

IOWA DEFAMATION LAW REDUX: SIXTEEN YEARS AFTER

*Patrick J. McNulty**

*Adam D. Zenor***

TABLE OF CONTENTS

I. Introduction	366
II. The <i>New York Times</i> Fault Standard Reins Supreme	368
A. The <i>Barreca</i> Decision	368
B. The Impact of <i>Barreca</i>	370
III. Other Common Law Declarations and Developments	377
A. Publication	377
B. Defamatory Meaning and Division of Labor Between Judge and Jury.....	378
1. Capability	378
2. Understanding	379
C. The Expansion of Slander Per Se	385
D. Dramatic Pantomime	386
E. Defamation by Implication.....	387
F. Of and Concerning the Plaintiff.....	388
G. Damages.....	389
H. Defenses.....	391
1. Truth	391
2. Absolute Privilege.....	392
3. Qualified Privilege	395
IV. Constitutional Expressions	396
A. Defamation by Implication.....	397
B. Constitutional Malice	399
C. Facts and Provable Falsity	401
D. Independent Review.....	402
V. Internet and Electronic Communications	404

* Member, Grefe & Sidney, P.L.C.; B.A., University of Iowa, 1974; J.D., University of Iowa College of Law, 1977.

** Associate, Grefe & Sidney, P.L.C.; B.A., Drake University, 2005; J.D., University of Iowa College of Law, 2008.

A. Publisher Immunity Under the Communications Decency Act of 1996.....	408
1. The <i>Zeran</i> Analysis.....	409
2. The <i>Zeran</i> Progeny	412
3. Promise at Your Peril	415
B. Identity of Anonymous and Pseudonymous Internet Speakers	416
C. Personal Jurisdiction.....	419
1. Iowa’s Long-Arm Statute.....	420
2. The <i>Calder</i> Effects Test.....	422
VI. Conclusion	425

I. INTRODUCTION

Since the last venture into the fiercely fought and sometimes wacky world of defamation,¹ a new cast of Iowa plaintiffs has appeared and cried foul against publishers and would-be assassins of their reputation and dignity.² A church parishioner is angry that a district church official let the town of Shell Rock know she was infected with the “spirit of Satan.”³ A sports columnist sues a fellow member of the Fourth Estate, implying that he fabricated columns because he rarely attended sporting events.⁴ Owners of greyhound dogs take offense when their kennels are labeled as substandard by a racetrack operator.⁵ All of these cases implicated First Amendment defamation doctrine, but the most significant impact in the last sixteen years has occurred on the common law front. In *Barreca v. Nickolas*, the Iowa Supreme Court held that qualified privileges must now

1. Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner*, 44 DRAKE L. REV. 639 (1996).

2. Perhaps no one has quite captured the passion and sensibility of reputation as well as the great American poet and essayist James Russell Lowell when he wrote: “Reputation is in itself only a farthing-candle, of wavering and uncertain flame, and easily blown out, but it is the light by which the world looks for and finds merit.” 1 JAMES RUSSELL LOWELL, *Keats 1854*, in THE WRITINGS OF JAMES RUSSELL LOWELL: LITERARY ESSAYS 218, 227 (1890).

3. See *Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404, 405–06 (Iowa 2003).

4. See *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 826, 831 (Iowa 2007).

5. See *Yates v. Iowa W. Racing Ass’n*, 721 N.W.2d 762, 772 (Iowa 2006).

be overcome by proof of *New York Times* malice,⁶ that is, knowing or reckless disregard of the truth.⁷ Ill will or spite toward the plaintiff will no longer suffice.⁸ As a practical matter, this holding applies to virtually all defamation cases with the only exceptions being those rare situations in which a defendant cannot invoke a qualified privilege.⁹ The court has now effectively completed the transformation of the defamation tort from one based on strict liability and improper purpose to one based on fault. The court did not choose an ordinary fault standard—a plaintiff must now either prove a defendant knowingly lied or entertained serious doubts about the truth of the statement.¹⁰

Barreca was not the only common law decision of note. The court handed down decisions regarding damages and what constitutes a defamatory statement. Dramatic pantomimes of innocent shoppers being marched through a store¹¹ or paraded through security gates are defamatory statements.¹² Unfortunately for Dennis Delaney and friends, however, being blasted as freeloading little rodents and scabs is not actionable as a matter of law.¹³ The court also imposed a “reputational harm prerequisite,” holding that such harm must first be proven before such parasitical damages as mental anguish can be recovered.¹⁴ The *Ottumwa Courier* breathed a \$2,380,000 sigh of relief.¹⁵

6. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (defining actual malice). To avoid confusion with the common law meaning of actual malice, the constitutional fault standard of actual malice will be referred to herein as *New York Times* malice or constitutional malice.

7. *Barreca v. Nickolas*, 683 N.W.2d 111, 121 (Iowa 2004).

8. *See id.* at 122.

9. *See infra* text accompanying note 60.

10. *See Barreca*, 683 N.W.2d at 121 (explaining the common law standard is no longer applicable).

11. *See Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 458–59 (Iowa 2002) (citing *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 85 (Iowa 2001)), *abrogated on other grounds by Barreca*, 683 N.W.2d 111.

12. *See Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 200 (Iowa Ct. App. 2006) (applying the holding in *Winckel* to support this finding).

13. *See Delaney v. Int’l Union UAW Local No. 94 of John Deere Mfg. Co.*, 675 N.W.2d 832, 844 (Iowa 2004) (citing *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284 (1974)).

14. *See Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 223–24 (Iowa 1998) (citing *Johnson v. Nickerson*, 542 N.W.2d 506, 513 (Iowa 1996)).

15. *See id.* at 220. The jury awarded that amount in compensatory and punitive damages. *Id.* (awarding \$380,000 in compensatory and \$2 million punitive damages). The district court threw out the punitive damage award but rejected the

The dialectal heat generated by the competing interests of reputation and freedom of speech continues to simmer. The judicial heavy lifting necessitated by the constitutional revolution that began nearly fifty years ago in *New York Times Co. v. Sullivan*¹⁶ has abated. Most of the cases decided by the Iowa Supreme Court in the last sixteen years are private disputes involving application of common law principles.¹⁷ *Barreca* is the most significant case in which the principles of the common law and the First Amendment intersect.¹⁸ In the following pages, this convergence is explored.¹⁹ It is followed by a survey of other Iowa cases that have likewise made their mark on the common law and constitutional scene.²⁰ This reconnaissance of the last decade and a half of defamation law concludes with how the world of electronic communication and the Internet caused Congress to intervene and abolish liability for certain publishers of electronic defamatory content.²¹

II. THE *NEW YORK TIMES* FAULT STANDARD REINS SUPREME

A. *The Barreca Decision*

Little did city alderman George Nickolas know when he shot his mouth off at a public meeting on July 30, 2001, that he would change the course of Iowa defamation law. Purporting to seek public input on the alleged nefarious activities of a local business, Nickolas proclaimed that he received “a call from a lady who was concerned about teenage thong contests . . . and wet t-shirt contests being held at what is supposed to be an

newspaper’s argument that compensatory damages were not recoverable due to the plaintiff’s failure, as a matter of law, to produce evidence of reputational harm. *See id.* at 225–26. The Supreme Court agreed with the newspaper and dismissed the case. *See id.* at 226.

16. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

17. *See infra* Parts III–IV. Of the seventeen defamation cases formally published by the Iowa appellate courts since the end of 1996—sixteen by the supreme court and one by the court of appeals—all but three involve nonmedia defendants. One of those three was an intramural dispute between newspaper columnists. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823 (Iowa 2007).

18. *Barreca v. Nickolas*, 683 N.W.2d 111, 122 (Iowa 2004) (citing Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 78–81 (1983) (identifying grounds for unifying constitutional and common law malice standards)).

19. *See infra* Part II.B.

20. *See infra* Parts III–IV.

21. *See infra* Part V.

all-age nightclub called “The Factory.””²² The female informant did not tell Nickolas her name, nor did Nickolas contact The Factory or do any investigation to confirm the accuracy of the anonymous complaint.²³ Nickolas “played a tape of the anonymous phone call to local media outlets,” and his own public comments about the call were broadcast numerous times.²⁴ These statements were false, and within twenty-four hours, Nickolas admitted as much.²⁵ He refused, however, to issue a public apology to the owner of The Factory, Frank Barreca, who requested one within a couple of days of the publication.²⁶

Barreca sued for defamation after his business closed, and predictably, Nickolas moved for summary judgment arguing that the occasion was conditionally privileged and that he had not abused the privilege.²⁷ Specifically, Nickolas contended he had not published the statement out of any improper malice or purpose, such as hatred or spite, toward Barreca.²⁸ How could he, for he did not even know the man.²⁹ He was motivated only by his legitimate public interest in having the public contact the Davenport police with any information that could verify or refute the dastardly substance of the solitary anonymous complaint.³⁰

The district court granted summary judgment.³¹ It held that Nickolas’s statement was qualifiedly privileged and because he did not act out of any personal vendetta toward Barreca, he did not abuse the privilege.³² The Iowa Supreme Court reversed.³³ It abandoned the “improper motive” test of actual malice,³⁴ which, for over one hundred years, focused on defendants’ attitudes toward plaintiffs.³⁵ In its place, the

22. *Barreca*, 683 N.W.2d at 114.

23. *Id.* at 115.

24. *Id.*

25. *Id.*

26. See Appendix of Plaintiffs-Appellants at 38–39, *Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004) (No. 03-0439). One of the television news anchors stated that some members of the public believed these so-called contests amounted to child pornography. *Id.* at 38.

27. *Barreca*, 683 N.W.2d at 115.

28. Appendix of Plaintiffs-Appellants, *supra* note 26, at 35.

29. *Id.*

30. *Id.* at 35–36.

31. *Barreca*, 683 N.W.2d at 115.

32. *Id.*

33. *Id.* at 114.

34. *Id.* at 121.

35. See *id.* (discussing how the focus on defendants’ motives is misplaced).

court adopted one based on a publisher's attitude toward the truth of the statement—namely, whether a defendant knowingly or recklessly published a false statement.³⁶ This standard, of course, comes from the landmark case of *New York Times Co. v. Sullivan*.³⁷ A focus on the defendant's belief in the truth of a statement, the Iowa Supreme Court believed, more logically protects the interests underlying qualified privileges than a test based on personal attitude toward a plaintiff.³⁸ “[I]t should not matter whether the speaker acts out of ill will if the speech furthers those interests, as long as the speaker does not know the statements are false, and does not recklessly disregard indications of their falsity.”³⁹ The common law “wrongful motive” formulation of actual malice is a vestigial relic that was premised on the punishment of slander as a sinful state of mind.⁴⁰ This ecclesiastical justification, the court intimated, persisted “from blind imitation of the past.”⁴¹ But no more. This anachronism has given way to a falsity-based test—the *New York Times* fault standard—which serves as the sole and unified standard by which a defamation plaintiff must defeat both a constitutional and common law qualified privilege.⁴²

Applying this test to Nickolas's statements, the court held a jury question was created.⁴³ His profession of good faith could not overcome, as a matter of law, the fact that he published a defamatory statement “based wholly on an unverified anonymous telephone call.”⁴⁴

B. *The Impact of Barreca*

Barreca changes the fabric of Iowa defamation law: no more divining the intent, motive, and purpose of a speaker or publisher; no more elevating the motive of the defendant over the substance of the speech; and

36. *Id.*

37. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

38. *See Barreca*, 683 N.W.2d at 122–23.

39. *Id.* at 122 (quoting Smolla, *supra* note 18, at 80).

40. *Id.*

41. *Id.* (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

42. *See id.* at 123 (“[T]imes change, and the law must evolve to meet the demands of the present day.”).

43. *See id.*

44. *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). The Court did not have occasion to specifically address whether a plaintiff must now offer proof of “convincing clarity” to rebut a qualified privilege, a requirement that exists in the constitutional context. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964).

no more punishing the sinful conduct of the defendant. The focus is now on whether the defendant knew the defamatory publication was false or was reckless in failing to appreciate the statement's falsity.⁴⁵ This new common law standard directly intersects with constitutionally imposed fault standards in two particulars: rendering qualified privileges obsolete in one, while enhancing their role in the other. In yet a third situation, this newly minted *New York Times* axiom of the common law lifts a defendant's protections under qualified privileges to virtually unprecedented heights. With respect to public officials and public figures, qualified privileges are obsolete, as the proof necessary to overcome their application—knowing or reckless falsity—is identical to what must be proven to establish liability consistent with First Amendment guarantees.⁴⁶ This is nothing new. Since the days of the Cherry sisters and their wailings and prancings, Iowa law has conditionally immunized false and defamatory publications about persons who offered their conduct to the public for exhibition or approval as long as the defendants did not know they were false.⁴⁷ In *New York Times Co. v. Sullivan*, the Supreme Court constitutionalized this form of the common law fair comment privilege by requiring a public official to bear this burden of proof by a clear and convincing preponderance in the case-in-chief.⁴⁸ With the abrogation of the improper purpose component of the common law actual malice standard,⁴⁹ it can now be stated, clearly and unambiguously, that qualified privileges for public plaintiffs are vestigial relics of a bygone era.⁵⁰

This contrasts with the revitalized role qualified privileges now play when speakers or publishers are accused of defaming private figures involved in matters of public concern.⁵¹ Since the Court's decision in *Gertz*

45. See *Barreca*, 683 N.W.2d at 123 (applying the facts of the case to the newly-announced rule).

46. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (noting public figures voluntarily expose themselves to defamatory injury risks like public officials, meaning the same standard applies); *N.Y. Times Co.*, 376 U.S. at 279–80 (providing the standard for public officials).

47. See *Cherry v. Des Moines Leader*, 86 N.W. 323, 325 (Iowa 1901) (protecting publication “in the absence of malice or wicked purpose” about a performance the public is invited to).

48. See *N.Y. Times Co.*, 376 U.S. at 279–80, 284–86 (noting the burden of proof is on the plaintiff).

49. See *id.* at 279–80; *Barreca*, 683 N.W.2d at 121.

50. See *Barreca*, 683 N.W.2d at 122 (adopting the view that “actual malice is a vestigial relic which must be abolished”).

51. See *Gertz*, 418 U.S. at 345–46 (explaining the importance and rationale

v. Robert Welch, Inc., such private figures are required by the First Amendment to prove, at a minimum, that a defendant acted negligently in not ascertaining the falsity of a defamatory communication.⁵² The particular level of fault was left to the states.⁵³ Iowa chose negligence.⁵⁴ As long as an occasion for a qualified privilege is present, a private figure caught up in a public controversy must prove the heightened standard of *New York Times* malice.⁵⁵ The consequence of the court's incorporation of the *New York Times* fault standard into the qualified privilege–actual malice axis of the common law is that the common law provides greater protection and breathing space for speech than what the First Amendment requires. This means, as a practical matter, a defendant will no longer engage in a mini-trial to prove that a plaintiff is a public official or figure, but instead will merely assert that a qualified privilege applies in such a way that a plaintiff will have to establish the knowing or reckless falsity standard of *New York Times* malice.⁵⁶

But perhaps the most significant impact of *Barreca* is the ascension of those qualified privileges to new free speech heights in actions brought by private figures that do not pertain to any issue of public concern. These actions typically involve nonmedia defendants who claim their defamatory statements are not actionable because they further an interest protected by a qualified privilege.⁵⁷ Constitutional free speech protections are

for providing increased protection and privilege for private individuals in comparison to public officials and figures).

52. See *id.* at 347 (holding states may determine the standard of liability “so long as they do not impose liability without fault”).

53. *Id.*

54. *Jones v. Palmer Commc'ns, Inc.*, 440 N.W.2d 884, 898 (Iowa 1989).

55. See *Barreca*, 683 N.W.2d at 121 (deciding the private plaintiff had to meet the *New York Times* burden of “actual malice” to overcome the privilege asserted).

56. See *id.* at 121, 123 (setting forth the test and applying it without regard to the public or private definition of the plaintiff).

