The Constitutional Fault Test of *Gertz v. Robert Welch, Inc.* and the Continued Viability of the Common Law Privileges in the Law of Defamation

Richard L. Barnes

The United States Supreme Court in *Gertz v. Robert Welch, Inc.*[1] announced an end to the strict liability standard in cases involving defamation of a private individual by publishers and broadcasters.[2] While ending strict liability, the *Gertz* Court failed to prescribe an alternative standard.[3] Instead, where the plaintiff is a private individual, the *Gertz* decision allows a state to impose liability based on any standard, so long as it is not a standard of liability without fault.[4]

New York Times Co. v. Sullivan[5] was explicitly approved by *Gertz* to the extent that it ended strict liability in the defamation of public officials and applied a test of liability requiring knowledge of falsity or reckless disregard for truth or falsity in the publication of the defamatory statement.[6] However, the Court in *Gertz* implicitly overruled the holding of *Rosenbloom v. Metromedia, Inc.*[7] which stated that the ac-

1. 418 U.S. 323 (1974). At common law the defendant was held liable for defamation no matter how innocent the conduct was that led to the defamation. Thus, the defendant was liable simply because he caused the statement to be published and the statement injured the reputation of the defendant. There was no inquiry into the motive which was assumed to be malicious. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 771-73 (4th ed. 1971).

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

3. *Id.*

4. *Id.* The Court concluded that providing a legal remedy for defamation is a legitimate state interest, and that the states must be accorded substantial latitude in enforcing this remedy. *Id.* at 345-46. Thus, the Court's decision does not preclude the use of the actual malice test announced in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); nor does it preclude the use of a negligence or gross negligence test. In this way, the holding in *Gertz* minimizes abridgement of a legitimate state interest while protecting the press and broadcast media from the rigors of strict liability for defamation. 418 U.S. at 348. The *Gertz* Court expressed concern that ideas and their expression would be stifled under a system of strict liability. 418 U.S. at 340. *See generally* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 423-24 (1975).

5. 376 U.S. 254 (1964).

6. Gertz v. Robert Welch, Inc., 418 U.S. at 343. This test is referred to as the actual malice test.

7. 403 U.S. 29 (1971). *Rosenbloom* was overruled by *Gertz* to the extent it required a private

tual malice test of *New York Times Co. v. Sullivan* should be applied to all defamations arising from matters of public interest.[8] Thus, *Gertz* brought about an abrupt end to the expansion of the actual malice test. In the span of three years, the United States Supreme Court abandoned a test based on knowledge of falsity or reckless disregard for truth or falsity and, as to private individuals, adopted a formula requiring, simply, some fault.[9]

By requiring the states to impose liability on a fault basis, the *Gertz* Court held invalid the common law system of strict liability for defamation.[10] This disapproval will affect aspects of the law of defamation in addition to the fault test to be adopted by the states. Specifically, it will affect the common law privileges, which are a feature of the strict liability system.[11] These privileges, absolute and qualified, were developed to alleviate the harshness of that system, and were a recognition that society's interest in potentially defamatory communications was sometimes greater than the interest of the individual in his or her reputation.[12] Thus, the states deciding on a test of fault following *Gertz* should consider these extant privileges in making their choice of a standard.

This Note will focus on the *Gertz* fault test as it has been interpreted in state courts. The permissible standards of fault and the types of defendants affected by the decision will then be analyzed. The common law privileges will then be defined and the standards for imposition of liability under each will be established. There will follow a

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person involved in a matter of public or general interest to prove knowledge of falsity or reckless disregard of truth or falsity in the publication of the defamatory statement. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

8. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (overruling Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971)).

9. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971), where the Court applied the actual malice test to a private person involved in an event of general or public concern, *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), where fault was adopted as the level of conduct to be proved by all private persons defamed by a publisher or broadcaster. This sudden change in momentum away from the use of the actual malice test has produced confusion. *See* Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HAST. L.J. 777, 796 (1975); Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 48-50 (1976).

The term actual malice, before it was construed by the *New York Times* Court to mean knowledge of falsity or recklessness, was used to indicate ill will, spite, improper motive, or lack of good faith. Express malice under the common law was synonymous with this type of actual malice. Therefore, this Note will adopt the improper motive definition for express malice and the recklessness definition for actual malice. For a discussion of the confusion caused by these terms see 45 U. CINN. L. REV. 139, 142-43 (1976).

10. 418 U.S. at 347. *Gertz*, by its language, is limited to media defendants. *See id.* at 347. However, the holding may well be extended to all defendants. *See* text & notes 46-57 *infra*.

11. *See* W. PROSSER, *supra* note 1, § 113, at 772-73. For a discussion of the effect of *Gertz* on the qualified privileges, see text & notes 134-54 *infra*.

12. *See* W. PROSSER, *supra* note 1, §§ 114, 115, at 776, 785-86. *See also* Chagnon v. Union Leader Corp., 103 N.H. 426, 438, 174 A.2d 825, 833 (1961), *cert. denied*, 369 U.S. 830 (1962); Hett v. Ploetz, 20 Wis. 2d 55, 59, 121 N.W.2d 270, 272-73 (1963); text & notes 134-54 *infra*.

comparison of the *Gertz* fault standard, as interpreted by the states, with the fault standards of the common law privileges. Finally, the compatibility of these systems will be evaluated.

THE GERTZ FAULT TEST

Gertz has left to the states the task of defining the fault required to be shown by a private person who wishes to recover damages for defamation from a media defendant. So long as the states do not impose liability without fault they are free to predicate liability on any relevant standard.[13] Thus, states apparently may apply an actual malice test if that test is defined as knowledge of falsity or reckless disregard for the truth or falsity of a statement.[14] In interpreting the term fault, most states have chosen negligence as the appropriate test of fault.[15] In addition, one state has adopted gross negligence as the level of fault for which liability may be imposed in some defamation cases.[16] Two states have applied the actual malice test[17] and one state has held that negligence or express malice will satisfy the fault requirement.[18]

Of the seventeen states that have announced a fault standard sub-

13. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347 (footnote omitted); *see* Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1426 (1975).

14. The actual malice test was first applied to public officials in *New York Times Co. v. Sullivan*. This type of malice test would satisfy *Gertz* because it exceeds the fault required by that case. This actual malice test has been accepted in two states. *See* Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457, *cert. denied*, 423 U.S. 1025 (1975); AAFCO Heating & Air Cond. Co. v. Northwest Pub., Inc., 162 Ind. App. 671, 673-74, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976). It is also clear that the states could abandon the tort of defamation since there would be no liability at all and thus no liability imposed without some fault on the part of the publisher or broadcaster.

15. The following states favor negligence as the minimum level of fault necessary under *Gertz*: Arizona, Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977); Hawaii, Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 536, 543 P.2d 1356, 1366 (1975); Illinois, Troman v. Wood, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 299 (1975); Kansas, Gobin v. Globe Pub. Co., 216 Kan. 223, 233, 531 P.2d 76, 84 (1975); Kentucky, E.W. Scripps Co. v. Cholomondelay, 569 S.W.2d 700, 702-03 (Ky. App. 1978); Maryland, Jacron Sales Co. v. Sindorf, 276 Md. 580, 596-97, 350 A.2d 688, 697-98 (1976); Massachusetts, Stone v. Essex County Newspapers, Inc., 367 Mass. 849, —, 330 N.E.2d 161, 168 (1975); Oklahoma, Martin v. Griffin Television, Inc., 549 P.2d 85, 92 (Okla. 1975); Texas, Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); Tennessee, Memphis Pub. Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978); Washington, Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976). *See also* Louisiana, Wilson v. Capital City Press, 315 So. 2d 393, 398 (La. App. 1975); North Carolina, Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 236, 228 S.E.2d 766, 768 (1976). The statements in the cases from Louisiana and North Carolina are dicta.

16. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (limited to communications in the sphere of public concern).

17. *See* Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457, *cert. denied*, 423 U.S. 1025 (1975); AAFCO Heating & Air Cond. Co. v. Northwest Pub., Inc., 162 Ind. App. 671, 673-74, 321 N.E.2d 580, 586 (1974), *cert. denied* 424 U.S. 913 (1976).

18. Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 110, 334 N.E.2d 494, 498 (1974), *cert. denied*, 423 U.S. 883 (1975).

sequent to *Gertz*, fourteen appear to have adopted a negligence test.[19] An important consideration in the adoption of the negligence standard appears to be that a negligence test goes further than the actual malice test to protect the private individual from defamation. This extra protection is needed because a private person has less access to the media for rebuttal than a public official or figure.[20] Clearly, states accepting a negligence standard are placing an emphasis on the individual's interest in being free from defamation, and are relying upon the sufficiency of a reasonable care standard to ensure public discussion.[21]

Other states, hoping to protect free and robust discussion of public issues and concerns, have chosen an actual malice standard.[22] Not surprisingly, the states accepting this standard have limited its application to those private plaintiffs who were involved in a matter of general or public interest.[23]

The diverse approaches adopted by the states indicate the difference of opinion over important policy considerations and the factors to be considered in choosing an appropriate standard of liability for defamation. These diverse approaches apparently do not consider the standards that the common law of each state applies to the qualified privileges in defamation. These qualified privileges removed the presumption of malice which attached at common law. In effect, they offered a qualified immunity to the defendant who was able to establish the existence of a privilege for the communication alleged to be defamatory.[24] Their purpose was to further the communication of important information even though someone's reputation might occasionally be injured by the communication.[25] Thus, the qualified privileges were purpose-oriented and generally were defeated where an improper motive was present.[26] The privileges were part of the system of defamation that emphasized malice rather than negligence or some other type of fault based on lack of due care. In developing a standard of liability

19. See cases cited note 15 *supra*.

20. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974); Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 446-47, 546 P.2d 81, 84-85 (1976).

