there was no issue of identity on the face of the article in *Troman*,⁴¹³ without clarifying which test it had applied.⁴¹⁴ Yet, on the question of whether the article was defamatory, the court did appear to follow the reasonable construction rule in determining that the article could be interpreted in a defamatory way.⁴¹⁵ Although the court did not accept or reject the innocent construction rule explicitly on either issue,⁴¹⁶ *Troman* has been interpreted as an attempt by the court to limit *John* to the issue of defamatory meaning and to adopt

411. *Id.* (emphasis added).

412. *Id.*

413. See *supra* text accompanying notes 327-28.

414. See *supra* text accompanying note 330.

415. See *supra* text accompanying note 342.

416. See *supra* notes 325-44 and accompanying text.

a reasonable construction approach in determining colloquium.⁴¹⁷ *Troman* may have been cited by the court in *Chapski* as support for nothing more than the court's position that the question of how a statement is in fact understood is to be made by the jury, if reached.⁴¹⁸ In that sense, the court's citation of *Troman* could not have been intended to reflect in any way on the method by which the court's "initial determination" must be made. However, *Troman* is neither so clear in its approach nor so fundamental to the *Chapski* court's opinion that it can be said to mandate any particular interpretation.

Though *Troman*'s citation may be advanced to demonstrate that the court was adopting the reasonable construction rule, there are several other indications in the court's opinion, of varying degrees of persuasiveness, that demonstrate that the court did not intend to abandon the innocent construction rule. First, to interpret the opinion as adopting the reasonable construction rule, it becomes necessary to read "actionable per se" in such a way as to read in the assumption of a defamatory interpretation alternative to an innocent interpretation, and then to assume that the court was also referring to a particular point in the defamation proceedings. It is difficult to posit an explanation for the court's use of the term "actionable per se" in this context. To interpret "actionable per se" as referring to the innocent construction rule involves fewer semantic acrobatics, and obviates the necessity for reading assumptions into the court's statement.

Second, "per se" is a term of art in the law of defamation signifying either that the words are defamatory on their face or that they are actionable without proof of special damages.⁴¹⁹ Given either of these meanings, the court can be viewed as continuing to adhere to an innocent construction rule—that is, if a statement is reasonably susceptible of an innocent interpretation or as not referring to the plaintiff, the court must find against the plaintiff as a matter of law. There is a hint in the opinion that the court was using the term "actionable per se" in the sense of actionable without proof of special damages. In its discussion of the appellate court's extension of *John* to issues other than colloquium,⁴²⁰ the court noted that the decision in *Makis v. Area Publications Corp.*⁴²¹ extended *John*'s innocent construction rule to the issue of whether the actionable language fell into one of the traditional categories of slander for which special damages would be

417. Polelle, *supra* note 309, at 204.

418. The appellate court in *Chapski* used *Troman* as authority in this limited sense. See *Chapski*, 100 Ill. App. 3d 1012, 1017, 427 N.E.2d 638, 642 (2d Dist. 1975).

419. PROSSER, *supra* note 4, § 112, at 763. Special damages are defined as "[t]hose which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case. . . ." BLACK'S LAW DICTIONARY 354 (5th ed. 1979). In a defamation action, special damages would include the damages that flow from the injured reputation.

420. See *Chapski*, 92 Ill. 2d at 348-49, 442 N.E.2d at 196-97.

421. 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1st Dist. 1979).

presumed—the so-called per se categories.⁴²² The *Chapski* court characterized *Makis* as extending *John* “to the determination of whether the language is *actionable* per se,”⁴²³ thereby employing the precise language it would later use in enunciating its new standard. In part, this approach is in keeping with the appellate court’s evaluation of the issue in *Chapski* as being whether the plaintiff was defamed in the performance of his professional duties.⁴²⁴

By characterizing its opinion in *Chapski* as a partial reaffirmation of *John*, the court attempted to buttress the opinion. The court never explicitly rejected, overruled, or even criticized the *John* decision itself. Rather, it proposed a “modification” of the innocent construction rule.⁴²⁵ That it was indeed the court’s intention only to modify the rule with an overlay of reasonableness is supported by the historical development of the rule⁴²⁶ and by the court’s determination that the application of this rule in the case would not be “unfair” in light of previous decisions which “in essence” applied the court’s modified approach.⁴²⁷ The focus of the court’s concern in its examination of the innocent construction rule was the rule’s practical application in the lower courts. As discussed above, the court found such strained constructions inconsistent with *John* and noted with approval those appellate courts that had imposed a requirement of reasonableness for innocent constructions.⁴²⁸ Possibly referring to these latter decisions, the court refused to find application of its ruling unfair to the defendants “[s]ince several opinions of the appellate court have in essence applied the modified approach we announce today.”⁴²⁹

Finally, the court admonished the trial court that the innocent construction rule requires language to be treated as a constitutionally protected expression of opinion only if such a characterization is reasonable.⁴³⁰ This admonishment demonstrates that the innocent construction rule would be alive and well on remand, with the caveat that any proposed construction of the

422. *Id.* at 456-57, 395 N.E.2d at 1188; see also Polelle, *supra* note 309, at n.135 and accompanying text (exploring *Makis*’s application of the innocent construction rule to determinations of whether language was defamatory per se or per quod).