57. See, e.g., *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 458–59 (Iowa 2002), *abrogated on other grounds by Barreca*, 683 N.W.2d at 123 (explaining the “dramatic pantomime created by plaintiff being marched through the store” by employees of a department store should have led the judge to provide an instruction on qualified privilege); *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 84–85 (Iowa 2001) (recognizing the jury should receive an instruction regarding qualified privilege when employer's statements about an employee's termination are at issue); *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 200 (Iowa Ct. App. 2006) (utilizing the qualified privilege instruction, which was deemed proper in *Winckel*, after the plaintiff was paraded through security); see also, e.g., *Reeder v. Carroll*, 759 F. Supp. 2d 1064, 1085–87 (N.D. Iowa 2010) (applying the qualified privilege when doctor's reporting duties

inapplicable in these purely private disputes.⁵⁸ Of course, qualified privileges are defeasible only upon a showing of knowing or reckless falsity.⁵⁹ Thus, a defendant in a private defamation action has the same protection as a defendant who publishes or broadcasts matters of the utmost public importance as long as the occasion for the private speech is conditionally privileged. The significance of this change from a motive-based test to one based on an awareness of falsity cannot be underestimated, as it will be a rare case in which an occasion for the invocation of a qualified privilege will not be present.⁶⁰

required him to make such statements); *Gries v. AKAL Sec., Inc.*, No. 06-CV-33-LRR, 2007 WL 2710034, at *38 (S.D. Iowa Aug. 27, 2007) (recognizing termination proceedings need qualified privilege because they would otherwise be automatic defamation cases); *Chapman v. Labone*, 460 F. Supp. 2d 989, 1003 (S.D. Iowa 2006) (applying qualified privilege to reports associated with random drug testing); *Wright v. Keokuk Cnty. Health Ctr.*, 399 F. Supp. 2d 938, 953–56 (S.D. Iowa 2005) (applying the qualified privilege to statements in employee termination proceedings due to the investigatory, human-resource nature of the proceedings).

58. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–61 (1985) (plurality opinion) (analyzing and noting private speech is of less First Amendment concern, meaning public speech caselaw does not apply); *id.* at 764 (Burger, C.J., concurring separately) (agreeing that the public speech caselaw does not apply for the reasons mentioned); *id.* at 774 (White, J., concurring separately) (noting the lack of a matter of public importance means First Amendment jurisprudence does not apply).

59. See *Barreca*, 683 N.W.2d at 121.

60. Courts consider a “list of factors to determine which occasions give rise to a qualified privilege.” *Reeder*, 759 F. Supp. 2d at 1078. The factors include: “(1) protection of the publisher’s interest; (2) protection of the interest of the recipient or third party; (3) common interest; (4) family relationships; and (5) communication to those who may act in the public interest.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 594–598A (1977)). Based at least in part on these factors, the defamatory statements at issue in almost all of the defamation cases published by the Iowa appellate courts since 1996 were either conditionally privileged or published on occasions that were traditionally conditionally protected. See, e.g., *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 826, 829 (Iowa 2007) (considering and protecting self-interest, common interest, and fair comment in a case about statements regarding the professionalism of a newspaper columnist); *Yates v. Iowa W. Racing Ass’n*, 721 N.W.2d 762, 772–73 (Iowa 2006) (recognizing that factors such as self-interest and public interest were implicated by statements made to a state agency regarding practices of dog kennels); *Barreca*, 683 N.W.2d at 118–19 (finding that statements made by a member of the city council in the performance of official duties were conditionally privileged); *Delaney v. Int’l Union UAW Local No. 94 of John Deere Mfg. Co.*, 675 N.W.2d 832, 839, 844 (Iowa 2004) (allowing fair comment on issues of public concern implicated by statements made regarding a labor dispute between union and nonunion workers); *Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404, 406–07 (Iowa 2003) (holding that statements made about a member of

This is made all the more evident by the court's companion holding in *Barreca*—that in assessing whether a statement is conditionally privileged, the court will look only at the occasion or context of the publication.⁶¹ The court disavowed that the presence or absence of a defendant's good faith

church congregation were privileged); *Winckel*, 652 N.W.2d at 458–59 (finding that conversations among store personnel and with police about perceived shoplifting and the “dramatic pantomime” of plaintiff being marched through the store were protected by self-interest and common-interest privileges); *Theisen*, 636 N.W.2d at 84–85 (finding that an employer's statements concerning the reasons for an employee's termination were protected by self-interest and public-interest privileges); *Kerndt v. Rolling Hills Nat'l Bank*, 558 N.W.2d 410, 418–19 (Iowa 1997) (applying self-interest and common-interest privileges to statements regarding the termination of a bank president); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 297, 303 (Iowa 1996) (upholding the district court's finding that statements contained in an audit of school financial records and statements made in the course of a criminal investigation were protected by qualified privilege); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 136, 140 (Iowa 1996) (applying self-interest and common-interest privileges to statements made by employer's nurse to physician in the course of administering an employee's workers' compensation claim); *Kiray*, 716 N.W.2d at 200 (finding that the act of plaintiff being paraded through security gates of store was conditionally privileged).

Many federal decisions applying Iowa defamation principles in the last sixteen years likewise have held defamatory statements conditionally privileged. *See, e.g.*, *Smith v. Des Moines Pub. Schs.*, 259 F.3d 942, 948 (8th Cir. 2001) (finding that defamatory remarks concerning the termination of a school administrator were conditionally privileged); *Reeder*, 759 F. Supp. 2d at 1085–87 (finding that physician's letter to state professional board concerning the professional conduct of another physician was conditionally protected by virtue of his own self-interest, the interests of the board, and the interests of the public); *Mechdyne Corp. v. Garwood*, 707 F. Supp. 2d 864, 878 (S.D. Iowa 2009) (finding that statements in letters by plaintiff's former employer to current employer concerning plaintiff's breach of noncompete agreement were subject to qualified privilege); *Gries*, 2007 WL 2710034, at *38 (finding statements made as part of a joint investigation of employee misconduct conditionally privileged because of the common interests of coemployee and public safety); *Chapman*, 460 F. Supp. 2d at 1003 (finding that the report of a drug test by laboratory to plaintiff's employer was protected by a common interest); *Park v. Hill*, 380 F. Supp. 2d 1002, 1022–23 (N.D. Iowa 2005) (finding that statements made in a letter to bank shareholders by a fellow shareholder about bank president's handling of tender offer were protected by the self-interest and common-interest privileges); *Wright*, 399 F. Supp. 2d at 953–56 (finding that communications made while investigating employee misconduct and running a successful hospital were conditionally protected).

61. *See Barreca*, 683 N.W.2d at 118. Previously, in determining the existence of a qualified privilege, the court looked at several factors: “(1) the statement was made in good faith; (2) the defendant had an interest to uphold; (3) the scope of the statement was limited to the identified interest; and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.” *Id.* (quoting *Winckel*, 652 N.W.2d at 458).

will enter into the calculus of whether a privilege exists.⁶² Good faith is now relevant only in the determination of whether the qualified privilege is abused, as it may be probative of the defendant's knowledge of falsity or reckless disregard of the truth.⁶³ Alderman Nickolas's assertion of a privilege serves as an excellent illustration of this distinction, for if good faith were an element of privilege,⁶⁴ Nickolas would probably have lost earlier.⁶⁵ Surely an elected government official cannot justify the republication of an anonymous defamatory statement about a citizen's livelihood on the grounds that he was simply requesting information from the public so the police could investigate.⁶⁶ If the ultimate determination of good faith were made at this preliminary level of determining whether a conditional privilege even exists, statements like those made by Nickolas would be subject to the rigors of strict liability absent the defense of truth.⁶⁷ By focusing only on the occasion for the speech, the court broadens the legal protection for those interests deemed worthy of protection and leaves the good faith element to the factual resolution of whether the privileged occasion was abused.⁶⁸ Although *Barreca* does not possess the core appeal of a landmark case like *Sullivan*, its reach and impact cannot be denied. Comments made by a public official about the business affairs of a private citizen in a Mississippi River town—and, consequently, any statements

62. See *id.* (“Our task is simply to determine whether the occasion of [defendant’s] statement was qualifiedly privileged; if the occasion was so privileged, it must then be determined whether that privilege was abused.” (citation omitted)).

63. See *id.* at 123 & n.8 (citing Smolla, *supra* note 18, at 80). Other traditional ways in which qualified privileges can be abused include the publication of a statement “to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege,” or the publication of a statement that contains “defamatory matter not reasonably believed to be necessary” to fulfill the aims of the underlying occasion. RESTATEMENT (SECOND) OF TORTS § 599 cmt. a (1977).

64. See *Barreca*, 683 N.W.2d at 118 (noting that previously, for a qualified privilege to exist, otherwise defamatory statements must have been made in good faith).

65. See *id.* at 123 (noting it is not determinative that Nickolas acted without actual malice or in good faith).

66. See *id.* (“[P]rofessions of good faith will be unlikely to prove persuasive . . . where a story is . . . based wholly on an unverified anonymous telephone call.” (omissions in original) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968))).

67. See *id.* at 117 n.2 (noting that historically defendants used the privilege as a “counterweight to the strict liability” which attached in common law defamation cases (citing McNulty, *supra* note 1, at 718)).

68. See *id.* at 118, 123.

made by individuals that further their protected private interests—now have as much protection under the common law as the rising voices of the civil rights movement have under the First Amendment.⁶⁹

The court's decision in *Barreca* also raises the question whether *New York Times* malice is now the exclusive standard for an award of punitive damages in all defamation cases; the answer is unclear.⁷⁰ The traditional test, of course, is "willful and wanton disregard for the rights or safety of another."⁷¹ In *Winckel v. Von Maur, Inc.*, a successful defamation plaintiff argued that the trial court's failure to give an instruction on qualified privilege was harmless error because the jury awarded punitive damages based on an instruction that incorporated the *New York Times* definition of actual malice.⁷² Rejecting this argument, the court held that the then valid improper motive standard for defeating a qualified privilege could not be inferred from *New York Times* malice.⁷³ But with the adoption in *Barreca* of a unified standard for the rebuttal of both constitutional and common

69. Compare *id.* at 118, 123 (abandoning the old common law definition of actual malice in favor of the *New York Times* standard for "actual malice"), with *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (setting forth and applying the "actual malice" standard of "knowledge that [the statement] was false or with reckless disregard of whether it was false or not"). The Iowa Supreme Court also looked to the *New York Times* malice standard for guidance in determining whether an attorney should be suspended for making statements to a newspaper reporter challenging the honesty of the judge presiding over his drunk driving prosecution. See *Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 80 (Iowa 2008). The court's holding in *Weaver* is confusing, as it rejected the *New York Times* standard in favor of a reasonableness standard, yet held the attorney acted in reckless disregard for the truth and falsity of his statement. *Id.* at 81, 85. But see *Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver*, No. 11-1626, 2012 WL 877104, at *15 (Iowa Mar. 16, 2012) ("intemperate statements to the press").

70. The *New York Times* standard must be shown to warrant an award of punitive damages in cases in which the speech is of interest or concern to the public. Compare *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding only compensatory damages may be recoverable if the *New York Times* standard is not met), with *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–61 (1985) (plurality opinion), and *Dun & Bradstreet*, 472 U.S. at 766 (White, J., concurring) (recognizing the application of *Gertz* in requiring the *New York Times* standard to be met in order to be awarded punitive damages, is limited to defamatory statements of public concern and holding punitive damages "absent a showing of 'actual malice'" are allowed for statements not involving public concern).

71. IOWA CODE § 668A.1(1)(a) (2011).

72. See *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 459–60 (Iowa 2002), *abrogated on other grounds by Barreca*, 683 N.W.2d at 119–21.

73. *Id.* at 459.

law conditional privileges,⁷⁴ the court may very well extend that standard for the recovery of punitive damages. Knowing falsity or reckless disregard for the truth is, it is submitted, the functional equivalent of willfully and wantonly disregarding the reputational rights of another.⁷⁵

III. OTHER COMMON LAW DECLARATIONS AND DEVELOPMENTS

A. Publication

The communication of a defamatory message to a third person is the foundation for a claim for reputational injury.⁷⁶ Because reputation is the estimation of one's character held by neighbors and associates, there can be no reputational loss unless a defamatory message is communicated to a third person: publication.⁷⁷ A party generally cannot state a claim for defamation by informing a third party of a defamatory statement published only to him.⁷⁸ The only exception to this requirement is if the plaintiff is under a "strong compulsion" to repeat the communication.⁷⁹ In *Theisen v. Covenant Medical Center*, the court held that a job applicant is under a strong compulsion to advise a prospective employer of a prior, unsatisfactory job evaluation that the applicant deems defamatory.⁸⁰ The applicant's repetition of the defamatory evaluation is deemed a publication because the former employer can reasonably foresee that the disclosure of employment history is part of the job-seeking process.⁸¹

74. See *Barreca*, 683 N.W.2d at 122–23 (quoting Smolla, *supra* note 18, at 78–81).

75. See *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 142–44 (Iowa 1996) (finding evidence sufficient to warrant an award of punitive damages under the willful and wanton standard where one of the defendants knowingly published a false statement about the plaintiff).

76. See RESTATEMENT (SECOND) OF TORTS § 577 cmt. a (1977).

77. *Id.* § 577 cmts. a–b; *Belcher v. Little*, 315 N.W.2d 734, 737 (Iowa 1982) (citations omitted); see also *Kiesau v. Bantz*, 686 N.W.2d 164, 176 (Iowa 2004) (including in the jury instruction that publication or a showing to more than one person was an element to be proven for a jury finding).

78. See *Belcher*, 315 N.W.2d at 738 (refusing to recognize a claim where the plaintiff communicated the statements).

79. *Id.*

80. See *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 83–84 (Iowa 2001).

81. See *id.* at 83 (providing that being able to "reasonably foresee" this compulsion is a requirement for the exception).

B. Defamatory Meaning and Division of Labor Between Judge and Jury

1. Capability

As part of the publication analysis, the court determines whether a communication is *capable* of being understood as defamatory by the recipient of the message.⁸² Once the court decides a statement is capable of bearing a defamatory meaning, then the court, or the jury, if the statement is ambiguous in its meaning, decides whether the communication was in fact understood as defamatory.⁸³ Two recent libel cases illustrate the court's judgment that some communications, for markedly different reasons, are not capable of being understood as defamatory. In *Lloyd v. Drake University*, a university security guard claimed that a panel report commissioned by Drake to review an incident involving his attempted arrest of a black football player had libeled him because the panel suggested he was immoral and a racist.⁸⁴ The language in the report, however, stated that "[t]he panel found no evidence of overt racial motivation in any aspect of the actions that led to the arrest of [the football player]."⁸⁵ The court held this statement was not capable of conveying a defamatory meaning.⁸⁶ Summary judgment was affirmed.⁸⁷

The rhetorical hyperbole exception to this aspect of the publication requirement arose in *Delaney v. International Union UAW Local No. 94*.⁸⁸

82. *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 14 (Iowa 1990).

83. *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996) ("A defamatory communication is not published, and is therefore not actionable, unless it is heard and understood by a third person to be defamatory." (citations omitted)); RESTATEMENT (SECOND) OF TORTS § 577 cmt. c (1977); *see also* McNulty, *supra* note 1, at 648 (footnote omitted).

84. *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 232 (Iowa 2004).

85. *Id.*

86. *See id.*

87. *Id.* at 233.

88. *Delaney v. Int'l Union UAW Local No. 94 of John Deere Mfg. Co.*, 675 N.W.2d 832 (Iowa 2004). The United States Supreme Court created the exception as a matter of constitutional law in 1970 in a case involving newspaper reports of city council meetings in which citizens complained a local real estate developer was attempting to blackmail the city into granting him a zoning variance. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 7–8, 14 (1970). The Court held no reader of the newspaper could have understood the developer was being charged with the crime of blackmail. *See id.* at 14 (footnote omitted). Even a careless reader, the Court concluded, must have perceived the word was no more than rhetorical hyperbole used by those who considered the developer's negotiating position unreasonable. *Id.* In a later case, the Court again held the First Amendment requires that defamatory speech

Plaintiffs, former union members, contended drawings that accompanied their identification on scab lists in a union newsletter defamed them.⁸⁹ Recognizing that federal labor law preempted their defamation claim insofar as it was based upon factually true assertions that they were scabs—non-union workers⁹⁰—the plaintiffs argued that the drawings “called for physical harm onto others” and thus were not protected.⁹¹ One of the union’s drawings depicted a lighted bomb and stated, “We’d like to [picture of bomb] our SCABS.”⁹² Another showed “the plaintiffs as rats deserving the sharp end of a turkey’s hatchet” under the caption that stated, “Our SCABS will be enjoying this Union negotiated Thanksgiving holiday, too. We do the work and they come around at harvest time.”⁹³ The court characterized these drawings as cartoons that no reasonable reader could interpret as “literally depicting an actual event or situation.”⁹⁴ They were rhetorical hyperbole designed to encourage union membership, and summary judgment for the defendants was appropriate.⁹⁵ The message of this case is aptly stated in the court’s first and non-hyperbolic sentence of its opinion: “Labor disputes are not for the faint of heart.”⁹⁶

2. *Understanding*

If the court determines that a communication is capable of conveying a defamatory meaning, then the inquiry becomes whether the communication was understood as such by its recipient.⁹⁷ The determination of “whether a communication is capable of bearing a

must be interpreted reasonably as stating actual facts about an individual or an entity in order for a plaintiff to recover. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (construing *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

89. *See Delaney*, 675 N.W.2d at 844.