21. *See* Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 314, 560 P.2d 1216, 1221 (1977); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 536, 543 P.2d 1356, 1366 (1975); Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 446-47, 546 P.2d 81, 84-85 (1976).

22. *See* Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 99, 538 P.2d 450, 458, *cert. denied*, 423 U.S. 1025 (1975); AAFCO Heating & Air Cond. Co. v. Northwest Pub., Inc., 162 Ind. App. 671, 679, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976).

23. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457; AAFCO Heating & Air Cond. Co. v. Northwest Pub., Inc., 162 Ind. App. 671, 679, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976). The actual malice test is drawn from *New York Times Co. v. Sullivan* and *Rosenbloom v. Metromedia, Inc.*, so it is not surprising that its application be limited to public figures and events as it was in those cases.

24. *See* text & notes 80-124 *infra*.

25. *See id.*

26. *See* text & notes 80-90 *infra*.

to satisfy the requirement of fault in *Gertz*, the courts should consider these older privileges and their test of malice because adoption of a fault standard might make them obsolete.[27]

Malice is a multiple purpose term that has lost almost all meaning because of its often inconsistent interpretations.[28] At common law, publication of a defamation carried with it a presumption of malice.[29] This presumed malice was the basis of liability.[30] Consequently, when the presumption did not apply, such as where a privilege existed, proof of actual malice, malice in fact, was necessary for recovery.[31] A requirement of proof of malice was the common law's method of indicating the value of a particular communication and ensuring its recognition despite an individual's interest in reputation.[32] In this area of common law privileges the term malice has been used generally to indicate an improper motive or wrong feeling, such as ill will, which would defeat the privileges.[33]

Gertz requires that the imposition of liability for defamation be based upon some fault of the defendant.[34] This was a change from the liability without fault of the early common law. Before *Gertz*, the United States Supreme Court had considered the impact of the first amendment on the liability imposed at common law for the defamation

27. *See* text & notes 137-54 *infra*.

28. *See* W. PROSSER, *supra* note 1, § 115, at 794-95.

29. *See* Stice v. Beacon Newspaper Corp., 185 Kan. 61, 64, 340 P.2d 396, 399 (1959); Jolly v. Fossum, 63 Wash. 2d 537, 540, 388 P.2d 139, 141 (1964) (malice called a disguise for strict liability).

30. *See* W. PROSSER, *supra* note 1, § 113, at 771-73. No inquiry was made into the motive of the defendants or the care exercised in making the statement. Thus, to the extent tort law is seen as a redressing of a wrong, the cause of action for defamation must have been founded on the presumed malice. W. PROSSER, *supra* note 1, § 115, at 794.

31. *See* Wason v. Walter, L.R. 4 Q.B. 73, 87 (1868); Whiteley v. Adams, 143 Eng. Rep. 838, 846-47 (1863); Harrison v. Bush, 119 Eng. Rep. 509, 512 (1855). This system created certain safe zones where defamation was privileged because the purpose of the communication was considered of such importance as to deserve protection. These cases where privileges are recognized are grouped in broad general categories, such as the common interest, interest of another, self-interest, public interest, and the reportorial privilege. *See* text & notes 67-105 *infra*. Their origin is obscure but it appears that the titles are merely the generalization of a common factor running through many cases that recognized a privilege. Thus, it appears that a privilege was recognized as needed. No presumption of malice attached to the communication if it fell within this area of protected communications. This area of protected communications had defined boundaries, established by the purpose of the privileged communication. If the defamer went beyond the protected purpose by having an improper motive or improper attitude the privilege was withdrawn. *See* Clark v. Molyneux, 3 Q.B.D. 237, 246-47 (1877); Simpson v. Robinson, 116 Eng. Rep. 959, 960 (1848).

32. *See* text & notes 58-90, 93-124 *infra*.

33. *See id.* In this area, as in all areas where the courts have struggled for a definition of such a broad term as malice, there is confusion and contradiction, not only among the different states, but often among cases from the same state. For what was probably the majority view before *Gertz*, see Stice v. Beacon Newspapers Corp., 185 Kan. 61, 65, 340 P.2d 396, 400 (1959); Killebrew v. Jackson City Lines, Inc., 225 Miss. 84, 92, 82 So. 2d 648, 650 (1955). *See generally* W. PROSSER, *supra* note 1, § 115, at 794-95; Hallen, *The Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865, 874 (1931).

34. 418 U.S. at 347.

of public officials and public figures.[35] These constitutional law cases dealing with public figures and public officials had broken from the common law and required that there be knowledge of falsity or wanton and reckless disregard for the truth or falsity of the defamatory statement before liability could be imposed.[36] The holding of *Gertz* goes beyond these cases and requires that all plaintiffs prove some fault.[37] This requirement of fault is similar to the common law privileges in that it attempts to protect valuable communications while recognizing the individual's interest in being free of defamation. However, instead of relying on the presence or absence of malice, as did the privileges, to determine liability, the *Gertz* Court protected these communications by requiring some fault for the imposition of liability for defamation. Thus, *Gertz* may simply be a more modern expression of the same concerns that motivated the creation of the common law privilege utilizing a fault test rather than malice. It then becomes necessary to explore the *Gertz* standard to determine if it conflicts with the older standards of the common law privileges.

Possibly, the Court in *Gertz* believed that the proper standard for imposition of liability for defamation is negligence, but because that concept has so many secondary meanings and problems attached to it,[38] Justice Powell chose to avoid using it. Justice Powell, at one point, mentions negligence and hints that negligence is the minimum level of fault necessary to sustain an action for defamation.[39] *Gertz* also contains references to a reasonableness standard, which again implies that negligence is a proper standard for evaluating fault.[40] When enumerating the defects of the common law system, Justice Powell referred to the common law doctrine where a publisher or broadcaster who took reasonable precautions to ensure the accuracy of a statement would still be liable.[41] Later in the opinion, the Court limited its holding by stating that a different inquiry would result if the statement published did

35. *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

36. *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

37. 418 U.S. at 347.

38. Negligence, as a basis of liability, developed in tort actions involving a physical injury. Problems such as legal causation and foreseeability are tied very closely to negligence as it is applied to physical injuries. Perhaps the Court wished to leave the decision to the states as to whether these concepts had any application to injuries to reputation.

39. In discussing whether or not punitive damages are part of the legitimate state interest in protecting individual reputation Justice Powell stated, "punitive damages are wholly irrelevant to the state interest that justifies a *negligence standard* for private defamation actions." 418 U.S. at 350 (emphasis added). This implies that the state interest is sufficient to allow a state to adopt a negligence standard but not to impose punitive damages. This also indicates that a negligence standard is acceptable and may actually have been contemplated when the term "fault" was used.

40. *See* 418 U.S. at 346, 348.

41. *Id.* at 346.

not "warn a reasonably prudent editor or broadcaster of its defamatory potential."[42] This limitation implies that the inquiry must at least show some breach of a reasonable care standard and, therefore, the existence of negligence.[43]

Beyond specifying a minimum level of fault, the *Gertz* Court deals at length with the policy considerations leading to the fault standard. Consideration of these policy arguments yields valuable insight into the intended standard. Just prior to stating the holding of *Gertz*, Justice Powell explains the balancing process that occurs in the case. He emphasizes that the Court did not have to choose between the "drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error."[44] He points out the major faults in both systems: under *New York Times* the private plaintiff would be unable to recover except where he or she could meet the heavy burden of showing actual malice, while at common law the publisher of a defamatory statement was liable even if he or she took every reasonable precaution to ensure the accuracy of the statement.[45]

Considering these points, a test based on ill will, spite, or lack of good faith does not appear to satisfy the balance struck in *Gertz* between the interest in valuable communication and an individual's interest in his or her reputation. If such a test were applied to the defendant's conduct, the result would depend on the attitude of the defendant. In some cases, liability would be imposed on a defendant who took every precaution to ensure accuracy and who was unaware of the defamatory content. Liability would be imposed because of the defenant's motivation. This result seems contrary to one value recognized in *Gertz*, the protection of those who take every precaution to ensure the accuracy of a statement. The fault test has as one of its objectives to enable society to share information and to choose from among competing ideas.[46] Whether society has a legitimate interest in protecting the expression of these ideas should not depend on the motive of their speaker, but on their persuasive character and content. Where the

42. *Id.* at 348.

43. In the dissenting opinions, negligence emerges as a common interpretation of the vague standard adopted by the majority. *See* 418 U.S. at 355 (Burger, C.J., dissenting); *id.* at 360 (Douglas, J., dissenting); *id.* at 369 (Brennan, J., dissenting); and *id.* at 375-76 (White, J., dissenting). The proposition that negligence is a satisfactory standard on which to base liability is also recognized by a number of states adopting this standard to satisfy *Gertz*. *See* text & note 15 *supra*. These eleven states accept negligence as the minimum level of fault necessary to impose liability for defamation. However, several states have declared that higher levels of fault, such as actual malice as defined in *New York Times*, will also serve as bases of liability. Ohio requires negligence and ill will, defined as improper motive, as bases of liability. Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 110, 334 N.E.2d 494, 498 (1974). Whether this is a permissible standard under *Gertz* is considered in text & notes 55-57 *infra*.

44. 418 U.S. at 346.

45. *Id.*

46. *See id.* at 339-40.

statement is false and the defamer should reasonably have known it to be so, the purpose of promoting free discussion of ideas has been abused to a greater degree than where the statement is made with all reasonable care, but the defamer does not like the person about whom he or she speaks. If what is desired is the opportunity for society to choose knowledgeably from among competing ideas, then the motive of the speaker should not be of as much concern as the factual basis of the idea.