423. *Chapski*, 92 Ill. 2d at 348-49, 442 N.E.2d at 197 (emphasis added).

424. See *Chapski*, 100 Ill. App. 3d at 1016-17, 427 N.E.2d at 641-42.

425. *Chapski*, 92 Ill. 2d at 351, 442 N.E.2d at 198.

426. *Id.* at 347-51, 442 N.E.2d at 196-98; see *supra* notes 385-402 and accompanying text.

427. 92 Ill. 2d at 352, 442 N.E.2d at 199.

428. *Id.* at 351, 442 N.E.2d at 198. The relevant Illinois appellate court decisions referred to in the court’s opinion as imposing a reasonableness requirement include *Altman v. Amoco Oil Co.*, 85 Ill. App. 3d 104, 406 N.E.2d 142 (1st Dist. 1980); *Moricoli v. Schwartz*, 46 Ill. App. 3d 481, 361 N.E.2d 74 (1st Dist. 1977); *Roemer v. Zurick Ins. Co.*, 25 Ill. App. 3d 606, 323 N.E.2d 582 (1st Dist. 1975). *Chapski*, 92 Ill. 2d at 351, 442 N.E.2d at 198. Professor Polelle also has noted several other cases cited in *John* itself which incorporate the same standard. See Polelle, *supra* note 309, at 211 n.132.

429. *Chapski*, 92 Ill. 2d at 352, 442 N.E.2d at 199.

430. *Id.*

allegedly defamatory statement as an opinion must be reasonable. Interestingly, the court referred to *Catalano*, the recent progenitor of the "reasonable" innocent construction rule,⁴³¹ as direct authority for this proposition.⁴³²

What, then, was the import of *Chapski*'s modification of the innocent construction rule? The rule may be expressed as follows: In determining the defamatory nature of a written or oral statement, the statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning. If so construed, and if the statement may be *reasonably* interpreted in an innocent manner, the words must be so read and declared by the court to be nonactionable as a matter of law. If the words cannot be so read because they are not reasonably susceptible of an innocent interpretation, it is for the jury to determine whether the words were in fact understood as defamatory. *Chapski* suggested that the plaintiff is not entitled to judgment as a matter of law by stating that the issue must go to the jury when the "initial determination" is resolved in favor of the plaintiff.

This expression of the rule is the same as that for the traditional innocent construction rule,⁴³³ except that any innocent construction must be reasonable. As a result, it is still true in Illinois that in a case in which reasonable persons may differ as to whether a statement is defamatory or nondefamatory *the defendant will prevail as a matter of law* without the issue ever having gone to the jury. Conversely, in a case in which the court finds that the statement is not reasonably subject to an innocent interpretation, the plaintiff will not be entitled to judgment as a matter of law since the issue must be determined by the jury.

The *Chapski* court's reasonable innocent construction rule is not limited to determining the defamatory meaning of words. Rather, *Chapski* appears to have formulated the rule in a way that may have encompassed the determination of whether the language in the case was actionable per se or per quod.⁴³⁴ If this was the court's intention, the decision addressed only the easiest situation that might arise. It posited that a statement could not be actionable per se if it could be interpreted innocently or as referring to some-

431. See *supra* notes 345-69 and accompanying text.

432. See *Chapski*, 92 Ill. 2d at 352, 442 N.E.2d at 199.

433. See *supra* text accompanying note 324.

434. See *supra* text accompanying notes 420-24. The term "per quod" is defined as follows:

At the common law, "per quod" acquired two meanings in the law of defamation: when used in the frame of reference of slander it meant proof of special damages was required and when used in the frame of reference of libel it meant that proof of extrinsic circumstances was required. . . .

Words "actionable per quod" are those not actionable per se upon their face, but are only actionable in consequence of extrinsic facts showing circumstances under which they were said or the damages resulting to slandered party therefrom.