90. *See Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 286–87 (1974) (finding the use of the term “scab” was mere “rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join”).

91. *Delaney*, 675 N.W.2d at 844.

92. *Id.* at 836, 844 (alteration in original).

93. *Id.* at 838.

94. *Id.* at 844 (quoting *Keller v. Miami Herald Publ’g Co.*, 778 F.2d 711, 716 (11th Cir. 1985)).

95. *Id.* Although the court cited *Bresler* in support of its conclusion, the court specifically based its holding of no publication on the basis of federal labor law and the *Letter Carriers* case. *See id.*

96. *Id.* at 834.

97. RESTATEMENT (SECOND) OF TORTS § 614 (1977).

particular meaning, and whether that meaning is defamatory” are determinations for the court.⁹⁸ The question of whether the communication was understood as defamatory by its recipient is a question for the jury.⁹⁹ Two recent libel cases and two slander cases illustrate this distinction. Both of the libel cases add a layer of complexity to the discussion. In one—the spirit of Satan case—the extent of the publication was dispositive of the court’s conclusion that the plaintiff made a case for libel per se.¹⁰⁰ In the other, the defendant’s claim that he parodied, not defamed, the plaintiff was deemed to have created a jury issue on the issue of defamatory meaning.¹⁰¹

First, the matter of Satan. Jerrold Swinton, district superintendent of the United Methodist Church, was upset with the church’s handling of issues with one of its parishioners, Jane Kliebenstein.¹⁰² After visiting the church one Sunday, Swinton, an ordained minister, wrote a letter signed by a parish committee that was mailed to Shell Rock congregation members and Shell Rock community persons.¹⁰³ Upset by Kliebenstein’s comments to him about the local pastor’s shortcomings, Swinton told the congregation to “acknowledge they allowed the spirit of Satan to work in their midst”¹⁰⁴ and that the members needed to express contrition and seek help for their misconduct.¹⁰⁵ Swinton concluded his letter by announcing a church conference would be held to determine if Kliebenstein should be stripped of her church office and expelled from the church if her dissension continued.¹⁰⁶ Kliebenstein and her husband responded with a defamation suit.¹⁰⁷ The church and Swinton prevailed on a motion for summary judgment by arguing the “spirit of Satan” “is a ‘purely ecclesiastical term, deriving its meaning from religious dogma’ thereby preventing the court from adjudicating its impact” due to the free exercise and establishment

98. *Id.* § 614(1).

99. *Id.* § 614(2).

100. *See Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404, 407–08 (Iowa 2003) (noting the sectarian meaning did not control and the dismissal was error at law).

101. *See Kiesau v. Bantz*, 686 N.W.2d 164, 177 (Iowa 2004) (placing the burden on the defendant to show it was not a parody).

102. *See Kliebenstein*, 663 N.W.2d at 405.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

clauses of the federal and Iowa constitutions.¹⁰⁸ Recognizing the general legitimacy of this argument within the context of church discipline or excommunication, the court rejected its application to Swinton's letter because the letter was published outside the congregation.¹⁰⁹ The court had no trouble finding "Satan" and "satanic" had secular defamatory meanings such as "'the great enemy of man and of goodness; the Devil'"¹¹⁰ and "'characterized by extreme cruelty or viciousness' and 'innate wickedness.'"¹¹¹ There is no question these attacks on the character of Ms. Kliebenstein were libelous per se, and the court reversed the grant of summary judgment.¹¹²

In contrast, the attack on Buchanan County Deputy Sheriff Crystal Kiesau by fellow officer Tracey Bantz was not deemed to be libelous per se.¹¹³ Bantz fulfilled the prophecy of his immediate supervisor's complaints to the sheriff—who happened to be his father-in-law—that he was "'a lawsuit waiting to happen'"¹¹⁴ when Bantz altered a photograph of Kiesau to make it appear she was standing with her K-9 dog in front of her sheriff's vehicle with her breasts exposed.¹¹⁵ At trial, Kiesau argued that because the altered photograph was clear and unambiguous, the court should find that it was libelous per se.¹¹⁶ Bantz countered that the altered photograph was a parody in that it could not be reasonably understood to describe actual facts about Kiesau or actual events in which she participated.¹¹⁷ The district court "concluded the altered photograph was susceptible of more than one meaning and refused to instruct the jury the altered photograph was libelous per se."¹¹⁸ Instead, the court left the determination of libel per

108. *Id.* at 406.

109. *See id.* at 407.

110. *Id.* at 407–08 (quoting WEBSTER'S NEW WORLD DICTIONARY 1192 (3d ed. 1994)).

111. *Id.* at 408 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1044 (1986)). Excessive publication usually pertains only to whether a qualified privilege has been abused. *See* RESTATEMENT (SECOND) OF TORTS § 604 (1977). Here, the nature of the audience was the dispositive factor in determining the communication was defamatory. *See Kliebenstein*, 663 N.W.2d at 408.

112. *See Kliebenstein*, 663 N.W.2d at 408.

113. *See Kiesau v. Bantz*, 686 N.W.2d 164, 177 (Iowa 2004) (holding these statements did not even constitute opinion).

114. *Id.* at 170.

115. *Id.*

116. *See id.* at 176 (explaining Kiesau asked for this jury instruction).

117. *Id.*

118. *Id.* at 177.

se to the jury, instructing that Kiesau needed to prove “the altered photograph would reasonably be understood to be an expression which would attack a person’s integrity or moral character.”¹¹⁹ The jury so found, awarding \$96,000 in compensatory damages and \$60,000 in punitive damages.¹²⁰ The Iowa Supreme Court rejected Bantz’s argument that the trial court erred by refusing to give a specific instruction on the defense of parody, holding the concept was contained in the charge of the jury to determine whether the altered photograph conveyed a defamatory meaning.¹²¹ The judgment against Bantz was affirmed.¹²²

In two cases decided about a month apart in late 1996¹²³ and early 1997,¹²⁴ the court addressed the role of judge and jury in slander per se cases. Because slander per se, unlike libel per se, encompasses only four categories of defamatory statements,¹²⁵ three scenarios are possible if the jury is given the task of ascertaining defamatory meaning:

First, the jury could decide the language was reasonably understood as falling within one of the four categories of slander per se. Second, the jury could decide the language, although understood as defamatory, did not fit into the categories of slander per se. . . . Finally, the jury could decide the statement was not understood as defamatory and, therefore, not actionable at all.¹²⁶

This latter alternative was chosen by the jury in *Kerndt v. Rolling Hills National Bank*.¹²⁷ There, the board of directors of the bank terminated for cause the employment of its president, Roger Kerndt.¹²⁸

119. *Id.*

120. *See id.* at 178.

121. *See id.* at 177.

122. *Id.* at 179.

123. *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996).

124. *Kerndt v. Rolling Hills Nat’l Bank*, 558 N.W.2d 410 (Iowa 1997).

125. These four categories of oral accusations are actionable without proof of falsity, malice, and special harm if they pertain to: “1) indictable criminal conduct punishable by imprisonment or involving moral turpitude; 2) loathsome disease; 3) business incompetence or lack of skill in an occupation by which one earns a living; and 4) unchastity of a woman or a married man.” McNulty, *supra* note 1, at 650. In contrast, libel per se includes all written statements “which are defamatory on their face.” *Id.* at 647.

126. *Id.* at 652.

127. *See Kerndt*, 558 N.W.2d at 418 (explaining the statement was ambiguous, which merited giving it to the jury).

128. *Id.* at 413–14.

Just before the termination, the board chairman orally advised a banking consultant who had helped Kerndt obtain employment with the bank “that Kerndt had not been functioning for six months, [he] had been having mood swings,” he had trust issues with bank employees, and physicians on the board had concerns about his mental health.¹²⁹ Kerndt unsuccessfully argued to the trial court that these statements constituted slander per se, and, as such, the question of defamation should not have been submitted to the jury.¹³⁰ The trial court reasoned the statements had at least two possible meanings, one of which was not defamatory; therefore, it was for the jury to determine if Kerndt was in fact slandered.¹³¹ The jury concluded he was not.¹³² Kerndt’s appeal of whether the speech constituted defamation per se was rejected by the court.¹³³ Critical to the court’s conclusion was the testimony of a banking consultant who stated the board chairman never criticized Kerndt’s banking skills and was instead reaching out to assist Kerndt.¹³⁴ Similarly, a former loan officer interpreted the board chairman’s statement about his concerns with Kerndt’s mental health not as disparagement but as an expression of concern and compassion.¹³⁵ Because the manner in which the actual recipients of the communication understood their conversations were nondefamatory, the court reasoned that so could a reasonable person.¹³⁶ Accordingly, the court held that the issue of whether a defamatory meaning was in fact conveyed was correctly left to the jury.¹³⁷

One month earlier, in *Wilson v. IBP, Inc.*, the court similarly held a jury question was created on slander per se.¹³⁸ This case grew out of a situation in which Diane Arndt, a nurse employed by IBP to coordinate authorized care for injured IBP employee Keain Wilson, falsely advised his physician “that IBP had a videotape showing that Wilson was not following his prescribed treatment regimen.”¹³⁹ No videotape existed.¹⁴⁰ Arndt was

129. *Id.* at 414.

130. *See id.* at 418.

131. *Id.*

132. *See id.* at 419.

133. *See id.* at 418 (agreeing with the findings of the lower court and the jury).

134. *Id.* at 418–19.

135. *Id.* at 419.

136. *Id.*

137. *Id.*

138. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 140 (Iowa 1996).

139. *Id.* at 136.

140. *Id.*

told by the IBP corporate security department that Wilson had been driving at a time when he had been under doctor's orders to maintain bed rest for an unstable lumbar disc.¹⁴¹ Arndt's statement to the physician resulted in Wilson being returned to light-duty work, which either reduced or eliminated his receipt of workers' compensation benefits.¹⁴² In addition to lifting his bed rest restriction, Dr. William Hamsa discontinued his treatment of Wilson, telling Wilson he knew he was "messing around" by not following the treatment plan.¹⁴³ Wilson eventually saw a surgeon who took Wilson off light-duty status and performed surgery to correct his back condition.¹⁴⁴ After settling his workers' compensation claim against IBP, Wilson sued Arndt and IBP for slander per se and breach of fiduciary duty.¹⁴⁵ He obtained a general verdict for "\$4000 in compensatory damages and \$15 million in punitive damages."¹⁴⁶ The trial court ordered a remittitur of all but \$100,000 of the \$15 million amount, or in the alternative, granted a new trial on the issue of punitive damages.¹⁴⁷ Wilson rejected the remittitur and appealed.¹⁴⁸ IBP cross-appealed, arguing that Wilson had not generated a fact question on slander per se.¹⁴⁹ The court rejected IBP's argument.¹⁵⁰ As Arndt's statements regarding Wilson's alleged failure to follow Dr. Hamsa's advice and the non-existent videotape could reasonably be understood as imputing dishonesty to Wilson and an attack on his integrity and moral character, the court determined the issue of slander per se had been correctly submitted to the jury.¹⁵¹ The court affirmed the \$4,000 compensatory award and affirmed the finding for punitive damages in the amount of \$2 million if plaintiff agreed to a remittitur of all amounts in excess of that amount.¹⁵²

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.*

146. *Id.*

147. *See id.*

148. *See id.* at 136–37.

149. *See id.* at 139.

150. *Id.*

151. *Id.* at 139–40; *see also* Lundell Mfg. Co. v. Am. Broad. Cos., 98 F.3d 351, 360–61 (8th Cir. 1996) (finding substantial evidence supported the jury's conclusion that the statement "does not work" meant a machine was inoperable and, therefore, defamatory, as opposed to the defendant's contention that the phrase meant the machine was not economically viable and, therefore, not defamatory).

152. *Wilson*, 558 N.W.2d at 148.

C. *The Expansion of Slander Per Se*

Wilson also raises the issue of whether the court is really serious about maintaining the distinction between slander per se and slander. In support of its conclusion that Arndt's statements could constitute slander per se, the court reasoned that "Iowa law is clear that '[a]n attack on the integrity and moral character of a party is libelous per se.'"¹⁵³ Slander per se, of course, is not as all-inclusive as libel per se.¹⁵⁴ The only category¹⁵⁵ of slander per se that Arndt's statements conceivably touch on is lack of business or trade skill.¹⁵⁶ But the authors of the *Restatement (Second) of Torts* make clear that mere disparagements of a general character "equally discreditable to all persons" is not enough to fit into this category.¹⁵⁷ Rather, the particular character quality disparaged must be of such a character that it is peculiarly valuable in the plaintiff's business or reputation.¹⁵⁸ For example, a statement that a physician consorts with harlots is not slander per se, but a charge that he makes improper advances to his patients is.¹⁵⁹ Similarly, Arndt's statements to Dr. Hamsa regarding Wilson's alleged failure to follow his doctor's orders as shown by a non-existent videotape "may be reasonably understood as imputing dishonesty to Wilson and as an attack on his integrity and moral character,"¹⁶⁰ but the statements were not peculiarly harmful to his trade. The court does not even attempt to justify its holding by invoking the "peculiarly harmful" argument.¹⁶¹ Instead, it rests its holding on a reference to the definition of libel per se.¹⁶²

The blurring of the distinction between slander per se and slander is also found in *Kerndt*, in which the court held that defamatory statements affecting individuals in their trade or business and "*attacks on a person's integrity and moral character*" are defamatory per se.¹⁶³ The court also used

153. *Id.* at 139 (quoting *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984)).

154. *See supra* note 125 and accompanying text.

155. McNulty, *supra* note 1, at 650.

156. *See Wilson*, 558 N.W.2d at 136 (explaining the facts of the case that revolve around a workers' compensation claim).

157. RESTATEMENT (SECOND) OF TORTS § 573 cmt. e (1977).

158. *Id.*

159. *Id.*

160. *Wilson*, 558 N.W.2d at 140.

161. *See id.* at 139–40 (mentioning only the existence of the generalization).

162. *See id.* at 139.

163. *Kerndt v. Rolling Hills Nat'l Bank*, 558 N.W.2d 410, 418 (Iowa

this “defamatory per se” phrase in discussing the trilogy of possibilities available to the jury in determining whether certain oral accusations are either slander per se, slander, or not actionable.¹⁶⁴ By coining this new phrase in *Kerndt*¹⁶⁵ and by citing the definition of libel per se to support its conclusion that Wilson had been slandered per se,¹⁶⁶ the court is clearly brushing aside the traditional distinction between slander per se and slander. The court seems to be signaling a new jurisprudence based on defamation per se.

D. Dramatic Pantomime

Defamatory attacks on reputation have almost always involved the written or spoken word. We can now add dramatic pantomime to the universe of actionable defamatory communications that can impair a person’s standing in the community. Two recent cases highlight the drama involved in false accusations of shoplifting. In *Winckel v. Von Maur, Inc.*, a customer had been shopping at a department store when a security guard approached her.¹⁶⁷ The guard led her through the store to the manager’s office where she was accused of shoplifting.¹⁶⁸ Based both on the verbal accusations of theft and parading her through the store, she successfully sued the store for defamation.¹⁶⁹ The court held the jury could have properly concluded that a defamatory act was created by the dramatic pantomime of marching the customer through the store.¹⁷⁰ Similarly, in *Kiray v. Hy-Vee, Inc.*, the court of appeals held the passing of a customer and her shopping bag through the newly installed and periodically defective security gate and the use of a scanner wand after the alarm on the gate falsely sounded could also amount to a defamatory dramatic pantomime.¹⁷¹ In contrast, a plaintiff’s claim for dramatic pantomime was rejected as a matter of law when the plaintiff only offered proof that he was

1997) (emphasis added).

164. *Id.* (citing McNulty, *supra* note 1, at 652).