Another question is whether *Gertz* will be applied to defamatory statements made by non-media defendants. In *Gertz*, each time that Justice Powell wrote of the defendant group covered by the decision, he added the phrase "publisher or broadcaster" or some other similar qualifying expression.[47] Arguably, the concern expressed by Justice Powell in *Gertz* is for the protection of the mass media because of the special role it plays in fostering public debate.[48] However, this same argument might apply to *New York Times Co. v. Sullivan*.[49] Yet despite this apparent limitation, the holding of *New York Times* has been extended beyond media defendants. For example, in *Curtis Publishing Co. v. Butts*,[50] the Court recognized that the protection should be extended to each person taking part in the exchange of ideas within society.[51] The need to protect the individual's interest in communicating

47. *See id.* at 340, 347, 350.

48. *See id.* at 340.

49. 376 U.S. 254 (1964). The same concern for a free and open debate led by the media was expressed in this case: "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticisms is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

50. 388 U.S. 130 (1967).

51. The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an "unalienable right" that "governments are instituted among men to secure." History shows us that the Founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us" but that they firmly adhered to the proposition that the "true liberty of the press" permitted "every man to publish his opinion."

Id. at 149-50 (citation omitted). Respublica v. Oswald, 1 Dall. 319, 325, 1 A.D. 246, 250 (Pa. 1788) is an instructive case. It indicates the very strong feeling of at least one court that at the time of the adoption of the United States Constitution there was no special privilege given to the press as an occupational group. Instead, as printers they were no more than private individuals with the capability of widely circulating their views. While this ability to reach a wider audience certainly did not limit their right to speak on public issues, neither were they accorded special status or rights.

It is difficult to see the foundation for a distinction between private persons and the mass media. The dubious separation might be based on the thought that because they have a wider audience, newspapers and television and radio stations should be given greater freedom so that they will lead public discussion. Yet the traditional rule is that the one who repeats a defamatory statement is not excused from liability because he or she was merely repeating the defamation of another. *See* W. PROSSER, *supra* note 1, § 113, at 768. Thus, if the fault requirement of *Gertz* applies only to media defendants the result would be that because of this constitutional privilege accorded by *Gertz* the newspaper would not be liable, but the person who repeats that which the newspaper is privileged to print would be liable. This result effectively hinders communication between all but the newspaper and its subscribers. Obviously one of the chief means of circulating ideas in a free society is communication among individuals. Consequently, not applying *Gertz* to

ideas in an open society is a strong argument for extension of the protection of *Gertz* to non-media defendants.

Further indication that the *Gertz* holding will be extended to non-media defendants can be seen in the apparent source of Justice Powell's holding. In *Rosenbloom v. Metromedia, Inc.*,[52] Justice Harlan used the same phrase, liability based on fault, to propose a standard of liability in defamation cases.[53] This possible source of the test announced in *Gertz* did not stress the application of a special privilege to media defendants. Harlan's dissent in *Rosenbloom* neither refers to the media as a separate class of defendants nor does it have a tenor of media protection. Justice Harlan at one point specifically rejects allocating a privilege to the press based solely on occupation.[54] If Harlan's opinion were persuasive enough to provide the holding in *Gertz*, perhaps the broader application to all defendants will also be accepted.

Gertz allows each state to adopt a system of liability so long as it is not liability without fault. This means that states are probably precluded from using a standard based upon express malice, defined as ill will, spite, or lack of good faith.[55] Thus, states utilizing this ill will-improper motive standard to defeat the common law privileges must reevaluate this practice. Since it appears that *Gertz* should be applied to media and non-media defendants alike,[56] the need for such a reconsideration is increased because the majority of the common law privileges arise in a non-media context.[57] In adopting a standard that complies with *Gertz*, reconsideration of the value of the privileges is

non-media defendants would be in direct conflict with a policy that protects the communication of ideas.

Consideration should also be given to the amount of damage that can be done to the plaintiff by a media defendant as opposed to a private individual. Justice Powell indicated that the holding in *Gertz* was the result of a balancing of society's interest in free communication of ideas and the individual's right to be free from defamatory injury. 418 U.S. at 341-46. Such a balancing should include consideration of the magnitude of damage caused by an individual's defamatory statement when compared to that caused by a mass media defendant. This is manifestly true if defamation is a dignitary tort that becomes more serious as more people are influenced by hearing or reading the defamatory statement. An individual speaking out on an issue reaches a much smaller audience than the mass media.

52. 403 U.S. 29 (1971).

53. "[T]he States should be free to define for themselves the applicable standard of care so long as they do not impose liability without fault. . . ." *Id.* at 64 (Harlan, J., dissenting).

54. "While the First Amendment protects the press from the imposition of special liabilities upon it, '[t]o exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee.' " *Id.* at 66-67.

55. *See* text & notes 44-46 *supra*.

56. *See* text & notes 49-53 *supra*.

57. *See* cases cited at notes 58-122 *infra*. Approximately 20 states apply an express malice test to the qualified privileges; 10 apply a negligence test; 5 apply a recklessness test; and the others are apparently undecided as to what test to apply. It should be stressed that the law within many jurisdictions is inconsistent. At times it is necessary to judge which of several tests appears to command the most authority within the jurisdiction. The best that can be done in many cases is to indicate a trend.

also necessary. Conceivably, a state may eliminate the privileges in favor of a single fault standard under *Gertz*, or modify the privilege to arrive at a less complex, compromise standard. This compromise would be necessary because, as will be seen in the following section, the common law qualified privileges are generally defeated by a showing of malice-improper motive on the part of the defendant.

THE COMMON LAW PRIVILEGES

Two types of common law privileges are recognized: absolute and qualified.[58] These privileges are an outgrowth of the strict liability of common law defamation.[59] At common law, falsity and malice were presumed if a publication was found to be libelous per se.[60] Within this harsh system, before the development of privileges, the defendant had the burden of showing the truth of the statement or consent to the defamation in order to prevent the imposition of liability.[61] This burden was a heavy one and at times certain beneficial communications were stifled because of it. To alleviate this burden and to encourage desirable communications the common law privileges were developed.[62] Depending on the value attributed to the communication, the privilege available was either absolute or qualified.[63]

Absolute Privileges

There are three categories of absolute privileges: judicial, executive, and legislative.[64] The interests protected by these privileges are considered so important that the defendant is unconditionally released from liability once the privilege is shown to attach to the communication at issue.[65]

Almost all jurisdictions hold that a judge is absolutely privileged to defame in a judicial proceeding.[66] The purpose of the privilege is to

58. *See* W. PROSSER, *supra* note 1, § 114, at 776-77.

59. *See id.* at 776. *See also* Jacron Sales Co. v. Sindorf, 276 Md. 580, 584, 350 A.2d 688, 691 (1976); Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 444, 546 P.2d 81, 84-85 (1976). These cases recognize that the privilege was one of the few defenses available.

60. *See* Kinsey v. Real Detective Pub. Co., 52 Ariz. 353, 358, 80 P.2d 963, 967 (1938); W. PROSSER, *supra* note 1, § 113, at 771. The attachment of the phrase "per se" generally indicates that the communication is defamatory without reference to extrinsic facts or proof of damages. *See id.*, § 112, at 763.

61. *See* Carpenter v. Bailey, 53 N.H. 590, 593-94 (1873); *accord*, Jolly v. Fossum, 63 Wash. 2d 537, 541, 388 P.2d 139, 141 (1964). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 593-98, at 189-215 (Tent. Draft No. 20, 1974).

62. *See* W. PROSSER, *supra* note 1, § 114, at 776; text & notes 92-118 *infra*.

63. *See* W. PROSSER, *supra* note 1, § 114, at 776.

64. *See id.* at 777-84.

65. *See id.* at 776-77; text & notes 66-75 *infra*.

66. *See, e.g.*, Thornton v. Rhoden, 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706, 713 (1966); Karelas v. Baldwin, 237 App. Div. 265, 269, 261 N.Y.S. 518, 522-23 (1932); Irwin v. Ashurst, 158 Or. 61, 66, 74 P.2d 1127, 1130 (1938). For a consideration of judicial opinion publication and the

ensure that in the performance of his or her duties the judge is free to speak and act without fear of liability.[67] This freedom allows fearless inquiry into the issues being tried so that proper judicial action may be taken. To hamper the judge with fear of libel or slander suits is to reduce his effectiveness.[68]

An absolute privilege is also available to counsel if the alleged defamation is in the course of a judicial proceeding.[69] It appears that the justification is very similar to that which allows an absolute privilege for the judge, that is, counsel must feel free to fulfill the duties imposed upon him or her while functioning in the courtroom. An absolute privilege also exists in most jurisdictions for witnesses and parties producing evidence and submitting affidavits in a judicial proceeding, if the material is relevant.[70]

An analogous absolute privilege has been created to allow members of the executive branch to act within the scope of their duties without concern for the possibility of a defamation suit.[71] This privilege extends to all federal executive officers,[72] although many states limit it to officials of cabinet or corresponding rank in state and local govern-

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privilege available for defamatory material, see 55 TEX. L. REV. 1103 (1977). For a discussion of the judicial privilege and judicial immunity in general, see Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978).

67. *See* W. PROSSER, *supra* note 1, § 114, at 777. "As in the case of other acts in his judicial capacity, therefore, the judge is absolutely privileged as to any defamation he may utter even though he knows it to be false and even though it is motivated by personal ill will toward the plaintiff." *Id.* (footnote omitted).