BLACK'S LAW DICTIONARY 1027-28 (5th ed. 1979).

one other than the plaintiff. In such a case, the statement is not defamatory, and, *a fortiori*, cannot be defamatory per se. What must a court do if it initially determines that a statement is not subject to an innocent interpretation or does not refer to someone other than the plaintiff? According to *Chapski*, whether the publication was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury. Who, then, determines whether the language is defamatory per se? Is that determination encompassed within the determination of whether the statement is defamatory, a decision to be made by the jury? If, for example, a complaint fails to allege special damages and such allegations are necessary to sustain the complaint, or if the defamation does not fall within one of the categories which does not require a showing of special damages, it seems illogical to send the issue to the jury before the court has determined that the statement could be defamatory per se and, thus, actionable without allegations and proof of special damages.⁴³⁵ Must the judge make a preliminary determination that the statement cannot reasonably be construed as falling outside the per se

435. The first case to apply *Chapski* substantiated the authors' viewpoint that with respect to the per se determination, the innocent construction rule must be applied by the judge as a preliminary matter. In *Costello v. Capital Cities Media, Inc.*, 111 Ill. App. 3d 1009, 445 N.E.2d 13 (5th Dist. 1983), a newspaper published by defendant carried an editorial in which the writer called the chairman of the county board, Costello, a liar. Costello contended that the accusation constituted libel per se since it reflected adversely upon him with respect to his duties as county board chairman. No special damages were pleaded. At trial, the defendants successfully demonstrated that under the innocent construction rule, the editorial was a criticism of the plaintiff's conduct in a particular instance, not a general attack on the plaintiff's honesty or character. The appellate court reversed, reasoning that:

As the plaintiff points out, the editorial in the instant case repeatedly attacked him as a liar and also included an explicit reference to "two more years of the Costello brand of lying leadership." The language of the editorial makes it quite apparent that it was an actionable assault on the plaintiff's character in general, not mere criticism of his conduct in a particular instance. Accordingly, we find that the editorial constituted libel *per se* because it imputed to the plaintiff an inability to perform his duties and a want of integrity or lack of honesty in performing the duties of his office.

Moreover, the Illinois Supreme Court recently clarified the application of the innocent construction rule in *Chapski*. . . .

. . . Although *Chapski* allows trial judges to continue to make a preliminary determination whether a statement may reasonably be innocently construed, contorted interpretations of language so that it might be seen as innocent are now precluded. The court stressed that this modified rule would serve to protect both the individual's interest in vindicating his good name and reputation as well as first amendment interests. . . .

Since the editorial in the instant case repeatedly attacks the plaintiff's honesty and makes reference to "two more years of the Costello brand of lying leadership," we feel the *Chapski* decision does not allow us to consider this language innocent of libelous content as a matter of law. To do so would require us to strain to find a possible, but unnatural, innocent meaning, when a defamatory meaning is far more probable.

Id. at 1014-15, 445 N.E.2d at 17-18 (citations omitted). The court "hedged its bets" somewhat

categories before sending it to the jury for its determination of whether the statement was in fact defamatory? *Chapski* answers none of these questions, although the trial court would have to confront them on remand if it were to find, as *Chapski* seemed to suggest, that the articles could not reasonably be given an innocent meaning or construed as referring to someone other than the plaintiff.

Also, *Chapski* made it clear that the court considered its reasonable innocent construction rule to apply to the issue of colloquium.⁴³⁶ Therefore, if a statement can reasonably be interpreted as referring to someone other than the plaintiff, it must be so read and declared by the court to be nonactionable as a matter of law. If it cannot be reasonably interpreted as referring to someone other than the plaintiff, the jury must then determine whether the statement was in fact understood as referring to the plaintiff. Finally, in determining whether a statement is one of fact or of a constitutionally protected expression of opinion, it must be found nonactionable as a matter of law if the statement may reasonably be interpreted as an opinion rather than a statement of fact.⁴³⁷

The *Chapski* court's cutback on the breadth of the innocent construction rule⁴³⁸ was predicated on the development of the *New York Times* actual malice standard and the increased availability of various privileges, including those recognized in *Colson*.⁴³⁹ The court's preservation of the rule was based on the constitutional interests of free speech and free press served by the rule.⁴⁴⁰ At this point, it is impossible to weigh *Chapski*'s increased protec-

by holding in the alternative that the editorial reflected generally on the plaintiff's integrity, and that it could not be innocently construed as referring to a particular instance of plaintiff's conduct. *Id.* In any event, the court apparently viewed the application of the innocent construction rule to the determination of libel per se as requiring a preliminary determination by the court, at least when special damages were not pleaded. *See also* *Fogus v. Capital Cities Media, Inc.*, 111 Ill. App. 3d 1060, 444 N.E.2d 1100 (5th Dist. 1983) (defendants suggested no plausible innocent construction of their statements and had not responded in their brief to plaintiff's contention that allegations of criminal conduct are libel per se).