165. *See id.* (referring to statements that are “defamatory per se”).

166. *Wilson*, 558 N.W.2d at 139.

167. *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 456 (Iowa 2002), *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111, 123 (Iowa 2004).

168. *Id.*

169. *See id.* at 458–60.

170. *Id.* at 459. The court reversed the award for defamation-related damages, however, finding that an instruction on qualified privilege should have been given. *Id.* at 460.

171. *See Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 199 (Iowa Ct. App. 2006) (basing the finding of a possible defamatory act on the standard utilized in *Winckel*).

simply escorted from his place of employment without words spoken or other conduct after being terminated.¹⁷² The court reasoned such escorts “are part of the everyday work environment.”¹⁷³

E. *Defamation by Implication*

A defamatory communication need not be explicit to be actionable. As the Supreme Court of Iowa eloquently stated nearly one hundred years ago, “It is the thought conveyed to the minds of others by the publication that produces the poison which defames the good name and character of the person assailed.”¹⁷⁴ What if the false and defamatory poison conveyed by that thought originated solely from a true statement? Would that be actionable? Yes, the Supreme Court of Iowa answered in *Stevens v. Iowa Newspapers, Inc.* when it expressly adopted the principle of defamation by implication.¹⁷⁵ That principle, the court stated, arises not from what is stated but from what is implied when a defendant:

“(1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.”¹⁷⁶

The correctness or accuracy of facts contained in the underlying statement do not provide a shield from liability.¹⁷⁷ Otherwise, the court reasoned, legal cover is provided to one who has the cleverness or literary facility to juxtapose a combination of ““suggestions, cues, allusions, presumptions, and intimations”” in conveying a defamatory thought or meaning.¹⁷⁸ The more specific question presented in *Stevens* was whether

172. *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 85 (Iowa 2001) (citing *Bolton v. Dep’t of Human Servs.*, 540 N.W.2d 523, 525 (Minn. 1995)).

173. *Id.* (citing *Bolton*, 540 N.W.2d at 526). The court also held the claim for defamation failed as a matter of law because there was no evidence anyone saw the plaintiff being escorted out of the building. *Id.* at 85–86. In other words, there was no publication of the dramatic pantomime. *Id.* at 86.

174. *Turner v. Brien*, 167 N.W. 584, 586 (Iowa 1918).

175. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 828 (Iowa 2007).

176. *Id.* at 827 (alteration in original) (quoting DAN B. DOBBS, PROSSER & KEETON ON THE LAW OF TORTS § 116, at 117 (Supp. 1988)).

177. *See id.* at 828 (noting the clever use and choice of words, though true, could otherwise allow a defendant to avoid liability).

178. *Id.* at 829 (quoting Nicole Alexandra LaBarbera, *The Art of Insinuation: Defamation by Implication*, 58 *FORDHAM L. REV.* 677, 701 (1990)).

implied defamation could be asserted, consistent with the First Amendment, by a public figure.¹⁷⁹ The court held that it could.¹⁸⁰ This is further discussed in detail in Part IV: Constitutional Expressions.¹⁸¹

F. *Of and Concerning the Plaintiff*

In addition to proof of publication of a defamatory statement, a prima facie case of defamation is established by showing the statement made reference to and concerned the plaintiff.¹⁸² The reference need not be direct; it is sufficient that persons who read the defamatory statement reasonably understand it to refer to the plaintiff.¹⁸³ The Eighth Circuit recently weighed in on this element in the group defamation context by breathing life into a century-old Iowa Supreme Court case, *Wisner v. Nichols*.¹⁸⁴ In *Wisner*, the court held that an individual member of a group or class can state a viable claim for relief arising out of a publication disparaging the group or class if the defamatory matter can reasonably be understood to refer to the member.¹⁸⁵ The modern-day manifestation of this principle involved statements made by the president of Titan Tire Corporation, Maurice Taylor, Jr., at a press conference held one day after Titan filed a federal racketeering (RICO)¹⁸⁶ lawsuit against the United Steelmakers of America and 130 of its union members.¹⁸⁷ Taylor accused over one hundred union members at the Des Moines plant of filing fraudulent occupational hearing loss claims contemporaneously with a labor strike in order to bankrupt Titan.¹⁸⁸ Taylor did not mention any union members by name at his press conference, but he did hand out

179. *Id.* at 828.

180. *See id.* at 829 (noting to deny a public official the opportunity to assert implied defamation would “open Pandora’s Box”).

181. *See infra* Part IV.A.

182. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996) (citations omitted).

183. *See Haas v. Evening Democrat Co.*, 107 N.W.2d 444, 453 (Iowa 1961) (citations omitted).

184. *See Brummett v. Taylor*, 569 F.3d 890, 892 (8th Cir. 2009) (citing *Wisner v. Nichols*, 143 N.W. 1020, 1025 (Iowa 1913)).

185. *Wisner*, 143 N.W. at 1025 (citations omitted). Specifically, the court held a newspaper’s charge that the *Wisner* estate was financially fostering a climate of immorality in the town of Eldora could reasonably be understood to refer to the *Wisner* siblings who owned the estate. *See id.* at 1023–25.

186. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68 (2006).

187. *Brummett*, 569 F.3d at 891.

188. *Id.*

copies of the RICO lawsuit that specified their names and positions of employment and alleged they had committed mail fraud by sending their fraudulent claims through the mail.¹⁸⁹ The press conference was reported in the print and broadcast media, but none of the employees were identified by name.¹⁹⁰ Nearly sixty of the union workers sued for defamation.¹⁹¹ The district court originally granted Taylor's motion for summary judgment, holding the group defamation doctrine precluded recovery because Taylor did not verbally name the employees individually at the press conference.¹⁹² The Eighth Circuit reversed, concluding Taylor's statements "could reasonably be understood to be of and concerning each employee" because his listeners could easily ascertain the identities of the group members.¹⁹³ The claims of twenty plaintiffs whose cases had not settled or been dismissed were tried on remand.¹⁹⁴ The jury awarded compensatory and punitive damages to each plaintiff after finding Taylor liable.¹⁹⁵ Taylor's motion for judgment as a matter of law was granted by the district court, and the Eighth Circuit affirmed.¹⁹⁶ The appellate court adopted the reasoning of the trial court—that although the plaintiffs were "intended to be the object of Taylor's statements," they did not prove that the "recipients of Taylor's publication understood each individual plaintiff to be the intended object of Taylor's statements."¹⁹⁷ In other words, the plaintiffs may have stated a claim upon which relief could be granted—the statements could reasonably be understood to be about them—but they failed to deliver proof the statements *were in fact* understood by others to be about them.¹⁹⁸ The judgment for Taylor was affirmed.¹⁹⁹

G. Damages

Since the seminal case of *Gertz v. Robert Welch, Inc.* in 1974,²⁰⁰

-
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* (citations omitted).
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 891–92.
197. *Id.* at 892 (citations omitted).
198. *See id.*
199. *Id.* at 893.
200. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

presumed damages have been constitutionally prohibited in defamation actions involving an issue of public concern unless the plaintiff establishes the defendant acted with *New York Times* malice.²⁰¹ Proof of actual injury is now required in these types of cases.²⁰² The Supreme Court made clear, however, that the First Amendment does not go so far as to mandate that reputational injury must first be shown before other types of damages, such as mental anguish and suffering, can be recovered.²⁰³ This issue is left to the states.²⁰⁴ The Iowa Supreme Court specifically addressed this issue in *Schlegel v. Ottumwa Courier*.²⁰⁵ Richard Schlegel and his wife sued the Ottumwa Courier and its editor in chief for defamation for falsely publishing that Richard had declared bankruptcy.²⁰⁶ The jury awarded Richard \$230,000 in compensatory damages and his wife \$150,000 for loss of consortium.²⁰⁷ Punitive damages of \$2 million were also awarded.²⁰⁸ The trial court granted the defendants' motion for judgment notwithstanding the verdict (JNOV) on the punitive damages award, set aside the compensatory damages as excessive, and granted the defendants a new trial.²⁰⁹ The Schlegels appealed the trial court's rulings and the newspaper cross-appealed, contending that the trial court should have granted the JNOV motion on compensatory damages because the Schlegels did not prove actual injury to reputation.²¹⁰

The court held as a matter of Iowa common law that proof of reputational harm is a prerequisite in public defamation actions.²¹¹ No other types of compensatory damages, so-called parasitic damages, can be recovered until and unless damage to reputation is shown.²¹² The court

201. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (plurality opinion); *id.* at 764 (Burger, C. J., concurring); *id.* at 776 (White, J., concurring) (concluding it is allowed to recover these when not of public concern).

202. *Gertz*, 418 U.S. at 349.

203. See *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

204. *Id.*

205. See *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 223 (Iowa 1998) (relying on *Time* in finding the United States Constitution does not bar emotional distress damages).

206. *Id.* at 220.

207. *Id.*

208. *Id.*

209. *Id.* at 219.

210. *Id.*

211. See *id.* at 223.

212. *Id.* at 224.

reasoned “that to do otherwise would set the law of defamation on end.”²¹³ Because the Schlegels presented no evidence of Richard’s reputation prior to the publication or what effect the publication had on his reputation, the court held the Schlegels had not generated a jury question on compensatory damages.²¹⁴ Case dismissed.²¹⁵

H. *Defenses*

Truth and privilege remain the two basic defenses to a charge of defamation. The developments with respect to each are discussed below.

1. *Truth*

As long as the defamatory “gist” or “sting” of the communication at issue is substantially true, no liability exists.²¹⁶ The gist or sting of the defamatory charge is “the heart of the matter in question—the hurtfulness of the utterance.”²¹⁷ The inquiry focuses on whether the highlight of the publication and the pertinent angle of its message are substantially true.²¹⁸ In *Wilson v. IBP*, IBP and Diane Arndt argued, “because Wilson allegedly did not follow his prescribed bed rest and . . . continued to run errands and work on his car against Dr. Hamsa’s orders[,] then Arndt’s statements that Wilson was not injured as severely as he claimed and . . . was not following Dr. Hamsa’s orders were substantially true” as a matter of law.²¹⁹ The court quickly disposed of this claim. The pertinent angle of the message Arndt was trying to convey to Dr. Hamsa was that “Wilson was faking the severity of his injury” and was lying to the doctor about it, “not . . . that he was working on his car or driving his children to school.”²²⁰ Because sufficient evidence existed to support the submission of the hurtfulness of these utterances to the jury, the court held a fact question was properly presented for resolution.²²¹

213. *Id.* at 223.

214. *Id.* at 226.

215. *Id.*

216. *Behr v. Meredith Corp.*, 414 N.W.2d 339, 342 (Iowa 1987) (citing *Hovey v. Iowa State Daily Publ’n Bd., Inc.*, 372 N.W.2d 253, 255 (Iowa 1985)).

217. *Id.* (quoting *Vachet v. Cent. Newspapers, Inc.*, 816 F.2d 313, 316 (7th Cir. 1987)).

218. *Id.* (quoting *Vachet*, 816 F.2d at 316).

219. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 140 (Iowa 1996).

220. *Id.* at 141.

221. *Id.*

2. *Absolute Privilege*

In *Kennedy v. Zimmerman*, the Iowa Supreme Court addressed the issue of whether statements made by an attorney to a newspaper reporter in the course of an interview, during which the attorney essentially restated the allegations of a petition, are absolutely privileged, and the court held they were not.²²² This case arose as a result of the deterioration of an attorney–client relationship between Mary Kennedy, a Waterloo attorney, and Thomas Richmond, an inmate at the Iowa State Penitentiary in Fort Madison.²²³ Kennedy, who was dating another penitentiary inmate, was representing Richmond on a child custody matter.²²⁴ “Shortly after Richmond complained to Kennedy about her representation, he was assaulted in the penitentiary by Kennedy’s boyfriend.”²²⁵ Kennedy then withdrew from representing Richmond, and he filed a lawsuit against her “alleging she violated her ethical obligations . . . by communicating matters within the attorney-client privilege to her boyfriend.”²²⁶ Richard Zimmerman represented Richmond in the lawsuit. In an interview, parts of which were published in a Waterloo newspaper, Zimmerman said Kennedy’s alleged actions were a “breach of her ethical duties and negligent.”²²⁷ He added that Richmond was seeking damages for physical injuries, the amount of which would be determined by a jury.²²⁸

Kennedy filed a defamation action against Zimmerman for these extra-judicial statements.²²⁹ Zimmerman responded with a summary judgment motion, claiming he possessed an absolute privilege to publish statements made in the course of a judicial proceeding.²³⁰ The trial court agreed with Zimmerman; the supreme court did not.²³¹ Formally adopting the two-part *Restatement* test, the supreme court held Zimmerman failed the first part because his statements were not published as a part of or in connection with a judicial proceeding.²³² Favoring the interest of reputation over unbridled advocacy, the court reasoned that the lack of

222. See *Kennedy v. Zimmermann*, 601 N.W.2d 61, 65–66 (Iowa 1999).

223. *Id.* at 63.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 63, 66.

232. See *id.* at 64–65.

absolute protection for newspaper interviews would not typically inhibit attorneys from freely and fully investigating and completely presenting their client's claims to the court.²³³ Moreover, "the occasion [for talking to the media] is without close judicial control in most instances."²³⁴ The fact that Zimmerman met the second part of the test—the content of his communication related to a judicial proceeding—was immaterial.²³⁵ The disposition of *Kennedy* brings to mind the Eighth Circuit's admonition in *Asay v. Hallmark Cards, Inc.*²³⁶ In *Asay*, the court rejected a defendant's argument that the dissemination of a federal complaint to the news media did not warrant absolute protection because otherwise "a person need only file false and defamatory statements as judicial pleadings and then proceed to re-publish the defamation at will under the cloak of immunity."²³⁷

Kennedy stands in contrast to the conventional application of the privilege, as illustrated by the recent federal district court case of *McFarland v. McFarland*.²³⁸ This case grew out of a contentious marital dissolution proceeding in which Brian McFarland sued approximately sixty defendants, one of whom was his wife's dissolution attorney.²³⁹ McFarland alleged the attorney, Randy Waagmeester, conspired to obtain false and disparaging affidavits and to secure false reports from the Iowa Department of Human Services to deprive him of custody and visitation rights with respect to the couple's son.²⁴⁰ Waagmeester filed a motion to dismiss, which was granted.²⁴¹ Unlike the facts in *Kennedy*, the allegations made by McFarland dealt with statements contained in documents filed with the court that were obviously a part of Waagmeester's representation of his client's interests.²⁴² The court reasoned that declining to extend the privilege in this instance would inhibit attorneys from freely and "completely representing their client's interests before the courts."²⁴³ Echoing the Iowa Supreme Court's conclusion that close judicial control is

233. *See id.* at 65.

234. *Id.* at 65–66 (citations omitted).

235. *See id.* at 66.

236. *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692 (8th Cir. 1979).

237. *Id.* at 698.

238. *McFarland v. McFarland*, Nos. C08-4047-MWB, C09-4047-MWB, 2010 WL 746878 (N.D. Iowa Feb. 26, 2010) [hereinafter *McFarland I*].

239. *Id.* at *1.

240. *Id.* at *2–3.

241. *See id.* at *7.

242. *See id.* at *6.

243. *Id.*

a prerequisite for the application of the privilege, the court added that a litigant in a court proceeding can call upon the authority of a judge “who may reprimand, fine and punish as well as expunge from [the record any] statements of those who exceed proper bounds, and who may themselves be disciplined when necessary.”²⁴⁴ Because Waagmeester’s alleged conduct occurred under the control and supervision of the state court family law judge, it was absolutely privileged.²⁴⁵

In two separate opinions arising from the *McFarland* suit, the same federal court held individuals who submitted affidavits in the underlying dissolution proceeding were also protected by an absolute privilege.²⁴⁶ The court believed the Iowa Supreme Court, which had never addressed the issue of absolute privilege for witnesses, would adopt such a privilege applying the nearly identical two-part test of the *Restatement* that governs attorney statements.²⁴⁷ One of the individuals who Mr. McFarland claimed had defamed him was a mental health counselor who opined in her affidavit that McFarland’s conduct with the couple’s son was detrimental.²⁴⁸ Mr. McFarland further alleged in another proceeding that a bank official defamed him through statements made in the bank official’s affidavit, including a statement that Mr. McFarland “became extremely belligerent with bank personnel when they refused to provide [him] with information on [Mrs. McFarland’s] account.”²⁴⁹ The court held each affidavit was made in connection with a judicial proceeding and the content of each had some relation to the judicial proceeding—child custody or visitation and property distribution.²⁵⁰

244. *Id.* (quoting *Mills v. Denny*, 63 N.W.2d 222, 225 (Iowa 1954)).