68. *Id.* An absolute privilege is also available in administrative proceedings to the participants in roles analogous to those protected by the absolute privilege in judicial proceedings. The protected persons include witnesses, attorneys, and those acting as judge. *See, e.g.*, Parker v. Kirkland, 298 Ill. App. 340, 346, 18 N.E.2d 709, 712 (1939); Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 111, 166 S.W.2d 909, 913 (1942); Engelmohr v. Bache, 66 Wash. 2d 103, 106, 401 P.2d 346, 348 (1965), *cert. dis.*, 382 U.S. 950 (1965). For consideration of defamation-type problems associated with news releases by administrative agencies, see Lemov, *Administrative Agency News Releases: Public Information Versus Private Injury*, 37 GEO. WASH. L. REV. 63 (1968).

69. *See* Lesparence v. North Am. Aviation, Inc., 217 Cal. App. 2d 336, 342-43, 31 Cal. Rptr. 873, 876 (1963); Renner v. Chilton, 142 Colo. 454, 455-56, 351 P.2d 277, 277 (1959); Klein v. Walston & Co., 41 Misc. 2d 379, 381, 245 N.Y.S.2d 660, 662-63 (App. Term 1963); Wall v. Blalock, 245 N.C. 232, 232, 95 S.E.2d 450, 451 (1956) (quoting Shelfer v. Gooding, 47 N.C. 175 (1855)).

70. *See, e.g.*, Sarelas v. Alexander, 132 Ill. App. 2d 380, 384, 270 N.E.2d 558, 561 (1971); Sanders v. Leeson Air Cond. Corp., 362 Mich. 692, 695, 108 N.W.2d 761, 762 (1961); Zefferer v. Campbell, 3 App. Div. 2d 856, 856, 161 N.Y.S.2d 497, 497-98 (1957) (memorandum).

71. *See* Barr v. Matteo, 360 U.S. 564, 571 (1959). As to the scope of the federal executive privilege the *Barr* Court stated:

> The privilege is not a badge or emoluement of exalted office, but an expression of a policy designed to aid the effective functioning of government . . . . To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties and the wider the scope of discretion it entails.

Id. at 572-74. For a discussion of the executive official privilege as applied in Arizona, see "Absolute Privilege of Executive Branch Officials," 20 ARIZ. L. REV. — (1978).

72. *See* 360 U.S. at 574.

ment.[73]

The third category of absolute privilege is the legislative privilege. This privilege is recognized in the United States Constitution[74] and is based on the need for a bold and unrestrained debate in the legislative process.[75]

The importance of these privileges to society is demonstrated by their quality of absoluteness. These absolute privileges are not destroyed no matter how great the fault or how evil the intent of the defamer.[76] Being absolute, these privileges are beyond the reach of the *Gertz* decision which merely requires that the states not impose liability without fault.[77] Thus, the states need not evaluate the policies or rationale behind these privileges to determine whether they should be abandoned for a negligence test of liability. Society places such value in the functions protected by the privileges that no level of fault or evil intent will defeat them.

Qualified Privileges

Courts accepting the qualified privileges recognize that while a particular communication is potentially defamatory, it furthers an interest of society and therefore deserves protection. However, unlike the absolute privileges, the qualified privileges are conditioned on proper conduct or state of mind of the individual making the defamatory statement.[78] Because society's interest in the qualified privileges is not as great as its interest in absolute privileges, qualified privileges can be defeated.

The qualified privileges serve to dispel the presumption of malice, which at common law attaches to a defamatory statement found to be libel or slander per se.[79] Without the presumption, the plaintiff is

73. *See, e.g.*, Saroyan v. Burkett, 57 Cal. 2d 706, 711, 371 P.2d 293, 296, 21 Cal. Rptr. 557, 560 (1962); Cheatum v. Wehle, 5 N.Y.2d 585, 592-93, 159 N.E.2d 166, 170, 186 N.Y.S.2d 606, 611 (1959); Shade v. Bowers, 29 Ohio Op. 2d 130, 137, 199 N.E.2d 131, 140 (1964).

74. U.S. CONST. art. I, § 6, cl. 1.

75. "The common law immunity was subject to the limitation that the defamation must have some relation to the business of the legislature; but in this country federal and state constitutional provisions generally have extended it to anything whatever that is said in the course of legislative proceedings themselves." W. PROSSER, *supra* note 1, § 114, at 781 (footnotes omitted). The privilege is operative in debates, voting, reports, and work in committee. *Id.*

76. *See* Barr v. Matteo, 360 U.S. 564, 571 (1959). For a general view of California law and absolute privileges, see Comment, *Absolute Privilege in California: The Scope of Cal. Civil Code Section 47(2)*, 7 U. S. F. L. REV. 176 (1972).

77. 418 U.S. at 347.

78. *See* Stice v. Beacon Newspapers Corp., 185 Kan. 61, 64-65, 340 P.2d 396, 399-400 (1959). Some states allow the qualified privilege to be defeated on a showing of improper motive while others allow it to be defeated on a showing of lack of due care or improper motive or a lack of due care alone. *See* text & notes 128-33 *infra*.

79. *See, e.g.*, Emde v. San Joaquin County General Labor Council, 23 Cal. 2d 146, 161, 143 P.2d 20, 28 (1943); Bereman v. Power Pub. Co., 93 Colo. 581, 585, 27 P.2d 749, 751 (1933).

forced to show that the defendant was motivated by malice.[80] The allowance of a qualified privilege assumes that there is a defamation.[81] The issue is no longer whether the defendant committed the tortious act, but whether the defendant should be released from liability because of a greater interest in furthering communications of the type that led to the defamation.[82] Where an expression is protected by a qualified privilege it must be shown that the defendant's actions were consistent with the purpose of the qualified privilege.[83]

Generally, interests protected by the qualified privileges fall into five categories: an interest of the publisher of the defamation,[84] an interest of a third person,[85] a common interest,[86] an interest in the reporting of public proceedings,[87] and an interest of society.[88] These interests will immunize the defendant only where express malice, bad faith, or improper motive is absent.[89] Some courts have also added a requirement of "reasonable grounds"[90] or probable cause for the statement. This requirement indicates that negligence, if present, would destroy a qualified privilege. Therefore, both motivation and due care are the

80. In these cases, the malice that the plaintiff must show is express malice. *See* text & notes 29-31 *supra*.

81. "A conditional privilege . . . is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose. . . ." Chagnon v. Union Leader Corp., 103 N.H. 426, 438, 174 A.2d 825, 833 (1961), *cert. denied*, 369 U.S. 830 (1962).

82. *See* W. PROSSER, *supra* note 1, § 114, at 776; text & notes 92-118 *infra*. If the expression was protected by an absolute privilege, the inquiry would end with a showing that the privilege existed.

83. *See* Stice v. Beacon Newspapers Corp., 185 Kan. 61, 64-65, 340 P.2d 396, 399-400 (1959); Chagnon v. Union-Leader Corp., 103 N.H. 426, 438, 174 A.2d 825, 833 (1961), *cert. denied*, 369 U.S. 830 (1962). If the defendant's actions are inconsistent with the purpose of the privilege, society receives no recognizable benefit from the communication while the defamed person suffers unjust damage to his or her reputation.

84. *See* Biggins v. Hanson, 252 Cal. App. 2d 16, 20, 58 Cal. Rptr. 897, 900 (1967). This is the self-interest privilege.

85. *See* Retail Credit Co. v. Russell, 234 Ga. 765, 770, 218 S.E.2d 54, 57 (1975).

86. *See In re* Retailers Com. Agency, Inc., 342 Mass. 515, 520, 174 N.E.2d 376, 379 (1961).

87. *See* Segall v. Lindsay-Schaub Newspapers, Inc., 68 Ill. App. 2d 209, 213, 215 N.E.2d 295, 297 (1966).

88. *See* Jolly v. Fossum, 63 Wash. 2d 537, 542, 388 P.2d 139, 142 (1964).

89. *See* Stice v. Beacon Newspapers Corp., 185 Kan. 61, 65, 340 P.2d 396, 400 (1959); Killebrew v. Jackson City Lines, Inc., 225 Miss. 84, 92, 82 So. 2d 648, 650 (1955). Malice is a nebulous and unsatisfactory concept. The majority position is that the term means lack of good faith or improper motive. *See, e.g.*, Interstate Elec. Co. v. Daniel, 227 Ala. 609, 614, 151 So. 463, 466 (1933); Stice v. Beacon Newspapers Corp., 185 Kan. 61, 65, 340 P.2d 396, 400 (1959); Killibrew v. Jackson City Lines, Inc., 225 Miss. 84, 92, 82 So. 2d 648, 650 (1955). What this definition indicates is that the qualification of the privilege is designed to ensure that where it is available it will serve the purposes for which it was created. If the motive or purpose are not proper the privilege will be defeated. Hallen, *supra* note 33, at 874. The privilege may also be defeated in other ways such as where the defendant publishes the defamation excessively or where extraneous defamation is published along with the privileged material. *See* W. PROSSER, *supra* note 1, § 115, at 793-95; *but see* 12 HARV. C.R.-C.L.L. REV. 143, 158-61 (1977) (suggesting that a majority of the states may favor negligence as the level of fault necessary to defeat qualified privileges).

90. *See, e.g.*, Boulet v. Beals, 158 Me. 53, 59, 177 A.2d 665, 668 (1962); Chagnon v. Union-Leader Corp., 103 N.H. 426, 438, 174 A.2d 825, 833 (1961), *cert. denied*, 369 U.S. 830 (1962); Morgan v. Bulletin Co., 269 Pa. 349, 353-54, 85 A.2d 869, 872 (1952).

focus of inquiry under the common law privileges of some jurisdictions.