Interestingly, in determining whether the allegations of dishonesty constituted fact or opinion, the *Costello* court made no reference to *Chapski* or the innocent construction rule. Instead, the court relied on *Catalano* in concluding that the defendants had "made factual statements that the plaintiff deliberately lied for politically motivated reasons." *Costello*, 111 Ill. App. 3d at 1016, 445 N.E.2d at 18.

436. *Chapski*, 92 Ill. 2d at 352, 442 N.E.2d at 199.

437. *Id.*

438. Though *Chapski* evinces a retraction by the court from the innocent construction rule, the opinion opened the door to an application of the rule to a broader range of issues. There is no question after *Chapski* that the rule applies to the issue of colloquium as well as to defamatory meaning. *Id.* With the aid of *Catalano*, the court applied the rule unequivocally to the determination of whether a statement is a statement of fact or an expression of opinion. Also, *Chapski* arguably laid the ground for application of the rule to the determination of whether language is actionable per se or per quod. *See supra* notes 420-24 and accompanying text.

439. *Chapski*, 92 Ill. 2d at 351, 442 N.E.2d at 198. For a discussion of the privileges recognized in *Colson*, see *supra* notes 35-49 and accompanying text.

440. *Id.* at 351-52, 442 N.E.2d at 198-99.

tion of individual reputation (through its reasonableness requirement) against its broadened protection of free speech on the issues to which the rule may now be applied. The outcome will depend, of course, on the stringency with which the courts will apply the reasonableness standard and their willingness to extend *Chapski* beyond its most narrow parameters.

Aside from those issues noted above,⁴⁴¹ the question remains whether the innocent construction rule will apply in false light cases. Professor Polelle has suggested that either the policy behind the innocent construction rule is valid as to both defamation and false light or it is valid as to neither.⁴⁴² Yet, that conclusion is premised on his perception of both torts as being "fundamentally premised on a false statement that causes harm by bringing one into *discredit* among the members of the community."⁴⁴³ This characterization, however, ignores one fundamental distinction between these torts: a cause of action for false light may be predicated on a false portrayal of an individual in a "positive" light.⁴⁴⁴ Given the purpose of the innocent construction rule—to render nonactionable language capable of nondefamatory interpretation—the rule is directly inconsistent with "positive" false light cases. Application of the innocent construction rule to false light cases, therefore, would completely swallow up the one conceptual distinction between false light and defamation.

On the other hand, failure to apply the innocent construction rule to false light cases might lead to false light "swallowing up and engulfing the whole law of defamation."⁴⁴⁵ There would be a great incentive for plaintiffs to sue under a false light theory for language with defamatory implications because it would avoid the innocent construction rule and other technical hurdles to an action brought under defamation law. Of course, a compromise position would be to apply the innocent construction rule only to false light cases with defamatory overtones, although the manageability of such an approach would be subject to question. The best approach, so long as the innocent construction rule remains in effect, might be to abolish false light as a theory of recovery altogether. Those false light actions sounding in defamation would be subject to recovery on a defamation theory in most cases. Cases in which the plaintiff is portrayed in a positive false light do not serve as important a function in preserving individual reputation as other false light and defamation actions. Weighing the lesser interest in individual reputation in such actions against the greater interest in free speech and press so zealously guarded in this jurisdiction and reaffirmed in *Chapski* and *Colson*, the free speech interest should prevail.

441. See *supra* text accompanying notes 433-37.

442. Polelle, *supra* note 309, at 217.

443. *Id.* (emphasis added).

444. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967); see also PROSSER, *supra* note 4, § 117, at 813 ("the false light need not necessarily be a defamatory one, although it very often is, so that a defamation action will also lie").

445. PROSSER, *supra* note 4, § 117, at 813.

IV. CONCLUSION

Illinois has a long history of formulating its own peculiar brand of defamation law. The *Colson* and *Chapski* decisions insure that the uniqueness of Illinois' approach to defamation will continue. The Illinois Supreme Court has clearly allied itself with the views espoused in Iago's cynical speech concerning the value of reputation⁴⁴⁶ by placing Illinois at or near the bottom of all states in protection of reputation. At the same time, *Colson* and *Chapski* place Illinois in the nation's forefront in its commitment to "uninhibited robust, and wide-open" free expression. For both media and non-media speakers, there is no other state that is as liberal in construing speech and granting conditional privileges in a manner calculated to shield the speaker from liability for defamation.

446. See *supra* text accompanying note 2.