245. *Id.* at *6–7.

246. *See* *McFarland v. McFarland*, Nos. C08-4047-MWB, C09-4047-MWB, 2010 WL 2899013, at *1, *9 (N.D. Iowa July 26, 2010) [hereinafter *McFarland II*] (applying absolute immunity to a bank official); *McFarland v. McFarland*, Nos. C08-4047-MWB, C09-4047-MWB, 2010 WL 2265681, at *1, *5 (N.D. Iowa June 4, 2010) [hereinafter *McFarland III*] (applying absolute immunity to a mental health counselor).

247. *See* *McFarland II*, 2010 WL 2899013, at *9; *McFarland III*, 2010 WL 2265681, at *5.

248. *See* *McFarland III*, 2010 WL 2265681, at *2, *5.

249. *See* *McFarland II*, 2010 WL 2899013, at *1–3.

250. *Id.* at *9; *McFarland III*, 2010 WL 2265681, at *5. In another federal case applying Iowa law, the court held an unemployment hearing was a judicial proceeding such that a defamatory statement published therein was deemed to be absolutely privileged. *See* *Wright v. Keokuk Cnty. Health Ctr.*, 399 F. Supp. 2d 938, 950–51 (S.D. Iowa 2005).

3. *Qualified Privilege*

Prior to *Barreca*, the Supreme Court of Iowa often used a four-part test to determine the existence of a qualified privilege: (1) the statement was made in good faith; (2) the defendant had an interest to uphold; (3) the scope of the statement was limited to the identified interest; and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.²⁵¹ Adopting the *Restatement* approach, the court in *Barreca* decided a court's task henceforth would be much simpler—namely, to determine only whether the occasion or context of the publication was subject to qualified protection.²⁵² Those protections are generally expressed in terms of the interest being served by the publication, such as self-interest,²⁵³ interest of the recipient or a third party,²⁵⁴ common interest,²⁵⁵ family relationships,²⁵⁶ public interest,²⁵⁷ and performance of official duties by inferior government officials.²⁵⁸ The recent case of *Reeder v. Carroll* serves as an excellent illustration of many of these interests.²⁵⁹ Dr. Thomas Carroll, a practicing pathologist and Woodbury County Medical Examiner, wrote a letter to the Iowa Board of Medicine (the Board) in which he advised he was aware of three patients who experienced adverse outcomes after Dr. Ralph Reeder, a local neurosurgeon, performed certain surgical techniques on them in the face of available and untried conservative treatment measures.²⁶⁰ Dr. Carroll performed autopsies on two of the patients and provided summaries on the care provided to these patients as part of his letter.²⁶¹ He concluded his letter by stating he had “overheard other physicians state that Dr. Reeder

251. See, e.g., *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 458 (Iowa 2002), *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004); *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 83–84 (Iowa 2001); *Vojak v. Jensen*, 161 N.W.2d 100, 105 (Iowa 1968).

252. *Barreca*, 683 N.W.2d at 118.

253. RESTATEMENT (SECOND) OF TORTS § 594 (1977).

254. *Id.* § 595.

255. *Id.* § 596.

256. *Id.* § 597.

257. *Id.* § 598.

258. *Id.* § 598A.

259. See *Reeder v. Carroll*, 759 F. Supp. 2d 1064, 1078, 1086–87 (N.D. Iowa 2010) (providing first a detailed list of the interests the qualified privilege is meant to protect, and then thoroughly applying the facts to show how this interest analysis is supposed to work).

260. See *id.* at 1071–72.

261. *Id.*

ha[d] been investigated by [a local hospital] for concerns related to quality of patient care issues” but he was not familiar with those cases.²⁶²

The Board subsequently filed charges against Dr. Reeder, stating it found probable cause to charge him with “‘professional incompetency’ and ‘engaging in practice harmful or detrimental to the public.’”²⁶³ The charges were subsequently dismissed, however, as the Board concluded it was unable to prove that Dr. Reeder’s care in the three cases identified by Dr. Carroll fell below the standard of care.²⁶⁴ Dr. Reeder then sued Dr. Carroll for defamation, and following discovery, Dr. Carroll moved for summary judgment largely on the basis of several common law qualified privileges.²⁶⁵ The court granted the motion, finding several applicable privileges. They were: (1) self-interest—Dr. Carroll was required under Iowa Code chapter 653 to report his concerns;²⁶⁶ (2) interest of the recipient—the Board had an interest in ensuring that licensed physicians practice medicine competently and safely;²⁶⁷ and (3) public interest—the board was authorized to take action in the public’s interest to protect it from incompetent physicians.²⁶⁸ The court then determined as a matter of law that Dr. Carroll did not abuse these privileges by publishing the statements with “knowing or reckless disregard of their truth.”²⁶⁹

IV. CONSTITUTIONAL EXPRESSIONS

It has been almost fifty years since the United States Supreme Court reversed Sheriff L. B. Sullivan’s \$500,000 judgment against the *New York Times* and four Alabama clergymen,²⁷⁰ and gave birth to a brave new world of constitutional defamation jurisprudence. Nearly every aspect of the common law tort has been affected; liability, damages, the type and nature of defamatory speech, the nature and quality of evidence, and the scope of appellate review have all undergone scrutiny, change, and in some particulars, a metamorphosis.²⁷¹ The constitutional tumult has long

262. *Id.* at 1072.

263. *Id.* at 1076–77 (quoting Pl. App’x at 47–49).

264. *Id.* at 1077 (quoting Pl. App’x at 57).

265. *See id.*

266. *See id.* at 1086.

267. *See id.* at 1086–87.

268. *See id.* at 1087.

269. *Id.* at 1088.

270. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256, 292 (1964).

271. *See McNulty*, *supra* note 1, at 679.

subsided, and the once innovative rules have become well-settled.²⁷² The last sixteen years have yielded, however, several cases from the Iowa Supreme Court and local federal courts that provide further context and meaning to these constitutionally based defamation principles. These cases, and more specifically the subject matters of defamation by implication, constitutional malice, facts and provable falsity, and independent review are touched upon below.

A. *Defamation by Implication*

As noted in Part III, the Supreme Court of Iowa has made clear the literal truth of a statement will not stand in the way of a claim for defamation by implication.²⁷³ If a potential defendant, either through the clever juxtaposition of statements or through the omission of certain facts, implies a defamatory message, liability may result.²⁷⁴ The specific question in *Stevens v. Iowa Newspapers, Inc.* was whether such a claim could be brought by a public figure consistent with First Amendment free speech guarantees.²⁷⁵ The court held that it could.²⁷⁶ Todd Stevens, a freelance columnist for the *Ames Tribune*, believed a column about the resignation of Iowa State University's associate athletic director penned by the newspaper's sports editor, Susan Harman, "was too complimentary toward the resigning employee."²⁷⁷ An internal brouhaha ensued, culminating in Stevens advising the managing editor he would no longer write for the newspaper but wanted to write a farewell column about this resignation imbroglio.²⁷⁸ The managing editor consented, and the column of Stevens appeared side by side with a responsive column by Harman.²⁷⁹ In her column, Harman wrote that "Stevens 'in fact rarely attended events upon which he wrote columns.'"²⁸⁰ Stevens sued Harman, the managing editor, and the owner of the newspaper for defamation, contending and arguing Harman's statement while factually accurate, implied he fabricated his

272. *See id.* at 709–22 (describing the principles that have become "certain" over time).

273. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 828 (Iowa 2007).

274. *See id.*

275. *See id.* ("Whether we adopt the theory of implied defamation suits against public officials or public figures . . . presents a closer question.").

276. *Id.* at 829.

277. *Id.* at 826.

278. *See id.*

279. *Id.*

280. *Id.*

columns.²⁸¹ The district court granted the defendants' motion for summary judgment; however the court of appeals reversed, concluding Iowa would recognize the defamation by implication claim.²⁸² The Supreme Court of Iowa held the *New York Times* requirement that a plaintiff prove falsity and actual malice—knowing or reckless falsity—adequately and constitutionally protected a potential defendant's free speech rights in a defamation by implication action.²⁸³ Critical to the court's decision were potential consequences of a defendant who was absolutely immune from such a claim. Quoting a Seventh Circuit opinion that upheld a public official's defamation by implication action, the court stated:

To deny a public official the opportunity to demonstrate the defamatory innuendo of a publication, even one critical of governmental conduct, is to open Pandora's Box from which countless evils may spring. A legal fiction denying the existence of clearly discernible, though not explicit charges, exposes public officials to baseless accusations and public mistrust while promoting an undisciplined brand of journalism²⁸⁴

Applying the *New York Times* standard to the facts of the case, the court held that Stevens created a fact question.²⁸⁵ "Harman admitted in her deposition [that] personal attendance at sporting events is not required by professional standards for a sports opinion, as opposed to a news story."²⁸⁶ In view of this admission, the court held that Harman's statement about Stevens's lack of personal attendance at events was capable of implying a false and defamatory meaning that Stevens fabricated his columns.²⁸⁷ It was up to the jury to determine whether Harman knew of, or recklessly disregarded, the false implication she conveyed.²⁸⁸

281. See *id.* at 825–26. Stevens also claimed he was expressly libeled by Harman's statements that his column "contained numerous factual errors and unsubstantiated claims . . . [and] near libelous characterizations." *Id.* at 826.

282. *Id.* at 827.

283. See *id.* at 827, 829–30 (noting the importance of the protections and recognizing their existence).

284. *Id.* at 829 (quoting *Saenz v. Playboy Enter., Inc.*, 841 F.2d 1309, 1317 (7th Cir. 1988)).

285. See *id.* at 831.

286. *Id.*

287. *Id.*

288. See *id.*

B. Constitutional Malice

The *New York Times* actual malice standard was premised on the proposition “that debate on public issues should be uninhibited, robust, and wide-open” and some falsity must be tolerated to avoid self-censorship.²⁸⁹ It is a difficult evidentiary burden to satisfy. The three following Iowa parties were told, by three different courts, that their proof of knowing or reckless falsity on the part of the publisher was wanting as a matter of law.

In *Caveman Adventures UN, Ltd. v. Press-Citizen Co.*, the Supreme Court of Iowa reversed a punitive damage judgment of \$240,000 that Caveman, a retail electronics store, obtained against an Iowa City newspaper for publishing a paid advertisement of a business competitor that accused Caveman of false and misleading advertising designed to deceive the buying public.²⁹⁰ The advertisement of Caveman’s competitor, Woodburn Electronics, was prompted by Woodburn’s belief that Caveman falsely disparaged the kind of camcorder Woodburn sold in its own advertisement in the same local newspaper.²⁹¹ Unlike Caveman’s advertisement, Woodburn referred to its competitor by name, claiming that Caveman published “fiction being cloaked as ‘fact,’” not the “TRUTH,” about the 8 mm camcorder it had been marketing and selling.²⁹² After obtaining a judgment for \$30,000 in actual damages against Woodburn, Caveman went after the *Press-Citizen* for punitive damages for its role in publishing the libelous statements.²⁹³ Conceding that the *New York Times* constitutional malice standard was applicable,²⁹⁴ Caveman attempted to uphold the judgment by arguing three points: (1) the advertising manager for the newspaper acknowledged that Woodburn’s advertisement amounted to an accusation of fraud on the part of Caveman; (2) the advertisement was accepted contrary to the newspaper’s “policy of not printing attack advertisements”; and (3) the newspaper, by running Woodburn’s advertisement, hoped to motivate Caveman to provide an advertisement in response, presumably enriching its coffers thereby.²⁹⁵ The

289. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

290. *See Caveman Adventures UN, Ltd. v. Press-Citizen Co.*, 633 N.W.2d 757, 758, 760 (Iowa 2001).

291. *See id.* at 758–59 (detailing the Caveman’s ad and providing Woodburn Electronics’ motive for its response ad).

292. *Id.* at 759.

293. *Id.* at 760.

294. *See id.* at 761.

295. *Id.* at 762.

court was not persuaded, finding Woodburn's so-called attack ad was nothing more than an attempt to counter the puffery of the original Caveman ad.²⁹⁶ Unless the *Press-Citizen* actively entered the product debate and ascertained which of the competing claims was closest to the truth, which it did not do, it could not, as a matter of law, be held accountable under the *New York Times* malice standard.²⁹⁷ The moral of this story is self-evident: do not inquire or investigate; just accept the money and publish the advertisement.²⁹⁸

In *Mercer v. City of Cedar Rapids*, a former Cedar Rapids police officer's defamation judgment met a similar fate after the Eighth Circuit's independent review of the record found insufficient evidence of actual malice as a matter of law.²⁹⁹ Four days before the end of her one-year probationary period, Teresa Mercer was terminated following a notice of charges and an informal hearing.³⁰⁰ She was charged by Chief of Police William Byrne with the following: "(i) provid[ing] false, misleading, evasive, or untruthful answers . . . to the Internal Affairs investigators, (ii) disobey[ing] a direct order by discussing the investigation with the Commissioner of Public Safety, and (iii) violat[ing] Iowa law regarding domestic abuse and Police Department regulations" for not reporting a confrontation with her estranged husband at her residence.³⁰¹

Chief Byrne advised Mercer of the termination by letter in which he stated "she did 'not meet the standards required of a police officer on the Cedar Rapids Police Department.'"³⁰² In an interview with a newspaper reporter the same day, Chief Byrne stated that it is not uncommon for a probationary officer to lose a job in the year before a permanent assignment begins because "it's not an unusual thing to find people who just don't meet up."³⁰³ The chief's comments appeared in the newspaper the next day under the headline "'Officer loses job; had relationship with co-worker.'"³⁰⁴ Mercer sued the city and the chief on several theories and obtained a jury verdict for \$48,000 on her defamation claim.³⁰⁵ The district

296. *Id.*

297. *See id.*

298. *See id.* at 759.

299. *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 849–50 (8th Cir. 2002).

300. *Id.* at 844.

301. *Id.* at 846–47.

302. *Id.* at 847.

303. *Id.*

304. *Id.*

305. *Id.* at 843.

court entered judgment on the verdict and denied the post-verdict motion for judgment as a matter of law by the city, reasoning that sufficient evidence of *New York Times* malice existed “because a reasonable jury could conclude that Chief Byrne acted out of anger.”³⁰⁶ The Eighth Circuit reversed.³⁰⁷ The court rejected the district court’s rationale, holding the chief’s anger or personal feelings simply had “no bearing” on whether the chief made his statements knowing they were false or with reckless disregard for their truth.³⁰⁸ Not only had Mercer failed to prove constitutional malice as a matter of law, but the objective evidence underlying the three specific charges actually supported the truth of why Byrne did not think Mercer met the standards required to successfully complete her probationary period.³⁰⁹

Similarly, in *Reeder*, the results of an administrative investigation into the professional competency of a neurosurgeon supported the summary dismissal of his defamation claim against a pathologist whose concerns prompted the Iowa Board of Medicine to initiate an investigation.³¹⁰ After a four-year investigation including peer review, the board found there was probable cause to charge the neurosurgeon with professional incompetency and engaging in practice harmful or detrimental to the public.³¹¹ The fact that the charges were ultimately dismissed was immaterial.³¹² Given the probable cause finding, the court held there was no way a reasonable juror could find that the patient safety concerns expressed by the pathologist had been published with knowing or reckless falsity.³¹³ Moreover, unlike the ill-informed city alderman in *Barreca*, the pathologist had personal knowledge of the underlying facts, as he performed autopsies on two of the patients at issue.³¹⁴ The case was closed.³¹⁵

C. *Facts and Provable Falsity*

According to the United States Supreme Court, a defamatory

306. *Id.* at 843, 849 (citations omitted).

307. *Id.* at 850.

308. *Id.* at 849.

309. *See id.* at 850.

310. *See Reeder v. Carroll*, 759 F. Supp. 2d 1064, 1089 (N.D. Iowa 2010).

311. *Id.*

312. *See id.*

313. *See id.* at 1088 (noting there was no evidence presented supporting these assertions).

314. *Id.* at 1089.