The focus on fault in *Gertz* and the consideration of motivation under the common law privileges present separate analyses. One looks to the care taken by the defendant while the other questions the motivation of the defendant in taking the defamatory action. If *Gertz* is extended to non-media defendants and the defendant has available a common law qualified privilege, there are areas where both analyses should be applied to determine liability. For example, consider the situation where the defendant, a former employer of the plaintiff, is asked by a third party who is contemplating hiring the plaintiff to evaluate the plaintiff's performance as an employee. The defendant renders a defamatory evaluation, and the plaintiff sues. Under *Gertz*, the plaintiff must show some fault in the defendant's action to recover.[91] A common law privilege is also available here.[92] If the jurisdiction in which this suit is brought has adopted a negligence standard to satisfy the fault requirement of *Gertz*, but an improper motive test to determine if the common law privilege is defeated, then two levels of culpability must be considered. The first is the basic requirement of *Gertz* that some fault be shown in the defendant's actions that caused the defamation. The second is that level of protection a state gives in circumstances where a privilege is available. This second standard is concerned with the attitude of the defendant rather than the care he exercised.

In the following section the common law qualified privileges and the level of culpability sufficient to destroy these privileges will be examined. The standard of conduct necessary to claim the privilege will be established for each privilege. The compatability of the qualified privilege standard and the fault standard of *Gertz* will then be considered.

Self-Interest Privilege

The inadvertant publication of defamatory material in the course of protecting a legitimate self-interest is generally privileged.[93] Because the privilege is extended only to legitimate interests it will be defeated

91. 418 U.S. at 347.

92. The privilege available is the employee comment privilege. *See* Lesparence v. North Am. Aviation, Inc. 217 Cal. App. 2d 336, 341, 31 Cal. Rptr. 873, 875 (1963); text & notes 98-101 *infra*. This is usually classified within the interest of another privilege.

93. *See, e.g.*, Faber v. Byrle, 171 Kan. 38, 44, 229 P.2d 718, 723 (1951); Campo v. Paar, 18 A. D. 2d 364, 366, 239 N.Y.S.2d 494, 496-97 (1963); Phifer v. Foe, 443 P.2d 870, 871 (Wyo. 1968). The cases indicate that no one category of interest is a legitimate self-interest. From the reasoning of the cases it appears that it is simply required that the self-interest be a legitimate one, that is, one that is accepted by society as a proper concern. The cases cited in this footnote are representative of two legitimate concerns. These categories are reputation and physical well-being. It seems

where the purpose of the defamatory communication was not the protection of such an interest, such as where the defendant lacked a proper motive or good faith in acting.[94] The requirements of a legitimate interest and lack of malice are different aspects of the rule that a privilege will be allowed only where the circumstances indicate that the motive for the communication was innocent.[95] The focus is on the necessity of the privilege, and consequently, the attitude of the defendant must conform to the need society has recognized.[96]

The interest of society is not served where the defendant acts primarily with an improper motive. This is malice in fact because it is malice which actually exists. This malice in fact defeats the common law qualified privilege. The qualified privilege merely removes the presumed malice of the common law, making it necessary for the plaintiff to prove true malice to recover for the defamation. Where malice in fact exists the privilege is defeated. Thus, where the defendant shows that there was a need to protect his or her self-interest, the defamatory action will be presumed to be innocent, and the plaintiff will be required to show malice on the part of the defendant in order to recover.[97]

Interest of Another

The interest of another privilege can be best explained in terms of two categories of situations: the employee comment situation,[98] and the mercantile interest situation.[99] These two situations involve either a comment on the character of the person claiming to be defamed, or a comment on the business standing of the person claiming to be defamed. A typical employee comment situation is where an employer

apparent that any similar interest such as interests in financial or emotional well-being would also be protected.

94. *See* Interstate Elec. Co. v. Daniel, 227 Ala. 609, 614, 151 So. 463, 466 (1933); Biggins v. Hanson, 252 Cal. App. 2d 16, 20, 59 Cal. Rptr. 897, 900 (1967); Galvin v. New York, New Haven & Hartford Ry., 341 Mass. 293, 296-97, 168 N.E.2d 262, 265 (1960).

95. *Cf.* Biggins v. Hanson, 252 Cal. App. 2d 16, 20 & n.2, 59 Cal. Rptr. 897, 900 & n.2 (1967) (indicating that innocent motive is the foundation of all privileges).

96. *See* General Motors Corp. v. Piskor, 277 Md. 165, 172, 352 A.2d 810, 815 (1976); Phifer v. Foe, 443 P.2d 870, 871 (Wyo. 1968); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.26, at 441-42 (1956). For a discussion of property protection as a self-interest and defamation of the shoplifter see Note, *The Merchant, the Shoplifter and the Law*, 55 MINN. L. REV. 825, 833-35 (1971).

97. *Cf.* Biggins v. Hanson, 252 Cal. App. 2d 16, 20 & n.2, 59 Cal. Rptr. 897, 900 & n.2 (1967) (indicating that innocent motive is the foundation of all privileges).

98. *See* DeSapio v. Kohlmeyer, 52 A.D. 2d 780, 781, 383 N.Y.S.2d 16, 17 (1976) (memorandum); Walsh v. Consol. Freightways, Inc., 278 Or. 347, 355, 563 P.2d 1205, 1210 (1977). *See generally* RESTATEMENT (SECOND) OF TORTS § 595, Comment h at 201 (Tent. Draft No. 20, 1974).

99. *See, e.g.*, Retail Credit Co. v. Russell, 234 Ga. 765, 770, 218 S.E.2d 54, 57 (1975) (the court recognized existence of the mercantile interest but did not adopt it); Retail Credit Co. v. Garraway, 240 Miss. 230, 239, 126 So. 2d 271, 274 (1961); Baker v. Retail Credit Co., 8 Wis. 2d 664, 665, 100 N.W.2d 391, 392 (1960) (per curiam). *See generally* 49 TEX. L. REV. 198 (1970).

makes statements about a former employee.[100] In this situation, a privilege is extended to permit the prior employer to give information on the character of the former employee to aid the prospective employer in evaluating the employee.[101]

The privilege to comment on the credit or mercantile reputation of another is recognized by almost all jurisdictions.[102] This privilege, like the self-interest privilege, exists only in the absence of malice.[103]

As with the self-interest privilege, society has recognized that certain circumstances present a situation where the defendant appears to have acted without malice, but nonetheless has defamed the plaintiff.[104] This apparent innocence is present where some interest of another is being promoted by the defendant's communication, and absent malice on the part of the defendant there will be no liability.[105]

Common Interest

A majority of jurisdictions recognize the common interest privilege.[106] This privilege is available where the parties to the communication share an interest.[107] Here the policy is to allow the defamatory

100. *See* text & note 101 *infra*.

101. *See* Lesparence v. North Am. Aviation, Inc., 217 Cal. App. 2d 336, 341, 31 Cal. Rptr. 873, 875 (1963) (privileged response to inquiry from prospective employer); Judge v. Rockford Memorial Hosp., 17 Ill. App. 2d 365, 378, 150 N.E.2d 202, 207 (1958); DeSapio v. Kohlmeyer, 52 A.D. 2d 780, 781, 383 N.Y.S.2d 16, 17 (1976) (memorandum); Conwell v. Spur Oil Co., 240 S.C. 170, 179-81, 125 S.E.2d 270, 275 (1962) (employee comment).

102. *See* Retail Credit Co. v. Russell, 234 Ga. 765, 770, 218 S.E.2d 54, 57 (1975) where the court pointed out that there are 48 jurisdictions that have recognized a qualified privilege where the defendant is reporting on the credit rating of the plaintiff.

103. *See* Pavlovsky v. Board of Trade, 171 Cal. App. 2d 110, 114, 340 P.2d 63, 65 (1959); *In re* Retailers Com. Agency, Inc., 342 Mass. 515, 520, 174 N.E.2d 376, 379 (1961); Novack v. Cities Service Co., 149 N.J. Super. 542, 552-53, 374 A.2d 89, 94 (1977); Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 388-89, 90 S.E.2d 370, 372 (1955).

104. See text & note 97 *supra*.

105. *See, e.g.*, Novack v. Cities Service Co., 149 N.J. Super. 542, 552-53, 374 A.2d 89, 94 (1977); Cullum v. Dunn & Bradstreet, Inc., 228 S.C. 384, 388-89, 90 S.E.2d 370, 372 (1955); Fahey v. Shafer, 98 Wash. 517, 522, 167 P.2d 118, 120 (1917).

106. *See, e.g.*, Kenney v. Gurley, 208 Ala. 623, 626, 95 So. 34, 37 (1923); Katz v. Rosen, 48 Cal. App. 3d 1032, 1037, 121 Cal. Rptr. 853, 856 (1975); Bereman v. Power Pub. Co., 93 Colo. 581, 585, 27 P.2d 749, 751 (1933); Killebrew v. Jackson City Lines, Inc., 225 Miss. 84, 92, 82 So. 2d 648, 650 (1955); Forsythe v. Durham, 270 N.Y. 141, 142, 200 N.E. 674, 674 (1936) (per curiam); Jones v. Hester, 260 N.C. 264, 269, 132 S.E.2d 586, 589 (1963); Browning v. Gomez, 332 S.W.2d 588, 591 (Tex. Ct. App. 1960); Combes v. Montgomery Ward & Co., 119 Utah 407, —, 228 P.2d 272, 277 (1951); Sylvester v. Armstrong, 53 Wyo. 382, —, 84 P.2d 729, 732 (1938). On the common interest in labor relations see Schmidt, *Fault without Liability, Don't Belabor Labor*, 36 U. PITT. L. REV. 1, 9 (1974). For a look at the confusion in the definition of actual malice, see 45 U. CINN. L. REV. 139, 142-43 (1976).