315. *Id.* at 1090.

statement about a matter of public concern must state or reasonably be interpreted as stating actual fact and must also be provable as false.³¹⁶ If not, it cannot, consistent with the First Amendment, serve as the basis for a defamation action.³¹⁷ Whether a particular statement or assertion is provable as true or false largely depends on whether it is objectively verifiable.³¹⁸ The Supreme Court of Iowa explored this concept in *Yates v. Iowa West Racing Ass'n*.³¹⁹ Beverly and Arthur Yates, owners of a greyhound racing dog kennel, brought an action against the owner and manager of Bluffs Run Casino for criticizing the performance of their dogs.³²⁰ Specifically, they alleged that a casino representative's remark made at a meeting of the Iowa Racing and Gaming Commission—that the kennel was “substandard and [a] poor performer[.]”—amounted to slander per se.³²¹ The casino declined to renew its contract with the Yateses to have the kennel's greyhounds participate in racing events.³²² The Yateses obtained a punitive damage award for slander,³²³ but the court reversed.³²⁴ It held the statement that the kennel was “substandard and [a] poor performer[.]” was not actionable as a matter of law because it was not objectively verifiable.³²⁵ It was nothing more than the casino representative's opinion, which contained nothing that implied any provable false fact.³²⁶

D. Independent Review

Since the decision in *New York Times*, courts must make an independent examination of the record to assure a judgment obtained by a public official is in fact based on clear and convincing evidence of constitutional malice.³²⁷ An independent examination is constitutionally

316. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *see also* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990).

317. *See Milkovich*, 497 U.S. at 20 (footnote omitted).

318. *See id.* at 21–22 (noting the determination should “be made on a core of objective evidence”).

319. *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762 (Iowa 2006).

320. *Id.* at 765, 767.

321. *See id.* at 767, 772.

322. *See id.* at 766.

323. *Id.* at 767.

324. *Id.* at 776.

325. *See id.* at 773.

326. *See id.*

327. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964) (finding a lack of convincing evidence of actual malice, which the Constitution demands).

mandated to ensure that any such judgment does not constitute a forbidden intrusion on the field of free expression.³²⁸ The Court extended this rule to public figures in 1984,³²⁹ but has not had occasion to flesh out the nature and extent of this principle since its 1989 decision in *Harte-Hanks Communications, Inc. v. Connaughton*.³³⁰ The Court in *Harte-Hanks* demonstrated that considerations pertinent to review of a trial court's finding of defamation include that the record must be reviewed anew in full, that credibility determinations should be reviewed under the clearly-erroneous standard,³³¹ and that a reviewing court should not base its opinion on subsidiary facts that a jury *could have* found but rather on what the jury *must have* found in conjunction with the undisputed facts.³³²

There does appear to be some inconsistency in the Court's application of this standard as it pertains to other factual findings of constitutional magnitude affecting public plaintiffs—namely falsity, defamatory meaning, and reference to the plaintiff. For example, the Court independently reviewed the alleged reference to Sheriff Sullivan in *New York Times* and found it constitutionally wanting.³³³ Also, in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, the Court held a written charge of blackmail could not support—even to the most careless reader—a claim of defamation as a matter of constitutional law despite a contrary finding of fact by the lower courts.³³⁴ In contrast, the Court in *Masson v. New Yorker Magazine, Inc.* appeared to apply a traditional sufficiency of the evidence standard³³⁵ in determining whether a jury issue had been created on the falsity of a publication.³³⁶

328. *See id.* at 286.

329. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (citations omitted).

330. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688–90 (1989).

331. *Id.* at 688.

332. *Id.* at 690; *see also* McNulty, *supra* note 1, at 707 (footnote omitted).

333. *See N.Y. Times*, 376 U.S. at 288–92.

334. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

335. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513 (1991). In a private figure–public issue defamation action arising out of federal district court in Iowa, the Eighth Circuit relied on *Masson* in declining to independently review the record on the issue of falsity. *See Lundell Mfg. Co. v. Am. Broad. Co.*, 98 F.3d 351, 359 (8th Cir. 1996). Reinstating a verdict of \$1,058,000, the court held the First Amendment only requires that a finding of falsity be reviewed on a sufficiency of the evidence standard. *See id.* at 359, 364.

336. *See Masson*, 501 U.S. at 522–25 (holding that a reasonable reader and jury could find that the author's use of quotation marks to attribute to the plaintiff's

In addition, the Court has yet to definitely rule on whether the principle of independent review applies to fault determinations adverse to defendants in actions brought by private figures arising out of publications that are of public interest. Presumably, it will not take another forty-seven years to learn whether the First Amendment commands such a finding—which, in Iowa, is negligence³³⁷—be reviewed independently so as to assure that it “does not constitute a forbidden intrusion on the field of free expression.”³³⁸ Just recently, the Court quoted this phrase from *New York Times*³³⁹ in justifying its independent review and reversal of a multimillion dollar verdict that the father of a deceased military service member obtained against a fundamentalist church, which stemmed from an anti-homosexual demonstration at the military service member’s funeral.³⁴⁰ The independent review centered around whether the content of the demonstration was of public or of private concern.³⁴¹ Why should not the same enhanced appellate review apply to a defamation case in which a private figure has obtained a verdict and it is disputed whether the defamatory statement is of public or private concern?

V. INTERNET AND ELECTRONIC COMMUNICATIONS

To say that the forums through which the poisonous tongue of slander and the venomous tablet of libel proliferated over the last sixteen years would be a bit of an understatement. It can be summed up in two words: the Internet. As of 1996, the Court recognized that approximately forty million people used this international network of interconnected computers to communicate and transmit information.³⁴² Over two billion people are now online taking part in electronic commerce.³⁴³ Internet users are e-mailing, talking in chat rooms, communicating on message boards,

comments he claimed he did not make conveyed a false and defamatory meaning).

337. See *Jones v. Palmer Commc’ns, Inc.*, 440 N.W.2d 884, 898 (Iowa 1989).

338. *N.Y. Times*, 376 U.S. at 285.

339. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (citations omitted).

340. *Id.* at 1220–21.

341. See *id.* at 1215–16.

342. See *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (providing these facts from specific findings made by the Court by provided information).

343. See The World Factbook, *Country Comparison: Internet Users*, CIA, <http://www.cia.gov/library/publications/the-world-factbook/rankorder/2153rank.html> (last updated Nov. 30, 2010, 1:54 PM) (providing the statistics of Internet users by country as of 2009); *Internet Users in the World Distribution by World Regions— 2011*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last updated Feb. 15, 2012) (reflecting Internet users exceeds 2.2 billion in 2011).

making friends and posting comments on Facebook, joining and tweeting on Twitter, and authoring Wikipedia pieces. Viewed in this context, the Biblical image of publishers proclaiming defamatory speech from the housetops³⁴⁴ is a “rustic relic[] of ancient asininity.”³⁴⁵ But the publication rules of defamation common law are not rusted relics, they persist and thrive. Not only is every repetition of a defamatory statement considered a publication, but also nearly everyone who takes part in the publication is deemed a publisher, including those who deliver, transmit, or distribute defamatory matter published by a third person if they know or have reason to know of its defamatory character.³⁴⁶ Newsdealers, bookstores, and libraries are all subject to this rule, granted, however, there is a heightened showing of liability for these secondary publishers in that there must be proof of special circumstances warning them that a particular publication is defamatory.³⁴⁷ But the risk is present.

A risk of liability is also present for those who intentionally and unreasonably fail to remove defamatory matter they know is exhibited on their land and chattels—continuing publication.³⁴⁸ The *Restatement* authors cite the instance of writing on the wall of a washroom that indicates a certain woman is unchaste.³⁴⁹ If, after discovery of this writing, a tavern owner fails to remove it even though he was able to, he is subject to liability for the continued publication of the libel, although not from the time of original publication until the discovery.³⁵⁰ So, how did courts initially apply these common law rules of publication to electronic communications and, more specifically, to internet service providers³⁵¹ (ISPs)?³⁵² In a word, inconsistently. The two preeminent cases arise from New York in the early 1990s—*Cubby, Inc. v. CompuServe, Inc.*³⁵³ and

344. *Morse v. Times-Republican Printing Co.*, 100 N.W. 867, 873 (Iowa 1904) (referencing *Luke* 12:3, which states that what is whispered behind closed doors will be proclaimed from the housetops).

345. *Sauerhoff v. Hearst Corp.*, 538 F.2d 588, 590 n.1 (4th Cir. 1976).

346. RESTATEMENT (SECOND) OF TORTS § 581(1) (1977).

347. *See id.* § 581 cmts. d & e (noting the knowledge requirements associated with each type of occupation).

348. *Id.* § 577.

349. *Id.* at cmt. d, illus. 15.

350. *Id.*

351. An internet service provider allows a user access to the Internet.

352. *See, e.g., In re Charter Commc'ns, Inc., Subpoena Enforcement Matter*, 393 F.3d 771, 772 (8th Cir. 2005).

353. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

*Stratton Oakmont, Inc. v. Prodigy Services Co.*³⁵⁴ In *CompuServe*, a federal court held common law publication rules were sufficient to bar liability for an ISP.³⁵⁵ In *Stratton Oakmont*, the same common law rules were insufficient.³⁵⁶

Cubby, Inc. and Robert Blanchard sued CompuServe, Inc. after it allegedly allowed publication of false and defamatory statements on a website it maintained.³⁵⁷ The defamatory remarks suggested the plaintiff's website was a new start-up scam and that Blanchard had been "bounced" by his previous employer.³⁵⁸ CompuServe moved for summary judgment on the basis "it had acted as a distributor, and not a publisher, of the statements, and [could not] be held liable for the statements because it did not know and had no reason to know of the statements."³⁵⁹ The court granted the motion, analogizing the role of CompuServe and its computerized database to a traditional news vendor who merely distributes or delivers information.³⁶⁰ To impose tort liability on such a distributor without proof "it knew or had reason to know of" the statements at issue, the court reasoned, "would impose an undue burden on the free flow of information."³⁶¹

Four years later, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the result was different. The plaintiffs sued Prodigy Services Company—an ISP like CompuServe—for libelous posts on Prodigy's Internet bulletin board.³⁶² The posts claimed Stratton Oakmont, Inc., a securities investment banking firm, and its president engaged in criminal and fraudulent acts

354. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (1998), *as recognized in* *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1016 (N.Y. 2011).

355. *See CompuServe*, 776 F. Supp. at 141 (utilizing the common law analysis to come to the conclusion).

356. *Stratton Oakmont*, 1995 WL 323710, at *5 (refusing to apply common law analysis as the court found a computer could not be properly classified within those rules).

357. *CompuServe*, 776 F. Supp. at 137–38.

358. *Id.* at 138.

359. *Id.*

360. *Id.* at 140.

361. *Id.* at 140–41.

362. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (1998), *as recognized in* *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1016 (N.Y. 2011).

regarding an initial public offering of stock.³⁶³ Stratton moved for partial summary judgment on the ground that Prodigy was a publisher of the offending posts.³⁶⁴ Invoking *CompuServe*, Prodigy claimed it was merely a distributor and was under no duty to ascertain the nature or character of the posts.³⁶⁵ Not persuaded, the New York state trial court found Prodigy to be a publisher as a matter of law.³⁶⁶ To distinguish *CompuServe*, the court emphasized the editorial control Prodigy exercised over the alleged defamatory content.³⁶⁷ The court determined Prodigy not only “held itself out to the public and its members as controlling the content of its bulletin boards,” but it also utilized technology and manpower “to delete notes from its bulletin boards on the basis of offensiveness and ‘bad taste.’”³⁶⁸ The court believed Prodigy’s election to reap the benefits of editorial control sowed the potential for civil liability where none would have otherwise existed.³⁶⁹

Could it be that an ISP that devotes substantial resources to reviewing the content is the distinguishing factor for the imposition of defamation liability? ISPs certainly benefit from third-party content uploaded to their sites; should they be legally responsible for that content as well? Or, is it unfair to saddle ISPs with legal liability given the sheer volume of content and the rapidity of the content’s production? These broad policy questions were brought to a legislative head as a result of these two different judicial outcomes.³⁷⁰ Indeed, the *Stratton Oakmont* court noted its holding could very well be preempted by the Communications Decency Act, which was then under consideration by Congress.³⁷¹ The court’s prophecy was correct.

363. *Id.*

364. *See id.*

365. *Id.* at *4.

366. *Id.*

367. *Id.*

368. *Id.*

369. *See id.* at *5.

370. *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (“One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”).

371. *Stratton Oakmont*, 1995 WL 323710, at *5.

A. *Publisher Immunity Under the Communications Decency Act of 1996*

On February 8, 1996, President Clinton signed the Communications Decency Act (CDA) into law.³⁷² The provisions that speak to the *CompuServe* and *Stratton Oakmont* holdings are 47 U.S.C. § 230(c) and (e)(3).

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).³⁷³

....

(e) Effect on other laws

....

(3) State law

... No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.³⁷⁴

Just how these provisions spoke to *CompuServe*, *Stratton Oakmont*,

372. See 110 Stat. 118–28.

373. 47 U.S.C. § 230(c) (2006).

374. *Id.* § 230(e)(3).

and other similar cases, however, was unclear at the outset.

1. *The Zeran Analysis*

The first case to interpret § 230(c) of the CDA was *Zeran v. America Online, Inc.*³⁷⁵ On April 19, 1995, and out of the blue, Ken Zeran received death threats and countless angry calls.³⁷⁶ Zeran later discovered someone posted a message on an America Online bulletin board that advertised “Naughty Oklahoma T-Shirts.”³⁷⁷ The posting contained “offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City.”³⁷⁸ The post also contained an instruction to call Zeran with inquiries.³⁷⁹ Upon the discovery, Zeran called America Online.³⁸⁰ An America Online representative told Zeran the post would be removed.³⁸¹ The following day, another post appeared on AOL that advertised “additional shirts with new tasteless slogans related to the Oklahoma City bombing.”³⁸² The post again contained Zeran’s name and telephone number.³⁸³ According to Zeran, the threats and anger intensified.³⁸⁴ The following days resulted in additional posts that mirrored the prior posts; now, however, the posts offered additional memorabilia for purchase, including bumper stickers and key chains.³⁸⁵ Frustrated, Zeran continued communication with America Online, and a representative advised him that an “individual account from which the messages were posted would soon be closed.”³⁸⁶ Zeran also involved the FBI.³⁸⁷ In the weeks following the initial posts, Zeran received an angry phone call approximately every two minutes.³⁸⁸ To protect his safety, local police watched at his home.³⁸⁹

375. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

376. *Id.* at 329.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

Zeran had enough and sued America Online.³⁹⁰ The suit claimed America Online was negligent by unreasonably delaying the removal of defamatory messages posted by an unidentified third party, refusing to post retractions of those messages, and failing to screen for similar postings after being notified.³⁹¹ America Online pleaded § 230(c) as an affirmative defense and then moved for judgment on the pleadings.³⁹² The district court granted the motion.³⁹³ Zeran appealed.³⁹⁴ Affirming the judgment, the Fourth Circuit determined the following:

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.³⁹⁵

The court found the purpose of statutory immunity was not difficult to discern—namely, the recognition of the threat tort-based lawsuits posed to freedom of speech in the Internet medium, the need to maintain the robust nature of Internet communication, and the commitment to keep government interference to a minimum.³⁹⁶ The statutory immunity merely represented a “policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”³⁹⁷ Indeed, § 230 does not bar suit against the actual author of the defamatory messages.

Zeran argued that § 230 immunity eliminates only publisher liability, not distributor liability, for ISPs that allow access to third-party content suppliers.³⁹⁸ Zeran grounded his argument on the language of § 230(c),

390. *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1128 (E.D. Va. 1997).

391. *Id.*

392. *See id.* at 1129 (arguing the CDA preempts the state tort action claim brought against it).

393. *Id.* at 1137.

394. *Zeran*, 129 F.3d at 328.

395. *Id.* at 330.

396. *Id.*

397. *Id.* at 330–31.

398. *Id.* at 331.

which only uses the term “publisher.”³⁹⁹ “No provider or user of an interactive computer service shall be treated as the *publisher* or speaker of any information provided by another information content provider.”⁴⁰⁰ The court was unpersuaded.⁴⁰¹ It deemed distributor liability as a “subset, or a species, of publisher liability”;⁴⁰² the statute’s omission of the word “distributor” was not fatal to distributor immunity. Simply stated, the court interpreted “publisher” in § 230(c) to encompass both publisher and distributor liability.⁴⁰³ This is inconsistent with the common law:

Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents—including the defamatory content—and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.⁴⁰⁴

Moreover, the court determined the purpose of § 230, to increase self-regulation, would only be served if publishers meant publishers and distributors.⁴⁰⁵ If distributor liability were left intact, mere notice would put the ISP in the role of an editor, deciding the veracity of content.⁴⁰⁶ This was exactly the role, according to the court, that Congress sought to prevent in a digital environment that houses unprecedented amounts of media.⁴⁰⁷ In short, distributor liability would lead ISPs to simply remove any alleged defamatory content—an impermissible chill on speech that

399. *Id.* at 332.