107. The privilege appears to be a combination of the self-interest and the interest of another privileges. See text & notes 93-103 *supra*. Although there are no cases specifically stating the range of interests covered, the privileges appear to cover the full range of economic and social concerns that might be common to two or more persons. Persons associated in this manner are better able to further their common interest if privileged to communicate with each other within this area despite the possibility of error. So long as their goals and motives are consistent with the reason for the privilege, this mutual protection is in the interest of society. *Cf.* W. PROSSER, *supra* note 1, § 115, at 786 (no general language describes qualified privileges, but they are based on the discharge of moral or legal duties).

communication without imposition of liability because this assures the protected parties greater mutual protection in the area of common interest. The majority of jurisdictions have conditioned the availability of the common interest privilege on the absence of express malice.[108] This protection is based on the same general premise underlying the previously discussed privileges. Where the interest is present, the circumstances of the defamation are presumed to be innocent.[109]

Interest of the Public

A privilege to inadvertantly defame another in the course of protecting an interest of the public is also recognized by most jurisdictions.[110] Frequently, this privilege appears in the reporting of a suspected crime.[111] The reporting of a suspected crime involves a belief on the defendant's part that action will be taken by the person to whom the defendant communicates. To have action taken where there is a suspected crime is in the interest of the public. The privilege is also recognized in other situations where the public can be expected to benefit from action taken pursuant to the communication, such as where the unjustified release of a prisoner is prevented or where an unqualified teacher is prevented from teaching.[112]

This privilege is generally conditioned on the defendant's good faith and proper motive.[113] This condition allows the defendant to

108. The formulation and wording varies, but the common element is an abuse of the purpose for which the privilege is extended. *See, e.g.*, Kenney v. Gurley, 208 Ala. 623, 626, 95 So. 34, 37 (1923); Katz v. Rosen, 48 Cal. App. 3d 1032, 1037, 121 Cal. Rptr. 853, 856 (1975); Bereman v. Power Pub. Co., 93 Colo. 581, 585, 27 P.2d 749, 751 (1933); Killebrew v. Jackson City Lines, Inc., 225 Miss. 84, 92, 82 So. 2d 648, 650 (1955); Jones v. Hester, 260 N.C. 264, 269, 132 S.E.2d 586, 589 (1963); Browning v. Gomez, 332 S.W.2d 588, 591 (Tex. Ct. App. 1960); Knight v. Patterson, 20 Utah 2d 242, 245, n.2, 436 P.2d 801, 803, n.2 (1968); Combes v. Montgomery Ward & Co., 119 Utah 407, —, 228 P.2d 272, 277 (1951). *But see* Schultze v. Coykendall, 218 Kan. 653, 660-61, 545 P.2d 392, 398 (1976) (adopting actual malice test, apparently on the authority of the definition given in *New York Times*); Reininger v. Prickett, 192 Okla. 486, 488, 137 P.2d 595, 598 (1943) (accepting culpable recklessness as the fault needed to defeat the common interest privilege). *Accord*, Murphy v. Harty, 238 Or. 228, 248, 393 P.2d 206, 216 (1964) (adding a requirement of reasonable grounds for believing the truth of the statement).

109. Thus, a California court held that a comment published in a newspaper devoted exclusively to the interests of organized labor was conditionally privileged. *See* Emde v. San Joaquin County Central Labor Council, 23 Cal. 2d 146, 161, 143 P.2d 20, 28 (1943).

110. *See, e.g.*, Martinez v. Cardwell, 25 Ariz. App. 253, 255, 542 P.2d 1133, 1135 (1975); Tanner v. Stevenson, 138 Ky. 578, 587-88, 128 S.W. 878, 882 (1910); Jolly v. Fossum, 63 Wash. 2d 537, 542, 388 P.2d 139, 142 (1964); Joseph v. Baars, 142 Wis. 390, 392, 125 N.W. 913, 914 (1910). *See generally* W. PROSSER, *supra* note 1, § 115, at 791.

111. *See* Johnson v. Inglis, 190 Okla. 316, 318, 123 P.2d 272, 274 (1942) (per curiam); Jolly v. Fossum, 63 Wash. 2d 537, 542, 388 P. 2d 139, 143 (1964); Joseph v. Baars, 142 Wis. 390, 392, 125 N.W. 913, 914 (1910).

112. *See, e.g.*, Martinez v. Cardwell, 25 Ariz. App. 253, 255, 542 P.2d 1133, 1135 (1975); Tanner v. Stevenson, 138 Ky. 578, 587-88, 128 S.W. 878, 882 (1910); Jolly v. Fossum, 63 Wash. 2d 537, 542, 388 P.2d 139, 142 (1964).

113. *See* Tanner v. Stevenson, 138 Ky. 578, 587-88, 128 S.W. 878, 882 (1910); Jolly v. Fossum, 63 Wash. 2d 537, 542, 388 P.2d 139, 142 (1964); Joseph v. Baars, 142 Wis. 390, 392, 125 N.W. 2d 913, 914 (1910).

communicate what may be defamatory information only so long as the purpose of the communication is to further the protected interest.

Reportorial Privilege

The reportorial privilege was created because of society's interest in encouraging the reporting of public proceedings and records that society as a whole cannot attend or examine.[114] Society's interest in open and public proceedings is also furthered through reporting.[115] The reportorial privilege applies to judicial,[116] executive[117] and administrative proceedings.[118] However, for the privilege to attach the report must be fair and accurate.[119] Therefore, lack of express malice is no defense. Because of the requirement of accuracy and fairness this privilege differs substantially from the other privileges.

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114. *See* W. PROSSER, *supra* note 1, § 118, at 830. To expect all who are interested in trials, administrative proceedings, and public records to attend or examine them would be ludicrous. The investment of time and material resources to make dissemination of such material possible would be beyond the capabilities of government. To extend to those willing to perform the function a privilege to report the proceedings is a more practical approach to the problem. As an extension of the case law it appears that so long as it is fair and accurate, such reporting will be privileged because it provides information to the public otherwise obtainable only by attendance.

115. "The reason underlying the privilege of fair and true reporting of a judicial proceeding is, . . . 'the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice.'" Shiles v. News Synd. Co., 27 N.Y.2d 9, 15, 261 N.E.2d 251, 253, 313 N.Y.S.2d 104, 107 (1970), *cert. denied*, 400 U.S. 999 (1971).

116. [I]t seems almost perfunctory to assert that proceedings in open court in connection with a pending criminal action are likewise privileged . . . the privilege thus afforded "can only be defeated by proving that a particular publication was motivated solely by actual malice" and that "it would not be the ordinary case where a plaintiff could establish that a news report or discussion of governmental activities was only published because of actual malice."

Segall v. Lindsay-Schaub Newspapers, Inc., 68 Ill. App. 2d 209, 213, 215 N.E.2d 295, 297 (1966). The actual malice referred to in the opinion is synonymous with express malice (ill will, improper motive or lack of good faith). It does not refer to knowledge of falsity or reckless disregard for falsity of the statement, as actual malice has come to be defined. See note 9 *supra*.

117. Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government. The "Reuter Report" is in this category. However, this is a qualified or conditional privilege, rather than absolute. If the newspaper account is fair, accurate and complete, and not published solely for the purpose of causing harm to the person defamed, it is privileged and no responsibility attaches, even though the information contained therein is false or inaccurate.

Sciandra v. Lynett, 409 Pa. 595, 600, 187 A.2d 586, 588-89 (1963) (citations omitted).

118. "The privilege plainly includes the right to report the activities of such agencies as the Peoria Health Department. . . . The privilege to report governmental acts or utterances can only be defeated . . . by actual malice." Lulay v. Peoria Journal-Star, Inc., 34 Ill. 2d 112, 114, 214 N.E.2d 746, 748 (1966).

119. *See* Kurata v. Los Angeles News Pub. Co., 4 Cal. App. 2d 224, 227, 40 P.2d 520, 522 (1935); Short v. News-Journal Co., 58 Del. 592, 599, 212 A.2d 718, 722 (1965); Henderson v. Evansville Press, Inc., 127 Ind. App. 592, 601, 142 N.E.2d 920, 923 (1957); Spradlin's Market, Inc. v. Springfield Newspapers, Inc., 398 S.W.2d 859, 864 (Mo. 1966); Rhodes v. Star Herald Co., 173 Neb. 496, 499, 113 N.W.2d 658, 661 (1962); Sciandra v. Lynett, 409 Pa. 595, 600, 187 A.2d 586, 588-89 (1963); Langford v. Vanderbilt Univ., 44 Tenn. App. 694, 707-08, 318 S.W.2d 568, 576 (1958); Nickson v. Avalanche Journal Pub. Co., Inc., 344 S.W.2d 749, 750 (Tex. Ct. App. 1961); Alexandria Gazette Corp. v. West, 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956). *Cf.* Note, *A New Standard of Fault for the Reportorial Privilege*, 37 LA. L. REV. 247 (1976) (indicating that the fault needed to satisfy *Gertz* may be more than simple inaccuracy). *See generally* 39 FORDHAM L. REV. 800 (1971); 7 MEMPHIS S.U.L. REV. 152 (1976).

If the report is inaccurate, the publisher has apparently breached the duty of reasonable care for an individual in a similar situation charged with the same responsibility. Although some courts have declared that inaccuracy or unfairness in reporting public proceedings and records is malice,[120] this unfairness or inaccuracy is not the traditional standard of improper motive to which the express malice label is usually applied.[121] Although courts sometimes use the term malice or express malice when referring to inaccuracy or unfairness,[122] liability for inaccuracy or unfairness is something closer to negligence.