400. 47 U.S.C. § 230(c)(1) (2006) (emphasis added).

401. *See Zeran*, 129 F.3d at 332.

402. *Id.*

403. *See id.* The court acknowledged the ISP in *Stratton* was deemed a “publisher,” not a distributor. *Id.* The court, however, determined *Stratton* left open the possibility that distributors were a subset of publishers for purposes of defamation law. *See id.*

404. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 803 (5th ed. 1984)).

405. *Id.* at 334.

406. *See id.* at 333.

407. *Id.*

Congress never intended.⁴⁰⁸ Finally, the court rejected *Zeran*'s argument that the statute's construction should be narrow, given the statute was in derivation of common law.⁴⁰⁹ The court reiterated Congress's intent "to promote unfettered speech on the Internet," which necessitates the federal immunity from conflicting state law causes of action.⁴¹⁰

The significance of *Zeran* is at least two-fold: (1) § 230 bars both publisher and distributor liability for ISPs,⁴¹¹ and (2) the liability bar applies not only to defamation claims but also to other causes of action that are based upon the content a third-party supplies.⁴¹²

2. *The Zeran Progeny*

Since the Fourth Circuit decided *Zeran* in 1997, six different federal circuit courts of appeal have addressed immunity arguments made under § 230(c).⁴¹³ Courts generally engage in the following analysis to determine whether the CDA preempts common law liability: (1) whether defendant is an ISP and, as such, is a provider of an "interactive computer service,"⁴¹⁴ (2) whether words or "information content" found on the Internet site that a plaintiff deems damaging were in fact provided by a third party,⁴¹⁵ and (3)

408. *Id.*

409. *Id.* at 333–34.

410. *Id.* at 334.

411. *See id.* at 332–34.

412. *See id.* at 333 (applying it to the case at hand).

413. *See, e.g.,* *Johnson v. Arden*, 614 F.3d 785, 790 (8th Cir. 2010); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 (11th Cir. 2006); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470 (3d Cir. 2003); *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983 (10th Cir. 2000).

414. *See, e.g., Barnes*, 570 F.3d at 1101; *Green*, 318 F.3d at 470; *Ben Ezra*, 206 F.3d at 985. The CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2006). Courts have found the following entities qualify as interactive computer services: Google, Craigslist, AOL, Amazon, and Yahoo!. *See Barnes*, 570 F.3d at 1101; *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Almeida*, 456 F.3d at 1321; *Green*, 318 F.3d at 468; *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006).

415. *See, e.g., Johnson*, 614 F.3d at 791; *Barnes*, 570 F.3d at 1101; *Green*, 318 F.3d at 470; *Ben Ezra*, 206 F.3d at 985. Courts are somewhat more willing to draw a finer line with this element. Generally, where an ISP merely provides an interactive

whether plaintiff's cause of action attempts to treat the ISP as a "publisher or speaker" in either its publication of the statements or its inaction in removing the statements.⁴¹⁶ Courts have followed *Zeran's* statutory interpretation of the word "publisher" so as to include "distributor" and thereby exclude either type of common law liability for ISPs whose content is supplied by third parties.⁴¹⁷ In addition, while courts recognize the direct relationship between § 230(c) and defamation claims, courts have expanded the immunity found therein to include nearly all causes of action in which the theory of liability is premised upon the ISP's role as a "publisher or speaker."

For example, the Eighth Circuit recently addressed § 230(c) for the first time in *Johnson v. Arden*.⁴¹⁸ The Johnsons, a Missouri couple who owned and operated an exotic cat breeding business known as Cozy Kitten Cattery, were allegedly killing cats, ripping off cat breeders, selling infected kittens, stealing kittens, and generally engaging in the business of being con artists.⁴¹⁹ The allegation was posted on a website,

website where users can add information content, courts are unwilling to find the content was "provided by" the ISP. For example, in *Carafano v. Metrosplash.com, Inc.*, the Ninth Circuit rejected an argument that a dating website was a content provider even though the website had preset menus that contained sexually suggestive phrases that might facilitate the development of libelous profiles. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003). The court found the "tools" merely facilitated the expression of information and did not permit a finding that information was "provided by" the ISP. *Id.* at 1124–25. The exception to the general rule is found in another Ninth Circuit case. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008). There, the Ninth Circuit limited its *Carafano* holding, finding the ISP was responsible for providing the objectionable content and, therefore, unable to claim § 230 immunity. *See id.* at 1171–73. *Roommates.com* was sued for discriminatory housing practices because its website allowed users to select a potential roommate by ethnicity, gender, and sexual orientation. *Id.* at 1161. The distinction, according to the Ninth Circuit, was that the website contributed materially to the alleged unlawfulness by only permitting users to provide improper content—it required users to pick improper bases for selection of a roommate. *Id.* at 1172. The *Carafano* defendant, by contrast, merely provided a framework that could be utilized for proper or improper purposes. *Id.* In sum, as long as the ISP does not require its users to provide illegal content, the ISP will likely not be deemed to be the provider of the information.

416. *See, e.g., Johnson*, 614 F.3d at 791–92; *Barnes*, 570 F.3d at 1101–02; *Green*, 318 F.3d at 470–71; *Doe*, 347 F.3d at 659–60; *Ben Ezra*, 206 F.3d at 985–86.

417. *See, e.g., Johnson*, 614 F.3d at 792; *Green*, 318 F.3d at 471.

418. *Johnson*, 614 F.3d at 790.

419. *Id.* at 787–88.

www.ComplaintsBoard.com.⁴²⁰ The Johnsons were not pleased and asked that the statements be removed.⁴²¹ The statements were eventually removed, but not before the Johnsons claimed they lost sales and goodwill.⁴²² They sued for defamation, naming the ISP, InMotion Hosting, Inc., among other defendants.⁴²³ The district court raised § 230(c) sua sponte to find InMotion immune from suit and, therefore, the district court dismissed the defamation claim.⁴²⁴ The Johnsons appealed.⁴²⁵ They argued the district court erred because § 230(c) does not immunize an ISP from suit and the ISP should be subject to Missouri's joint liability doctrine, which applies when "a wrong is done by concert of action and common intent and purpose."⁴²⁶ The Eighth Circuit rejected the Johnsons' pleas,⁴²⁷ making quick work of their arguments.⁴²⁸ The court determined InMotion was not a publisher or speaker because InMotion did not originate the material deemed defamatory.⁴²⁹ The court determined InMotion was merely an ISP host and not an information content provider and, therefore, § 230(c) barred the Johnsons' claims.⁴³⁰ The court did not grapple with the distinction between publisher and distributor liability, which had once garnered the attention of the *Zeran* court.⁴³¹ Instead, it cited *Zeran* for the proposition that any cause of action to make ISPs liable for information originating with a third party was not viable.⁴³² This was done to be consistent with the decisions of other circuits that have found Congress intended to immunize ISPs from secondary liability.⁴³³ At this point, whether "publisher" means publisher liability or publisher and distributor liability is nothing more than a matter of passing academic interest; Congress had fourteen years since *Zeran* to redraft the language of § 230(c)

420. *Id.* at 788.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.* at 790.

425. *Id.*

426. *Id.*

427. *Id.* at 792.

428. *Id.* at 791 ("Read together, these provisions [under § 230] bar plaintiffs from holding ISPs legally responsible for information that third parties created and developed." (citation omitted)).

429. *Id.*

430. *Id.* at 792.

431. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (discussing the legal significance of the distinction).

432. *Johnson*, 614 F.3d at 792.

433. *See id.* at 791–92 (citing cases with similar holdings).

had it intended distributor liability to be separate and distinct from publisher liability.

3. *Promise at Your Peril*

The dispositive issue in the § 230 analysis is routinely the final element—whether the ISP is to be treated as a “publisher or speaker.”⁴³⁴ Since *Zeran*, courts have preempted countless causes of action under the auspice of § 230 on the ground that plaintiffs impermissibly attempt to treat the ISP as a publisher or speaker.⁴³⁵ The lone exception to this trend was etched by the Ninth Circuit in *Barnes v. Yahoo!, Inc.*⁴³⁶ Cecilia Barnes’s ex-boyfriend posted nude pictures and other suggestive content on a dating website run by Yahoo!.⁴³⁷ The dating website was visible to anyone on the Internet.⁴³⁸ It was not long before Barnes became the subject of unsolicited attention and harassment as a result of the dating website content.⁴³⁹ “Barnes mailed Yahoo! a copy of her photo ID and a signed statement denying her involvement with the profiles and requesting their removal.”⁴⁴⁰ Yahoo! provided no response.⁴⁴¹ A month later by mail Barnes asked Yahoo! to remove the profiles.⁴⁴² Still, there was no action by Yahoo!.⁴⁴³ The following month, Barnes sent Yahoo! two more mailings.⁴⁴⁴ Apparently as a consequence of an upcoming local news story regarding the issue that would be critical of Yahoo!, Yahoo! called Barnes and asked her to fax the previous statements she had mailed.⁴⁴⁵ Further, a Yahoo! employee told Barnes she would “take care of it.”⁴⁴⁶ Neither Barnes nor Yahoo! engaged in any further action until Barnes filed a lawsuit two

434. See *supra* text accompanying notes 400–03.

435. See, e.g., *Johnson*, 614 F.3d at 791; *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Doe v. GTE Corp.*, 347 F.3d 655, 659–60 (7th Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

436. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

437. *Id.* at 1098.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.* at 1099.

months later.⁴⁴⁷ At that point, Yahoo! removed the allegedly defamatory content.⁴⁴⁸

Barnes's suit alleged two causes of action under Oregon law: (1) negligent undertaking and (2) promissory estoppel.⁴⁴⁹ As to the negligent undertaking claim, the court found the claim attempted to treat Yahoo! as a publisher or speaker and, as such, was preempted by § 230.⁴⁵⁰ In contrast, the court found the promissory estoppel claim did not attempt to treat Yahoo! as a publisher or speaker.⁴⁵¹ Rather, it was based on Yahoo!'s voluntary assumption of a separate and distinct legal duty under the contract.⁴⁵² Promissory estoppel is predicated upon the breach of duty by a defendant, which arises from the defendant's voluntary conduct.⁴⁵³ In other words, when Yahoo! told Barnes it would "take care of it," Yahoo! created an obligation outside of the realm of a publisher or speaker.⁴⁵⁴ The court reasoned that § 230(c) created a baseline rule that an ISP could alter by agreement.⁴⁵⁵

What is the implication of *Barnes*? While it is a good result for the plaintiff in the case, it offers little help for future plaintiffs. An ISP will recognize that the path to foreclose liability is to take an ostrich-like approach and be nonresponsive to complaints as to content.⁴⁵⁶ The only practical recourse appears to be against the person who posted the derogatory content or information. But what recourse is there in a situation in which a plaintiff does not know who posted the defamatory words?

B. *Identity of Anonymous and Pseudonymous Internet Speakers*

The Internet is fertile ground for a person to speak anonymously. Whether the failure to claim ownership of content posted online is due to timidity or grounded in good reason is likely to depend on the case.

447. *Id.*

448. *Id.*

449. *See id.*

450. *Id.* at 1105.

451. *Id.* at 1107.

452. *Id.*

453. *Id.*

454. *See id.* (explaining how the statement that Yahoo! would "take care of it" and promise could bind the company).

455. *Id.*

456. *See id.* (discussing how liability arises when ISPs "manifest [their] intention to be legally obligated to do something").

Regardless of the reason, the First Amendment entitles a person to anonymous speech.⁴⁵⁷ The confluence of protection afforded to ISPs by § 230⁴⁵⁸ and the shelter provided anonymous speakers under the First Amendment⁴⁵⁹ may leave potential plaintiffs with little recourse if defamed online. How, for example, is a lawsuit initiated when the identity of the defamer is unknown? Plaintiffs in the past have simply named the defendant “John Doe” and then sought the identity of the Internet speakers via a subpoena.⁴⁶⁰ Subpoena power allows a seeker to ascertain the ISP of the anonymous poster and, if necessary, the IP address and the precise computer used for online access.⁴⁶¹

ISPs that receive subpoenas to ascertain the identity of anonymous or pseudonymous posters may resist compliance with the subpoena in an effort to protect the identity of their users. This is what Yahoo! did in a New Jersey case in which plaintiff Dendrite International sought an order to enforce a subpoena seeking to discover the identity of anonymous posters.⁴⁶² The trial court denied Dendrite the relief as to the named defendants based on the conclusion that Dendrite failed to establish harm resulting from the posts.⁴⁶³ Dendrite appealed.⁴⁶⁴ The New Jersey Appellate Division affirmed and formulated the following process for plaintiffs seeking disclosure of identities of otherwise anonymous posters:

[P]laintiff [is] to undertake efforts to notify the anonymous posters that they are the subject of a subpoena and . . . withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the [subpoena]. . . .⁴⁶⁵ [P]laintiff [is] to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable

457. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”).

458. *See Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010).

459. *McIntyre*, 514 U.S. at 342.

460. *See, e.g., Dendrite Int’l, Inc. v. Doe*, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (describing how the courts should best approach situations in which the defendant is unknown).

461. *See id.*

462. *Id.* at 763–64.

463. *Id.* at 764.

464. *Id.*

465. *Id.* at 760.

speech. . . .⁴⁶⁶

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. . . .⁴⁶⁷ [T]he plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to the court ordering the disclosure of the identity of the unnamed defendant. . . .⁴⁶⁸

Upon the completion of these four steps, “the court must balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to properly proceed.”⁴⁶⁹

The court determined, upon application of the foregoing factors, that nondisclosure was appropriate.⁴⁷⁰ The crux of the court’s ruling was its determination that the plaintiff was unable to show harm.⁴⁷¹ The court was critical of *Dendrite*’s claim of a decline in stock price as the harm or damage, determining that gains on thirty-two days and losses on forty days failed to show injury, apparently as a matter of law.⁴⁷² This more aggressive analysis of the merits of the underlying defamation claim to resolve a discovery dispute was deemed necessary given the heightened First Amendment concerns to protect anonymity on the Internet.⁴⁷³ Although the *Dendrite* court made no specific finding with respect to an ISP’s standing to defend the First Amendment rights of its users, one court has explicitly determined ISPs have such standing.⁴⁷⁴

At present, no Iowa court has decided these issues. When one does and is asked to adopt a *Dendrite* analysis, it will likely appreciate the primacy of First Amendment concerns. There are obviously other

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.* at 760–61.

470. *See id.* at 760, 771.

471. *Id.* at 760.

472. *See id.* at 772.

473. *Id.* at 766 (citing *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573 (N.D. Cal. 1999)).

474. *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *5 (Va. Cir. Ct. Jan. 31, 2000), *rev’d on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

interests, besides monetary harm, served by the tort of defamation. The authors of the *Restatement (Second) of Torts* claim the purpose of the tort is “(1) to compensate the plaintiff for the injury to his reputation, for his pecuniary losses, and for his emotional distress, (2) to vindicate him and aid in restoring his reputation and (3) to punish the defendant and dissuade him and others from publishing defamatory statements.”⁴⁷⁵ The *Restatement* authors also recognize the inadequacy of money damages in many defamation cases and question whether such a remedy fully serves the purposes for which the law of defamation was established, especially the vindication of plaintiff’s reputation.⁴⁷⁶ Consequently, consideration should be provided to alternative remedies such as declaratory relief, retraction, injunctive relief, and self-help.⁴⁷⁷ In other words, an Iowa court may not confine its analysis of plaintiff’s showing of harm to monetary harm as in *Dendrite*,⁴⁷⁸ and plaintiffs should think of availing themselves of these more nontraditional remedies.⁴⁷⁹

Consistent with the *Restatement*’s foreshadowing, the practical implications of § 230 also militate toward consideration of other remedies.⁴⁸⁰ In more than two-thirds of the cases in which defendants or courts raised the § 230 defense, the plaintiff was prevented from proceeding against the ISP.⁴⁸¹ Only sixteen percent succeeded in establishing that the third-party source of the content was liable.⁴⁸² Indeed, the Media Law Resource Center reports only nine jury trials in 2009 against media entities as defendants.⁴⁸³

C. *Personal Jurisdiction*

The Internet gives rise to situations in which defamatory words are electronically hurled at soon-to-be plaintiffs from hundreds of miles

475. RESTATEMENT (SECOND) OF TORTS ch. 27, special note (1977).

476. *See id.*

477. *Id.*

478. *Dendrite*, 775 A.2d at 772.