The recent Supreme Court case of *Time, Inc. v. Firestone*[123] has altered the test. Applying *Gertz*, the *Firestone* Court required that some fault must be found before the media defendant is held liable for the inaccurate reporting of a public proceeding.[124]

The reportorial privilege's development has differed from the development of the other qualified privileges to the extent that the minimum standard of conduct necessary to impose liability for defamation is not malice, but a type of fault very close to negligence even though in some opinions courts may speak of it as malice. Because of this variance from the standard for the other common law qualified privileges, the reportorial privilege standard is actually closer to the minimum level of fault required by *Gertz*. For those states accepting a negligence test to satisfy the *Gertz* minimum fault standard, it would be a logical step to allow that test to absorb the reportorial privilege. Thus, a negligence test could then be applied without mention of the common law privilege in this area. If a state accepts the knowing or reckless disregard for falsity test to satisfy *Gertz*,[125] liability for inaccurate reports of public proceedings would be imposed for a lower level of culpability

120. *See* Henderson v. Evansville Press, Inc., 127 Ind. App. 592, 601, 142 N.E.2d 920, 923 (1957) (bias or unfairness may amount to actual malice defined as improper motive or lack of good faith); Alexandria Gazette Corp. v. West, 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956) (if the report is accurate it is not necessary that the proceeding itself be free from defamation for the defendant to be protected).

121. *See* Henderson & Evansville Press, Inc., 127 Ind. App. 592, 601, 142 N.E.2d 920, 923 (1957); Alexandria Gazette Corp. v. West, 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956).

122. *See* Henderson v. Evansville Press, Inc., 127 Ind. App. 592, 599-600, 142 N.E.2d 920, 923 (1957) (liability for inaccuracy); Shiles v. News Synd. Co., 27 N.Y.2d 9, 15, 261 N.E.2d 251, 254, 313 N.Y.S.2d 104, 108 (1970) (liability for inaccuracy); Alexandria Gazette Corp. v. West, 198 Va. 154, 159-60, 98 S.E.2d 274, 279 (1956) (liability for inaccuracy).

123. 424 U.S. 448 (1976).

124. *See id.* at 461-62. This is a modification of the common law test because fault in reporting inaccurately must be shown. *Contra* Sciandra v. Lynett, 409 Pa. 595, 600, 186 A.2d 586, 588-89 (1963) (report must be "fair, accurate and complete," or the defendant will be liable). The concern at common law was to ensure that the reporting was done in an accurate manner. The accuracy of the material in the proceeding was not an issue in determining whether the report was accurate and fair. *See* Alexandria Gazette Corp. v. West, 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956). Even though the proceeding or record itself might be defamatory, so long as the report of it was accurate and fair there would be no liability. *Id.* However, if the report were inaccurate there would be liability for the report without regard to fault. *Id.*

125. For cases adopting such a standard, see cases cited notes 17-18 *supra*.

than that adopted to satisfy *Gertz*. To prevent this, the jurisdiction would have to modify the test under the privilege to knowing or reckless disregard for falsity.[126]

The pattern presented above—that malice, improper motive, or lack of good faith is the level of culpability for defeating most qualified privileges—must be qualified. In at least ten states, lack of a reasonable basis or probable cause for believing the defamatory statement to be true is sufficient to defeat any qualified privilege.[127] In this context, the failure to have reasonable or probable cause for the belief appears to be closer to negligence than express malice.[128] Most of the courts holding that this type of fault will defeat the common law privileges do not call it negligence, but lack of probable or reasonable cause.[129] Nonetheless, this lack of probable or reasonable cause appears to be a variety of negligence since one who acts unreasonably in a situation

126. It may be that this question has been answered by the standard adopted to satisfy *Gertz*. The three states adopting either a gross negligence or actual malice (knowing or reckless disregard for falsity) test have limited its applicability to situations involving public or general concern. *See* text & notes 16-17 *supra*. An extension of this limitation would seem to include reports of public proceedings and records. If this limitation does apply to these reports of public proceedings and records, then the level of fault needed to defeat the reportorial privilege has been raised to the gross negligence or recklessness levels announced in the cases that adopted these levels to satisfy the fault requirement of *Gertz*. *See* cases cited notes 16-18 *supra*.

127. California law, although unsettled, appears to announce a reasonable or probable cause standard. *See* MacLeod v. Tribune Pub. Co., 52 Cal. 2d 536, 552, 343 P.2d 36, 45 (1959). The standard indicates that where the defendant lacks reasonable or probable cause to believe the defamatory statement, the qualified privilege will be defeated. *Id.* A fair interpretation of this is that if a reasonable person would not make a statement in a similar situation without reasonable or probable cause, then to do so is equivalent to negligence. *But see* Katz v. Rosen, 48 Cal. App. 3d 1032, 1037, 121 Cal. Rptr. 853, 856 (1975) (applied qualified privilege without consideration of whether reasonable grounds existed for the communication). The rule in Illinois is the same. Myers v. Sponnholtz, 11 Ill. App. 3d 560, 569, 297 N.E.2d 183, 189 (1973). A Louisiana court held that "[t]he existence of probable cause is the second requisite for invoking the doctrine of qualified privilege." Waldo v. Morrison, 220 La. 1006, 1011, 58 So. 2d 210, 211 (1952). Maine has adopted this rule also. Boulet v. Beals, 158 Me. 53, 59, 177 A.2d 665, 668 (1962). Minnesota follows this rule. Otto v. Charles T. Miller Hosp., 262 Minn. 408, 413, 115 N.W.2d 36, 39 (1962). In New Hampshire the limitation that the statement be based on probable or reasonable cause has also been added. Baer v. Rosenblatt, 106 N.H. 26, 29-30, 203 A.2d 773, 777 (1964), *rev'd on other grounds*, 383 U.S. 75 (1966). New York appears to hold a similar view, but its position is not entirely clear. It may be that some fault greater than negligence, such as gross negligence or recklessness, may be required to defeat the qualified privileges. Stillman v. Ford, 22 N.Y.2d 48, 53, 238 N.E.2d 304, 306, 290 N.Y.S.2d 893, 897 (1968). In Pennsylvania, " '[a] communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based on reasonable or probable cause.' " Morgan v. Bulletin Co., 369 Pa. 349, 353-54, 85 A.2d 869, 872 (1952). In Washington, *see* Twelker v. Shannon & Wilson, Inc., 88 Wash. 2d 473, 479, 564 P.2d 1131, 1135 (1977). In Wisconsin, "[a] conditional privilege is subject to the . . . limitation that the person making the statement must have reasonable grounds for believing the truth of the statements made." Hartman v. Buerger, 71 Wis. 2d 393, 398, 238 N.W.2d 505, 508 (1976).

128. But to be on this ground privileged any accusation of crime in pursuance of such inquiry must be made (1) in good faith and without actual malice; . . . (2) upon reasonable or probable cause after a reasonably careful inquiry. . .; and (3) for the public purpose of detecting and bringing a criminal to punishment . . . .

Elms v. Crane, 118 Me. 261, 264, 107 A. 852, 853 (1919) (citations omitted). *See* Morgan v. Bulletin Co., 369 Pa. 349, 353-54, 85 A.2d 869, 872 (1952); Montgomery v. Dennison, 363 Pa. 255, 264, 69 A.2d 520, 524 (1949); O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 315, 51 A.2d 715, 718 (1947).

129. *See* cases cited note 127 *supra*.

where there is a duty to act reasonably is usually considered to be negligent.[130] Occasionally, a court may refer to the prudent person standard.[131] Although some jurisdictions limit this negligence standard to one privilege,[132] others have applied it to several of the privileges.[133]

In adopting a minimum standard of fault to satisfy *Gertz*, these jurisdictions should reconsider the implications of the fault level for the qualified privileges. Adoption of a negligence standard to satisfy *Gertz* would produce few changes in these common law qualified privileges. Of the ten states where negligence will overcome a privilege, only Illinois, Louisiana, New York and Washington have adopted a standard of fault to satisfy the fault requirement of the *Gertz* decision. Of these, only Illinois, Louisiana and Washington have expressed a preference for the negligence standard.[134] New York in *Chapadeau v. Utica Observer-Dispatch, Inc.*[135] adopted gross negligence as the minimum fault standard.[136]

For the six states, of these ten, that have not adopted a standard under *Gertz* the fact that the qualified privileges are defeated by a showing of negligence should be influential toward adoption of a negligence standard to satisfy the *Gertz* fault requirement. Extension of this negligence standard would make uniform a large area of the law of defamation without a radical departure from the traditional notion that certain communications deserve protection. For the jurisdictions that apply a standard of malice, defined as improper motive, ill will, or lack, of good faith, to defeat the qualified privileges, the compatibility of such a standard with the available *Gertz* standards remains to be examined.

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130. *See* W. PROSSER, *supra* note 1, § 32, at 150-51.

131. "[I]t is clear that he did not act as a prudent man in checking the facts upon which this serious and false statement was made." Boulet v. Beals, 158 Me. 53, 59, 177 A.2d 665, 668 (1962).

132. Louisiana has limited the use of this standard to the privilege available to participants in judicial proceedings. *See* Waldo v. Morrison, 220 La. 1006, 1011, 58 So. 2d 210, 211 (1952). New Hampshire has limited the use of the lack of reasonable or probable cause standard to the privilege to comment on matters of public concern. *See* Baer v. Rosenblatt, 106 N.H. 26, 29-30, 203 A.2d 773, 777 (1964), *rev'd on other grounds*, 383 U.S. 75 (1966).