479. RESTATEMENT (SECOND) OF TORTS ch. 27, special note.

480. *See* Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 791 (1986) (explaining the possible motives behind plaintiffs’ defamation suits).

481. *See* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 481, 492 (2010).

482. *See id.* at 492.

483. MEDIA LAW RESOURCE CENTER BULLETIN, MLRC 2010 REPORT ON TRIALS AND DAMAGES, Spring 2010, at 6.

away.⁴⁸⁴ Questions of personal jurisdiction often arise.⁴⁸⁵ While the legal analysis on whether personal jurisdiction exists is predicable, the results are not.⁴⁸⁶ A plaintiff arguing that Iowa courts have personal jurisdiction over the alleged defamer can assert two grounds: (1) Iowa's long-arm statute, and (2) the *Calder* effects test.

1. *Iowa's Long-Arm Statute*

Iowa's long-arm statute allows a court to exercise personal jurisdiction over a nonresident defendant to the fullest extent permissible under the Due Process Clause.⁴⁸⁷ Minimum contacts necessary for due process may be invoked for either general or specific jurisdiction with the nonresident defendant.⁴⁸⁸ General jurisdiction exists when the defendant

484. See, e.g., *Johnson v. Arden*, 614 F.3d 785, 795 (8th Cir. 2010) (stating the appellee in Colorado posted defamatory statements on the Internet about appellants in Missouri).

485. See *id.* at 792.

486. Compare *id.* at 793–97 (holding requirements of personal jurisdiction were not met), with *Tamburo v. Dworkin*, 601 F.3d 693, 700–09 (7th Cir. 2010) (holding requirements of personal jurisdiction were met with respect to individual defendants).

487. IOWA CODE § 617.3(2) (2011) (“If a nonresident person makes a contract with a resident of Iowa to be performed in whole or in part by either party in Iowa, or if such person commits a tort in whole or in part in Iowa against a resident of Iowa, such acts shall be deemed to be doing business in Iowa by such person for the purpose of service of process or original notice on such person under this section, and shall be deemed to constitute the appointment of the secretary of state of the state of Iowa to be the true and lawful attorney of such person upon whom may be served all lawful process or original notice in actions or proceedings arising from or growing out of such contract or tort. The term ‘nonresident person’ shall include any person who was, at the time of the contract or tort, a resident of the state of Iowa but who removed from the state before the commencement of such action or proceedings and ceased to be a resident of Iowa or, a resident who has remained continuously absent from the state for at least a period of six months following commission of the tort. The making of the contract or the committing of the tort shall be deemed to be the agreement of such corporation or such person that any process or original notice so served shall be of the same legal force and effect as if served personally upon such defendant within the state of Iowa.”).

488. *Hodges v. Hodges*, 572 N.W.2d 549, 551 (Iowa 1997) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); see also *Roquette Am., Inc. v. Gerber*, 651 N.W.2d 896, 899 (Iowa Ct. App. 2002) (whether minimum contacts are deemed to exist is subject to a five-factor test: (1) the nature and quality of the contacts with the forum, (2) the quantity of such contacts, (3) the relation and source of the cause of action to the contacts, (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties (citing *Cascade Lumber Co. v. Edward Rose Bldg. Co.*, 596 N.W.2d 90, 92 (Iowa 1999))).

has “continuous and systematic contacts” with the forum state.⁴⁸⁹ Specific jurisdiction exists when the case is related to or arises out of a sufficient number of activities a defendant directs at a forum state.⁴⁹⁰ When a plaintiff alleges harm through defamatory statements on the Internet by a nonresident defendant, the plaintiff will most often have to advocate specific jurisdiction as the basis for personal jurisdiction.⁴⁹¹ In *Hanson v. Denckla*, the United States Supreme Court cautioned courts from eviscerating the due process guarantee in the face of evolving technology.⁴⁹² If *Johnson v. Arden* is any indication, the Eighth Circuit has heeded the Court’s call for caution.⁴⁹³ There, the court articulated that the sufficiency of Internet contacts under a specific jurisdiction analysis should be subjected to a “sliding scale” test.⁴⁹⁴ On one end of the scale lies actual contract formation and repeated transmission of computer files, and on the other end lies the mere posting of information on a website.⁴⁹⁵ The court determined claims of defamation posted on the Internet by out-of-state defendants are deemed to land on the “mere posting” end of the spectrum, which militates against a finding of personal jurisdiction.⁴⁹⁶ Indeed, the

489. *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 726 (N.D. Iowa 2005) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

490. *Id.* (citing *Helicopteros*, 466 U.S. at 414).

491. *See, e.g., Johnson*, 614 F.3d at 797 (citations omitted) (holding “mere effects” are not enough).

492. *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (“As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. *See Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him. *See International Shoe Co. v. Washington*, 326 U.S. 310, 319.”).

493. *See Johnson*, 614 F.3d at 797 (holding the *Calder* effects test should be construed narrowly).

494. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

495. *Id.*

496. *See Johnson*, 614 F.3d at 796 (explaining the effects test in similar fashion to the sliding scale used in *Zippo*).

court ultimately held that a website's accessibility in Missouri alone is insufficient to confer personal jurisdiction.⁴⁹⁷

2. *The Calder Effects Test*

There is another basis to achieve specific jurisdiction for plaintiffs seeking the viability of suit against out-of-state defendants—the so-called *Calder* effects test. This test is the product of the United States Supreme Court's 1984 decision in *Calder v. Jones*, and it is distinct from the minimum contacts analysis.⁴⁹⁸ The distinguishing feature revolves around the underlying intentional nature of the alleged tort.⁴⁹⁹ Shirley Jones, a professional entertainer, brought a libel suit in California against Florida individuals, who owned and edited the *National Enquirer*.⁵⁰⁰ The defendants moved to quash service, alleging lack of personal jurisdiction, and they were successful.⁵⁰¹ The case eventually made its way to the United States Supreme Court, which determined California courts had personal jurisdiction over the Florida defendants.⁵⁰² In analyzing the issue, the Court determined Jones was the focus of the defendants' conduct in the foreign state, thereby justifying the defendants being hauled to the forum state.⁵⁰³ The reasoning of the Court seemed to be that an intentional tort gives rise to the notion that a defendant's action was aimed at the forum state.⁵⁰⁴ When nonresident defendants act with the specific purpose of having their consequences felt in a forum, the due process considerations change:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered.

497. *Id.* at 797.

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

499. *See id.* at 790 (noting intentional acts make it anticipatory to be “haled into court there”) (citations omitted).

500. *Id.* at 785.

501. *Id.* at 784–85.

502. *See id.* at 785 (affirming the court of appeals decision, which reversed the dismissal of the lower court).

503. *Id.* at 788–90.

504. *See id.* at 789–90.

Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.⁵⁰⁵

Stated differently, the intentional nature of the tort justifies a less stringent jurisdictional analysis because a defendant appreciates, if not knows, that his wrongful conduct would lead to harm in the jurisdiction in which the plaintiff resides.⁵⁰⁶ The Court also rejected the notion that “First Amendment concerns enter into the jurisdictional analysis.”⁵⁰⁷

The Eighth Circuit analyzed the *Calder* effects test in *Johnson*.⁵⁰⁸ The court recognized the effects test “allows the assertion of personal jurisdiction over nonresident defendants whose acts are performed for the very purpose of having their consequences felt in the forum state.”⁵⁰⁹ Despite the similar factual circumstances between *Calder*, a case discussing an alleged defamatory article directed at a California actress, and *Johnson*, a case discussing an alleged defamatory Internet post directed at cat breeders in Missouri, the Eighth Circuit held Missouri could not exercise jurisdiction under the effects test.

The Johnsons allege that Heineman [defendant] stated on www.ComplaintBoards.com that “Sue Johnson and Cozy Kittens operated from Unionville, Missouri, where they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats and operated a ‘kitten mill’ in Unionville, Missouri.” Although we accept this allegation as true, alone, it fails to show that Heineman uniquely or expressly aimed her statements at Missouri. The statements were aimed at the Johnsons; the *inclusion* of “Missouri” in the posting was incidental and not “performed for the very purpose of having their consequences felt in Missouri.” There is no evidence that the www.ComplaintsBoard.com website specifically targets Missouri, or that the content of Heineman’s alleged postings specifically targeted

505. *Id.* at 788–89 (footnote omitted) (citations omitted).

506. *See id.* at 790.

507. *Id.* The First Amendment’s import here with respect to jurisdiction is different than the First Amendment’s import with respect to discovery disputes regarding subpoena enforcement. The core of the concern in the subpoena enforcement centers around the potential chilling effect on speech. *See* Local 1814, Int’l Longshoremen’s Ass’n, AFL-CIO v. Waterfront Comm’n of N.Y. Harbor, 667 F.2d 267, 272 (2d Cir. 1981). It seems that chilling concern would also be present in the jurisdictional context.

508. *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010).

509. *Id.* (quoting *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1390–91 (8th Cir. 1991)).

Missouri.⁵¹⁰

The court interprets *Calder* to require the defendant's defamatory statement to be directed at the forum state itself over and above a plaintiff.⁵¹¹ This interpretation seems misplaced. Defamation on the Internet may be far more devastating than defamation in traditional print media due not only to the number of potential viewers, but also due to its targeted nature. For example, on Facebook, an individual selects "friends" who represent the individual's family, friends, and acquaintances.⁵¹² Can it be that the personal jurisdiction analysis is contingent upon merely whether the alleged defamatory statement references the plaintiff's forum state? Is the Internet post "John Doe, an Iowan, committed a crime" rightly prosecuted by an Iowan in Iowa while the Internet post "John Doe committed a crime" is not? How is it that a court is to determine whether a defendant's alleged defamatory statement was aimed at Iowa as required by the *Calder* effects test?⁵¹³ Is this a scienter requirement? Are courts to evaluate the "aimed at Iowa" requirement by analyzing only the words used by the alleged defamer, or is the plaintiff entitled to an evidentiary hearing as to the defendant's motive? And if courts are only to analyze the words used by the alleged defamer, which words should a court analyze—the alleged defamatory words or all words within the statement?

The Seventh Circuit appears to have cut through these questions and crafted a more workable analysis. In *Tamburo v. Dworkin*, the court determined defamation allegations were sufficient to establish that the defendants purposefully directed their activities at the state of Illinois.⁵¹⁴ The *Tamburo* court read *Calder* to suggest three requirements of personal jurisdiction in the defamation context: "(1) intentional conduct (or 'intentional and allegedly tortious' conduct); (2) expressly aimed at the forum state; (3) with the defendant's knowledge that the effects would be

510. *Id.* (emphasis added) (footnote omitted).

511. *Id.* ("There is no evidence that the www.ComplaintsBoard.com website specifically targets Missouri, or that the content of [defendant's] alleged postings specifically targeted Missouri.").

512. See *Adding Friends & Friend Requests*, FACEBOOK HELP CENTER, <http://www.facebook.com/help/friends/requests> (last visited Mar. 18, 2012) (explaining how users can choose and control who they have as friends).

513. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) ("[The defendants'] intentional, and allegedly tortious, actions were expressly aimed at [the forum state]").

514. See *Tamburo v. Dworkin*, 601 F.3d 693, 697 (7th Cir. 2010) (finding the defamation allegations were adequate for a prima facie showing of personal jurisdiction).

felt—that is, the plaintiff would be injured—in the forum state.”⁵¹⁵ The court acknowledged that “[s]ome circuits have read *Calder’s* ‘express aiming’ requirement fairly broadly, requiring only conduct that is ‘targeted at a plaintiff whom the defendant knows to be a resident of the forum state.’”⁵¹⁶ Others have read the express aiming requirement to necessitate the forum state be the “‘focal point of the tort.’”⁵¹⁷ The *Tamburo* court struck a middle ground, determining “[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder’s* express-aiming requirement.”⁵¹⁸

VI. CONCLUSION

From gouging defamatory comments with a penknife on the walls of a tavern washroom to posting scurrilous ramblings on the walls of Facebook, the law of defamation has had to evolve to meet the demands of the present day.⁵¹⁹ It has evolved in the last sixteen years, but not through the adoption of new constitutional principles or even by legislation—although Congress has immunized certain republishers from liability.⁵²⁰ Rather, it has been the common law—at least in Iowa—in which perhaps the most significant developments have occurred. Dramatic pantomimes are now actionable.⁵²¹ The reality of self-compelled publication in the context of employment termination has been recognized.⁵²² Those wonderful and rustic relics of ancient asininity—the presumptions of falsity, malice, and

515. *Id.* at 703 (citations omitted).

516. *Id.* at 704 (quoting *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).

517. *Id.* (quoting *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1074 n.9 (10th Cir. 2008)); *see also* *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998) (“[T]he *Calder* ‘effects test’ can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity.”); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997) (noting conduct must be “intentionally targeted at and focused on” the forum state (citation omitted)).

518. *Tamburo*, 601 F.3d at 707 (citations omitted).

519. *See* *Barreca v. Nickolas*, 683 N.W.2d 111, 123 (Iowa 2004) (“[T]imes change, and the law must evolve to meet the demands of the present day.”).

520. *See* 47 U.S.C. § 230 (2006).

521. *See* *Winckel v. Von Maur, Inc.*, 652 N.W.2d 453, 458–59 (Iowa 2002), *abrogated on other grounds by* *Barreca*, 683 N.W.2d 111; *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 200 (Iowa Ct. App. 2006).

522. *See* *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 84–85 (Iowa 2001).

damage—are all but extinct; actual injury and damage to reputation must now first be shown before such parasitic damages as mental anguish can be recovered.⁵²³ Truth is no longer available as an absolute defense to those clever and cunning wordsmiths who, through juxtaposition and omission of facts, defame another by implication.⁵²⁴ Actual malice, defined as ill-will and personal spite, is no longer the paradigm of proof necessary to overcome the newly minted occasion-based conditional privilege.⁵²⁵ Attitude toward the truth of speech, not personal attitude toward the plaintiff, now rules the day.⁵²⁶ Times have indeed changed, and the Iowa Supreme Court has been there to meet the demands occasioned thereby.

What is next? The abolition of the distinction between libel and slander?⁵²⁷ The creation of a new tort of defamation per se?⁵²⁸ The adoption of a fault standard for all defamation actions, along with an actual injury rule, even for those statements of a purely private nature?⁵²⁹ Or does any of this really matter when there is an immediate self-help remedy available on your own website or Facebook page by merely pressing the enter key on your laptop computer?⁵³⁰ After all, that is the first remedy available to any victim of defamation—“using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation.”⁵³¹ Or to borrow from Mr. Lowell’s imagery, one should remain vigilant to keep the candle of reputation burning because the self-ignited flame, no matter how small, may illuminate the rhetorical

523. See *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 224 (Iowa 1998). This is true where a public issue is concerned, but the rationale of *Schlegel* is consistent with an expansive reading.

524. See *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 828–29 (Iowa 2007).

525. See *Barreca*, 683 N.W.2d at 122–23.

526. See *id.*

527. See *Wilson v. IBP, Inc.* 558 N.W.2d 132, 139–40 (Iowa 1996) (referring to a libel statute when determining a slander case).

528. See *Kerndt v. Rolling Hills Nat’l Bank*, 558 N.W.2d 410, 418 (Iowa 1997).

529. Patrick J. McNulty, *The Gertz Fault Standard and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation*, 35 DRAKE L. REV. 51, 92–99 (1985).

530. See generally Barbara Rose, *Staking Your Reputation*, 97 A.B.A. J. 48 (2011) (providing examples of reputation at risk and stating ways to manage an individual’s online reputation). See also REPUTATION.COM, <http://www.reputation.com> (last visited Mar. 18, 2012) (providing a means for individuals to monitor their private data on the Internet).

531. *Gertz v. Welch*, 418 U.S. 323, 344 (1974).

2012] *Iowa Defamation Law Redux: Sixteen Years After* 427

path back to honor and virtue.⁵³²

532. See LOWELL, *supra* note 2, at 227.