133. Maine has applied the test to several privileges. *See* Boulet v. Beals, 158 Me. 53, 59, 177 A.2d 665, 668 (1962) (mercantile privilege); Hodgkins v. Gallagher, 122 Me. 112, 113, 119 A. 68, 69 (1922) (employee comment privilege); Elms v. Crane, 118 Me. 261, 264, 107 A. 852, 853 (1919) (public interest privilege). Pennsylvania also has applied the negligence standard to a variety of privileges. *See* Morgan v. Bulletin Co., 369 Pa. 349, 353-54, 85 A.2d 869, 872 (1952) (reportorial privilege); J. Hartman & Co. v. Hyman, 287 Pa. 78, 83-84, 134 A. 486, 488 (1926) (mercantile privilege); Chapman v. Calder, 14 Pa. 365, 369 (1850) (common interest privilege).

134. *See* Troman v. Wood, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 299 (1975); Taskett v. KING Broadcasting Corp., 86 Wash.2d 439, 445, 546 P.2d 81, 85 (1976); Wilson v. Capital City Press, 315 So. 2d 393, 398 (La. App. 1975). In *Wilson* the Louisiana court held that there was no fault whatsoever on the part of the defendant. This would seem to make the probable cause standard dictum since the case could have been decided on the basis that there was no fault to satisfy *Gertz*.

135. 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

136. The holding was limited to defendants who defame persons involved in matters of general or public concern. *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

Compatibility

All but one of the common law qualified privileges are defeated in most jurisdictions where express malice is present on the part of the defendant.[137] For these jurisdictions, the *Gertz* requirement of a minimum of fault on which liability may be imposed presents a challenge to the present system. This express malice requirement may not be a constitutionally permissible standard of fault.[138] These states must decide whether another standard of fault based on due care will serve the purposes of the common law qualified privileges. Two choices appear to be available to these states.

A state may choose a due care standard satisfying *Gertz* and apply this to all defamations whether qualifiedly privileged or not. This due care standard would absorb the common law privileges and there would not be a distinction made between qualifiedly privileged and unprivileged communications. All private plaintiffs would have to show the same level of lack of due care to sustain a claim for defamation. In such a system, a state could adopt negligence, gross negligence, or actual malice (defined as a knowing or reckless disregard for falsity) as the level of fault.

A second alternative is available where a state determines that there is reason to continue to recognize privileged communications as somehow different from other communications. A state could adopt a standard based on due care to satisfy *Gertz* but retain the qualified privileges which would continue to be defeated by express malice. A variation on this second alternative would be to retain qualified privileges but make them subject to defeat only upon a higher degree of lack of due care, such as a knowing or reckless disregard of falsity. Retention of the qualified privileges with a higher standard has the advantage that only one type of culpability—lack of due care—is measured, whereas the dual system of express malice and lack of due care involves changing the thrust of the inquiry from whether due care was exercised to whether the attitude of the defendant was proper. If the qualified privileges are retained with an attitudinal test, such as express malice, then two types of culpability would have to be shown by the plaintiff before liability would be imposed. The first level of culpability is that adopted pursuant to *Gertz*. If the plaintiff proved that the defendant had breached this standard of care, the focus of the inquiry would shift to the second level of culpability. If the qualified privilege has been abused by the presence of express malice or some other improper motive or attitude, liability would be imposed. It must be emphasized that

137. *See* text & notes 92-118 *supra*.
138. *See* text & notes 44-46 *supra*.

there would never be an inquiry into the attitude and motives of the defendant unless fault under *Gertz* were first shown. The qualified privilege test is logically the second test. There would be no point in testing for express malice until the minimum level of fault required by *Gertz* has been shown.[139]

An example of a system where two tests of culpability are applied can be found in New Hampshire. New Hampshire recognizes that negligence, in the form of lack of reasonable or probable cause for the defamatory statement, will defeat the qualified privileges.[140] However, New Hampshire does not end the inquiry with a showing of probable cause for the statements,[141] proper motive must also be shown.[142] This creates two types of culpability, and the existence of either will be the basis of liability. If negligence, in the form of lack of probable cause, is present the defendant will be liable. If negligence is not present the defendant might yet be liable if his or her motive was improper.[143]

The arrangement in New Hampshire indicates one way in which culpability based on improper attitude and culpability based on lack of due care may be treated differently within the same system. *Gertz* requires that fault be present. Therefore, the New Hampshire system may be constitutionally infirm, but it could still serve as a model for a two level system in which qualifiedly privileged[144] and unprivileged communications would continue to be distinguished.

Gertz recognized that the states have an interest in protecting a person's reputation.[145] A number of states have already chosen negligence as the best available substitute for the prohibited strict liability in fulfilling this legitimate interest.[146] Because of this widespread acceptance of negligence as a test for liability, a uniform negligence system

139. Since *Gertz* requires that some fault be shown in all defamation cases where a private person is defamed, this would be the broader and more frequently applied test. For a discussion of the applicability of *Gertz* to all defendants, see text & notes 47-54 *supra*. Because the law would be more developed as to this test and the fact finder more accustomed to it, it would appear wiser to test for fault first. If no fault is found, then there would be no reason to test for malice. A due care standard is also more frequently used in other torts and is, therefore, less apt to cause confusion than an express malice standard with its limited use.

140. *See* Baer v. Rosenblatt, 106 N.H. 26, 29-30, 203 A.2d 773, 777 (1964), *rev'd on other grounds*, 383 U.S. 75 (1966).

141. *See* State v. Burnham, 9 N.H. 34, 44, 31 A.D. 217, 222 (1837) (cited as authority in Chagnon v. Union Leader Co., 103 N.H. 426, 439, 174 A.2d 825, 833 (1961).

142. To justify the defamation the defendant must have acted with proper motivation *and* must not have been negligent. *See id.* Imposition of liability for improper motive alone may not satisfy the requiremnt of fault in *Gertz*. *See* text & notes 28-54 *supra*.

143. *See* State v. Burnham, 9 N.H. 34, 44, 31 A.D. 217, 222 (1837).

144. There would continue to be absolute privileges under either system because of the recognition that no level of fault will defeat them. There would then be no concern about continued differentiation between absolutely privileged communications and unprivileged communications. The absolute privileges will be distinguished so long as they may not be defeated no matter how great the fault or ill will.

145. *See* 418 U.S. at 341.

146. *See* cases cited note 15 *supra*.

must be considered as an alternative to a system based on two levels of fault.

There are two principal arguments for a uniform negligence system. The first is that adoption of a test giving relief to a person injured by the negligent use of words would lend uniformity to tort law which recognizes liability for physical injury based on negligence. The second reason is that the qualified privilege is an exceptional legal entity, born of the recognition of the harshness of the common law strict liability for defamation. Its origin predates the concept of negligence,[147] and its central reason for existence is no longer present.[148] The *Gertz* Court stated that there is no such thing as a false idea.[149] Thus, *Gertz* was a reaction against the common law system which restricted the exchange of ideas.[150] This recognition of the value of free speech led to the elimination of strict liability[151] and the substitution of a new standard of fault to be determined by the states.[152] This holding can be seen as a vast privilege created to facilitate the exchange of ideas. Since the common law qualified privileges served a similar function in their narrow capacity, it would seem advantageous to combine the two and allow the greater to absorb the lesser.

It appears that the absorption of the qualified privileges by the standard of fault adopted to satisfy *Gertz* is the better choice. This approach is more consistent with the development of the law of defamation as it has been modified by constitutional restraints. When the common law of defamation originated, it was logical to see the common law privileges' purpose as the elimination of presumed malice. This alleviated the harshness of strict liability in terms that were familiar in the law of defamation of that time. However, since that time the United States Supreme Court has begun to phrase the test of liability in terms of due care.[153] Now that *Gertz* has forced the states to impose liability only upon some showing of fault, there exists the opportunity to consider whether the attitude of the defendant[154] should continue to be important in deciding the value of certain communications. *Gertz* has made less harsh the common law of defamation and indicated that society's interests in a free exchange of ideas is greater than the individ-

147. Hallen, *supra* note 33, at 867.
148. With the decision in *Gertz* the common law was freed of strict liability (assuming the holding is extended to non-media defendants) thus removing the need to lessen the harshness of the common law system.
149. 418 U.S. at 339.
150. *Id.* at 340.
151. *Id.* at 347.
152. *Id.*
153. *See* text & notes 5-8 *supra.*
154. For a discussion of the applicability of *Gertz* to non-media defendants, see text & notes 47-54 *supra.*

ual's interest in being free from defamation, at least where there is no fault connected with the defamation. Since some reform of the common law is necessary under *Gertz*, an extra step extending this reform to the confusing qualified privileges is desirable.

Conclusion

Each state that currently conditions the availability of a qualified privilege on proper motive or lack of malice must decide whether an analysis of the defendant's attitude better serves the policies of a qualified privilege than an analysis based on lack of due care. It must be recognized that the malice standard for imposition of liability was adopted when negligence was not available as an alternative,[155] and that this express malice test is inconsistent with the constitutional fault standard.[156] The qualified privileges have become conditioned on proper motivation in most jurisdictions, but *Gertz* requires that each state develop a standard of fault that must be met before a defendant may, constitutionally, be held liable.[157] To retain a bifurcated system of standards, a state must decide that a motivational or attitudinal analysis better serves the policies of the qualified privileges than a fault analysis, and that this outweighs the benefits of a uniform fault standard.

155. *See* Hallen, *supra* note 33 at 867.
156. *See* text and notes 44-46 *supra*.
157. 418 U.S. at 347.